

RISKY BUSINESS: MANAGING RISK TO INNOVATE, CHANGE AND DEVELOP

Can a state lawfully decline to receive
asylum seekers? **South Africa's
involvement in the Afghanistan
refugee crisis**

When is the obvious not so obvious?
**A discussion on regs 2(1)(b) and 2(2) of the
Road Accident Fund Regulations**

Administration
and winding-up
of a deceased
estate

**Intestate
succession –
heterosexual
life partners**

**Keep your
guard up**

**Who may
appear before
a Taxing Master?**

**An employee is handed a
red card for his actions**

**Can a car sold under
finance, or a suspensive
condition be attached and
sold in execution by a Sheriff?**





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FEATURES

12 Risky business: Managing risk to innovate, change and develop

The purpose of risk management is not to avoid all risk but to help an organisation reach its objectives. Without taking risks, the organisation will never have a chance to develop and grow its business. Legal compliance practitioner, **Sipho Nkosi**, writes that the whole goal of risk management is to make sure that the organisation only takes the risks that will help it achieve its primary objectives while keeping all other risks under control. Mr Nkosi writes that organisations should determine their level of risk tolerance to always ensure that appropriate risk responses are considered and implemented.

15 Can a state lawfully decline to receive asylum seekers? South Africa's involvement in the Afghanistan refugee crisis

Following the Taliban takeover of Afghanistan in the last weeks of August 2021, a request was sent to South Africa (SA) to accommodate 126 refugees for six months. The South African government responded that it was not in a position to accommodate a request to host the refugees. It further said it was already a home to a substantial number of refugees and was seized with addressing their needs and that most of them already benefiting from social assistance and free medical health programmes offered by the country. Law lecturer, **Dr Milton Owuor**, notes SA has acceded to international refugee legal instruments, namely the UN Refugee Convention and the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and asks if these Conventions entitled the Afghan refugees to be qualified for acceptance into SA as asylum seekers. Dr Owuor further examines the principle of non-refoulement as it relates to the refusal to allow the 126 refugees into the country.

17 When is the obvious not so obvious? A discussion on regs 2(1)(b) and 2(2) of the Road Accident Fund Regulations

Legal practitioner, **Marius van Staden**, discusses the case of Legal Practitioners Indemnity Insurance Fund NPC v The Minister of Transport and The Road Accident Fund (GP) (case no 26286/2020, 21-6-2021) (Janse van Nieuwenhuizen J) in which the Gauteng Division of the High Court declared the provisions of regs 2(1)(b) and 2(2) of the Road Accident Fund (RAF) Regulations, 2008 to be inconsistent with the Constitution and to the extent that the regulations relate to minors and persons under curatorship, be set aside. In so doing the court set aside the two years' limitation period for the lodgement of RAF claims in respect of unidentified vehicles, as far as minors and persons under curatorship were concerned. Mr van Staden writes that the RAF regulations were set aside for clear and valid reasons but says the question remains: Why is the obvious sometime not so obvious?

19 With her energy and zest to serve, Baitseng Rangata, stands on shoulders of remarkable women

Legal practitioner and founder of BR Rangata Attorneys, **Baitseng Rangata**, features in this month's Women in Law column. *De Rebus* news reporter, **Kgomotso Ramotsho**, spoke to Ms Rangata about her decision to become a legal practitioner, her time as Co-chairperson of Maponya Inc, the starting up of her own firm and her future aspirations. Ms Rangata also spoke about being inspired by Justice Yvonne Mokgoro, becoming the Chairperson of the Black Lawyers Association and her goals for BR Rangata Attorneys.

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Criticism of the judiciary in a constitutional democracy

It goes without saying that in a constitutional democratic country, such as ours, the judiciary is the ultimate guarantor of the rule of law and all that it encompasses. Added to that, the judiciary has an important role of being the final arbiter in all disputes that society has. Therefore, criticism of the judiciary should be made with consideration of the position the judiciary holds in the ecosystem of a constitutional democracy. Of utmost concern – and a potential threat to constitutional democracy – is when there are allegations of the judiciary being captured or seeming to toe a particular political line.

In July 2015, the then Co-chairpersons of the Law Society of South Africa, Richard Scott and Busani Mabunda, attended a press conference by former Chief Justice Mogoeng Mogoeng to support the judiciary in its call for respect for its independence and the rule of law. The aim of the press conference was to discuss the repeated and unfounded criticism of the judiciary during that time. ‘Criticism of that kind has the potential to delegitimise the courts. Courts serve a public purpose and should not be undermined,’ said the former Chief Justice.

In his statement, on behalf of the judiciary, the former Chief Justice noted that a judge’s principal article of faith is to adjudicate without fear, favour or prejudice. ‘When each judge assumes office, she or he takes an oath or affirmation in the following terms: To be faithful to the Republic of South Africa; to uphold and protect the constitution and the human rights entrenched in it; to administer justice to all persons alike without fear favour or prejudice and in accordance with the Constitution and the law. To judges this obligation and the oath are sacred.’ He added that, in terms of the Constitution, no arm of the state is entitled to intrude on the domain of the other. However, the Constitution requires the judiciary ultimately to determine the limits and regulate the exercise of public power.

Speaking on the criticism of the judiciary former Chief Justice noted that: ‘Judges like others should be susceptible to constructive criticism. However, in this regard, the criticism should be fair and in good faith. Importantly the criticism should be specific and clear. General gratuitous criticism is unacceptable.’ The former Chief Justice acknowledged that judges, like other mortals, err, but he said that several levels of courts – through an appeal mechanism – serve a corrective purpose when judges make a

mistake. Moreover, judgments were often subjected to intensive peer and academic scrutiny and criticism. The Chief Justice rejected the notion that in certain cases judges had been prompted by others to arrive at a predetermined result. He added that, in a case in which a judge did overstep, the general public, litigants or other aggrieved or interested parties should refer the matter to the Judicial Conduct Committee of Judicial Service Commission (Barbara Whittle ‘*Profession stands behind Chief Justice and judiciary in raising concern on attacks on the judiciary and the rule of law*’ 2015 (Aug) DR 14).

In August 2019, at the Gauteng Attorneys Association annual general meeting, guest speaker retired Judge, Kathy Satchwell, said: ‘The judiciary is criticised. There is nothing wrong with this. We are all subject to scrutiny. It is why we write judgments so that they can be read and analysed and discussed and debated. Where wrong, they are taken on appeal and again and again.’ She pointed out that criticism of judgments and rulings is also expected. She said the judiciary must be open to scrutiny. ‘We must expect debate and [engage] with the law. But judges speak through their judgments. We do not defend ourselves or our work in the public arena,’ Judge Satchwell added (Kgomoiso Ramotsho ‘*The judiciary should be left to do its work*’ (www.derebus.org.za, accessed 21-2-2022).

In *Mkhatshwa and Others v Mkhatshwa and Others* (CC) (unreported case- no CCT 220/20, 18-6-2021) (Khampepe J (Mogoeng CJ, Jafta J, Madlanga J, Majiedt J, Mhlantla J, Pillay AJ, Theron J, Tlaletsi AJ and Tshiqi J concurring)) the Constitutional Court (CC) held that courts and their members are by no means immune to public criticism and accountability to those they serve. However, that does not mean that it is open to a litigant to level unfounded and scurrilous attacks against judicial officers to further their own end. The CC pointed out that it enjoys a sacrosanct power and privilege to uphold the law in furtherance of the constitutional project. The CC added that litigants who resort to the kind of tactics displayed in this matter must beware that they are unlikely to enjoy the CC’s sympathies or be shown mercy in relation to costs (Kgomoiso Ramotsho ‘*Biowatch principle does not apply to a matter that is not of a constitutional nature*’ 2021 (Aug) DR 35).

While presenting his presidential report at the annual general meeting of the National Association of Democratic Law-



Mapula Oliphant – Editor

yers (NADEL), the President of NADEL, Deputy President of the Law Society of South Africa and Member of the Judicial Service Commission, Mvuzo Ntyesu pointed out that the judiciary is the last line of defence in a constitutional democracy and that there must never be a suspicion that the judiciary is captured. (Kgomoiso Ramotsho ‘*The hope of society lies on the shoulders of progressive legal practitioner*’ (www.derebus.org.za, accessed 21-2-2022).

In as much as a constitutional democracy encourages healthy debate and dissection of important issues affecting its citizens, this should be done in a method that ensures that the very same democracy is not threatened. When a need arises for the judiciary to be criticised, this should be done in a manner that is constructive and does not attack the judiciary or democracy. The importance of the judiciary is quite apparent in democratic South Africa; therefore, its independence should be safeguarded. □

Would you like to write for De Rebus?

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

- Upcoming deadlines for article submissions: 22 March; 18 April and 23 May 2022.



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By
Nomfundo
Jele

Risk Management and Compliance Programme for legal practitioners

In terms of the Financial Intelligence Centre Act 38 of 2001 (FICA), a legal practitioner who practices as defined in s 1 of the Attorneys Act 53 of 1979 (the Attorneys Act) are accountable institutions.

The erstwhile law societies, as contemplated in s 56 of the Attorneys Act are listed as the supervisory bodies for attorneys in terms of sch 2 of FICA. In a communication dated 8 January 2020, the Legal Practice Council (LPC), among other, indicated that:

‘The Financial Intelligence Centre (the Centre) advised the Legal Practice Council [LPC], as the successor to the Law Societies, that the Minister of Finance had decided, prior to the LPC coming into being on 1 November 2018, to remove the Law Societies from Schedule 2 to FICA and that the Centre would take over that supervisory function.

The amendment to Schedule 2 has been delayed, but the Centre asked the Council to enter into a Memorandum of Understanding [(MOU)] in terms of which the Council delegates its powers to the Centre until such time as the amendment takes place.

The Council agreed to enter into such an MOU, and this was signed by the LPC on 5 November 2019, on which date it took effect.

Attorneys should therefore note that the Centre is now the entity that supervises compliance by attorneys with FICA.’

While amendments to FICA are still

pending, the Law Society of South Africa (LSSA) reminds attorneys that:

- All practising attorneys (in its 2020/21 Annual Report, the FIC states that attorneys register with it based on the number of main businesses and branch offices, rather than the individual practitioners active in each office or branch) are in terms of s 43B of FICA required to:
 - register as accountable institutions with the FIC. For more information on how to register, see: www.fic.gov.za.
 - notify the FIC in writing within 90 days of any changes to the particulars furnished to the FIC.
- The LPC requires proof of registration in terms of FICA (ie, ORG ID) when opening a legal practice. Legal practitioners must, in support of the application for the Fidelity Fund Certificate, confirm its annual statement on trust accounts, that it is registered as an accountable institution in terms of FICA.
- Section 42 of FICA provides that attorneys, as accountable institutions, must develop, document, maintain and implement a Risk Management and Compliance Programme for anti-money laundering and counter-terrorist financing. The programme must enable the attorney to identify, assess, monitor, mitigate and manage the risk that the provision of services rendered by the attorney may involve or facilitate money laundering activities or the financing of terrorist and related activities.

- Legal practitioners must submit regulatory reports as required, among other, in terms of ss 28 and 29 of FICA, namely, cash threshold reports and suspicious and unusual transaction reports to the FIC.

The LSSA has prepared guidelines for attorneys and firms to help them prepare their unique Risk and Management Compliance Programmes, which can be accessed on the LSSA’s website at www.LSSA.org.za.

LSSA AGM – save the date!

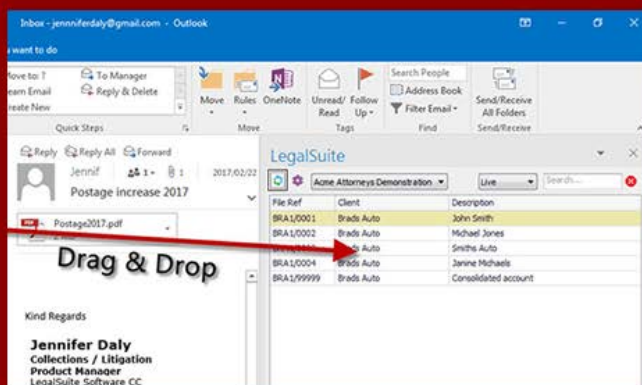
Please note that the Law Society of South Africa’s annual general meeting and conference will take place on 23 March 2022. The AGM will be held at Emperors Palace in Kempton Park, Johannesburg and will immediately be followed by the Southern African Development Community Lawyers Association annual conference and general meeting, which is scheduled for 24 to 25 March 2022 at Birchwood Hotel in Kempton Park, Johannesburg. More information will be communicated in due course.

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Meeting of the LSSA and the LPC

The Law Society of South Africa (LSSA) will set up a meeting with the new LPC Council. Legal practitioners are requested to advise

the LSSA on any important issues that they want the LSSA to raise. E-mails can be sent to nomfundom@LSSA.org.za.

Call for nominations for LPC provincial council elections

The Law Society of South Africa (LSSA) urges legal practitioners to participate in the election of the new Legal Practice Council (LPC) provincial councils.

At the beginning of the year, the LPC called for nominations of practising attorneys and advocates for the elections to the LPC Provincial Councils. Attorneys could only be nominated and seconded by attorneys, and advocates could only be nominated and seconded by advocates.

Six attorneys and four advocates need to be elected in eight of the nine provincial councils, with the Gauteng Provincial Council needing eight attorneys and four advocates.

Nominations opened on 18 January 2022 and closed on 31 January. Elections started on 22 February and will end on 7 March. The results will be announced on 11 March 2022.

To read GN761 GG45770/17-1-2022 from the Government Gazette, please visit www.gov.za.

Reminder to register for professional examination

The Law Society of South Africa (LSSA) would like to remind practitioners that the registration for the first session for the 2021 examinations is now closed.

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.

Advocates Admission Examination

- 6 April Paper 1 and 2
- 7 April Paper 3 and 4
- 13 April Paper

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

Visit www.lpc.org.za for more information and download the notice at www.lpc.org.za.

Company and close corporation reinstatement requirements

The Companies and Intellectual Property Commission (CIPC) have circulated a practice note, which took effect on 1 January 2022. It deals with the requirements for the reinstatement of companies and close corporations. Visit www.cipc.co.za to read the practice note.

Follow the LSSA on social media to get the latest information as it happens!

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Notice on Johannesburg Unopposed Motion Court

At the end of 2021, Deputy Judge President, Roland Sutherland issued a circular to announce, among other things, that the number of judges in the unopposed motion court would be doubled in term 1 of 2022, which would reduce the lead time to a hearing. At the beginning of January, Judge Sutherland issued a notice to all litigation attorneys in Gauteng to let them know that the required number of judges cannot be made available.

Judge Sutherland also states that some practitioners took up the invitation to accelerate the hearing date of their matters and these revised dates have now had to be withdrawn. Judge Sutherland concluded the notice by saying that although they will not be able to introduce any innovations before the second term of 2022, consultations with the leadership of the legal profession will be conducted regarding the organisation of the unopposed motion court, and other courts, which will include the prospects of acting appointments to expand the judicial capacity of the court.

Visit www.LSSA.org.za to read the notice.

Contingency Fees Act

Practitioners are reminded that the LPC has published Rules in terms of s 6 of the Contingency Fees Act 66 of 1997. These rules can be found in GN525 GG42739/4-10-2019 at www.gov.za.

Nomfundo Jele, Acting Communications Manager, Law Society of South Africa, nomfundom@lssa.org.za



By
Simthandile
Kholelwa
Myemane

Keep your guard up

Several articles have been written around risk management, internal controls and due diligence, as well as 'know-your-client' as required in terms of the Financial Intelligence Centre Act 38 of 2001 (FICA). This is a subject that one can never claim to have exhausted because there is a particular risk that one faces daily, and so do businesses, including trust legal practices. Believing that you have exhausted all avenues around managing the risks in your business, is a risk on its own because you close-off from seeing potential events that can negatively affect your operations and deciding on your responses to those potential events.

Reality is that while you run your trust legal practice, someone is running another business, which may ultimately destroy what you are busy building. Even if you call it a 'black-market business' that they are running, it still is a business with strategic objectives, which its strategic partners are growing and putting every effort into, while protecting its discovery by law enforcement agencies. Participants in this market will stop at nothing to see their objectives achieved, and that is to reap significant profits from conducting illicit businesses.

Many definitions are given to black-market by various text. According to the Market Business News, 'Black market – definition and meaning' (<https://market-businessnews.com>, accessed 13-1-2022): 'The *black market*, *underground market*, or *underground economy* is a market where people buy and sell products illegally. The term refers to the business activity rather than the products themselves' (my italics).

What does this mean for a trust legal practice?

Let us recap on previously published articles, which readers are encouraged to read together with this article. We already established that trust legal practices are accountable institutions as determined

under sch 1 of the FICA. This we dealt with in the article, '[How FICA affects you and your legal practice](#)' 2019 (Oct) DR 6. We further established the requirements posed on trust legal practices and relating to customer due diligence and risk management and compliance programme. This is covered in the article, '[Customer due diligence and risk management and compliance programme](#)' 2019 (Dec) DR 6.

It is mandatory for an accountable institution to conduct due diligence on their potential clients and to know their clients. Conducting a due diligence involves doing background checks and other forms of screening of a potential client for purposes of assessing the risk that the potential client would be bringing to the accountable institution and using the outcomes of that due diligence to decide on whether to accept the potential client or not. If this process is not done, or not done thoroughly, the accountable institution could find itself onboarding unwanted risk that it may fail to manage.

A further requirement on trust legal practices is premised on knowing their clients. Both customer diligence and knowing a client are not and cannot be a once-off activity. At the time of accepting a client, certain representations may have been made by the client to the trust legal practice. However, it remains a test if those representations hold throughout the period of the client remaining the client of the trust legal practice. Due diligence conducted may have revealed certain information about the potential client, which information may have been true and relevant at the time of conducting the due diligence and yielded certain risk levels that the trust legal practice acted on. Things do change as time passes, and certain things may change the risk assessment outcomes of the client if checked on. After accepting a new client, there could be indications that the client is involved in suspicious activities. If the trust legal practice does not on a continuous basis conduct customer diligence (best referred to as 'ongoing due diligence') and 'know your client exer-

cises', the client can easily use the trust legal practice as a conduit to advance the objective of their illegal activities.

Money laundering and the financing of terrorist activities are some of the illegal activities that the world continues to battle with and requires the involvement of everyone to combat. In the past, authorities focused on solving crimes, but now also use deterrents in the fight of crime. Money that criminals launder is obtained from illegal activities, such as human trafficking, drug trafficking, corruption, extortion, etcetera. It threatens the legitimate economy and integrity of financial institutions with unwanted effects on the economic power and may corrupt society. Some of the areas that fighting money laundering may assist in are societal importance, identification of tax and other financial crimes, location and confiscation of criminal assets, and the legal context. Readers are encouraged to read more on the topic in *Money Laundering and Terrorist Financing Awareness Handbook for Tax Examiners and Tax Auditors* (Paris: OECD 2019).

We now look at the practical examples of what a trust legal practice may potentially be faced with in an effort by the criminals to conceal the origins of the money. One way in which money launderers operate is to create complex transactions that are confusing and, in that complexity, ensuring that some elements are not traceable or not easy to trace.

- There are instances where legal persons that become clients of trust legal practices, change ownerships, forms of business, etcetera. The changes taking place may bring about complications in that they may attract the application of certain legislation that may not have been applicable before or eliminate legislation that was previously applicable and may even have their registration in regions where there is little or no legislation for them to be unveiled. This would possibly be because the beneficial owners continue to research ways of beating the system and the best ways to conceal their activities. These

are some of the changes that the accountable institution needs to concern itself with and conduct a thorough due diligence, and carefully follow questioning the changes. The frequency of changes to these aspects, if too often, including if they occur while the client is engaged with the trust legal practice, should be reason enough for the accountable institution to conduct further due diligence on the client to determine the real reasons for the frequent changes. It may be nothing untoward, but it could well be something that the trust legal practice should in fact concern itself with for purposes of determining whether ongoing relationship should be maintained and/or if filing a suspicious activity and/or transaction report to the Financial Intelligence Centre (the FIC) is required. Regions with little or no legislation require that legal practitioners are on the know-how of such regions as they are often published, and not be naïve to that information.

- With the understanding that trust legal practices act on the instructions of their trust creditors, clients with ulterior motives may use this to their advantage. Clients aiming to use trust legal practices to pursue their illegal objectives study the way the institutions operate, understand the legislation surrounding them, and identify areas in the system that they can use to their advantage. While reallocation of funds between two or more accounts is permissible and legal, such journal entries can also be abused by individuals seeking to create complex transaction trails for purposes of pursuing their own ill-thought objectives. For example, a client accepted by a trust legal practice may later introduce other matters or clients to the trust legal practice and start authorising journal entries reallocating funds from one account to another. This the client will not do

overnight following acceptance as a client but will first develop a rapport with the trust legal practice and once comfortable that this is achieved start introducing methods to pursue their hidden objectives. They rely on 'trust' to manipulate the trust legal practice and the system. They may authorise a reallocation of funds between accounts and later reverse the instruction and do this between various accounts ensuring that they cause as much confusion as they possibly can. This can be one of the indications of potentially laundering money and ongoing due diligence should highlight concerns around such and if the concerns are very strong, suspicious activity and/or transactions should be reported to the FIC for further investigation.

When developing a risk management and compliance programme for the trust legal practice, these are some of the areas that the programme should not ignore. The programme should consider various potential developments that the trust legal practice may confront and address how such should be dealt with when they occur. The examples cited in the foregoing paragraphs should be covered in the programme in terms of how and what to do when they occur and that should be applied without exception, irrespective of who the client in question is. Staff at the trust legal practice should be trained to always apply the required actions to similar circumstances. This ensures the effectiveness of the measure that the trust legal practice employs. Failure to do so should be punishable and that can serve as a deterrent for staff to do the right thing, all the time, without fail.

Conclusion

In conclusion, trust legal practices should always be on guard for clients who may abuse them and use them for further advancement of their illegal practices. Where suspicion occurs,

trust legal practices have an obligation to report such suspicion and not ignore it. They also cannot only terminate the relationship between themselves and the suspicious client but must report their suspicion to the FIC as required in terms of FICA. Failure to report suspicion to the FIC could suggest conspiracy and amounts to failure by the trust legal practice to assist other authorities in the fight against crime. All accountable institutions are expected to become part of the chain for combating crime, irrespective of its origination.

Do not be dissuaded from acting as expected and from being a trusted accountable institution and comply with the requirements of all legislation surrounding your operations.

No matter how much mutual trust you have with your clients due to the established rapport with them, never relax your internal controls and always keep your guard up. This may not only keep you in business but also positively contribute to the combating of illicit activities.

Simthandile Kholelwa Myemane
BCom Dip Advanced Business Management (UJ) Cert Forensic and Investigative Auditing (Unisa) Certified Control Self Assessor (Institute of Internal Auditors) Cert in Management and Investigation of Cyber and Electronic Crimes Cert in Fraud Risk Management Cert in Law for Commercial Forensic Practitioners Cert in Investigation of Financial Crimes Cert in Investigation and Detection of Money Laundering Cert in Economic Crime Schemes (Enterprises University of Pretoria) is the Practitioner Support Manager at the Legal Practitioners' Fidelity Fund in Centurion.



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By
Mohammed
Moolla

Administration and winding-up of a deceased estate

The administration of deceased estates is governed by the Administration of Estates Act 66 of 1965 (the Act).

On the death of a person, the surviving spouse or nearest relative residing in the district where the death has taken place, shall within 14 days give notice of death substantially in the prescribed form to the Master of the High Court. 'Where the deceased was living in ... South Africa [(SA)], the estate must be reported to the Master of the High Court in whose area of jurisdiction the deceased was living 12 months prior to his/her death' (www.justice.gov.za, accessed 1-2-2022). Where the deceased was living outside SA at the time of their death, the estate may be reported to any Master of the High Court provided that it is reported to one Master's Office. 'Any person who has any document ... purporting to be a Will in his possession at the time of or at any time after the death of any person ..., shall, as soon as the death comes to his knowledge, transmit or deliver such document to the Master [of the High Court]' (s 8(1) of the Act).

'No person shall liquidate or distribute the estate of a deceased person, except under letters of executorship granted or signed ... under this Act' (see s 13).

Reporting a deceased estate

'The reporting documents will differ slightly depending on the value of the estate and the type of appointment required.

If the ... estate exceeds R 250 000, letters of executorship must be issued and the full process prescribed by the Administration of Estates Act must be followed.

However, if the value of the estate is less than R 250 000, the Master of the High Court may dispense with letters of executorship and issue letters of authority in terms of section 18(3) of the Administration of Estates Act' (<https://www.justice.gov.za>, accessed 1-2-2022).

The following reporting documents will be required:

- Death Notice form - J294.
- The original or certified copy of the death certificate.

- The original or certified copy of marriage certificate or acceptable proof of marriage as accepted by the Master or proof of registration of a customary marriage or proof of a religious marriage (Muslim/Hindu) declaration confirming the existence of marriage.
- All original wills or codicils or any document purporting to be such.
- Completed next of kin affidavit (J192 form).
- Completed inventory (J243 form) showing all assets of the deceased.
- List of creditors is optional and if available at the time should be listed.
- Nominations by the heirs for the appointment of a Master's representative in the case of an intestate estate or where no executor has been nominated in the will or the executor declines the appointment.
- Acceptance of Master's Direction (J155 form) or acceptance of trust as executor in duplicate completed by person accepting appointment.
- Certified copy of the identity document of the person accepting appointment together with recent utility bill confirming their address.

On receipt of the documents, the Master of the High Court will issue a Master's Direction in terms of s 18(3) or letters of executorship, depending on the value of the estate as reflected in the inventory.

Banking accounts

'An executor -

shall, unless the Master otherwise directs, as soon as he or she has in hand moneys in the estate in excess of R 1 000, open a cheque account in the name of the estate ... and shall deposit therein the moneys which he or she has in hand and such other moneys as he or she may from time to time receive for the estate' (s 28 of the Act). An executor shall be required by the Master to do so, notify the Master in writing of the bank details wherein such an account has been opened and furnish the Master with bank statements or such other sufficient evidence of the position of the account (see s 28 of the Act).

Notice to lodge claims

Once the letters of executorship have been issued, the executor shall initiate

a notice for debtors and creditors to be published in the *Government Gazette* and in one or more of the newspapers in the area in which the deceased had resided at least 12 months prior to their death. The said notice of debtors and creditors calls on persons having claims against the estate to lodge such claims with the executor within a period not less than 30 days or more than three months from the date of the publication, which includes debtors to pay any claims due to the estate. (see s 29 of the Act).

Liquidation and distribution account

The executor shall after the last day of the period specified in the notice referred to in s 29(1) of the Act and within six months after letters of executorship having been granted or such period as the Master may allow, submit to the Master an account in the prescribed form, supported by vouchers of the liquidation and distribution of the estate (see s 35(1) of the Act). The executor shall also in the prescribed form submit an estate duty schedule.

Inspection of the accounts

The executor's account shall, after the Master has examined and issued a memorandum dealing with any queries also has authority to advertise the account to lie open at the office of the Master's Office, as well as the office of the Magistrate of such district where the deceased was residing for not less than 20 days for inspection by any person interested in the estate. The need to lie for inspection with a Magistrate only arises if the deceased did not reside in the city or town where the Master's Office is situated.

The executor shall give notice of the account to lie for inspection by advertisement in the *Government Gazette* and in one or more newspapers circulating in the district in which the deceased was ordinarily resident at the time of their death (see s 35(5)).

On expiry of the period, the Magistrate (where the account lay for inspection at a Magistrate's Office) shall endorse on each account that the account has been laid out for inspection without objection and transmit the account to the Master.

Objections to the accounts

Any person interested in the estate, may at any time before the expiry of the period allowed for inspection, lodge an objection in duplicate with any reasons for objection to any account. The Master shall deliver or transmit by registered post to the executor a copy of any objection with any documents in support thereof. The executor shall within 14 days after receipt of the copy of objection, transmit copies of their comments thereon to the Master.

The Master shall consider the objection and comments of the executor and if the Master finds the objection is well-founded or the account is incorrect they may direct the executor to amend the account or may give such direction as they may think fit.

Any person aggrieved by any such di-

rection of the Master or by the refusal of the Master to sustain an objection so lodged, may apply to the High Court within 30 days for an order to set aside the Master's decision. The High Court may make such an order as it may think fit.

Distribution of estate

When an account has been laid out for inspection and no objection has been lodged, the executor shall forthwith pay the creditors and distribute the estate among the heirs in accordance with the account. The executor must lodge with the Master the receipts and acquittances of such creditors and heirs. The executor must also lodge a certificate by the registration officer or conveyancer specifying registrations, which have been effected by the executor.

Once the letters of executorship have been issued, all the property of the deceased vests in the executor. In terms of the Act the executor is empowered to take full control of all assets forming part of the estate. The duties of the executor, include selling the property; realising its proceeds; settling debts and paying out the balance to the heirs. The executor stand in the proverbial shoes of the deceased and oversees the deceased's property by virtue of the empowering provisions of the Act.

Mohammed Moolla BProc (UKZN) LL.M (UWC) is a senior magistrate at the Wynberg Magistrate's Court in Cape Town.



By
Zibalule
Wiseman
Mdeni

Can a car sold under finance, or a suspensive condition be attached and sold in execution by a Sheriff?

One of the primary duties of a Sheriff is to attach and sell in execution, property of a judgment debtor in accordance with a court order granted against the latter. Even so, the Sheriff can only attach and sell property that is owned by a judgment debtor, not property merely in their possession. This begs the question of whether a car sold under finance or a suspensive condition in terms of which ownership will be transferred to the purchaser on full payment of the purchase price can be sold in execution where the purchaser is a judgment debtor. In an attempt to untangle this issue, the provisions of the National Road Traffic Act 93 of 1996 (the Act) provide clarity by defining the terms 'title holder' and 'owner' in relation to a motor vehicle.

Title holder and owner

In the definitions section of the Act, 'owner' in relation to a motor vehicle means:

- (a) the person who has the right to the use and enjoyment of a vehicle in terms of the common law or a contractual agreement with the title holder of such vehicle;
- (b) any person referred to in paragraph (a), for any period during which such

person has failed to return that vehicle to the title holder in accordance with the contractual agreement referred to in paragraph (a); or

- (c) a motor dealer ...

The word 'title holder' is defined as meaning:

- (a) the person who has to give permission for the alienation of that vehicle in terms of a contractual agreement with the owner of such vehicle; or
- (b) the person who has the right to alienate that vehicle in terms of the common law, and who is registered as such in accordance with the regulations under section 4.

The Gauteng Division of the High Court in *ABSA Bank Ltd v Van Eeden and Others* 2011 (4) SA 430 (GSJ), per Willis J, simplified the above definitions as follows: A 'title holder' is 'the person whom lawyers would ordinarily call the owner', and the 'owner' as 'the person whom lawyers would ordinarily call the *bona fide* possessor, the person who drives around in the vehicle as if owner and who is looked to for payment of fines, licenses, etc.' From this illustration, it is clear that the client is the owner of the vehicle and the judgment debtor is the *bona fide* possessor thereof.

The attachment process and effects of a sale in execution

Before the Sheriff can attach and proceed to sale in execution of a motor vehicle, they must first ascertain whether the vehicle is subject to an instalment sale or suspensive condition. This is to ensure compliance with reg 53 of the National Road Traffic Regulations, 2000 and to eliminate the possibility of having the sale in execution set aside by a court of law. This regulation provides that:

'No person shall, either for himself or herself, the State or on behalf of another person -

- (a) dispose of or deliver or trade with a motor vehicle unless -
- ...
- (ii) the registration certificate, and if the motor vehicle is required to be licensed, the motor vehicle license, accompanies the motor vehicle concerned.'

The object of this provision is to protect the interests of all parties who have an interest in the vehicle, particularly the title holder, and to promote commercial sanity.

In addition, if the title holder and the

owner are not the same person, and the latter is a judgment debtor, the Sheriff is obliged to effect service of a notice of attachment and warrant of execution on the title holder. This is a requirement of r 42(2) of the Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa (GNR 740 GG33487/23-8-2010) (the Magistrate's Courts Rules). Rule 42(2), which provides as follows:

'(2) Where the movable property sought to be attached is the interest of the execution debtor in property pledged, leased or sold under a suspensive condition to or by a third person or is under the supervision or control of a third person -

(a) attachment shall be effected by service by the sheriff on the execution debtor and on such third person of notice of the attachment with a copy of the warrant of execution, which service may be effected as if such notice was a summons: Provided that where service cannot be effected in any manner prescribed the court may make an order allowing service to be effected in the manner stated in the order; and

(b) the sheriff may, upon exhibiting the original of such warrant of execution to the pledgee, lessor, lessee, purchaser, seller or such other third person, enter upon the premises where such property is and make an inventory and valuation of the said property.'

A plain reading of r 42(2) obliges the Sheriff effect service of a notice of attach-

ment and warrant of execution on the title holder of the vehicle before proceeding to attach it. This step, however, ought to be preceded by an inquiry into whether the vehicle is subject to any suspensive condition which relates to the ownership and title of the vehicle.

Willis J, in the *Van Eeden* case at para 39, emphasised the significance of r 42(2) in the following words: 'Sales in execution of motor vehicles by the sheriff, without at least giving notice of the intention to do so to both the "title holder" and the "owner", as defined in the National Road Traffic Act, will undermine public confidence, not only in the system of sales in execution, but also the system of registration of vehicles provided for in the National Road Traffic Act, as well as the whole system of credit financing of vehicles and the regulatory framework of the NCA.'

Rule 42(2) must be read together with s 68(3) of the Magistrates' Courts Act 32 of 1944, which provides that 'the sheriff may ... attach and sell in execution the interest of the execution debtor in any movable property belonging to him and pledged or sold under a suspensive condition to a third person, and may also sell the interest of the execution debtor in property movable or immovable leased to the execution debtor or sold to him under any hire purchase contract or under a suspensive condition.'

Be that as it may, a purchaser at the sale in execution does not necessarily ac-

quire ownership of the vehicle, but merely acquires the execution debtor's interest in the vehicle - the right to possess and enjoy the vehicle and not become owner thereof until the purchase price is paid in full (see *Van Eden* at para 19). In other words, where the 'title holder' and the 'owner' are separate persons, this may only entitle the Sheriff to sell the owner's right, title and interest in the vehicle.

Conclusion

In conclusion, the Sheriff can attach a motor vehicle under finance or subject to a suspensive condition provided they comply with the procedure enumerated in reg 53 and r 42(2). Before attachment, the Sheriff must establish who is the title holder of the vehicle and effect notice of attachment and warrant of execution on him to allow him an opportunity to protect his interests. When the vehicle is attached and subsequently sold in execution, the purchaser at the sale in execution will assume the interests of the judgment debtor in the vehicle - undisturbed use and enjoyment of the vehicle and will become owner thereof when the full payment of the purchase price is paid.

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Risky business: Managing risk to innovate, change and develop



By
Siphon
Nkosi

The fundamental purpose of risk management is not to help a governing body avoid all risks that the organisation faces (Organisation for Economic Co-operation and Development *Risk Management and Corporate Governance* (OECD Publishing 2014) (www.oecd.org, accessed 31-8-2021)).

Risks often stand between the business and reaching beneficial objectives. Without taking risks, the organisation will never have the chance to innovate, change or develop its business. The whole goal of risk management is to make sure that the organisation only takes the risks that will help it achieve its primary objectives while keeping all other risks under control ('The importance of risk management in an organisation' (www.ca-reersinaudit.com, accessed 31-8-2021)).

The difference between a pure risk and a speculative risk is that the former has the possibility of a loss and there is no opportunity that can be exploited, and the latter has the possibility of either producing a gain or a loss (Entsogo 'Risk Management - Pure Risk and Speculative Risk Explained' (www.supgrp.com, accessed 31-8-2021)). Pure risks are those risks that a company needs to avoid if possible, since there is no potential benefit to be gained from them. Speculative risks require that one decides whether they are worth pursuing, since one can either benefit or lose depending on how one manages those risks.



Picture source: Gallo Images/Getty

According to King IV, 'the governing body should govern risk in a way that supports the organisation in setting and achieving its strategic objectives. The nature and extent of the risks and opportunities the organisation is willing to take should be disclosed without compromising sensitive information. In addition, the following should be disclosed in relation to risk:

...
(c) Actions taken to monitor the effectiveness of risk management and how the outcomes were addressed' (Institute of Directors of Southern Africa (IoDSA)

- implementation of corporate governance, ERM (Enterprise Risk Management) and compliance;
- deciding who will manage the business; and
- providing support to a person or group of persons (OECD (*op cit*) at p 12).

The board should guide the entity in a direction that will be beneficial to all the stakeholders of the business. The board is responsible for ensuring that stakeholders are made aware of all risk-related information (Glenn Jarrad 'How to communicate risk to project stakeholders' (www.safran.com, accessed 31-8-2021)). The board ensures that frameworks and methodologies set in place are implemented in such a way that they increase the probability of anticipating unpredictable risks.

When developing risk management plans, and proactively planning for designing controls etcetera, one of the key points to consider, is simply 'to know the business'. 'To know the business' can be achieved by implementing the recommendations contained in King III and King IV Codes, which make it clear that it is fundamental to understand and appreciate the context within which the risk management should be performed. To do that, the organisation should follow a top-down approach to risk management, in which the board and management take responsibility and delegate specific activities to the employees under them (Andre Brodeur and Martin Pergler McKinsey *Working Papers on Risk, Number 22: Top-down ERM: A Pragmatic Approach to Managing Risk from the C-suite* (2010) (www.mckinsey.com, accessed 31-8-2021)).

There is a need for legal practitioners to be hands on with the affairs of their practices and focus on the strategic, rather than operational issues. The practitioners have overarching responsibility for governance and management of the risk in their practices and may task the compliance risk officer (CRO) to assist. The role of the CRO comes into play in connecting the management and the board with the line managers who work with the CRO, and who have been trained in the management of risks and take responsibility for the risks in various departments or sections throughout the organisation. The delegation of any power, or action taken by the CRO, 'does not alone satisfy or constitute compliance by a director with the required duty of a director to the company' (s 72(3) Companies Act 71 of 2008). Risk managers should be adding value to the organisation by ensuring not only that risk is managed in a prudent manner, but that they provide guidance and ad-

vice in regard to proactively bettering the organisation (Deloitte 'Finding New Ways for Risk Teams to Add Value to the Business' (<https://deloitte.wsj.com>, accessed 31-8-2021)).

The key to this is to ensure that you are always forward-looking, not addressing problems when (or after) they arise. 'By developing and implementing a proactive risk management approach, supported by the right risk management tools, you can identify and minimise the negative impact of risk on your organisation's productivity and profitability' (Lyle Del Vecchio 'Proactive risk management – identifying and avoiding risks' (<https://planergy.com>, accessed 31-8-2021)). Corporate governance standards should place emphasis on *ex-ante* identification of risks, and risk management should emphasise both strategic and operational risk (OECD (*op cit*) at p 7).

Tools typically used in compliance risk identification and analyses are –

- escalation triggers;
- self-assessment; and
- audit, namely, file audits/reviews.

Escalation triggers serve to notify the relevant stakeholders of potential problems, such as processes that are increasingly prone to risk. Provided that specific triggers have been defined and agreed on by the relevant stakeholders, when a problem reaches a certain predetermined level, those stakeholders will be alerted to the problem. Rule 54.14.10 of the Legal Practice Council (LPC) Rules made under the authority of ss 95(1), 95(3) and 109(2) of the Legal Practice Act 28 of 2014, requires that a legal practitioner must immediately report in writing to the LPC should the 'total amount of money in its trust bank accounts and money held as trust cash be less than the total amount of credit balances of the trust creditors shown in its accounting records'. Minimum operating standards, self-assessment, and file audits/reviews also assist in the risk identification and analysis process.

'The identification, evaluation and mitigation of risks can be carried out with both formal and informal tools and techniques' (DueDil 'Tools and techniques for risk management' (www.duedil.com, accessed 31-8-2021)). Risk analysis is finding out more about the risk and developing an understanding of the potential impact that it may have. Risk identification is highlighting risk to be able to prepare yourself for addressing them if they materialise and preparing to capitalise on them if they present opportunities. Risk evaluation is comparing the level of risk found during your analysis with the risk criteria that you established when you determined the context of risk management within the organisation.

Detect control, action plans and the

'General Guidance Note: Summary of King IV: Disclosure requirements' (<https://saef.org.za>, accessed 31-08-2021)). The risk management process starts when the practitioner sets the policies and philosophy of risk management for the practice (Chartered Secretaries Southern Africa 'Risk Management' (2010) (www.chartsec.co.za, accessed 31-8-2021)).

The board should determine the level of risk tolerance, ensure that appropriate risk responses are considered and implemented (Deloitte 'Risk Committee Resource Guide' (2014) (www2.deloitte.com, accessed 31-8-2021)). The board is responsible for making decisions regarding the –

flow of information are control-frame-work elements that should be reviewed and engaged with on a highly frequent basis (weekly or daily). Detect controls are typically developed to identify problems that have occurred within a short period of time to minimise any loss that may result from them. Client complaint procedures to alert you at an early stage where there is any client dissatisfaction, are detect controls that are regularly engaged with in a legal practice. Back-stop controls are used during the monitoring of risk and are infrequent reviews, such as the quarterly compliance report, that are intended to minimise the loss incurred from risk-related problems. Proper induction, training and development of staff, and effective knowledge management, are also crucial in risk management.

Key Risk Indicators (KRIs) 'helps a company work toward its goals without incurring the sting of non-compliance or breaches' (Comply 'Risk Management: What are Key Risk Indicators?' (www.v-comply.com, accessed 31-8-2021)). The KRIs allow the compliance functionary to monitor risks related to business processes and, as such, are a useful tool for highlighting inefficiencies or poor performance in business processes. An analysis of the KRIs can help a compliance functionary develop better processes throughout the business and improve the process of risk monitoring.

The main consideration when determining the frequency with which core compliance reviews of business processes should be conducted, are the risk ratings attached to those processes, and the extent to which the processes are likely to have changed. Risk ratings are based on your own opinion (Katie Yahnke 'How to use a risk assessment matrix' (<https://i-sight.com>, accessed 31-8-2021)). The risk rating assigned to each process provides the organisation with a reasonable idea of its probability and seriousness, which should allow the risk to be prioritised appropriately and scheduled for review as needed (Integrity Governance

Advisory 'Compliance monitoring plan' (<https://igadvisory.co.za/>, accessed 2-2-2022)).

The compliance mandate is to mitigate risk with an understanding of compliance law (David Strachan and Rebecca Walsh 'Targeting compliance: The changing role of compliance in the Financial Services Industry' (www2.deloitte.com, accessed 31-8-2021)). During the monitoring phase the compliance function should aim to assist management in focusing on how business processes operate to identify areas where the quality of those processes can be improved. The compliance function should, to the extent that it is feasible, align its activities with those of the organisation, and improving the quality of business processes is one such opportunity (Deloitte 'Compliance modernisation is no longer optional: How evolved is your approach?' (2017) (www2.deloitte.com, accessed 31-8-2021)). It is a sure way to demonstrate the value of the compliance function, which could help foster a company culture that is supportive of its work.

Risk policies and procedures implemented by the board and management should not be challenged. 'Creating a culture of risk is a step towards progress and innovation. While not easy or quickly done, it will improve every aspect of an organisation' (Jon Siegler 'Creating a culture of risk throughout the organisation' (www.logicgate.com, accessed 31-8-2021)). Practitioners should set the tone for the organisation's risk culture. Employees should be held accountable for any conduct or actions that disregard or subvert the company's risk culture. Risk culture determines the organisation's attitude towards risk, how the organisation integrates it, how important you consider it, and how people will engage with the risks they encounter in the pursuit of business objectives. Poor risk culture can result in financial crisis.

Risk can come from both internal and external sources. The external risks are those that are not in direct control of the management. The key difference

between regulatory risk and compliance risk is that the former describes the potential loss or damage that a company could incur through failing to comply with the regulatory requirements, while the latter describes the risk that the systems and process that have been put in place to ensure compliance with those regulations are proven to be inefficient or ineffective (IRBA *Guide for Registered Auditors* (Revised, 2020) (www.lssa.org.za, accessed 31-8-2021)). The contributing factors to high risk of non-compliance with applicable legislation are the large number of regulatory requirements that organisations are obliged or expected to comply with, industry-specific regulations, and the regulations could be difficult to interpret.

The different types of risks that organisations have to contend with in the pursuit of business objectives are operational, strategic, legal and reputational (Tasneem Suliman Joosub *Risk Management Strategies to Maintain Corporate Reputation* (MCom thesis, UNISA, 2006) (<https://core.ac.uk>, accessed 31-8-2021)). The imprisonment of employees because of misconduct, or non-compliance, would have the most severe impact on the long-term standing of a business. In many instances, it would entail bad press coverage, and possibly, the suspension of business activities. The reputational damage that would result from having the business's misconduct published in a popular newspaper would do more long-term harm to a business than a temporary suspension of activities. Additionally, the financial loss that stems from suspension is still likely to be larger and more detrimental to a business than the imposition of a minor fine.

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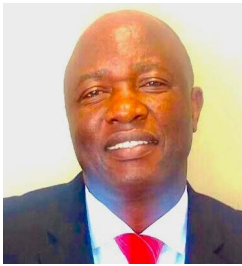
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Can a state lawfully decline to receive asylum seekers? South Africa's involvement in the Afghanistan refugee crisis



By Dr
Milton
Owuor

This article seeks to critically engage with the relevant principles of international law, in an overarching contextualised approach, and to analyse the response so far made to the South African Government statement on the Afghanistan refugees (www.dirco.gov.za, accessed 1-2-2022) dated 1 September 2021.

The statement indicated that the South African Government notes the overtures made to the country to consider receiving, and accommodating in the country, a number of Afghanistan refugees, who have sought refuge in Pakistan, enroute to their final destinations. It further indicated that South Africa (SA) is unfortunately not in a position to accommodate a request to host Afghanistan refugees. The reason advanced was that 'South Africa is

already home to a substantial number of refugees and is seized with addressing their needs. Most of them already benefit from the Social Assistance and free medical health programmes offered by [the] country.' Arguably, the irresistible reasonable inference from the contextual construction of this statement, is that the refusal must mean that SA is unable, rather than unwilling, to take in the Afghan refugees. The statement concluded by explaining that, in terms of international law, the well-being of the refugees is best served by remaining in the first country of arrival – Pakistan – pending their final destinations.

The statement did not disclose who made the overtures. However, the lawyers acting for Exitus (Matthew Savides 'SA's refusal to take in 126 Afghan refugees puts lives in danger: lawyers' (www.timeslive.co.za, accessed 1-2-2022)), a United States (US)-based non-profit, have indicated that their client had requested SA to accommodate, for six months, a group of 126 Afghan refugees fleeing the Taliban takeover in Afghanistan, and at the time residing in Pakistan, in transit to their final destinations.

Exitus lawyers explained that Wade Hill of a US-based corporation, PerryHill International, had committed to be surety, offering to be responsible for all the costs of 'the private evacuation, housing, medical care and all other expenses of the refugees in question for a minimum of six months or however long it took to relocate' the refugees (Savides (*op cit*)). They further indicated that a South African company had also undertaken to be second surety for the 126 Afghan refugees while they were on South African soil, and

that it had organised medical care and housing for all the refugees. Exitus lawyers argued that, in light of its elaborate funding arrangement, there is no plausible justification for the government to be concerned about the refugee burden (Savides (*op cit*)). However, it is submitted that the tenability of that argument advanced by Exitus lawyers may be questionable, when considered in light of the fact that a strict construction of the criteria for admission of refugees, under the United Nations (UN) Refugee Convention, entails an overarching approach that goes way beyond mere cost financing considerations.

Taliban takeover

The plight of the 126 Afghan refugees emerges against the backdrop of an unprecedented swift Taliban takeover of military control and ultimate political power in Afghanistan, witnessed in the last weeks of August 2021 (Wall Street Journal 'Afghanistan takeover: A timeline of the Taliban's swift advance' (www.wsj.com, accessed 1-2-2022)). The takeover has invariably generated considerable political controversy and unabating legal discourse. It engendered, not only, an embarrassing hasty exit of the forces and nationals of the US and other foreign powers, but also the massive panicked evacuation of thousands of Afghan nationals fleeing the new Taliban regime. The exponential influx of the Afghan refugees into other countries has unleashed political and humanitarian ripples, of astonishingly ungovernable proportions, globally. Consequently, these events have had tremendous implications for international human rights law and, in particular, international law in general.

South Africa and the UN Refugee Conventions

South Africa has acceded to the relevant international Refugee legal instruments, namely, the 1951 United Nations Convention Relating to the Status of Refugees (UN Refugee Convention) (www.unhcr.org, accessed 1-2-2022), its 1967 Protocol Relating to the Status of Refugees (www.unhcr.org, accessed 1-2-2022), and the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (<https://au.int>, accessed 1-2-2022). The UN Refugee Convention provides for several rights for refugees, as they arrive in a country where they are seeking asylum. The rights relevant to this discourse, include, *inter alia*, 'the right to non-discrimination (article 3), the right to work (article 17), ... the right to housing (article 21), the right not to be penalised for illegal entry (article 31), the right not to be expelled from a country unless the refugee poses a threat to national security or public order (article 32), and the right not to be sent back to a country where their life or freedom would be threatened (ie, the principle of non-refoulement principle) (article 33)' (Andrew and Renata Kaldor Centre for International Refugee Law (www.kaldorcentre.unsw.edu.au, accessed 1-2-2022)). It is critical to note that the essence of a special status being accorded to refugees in international law is that they have lost the inherent protection of their domestic jurisdictions.

In a retrospective trajectory, it could be argued that the South African Government considered the burden associated with securing a decent livelihood connected to the rights of refugees, under the UN Refugee Convention, in declining the request for admission of the 126 Afghan refugees. The lawyers for Exitus had argued that the refugees did not require any financial assistance from the South African Government, as all the expenses related to their six months stay in SA were covered by two private sureties. However, the Exitus lawyers have not demonstrated how that arrangement would relieve the South African Government from its Convention obligations to avert conditions inimical to the Afghan refugee rights, for instance, if the Exitus reneged on its financial arrangement for the support of the refugees.

Can a state lawfully decline to receive asylum seekers?

To determine under what circumstances a state may decline to receive refugees or asylum seekers, it is instructive to examine the application of the principle of non-refoulement. The principle, as set out under the UN Refugee Convention, prohibits the expulsion or the return of a refugee to a territory where his or her life

or freedom is threatened (article 33(1)). The only exception, where the benefit of the principle of non-refoulement may not be claimed by a refugee, is where there are reasonable grounds for regarding such a refugee as a danger to the security of the country.

Moreover, the UN High Commissioner of Refugees (UNHCR) has stated that a refugee seeking protection must not be prevented from entering a country as this would amount to refoulement (*Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status* (Geneva: UNHCR 2011) at p 5 (www.refworld.org, accessed 1-2-2022)). So, the question is: Does the refusal, by SA to allow the 126 Afghan refugees into the country, amount to refoulement? This is open to debate and may be subject of jurisprudential guidance.

Whereas, the OAU Refugee Convention (article II(2)) explicitly provides that states have an obligation to grant asylum to refugees, and imposes a duty on states to 'use their best endeavours consistent with their respective legislations to receive refugees and to secure the settlement of ... refugees' (article II(1)), the UN Refugee Convention is, however, silent on this obligation. The OAU Refugee Convention provides that 'no person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened' (article II(3)).

It is critical to note that the non-refoulement principle has assumed a status of a rule of customary international law, binding all States, irrespective of whether they are party to the UN Refugee Convention, or not. SA is, therefore, bound by the principle of non-refoulement because of its customary law status, and by virtue of being party to the UN Refugee Convention.

Does it matter that the Afghan refugees intended to stay in SA for a maximum period of six months only, pending their transit to their final destinations? Arguably, the threshold for their admission is governed solely by the criteria set out under the relevant UN Refugee Convention, and it is immaterial how long the asylum seeker intends to stay in the country of asylum, whether on transit or not.

The question then turns on to whether the Afghan refugees do qualify for acceptance into SA as asylum seekers. The UN Refugee Convention only protects individuals who satisfy the prescribed criteria for refugee status. In other words, persons who fail to meet the criteria are excluded from the protection under the UN Refugee Convention, and these include –

- persons who have committed a crime against peace, a war crime, a crime

against humanity or a serious non-political crime outside their country of refuge; or

- persons who are guilty of acts contrary to the purposes and principles of the United Nations (art 1(F)).

Similar exclusionary provisions exist under the OAU Refugee Convention (article I(5)). Again, no evidence has been proffered by the parties to suggest that any of the 126 Afghan refugees would be disqualified under the exclusionary clauses of the UN and OAU Refugee Conventions.

The issue of whether 'the well-being of the refugees is best served by remaining in the first country [of] arrival' (as asserted in the Government statement), has also not been fully ventilated by both parties. It is, however, helpful to look at the OAU Refugee Convention in this regard. Arguably, the position by the South African Government appears to be in consonance with the OAU Refugee Convention, which provides that 'where a refugee has not received the right to reside in any country of asylum, he may be granted temporary residence in any country of asylum in which he first presented himself as a refugee pending arrangement for his resettlement' (article II(5)). Whether that provides a legal basis for the government's decline of the request by the 126 Afghan refugees is an entirely debatable matter.

On the other hand, the South African Government may perhaps argue that, in any event, since the US authorities are willing and prepared to accept the 126 Afghan refugees owing to their ties with the US, then it should be entirely the responsibility of the US to make appropriate arrangements for their transit from Pakistan. The proponents of the government position may also wish to advance the argument that, in the event of granting admission to the 126 Afghan refugees into SA, that would set an irreversible precedent for further unabated sporadic inflow of more Afghan refugees into the country.

Ultimately it may be interesting to observe that, in the highly charged global political arena, international law issues are invariably not entirely divorced from considerations of national political or economic interests. There is, undoubtedly, a glaring dearth of literature of the law on this facet of the refugee issue, and thus this article amounts to a contribution to provoke and inspire further intellectual discourse.

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When is the obvious not so obvious?

A discussion on regs 2(1)(b) and 2(2) of the Road Accident Fund Regulations

Picture source: Gallo Images/Getty



By Marius
van
Staden

In *Legal Practitioners Indemnity Insurance Fund NPC v The Minister of Transport and The Road Accident Fund* (GP) (unreported case no 26286/2020, 21-6-2021) (Janse van Nieuwenhuizen J) the Gauteng Division of the High Court, declared the provisions of regs 2(1)(b) and 2(2) of the Road Accident Fund Regulations, 2008, promulgated under the Road Accident Fund Act 56 of 1996 (the Act) to be inconsistent with the Constitution and invalid, as well as, to the extent that the regulations relate to minors and persons under curatorship, be set aside. The court also declared that s 23(2) of the Act is to be read as 'including minors and persons under curatorship who claim in terms of s 17(1)(b) of the Act'.

In so doing the court set aside the two years' limited period for the lodgement of Road Accident Fund (RAF) claims in respect of unidentified vehicles, as far as minors and persons under curatorship are concerned. This is an important development for attorneys undertaking RAF claims.

Unavoidably the question arises as to why only now, after a constitutional dispensation of more than 27 years prohibiting discrimination? Surely it should have been self-evident that regs 2(1)(b) and 2(2) discriminate against minors and persons under curatorship, and the requisite court application should have been lodged much earlier?

In this article the fundamental reasoning contained in the judgment, will be discussed, and an answer to the question will be proposed.

Regulation 2 and s 17(1) and other statutory provisions

Section 3 of the Act provides that 'the object of the Fund shall be the payment of compensation in accordance with this Act for loss or damage wrongfully caused by the driving of motor vehicles'.

Section 17 of the Act limits the RAF's liability:

'The Fund or an agent shall -

(a) subject to this Act, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of the owner or the driver thereof has been established;

(b) subject to any regulation made under section 26, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of neither the owner nor the driver thereof has been established,

be obliged to compensate any person (the third party) for any loss or damage ... suffered as a result of any bodily injury ..., caused by or arising from the driving of a motor vehicle ..., if the injury or death is due to the negligence or other wrongful act of the driver or of the

owner of the motor vehicle or of his or her employee in the performance of the employee's duties as employee'.

Section 23 deals with prescription of claims:

'... the right to claim compensation under section 17 from the Fund or an agent in respect of loss or damage arising from the driving of a motor vehicle in the case where the identity of either the driver or the owner thereof has been established, shall become prescribed upon the expiry of a period of three years from the date upon which the cause of action arose.

(2) Prescription of a claim for compensation referred to in subsection (1) *shall not run against* -

(a) a minor;

(b) any person detained as a patient in terms of any mental health legislation; or

(c) a person under curatorship' (my italics).

Section 26, empowers the Minister of Transport (the Minister) to make regulations:

'The Minister may make regulations regarding any matter that shall or may be prescribed in terms of this Act or which it is necessary or expedient to prescribe in order to achieve or promote the object of this Act.'

Regulations 2(1)(b) and 2(2) provide that:

'(a) A claim for compensation referred to in section 17(1)(b) of the Act shall be sent or delivered to the Fund in accordance with the provisions of section 24 of the Act, within two years from the date upon which the cause of action arose.

(b) A right to claim compensation from the Fund under section 17(1)(b) of the Act in respect of loss or damage arising from the driving of a motor vehicle in the case where the identity of neither the owner nor the driver thereof has been

established, shall become prescribed upon the expiry of a period of two years from the date upon which the cause of action arose ...

(2) Notwithstanding anything to the contrary contained in any law a claim for compensation referred to in section 17(1) (b) of the Act shall be sent or delivered to the Fund within two years from the date upon which the cause of action arose irrespective of any legal disability to which the third party concerned may be subject.'

The applicant's case

The applicant submitted:

- Regulation 2 discriminates unfairly between minors and persons under curatorship who sustain injuries, where the driver or owner of the motor vehicle is known, and instances where the driver or owner of the said motor vehicle is unknown.
- Minors and persons under curatorship who are the victims of negligent hit and run motorists, have a justiciable right to claim compensation for loss suffered. The imposition of the two-year prescription period infringes on their constitutional rights to seek relief for their damages before courts. The offending regulations infringe on their rights under s 34 of the Constitution to bring their claims before court in the same time frame as persons claiming in terms of s 17(1)(a).
- If a plaintiff had been unconscious for the greater part of their stay in hospital, it might have impacted on the commencement of prescription in relation to both the provisions of s 13(1)(a) of the Prescription Act 68 of 1969 (the Prescription Act), and s 23(1) of the Act, on the basis of the doctrine that the law does not require one to do the impossible. Legal disability may similarly account for the inability to lodge a claim timeously. However, the impugned regulations disregard legal disability after two years as such a reason. In effect, the impugned regulations punish the most vulnerable for not doing what may not be possible.
- The provisions of reg 2(2) legislate beyond the scope of the Act. The Minister's powers in terms of s 26 of the Act to make regulations is limited to 'make regulations regarding any matter that shall or may be prescribed in terms of this Act or which it is necessary or expedient to prescribe in order to achieve or promote the object of this Act.' If, in making regulations, the Minister exceeds the powers conferred by the Act, the Minister acts *ultra vires* and in breach of the doctrine of legality.
- The impugned regulations do not further the purpose of the Act. They offend against the principle of legality contained in s 1(c) of the Constitution,

in that the Minister was not empowered to determine, the limitation of time within which a claim may be made, or an action brought, or to impose conditions on the institution of an action, having regard to s 3 of the Act.

- The regulations are at odds with s 23 of the Act, as they provide for the prescription of claims of minors and persons under curatorship in unidentified vehicle matters. The regulations do not have the status of an Act of Parliament and cannot oust the provisions of s 23.
- The regulations offend against the principle of legality contained in s 1(c) of the Constitution, as 'the Minister was not empowered to determine by regulation the limitation of time within which a claim may be made' (para 71). 'A delegate is not intended to travel wider than the object of the Legislature' (*Bezuidenhout v Road Accident Fund* 2003 (6) SA 61 (SCA)). In the Minister enacting the regulations, he went wider than the object of the Act.

The respondent's case

The Minister and the RAF submitted:

- The Minister argued that the impugned regulations do not differentiate between people or categories of people. The regulations, read together with s 17(1)(b), provide for a different procedure and time for the lodgement and processing of claims in unidentified vehicle cases. The differentiation is not directed at persons, but at the cause for the claim. The purpose of the two years' time period is to eliminate fraud and facilitate proof.
- The court determined that the problem is rather that persons who do not possess full legal capacity, and who have claims under s 17(1)(b), are not afforded the same protection in terms of s 23(2) to similar persons in identified vehicle cases. The court accordingly agreed with the applicant that the differentiation does not fulfil a legitimate government purpose.
- The court pointed out that the impact of the discrimination is self-evident. A minor that sustains a serious brain injury in an identified vehicle case, will have the necessary finances to get specialised care, proper educational assistance and will be compensated for loss of earnings or earning ability. Minors and persons under curatorship in unidentified vehicle cases will forfeit these benefits and will be left to fend for themselves without any form of assistance.
- The Minister contended that once a claim has been lodged in terms of reg 2(1)(a), a claimant (claiming in terms of s 17(1)(b)) is entitled to approach a court of law.
- The court pointed out that the problem with the lodgement of claims by minors and persons under curatorship, is

that they simply do not have the capacity to do so within the prescribed two year period. In the result, and due to no fault of their own, their claims will prescribe, whereas those of minors and persons under curatorship who claim under s 17(1)(a), will not.

- The Minister submitted that unlike other prescription provisions which violate the rights of access to courts, regss 2(1)(b) and 2(2) provide a substantial period for claimants to lodge their claims – a full two years after the accident. The claimant need not institute legal proceedings but is only required to lodge a claim with the RAF. Provided this is done, the claimants then have a further five years within which to institute an action against the RAF. The lodging of a claim does not require the claimant to be legally assisted. Hence, the RAF provides staff members who assist members of the public to lodge claims themselves, rather than via an attorney.
- The court found that the purported justification failed to consider that minors and persons under curatorship do not have the physical and legal capacity and/or knowledge to lodge claims on their own behalf.
- The next ground of justification involved the finances of the RAF and the fact that unidentified claims, which might be fraudulent claims, drain the funds of the RAF, to the prejudice of claimants in justified claims.
- The court criticised the RAF for not specifically addressing the impact of the claims of minors and person under curatorship, in this regard. The court indicated that one would have expected statistics in respect of this category of claimants, and the financial impact of their claims on the RAF's financial liabilities. Although fraudulent claims are of concern, the possibility of fraudulent claims in instances where minors and persons under curatorship lodge claims in unidentified vehicle claims, could never justify the infringement of their human rights *in casu*.

Conclusion

The RAF Regulations in question were set aside for clear and valid reasons. The question arises why the obvious has not been obvious for more than 27 years.

The answer possibly lies in the following: Sometimes, the obvious is not so obvious, and it requires a leader to take a bold step, to point out the obvious, like was done in this matter by the applicant.

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With her energy and zest to serve, Baitseng Rangata, stands on shoulders of remarkable women



By
Kgomoitso
Ramotsho

In our March issue for our Women in Law feature article, our news reporter, Kgomoitso Ramotsho, speaks to legal practitioner and founder of the BR Rangata Attorneys, Baitseng Rangata. Ms Rangata is a 48-year-old, legal practitioner, practising in Gauteng. Ms Rangata was born in Limpopo, Ga-Mphahlele, which falls under the Capricorn District. She is the fifth of eight children of Hlabirwa and Morweshadi Mello. Ms Rangata is blessed with a loving husband and three children, aged 26, 21 and 17. Ms Rangata said she grew up in a family, which is grounded on Christian roots, with her father as the founder and Pastor of the Church of Christ.

Ms Rangata added that growing up, she was taught that sharing is caring. 'I grew up not only with my seven other siblings, but with many other children that my parents adopted. At any given time, we had more than ten children in my family home that lived with us. I learned that your brothers or sisters are not only those you are born with. What stood out for me was the nature and extent that love and support from parents can push you to achieve the unthinkable,' Ms Rangata said.

Kgomoitso Ramotsho (KR): What influenced your decision to become a legal practitioner?

Baitseng Rangata (BR): Growing up, I had keen interest in justice and fairness. A family friend who was very close to my parents, advocate Theledi, made a habit of having monthly sessions with me, and our talks were dominated by what I wanted to do for a living. We spoke about whether a career should be guided by financial interest or passion. I had a view – as early as during my grade 11 –



Legal practitioner and founder of BR Rangata Attorneys, Baitseng Rangata said her law firm intends to be a training home for young legal practitioners.

that my career will be passion driven. I knew that when I completed my matric that I would be a future lawyer. Choosing a career for myself was not an issue, the issue for me was how far I would go and what impact I would make in the legal fraternity. I wanted to make a mark in my career, to do something meaningful for the poor.

KR: You were a Co-chairperson at one of South Africa's (SA's) leading law firms, a trail-blazer. How did you achieve that and how long have you been practising law?

BR: I joined Maponya Inc in April 2000 as a professional assistant, making my years of practice almost 22 years in

two months. I progressed through the ranks to being a director a few years down the line. Few years later, I served as a managing director of the firm for a five-year period and progressed to being appointed Co-chairperson. This recognition meant so much for me and afforded me an opportunity to pave a direction for the firm. Being able to lead and support the business in building a more sustainable practice. At the heart of my responsibility was the duty to impart knowledge, support young legal practitioners in their journey of acquiring experience and training in the field of law. I also used this position to fine tune social development, where I formed a bursary scheme that offered financial

support to students from previously disadvantaged backgrounds. Maponya Inc partnered with the North-West University and offered full study bursaries to five students each year, which covered all financial needs, including boarding and lodging.

I have recently resigned from Maponya Inc and started my own law firm, under the name BR Rangata Attorneys in Pretoria. I intend to grow the firm to be a home for the training of young legal practitioners and to continue providing opportunities to legal practitioners to serve articles and offer mentorship to university students. The firm is more focused in making contributions to social development in the nearer communities and empower as many as possible. The key focus of our mission is to bring justice to the people. BR Rangata Attorneys is centred on delivering professional, diligent, solution orientated services to the people. We are driven by passion.

KR: Not only are you a leader in your law firm, but we have seen you become the Chairperson of Gauteng Branch of the Black Lawyers Association (BLA), the Secretary General, and later a Deputy President of that organisation. How important was it or how did it make you feel that there were people in that organisation, who chose you to be in the forefront and lead, especially as a woman?

BR: I am member of the BLA and in good standing. The BLA is an organisation, at the forefront of promoting the rights of black practitioners. I was privileged to be elected a Chairperson of this organisation. I also served as the General Secretary of the organisation, as well as the Deputy President under the leadership of the late BLA President Lutendo Benedict Sigogo (May his soul rest in peace). It is an honour to be elected to serve in these positions in the organisation. The BLA is the most recognised organisation representing the previously disadvantaged, advocating for empowerment and impacting positively towards social transformation. It is an honour to be at the forefront of advocating the rights of the less privileged, serving the members of the profession.

KR: It is obviously important that one needs to work hard to achieve their goals, what would you say to women who feel entitled, because they were historically disadvantaged, that automatically they should be handed a space at the big table?

BR: I am a firm believer that professionals should occupy positions because they have proven themselves to be worthy of the recognition, and not because of gender or race. Women are no exception to this belief. Women are quite capable of performing on par with their male coun-

terparts. The stereotype of considering people for certain positions or expectation to be treated differently because of gender or race is seriously discouraged. Women should be respected and afforded opportunities because of their capability and strengths. Women are in no way handicapped and do not require any special treatment. Equally women should take themselves seriously, go out there and grab what they are entitled to because they deserve it and are very capable.

Listening to Justice Maya during her interview for the position of Chief Justice on 2 February 2022, responding to the question as to whether South Africa is ready for a woman Chief Justice, assured me that we are standing on the shoulders of very strong women. She was justifiably annoyed. She responded that:

‘That question annoys a lot of women Why are we asking about women as if we are this homogenous, this special group that needs to be done a favour. ... It’s not a proper question to ask. South Africa has always been ready for a female Chief Justice. There have always been capable women.’

KR: How do you stay grounded even when you are such a powerhouse?

BR: I am an ordinary black woman, with a lot of energy and zest to serve. I do not believe that I am a powerhouse. I believe that I am favoured by God’s grace to be able to reach people and make a difference in a small way that I can. Every assignment I put my hands on, I take seriously and I give my full attention to the assignment. I believe that clients are directed to us because they have trust in us. So, when rendering professional service, we should do so with respect and dedication.

KR: Who is your female inspiration in the Legal Profession and why?

BR: I am inspired by Justice Yvonne Mokgoro. Looking at her background, her humble beginnings, how she has progressed through the ranks. She never stopped learning. She has dedicated her time to serving and is very passionate about transferring skills. Her love for children is obvious and admirable. Obviously thinking back about *S v Makwanyane and Another* 1995 (6) BCLR 665 (CC), wherein the court forbade death sentence on any prisoner, Justice Mokgoro played a critical role in the jurisprudence. She continues to inspire a lot of women in the legal profession. Of course, Justice Maya inspires me for her frankness, her work speaks volumes.

KR: Besides running your law firm, which other positions are you currently in, including sitting on boards etcetera?

BR: I served as the Chairperson of the Finance Committee of the Legal Practice Fidelity Fund and I served on the Board of SAFLII. I am currently not sitting on any board. I am looking forward to being involved in various structures and making a positive contribution.

KR: Any aspiration of perhaps becoming a judge one day and in which court and why?

BR: I have expressed my interest in availing myself to becoming a judge. Being a judge is a calling and requires dedication and respect for the rule of law. I am confident that I have what it takes to be a member of the judiciary. I have been afforded opportunities by the Judge President of the Gauteng Division to act, for which I am truly grateful, and I have acted on a number of occasions. When the time is right, I will not hesitate to avail myself and apply for a permanent position.

KR: What can we expect from you, in your quest to deliver access to justice in the coming years?

BR: I am on a journey to making justice accessible to the public to entrench access to socio-economic rights as a founding feature of our democracy. Through my firm BR Rangata Attorneys, I will be serving communities, I intend to work closely with organisations like Probono. Org and others to deliver such services. BR Rangata Attorneys is imbued in the values of talent development and systematic transfer of skills thereto making it possible for young lawyers to unleash their potential.

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THE LAW REPORTS



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

January 2022 (1) South African Law
Reports (pp 1 – 316); January 2022
South African Criminal Law
Reports (pp 1 – 113)

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 Local Division, Johannesburg

GP: Gauteng Division, Pretoria

SCA: Supreme Court of Appeal

Constitutional law

Provincial intervention in local government: When dissolution of a municipal council is appropriate:

The case of *Premier, Gauteng and Others v Democratic Alliance and Others* 2022 (1) SA 16 (CC) dealt with the lawfulness of a resolution by the Gauteng Executive Council, taken under s 139(1)(c) of the Constitution, to dissolve the City of Tshwane Metropolitan Municipal Council. Section 139(1) of the Constitution empowers a province, when a municipality within its boundaries cannot or does not fulfil an executive obligation in terms of the Constitution or legislation, to intervene by taking any appropriate steps to its fulfilment and sets out examples of such steps in subparagraphs (a)–(c), namely –

- the issuing of a directive;
- the assumption of responsibility for the obligation in question; or
- dissolution of the council.

What gave rise to the action taken by the Gauteng Province was a state of deadlock that had arisen in the Democratic Alliance (DA)-led municipal council, impacting on its ability to perform its public functions, because of repeated walkouts by opposition African National Congress (ANC) and Economic Freedom Fighters (EFF) councillors from meetings. They had claimed among other things to be dissatisfied with the way the speaker had dealt with motions of no confidence

in the mayor. Consequent to the province's decision, the DA approached the GP on an urgent basis with a legality review to reverse the dissolution decision. The GP quashed the Gauteng Executive Council's decision, finding that dissolution was inappropriate because there were less intrusive measures, which the provincial executive could have taken to ensure the municipal council would fulfil its core responsibilities. The court ordered the ANC and EFF councillors to attend, and remain in, all meetings of the municipal council unless they had lawful reason to be absent. The Premier, the Gauteng Executive Council, and the Member of the Executive Council (MEC) for Co-operative Governance and Traditional Affairs, Gauteng, in a first application; and all Tshwane councillors who were members of the EFF, and the EFF, in a second application, brought direct appeals to the CC. The DA was first respondent in both. The key question to be addressed was whether the exercise of the Premier's power to dissolve the municipal council offended the principle of legality.

Mathopo AJ wrote the majority judgment (Khampepe J, Majiedt J, Theron J and Victor AJ concurring). He characterised the leadership crisis resulting from the councillor walkouts as constituting 'exceptional circumstances' that had resulted in the municipal council failing to fulfil its executive obligations, as contemplated in s 139(1). However, he expressed the view that dissolution of the council was not an appropriate step for the province to take. He held that the province, before taking a decision to dissolve the municipal council, had a duty to first engage with the speaker

and council, and consider all prevailing circumstances, which it did not do. Such duty arose in the light of the constitutional principle of cooperative governance and intergovernmental relations, as encapsulated in various provisions of the Constitution, including ss 40 and 41(1)(e), (f) and (h), as well as the duty imposed by the Constitution, in terms of its s 154(1), to support and strengthen the capacity of the municipal council to perform its functions. Mathopo AJ also held that the decision by a province to dissolve a municipal council may well be inappropriate where there existed less intrusive means that could resolve the issue at hand that were less invasive of government autonomy. Section 139(1)(c), he said, had to be invoked sparingly, especially given the other options of intervention available to the provincial executive. In this case, the Gauteng Executive Council had failed to explore any other avenues before taking its decision. Mathopo AJ concluded that the provincial government misconstrued its powers and failed to apply itself to the issues faced by the municipality; and that the dissolution had to be set aside, as it offended the principles of lawfulness. He held that, in the main, the appeal should be dismissed. He disagreed, however, with that part of the GP's order that directed councillors to attend all future meetings, finding that an appropriate order would be one compelling MECs to invoke their powers in terms of item 14(4) of sch 1 of the Local Government: Municipal Systems Act 32 of 2000 by appointing a person or committee to investigate the cause of the deadlock in the Municipal Council and recommend an appropriate sanction.

Jafta J wrote a dissenting minority judgment (in which Mhlantla J, Tshiqi J and Mogoeng CJ (in a separate judgment) concurred). Jafta J directed his attention to the finding of the GP that the dissolution decision was inappropriate in circumstances in which there were less intrusive measures. Such a finding, he held, was misguided. Having regard to s 139(1), if dissolution was 'an appropriate step' that was likely to fulfil the executive obligation, and exceptional circumstances warranted such decision, the province was entitled to take such course. It mattered not that there happened to be other steps which were 'also appropriate and [that] were less intrusive'. In the circumstances of the present case, which were exceptional, dissolution was an appropriate step to take. In fact, he held, no other form of intervention would have ensured the fulfilment of the council's obligations. The appeal, he held, should have been upheld.

Contract

A reconciliation of the expansive approach to contractual interpretation and the parole evidence rule: In *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* 2022 (1) SA 100 (SCA) the first appellant (Capitec), acting in terms of a share sale agreement (the agreement), had transferred some of its shares to the first respondent (Coral). Coral later wanted to sell them to a third party under a settlement agreement that required Capitec's consent, but Capitec refused such consent. Coral applied for an order that the refusal was unreasonable and in breach of the good faith required by the agreement, alternatively in dereliction of Capitec's common-law duty of contractual good faith.

The GJ (per Vally J) agreed with Coral. Vally J found that Capitec had in the past granted consent to such sales, and that its failure to do so in the present instance was contrary to its common-law duties of good faith and reasonableness. The GJ, therefore, ordered Capitec to consent to the sale. The SCA subsequently granted Capitec leave to appeal the GJ's order.

The central issue before the SCA was whether the agreement required Capitec's consent for Coral to sell its shares, and if it did, whether Capitec had unreasonably or in bad faith refused to grant it. Coral argued that Capitec's prior conduct of first requiring and then granting consent to Coral's transactions was significant for the interpretation of clause 8.3 of the agreement, which governed the resale of Capitec shares by Coral. It provided that if Capitec deemed the intended purchaser to be non-Broad-Based Black Economic Empowerment-compliant, then Capitec could require

Coral to repurchase an equal number of Capitec shares. Coral argued that, notwithstanding the actual text of clause 8.3, the way the parties had implemented the agreement was relevant evidence as to what the clause meant.

To determine whether Capitec's consent was indeed a requirement, the SCA (per Unterhalter AJA (Ponnan JA, Makgoka JA, Mbatha JA and Goosen AJA concurring)) examined clause 8.3 and ruled that neither its text nor its context nor the agreement's purpose militated for a consent requirement, and that the extratextual evidence as to the conduct of the parties failed to displace the meaning derived from the abovementioned factors.

Unterhalter AJA pointed out that Coral's argument, that the manner of the implementation of the agreement was relevant to the meaning of clause 8.3, gave rise to an issue that has long troubled our courts. This was the relationship between the 'expansive' approach adopted by the Constitutional Court – which allows the admission of extrinsic evidence to construe a contract's words, and the parole evidence rule – which bars the admission of extrinsic evidence to contradict, add to or modify a written contract's wording.

Unterhalter AJA conducted a survey of recent CC judgments on the topic and noted that it had given a very wide remit to the admissibility of extrinsic evidence of context and purpose, reconciling this with the strictures of the parole evidence rule by associating the latter with the 'plain meaning' principle: If the contract had a plain meaning and was an exclusive memorial of the agreement, then the parole evidence rule would exclude extrinsic evidence contradicting it. Unterhalter AJA noted that because contracts, and particularly commercial ones, were carefully designed and worded, their text and structure had an undeniable gravitational pull. Context and purpose, rather than providing a licence to contend for meanings unmoored in the text and its structure, could serve to elucidate the text.

In his discussion of the CC judgments, Unterhalter AJA was at pains to emphasise that none of them sanctioned the importation of meanings into a contract to make it a better contract or one that is ethically preferable. Nor did they confer open-ended permission to pursue undisciplined and self-serving interpretations. And nowhere did the CC evince scepticism that the words and terms used in contract have meaning, stressing instead that meaning is properly understood by looking at how they fit into the larger structure of the agreement and its context and purpose.

Unterhalter AJA concluded this part of his judgment by noting that the evidence as to how the parties had conducted themselves after the conclusion of the agreement was indeed relevant and had to be considered in deciding on the

meaning to be attributed to clause 8.3. But while the evidence was that Capitec had (initially) conducted itself as if its consent was required, it did not lend context to clause 8.3 which displaced its clear meaning that Capitec's consent was *not* necessary for Coral to conclude the sale in question.

While this was sufficient for Unterhalter AJA to rule that the GJ's orders had to be rescinded, he nevertheless went on to deal with the good faith requirement. The GJ had ruled that Capitec's withholding of consent was in breach of its contractual and common law duties of good faith and reasonable conduct, and that justice would only be served if the agreement was taken to require Capitec's consent to Coral's sale of the shares.

Unterhalter AJA rejected the reasoning of the GJ. He pointed out that the principle that contracts freely and voluntarily entered had to be honoured remains central to the law of contract. He stressed that the scope and application of public policy to invalidate contractual terms should be undertaken with circumspection and that good faith cannot be invoked to determine contractual terms. There was, according to Unterhalter J, no interpretation of the agreement that established a requirement of consent. The court would not impose an agreement that the parties did not make.

Good faith, said Unterhalter J, is not a norm that could be used, as the GJ did, to decide what the parties should be taken to have agreed or how they should act. Coral's ambitious efforts to use the concept of good faith to re-engineer the agreement to require consent and then to find Capitec wanting for withholding it, could not prevail.

In the result the SCA upheld the appeal and set aside the GJ's order, substituting it to dismiss Coral's application.

Criminal law

No different threshold of proof of consent in rape cases, regardless of whether victim was virgin or not: The case of *S v Coko* 2022 (1) SACR 24 (ECG) concerns an appeal by the appellant to the ECG against a conviction of the accused by the regional magistrate's court on a charge of rape. He was sentenced to seven years' imprisonment.

The principal issue was whether the complainant had granted consent to sexual penetration after the parties had started to engage in sexual intimacy – it was common cause that the appellant and complainant had been in a relationship, which had been terminated by the complainant shortly after the incident. The complainant insisted that she had not consented although conceding to indulging in oral sex during the incident.

In assessing the matter, ECG on appeal (per Ngcukaitobi AJ (Gqamana J concur-

ring)) noted that the magistrate and the prosecutor had made much of the fact that the complainant had been a virgin at the time of the incident. It had been suggested to the appellant that 'something more' was required to demonstrate her consent and that it was not sufficient for him to rely solely on her conduct as indicative of consent. This was found to be a misdirection of law and the court emphasised that there were no different standards applicable to women or men who were virgins and those who were not. Consent meant the same thing, regardless of whether the victim was a virgin, and an unfortunate precedent would be set if the law applied a different threshold to consent in respect of persons who were not virgins.

However, this was not the only flaw in the judgment. Ngcukaitobi AJ also ruled that the magistrate had committed factual misdirection in concluding, *inter alia*, that the appellant had conceded that the complainant had made it plain more than once that she did not want sexual intercourse, and that this had played a crucial role in the overall assessment of the evidence and influenced the findings of the magistrate in finding the appellant guilty. The only real area of dispute in the appellant's evidence, and this was after the commencement of intercourse, was his concession that when complainant said that his actions were hurting her, he 'would stop and then continue'. This aspect was, however, not taken up in cross-examination, nor was it weighed in the assessment of the probabilities by the magistrate. Ultimately Ngcukaitobi AJ was unable to uphold the findings of fact of the magistrate and consequently that the state had proved that the version of the appellant, that he genuinely believed that there was at least tacit consent, was false beyond reasonable doubt. The appeal, therefore succeeded, and the conviction and sentence were set aside.

Other criminal cases

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

- bail – pending petition to SCA – court jurisdiction;
- court – judicial officer – conduct of;
- evidence – admissibility of – documents; and
- evidence – admissibility of – dying declaration.

Delict

State's liability for injuries at places of care under Child Care Act 74 of 1983: In *BE obo JE v MEC for Social Development, Western Cape* 2022 (1) SA 1 (CC) the CC considered whether the minister had a legal duty to prevent harm to children

in early childhood development centres (ECD centres) and other places of care.

JE had suffered severe traumatic head and brain injuries, leaving her severely and permanently disabled, when the top beam of a wooden swing structure she was playing on collapsed on her at her playschool, a community organisation and 'place of care' under the Child Care Act 74 of 1983 (the Act). BE, her father, on her behalf instituted a delictual claim against the playschool and the Provincial Minister: Western Cape Department of Social Development (the MEC). The action against the playschool was settled and proceeded only against the MEC. The High Court held that delictual liability had been established, and that the MEC was liable for damages flowing from the accident. The SCA upheld the minister's appeal against the High Court's decision, on the basis that wrongfulness had not been proven.

The CC, dismissing CB's appeal against the SCA's decision, held that the alleged statutory duties were regulatory and did not translate into a private-law duty to prevent harm to children at places of care; and that public policy did not favour the imposition of such duty.

Ownership

A revisiting of bound and free co-ownership and the *actio communi dividundo*: In *Municipal Employees Pension Fund and Others v Chrisal Investments (Pty) Ltd and Others* 2022 (1) SA 137 (SCA) three companies (the first to third respondents) that owned a business operating three shopping centres had agreed to sell a 55% share in that business to the first appellant pension fund (the Municipal Employees Pension Fund (MEPF)) for a total price of R 550 million. The assets of the business consisted of the immovable properties on which the shopping centres were situated and the leases with tenants that provided the revenue stream of the business (without the leases the shopping centres would have been white elephants with little commercial value). Under this agreement of sale, then, the MEPF did not merely purchase certain immovable properties but acquired an interest in the business of operating the three shopping centres.

The fourth respondent (Adamax Property Projects Menlyn (Pty) Ltd (Adamax)), the holding company of first to third respondents, concluded a separate agreement governing the co-ownership of the business. This co-ownership agreement encompassed –

- the distribution of income from the business;
- the incurring of costs and other obligations;
- the constitution of an executive committee;

- property and financial management of the business; and
- the costs of managing the shopping centres.

It was linked to the sale agreement by way of a condition precedent that made the sale agreement dependent on the conclusion of the co-ownership agreement.

The day after the sale agreement, however, Adamax invoked the *actio communi dividundo* to demand the dissolution of the co-ownership of the business and the sale of the properties on which the shopping centres stood. Adamax claimed that it was open to it to invoke the *actio* – for any reason – immediately after the conclusion and implementation of the sale agreement and the co-ownership agreement or at any time thereafter. It was clear from the facts that allowing Adamax to invoke the *actio* would have the effect of destroying the very basis on which the MEPF had entered into the arrangement, namely, to secure a stable stream of income to meet its obligations to pensioners.

The MEPF resisted Adamax's demand on the ground that the application was an endeavour to subvert the provisions of the co-ownership agreement, which they said regulated all incidents of its operation and constituted the complete record of the parties' agreement. Its primary case was that the relationship between the parties was governed by the contracts and nothing else. The *actio* was accordingly unavailable to Adamax.

Adamax then approached the GP, which ruled in its favour on the premise that the *actio* was available even where a contractual relationship governed co-ownership of property. The SCA granted the MEPF's application for leave to appeal.

The SCA (per Wallis JA (Cachalia JA, Mbha JA, Eksteen AJA and Weiner AJA concurring)) reversed the GP's order. In his reasons Wallis JA stressed in the first place that the GP's entire approach to the case was flawed because it erroneously assumed that the availability of the *actio* was one of the *naturalia* of any agreement giving rise to co-ownership.

Wallis JA pointed out that there were two forms of co-ownership: free and bound. In the former, the co-ownership was the sole legal relationship between the parties, while in the latter, the co-ownership arose from another legal relationship (for example, marriage in community of property or a partnership agreement). Under free co-ownership each owner had a right at any time to dissolve the ownership relationship, while in the case of bound co-ownership, dissolution was governed by the legal arrangement creating the co-ownership. There was no closed list of instances of bound co-ownership, and whether

a particular relationship was bound or free was determined by the terms under which it was created.

According to Wallis JA the co-ownership of the properties arose from the co-ownership agreement business, and that co-ownership was bound rather than free: the terms of the contractual bond between the parties made it sufficiently similar to a partnership or joint venture for it to constitute bound co-ownership. Accordingly, the operation of the *actio* was excluded, with any dissolution of co-ownership being governed by the ownership agreement.

The SCA, therefore, upheld the appeal and set aside the order of the GP, substituting it with an order dismissing Adamax's application.

Sectional title

Vesting of exclusive use areas when last unit owned by developer in scheme validly sold but by mistake not transferred: In *Diaz Hotel and Resort (Pty) Ltd v Vista Bonita Sectional Titles Scheme Body Corporate and Another* 2022 (1) SA 175 (WCC) a developer (SDC) had sold its last unit in a sectional title development to the applicant (Diaz Hotel), together with three exclusive areas. Registration of transfer of the unit was completed but not of the exclusive areas, three parking bays. These were not transferred

because the notary executed deeds of cession thereof was not registered, allegedly as a result of a deeds office mistake. Unable to get the body corporate (Vista BC) to cooperate with it to obtain transfer of the exclusive use areas, Diaz Hotel brought an application to compel Vista BC to do so, together with certain declaratory relief.

Under s 2 of the Sectional Title Schemes Management Act 8 of 2011, a developer ceases to be a member of a body corporate when they no longer have a share in the common property. In turn, s 27(1)(c) of the Sectional Titles Act 95 of 1986 (the STA) provides that when a developer ceases to be a member of a body corporate, 'any right to an exclusive use area still registered in his or her name vests in the body corporate free from any mortgage bond'. One of the opposing grounds was that by operation of s 27(1)(c) the parking bays now vested in Vista BC, so that SDC, no longer being the holder of any rights in and to the exclusive use areas, could not give transfer thereof to Diaz Hotel. This raised the legal issues of the scope of s 27(1)(c), that is, whether it applied in these circumstances to vest the exclusive use areas in Vista BC; and in view of the relief sought, what the nature of such rights were, more particularly whether such vesting amounted to ownership as contemplated in s 33 of the Deeds Registries Act

47 of 1937 (the DRA) so that it could be utilised to effect 'registration of title by other than the ordinary procedure'.

The WCC (per Dolamo J and Sher J (Ndita J concurring)) ruled that the steps taken by SDC to effect transfer of the exclusive use areas evinced an *animus transferendi domini* – the subjective element required for the passing of ownership – and resulted in Diaz Hotel acquiring personal rights, which preceded the entitlement of Vista BC to have the rights to the exclusive use areas vest in it in terms of s 27(1)(c). That transfer of these exclusive use areas did not happen was an error which ought to be rectified to reflect the correct legal position.

The WCC pointed out that acquisition by a body corporate of and exclusive use rights in terms of s 27(1)(c) did not cover instances where a developer expressly, and in a binding agreement, intended its rights to be transferred to a purchaser but where through a mistake, negligent or otherwise, these were not so transferred at the time when the last unit owned by the developer in the scheme was transferred. The only rights, which vested in a body corporate once the last unit which the developer owned was transferred, were rights of exclusive use, and not rights of ownership. In the circumstances the Vista BC could not and did not obtain better rights over the exclusive use areas than those which

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SDC had, as these bays collectively belonged to all the owners of units in the scheme, as part of its common property. To hold that ss 27(1)(c) and 27(4)(b) had the effect of vesting ownership rights in respect of the parking bays in the body corporate would amount to an unlawful and arbitrary expropriation of the property rights of all the owners in the scheme in respect of the bays, in violation of s 25 of the Constitution.

In closing the WCC held that when exclusive use rights in respect of common property vested in a body corporate in terms of ss 27(1)(c) or 27(4)(b), it did not have the right to do with them as it pleased but had to deal with them in the interests of and for the benefit of all owners in the scheme. An expansive interpretation of s 33 of the DRA to equate the holder of an exclusive use right in a sectional title scheme with the holder of ownership rights in immovable proper-

ty was not justified. Section 2(e) of the STA expressly authorised the Registrar of Deeds to register a title deed conferring ownership (or other real right) in a section or undivided share or common property of the scheme. This was the operative provision for the transfer of exclusive use rights in sectional title schemes generally, and in circumstances of this case, not s 33(1) of the DRA. Diaz Hotel was therefore entitled to an order which would allow for the transfer to it of the exclusive use rights to the parking bays which were still registered in the name of SDC.

Other cases

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

- conversion of informal land rights to leases;

- courts' discretion to order final liquidation of a company;
- execution in actions against the state; execution pending appeal;
- liability of city electricity providers to income tax;
- meaning of 'default' in default judgments;
- notices under r 6(5) of the Uniform Rules of Court; and
- role of the Community Schemes Ombud.

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



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.

Nicqui Galaktiou Inc Attorneys in Johannesburg has one promotion and one appointment.



Thembelihle Shabalala has been promoted as a Senior Associate in the Constitutional and Administrative Law Department, which deals with public law matters, contractual disputes and commercial litigation.



Marie-Claire Willys has been appointed as an Associate and Conveyancer in the Commercial Property and Real Estate Law Department.

Garlicke & Bousfield in La Lucia Ridge has two new appointments.



Odel Jaganathan has been appointed as an Associate in the Litigation Department.



Verushka Ramlucken has been appointed as an Associate in the Estates and Trusts Department.



Stegmanns Inc in Pretoria have appointed Gareth Shepperson as a Senior Associate in the Property Law Department.





By
Nozipho
Lethokuhle
Ndebele

Intestate succession – heterosexual life partners

Bwanya v the Master and Others
2021 (1) SA 138 (WCC)

For a great many years, couples have lived together without entering into a legally recognised marriage and numerous people in South Africa still live in this way. The term ‘life partnership’ is one of the terms used to signify this type of relationship. A heterosexual life partnership is between partners in an opposite-sex relationship.

In *Bwanya v the Master*, the court addressed the challenge on the constitutionality of both the Maintenance of Surviving Spouses Act 27 of 1990 (MSSA) and the Intestate Succession Act 81 of 1987 (ISA), insofar as they excluded the applicant from inheriting or receiving maintenance from her deceased life partner’s estate.

The applicant was in a permanent life partnership with the deceased and they lived together. The applicant and the deceased were engaged to be married to each other and the people who were close to them knew about their commitment to marry one another (paras 23 to 25). The deceased provided financial support to the applicant but unfortunately died two months prior to their arranged travel to the applicant’s home-country to finalise *lobolo* negotiations, after which they would get married (para 25). Based on the presented evidence, the court was convinced that the applicant and the deceased had been in a permanent life partnership and had undertaken reciprocal duties of support (para 142).

The court was called on to determine whether some of the provisions of the ISA and the MSSA that were pertinent to this case were unconstitutional and invalid, and if so, what would be a just and equitable remedy.

The challenge of the Intestate Succession Act

Section 1(1) of the ISA excludes life partners in a permanent opposite-sex life partnership from inheriting intestate as per the Act.

The court found an unfair discrimination insofar as heterosexual partners who have undertaken a reciprocal duty of support are excluded from inheriting intestate from the estate of their deceased partners. This was based on the fact that same-sex life partners are still allowed to inherit intestate post the Civil Union Act 17 of 2006 (CUA), which allows them to marry.

In *Laubscher NO v Duplan and Others* 2017 (2) SA 264 (CC), the Constitutional Court (CC) decided that the CUA did not repeal the *Gory* court order (*Gory v Kolver NO and Others (Starke and Others Intervening)* 2007 (4) SA 97 (CC)), which permitted same sex permanent life partners to inherit intestate from each other’s estate because it did not amend s 1(1) of the ISA. This decision permits same-sex life partners to invoke the protection of pre-CUA case law despite not having solemnised a marriage. As a result, this clearly discriminated against heterosexual permanent life partners because the same protection was not extended to opposite-sex partners in a similar position.

Consequently, the court found this discrimination to gravely affect the rights and interests of heterosexual permanent life partners who depend on each other for support (para 170). It was further held by the court that it is an infringement of the right to equality for heterosexual permanent life partners to be ‘left out in the cold’ while same-sex life partners in the same boat, stand to benefit (para 172).

Therefore, the court found the ISA to unfairly discriminate against heterosexual life partners and ordered that wherever the word ‘spouse’ appears in the Act, there should be a read in of the words ‘or partner in a permanent opposite-sex life partnership in which the partners [have] undertaken reciprocal duties of support’ (para 225).

The challenge of the Maintenance of Surviving Spouse Act

The definition of a ‘survivor’ in the MSSA excludes a heterosexual permanent life partner. The applicant’s challenge on the MSSA failed on the ground that the precedence set by the CC in *Volks NO v Robinson and Others* 2005 (5) BCLR 446 (CC), upheld that a claim for spousal maintenance must be created by ‘operation of law’ through a marriage, as opposed to a ‘contractual one’, which is through an agreement to cohabit (paras 200 and 209). The *Volks* judgment was based on the ‘choice argument’, which is an argument that, by choosing not to enter into a marriage, a cohabitant cannot insist on the benefits of a marriage. In this regard, one could not help but wonder whether there was logic in applying the ‘choice

argument’ on claims based on the MSSA (spousal maintenance), but not in the context of the ISA (intestate succession), because both claims are predicated on the existence of a reciprocal duty of support. Thus, it was considered necessary by several legal scholars to review and overrule the *Volks* decision in order to provide heterosexual permanent life partners with the same benefits enjoyed by same-sex life partners.

Consequently, the High Court’s judgment was referred to the CC.

In the recent judgment of the CC, the High Court’s order was confirmed in declaring that the ‘exclusion of surviving permanent opposite-sex life partners from enjoying benefits under section 1(1) of the Intestate Succession Act amounts to unfair discrimination’ (*Bwanya v the Master and Others* (CC) (unreported case no 241/20, 31-12-2021) (Mogoeng CJ, Jafta J, Khampepe J, Madlanga J, Majiedt J, Mhlantla J, Pillay AJ, Theron J, Tlaletsi AJ and Tshiqi J) (para 92)).

However, contrary to the High Court’s order, the CC has concluded that ‘the denial of the section 2(1) maintenance benefit to permanent life partners constitutes unfair discrimination’ insofar as it excludes permanent life partners who undertook reciprocal duties of support (paras 73 and 81). It sufficed that the important fact to establish is whether there is a ‘legally enforceable duty of support arising out of a relationship’ (para 71). As a result, it was ordered that the definition of ‘survivor’ in the MSSA should be read as if it also included a surviving partner of a permanent life partnership where the ‘partners undertook reciprocal duties of support and ... where the surviving partner has not received an equitable share in the deceased partner’s estate’ (para 95).

Therefore, Parliament has a period of 18 months to rectify the identified constitutional defects.

Significantly, this judgment now permits heterosexual permanent life partners who have undertaken reciprocal duties of support to claim for inheritance and maintenance from the other deceased partner’s estate.

Nozipho Lethokuhle Ndebele LLB (UFS) LLM (UFS) is a graduate in Cape Town.



By
Tinotenda
Mparutsa

Section 66 of the LRA imports the proportionality principle in determining the reasonableness of a secondary strike

Association of Mineworkers and Construction Union and Others v AngloGold Ashanti Ltd t/a AngloGold Ashanti and Others [2022] 2 BLLR 115 (CC)

Section 66(1) of the Labour Relations Act 66 of 1995 (the LRA) defines a ‘secondary strike’ as a ‘strike, that is in support of a strike by other employees against their employer’. From this definition, a secondary strike involves two employers. The primary employer, whose employees are on strike to remedy a dispute that they have. The secondary employer, whose employees are on strike in support of the employees of the primary employer. The nature and extent of any right to engage in secondary strike has been interpreted inconsistently in the labour relations community.

Some members contend that, ‘in relation to the primary employer, a secondary strike must have an effect, and that, in relation to a secondary employer, the secondary strike must be reasonable’ (Post Judgment Media Summary (www.concourt.org.za, accessed 1-2-2022)). Therefore, implying a principle of proportionality. While other members are of the view that priority should be afforded to the effect of the secondary strike on the business of the primary employer rather than the harm to the secondary employer.

This debate whittles down to the interpretation and application of s 66(2) of the LRA. In a recent Constitutional Court (CC) decision of *AngloGold Ashanti Ltd t/a AngloGold Ashanti*, the issue of whether the LRA imports the principle of proportionality into secondary strike action was considered.

The facts

In November 2018 the members of the Association of Mineworkers and Construction Union (AMCU) employed by Sibanye Gold Ltd embarked on a wage strike. In February 2019, while the primary strike was ongoing, AMCU gave notice in terms of s 66 of the LRA of secondary strike action to ten mining companies operating in different mineral

sectors. These strikes were to commence on 28 February 2019 and continue until 7 March 2019. The secondary strikes would involve all AMCU members employed by the ten mining companies.

The ten employers approached the Labour Court (LC) for an interdict preventing AMCU and its members from participating in the strike on the basis that the strike did not meet the requirements for a protected secondary strike as provided in s 66 of the LRA. The LC found that all the secondary strikes were unprotected. AMCU approached the Labour Appeal Court (LAC), by then the primary strike had already been resolved. The union stated that ‘exceptional circumstances existed for the hearing of the matter based on a significant point of law, being the interpretation of section 66(2) (c) of the LRA, the Labour Appeal Court held that the interpretation was already settled in law and proceeded to dismiss the appeal on account of its mootness’ (Post Judgment Media Summary (*op cit*)). The union then sought, and was granted, leave to appeal to the CC. The CC held that although the matter was moot, it was in the interest of justice to grant leave to appeal citing the importance of the issue to employers and trade unions.

The law

Section 66(2) of the LRA imposes three limitations on the right to engage in a secondary strike. The limitations are as follows:

‘(a) the strike that is to be supported complies with the provisions of sections 64 and 65;

(b) the employer of the employees taking part in the secondary strike or, where appropriate, the employers’ organisation of which that employer is a member, has received written notice of the proposed secondary strike at least seven days prior to its commencement; and

(c) the nature and extent of the secondary strike is reasonable in relation to

the possible direct or indirect effect that the secondary strike may have on the business of the primary employer.’

The decision

The CC held, ‘in its interpretation of section 66(2)(c) of the LRA, that, in relation to the primary employer, a secondary strike must have an effect, and that, in relation to a secondary employer, the secondary strike must be reasonable’ (Post Judgment Media Summary (*op cit*)). The court interpreted the phrase ‘reasonable in relation to’ in s 66(2)(c) of the LRA to import proportionality in the assessment of reasonableness. As a way of illustration, the CC found that AMCU’s proposed secondary strike would not be proportionate and reasonable, mainly, for having no effect on Sibanye as the primary employer. Furthermore, the secondary strikes would have been unreasonably destructive regarding their impact on the secondary employers.

The CC also considered two subsidiary questions. The first question was: Can a court aggregate secondary employers in the assessment of ‘whether a secondary strike is reasonable in relation to its effects on the business of the primary employer’? (See para 163). The CC supported the notion that the assessment of reasonableness must focus on the individual secondary employer that is challenging the lawfulness of a secondary strike. However, contingent on the facts, multiple secondary employers can be aggregated for purposes of the inquiry in terms of s 66(2)(c) of the LRA.

The second subsidiary question was whether the prospect of violence during the secondary strike is a consideration when assessing the reasonableness of a secondary strike. The CC found it so. Notwithstanding, the court preferred the route of the secondary employer obtaining an interdict to prohibit the violence without interfering with the secondary strike. The CC dismissed the appeal

against the judgments of the LC and the LAC, except insofar as the cost orders were concerned. Consequently, each party was ordered to pay its own costs.

Conclusion

The debate is settled. The proportionality principle has application in the assessment of the reasonableness of a secondary strike on the business of a

secondary employer. This assessment is fact sensitive and is determined on a case-by-case basis. Therefore, employers seeking to interdict secondary strike action must furnish sufficient proof that the strike did not meet the requirements for a protected secondary strike. The CC's decision provides protection for secondary employers who were otherwise without 'procedural safeguards,

such as conciliation and more than seven days' notice of the intended strike that primary employers have' (Post Judgment Media Summary (*op cit*)).

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By Cora
van der
Merwe

Who may appear before a Taxing Master?

Middelberg v Takseermeester en Andere (TPD) (unreported case no 26645/97, 12-3-1998) (Spoelstra, J)

There has for a long time been a debate, and on occasion a heated one, concerning who may appear before a Taxing Master to present or oppose bills of costs.

In some courts the Taxing Masters have made a ruling at the commencement of a taxation that only a person with right of appearance in terms of s 4(2) of the Right of Appearance in Courts Act 62 of 1995 or in terms of s 25(3) of the Legal Practice Act 28 of 2014 (LPA) may appear.

Ancillary to this is whether evidence may be led at taxation.

What is the answer and why?

In terms of s 25(3) of the LPA, the right of attorneys to appear in the High Court, the Supreme Court of Appeal or the Constitutional Court (ie, Superior Courts) is restricted. Attorneys wishing to appear in these courts must apply to the Registrar of the High Court for a certificate of right of appearance, which will be issued if the attorney –

- has been practising for a continuous period of not less than three years (the period may be reduced if the attorney has undergone a trial advocacy training programme) and is in possession of an LLB degree; (s 25(3)(a)); or
- 'has gained appropriate relevant experience' (s 25(3)(b)).

Taxation is a quasi-judicial proceeding and, although not expressly stated in the LPA is contemplated in it.

Section 25(2) of the LPA provides that an attorney (who does not have audience before Superior Courts) has the right to appear in any court or before any board, tribunal or similar institution. A Taxing Master indubitably falls into this latter category.

A candidate attorney is also permitted to appear at taxation right from the first day of practical vocational training.

Section 25(5)(a)(ii) makes provision for this.

'(5)(a) A candidate attorney is, ... , entitled to appear –

...
(ii) before any board, tribunal or similar institution on behalf of any person, instead of and on behalf of the person under whose supervision he or she is undergoing his or her practical vocational training'.

The question of what the position concerning a cost consultant, who does not have a legal qualification but who is the drafter of the bill of costs or has prepared the opposition to the bill of costs is?

The answer is to be found in the judgment in *Middelberg v Takseermeester en Andere* (TPD) (unreported case no 26645/97, 12-3-1998) (Spoelstra, J).

The bill of costs in this matter was presented for taxation by counsel (who automatically have a right of appearance) but was taken on review because the expert witness was a cost consultant whose business was the preparation and opposition of bills of cost.

According to Spoelstra J only one of the grounds is still applicable at this stage, namely that the proceedings were irregular and owing to the fact that a cost consultant that appeared on behalf of the respondents was not qualified as a legal practitioner (paraphrased from the Afrikaans judgment).

Although the taxation proceedings form an integral part of the legal process, the nature thereof differs from the previously mentioned part of the legal process. The goal or objective of taxation is firstly to quantify the costs and secondly,

to ensure that the parties responsible for the costs do not pay too much, and that the successful party is not prejudiced (*Mouton and Another v Martine* 1968 (4) SA 738 (T) on 742) (paraphrased from the Afrikaans judgment). In *Botha v Themstocleous* 1966 (1) SA 107 (T) Hill, R on page 111 it states:

'The taxing master is not a judicial officer and is not bound by the strict rules of evidence. He is virtually in the position of an arbitrator or referee appointed to assist the court in determining what a just remuneration should be for an attorney's services in any particular case'.

There is no specific procedure prescribed for taxation. The Taxing Master determines the course of the proceedings. What occurs in front of the Taxing Master is, in essence, a debate pertaining to a bill of costs. Where necessary, the Taxing Master may hear evidence. There is no reason why the Taxing Master will deny a person, such as a cost consultant, who compiled a bill of costs and who in all likelihood is in a better position to provide the necessary information, the opportunity to deliver a contribution. It may even be essential for the proper execution of his task (paraphrased from the Afrikaans judgment).

Consequently, in the light of the decision, a costs consultant has the right to appear at a taxation on behalf of a party as an expert witness.

Cora van der Merwe BA (UJ) BA (Hons) (cum laude) (UP) is a legal cost consultant at Legally Accurate Cost Consultants in Pretoria. □

By
Wasim Cassim,
Lauren Lloyd and
Lizelle Rossouw

New legislation

Legislation published from
3 January – 28 January 2022

Acts

Adjustments Appropriation Act 18 of 2021

Commencement: 19 January 2022. GenN768 GG45785/19-1-2022.

Criminal and Related Matters Amendment Act 12 of 2021

Commencement: To be proclaimed. GenN786 GG45822/28-1-2022.

Pending insertion of ss 51A, 51B and 51C in the Magistrates' Courts Act 32 of 1944.

Pending amendment of ss 59, 59A, 60, 158, 161, 170A and 299A and sch 1, Part II of sch 2, sch 7 and sch 8 and pending substitution of ss 68 and 316B of the Criminal Procedure Act 51 of 1977.

Pending amendment of Parts I, II and III of sch 2 of the Criminal Law Amendment Act 105 of 1997.

Pending insertion of ss 37A, 37B and 37C of Superior Courts Act 10 of 2013.

Criminal Law (Forensic Procedures) Amendment Act 37 of 2013

Commencement: Section 2 in terms of the insertion of s 36D (1): 31 January 2022. Proc 48 GG45739/13-1-2022.

Insertion of s 36D(1) of the Criminal Procedure Act 51 of 1977.

Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act 13 of 2021

Commencement: To be proclaimed. GenN787 GG45823/28-1-2022.

Pending amendment of ss 1, 2, 5, 12, 24, 30, 40, 42, 43, 44, 45, 46, 47, 48, 49, 50, 53, 56 and 57, the long title and index, pending insertion of Part 5 (s 14A) in Ch 2, ss 44B and 44C, pending substitution of the heading for Ch 4 and ss 2, 25, 26, 41, 51 and 54 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

Customs and Excise Act 91 of 1964

Amendment of sch 1 (no 1/1684). GN R1703 GG45817/28-1-2022.

Amendment of sch 1 (no 1/1683). GN R1704 GG45817/28-1-2022.

Amendment of sch 1 (no 1/1682). GN R1705 GG45817/28-1-2022.

Amendment of sch 1 (no 1/1681). GN R1706 GG45817/28-1-2022.

Amendment of sch 4 (no 4/2/381). GN R1707 GG45817/28-1-2022.

Division of Revenue Amendment Act 17 of 2021

Commencement: 19 January 2022. GenN767 GG45784/19-1-2022.

Substitution of Column A of sch 1, Col-

umn A of sch 2, Part A and Column A of Part B of sch 5, Column A of Part A of sch 6 and Column A of Part B of sch 6 of the Division of Revenue Act 9 of 2021.

Domestic Violence Amendment Act 14 of 2021

Commencement: To be proclaimed, except s 26, which inserts s 19A in the Domestic Violence Act 116 of 1998: 28 January 2022. GenN788 GG45824/28-1-2022.

Pending insertion of the arrangement of sections and ss 2A, 2B, 3A, 4A, 5A, 5B, 5C, 6A, 18A and 18B.

Pending substitution of ss 1, 3, 4, 5, 6, 9, 15, 16, 19 and 20 and pending amendment of ss 2, 7, 8, 10, 11, 12, 13, 17 and 18 of the Domestic Violence Act 116 of 1998.

Insertion of s 19A with effect from 28 January 2022 of the Domestic Violence Act 116 of 1998.

Pending amendment of s 40 of the Criminal Procedure Act 51 of 1977.

Pending amendment of sch 2 of the Firearms Control Act 60 of 2000.

Pending amendment of s 1 of the Protection from Harassment Act 17 of 2011.

Pending amendment of s 47 of the Superior Courts Act 10 of 2013.

Financial Sector Laws Amendment Act 23 of 2021

Commencement: To be proclaimed. GenN789 GG45825/28-1-2022.

Pending insertion of s 22A and pending amendment of ss 35A and 83 and the arrangement of sections in the Insolvency Act 24 of 1936.

Pending amendment of s 10 of the South African Reserve Bank Act 90 of 1989.

Pending amendment of ss 51, 54, 60 and 91, pending repeal of ss 68, 69 and 69A and pending substitution of s 89A of the Banks Act 94 of 1990.

Pending amendment of ss 4, 29 and 92 and the arrangement of sections, pending repeal of ss 73, 74, 75, 76, 77, 80 and 81 and pending insertion of s 78A of the Mutual Banks Act 124 of 1993.

Pending amendment of s 18 of the Competition Act 89 of 1998.

Pending insertion of s 9B and pending amendment of the arrangement of sections of the Financial Institutions (Protection of Funds) Act 28 of 2001.

Pending amendment of ss 1, 55 and 80, pending repeal of ss 24, 25, 26 and 30 and pending insertion of s 30A of the Co-operative Banks Act 40 of 2007.

Pending amendment of ss 81, 112, 113,

114 and 128 of the Companies Act 71 of 2008.

Pending amendment of ss 3, 60 and 64 of the Financial Markets Act 19 of 2012.

Pending amendment of ss 1, 7, 26, 27, 30, 105, 109, 129, 134, 241, 248, 250 and 267, schs 2 and 3, the long title and the arrangement of sections, pending substitution of ss 9, 28, 91, 265 and 285 and the heading to Part 6 of ch 2, pending insertion of ss 29A, 29B, 135A and ch 12A (ss 166A to 166Z, ss 166AA to 166AZ, ss 166BA to 166BH) and pending repeal of s 31 of the Financial Sector Regulation Act 9 of 2017.

Pending amendment of s 52 of the Insurance Act 18 of 2017.

Property Practitioners Act 22 of 2019

Commencement: 1 February 2022. Proc 47 GG45735/14-1-2022.

Repeal of the Estate Agency Affairs Act 112 of 1976.

Rates and Monetary Amounts and Amendment of Revenue Laws Act 19 of 2021

Commencement: 19 January 2022, unless otherwise indicated. GenN769 GG45786/19-1-2022.

Amendment of ss 6, 6A, para 9 of the sch 7 of the Income Tax Act 58 of 1962.

Amendment of s 5 of the Carbon Tax Act 15 of 2019.

Amendment of s 2 and sch 1 of the Rates and Monetary Amounts and Amendment of Revenue Laws Act 22 of 2020.

Tax Administration Laws Amendment Act 21 of 2021

Commencement: 19 January 2022, unless otherwise indicated. GenN771 GG45788/19-1-2022.

Amendment of s 5 of the Estate Duty Act 45 of 1955.

Amendment of ss 18A, 49F and 64LA, para 13 of the Sch 1, paras 6, 14, 21 and 23 of sch 4 and para, 17 of sch 7 of the Income Tax Act 58 of 1962.

Amendment of ss 1, 6, 38A, 60, 64E, 75 and 79 of the Customs and Excise Act 91 of 1964.

Amendment of ss 93, 95, 99, 149 and 223 of the Tax Administration Act 28 of 2011.

Amendment of ss 1 and 2 of the Disaster Management Tax Relief Administration Act 14 of 2020.

Taxation Laws Amendment Act 20 of 2021

Commencement: 19 January 2022, unless otherwise indicated. GenN770 GG45787/19-1-2022.

Amendment of s 9 of the Transfer Duty Act 40 of 1949.

Amendment of ss 5 and 13 of the Estate Duty Act 45 of 1955.

Amendment of ss 1, 7C, 8, 8E, 8F, 8FA, 9D, 9H, 12DA, 12F, 12H, 12I, 13*quat*, 19, 20, 23M, 25, 28, 29A, 41, 42, 45, 46, 46A, 47, 49E, 50A, 64G, 64H, para 6A of sch 2, paras 1, 2, 5 and 6 of sch 4, paras 5, 6, 10 and 12D of sch 7, para 12A, 48A and 49 of sch 8, substitution of s 40CA and sch 11 and insertion of s 57B to the Income Tax Act 58 of 1962.

Continuation of certain amendments of schedules to the Customs and Excise Act 91 of 1964.

Amendment of ss 2, 9, 10, 11 and 16 and sch 2 and insertion of s 18D of the Value-Added Tax Act 89 of 1991.

Amendment of ss 1 and 8 of the Securities Transfer Tax Act 25 of 2007. Amendment of ss 1 and 6 of the Employment Tax Incentive Act 26 of 2013.

Amendment of ss 13, 15 and 62 of the Taxation Laws Amendment Act 31 of 2013. Amendment of ss 6 and 12 and sch 2 of the Carbon Tax Act 15 of 2019. Amendment of s 37 of the Taxation Laws Amendment Act 34 of 2019.

Amendment of the long title, preamble and ss 2, 3, 4, 5, 6, 8 and 11 of the Disaster Management Tax Relief Act 13 of 2020.

Amendment of s 77 of the Taxation Laws Amendment Act 23 of 2020.

Bills and White Papers

Financial Sector and Deposit Insurance Levies (Administration) and Deposit Insurance Premiums Bill, 2022

Notice of introduction in National Assembly and publication of explanatory summary of Bill. GenN773 GG45791/20-1-2022.

Financial Sector and Deposit Insurance Levies Bill, 2022

Notice of introduction in National Assembly and publication of explanatory summary of Bill. GenN772 GG45791/20-1-2022.

Government, General and Board Notices

Banks Act 94 of 1990

Designation by the Prudential Authority of activities of an institution which shall not be deemed to constitute 'the business of a bank' under para (cc) in s 1(1) of the Act. GenN779 GG45816/28-1-2022.

Commissions Act 8 of 1947

Amendments to the terms of reference of the commission of inquiry into allegations of state capture, corruption and fraud in the public sector including organs of state. Proc 46 GG45720/3-1-2022.

Construction Industry Development Act 38 of 2000

Appointment of the new Accounting Authority for the Construction Industry Development Board (CIDB). BN196 GG45816/28-1-2022.

Correctional Services Act 111 of 1998

Review: Establishment of Correctional Centres and Remand Detention Facilities. GN1699 GG45816/28-1-2022.

Critical Infrastructure Protection Act 8 of 2019

Publication of Members of the Critical Infrastructure Council. GenN777 GG45816/28-1-2022.

Currency and Exchanges Act 9 of 1933

Financial Surveillance Department: Appointment of an Authorised Dealer in Foreign Exchange with limited authority. GenN753 GG45735/14-1-2022.

Customary Initiation Act 2 of 2021

National Initiation Oversight Committee: Filling of vacancy. GenN781 GG45816/28-1-2022.

Disaster Management Act 57 of 2002

Classification of a National Disaster in terms of s 23 of the Act: Severe Weather Events. GN R1687 GG45789/19-1-2022.

Disaster Management Act 57 of 2002

Extension of a National State of Disaster (COVID-19). GN R1672 GG45754/14-1-2022.

General and Further Education and Training Quality Assurance Act 58 of 2001

Amendment of GN1005 published on 26 July 2019 pertaining to the names of

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persons appointed to serve as Members on the Fifth Umalusi Council for the period 8 June 2018 to 7 June 2022. GN1682 GG45771/21-1-2022.

Immigration Act 13 of 2002

Implementation of the decision to extend Zimbabwean Nationals' Exemption granted in terms of s 31 (2)(b), read with s 31 (2) (d) of the Act. GN1666 GG45727/7-1-2022.

Labour Relations Act 66 of 1995

Essential Services Committee: Notice of investigation into the manufacturing, supply and distribution of certain vaccines and or biologicals, anaesthetics, antiretrovirals to treat HIV virus, immunosuppressants, COVID-19 related products, chronic medicines; and antibiotics. GenN778 GG45816/28-1-2022.

National Environmental Management Act 107 of 1998

General notice calling for submissions of scientific information, socio-economic information or any other relevant information to the panel of experts appointed to lead a review of the scientific basis for the breach of the Mouth of Lake St Lucia Estuary, Isimangaliso Wetland Park, KwaZulu-Natal Province. GN1688 GG45790/20-1-2022.

National Environmental Management: Air Quality Act 39 of 2004

Methodological Guidelines for Quantification of Greenhouse Gas Emissions – Carbon Sequestration in the Forestry Industry. GN1700 GG45816/28-1-2022.

National Heritage Resources Act, No. 25 of 1999

Declaration of ten (10) Kramats in the 'Circle of Tombs' situated at various locations around the Cape Peninsula, Western Cape as National Heritage Sites. GN1571 GG45602/3-1-2022.

Special Investigating Units and Special Tribunals Act 74 of 1996

Referral of matters to existing Special Investigating Unit. Proc49 GG45809/25-1-2022. Referral of matters to existing Special Investigating Unit. Proc50 GG45818/28-1-2022.

Standards Act 8 of 2008

Notice on the issuance of Certificates of Compliance for Electromagnetic Compatibility for Manufacturers. GenN751 GG45717/3-1-2022.

Superior Courts Act 10 of 2013

Rationalisation of areas of jurisdiction and judicial establishments of the divisions of the High Court of South Africa in terms of s 16(6)(b) of sch 6 to the Constitution read with s 6(3) of the Act. GN1661 GG45719/3-1-2022.

Legislation for comment

• **Civil Aviation Act 13 of 2009**

Draft Amendments to the Civil Aviation Regulations, 2011. GN1684 GG45777/18-1-2022.

• **Protection of Personal information Act 4 of 2013**

Code of Conduct: Credit Bureau Association: Notice in terms of s 61(2) of the Act. Gen NR1685 GG45778/19-1-2022.

• **Use of Official Languages Act 12 of 2012**

Consultation on the Draft Reviewed Language Policy for the Department. GN1689 GG45794/21-1-2022. Strategic Policy Framework on Disability for the Post-school Education and Training (PSET) System: Invitation for comments on the Draft Framework and Guidelines to Accommodate Students with Disabilities in Technical and Vocational Education and Training (TVET) Colleges. GN1701 GG45816/28-1-2022.

Rules, regulations, fees and amounts

• **Administration of Estate Act 66 of 1965**

Regiments Securities Limited. GN1708 GG45821/28-1-2022.

Statement of Unclaimed Moneys. GN1709 GG45821/28-1-2022.

South African Sugar Association: Statement of Unclaimed Monies. GN1710 GG45821/28-1-2022.

• **Disaster Management Act 57 of 2002**

Amendment of Directions issued in terms of reg 4(3), read with reg 66A(1) and 66A(4), read with reg 69, of the regulations made under the Act, regarding the re-opening of schools and measures to address, prevent and combat the spread of COVID-19 in the National Department of Basic Education, all Provincial Departments of Education, all Education District Offices and all schools in the Republic of South Africa. GenN758 GG45753/14-1-2022.

• **Marketing of Agricultural Products Act 47 of 1996**

Continuation of statutory levies on table eggs as prescribed by reg R345, as amended and on egg products sold to the trade and determination of guideline price. GN1679 GG45771/21-1-2022.

Continuation of statutory measure regarding the registration of sellers of table eggs as prescribed by reg R345, as amended and egg products sold to the trade. GN1680 GG45771/21-1-2022.

Continuation of statutory measure regarding records and returns by sellers of table eggs as prescribed by reg R345, as amended and egg products sold to the trade. GN1681 GG45771/21-1-2022.

• **Military Pensions Act 84 of 1976**

Determination of amounts for purposes of the Act. G NR1685 GG45779/21-1-2022.

• **Military Pensions Act 84 of 1976**

Determination of amounts for purposes of the Act. G NR1702 GG45817/28-1-2022.

• **National Water Act 36 of 1998**

Reserve determination for water resources of the Mokolo and Matlabas Catchments. GN1669 GG45735/14-1-2022.

• **Petroleum Products Act 120 of 1977**

Regulations in respect of the single maximum national retail price for illuminating paraffin G NR1662 GG45724/4-1-2022.

Maximum retail price for liquefied petroleum gas. G NR1663 GG45724/4-1-2022.

Amendment of the regulations in respect of petroleum products. G NR1664 GG45724/4-1-2022.

• **Political Party Funding Act 6 of 2018**

Multi-Party Democracy Fund. Gen N759 GG45755/14-1-2022.

• **Postal Services Act 124 of 1998**

Fees and charges for postal services. GN1686 GG45780/19-1-2022.

• **Property Practitioners Act 22 of 2019**

Property Practitioners Regulations, 2022. Proc 47 GG45735/14-1-2022.

• **Road Accident Fund Act 56 of 1996**

Adjustment of the statutory limit in respect of claims for loss of income and loss of support. BN194 GG45816/28-1-2022.

• **Road Traffic Management Corporation Act 20 of 1999**

Road Traffic Management Corporation Regulations, 2022. GN1671 GG45738/14-1-2022.

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By
Monique
Jefferson

Employment law update

Interdicting a recruitment process and legal costs

In *Masupha v Member of the Executive Council for Gauteng Provincial Treasury and Another* [2022] 1 BLLR 80 (LC) an employee lodged a grievance on the basis that she alleged that she had a reasonable expectation of being appointed as a permanent employee in the position of Director: Performance Audit and her contract had not been renewed, nor was she offered a permanent position. In this regard, the employee alleged that in 2015 she had attended an interview for the position of Director: Performance Audit and had been advised that if she performed well during the five-year fixed-term contract there would be no reason why her contract would not be renewed beyond 31 December 2020.

In addition, during 2018 the Premier of Gauteng advised that going forward Senior Management Service employees should be engaged as permanent employees as opposed to on fixed-term contracts. Three of her colleagues were then subsequently converted from fixed-term employment contracts to permanent contracts with no recruitment process being followed, but the employee remained engaged on a fixed-term contract. Her fixed-term contract was, however, subsequently extended until 31 December 2021. In July 2021 her position was advertised on a permanent basis. The employee applied for this position but simultaneously sought an undertaking from the employer that the recruitment process be put on hold as she had a reasonable expectation of being employed on a permanent basis in that position. The employer did not give such an undertaking and in approximately August 2021 the employee approached the Labour Court (LC) on an urgent basis for an order restraining the employer from conducting the recruitment process and from interviewing candidates for the position of Director: Performance Audit until the grievance was concluded.

The LC found that the recruitment process is distinguishable from the grievance process. Furthermore, it was held that the relief could not be granted as there was no legitimate grievance

pending as she was not automatically entitled to employment on a permanent basis in the position of Director: Performance Audit. Her relief would instead be to institute an unfair dismissal claim on the basis that she had a reasonable expectation of renewal, but her contract was not renewed, or she had a reasonable expectation of continued employment on an indefinite basis. The court also remarked that the employee would be prejudiced by interdicting the recruitment process as she had applied for the position and may be appointed as part of the interview process. The LC found that the employee failed to demonstrate a reasonable apprehension of irreparable harm to the alleged clear right. It was accordingly held that there was no basis to interdict the recruitment process and the application was dismissed.

As regards costs, the LC followed the default position and did not order costs as it was of the view that the awarding of costs in the circumstances may amount to an error of law and a misdirection. In this regard, reference was made to the Constitutional Court (CC) decision in *Union for Police Security and Corrections Organisation v South African Custodial Management (Pty) Ltd and Others* [2021] 12 BLLR 1173 (CC) in which the ordinary position in the Labour Relations Act 66 of 1995 (LRA) that costs follow the results was overridden by a principle of 'law and fairness'. In this regard, the CC prescribed that a principle of fairness must be applied when making costs orders in labour matters. This means that in the labour context the judicial exercise of a court's discretion to award costs requires the court to –

- give reasons for making a costs order and account for the departure from the default position that costs should not be ordered; and
- apply its mind to the dictates of only the fairness standard in s 162 of the LRA.

Vicarious liability for sexual harassment in the workplace

In *National Union of Metalworkers of South Africa and Another v Passenger*

Rail Agency of South Africa [2022] 1 BLLR 90 (LC) the employee claimed damages from her employer in terms of s 60 of the Employment Equity Act 55 of 1998 (EEA) for alleged sexual harassment. The employee alleged that she had been sexually harassed by two managers and had resigned as a result and then withdrawn her resignation. She lodged a formal grievance in about 2016 dating back to conduct that had arisen in December 2013. The employer appointed a manager to investigate the matter, but the employee objected on the basis that she did not trust the manager. An external law firm was then appointed to conduct the investigation, but the employee also refused to co-operate. She then sought damages from the employer.

The Labour Court (LC) found that s 60 of the EEA was a codification of the common law principle of vicarious liability and to succeed in such a claim sexual harassment would need to have taken place. It was found that sexual harassment had taken place in the circumstances as the onus was on the employer to show that sexual harassment did not take place and the employer did not discharge that onus. In this case, the employee was subjected to acts of harassment by her superior during a work excursion. She also gave evidence that she had been punished as a result of not adhering to sexual advances in that internal transfers happened to her, and she was not appropriately remunerated.

The LC concluded that s 11 of the EEA does not apply in a claim under s 60 and that the onus rests on the employee to prove that the employer was liable. The employee, therefore, needs to satisfy the following –

- that the sexual harassment took place; it was reported immediately;
- the alleged contravention needs to be proven by the employee; and
- the employer must have failed to take the necessary steps to protect the employee.

If the employee proves the four elements referred to above, then there is a deemed order of liability.

To avoid this deemed liability, the employer must demonstrate that it took adequate steps to protect the employee.

The LC held that employers are required to protect employees from harm in the workplace, but the court acknowledged that it was practically impossible for the employer to ensure that all laws are adhered to by employees and the only practical steps that could be taken by employers to ensure that employees do not contravene the law is to adopt appropriate policies such as a sexual harassment policy. Therefore, the employer was required to remind employees not to commit any form of harassment and the employer had discharged this obligation.

The employer must also be aware that the employees committed sexual harassment to be vicariously liable. This means that the sexual harassment must be brought to the attention of the employer as soon as possible. The LC also noted further that the EEA requires the aggrieved employee to 'immediately' bring the alleged harassment to the employer's attention and it is this element that the employee fell short on. In this case, the employee had waited two years to bring it to the employer's attention and when she did, she was not co-opera-

tive. The court, therefore, found that the second element of reporting the conduct immediately was not satisfied. In regard to who the sexual harassment should be reported to, the LC found that the reporting must be to an employer through the mechanism in its adopted policy.

The application was dismissed.

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



By
**Moksha
Naidoo**

An employee is handed a red card for his actions

Woolworths (Pty) Ltd v CCMA and Others (LAC) (unreported case no PA12/2012, 10-12-2021) (Davis JA with Waglay JP and Savage AJA concurring).

On the morning of 9 June 2018, the employee called his manager informing him that he had taken ill and would not be attending work that day. However, later the very same day, the employee travelled an hour to watch a rugby match.

At the start of the employee's next shift and in response as to why he was not a work the previous shift, the employee said he had taken ill but had nevertheless attended a rugby match on the same day.

The employee was charged and dis-

missed for gross misconduct in that he abused the employer's sick leave policy, which conduct if left undetected, could have resulted in the employee claiming his wages when he was not entitled to sick leave.

At the Commission for Conciliation, Mediation and Arbitration (CCMA), the arbitrator found the employee's dismissal both procedurally and substantively unfair. The arbitrator's reasoning in this regard was underpinned by the view that the employee was forthright about attending the rugby match and furthermore, the employer did not charge the employee with any act of dishonesty. Pursuant to his findings, the arbitrator awarded the employee retrospective reinstatement.

The employer's attempt to set aside the award on review failed. The Labour Court found that the arbitrator correctly considered whether the employee's actions were dishonest and based on the employer's lack of evidence to establish any dishonesty; the arbitrator's finding in this regard was not unreasonable. Furthermore, the employer did not have a policy, which dictated what an employee ought not do when booked off sick – the view of the manager – which was that the employee ought to have returned to work once he was feeling better, was a personal view not found in any policy.

On petition to the Labour Appeal Court (LAC), the employer turned to the appeal court. Having considered an extract of the record, the LAC found that there was little doubt that the employee had acted dishonestly. When he was asked whether

it was 'honest' that his employer pay him for the day, including the time he spent attending the rugby match, the employee's reply was 'no, I don't think so'.

The LAC held:

'Manifestly, the third respondent acted dishonestly in absenting himself from work on the basis that he was too ill to perform his duties but then travelled for at least an hour to support his local rugby team, knowing full well that he would be paid for the day. The finding of the second respondent that there had been no act of dishonesty is obviously subject to review, even if the standard for review were so onerous that an award could only be set aside based on an egregious error.'

This is exactly the appropriate term to describe the approach adopted by the second respondent and regrettably it was repeated by the court *a quo*.'

Addressing the question of whether the sanction of dismissal was appropriate, the LAC found that the employee's act of dishonesty impaired the trust relation between the parties, to the extent that dismissal was justified.

The appeal was upheld, and the arbitration award was replaced with a finding that the employee's dismissal was procedurally and substantively fair.

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By
Kathleen
Kriel

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<i>PSLR</i>	Pretoria Student Law Review	Pretoria University Law Press (PULP)	(2021) 15.1
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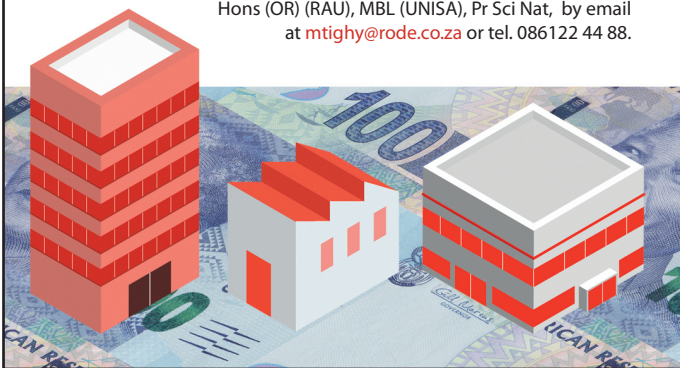
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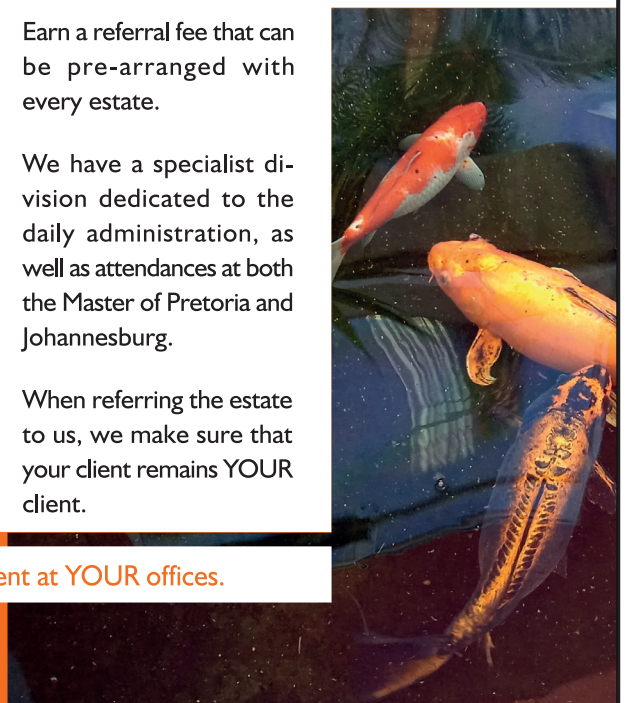
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