

## THE DRAFT LEGAL SECTOR CODES AND HOW IT WILL IMPACT LEGAL PRACTITIONERS

**Seen but not heard:** Hearing the voice  
of the child in divorce proceedings

**Taking an interpretative approach  
on the deeming provision of  
s 8(15) of the VAT Act**

**Laws oppressing women need to  
be amended or repealed**

**Building solid foundations:  
The legal understanding  
of a 'home'**

**Take time to check that all  
the basics are done correctly**

**The Act, the firms,  
and the Information  
Regulator: How s 57  
of POPIA impedes  
legal practice**

**The new era of  
COVID-19 legal  
paternalism and  
the limitation  
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### News articles on the *De Rebus* website:

- BLA must build confidence and be proud of black legal practitioners
- Advocacy training aims to improve the standard of advocacy to produce better advocates
- Women can help one another rise
- Women must make sure the laws that exist address the challenges they are facing
- A good track record and competence are some of the qualities women leaders should have
- Professor Thuli Madonsela's M-Plan aims to advance equality and poverty eradication
- WLSA drafts a model law to address the participation of women in politics
- University of Venda and the LSSA launch a School for Legal Practice in Thohoyandou



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## FEATURES

### 12 The draft Legal Sector Codes and how it will impact legal practitioners

The deadline to submit comments on the draft Broad-Based Black Economic Empowerment (B-BBEE) Legal Sector Code of Good Practice (the draft Codes) expired on 15 March 2021. Legal advisor, **Janine Snyman**, discusses the draft Codes in its current format and highlights the impact it will have on legal practitioners. Ms Snyman writes that there are many that hail the draft Codes as necessary to facilitating transformation in the legal profession and others who believe the provisions specifically relating to increased *pro bono* services will not be economically viable nor sustainable.

### 16 Taking an interpretative approach on the deeming provision of s 8(15) of the VAT Act



LM student, **Samuel Mariens**, discusses the case of *Diageo South Africa (Pty) Ltd v Commissioner for South African Revenue Service* 82 SATC 351 in which the court was tasked with deciding the proper interpretation and application of the deeming provision of

s 8(15) of the Value-Added Tax Act 89 of 1991. In the case of *Diageo*, the appellant contended that the facts did not trigger the application of s 8(15) and relied on foreign authorities to support its argument. Although the use of foreign authorities serves an important role in South African litigation, Mr Mariens notes that it is not binding and ultimately relies on its persuasive value.

### 18 Seen but not heard: Hearing the voice of the child in divorce proceedings

The foundational law concepts of 'custody' and 'access' as they pertain to post-separation parenting under the Divorce Act 70 of 1979 are unhelpful relics of the past as they focus on the protection of the rights of parents rather than the 'best interests' of the child.



Magistrate, **Desmond Francke**, writes that the provisions in the Divorce Act that deal with post-separation do not reflect current social science research, especially as they relate to the effects that separation and domestic violence have on children. Furthermore, Magistrate Francke, implores the family law system to acknowledge that the principles of equality, dignity and respect demand that children have the opportunity to express their views.

### 21 Laws oppressing women need to be amended or repealed

Legal practitioner and South African Women Lawyers Association (SAWLA) President, **Nomaswazi Shabangu-Mndawe** features in this month's Women in Law feature. *De Rebus* news reporter, **Kgomotso Ramotsho**, spoke to Ms Shabangu-Mndawe about her appointment to the Judicial Services Commission, her role as SAWLA President, and her thoughts on challenges women face in the legal profession, and the need for women to support each other in leadership positions.

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# About the LPC

**T**he Legal Practice Council (LPC) has been in existence since 2018, yet there are still legal practitioners who do not know its function or the difference between the LPC and the Law Society of South Africa (LSSA). This has led to some confusion in the profession to the extent that legal practitioners want to submit their audit documents to the LSSA instead of the LPC. The confusion by the public can be seen by the number of calls the LSSA receives from the public about attorneys.

For a simpler explanation, the LPC has taken over the functions of the former four provincial societies, namely the Cape Law Society, the Free State Law Society, the KwaZulu-Natal Law Society, and the Law Society of the Northern Provinces. The LSSA, on the other hand, continues with its former functions, which are:

- To provide legal education through its Legal Education and Development (LEAD) division. LEAD provides access to quality learning, which is relevant and affordable through its extensive range of learning activities (seminars, courses, etcetera).
- To publish the *De Rebus* journal, which is an educational tool used by the profession for research purposes.
- Through its Professional Affairs Department, to coordinate and support the activities and representations of the LSSA's 24 specialist committees. The department comments on issues and legislation that affect the legal profession and the public. The department also liaises with Parliament and LSSA stakeholders and coordinates special projects.

The website of the LPC states that: 'The Legal Practice Council is a national, statutory body established in terms of section 4 of the Legal Practice Act, No 28 of 2014 [LPA]. The Legal Practice Council and its Provincial Councils regulate the affairs of and exercise jurisdiction over all legal practitioners (attorneys and advocates) and candidate legal practitioners'. 'The Legal Practice Coun-

cil is mandated to set norms and standards, to provide for the admission and enrolment of legal practitioners and to regulate the professional conduct of legal practitioners to ensure accountability'.

According to s 5 the LPA, the objects of the LPC are to -

- '(a) facilitate the realisation of the goal of a transformed and re-structured legal profession that is accountable, efficient and independent;
- (b) ensure that fees charged by legal practitioners for legal services rendered are reasonable and promote access to legal services, thereby enhancing access to justice;
- (c) promote and protect the public interest;
- (d) regulate all legal practitioners and all candidate legal practitioners;
- (e) preserve and uphold the independence of the legal profession;
- (f) enhance and maintain the integrity and status of the legal profession;
- (g) determine, enhance and maintain appropriate standards of professional practice and ethical conduct of all legal practitioners and all candidate legal practitioners;
- (h) promote high standards of legal education and training, and compulsory post-qualification professional development;
- (i) promote access to the legal profession, in pursuit of a legal profession that broadly reflects the demographics of the Republic;



Mapula Oliphant - Editor

- (j) ensure accessible and sustainable training of law graduates aspiring to be admitted and enrolled as legal practitioners;
- (k) uphold and advance the rule of law, the administration of justice, and the Constitution of the Republic; and
- (l) give effect to the provisions of this Act in order to achieve the purpose of this Act, as set out in section 3'.

The message about what the LPC is all about is somehow not getting across to the profession despite the numerous editorials I have written and numerous articles published in *De Rebus*. For a deep dive into the explanation of what the LPC is all about, read all articles published on the topic here: [www.derebus.org.za](http://www.derebus.org.za)

## Would you like to write for *De Rebus*?

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

The decision on whether to publish a particular submission is that of the *De Rebus* Editorial Committee, whose decision is final. In general, contributions should be useful or of interest to practising attorneys and must be original and not published elsewhere. For more information, see the 'Guidelines for articles in *De Rebus*' on our website ([www.derebus.org.za](http://www.derebus.org.za)).

- Please note that the word limit is 2 000 words.
- Upcoming deadlines for article submissions: 14 February; 22 March; and 18 April 2022.



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By  
Nomfundo  
Jele

## LSSA Exco Member appointed member of Information Regulator

**T**he Law Society of South Africa (LSSA) welcomes the appointment of its Executive Committee and House of Constituents member, Mfana Gwala, as a part-time member of the Information Regulator for a period of five years, with effect from 1 December 2021. The LSSA congratulates Mr Gwala on his appointment. The Information Regulator is an independent body, which was established in terms of the Protection of Personal In-

formation Act 4 of 2013 (POPIA). POPIA aims to promote the protection of personal information processed by, among others, introducing certain conditions for the lawful processing of personal information. The Information Regulator is empowered to monitor and enforce compliance by public and private bodies with the provisions of POPIA.

The Information Regulator consists of a chairperson and four other members. Two members serve in a full-time capac-

ity and two members may serve in a full-time or part-time capacity.

The recently appointed members of the Information Regulator are:

- Ms Pansy Tlakula as a full-time member and Chairperson;
- Mr Lebogang Stroom-Nzama as a full-time member;
- Mr Johannes Collen Weapond as a full-time member; and
- Mr Mfana Gwala, as a part-time member.

## Reminder to register for professional examination

**P**lease note that the registration for the first session for the 2022 Professional Examinations opened on 3 January 2022 and will close on 4 February 2022. Candidates can apply by completing their applications online at <https://exams.lpc.org.za/>.

The dates for the first session of 2022 exams are as follows:

### Attorneys Admission Examination

- 15 March 2022 Paper 1 and 2
- 16 March 2022 Paper 3 and 4

### Conveyancing Examination

As of 2021, the exam is written over two days, with Paper 1 on theory and Paper 2 on practice.

- 6 April 2022 Paper 1
- 13 April 2022 Paper 2

### Notarial Practice Examination

- 7 April 2022

The registration for the second session will open on 6 June 2022 and close on 8 July 2022.

## Practice directive on applications for default judgments

**T**he Judge President of the Free State Division of the High Court in Bloemfontein issued a practice directive, effective immediately, relating to applications for default judgment pertaining to the National Credit Act 34 of 2005. The directive states that these applications will no longer be considered by the Registrar's office and must be directly placed on the motion court roll by way of Notice of Set Down.

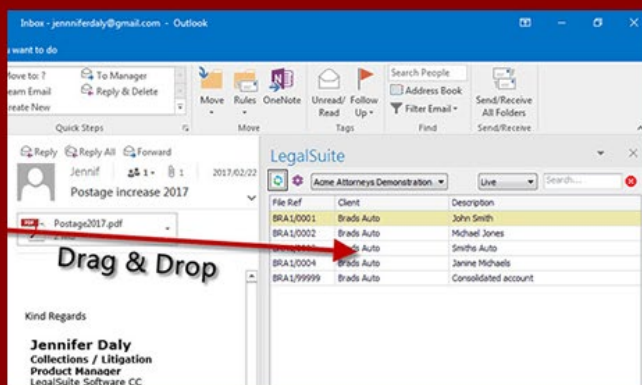
Visit [www.judiciary.org.za](http://www.judiciary.org.za) to view the directive.

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## 2021 LSSA LexisNexis Legal Tech Report

The Law Society of South Africa (LSSA) in conjunction with LexisNexis conducted a national survey of the legal profession. Drawing comparisons against a 2016 survey, the survey analysed the evolution of South African law firms as they responded to challenges facing the profession in 2021.

The results of the survey show that law firms in South Africa have been hard

hit by the pandemic but have remained strong and resilient. Sixty percent of mainly small and medium size firms say they have been hugely impacted by the lockdown with the remainder saying the pandemic had a minimum effect on their law firm.

Visit the [De Rebus website](#) for a summary of the report and download the report.



### Practitioners urged to advise LPC on change of contact details and practice status

The Legal Practice Council (LPC) has urged legal practitioners to let the relevant provincial LPC office know of any changes in their contact details (physical address, e-mail address and telephone number of the practice and cell phone number where applicable).

In terms of para 3.17 of the Code of Conduct for all Legal Practitioners, Candidate Legal Practitioners and Juristic Entities published in terms of s 36 of the Legal Practice Act 28 of 2014 (LPA), it is mandatory to notify the LPC, in writing, within 30 days of any change to any of their contact details.

In the notice the LPC adds that several legal practitioners have ceased practising without notifying the relevant provincial office of the changed status, and without complying with the requirements for the closure of their practice as set out in subrules 54.31 to 52.32 of the Rules made under the authority of ss 95(1), 95(3) and 109(2) of the LPA.

Visit [www.derebus.org.za](http://www.derebus.org.za) to read the notice.

### Compliance obligations while in business rescue

The Companies and Intellectual Property Commission (CIPC) issued an important reminder to companies, close corporations and business rescue practitioners regarding the compliance obligations of companies and close corporations in business rescue.

Visit [www.cipc.co.za](http://www.cipc.co.za) to read CIPC notice 61 of 2021.

Nomfundo Jele, Acting Communications Manager, Law Society of South Africa, [nomfundom@lssa.org.za](mailto:nomfundom@lssa.org.za)

## LSSA information videos

The Law Society of South Africa (LSSA) has, at a national level, made educational videos. The videos aim to inform attorneys of the relevant requirements and practices regarding the specific focus topic.

The links can be found on the LSSA's YouTube channel. Do not forget to subscribe to the channel to watch the videos.

We would also appreciate any suggestions on further related video topics that you may have.

The current videos online are:

- The importance of cross-border practice rights for legal practitioners.
- LSSA History and Mandate.
- Admission of Guilt Fines Final.
- What to know when appointing a Liquidator/Receiver in divorce matters.
- Good Practices Withdrawal as Attorneys Part 1.
- Good Practices Withdrawal as Attorneys Part 2.
- Pension Fund Interests in Divorce Matters Part 1.
- Pension Fund Interest in Divorce Matters Part 2.
- Requirements for the Recognition of Customary Marriages.
- Forfeiture of Patrimonial Benefits.

## Innovations in organisation of Johannesburg Motion Court

The Office of the Deputy Judge President of the Gauteng Local Division has issued a notice to all litigation attorneys in Gauteng regarding innovations in the organisation of the motion court in Johannesburg. The notice states that with effect from 1 January 2022 a new set of categorisations of applications will

be in place for all applications filed in the High Court in Johannesburg. When enrolling an application from that date, the new system should be used. The notice also talks about case load per judge and the current lead time from first enrolment to final set down date.

The telephone numbers to be used when communicating with the Motion Applications' Office have also been updated, effective immediately.

Visit [www.judiciary.org.za](http://www.judiciary.org.za) to read the notice and to download the new category template.

Visit [www.derebus.org.za](http://www.derebus.org.za) to view the notice regarding the updated telephone numbers.

## LSSA AGM – save the date!

Please note that the Law Society of South Africa's annual general meeting and conference is provi-

sionally scheduled to take place on 23 March 2022. The venue will be communicated in due course.



By  
Thomas  
Harban

# Take time to check that all the basics are done correctly

**F**or legal practitioners, time is of the essence. There are often multiple deadlines to meet in meeting timelines imposed by legislation (including prescription dates) and the rules of court, ensuring efficient service to clients and, after all, what legal practitioners sell is their professional expertise and time. Balancing all the interests thus calls for improved time management. Many firms are currently operating with a reduced number of personnel and the way operations are taking place during the COVID-19 pandemic, requires the firm to 'always be switched on' (in modern parlance). This operating environment becomes fertile ground for errors to go undetected and for internal controls to be waived or even ignored in an attempt to produce quick turn-around times. Adherence to the proverb 'more haste, less speed' will be prudent for risk management.

This article aims to demonstrate that taking time to ensure that all the basics have been properly attended to will go a long way in mitigating several risks. I use the examples of three areas of operation, namely –

- taking instructions;
- settlement negotiations; and
- payments.

## Taking instructions and commencing the instruction

Take full and detailed instructions as early as possible in the matter. Also request that the client furnishes you with all the relevant information, documents and banking details with the proper proof of the latter. The verification of the identity of the client and the other verifications required in terms of the Financial Intelligence Centre Act 38 of 2001 must also be completed at the commencement of the relationship with the client. Banking details and documentary proof thereof must also be provided by the client. If the initial instruction is taken at a physical meeting between the parties, it is prudent that the client is requested to bring original stamped banking documents. In the event that a meeting is held using one of the electronic

systems that are now available, ensure that all the parties log on using a secure link, that you have both visual (the video feature is on) and audio contact with the client, and that the meeting is recorded. The recording should then be downloaded and securely stored. In an electronic meeting, it will also go a long way in mitigating the risk of payment into an incorrect bank account if you ask the client to verbally confirm their banking details for the record and to confirm that those are identical to the information provided to you. Provide a written record of your firm's banking details and read them out to the client. Explain the cyber risks associated with business e-mail compromise and how all parties are potentially vulnerable to the risk. Record at the early stage of the engagement with the client that neither party's banking details will be changed by way of e-mail will mitigate cyber risks. Remember that cyber criminals target all payments, no matter who the payment is from or who the intended recipient thereof is. Your client and other intended recipients of funds are also vulnerable to cyber risks.

If the firm will act on a contingency basis, the terms of the contingency fee agreement must be explained to the client. A contingency fee agreement that complies with the Contingency Fees Act 66 of 1997 must be drawn up and signed by all the parties.

Take detailed notes of the discussion and ask for clarification if anything is not clear. It is best to spend time clarifying a point so that you know exactly what the client's expectations are, and the client can confirm whether there is a common understanding of the scope of the instructions, estimated timelines for the completion of the instruction, the fee and billing terms, the servicing team, obligations of the parties and any other relevant terms. If counsel or another external expert will be required, this should also be discussed, agreed on, and recorded.

Detailed, legible file notes will also go a long way in protecting your respective interests. If necessary, get another person in the firm to take the detailed notes. Make a list of all the documents that have been handed to you, as well as a list of all outstanding documents and

information that you have requested the client to provide and the date by which the information is to be provided. If the client is instructing you in a representative capacity, request documents to prove the authority to engage your services and to pursue the matter.

Potential conflict of interests should also be checked at the initial instruction or during the early stages of the instruction. You can also explain your professional duties to the client in respect of the instruction and then place on record that these cannot be compromised.

The instruction can then be recorded in a letter of engagement, which sets out the agreed terms. The letter of engagement must be signed by all the parties and a copy must be handed to the client. If the firm cannot accept the instruction for any reason, it is also good practice to record this in the correspondence to the client so that there are no disputes at a later stage regarding whether you accepted the instruction or not.

Each firm should be able to produce a checklist of matters to be discussed and agreed with the client at the initial consultation, the information and documents required and any other information relevant to the type of work the firm renders and the requirements of its standard operating procedures.

## Settlement negotiations

In some circumstances, settlement negotiations can move quickly. In litigation matters there is an added risk that settlement negotiations can take place just before the commencement of a hearing in a matter or even during the litigation itself. Always take time to consult with the client (even telephonically) to explain all the terms of the proposed settlement and, if necessary, give your recommendations. Do not rely on the power of attorney (if one has been signed by the client) and manage the client's expectations. Similarly, with taking the initial instructions, make detailed notes of the discussion and record the time and duration of the telephone call. In some instances, these negotiations happen when the legal practitioner is out of the office (often at court), but the discussion and instruction can be confirmed by an e-mail sent to the client later that day. In

this technological age, the portable electronic devices used by many legal practitioners enable a remarkable amount of work to be conducted remotely and e-mails can be dispatched from anywhere that a network connection can be established. Various technological solutions on the portable devices even allow for voice recordings to be made that you can send to your client (or even your office to be typed).

Do not concede to pressure from your opponents to accept an offer that is detrimental to your client's interests or one on which you have not received clear instructions.

The suggested measures will go a long way in mitigating the risk of under-settlement of matters (if you are acting for the plaintiff) or any other claim on the basis that the settlement reached was not in line with the instructions.

## Payments

Take time to verify the reason for all payments and ensure that you have the relevant audit trail available. It is particularly important to check that the banking details of the payee are correct and accord with the records on file. Remember that cybercrime has become more prevalent and that cyber criminals constantly refine their *modus operandi* in the hope that some of their attempts will slip through the proverbial 'cracks' resulting in a payment to them rather than the intended recipient of the funds. Take extra caution when making payments and remember that you have an obligation to verify banking details before making any payments.

The rules issued in terms of the Legal Practice Act 28 of 2014 prescribe as follows:

### 'Payment to clients

54.13 A firm shall, unless otherwise instructed, pay any amount due to a client within a reasonable time. Prior to making any such payment the firm shall take adequate steps to verify the bank account details provided to it by the client for the payment of amounts due. Any subsequent changes to the bank ac-

count details must be similarly verified.'

Though this rule applies to payments from the trust account to the client, the principle can be applied to any payment whether from the trust or business account. Verification requires action on the part of the firm to establish whether the bank account details are indeed those of the intended recipient. There are a number of steps that can be taken to verify the banking details of the client (or any purported change) and suggestions for the steps that can be taken to mitigate cyber risks are listed on p 6 to 7 of the August 2019 edition of the Risk Alert Bulletin (<https://lpiif.co.za>, accessed 4-12-2019).

The case of *Jurgens and Another v Volschenk* (ECP) (unreported case no 4067/18, 27-6-2019) (Tokota J) focusses on the circumstances where an attorney fell victim to the business e-mail compromise scam and paid funds to an incorrect party. The court noted (at para 26) that the furnishing of what purported to be new banking details to the attorney within a short space of time should have raised red flags for the attorney. The court highlighted some of the contents of the documents provided that should have raised the red flags for the attorney and stated that:

'A diligent, reasonable attorney would have taken steps to verify the information from [the client]. The respondent failed to do so. It is no defence to pass the buck to her secretary and state that the account was dictated to her by her secretary. She owed a duty to her clients to act in their interests and safeguard their money. In my view, a reasonable attorney in her position would have exercised more care under the circumstances ... She failed to do so and the applicants suffered loss as a result of her negligence.'

The law firm in *Fourie v Van der Spuy & De Jongh Inc and Others* 2020 (1) SA 560 (GP) was similarly held liable for losses resulting from payment to an incorrect party.

Legal practitioners must insist on the verification of the banking details of the

intended recipient of the funds and not accept e-mails purporting to be from their clients on face value or pressure from parties (inside or outside of the law firm) to make the payment as soon as possible and suggesting that the verification must be dispensed with because of some or other urgency. At the end of the day the liability for losses suffered will lie with you, the legal practitioner.

Cybercrime related claims are excluded from the Master Policy issued by the Legal Practitioners Indemnity Insurance Fund NPC (LPIIF). The cybercrime exclusion is in clause 16(o) of the Master Policy, a copy of which can be accessed on the LPIIF website ([www.lpiif.co.za](http://www.lpiif.co.za)). If the firm has purchased insurance cover for this risk in the commercial market, regard must be had to the specific terms on which the insurer has agreed to indemnify such losses and the risk management measures that the insurer has required be put in place. The various commercial insurers prescribe different measures that must be put in place in order to trigger the indemnity provided.

Do not lose sight of the fact that theft can, unfortunately, also be perpetrated by parties inside your firm. Apply an equal amount of scrutiny to all payments, no matter the value or the intended recipient.

## Conclusion

The risk associated with the human factor in any legal practice can never be completely discounted. The risk of something falling through the proverbial cracks will always be present and is exacerbated by the pressures of servicing clients efficiently and the associated efforts to narrow the turn-around times. Those efforts should not, however, increase the risks faced by the practice.

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



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By  
Trudie  
Broekmann

# The Act, the firms, and the Information Regulator: How s 57 of POPIA impedes legal practice

**T**he Protection of Personal Information Act 4 of 2013 (POPIA) came into effect on 1 July 2020, with a one-year grace period, following much anticipation. Its commencement brought a frenzy with it, as businesses rushed to ensure their compliance. A chief concern was around the information already held by businesses, including the contact information of past and current clients. For law firms, the impact of s 57 (in particular s 57(1)(b)) on the day-to-day functioning of legal practitioners may have been overlooked. In this article, I discuss how this section affects the work that legal practitioners do and what can be done to cure the potential crisis that could unfold.

## POPIA terminology

Responsible party: The person or entity processing the personal information.

- Processing personal information: This includes gathering, using, storing, and destroying the personal information.
- Data subject: The person or entity whose personal information it is.
- Third party: Not the data subject or the responsible party.
- Regulator: The Information Regulator oversees the monitoring and enforces the compliance of POPIA.

## What does the section say?

- Section 57(1) makes it clear that 'the responsible party must obtain prior authorisation from the Regulator, in terms of section 58, prior to any processing if that responsible party plans to –  
...  
(b) process information on criminal behaviour or on unlawful or objectionable conduct on behalf of third parties'.
- Section 57 and section 58 are 'not applicable if a code of conduct has been issued and has come into force in terms of chapter 7 in a specific sector or sectors of society' (s 57(3)).
- All processing of such information must cease until a report is given by the Regulator or they give notice of the need for further investigation (s 58(2)).

- The initial notification by the Regulator may take up to four weeks, the investigation may take up to 13 weeks and then the report is to be issued (s 58(4)).
- Contravening the prior authorisation requirement and the processing ban are both an offence subject to a fine or imprisonment for a period not exceeding 12 months (s 59 read with s 107).

## How does it impact the profession?

Attorneys and advocates process information on criminal, unlawful and objectionable behaviour on a regular basis, some daily. For example, a firm which specialises in criminal law engages with evidence of criminal behaviour daily. A firm specialising in motor vehicle accident claims regularly processes information regarding which party caused the car accident by their negligent or criminal behaviour. A firm which specialises in consumer law, regularly processes information on the cause of defects in goods, the supply of defective goods, or the providing of defective services, all those categories presumably qualify as objectionable behaviour. Even a conveying firm encounters situations where building regulations were breached, estate agents acted unethically, officials expected bribes etcetera.

Seeking this approval, even though only once-off approval is required, would significantly impede the functioning of attorneys and advocates as the Act requires cessation of any processing of the relevant personal information for the period during which the approval request is being processed by the Regulator. The deadlines set in s 58 of POPIA allow the Regulator to take 17 weeks (four months) to complete the investigation.

Such a cessation of activities would compromise a firm's solvency, case outcomes and their ability to retain clients. On the other hand, failure to comply could render a firm liable for a hefty fine or even prison time.

## Where to from here?

Legal practitioners already have the

Code of Conduct for all Legal Practitioners, Candidate Legal Practitioners and Juristic Entities set by the Legal Practice Council (LPC) as envisioned in s 57(3) of POPIA. It may not meet the specific criteria of POPIA, but the structure is already there.

I strongly suggest that the Legal Practice Council update this Code to reflect the necessary POPIA criteria and then register this Code with the Regulator so that the exception applies in favour of the legal profession and the work of attorneys and advocates is not hampered by this section of POPIA.

- See LSSA News 'LSSA Exco Member appointed member of Information Regulator' on p 5.

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## Fact corner

- The Information Regulator (South Africa) is an independent body established in terms of s 39 of the Protection of Personal Information Act 4 of 2013. It is subject only to the law and the Constitution and it is accountable to the national assembly.
- The Information Regulator is, among others, empowered to monitor and enforce compliance by public and private bodies with the provisions of the Promotion of Access to Information Act 2 of 2000 and the POPI Act.
- The Information Regulator of South Africa is based at: JD House, 27 Stiemens Street, Braamfontein, Johannesburg, 2001.



By  
Jeremy  
Phillips

# Building solid foundations: The legal understanding of a 'home'

According to the classic adage, 'home is where the heart is', however, the legal standard for determining whether a structure constitutes a 'home' is, thankfully, somewhat more sophisticated. It is much more mystifying. The respective courts in *South African Human Rights Commission and Others v Cape Town City and Others* 2021 (2) SA 565 (WCC) and *Davids v City of Cape Town* (WCC) (unreported case no 16372/2021, 7-10-2021) (Allie J) have added yet another layer to the slow judicial construction of the legal definition of a 'home'.

Section 26(3) of the Constitution provides that: 'No one may be evicted from their home ... without an order of court made after considering all the relevant circumstances' (my italics). The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (the PIE Act) was enacted to give expression to s 26(3). In its preamble, the PIE Act mirrors the s 26(3) guarantee against evictions from the home. It is thus very clear the kind of structure, which is afforded constitutional protection – a 'home'.

The constitutional protection afforded is significant – if a structure qualifies as a 'home', it cannot be demolished, or its occupants evicted, summarily. Eviction from, and demolition of, a home may only proceed if countenanced by a court; otherwise, it is unlawful.

In *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) at para 20, Sachs J explained that 'the landowner cannot simply say: This is my land, I can do with it what I want, and then send in the bulldozers or sledgehammers'. The landowner must apply to court. However, if the structure is not a home, the bulldozer-and-sledgehammer approach is then a viable course of action.

And so, a lot turns on the definition of a 'home'.

Despite its importance, there is no conclusive all-encompassing definition – either in legislation or advanced by the

courts. Presumably, this reluctance is because it may eventuate that a definition now may prove to be too restrictive later. Structures, which ought to be classified as homes may fall beyond the definitional walls of any erstwhile definition.

Instead, there has been a cautious brick-by-brick approach, slowly building up the definition. This article surveys the position as it currently stands of which structures constitute homes, and which do not.

The PIE Act enumerates a limited number of home-qualifying structures. Section one provides that a 'hut, shack, tent or similar structure' may all constitute a home, as well as 'any other form of temporary or permanent dwelling or shelter' (see *Barnett and Others v Minister of Land Affairs and Others* 2007 (6) SA 313 (SCA) for further discussion). The Supreme Court of Appeal (SCA), in the seminal case of *Ndlovu v Ngcobo; Bekker and Another v Jika* [2002] 4 All SA 384 (SCA), at para 20, reiterated the latter as the determinative test. A structure constitutes a home if it 'perform[s] the function of a ... dwelling or shelter for humans'.

The question then really is: When does a structure perform the function of a dwelling or shelter? When it does, does the structure qualify as a home?

The SCA, in *Ngomane and Others v Johannesburg City and Another* 2020 (1) SA 52 (SCA), found that a dwelling or shelter must take a certain physical form. The case arose from the confiscation of wooden pallets and cardboard boxes. The pallets and boxes were assembled into structures in the evenings, affording the applicants some shelter from the elements, and then disassembled again in the morning. It is while the materials were disassembled that they were confiscated.

It is evident from *Ngomane* (as well as several other cases – see, for example, *City of Cape Town v Rudolph and Others* 2003 (11) BCLR 1236 (C)) that there is no restriction on the component materials used to construct a home. A home can

comprise of even the most rudimentary materials (eg, cardboard boxes and wooden pallets), so long as it is fashioned into a dwelling or shelter.

However, in the instant case, Maya P, writing for a unanimous court, held that the confiscated materials in question did not amount to a home as they were disassembled and scattered. Materials, lying around, notwithstanding the potential to be assembled into a shelter or dwelling, do not constitute a home. A disassembled structure, no matter the frequency of its assembly and disassembly, is not a home. The judgment has come in for criticism (see, for example, Ndivhuwo Ishmel Moleya 'The plight of the homeless under PIE: A critical analysis of *Ngomane and Others v City of Johannesburg*' 2020 (March) DR 39), but still stands as valid law.

There is also then a temporal question – for how long does a structure have to perform the function of a dwelling or shelter to be considered a home? This is highly contested.

According to the SCA in *Barnett*, a structure only performs the function of a dwelling or shelter if there is an 'element of regular occupation coupled with some degree of permanence' (at para 38). In *Barnett*, the court considered whether a holiday house might be a home in the constitutional sense. The court held that it cannot. The structure must be a primary abode, not merely a destination for an occasional visit. Therefore, a holiday house does not constitute a home.

Unlike a holiday house, a dormitory, however, is occupied with sufficient regularity for most of the year to constitute a home. This was the High Court's finding in *Tshwane University Technology v All Members of the Central Student Representative Council of the Applicant and Others* (GP) (unreported case no 67856/14, 22-9-2016) (Wentzel AJ).

Though occupation of the structure must be regular and permanent, it may not need to be long-established.

In *Breede Vallei Munisipaliteit v Die Inwoners van ERF 18184 and Others* (WCC)

(unreported no A369/12, 13-12-2012) (Bozalek J), the High Court was called on to decide the length of occupation required for an occupied structure to be considered a home. The matter arose because of 19 houses that were occupied within the period of 24 – 48-hour period. The applicant municipality argued that the houses had not been occupied for a sufficiently long period to constitute homes. Bozalek J disagreed. He held that 'where a person's housing circumstances are dire' and there is no other shelter available to them, the occupied structure will be considered to be their 'home' 'without the elapse of much time in occupation' (para 19). As such, 24 – 48 hours' occupation may be sufficient for a structure to be considered the occupant's home where the occupant would otherwise be homeless.

This period has been reduced even further in subsequent cases. *Fischer and Another v Persons whose identities are to the applicants unknown and who have attempted or are threatening to unlawfully occupy Erf 150 (remaining extent), Philippi; Ramahlele and Others v Fischer and Another* [2014] 3 All SA 365 (WCC) concerned an archetypal cynical eviction.

As *obiter*, Gamble J ventured a comment about the home (paras 84 – 96). Again, in the context of destitute occupiers, he stated that an intention to occupy on a regular and permanent basis is all that is required. Such intention is satisfactorily evidenced by the structure being completely built. As such, a completely built structure, even if it has not been occupied at all, can constitute a home.

The *Fischer* judgment, however, was overturned on appeal by the SCA (see *Fischer and Another v Ramahlele and Others* [2014] 3 All SA 395 (SCA)); not because of Gamble J's *obiter* comments, but for his failure to hear oral evidence. Nevertheless, his intention-based assessment for a home was quashed, but only temporarily so.

The latest definitional developments have come in the respective cases of *South African Human Rights Commission* and *Dauids*. Both cases were decided against the backdrop of ongoing cynical evictions, and given the rise of seemingly unrelenting cynical evictions, the respective judges prescribed an abundantly cautious (but, I submit, a much-needed) approach.

Echoing the *obiter* comments in *Fis-*

*cher*, Meer and Allie JJ both held that if a structure is capable of performing the function of a dwelling or shelter, or even resembles a dwelling or shelter, it is presumed to be someone's home, regardless of prior occupation or a lack thereof.

This is, by far, the most expansive understanding. Undoubtedly, it is not the end of the perpetual incremental defining, and re-defining, of a 'home'.

Nevertheless, at this current juncture, the cumulative precedent is this: any completed structure, made of any materials, that appears to be capable of performing the function of a shelter or dwelling, should be regarded as a home. On encountering such a structure, a court order is peremptory before an eviction or demolition can occur.

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## PEOPLE AND PRACTICES

# 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.

**Phukubje Pierce Masithela Attorneys** in Johannesburg has four new promotions.



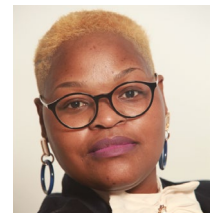
Mathando Likhanya has been promoted as a Director.



Delphine Daversin has been promoted as a Principal Legal Consultant.



Melody Musoni has been promoted as a Senior Legal Consultant.



Zandile Mthabela has been promoted as an Associate.





# The draft Legal Sector Codes and how it will impact legal practitioners

By  
Janine  
Snyman

**T**he draft Broad-Based Black Economic Empowerment (B-BBEE) Legal Sector Code of Good Practice (the draft Codes), in its current format, may have far-reaching consequences for the legal profession. The deadline to furnish comments on the draft expired on 15 March 2021.

It should firstly be noted that the draft Codes do not provide for a transition period but will ostensibly come into effect on the date of publication (once the Steering Committee has finalised deliberations regarding comments received from legal practitioners and interested parties). The effect hereof would be that legal practices who have previously been rated under the Codes of Good Practice, issued under s 9 of the Broad-Based Black Economic Empowerment Act 53 of 2003, may potentially receive lower levels if such legal practices have not been planned in accordance with the Draft Codes, as the targets set out in the Draft Codes are far more onerous than those set out in the Codes of Good Practice.

Though legal practitioners and legal firms may elect whether to comply with B-BBEE legislation, it should also be noted that compliance may become compulsory in the future, with specific reference to s 50 of the Property Practitioners Act 22 of 2019, which requires, *inter alia*, a valid B-BBEE certificate to obtain a Fidelity Fund Certificate.

## *Pro bono services*

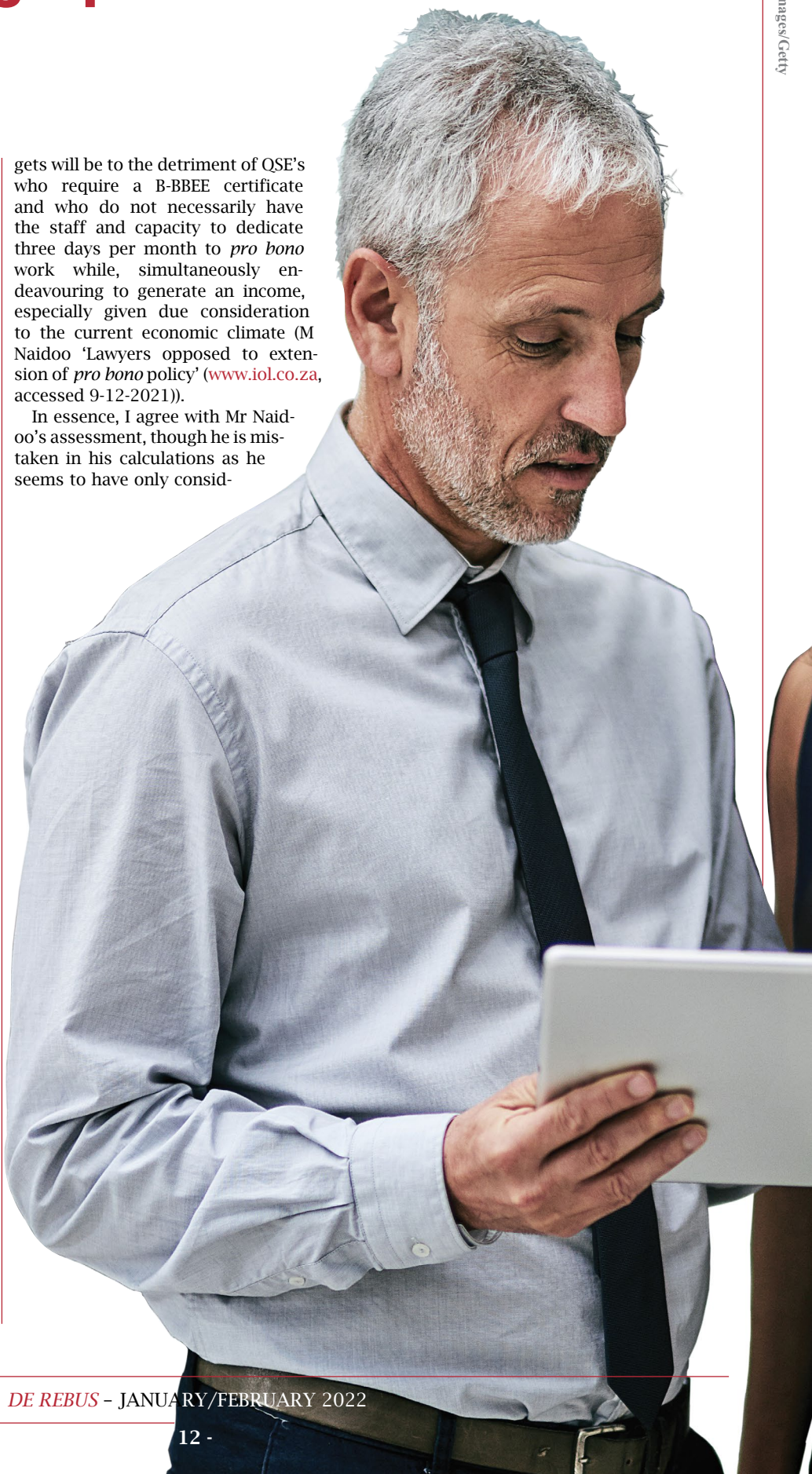
To obtain the maximum score on the Socio-Economic Development Scorecard, para 28.2 of the draft Codes requires each legal practitioner practising at a Qualifying Small Enterprises (QSE) to spend a minimum of 600 hours providing *pro bono* services for the benefit of poor, marginalised, and black clients. Legal practitioners practicing at large entities will each be required to spend at least 1 500 hours and advocates with an annual revenue exceeding R 5 million will be required to spend at least 450 hours.

These targets are clearly far more burdensome and excessive than the current target of 24 hours per annum.

As stated by Mervyn Naidoo these tar-

gets will be to the detriment of QSE's who require a B-BBEE certificate and who do not necessarily have the staff and capacity to dedicate three days per month to *pro bono* work while, simultaneously endeavouring to generate an income, especially given due consideration to the current economic climate (M Naidoo 'Lawyers opposed to extension of *pro bono* policy' ([www.iol.co.za](http://www.iol.co.za), accessed 9-12-2021)).

In essence, I agree with Mr Naidoo's assessment, though he is mistaken in his calculations as he seems to have only consid-





ered the *pro bono* services rendered 'for the benefit of poor, marginalised and black clients from rural areas' (my italics), which is set at 200 hours per annum. However, the draft Codes also require an additional 200 hours to be rendered in respect of 'black clients in community legal centres', as well as a further 200 hours per annum in respect of 'black clients who require legal commercial and contractual assistance for the enhancement',

thus a total of 600 hours in the instance where the measured entity is a QSE.

Should it be accepted that there is, on average, 22 business days per month consisting of 8 business hours per day, this would mean that each practitioner practising at a QSE would have to dedicate a total of more than three months solely to *pro bono* work, which is not economically viable nor sustainable.

### Opposing views

There are many that hail the draft Codes as a step in the right direction to facilitate the transformation of the legal profession in order to correct the wrongs of Apartheid.

Minister of Justice and Correctional Services, Ronald Lamola, stated in his opening address at the launch of the draft Codes that the aim of the draft Codes was to ensure transformation in the private sector and, more specifically, that s 217 of the Constitution be given effect to in all economic sectors, by warranting the participation of black and female practitioners in the industry and protecting and advancing previously disadvantaged persons ([www.gov.za](http://www.gov.za), accessed 9-12-2021).

The former President of the Black Lawyers Association (BLA), Mashudu Kutama, also confirmed their support of the draft Codes as 'it aimed to transform the legal profession and bring the issue of general economic empowerment back to the industry', though he also indicated concerns regarding the viability of the suggested increased *pro bono* hours (Mervyn Naidoo 'Lawyers oppose extension of *pro bono* policy' (<https://eminentra.co.za>, accessed 9-12-2021)).

Denis Pokani Mitole and Chantelle Gladwin-Wood state that transformation is not only required in the legal profession but is inevitable, and that the fairness of B-BBEE legislation is found in the fact that it is not compulsory for the private sector to abide by same. However, they go on to suggest that a cut-off date be implemented, by which date B-BBEE legislation should be abolished (DP Mitole and C Gladwin-Wood 'Black Economic Empowerment (BEE) Window Dressing in the Legal Profession' ([www.schindlers.co.za](http://www.schindlers.co.za), accessed 9-12-2021)).

Others, such as Solidariteit and AfriForum have indicated their vehement opposition to the Codes; Solidariteit on the basis that the draft Codes seeks to impose equality, which

'should not be imposed through state intervention' ('Comments submitted to avert BEE takeover of legal profession' (<https://solidariteit.co.za>, accessed 9-12-2021)) and AfriForum on the basis that the draft Codes will be to the detriment of white practitioners and, furthermore, that the draft Codes are in violation of the Bill of Rights, specifically the right to free trade and profession ('AfriForum to fight against new BEE Codes for legal sector' (<https://afriforum.co.za>, accessed 9-12-2021)).

In their comments submitted to the Legal Practice Council (LPC), Sakeliga indicated that their opposition to the draft Codes stems from the unconstitutionality of same, as s 217 of the Constitution will only find application where organs of state contract for services either with other organs of state or with the private sector (<https://sakeliga.co.za>, accessed 9-12-2021).

### Constitutional validity of the draft Codes

Section 217 of the Constitution states that:

'(1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

(2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for –

(a) categories of preference in the allocation of contracts; and

(b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.

(3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.'

As is clear from the above, s 217 allows for a procurement policy, which advances previously disadvantaged persons when contracting with organs of state. Section 217 accordingly does not allow for such policy in the private sector.

However, the basis or justification for B-BBEE legislation can be found in s 9 the Bill of Rights. Section 9(1) states that '[e]veryone is equal before the law and has the right to equal protection and benefit of the law'.

Section 9(2), however, allows for affirmative action measures as it states that '[e]quality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.'



Section 9(3) goes on to state that '[t]he state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.'

Former Constitutional Court Judge, Albie Sachs, has stated that B-BBEE legislation passes constitutional scrutiny when reading clauses 9(1), 9(2) and 9(3) together, as, if viewed separately, principles of affirmative action allowed for would be contradictory to the anti-discrimination provisions. To properly give effect to the three clauses, cognisance should be taken of a history of inequality and the aim to correct same. Justice Sachs lobbies for a holistic approach in this regard (G Marcus, X Mangcu, K Shubane and A Hadland (Ed) *Visions of Black Economic Empowerment* (Johannesburg: Jacana Media 2008)).

Section 9(5) is also important in the context of the aforementioned as it prohibits discrimination unless it is fair. Similarly, s 36(1) states that '[t]he rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable.'

Therefore, to determine whether the draft Codes are constitutional, the question to be answered would be whether the draft Codes are fair, reasonable, and justifiable.

I believe the provisions relating to increased *pro bono* services cannot reasonably be found to be fair, reasonable or justifiable.

Furthermore, targets set out in the draft Codes regarding priority elements are also far more onerous than those set out in other sector codes. For example, the black ownership target after three

years is 40% for a QSE and 50% for large enterprises, whereas the Codes of Good Practice target is simply set at 25% plus one vote (para 2.1.1 of the B-BBEE Codes of Good Practice, Code Series 100: Measurement of the Ownership Element of Broad-Based Black Economic Empowerment, Statement 100: The General Principles for Measuring Ownership). There is a similar trend as to black female and black disabled ownership. It is unclear as to the motivation for almost doubling the target for the legal profession compared to most of the other industries in SA.

As to the Skills Development Element, the draft Codes' requirements for training as set out in para 18.9.3.3 amount to a substantially higher percentage of the leviable amount to be spent on black skills development. I estimate the target to be more than double that of the other industries. The targets are not aligned with any other sector code and places an unnecessary burden on the legal profession during a period where the profession, as well as others including clientele, are attempting to recover from the financial impact of the COVID-19 pandemic.

In the instance of the Supplier Enterprise Development Scorecard, the draft Codes attempt to impose similar targets for entities who, for example, have a turnover of R 3 million, as for entities whose turnover is in excess of R 15 million. Such targets, if implemented, would be extremely unfair and harmful to smaller practices.

In the introduction, the draft Codes state at para 1.4 that the legal sector previously had to make use of the Codes of Good Practice, which Codes did not account for the unique nature of the legal industry. It goes on to state that one of the aims of the draft Codes is to correct this, yet it fails to actually do so. For ex-

ample, the draft Codes state that advocates cannot be measured on the ownership and management scorecards, due to the nature of their practice as sole proprietors, though the same concession is not made for attorneys who are also practicing as sole proprietors. Furthermore, the draft Codes fail to take into account legal practices that are not yet allowed to take in candidate legal practitioners, as the minimum years of practice criteria has yet to be met. Such legal practices will thus be unjustly penalised by being unable to obtain points for skills development whereas their counterparts who may have employed candidate legal practitioners from the designated groups will reap the benefits under the Skills Development scorecard.

## Conclusion

Though it is trite that imbalances and inequality in the legal profession should be addressed, I am of the opinion that the draft Codes, in its current format, will not only fail to achieve same but will be to the detriment of the legal profession.

Though the B-BBEE Act has been found to be constitutional, whether the draft Codes, if implemented as is, will hold up to constitutional scrutiny remains to be seen.

- To view the comments from the Law Society of South Africa Legal Sector Code of Good Practice On Broad-Based Black Economic Empowerment visit [www.derebus.org.za](http://www.derebus.org.za)

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# VAT

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## Taking an interpretative approach on the deeming provision of s 8(15) of the VAT Act



By  
Samuel  
Mariens

**I**n *Diageo South Africa (Pty) Ltd v Commissioner for South African Revenue Service* 82 SATC 351, Diageo South Africa (Pty) Ltd (Diageo) established a business as an importer, manufacturer, and distributor of alcoholic beverages. Diageo entered into an agreement with foreign brand owners, whereby Diageo undertook to advertise and promote the foreign brand owners' alcoholic products in the South Africa (SA). The performance undertaken by Diageo constituted the supply of advertising and promotional goods and services (A&P services) to the

foreign brand owners. The A&P services supplied by Diageo included, *inter alia* –

- advertising from various channels; and
  - brand building promotions, events, and sponsorships.
- In addition, Diageo distributed physical goods to third parties. Two categories of physical goods were distributed by Diageo for use or consumption within SA, namely –
- alcoholic products, which were provided to third parties for sampling and tasting; and
  - branded merchandise (eg, clothing items), which were distributed free of charge.

The aforementioned was done by Diageo for brand advertisement and promotional purposes, and thus, formed part of the A&P services supplied to the foreign brand owners.

Diageo charged the foreign brand owners a fee in consideration for the A&P services supplied in terms of the agreement. However, the fee charged by Diageo did not differentiate between the goods and services supplied. In accordance with s 11(2)(l) of the Value-Added Tax Act 89 of 1991 (the VAT Act), Diageo submitted tax returns for the 2009, 2010 and 2011 tax years to the South African Revenue Service (Sars) enclosing accounts reflecting VAT levied at

0% for A&P services supplied to the foreign brand owners. The commissioner contended that Diageo made separate supplies of A&P services in the form of promotional giveaways and samples to third parties, which were consumed in SA and not exported to non-residents. Consequently, the commissioner invoked s 8(15) of the VAT Act and Diageo was assessed for additional output VAT. The Supreme Court of Appeal (SCA) was tasked with deciding the proper interpretation and application of s 8(15).

### Section 8(15) of the VAT Act

Section 8(15) of the VAT Act is triggered in circumstances where a VAT vendor makes a single supply of goods or services and only one fee/consideration is payable for the single supply. In such circumstances, VAT would be levied at only one rate. However, had the VAT vendor charged a separate fee for the supply of goods and/or services, part of the supply would have attracted VAT at the standard rate and part of the supply would have attracted VAT at a rate of 0% (notional separate considerations). In such circumstances, s 8(15) operates as a deeming provision and deems each part of the single supply to be a separate supply.

## The contentions of the taxpayer

Diageo contended that the facts did not trigger the application of s 8(15). In amplification of its contention, Diageo relied on foreign authorities to argue that in order for s 8(15) to apply, a VAT vendor 'must make "separate dissociable supplies of both services and goods" or supplies that are "economically divisible, independent and hence dissociable" and which constitute "an end in itself", not a means to achieve that end'. Diageo argued that, in terms of s 8(15), the deeming provision did not operate in circumstances where the supply of goods and/or services were economically not dissociable. Diageo contended that it was only if a single supply of goods and/or services, which constituted a combination of economically divisible, independent and dissociable supplies was made, that s 8(15) would deem separate supplies to have been made in order to levy the appropriate rate of VAT.

Diageo referred to the agreement between it and the foreign brand owners to illustrate that it did not have an obligation to supply goods but was only contracted to supply a service for the purposes of the VAT Act. This suggests that the transaction between Diageo and the foreign brand owners may have been specifically structured to ensure that the fee payable by the foreign brand owners would attract zero-rated VAT. Diageo argued that the supply of goods was not an end, but rather a means to achieve an end (the end being the advertising and promotion of the foreign brand owners' alcoholic products in SA). Diageo contended that, although it incurred expenditure in acquiring goods to supply a service, it did not result in it supplying both goods and services. Effectively, Diageo maintained that it made only a single supply of A&P services to the foreign brand owners, and thus, the deeming provision of s 8(15) did not find application. Diageo argued that the commissioner's approach sought to artificially dissect a single supply, the result of which, would increase its liability for VAT.

## The SCA's interpretation of s 8(15) of the VAT Act

The SCA held that s 8(15) must be interpreted in the context of ss 7(1)(a) and 11(2)(l). In terms of s 7(1)(a), a standard rate of VAT is applied on a VAT vendor's supply of goods and/or services in the course or furtherance of an enterprise. Section 11(2)(l) is an exception to s 7(1)(a) and provides that VAT is levied at 0% in respect of a vendor's supply of goods and/or services to non-residents. The SCA held that the purpose of s 8(15) is to cater for a situation where both ss 7(1)(a)

*'The SCA held that the purpose of s 8(15) is to provide for a notional separation to ensure that VAT vendors fulfil their obligation to pay VAT at a standard rate on goods and/or services, which constitute a standard-rated supply.'*

and 11(2)(l) are triggered in a single supply of goods and/or services. The deeming provision of s 8(15) ensures that VAT is levied at the appropriate rate for the goods and/or services supplied.

The SCA held that Diageo's reliance on foreign authorities was misplaced because it did not concern the interpretation of statutes, which provided for a deeming provision or an apportionment provision. The SCA held that 'formulations such as "economically not dissociable", "the supply not being an end in itself" and the question of "principal and ancillary supplies"' as set out in the foreign authorities, had no bearing on the interpretation and application of s 8(15). The SCA held that its interpretation of s 8(15) would not lead to an artificial or insensible consequence nor result in a commercially unreal outcome.

## The SCA's application of s 8(15) of the VAT Act

The SCA found that the supply of A&P services made by Diageo to the foreign brand owners amounted to the supply of both goods and services, which were distinct and clearly identifiable from each other. The SCA observed that only a single fee was charged by Diageo for the supply of A&P services. The SCA held that had separate fees been charged by Diageo for the supply of goods and services, the supply of the services to the foreign brand owners would have attracted VAT at a zero rate and the supply of goods, which were used and consumed within SA would have attracted VAT at a standard rate. The SCA held that s 8(15) deemed each part of the supply of A&P services to be a separate supply and apportioned VAT at different rates. Therefore, the part of Diageo's supply relating to goods which were used and consumed within SA resulted in VAT being levied at the standard-rate. Consequently, Diageo was liable for the VAT output tax adjustments under s 8(15).

## Conclusion

The use of foreign authorities serves an important role in South African litigation. Section 39(1) of the Constitution permits a court to consider foreign law when interpreting the Bill of Rights. Although the judgments of foreign courts are not binding on South African courts, it does have a persuasive value. The degree of persuasion depends on certain factors, such as –

- the status of the foreign court;
- the similarity between the South African statutory provision (to be interpreted) and the foreign statutory provision; and
- the cogency of the argument.

However, when interpreting legislation in SA, the starting point is the interpretative approach set out in the SCA's judgment in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA), which requires the language of a statutory provision to be interpreted contextually, purposively, and literally.

In *Diageo*, this was reaffirmed by the SCA. The SCA held that the purpose of s 8(15) is to provide for a notional separation to ensure that VAT vendors fulfil their obligation to pay VAT at a standard rate on goods and/or services, which constitute a standard-rated supply. Therefore, it was irrelevant whether the goods supplied were not economically dissociable, but only incidental to the supply of the A&P services. The interpretation adopted by Diageo would have resulted in a commercially unreal outcome because all that a VAT vendor would have to do to avoid the levy of standard-rated VAT is show that the standard rated supply was only incidental to the supply, which attracted VAT at a zero rate. Such an interpretation would likely result in a myriad of transactions being structured in a specific way to ensure that the standard-rated supply is merely a subsidiary of, and not economically dissociable from, the zero-rated supply, which constitutes the whole. In such circumstances, Sars would be deprived of VAT, which it would legally be entitled to, and consequently, the purpose of s 8(15) would be undermined. On this note, when interpreting legislation, it is important to remember the guidance provided by the SCA in the *Endumeni* judgment: 'A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.'

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# Seen but not heard: Hearing the voice of the child in divorce proceedings



Picture source: Gallo Images/Getty



By  
Desmond  
Francke

**T**he concepts of 'custody' and 'access', which are foundational to the law governing post-separation parenting in South Africa's (SA's) Divorce Act 70 of 1979, are unhelpful relics of the last century, focusing as they do, on the protection of the rights of parents rather than the promotion of the 'best interests' of children. The provisions in the Divorce Act dealing with post-separation parenting are inconsistent with practices. The provisions do not reflect current social science research, especially with regard to the effects that separation and domestic violence have on children and are contrary to the requirements of the United Nations Convention on the Rights of the Child.

Section 6(3) of the Divorce Act reads: 'A court granting a decree of divorce may, in regard to the maintenance of a dependent child of the marriage or the custody or guardianship of, or access to, a minor child of the marriage, make any order which it may deem fit'. Section 4(2) of the Mediation in Certain Divorce Matters Act 24 of 1987 uses the concepts of custody insofar as children are concerned. These words denote that there are winners and losers when it comes to children. They promote an adversarial approach to parenting and do little to benefit the child. The danger of this 'winner/loser syndrome' in child custody battles must be recognised. The concepts of 'custody' and 'access', are widely viewed as placing too great a focus on the notions of control and pa-



rental rights concerning parenting matters and created a sense of exclusion and marginalisation for the parent who was not granted custody. 'The interests of children, parents and the justice system require the reform of the parenting provisions of [both] Acts. The reforms need to focus on parental responsibilities and children's relationships, rather than on parental rights. Divorce means the end of the spousal relationship, but it does not mean the end of the parent/child relationship, and there needs to be supports in place to allow for effective "co-parenting" relationship to develop' (Nicholas Bala 'Bringing Canada's Divorce Act into the new millennium: Enacting a child-focused parenting law' (2015) 40 *Queen's Law Journal* 425).

The legislature, which is intent on reform, must recognise the importance of 'hearing the voices of children', not only to protect the children's rights but also to improve their outcomes. Courts should impose a plan on parents, or even stop the involvement of a violent or abusive parent in a child's life. These plans should allow for significant involvement of both parents in the lives of their children, as the children will evolve and mature and their circumstances will change. The law must recognise that, in most cases, children benefit from a significant ongoing relationship with both parents, yet, at the same time, offer a way to adequately deal with issues of domestic violence and the protection of children.

Section 18 of the Children's Act 38 of 2005 defines parental responsibilities as a person who has either full or specific parental responsibilities and rights in respect of a child. This terminology respects parenting matters and is more child-focused and represents a fresh start by eliminating the negative connotations that have been often associated with the terms 'custody' and 'access'. The legislative provisions relating to parenting issues now focus on parental responsibilities for children rather than rights, and the key legal terms relating to parenting issues are now parenting orders, 'decision-making responsibility', parenting time, and contact orders.

Section 1 of the Children's Act refers to 'contact', in relation to a child, means –

- '(a) maintaining a personal relationship with the child; and
- (b) if the child lives with someone else –
  - (i) communication on a regular basis with the child in person, including –
    - (aa) visiting the child; or
    - (bb) being visited by the child; or
  - (ii) communication on a regular basis with the child in any other manner, including –
    - (aa) through the post; or
    - (bb) by telephone or any other form of electronic communication'.

The term 'co-parenting' has more connotation than the words 'custody', which is something that parents will do rather than have. Co-parenting is thus related to the concepts of being involved in a child's life, providing care, and exercising parental responsibilities. Furthermore, co-parenting is related to the promotion of parents developing their own co-parenting plans. While guides and precedents can help separated parents develop their individualised parenting plans, the expectation is clear that these will be living documents to be reviewed and to evolve as the children's needs and parental circumstances change. Co-parenting will usually involve consultative decision-making.

The problems in this area are easier to identify than finding solutions. One

of the difficulties in this area is the high level of emotion and rhetoric, which is unfortunately not accompanied by the clarity of an argument. It begs the question: Do those who argue for co-parenting mean that each parent should have the child with him or her for equal periods or do they want to share the legal responsibilities that are attached to parenthood? 'The family law system, in my view, still takes a somewhat paternalistic approach to children when it comes to considering their involvement in proceedings that are explicitly concerned with their welfare and care. Such children are rarely seen, yet they are the prime rationale for many mediation sessions' (Justice Alastair Nicholson 'Children and children's rights in the context of family law' LawAsia Conference, 2003). 'Children are rarely seen by [the court], regardless of their age or circumstances' (Nicholson (*op cit*)).

I believe s 18 of the Children's Act should be amended to ensure that the views of the children are considered when orders are made in terms of the Act. These are:

'... except when it is or would be contrary to a child's best interests:

- (a) children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married, or have never lived together; and
- (b) children have a right of contact, regularly, with both their parents and with other people significant to their care, welfare, and development;
- (c) parents share duties and responsibilities concerning the care, welfare and development of their children; and
- (d) parents should agree about the future parenting of their children'.

The intention to amend the section is not to introduce any presumptions as to who would parent the children after the separation has taken place. It should be to encourage parental responsibility and exhort both the mother and father to focus on their children's future well-being rather than their own grief and anger. It is important to ensure the child has a real voice and by listening to the children's perspectives, parents can make informed decisions that can better serve their children's interests.

The family law system serves and protects adults' concerns more than the children's interests. The inclusion of children's voices in parenting decisions is justifiable on several grounds, such as –

- increased participation is likely to have positive effects on children;
- children are social actors who construct their knowledge; and
- the principles of equality, dignity, and respect demand that children have the opportunity to express their views.



'Children must "become players in decisions that concern them, so that decisions are made with them rather than about them". The legal system must not "muffle" the child's voice; it must err on the side of inclusion rather than exclusion of the child's views. This will contribute to their self-esteem and grant children the respect to which they are deserving. It is fundamental to note that the child's preferences and wishes alone will not determine the outcome of the court decision, but rather will be weighed with other evidence presented to the court.

A further reason for a reassessment of the child's role in family law proceedings is the relatively new perception that children have independent rights. Central to a child-centred approach is the notion that children are legal subjects as opposed to legal objects. This involves ... "a philosophical shift from seeing children as extensions of their parents or in the extreme as property of their parents, to seeing them as legal entities in their rights." In other words, children are to be considered as "subjects actively involved in the legal process" rather than objects "over which a legal battle is fought" (Ronda Bessner 'The voice of the child in divorce, custody and access proceedings' presented to Family, Children and Youth Section: Department of Justice Canada, 2002).

Article 12, which asserts the right of children to participate in decisions that affect them, is considered the 'linchpin' of the UN document. It reads:

'1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law'.

Courts have been reluctant to allow children to testify as witnesses in family disputes. Section 22(6)(a) states: 'A pa-

***"The legal system must not "muffle" the child's voice; it must err on the side of inclusion rather than exclusion of the child's views. This will contribute to their self-esteem and grant children the respect to which they are deserving.'***

rental responsibilities and rights agreement registered by the family advocate may be amended or terminated by the family advocate on application -

... (ii) by the child, acting with leave of the court'.

'There is concern that children will be irrevocably harmed by such an experience. It is argued that the pressure to choose between parents, the fear of hurting a loved adult on whom one is dependent, and the potential for vengeful retribution from a parent can be damaging to children. ... The imposing atmosphere of the courtroom, repetition of details of an event to strangers in public, cross-examination, and physical separation from a parent or relative are some of the features of providing evidence that are feared will adversely affect children' (Bessner *op cit*). Good reasons exist to allow a child to participate in specifically divorce proceedings.

'First, it ensures that the decision-making process is child-centred. It gives children the opportunity to convey their physical, emotional, and social needs to a [court], which ensures that the decision-making process is not focused exclusively on their parents' views and preferences. Children will know that their views are being stated as clearly as they can formulate them, in a language they choose, without the danger of being misstated by a well-meaning adult. Second, ... for a [court] to ascertain the

best interests of a child in a custody dispute, "it seems logical to find out what the child thinks". ... To determine guardianship, custody, or access without seeing or hearing from the child is to fix the future pattern of their life without which may be the most useful evidence.

... The third reason for allowing children to directly convey their wishes and needs to the court is that excluding them may be more damaging to children than permitting young persons to participate in a process that has life-long ramifications for them. ... Children whose divorcing parents cannot communicate rationally will usually have seen much more damaging fights than those in a courtroom. But most [courts] prefer to protect the child from the presumed harm.

... The stress which testimony in custody proceedings must place on a child who is both a witness and a party affected is difficult to calculate. But the damage which may be done by leaving the child out of the process may be even greater.

A further argument in support of child participation in custody and access disputes is that the parents of the child will be obliged to listen and consider the wishes and concerns of their children' (Bessner *op cit*).

Lastly, it was said: 'If we learn as much as we can about the children of [the] relationship, their needs, their affective ties, their capabilities, their interests, or as much as we can about the abilities of those adults willing to care for them, we will be able to make orders that will best take advantage of the adult abilities available to fulfil the child's needs. To accomplish this task requires that we hear the voice of the child. ... We must not be afraid of the truth; we must allow the child's voice to be heard. We must have definitions and guidelines from the legislatures as well as clear and consistent rulings from the courts to entrench the child's rights to be heard if we are to continue the slow march towards integrity in family law' (Bessner *op cit*).

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



THE SA ATTORNEYS' JOURNAL

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# Laws oppressing women need to be amended or repealed



By  
Kgomoiso  
Ramotsho

**F**or our January/February Women in Law feature article, we spoke to legal practitioner and South African Women Lawyers Association (SAWLA) President, Nomaswazi Shabangu-Mndawe. Ms Shabangu-Mndawe hails from a small town in Mpumalanga called Dullstroom. She was the only child to her late mother. She was raised by her grandparents who passed away while she was a teenager. This led to her not having a place to call home and having to stay with relatives and friends.

Ms Shabangu-Mndawe said in the 80s she became actively involved in politics, and like many of her peers who were fighting the Apartheid regime, she was harassed and detained by the police. Ms Shabangu-Mndawe added that in early 1988, she hitchhiked from Carolina (where she stayed for a year) to Mbombela (Nelspruit), where she enrolled at Sitintile Secondary School and completed her matric. 'Mr Myanga, the school principal is among the people who contributed to what I am today. He paid for my examination fee and allowed me to wear sandals to school, the only pair of shoes I had at that time,' Ms Shabangu-Mndawe said.

After completing her matric, Ms Shabangu-Mndawe said that due to a lack of finances, she did not go study for two years, however, after the unbanning of the African National Congress (ANC), comrades who were involved in education started negotiations with the KaNgwane government to give bursaries to those who wanted to pursue their studies. Ms Shabangu-Mndawe was fortunate to receive a bursary and enrol with the University of the North. In 1994, she received her BProc degree,



*Legal practitioner and South African Women Lawyers Association (SAWLA) President, Nomaswazi Shabangu-Mndawe.*

and in 1996, she completed her LLB at the University of the North. In 1998, she entered into a contract of articles with Hough Bremner Inc Attorneys, a Mbombela based law firm. After her admission as an attorney in 2002, she continued to be a Professional Assistant at Hough Bremner Inc Attorneys until 2004. Ms Shabangu-Mndawe then started a law firm with her partner under the name, Shilubane Shabangu Attorneys. In 2008, she became a sole proprietor and practiced under the name of Nomaswazi Shabangu Attorneys, a 100% black female owned law firm, which employed and mentored female legal practitioners.

Among the many roles she has held over the years and still holds, she was once elected the Deputy Secretary of the Black Lawyers Association (BLA) in the Mpumalanga province in 2006, the Councillor of the Mpumalanga Attorneys Circle in 2007, and the provincial Chairperson of the BLA in 2008. In 2010, she was requested to assist with transformation at the Mpumalanga Regional Court where she acted as a magistrate. In 2011, she became the Councillor of the Law Society of the Northern Provinces (LSNP) until 2018, serving in different committees of the LSNP (namely, the Gender Committee, *Pro Bono* Committee

etcetera). In 2017 to 2019, she was the Deputy Chairperson of the Law Society of South Africa's Family Law Committee and later appointed as the Chairperson of the same committee. In 2020, she was elected as the President of SAWLA. She is a member of the Mpumalanga Province Legal Practice Council and serving in its committee. She acted as a judge in the Mpumalanga Division of the High Court. Her most recent appointment in 2021, she was called to serve as a Commissioner of the Judicial Services Commission (JSC). In an interview with *De Rebus* News Reporter, Kgomoitso Ramotsho, this is what Ms Shabangu-Mndawe had to say.

**Kgomoitso Ramotsho (KR): In your own words, what is transformation?**

**Nomaswazi Shabangu-Mndawe (NM):** Transformation to me is when anyone who qualifies regardless of gender or race occupies any position. It is a change that we want to see where we bridge the gap between woman and man, white and black when it comes to opportunities and salaries.

**KR: Why is it important that women support each other in the legal profession, especially for leadership roles?**

**MN:** Women are at war in the legal profession, fighting for recognition, fighting to occupy those strategic positions. Women are tired of being led, and they want to lead because they can. There are so many laws still oppressing women, which need to be amended or even repealed. It is for those reasons that we need to support each other as women to occupy those positions so that we can make a difference.

**KR: Do you think women can support each other?**

**NM:** Yes, women can support each other. I think we have reached a stage where we have realised that our success depends on us supporting one another. Women have power and we need to pull each other up as we rise.

**KR: When were you appointed to the JSC?**

**NM:** President Cyril Ramaphosa had consultations with the leaders of all parties in the National Assembly and the minutes were signed on 6 June 2021. The Minister of Justice and Correctional Services, Mr Ronald Lamola signed the appointment letter on 8 August 2021.

**KR: What is your role at the JSC?**

**NM:** My role together with other commissioners is to identify a suitable candidate to be appointed as a judge and make recommendations to the President of South Africa.

**KR: What are the two most important qualities a judge should have?**

**NM:** To me a judge should, *inter alia*, be impartial and have integrity.

**KR: Do you have a book that you have read, that has an impact on how you live your everyday life?**

**NM:** I read different books from politics, motivation, culture, leadership etcetera. The book that I read repeatedly is *The Art of War* by Sun Tzu.

**KR: Do you have a favourite quote that you live by and why?**

**NM:** Be content with what you have. I believe that every person has a destiny, and

your ancestors and God will show you the way to reach your destiny, but if you are greedy, you will derail your destiny.

**KR: What does a typical day in the life of a SAWLA President look like?**

**NM:** My day starts between 7 am and 8 am by reading WhatsApp and SMS messages, to which I respond. I attend to e-mails and make calls following up on tasks given to members and to my staff at the office. I will thereafter go to the office to attend to my day-to-day office work and in between attend scheduled meetings for the day. When I get home, as a wife and a mother, I will attend to my usual chores. Between 7 pm and 9 pm I will meet with the SAWLA NEC (if it is scheduled for that day) or sometimes with different committees. If I do not have meetings, I will then do other organisational work. I make sure that my everyday time is split between my family, office work, SAWLA and the other activities that I am involved in. By the way in my spare time, I am a dress maker, interior decorator, and an events planner. My day ends at around 2 am.

**KR: Who inspires you and why?**

**NM:** My late grandfather, Makhosonke Shabangu. He was a hard worker, very humble, intelligent, and believed in sharing. He wanted the best for me, and I know he is with me in spirit.

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



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# THE LAW REPORTS



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

**November 2021 (6) South African Law Reports (pp 1 – 320); November 2021 (2) South African Criminal Law Reports (pp 451 – 564)**

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

## Abbreviations

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

## Companies

**Restrictions applicable to financial assistance by a company to a related or interrelated company, and whether applying to foreign related or interrelated companies:** The matter reported as *Trevo Capital Ltd and Others v Steinhoff International Holdings (Pty) Ltd and Others 2021 (6) SA 260 (WCC)*, heard before Bozalek J in the WCC, was one of several that came before the courts out of claims brought against the Steinhoff Group of companies after the discovery of irregularities in its financial statements and the resulting financial losses it suffered.

In this application claimants against Steinhoff – Trevo Capital Ltd (the first applicant) and two foreign companies, Hamilton BV and Hamilton 2 BV (the second and third applicants) – argued that in two instances the first respondent, Steinhoff International Holdings (Pty) Ltd (Steinhoff) – a private SA company, and at relevant times the holding company in the Steinhoff Group – had granted financial assistance in contravention of the requirements of s 45(3) of the Companies Act 71 of 2008 (the Act).

- In 2014, Steinhoff issued a guarantee (the 2014 guarantee) in respect of the indebtedness of Steinhoff Finance Holding GMBH (SFHG) – an Austrian subsidiary in the Steinhoff group – relating to convertible bonds issued by SFHG to certain investors, with a ma-

turity date of 30 January 2021: The effect was that Steinhoff would satisfy SFHG's debt to the investors should the latter be unable to do so.

- As a consequence of SFHG defaulting under its obligations in respect of the above bonds, the investors thereto did indeed seek payment from Steinhoff under the 2014 guarantee. This prompted the Steinhoff group to affect a debt restructuring process. In terms thereof, SFHG entered into a 'company voluntary arrangement' in November 2018 with the bondholders, extending the maturity of the bonds to 31 December 2021, and 'restating' SFHG's debt: The bondholders would issue a cashless loan to the Luxembourg-based Steinhoff Group company, Lux Finco 1, the cashless proceeds of which loan Lux Finco 1 would then on-lend to SFHG, which would then pay such proceeds over to the bondholders. Steinhoff in turn entered into a 'contingent payment undertaking' (the 2019 CPU) in August 2019 with the bondholders: Steinhoff's debt under the guarantee was 'restated', but it was added that it would no longer remain immediately due and payable but deferred such that the payment amount could not be demanded before 31 December 2021, and that the amount recoverable from Steinhoff would not exceed the initial payment amount.

The applicants argued that both the 2014 guarantee and the 2019 CPU constituted financial assistance by Steinhoff to related or interrelated companies or corporations (SFHG and Lux Finco) as intended in s 45(2) read with s 45(1). This meant that under s 45(3), Steinhoff's board of di-

rectors could have only authorised such assistance if –

- Steinhoff's shareholders had passed a special resolution providing approval;
- the board was satisfied that the company would pass the solvency and liquidity test immediately after the loan; and
- the terms of the financial assistance were fair and reasonable to the company.

The applicants argued that, in respect of the 2014 guarantee, Steinhoff had breached the terms of s 45(3) because a reasonable board in its position would not have thought that the company would satisfy the solvency-and-liquidity test; and further, in respect of the 2019 CPU, Steinhoff had not even purported to comply with s 45(3).

The applicants sought orders declaring the guarantee and CPU and the preceding board resolutions void under s 45(6) of the Act.

In addressing a preliminary point raised by Steinhoff, the WCC confirmed that the wording of s 45(3) showed that the legislature intended that foreign companies should fall in the class of persons to whom financial assistance could be extended by local companies only on compliance by the latter with s 45(3). In addition, the purpose of s 45 – preventing directors from abusing their powers by providing financial assistance to external entities or persons on terms contrary to the interests of the company's creditors and shareholders – would be served by broadening the class of persons to which s 45 applied in this way.

The WCC went on to consider whether Steinhoff had satisfied the requirements of s 45 with respect to the 2014 guar-



antee. As to the injunction that, before granting financial assistance to a related company, a board had to be satisfied that immediately post-loan the company would be solvent, the requisite standard was 'subjective satisfaction based on reasonable grounds'. A purely subjective belief was thus not enough. The WCC found, however, that in the light of the facts, information, and documentation available to it, the board – while mistaken – had been justified in concluding that the conditions set out in s 45(3)(b) had been met and was accordingly not in breach of s 45.

Turning to the 2019 CPU, the WCC rejected the contention by Steinhoff that it was merely a restatement of its debt under the previous 2014 guarantee; in fact, the judge held, the debt restructuring arrangement mentioned above served to discharge Steinhoff's debt under the 2014 guarantee, and the 2019 CPU indeed constituted the giving of new financial assistance by Steinhoff to a company or corporation related or interrelated to it, namely, Lux Finco 1. And Steinhoff had failed to comply with the requirements of s 45 in this regard, rendering the resolution of Steinhoff's board authorising the conclusion of the CPU, as well as the CPU itself, void, by virtue of s 45(6) of the Act. The WCC granted a declaration to such effect.

## Criminal law

**Vulnerability of older persons highlighted in confirmation of sentence imposed for rape:** The matter of *S v IT* 2021 (2) SACR 494 (GP) concerns an appeal against the sentence of ten years' imprisonment imposed on the appellant for the rape of his 65-year-old neighbour.

It appears that the appellant had decided, after a drinking session at home, to go to the complainant's home to rape her. To this end, he armed himself with a panga and went to her house, where he – after threatening her and forcing her into a bedroom – violently raped her. During the commission of the crime the complainant's daughter called her name from outside, interrupting the appellant and causing him to flee. He confessed that he was at all relevant times able to comprehend the unlawfulness of his act and its consequences, despite having consumed alcohol prior to its commission.

The appellant was 59 years old at the time, unemployed, and living with a female partner. He pleaded guilty, and, despite having previous convictions for crimes of dishonesty, his probation officer reported that all who knew him were stunned to hear of his actions and recommended a short-term period of imprisonment as an appropriate sentence. His counsel contended that the term of imprisonment was shockingly inappropriate given the totality of the mitigating factors placed on record and did not take

account of the appellant's advanced age. The sentencing court had misdirected itself in finding that the appellant would not serve the entire minimum term of imprisonment prescribed and, therefore, a deviation from the minimum sentence was not warranted; and said court had erred in having the appellant's name entered into the register for sexual offenders in terms of s 50(1)(a)(i) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, given that the conviction was not related to a sexual offence against a child or person who was mentally disabled as provided by the legislation.

The GP (per Matthys AJ, Khumalo J concurring) noted that the offence was a serious one and that the age of the complainant brought into play the often-overlooked plight of older persons in the context of abuse. The unsuspecting complainant had been an easy target for the appellant's violent conduct and the personal circumstances of the appellant were outweighed in such a situation by society's demands for protection and the complainant's age remained an aggravating circumstance as provided for in s 30(4) of the Older Persons Act 13 of 2006. Further, the consideration by the magistrate, that the deviation from the prescribed sentence was not warranted due to prospects of early release on parole, was indeed misguided, but it could not be said that she had in any material manner misdirected herself in the execution of her judicial discretion. The judge concluded that there was no justification for deviating from the prescribed minimum term of imprisonment and the sentence was accordingly confirmed. He agreed, however, that the jurisdictional facts were not present for an order that the appellant's name be entered into the register of sexual offenders, and that it had to be set aside. Instead, the prosecution was ordered to facilitate for the appellant to be brought before the sentencing court and for the consequences of s 31 of the Older Persons Act to be explained to him by the court and for the crime and his personal details to be reported and entered in the prescribed form in the Register of Abuse of Older Persons held by the Department of Social Development.

## Other criminal cases

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

- appeal – destroyed record;
- arrest by private person – requirements;
- arrest without warrant – justification;
- arrest – use of force;
- bail application – onus;
- bail – failure of accused on bail to appear at trial;

- evidence – admissibility of video footage;
- special review – in what cases; and
- trial – unavailability of presiding officer to proceed with trial.

## Intellectual property and spoliation

**The protection of intellectual property (IP): Application for interim interdict to compel access to applicant's IP on respondent's servers:** In *Vital Sales Cape Town (Pty) Ltd v Vital Engineering (Pty) Ltd and Others* 2021 (6) SA 309 (WCC) the WCC, per Wille J, had to deal with an application for the restoration of 'possession' of information housed on communal servers and a system hosted by the first respondent. Alternatively, it sought an interim interdict to restore its access to the servers and system pending the institution of contractual proceedings.

The applicant was in the business of the manufacturing and supply of mainly steel products throughout South Africa. It relied on the information it possessed and its access to the communal servers and systems administered by the first respondent. The servers and systems housed the applicant's IP, including its employees' e-mails relating to the applicant's business.

The applicant enjoyed peaceful and undisturbed access to its IP until 16 February 2021, when access was summarily interrupted by the respondents, who claimed that they were entitled to this obstruction because the applicant had breached an 'arrangement' between them by accessing the first respondent's proprietary and confidential information on the servers and systems. The first respondent claimed that it was entitled to take this step to protect its own proprietary and confidential information on the servers and systems.

In denying spoliatory relief the WCC pointed out that the spoliation remedy (the *mandament van spolie*) required possession and that it could not be seriously argued that the applicant had ever been in physical possession of the servers on which the information was stored.

But the WCC was more sympathetic to the notion of interim relief by way of interdict. It pointed out that the applicant required access to its IP to continue to effectively run its business activities and that the balance of convenience accordingly favoured the granting of the interim relief contended for in the alternative to the spoliatory relief. In contrast, no harm would be suffered by the first respondent if the interim relief fell to be granted. The WCC pointed out that irreparable harm was being suffered by the applicant and that its business could face imminent closure if it was not afforded urgent interim relief. The WCC accordingly granted interim relief restraining the first respondent

ent from blocking the applicant's undisturbed access to the communal server, e-mails and systems administered by the first respondent.

## Marriage

**Jurisdiction in cases of divorce: The need for a 'flexible approach':** In *OB v LBDS* 2021 (6) SA 215 (WCC) a Full Bench of the WCC (Cloete J, Saldanha J and Henney J) had before it an appeal against a decision of a single judge (Binns-Ward J) of the same division. The facts were that the parties, both foreign nationals of the same gender, had decided to get married in South Africa (SA). They had decided to get married in SA because same-sex marriages were not recognised in either Russia or Namibia, respectively the appellant's and respondent's countries of birth. They had before their marriage travelled to SA to look for a suitable place to live and, according to the appellant, settled on Caledon after they met one Mr Kleyn, who suggested that the parties stay on his farm in the district.

Having decided to remain in Caledon indefinitely, the parties on 6 December 2017 entered into a civil union under the Civil Union Act 17 of 2006 in Cape Town. However, while on honeymoon in Germany in late December 2017, the appellant became convinced that the marriage was a major mistake, and the parties sepa-

rated. The appellant, who claimed that at this point it had still been her intention to live and work in Caledon, travelled to Moscow, her birthplace, to make certain urgent work arrangements. She returned to Caledon in April 2018. On 18 October 2018 the parties concluded a settlement agreement in anticipation of divorce. The appellant issued summons out of the WCC on 7 November 2018, claiming she was 'ordinarily resident' in Caledon. By this time the respondent had returned to Namibia, and service was affected on her there in April 2019. By this time, however, the appellant had returned to Russia. Binns-Ward J concluded that the appellant's 'sojourn' in Caledon was insufficient to meet the 'ordinarily resident' jurisdiction requirement in s 2(1)(b) of the Divorce Act 70 of 1979 (the Act).

The appeal court found that it was incumbent on it to raise the issue of domicile under s 2(1)(a), which was not relied on by the appellant's counsel. The issue was, therefore, whether, for purposes of jurisdiction, the appellant was 'domiciled in the area of jurisdiction of the court on the date on which the action [was] instituted' as intended in s 2(1)(a) of the Act. Section 2(1) further provides that: 'For the purposes of [the] Act a divorce action shall be deemed to be instituted on the date on which the summons [was] issued ...'.

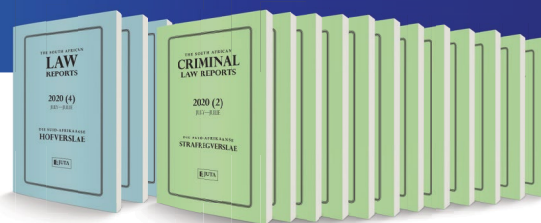
The WCC pointed out that the date of issue of the appellant's summons by the registrar – in the present case 7 November 2018 – was, in the light of the wording of s 2(1), crucial. It emphasised that this was a 'hard case' on domicile that called for a flexible approach and that to lean on legal certainty alone would undermine the interests of justice. The WCC ruled that the appellant had established on a balance of probabilities that she was, at the time of the institution of the divorce proceedings, domiciled in Caledon, that is, in the WCC's area of jurisdiction, and that the court *a quo*, therefore, did have jurisdiction to grant the divorce. The WCC accordingly upheld the appeal and replaced the order of the court *a quo* with one granting divorce.

## The Public Protector and her powers

**Does the Public Protector (PP) have to grant a hearing before making a decision on remedial action?** In the case of *Public Protector and Others v President of the Republic of South Africa and Others* 2021 (6) SA 37 (CC) it was held that during question time in Parliament, the leader of the opposition had posed a question to the President. Although the question had not been submitted beforehand as required by parliamentary procedure, the

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President decided to answer. The question involved an alleged transfer of funds from a company to a trust and from there to the President's son and questioned its propriety. In his answer the President acknowledged the payment and assured Parliament of its legality. Shortly thereafter, however, the President addressed a letter to the Speaker of Parliament informing her he had been mistaken in his answer and that the beneficiary of the payment had in fact been a campaign established to support his then candidacy for the presidency of the country.

This caused the leader of the opposition (and later the second applicant, the Economic Freedom Fighters) to file a complaint with the PP that stated that the President had breached the Executive Ethics Code. The complaint was that the President had wilfully misled Parliament in violation of provision 2(3)(a) of the Code, which states that: 'Members of the Executive may not ... fully mislead the legislature to which they are accountable'. On receipt of the complaint the PP notified the President, inviting his response, which he then provided.

The PP and President later met, and there the PP raised, in addition to the opposition's complaint, an alleged failure to declare that the donations to the campaign were 'personal sponsorships' requiring disclosure under the Code. In his response the President disputed any obligation to disclose these donations, on the basis that they were not made to him.

Some months later the PP furnished the President with her preliminary report and afforded him an opportunity to respond, which he again did. The PP then released her final report, in which she found the President -

- had violated provision 2(3)(a) of the Code;
- had failed to disclose donations to himself;
- that some of these donations raised a reasonable suspicion of money laundering; and
- that in breach of provision 2(3)(f) of the Code he had exposed himself to a conflict between his official responsibilities and private interests.

As remedial action the PP directed the Speaker to refer the violations to a Parliamentary Committee and to -

- demand publication of all the donations;
- directed the National Director of Public Prosecutions to investigate evidence of money laundering; and the National Commissioner of Police to investigate lying under oath by a third party.

She also ordered these parties to submit plans to her of how these actions would be implemented. In response the President instituted and obtained the review of these findings and remedial actions in the GP and their setting aside.

The PP then applied to the CC for leave to appeal directly to it. The CC granted leave but dismissed the appeal, and in doing so raised the following points of law.

Though unnecessary to decide the issue, the SCA's characterisation of the PP's decision as not being administrative in nature was open to some doubt: This characterisation appeared contrary to case law to be based on the identity of the functionary concerned rather than on the nature of the power as required.

Implicit in s 7(9) of the Public Protector Act 23 of 1994 was that, where the PP contemplated taking remedial action against an individual, that individual was entitled to make representations on the contemplated action. To this end the PP was required to sufficiently describe the envisaged action as to allow a meaningful response thereto. Consequently here, where the President was afforded no hearing at all, the decision as to remedial action was fatally flawed. The CC gave leave to appeal but dismissed the appeal.

## Road Accident Fund

**Temporary suspension of certain writs of execution and attachments:** In *Road Accident Fund v Legal Practice Council and Others* 2021 (6) SA 230 (GP), a Full Bench of that division (per Meyer J, with Adams J and Van der Westhuizen J concurring) considered an application by the Road Accident Fund (the RAF) for the suspension of all writs of execution and attachments against it based on court orders already granted or settlements already reached with claimants, for a period of 180 days, so that it could make payment of the oldest claims first by date of court order or date of settlement agreement *a priore tempore*.

According to the evidence presented by the RAF's Chief Executive Officer, it was experiencing severe financial difficulties, exacerbated by the COVID-19 pandemic, and its implosion was imminent. He further testified that the RAF's policy and avowed intention to address this situation was to pay *a priore tempore* claims first, but that execution steps were bringing the RAF's operations to a standstill, causing it irreparable damage, and debilitating any progress made towards bringing stability to the RAF's operations and financial position.

The relief that it sought, so it was contended, was therefore, a necessary short-term solution to stabilise the RAF's precarious financial position, and to prevent the imminent danger that attachments against its essential assets (including its bank account) would render it unable to comply with its constitutional obligation to pay compensation traffic accident victims. It was also necessary to prevent the crisis that would ensue if s 21(2)(a) of the Road Accident Fund Act 56 of 1996 (the RAF Act) were triggered. Section 21(2)

(a) provides that no claim for compensation in respect of loss or damage resulting from bodily injury or the death of any person caused by or arising from the driving of a motor vehicle shall lie against the owner or driver of a motor vehicle or against the employer of the driver unless the RAF or an agent is unable to pay any compensation.

Most of the opposing respondents argued that the relief sought was unconstitutional because it would infringe on successful claimants' constitutional rights to equal protection and benefit of the law, and access to courts. The GP did not agree, stating an important purpose of s 34 of the Constitution (access to courts) was to guarantee the protection of the judicial process to persons who had disputes that could be resolved by law, but that execution was incidental to the judicial process - it was regulated by statute and the Rules of Court and was subject to the supervision of the court, which has an inherent jurisdiction to stay the execution if the interests of justice so required.

The GP concluded that, on the peculiar facts of the case, exceptional circumstances existed: The granting of a temporary stay in order to prevent the RAF's financial implosion and the triggering of s 21(2)(a) was necessary and in the interests of justice so as to avoid the constitutional crisis that would ensue were the RAF would no longer be able to fulfil its constitutional obligation to provide social security and access to healthcare services for road accident victims taking. Accordingly, and exercising its inherent power to regulate its procedures under the common law and s 173 of the Constitution, it ordered temporary suspension for a period of 180 days.

## Other cases

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

- communal property association - placement under administration;
- contract - proper interpretation and the parole evidence rule;
- conventional penalties - acceleration clause in settlement agreement;
- divorce - anti-dissipation interdict *pendente lite*;
- divorce - deemed date of institution;
- land reform - *inspectio in loco* to determine claim; and
- *res judicata* - application of the doctrine of issue estoppel.

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# THE LAW REPORTS



By  
Merilyn  
Rowena  
Kader

December [2021] 4 All South African  
Law Reports (pp 619 – 917)

## Abbreviations

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

## Corporate and commercial

**Validity of dispositions made by company being wound-up:** Four payments for goods sold and delivered were made to the appellant (Pride Milling) by a company, which was in the process of being liquidated. As joint liquidators of the company, the respondents contended that the payments were void and prohibited in terms of s 341(2) of the Companies Act 61 of 1973. They maintained that the payments were liable to be set aside because they were made after the effective date of the winding-up application. The High Court upheld the respondents' contentions, leading to Pride Milling's appeal.

In *Pride Milling Company (Pty) Ltd v Bekker NO and Another* [2021] 4 All SA 696 (SCA), the appeal hinged on the proper interpretation of s 341(2), read with s 348. The text, context and purpose of the legislation must be considered together when interpreting a statutory provision. The predominant purpose of s 341(2) is to decree that all dispositions made by a company being wound-up are void. That provision had to be read with s 348, which provides that the winding-up of a company by a court shall be deemed to have commenced at the time of the presentation of the application for winding-up to the court. The effect is that the payments are potentially invalid at the moment they are made, because the granting of a winding-up order will render s 341(2) operative.

Petse AP (with Carelse, Mokgohloa, Ponnann and Wallis JJA concurring) looked at whether a court may validate disposi-

tions made after a provisional winding-up order has been granted but prior to the granting of a final order. Once a court grants a provisional order a *concur-sus creditorum* is established. The effect thereof is that the claim of each creditor falls to be dealt with as it existed at the time when the provisional order was granted.

Regarding the High Court's discretion in such applications, the court confirmed that a court exercising such a discretion may properly come to different decisions having regard to a wide range of equally permissible options available to it. Thus, a court exercising a wide discretion should not fetter its own discretion. An appellate court may interfere with the exercise of a discretion in the true sense by a court of first instance only if it can be demonstrated that the latter court exercised its discretion capriciously or on a wrong principle or has not brought an unbiased judgment to bear on the question under consideration or has not acted for substantial reasons.

The provisions of s 341(2) decree that every disposition of its property by a company being wound-up is void. Thus, the default position ordained is that all such dispositions have no force and effect in the eyes of the law, namely the disposition is regarded as if it had never occurred. A rider in s 341(2) aims to give a court an unfettered discretion to decide whether or not to direct otherwise and thus depart from the default position decreed by the Legislature. That discretion is only exercisable in relation to payments made between the date of lodging of the application for winding-up and the granting of a provisional order.

Finding no reason to interfere on appeal with the manner in which the High Court exercised its discretion, the court dismissed the appeal with costs.

## Criminal law and procedure

**Application for discharge:** A shooting incident that took place in Atlantis, Cape Town, led to the accused in *S v Booysen and Others* [2021] 4 All SA 859 (WCC) being charged with murder, attempted murder, and contravention of the Prevention of Organised Crime Act 121 of 1998

and the Firearms Control Act 60 of 2000. They pleaded not guilty on all counts.

After the state closed its case, the accused applied to be discharged in terms of s 174 of the Criminal Procedure Act 51 of 1977. The court refused the applications and provided its reason for doing so in the judgment.

It was held that an accused was entitled to their discharge at the close of the prosecution's case if at that stage there was no evidence on which a reasonable court could convict them. A court seized of the question of the possible discharge of an accused at the close of the state's case is concerned with whether there was *prima facie* evidence that could, not would, sustain a conviction. As there was eyewitness testimony identifying all accused as having been involved in the gang-related shooting incidents that gave rise to the charges brought against them, that evidence could not be rejected out of hand without the need to properly weigh its credibility.

After the dismissal of the applications in terms of s 174, the accused chose to adduce evidence in their defence, with each maintaining that they were somewhere else when the shootings happened.

The fundamental issues to be weighed in determining whether the state had proved its case against the accused beyond reasonable doubt were whether their identification by the eyewitnesses who gave evidence for the prosecution was credible and reliable and whether there was a reasonable possibility that their alibi defences could be true. There is nothing exceptional or special in the assessment of the evidence required in alibi cases, and the proper approach is that the court's judgment must be founded on a holistic consideration in an integrated manner of all the evidence adduced at the trial.

Identification evidence must always be weighed with some caution, due to the danger of honest but mistaken identification. The court was satisfied with the reliability of the identification evidence adduced in this case.

Despite it being unclear who exactly had fired the shots causing the deaths and injuries, the evidence established the requirements for the doctrine of common purpose to apply. The evidence also es-

established so-called *dolus indeterminatus* or general intention to kill.

Turning to the charges brought under s 9 of the Prevention of Organised Crime Act, regarding gang-related criminal activity, the court, per Binns-Ward J, held that a person charged with s 9(2)(a) must be shown to have intended their act to cause, bring about, promote, or contribute towards a pattern of criminal gang activity. That could not be said to be the case in this instance, and the accused could be found guilty of contravening s 9(2).

Based on the above findings, the second and third accused were acquitted on all counts due to insufficient evidence against them. The first accused was, however, convicted of two counts of murder, two counts of attempted murder, and of unlawful possession of a firearm and ammunition.

**Criminal proceedings:** A trial, which had been set down to run from 3 August 2021 until 31 August 2021, was plagued by postponements and was still not complete by 9 September 2021. After the court had heard only three witnesses. Counsel for the third and fourth accused, Mr Gladile, in *S v Kwaza and Others* [2021] 4 All SA 906 (WCC) requested the court's permission to withdraw from the matter. He relied on alleged lack of financial instructions from the clients, and a prior commitment to attend a part-heard matter in the Eastern Cape Circuit Court.

The court decided to conduct an inquiry in terms of s 342A of the Criminal Procedure Act 51 of 1977 to investigate whether there had been an unreasonable delay on the part of Mr Gladile in the completion of the proceedings.

In accordance with s 342A(2), the court listed the various postponements in the matter, the causes therefore, and the explanations furnished in relation thereto.

The court harboured serious reservations about the *bona fides* of the application. However, it was of the view that allowing Mr Gladile to withdraw was likely to significantly enhance the pace at which the trial progressed, which would be to the benefit of the court and the accused. Leave to withdraw was thus granted.

In terms of s 342A(1), a court before which criminal proceedings are pending, shall investigate any delay in the completion of proceedings, which appears to the court to be unreasonable and which could cause substantial prejudice to the prosecution, the accused or their legal advisor, the state or a witness. In considering whether any delay is unreasonable, the court shall consider the factors set out in s 342A(2).

Mr Gladile was found to have been responsible for a significant part of the delays in this matter. The court referred to the time lost due to his poor timekeeping, and to delays, which were entirely

attributable to Mr Gladile's misconduct, and blatant dishonesty in advancing false explanations to explain absences from court. Emphasising duty of absolute honesty which Counsel owes to the court, the court held that Mr Gladile's behaviour warranted the attention of the Legal Practice Council (LPC).

Having regard to the criteria set out in s 342A(2), the court found that there had been an unreasonable delay in the proceedings caused by Mr Gladile's unauthorised absences, and that the wasted costs to the state occasioned by such delays amounted to an aggregate of not less than R 4 551,24. An order was made under s 342A(3)(f), referring the matter to the LPC for consideration of appropriate steps to be taken against Mr Gladile.

**Expert evidence:** The appellant was convicted of the murder of his wife and obstructing the course of justice and was sentenced to an effective term of imprisonment of 20 years. On appeal in *Rohde v S* [2021] 4 All SA 710 (SCA), the central question was whether the state had proved beyond reasonable doubt that the deceased had been killed or whether there was a reasonable possibility that she might have committed suicide. The deceased was found dead in the bathroom of the hotel room she was staying at with the appellant.

Four specialist pathologists testified at the trial, explaining to the court the nature and likely cause of the injuries found on the deceased. The trial court concluded that the appellant and deceased had had a physical altercation in which the appellant had struck the deceased, smothered her to death and then set it up to look as if she had committed suicide.

In evaluating the divergent opinions of the pathologists, the court had to make a determination of whether, and to what extent their opinions were founded on logical reasoning or were otherwise valid. The court found that the acceptable expert evidence showed that the trial court had erred in its finding of smothering of the deceased. It was concluded instead that the deceased's neck injuries were caused by manual strangulation and that the ligature found around her neck was applied post-mortem.

Based on the conclusion that the appellant had unlawfully and intentionally killed the deceased by manual strangulation but did not assault her in any other way (as suggested by the trial court), the court had to reconsider sentence on the first count. Section 51(2)(a) of the Criminal Law Amendment Act 105 of 1997 prescribes a minimum sentence of 15 years' imprisonment in respect of murder unless there are substantial and compelling circumstances that justify a departure from the prescribed sentence. There were no such circumstances to depart from the prescribed minimum sentence, and the

court imposed a sentence of three years' imprisonment on the second count, which was to run concurrently with the sentence on the murder count.

## Immigration

**Duties of refugee status determination officers and Refugee Appeal Board:** In *Somali Association of South Africa and Others v Refugee Appeal Board and Others* [2021] 4 All SA 731 (SCA), the first appellant was a registered non-profit organisation, which had among its objectives, defending the rights, and advancing the welfare of the Somali community in South Africa. The second to ninth appellants were asylum seekers. They brought appeals against the refusal of refugee status by Refugee Status Determination Officers (RSDOs). Their appeals were dismissed by the Refugee Appeal Board (the Board), and the High Court then dismissed their application for review of the Board's decision.

On appeal, the appellants challenged the legality and fairness of the process adopted by the Board. The issues were whether the Board had complied with its duty to assist an asylum seeker to procure evidence and information on which the decisions were to be based. It was also alleged that the Board misapplied the statutory requirements for refugee status.

The Refugees Act 130 of 1998, as it stood at the time of this matter being decided, deals with the state's interests to ensure that refugee status is granted to only those who qualify. In dealing with such applications, state authorities are required to ensure that constitutional values, including those that embrace international human rights standards, are maintained. Section 2 of the Act, in recognition of the aforesaid values, entrenches the international principle of non-refoulement.

The court took note of the conditions in Somalia leading up to the flight by the eight asylum seekers from that country before turning to consider the refugee status determination process that each had been subjected to. The RSDOs, the Board and the High Court were mistaken in their view of how the statutory process leading up to the adjudication of an application for refugee status or an appeal was designed to unfold. In terms of s 21(2)(b) of the Act, a Refugee Reception Officer (RRO) must, at source, in accepting an application form from an asylum seeker, see to it that the application form is properly completed, and, where necessary, must assist the applicant in that regard. In terms of s 21(2)(c) a RRO may conduct such enquiry as they deem necessary to verify the information furnished in the application. Section 24(1)(a) requires, that on receipt of an application for asylum, the RSDO, in order to make a decision, may request any information

or clarification he deems necessary from an applicant or RRO. Section 24 provides that the RSDOs must, in dealing with an application, bear in mind the provisions of the Promotion of Administrative Justice Act 3 of 2000, and ensure that an applicant fully understands the procedures, his responsibilities, and the evidence presented.

While the High Court was correct about an asylum seeker having to ultimately show that they meet the statutory standard, it erred in holding that the Board was confined to the record before it and to the evidence thus presented. An asylum seeker should be assisted to present as full a picture as the circumstances permit. The High Court ought to have concluded that the RSDOs and the Board failed in that duty. There was also a failure to afford the asylum seekers an opportunity to respond to what the Board considered adverse to their case. The appeal was upheld.

## Mining, minerals, and energy

**Mining charter:** In *Minerals Council of South Africa v Minister of Mineral Resources and Energy and Others* [2021] 4 All SA 836 (GP) the Minerals Council of South Africa sought to review and set aside certain clauses of the Broad-Based

Socio-Economic Empowerment Charter for the Mining and Minerals Industry, 2018. Alternatively, it sought a declaration that the challenged clauses were inconsistent with the principle of legality and should be set aside. At issue in the application was whether the 2018 Mining Charter was a formal policy document setting out a policy developed by the first respondent, the Minister of Mineral Resources (the Minister), in terms of s 100(2) of the Minerals and Petroleum Resources Development Act 28 of 2002 (the Act), or a *sui generis* form of subordinate legislation.

It was held that s 100(2) enjoins the minister to develop a charter that will set the framework for targets and a timetable for attaining the object in s 2(d) of the Act, which is essentially to expand opportunities for historically disadvantaged South Africans to enter into and actively participate in the mining industry, and to benefit from the exploitation of the mining and beneficiation of mineral resources. Section 100(2)(b) adds that the charter must set out how the objects referred to in ss 2(c), (d), (e), (f) and (i) of the Act can be achieved.

Section 4(1) of the Act provides that when interpreting its provisions, a court must prefer a reasonable interpretation, which is consistent with its objects over any other interpretation, which is incon-

sistent with such objects. The Legislature specifically chose to use the term 'charter' in s 100(2)(a). That on its own was not determinative of whether the Legislature intended it to be an instrument of law or policy. The use of the term 'charter' in s 100(2) had to be viewed in the context of the statutory provision in which it is used, as well as the context of the legislation as a whole. The terms used in the Act led the court to conclude that the charter was not subordinate legislation but a policy document.

It was also confirmed that the interpretation that the charter was not enforceable law was consistent with the values of the Constitution.

Having considered the language of s 100(2) in light of its ordinary meaning, the context in which it appeared and the apparent purpose for which it was directed, the court, *per* Kathree-Setiloane J, (Van der Schyff J and Ceylon AJ concurring) concluded that the section does not empower the minister to make law. The Minerals Council was, therefore, entitled to the relief sought.

## Property

**Lawfulness of eviction order:** In *Nimble Investments (Pty) Ltd (formerly known as Tadvest Industrial (Pty) Ltd and Old Abland (Pty) Ltd) v Malan and Others* [2021] 4 All SA 672 (SCA), Nimble ap-

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pealed against the setting aside by the Land Claims Court (LCC) of an order for the eviction of the respondents.

The first respondent, Mrs Malan, was a long-term occupier living in a cottage on a farm owned by Nimble. When Nimble required her to move to another cottage on the farm, meetings were held with the first respondent, to get her to agree to relocate to the alternative cottage. She and her family eventually moved but during the relocation process the fourth respondent (the son of the first respondent) and some unidentified members of the first respondent's household removed the roof tiles, roof sheets and trusses from the cottage they had first occupied and erected an illegal structure next to the new cottage using such building material. That led to termination of her right of residence and her being required to vacate the property.

The two issues on appeal were whether the termination of the right of residence was just and equitable both in substance and in procedure, and if so, whether the eviction would be just and equitable. The Extension of Security of Tenure Act 62 of 1997 envisages a two-stage eviction procedure:

- first, a notice of termination of the right of residence in terms of s 8, and
- second the notice of eviction in terms of s 9(2)(d).

If found that the termination of the right of residence was not just and equitable due to non-compliance with s 8(1)(e), then there would be no need to determine the second issue. Eviction proceedings can only commence after the right of residence is terminated.

The basis on which the appellant terminated the first respondent's right of residence was that she had committed a fundamental breach of trust as contemplated in s 10(1)(c) of the Act by allowing the building materials to be removed.

In considering whether the termination of the right of residence was just and equitable, both procedurally and in substance, the court had regard to s 8(1) of the Act. Section 8(1)(e) provides that 'the fairness of the procedure followed by the owner or person in charge, including whether or not the occupier had or should have been granted an effective opportunity to make representations before the decision was made to terminate the right of residence'.

As Mrs Malan had lived on the farm for at least ten years and had reached the age of 60 years, she qualifies as an 'occupier' under s 8(4) of the Act, and her right of residence could not be terminated unless she committed a breach contemplated in s 10(1)(c). Allowing unauthorised persons to occupy the farm by erecting an illegal structure on it and refusing to demolish

the illegal structure and return the building materials, constituted a breach as contemplated in s 10(1)(c).

The court interpreted s 8(1)(e) and held that an opportunity for representations was not required in the circumstances of this case. The appeal was upheld, and the eviction order confirmed.

## Other cases

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

- applicable standard for appellate court interference with a High Court order made under s 8(1) of the Promotion of Administrative Justice Act 3 of 2000;
- application for leave to institute or continue derivative action;
- court finding that when analysing evidence from a previous case it must be cautioned not to apply too much focus on one aspect of the evidence, thus the court found that the inferences drawn by the court *a quo* were not misguided and the appeal was dismissed; and
- the flexibility of provisions, based on their generality, not rendering them unconstitutionally vague.

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



By  
Pule  
Shaku

# Can an employer make deductions on an employee's salary without consent?

*Stein v Minister of Education and Training and Others (LC)*  
(unreported case no J415/20, 14-5-2020) (Mahosi J)

**I**n terms of s 34(1) of the Basic Conditions of Employment Act 75 of 1997 (BCEA), the employer may make deductions from the employee's salary under the following circumstances, if –

- the employee agrees in writing to the deduction in respect of a debt specified in the agreement; or
- the deduction is required or permitted in terms of a law, collective agreement, court order or arbitration award.

In terms of s 34(5) of the BCEA the employer may require the employee to repay remuneration paid erroneously to the employee. Therefore, the question that arises is whether the employer can

make deductions from the employee's salary under other circumstances that are not those mentioned above. The issue of salary deductions has often been argued in South African courts and it is an intriguing subject.

The *Stein* case has once again showed us that employers can make deductions from the employee's salary even though the circumstances are not those mentioned under s 34.

## Background of the facts

In the *Stein* case, the employee failed to submit the leave forms that were given to him to complete arguing instead that he was not on leave but working outside

the office on matters assigned to him. Therefore, due to the employee's failure to complete and submit the leave forms, the employer declared the days that the employee was not at work as unpaid leave and deducted the employee's salary for those specific days.

The employee averred that the deductions were unlawful because he did not consent to them being made against his salary as required by s 34 of the BCEA nor were they permitted by law, court order or by a collective bargaining agreement. He asked that the deductions be declared unlawful, and a consequential order be made that the deductions already made be reversed within 15 working days.

The Labour Court (LC) held that s 34 permits an employer to make deductions under certain prescribed circumstances and on the reading of the subsection, the employer is required to obtain an employee's consent before making a deduction in respect of a debt specified in the agreement. This postulates for a situation where the employee acknowledges their indebtedness. The section does not provide for a situation where there is no agreement between the parties.

The LC held that in Stein's case, the employer notified the employee that the days he had been absent would be treated as unpaid leave. The employer proceeded to obtain an approval for deductions to be made from the employee's salary in respect of those days that he was not at work. Deductions for days the employee was not at work constitute recoupment for payment done in circumstances where it is not supposed to have been made. The employer is recovering an amount in respect of an overpayment previously made.

An employee is, by law, required to be at work and render service to the employer in exchange for payment. The BCEA

defines 'remuneration' as 'any payment in money or in kind, or both in money and in kind', made or owing to any person in return for that person working for any other, including the state.

Where an employee is absent from work and fails to submit the leave forms in accordance with the policy, the employer is entitled to withhold payment. In instances where they had already effected payment, the employer should be allowed to recover it without the consent of the employee.

### Key principles of the judgment

The employer must comply with several requirements, such as –

- the employer must follow a fair procedure and give the employee a reasonable opportunity to show why the deductions should not be made;
- the total amount of the debt must not exceed the actual amount of the loss or damage; and
- the total deductions from the employee's remuneration must not exceed one-quarter of the employee's remuneration in monetary terms.

### Conclusion

The key lessons from this judgment are that –

- employees are entitled to be remunerated for days on which they have tendered their services to the employer; and
- employers are entitled to make deductions on employees' remunerations for days on which employees were absent from work and not rendering services to the employer.

The principle of 'no work, no pay' is of paramount importance in the employment arena and the employer does not need the consent of the employee to deduct their remuneration for days on which the employee was absent from work. Section 34 does not preclude an employer from making such deductions.

Pule Shaku LLB (University of Limpopo) is a legal practitioner at Poswa Inc in Johannesburg.



By  
Kgomotso  
Ramotsho

## Attorneys of record and counsel should never lose sight of the fact that they are officers of the court

*West Dunes Properties 142 (Pty) Ltd v Subtinix (Pty) Ltd and Another (GP) (unreported case no 94789/2019, 15-11-2021) (Van der Schyff J)*

The Gauteng Division of the High Court in Pretoria dismissed an urgent application in the matter of *West Dunes Properties* and ordered that the judgment together with the s 18 application and all supporting documentation be delivered to the Chairperson of the Legal Practice Council (LPC) for an investigation into the respondents' legal representatives' conduct. This was after the respondents' attorney of record failed to inform the High Court during the hearing on 6 August 2021, that the attorney of record paid out the funds received in trust contrary to an undertaking that was provided to the applicant's attorney of record, and in the face of a pending urgent court application.

This was said by the court after the applicant (*West Dunes Properties*) sought

an order that the respondents (*Subtinix* and *Hendrick Ramokgato Morua*) be found guilty of the crime of civil contempt of an order granted by Nonyane AJ (the Nonyane order) on 17 February 2020. The applicant also sought an order committing the second respondent to imprisonment for a period of three months, and the suspension of this sentence for one day, to allow the second respondent the opportunity to comply with the terms of the order. The High Court pointed out that the attorneys of record and counsel should never lose sight of the fact that they are officers of the court, and they owe the court an ethical duty.

The High Court added that by not informing the court during the hearing of the urgent court application that the funds in question were already paid out

to the respondents, despite a prior undertaking to keep such funds in a s 78(2) (a) of Attorneys Act 53 of 1979 investment account pending the determination of the dispute by the court, on face value, constitutes a serious breach of such ethical duty.

The applicant issued the application in terms of s 18(1) and (3) of the Superior Courts Act 10 of 2013. The applicant's case sought an order that a sum of R 2 996 353,73 and R 5 579 110,50 be retained in their attorneys of record's trust account pending the finalisation for leave to appeal to the Supreme Court of Appeal (SCA) and any further applications for leave to appeal that the respondents may institute. In their application, the applicant submitted that:

'Given the fact that the funds received from Fundi Capital have been paid out

by the respondent's attorney of record, the only effective order to be granted by this court will be to specify which amounts should be paid in trust as an instruction by the respondents to their attorneys of record, as per the Van der Schyff order will not suffice under these circumstance[s].

On 6 August 2021, the High Court agreed with the applicant's interpretation of the Nonyane order, however, it did not find the respondents to be in contempt. The following relief was granted:

"The first respondent, through the second respondent, must instruct its attorneys of record within 3 (three) days of this order being granted, to pay over to the application the amount received from Fundi Capital (Pty) Ltd in compliance with the order granted on 17 February 2020 by Nonyane AJ under case number 94789/2019".

The respondents applied for leave to appeal the order granted by this court. The application for leave to appeal was dismissed. The respondents subsequently applied to the [SCA] for leave to appeal. The outcome of this application for leave to appeal is pending.

The respondents raised the question as to whether relief sought in terms of s 18(1) and (3) is available to an applicant who seeks different relief from what was granted in the initial proceedings. The respondents submitted that the application falls short of being an application in terms of s 18(1) and (3) of the Superior

Courts Act, and that the relief the applicant seeks is legally incompetent and impermissible in law. The High Court pointed out that subss 18(1) and (3) refer to 'the operation and execution of a decision which is the subject of an application for leave to appeal or appeal'.

The High Court said the order that is currently suspended due to the respondents having filed application for leave to appeal is the order that:

'(3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.'

The High Court pointed out that it was confirmed by now that the respondents' attorney of record paid out the amounts, they held in trust to either the first or the second respondent before the Van der Schyff order was granted in August 2021. The respondents' attorneys of record were not party to the contempt application and no relief was, or is, sought against them. The respondents claim that the relief that the applicants seek surpasses the upliftment of the suspension of the operation and execution of the order pending the decision of the application of leave to appeal. The High Court said that it is a common cause that, the lease agreement between parties were cancelled, and that the money

that was supposed to be paid out to the applicant in terms of the Nonyane order, was paid to either the first or the second respondent. That it is impractical, if not impossible, to insist on the enforcement of the Van der Schyff order granted on 6 August 2021 as it stands, is conceded in so many words by the applicant.

The High Court said that the applicant wanted it to grant an order that would arguably put it in the same position it would have been had the Nonyane - and Van der Schyff orders been honoured. However, the High Court said had it been made aware of the fact that the respondents' attorney of record paid out the funds received in trust contrary to an undertaking that was provided to the applicant's attorney of record, and in the face of a pending urgent court application, it would have granted a different order on 6 August 2021.

The following order was made:

'1. The application is dismissed.

2. Each party is liable for their own costs.

3. The judgment together with the section 18 application and all supporting documentation are to be delivered to the Chairperson of the Legal Practice Council for an investigation into the respondents' legal representatives' conduct.'

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

By  
Michele  
van Eck

## Duties of practitioners to court?

*Mzayiya v Road Accident Fund* [2021] 1 All SA 517 (ECL)

The issue of legal ethics is not novel to the legal profession. In fact, the Code of Conduct for all Legal Practitioners, Candidate Legal Practitioners and Juristic Entities (GG42364/29-3-2019) read with s 36(2) of the Legal Practice Act 28 of 2014 (the Act) highlights the expected standards of conduct of legal practitioners. This notwithstanding, there are still instances where South African courts have highlighted the importance of legal ethics. A recent example can be found in the *Mzayiya* case, where the court emphasised that discharging an effective trial strategy is secondary to the legal practitioner's duty towards the court. Herein the court highlighted ethical principles that are comparable to the expected standards found in the Code of Conduct, which effectively function as guidance of the expected conduct of legal practitioners.

### The facts in brief

The issue before the court related to the date of a motor vehicle accident. A default judgment application was brought before the court but the documents that formed part of the application reflected different dates of the accident. On the one hand, the s 19(f) affidavit, summons, particulars of claim, and the affidavit in support of default judgment application, indicated that the

accident occurred in March 2019. While on the other hand, the medical report, draft order, and subsequent explanatory affidavit of the legal practitioner, indicated that the accident occurred in February 2007. The court dismissed the notion that the different dates were that of an error or typo and described it as a misrepresentation. The court also pointed out that:

- The way the incorrect date of the accident was presented in the draft court order and the lack of explanation (or correction of this in the court papers) was a point of concern.
- The incorrect date of the accident in the papers had significant ramifications, including depriving the Road Accident Fund (RAF) from raising a special plea in relation to prescription.
- The name of Mzayiya's mother appeared as the deponent to the s 19(f) affidavit, as well as the affidavit in support of the default judgment application. This brought to question whether Mzayiya knew about or had been involved in the claim at all.

Ultimately, the matter was struck from the roll and the court referred the matter to the National Prosecuting Authority to investigate if there was a fraudulent claim, and it was also referred to the Legal Practice Council to investigate whether the



legal practitioner was guilty of unprofessional conduct, fraud, and obstruction of justice.

## Ethical principles highlighted

It is unfortunate that the court did not refer to the Code of Conduct in its judgment, but it did make important observa-

tions regarding the professional and ethical duties of legal practitioners. Central to this was that the litigation strategy employed should not be designed to mislead the court. Therein, five principles can be extracted from the judgment, which is comparable to the principle in the Code of Conduct:

Principles confirmed by the court	Code of Conduct equivalent
The legal practitioner has a duty to uphold the values of honesty and integrity (para 82).	Article 3.1 requires a legal practitioner to 'maintain the highest standards of honesty and integrity'.
The legal practitioner has, despite their duty towards the client, a duty towards the court that must be upheld (para 87).	Article 3.3 requires a legal practitioner to fulfil their duty towards a client, but that such a duty is subject to the legal practitioner's duty towards the court, the interest of justice, observing the law, and maintaining ethical standards of the profession.
The legal practitioner must not offer or rely on false evidence (para 83).	There are several comparable provisions in the Code of Conduct, but two are highlighted. The first being art 18.15.1, which requires a legal practitioner not to represent anything that they may know to be untrue. Article 9.2 expands on this principle requiring that the legal practitioner must not advise a client to 'contravene any law' and may not 'devise any scheme, which involves the commission of any offence'.
Not allow a client to depose of an affidavit that the legal practitioner knows contains false information (para 83).	Article 9.7.2 may apply indirectly and requires a legal practitioner 'not [to] recklessly make averments or allegations unsubstantiated by the information given to the legal practitioner'.
Documents should not be drafted in a way that is different to the information received from the client (para 83).	Article 57.1 requires a legal practitioner not to mislead the court 'on any matter of fact or question of law', and may not mislead the court on 'what is in papers before the court'.

Kroon AJ noted that to 'suppress evidence or worse still to suborn perjury, is to sabotage the administration of justice and it strikes at the heart of the legal practitioner's duty to the court' (para 83). Therein, the duty of disclosure is part of the legal practitioner's duty to fulfil their role in the 'proper administration of justice' (para 87).

## Conclusion

This case is one of many cases that have highlighted the professional and ethical duties of a legal practitioner. Not only is there a duty to one's client, but there are wider considerations necessary to consider when executing legal services. This includes that of the legal practitioner's duty towards the court, justice, the law itself as well as ethical considerations. Kroon

AJ, put it as follows '[c]ases can and should be fought fearlessly but they must be fought within the bounds of honour and propriety' (para 93).

Although the court did not refer to the Code of Conduct, many of these principles are now recorded in the Code of Conduct. A failure to adhere to the Code of Conduct may have a negative impact not only on the outcome of the matter for the client, but also on the individual legal practitioner.

Dr Michele van Eck *BCom (Law) (RAU) LLB (UJ) LLM (UJ) LLD (UP)* is a senior lecturer at the University of Johannesburg.



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By  
Robyn  
Snyman

# CPUT students gets a piece of the pie

*Stay at South Point Properties (Pty) Limited v Mqulwana and Others* (WCC) (unreported case no 622/2021, 13-5-2021) (Baartman J)

**T**he COVID-19 pandemic has become synonymous with a 'new normal' of uncertainty. The higher education system in South Africa (SA) has not been exempted from the unpredictable effects of this 'new normal'.

A dismal reality for many university students who occupy university residences are that they could be called on to vacate their residences, at any time with little or no prior notice and consequently be left with no place of refuge.

Recently, in the case of *Stay at South Point Properties (Pty) Limited*, the Western Cape Division of the High Court in Cape Town, considered whether a university residence constitutes a home for purposes of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) and consequently whether the applicant had to comply with the provisions of PIE to evict the university students from the residence.

## Background

The 90 respondents were enrolled as students for the 2020 academic year at the Cape Peninsula University of Technology (the university) and lived in the student residence New Market Junction (the residence).

The students occupied the residence in terms of a head lease agreement concluded between the applicant, Stay at South Point Properties (Pty) Limited (South Point) and the university. The university had provided South Point with a list of students to be accommodated at the residence for the 2020 academic year. The respondents were included on this list.

South Point alleged that the university concluded their final examinations on 24 December 2020 and that the respondents were expected to vacate the residence 72 hours thereafter. The students had failed to vacate the premises and as a result thereof South Point – as the owner of the residence – sought to evict the students through the *rei vindicatio*.

On 22 January 2021, De Villiers AJ is-

sued a *rule nisi* calling on the respondents to show cause as to why they should not be evicted from the student residence. The return day of the *rule nisi* was heard by Baartman J. The legal issue before Baartman J was whether South Point should have approached the court in terms of the *rei vindicatio* or in terms of PIE.

## Submissions made by the applicant and respondent

The submissions made by South Point was that the need to comply with the provisions of PIE did not arise as the student residence did not serve as the primary residence of the students and accordingly, the eviction would not render them homeless.

Conversely, the respondents submitted that the provisions of PIE did find applicability as the residence constituted their home for the academic year and the relief sought by South Point would render the students homeless. The respondents further submitted that their occupation of the residence was lawful.

## The current legal position

In the matter of *Barnett and Others v Minister of Land Affairs and Others* 2007 (6) SA 313 (SCA), Brand JA held that PIE only applies to evictions of persons from their homes.

Similarly, in the matter of *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici Curiae)* 2005 (5) SA 3 (CC), Langa ACJ held that in terms of the preamble of PIE, 'no one may be evicted from their home, or have their home demolished, without an order of the court made after considering all the relevant circumstances'. Consequently, the primary question that the court had to consider was whether the residence would qualify as the respondents' home for purposes of PIE.

In *Barnett*, the court considered whether the 'cottages on the sites that were put up by the defendants for holiday purposes' constituted their home in the context

of PIE. The court found that the cottages do not constitute a home for purposes of PIE in that although one can have more than one home, the term home requires an 'element of regular occupation coupled with some degree of permanence'. The court further held that this rational was in accordance with the ratio in *Beck v Scholz* [1953] 1 All ER 814, where the court held that 'the word "home" itself is not easy of exact definition, but the question posed, and to be answered by ordinary common sense standards, is whether the particular premises are in the personal occupation of the tenant as his or her home, or, if the tenant has more than one home, as one of his or her homes. Occupation merely as a convenience for such occasional visits ... would not ... according to the common sense of the matter, be occupation as a home'.

In *Tshwane University Technology v All Members of the Central Student Representative Council of the Applicant and Others* (GP) (unreported case no 67856/14, 22-9-2021) (Wentzel AJ), the court held that there can be little doubt that a student residence is not like holiday cottages and that a student residence satisfies the requirement of a 'home' as so defined.

'It is the place where [the students] stay for the majority of the year; although they may not regard it from the point of view of their domicile as their permanent home, it is their home for the majority of the year'.

## Findings by the court

The court was of the view that a home refers to more than a convenient lodging and accepted that the residence was more than just a convenient lodging in that for a particular academic year it constitutes the home of the respondents. The court further held that the students who are accommodated in a particular residence for an academic year occupy the residence for that year with the required elements of regularity and a degree of permanence.

In addition, the court found that it was not uncommon for students to move

furniture into the residence and consequently recapitulated the ratio of the court in the *Tshwane University of Technology* matter.

In the *Tshwane University of Technology* matter, the court held that a student residence is not like a holiday cottage and satisfies the requirement of a home as so defined as it is the place where the students stay for the majority of the year. The court further held that although one cannot 'regard it from the point of view of their domicile as their permanent home, it is their home for the majority of the year'.

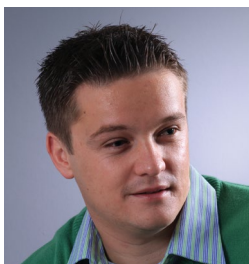
Accordingly, given that a tertiary education residence constitutes a home to its residents and given that the respondents had occupied the residence for the 2020 academic year it followed that they could only be evicted through an application in terms of PIE. Baartman J further held that the substantive and procedural protection that PIE provides was not afforded to the respondents.

### Conclusion

Although leave to appeal to the Supreme Court of Appeal has been granted, it is to be seen whether the SCA agrees with

the ratio of the court *a quo*. For now, however, it cannot be disputed that for many university students who view their university residence as a place of refuge, a shelter and home from the high demands and pressures of seeking a tertiary education this judgment comes as a protection against eviction.

Robyn Snyman LLB (Stell) is a candidate legal practitioner at Herold Gie Attorneys in Cape Town. □



By  
Philip  
Stoop

## New legislation

Legislation published from  
1 November – 31 December 2021

### Bills

Division of Revenue Amendment Bill B19 of 2021.

Adjustments Appropriation Bill B20 of 2021.

Rates and Monetary Amounts and Amendment of Revenue Laws Bill B21 of 2021.

Taxation Laws Amendment Bill B22 of 2021.

Tax Administration Laws Amendment Bill B23 of 2021.

### Commencement of Acts

**Hydrographic Act 35 of 2019.** Commencement: 29 October 2020. Proc39 GG45426/5-11-2021.

**Cybercrimes Act 19 of 2020 (only certain sections).** Commencement: 1 December 2021. Proc R42 GG45562/30-11-2021.

### Promulgation of Acts

**Second Special Appropriation Act 15 of 2021.** Commencement: 22 December 2021. GenN742 GG45698/22-12-2021.

### Selected list of delegated legislation

**Air Traffic and Navigation Services Company Act 45 of 1993**

Air traffic service charges. GenN740 GG45690/24-12-2021.

**Architectural Profession Act 44 of 2000**  
Guideline professional fees. BN172 GG45554/26-11-2021.

**Audit Profession Act 26 of 2005**  
Adoption of the International Qual-

ity Control, Auditing, Review, Other Assurance and Related Services Pronouncements (IAASB) Handbook. BN146 GG45500/19-11-2021.

**Carbon Tax Act 15 of 2019**

Renewable energy premium in respect of the tax period from 1 January 2020, for purposes of Symbol 'B' in the formula contained in s 6(2). GN1627 GG45654/15-12-2021.

**Civil Aviation Act 13 of 2009**

Twenty-first Amendment of the Civil Aviation Regulations, 2021. GN R1503 GG45491/15-11-2021.

Amendment of the schedules to the Civil Aviation Regulations, 2011. GN1613 GG45648/14-12-2021.

**Companies Act 71 of 2008**

Practice note 1 of 2022: Requirements for the reinstatement of companies and close corporations in terms of the reg 40 of the Companies Regulations. GN1654 GG45703/31-12-2021.

**Conservation of Agricultural Resources Act 43 of 1983**

Amendment of regulations. GN1580 GG45616/10-12-2021.

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

Increase in monthly pensions and the manner of calculating compensation. GN1494 GG45452/12-11-2021.

**Constitution of the Republic of South Africa, 1996**

Transfer of administration, powers and functions entrusted by legislation to certain Cabinet members in terms of s 97. Proc41 GG45500/19-11-2021 (also available in isiZulu).

**Deeds Registries Act 47 of 1937**

Amendment of regulations. GN R1595 GG45625/10-12-2021 (also available in Afrikaans).

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

#### • General regulations

Extension of the National State of Disaster under the COVID-19 lockdown to 15 December 2021. GN R1501 GG45485/13-11-2021.

Extension of the National State of Disaster under the COVID-19 lockdown to 15 January 2022. GN R1598 GG45633/10-12-2021.

Amended alert level 1 regulations. GN R1646 GG45697/21-12-2021.

Amendment of the adjusted alert level 1 regulations. GN R1659 GG45715/30-12-2021.

#### • Transport

Directions in terms of reg 4(7): The taxi relief fund towards the impact of COVID-19 in the taxi industry. GN1567 GG45575/2-12-2021.

**Electronic Communications Act 36 of 2005**

Information and Communications Technology Coronavirus COVID-19 National Disaster Regulations. GenN661 GG45458/11-11-2021.

Implementation of the Number Portability Regulations on 7 March 2022. GenN731 GG45653/15-12-2021.

Amendment to the Radio Frequency Spectrum Regulations, 2015. GenN737 GG45690/24-12-2021.

Amendment of the ordering system



specification for number portability. GenN748 GG45713/30-12-2021.

#### **Employment of Educators Act 76 of 1998**

Improvement in the conditions of service of educators: Annual cost-of-living adjustment for educators employed in terms of the Act, with effect from 1 April 2021. GN1600 GG45640/15-12-2021.

#### **Interim Protection of Informal Land Rights Act 31 of 1996**

Extension of the application of the provisions of the Act to 31 December 2021. GN1635 GG45687/20-12-2021 (also available in Afrikaans).

#### **Legal Practice Act 28 of 2014**

Amendment of r 30.1 of the Rules of the Council (conversion of enrolment from attorney to that of an advocate and *vice versa*). GenN665 GG45482/12-11-2021 and GenN657 GG45452/12-11-2021.

Amendment of r 22.1.4.2 of the Rules of the Council (absence of candidate attorneys). GenN658 GG45452/12-11-2021 and GenN666 GG45482/12-11-2021.

Amendment of Code of Conduct: Amendment of clause 13 and insertion of clause 25.9 and 41.6 (sharing of offices). GenN655 GG45452/12-11-2021, GenN659 GG45452/12-11-2021, GenN663 GG45482/12-11-2021 and GenN667 GG45482/12-11-2021.

Amendment of r 54.34 of the Rules of the Council (designation of the main office of a firm). GenN656 GG45452/12-11-2021 and GenN664 GG45482/12-11-2021.

Amendment of r 30.4.4.2 (application for the conversion of enrolment), 32.2.2 (conversion of enrolment to that of an attorney) and 47.7.1 (conversion and the Fidelity Fund) the Rules of the Council. GenN673 GG45500/19-11-2021.

#### **Marine Living Resources Act 18 of 1998**

General policy on the allocation and management of commercial fishing rights, 2021. GN1515 GG45504/19-11-2021.

#### **Medicines and Related Substances Act 101 of 1965**

Exclusion of COVID-19 vaccines from the operation of certain provisions. GN1502 GG45487/15-11-2021.

Exclusion of schedule 0 medicines from the operation of ss 18 and 22G. GN1581 GG45616/10-12-2021.

#### **National Environmental Management Act 107 of 1998**

Environmental Implementation Plan (EIP), 2020-2025. GenN645 GG45425/5-11-2021.

Suspension of the implementation of the regulations to domesticate the requirements of the Rotterdam Convention on the Prior Informed Consent Proce-

dure for Certain Hazardous Chemicals and Pesticides in International Trade, for a period of 12 months. GN1513 GG45502/18-11-2021 and GN1514 GG45503/19-11-2021.

Amendment of the procedures to be followed in applying or deciding on an environmental authorisation application for large scale wind and solar photovoltaic renewable energy development activities when occurring in renewable energy development zones. GN1617 GG45649/17-12-2021.

#### **National Environmental Management: Air Quality Act 39 of 2004**

Technical guidelines for the validation and verification of greenhouse gas emissions. GN1496 GG45452/12-11-2021.

#### **National Policy Act 27 of 1996**

Policy on the Prevention and Management of Learner Pregnancy in Schools. GenN704 GG45580/3-12-2021.

#### **National Small Business Amendment Act 29 of 2004**

Merging the Small Enterprise Finance Agency and the Small Enterprise Development Agency into a new single agency. GN1499 GG45469/12-11-2021 and GN1500 GG45478/12-11-2021.

#### **Private Security Industry Regulation Act 56 of 2001**

Annual fee increase. GenN693 GG45568/3-12-2021.

#### **Promotion of Access to Information Act 2 of 2000**

Regulations Relating to the Promotion of Access to Information, 2021: PAIA Guides. GN1504 GG45492/16-11-2021.

#### **Public Audit Act 25 of 2004**

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#### **Public Finance Management Act 1 of 1999**

Borrowing powers of public entities listed under sch 3, part A of the Act. GN1593 GG45623/10-12-2021.

Rate of interest on government loans from 1 January 2022. GenN746 GG45703/31-12-2021.

#### **Remuneration of Public Office Bearers Act 20 of 1998**

Determination of upper limits of salaries, allowances and benefits of different members of municipal councils for 2020/21 municipal financial year. GN1465 GG45420/2-11-2021.

#### **Rules Board for Courts of Law Act 107 of 1985**

Amendment of the Rules Regulating the Conduct of the Proceedings of the Magistrate's Courts of South Africa. GN R1604 GG45645/17-12-2021 (also available in Afrikaans).

Amendment of the Rules Regulating the Conduct of the Proceedings of the Supreme Court of Appeal of South Africa. GN R1602 GG45645/17-12-2021 (also available in Afrikaans).

Amendment of the Rules regulating the conduct of the Proceedings of the Several Provincial and Local Division of the High Court of South Africa. GN R1603 GG45645/17-12-2021.

#### **Social Service Professions Act 110 of 1978**

Fees payable by social workers, child and youth care workers, social auxiliary workers, auxiliary child and youth care workers, student social workers and student child and youth care workers' amendment regulations. GN R1512 GG45501/19-11-2021.

#### **South African Schools Act 84 of 1996**

National norms and standards for school funding: Schools that may not charge school fees. GN1574 GG45613/9-12-2021.

#### **Statistics Act 6 of 1999**

Date of Population Census 2022: 2 February 2022. GN1628 GG45655/15-12-2021.

#### **Tax Administration Act 28 of 2011**

Incidences of non-compliance that are subject to a fixed amount penalty in terms of ss 210 and 211. GN1531 GG45540/26-11-2021 (also available in Afrikaans).

Extension of the due date for Income Tax Returns relating to certain persons. GN1530 GG45539/26-11-2021 (also available in Afrikaans).

#### **Tourism Act 3 of 2014**

Norms and standards for the safe operations of the tourism sector in the context of COVID-19 and other related pandemics. GenN696 GG45568/3-12-2021.

#### **Traditional and Khoi-San Leadership Act 3 of 2019**

Determination of the date from which Khoi-San communities and leaders may lodge applications for recognition with the Commission on Khoi-San matters: 30 March 2022. GN1639 GG45690/24-12-2021.

#### **Value-Added Tax Act 89 of 1991**

Particulars that a tax invoice must contain if the supply by a vendor relates to any enterprise contemplated in the definition of 'enterprise' in s 1(1). GN1583 GG45616/10-12-2021 and GN1594 GG45624/10-12-2021 (also available in Afrikaans).

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

Amendment of the regulations relating to the veterinary and para-veterinary professions. GenN652 GG45436/8-11-2021.

### **Draft delegated legislation**

- Regulations defining the scope of the profession of occupational therapy in terms of the Health Professions Act 56 of 1974 for comment. GN1477 GG45426/5-11-2021.

- Draft Construction Amendment Regulations, 2021 in terms of the Merchant Shipping Act 57 of 1951 for comment. GN R1482 and GN R1483 GG45427/5-11-2021.
- Draft Marine Traffic Amendment Regulations, 2021 in terms of the Marine Traffic Act 2 of 1981 for comment. GN R1484 GG45427/5-11-2021.
- Proposed amendments to the list of protected tree species declared as protected in terms of the National Forests Act 84 of 1998 for comment. GN1487 GG45435/8-11-2021.
- Proposed levies on medical schemes in terms of the Council for Medical Schemes Levies Act 58 of 2000 for comment. GenN672 GG45500/19-11-2021.
- Proposed amendments to the Code of Professional Conduct for Registered Auditors in terms of the Auditing Profession Act 26 of 2005 for comment. BN173 GG45568/3-12-2021.
- Procedure to be followed in applying for environmental authorisation for large scale electricity and distribution development activities in geographical areas of strategic importance in terms of the National Environmental Management Act 107 of 1998 for comment. GN1572 GG45605/7-12-2021.
- Policy and criteria for registration of qualifications and part-qualifications; and policy and criteria for recognition of professional bodies and registration of professional designations in terms of the National Qualifications Framework Act 67 of 2008 for comment. GN1573 GG45610/8-12-2021.
- Guidelines on accreditation of consumer protection groups in terms of the Consumer Protection Act 68 of 2008 for comment. GN1584 GG45616/10-12-2021.
- Regulations relating to a transparent pricing system for medicines and scheduled substances: Draft dispensing fee for pharmacists in terms of the Medicines and Related Substances Act 101 of 1965 for comment. GN1618 GG45649/17-12-2021.
- Draft dispensing fee to be charged by persons licenced in terms of s 22C(1) (a) of the Medicines and Related Substances Act 101 of 1965 for comment. GN1619 GG45649/17-12-2021.
- National Policy pertaining to the Conduct, Administration and Management of Examination of Colleges Established, Declared or Registered in terms of the Continuing Education and Training Act 16 of 2006 for comment. GN1620 GG45649/17-11-2021.
- Scope of practice, competency standards and criteria for accreditation of pharmacists providing family planning services in terms of the Pharmacy Act 53 of 1974 for comment. BN180 GG45649/17-12-2021.
- Regulations defining the scope of practice of the profession of social work in terms of the Social Service Professions Act 110 of 1978 for comment. GN R1610 GG45645/17-12-2021.
- Amendment of regulations in accordance with s 9 of the National Heritage Resources Act 25 of 1999 for comment. GN R1612 GG45645/17-12-2021.

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By  
Nadine  
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# Employment law update

## An overly technical approach to disciplinary charges

In *Sol Plaatje Municipality v South African Local Government Bargaining Council and Others* [2021] 11 BLLR 1096 (LAC), Mr Botha and Mr Fritz (collectively, the employees) were employed by the Sol Plaatje Municipality as carpenters. The employees were instructed to repair the roof and ceilings of a community hall in Kimberley. While doing so, the employees dismantled an air conditioner and attempted to sell the parts to a scrap metal dealer. The parts were subsequently confiscated and secured at the premises of the municipality. Notwithstanding this, the employees thereafter sought to coerce the security official on duty to provide them with access to the parts.

As a result, the employees were subjected to disciplinary action and were charged with, among other things –

- stealing and selling parts of the air conditioner to a scrap metal dealer;
- disobeying a reasonable instruction; and
- intending to gain entry to the municipality's premises to obtain the parts.

The disciplinary hearing proceeded in the absence of the employees after they had left the hearing with their union representative. The presiding officer found that the employees were guilty as charged and that dismissal was the only appropriate sanction.

An unfair dismissal dispute was referred to the South African Local Government Bargaining Council, where one, Mr Botha testified on behalf of both the employees. The arbitrator found Mr Botha to be an evasive and unreliable witness. Notwithstanding this, the arbitrator concluded that the employees were not guilty of certain charges because it had not been demonstrated that the employees had sold the parts, but rather that they merely had an intention to do so. Further, the arbitrator rejected the arguments made on behalf of the municipality that the employees were guilty of 'derivative' or 'team' misconduct. As a result, the arbitrator held that the dismissals of the employees were unfair, and the employees were reinstated with back-pay.

The municipality sought to review and set aside the arbitrator's award. The Labour Court, however, found that the municipality had not established a basis on which the court could find that the arbitrator's award was reviewable and consequently dismissed the review application. Thereafter, the municipality took the matter on appeal on the grounds, *inter alia*, that the probabilities were that the employees had stripped the air conditioners with the intention of misappropriating the parts and selling them and that the outcome of the award was unreasonable.

The only issue on appeal was whether it could reasonably be found on the evidence that the employees had committed misconduct involving dishonesty and whether the sanction of dismissal was appropriate. The Labour Appeal Court (LAC) reiterated that it had been repeatedly held that charges in disciplinary proceedings need not be drafted with the precision of those in criminal matters, and that an overly technical approach to the framing and consideration of disciplinary charges should be avoided. There is also authority that if the main charge of misconduct is not proved, but an attempt to commit such misconduct is proved, the employee may be found guilty of such an attempt on that same charge.

The LAC found that not only did the arbitrator err in his interpretation of the charges and adopted an overly technical approach, but he also overlooked crucial facts that led him to unreasonably conclude that some of the charges had not been proved against the employees concerned. It was clear from the evidence that the dismantling of the air conditioner by the employees was wrongful and unlawful. When confronted by the security official, the employees, either brazenly or naively, informed him that they were there to make a deal to sell the parts. The employees accordingly had not only intended to strip and sell the parts but acted with that intention. The parts were then confiscated and taken back to the municipal premises, after which the employees still tried to remove those parts through dishonest means and coercion.

Taking all the evidence into account, the LAC held that the only reasonable

inference to be drawn is that the employees intended to sell the parts after having removed them. They were caught in the process of doing so. They acted in concert and their acts were not only without the authority of the municipality but were dishonest. Accordingly, although the employees could not be found guilty of selling the parts, they could have been found guilty of attempting to steal and sell the parts for their own gain.

The extensive damage caused to the municipality's property, the cost of replacing the air conditioner, and the dishonesty was sufficiently serious to warrant a dismissal. The LAC concluded that this is what a reasonable arbitrator should have found considering the relevant facts.

The appeal was upheld.

## Does a proposed severance package constitute a settlement agreement?

In *Perumal v Clover SA (Pty) Ltd* [2021] 11 BLLR 1143 (LC), the employee, employed by Clover SA (the Company), was invited to participate in retrenchment consultations. During the consultation process, the employee requested a breakdown of his severance package. Thereafter, a manager of the Company issued the employee with a letter, alleged to be an 'agreement', in terms of which it was stated that the employee was to be retrenched and setting out the severance package that the employee would receive.

The Company subsequently withdrew the letter, claiming that it had been erroneously issued to the employee. The Company reiterated to the employee that his employment had not been terminated and that the consultation process was continuing with a view to establish whether there were alternatives to avoid retrenchment. Thereafter, the Company decided that there was no need to retrench the employee and advised the employee that his position would no longer be affected by the proposed restructuring.

The employee sent correspondence to the Company indicating that he did not accept the withdrawal of the 'agreement' and that the Company was required to



pay him the severance package. The employee thereafter refused to report for duty. As a result, the Company instituted disciplinary action against the employee, and he was subsequently dismissed.

Six months later, the employee instituted an application in the Labour Court (LC) to have the 'agreement' made an order of court in terms of s 158(1)(c) of the Labour Relations Act 66 of 1995 (the LRA).

The court noted that s 158(1)(c) of the LRA empowers the LC to make an arbitration award or settlement agreement an order of court. This section must be read with s 158(1A) of the LRA, which defines a settlement agreement as a written agreement in settlement of a dispute that a party may refer for arbitration or for adjudication to the LC. Section 158(1)(c) accordingly does not oblige the LC to make a settlement agreement an order of court. The court has a discretion to do so but may not do so if the agreement

does not comply with the criteria set out in s 158(1A).

The question was thus whether the 'agreement' satisfied the criteria set out in s 158(1A) of the LRA and should be made an order of court. In this regard, the employee submitted that the agreement should be made an order of court as it concerned a matter that is capable of being arbitrated as it involved a retrenchment. In turn, the Company submitted that the employee was not retrenched and that the agreement accordingly did not seek to settle any dispute.

Applying the criteria set out in s 158(1A), the court found it highly improbable that the Company would have continued with the consultation process if it had agreed to retrench the employee. Furthermore, the facts indicated that the Company had made it clear to the employee that he had not been retrenched and that there was no agreement to justify the termination of his

employment. Thereafter, the employee returned to work and was paid his salary. The court struggled to understand how the employee could have interpreted the factual position as one where he had been retrenched.

In the circumstances, the employee had failed to demonstrate that there was a dispute that was settled relating to a retrenchment. The court found that absent a retrenchment, there could be no dispute, let alone one that the employee was entitled to refer to arbitration or adjudication by the court. As the 'agreement' did not satisfy the criteria set out in s 158(1A) of the LRA, the court held that it did not have the discretion to make the agreement an order of court.

The application was dismissed.

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## Recent articles and research

Abbreviation	Title	Publisher	Volume/issue
<i>Advocate</i>	Advocate	General Council of the Bar	(2021) 34.3
<i>BTCLQ</i>	Business Tax and Company Law Quarterly	SiberInk	(2021) 12.1 (2021) 12.2 (2021) 12.3
<i>DJ</i>	De Jure	University of Pretoria	(2021) 54
<i>EL</i>	Employment Law Journal	LexisNexis	(2021) 37.5 (2021) 37.6
<i>ILJ</i>	Industrial Law Journal	Juta	(2021) 42
<i>ITJ</i>	Insurance and Tax Journal	LexisNexis	(2021) 36.3 (2021) 36.4
<i>JCLA</i>	Journal of Comparative Law in Africa	Juta	(2020) 8.2
<i>JJS</i>	Journal for Juridical Science	University of the Free State, Faculty of Law	(2021) 43.2
<i>LDD</i>	Law, Democracy and Development	University of the Western Cape, Faculty of Law	(2021) 25 (2021) 25 Special Edition
<i>LitNet</i>	LitNet Akademies (Regte)	Trust vir Afrikaanse Onderwys	(2021) 18(3)
<i>Obiter</i>	Obiter	Nelson Mandela University	(2021) 42.2 (2021) 42.3

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**Diala, JC** "Talk to my father": Re-thinking social exclusion and access to justice in the context of bridewealth negotiation' (2021) 25 Special Edition *LDD* 20.  
**Mwambene, L; Dubin, A and Lawson, D** 'Engendering access to justice for development in Sub-Saharan Africa: A study of policy, programming and implementation' (2021) 25 Special Edition *LDD* 1.  
**Roberts, FN** 'Engendering access to environmental justice in Nigeria's oil producing areas' (2021) 25 Special Edition *LDD* 167.

## Alternative dispute resolution

**Batchelor, BL; Chetty, N and Makore, STM** 'Incorporating Afrocentric alternative dispute resolution in South Africa's clinical legal education' (2021) 25 *LDD* 482.  
**Koekemoer, MM** 'An analysis of aspects of the proposed reform of the financial consumer complaint resolution mechanisms in the South African banking sector' (2021) 42.2 *Obiter* 336.

## Cadaveric organ donation

**Nadvi, SS and Osman-Hyder, M** 'A comparative study of Islamic and South African law on living and cadaveric organ donations: Consensus and divergence' (2021) 42.3 *Obiter* 608.

## Children's rights

**De Freitas, S** 'Freedom to agreed-upon religious upbringing of the child on dissolution of a marriage: A critique of *Kotze v Kotze*' (2021) 54 *DJ* 533.

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**Bidie, SS** 'The relief provided to a complainant under section 163(1)(a) of the 2008 Companies Act: An examination of the criterion with reference to *Peel v Hamon J&C Engineering (Pty) Ltd*' (2021) 42.3 *Obiter* 595.  
**Subramanien, D** 'A discussion on the issue of costs in relation to derivative proceedings in section 165 of the Companies Act 71 of 2008' (2021) 42.2 *Obiter* 210.  
**Swart, C** 'Die statutêre persoonlike en die statutêre afgeleide aksie: Is 'n streng onderskeid steeds geregverdig?' (2021) 18(3) *LitNet*.

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and predatory prices (part 2)' (2021) 42.2 *Obiter* 194.

**Van Tonder, JL** 'Predatory pricing: Single-firm dominance, exclusionary abuse and predatory prices (part 3)' (2021) 42.3 *Obiter* 470.

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**Calvino, LR** 'Protecting the vulnerable in South Africa: Prohibition of corporal punishment in the private sphere' (2021) 42.3 *Obiter* 580.  
**Nkoane, P** 'Deciding non-constitutional matters of general public importance in South African law: Can constitutional values be used?' (2021) 25 *LDD* 604.  
**Slabbert, M and Venter, B** 'Burn victims and skin donations: A legal perspective' (2021) 42.2 *Obiter* 289.

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## COVID-19

**Prinsen, L** '(Don't) hold your breath: The South African COVID-19 vaccine approval process and regulatory framework' (2021) 42.3 *Obiter* 685.  
**Tshoose, CI** 'Dismissal arising from flouting COVID-19 health and safety protocols: *Eskort Limited v Stuurman Mogotsi* [2021] ZALCJHB 53' (2021) 42.3 *Obiter* 692.

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## Criminal law and procedure

**Hector, S** 'Mistaken identity of the victim in criminal law' (2021) 42.3 *Obiter* 676.  
**Tshehla, B** 'Police officers' discretion and its (in)adequacy as a safety valve against unnecessary arrest' (2021) 46.2 *JJS* 80.  
**Van der Linde, DC** 'An overview of the sentencing regime for gang members under the prevention of Organised Crime Act 121/1998 and the potential for restorative justice' (2021) 46.2 *JJS* 56.  
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**Kahn, F** 'The impact of COVID-19 on cyberbullying: A delictual claim for emotional harm?' (2021) 54 *DJ* 565.

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**Joffe, H** 'An offshore endowment wrapper with a South African insurer – a perfect estate planning tool' (2021) 36.4 *ITJ*.  
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**Qumba, MF** 'Balancing investor protection with a state's regulatory autonomy in the amended SADC FIP' (2021) 42.3 *Obiter* 625.

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## International children's rights

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**Murumba, RN** 'Leveraging the local administration to engender access to justice in Kenya: The case of Mukuru Kayaba Informal Settlement, Nairobi County, Kenya' (2021) 25 Special Edition *LDD* 192.  
**Thamari-Odhiambo, M** 'Embracing risky refuge: Women, land laws and livelihood vulnerabilities in rural Kenya' (2021) 25 Special Edition *LDD* 71.

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



By Dr  
Willem  
van Aardt

# The new era of COVID-19 legal paternalism and the limitation of fundamental human rights

In response to the COVID-19 pandemic, the world saw an unprecedented wave of paternalistic government public health policies being implemented around the globe. 'Legal paternalism seems to imply that since the state often can know the interests of individual citizens better than the citizens know them themselves, it stands as a permanent guardian of those interests in *loco parentis*' (Joel Feinberg 'Legal paternalism' (1971) 1 *Canadian Journal of Philosophy* 105).

Paternalistic government policies are often criticized on the grounds that they infringe on civil liberties. Some of these policies violate derogation provisions, and others even violate non-derogable rights that are regarded as core human rights, *jus cogens*, and obligations *erga omnes* due to their normative specificity and status (art 4 of the International Covenant on Civil and Political Rights 1966 (ICCPR)).

What kind of paternalism is compatible with an open and democratic society based on freedom and equality and a legal system that recognises fundamental human rights as espoused in the ICCPR and the South African Constitution? Do governments have the right to influence citizens' behaviour through vaccine mandates, mask mandates, travel mandates, social distancing mandates, alcohol mandates, isolation mandates and stay at home mandates? Or does this create an authoritarian state, leading to infantilisation, demotivation, and severe breaches in individual autonomy and freedom?

This article examines key issues related to the appropriateness of paternalistic public health measures during the COVID-19 pandemic and investigates under what circumstances paternalistic policies may be justified.

## Legal paternalism defined

"Paternalism" comes from the Latin *pater*, meaning to act like a father, or to treat another person like a child. In modern philosophy and jurisprudence, it is to act for the good of another person without that person's consent, as parents do for children. It is controversial because its end is benevolent, and its means coercive. Paternalists advance people's interests (such as life, health, or safety) at the expense of their liberty. ... Paternalists

suppose that they can make wiser decisions than the people for whom they act (Peter Suber 'Paternalism' (<https://dash.harvard.edu>, accessed 6-12-2021)).

Paternalistic policies have three essential elements, it -

- involves interference in a person's ability to choose;
- is enacted to further the person's perceived good or welfare; and
- is enacted without the consent of the person concerned (Matthew Thomas and Luke Buckmaster 'Paternalism in social policy: when is it justifiable?' ([www.aph.gov.au](http://www.aph.gov.au), accessed 6-12-2021)).

Impure paternalism describes interventions in which 'the class of persons [being] interfered with is larger than the class being protected' while in the case of pure paternalism, 'the class being protected is identical with the class being interfered with' (Gerald Dworkin 'Paternalism' (1972) 56 *The Monist* 64).

In the COVID-19 era, most paternalistic policies are an example of impure paternalism given the mandatory nature and that only 0,5% of the population are at risk of death from SARS-CoV-2 (see Dr Willem van Aardt 'Can government mandate the COVID-19 vaccine against your will? A discussion on international human rights law' 2021 (July) *DR* 12).

## The quandary with paternalism that violates fundamental human rights

- *The individual is better placed to know what is best*

Paternalist policies are controversial principally because they are premised on the notion that the government is better able to make decisions in a person's interests than the person themselves. Such policies offend a fundamental tenet of liberal societies, namely, that the individual is best placed to know what is in their interests (Bill New 'Paternalism and public policy' (1999) 15.1 *Economics & Philosophy* 63).

- *Paternalism is incompatible to the respect for human dignity and fundamental human rights*

Respect for human dignity implies free will at its core. From the recognition of

human dignity descends the right and the freedom to make one's own decisions. By imposing choices based on what someone else thinks are good for a person, legal paternalism violates the equal dignity of all human beings and, given the interdependence and indivisibility of human rights, adversely affects all human rights. Therefore, as Immanuel Kant argues, a government that was established on the principle of regarding the people in the same way that a father regards his children's welfare, a paternal government, is 'the worst despotism we can think of' and a constitution that "subverts all the freedom of the subjects, who would have no freedom whatsoever" ... The sovereign who "wants to make people happy in accord with his own concept of happiness...becomes a despot" (Immanuel Kant 'On the proverb: That may be true in theory but is of no practical use' (1793) in *Perpetual Peace and Other Essays* (Hackett Publishing Company 1983)).

- *Paternalism violates intimate aspects of private life*

'Respect for a person's autonomy is respect for his unfettered voluntary choice as the sole rightful determinant of his actions except where the interests of others need protection from him' (Richard J Arneson 'Joel Feinberg and the Justification of Hard Paternalism' (2005) 11 *Cambridge University Press* 259). The reason why the government should not interfere in principally self-regarding affairs is not that such meddling is self-defeating and probable to cause more harm than it prevents, but rather that it would itself be an injustice and a violation of the private sanctuary, which is every person's self. This is true irrespective what the calculus of harm and benefits might show (Enrico Bertrand Cattinari 'The Doctrine of "Implied Limitations" of Fundamental Rights: An Argument Against Legal Paternalism' University of Leicester School of Law Research Paper No 15-18, 2015, Joel Feinberg (*op cit*)).

In his celebrated essay 'On Liberty', John Stuart Mill asserts that 'Society can and does execute its own mandates: And if it issues wrong mandates instead of right, or any mandates at all in things with it ought not to meddle, it practices a social tyranny more formidable than

many kinds of political oppression, since, though not usually upheld by such extreme penalties, it leaves fewer means of escape, penetrating much more deeply into the details of life, and enslaving the soul itself' (John Stuart Mill *On Liberty and Utilitarianism* (New York: Alfred A Knopf 1992)).

The South African Constitutional Court (CC) held that where there is a limitation to a right fundamental to a democratic society, a higher standard of justification is required; so too, where a law interferes with the 'intimate aspects of private life' (*S v Makwanyane and Another* 1995 (6) BCLR 665 (CC) at para 109).

### • Paternalism has unintended consequences

A further related argument against legal paternalism is that there is no guarantee that it will improve people's health and welfare; indeed, it may make it worse. Mill argues that 'the strongest of all arguments against the interference of the public with purely personal conduct, is that when it does interfere, the odds are that it interferes wrongly, and in the wrong place' (Mill (*op cit*)).

In the case of the COVID-19 lockdowns, unintended consequences included economic devastation, hunger, disruption in education, significant spikes in suicides and mental health issues, and increased domestic violence (Brad Polumbo '4 Life-Threatening Unintended Consequences of the Lockdowns' (<https://fee.org>, accessed 6-12-2021)).

### Justification for paternalistic policies

When and to which extent can the state restrict the fundamental freedoms? What kinds of conduct may the legislature make criminal without infringing on the moral autonomy of individual citizens? Is there a limit to legal paternalism that the state must not exceed?

Mill (*op cit*) presents that which is probably the best answer to this question: The 'harm principle'. This 'principle protects only self-regarding acts, carving out a space for freedom which ... should be protected from external interference. Other-regarding acts, however, may be subject to control by others' (Jovan Babic 'Self-Regarding/Other-Regarding Acts: Some Remarks' 2006 (5) *Prolegomena* 193). Mill writes: 'The only part of the conduct of anyone, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his body and mind, the individual is sovereign' (Babic (*op cit*) 195).

COVID-19 poses a risk of death to approximately 0,5% of the population that is categorised as vulnerable. All vulnerable people have access to COVID-19

vaccines and can take other effective precautionary measures to reduce their risk of infection, such as self-isolation, prophylactic medication, and protective apparel. Considering the aforementioned, and the fact that the theory of symptomless spread has been debunked *in toto* the argument that healthy people pose a risk to vulnerable groups and, therefore, need to be subjected to paternalistic policies that infringe a wide array of fundamental human rights and freedoms such as freedom of movement, freedom of religion, freedom to bodily autonomy is highly questionable (<https://covid.cdc.gov> and Shiyi Cao, Yong Gan, Chao Ang, and Max Bachmann *et al* 'Post-lockdown SARS-CoV-2 nucleic acid screening in nearly ten million residents of Wuhan, China' ([www.nature.com](http://www.nature.com), accessed 6-11-2020)).

### Limitation of fundamental human rights

In terms of the thesis of "implied limitations" of fundamental [human] rights, the only permissible legal limitations to human rights are those necessary for their existence as a whole'. The theory of 'implied limitations' is a consequence of the inviolability and interdependence of fundamental human rights. 'If the fundamental right could be restricted for reasons other than their overall protection – for example for a general social benefit ... – they would no longer be inviolable' (Cattinari (*op cit*)).

Fundamental rights are constitutively inalienable; they exist necessarily, inherent in every person, and cannot be taken away from them. Therefore, they cannot be limited for a reason other than their overall protection. This does not imply, of course, that their exercise does not meet some limits, but such limits cannot find their justification outside the system of fundamental rights itself (Cattinari (*op cit*)).

Paternalistic policies can consequently only be lawful if the policy strictly complies with the derogation and limitation provisions set out in art 4 of the ICCPR and s 36 of the Constitution. It must, therefore, be shown that the paternalistic policy or law in question serves a 'constitutionally-acceptable' purpose and that there is sufficient proportionality between the harm done by the law, action or omission and the benefits it is designed to achieve. In *S v Makwanyane*, the CC adopted the following approach to the limitation clause: 'The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality.'

The principle of proportionality prescribes that all statutes that affect human rights should be proportionate or

reasonable. 'The proportionality analysis examines the following set of sequential questions once a *prima facie* infringement of a fundamental human right has been found. First, does the infringing [paternalistic] policy pursue a legitimate aim (legitimacy)? Second, is the [paternalistic] policy suitable and rationally connected to the fulfilment of policy goals (adequacy or efficacy)? Third, is the infringing [paternalistic] policy necessary and the least restrictive option (necessity)? Fourth, do the benefits of the [paternalistic] policy measures outweigh the cost?' (proportionality '*strictu sensu*' or 'balancing') (Dr W van Aardt 'The Mandatory COVID-19 Vaccination of School Children: A Bioethical and Human Rights Assessment' (2021) 12 *Journal of Vaccines & Vaccination*).

### Conclusion

Paternalism, as such, is not incompatible with the legal order of a constitutional state, but in such a legal order, a paternalistic purpose for the greater good cannot be considered a sufficient reason to restrict personal freedom. Fundamental human rights may only be restricted in line with international and national derogation and limitation provisions.

Where governments interfere in individuals' autonomy, it is important that paternalistic policies should be subjected to rigorous scrutiny to determine their legitimacy, efficacy, necessity, and proportionality. If the limitation of rights does not serve the purpose of and contributing to a society based on human dignity, equality, and freedom, it cannot be justifiable.

As espoused in the United Nations (UN) Vienna Declaration and Programme of Action: 'Human rights and fundamental freedoms are the birth right of all human beings; their protection and promotion [are] the first responsibility of Governments'. Governments do not have the right to decide when people are entitled to enjoy their fundamental human rights. Governments only duty is to protect fundamental rights and freedoms (Vienna Declaration and Programme of Action <https://www.ohchr.org>, accessed 6-11-2021).

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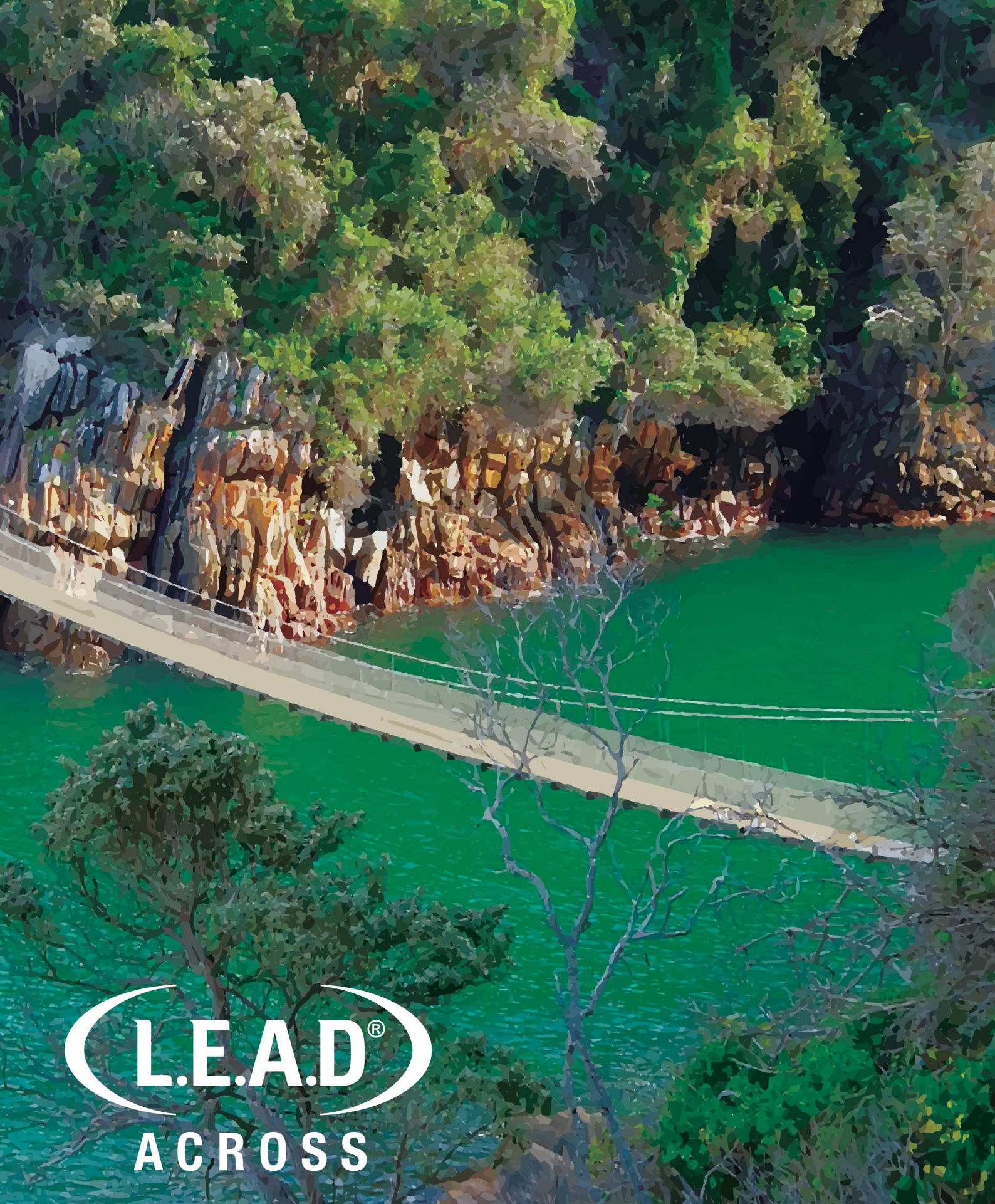
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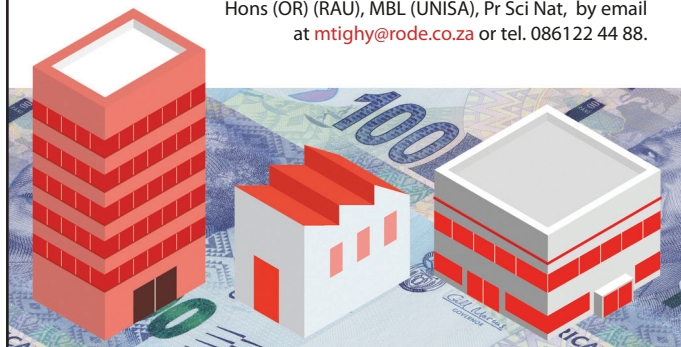
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- Please remember that this is a public portal, therefore, **DO NOT include your physical address, your ID number or any certificates.**

**An example of the advert that you  
should send:**

25-year-old LLB graduate currently completing PLT seeks articles in Gauteng. Valid driver's licence. Contact ABC at 000 000 0000 or e-mail: [E-mail@gmail.com](mailto:E-mail@gmail.com)

**Advertisements and CVs may be e-mailed to:  
[Classifieds@derebus.org.za](mailto:Classifieds@derebus.org.za)**

**Disclaimer:**

- Please note that we will not write the advert on your behalf from the information on your CV.
- No liability for any mistakes in advertisements or CVs is accepted.
- The candidate must inform *De Rebus* to remove their advert once they have found articles.
- Please note that if *De Rebus* removes your advert from the website, Google search algorithms may still pick up the link or image with their various search algorithms for a period of time. However, the link will be 'broken' and revert to the *De Rebus* homepage.
- Should a candidate need to re-post their CV after the two-month period, please e-mail: [Classifieds@derebus.org.za](mailto:Classifieds@derebus.org.za)

# RISKALERT

FEBRUARY 2022 NO 1/2022

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### RISK MANAGEMENT COLUMN

- Reflections on 2021

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## RISK MANAGEMENT COLUMN

# REFLECTIONS ON 2021

**W**elcome to the first edition of the Risk Alert Bulletin for 2022.

By the time this edition is published, legal practitioners will be well into the new year. In this first edition of the year, I thought it apposite to commence with a risk management reflection on what transpired in 2021. The beginning of the calendar year is an opportune time to reflect on what transpired in the previous year, consider the lessons learned and to plan for the year ahead.

The Legal Practitioners Indemnity Insurance Fund NPC (the LPIIF) was notified of 95 claims in the 2021 calendar year. The provision for all outstanding claims as at 31 December 2021 is R692, 964,800 according to the latest actuarial assessment. The corresponding figure was R665,566,300 at the end of December 2020. The increase of R27, 398, 500 in



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exposure for an insurer of the LPIIF's size and mandate is significant.

My focus on a calendar year rather than on an insurance scheme year is purely a matter of timing and context. The insurance scheme year runs from 1 July of each year to 30 June of the following year. More than ever, special attention must be paid to

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Please note that the Risk Alert Bulletin is intended to provide general information to legal practitioners and its contents are not intended as legal advice.



**Legal Practitioners'  
Indemnity Insurance  
Fund NPC**

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**LEGAL  
PRACTITIONERS'  
FIDELITY FUND**

SOUTH AFRICA



## RISK MANAGEMENT COLUMN continued...

how the 2021/2022 insurance scheme year develops. For the first time since the inception of the company, the LPIIF has not received an annual premium from the Legal Practitioners' Fidelity Fund (the Fidelity Fund) and will thus have to use the reserves built up over the years to fund its operating costs and to pay claims. One of the reasons advanced by the Fidelity Fund for the non-payment of the premium is the decline in its own revenue in the period since the start of the pandemic.

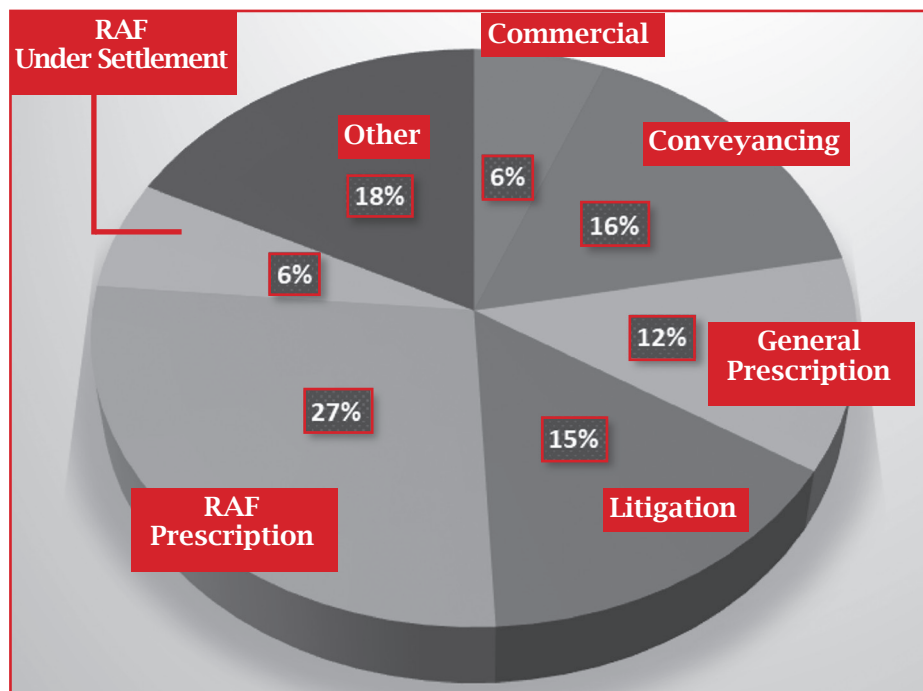
### Claims notified in 2021

The breakdown of claims notified to the LPIIF in the year ended 31 December 2021 is shown in the graph on the right.

The main claim types have remained consistent over the years. From a risk management perspective, this requires that firms pursuing these high-risk areas of practice increase their focus on the risk mitigation measures they have in place. In some instances, the internal controls and other risk mitigation measures will need to be enhanced.

Even if your firm has never had a claim against it in the past, you may still be affected by the number and value of claims against legal practitioners. An increase in claims notified to the LPIIF puts a strain on its long-term sustain-

### Breakdown of claim notifications by type



ability and this threatens the current professional indemnity model. Those firms who have taken out top-up insurance in the commercial market will recall that insurance premiums increased by between 50% and 500% in 2021. The reasons for the significant increase, according to the commercial insurers, were a hardening of the reinsurance market, the increase in losses arising from cyber-related claims, a decline in investment performance because of the pandemic and the increasing number and value of professional indemnity claims in general. In other jurisdictions, most notably the United King-

dom, the professional indemnity market for legal practitioners experienced several significant disruptions with some of the insurers pulling out of the market and others increasing their premiums significantly or tightening the conditions under which they were prepared to provide cover. The result was that many firms experienced significant challenges in securing professional indemnity insurance. This put the ability of the firms concerned to continue operating at risk. South Africa is not immune to such seismic events. There is a responsibility on all stakeholders to try to curb the increase

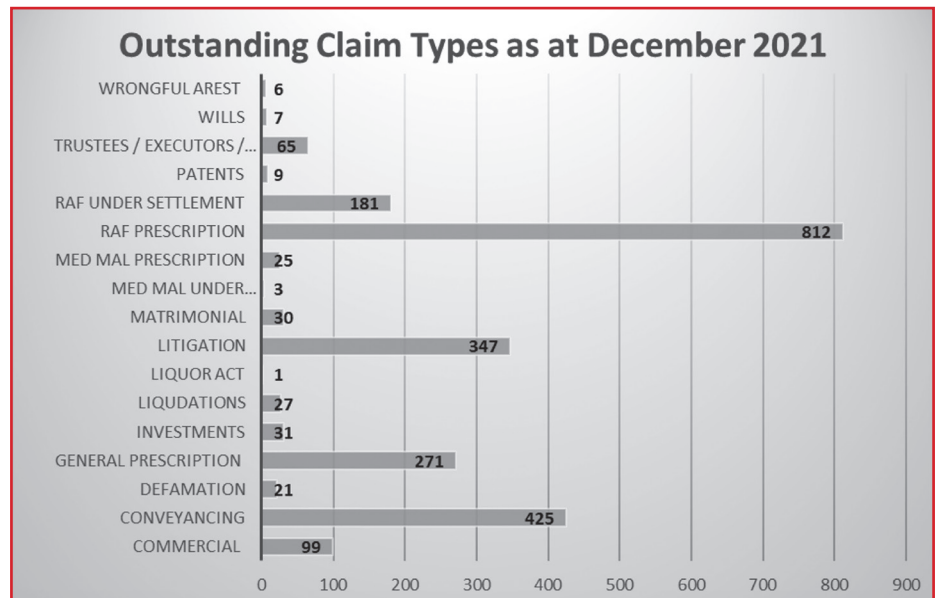
## RISK MANAGEMENT COLUMN continued...

in claims and to promote a risk management culture.

One of the first steps that you can consider taking in 2022 is to arrange a risk management education session for all professional and support staff in your firm. Even if you are of the view that the risk management measures that you have implemented in your firm are adequate to meet the identified risks, a risk management session will assist in benchmarking your internal measures against the rest of the market. You can then also use the training session to do a gap analysis to ensure that you have covered all the basis and are not blind-sided by a risk that you had not adequately considered. Please contact the LPIIF's Practitioner Support Executive at [Risk.Queries@LPIIF.co.za](mailto:Risk.Queries@LPIIF.co.za) to arrange a training session. These training sessions are provided at no cost and offered to all insured legal practitioners. In the current operating environment, the training sessions can be conducted using any of the online platforms if face-to-face training is not feasible.

### Outstanding claims

The assessment of professional indemnity claims is not straight forward and takes up a significant amount of time and resources. It will be appreciated that the assessment of



liability on the part of a legal practitioner involves, amongst others, consideration of a host of factual and legal considerations. These considerations include assessing whether the claim falls within the indemnity afforded under the Master Policy. A copy of the Master Policy is available on the LPIIF website [www.lpiif.co.za](http://www.lpiif.co.za). Professional indemnity claims against legal practitioners are mainly litigious in nature and this compounds the long-tail nature of such claims (the oldest active claim was registered in the 2004/2005 insurance year), resulting in matters taking many years to be finalised in many instances. A breakdown of all outstanding claims (not only those registered in the 2021 calendar year) at the close of last year is depicted in the picture above.

### A focus on prescription

Prescription related claims make up the highest number and value of claims notified to the LPIIF. A significant number of resources have been dedicated to dealing with this risk. Please have regard to our previous publications and the website for tips aimed at mitigating this risk. Prescription (and compliance with all other statutory time limits) must be central to every action you take in a matter and must be one of the considerations when deciding whether or not to accept an instruction. Do you have the appetite, time, resources and capacity to pursue the matter timeously? Has the client provided you with all the relevant information and

## RISK MANAGEMENT COLUMN continued...

documents to carry out the instruction? Will you require the assistance of counsel, a correspondent or some other expert in order to draft the pleadings timeously and then have them served in time to interrupt prescription? Has the client consulted with any other legal practitioner previously in respect of the same matter? If so, when and why was the mandate of that legal practitioner terminated and has the client's file been retrieved from the previous legal representative? These are some of the questions that you must consider before you accept the instruction.

We have previously published several tips that legal practitioners can implement to mitigate the risk of prescription. These tips can be accessed in the publications on the LPIIF website and in the practice management column in *De Rebus*. The suggestions are mainly internal controls that can be implemented in the respective practices. In addition, you must also consider the law in respect of the prescription point that you are faced with. Do not simply accept an allegation that the claim has prescribed without considering all the relevant facts and the applicable legal principles. There were several significant judgements handed down in 2021, which have an impact on different aspects of the prescription risk. The judgements include:

□ *NMZ obo SFZ v MEC for Health and Social Development of the Mpumalanga Provincial Government* (Case no 1149/2020) [2021] ZASCA 184 (24 December 2021). The issue considered by the Supreme Court of Appeal (SCA) was whether the Mpumalanga Division of the High Court was correct in dismissing the appellant's application for condonation of the failure to give timeous notice under section 3 of the Institution of Legal Proceedings against certain Organs of State Act 40 of 2002. The SCA upheld the appeal and granted the application for condonation as good cause had been established. The SCA restated the requirements for condonation;

□ *Van Zyl N.O. v Road Accident Fund* [2021] ZACC 44- in this matter the Constitutional Court considered sections 23(1), 23(2)(b) and (c) of the Road Accident Fund Act 56 of 1996 in respect of claimants of unsound mind. The court found that prescription only begins to run from the date of appointment of the *curator ad litem*. The judgment was delivered on 19 November 2021;

□ *Jugwanth v MTN (Case no 529/2020)* [2021] ZASCA 114 (9 September 2021). The case concerned an exception to particulars of claim for not disclosing a cause of action

on the basis that *ex facie* the claim had prescribed. It was found that the party relying on prescription must invoke and prove it. There was no requirement that the particulars of claim pre-emptively plead a basis to defeat a possible plea of prescription;

□ In *Legal Practitioners Indemnity Insurance Fund NPC v The Minister of Transport and Another* (GP) (case no 26286/2020, 21 June 2021) (Janse Van Nieuwenhuizen J) the LPIIF successfully challenged the constitutionality of Regulations 2 (1) (b) and 2 (2) issued in terms of the Road Accident Fund Act in so far they relate to the two-year prescription period for minors and persons under legal disability in matters where an unidentified vehicle is involved ('hit-and-run' claims); and

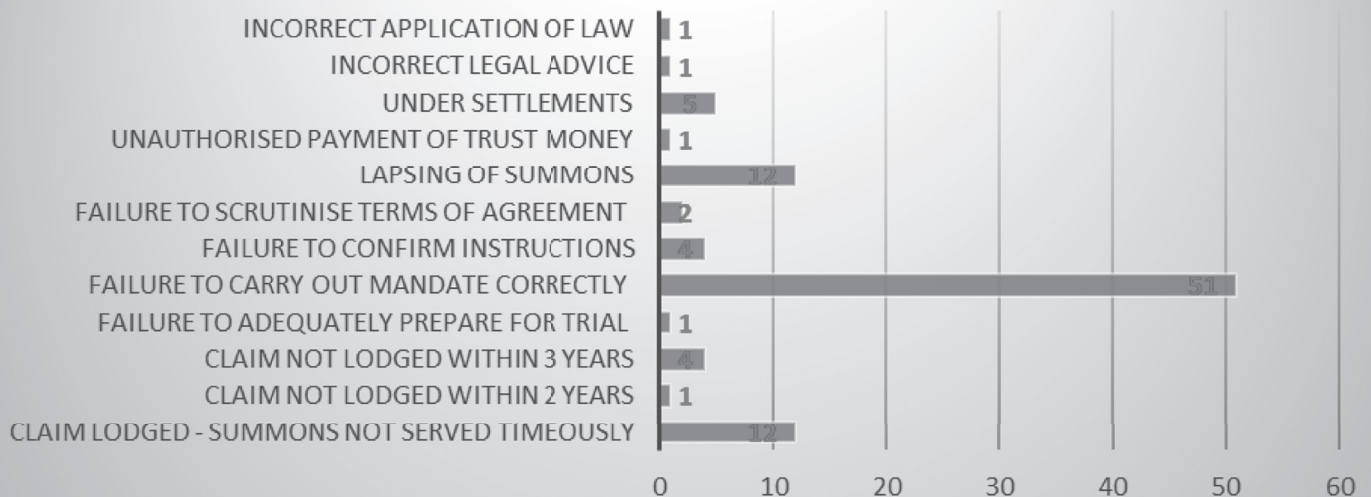
□ In *Van Heerden & Brummer Inc v Bath* (356/2020) [2021] ZASCA 80 (11 June 2020) and *McMillan v Bate Chubb & Dickson Incorporated* (Case no 299/2020) [2021] ZASCA 45 (15 April 2021) the SCA considered when prescription begins to run in an action for damages against an attorney.

It would not be possible to list all the judgements handed down on the prescription question in this article. Practitioners are urged to study the individual matters where



## RISK MANAGEMENT COLUMN continued...

### Breakdown by underlying error or omission



they are dealing with prescription and to carefully consider whether there are any grounds on which a special plea of prescription can be challenged.

If you come across any cases where a novel legal point on prescription (or any other area that may affect the liability of legal practitioners) arises please bring it to our attention. There are many proverbial grey areas in this interesting legal subject.

### Errors and omissions that resulted in claims

What errors and omissions are firms making that ultimately result in claims? Drilling down into the underlying reasons for the claims, the LPIIF team has identified the underlying

causes listed in the picture above as the main reasons for claims notified last year.

### Exclusions

Some of the claims notified to the LPIIF have not been indemnified. In the past five years, claims have mainly been excluded because (the percentage of the overall exclusions and the applicable clause of the policy are indicated next to each category) the claim for compensation -

- does not arise out of the provision of legal services by the insured legal practitioner (4%) (clause 1);
- relates to a trading debt of the legal practice (9%) (clause 16 (a));
- arises from or is in connection with misappropriation or unauthorised borrowing of trust money or property (17%) (clause 16(b));

tion with misappropriation or unauthorised borrowing of trust money or property (17%) (clause 16(b));

- arose from or was connected to a fine, penalty, punitive or exemplary damages against the insured or an order to that the insured pay costs *de bonis propriis* (3%) (clause 16(g));
- arose from circumstances where the insured legal practitioner either received or paid out funds, in trust or otherwise, where the receipt or payment of the funds was unrelated an existing direct instruction to provide specific legal services or where the insured merely acted as a conduit for the transfer of funds to the payee. This exclusion applies, for example, in circumstances where the

## RISK MANAGEMENT COLUMN continued...

legal practice merely acts as a so-called paymaster or where the practice merely acts as a conduit for funds unrelated to an existing/ current instruction to carry out legal services (4%) (clause 16 (m));

- is in respect of a defamation claim brought against the insured (5%) (clause 16(n)); or
- arises out of cybercrime (52%) (clause 16(o));

The remaining 6% of claims not indemnified relate to other grounds stated in the policy.

### Cybercrime

It will be noted that most of the excluded claims relate to the cybercrime. It is concerning that several legal practices are still falling victim to cybercrime despite the numerous warnings published by the LPIIF and many other entities regarding cyber-risk. Insurers internationally have reported a sharp increase in cybercrime activity in the last 22 months as legal practitioners transitioned to remote or hybrid working environments in the wake of the coronavirus pandemic. It is important that legal practitioners ensure that there is a heightened awareness of cybercrime in their firms and that there are appropriate measures in place to respond to this increasing risk. The

value of cybercrime claims rejected by the LPIIF in terms of clause 16(o) was R142,691,667 as at 31 December 2021. Cybercrime claims with a total value of R11,266,003 were rejected in the 2021 calendar year. Legal practitioners and their staff are urged to have regard to the following for information on cyber risks faced by practices:

- “The professional indemnity claims trends”, *De Rebus*, November 2021;
- “Ongoing cybercrime threats”, *De Rebus*, May 2021;
- The December 2020, November 2019, August 2019 and August 2018 editions of the Risk Alert Bulletin;
- *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 June 2019) (Tokota J);
- *Galactic Auto (Pty) Ltd v Venter* (LP) (unreported case no 4052, 14 June 2019) (Makgoba JP); and
- *Lochner v Shaefer Incorporated and Others* (ECD) (unreported case no 3518/16, 24 January 2017) (Plasket J).

Prior editions of the Risk Alert Bulletin are available on the LPIIF website on the risk management page. The articles

previously published in *De Rebus* can, likewise, be accessed on the website of that publication at [www.derebus.org.za](http://www.derebus.org.za)

A coordinated, concerted effort by all stakeholders is required to stem the ongoing cybercrime pandemic. We have made several attempts to get the law enforcement and prosecution agencies to prioritise the cybercrime matters. Unfortunately, our efforts have not yielded much success. We call on all legal practitioners and the various bodies in the profession, the regulators and the voluntary associations, to assist wherever they can to get the authorities to recognise the significant risk posed by cybercriminals to legal practitioners, their clients, the property industry and society in general. The reports in the media on the arrest of some cyber syndicates in the last quarter of 2021 are noted. This is a welcome development, and we will monitor how the matters play out in the court system.

The extent posed by cyber criminals to conveyancing practices in particular can be seen from the suggestion by one regulatory body abroad that consideration be given to making cyber insurance mandatory for conveyancers—see <https://www.legalfutures.co.uk/latest-news/conveyancers-might-be-forced-to-buy-cyber-insurance-in-pii-rejig>

## RISK MANAGEMENT COLUMN continued...

### The coronavirus pandemic

The coronavirus pandemic, state of national disaster and the new normal have now been with us for almost two years. Many of the measures implemented by firms to operate in the current environment may be permanent.

The new way of working forced firms to rely on technology to a larger extent. The new manner of operation has, however, introduced its own risks. Some of the challenges facing legal practitioners were addressed in the article “Is a perfect storm on the way?” which was published in the March 2021 edition of *De Rebus*. The article “Take time to check that all the basics are done correctly” in the January/February 2022 edition of *De Rebus* makes some risk management suggestions for firms to consider in the current operating environment.

At the time of writing, I am not aware of a comprehensive study that has been conducted on the impact of the coronavirus pandemic on the legal profession in South Africa. Nevertheless, legal practitioners have been impacted by the pandemic in their professional and personal lives in some way or another.

I also write at a time when the offices of the Master of the High Court have not reverted

to full operating capacity yet in the wake of the cybercrime attack that occurred on 7 September 2021. The impact of this has been significant for the members of the public who require various services to be provided by the Master’s office. Those legal practitioners who deal with the administration of estates have also been significantly affected. The timing of the interruption of services could not have come at a more inopportune time as many practitioners were already facing vulnerabilities as the country was just emerging from the third wave of the pandemic and entering its 18<sup>th</sup> month under lockdown and the national state of disaster.

The risk transfer measures that have been brought to the fore by the coronavirus pandemic include business interruption insurance. I am not aware whether any legal practices have managed to obtain indemnification from their respective insurance companies under their business interruption policies. The judgements handed down in *Santam Limited v Ma-Africa Holdings (Pty) Ltd & Another* (255/2021) [2021] ZASCA 141 (7 October 2021) and *Guardrisk Insurance Company v Café Chameleon* [2020] ZASCA 173; [2021] 1 All SA 707 (SCA; 2021 (2) SA 323 (SCA)) relate to indemnification for losses suffered by businesses in the wake of the declaration

of the national state of disaster and the implementation of the lockdown measures. The cases have received a lot of media coverage. The pandemic forced many insured entities to scrutinise the wording of their respective business interruption policies. Some insurers have also reconsidered their policy wording and, where necessary, amended the wording to specifically exclude losses that arise from a pandemic. Legal practitioners must consult with their insurance brokers and intermediaries, do a comprehensive assessment of the cover they have in place and, where necessary, ensure that any potential gaps in cover are addressed.

One of the main concerns raised by legal practitioners at the outset of the pandemic related to prescription. The risk management suggestions published in the April 2020 edition of the Risk Alert Bulletin and the suggestions for legal points to be considered in response to a prescription point raised (“Arguments for a delay in the completion of prescription and expiry periods during the lockdown period”) in the June 2020 edition remain relevant.

There are currently a lot of debates going on across the globe on the future operating models for law firms. Various opinions have been expressed ranging from those who advocate a return to offices on a full-time



## RISK MANAGEMENT COLUMN continued...

basis, proponents of a hybrid operating model with time split between offsite and in-office working and those who prefer a remote working arrangement on a permanent basis. There is no one size fits all approach to this question. Each firm will need to decide on an appropriate model based on its own unique requirements. Not all types of legal work can be carried out remotely, though some types of work and some components of the legal service can readily be carried out offsite. Issues regarding supervision of staff, training and monitoring the quality of the output must be considered. Invest in the appropriate secure information and technology solutions. It is important that the internal controls are still applied whether the team is working remotely, in a hybrid model or at the office.

One of the points raised in other jurisdictions is that some practitioners decried the isolation felt during the hard lockdown periods. Some areas of legal practice are not as well suited to working in silos than others. Similarly, some legal practitioners prefer working on their own while others do not. One of the points raised was that the remote working conditions took away the ability of practitioners to run problems by their colleagues in the firms, that the collegial atmosphere and cooperation were lost and younger practitioners felt that they were left to their own de-

vices (literally and figuratively) in some instances. The longer working hours, the expectation that legal practitioners must always be 'switched on' and the intrusion into personal time are also concerns that have been raised. The increased risk of burnout and other psychological matters has also been raised in the discussions. Please take account of these human factors when you consider the appropriate future operating model for your practice. Remember that these are factors which result in people taking their eyes off the proverbial ball and that is fertile ground for errors and omissions to occur.

### Loadshedding

I write this as the threat of loadshedding is, once again, on the horizon. A lack of access to electricity for long periods will have a substantial impact on the ability of legal practitioners to operate. This risk must also be considered by legal practitioners and, where necessary, alternate power solutions must be sought. The technological solutions used in legal practices require a reliable power supply. A regular disruption of the power supply will lead to a lot of down time and affect your service offering to clients, the ability to earn an income and your achievement of the milestones in a matter. The risk of losing an instruction because you cannot operate optimally

or even facing a claim because you failed to meet a deadline or fulfil your mandate adequately is real. In the last year I have had sight of several cases where loadshedding and the loss of documents due to servers crashing have been raised in applications for condonation of a failure to meet a due date.

Loadshedding and other interruptions to services are some of the business interruptions that must be considered by all firms when assessing risks in the broad operating environment.

### Conclusion

It is hoped that 2022 will be a better and more predictable year for legal practitioners, the country and the world. Unfortunately, prior experience shows that each year throws new risk management challenges at the profession. Constant assessment of the operating environment and the development of appropriate measures to deal with the challenges that emerge is one of the best methods for dealing with what lies ahead.

May we all learn from prior mistakes and not take a *laissez-faire* attitude to risk management into 2022.