SHOULD A GENERAL MORATORIUM DURING BUSINESS RESCUE BE EXTENDED TO DISMISSALS FOR OPERATIONAL REQUIREMENTS?

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Organs of state are expressly enjoined to ‘assist and protect the courts to ensure the independence, impartiality, dignity, accessibility, and effectiveness of the courts’

Sign on the virtual line – commissioning affidavits in the digital era

Women should be visible and show their competency

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Should a general moratorium during business rescue be extended to dismissals for operational requirements?

Business rescue proceedings are aimed at facilitating the rehabilitation of a financially distressed company by providing temporary supervision of the company by a business rescue practitioner. The proceedings also provide for a temporary moratorium on legal proceedings against the company and the courts have accepted that the general moratorium extends to labour disputes. It is also commonly understood that the business rescue practitioner is allowed to retrench employees as part of the business rescue plan. However, Legal Counsel, Njabulo Kubheka, notes that an argument has been made that this general moratorium should not extend to procedural challenges under s 189A(13) of the Labour Relations Act 66 of 1995.
FEATURES

12 Is an adjudicator’s decision valid if issued after the expiry of the prescribed period in construction contracts?

A n Engineering and Construction Contract makes provision for the referral of disputes ensuing under the contract to an adjudicator and sets out the process for referring the dispute. In terms of clause W1.38(8) the adjudicator has four weeks after the end of the period for receiving information within which to make their decisions and notify the parties of their decision and reasons. Legal practitioner, Nomthandazo Sihlalo, examine the cases of Freeman NO and Another v Eskom Holdings Ltd [2010] JOL 25357 (GSJ) and Group Five Construction (Pty) Ltd v Transnet SOC Limited [2019] JOL 45795 (GJ) where the High Court was faced with the question of whether an adjudicator’s decision is valid and enforceable if issued after the expiry of the prescribed period of four weeks.

14 Sign on the virtual line – commissioning affidavits in the digital era

T he COVID-19 pandemic has placed constraints on certain legal formalities in South Africa. Most notably the heavy reliance on evidence being provided by means of an affidavit under oath. When commissioning an affidavit, the deponent must depose to the affidavit in the physical presence of a Commissioner of Oaths. Candidate legal practitioners, Robyn Snyman and Bukhobethu Matyeni, write that a frequent occurrence is that the deponent cannot depose to the affidavit in the physical presence of the Commissioner due to being infected with COVID-19. Therefore, Ms Snyman and Matyeni ask if an affidavit can be commissioned virtually and what are the implications on the legal profession?

16 Women should be visible and show their competency

L egal practitioner, founder and Co-director of the Women in Law Awards (WOZA Awards), Rehana Khan Parker, features in this month’s Women in Law column. De Rebus news reporter, Kgomotso Ramotsho, spoke to Ms Parker about the inspiration for the WOZA Awards, the Women in Law and Leadership Academy, and empowering young legal practitioners through training, mentorships and internships.
The legal education journal

The De Rebus journal has been in existence for 66 years. The first issue of the journal was published by the Law Society of Transvaal in September 1956 under the title De Rebus Procuratoris (about the affairs of attorneys). Since its first issue, the journal has evolved with the times in terms of the topics covered and the way in which it is published. What has remained of utmost importance throughout the years is its mandate to be a legal education tool for the attorneys’ profession.

I have had instances where the relevance of the journal has been questioned, others have gone as far as to say that no one reads the journal. Is this in fact true? At this point it is fitting to include the objectives of the journal. The objectives of the journal are –

• to be an educational tool for the profession, while it informs legal practitioners of the latest developments in the profession;
• to provide legal practitioners, with a platform to discuss and share opinions on matters relating to the profession;
• to play a pivotal role in the profession as its content is authoritative, credible and enables practitioners to practise more efficiently and effectively; and
• to reinforce collegiality in the profession, which in turn promotes the maintenance of high professional standards.

Despite the journal going digital and being published electronically, legal practitioners continue to support and read the journal. This can be seen by the quality of the submitted articles for publication and the number of readers that constantly visit the De Rebus website. One of the many advantages of the digitisation of the journal is that it enables readers to research topics in the journal at ease, which is one of the primary reasons why the journal is published, to provide legal education.

Since the journal is fully digital, with a few printed copies, it is easy to track the number of people who read the journal. On average, the journal receives 55 000 unique browsers on its website monthly. Unique browsers refers to the number of individuals who visit the De Rebus website. The tracking of the website can go as far as stating which articles and topics were the most read on the website.

By looking at the average number of the monthly unique browsers on the De Rebus website, it is apparent that at least 55 000 individuals read the journal on a monthly basis. Therefore, there is no need to debate the relevance of the journal or if it has readers because the numbers speak for themselves.
My experience as a candidate legal practitioner in South Africa during the COVID-19 lockdown

On 2 March 2020, I started serving my articles of clerkship with Phukubje Pierce Masithela Attorneys in Johannesburg. Prior to starting out, I was mentally preparing myself for a typical experience as a candidate legal practitioner. The work of a candidate legal practitioner includes working late at night, meeting with clients, counsel, colleagues, and attending to matters in various courts in the province and of course not forgetting the stress of having to re-print and re-file missing papers from a court file. Little did I know that the world was on a different trajectory from what I pictured in my mind.

During the first week of my articles, South Africa (SA) had its first COVID-19 case. I remember reading the news and the panic that ensued. People were confused and worried, especially with the news of knowing that scientists did not understand the virus and it would take time for a vaccine to be produced. Within the week, South Africa’s COVID-19 cases started multiplying. At that time, what was clear was that COVID-19 was highly contagious. As a law firm, which prides itself in promoting technology and being paperless, our seniors made the decision to work from home for the foreseeable future. All physical meetings were converted to online meetings, and we were required to report on our matters on a weekly basis via Microsoft Teams. We had to be available online and be accountable for a full day’s work. I wondered about other law firms and their practices during the lockdown. I must say the paperless culture in our law firm had already prepared us for what was soon to become the ‘new normal’. Just shy of four weeks after I started my articles of clerkship, the President announced the national lockdown on 27 March 2020.

Since we were already working remotely, my first concern was what did this lockdown mean for my job security. I was concerned that if all our clients were impacted by the lockdown and they decided not to give us work, that would directly have an impact on me. Normally, companies will retrench staff that are new if they are in trouble – last in, first out. Reading the news about the rising cases, and major companies that had to shut down and cut budgets made me very depressed about my future. Not only was I a new employee, I was also new to the city and I had left my family behind just a few weeks back. I was alone and in unfamiliar territory. I do not think I was the only one feeling this way. In times of uncertainty, people feel isolated and not in control of their future. I read countless articles about people suffering from various mental health problems, such as depression and anxiety.

They say what does not break you makes you stronger. Instead of focusing on the depressing news, I ignored it and focussed my attention on learning from my experienced seniors and doing my work to the best of my abilities. A few months into the lockdown, everything was online. Every meeting was held via Teams or Zoom. ‘You are on mute’ was the first sentence we would say to each other. It was a unique experience but also a learning experience.

A few months later, working from home became more normalised. I was thriving. Being an introvert, helped my situation. Everything was online, even at
tending to High Court processes on Case-Lines had become simpler. At least now we do not need to worry about missing papers in a court file. I preferred remote work as opposed to working from the office. Overall, this 'new normal' situation worked for me, and my training was not lacking, as I was in constant contact with my seniors.

I am about to complete my two years of articles. Here are some lessons that I have learned during my experience:

• It is important to plan ahead. I believe that because of the foresight my seniors had, none of the firm’s employees took pay cuts or were retrenched. We managed to maintain a stable working environment and by looking towards the future, we were more prepared for the lockdown than most firms.

• It is important to read and keep updated and relevant with new changes. During the lockdown, courts had to continue to operate. This meant that new directives for each court had to be issued, and to continue to assist our clients, we had to adhere to new directives and practices at court. Keeping updated means being up to date with new laws and regulations. We had to read and understand all regulations passed in respect to the Disaster Management Act 57 of 2002 and advise our clients on things such as remote working policies, the new workplace health and safety requirements, and later, COVID-19 mandatory vaccine policies.

• Continuous learning. In the absence of billable work, we were required to complete courses on Microsoft Office tools, marketing courses, etcetera. It is important to continuously upskill and supplement your knowledge.

• Foster good working relationships. It is important to obtain guidance from colleagues. They possess a wealth of knowledge from their years of experience.

• Leveraging technology in the fourth Industrial Revolution is the way to go. Digital transformation is inescapable. Law firms and other businesses need innovative solutions for their businesses and clients.

• Learn how to use technology. The pandemic will be with us for the foreseeable future. Although things have normalised, there are still clients who will prefer online meetings. Learning how to use these platforms will help you maintain a professional relationship with clients.

Although it has been a tumultuous and disruptive period of lockdown, ultimately, I believe my experience as a candidate attorney allowed me to think on my feet and learn how to practise law differently. It allowed me to absorb more knowledge from my seniors because I did not have to spend exorbitant amounts of time on administrative tasks. I also think I adjusted well to the culture of the firm. Every day has taught me something new and I thoroughly enjoyed my experience.

Sadia Rizvi LLB (UKZN) is a candidate legal practitioner at Phukubje Pierce Masithela Attorneys in Johannesburg.

Succession planning for sole practitioners in incorporated practices and pointers on the authorised forms of practice

When investigating professional indemnity (PI) claims, the team at the Legal Practitioners Indemnity Insurance Fund NPC (LPIIF) has encountered instances where legal practices have either:

(a) purported to continue operating as such after the demise of a sole director of an incorporated practice; or

(b) purported to be established/constituted as private companies which are neither a public company, rather than personal liability companies, in terms of the Companies Act 71 of 2008; or

(c) been constituted as partnerships of incorporated companies.

In this article, I:

• explore the implications of the death of a sole director of an incorporated legal practice to the continued existence and operations of that practice; and

• consider the types of legal practices indemnified in the LPIIF’s Master Policy. I will also show that the Master Policy does not indemnify the entities mentioned in (b) and (c) above and explain the reasons therefor.

Does an incorporated legal practice cease existing and/or operating on the death of a sole director?

This section of the article considers the legal consequences flowing from the death of a sole director of an incorporated legal practice. This question has an important bearing on the practice’s liabilities after the passing of the sole director and whether the entity is still authorised to conduct legal practice. Those liabilities, for example, might be the payment of a deductible to a claimant in the event of a successful professional indemnity claim against the practice.

Section 34 of the Legal Practice Act 28 of 2014 (the Act) sets out the statutory framework for the types of legal practice permitted in South Africa. These include incorporated legal practices. The incorporated legal practice is conducted through what the Act refers to as a commercial juristic entity (s 34(7)). This is a company established in accordance with the provisions of s 8(2)(c) of the Companies Act. Under the Companies Act, such an entity-practice is a private company whose memorandum of incorporation states that it is a personal liability company. Section 34(7)(a) of the Act prescribes that only attorneys can be the shareholders, partners, or members of such commercial juristic entity. Such an entity is also a profit company. The terms ‘personal liability company’ and ‘incorporated company’ are used interchangeably in this article.

A sole director of an incorporated legal
practice would be the only shareholder or member. In terms of s 66 of the Companies Act, "the business and affairs of a [personal liability] company must be managed by or under the direction of its board". The authority and powers to perform the functions of the company, therefore, vest in the board. Subsection 66(2) stipulates that the board of a personal liability company must comprise of at least one director. It is, therefore, legally permitted for an entity to have only one director. Such a director can also be the sole shareholder of the company.

The question then arises as to what happens to the company in the event of the death of such a sole shareholder and director. The immediate logical consequence and implication is that the company's board ceases to exist. The next implication is that the company cannot perform its functions in the absence of its board. There would be no authority available to make decisions on behalf of the company. The resultant problems can manifest in several ways, such as the negative impact on the continued operations of the company, including the freezing of the company's bank accounts, non-payment of creditors and employees' salaries. The Western Cape High Court was called on to consider this issue in the matter of Ellis v Saga Wine Farms (Pty) Ltd and Others (WCC) (unreported case no 4469/2014, 4-4-2014) (Dlodlo J). Dlodlo J (as he then was) was faced with an application by Mr Daniel Ellis who was a financial manager of the applicant to be appointed as an interim receiver to take control of the business of Saga Wines pending appointment of the executor of the estate of Ms Roza Galimovna Sagazidinov, the sole director and shareholder of Saga Wines Proprietary Limited.

The court (at para 8 of the judgment) dismissed the application on the basis that the relief sought was incompetent because it sought to give Mr Ellis the power to conduct the affairs of the company -

(a) without regard for the provisions of the Companies Act, 2008 or the Articles and Memorandum of Association ...
(b) in a manner not provided for or envisaged in either the Companies Act, 2008 or the Articles and Memorandum of Association ...
(c) without the applicant being a director; and
(d) without regard for the rights of the shareholder ..., which is the deceased estate of the late [Ms] Roza and in whose deceased estate dominium in respect of the shares of the company vests.

It is instructive that the court stated that the right of ownership and control (dominium) of the shares of a company belonged to the deceased estate. The implication of this is that the estate (represented by the executor/executrix) is the only authority that may determine the continued existence of the company in such circumstances. In the absence of the executor/executrix appointed in terms of the Administration of Estates Act 66 of 1965, to which the court made pertinent reference, it seems that the affairs and operations of the company are halted pending the appointment of the executor/executrix for the deceased estate.

The Chancery Division of the High Court of England and Wales was also called on to consider a similar question in the matter of Kings Court Trust Limited and Others v Lancashire Cleaning Services Limited [2017] EWHC 1094 (Ch). The company, Lancashire Cleaning Services Limited, ran the risk if it could not be accepted. To his credit, the deceased, Mr Pilling, had executed a will in which he appointed three co-executors and trustees of his estate. He was the sole shareholder and director of Lancashire Cleaning Services Limited during his lifetime. The company did not have any surviving director or a company secretary either. An application was brought to appoint a director to take control of the company but the executor, who could, with required authority, action such a step had not yet been properly appointed as such.

The court granted the application after it found the circumstances of the case to be exceptional. It seems that the existence of the will saved the day for the applicant in this matter. In para 16, the court stated the following:

‘In my judgment, in the exceptional circumstances of this case, it does seem to me that unnecessary delay is taking place in entering the names of the named executors on the company’s register of members. The company is presently completely directionless, with no officer capable of acting on its behalf. It is only the court that can rectify that situation by ordering rectification of the register. Normally the company should await the grant of probate; but, in this case, it may be too late for company if it does.’

It seems that if the deceased had not left an appropriately drafted will, the situation would have been different (see also Shand Attorneys ‘Business continuity risk – death of a company’s sole shareholder and sole director’ (https://shandattorneys.co.za, accessed 7-3-2022)). The result would probably have been like that which resulted in the South African judgment in the Saga Wine Farms Proprietary Limited matter.

It appears that a memorandum of incorporation can include a provision delineating how the shares of a company with a sole director can be devolved. Rosie Todd argues that succession planning can be managed by having a will in place in which the sole director directs who the shares of the company should pass on to upon their death (Rosie Todd ‘How to prepare for the death of a sole director and shareholder’ (www.stevens-bolton.com, accessed 7-3-2022)). However, it should always be kept in mind that, in terms of s 34(7) of the Act, the shares of an incorporated legal practice cannot be held by persons who are not practising legal practitioners. It is also important to note that s 33(2) of the Act provides that ‘no person other than a legal practitioner may hold himself or herself out as a legal practitioner or make any representation or use any type or description indicating or implying that he or she is a legal practitioner.’ Section 33(3) provides that ‘no person may, in expectation of any fee, commission, gain or reward, directly or indirectly, perform any act or render any service which in terms of any other law may only be done by an advocate, attorney, conveyancer or notary, unless that person is a practising advocate, attorney, conveyancer or notary, as the case may be’.

In answering the question whether an incorporated personal liability company ceases existing and/or operating on the death of its sole director, one should not lose sight of the fact that as a company, an entity, has its own legal personality separate from its shareholders or incorporators. Such separate legal personality enables the company to survive the death of its directors and/or shareholders. The challenge faced by that the entity on the death of its sole director is that it would not be able to comply with the requirement of s 66(2)(a) which requires it to have at least one director. Failure to have a will in place might have an effect that the operations of the company are suspended pending the legal process of passing its shares to the person or legal entity that can legally conduct the operations of the company.

A practice has been noted where the Legal Practice Council (the LPC) appoints a ‘caretaker’ of the practice on the death of the sole director of the practice. I do not know what the duties of such a caretaker are, or what they entail. It is also not known, at this point, which section of the Act gives the LPC such powers. It must be noted that the article does not, in anyway, intend to criticise the LPC for adopting such a practice, nor does it intend to take a stand for or against such practice.
Your succession planning must include a consideration of what will happen to your practice in the event of your passing.

Types of insured recognised by the LPIIF’s Master Policy

Clause 6 of the Master Policy provides that the cover is provided to the legal practice itself. The Master Policy indemnifies only the following types of legal practices:

(a) a sole practitioner;
(b) a partnership of practitioners;
(c) an incorporated legal practice [that is, a commercial juristic entity] as referred to in section 34(7) of the Act; or
(d) an advocate referred to in section 34(2)(b) of the Act.

For purposes of this policy, an advocate referred to in s 34(2)(b) of the Act, will be regarded as a sole practitioner, who can only practice for their own account. It should be noted that such advocate cannot practise in the form of a commercial juristic entity as s 34(7) of the Act restricts such entity’s shareholding or membership exclusively to attorneys. Section 34(6)(a) states that an advocate in private practice can only do so for their own account. It is also important to note that such an advocate has a limitation in that they cannot practice as a conveyancer or a notary. The respective definitions of a conveyancer and notary (s 1 of the Act) exclude an advocate.

Some legal practices have formed private (Pty) Ltd companies to handle, on behalf of the legal practice, areas of work such as deceased estates, liquidations, tax related work etcetera. While the principals of the legal practice would, simultaneously, be the directors of such (Pty) Ltd entities, the work would exclusively be carried out in the name of the (Pty) Ltd entities. The (Pty) Ltd may even have an identical or similar name to the legal practice itself with which it shares premises. If any professional errors or omissions were to be committed by such entities, the LPIIF’s professional indemnity policy would not cover such claims as the entity would not be covered as an insured in terms of clause 5 of the policy.

An argument may be raised that the Act does not define a commercial juristic entity as referred to in section 34(7) of the Act. Therefore, it should be noted that s 34(7) (c) requires that the founding documents of such an entity should stipulate that all members or shareholders, past and present, of the entity bear joint and several liability together with the entity concerned. In this regard, s 8(2)(c) of the Companies Act also stipulates that the memorandum of incorporation must state that it is a personal liability company. It should be noted that the directors and/or shareholders of a (Pty) Ltd company, on the other hand, do not ordinarily bear joint and several liability for the debts and/or liabilities of the entity. They are, therefore, excluded because they would not meet those stringent requirements. The officers of the company would, therefore, have to consider purchasing relevant professional indemnity and directors’ and officers’ liability cover on the open market, and independently of the LPIIF.

In one known case, the legal practice was conducted in the form of a (Pty) Ltd entity. It is irrelevant whether the practitioner concerned was unaware that a legal practice could not be conducted under such an entity. The professional indemnity policy is clear in this regard. The Master Policy will, unfortunately, not indemnify such a practice in the event of a professional indemnity claim against it.

In another known case, incorporated practices came together to form a partnership for purposes of conducting a legal practice. During the existence of this practice, constituted by the incorporated practices, a claim arose. The ‘legal practice’ applied to the LPIIF for the provision of indemnity for that claim. The LPIIF successfully rejected the claim on the basis that the legal practice so constituted was not an insured as defined in the policy and that the legal practice was not conducted in accordance with the Act.

Finally, it should be noted that clause 16(t) of the Master Policy provides that any claims ‘arising out of or resulting from legal services carried out in violation of the Act and the Rules’ will be excluded. Practising in the form of an entity that violates the provisions of the Act and the Rules will trigger the exclusion referred to in this clause.

Sithembinkosi Joseph Kunene BProc (UNIZULU) MBA (Wits Business School) is the Claims Executive at the LPIIF.

Generice: Could you be at risk of losing your trade mark?

Most of us use words such as Escalator, Flip Phone, Laundromat, and Sellotape as part of our daily vocabulary. What may come as a bit of a shock is that these words were once trade marks that belonged to, and were owned by, specific companies that had exclusive use over them and were used to identify only their products and services. Evidently, as time went on, they lost their distinguishing characteristics and found their way into our daily language. Today, most of us use Laundromat to refer to a laundry washing service and Escalator to refer to the automated stairs we use when we are not using elevators. These trade marks are termed generic trade marks.

What is a trade mark?

A trade mark is a mark used or proposed to be used by a person in relation to specific goods and/or services to differentiate those goods and/or services from similar ones in trade. Frequently, we understand trade marks to be the logos, words, or pictures that we identify a brand or services with, such as the tick for Nike or the half-bitten apple for Apple. South Africa’s Trade Marks Act 194 of 1993 (the Act) also requires that a trade mark is only registrable if it can differentiate the particular goods and/or services inherently (through being unique) or prior or use (being used for a period of time
before registration and being associated with the goods and/or services). When a trade mark does not achieve this, it is not distinctive, which also means it is not registerable as a trade mark in South Africa (SA).

**Distinctiveness**

Trade marks are considered source identifiers and this requires that they must be able to distinguish products/services in order to fulfil their purpose. This article discusses principles around words and marks that lose their uniqueness over time as they become popular and commonly used. These types of generic trade marks suffer from what is referred to as the ‘genericide doctrine’ (see SL Rierson ’Toward a More Coherent Doctrine of Trademark Genericism and Functionality: Focusing on Fair Competition’ (2017) 27 Fordham Intellectual Property, Media and Entertainment Law Journal 691; and Andre van der Merwe ‘How and when does a trade mark become generic?’ (www.kisch-ip.com, accessed 7-3-2022)). In SA, the following scale is used to consider trade mark distinctiveness:

- **Fanciful/coined trade marks**: Trade marks that are completely invented and have no specific reference from anywhere. The fact that they are invented makes them the most protected trade marks. Examples include Xerox, which is an invented word.
- **Arbitrary trade marks**: Trade marks that may appear in the dictionary, but for different goods and/or services than their meaning may suggest. Examples include Apple for computers or Virgin for gyms and the airline industry.
- **Suggestive trade marks**: Trade marks that hint at the product and/or service that they relate to. Examples include PlayStation to suggest a ‘station’ where you can play video games.
- **Descriptive trade marks**: Trade marks that are descriptive of the goods and/or services offered. American Airlines is a good example that describes an American company in the airline industry.
- **Generic trade marks**: Trade marks that are, or become, commonly used terms or words in daily language. As they become commonly used, they lose their distinguishing function. Usually, these trade marks end up being words used to refer to the whole group of goods and/or services, such as an Escalator.

**The genericide doctrine**

Genericide doctrine is a concept that refers to trade marks that are unprotectable and invalid (Rierson (op cit)) because, over time, they lose their distinctive and unique purpose. The types of trade marks that are typically at issue are word marks that no longer refer to their original product and/or service of interest. Most often, these marks relate to a general group of products and/or services in a trade or used as a noun/verb in daily language.

- On the one hand, one could say the doctrine helps by avoiding situations where only one company may use and register a mark which is considered generic. In this way, the most popular words and names are available to be used by any company to allow fair competition. In the Cadbury (Pty) Ltd v Beacon Sweets & Chocolates (Pty) Ltd and Another 2000 (2) SA 771 (SCA) the court held that the terms Liquorice Allsorts were generic and descriptive terms in trade that could not be reserved for only one company to use. In essence, more companies compete better because they can use these famously identifiable words for publicising and advertising on any platform.

- On the other hand, as stated in King-Seeley Thermos Co v Aladdin Industries Inc 321 F.2d 577 (2d Cir. 1963) the genericide doctrine is ‘harsh ... for it places a penalty on the manufacturer who has made skilful use of advertising and has popularized his product’. A once small company that may have spent hystERICALLY on marketing may have to forfeit its trade mark to the public domain because it has become popular to the extent of being generic. For example, the owners of the trade mark Trampoline can now never enjoy the benefits of being the only ones using the trade mark Trampoline.

One may say that the advantage of this risk, however, is that it encourages owners to supervise the way their trade marks are used and to be careful when promoting their goods/services. Owners of trade marks must lead the use of their trade marks in order avoid them turning into generic marks. To achieve this, several companies publish guidelines on how the media, businesses, and the public should use their trade marks.

Words such as Escalator were once only allowed to be used by a specific company to advertise and publicise their ‘automated moving stairs’. Now, however, the public uses the word Escalator to refer to any ‘automated moving stairs’ that we see everywhere, despite being manufactured by other companies. In rare, but possible, cases, not having alternative words to refer to products and/or services of a certain nature may lead to such generic status of marks. The dominant word/s used may eventually be tossed into the mix of ordinary daily words to refer to all similar products, just as was the case with Aspirin. Aspirin was not only another available term to relate to similar products as Aspirin, the term became the widely used term to refer to all products of the same nature.

Courts consider multiple factors before deciding on the question of generic trade marks, such as use by the owner of the trade mark, use by the media, use by the competitors, dictionary definitions, and evidence of consumer use (P Goliath ‘Everyday words can be the death of a trade mark’ 2015 (Jan/Feb) DR 39). In her article, Judge Patricia Goliath argues that trade mark owners usually make some mistakes when popularising their trade marks. By using their own trade marks recklessly in efforts to be popular, owners may lead to use of their trade marks as nouns/verbs, whereby dictionaries also define the marks without referring to their owners (Goliath (op cit)). Once a trade mark is used as a verb or noun by the public, it may indicate the start of generic use.

**How to prevent generic trade marks**

Most companies adopt strict guidelines over the usage of their trade marks, colour scheme, font use etcetera. In addition to policing, Judge Goliath (op cit) lists several more ways to protect your trade mark:

- Select a unique, non-generic trade mark for the goods/services.
- Use the product’s name next to the trade mark. For example, Apple computers or Google search engine.
- Companies should not use their trade marks as verbs or nouns and should supervise that their marks do not get used in any way that suggests a common, descriptive or generic meaning.
- The owner and the public should refrain from using the trade mark in ‘plural or possessive form’. For example, ‘kids play with Lego bricks’, not ‘kids play with Legos’.
- Owners must capitalise, or put in bold, ‘the first letter of the mark, or put the whole trade mark in capital letters’, such as with KODAK or HP. This helps with the product standing out when being advertised or when within text.
- Owners may use the trade mark notice next to the trade mark, such as TM/tm or R/reg when it is registered.
- Owners should avoid use of abbreviations or variations of the trade mark, even for humorous or collaborative purposes.

**Conclusion**

Companies have a responsibility in how they use their trade marks because the public follows their example in most instances. Paying attention to this will assist companies to avoid losing their trade marks to the public domain and have advantage in court in case the trade mark still becomes generic. It is important that when one experiences trouble with their trade marks, they consult an attorney.

**Siyabonga Skosana LLB (Rhodes)** is a Legal Analyst at IHS Towers South Africa.
Should a general moratorium during business rescue be extended to dismissals for operational requirements?

By Njabulo Kubheka

Chapter 6 of the Companies Act 71 of 2008 (the Act), provides a tool for financially distressed companies in the form of ‘business rescue’. Business rescue proceedings (rescue proceedings) are aimed at facilitating the rehabilitation of a financially distressed company ‘by providing for the temporary supervision of the company, and the management of its affairs, business and property by a business rescue practitioner’ (www.insolvencycare.co.za, accessed 4-3-2022). Furthermore, rescue proceedings provide for a ‘temporary moratorium on the rights of claimants against the company or in respect of property in its possession’ (C Klokow ‘Webinar: Introduction to business rescue proceedings’ (www.cipc.co.za, accessed 4-3-2022)).

In Panamo Properties (Pty) Ltd and Another v Nel NO and Others [2015] 3 All SA 274 (SCA), the court held that rescue proceedings under the Act are intended to provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders.

Since the enactment of the Act, there has been a significant interplay between the provisions relating to rescue proceedings and employment disputes. Section 136(1) of the Act provides that during rescue proceedings, persons employed by the company, immediately before the be-
ginning of those proceedings, continue to be employed on the same terms and conditions, except to the extent that changes occur in the ordinary course of attrition of the employees and the company or in accordance with applicable labour laws or if there is an agreement to different terms and conditions. This same section further provides that any retrenchment of any such employees contemplated in the company’s rescue plan is subject to ss 189 and 189A of the Labour Relations Act 66 of 1995 (LRA), and other applicable employment related legislation.

It follows that the business rescue practitioners of a company under business rescue may provide for a retrenchment provision in their business rescue plan but that such retrenchment process must be dealt with under ss 189 and 189A of the LRA.

General moratorium on legal proceedings under the Act

Section 133 of the Act provides that ‘no legal proceeding … against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except—

(a) with the written consent of the practitioner; or

(b) with the leave of the court and in accordance with any terms the court considers suitable’. In Cloete Murray and Another NNO v Fristrand Bank Ltd t/a Wesbank 2015 (3) SA 438 (SCA), the court held that it is generally accepted that a moratorium on legal proceedings against a company under rescue proceedings is of fundamental importance since it provides the crucial breathing space … to enable the company to restructure its affairs’. Furthermore, the court held that the general moratorium is a cornerstone of all business rescue procedures’ (Romeo Tsusi ‘Interpretation of s 133(1) of the Companies Act 71 of 2008 – the principle of moratorium rede fined under business rescue’ 2015 (July) DR 51).

The word ‘legal proceedings’ is not defined in the Act. As a result, conflicting views and findings have arisen regarding the interpretation of ‘legal proceedings’ in the context of rescue proceedings and labour dispute resolution. At some point, there was uncertainty as to whether ‘legal proceedings’ extends to proceedings over which the Labour Court (LC), Labour Appeal Court, and Commission for Conciliation, Mediation and Arbitration (CCMA) have exclusive jurisdiction.

Settled conflict between the LRA and the Act

A conflict of interpretation arose between s 133 of the Act and s 210 of the LRA. The challenge mainly arose from the provisions of s 210 of the LRA. This section provides that ‘if any conflict, relating to the matters dealt with in [the LRA], arises between [the LRA] and the provisions of any other law save the Constitution or any Act expressly amending [the LRA], the provisions of [the LRA] will prevail’. The argument was that s 133 of the Act conflicted with the dispute resolution provisions contained in the LRA to the extent that it seeks to prevent employees from instituting labour disputes against their employers during rescue proceedings. It was argued that s 210 of the LRA should prevail over s 133 of the Act.

In the case of National Union of Metal Workers of South Africa obo Members v Motheo Steel Engineering CC [2014] JOL 32257 (LC), the court held that ‘in terms of section 210 of the [LRA] a matter dealt with in that Act prevails over the provisions of any other law save the Constitution or any Act expressly amending [the LRA]’. Section 133(1) of the Companies Act does not expressly amend the provisions of the [LRA], … as it might otherwise prevent legal proceedings without the leave of a court or the relevant business rescue practitioner, it did not prevent the applicant [from] bringing this application’. In the case of Chetty t/a Nationwide Electrical v Hart and Another NNO 2015 (6) SA 424 (SCA), the court held that the general moratorium applies not only to legal proceedings in court but also to arbitration proceedings. In Fabrizio Burda v Integcomm (Pty) Ltd (unreported case no JJS39/12, 29-11-2013) (Maenetje AJ), the court held that the general moratorium applies not only to legal proceedings in court but also to arbitration proceedings.

Potential conflict

The above issue seems to be resolved now as the courts have, in the recent matters, accepted that the general moratorium extends to labour disputes. However, the above interpretation by the courts has caused another challenge for the employees of a company that is subject to rescue proceedings. It is commonly understood that a business rescue practitioner of a company under business rescue is allowed to retrench the employees of a company as part of the business rescue plan to save the company from its financial distress.

In National Union of Metalworkers of South Africa obo Members and Another v South African Airways (SOC) Ltd (in Business Rescue) and Others [2020] 6 BLIR 588 (LC), the court held that in the business rescue plan, the business rescue practitioner may contemplate retrenchment of employees. The court held that ‘section 136(1)(b) of the Companies Act, obligates the business rescue plan to subject itself to the provisions of section 189 and 189A of the LRA. In other words, if retrenchment is contemplated in the plan published by the [business rescue practitioner], such retrenchment would be subjected to the provisions of the LRA’.

Section 189A of the LRA deals with dismissals based on operational requirements by employers. Section 189A(13) provides that ‘if an employer does not comply with fair procedure, a consulting party may approach the Labour Court by way of an application for an order –

(a) compelling the employer to comply with a fair procedure;

(b) interdicting or restraining the employer from dismissing an employee prior to complying with a fair procedure; and

(c) directing the employer to reinstate an employee until it has complied with a fair procedure’.

Section 189A(17) of the LRA states that the application contemplated in subs 13 ‘must be brought not later than 30 days after the employer has given notice to terminate the employee’s services or, if notice is not given, the date on which the employees are dismissed’. In the context of rescue proceedings, this means that the 30 day period will fall during the proceedings. The question that follows then is whether the employees who have been given a notice during business rescue proceedings can make an application to the LC in terms of s 189A(13) if there has been non-compliance with fair procedure. The LC in National Union of Metalworkers of South Africa obo Members was asked to consider whether there is a potential conflict between s 133(1) of the Act and s 189A (13) of the LRA. However, the court decided not to entertain this issue on the basis that the factual question of whether retrenchment was contemplated by South African Airways in the proceedings was dispositive of the matter alone. Therefore, there was no need to consider the potential conflict between these two sections.

In Sondamase and Another v Ellerine Holdings Ltd and Another (LC) (unreported case no C669/2014, 22-4-2016) (Steenkamp J), the court held that by suspending the legal proceedings and giving the respondents ‘breathing space’,
the ‘employees are not deprived of their right to continue with their claim against the company at a later stage. The claim is only suspended during the period of business rescue proceedings. That does not appear … to be in conflict with the provisions of the LRA’.

There have been arguments that in as much as the general moratorium is applicable to labour related disputes, it should not extend to procedural challenges under s 189A(13) of the LRA. This should be the case because applications under s 189A(13) cannot be brought at a later stage.

The aim of s 189A(13) applications is to bring the consulting parties into a negotiation phase and ensure compliance with a fair procedure during the consultation process. It may be argued that an order given after rescue proceedings have ended might not bring the parties into fair negotiation terms, and the consultation process would have ended by that time.

Furthermore, once the rescue proceedings have ended, especially in cases where the rescue proceedings were unsuccessful, the relief under s 189A(13) will not be available to employees.

As it stands, should the issue of procedural challenge under s 189A(13) of the LRA arise, the employee will have to seek consent from the business rescue practitioner to proceed to the LC. Should the practitioner not give consent, the other available option to the employee will be to approach the High Court on an urgent basis to apply for an order to lift the general moratorium. In this case, s 133 of the Act then prevents the employees from making s 189A applications directly to the LC without the consent of the business rescue practitioner or without the leave of the court.

Conclusion
I submit that the general moratorium afforded to a company in business rescue should not be extended to procedural challenges under s 189A(13) of the LRA. This limitation will allow the employees to exercise their rights in terms of s 189A(13) expeditiously and without incurring extra legal costs of having to obtain an order from the High Court lifting the general moratorium.

While it is accepted that these rights of the employees are not denied but simply suspended, it is submitted that the suspension has a greater negative effect than those of limiting the application of a general moratorium to procedural challenges under s 189A(13) of the LRA.

Njabulo Kubheka BA LLB LLM (UKZN)
is a Legal Counsel with Absa Group Legal, formerly an associate at Gottschalk Attorneys in Johannesburg.
Is an adjudicator’s decision valid if issued after the expiry of the prescribed period in construction contracts?

By Nomthandazo Sihlalo

The New Engineering Contract (NEC) of which the Engineering and Construction Contract forms part, makes provision for the referral of disputes ensuing under the contract to an adjudicator. This is provided in clause W1 of the contract, which sets out the process for referring a dispute to adjudication. In terms of clause W1.3(8) the adjudicator has four weeks after the end of the period for receiving information within which to make their decisions and notify the parties of their decision and the reasons thereof. The four-week period may be extended if the parties agree. Clause W1.4(3) sets out that if the adjudicator does not notify their decision within the time provided for in the contract, a party may notify the other party that they intend to refer the dispute to the tribunal. Such a party needs to give its notification within four weeks of the date by which the adjudicator should have notified their decision. The Engineering and Construction Contract does not stipulate whether an adjudicator’s decision is valid and enforceable if issued after the expiry of the prescribed time period of four weeks.

As such, the Gauteng Local Division of the High Court in Gauteng, Johannesburg was faced with the question of whether an adjudicator’s decision is valid and enforceable if issued after the expiry of the prescribed period of four weeks. In this article we explore the decision of the High Court in two matters dealing with the same question.

In *Freeman NO and Another v Eskom Holdings Ltd* [2010] JOL 25357 (GSJ) the High Court had to determine whether an adjudicator’s decision is valid and enforceable where it is issued after the expiry of the date within which it was supposed to be issued. The facts of this matter are as follows:

Freeman was the joint liquidators of Transdeco GTMH (Pty) Ltd (Transdeco), a company under liquidation. Freeman in their capacity as liquidators of Transdeco brought a claim against Eskom for the payment of money due to Transdeco payable by Eskom. Transdeco and Eskom entered into an Engineering and Construction Contract on 14 May 2004 (the Contract). Disputes arose between Transdeco and Eskom during the course of the Contract and was referred to adjudication and in each of the disputes the adjudicator held that Eskom should pay Transdeco a certain amount. The liquidators of Transdeco brought a claim against Eskom for the payment of money due to Transdeco payable by Eskom. Transdeco and Eskom entered into an Engineering and Construction Contract on 14 May 2004 (the Contract). Disputes arose between Transdeco and Eskom during the course of the Contract and was referred to adjudication and in each of the disputes the adjudicator held that Eskom should pay Transdeco a certain amount. The liquidators of Transdeco brought a claim against Eskom for the payment of money due to Transdeco payable by Eskom. Freeman in their capacity as liquidators of Transdeco brought a claim against Eskom for the payment of money due to Transdeco payable by Eskom. Freeman subsequently instituted an application for summary judgment. In its affidavit setting out its defences Eskom submitted 'that the adjudicator’s decisions are only binding if given in the four-week time period stipulated in the contract, and that because they were late, they are not binding on the defendant'. In respect of the first dispute ‘the adjudicator had until 30 October 2006 to deliver his decision, in order to comply with the provisions of the contract and to render the decision binding on the parties’. But the adjudicator notified the first decision on 3 November 2006. In relation to the second dispute, the adjudicator had until 15 November 2006 to notify his decision, but the adjudicator notified his decision on 10 November 2006, out of time.

The following contract clauses were applicable in this dispute. In terms of core clause 90.2 of the Contract:

‘The Adjudicator settles the dispute by notifying the Parties and the Project Manager of his decision together with his reasons within the time allowed by this contract. Unless and until there is such a settlement, the Parties and the Project Manager proceed as if the action, inaction or other matter disputed were not disputed. The decision is final and binding unless and until revised by the tribunal.’

In terms of core clause 91.1 of the Contract:

‘The Party submitting the dispute to the Adjudicator includes with his submission information to be considered by the Adjudicator. Any further information from a Party to be considered by the Adjudicator is provided within four weeks from the submission. The Adjudicator notifies his decision within four weeks of the end of the period for providing information. The four-week periods in this clause may be extended if requested by the Adjudicator in view of the nature of the dispute and agreed by the Parties.’

The court held that although the Contract set out time within which the adju-
dicator is to notify its decision, it does not state that a late adjudicator’s decision is invalid. Furthermore, there is no clause in the Contract, which states that “unless the decision is made within a certain time it shall not be binding or of any force and effect” thereby making time of the essence of the contract. The court further held that the adjudicator settles the dispute as an independent adjudicator and not as an arbitrator. As such their ‘decision is enforceable as a matter of contractual obligation between the parties and not as an arbitral award.’ Thus, in the absence of a clause, which makes time of the essence, ‘failure by an adjudicator, to deliver his or her award in the time stipulated in the contract, cannot be rendered as binding on the parties or of any force and effect. Unlike in arbitrations, there is no statutory or common law contractual basis for declaring the delivery of a late adjudication award invalid, particularly where there is no agreement between the parties that unless the decision is made within a certain time it shall not be binding or of any effect’. There is accordingly no basis in law for treating the adjudicator’s delayed award as invalid.

The court further considered clause 93.1 of the Contract which set out that: ‘If after the adjudicator notifies his decision or fails to do so within the time provided by this contract and a Party is dissatisfied, that Party notifies the other Party of his intention to refer the matter which he disputes to the tribunal.’ In considering this clause, the court held that the remedy for dealing with a late adjudicator’s decision, is for the party who is dissatisfied with the adjudicator notifying its decision late. Such a party is to issue its notice to the other party of its dissatisfaction and intention to refer the matter, which it disputes, to the arbitral tribunal. In considering whether the court held that the remedy for dealing with a late adjudicator’s decision, is for the party who is dissatisfied with the adjudicator notifying its decision late. Such a party is to issue its notice to the other party of its dissatisfaction and intention to refer the matter, which it disputes, to the arbitral tribunal. Eskom did not issue such notice.

In terms of clauses W1.3.3 and W1.3.8 of the agreement between the parties the time period for the publication of the adjudicator’s decision is [four] weeks from the date when he receives the last submissions from the parties, unless the parties agree to grant him an extension of time. These clauses do not state what should happen when a party does not grant the consent to extend the period. I am of the respectful view that the intention of the parties to make the requirement of consent from the parties to afford the adjudicator more time is meant to give the parties control over the process of the adjudication. It is meant to give the parties some power to deal, should they find themselves in that situation, with a recalcitrant adjudicator. The ineluctable conclusion is therefore that, absent such consent to the extension of time, the adjudicator should publish his report on due date failing which his mandate is terminated. I am therefore unable to disagree with Counsel for the respondent that, from the plain wording of these clauses, the adjudicator is not competent to proceed and act beyond the time period set by the agreement if he is unable to secure the necessary consent from both parties. No other meaning can be ascribed to these provisions for they are not at all ambiguous.’

The court held that time is of the essence in adjudication matters and that the adjudicator’s mandate in this regard was terminated by Transnet when Transnet refused to consent to the extension of time as requested by the adjudicator. Thus, the decision of the adjudicator was published late and in breach of the terms of the agreement of the parties and is therefore not binding and enforceable against Transnet.

Differences between the two judgments:

- **Freeman NO and Another v Eskom Holdings Ltd –**
  - the court held that time was not of the essence;
  - there is no clause in the Contract which invalidates the decision of the adjudicator where it is issued after the prescribed four weeks;
  - the adjudicator did not request any extension within which to issue its decision; and
  - the remedy for a party wanting to deal with a late adjudicator’s decision, is for the party who is dissatisfied with the adjudicator notifying its decision late to issue its notice to the other party of its dissatisfaction and intention to refer the matter, which it disputes, to the arbitral tribunal. Eskom did not issue such a notice.

- **Group Five Construction (Pty) Ltd v Transnet SOC Limited –**
  - the court held that time was of the essence in adjudication matters;
  - the adjudicator requested consent to issue its decision later, which consent was withheld by Transnet;
  - the notification to refer the matter to an arbitral tribunal by Transnet rendered the adjudicator incompetent to continue with the matter; and
  - Transnet complied with the requirements of clause W1.4.3 and issued its notice within the four-week period within which the adjudicator should have issued its decision.

As such it is vital for parties in contracts to ensure that their intentions are clear regarding the status and enforceability of an adjudicator’s decision.
It cannot be disputed that the ongoing COVID-19 pandemic has pressurised the legal profession to re-examine and reconsider certain legal requirements. With the everchanging social climate that accompanies the new sense of normal, many constraints have been placed on certain legal formalities and regulations in South Africa.

The legal profession places heavy reliance on evidence being provided by means of an affidavit under oath. In accordance with reg 3(1) of the GN R1258 in GG3619/21-7-1972, when commissioning an affidavit, the deponent to the

**Sign on the virtual line – commissioning affidavits in the digital era**

By Robyn Snyman and Bukhobethu Matyeni
affidavit must depose to the affidavit in the physical presence of a Commissioner of Oaths (Commissioner). This regulation has been under much strain during the pandemic. A frequent occurrence is that the deponent to an affidavit cannot depose to the affidavit in the physical presence of the Commissioner due to the deponent being infected with the COVID-19 virus and consequently running the risk of infecting the Commissioner. Conversely, a deponent with comorbidities runs the risk of getting infected while attending the Commissioner’s office.

The legal question that this article aims to address with reference to the unreported decision of the Gauteng Local Division High Court in the case of Knuttel NO and Others v Shana and Others (GJ) (unreported case no 38683/2020, 27-8-2021) (Katzev AJ) is whether an affidavit can be commissioned virtually and what the implication of this judgment is on the legal profession at large.

The legal position in South African law

'Section 10(1)(b) of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963, provides for the Minister of Justice to make regulations prescribing the form and way an oath or affirmation shall be administered, and a solemn or attested declaration shall be taken, when not prescribed by any other law. The regulations that were made by the Minister in this respect are the Regulations Governing the Administration of an Oath or Affirmation, which were published under GN R1258 in GG3619 of 21 July 1972 [the Regulations]. In terms of reg 3(1), the deponent shall sign the declaration in the presence of the Commissioner.

In the matter of S v Munn 1973 (3) SA 734 (NC), the court held that ‘the purpose of sworn deposition is to establish the identity of the deponent and to obtain irrefutable evidence that the relevant deposition was indeed sworn to’. The court further held that non-compliance with the regulations does not intrinsically invalidate an affidavit in that the regulations are mandatory in nature. Accordingly, ‘non-compliance with the regulations would not invalidate an affidavit if there was substantial compliance with the formalities in such a way as to give effect to the purpose of obtaining a deponent’s signature to an affidavit’.

In Uramin (Incorporated in British Columbia) v/a Areva Resources Southern Africa v Perie 2017 (1) SA 236 (GJ) judicial recognition was ‘given to the relaxation of the requirement of person-to-person presence for the administering of an oath’. Here, the court allowed video usage to ‘lead evidence in a civil matter from witnesses who were abroad’. Satchell J administered the oath to the party virtually before their evidence was led.

Legal position in terms of the Knuttel case

The legal question before the court for purposes of this discussion was ‘whether there was substantial compliance with the requirements for the commissioning of the oath to the founding affidavit’. Here, the founding affidavit was not signed by the deponent in the presence of the Commissioner, which accordingly conflicts with the Regulations.

In this matter, the deponent to the founding affidavit was infected with the COVID-19 virus and was accordingly in isolation. The unsigned draft founding affidavit was e-mailed to the deponent, the first applicant, by their attorney of record whereby the instructions to the deponent were to read, initial and sign it before the deponent e-mailed it back to the attorney. The attorney then enlisted the services of an independent Commissioner.

In the presence of the first applicant’s attorney, the Commissioner spoke to the first applicant by means of a WhatsApp video call. During this video call, the Commissioner ‘identified the first applicant as the person she professed to be, the Commissioner then posed the usual questions, before she administered the oath in the conventional way, except that the deponent’s initialling and signature had been appended’ before the video call had commenced.

The court, in determining this matter, looked at the legal position in the Munn case whereby the court held that the requirement of person-to-person presence between a Commissioner and a deponent is not peremptory, and can be relaxed between a Commissioner and a deponent provided that the identity of the deponent can be confirmed by the Commissioner. Furthermore, it is important to highlight that the Gauteng Local Division, in this matter, did not participate in an exercise whereby they were developing the South African legal position. This position, as highlighted previously, was already trite in our law. The court was merely giving effect to the already existing law.

This judgment, therefore, serves as a practical guide to legal practitioners and the legal profession as a whole when faced with similar circumstances. Litigants, however, should not use this judgment as a precedent to wilfully ignore the requirements prescribed by the Regulations for the commissioning of affidavits. Where it poses great difficulty or even impossibility for litigants to comply with the Regulations, the courts should adopt this pragmatic approach.

Conclusion

The legal position set out and confirmed by the Gauteng Local Division High Court, comes as a relief during these pandemic times whereby it is almost impossible for individuals to physically attend before a Commissioner in order to avoid the spreading of the COVID-19 virus.

Impact of the judgment on the South African legal fraternity

This judgment illustrates what the court will consider as substantial compliance with the regulation that the deponent to an affidavit must depose to an affidavit in the physical presence of a Commissioner provided that the identity of the deponent can be confirmed by the Commissioner, the deponent is capable of answering the questions asked by the Commissioner and that the deponent has taken the prescribed oath.

The reasoning adopted by the court in this matter is persuasive in nature albeit not binding on other divisions. Furthermore, it is important to highlight that the Gauteng Local Division in this matter, did not participate in an exercise whereby they were developing the South African legal position. This position, as highlighted previously, was already trite in our law. The court was merely giving effect to the already existing law.

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**FEATURE – CONTRACT LAW**

Robyn Snyman LLB (Stell) and Bukhobethu Matyeni LLB (UWC) are candidate legal practitioners at Hérold Gie Attorneys in Cape Town.
Women should be visible and show their competency

By Kgomotso Ramotsho

Rehana Khan Parker is a 61-year-old legal practitioner, practising in the Western Cape for the past 29 years. Ms Parker was born in Cape Town, she is the eldest of five children of Gulzar Khan and Farieda Khan. She is a wife and a mother of three children. Ms Parker grew up in a family, which was grounded on humanitarian values and respect for fellow human beings irrespective of race, colour, religion or ethnicity. Her father came to South Africa (SA) from India in 1948 as a mathematics and language teacher and rose to politics as an uMkhonto we Sizwe veteran, her mother was a housewife whose mother was a Cape Malay.

Ms Parker grew up in an era of political unrest and her father played a major role in shaping her thoughts, in a family home where politics was the discussion at the dinner table. Her father received a Magisterial warning under the Suppression of Communism Act 44 of 1950, following his public lectures. The value of philanthropism was imbibed in her since her youth, by feeding the poor and defending the voiceless. Ms Parker runs her practice, RKP Attorneys Inc and has held acting positions in the Western Cape Division High Court and the Gauteng Local Division of the High Court.

De Rebus news reporter Kgomotso Ramotsho interviewed Ms Parker about her views.

Kgomotso Ramotsho (KR): Which field of legal matters do you specialise in and why?

Rehana Khan Parker (RKP): My practice developed into representing from the corporate from the government sectors to the most downtrodden, which includes defending the rights of farmworkers and settlements from eviction, with success.

I sharpened my toolkit by upskilling myself by becoming an arbitrator, a mediator in land issues and obtaining certificates in labour law, disability medicine and most recently a certificate in family law mediation from the Pan African Bar Association of South Africa.

KR: You are the founder of the Women in Law Awards (WOZA Awards). How did the WOZA Awards come about?

RKP: I am the founder and co-director of the first awards programme recognising the contribution of Women in Law. The organisation was born from the BRICS Legal Forum conference when it was held in SA in 2018, where the presence of female legal practitioners in the room was glaringly absent. Something had to be done to entice female legal practitioners who are change-makers and trailblazers tucked in corners. The aim is to make them visible and showcase their competencies.

However, the WOZA Awards revealed the shortcomings of female legal practitioners and as a result, the Women in Law and Leadership Academy was formed. Both these companies have taken the advancement of women in law in SA to great heights since its inception in August 2019, among its activities include:

• Financial wellness.
• Transformation of the legal profession.
• Addressing skewed briefing patterns.
• The participation in The Law Society (England and Wales) in their international roundtables and holding roundtables throughout SA with approximately 135 women on issues of unconscious bias and the gender pay gap.
• Writing of a blog for the Institute for African Women in Law.
• Interviews on the South African Broadcasting Corporation (SABC) television channels on current issues on news slots.
• The holding of several topical webinars with South African women judges making a difference with a view of forming a trained cadre of women in law in specialised areas – for example, webinars were held during the lockdown period.
• The forming of mentorships for legal practitioners with South African women judges making a difference.
• In the pipeline is the forming of a bursary fund for women in law.

KR: You have other projects that you are involved in, besides the WOZA Awards, can you briefly tell us about some of them?

RKP: We provide training programmes with the industry, judges, and academics, locally and globally, to empower and advance women. The Women in Law and Leadership Academy ensures that women become recognised for their professionalism, competence and skills. It was necessary to continue self-development training, especially in niche areas of law or work, which is exclusive. I use every avenue to speak up for women and question patterns of patriarchy.

KR: Why are the WOZA Awards specifically focusing on women, why are men not included?

RKP: Until and unless women gain their rightful place in the economy by ensuring women get their fair share of the briefing pie or board positions, the need for the stand-alone awards will be here to stay. While there is a legislative will to create parity, inclusive of structures by the Legal Practice Council (LPC), transformation in the private sector, where the wealth lies is slow. The awards are not exclusively for women, we do have a male champion of change award, the first of which was awarded in a special edition of our WOZA Awards, COVID-19 Awards in 2020.

KR: Do you think male legal practitioners have it easier in the legal profession, in regard to getting work and also with senior appointments, if yes, why do you think this is the case?

RKP: It is the old boys club and tradition-al networks that entrenches this. Women need to harness the value of networking and to oil the lamps of other women to act as support and mentorship. Network for net worth. I am a strong advocate of a sisterhood where we can refer work to the sisterhood and act as their mentors/ crutches. Together we can achieve great things. However, we need to learn not to work against each other and to pull as we rise and pass the baton to younger legal practitioners. For example, I did not stand for the recent Provincial Council elections after many years of service which is in excess of 15 years, and it was time for me to pass the baton to younger professionals to serve the profession.

KR: Do you think SA is doing enough to address issues of crime against women and children, if not what do you think is lacking?

RKP: This is a hot potato. We have among the most progressive laws to protect women, however, this becomes frustrating when other arms of government who are mandated to ensure the criminal justice system works, instead one witnesses inordinate delays by South African Police Service. Their failure to investigate or follow up on a docket speedily, together with a lack of training on sensitive issues, for example, rape, leaves complainants to abandon their rights. Often it is the issue of lack of capacity, training, weak policing and victim-blaming. We need more police, trained on gender issues and more social workers, and more courts to ensure that we get cases heard swifter.

KR: What do you think about the justice system in SA?

RKP: The independence of the judiciary is crucial to the values of our Constitution. The COVID-19 pandemic has shown that the rule of law is intact, however, there are increasing concerns about the erosion of the doctrine of separation of powers and we as legal practitioners are officers of the court, must guard against such erosion. Our courts are clogged and the COVID-19 pandemic has forced us to adopt a new method for service delivery. Many of us were forced to sharpen our information technology skills. I support the notion of a virtual office and Case-Lines being rolled out to all courts in SA. We will certainly benefit from a special family court within the division of the High Court as a one-stop shop for everything related to family law from gender-based violence, interdicts to divorces. I do not think we are taking mediation seriously enough. Courts should be our last resort. Mediation should be compulsory, as a prerequisite to issuing process so that only such matters which need to be heard will go to court. We should deepen our discussions with the offices of Legal Aid South Africa to consider avenues to address access to justice for the indigent in respect of mediation with a sliding scale fee for those who can afford it. Those who have the financial means may use their own mediators. A certificate would then be issued where mediation has failed or succeeded. Perhaps we need to research mediation processes around the world more deeply, such as in the United Kingdom, Australia, and Canada.

KR: What do you think about the state of the Judiciary in SA?

RKP: It remains my opinion that the Judicial Service Commission interview panel must not consist of politicians. In that way, we can avoid political interference and I remain concerned where this has the potential to be an erosion of the rule of law. This panel should ideally consist of law academics and legal practitioners both on the practising roll and non-practising roll. I do understand that the Constitution would need to change to adopt this restriction.

KR: What are some of the contributions that we can expect from you in the legal profession, especially in regard to empowering candidate legal practitioners and young legal practitioners?

RKP: We continue to empower candidate legal practitioners and young professionals through our training, mentorships, and internships.

The past Admission Examination results for 2021, were shocking. While there is no evidence that it is COVID-19 related, as an examiner, I have been witnessing a deterioration over the past few years. The pass rate is my concern. I would like to see the profession reach a level where 70% of those who sat for the examinations achieve an average of 70%. We need to raise the bar. However, we are currently developing strategies to focus on our young professionals and candidate legal practitioners. In this regard, we have held webinars in 2021 with the University of Johannesburg, where students from across the country attended. This was in the form of a career junction which followed with a series of training programmes. We are currently looking at avenues to encourage postgraduate studies at Honours and Doctorate levels.

Ms Parker is currently a councillor with the Western Cape Provincial Council of the LPC, she was a Tribunal Chairperson for the Department of Cultural Affairs and Sports in the Western Cape in 2013 to 2019, Advisory Board Member for the Unit of Applied Law at the Cape Peninsula University of Technology, from 2017 to date. Board Member at the Victoria Hospital in Wynberg since 2017. She is also a Board Member for the South African Geographical Names Council since 2021, the Independent Development Trust since July 2021 and the International Peace College South Africa since 2017 to date.
The court agreed with the plaintiffs’ contentions that the application was vague, ambiguous, and confusing to the extent that the plaintiffs were not properly informed of the case, which the defendants sought to make out and which the plaintiffs had to meet in opposing the application for leave to appeal. The grounds of appeal did not comply with the requirements of r 49 and were thus fatally flawed.

Among the grounds advanced, were that the trial was not fair, with allegations of bias made against the presiding officer. Not only was that issue not raised at the material time, but the onus of establishing bias was not discharged. The defendants did not specify what acts formed the basis of their complaint.

The grounds of appeal seeking to challenge the order refusing to compel discovery were also unsustainable. There was no room for interference with that order, which was not shown to be wrong.

Concluding that there were no prospects of success on appeal, the court refused leave to appeal.

Quantum of interest claimed – in dumplum rule: The defendant in Body Corporate of Nautica v Mispha CC [2022] 1 All SA 399 (WCC) was the owner of two units in a sectional title scheme, with the plaintiff as the scheme’s body corporate. The defendant’s units were a residential unit with a balcony and a garage unit. In keeping with South African law, the participation quota allotted to the units in the scheme determined the contribution or liability of owners towards the incurred expenses of the scheme.

Claiming the defendant failed to pay levies for the period of March 2008 up to May 2021, the plaintiff brought the present proceedings against the defendant for payment of R 1 826 366,86 in respect of outstanding levies, electricity charges and interest on the arrear levies. While not denying not having paid levies due, the defendant denied that it was obliged to make payments as demanded by plaintiff, denied that any valid resolution was taken by trustees to adjust the participation quota, and to add compound interest at the rate of 3% per annum on all arrear levies.

It was held that the plaintiff’s claim simply arose, factually, from a failure to pay overdue levies. The defendant’s attempt to the body corporate trustees’ adopt and retracting a resolution did not assist him in any way. He provided no acceptable justification for withholding payment of his levies. Unable to identify any tenable argument raised by the defendant, the court regarded him to be merely grasping at straws.

The next question addressed was whether the plaintiff had the necessary locus standi to institute the current proceedings. There was no basis for defendant’s contention that there was nothing to indicate that the party described as the body corporate of the scheme was in fact a body corporate in terms of the Sectional Title Act 95 of 1986. Section 2(7) of the Sectional Title Schemes Management Act 8 of 2011 confers standing on the body corporate to sue. That was exactly what the plaintiff was doing in this case. There was overwhelming evidence to show that it had the necessary legal standing to institute action for money owed to it by the defendant. The locus standi objection was accordingly dismissed.

Regarding the claim for interest, the court stated that the plaintiff, over and above the owed debt on arrear levies, was also entitled to the interest borne by the debt. Interest charges on arrear amounts are intended to mitigate the depreciation or decline in value of the currency, which is ordinarily occasioned by inflation. The parties in this case were in dispute regarding the quantum of interest charged in respect of the outstanding levies. The court confirmed that the defendant was entitled to levy compound interest on arrears. In respect of the claim for mora interest, it is established that the dumplum rule permits interest to run anew from the date that the judgment debt is due and payable. Interest runs on – and is
limited to an amount equal to – the whole of the judgment debt, including the portion which consists of previously accrued interest.

The defendant was ordered to pay the capital amount plus interest at the rate of 9.5% per annum from date of judgment to date of payment, limited to the amount of the capital debt.

**Company law**

**Business rescue practitioners:** In *Shiva Uranium (Pty) Limited (In Business Rescue) and Another v Tayob and Others 2022 (2) BCLR 197 (CC)*, the board of directors of Shiva resolved to place it in business rescue in terms of s 129 of the Companies Act 71 of 2008 (the Act). The board appointed Messrs Klopper and Knoop as Shiva’s business rescue practitioners. The Industrial Development Corporation, a major creditor of Shiva, brought an application in terms of s 130(1)(b) of the Act to remove Klopper and Knoop as the business rescue practitioners and to replace them with one Mr Murray in terms of s 130(6)(b) of the Act. When the application was due to be heard, Klopper and Knoop resigned. An order was made by consent, which recorded the resignation of Klopper and Knoop, appointed Mr Murray as the new business rescue practitioner and directed the Companies and Intellectual Property Commission (the CIPC) to appoint an additional business rescue practitioner to assist Mr Murray. Second applicant, Mr Monyela, was then appointed by the CIPC as an additional business rescue practitioner. Later Mr Murray resigned. Prior to his resignation, Mr Murray and Mr Monyela passed a resolution to appoint third respondent, one Mr Damons, as Mr Murray’s replacement. This resulted in a dispute. Shiva’s board passed a resolution resolving to appoint first and second respondents, Mahomed Tayob and Eugene Januarie, as the company’s business rescue practitioners. Mr Monyela, on his own behalf and purportedly on behalf of Shiva, brought proceedings in the Companies Tribunal (the Tribunal) to compel the CIPC to accept the filing of Mr Damons’ appointment and to remove the filing of Messrs Tayob and Januarie’s appointment. The Tribunal decided the case in Mr Monyela’s favour. Messrs Tayob and Januarie approached the High Court seeking to interdict the CIPC from implementing the Tribunal’s ruling. The High Court dismissed the application, holding that following a resignation by a business rescue practitioner, in case Mr Murray, the board could only appoint Messrs Tayob and Januarie as business rescue practitioners with the authorisation of Mr Monyela in accordance with s 137(2) of the Act. Messrs Tayob and Januarie appealed against this decision to the SCA.

The SCA held that the powers and duties of the practitioner related to the ‘management’ of the company, namely running the company on a day-to-day basis. A decision taken by directors on behalf of the company to appoint a substitute practitioner in terms of s 139(3) was an act of governance falling outside the ambit of the practitioner’s ‘management’ of the company. According to the board, it had not required the approval of the company’s business rescue practitioners in order to appoint Messrs Tayob and Januarie. The SCA held that if a company enters business rescue voluntarily in terms of s 129, the power to appoint a substitute, if the practitioner resigns, remains with the company. Conversely, if a company enters business rescue compulsorily, the power to appoint a substitute, if the practitioner resigns, remains with the affected person who brought the original application for business rescue. Applicants approached the CC seeking leave to appeal against the judgment of the SCA. In a unanimous judgment (per Rogers AJ, Madlanga, Majedeti, Mhlantla, Theron, Tshiqi JJ, Madondo, Pillay and Tlaletsi AJJ concurring) the court dismissed the application for leave to appeal. The court found that it would have jurisdiction to hear the appeal because the question that arose was one of public importance. However, the fact that the matter engaged the court’s jurisdiction did not mean, without more, that it was in the interests of justice to hear the appeal. The court observed that the question that arose was the following: Where, in the case of a voluntary business rescue initiated in terms of s 129 of the Act, a business rescue practitioner appointed by a court in terms of s 130(6)(b) in place of the company-appointed practitioner resigns, who has the power to appoint the court-appointed practitioner’s replacement? The answer to that question depended on the proper interpretation of s 139(3).

The court held that the SCA had correctly concluded that on Mr Murray’s resignation the right to appoint his replacement vested in Shiva’s board of directors and that Messrs Tayob and Januarie had thus been validly appointed. It followed that there were no prospects that applicants’ contentions would succeed. It was not in the interests of justice to hear the appeal. The application for leave to appeal fell to be dismissed.

**Piercing the corporate veil:** In *Department of Agriculture, Forestry and Fisheries and Another v B Zulu and Partners Incorporated and Others [2022] 1 All SA 434 (WCC)*, the first respondent (BXI) was a firm of attorneys, whose principal member was the fifth respondent (BX). Proceedings were brought against the applicants and BXI. BXI was held jointly and severally liable to repay over R 20 million to the applicants, from whose bank accounts the money had been taken. In the wake of that judgment, BXI contested his liability to pay the money jointly and severally with BXI.

The fact that BX was the sole director of BXI did not inevitably lead to a piercing of the corporate veil and holding him jointly and severally liable. Lifting the corporate veil entails ignoring the distinction between the company and the natural person behind it and will happen where it is shown that the natural person has abused the corporate personality of the corporate entity. Section 209 of the Companies Act 71 of 2008 is the statutory basis for piercing the corporate veil, requiring an unconscionable abuse of the company’s juristic personality. It broadens the basis on which relief may be granted, so courts will now resort to the remedy where justice requires it and not just where there is no alternative remedy.

Case law shows that where controllers of companies use the companies for improper purposes, courts will consider the entity such that there is no distinction between the separate juristic personality of the entity and those controlling it, that would constitute the required unconscionable abuse.

Applying the above principles to the facts of the case at hand, the court found the conduct of BX to satisfy all the requirements for piercing the corporate veil and holding him jointly and severally liable with BXI. The facts showed that he had, under guise of settling BXI’s liabilities, appropriated funds from BXI, channelling it to himself, friends, family and entities under his control. In application of the alter ego doctrine, the court found that BX acted not as an agent of BXI, but as the company’s actual persona. A proper case had thus been made for piercing the corporate veil and for holding BX jointly and severally liable with BXI or repayment of the funds. The court found further that BX acted wrongfully, with the requisite dolus, to warrant being held personally liable with BXI under the *actus ad exibendum*.

Setting out the principles applicable to applications for joinder, the court also ordered that the sixth to ninth respondents be joined as parties to the proceedings. The fifth to seventh respondents were held jointly and severally liable with BXI for payment of the money to the second applicant.

**Constitutional and administrative law**

**Appointment of magistrates:** The respondent (Mr Lawrence), an acting magistrate, applied for the position of a permanent magistrate in response to advertisements for such positions in the magisterial districts of Bloemfontein, Botshabelo and Petersburg. He was
not shortlisted for any of the posts. He approached the High Court for relief, and the shortlisting proceedings were declared unlawful and unconstitutional. That led to an appeal by the Magistrates Commission in Magistrates’ Commission and Others v Lawrence and Another [Helen Suzman Foundation v amicus curiae] [2022] 1 All SA 321 (SCA).

The court first considered two ancillary issues. First, the respondent contended that in terms of s 5(2), read with s 6(7), of the Magistrates Act 90 of 1993 (the Act), the Appointments Committee (the Committee) was not quorate when candidates were shortlisted for appointment to Bloemfontein. Second, the appellants contended, in limine, that, as all the other shortlisted candidates had a direct and substantial interest in the outcome of the proceedings, the respondent’s failure to join them precluded the court from granting the relief sought by the respondent until they had been joined as parties to the proceedings. However, the non-jointer point was later abandoned.

The Committee was not quorate with the result that the decisions taken at that meeting, including the shortlisting of candidates for Bloemfontein, could not stand and accordingly had to be set aside.

On the merits, the court set out the provisions of ss 174(1) and 174(2) of the Constitution regarding the appointment of judicial officers. The qualifications, experience, and suitability of Mr Lawrence for the post could not be faulted. The Committee nevertheless appeared to adopt a targeted exclusion of white candidates and was consequently not prepared to consider any of the other criteria in relation to Mr Lawrence. Rather than considering race as but one of factors, albeit an important one, the Committee set out to exclude candidates, including the respondent, based on their race. There should not have been any fixed order or sequence of prioritisation of the listed criteria, but rather a consideration of all the relevant criteria and, where necessary, a balancing of the one against the other. Insofar as the process was rigid, inflexible, and quota-driven, it was fundamentally flawed. The Committee’s rigid approach was inconsistent with a proper interpretation and application of s 174 of the Constitution. The appeal was dismissed with costs.

Criminal law and procedure

Application for bail pending appeal: After the SCA dismissed his appeal against conviction and sentence for the murder of his wife, the applicant in Rohde v S [2022] 1 All SA 504 (WCC) sought bail pending his application to the CC for special leave to appeal. Pending finalisation of his appeal, the applicant had been granted bail, but on dismissal of the appeal, he had 48 hours to hand himself over to a police station to undergo his imprisonment. In addition to the bail application, the applicant sought the recusal of the presiding judge from the hearing of the bail application and for the bail application to be postponed sine dies.

It was held by Salie-Hoppe J that the application for recusal was premised on ten grounds. The first was that the matter had been allocated to the judge in a manner, which formed the subject of a Judicial Service Commission (JSC), relating to the allocation process of the matter at inception. The court found the complaint to have been based on misleading and incorrect facts, and pointed out that after a thorough investigation, the JSC had dismissed the complaint.

Irregularities alleged to have been committed by the presiding judge during the trial had been considered by the SCA and dismissed. Significantly, irregularities form the subject of an appeal and not the basis of a recusal application. The applicant claimed to have an apprehension that the judge might make an adverse finding in a further bail application. However, an apprehension or fear of an adverse order is not the basis for recusal.

Other grounds advanced in support of recusal were equally without merit. It was stated that the impartiality of the judiciary is assumed, which assumption is only disturbed by weighty evidence, rather than imputations and aspersions. The applicant bore the onus of shifting that assumption and rebutting it by showing a reasonable apprehension of bias. The grounds relied on by the applicant, individually or cumulatively, did not meet the threshold for recusal.

At the time of hearing of the recusal application, the order that the applicant report to undergo a 15-year period of imprisonment had been suspended. The court explained the effect of suspension of the order. The order (by agreement) was effectively an interim order without a return day. The legal effect of an interim order without a return date was considered, and the court exercised its power to order that the suspension and applicant’s bail be extended on the same terms and conditions as previously granted pending the hearing of his bail application but in line with a specified time frame. Consequently, the suspension of the notice to report was made subject to a return date specified in the present court’s order.

Sexual intercourse with underage child: Convicted of rape in contravention of s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the Act), the appellant in Mbhamali v S [2022] 1 All SA 488 (KZD) was sentenced to 18 years’ imprisonment. The trial court granted leave to appeal against conviction. The complainant was a 14-year-old who was introduced to the appellant by a fellow member of his church as a prospective wife. The church member responsible for the introduction, Mrs Phakathi, was the second accused in the trial court. The complainant’s father was unaware of the situation until later. His intervention led to the arrest of the appellant.

In response to the charges against him, the appellant attempted to state that he was not aware that the complainant was underage. However, he could not convince the trial court that he could reasonably not have known that the complainant was a child.

It was held by Hadebe J (Moonley J concurring) that ss 15 and 16 of the Act create a prohibition of any act of sexual penetration or sexual violation with a child who is 12 years or older but under the age of 16 years. The fact that such child might have consented to such an act is no defence. In the context of child marriages, s 56(1) of the Act stipulates that when an accused person is charged with an offence under ss 3, 4, 5, 6 or 7, it is not a valid defence to contend that a marital or other relationship existed with the complainant. In terms of s 12(1) of the Children’s Act 38 of 2005, ‘every child has the right not to be subjected to social, cultural and religious practices which are detrimental to his or her well-being’.

The trial court, on an evaluation of the totality of the evidence, was satisfied beyond reasonable doubt that the complaint did not consent to sexual intercourse with the appellant and that there was no reasonable possibility that the appellant believed that she had consented. It also found that the evidence of the appellant that he reasonably believed that the complainant was 16 years, could not be reasonably, possibly true. On appeal, those findings by the court below could not be faulted. There being no misdirection in the trial court’s reasoning and evaluation of the evidence, its conclusion regarding the appellant’s guilt had to be confirmed. The court specifically addressed the sanction by certain churches of the practice of child marriages. It was held that the appellant’s church’s beliefs and practices could not supersede the laws and the Constitution of the country, which forbids sexual intercourse with underage girls.

The appeal against conviction accordingly failed.

Special plea in criminal trial: After both accused in S v Zuma and Another [2022] 1 All SA 533 (KZP) pleaded not guilty to an array of charges, the first accused (Mr Zuma) raised a special plea in terms of s 106(1)(h) of the Criminal Procedure Act 51 of 1977, contending that the lead prosecutor of the prosecuting team representing the state, Mr Downer, had no title to prosecute as contemplated in
s 106(1)(h), and should be removed as the prosecutor in the case.

It was held by Koen J, that the procedure for the adjudication of the special plea had to be addressed. The interests of justice demanded that the special plea be dealt with as expeditiously as possible. It made good sense for the special plea to be tried by the exchange of affidavits. An oral hearing was not required, neither on the wording of s 106(1)(h), s 108, or the law generally.

Before dealing with the interpretation of the phrase ‘title to prosecute’, the court considered the numerous complaints raised by Mr Zuma in support of his special plea. Emphasising that a judgment must be confined to the issues properly before the court, the court confirmed that the issue for determination was the special plea that Mr Downer allegedly lacked title to prosecute, as provided in s 106(1)(h) of the Criminal Procedure Act, and nothing more.

Mr Zuma’s argument was that the word ‘title’ should be given a wider meaning than a prosecutor’s standing or authority to prosecute, to include lack of objectivity and independence, bias, and whether the prosecutor acted in a manner which might violate Mr Zuma’s rights to a fair trial.

The court endorsed case authority, by which it was in any event bound, stating that the word ‘prosecutor’ in s 106(1)(h) refers not to the state, but to the person who acts as prosecutor in the court. The court interpreted ‘title to prosecute’ as being a plea relating to the standing of the prosecutor, and nothing wider.

In adversarial criminal proceedings, such as ours, it is inevitable that prosecutors will be partisan. Their role in criminal prosecutions makes it inevitable that they will be perceived to be biased. The test in respect of the apprehension of bias of a prosecutor is not that which applies to a judicial officer. It is not a given that a perception of bias held against a prosecutor will lead to an accused not having a fair trial. If an accused believes the prosecutor assigned to his case will not exercise, carry out or perform their powers, duties, and functions in good faith, impartially and without fear, favour or prejudice, or that the prosecutor is an essential witness in the case, then the accused may bring a substantive application to the court for an order that the prosecutor be removed and replaced. What the accused cannot achieve, however, is to seek such removal by the device of entering a special plea in terms of s 106(1)(h) of the Act.

Mr Zuma having not established that Mr Downer lacked title to prosecute, the special plea was dismissed.

Insurance

Business interruption indemnity: The first respondent (Ma-Afrika) operated hotels and businesses in the Western Cape, and the second respondent (the Kitchen) was a restaurant that operated on the premises of one of those hotels. In terms of insurance policies with the appellant (Santam), infectious disease indemnity cover was provided to the respondents. The policies also offered business interruption cover, and the respondents were indemnified for loss of revenue. The insurable event was the outbreak of a ‘notifiable disease’ at or within a 40km radius of each of the establishments.

On the outbreak of the COVID-19 pandemic in South Africa, the respondents claimed for business interruption losses under insurance policies. Santam upheld only one of five claims, in respect of the hotel and only for the period 15 to 27 March 2020, due to the outbreak at that establishment, causing revenue losses only for that period. The remaining claims were rejected on the basis that none of the losses claimed were caused by a notifiable disease occurring within a 40km radius of the premises. Santam contended further that the losses suffered were because of a government lockdown and general concern or fear instead of a local outbreak of the notifiable disease. The respondents sought a declaration in the High Court that the indemnity period for the loss of revenue claim was 18 months.
The High Court granted declaratory relief confirming Santam's liability to indemnify the businesses. Santam's appeal focused on the applicable indemnity period in relation to business interruption losses under the policies.

The issue on appeal in Santam Limited, a division of which is Hospitality and Leisure Insurance v Ma-Afrika Hotels (Pty) Ltd and Another [2022] 1 All SA 376 (SCA), required a consideration of the period during which, according to the policy, the indemnity operated.

Undertaking an interpretation of the policy and the Schedules, thereto, the court restated the approach in interpreting insurance contracts. Language, context, and purpose must be considered in a unitary exercise. A commercially sensible meaning is to be adopted. The analysis is objective and is aimed at establishing what the parties must be taken to have intended, having regard to the words they used in the light of the document as a whole and of the factual matrix within which they concluded the contract. Applying that approach, the court concluded that the indemnity period in relation to claims for loss of revenue due to business interruption was 18 months. The appeal was dismissed with costs.

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

- adequate remuneration, an aspect of judicial independence, and judicial officers not to be placed in a position of having to engage in negotiations with the executive over their salaries;
- application to recuse a judge;
- fiduciary duty of a trustee, a trustee nominating a company owned by him to acquire property being sold by a trust in which he was a trustee, and a company subsequently selling property at a significant profit;
- parliamentary obligations and not ensuring compliance with binding remedial action;
- postponement of proceedings pending re-enrolment, an applications for default judgments postponed affording a plaintiff an opportunity to take further steps deemed necessary by court under s 129(1) of the National Credit Act 34 of 2005 before matters could be re-enrolled;
- powers of the public protector; and
- trusts and trustees, beneficiaries, and locus standi to act independently.

Merilyn Rowena Kader LLB (Unisa) is a Legal Editor at LexisNexis in Durban.
The Constitutional Court (CC) had to discern whether a party is required to comply with a court order that it believes is a nullity in the matter of Municipal Manager OR Tambo District Municipality and Another v Ndabeni (CC) (unreported case no CCT 45/21, 14-2-2022). The CC granted leave to appeal in the matter.

On 1 July 2005 the municipality employed Ms Ndabeni (the respondent) on a fixed-term contract for a year as a manager at the Aids Training Information and Counselling Centre (ATICC). Her contract was repeatedly renewed until 2014 when her services were terminated. On 30 January 2011 the municipality passed Resolution 10/11 to convert all contract employees to permanent employees. Resolution 10/11 was not applied to Ms Ndabeni. Aggrieved, Ms Ndabeni approached the High Court on 19 May 2015 for an order declaring her employment to be permanent.

On 4 July 2015, the municipal parties requested and obtained an extension from Ms Ndabeni to deliver their answering affidavit. A few days before their answering affidavit was due, the municipal parties applied in terms of the Uniform Rules of Court, to declare the proceedings irregular. On 5 April 2016, Ms Ndabeni applied to amend her notice of motion. Once Ms Ndabeni opposed the request and obtained an extension by consent. Leave to appeal to amend her notice of motion was granted on 25 October 2016 by consent.

Still the municipal parties failed to deliver their answering affidavit. Notwithstanding the long delay since 2015, at the hearing before the High Court on 13 December 2016, the municipal parties formally applied for an adjournment for two weeks to file their answering affidavit. The primary reason advanced for the adjournment was that the municipal parties could provide witnesses to their attorneys while the municipality was under audit between 25 October and 1 December 2016. Ms Ndabeni opposed the application for the adjournment. Considering that the application had been launched in May 2015, the High Court refused the adjournment. The matter then proceeded unopposed. The High Court granted an order in favour of Ms Ndabeni.

That order, henceforth referred to as the 'Mjali J order', read as follows:

1. The applicant is hereby declared the permanent employee of the first respondent in her capacity as the Manager at Aids Training Information and Counselling Centre Manager Section – ATICCC by virtue of Resolution No. 10/11 of 30 January 2011 and any contrary conduct or action taken by the respondents is hereby declared a nullity;
2. The post referred to as AIDS Training Information and Counselling Centre Manager (ATICCC) previously occupied by the applicant is hereby declared a permanent post in line with Resolution No. 10/11 of 30 January 2011;
3. The respondents are directed to pay the costs of this application jointly and own client scale;
4. The first respondent be ordered to pay the applicant’s salary and other benefits, in future, in accordance with benefits and service conditions applicable to an employee of her status.

On 22 March 2018, the High Court refused leave to appeal. Belatedly and unsuccessfully, the municipal parties petitioned the Supreme Court of Appeal (SCA). After 30 July 2018, when the SCA refused the petition, the municipal parties remained inert. Allegedly, they received the order from the SCA late. According to the CC, after delays in securing counsel, further delays were encountered in getting papers back from counsel to apply for leave to appeal to the CC. The CC said that by January 2019, having missed the opportunity to seek leave to appeal to it, the municipal parties decided to abandon their application. The CC pointed out that municipal parties alleged that it would have been in the interest of justice to comply with the Mjali J order. But they did not.

On 1 February 2019, Ms Ndabeni applied to the High Court to hold the municipal parties in contempt of the Mjali J order and have imprisoned the erstwhile municipal manager, Owen Ngubende Hlazo. Ms Ndabeni alleged that the employment had been unlawfully terminated, and in terms of the Mjali J order, she was entitled to be treated as a permanent employee. Mbenenge JP issued a rule nisi, calling on –

(a) The municipal manager to show cause why his conduct in failing to comply with the Mjali J order should not be declared unlawful and in contempt of that judgment;
(b) The municipal parties to show cause why they should not be directed to purge their contempt; and
(c) The municipal manager to show cause why he should not be committed to jail for contempt and directed to pay costs on an attorney and client scale.

On the return day, the municipal parties and their attorney alleged that they became aware of the order of the SCA only on 19 November 2018 due to their change of e-mail address. Ms Ndabeni successfully refuted this allegation by proving that the order had been served physically by the sheriff on the municipal manager on 13 September 2018 and on the municipality on 11 October 2018. The CC said that almost four years passed since the litigation started. Only then did it dawn on the erstwhile municipal manager that implementing the order when there was no post on the staff establishment would result in him being liable for irregular and wasteful expenditure, in terms of s 66(5) of the Local Government: Municipal Systems Act 32 of 2000 (System Act).

The CC added that seemingly, the erstwhile municipal manager awakened to his responsibilities only when he was at risk of being held personally liable. To defend themselves, the municipal par-
The CC said furthermore, the municipal parties failed to explain why they did not apply Resolution 10/11 to Ms Ndabeni. That if the plan was to transfer her to the Provincial Department of Health, that did not happen. She was left unemployed. The CC pointed out that disclosure of the plan to transfer Ms Ndabeni to the Provincial Department was made for the first time in the municipal parties’ affidavit claiming nullity of the Mjali J order, hence this plan was not before Mjali J. The CC added that coupled with the evidence about Ms Ndabeni’s employment with the municipality, Mjali J had jurisdiction to decide that the effect of Resolution 10/11 was to convert Ms Ndabeni’s status to that of a permanent employment. Once Mjali J had jurisdiction, her order could not be impugned as a nullity. The CC said whether the decision was right or wrong on the merits did not affect the binding force of the order unless it was set aside on appeal.

The CC said that the Mjali J order is not a nullity, that it is indeed a lawful order, issued by a properly constituted court having jurisdiction. The CC added that, that case falls squarely within the ambit of the ruling Tasima. The CC pointed out that all Ms Ndabeni’s seeking was compliance by the municipal parties with the Mjali J order. That, consequently, it was not open to the majority to exclude para 2 of the High Court order. The CC having found that the Mjali J order was lawful, it said it must be complied with. The CC added that to give effect to the Mjali J order, the remaining grounds of appeal against the order of the SCA must be dismissed.

The CC granted the following cost:

‘Although the municipal parties escape being held in contempt, their dilatoriness, inertia and unaccountability must be viewed through the lens of the municipality’s heightened duty to comply with court orders. Organs of state, of which the municipality is one, are expressly enjoined to “assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts”. They have the obligations under the Constitution to respect the rule of law and the courts as guardians of the Constitution.

The CC said that if the municipal parties genuinely believed that the Mjali J order was nullity, then they had a public duty to pursue the appeal to correct the illegality. The CC added that by abandoning their appeal, they also forsook their obligation iterated in MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd v/v Eye and Lazer Institute 2014 (3) SA 481 (CC) to ‘do right, and . . . do it properly’. The CC said the municipal parties dragged Ms Ndabeni, an unemployed woman, through five courts over six years. While their litigation was at the expense of the public purse, Ms Ndabeni had to foot her own bills. The CC pointed out that the municipality as ‘the Constitution’s primary agent’ and employer of Ms Ndabeni had to do better.

The CC awarded a punitive costs order and included an order to give Ms Ndabeni leave to approach the High Court to facilitate her access to justice if the municipal parties failed with the order.

The following order was issued:

1. Leave to appeal is granted.
2. The appeal succeeds to the extent that paragraph 2(b) and (c) of the order of the Supreme Court of Appeal, which held the first and second applicants [Municipal Manager OR Tambo District Municipality and OR Tambo District Municipality] to be in contempt of the order of the High Court issued on 13 December 2016 (Mjali J order) and required them to purge such contempt, is set aside.
3. For the rest, the appeal is dismissed.
4. The first and second applicants are ordered to comply with the Mjali J order within 30 days of the order of this court.
5. The second applicant must pay to the respondent, Ms Nosipho Portia Ndabeni, the costs of this application on an attorney and client scale.
6. Ms Nosipho Portia Nqobeni is given leave to apply on the pleadings in this matter, supplemented as required, to a High Court having jurisdiction, to enforce this order’.

Kgomotso Ramotho Cert Journ (Boston) Cert Photography (Vega) Is the news reporter at De Rebus.
NEW LEGISLATION

New legislation
Legislation published from
1 February - 4 March 2022

Acts
Criminal Procedure Amendment Act 16 of 2021

Films and Publications Amendment Act 11 of 2019

Legal Practice Act 28 of 2014
Sections 4, 42, 93(5) and 95(2) and ch 5. Commencement: 1 March 2022. Proc 53 GG45988/1-3-2022.

Bills and White Papers
Division of Revenue Bill

Draft National Labour Migration Policy and Employment Services Amendment Bill, 2021
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PEOPLE AND PRACTICES

People and practices

Compiled by Shireen Mahomed

Garlicke & Bousfield Inc in La Lucia has three new appointments.

Aviwe Vezi has been appointed as an associate conveyancer and notary, in the Property and Conveyancing Department.

Lauren Theron has been appointed as an associate and conveyancer in the Property and Conveyancing Department.

Innocent Pakkies has been appointed as an associate in the Litigation Department.

Lauren Lloyd and Lizelle Rossouw are editors at LexisNexis in Durban.

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. For more information on submissions to the People and Practices column, e-mail: shireen@derebus.org.za
Employee defying an instruction to testify at the CCMA

In Kaefer Energy Projects (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others [2022] 2 BLLR 166 (LAC), the employee was employed by Kaefer Energy Projects (Pty) Ltd (the Company) in the position of human resource administration clerk. While attending to her duties, the employee heard an altercation take place between two colleagues, Ms Govender and Mr Maili. The employee rushed into Ms Govender’s office and escorted Mr Maili out. It was this incident that led to Mr Maili being dismissed by the Company. He subsequently referred an unfair dismissal dispute to the CCMA.

For purposes of the arbitration proceedings at the CCMA, the employee was instructed to testify on behalf of the Company. The employee refused to do so. Thereafter, the employee was charged with two acts of misconduct. The first related to her refusal to testify at the arbitration proceedings. The second related to a breach of her employment contract as a result of her leaking confidential information. The employee was found guilty of both charges and was subsequently dismissed. Aggrieved by her dismissal, the employee referred an unfair dismissal dispute to the CCMA.

With respect to the first charge, the CCMA commissioner found that since there was no evidence to demonstrate that the employee had deliberately refused to testify in order to protect Mr Maili, the employee had not committed misconduct. The Company could have, however, subpoenaed the employee in these circumstances. With respect to the second charge, the commissioner found that the sanction of dismissal was too harsh and issued the employee with a final written warning.

The Company was dissatisfied with the commissioner’s finding that the employee had not committed misconduct in failing to comply with a reasonable instruction to testify. The Company accordingly approached the Labour Court (LC) to set the award aside. The LC found, however, that no person may be penalised for not participating in any proceedings in terms of the Labour Relations Act 66 of 1995, and that the only way to compel an employee to testify is to subpoena the employee concerned. The LC upheld the award on review.

On appeal to the Labour Appeal Court (the LAC), the Company contended that the employee’s refusal to testify constituted insubordination and amounted to a breach of her duty of good faith. The employee, on the other hand, submitted that her refusal was neither deliberate nor did she act in bad faith. She refused to be a witness because she did not think her evidence was relevant and she did not want to ‘make a fool of herself’. In determining whether the employee was guilty, the LAC noted that the commissioner was required to consider – (a) the misconduct that the employee was said to have committed – this was her refusal to carry out an instruction given to her; (b) whether the instruction was lawful, reasonable or fair; (c) whether the employee was in a position to carry out the instruction; and (d) whether there was a lawful or reasonable excuse for her to refuse to carry out the instruction?

By finding that the Company should have subpoenaed the employee, the LAC held that the commissioner had totally misconstrued the issue before him. The employee had been given a clear instruction to testify and she had a duty to comply with that instruction. There was nothing unlawful or unreasonable about the instruction because the employee had not been coached or told how to respond to questions. All she was required to do was confirm that there had been an altercation in which she saw fit to intervene. It was not for the employee to decide whether her evidence would have been relevant. While an employee may raise a valid excuse for non-compliance, in the present matter, there was no evidence of threats or pressure that played any role in the employee’s decision not to testify.

The LAC found that the issue of the subpoena both at the arbitration and the LC was accordingly a red herring. The fact that a subpoena could have been obtained does not mean that an employee can simply refuse an employer’s instructions to testify. The employee had not proffered any acceptable and valid reason for not complying with the instruction. The misconduct in this instance was compounded by the fact that the employee was not being honest. A day or two before the arbitration, she was willing to testify and was able to answer the Company’s questions relating to the incident, but a day later she refused to testify claiming she knew nothing about the incident.

The LAC held that the consequence of treating such misconduct lightly is that it will have a negative impact on the entire workforce when it comes to disciplining any individual by relying on evidence of a fellow employee.

In the circumstances, the LAC found that the commissioner’s decision that the employee had not committed misconduct was not a decision a reasonable commissioner could have arrived at. Had the commissioner correctly found the employee to be guilty of insubordination, he would have imposed a penalty of dismissal, which was appropriate in the circumstances.

The appeal was upheld, and the award was replaced with a ruling that the employee’s dismissal was fair.

Accused persons have a fundamental right to be tried in their presence

In Mosikili v South African Board of Sheriffs [2022] 2 BLLR 197 (WCC), the applicant, a Sheriff falling under the jurisdiction of the South African Board for Sheriffs (the respondent), was found guilty on a slew of charges for misconduct. The respondent’s Disciplinary Committee recommended that the applicant be barred from acting as a Sheriff. The applicant appealed the decision to the Appeal Board, which appeal was rejected.

The applicant approached the court to appeal and set aside the decision barring him from practicing as a Sheriff. The
Does an employee have a duty to disclose any action which potentially is in conflict with their employer?

Bakrenrug Meat (Pty) Ltd v Joostenberg Meat (CCTA 2019) LAC

The appellant's business involves producing and selling a range of meat products. It employed the third respondent as a sales representative in October 2013.

The employee operated a side-line business, which marketed dried meat products. She did not disclose her activities to her employer. Based on these facts, the arbitrator found the employee's non-disclosure to be dishonest. The arbitrator reasoned that the employer had a duty to inform her employer of her activities and that the employer's side-line business were not a model of clarity. The court noted that neither the employer nor his legal representative had turned up at his disciplinary hearing. The employee, however, furnished a medical note to explain his absence and the employer's legal representative sent a colleague to the hearing to seek a postponement. Notwithstanding this, the hearing continued in the absence of the applicant and the appeal was dismissed.

The question before the court was whether the decision of the Appeal Board was irrational, unfair or irregular, as contended by the applicant. The court noted that there is an overarching and essential right of an accused person to be tried in their presence. A deviation from this principal may often do more harm than good. Accordingly, a hearing in the absence of an accused person may be justified only in exceptional circumstances. Similarly, there should be clear, valid and convincing reasons to proceed in the absence of an accused person.

The Appeal Board found that there was nothing preventing the hearing from proceeding in the absence of the applicant on the basis that, among other things -

- the applicant had failed to provide sufficient proof that he was unable to attend the hearing after being involved in an accident;
- the applicant's legal representative only applied for a postponement on the day of the hearing with no justifiable reason;
- there was overwhelming proof that the applicant was guilty of misconduct; and
- the Act allowed for hearings to proceed in the absence of the accused.

Having regard to the submissions placed before the Appeal Board, the court was of the view that its findings were unsustainable. In this regard, there was no evidence to indicate that the Disciplinary Committee made any attempt to contact the applicant or to investigate why the applicant had been absent from the hearing. There was no consideration of a potential adjournment or rescheduling of the hearing, nor of the impact of the decision to proceed in the absence of the applicant. There was also no evidence that the applicant or his legal representative had abandoned or waived their right to the hearing.

In October 2016, the employer became aware of the fact that the employee was operating her own business, which marketed biltong products.

The employee was charged for dishonesty in that she failed to inform her employer that she owned and operated a business, which marketed dried meat products and thus failed to give full attention to marketing the products produced by the employer.

Subsequent to being found guilty and dismissed, the employee referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (LAC).

The arbitrator made the following factual findings -

- the employee operated a formal business, which marketed dried meat products;
- in operating such a business the employee rented premises and employed one full-time employee; and
- prior to being charged, the employer did not produce or market dried meat products.

On these findings, the arbitrator found that the employee's non-disclosure was dishonest. The arbitrator reasoning was that the employee had a duty to inform her employer of her activities and thereafter allow the employer to decide whether her activities were in conflict with its business. The fact that the employer's operations did not include dried meat products did not negate the employee's duty to inform her employer of her side-line business.

Although the Act allows for hearings to continue in the absence of an accused, the court found that the Act did not grant the Appeal Board carte blanche to approve every case when this was done. On the contrary, the Act did not provide an unfettered discretionary power to the Appeal Board. Any discretion was required to be exercised with great caution.

In the circumstances, the court found that the Appeal Board’s conclusion was fallacious for several reasons. The Appeal Board should have accordingly found that the decision was procedurally unfair as it failed to comply with the audi alteram partem principle.

Turning to the relief, the court held that nothing in the Act precluded the court from ordering the re-enrolment of the applicant as a sheriff merely because his expulsion was ‘only’ procedurally unfair. The respondent’s argument that only the Minister could re-admit an expelled sheriff was without merit.

The appeal was upheld, and the applicant’s conviction and sanction were set aside.

Nadine Mather BA LLB (cum laude) (Rhodes) is a legal practitioner at Bowmans in Johannesburg.

By Moksha Naidoo
ever, that the third respondent failed to disclose an essential and important fact that she was running “a side-line business” in the market for the sale of meat products, albeit that they might not have been identical to the meat products which were sold by appellant. That she was able to discharge her duties to the appellant does not take her case any further. She was employed as a sales representative in a business that was involved in the sale of meat products. As a side-line business, she conducted a business which involved the sale of biltong, namely a meat product. She failed to disclose these obviously material activities to her employer and was therefore manifestly acting in violation of her duty of good faith to her employer.

The conclusion reached by the second respondent that “employees act in bad faith if conflict of interest may arise even though no real competition actually results” is unassailable.’

The LAC ordered that the court a quo’s findings be replaced with an order that the employee’s review application be dismissed with no order as to costs.

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

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Kathleen Kriel BTech (Journ) is the Production Editor at De Rebus.
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When you are drafting your will, first take care of your loved ones, then please consider leaving a gift to SA Guide-Dogs Association for the Blind. A charitable legacy is exempt from Estate Duty.

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E-mail: info@guidedog.org.za
The Kirstenbosch Centenary Tree Canopy Walkway, also known as The Boomslang, takes visitors on a 130 metre-long walkway, snaking its way through the canopy of the National Botanical Garden’s Arboretum. The walkway is crescent-shaped and takes advantage of the sloping ground, touching the forest floor in two places and raising visitors to 12 m above ground in the highest parts. Kirstenbosch National Botanical Garden was established in 1913 to promote, conserve and display the extraordinarily rich and diverse flora of southern Africa. It was also the first botanical garden in the world to be devoted to a country’s indigenous flora.
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<td>1p</td>
<td>R 9 003</td>
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<td>R 4 504</td>
<td>R 6 459</td>
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<td>R 1 619</td>
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**Small advertisements (including VAT):**

- Attorneys Other
  - 1–30 words: R 455
  - every 10 words thereafter: R 152

Service charge for code numbers is R 152.

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**van Wyk & van Heerden**

– Paarl/Wellington –

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Minimum requirements:
- LLB degree.
- At least two years’ post-conveyancing admission experience.
- Fluent in Afrikaans and English.
- Reside or willing to move to Paarl/Wellington.

Salary dependant on experience.

Forward CV plus proof of qualifications to gaynor@vwvh.co.za
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**COMMERCIAL LITIGATION ASSOCIATE**

Minimum requirements:
- LLB degree.
- Three years’ post-admission experience in commercial litigation.

The successful candidate should:
- have extensive drafting experience and skills;
- be able to work independently; and
- excellent communication and negotiation skills in Afrikaans and English.

Salary dependant on experience.

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South African attorney and member of the Italian Bar, who frequently visits colleagues and clients in South Africa.

**Rome office**
Via Aureliana 53
00187 Rome, Italy
Tel: 0039 06 8746 2843
Fax: 0039 06 4200 0261
Mobile: 0039 348 514 2937
E-mail: avelisio@tin.it

**Milan office**
Galleria del Corso 1
20122 Milan, Italy
Tel: 0039 02 7642 1200
Fax: 0039 02 7602 5773
Skype: Anthony V. Elisio
E-mail: a.elisio@alice.it

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Attorneys/Prokurists
– Polokwane –

Thomas Grobler Attorneys requires the services of a JUNIOR ADMITTED ATTORNEY in Polokwane.

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- Must have experience in litigation including High Court litigation.
- Hardworking and motivated.
- Will be required to work independently but also as part of a team.
- Willing to grow within the firm.
- Bilingual in English and Afrikaans.

Send your CV to: jamesfriskin@tgprok.co.za

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Attorney

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Supplement to De Rebus, April 2022

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Cell: +27 (0)82 553 7824
E-mail: odasilva@law.co.za

Avril Pagel:
Cell: +27 (0)82 606 0441
E-mail: pagel@law.co.za

Appraiser for estate purposes.
Translation: Afrikaans to English and English to Afrikaans.
Transcription services.
Proofreading and editing.

Lukas Kruger
E-Mail: lukas@omnival.co.za
Cell: 084 858 7708

Odete Da Silva:
Telephone: +27 (0) 11 463 1214
Cell: +27 (0)82 553 7824
E-mail: odasilva@law.co.za

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