

UNDERSTANDING THE *AMICUS CURIAE* ROLE IN LITIGATION AND HOW IT AFFECTS COSTS ORDERS

Sperm donors and their rights
regarding the child

Can a winding-up application
be brought under both the old and
the new Companies Act?

Are you over promising and
under delivering?

Access to justice in family law
field is lacking

Doctrine of *stare
decisis* requires
courts 'stand or
abide by cases
already
decided'

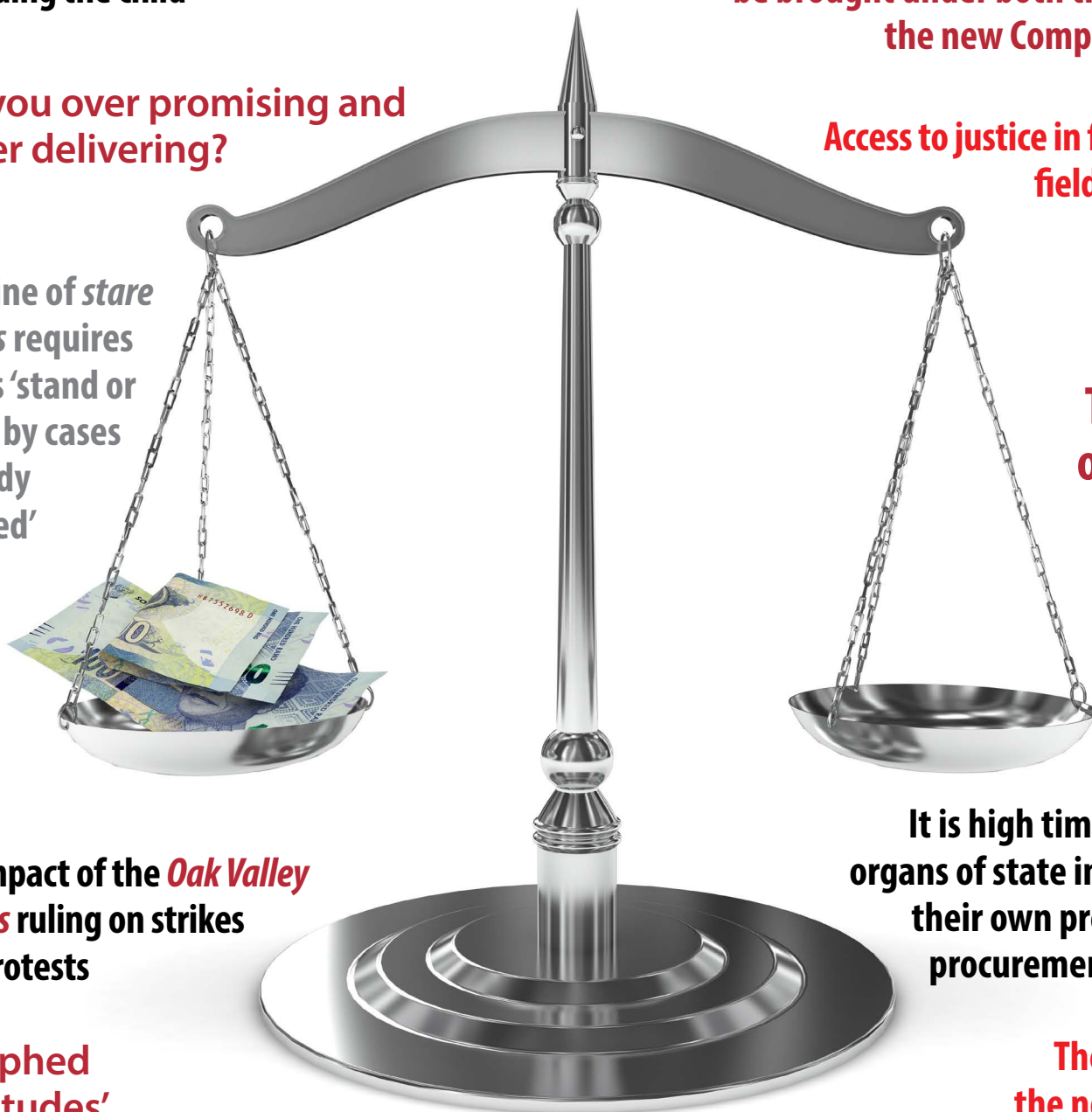
The rule
of law in
Africa

The impact of the *Oak Valley
Estates* ruling on strikes
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It is high time that the
organs of state implement
their own preferential
procurement policies

'Morphed
servitudes'

The rights of
the non-parent





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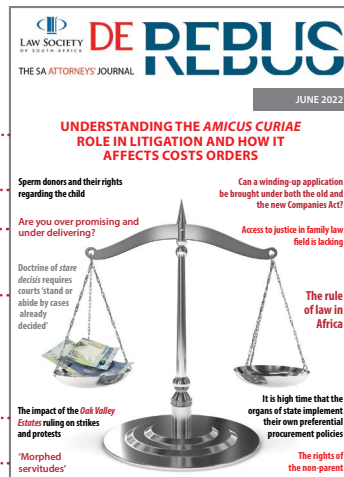
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News articles on the De Rebus website:

- Minister Lamola to approach Cabinet on the judiciary's proposed system of court administration
- The relationship between the principal and candidate legal practitioner is an important part of articles of clerkship
- The Presidency and the Department of Justice Intergovernmental National Litigation Forum aims to address state litigation challenges

12 Understanding the *amicus curiae* role in litigation and how it affects costs orders

An *amicus curiae* has no direct interest in litigation but rather joins the proceedings as a friend of the court and not as a litigant. Its purpose is to assist the court in matters that may be out of the court's field of expertise. However, the role of *amicus curiae* has grown over time into a role of third-party representation. LLM graduate, **Mpho Adam Titong**, writes that the question of whether an *amicus curiae* is entitled to a costs order raises inherently complex issues and ought to be dealt with effectively. Mr Titong notes that under common law, an *amicus curiae* is merely a friend of the court and not a litigating party and is generally not entitled to an order for costs of litigation. However, case law suggests a court may make an order dealing with costs and such order may make provision for the payment of costs incurred as a result of an intervention by an *amicus curiae*.

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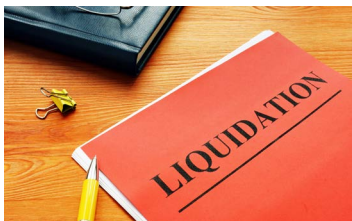
15 Sperm donors and their rights regarding the child

The costs associated with utilising an anonymous sperm donor from a sperm bank may not be affordable to some. To overcome this a few may turn to 'known donor agreements'. This is where a person enters an agreement with an individual they know to donate sperm for the purpose of impregnation. However, the landscape for such agreements is still very much unknown. In a recent Gauteng Division case, the respondents used Facebook to find a donor and entered an agreement, which barred the applicant from obtaining parental responsibilities and rights to the donor-conceived child. Despite agreeing to these terms, the applicant decided he wanted to play a role in the child's life and sought relief from the court. Candidate legal practitioner, **Roby Snyma**, highlights the risks associated with such known donor agreements. Pointing out that the best interests of the child is the primary factor the court considers and that the court may even chose to ignore the agreement concluded between parties.



17 Can a winding-up application be brought under both the old and the new Companies Act?

The Companies Act 71 of 2008 (the new Act) is used for the winding-up of a solvent company and the Companies Act 61 of 1973 (the old Act) is used for an insolvent company. Legal practitioner, **Nathan Segal**, asks what should a partner or shareholder that has been excluded from the business of the company and is not able to state conclusively whether the company is solvent or insolvent do during a winding-up? Mr Segal submits that in such situations it will be necessary for an application to be made for a winding-up order under both the old and the new Act as long as there is also compliance with s 346 of the old Act in the event the company is found to be insolvent.



19 Access to justice in family law field is lacking

Legal practitioner, **Joanne Anthony-Gooden**, features in this month's Women in Law column. Ms Anthony-Gooden was recently appointed Vice-President of the Law Society of South Africa. Ms Anthony-Gooden is a divorce and family law legal practitioner in Gqeberha (Port Elizabeth). Her firm has an all-female staff and specialises in family law matters. *De Rebus* news reporter, **Kgomotso Ramotsho**, spoke to Ms Anthony-Gooden about her views on the legal profession, her passion for family law, and her thoughts on women leaders in the legal profession.

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Comment on community service for legal practitioners

Section 29 of the Legal Practice Act 28 of 2014 (LPA) provides for the rendering of community service by candidate legal practitioners and practising legal practitioners. The Law Society of South Africa is collating comments from candidate legal practitioners and legal practitioners on the proposed regulations to be made under s 94(1)(j) of the LPA for purposes of community service. Comments are invited before 20 June 2022 and can be e-mailed to Kris Devan at Kris@lssa.org.za.

Below is the amendment of regulation made under s 94(1)(j).

"The classification of the regulations is hereby amended by the insertion after Item 4 of the following items:

"4A. Rendering of community service by candidate legal practitioners.

4B. Rendering of community service by practising legal practitioners".

Insertion of regulations 4A and 4B

...

"Rendering of community service by candidate legal practitioners

- 4A. (1) A candidate legal practitioner must, as a component of their vocational training, render eight hours per annum community service at the institutions referred to in section 29(2) of the Act, or at any institution approved by the Minister from time to time, as provided for by section 29(2)(a) and (e) of the Act.
- (2) A person who commences service as a candidate legal practitioner during the course of a calendar year must perform community service equal to not less than one hour per month, or part thereof, in the first calendar year of vocational training.
- (3) The community service rendered by a candidate attorney must be supervised by their principal and the community service rendered by a pupil must be supervised by their engaging advocate.
- (4) The period of service referred to in subregulation (1) may be intermittent or continuous.
- (5) Any extra hours of community service rendered in a calendar year may be carried forward as credits for the next calendar year.
- (6) Professional standards as provided for in the code of conduct and the rules will be applicable to community service rendered by a candidate legal practitioner.
- (7) A candidate legal practitioner must, after completion of the period of

practical vocational training, submit to the Council one or more certificates signed by their principal or engaging advocate, as the case may be, confirming that such community service has been rendered.

- (8) A candidate legal practitioner may be exempted from the rendering of community service as set out in the rules.

Rendering of community service by practising legal practitioners

- 4B. (1) A practising legal practitioner must render 40 hours per annum community service at the institutions referred to in section 29(2) of the Act, or at any institution approved by the Minister from time to time, as provided for by section 29(2)(a) and (e) of the Act.
- (2) A legal practitioner may be exempted from the rendering of community service as set out in the rules.
- (3) A legal practitioner who starts practising during the course of a calendar year must perform community service equal to not less than three hours per month, or part thereof, in the first calendar year of practice.
- (4) A legal practitioner need not be supervised during the rendering of community service.
- (5) Any *pro bono* services rendered by a practising legal practitioner will be recognised as community service.
- (6) The period of service referred to in subregulation (1) may be intermittent or continuous.
- (7) Any extra hours of community service rendered in a calendar year may be carried forward as credits for the next calendar year.
- (8) Professional standards as provided for in the code of conduct and the



Mapula Oliphant - Editor

rules will be applicable to community service rendered by a legal practitioner.

- (9) A practising legal practitioner must submit to the Council annually, when making payments for annual fees, one or more certificates signed by the recipients of the community service, confirming that such community services have been rendered."

It is imperative that amendments to regulations of the LPA are not made without the input of legal practitioners. The topic of community service by legal practitioners has received extensive attention by the media in the past weeks, which goes to show its importance in the justice system.



Would you like to write for De Rebus?

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

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

- Please note that the word limit is 2 000 words.
- Upcoming deadlines for article submissions: 18 July; 22 August and 19 September 2022.

LETTERS

TO THE EDITOR

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Letters are not published under *noms de plume*. However, letters from practising attorneys who make their identities and addresses known to the editor may be considered for publication anonymously.

Arrest of advocate Teffo

I am an admitted legal practitioner and I have practised for 11 years for my own account. I am currently one of the director's responsible for the Mpumalanga Rental Housing Tribunal in the Department of Human Settlement.

I wish to raise my disgust in the way and manner in which advocate, Malesela Teffo, was arrested and humiliated in front of the media by members of the South African Police Service (SAPS) in the Gauteng Division of the High Court in Pretoria on 28 April 2022.

The 'Hollywood style' arrest with guns and all the police used to handcuff Mr Teffo was unnecessary and uncalled for, no matter what the charges were for which he was wanted for.

It is common cause that Mr Teffo is involved in a very high-profile murder case, and the public interest in this specific case is high. Mr Teffo has been in court every day, thus I cannot understand what the threat or need was for such behaviour by members of the SAPS who effected the arrest of Mr Teffo. Was there any urgency to even arrest Mr Teffo while in court?

I believe the arrest could have been

handled better, where for example, the investigating officer could have brought the arrest warrant to the attention of the prosecutor. Thus, the prosecution could have brought it to the attention of the judge and request that all the parties go into chambers for such an arrest to be affected.

According to my knowledge and understanding, Mr Teffo is an officer of the court and is expected to behave in a professional manner in terms of the ethics of the legal profession. Thus, I believe this kind of behaviour should be discouraged, as it will cause tension between the various justice clusters.

Thus, I call on the Law Society of South Africa (LSSA) to discourage this

behaviour against all legal professionals, including prosecutors, magistrates, and judges. I call on the LSSA to demand an apology from both the Minister of Police and the Minister of Justice to Mr Teffo.

Roy Ledwaba BProc (University of Limpopo) is a non-practising legal practitioner and a director at the Department of Human Settlement in Mpumalanga.

Response from the LSSA

On 10 May 2022, the Law Society of South Africa released a press statement expressing its dismay at the manner in which legal practitioner Mr Teffo was arrested, read the full press release here: www.lssa.org.za/press-releases. – **Editor**

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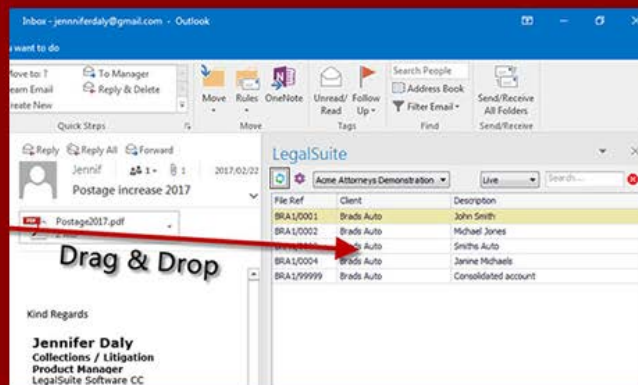
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By
Mapula
Oliphant

The rule of law in Africa

The below report has been compiled using the *World Justice Project (WJP) Rule of Law Index 2021*.

For this Africa Day, the Law Society of South Africa thought it would be the opportune time to summarise the information contained in the *WJP Rule of Law Index 2021* and highlight the numbers from the index that pertain to Africa and South Africa (SA). The *WJP Rule of Law Index 2021* is the latest report in an annual series that measures the rule of law based on the experiences and perceptions of the public, the legal practitioners of that country and experts worldwide.

The rule of law is an integral part of ensuring that countries are governed well and also ensures that the citizens of

that country trust that the justice system works. Strengthening the rule of law is a major goal of citizens, governments, donors, businesses, and civil society organisations around the world. The *WJP Rule of Law Index 2021* presents a portrait of the rule of law in 139 countries and jurisdictions by providing scores and rankings based on eight factors –

- constraints on government powers;
- absence of corruption;
- open government;
- fundamental rights;
- order and security;
- regulatory enforcement;
- civil justice; and
- criminal justice.

To derive at the scores and rankings in the *WJP Rule of Law Index 2021*,

more than 138 000 households were surveyed, including 4 200 legal practitioners and experts worldwide. The index is the world's most comprehensive dataset of its kind and the only one to rely principally on primary data, including the perspectives and experiences of ordinary people. The aim of the index is to help identify strengths and weaknesses within each country or jurisdiction, and encourage policy choices, guide programme development, and inform research to strengthen the rule of law within and across these countries and jurisdictions.

The overall ranking of SA is 52 out of 139 countries, while the country's overall score is 0,58 out of a possible 1. Below are tables that represent the ranking of African countries within their region.

Middle East and North Africa

Country/Jurisdiction	Regional Rank	Overall Score*	Change in Overall Score*	% Change in Overall Score*	Global Rank	Change in Global Rank [†]					
United Arab Emirates	1/8	0.64	-0.01	-0.9%	37	0					
Jordan	2/8	0.55	-0.02	-3.0%	59	2 ▼					
Tunisia	3/8	0.53	-0.01	-1.5%	65	2 ▼					
Algeria	4/8	0.49	0.00	-0.5%	82	8 ▲					
Morocco	5/8	0.49	-0.01	-2.6%	90	4 ▼					
Lebanon	6/8	0.45	0.00	-0.9%	104	0					
Iran, Islamic Rep.	7/8	0.42	-0.01	-2.3%	119	0					
Egypt, Arab Rep.	8/8	0.35	-0.01	-2.8%	136	0					

Sub-Saharan Africa

Country/Jurisdiction	Regional Rank	Overall Score*	Change in Overall Score*	% Change in Overall Score*	Global Rank	Change in Global Rank [†]					
Rwanda	1/33	0.62	0.00	0.5%	42	2 ▲					
Namibia	2/33	0.62	-0.01	-1.2%	44	2 ▼					
Mauritius	3/33	0.61	-0.01	-0.9%	45	0					
Botswana	4/33	0.59	-0.01	-1.5%	51	1 ▼					
South Africa	5/33	0.58	0.00	-0.4%	52	0					
Senegal	6/33	0.55	0.00	0.5%	57	2 ▲					
Ghana	7/33	0.55	-0.01	-2.2%	58	0					
Malawi	8/33	0.52	0.01	1.0%	67	5 ▲					
Burkina Faso	9/33	0.50	0.00	-0.9%	75	2 ▲					
The Gambia	10/33	0.49	-0.02	-3.1%	89	8 ▼					
Benin	11/33	0.49	-0.01	-2.3%	91	3 ▼					
Tanzania	12/33	0.47	-0.01	-1.1%	100	1 ▲					
Togo	13/33	0.45	0.00	0.9%	103	4 ▲					
Côte d'Ivoire	14/33	0.45	-0.02	-3.4%	105	2 ▼					
Kenya	15/33	0.44	0.00	-0.9%	106	4 ▲					
Zambia	16/33	0.44	-0.01	-2.3%	107	2 ▼					
Sierra Leone	17/33	0.44	-0.01	-1.5%	108	0					
Liberia	18/33	0.44	-0.01	-2.6%	110	4 ▼					
Niger	19/33	0.44	-0.01	-1.5%	111	0					
Madagascar	20/33	0.44	0.00	-0.6%	112	1 ▲					
Angola	21/33	0.43	0.00	0.5%	114	4 ▲					
Mali	22/33	0.43	-0.01	-2.9%	115	1 ▼					
Sudan	23/33	0.42	-	-	116	-					
Congo, Rep.	24/33	0.42	-	-	118	-					
Guinea	25/33	0.41	-0.01	-1.4%	120	1 ▲					
Nigeria	26/33	0.41	-0.02	-3.7%	121	3 ▼					
Ethiopia	27/33	0.41	0.00	-1.0%	122	2 ▲					
Mozambique	28/33	0.40	-0.01	-2.9%	123	0					
Uganda	29/33	0.39	0.00	-0.9%	125	2 ▲					
Zimbabwe	30/33	0.39	0.00	0.0%	127	2 ▲					
Mauritania	31/33	0.36	0.00	0.9%	133	1 ▲					
Cameroon	32/33	0.35	-0.01	-2.1%	135	0					
Congo, Dem. Rep.	33/33	0.35	0.00	1.2%	137	0					

*Scores and change in scores are rounded to two decimal places.

South Africa

Region: Sub-Saharan Africa
Income Group: Upper-Middle

The scores range from 0 to 1, where 1 signifies the highest possible score and 0 signifies the lowest possible score.

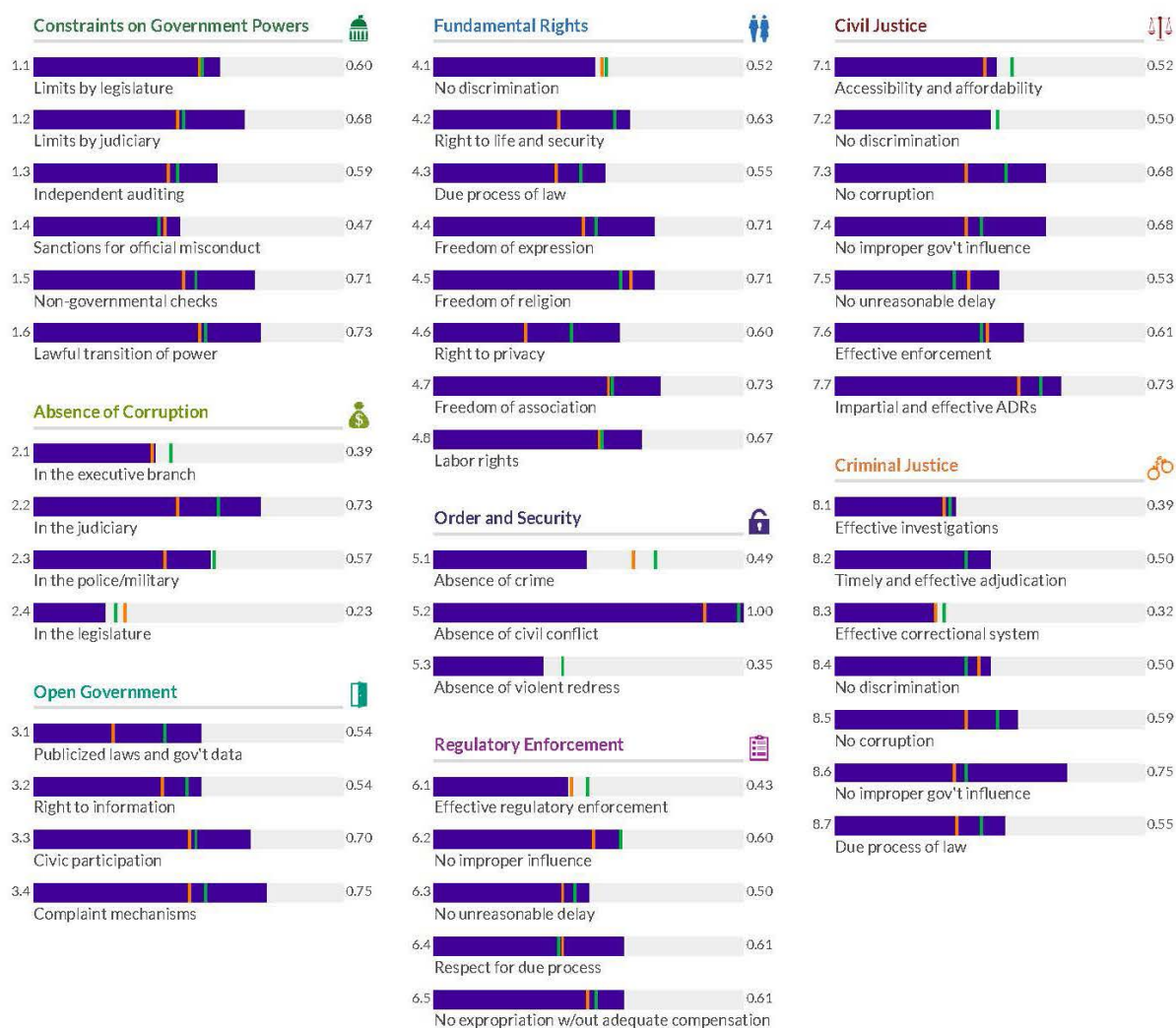
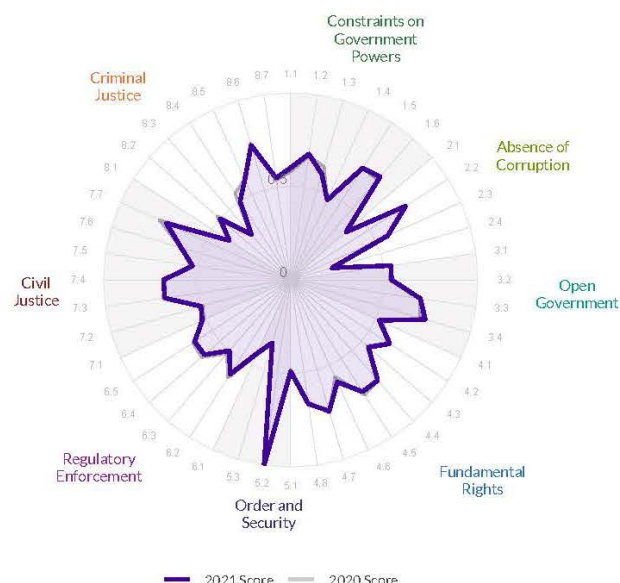
Overall Score	Regional Rank	Income Rank	Global Rank
0.58	5/33	8/40	52/139
Score Change	Rank Change		
0.00	0		

	Factor Score	Score Change	Regional Rank	Income Rank	Global Rank
Constraints on Government Powers	0.63	0.00	3/33	5/40	40/139
Absence of Corruption	0.48	0.00	6/33	16/40	65/139
Open Government	0.63	0.01	1/33	2/40	32/139
Fundamental Rights	0.64	0.00	2/33	6/40	45/139
Order and Security	0.61	0.00	23/33	35/40	118/139
Regulatory Enforcement	0.55	-0.01	6/33	11/40	55/139
Civil Justice	0.61	-0.01	4/33	8/40	47/139
Criminal Justice	0.52	-0.01	5/33	11/40	53/139

* Indicates statistically significant change at the 10 percent level

Low Medium High

South Africa Sub-Saharan Africa Upper-Middle



The constraints on government powers factor measure the extent to which those who are in government are bound by law. It includes the means, both constitutional and institutional, by which the powers of the government and its officials and agents are limited and held accountable under the law. This also includes non-governmental checks on the government's power, such as a free and independent press. In terms of the constraints on government powers factor, SA is ranked at number 40 out of 139 countries and has a score of 0,63 out of a possible 1.

The second factor measures the absence of corruption in government. This factor considers three forms of corruption, which include bribery, improper influence by public or private interests, and misappropriation of public funds or other resources. These three forms of corruption are examined with respect to government officers in the executive branch, the judiciary, the military, police, and the legislature. South Africa is ranked at number 65 out of 139 countries under this factor and has scored 0,48 out of a possible 1.

Factor four recognises that a system of positive law that fails to respect core human rights established under international law is at best 'rule by law' and does not deserve to be called a rule of law system. Since there are many other indicators that address human rights, and because it would be impossible for the index to assess adherence to the full range of rights, this factor focuses on a relatively modest menu of rights that are firmly established under the United Nations Universal Declaration of Human Rights and are most closely related to rule of law concerns. South Africa ranks at number 45 under this factor and scored 0,64 out of a possible 1.

Factor five measures how well a society ensures the security of persons and property. Security is one of the defining aspects of any rule of law in society and is a fundamental function of a state. It is also a precondition for the realisation of the rights and freedoms that the rule of law seeks to advance. Under this factor, SA is ranked at number 118 out of 139 countries and scored 0,61 out of 1.

Factor seven measures whether ordinary people can resolve their grievances peacefully and effectively through the civil justice system. It measures whether civil justice systems are accessible and affordable, as well as free of discrimination, corruption, and improper influence by public officials. It examines whether court proceedings are conducted without unreasonable delays and whether decisions are enforced effectively. It also measures the accessibility, impartiality, and effectiveness of alternative dispute resolution mechanisms. South Africa

ranks at number 47 out of 139 countries and scored 0,61 out of 1.

Factor eight evaluates a country's criminal justice system. An effective criminal justice system is a key aspect of the rule of law, as it constitutes the conventional mechanism to redress grievances and bring action against individuals for offenses against society. An assessment of the delivery of criminal justice should take into consideration the entire system, including the police, lawyers, prosecutors, judges, and prison officers. South Africa ranks at number 53 out of 139 countries and scored 0,52 out of 1.

South Africa's Constitution is hailed as one of the best the world over. It is unfortunate that, according to the *WJP Rule of Law Index 2021*, this best Constitution does not translate to SA having the best statistics when it comes to the rule of law.

Mapula Oliphant *NDip Journ (DUT)*
BTech (Journ) (TUT) is the Editor of
De Rebus.



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- Authors are required to give word counts. Articles should not exceed 2 000 words. Case notes, opinions and similar items should not exceed 1 000 words. Letters should be as short as possible.
- Footnotes should be avoided. All references must instead be incorporated into the body of the article.
- When referring to publications, the publisher, city and date of publication should be provided. When citing reported or unreported cases and legislation, full reference details must be included. Authors should include website URLs for all sources, quotes or paraphrases used in their articles.
- Where possible, authors are encouraged to avoid long verbatim quotes, but to rather interpret and paraphrase quotes.
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People and practices

Compiled by Shireen Mahomed



Obituary: Legal practitioner and founder of Cox Yeats, Graham Cox, passed away on Friday, 6 May 2022, several days before his 90th birthday in Dur-

ban. He had been battling pneumonia for several weeks. Mr Cox was well recognised in the Durban legal fraternity and the community as a highly respected commercial lawyer.

Mr Cox was born on 21 May 1932 in Bloemfontein, he attended Bishops Diocesan College and later the University of Cape Town. In 1964, Mr Cox founded the firm and in 1967, Jeremy Yeats joined as a partner. Mr Cox was a past president of the KwaZulu-Natal Law Society during 1981-1982 and Chairperson of the Association of Law Societies in 1985. He was a past Chairperson of the Council of the

University of KwaZulu-Natal, a past Council member of the Business Law Section of the International Bar Association and a fellow of the Association of Arbitrators.

During his time of active practice, Mr Cox specialised in Business Law, Tax Law, Trusts and Estate Planning and Construction Law. Mr Cox continued to actively practice law and take care of his clients until the age of 80. He leaves behind his son Ian, daughters Helen and Pamela, their spouses Lindsey, John and Ian, and eight grandchildren.

Shepstone & Wylie Attorneys has four new promotions.



Natercia dos Santos Niz has been promoted as an associate in the Environmental Law Department in Durban.



Thulisile Buthelezi has been appointed as an associate in the Property and Conveyancing Department in Durban.



Oratile Maselwa has been appointed as an associate in the Shipping and Logistics Department in Johannesburg.



Brandon Hoover has been appointed as an associate in the Litigation Department 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



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By
Thomas
Harban

Are you over promising and under delivering?

One of the triggers of a breakdown in the relationship between a legal practitioner and a client is when the client, justifiably or not, realises that the outcome that they had been promised at the beginning of the relationship by the legal practitioner will not be achieved. The legal practitioner involved in the matter will usually then be blamed for the failure to achieve the desired outcome. This article aims to highlight the risks flowing from heightening a client's expectation in an unrealistic manner to secure legal work.

Show me the money

The movie *Jerry Maguire* (1996) has a famous scene where an athlete (the client), in a telephone conversation with his professional advisor (the sports agent), requests that the latter repeat the phrase 'show me the money' over and over. The sports agent complies, repeating the phrase louder and with more vigour each time, and the call ends with him retaining the client's business which was supposedly at risk of going to a competing agent. Have you, similarly, been requested by a potential client to 'show me the money' in order for your firm to be appointed or retained rather than another legal practice? I refer here to clients who expect a promise (or even an undertaking) that you will deliver spectacular results, no matter how realistic – or otherwise – those expectations may be. Was the client inducing your firm to 'outbid' the competition in respect of the promised result?

In an increasingly competitive legal services market, some legal practitioners fall for the temptation to overpromise the expected results that can be achieved for clients. When such promises are made in the absence of any meaningful information on the underlying legal problem the client is facing, and realistic prospects of an outcome, it borders on egregious conduct. Puffery is common in many industries but, in my view, it has no place in legal practice. Saying that the statements were merely an exaggerated commendation for promotional purposes will not assist a legal practice facing

a professional indemnity (PI) claim or called to answer a complaint lodged with the Legal Practice Council (LPC). A disgruntled client may use the exaggerated level of expertise as the basis for the PI claim or the complaint to the LPC.

In *Steyn NO v Ronald Bobroff & Partners* [2013] 1 All SA 471 (SCA) the appellant alleged 'that she instructed the respondent on the strength of the fact that it had advertised itself widely, and publicly held itself out to be a firm of specialist personal injury attorneys. The appellant [averred] further that it was an express, alternatively implied, term of the agreements between the parties that the respondent would carry out its mandate with due skill, care, diligence and professionalism expected of a specialist firm of attorneys who held themselves out to be pre-eminent experts and specialists in the field of personal injury claims and third party matters' (at para 9). The appeal in that matter was dismissed but I think that the quoted passage was an appropriate demonstration of the point.

Pay special attention to paras 7 and 8 of the Code of Conduct for all Legal Practitioners, Candidate Legal Practitioners and Juristic Entities published in terms of s 97(1)(b) of the Legal Practice Act 28 of 2014 (the Code), which respectively relate to publicity and specialisation and expertise. The use of touts is prohibited by the Code (see para 18.22) and touts may have a propensity to make inflated promises, purportedly as agents of your firm, and to also shop a potential instruction around to multiple firms while seeking the best possible financial offer for themselves rather than serving the interests of their supposed client.

Consider the scenario where members of a legal practice are trying to convince a potential client to instruct their firm. At times the practitioners may promise the client that remarkable results will be achieved if their firm is selected. Examples of previous successes in similar matters may be over-emphasised in circumstances where the firm does not have the full details of the matter it seeks to be instructed in and what the real prospects of success are. Offering an enhanced level of service at a reduced

fee is not uncommon in such situations. In personal injury matters, for example, this may lead to the client seeing the proverbial dollar signs when enticed with a guarantee of success and a huge damages pay-out at the end of the matter. Some legal practitioners even go so far as promising that the pursuit of the matter will be completed in record time.

Consider what the consequences will be if, despite your best efforts in the matter, the spectacular results you had promised the client as a proverbial carrot to instruct you are not achieved. The client will probably remember the promises (and even the puffery) long after you have forgotten them. Trying to explain the result based on the facts and the applicable law will be too late. The client's disappointment in the outcome may be the first intimation of a looming PI claim against your legal practice. Even where you have succeeded in obtaining an adequate outcome for the client, the latter may be of the view that the result is insufficient and allegations of under-settlement or some other breach of your mandate may follow. Your views on how ungrateful the client is for the hard work and resources that were put into the matter and that the best possible result was achieved in the circumstances will be of no assistance to your firm.

The assessment of a PI claim against a legal practitioner includes a consideration of whether, but for the alleged breach of mandate or legal duty by the practitioner concerned, the client would have succeeded in their underlying case. It is surprising to note that many of the defendants in the resultant PI claims then contend that the client's underlying case would not have succeeded in any event. Some go so far as to use expressions such as 'the case was stillborn' or 'had absolutely no prospects of success' but cannot produce proof that the former client (who is now the plaintiff) was ever informed that the initial case should not be pursued. It is then also difficult for the legal practitioner to explain why, if they believed that the underlying matter had no prospects of success, they nonetheless accepted the mandate and acted on it. The steps taken may have included collating some of the information and

documents necessary to pursue the instruction, sending a letter of demand, or even lodging a claim with the Road Accident Fund (if the injuries were sustained in a motor vehicle collision) but then not issuing and serving summons timeously. The result is that the claim prescribes in the practitioner's hands. Sending a letter of demand or submitting a claim form that includes allegations that you doubt raises several ethical questions.

It is common that the dissatisfied client will not pay the fees due to the legal practice or refund the firm for disbursements. When the firm then institutes action to recover the funds due it is met with a counterclaim by the client for compensation. In other instances, the client brings an action against the firm for a refund of fees paid. Claims for a refund of fees are a trading debt of the firm and are excluded from the Legal Practitioners' Indemnity Insurance Fund NPC's (LPIIF) Master Policy (see clause 16 (a)).

Obtain all the necessary information before you give a client any indication of what the prospects of success in a matter are or what the quantum of damages will be. In a personal injury matter, this will include obtaining all the necessary medico-legal reports, updated actuarial calculations, gathering all supporting evidence, and having in-depth consultations with the relevant witnesses. You will then be in an informed position to 'show the money' by giving the client a knowledgeable view on the issues in dispute, the prospects of success, the length of time the litigation may take and a well-researched estimate of the lower and upper ranges of expected compensation. A prudent approach is to be conservative in your estimates.

Your reputation and further referrals from the client will be better served by delivering more than you had promised.

Titanic losses in supposedly watertight cases

There are several risks in any litigation.

Very few, if any, cases can be said to be sure winners. If your opponent disputes any part of your client's case, you and your client have to work to gather the evidence and put up the legal argument, as the case may be, to overcome what has been placed in dispute. When I address legal practitioners on risk management, members of the audience often give me examples of supposedly (in their words) watertight, unsinkable cases that they are dealing with. My response (often mistaken for cynicism, sarcasm, or dry humour) is always a reference to the famous supposedly watertight unsinkable vessel, the Titanic.

There's many a slip 'twixt the cup and the lip'

Legal practitioners will be well advised to heed the caution espoused in this old proverb.

A lot can happen during a case that will affect its outcome. Clients can become uncooperative, essential witnesses may perform badly on the witness stand or not be available to give evidence, your opponent may raise a legal point that torpedoes your case or have a better prepared case and strategy than yours. These are just examples of circumstances that can jeopardise your achievement of what you presumed and promised the client was an easy win. If your client is faced with a costs order or must pay the amount claimed (if you are acting for the defendant) they may look to you for compensation if you had not explained the risks or given undertakings of a guaranteed favourable result.

I have focussed on litigious matters because most of the claims notified to the LPIIF arise from that area of practice. However, the same caution must be applied to all other areas of practice. There have been claims against practitioners conducting commercial work where the fault is placed on the attorney who, for example, is alleged to have failed in drafting what the client expected to be 'bullet proof agreement' where the latter's interests would have been universally pro-

tected and all legal and commercial risks eliminated. Blame is sometimes placed at the door of the attorney for a non-achievement of a financial result that is out of the practitioner's control. Legal practitioners specialising in criminal law must similarly avoid giving unrealistic undertakings on the expected outcome of proceedings whether it be a bail application, the likelihood of an acquittal at the end of a trial or a lenient sentence if the client is convicted.

Clause 16(j) of the LPIIF policy excludes liability for compensation 'arising from the [insured legal practice] having given an unqualified undertaking legally binding his or her practice, in matters where the fulfilment of that undertaking is dependent on the act or omission of a third party'. There are many stakeholders who may have significant roles to play in the achievement of the outcome desired by your client in the matter that you are tasked with. Adopt a cautious approach and only give carefully worded written undertakings where necessary and then only if the fulfilment of the undertaking is within your control.

Conclusion

Managing a client's expectations throughout the execution of the mandate (from inception to finalisation) will go a long way to mitigate this risk. Document all discussions in detailed file notes and follow those up with correspondence confirming the contents of the discussions and what your advice to the client was. These will be essential in your defence of a PI claim or responding to a complaint to the LPC.

It is best to under promise and over-deliver.

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



The rights of the non-parent



By
Maryna
Burger

The position of the 'non-parent' is increasingly becoming more relevant in our day and age. 'Non-parents' are described as those individuals who play a role of caretaker in the lives of minor children or have involvement with the child but do not have the same legal rights as parents regarding decisions

about the child and their life. The prevalence of modern-day families breaking away from the traditional family, gives rise to much uncertainty regarding the rights and obligations that non-parents have towards children. The affording of rights to non-parents are, however, subject to the pervasive recognition that to unnecessarily 'invite dissent by increas-

ing the number of people who have legally enforceable rights in relation to a child should be avoided in the interests of the child', as iterated in the latest judgment on this matter, *RC v SHC* (GJ) (unreported case no 45327/2021, 18-3-2022) (Fisher J).

The starting point for determining the rights held by a person in terms of a child should always be the Children's Act 38 of 2005 (the Act). Section 23 of the Act specifically deals with the 'assignment of contact and care to [an] interested person by [an] order of court', and s 24 subsequently deals with the 'assignment of guardianship by [an] order of court'.

The judgment of *RC v SHC* was delivered on 18 March 2022, wherein the applicant had served in a 'fatherly role' to the minor child, B, after being romantically involved with the respondent from the date of B's birth until the age of four. The parties shared a communal home for two and a half years. The relationship had since broken down. The applicant, not being the legal father of B sought legal relief based on ss 23 and 24 (in two parts) of the Act to maintain his role in the life of the minor child.

The applicant also sought an interim order granting an assessment report of a clinical psychologist to determine whether care, contact and guardianship as sought by the applicant in the main application should be granted.

The respondent has two minor children, B and an 11-year-old son, D. In the interests of both children involved, the considered outcome effects the livelihoods of both children. In the two-part consideration, the court scrutinised the best interest of the children.

Part A: Section 23

In terms of s 23, 'any person having an interest in the care, well-being or development of a child may apply to the High Court, a divorce court in divorce matters or the children's court for an order granting to the applicant, on such conditions as the court may deem necessary –

- (a) contact with the child; or
- (b) care of the child'.

Section 23(2) states that the court should consider the following in dealing with Part A of this application –

- (a) the best interests of the child;
- (b) the relationship between the applicant and the child, and any other relevant person and the child;
- (c) the degree of commitment that the applicant has shown towards the child;
- (d) the extent to which the applicant has contributed towards expenses in connection with the birth and maintenance of the child; and
- (e) any other fact that should, in the

opinion of the court, be taken into account'.

The court considered the facts of the relevant case to ascertain whether granting parental rights in terms of s 23 would be to the benefit or detriment of both the minor children being affected. It is considered that the paternal father of B has played no role in his life and there is no clear indication as to whether the paternal father has acquired parental rights in terms of the child.

The applicant had greatly contributed to the lives of both minor children in terms of financial support and had undertaken to continue with his contributions in terms of B, should the application be successful. The issue is also raised by the court, that even though the respondent did not possess the financial means to provide for B in the same way the applicant does, it should not follow that the applicant be seen as better equipped to provide for the child or influence the decision of the court in determining the legal rights pertaining to the child. Children are not a commodity.

The role of the applicant in B's life is, furthermore, scrutinised as being overtly obsessive and resulted in a loss of connection between B and the respondent, as well as between B and his biological brother, D. The applicant has not established the same connection with D as he had with B, which has resulted in D feeling distressed and left out. He, in turn, has become resentful towards his younger brother, B and the negative effect the applicant has on this relationship would only be extended if care and contact is granted in terms of s 23.

The court further concluded that the applicant had not satisfied the fact that he has the necessary *locus standi* to bring the matter to the court in the first place. Although, he has inserted himself into the life of the minor children and maintained a fatherly relationship up until this relationship with the respondent broke down, legal rights pertaining to the children should not be awarded unless it is in the utmost best interest of the child. The court concluded that the applicant had not established that he is a person with the necessary interest to seek the relief that he does in respect of s 23. Due to the applicant's relationships with the respondent and D having a negative impact on their respective relationships with B, it further followed that allowing the applicant to obtain legal rights in terms of Part A of the application is not in the best interest of the child, or both children in this case.

The court, therefore, dismissed Part A of the application for care and contact of B, as well as the acquisition of an assessment report by a clinical psychologist, as to further limit the pain caused by the

applicant on the family of the respondent.

Part B: Section 24 - assignment of guardianship by order of court

Section 24(1) provides that: 'Any person having an interest in the care, well-being and development of a child may apply to the High Court for an order granting guardianship of the child to the applicant'.


However, s 24(3) states that: 'In the event of a person applying for guardianship of a child that already has a guardian, the applicant must submit reasons as to why the child's existing guardian is not suitable to have guardianship in respect of the child'.

The legal position regarding guardianship is more stringently applied than that of contact and care. The reason being that it grants the applicant legal rights in respect of formal consents pertaining to the child, as well as his movement and other important aspects of his life. The applicant seeks to be granted guardianship in Part B of his application. This brings about the interpretation of s 24(3), which clearly states that the applicant must 'submit reasons as to why the child's existing guardian is not suitable'.

The applicant had not provided the court with any reasons to consider why the respondent, as the guardian of B, is not a suitable guardian and, therefore, Part B of the application failed. It also follows that due to its more stringent nature, an application in terms of s 24 cannot succeed if the applicant had failed to satisfy the court to grant an application in terms of s 23.

Part A and Part B of this application was, therefore, dismissed.

Although the family dynamic is increasingly changing regarding the relationships between non-parents and children, the law remains conservative in its application, as to continually ensure the best interest of the child. The writer contends that it is imperative to maintain this position, especially where there exists confusion or ambiguity regarding the best interest of the child as not to disrupt and complicate the lives of children unnecessarily.

Maryna Burger LLB (NWU) is a candidate legal practitioner at Van Wyk Van Heerden Inc. 

Understanding the *amicus curiae* role in litigation and how it affects costs orders

The term *amicus curiae* is loosely translated from Latin as a 'friend of the court'. This traditionally refers to a person (natural or juristic) who is admitted into litigation by a court at such court's discretion for purposes of assisting the court on matters that are complex and beyond the court's field of expertise (A Spies 'The importance and relevance of *amicus curiae* participation in litigating on the customary law of marriage' 2016 *AHRJ* at 247). Given the constitutional dispensation in South Africa, the role of an *amicus curiae* has developed and evolved over the years into a role of third-party representation *in lieu* of just a role of assisting the court in complex matters as stated above (Spies (*op cit*) at 248).

There have been issues in the past regarding the entitlement to costs order by friends of the court, issues that were addressed adequately by the courts in which they arose. This article seeks to provide a detailed discussion on the entitlement to a costs order by an *amicus curiae*.

Analysing the role of an *amicus curiae* in litigation

As stated previously, the role of an *amicus curiae* was traditionally narrowed down to the assisting of a court regarding matters that are complicated and beyond the expertise of the court. Presently the role of an *amicus curiae* has evolved into a role of third-party representation (Spies (*op cit*) at 251). It is important to note that an *amicus curiae* under common law is requested by a court to intervene in a matter and to fulfil its role as a friend of the court, while an *amicus curiae* under the constitutional dispensation is required to make an application to court. By third-party representation it is meant the representation of third parties, parties that do not have *locus standi* in certain legal disputes (such as the public). Certain public interest groups join litigation as friends of the court and consequently provide a new or alternative legal position and may go as far as introducing evidence to a court (Spies (*op cit*) at 252).

Presently, a non-party to litigation is allowed to make a written request to a court of law requesting the right to intervene in the proceedings for purposes



By
Mpho
Adam Titong



of furthering a certain legal position, which it has chosen to advance. This form of intervention was not permitted under common law - it is a result of the country's constitutional dispensation (G Budlender 'Amicus Curiae' (<https://constitutionallawofsouthafrica.co.za>, accessed 12-5-2022)). This form of intervention emphasises the underlying constitutional principle of participatory democracy and indicates the fact that constitutional litigation affects not only the persons already litigating before the court but also the public.

Given the fact that the role of an *amicus curiae* in litigation is not equivalent

Picture source: Gallo Images/Getty

to that of a litigant in the ordinary sense of the word, a question of whether or not an *amicus curiae* is entitled to a costs order raises inherently complex issues and, therefore, ought to be dealt with effectively.

The *Khaya Projects* case

The question as to whether an *amicus curiae* is

entitled to a costs order was dealt with in the case of *City of Cape Town v Khaya Projects (Pty) Ltd and Others (Pty) Ltd* 2016 (5) SA 579 (SCA). In the case the court referred to *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) at para 63, where it was stated, *inter alia*, that the role of an *amicus curiae* is to assist the court by furnishing information and/or arguments regarding questions of fact or law. A friend of the court is essentially not a party to the litigation but believes the court's verdict may have the potential to affect its interests (*Hoffmann (op cit)* at para 63).

An *amicus curiae* has no direct interest in the litigation, it joins the proceedings as a friend and not a litigant, its purpose being to assist the court in matters that may be out of the court's field of expertise or matters that may be of interest to such a friend of the court (*Khaya (op cit)* at para 44). The court went as far as holding that an *amicus curiae* is neither a winner nor a loser in litigation and, therefore, cannot be entitled to be awarded an order for the costs of litigating (*Khaya (op cit)* at para 44). The court ultimately held that the order of the court of first instance

that the appellant in the Supreme Court of Appeal ought to bear the costs of the *amicus curiae* be set aside.

The *Shinga* case

The judgment in *Shinga and (Society of Advocates, Pietermaritzburg Bar intervening as Amicus Curiae) v S* [2007] 1 All SA 113 (N) begins by providing clarification on the role of an *amicus curiae* (*Shinga (op cit)* at para 2). From reading the judgment, it is relatively evident that indeed the role of an *amicus curiae* is limited to assisting a court of law by the providing of information regarding a question of law or a question of fact. An *amicus curiae* is not a litigating party because same is not entitled to a costs order while a litigating party can

be awarded an order for costs because of its direct role in the litigation proceedings as a litigant. In light of the context provided, it is safe to submit that an assertion that a friend of the court will, as a general rule, not be awarded a costs order rests with the role of such an *amicus curiae* and is also most certainly correct.

Rule 10 of the Rules of the Constitutional Court

Rule 10 of the Rules of the Constitutional Court (the Rules) is titled '*Amici curiae*' and provides the guidelines and other miscellaneous issues pertaining to an *amicus curiae* within the Constitutional Court (CC). Rule 10(1) of the Rules clearly states that for an *amicus curiae* to be admitted into litigation, such friend of the court needs to have an interest in the matter and must also seek written consent from the litigating parties. The Rules go on to further provide that if a written consent has not been secured then any person having an interest in a matter before the court is allowed to apply to the Chief Justice to be admitted into the proceedings as an *amicus curiae* and the Chief Justice may grant such request if deemed fit (r 10(4)). In this context, the refusal by the litigating parties to provide the consent required for an interested party to be admitted into litigation proceedings as an *amicus curiae* does not necessarily mean that the application for admission into the proceedings will be unsuccessful, this is because the court to which the application is made has a discretion to admit a party into the proceedings despite the required consent not being acquired.

Sub-rule 6 of r 10 goes on further to provide that before an *amicus curiae* can be allowed to intervene in the proceedings, same shall be required to briefly describe, in the application for admission, its interest in the matter, briefly identify the position it will adopt in the litigation proceedings and finally, set out the submissions to be made by such an *amicus curiae*, the relevance of such submissions to the proceedings, as well as the reasons for believing that such submissions will be useful to the court and different from the submissions of other litigating parties.

From what has been stated regarding r 10, it is clear that an *amicus curiae* that has been requested to join litigation proceedings in terms of the traditional meaning of an *amicus curiae* is not an *amicus curiae* in terms of r 10 of the Rules – the important difference rests in the application made (in terms of the Rules), as well as the request made by a court of law (in terms of the common law). A party requested by a court to join litigation as an *amicus curiae* is not a friend of the court for purposes of r 10 and, therefore, is not expected to

follow the procedures mentioned in the rule, the terms and conditions of such an *amicus*' role and/or participation are determined by the invitation or request made by the particular court.

The most important rule, which is highly relevant to this research contribution, is r 10(10), which states unequivocally that an order of a court of law (meaning the CC) dealing with costs may make provision for the payment of costs incurred as a result of an intervening *amicus curiae* or by such an *amicus curiae* itself. This rule places focus on the meaning of an *amicus curiae* under the constitutional dispensation.

In para 63 of the *Hoffmann* case (*op cit*) the court stated succinctly that a friend of the court, regardless of the side it joins, is neither a winner nor is it a loser hence it is generally not entitled to be awarded costs. The court went on to further hold that whether there may be circumstances calling for the departure from the general rule, it was not necessary to be decided in the case – meaning that the departure from the general rule referred to was not warranted. This submission by the court clearly indicates that generally an *amicus curiae* is not entitled to a costs order, however, if a court deems it fit to grant such order because of the existence of exceptional circum-

stances then it has the discretion to do so (as stated in the Rules).

One important case worth mentioning in relation to the exceptional circumstances referred to above is the landmark decision in *Fourie and Another v Minister of Home Affairs and Others* 2005 (3) SA 429 (SCA). In that matter, the court found that the conduct of an *amicus curiae* that was admitted into the proceedings was well beyond the proper conduct required from an *amicus curiae* and consequently ordered that the *amicus* pay the costs of litigation of the respondents jointly and severally with the appellants. This is a clear indication and support of the notion that if there exists an exceptional circumstance then a court has the discretion to grant an order, which makes provision for the payment of costs incurred by or as a result of the intervention of an *amicus curiae*.

Conclusion

There exists a difference between an *amicus curiae* in terms of common law and in terms of our constitutional dispensation. A friend of the court is traditionally requested by a court to join the litigation proceedings to assist the court with complex issues but can also represent and protect the interests of an unrepresented party. A friend of the court

in the new constitutional order makes an application to court seeking to be admitted as an *amicus curiae*, the court does not make a request to such party and also, such an *amicus* is required to seek written consent from all the parties involved in the litigation proceedings. In making the distinction between the two, the request made by a court (under common law) and the application made by a person who has an interest in a matter before a court under the constitutional order) must be considered. Additionally, the consent required also emphasises the difference between an *amicus curiae* under common law and one under the constitutional order because it is not a general rule under common law.

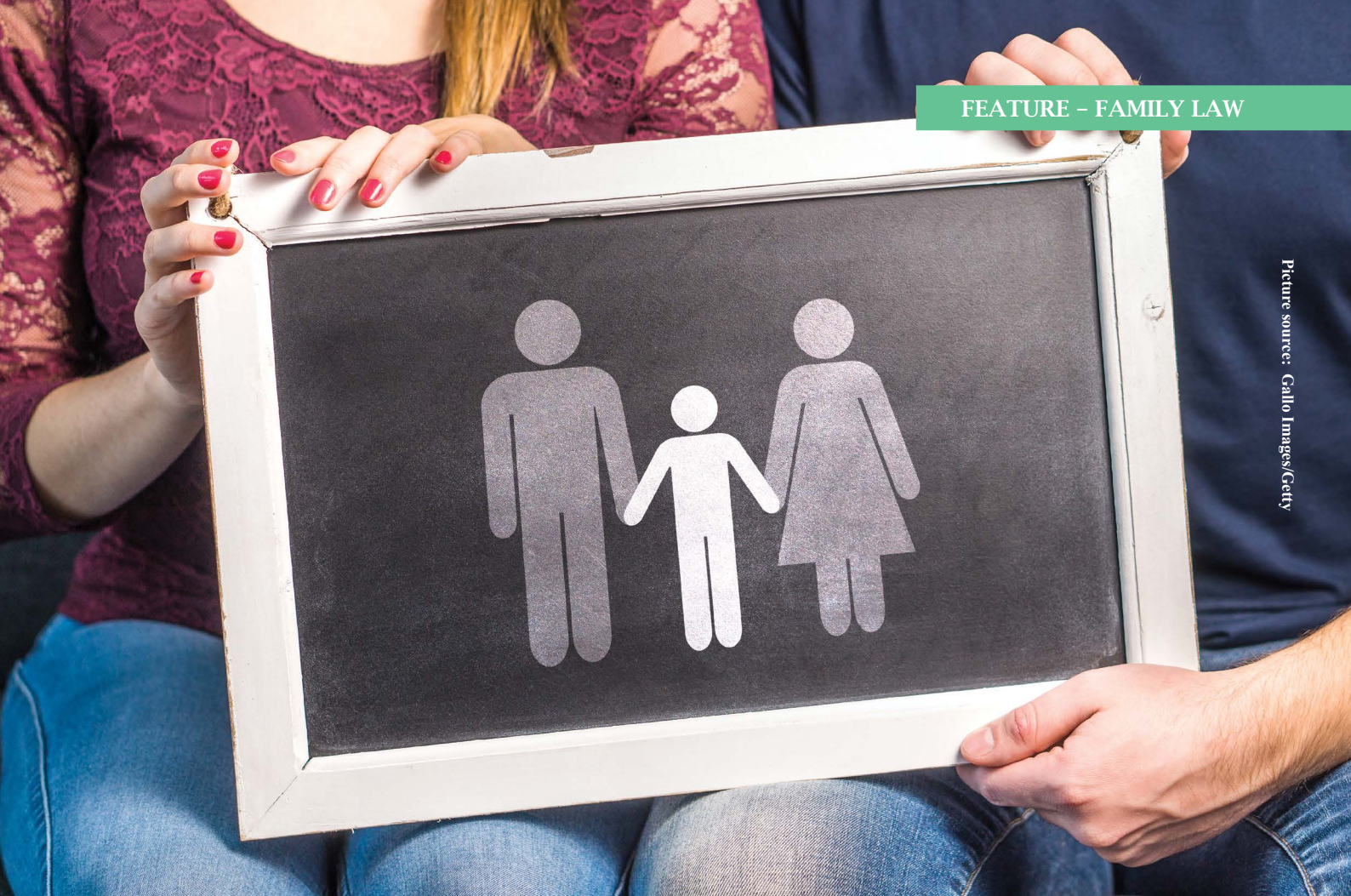
Under common law, an *amicus curiae* is merely a friend of the court and not a litigating party, hence such party is generally not entitled to an order for the costs of litigation. Under the constitutional dispensation, a court can make an order dealing with costs, such order may make provision for the payment of costs incurred by or as a result of an intervention by an *amicus curiae*.

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



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Sperm donors and their rights regarding the child



By
Robyn
Snyman

For many South Africans the costs associated with utilising an anonymous sperm donor from a sperm bank are simply not affordable and remain an exclusive avenue that only a few can afford.

A new phenomenon that is looking to curb the expenses related to sperm donors, are persons entering into agreements whereby individuals they know donate their sperm with the objective of impregnation. This arrangement is commonly known as a 'known donor agreement'.

Such an agreement might be referred to as a 'known donor agreement' but the legal consequences that flow from such agreement is still unknown in our legal landscape. The recent case of *QG and Another v CS and Another (GP)* (unreported case no 32200/2020, 14-4-2021) (Kollapen J) serves as testimony to this.

Factual background

In that matter, a lesbian couple (the respondents) were seeking the help of a sperm donor to conceive a child. To

circumvent the costs associated with sperm donations from a sperm bank, they resorted to using the social media platform, Facebook, to obtain a donor. The first applicant in the matter indicated his interest to serve as a sperm donor.

After discussions, the parties entered into a known sperm donor agreement in terms of which the respondents were established as the legal parents of the donor-conceived child. The first applicant, serving as the known sperm donor, was barred from obtaining parental responsibilities and rights in relation to the donor-conceived child.

Initially, the first applicant had agreed to the terms of the agreement, however, after interactions with the child, the applicant came to the realisation that he wanted to play an active role in the child's life. This position caused conflict between the parties resulting in the respondents deciding that they did not want the applicant to be part of the child's life.

The first applicant sought an order in terms of which he would be granted interim access to the child whereby he

would be entitled to have contact with the child at certain agreed on times. The primary objective of the first applicant was to obtain guardianship in relation of the child. The first applicant in his submissions empathised that his objective was not to take over the parental responsibilities.

Legal position in terms of South African law

As a point of departure, in terms of s 23 of the Children's Act 38 of 2005 (the Act), anyone who has an interest in the care, well-being or development of a child may approach the relevant court for an order granting contact with the child or care of the child.

Sections 40 and 26(2) of the Act hold that a gamete donor, with the exception of a spouse, is not legally regarded as the parent of any child born from using their gametes. Accordingly, they do not acquire any parental rights and responsibilities relating to the donor conceived child because of their genetic link.

It is trite in South African law that the purpose of these sections is that the gamete donor relinquishes any claim to parenthood, and the attendant rights and responsibilities that come with it, by virtue of becoming a gamete donor. Accordingly, a person does not qualify as a person having an interest in the care, well-being or development of a child as provided for in ss 23(1) and 24(1) of the Act because of a genetic link caused by gamete donation. 'An interest in the care, well-being or development of a child, therefore, needs to be based on facts other than genetic relatedness caused by gamete donation' (*QG* at 44).

Legal position in terms of QG case

The applicants brought their application in terms of s 23 of the Act. Their argument was premised on the notion that an order granted in terms of s 23 would facilitate their ongoing presence in the child's life and that such order would be in the best interests of the child as the applicants bring love and commitment to the child and are also able to contribute materially to his well-being.

The court held that when adjudicating an application premised on s 23(2), regard must be had for –

- (a) the best interests of the child;
- (b) the relationship between the applicant and the child, and any other relevant person and the child;
- (c) the degree of commitment that the applicant has shown towards the child;
- (d) the extent to which the applicant has contributed towards expenses in connection with the birth and maintenance of the child; and
- (e) any other fact that should, in the

opinion of the court, be taken into account'.

When considering the best interests of the child, the court found that the child was well cared for and lived in a family that was both sensitive and responsive to his needs. There was no evidence put before the court that would suggest that having contact with the applicants would amount to the child's best interests.

The court further held that allowing contact may cause confusion, create new alternate and possibly conflicting centres of focus in the child's life. The court further concluded that the child's best interests were already adequately catered for by the respondents and that granting contact rights to the applicants would not be in the best interests of the child but may rather create great uncertainty.

When looking at the relationship between the parties and the child, the court found that although the applicants felt deeply and strongly for the child, it could not follow that the existence of that level of affection and concern should not trigger an entitlement to have contact. The court also considered the fact that the applicants had not had contact or interaction with the child for a major part of his life and certainly no contact for the past 18 months. This absence of the applicants did not have any disruptive effect in the child's life. The relationship between the applicants and the child was a relationship of limited duration and interaction and while it brought great joy to the applicants, it was in all respects a tangential and subsidiary relationship to the one that the child enjoys with his parents.

When considering the applicants' commitment to the child, the court found that the applicants were committed to the child and wanted the best for him, however, such commitment occurred in the context of a limited relationship and could not be dispositive of the matter.

The court also considered the applicants' contribution towards expenses and found that the applicants had provided the child with gifts from time to time, but all the child's essential needs had been taken care of by the respondents. The respondents had within their available resources provided well for the child and there was at no stage any request by the respondents for assistance from the applicants.

Order made by the court

Pursuant to the abovementioned legal positions, the court in *QG* found that the relief sought by the applicants had to fail. The court emphasised that the reason for such failure was not based on the fact that the applicants were ill-suited in their commitment to the child but rather

in recognition of the family that the respondents had made for themselves in their relationship with their child, were intimate and special and were both worthy and deserving of constitutional protection from outside interference, even if the latter was well-meant. The granting of the contact rights sought would, therefore, not be in the best interests of the child.

Critical analysis of the matter

It is evident from the courts approach in this matter that a claim in terms of s 23 for contact and/or care must be predicated on the factors that are outlined in the section. To somehow infuse the genetic link into the process, as the first applicant in fact did but disavowed the reliance on such a link, did an injustice to the regime that s 40 contemplates, which is to provide legal certainty in the artificial reproduction system in South Africa.

Similarly, the court had little regard for the merits of the written agreement concluded between the parties. The High Court served as the upper guardian of children; therefore, a Constitutional duty is placed on the court to ensure that the best interests of the child is advanced and at the forefront, irrespective of the agreement concluded between the parties.

Considering this duty, the primary issue before the court was not what the parties had agreed to, but rather, whether allowing contact would be in the child's best interests. Therefore, as confirmed by the court, the first applicant's status as a sperm donor, as well as the known donor agreement did not bar persons from bringing an application in terms of s 23 of the Act. Therefore, in instances where there is a long-standing relationship between the sperm donor and the child or contact and/or care would be in the child's best interests, such application may be granted.

Conclusion

This judgment is, therefore, an indication of the risks associated with known donor agreements. Ultimately, the best interest of the child is the primary factor, which the court considers. Therefore, if any disputes arise, the court may elect to ignore the agreement concluded between parties. Individuals entering into a known donor agreement should, therefore, be wary with whom they enter into an agreement.

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LIQUIDATION

Picture source: Gallo Images/Getty

Can a winding-up application be brought under both the old and the new Companies Act?



By
Nathan
Segal

When one is not certain whether a company is solvent or insolvent, a difficulty will arise as to whether the application to wind-up the company is to be brought under the Companies Act 71 of 2008 (the new Act) or the Companies Act 61 of 1973 (the old Act). This issue will be considered in the present article.

The new Act governs the winding-up of companies, which are solvent (in Part G of the new Act). However, Chapter XIV

of the old Act continues to govern the winding-up of a company, which is insolvent (in terms of item 9(1) of sch 5 to the new Act).

It must firstly be noted that item 9(2) of sch 5 to the new Act provides that s 346 of the old Act (which is in Chapter XIV of the old Act) does not apply to the winding-up of solvent companies (as well as other sections of the old Act which do not apply, but which are not relevant for present purposes).

Section 346 of the old Act deals with an application for winding-up of a company. It provides that the application must be served on the company, the Master of the High Court, every registered trade union that represents any of the employees of the company and the employees themselves. Service must also take place on the South African Revenue Service (Sars). The application must also be accompanied by a certificate by the Master that sufficient security has been given for payment of all necessary fees and charges.

As an example of such a case, it is convenient to refer to a company, which is in effect a 'partnership' carried on by means of a limited liability company. It has long been accepted that a partner-

ship may be carried on through the vehicle of a small domestic company. The legal entity is a registered limited liability company, which the partners use as a vehicle for their partnership, and the applicable Companies Act will apply to such company.

However, it has been known to happen that the shareholders in such a company fall out with each other and an application is brought by one of the shareholders for the winding-up of the company. The court will wind such company up on the ground that such winding-up is just and equitable (see *Erasmus v Pentamed Investments (Pty) Ltd* 1982 (1) SA 178 (W) at 181A - 185C and *Apco Africa (Pty) Ltd and Another v Apco Worldwide Inc* 2008 (5) SA 615 (SCA) at para 18).

The problem could arise in the following scenario:

- A and B agree to enter a partnership as equal partners; they intend to carry on a business together.
- A is to be responsible for dealing with customers and carrying on the business on a day-to-day basis.
- B is to be responsible for the administration of the business and the financial matters.
- A and B decide to carry on the busi-

ness through the medium of a limited liability company.

- They accordingly cause such company to be registered, in which they are equal shareholders.
- The company carries on business for about a year, when B advises A that B has dismissed A as a partner and will carry on the business of the company on his own. B then proceeds to carry on the business of the company to the exclusion of A.
- A is naturally disconcerted and approaches an attorney for advice.

On the face of it the answer is for the company to be wound up so that its assets can be liquidated and divided between the shareholders (or partners).

However, B has taken over all aspects of the business and A is now unaware whether the company is solvent or insolvent.

As regards a solvent company

Section 81(1)(d) of the new Act provides that a court may order a solvent company to be wound up if:

- 'The company, one or more directors or one or more shareholders have applied to the court for an order to wind up the company on the grounds that –
- (i) the directors are deadlocked in the management of the company, and the shareholders are unable to break the deadlock, and –
 - (aa) irreparable injury to the company is resulting, or may result, from the deadlock; or
 - (bb) the company's business cannot be conducted to the advantage of shareholders generally, as a result of the deadlock; or
- ...
- (iii) it is otherwise just and equitable for the company to be wound up.'

The new Act thus recognises that the breakdown of the relationship between the 'partners' in such a company will constitute a ground for the winding-up of the company on the basis that it will be just and equitable for such an order to be granted.

The conclusion is thus that where the

company is solvent, application for a winding-up order must be made under s 81(1)(d) of the new Act and if it is insolvent, the application must be brought under Chapter XIV of the old Act and in particular under s 344(h) of the old Act, which provides that a company may be wound up by the court if 'it appears to the court that it is just and equitable that the company should be wound up'.

However, in the example, A has been excluded from the business of the company and is not able to state conclusively whether the company is solvent or insolvent.

I thus submit that it will be necessary for the winding-up application to be brought under both the old Act and s 81(1)(d) of the new Act. The old Act will apply if the company is found to be insolvent and the new Act will apply if the company is found to be solvent.

In *Boschpoort Ondernemings (Pty) Ltd v Absa Bank Ltd* 2014 (2) SA 518 (SCA) application was made for the winding-up of a company in terms of the old Act, alternatively in terms of s 81(1)(c)(ii) of the new Act (which provides for winding-up of a solvent company by creditors on the ground that it is just and equitable for the company to be wound-up). The court *a quo* granted a winding-up order in terms of s 81(1)(c)(ii) of the new Act. The Supreme Court of Appeal (SCA) found that the company was insolvent, and that a winding-up could only have been granted under the new Act. The SCA accordingly held that the winding-up order had been correctly granted but for the wrong reason and dismissed the appeal against the winding-up order. I submit that it is permissible for an application to be made for a winding-up order under the new Act alternatively the old Act, particularly where the applicant is not aware whether the company is solvent or insolvent.

A further issue arises as to the way the application is to be brought under the new Act.

Item 9(2) of sch 5 to the new Act provides, as mentioned, that s 346 of the old Act does not apply to the winding-up of a solvent company. However, item 9(2) of sch 5 does nevertheless state that

s 346 (and the other sections referred to) do apply to the winding-up of a solvent company 'to the extent necessary to give full effect to ... Part G of Chapter 2'.

I submit that the formal requirements of s 346 are in fact necessary to give full effect to s 81 of the new Act (which is in Part G of ch 2). It is surely necessary for the Master to furnish the certificate required by s 346(3) and for notice of the application to be given to the Master, trade unions, employees, and Sars.

It would thus follow that when an application is made to wind up a solvent company on the grounds of a deadlock between shareholders, it will still be necessary to obtain a certificate from the Master and to serve the application on the Master, trade unions, employees, and Sars.

Where the company is insolvent, it will of course be necessary to comply with the requirements of s 346.

In the example given above, as the application will be brought under Chapter XIV of the old Act and alternatively under s 81 of the new Act, it will in any event be necessary to furnish the certificate of the Master and serve the application on trade unions, employees and Sars, as such requirements are prescribed expressly by s 346 of the old Act, which applies to a winding-up application where the respondent company is insolvent.

It thus follows that when a practitioner wishes to have a company wound up, they must first determine whether the company is solvent or insolvent. If it is solvent, the application must be brought under the new Act. If the company is insolvent, the application must be brought under the old Act. If one is not certain whether the company is solvent or insolvent, then the application must comply with the requirements of both the new Act and the old Act.

Nathan Segal BA LLB (Wits) LLM (London) is a legal practitioner and member of the Bridge Group in Johannesburg. □



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Access to justice in family law field is lacking



By
Kgomotso
Ramotsho

Joanne Anthony-Gooden is a divorce and family law legal practitioner who was born and bred in Gqeberha (formerly Port Elizabeth), was recently appointed Vice-President of the Law Society of South Africa (LSSA). She attended Alexander Road High School and matriculated in 1992. She went to the University of Port Elizabeth, now known as Nelson Mandela University, and studied a BJuris LLB and graduated in 1997 and commenced her articles in Gqeberha in 1998. She was admitted as an attorney in December 1999.

Ms Anthony-Gooden commenced practising for her own account in April 2007 as Anthony Incorporated. She changed the firm's name to Anthony-Gooden Incorporated after she married in 2016. Ms Anthony-Gooden is married to Ian Gooden and has a 22-year-old son who is a third-year cadet pilot.

Anthony-Gooden Incorporated operates in Gqeberha, with an all-female staff of one professional assistant and two candidate legal practitioners. Her firm specialises in family law matters and has a large collections practice. The firm also assists in all spheres of civil litigation, however, the firm's predominant focus is on divorce, maintenance, variation of primary residence, domestic violence, and adoption law.

Ms Anthony-Gooden is an active member of the Yokhuselo Haven – an organisation whose primary goal is to assist women and children who have been abused. The organisation operates a safe house, which has been running for 34 years and is open 24 hours a day, seven days a week. Ms Anthony-Gooden is passionate about restoration of families.

De Rebus News Reporter, Kgomotso Ramotsho, spoke to Ms Anthony-Gooden about her views on the legal profession.

Kgomotso Ramotsho (KR): Congratulations on being elected as one of the



Recently appointed Vice-President of the Law Society of South Africa and divorce and family law legal practitioner, Joanne Anthony-Gooden.

Vice-Presidents of the LSSA. Did you ever imagine that one day an organisation, such as the LSSA would be led by an all women team?

Joanne Anthony-Gooden (JAG): Yes, I did believe that women were quite capable of leading an organisation such as the LSSA and I think it will bring a fresh change with a new outlook on several topics.

KR: With the events that took place at the LSSA Annual Conference and Annual General Meeting, would you say that men in the legal profession are as capable in leadership positions?

JAG: Absolutely, the men in law have been accepting of the gender transformation of the profession and have encouraged and pushed for the ladies to come forward and be seen and heard

in leadership roles. I, myself, have been mentored by many men in the legal profession whose input, advice and guidance have assisted me greatly in my career, as well as within the structures of the profession.

KR: You practice in the field of family law, please tell us why you chose that field?

JAG: I love a challenge and I am extremely passionate about fairness and restoration of families.

KR: The South African Law Reform Commission has recently handed over the report on Project 142: Investigation into legal fees, including access to justice and other interventions to the Minister of Justice and Correctional Services, Ronald Lamola. The Commission has made recommendations, proposals

and listed a number of options regarding tariffs on legal practitioner and clients' fees. What do you think about some of the proposals and recommendations made?

JAG: Fees are the life blood of any legal practitioner in private practice. Justice must be accessible, but legal practitioners are also entitled to bill a fair and reasonable fee for the work that they have done. I am confident that the legal profession will be able to finalise a fee structure, which is going to be a fair compromise to assist the public, but also enable legal practitioners to generate a living for themselves.

KR: You are a lecturer, what do you teach?

JAG: I lecture Matrimonial Property Law.

KR: What is the one piece of advice you always give to your law students?

JAG: Law is hard work – it requires dedication and commitment, and you need to

keep updated on daily developments in your field as the law is an ever-evolving creature. Be honest, be brave and most of all strive to have effective and meaningful relationships with your colleagues and clients.

KR: Do you think the current LLB qualification produces quality legal practitioners?

JAG: No, I believe that LLB graduates require far more practical legal training as most graduates have little or no court experience at the end of their degrees, which solely focusses on the academic side of their qualification.

KR: As one of the women leaders in the legal profession, if you had one thing you would like to change, what would it be and why?

JAG: Access to justice in the family law field is seriously lacking. I am seriously concerned as to the delay in finalisation of maintenance matters, as well as the

failure of the South African Police Service to act on domestic violence interdicts.

KR: Besides law related books, what are you currently reading?

JAG: I have just finished reading *Becoming*, Michelle Obama's biography.

KR: What can we expect to see from you in the near future in terms of your career?

JAG: I would like to continue to mentor young lawyers and to encourage other attorneys to do the same, to share their skills and to train upcoming legal professionals, and to ensure that there is proper access to justice for women for maintenance and domestic violence matters.

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



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By
Merilyn
Rowena
Kader

THE LAW REPORTS

April [2022] 2 All South African Law Reports (pp 1 – 297);
April 2022 (4) Butterworths Constitutional
Law Reports (pp 387 – 522)

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

Abbreviations:

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

Civil procedure

Subpoena duces tecum – requirements of relevance and specificity: An outbreak of listeriosis in South Africa between January 2017 and 3 September 2018 saw several people across the country contracting an infection of the bacterium *Listeria monocytogenes* (L. mono) as a result of consuming contaminated ready-to-eat meat products produced by the respondents (Tiger Brands) in *Deltamune (Pty) Ltd and Others v Tiger Brands Limited and Others* [2022] 2 All SA 26 (SCA).

A class action was brought against the company. In response, Tiger Brands issued subpoenas, which required the recipients thereof to produce an array of documents, items and test results conducted for the L. mono. The appellants in turn brought applications in the High Court, for setting aside of the subpoenas. The grounds for the applications were that the documents were –

- not relevant to the issues arising in the class action;
- the breadth of the requests constituted an abuse of the court process;
- the subpoenas amounted to a fishing expedition; and
- the information in the requested documents was confidential and private.

The court's upholding the validity and enforceability of subpoenas led to the present appeals.

It was held that the relevance in respect of a subpoena *duces tecum* is not only necessary, but appropriate. The second pertinent issue was that of specificity.

Rule 18(4) of the Uniform Rules of

Court requires that pleadings contain a clear and concise statement of the material facts on which the pleader relies. The particularity required in that rule relates only to the material facts of the party's case. Thus, the pleader is only required to set out the material facts – with due regard to the distinction that should be maintained between the facts, which must be proved in order to disclose the cause of action (*facta probanda*) and the facts or evidence which prove the *facta probanda* (*facta probantia*). The latter should not be pleaded at all, whereas the former must be pleaded together with the necessary particularity. In the context of a class action, there is an added consideration: The certification order sets the parameters within which the issues in the pleadings should be considered. What this suggests is that even where *facta probantia* are pleaded, as is the case here, a court is enjoined to distil the real issues between the parties, within the confines of the certification order. This it can only do if it ignores the unnecessarily pleaded pieces of evidence and focuses on the *facta probanda* of the case before it.

Tiger Brands' attempt to cast doubt on whether it was the sole source of the outbreak was not the purpose of a subpoena *duces tecum*. The focus of the class action was only on those whose damages resulted from consuming products from Tiger Brands' meat processing facility at Polokwane. It was, therefore, irrelevant for purposes of the class action, whether other persons might have been harmed by the consumption of products manufactured by anyone other than Tiger Brands through its Polokwane facility. Having regard to the certification order, the reference to possible cross-contamination was extraneous to the certified class action.

The appeals were upheld.

Commissioning of affidavit
Requirement that a deponent sign the declaration in the presence of a com-

missioner of oaths: In *Knuttel NO and Others v Bhana and Others* [2022] 2 All SA 201 (GJ) the court had to decide whether there was substantial compliance with the requirements for the commissioning of the founding affidavit, and whether the second respondent had an enrichment *lien* over the property. The application was for eviction of the first respondent and others from property owned by a trust in which the applicants were trustees. The deponent to the founding affidavit was infected with COVID-19 at the time, the affidavit was commissioned via a Whatsapp video call. Regulation 3(1) of the Regulations Governing the Administering of an Oath or Affirmation requires that a deponent sign the declaration in the presence of a commissioner of oaths. Non-compliance with regulations does not *per se* 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.

Based on concessions made by the first respondent after papers were filed, the matter eventually distilled to an application for eviction from the property of the first respondent, and through her the second respondent and his family, which the first and second respondents contested on the basis of a right of retention (*ius retentionis*) in favour of the second respondent, arising out of the alleged unjust enrichment of the applicants by the cost occasioned to the second respondent of effecting improvements to the property, and of the alleged increase in value of the property as a result of the improvements. The lease agreement between the trust and the first respondent required the latter to obtain the applicants' consent before effecting any improvements. The second respondent attempted to avoid that requirement by claiming that the relevant contractual term did not extend to him as a non-party to the agreement of sale. He also relied on the oral consent that

he alleged the trustees had given him for the improvements. The court referred to case authority stating that a third party with knowledge of the terms of a contract between two other parties (in this case, the second respondent), may be held bound by those terms. Explaining the nature of and requirements for a right of retention, the court rejected the defence of an enrichment *lien*. The eviction order was accordingly granted.

Constitutional law

Notice of birth by unmarried father: In *Centre for Child Law v Director-General: Department of Home Affairs and Others* 2020 (8) BCLR 1015 (2020 (6) SA 199) (ECG) the Full Court of the ECG in Grahamstown, declared s 10 of the Births and Deaths Registration Act 51 of 1992 (the Act) invalid and inconsistent with the Constitution to the extent that it prohibits an unmarried father from giving notice of the birth of his child under his surname, in the absence of the child's mother or without her consent. Section 9(1) of the Act provides for the notification of the birth of any child 'born alive'. Section 9(2) provides that this notification is 'subject to the provisions of s 10'. Section 10 deals with the notification of the birth of a child born out of wedlock and made the exercise by an unmarried father of his right under s 9(1) contingent on either the mother's presence or her consent.

The third respondent met the fourth respondent, a foreign national, while he was doing military service in the Democratic Republic of Congo (DRC). The couple were married in the DRC according to local traditions. The marriage was not registered, and no marriage certificate was issued. Customary marriages are apparently not registered in the DRC and the marriage is also not recognised by the South African authorities. Two children were born of the couple's relationship. The third respondent returned to South Africa (SA) and the fourth respondent followed him on a three-month visitor's visa. When her visa expired, she was heavily pregnant and was unable to travel back to the DRC and not able to apply for a new visa. She gave birth to a third child in SA. The couple applied to have the birth of their third child registered but the Department of Home Affairs refused to register the child on the basis that fourth respondent lacked a valid visa and could not comply with certain regulations made in terms of the Registration of Births and Deaths Act.

The third and fourth respondents approached the High Court for relief. The Centre for Child Law was admitted as an intervening party and sought orders declaring ss 9 and 10 of the Act unconstitutional to the extent that they do not allow unmarried fathers to register the

births of their children in the absence of the mothers. The High Court refused to declare ss 9 and 10 of the Act unconstitutional but declared sub-regulations (3) (f) and (i), and sub-regulation (5) of Regulations 3, 4 and 5, and sub-regulation (1) to Regulation 12 as constitutionally invalid. The High Court ordered the reading in of certain words in order to cure the defects in the sub-regulations.

The Centre for Child Law appealed to the Full Court. The Full Court found that the High Court's interpretation of s 9 failed to consider that the notification of any child born alive is subject to the provisions of s 10. The Full Court found that, even though s 9 empowers an unmarried father to give notice of his child's birth, the exercise by an unmarried father of his right under s 9(1) is contingent on either the mother's presence or her consent, in terms of s 10. The Full Court declared s 10 to be invalid and inconsistent with the Constitution, and it suspended the declaration of invalidity and ordered that in the interim certain words were to be read into the section.

In *Centre for Child Law v Director-General: Department of Home Affairs and Others* 2022 (4) BCLR 478 (CC), the CC by a majority (per Victor AJ with Jafta, Khampepe, Madlanga, Majiedt, Mhlantla, Theron and Tshiqi JJ concurring) sets out reasons for finding that s 10 differentiated unjustifiably between married and unmarried fathers in relation to registration of the birth of a child in the surname of the father, which amounted to unfair discrimination. The retention of s 10 of the Act would undermine the unmarried father's right to dignity. It implied that an unmarried father was not entitled to be treated as worthy of registering the birth of his child with his surname in the mother's absence merely because he and the child's mother were not married. Section 10 was manifestly inconsistent with the rights to equality, dignity and the best interests of the child and had to be severed in its entirety. Because s 9(2) stated that it was 'subject to the provisions of s 10', that proviso had similarly to be severed. An order was made that the declaration of invalidity would take effect from the date of the order.

A dissenting judgment (per Mogoeng CJ with Mathopo AJ concurring) set out reasons for finding that the differentiation by s 10 was reasonable and justifiable and that ss 9 and 10 of the Act were capable of being read in a constitutionally compliant manner.

- See 'The Law reports' 2021 (Jan/Feb) DR 28 for the ECG judgment.

Contingency fee agreements

Effect on settlement agreements and court orders flowing from invalid contingency fee agreement: Schindlers At-

torneys represented the plaintiffs in several litigious matters on a contingency basis. Settlement agreements in some of the matters were made orders of court. The plaintiffs in *Theodosiou and Others v Schindlers Attorneys and Others* [2022] 2 All SA 256 (GJ) sought the setting aside of two court orders, one incorporating the two settlement agreements and the other a consent to a money judgment, due to non-compliance with the Contingency Fees Act 66 of 1997. They contended that as the contingency fee agreement was illegal and void due to the said non-compliance, all agreements and orders flowing from that agreement were also void. That led to the second and third defendants raising an exception to the claim on the basis that it lacked the necessary averments to sustain a cause of action.

Referring to the general principles of pleading in the context of exceptions, the court turned to consider the effect the invalid contingency fee agreement had on the underlying settlement agreements. Non-compliance with the Act rendered the contingency fee agreement invalid and void, and the *condictio ob turpem vel iniustam causam* was an available cause of action to pursue against Schindlers Attorneys. Section 4(1) of the Act gives the court a discretion to inquire into the merits of the settlement agreement and make it an order of court. However, its power to enter the merits of the settlement interferes with the parties' right to agree to their bargain freely and is, therefore, limited to prevent extortion of a plaintiff through an illegal contingency fee agreement or fraud on a defendant. Concluding that particulars of claim failed to disclose a cause of action for the relief sought in six of the prayers, the court upheld the exception and struck out the offending paragraphs.

Corporate and commercial law

Liability for loss caused by fraudulent acts committed by company director:

In *Gore NO and Another v Ward and Another* [2022] 2 All SA 178 (WCC) as joint liquidators of a company (Brandstock), the applicants sought the setting aside, in terms of s 26 of the Insolvency Act 24 of 1936 read with s 340 of the Companies Act 61 of 1973, of payments of R 250 000 made to each of the respondents; alternatively, for a declaration that the payments were made *sine causa*. Orders were also sought directing the respondents to repay the amounts to the applicants, either pursuant to the relief granted in terms of s 26, or on the grounds of their alleged unjust enrichment at the company's expense.

Opposing the application, the respondents contended that the payments were

made not by Brandstock but rather by its sole shareholder and director one, Philp, using funds stolen by him from a third party (Louw). The payments had been made to the respondents in satisfaction of a long-standing debt owed to them by Philp and were made immediately after Philp had secured over R 2 million from Louw as financing for a sale transaction. Louw had paid the money into Brandstock's account at Philp's request.

The respondents contended that the funds used to make the payments had not become the property of Brandstock, and that the company's banking account had been used as a conduit for the purpose of fraudulently receiving and disposing of the money that Philp had stolen. In other words, the respondents denied that Brandstock had made dispositions to them within the meaning of that word in s 26 of the Insolvency Act. They also denied that they were enriched by the payments.

It was held that a company has no mind of its own, and is, therefore, capable of acting only through a human agency. The law treats the company as the principal in relation to the actions undertaken in its name and on its behalf and the persons acting for it as its agents. A company is, therefore, bound only by the actions of persons who have authority to represent it. The court acknowledged the possibility of persons acting, or purporting to act, on behalf of a company, to misuse the opportunity for fraudulent purposes, and to do so entirely for their own dishonest ends to the prejudice of those with whom they purported to transact in the name of the company, and often at the same time also to the prejudice of their supposed principal. That leads to the question of where the resultant loss should fall.

The ultimate control of a company's affairs is vested in its board of directors. Philp, as Brandstock's sole director, fell to be regarded as its authorised agent. His authority was actual, not apparent or ostensible. Actual authority arises from the legal or consensual relationship in place between the principal and the agent and exists quite independently of the third party's understanding of the facts. Brandstock was thus accountable to Louw for the money that was stolen by Philp.

The court rejected the respondents' seeking to resort to the directing mind doctrine to displace the law of agency where those are applicable and available to determine a company's liability in a contractual context.

In the circumstances of this case, the funds received from Louw became Brandstock's property when it received the payment. By disposing of the funds credited to its account because of Louw's payments, Brandstock exercised the personal right it had acquired against its

banker in consequence of the payments.

There being no suggestion by the respondents that the dispositions were for value, the court set aside the payments as dispositions without value.

Criminal law and procedure

Competing requests for extradition: In *Forum de Monitoria do Orçamento v Chang* [2022] 2 All SA 157 (GJ). The first respondent, Mr Chang, was a public official of Mozambique who had occupied the position of Minister of Finance for ten years. He was implicated in the 'Mozambican secret debt scandal' and was accused of grand corruption involving plundering public resources. After being charged in both the United States (US) and Mozambique for corruption and fraud, he was arrested in South Africa at the request of American authorities. The Minister of Justice then received competing requests by both Mozambique and the US to extradite Mr Chang to their respective countries.

The applicant, *Forum de Monitoria do Orçamento* (FMO), being committed to fighting corruption, sought review of the Minister's decision to extradite Mr Chang to Mozambique, after having first decided to extradite him to the US.

Victor J held that:

- The first issue for determination was whether the Minister's decision was rational and in conformity with the doctrine of legality when he changed his mind from extraditing Mr Chang to the US, to Mozambique.
- The second was whether the Minister ignored relevant facts, thus resulting in the decision and the procedure adopted in arriving at the decision, being marred by irrationality.

The Minister's decision must be rationally related to the purpose for which the power was conferred. If it is not, then the exercise of the power would be arbitrary and at odds with the Constitution. Thus, in exercising his power, the Minister must take into consideration all the relevant facts when weighing up a matter pertaining to extradition. The process in leading up to that decision must also be rational.

When a court is faced with an executive decision where certain factors were ignored, it must consider –

- whether the factors ignored were relevant;
 - whether the failure to consider the material concerned (the means) is rationally related to the purpose for which the power was conferred; and
 - if the answer to the second stage of the enquiry is negative, whether the ignoring of relevant facts tainted the entire process with irrationality, rendering the final decision irrational.
- One of the primary considerations,

which illustrated that the Minister's decision, was not rationally related to the purpose was that of immunity. Extradition to a state where the person enjoys immunity from prosecution is contraindicated. The question of Mr Chang's immunity from prosecution was uncertain, and the Minister's ignoring that aspect rendered his decision irrational. Further relevant concerns which the Minister did not consider or failed to give sufficient weight to were highlighted by the court.

Post hoc reasons for the Minister's decision did not have sufficient probative value to justify a rational decision.

The extradition decision was reviewed and set aside, and the court ordered Mr Chang to be extradited to the US.

Release of prisoner on medical parole:

In *Democratic Alliance v National Commissioner of Correctional Services and Others* [2022] 2 All SA 134 (GP). Urgent applications were brought by the Democratic Alliance (DA) and the Helen Suzman Foundation (HSF) for a declaration of unlawfulness against the decision of the then National Commissioner of Correctional Services, Mr Arthur Fraser, to grant the third respondent (Mr Zuma) medical parole under s 75(5) of the Correctional Services Act 111 of 1998 (the Act). The parole decision followed the CC's sentencing Mr Zuma to 15 months' imprisonment for contempt of court after he failed to comply with an order of that court, requiring him to appear before a Commission of Enquiry. Although the Medical Parole Advisory Board decided not to recommend medical parole, the Commissioner took the decision to place Mr Zuma on medical parole, without considering the grounds listed in ss 79(1)(b) and (c) of the Act.

The DA and HSF sought to have the medical parole decision reviewed and set aside and replaced with a decision refusing medical parole and requiring Mr Zuma to return to prison to serve out the remainder of his sentence. According to the applicants, Mr Zuma did not satisfy the requirement for medical parole as set out in s 79(1) of the Act.

It was held that the alleged abuse of power in the present proceedings, if proven, would impact the rule of law, and the matter was accordingly urgent.

The placement on medical parole extends to physically incapacitated offenders and those suffering from an illness that severely limits their daily activity or self-care. The Medical Parole Advisory Board, an independent expert body, must impartially and independently make a medical determination whether an offender is terminally ill or is suffering from an illness that severely limits his daily activity or self-care. It is the Board, and not the doctors treating the offender, which decides if an offender is terminally ill or severely incapacitated. If

its recommendation is positive, the Commissioner must then decide whether s 79(1)(b) and (c) are satisfied. The recommendations of the Board are ordinarily decisive and binding on the Commissioner, who does not have the medical expertise to overrule the recommendation of the Board.

The Commissioner's decision to grant Mr Zuma medical parole was an administrative exercise of public power and, therefore, had to be lawful, rational, reasonable, and procedurally fair. In its expert assessment, the Board had already considered medical reports, which the Commissioner then reconsidered and relied on to overturn the recommendation of the Board. In so doing, the Commissioner impermissibly usurped the statutory functions of the Board, and his conduct was irrational, unlawful and unconstitutional. The reasons given by the Commissioner to release Mr Zuma on medical parole were not connected with the requirements for medical parole and were not authorised by the empowering provision.

The effect of the Commissioner's decision was to unlawfully mitigate the punishment imposed by the CC, thereby rendering the Constitutional order ineffective, which undermined respect for the courts, the rule of law and the Constitution itself.

In the premises, the impugned deci-

sion was reviewed, declared unlawful, and set aside and Mr Zuma was required to return to prison to serve out the remainder of his sentence.

Education

School payment owed to creditor – liability of the state: The respondent, Komani Stationers, in *Member of the Executive Council, Department of Education, Eastern Cape v Komani School and Office Suppliers CC t/a Komani Stationers* [2022] 2 All SA 44 (SCA) had supplied school stationery to a public school. The Stationers did not receive payment and it sued the school's governing body and principal. Default judgment was obtained, but the District Director instituted interpleader summons seeking an order releasing the goods concerned from attachment on the ground that the goods were owned by the Eastern Cape Department of Education (the Department) who were not cited nor indebted to Komani Stationers. The latter then sued appellant (the MEC) for payment. As s 58A(4) of the South African Schools Act 84 of 1996 prevents attachment, in satisfaction of a judgment debt, of assets of a public school, the question in the present appeal was whether s 60(1) of the Schools Act encompasses claims for specific performance in respect of payment of money owed to a creditor by a public school because of the prohibi-

tion contained in s 58A(4). A subsidiary issue was whether Komani Stationers's claim against the MEC had prescribed.

The High Court found against the MEC who then appealed.

The court held that it was common cause between the parties that the claim asserted by Komani Stationers was essentially one for specific performance, and that on its terms s 60(1) does not absolve public schools from liability in respect of their contractual obligations. The court considered what s 60(1) means in providing that 'the State is liable for any delictual or contractual damage or loss caused as a result of any act or omission in connection with any school activity conducted by a public school and for which a public school would have been liable but for the provisions of this section'. The established tenets of statutory interpretation were applied.

A delict generally entails a breach of a duty imposed by the law independently of the will of the party bound. On the other hand, contractual damage or loss flows from a breach of contract and thus consists of a breach of a duty voluntarily assumed. There may well be an overlap between a claim for delictual and contractual damage where the conduct complained of constitutes both a breach of contract and satisfies the requirements of a delictual claim. In contrast, specific performance entails the right of a plain-



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tiff to insist, subject only to the court's discretion, that the other party to the contract performs their undertaking in terms of the contract whenever they are able to do so.

To bring a claim within the purview of s 60(1) to hold the state liable the claimant would need to establish delictual or contractual damage or loss, caused as a result of any act or omission, in connection with a school activity, conducted by a public school, for which such public school would have been liable but for the provisions of this section. The court held that s 60 is limited only to delictual or contractual damage or loss arising as a result of an act or omission in the circumstances stipulated in the section itself against a public school and does not avail a creditor who seeks to enforce a contractual claim for specific performance against the MEC concerned when a claim of that kind lies solely against a public school that is privy to the contract.

The appeal was upheld by the majority of court.

In a dissenting judgment, the point of departure was the interpretation of s 60. The minority judgment favoured a less narrow interpretation to read the section to include damages or loss flowing from the non-payment of a claim based on specific performance.

Trade (customs and excise)

Interpretation of indemnity clause – liability for customs duty, VAT, and other charges: In *Cornerstone Logistics (Pty) Ltd and Another v Zacpak Cape Town Depot (Pty) Ltd* [2022] 2 All SA 13 (SCA) the respondent (Zacpak), a licensee of a customs and excise warehouse, was liable, in terms of s 19(6) of the Customs and Excise Act 91 of 1964, for customs duties and VAT on all goods stored in

its warehouse. Such liability only ceases when it is proved that the goods in question have been duly entered in terms of s 20(4) of the Act, either for home consumption or export, and have been delivered or exported in terms of such entry.

The appellant (Cornerstone) had applied to Zacpak for credit facilities in respect of warehousing services and signed the application form renouncing the benefits of excussion and division. Cornerstone instructed Zacpak to store goods in its warehouse. Zacpak subsequently released the goods to a road carrier (Bridge), who was supposed to export the goods to Mozambique. Although the consignments were entered for export to Mozambique, they were impermissibly diverted, thus entering for home consumption in South Africa. When the South African Revenue Service demanded payment of duties, Zacpak successfully enforced its indemnity clauses against Cornerstone in the court *a quo*. That led to the present appeal.

It was held that, in interpreting the indemnity and suretyship clauses, they had to be given meaning and business-like efficacy by having regard to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appeared; the apparent purpose to which it is directed; and the material known to those responsible for its production. Properly construed, in terms of the agreement, Cornerstone indemnified Zacpak against any loss incurred by Zacpak as a result of Zacpak complying with Cornerstone's express or implied instructions. For the indemnity to become effective Zacpak merely had to establish, on a balance of probabilities, that it had released the goods to Bridge on Cornerstone's instructions. Based on the evidence, the court *a quo* correctly found that Zacpak

released the goods to Bridge on Cornerstone's express instructions. The court also highlighted evidence of Cornerstone's continued involvement with the goods beyond their entry into Zacpak's warehouse. In the absence of any fault on the part of Zacpak in the wrongful release of the goods to Bridge, liability was attributed only to the appellants.

The court *per* Smith AJA (Gorven, Mothle, Zondi JJA and Phatshoane AJA concurring) also found against the second appellant, who in signing the agreement as surety, assumed liability accessory to that of Cornerstone.

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 –

- illegal foreigner having entered South Africa (SA) illegally, application for asylum only after his arrest on a charge of unlawfully entering and residing in SA in contravention of the Immigration Act 13 of 2002;
- intestate succession, surviving partner in a permanent opposite-sex life partnership;
- medical negligence, claim for damages, determination of factual causation;
- powers of administrator of dissolved municipal council; and
- report of Public Protector finding of contravention of s 16(2)(b) of the Constitution and recommended remedial action against premier of province for statements about colonialism.

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By
Sithelo
Magagula

It is high time that the organs of state implement their own preferential procurement policies

Minister of Finance v Afribusiness NPC (CC) (unreported case no CCT 279/20, 16-2-2022) (Khampepe ADCJ, Jafta J, Madlanga J, Majiedt J, Mhlantla J, Pillay AJ, Theron J, Tlaletsi AJ and Tshiqi J)

On 16 February 2022, the Constitutional Court (CC) handed down the judgment of *Afribusiness*, which largely deals with s 217 of the Constitution, the Preferential Procurement Policy Framework Act 5 of 2000 (the Procurement Act), and the Preferential Procurement Regulations, 2017 (the 2017 Procurement Regulations). The CC found that the 2017 Procurement Regulations are unlawful, and the Minister of Finance (the Minister) acted *ultra vires* when he promulgated the regulations. The *Afribusiness* case is undoubtedly bringing new development into the government procurement system.

Section 217 of the South African Constitution explicitly mandates government procurement system that is fair, equitable, transparent, competitive, and cost-effective. This procurement process is a critical part of a functional government service delivery mechanism. To give effect to s 217 of the Constitution, Parliament enacted the Procurement Act. Section 5(1) of the Procurement Act gives the Minister a 'discretionary power to make regulations regarding any matter that is necessary or expedient to achieve the objects of the Act' (*Afribusiness* at para 46). Accordingly, in 2017 the then Minister promulgated the 2017 Procurement Regulations. It is important to note that regulations are subordinate legislation, therefore, they must be created within the limits of the empowering statute. If they are not, the exercise of the Minister's power to promulgate them is unlawful and may be reviewed and set aside in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

Section 2 of the Procurement Act mandates the organs of state to implement their preferential procurement policies, however, the organs of state have always relied on the preferential procurement system prescribed by the Minister in the 2017 Procurement Regulations instead of establishing their own preferential

procurement policies. The question that was confronted by the CC in the *Afribusiness* case was: 'If each organ of state is empowered to determine its own preferential procurement policy, how can it still lie with the Minister also to make regulations that cover that same field?' (*Afribusiness* at para 111).

Case law analysis

The *Afribusiness* case concerns the validity of the 2017 Procurement Regulations. This comes after the Supreme Court of Appeal (SCA) found that the Procurement Regulations were inconsistent with the Procurement Act and were thus invalid.

This matter has its genesis in complaints received by the National Treasury from members of the public that the 2011 Preferential Procurement Regulations 'created a competitive advantage for white persons as they would consistently win on price, and no corresponding emphasis was placed on the achievement of economic redress for previously disadvantaged persons' (*Afribusiness* at para 5). After establishing a Task Team to look at the issues raised by the members of the public the Minister promulgated the 2017 Procurement Regulations. The promulgation of the 2017 Procurement Regulation was in terms of s 5 of the Procurement Act, which gives the Minister the power to 'make regulations regarding any matter that may be necessary or expedient to prescribe in order to achieve the objects of this Act'.

'In terms of the 2017 Procurement Regulations, organs of state may elect to apply a specified list of pre-qualification criteria to advance certain groups, and only tenderers who comply with such criteria would be eligible to tender. The impugned regulations are regulations 3(b), 4 and 9 of the 2017 Procurement Regulations. Regulation 3(b) provides that "[a]n organ of state must . . . determine whether pre-qualification criteria

are applicable to the tender as envisaged in regulation 4." Regulations 4 and 9 fashion pre-qualification criteria that tenderers must meet to be eligible to tender and subcontract respectively. These can be understood as threshold requirements for entry to tender' (*Afribusiness* at para 10).

Afribusiness then launched an application in the High Court and sought an order reviewing and setting aside the 2017 Procurement Regulations 'on the basis that the Minister had acted beyond the scope of his powers and that the regulations were invalid. . . . [The High Court] held that the Minister was authorised to promulgate the regulations. It thus rejected the argument that the Minister had acted beyond the scope of his powers' and the application was dismissed (www.concourt.org.za, accessed 12-5-2022).

Aggrieved by the decision of the High Court, *Afribusiness* appealed to the SCA. The SCA reasoned differently from the High Court and held that the Minister acted *ultra vires*. The SCA held that in terms of s 2 of the Procurement Act, 'the correct approach to evaluating tenders is to first ascertain the highest points scorer and thereafter, if there are objective criteria that justify the award of the tender to a tenderer with a lower score, organs of state may do so. The [SCA] held that the preliminary disqualification was impermissible. . . . Consequently, it held that the Minister's promulgation of regulations 3(b), 4 and 9 was unlawful' (www.concourt.org.za, accessed 12-5-2022).

The SCA added that 'this unlawfulness was not cured by the fact that the application of pre-qualification was discretionary and that, in any event, the 2017 Procurement Regulations do not provide organs of state with a framework to guide the exercise of that discretion, which may lend itself to abuse. This . . . is inimical to the provisions of section 2 of the Procurement Act and section 217(1) of the Constitution' (*Afribusiness* at para

15). Accordingly, the 2017 Procurement Regulations were declared invalid as they were inconsistent with the Procurement Act and s 217 of the Constitution. However, the SCA suspended the declaration of invalidity for 12 months.

Aggrieved by the decision of the SCA the Minister appealed to the CC. The issues, which were placed before the CC, among others, are as follows:

- (d) Whether the Minister acted beyond the scope of his powers when he promulgated the impugned regulations. ...
- (i) Whether the 2017 Procurement Regulations are inconsistent with the Procurement Act.
- (ii) What is the scope of the Minister's regulatory powers in terms of the Procurement Act?
- (iii) Lastly, whether the 2017 Procurement Regulations are inconsistent with section 217(1) of the Constitution such that they are invalid' (*Afri-business* at para 18).

Law and application

The CC gave two judgments in this matter (the minority and majority judgments). The minority judgment found that the Minister acted within the scope of his powers when he promulgated the regulations and that a 'proper reading of the [2017] Procurement Regulations would demonstrate that an organ of state has a discretion to implement the pre-qualification criteria' (www.concourt.org.za, accessed 12-5-2022). Thus, the minority found that the regulations were lawful and valid. While one may argue that the minority judgment is interesting and somewhat transformative in nature, it has no value in our jurisprudence but remains academic. Therefore, the focus should only be placed on the majority judgment.

The majority held that s 217(3) of the Constitution envisages the Procurement Act from whose long title the Act is meant 'to give effect to section 217(3) of the Constitution by providing a framework for the implementation of the procurement policy contemplated in section 217(2) of the Constitution'. Section 2(1) of the Procurement Act provides that 'an organ of state must determine its preferential procurement policy', which it must implement within the framework set out in this section. Section 5(1) of the Act - which is the section that is at the centre of what the CC was asked to decide on - provides that 'the Minister may make regulations regarding any matter that may be necessary or expedient to prescribe in order to achieve the objects of this Act'.

The majority held that the 'purpose served by regulations is to make an Act of Parliament work. The Act itself sets the norm or provides the framework on

the subject matter legislated on. Regulations provide the sort of detail that is best left by Parliament to a functionary, ... to look beyond the framework and - in minute detail - to ascertain what is necessary to achieve the object of the Act or to make the Act work'. The difference between the minority and majority judgment lies in the interpretation of 'necessary or expedient' in s 5 of the Procurement Act. The majority interpreted the words 'necessary or expedient' to be the limiting factor to the powers of the Minister to make regulations. The majority arrived at 'this conclusion by reading the words "necessary or expedient" with section 2(1) of the Procurement Act, which provides that an organ of state must determine its preferential procurement policy' criteria' (www.concourt.org.za, accessed 12-5-2022).

Accordingly, 'since each organ of state is empowered to determine its own preferential procurement policy', the majority held that 'it cannot also lie with the Minister to make regulations that cover the same field' (www.concourt.org.za, accessed 12-5-2022). In the result, the majority held that 'it can neither be necessary nor expedient for the Minister to make regulations that seek to achieve that which can already be achieved in terms of s 2(1)' (www.concourt.org.za, accessed 12-5-2022). The question raised by the majority was: 'If each organ of state is empowered to determine its own preferential procurement policy, how can it still lie with the Minister also to make regulations that cover that same field?' (*Afri-business* at para 111). In the view of the majority judgment, the impugned regulations were not necessary and were somewhat meant to serve as a preferential procurement policy. The majority held that the 'conduct by an organ of state that has no foundation in some law breaches the principle of legality, which is a subset of the rule of law' (*Afri-business* at para 118). Accordingly, the CC dismissed the appeal and upheld the decision of the SCA that the Minister acted *ultra vires* when he promulgated the 2017 Procurement Regulation and that the regulations are unlawful and invalid.

Conclusion

What one learns from the *Afri-business* case is that the organs of state, including municipalities have failed to implement their own preferential procurement policies. Such failure by the organs of state to act in accordance with the power vesting in them to implement preferential procurement policies 'cannot have the effect of vesting in the Minister a power that otherwise vests in them' (*Afri-business* at para 120).

While the declaration of invalidity for the 2017 Procurement Regulation is sus-

pended for 12 months (beginning from 17 February 2022) the organs of state must still procure services for them to function. The question is, should the organs of state continue to apply the pre-qualification criteria prescribed by the impugned 2017 Procurement Regulations in their tender processes? We already know by now that 'the 2017 Procurement Regulations, which permit consideration of various criteria before the points system is applied, therefore, putting "the cart before the horse"' are unlawful. It is clear in the *Afri-business* case that s 2(1)(f) of the Procurement Act, which allows for a tender to be awarded to an entity based on 'objective criteria', even if that 'entity did not score the highest in terms of the points system, does not permit the pre-qualification criteria set out in the 2017 Procurement Regulations'.

What one learns from the *Afri-business* case is that the organs of state must implement their preferential procurement policies. In the absence of the policy, they have discretion to apply or not apply the pre-qualification criteria prescribed by the 2017 Procurement Regulations. In the interim, the declaration of invalidity for the 2017 Procurement Regulations are suspended for 12 months. Therefore, it is strongly advised that the organs of state should exercise their discretion not to apply the pre-qualification criteria as we already know that it is unlawful and inconsistent with the empowering statute.

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By
Kgomo
Ramotsho

Doctrine of *stare decisis* requires courts 'stand or abide by cases already decided'

Ayres and Another v Minister of Justice and Correctional Services and Another 2022 (5) BCLR 523 (CC)

In *Ayres*, the applicants, Gregory Craig Ayres and Valeri Lazanov Nikolov, applied for leave to appeal to the Constitutional Court (CC) against a judgment that was handed down by the KwaZulu-Natal Local Division of the High Court, Durban, which had dismissed the applicants' challenge to the constitutional validity of s 63 of the Drugs and Drug Trafficking Act 140 of 1992 (the Drugs Act).

The applicants were arrested in November 2014 after allegedly being found in possession of a substance described as methylenedioxymetamfetamine (MDMA) in contravention of the Drugs Act. The applicants were charged in the Middelburg Magistrate's Court with the alleged unlawful dealing in or alternatively, possession of MDMA. Before pleading to the charges brought against them, the applicants applied to the High Court for an order declaring s 63 of the Drugs Act, as well as the reference to MDMA in Part III of sch 2 to the Drugs Act, to be inconsistent with the Constitution and invalid. Section 63 of the Drugs Act provides:

'Amendment of Schedule 1 and 2 –

The Minister may by notice in the *Gazette* and after consultation with the Minister of National Health –

(a) include any substance or plant in Schedule 1 or 2;

(b) delete any substance or plant included in that Schedule; or

(c) otherwise amend that Schedule.'

In the High Court the applicants argued that the power to include, delete or otherwise amend the substances listed in the schedules to the Drugs Act is a plenary legislative power and, when exercised by a member of the Executive, constitutes a breach of the doctrine of separation of powers. The High Court stated that the applicants' attack was mainly directed at the inclusion of MDMA in Part III of sch 2 of the Drugs Act. The High Court rejected the applicants' attack and concluded that the application should be dismissed. The High Court pointed out that the applicants had not argued that the Minister of National Health (the Minister) had abused

his power. The High Court held that it was permissible for Parliament to delegate the power it delegated to the Minister in this case.

The CC said that whether leave to appeal would be granted would be determined on the basis of whether or not it was in the interests of justice to grant such leave. The CC added that in this matter it was in the interest of justice to grant leave because:

'(a) there are reasonable prospects of success since the CC has already given a judgment declaring s 63 of the Drugs Act constitutionally invalid and the judgment sought to be appealed against is in conflict with that judgment.

(b) there is no need to insist that the applicants should first approach the Supreme Court of Appeal [SCA] as the CC has already pronounced on the issue'.

The court said it was of the view that the matter warrants the granting of leave to appeal directly to it.

The CC pointed out that in *Smit v Minister of Justice and Correctional Services and Others* 2021 (3) BCLR 219 (CC) it considered the constitutionality of the impugned provisions. The CC added that the first judgment held that s 63, which confers on the Minister plenary legislative power to amend the schedules, which are part of the Drugs Act, is a delegation of original power to amend the Drugs Act, amounting to a complete delegation of legislative power to the executive. The CC said that the majority judgment affirmed the first judgment and declared, among other things, that s 63 of the Drugs Act, as well as the reference to the MDMA in Part III of sch 2 to the Drug Act, are invalid and unconstitutional. The CC pointed out that the High Court did not deal with or seek to distinguish *Smit* and neither did it consider whether MDMA was included in sch 2 when the Drugs Act was originally enacted by the Legislature, to distinguish it from other substances included in the schedule by the Minister.

The CC said it would assume that the High Court was not aware of *Smit* when it handed down its judgment. The

CC added that it was satisfied as to the credibility of the applicants' averments on this score based on the rule set out in the *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A), the version put forward by the applicants must, therefore, be accepted. The CC said that although the High Court was wrong to conclude in its judgment that s 63 was constitutional, it did not issue a declarator in this regard. It simply made an order dismissing the application. The CC pointed out that it is settled law that an appeal lies against the order of a court and not against the reasons underpinning the order. The CC said that given its judgment in *Smit* the order granted by the High Court in respect of the merits is correct even if the reasons provided by the High Court are not.

The CC pointed that the application ought to have been dismissed because once the CC declared legislation invalid, it was not competent for the High Court to make the order that the applicants' wanted, that such order are already made by the CC. The CC added that the applicants' approach to the High Court to seek a declaration of constitutional invalidity of the impugned provision was justified and correct. That the applicants' position was vindicated by the CC's judgment in *Smit*.

The CC made the following order:

'1. Leave to appeal on the merits is refused.

2. Leave to appeal against order of costs is granted.

3. The appeal against the order of costs is upheld.

4. The costs order of the High Court is set aside and replaced with the following:

"The first respondent must pay the applicants' costs, including the costs of two counsel".

5. Each party must pay their own costs in the [CC].'

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



By
Vuyokazi
Yokwe

The impact of the *Oak Valley Estates* ruling on strikes and protests

Commercial Stevedoring Agricultural and Allied Workers' Union and Others v Oak Valley Estates (Pty) Ltd and Another (CC) (unreported case no CCT 301/20, 1-3-2022) (Theron J (Madlanga J, Madondo AJ, Majiedt J, Pillay AJ, Rogers AJ, Tlaletsi AJ and Tshiqi J concurring))

This case review is aimed at critically analysing the *Oak Valley Estates* case decided by the Constitutional Court (CC) on 3 March 2022. This case came before the CC by way of an appeal against the decision of the Labour Appeal Court (LAC), which had confirmed the decision of the Labour Court (LC). In essence, the case is a contextualised revisit of the rules governing interdicts, in particular the satisfaction of the requirement of apprehensible harm, which is a condition for the granting of a final interdict. In other words, the court had to determine whether a link must be established between each individual participating in a protest action to the threat against legally protected rights.

For better appreciation of the issues dealt with, this article evaluates the soundness of the approach adopted by the CC. The article will further examine the impact of the CC decision on the exercise of the right to strike and protest.

It was 'common cause that the strike triggered incidents of intimidation, damage to property, and unlawful interference with Oak Valley's business operations and that there were numerous breaches of the Picketing Rules' (*Oak Valley Estates* para 5). This prompted the respondents to approach the LC on an urgent basis seeking an interdict against the protesting employees.

In response, the applicants raised three defences: (a) the court lacked jurisdiction regarding the alleged non-compliance with the Picketing Rules because Oak Valley did not refer a dispute regarding this alleged non-compliance in terms of either section 69(8) or 69(11) of the Labour Relations Act 66 of 1995;

(b) the interdict sought by Oak Valley was unduly broad and interfered with lawful conduct (in particular, it effectively

evicted certain of the workers from their homes by restricting access to Oak Valley's property); and

(c) Oak Valley had failed to link any of the unlawful conduct complained of to the respondents that it had cited (neither the 364 employees that were striking at the time nor the "unidentifiable" members of the public). The Labour Court accepted that it could not interdict the unidentifiable members of the public, but otherwise rejected the applicants' defences' (*Oak Valley Estate* para 11).

On the requirement of a 'link' question, the CC examined the law of interdicts and restated the requirements for a final interdict as including a 'clear right; an injury committed or reasonably apprehended; and the absence of similar protection by any other ordinary remedy' (*Oak Valley Estate* para 18).

The question on the link anchors on the requirement that a reasonable 'apprehension of injury' must exist before a final interdict is granted. Therefore, the court held that if the evidence presented before the court is 'insufficient to establish any link between the respondent and the actual or threatened injury, the apprehension of injury cannot be reasonable. Put differently, it follows that there must be some link between the respondent and the alleged actual or threatened injury' (*Oak Valley Estates* para 20).

The CC also examined the most significant issue, which was the dilemma the LC and the LAC faced, which was whether participation in a strike, protest, or assembly is sufficient to establish the link. If the answer is yes, then innocent participants in a strike or protest action will sometimes be caught in an interdict. The CC rejected the LAC's view.

Evaluation

The CC decision is sound for several rea-

sons. Firstly, it is worth noting that the judgment is unanimous. Secondly, the court took an opportunity to examine existing law on interdicts and surveyed a large collection of cases on the question of link where persons participate in a group. All these cases cited above establish that a link must be established between each person in the group except in exceptional circumstances where the protest action is prolonged giving individuals enough time to disassociate themselves with the unlawful conduct. Of all the cases examined, only one case is at odds with the established principle. On the facts, the court made a correct finding that no such link was established save for few individuals identified by names. Further, on principles and out of the need to protect and promote the rights to strike and protest as guaranteed by the Constitution, it makes good sense to avoid the granting of interdicts against innocent participants as that would discourage people to participate in protests and strike for fear of contempt proceedings emanating from group liability.

Impact of the ruling on strikes/protest

The court correctly noted the prevalence of strikes in South Africa as a tool of democracy and industrial relations. The court correctly observed that 'it is not far-fetched to conclude that the prospect of being implicated in a contempt application – whether or not such application is likely to succeed – will have a chilling effect on the exercise of the constitutional rights to strike and protest. If mere participation in a strike or protest carries the risk of being placed under an interdict, this might well serve to deter lawful strike and protest action. Moreover, if a participant in a strike or protest is placed under

an interdict, despite having conducted herself lawfully, she might well refrain from further strike action out of the justifiable fear of being swept up in contempt proceedings in the event that other persons in the crowd act in breach of the interdict' (*Oak Valley Estates* para 23).

Therefore, the CC ruling goes further to guarantee the right of everyone to protest and the right of workers to strike by ensuring that liability falls on specific individuals whose conduct is unlawful while protecting the lawful conduct of the innocent participants.

Vuyokazi Yokwe LLB (UFH) is a legal practitioner at the Right2Protest Project based at the Centre for Applied Legal Studies at Wits University.

By
Neels
Engelbrecht

'Morphed servitudes'

Re: Beyers Office Park Body Corporate et al v Honeyridge Centre (Pty) Ltd et al (GJ) (case number 2012/14582, 13-2-2017) (Gildenhuys J)

The question that was recently decided on, during an arbitration proceeding before former Judge Antonie Gildenhuys, was whether a clearly defined servitude of right of way, registered in the Johannesburg Deeds Office as a notarial deed of right of way, based on a servitude diagram depicting the right of way as such, could be interpreted as a parking servitude.

The facts

The developer of two adjacent commercial properties, Honeyridge Centre and Beyers Office Park in Randpark Ridge, Johannesburg registered a servitude of right of way over the servient property Beyers Office Park (the office park) in favour of Honeyridge Centre (Honeyridge), by virtue of a notarial deed of right of way entered into with himself (the development company).

The registration was one of a batch of deeds included in the opening of the sectional title register and the transfer of the units.

The reason for the registration appeared to be that the Johannesburg City Council required the registration of a parking servitude over the servient tenement in favour of the dominant tenement for the dominant tenement (the shopping centre), to comply with its zoning requirements.

For unknown reasons the conveyancers wrongly registered the servitude as a right of way, for the sake of convenience, based on a surveyor general diagram (SG diagram) depicting the right of way as such.

The owners of the office park were aware of the servitude requirement but did not consent thereto.

In a subsequent application to declare the servitude invalid, alternatively a declaratory that it was indeed a right of way and not a parking servitude, Gilden-

huys J found that the right of way could be interpreted as a parking servitude.

The law

The judgment was based, *inter alia*, on the following:

- The fact that the owners of the shopping centre were deemed to know of the servitude.
- The requirement of the city council that a parking servitude had to be registered.
- The interpretation of the servitude based on the case of *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA).
- The Scottish case of *Moncrieff and Another v Jamieson and Others* 2008 4 All ER 752 (HL).

The judge chose to ignore the South African case on point of *Kruger v Downer* 1976 (3) SA 172 (W) where Margo J found that where a servitude was clear, but incorrectly registered and, therefore ineffective, the court could not interpret the servitude other than the clear wording of the servitude, namely, the court could not re-write the servitude for the parties.

What Gildenhuys J effectively found is that he could, by using the principles of interpretation, looking at the background circumstances and the intention of only the developer, interpret the right of way as a parking servitude.

This finding is in my view clearly wrong and has far-reaching implications.

For example, in this instance there was no ambiguity or uncertainty regarding the wording of the servitude, furthermore it was based on a SG diagram depicting the servitude as one of right of way.

This effectively means that the judge only considered the background circumstances and the intention of the developer when the servitude was drafted and

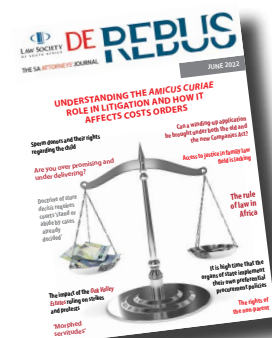
ignored the clear wording of the servitude.

I submit that this matter is taking the principles, as set out in the *Bothma-Batho* matter, too far and leads to uncertainty as it means that the wording of any agreement or servitude could be ignored and should only be regarded to the intention of the drafter and the surrounding circumstances.

Van der Walt discusses the decision of *Kruger v Downer* and agrees with the decision when he states: 'The principle that the servitude holder must be allowed effective use of the servitude must frame the interpretation of the servitude grant, but it cannot give the courts the power to rewrite the grant if it was badly drafted' (AJ van der Walt *The law of servitudes* (Cape Town: Juta 2017) at page 227).

Neels Engelbrecht LLB (UP) is a legal practitioner in Randburg. Mr Engelbrecht is the attorney on record for the applicant.

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By Lauren
Lloyd and
Lizelle
Rossouw

New legislation

*Legislation published from
4 April – 29 April 2022*

Acts

Civil Aviation Amendment Act 22 of 2021

Date of commencement to be proclaimed. GN956 GG46205/6-4-2022.

Customs and Excise Act 91 of 1964

Amendment of sch 1 Part 5A, sch 6 Part 3, sch 1 Part 3A, 3C, 3D. GN R1993 – GN R1997 GG46203/6-4-2022.

Amendment of sch 1 part 3F (no 1/3F/4), sch 1 part 5A (no 1/5A/171) and sch 6 part 3 (no 6/3/58). GN R2010, GN R2011 and GN R2012 GG46224/14-4-2022.

Amendment of sch 6 part 1D (no 6/1D/16) and sch 1 part 1 (no 1/1/1685). GN R2052 and GN R2053 GG46293/29-4-2022.

Customs and Excise Act 91 of 1964

Amendment of sch 2 part 1 (no 2/1/60). GN R2030 GG46248/19-4-2022.

Public Service Act (Proclamation no 103 of 1994)

Amendment of sch 2: KwaZulu-Natal Province. Proc57 GG46201/6-4-2022.

Financial Sector Laws Amendment Act 23 of 2021

Date of commencement of ss 2, 3, 12 and 58: 29 April 2022.

Amends ss 35A and 83 of the Insolvency Act 24 of 1936, s 4 of the Mutual Banks Act 124 of 1993 and sch 2 of the Financial Sector Regulation Act 9 of 2017. GenN2050 GG46288/29-4-2022.

Bills and White Papers

National Youth Development Agency Amendment Bill, 2022

Explanatory note. GN2003 GG46210/7-4-2022.

Preferential Procurement Policy Framework Amendment Bill, 2022

Notice of intention to introduce a Private Member's Amendment Bill into Parliament and invitation for public comment. GenN971 GG46242/14-4-2022.

South African Post Office SOC Ltd Amendment Bill, 2021

Invitation to provide written comments. GN2031 GG46250/20-4-2022.

South African Postbank Amendment Bill

Publication of explanatory summary. GenN955 GG46204/6-4-2022.

Government, General, and Board Notices

Agricultural Pests Act 36 of 1983

Control measures: Amendment. GN R1998 GG46207/8-4-2022.

Compensation for Occupational Injuries and Diseases Act 130 of 1993

Notice issued by the Compensation Commissioner under the Act. GenN993 GG46269/22-4-2022. Notice issued by the Director-General under the Act. GenN994 GG46270/22-4-2022.

Competition Act 89 of 1998

Notice of designation in terms of s 10(3)(b)(iv) of the Act. GenN997 GG46284/28-4-2022.

Abalone Farmers Association of South Africa granted conditional exemption. GenN2047 GG46288/29-4-2022.

Department of Agriculture, Land Reform and Rural Development

Cannabis Economy Gauteng: Request for Information: Partnerships for Cannabis Industrialisation. GN2054 GG46295/29-4-2022.

Disaster Management Act 57 of 2002

Amendment of Directions issued in terms of reg 4(8) and (10) of the regulations made under s 27(2) of the Act: Measures to prevent and combat the spread of COVID-19. GN2037 GG46260/21-4-2022. Amendment of directions regarding the full time return of learners to schools. GenN952 GG46172/4-4-2022.

Classification of a provincial disaster in terms of s 23 of the Act: Impact of severe weather events. GN R2013 GG46241/13-4-2022.

Declaration of a National State of Disaster: Impact of severe weather events. GN R2029 GG46247/18-4-2022.

Directions on the establishment of a COVID-19 Vaccine Injury No-Fault Compensation Scheme issued in terms of the Act. GN R1987 GG46196/4-4-2022.

Reclassification of Provincial Disaster as a National Disaster: Impact of severe weather events. GN R2028 GG46247/18-4-2022.

Revocation of the classification of the COVID-19 pandemic as a national disaster. GN R1992 GG46199/5-4-2022.

Termination of national state of disaster. GN R1988 GG46197/4-4-2022.

Financial Markets Act 19 of 2012

Approved amendments to A2X's listing requirements-listing of real estate investment trusts. BN240 GG46255/22-4-2022.

Approved amendments to the Johannesburg Stock Exchange (JSE) Listing Requirements in respect of the Cutting Red Tape Project. BN246 GG46288/29-4-2022.

Labour Relations Act 66 of 1995

Furniture Bargaining Council: Extension

of period of operation of the collective bargaining fee collective agreement. GenN998 GG46285/28-4-2022.

Liquor Products Act 60 of 1989

Notice of application for the defining of a Production Area Lanseria (Ward). BN236 GG46242/14-4-2022.

Medicines and Related Substance Act 101 of 1965

Publishing of notification retention fee payment in the *Gazette*. GN R1999 GG46207/8-4-2022.

National Environmental Management Act 107 of 1998

Adoption of the Generic Environmental Management Programme for Development Projects within the Atlantis Urban Area as an environmental management instrument and exclusion of activities identified in terms of s 24(2)(a) and (b) of the Act, from the requirement to obtain environmental authorisation if undertaken within the Atlantis Urban Area. GN2001 GG46208/7-4-2022.

National Payment System Act 78 of 1998

Southern African Development Community (SADC) Integrated Regional Electronic Settlement System Revocation and SADC Real-Time Gross Settlement System designation notice. GN2024 GG46242/14-4-2022.

Occupational Health and Safety Act 85 of 1993

Notice regarding implementation of regulations 14, 14A, 14B, 14C and 14D of the Regulations for Hazardous Chemical Agents, 2021 as amended. GN2056 GG46299/29-4-2022.

Pharmacy Act 53 of 1974

Scope of practice, competency standards and the criteria to accredit a generic short course for pharmacists in immunisation and injection technique and delivering immunisation services. BN241 GG46255/22-4-2022.

Plant Breeders' Rights Act 15 of 1976

Receipts of applications for plant breeders' rights. GN2016 GG46242/14-4-2022.

Political Party Funding Act 6 of 2018

Multi-Party Democracy Fund. GenN965 GG46214/8-4-2022. Represented Political Party Fund. GenN966 GG46215/8-4-2022.

Public Finance Management Act 1 of 1999

Borrowing powers of water boards listed under sch 3 part B of the Act. GenN2049 GG46288/29-4-2022.

Renewable Energy Independent Power Producers Procurement Programme (REIPPPP)

Request for qualification and proposals under Bid Window 6 of the REIPPPP Tender no DMRE/001/2022/23. GenN957 GG46206/6-4-2022.

Road Traffic Management Corporation Act 20 of 1999

Notice of Agreement between Chief Executive Officer of Road Traffic Management Corporation and Various Provinces: Eastern Cape, North West, Northern Cape, Gauteng, KwaZulu-Natal, Limpopo, Mpumalanga, Free State and Western Cape. GenN973 - Gen N981 GG46242/14-4-2022.

Social Service Professions Act 110 of 1978

Revised notice in terms of reg 11 on the election of members of the fifth South African Council for Social Service Professions and reg 15 on the election of members of the fifth Professional Board for Social Work and the fourth Professional Board for Child and Youth Care Work. BN243 GG46255/22-4-2022.

Revised notice in terms of reg 11 on the election of members of the fifth South African Council for Social Service Professions and reg 15 on the election of members of the fifth Professional Board for Social Work and fourth Professional Board for Child and Youth Care Work. BN248 GG46288/29-4-2022.

South African Police Service Act 68 of 1995

Amendment to the National Standard of

Metro Police Ranking Structure and Insignia. GN2041 GG46267/22-4-2022.

The South African National Roads Agency Limited and National Roads Act 7 of 1998

N2 North Coast, oThongathi and Mvoti toll collection suspension. GN2043 GG46286/28-4-2022.

Rules, regulations, fees and amounts

Council for Medical Schemes Levies Act 58 of 2000

Imposition of levies on medical schemes issued in terms of s 2 of the Act. GenN968 GG46217/8-4-2022.

Customs and Excise Act 91 of 1964

Amendment of rules. GN R2000 GG46207/8-4-2022.

Disaster Management Act 57 of 2002

Regulations made in terms of s 27(2): Amendment of Alert Level. GN R1986 GG46195/4-4-2022.

Electricity Act 41 of 1987

License fees payable by licensed generators of electricity. BN239 GG46255/22-4-2022.

Electricity Act 41 of 1987

License fees payable by licensed generators of electricity. GN2036 GG46255/22-4-2022.

Electricity Regulation Act 4 of 2006

Determination under s 34(1) of the Act. GN2023 GG46242/14-4-2022.

Electronic Communications Act 36 of 2005

Amendment of the Limitations of Control and Equity Ownership by Historically Disadvantaged Groups Regulations and Information and Communication Technology Sector Code Regulations. GenN983 GG46245/14-4-2022.

Exploration Strategy of South Africa

South Africa's Exploration Implementation Plan 2022. GN2027 GG46246/14-4-2022.

The Exploration Strategy for the Mining Industry of South Africa. GN2026 GG46246/14-4-2022.

Genetically Modified Organisms Act 15 of 1997

Regulations: Amendments. GN2014 GG46242/14-4-2022.

Health Professions Act 56 of 1974

Annual fees payable by registered practitioners. BN234 GG46236/14-4-2022.

Rules relating to fees payable to council. BN235 GG46237/14-4-2022.

Housing Act 107 of 1997 and Social Housing Act 16 of 2008

Adjustment of income bands for social housing. GN2009 GG46211/8-4-2022.

Legal Practice Act 28 of 2014

Office of the Legal Services Ombud: Rules. Proc59 GG46242/14-4-2022.

Natural Scientific Professions Act 27 of 2003



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Fee structure for 2022/2023. BN242 GG46255/22-4-2022.

Petroleum Products Act 120 of 1977

Maximum retail price for liquefied petroleum gas, amendment of regulations for petroleum products regulations and regulations for the single maximum national retail price for illuminating paraffin. GN R1989, GN R1990 and GN R1991 GG46198/5-4-2022.

Plant Breeders' Rights Act 15 of 1976

Regulations relating to Plant Breeders' Rights: Amendment. GN2015 GG46242/14-4-2022.

Plant Improvement Act 53 of 1976

Regulations relating to establishments, varieties, plants, and propagating material: Amendment. GN R2038 GG46261/22-4-2022.

Property Valuers Profession Act 47 of 2000

Publication of fees and charges for South African Council for the Property Valuers Profession: Effective 1 April 2022 until 31 March 2023. GenN1004 and BN247 GG46288/29-4-2022.

Social Assistance Act 13 of 2004

Regulations relating to COVID-19 social relief of distress issued in terms of s 32. GN R2042 GG46271/22-4-2022.

Veterinary and Para-Veterinary Professions Act 19 of 1982

Regulations relating to Veterinary and Para-Veterinary Professions: Amendment. GenN958 GG46211/8-4-2022.

Legislation for comment

Accounting Standards Board

Exposure Draft 198 for comment. BN238 GG46242/14-4-2022.

Agricultural Product Standards Act 119 of 1990

Food Safety Agency (Pty) Ltd: Proposed inspection fees increase for 2022/2023 for poultry meat and eggs for comment. GenN960 GG46211/8-4-2022.

Civil Aviation Act 13 of 2009

Civil Aviation Regulations, 2011: Draft amendments. GenN2048 GG46288/29-4-2022.

Compensation for Occupational Injuries and Diseases Act 130 of 1993

Pending amendment of sch 4: Manner of calculating compensation for comment. GenN982 GG46244/14-4-2022.

Criminal and Related Matters Amendment Act 12 of 2021

Draft determination of persons or category or class of persons who are competent to be appointed as intermediaries and a draft certificate of competency to be appointed as an intermediary for comment. GenN1008 GG46297/29-4-2022.

Critical Infrastructure Protection Act 8 of 2019

Publication of Interim Critical Infrastructure Protection Regulations for comment. GenN985 GG46255/22-4-2022.

Department of Public Service and Administration

Draft policy guidelines on the implementation of Recognition of Prior Learning for comment. GN2046 GG46288/29-4-2022.

Electronic Communications and Transactions Act 25 of 2002

Draft .ZA Registry and Registrar Licensing Regulations and Procedures for comment. GN R2039 GG46264/21-4-2022.

Financial Markets Act 19 of 2012

Proposed amendments to the JSE Derivatives Rules: Delta Option Trades and Structured Option Trades: Publication for comment. BN233 GG46211/8-4-2022.

Proposed amendments to A2X Trading Rules - Matched Principal Trade Type: Publication for comment. BN244 GG46288/29-4-2022.

Proposed amendments to the JSE Listing Requirements and the JSE Debt Listing Requirements - Appropriation of penalties. BN245 GG46288/29-4-2022.

Hazardous Substances Act 15 of 1973

Group II Hazardous Substances: Declaration. GenN2045 GG46288/29-4-2022.

Independent Communications Authority of South Africa Act 13 of 2000

Findings document on the review of the Independent Authority (Advertising, Infomercials and Programme Sponsorship) Regulations, 1999. GenN959 GG46211/8-4-2022.

Independent Communications Authority of South Africa Act 13 of 2000

Discussion document on the market inquiry into signal distribution services in South Africa. GenN986 GG46255/22-4-2022.

Marketing of Agricultural Products Act 47 of 1996

Request for the establishment of statutory measures relating to levies, registration and records and returns in the red

meat industry for comment. GenN995 GG46272/22-4-2022.

National Environmental Management Act 107 of 1998

Consultation on the intention to adopt a standard for the development and expansion of power lines and substations within identified geographical areas and the exclusion of this infrastructure from the requirement to obtain an environmental authorisation. GN2002 GG46209/7-4-2022.

National Health Act 61 of 2000 and International Health Regulations Act 28 of 1974

An extension of comment period for the regulations relating to surveillance and the control of notifiable medical conditions: Amendment, regulations relating to the public measures in points of entry, regulations relating to the management of human remains and regulations relating to environmental health. GN2025 GG46243/14-4-2022.

National Health Act 61 of 2003 and International Health Regulations Act 28 of 1974

An extension of comment period for the regulations relating to surveillance and the control of notifiable medical conditions: Amendment, regulations relating to the public measures in points and entry, regulations relating to the management of human remains and regulations relating to environmental health corrects GN2025 published in GG46243/14-4-2021. GN2051 GG46251/19-4-2022.

Private Security Industry Regulation Act 56 of 2001

Draft regulations relating to security service providers protecting and safeguarding game reserves, training of security service providers in the private security industry and the use of remotely piloted aircraft system in the private security industry for comment. GenN1003 GG46288/29-4-2022.

South African Weather Service Act 8 of 2001

Consultation on the proposed regulations regarding fees for the provision of aviation meteorological services for comment. GN2033 GG46253/20-4-2022.

Lauren Lloyd and Lizelle Rossouw are Editors: National Legislation at LexisNexis South Africa. □

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By
Moksha
Naidoo

Employment law update

Vexatious litigation or reasonable cause to pursue litigation

AngloGold Ashanti Ltd v Moloko (LC) (unreported case no J1199/20, 9-3-2022) (Moshoana J).

On 28 September 2018, the applicant employer and respondent employee amicably parted ways, by way of a mutual termination agreement, which saw the employee being 'handsomely' remunerated.

However, some months later, the employee became aware of certain rights he had in terms of the Labour Relations Act 66 of 1995 (LRA) and other labour legislations. In pursuit of exercising these rights, the employee referred ten separate disputes to the Commission for Conciliation, Mediation and Arbitration (CCMA).

In terms of proceedings at the Labour Court (LC), the respondent, on 10 March 2020, launched a review application to set aside an award, which dismissed his claim for unfair dismissal.

On 23 October 2020, the respondent launched a second review application seeking to set aside a jurisdictional ruling made by the CCMA.

Both review applications were dismissed and at the time of this judgment, the respondent's petition to the LAC in respect of one of his review applications, was also dismissed.

On 29 October 2020, the respondent initiated a claim for unfair discrimination.

On 11 March 2021 and relying on a different ground, the respondent launched his second claim for unfair discrimination. On 5 August 2021, the respondent referred a contractual claim to the LC in terms of s 77(3) of the Basic Conditions of Employment Act 75 of 1997 (BCEA).

Each discrimination claim, as well as the contractual application are currently pending before the LC.

Annoyed by the number of alleged vexatious disputes it had to defend, the applicant brought an application in terms of s 2(1)(b) of the Vexatious Proceedings Act 3 of 1956 (the Act).

In terms of this section, if a court, on application, is satisfied that a person is persistently and without reasonable grounds, instituting legal proceedings, then the court may order that no legal proceedings may be instituted by that person without leave of the court in which the person intends initiating legal proceedings and that leave will not be granted unless that court is satisfied that the proceedings are not an abuse of the court process and that there are *prima facie* grounds for the intended proceedings.

The LC, on the strength of the Supreme Court of Appeal judgment in *Member of the Executive Council for the Department of Co-operative Governance and Traditional Affairs v Maphanga* [2020] 1 All SA 52 (SCA), began by making the point that disputes to the CCMA, does not amount to legal proceedings as envisaged in the Act. As such, the applicant's complaint in respect of the ten referrals to the CCMA, was misplaced.

The court noted further that the Act was enacted nearly 66 years ago, and that a stringent and restrictive approach had to be adopted by the courts so as not to unduly limit an employee's right, set out in the LRA, Employment Equity Act 55 of 1998 or the BCEA. Such an approach is buttressed by the fact that when an employee approaches the LC, they are in fact exercising a right, be it a right not to be unfairly dismissed or a right not to be unfairly discriminated against.

Moreover, as a court of equity, the LC would not unrestrictedly grant an application, which seeks to limit another's right.

The question before the court was whether the respondent has persistently and without reasonable cause instituted legal proceedings.

Did the respondent persistently pursue litigation?

The court noted that appealing the LC orders dismissing the respondent's review applications, were not akin to 'recurrently' instituting legal proceedings – an appeal is in respect of the same is-

sue that served before a lower court and cannot be categorised as a new application. Thus, even if the respondent wishes to pursue their appeal rights further in respect of both review applications, they are well within their rights to do so without being restricted by an application of this nature.

Turning to the two unfair discrimination claims, the court found that the applicant entertained both actions, which were at the pre-trial stage. The fact that the respondent is relying on two grounds of alleged discrimination, does not, according to the court, mean that the respondent is being unduly persistent. Likewise, the court recognised the fact that the same set of facts can lend itself to multiple claims, such as unfair dismissal, unfair discrimination, and breach of contract.

The next inquiry was whether the respondent's litigation was without reasonable cause.

Reasonable cause, according to the court ought not be confused with reasonable prospects of success. Reviewing an award is a right that any aggrieved party has – there is no 'gate keeper', such as an application for leave to review, when claiming such a right. Therefore, the respondent has reasonable cause to review any decision, which he is of the view stands to be set aside on review. His actions in this regard cannot be said to be an abuse of the court process. There is nothing to suggest, that in instituting the review applications and other actions, there was something obviously unsustainable in the respective claims. The fact that the parties entered into a mutual termination agreement did not aid the applicant. Section 2(1)(b) of the Act does not require a court to consider pre-litigation arrangements. In any event, in his contractual claim, the respondent sought to set aside the termination agreement.

In conclusion, the court held:

'I venture to say that in interpreting the provisions of the [Act], regard must be had to the rights protected in the LRA and the EEA. A restrictive interpretation is required to not only trammel the justifiable limitations to section 34 but also to trammel the trampling of other corre-

sponding rights in the Bill of Rights.

In the final analysis, this court is constrained to dismiss the present application because Ashanti failed to demonstrate persistence and litigating without reasonable cause on the part of Moloko. As demonstrated above, Moloko has not been persistent and without reasonable cause. The court in *Beinash [and Another v Ernst and Young and Others 1999 (2) SA 116 (CC)]* described a vexatious litigant as one who manipulates the functioning of the courts so as to achieve a purpose other than that for

which the courts are designed. Moloko does not fit this description. His quest is to win, the question whether he has a winnable case, it is a matter for a court of law, and not to manipulate this court. The recent decision of the High Court by the learned Acting Justice Nziweni in *PricewaterhouseCoopers Inc v Pienaar and Others [(WCC) (unreported case no 1845/2021, 10-9-2021) (Nziweni AJ)]* is distinguishable. The respondents in that matter persisted with litigation even after the Constitutional Court dismissed their matter. The respondents sought to

rescind orders granted against them by the Constitutional Court. Such is not the case *in casu*.

The application was 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). □



By
Nadine
Mather

Dishonesty and gross negligence

In *Massmart Holdings v Reddy and Others [2022] 4 BLR 337 (LAC)*, the employee was employed as an audit manager by Massmart Holdings (the Company). As part of his duties, the employee, together with his line manager and subordinates, was responsible for preparing a risk assessment plan, which would be used to develop the annual audit for their area of operation.

The risk assessment plan was expected to be completed within six weeks and each member of the audit team was required to complete a risk assessment worksheet. On the eve of the deadline, it was alleged that the employee informed his line manager that his risk assessment worksheet was 'almost done'. The following day, the employee went on authorised sick leave for two weeks to undergo a scheduled medical procedure. The employee, however, failed to provide a completed risk assessment worksheet to his line manager prior to commencing sick leave.

On his return to work, the employee was summoned to a disciplinary hearing in which he was charged with the following –

- dishonesty in that he had advised his line manager that he was in the process of compiling the risk assessment worksheet notwithstanding that he

had not done any work in respect of the worksheet; and

- gross negligence in that he failed to meet the agreed deadlines for submission of the worksheet and failed to communicate such to his line manager.

The employee was found guilty of the charges and subsequently dismissed.

The employee referred an unfair dismissal to the Commission for Conciliation, Mediation and Arbitration (CCMA). The CCMA commissioner found that the employee had been dishonest on the basis that he did not complete a risk assessment worksheet and had been grossly negligent in that he failed to timeously submit the worksheet and to inform his line manager that he was unable to meet the deadline. As a result, the CCMA Commissioner found that the employee's dismissal was fair. The CCMA award was, however, set aside by the Labour Court (LC) and the employee was reinstated.

The Company appealed against the judgment of the LC and the employee cross-appealed against certain factual findings made by the LC. The Labour Appeal Court (LAC) held that for a commissioner to determine the fairness of a dismissal, they must first determine whether the employee was guilty of the offences for which they were dismissed, in this case dishonesty and gross negligence.

Dishonesty

In respect of the charge of dishonesty, the issue was whether the employee had advised his line manager that he was compiling the risk assessment worksheet when in fact he did not do any work in respect of the worksheet. While the CCMA Commissioner found that the employee was dishonest because no risk assessment worksheet was completed, the LAC was of the view that the Commissioner had misunderstood the question before her. The Commissioner failed to understand that the risk assessment worksheet was the final document to be produced after a long and complex process. The process required consultations and meetings with client businesses. The

risk assessment worksheet was the end-product of these interactions.

Having regard to the charge, the employee was not required to produce a completed worksheet to prove that he had been honest. All he was required to show was that he was in the process of compiling the worksheet, which he had been. The only thing that was outstanding was to change the ratings on the worksheet, which he would have done post-operation. The Commissioner's finding that he had been dishonest was accordingly unreasonable.

Gross negligence

In respect of the charge of gross negligence, the issue was whether the employee was grossly negligent in failing to meet the agreed deadlines and inform his line manager that he would not be able to complete the worksheet after he commenced his sick leave. The employee submitted that he could not be said to have acted negligently as he was unable to meet the deadline and inform his line manager because he was incapacitated owing to post-operative complications. The evidence was that, pursuant to his operation, the employee was not sleeping, he was bleeding excessively, and he was not able to work. This evidence was not challenged by the Company.

On the facts presented, the LAC found that the employee was fully prepared to work during his sick leave. However, it became impossible for him to do so given the severity of his post-operative problems. Had he been well enough, the employee would have completed the risk assessment worksheet and advised his line manager accordingly.

In the circumstances, the LAC was of the view that the LC was correct to have reviewed and set aside the findings of the Commissioner.

The appeal and cross appeal were dismissed.

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



By
Kathleen
Kriel

Recent articles and research

Abbreviation	Title	Publisher	Volume/issue
<i>CILSA</i>	Comparative and International Law Journal of Southern Africa	Juta	(2020) 53.1 (2020) 53.2
<i>DJ</i>	De Jure	University of Pretoria	(2021) 54 (2022) 55
<i>EL</i>	Employment Law Journal	LexisNexis	(2022) 38.1 (2022) 38.2

African constitutional law

Simbo, C 'The scope and content of section 75(1)(a) of the Zimbabwean Constitution: An international law approach' (2020) 53.2 *CILSA* 170.

Amnesty law

Kisla, A 'Namibia and blanket amnesties: Challenging the Namibian blanket amnesties on the basis of international law in the Namibian Courts' (2020) 53.2 *CILSA* 3.

Breach of contract

Seanego, KA 'A gain-based remedy for breach of contract in English law: Some lessons for South African law' (2020) 53.2 *CILSA* 101.

Children's rights - Namibia

Witting, SK and Angula, MP 'Leveraging international law to strengthen the national legal framework on child sexual abuse material in Namibia' (2020) 53.1 *CILSA* 4.

Comparative law

Somaru, N and Rautenbach, C 'The Indian approach to criminal justice: The role of traditional courts as alternative dispute resolution mechanisms' (2020) 53.2 *CILSA* 130.

COVID-19 - labour law

Khumalo, B 'Comply with workplace COVID-19 protocols or face dismissal: A stark reminder from *Eskort Limited v Sturman Mogotsi and Others* (JR1644/20) [2021] ZALCJHB 53 (28 March 2021)' (2021) 54 *DJ* 579.

Double taxation agreements

Jansen van Rensburg, E 'The interaction

between section 233 of the South African Constitution and the commentaries to the OECD Model Tax Convention on Income and on Capital' (2020) 53.1 *CILSA* 32.

Human rights

Mubangizi, JC 'National Human Rights Institutions and Sustainable Development with specific reference to selected African examples' (2020) 53.1 *CILSA* 90.

International Court of Justice

Barrie, GN 'Journal note: Third-party State intervention in disputes before the International Court of Justice: A reassessment of Articles 62 and 63 of the ICJ Statute' (2020) 53.1 *CILSA* 152.

International employment law

Mujuzi, JD 'The Seychelles Employment Tribunal: The drafting history of the Employment (Amendment) Act of 2008 and its relevancy to understanding the work of the Tribunal' (2022) 55 *DJ* 28.

International healthcare rights

Imam, I and Egbewole, W 'Comparative exposition of judicial interventionism in the enforcement of the healthcare right in Nigeria and India' (2020) 53.1 *CILSA* 116.

International human rights law

Dube, A 'Disparaging language (*ex curia*) as a barrier in individual complaints before the European Court of Human Rights

(*Zhdanov v Russia*) - lessons for the African System?' (2020) 53.2 *CILSA* 83.

Labour law

Grogan, J 'War zone - collateral damage of union rivalry' (2022) 38.1 *EL*.

Grogan, J 'Desertion, abscondment or just AWOL? How to deal with absent workers' (2022) 38.2 *EL*.

Grogan, J 'Reinstatement or compensation? The scope of section 193(2)(b)' (2022) 38.2 *EL*.

Grogan, J 'Secondary strikes - How reasonable must they be?' (2022) 38.1 *EL*.

Private international law

Kurasha, PER 'South Africa's jurisdictional challenge with the under-development of cross-border commercial litigation: Litigation v Arbitration' (2022) 55 *DJ* 1.

Right to the free exercise of religion

Clark, B 'Legally pluralist and rights-based approaches to South African and English Muslim personal law - a comparative analysis' (2020) 53.2 *CILSA* 40.

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Phoko, MR 'A call for public participation in the treaty-making process in South Africa: What can South Africa learn from the Kingdom of Thailand?' (2020) 53.1 *CILSA* 68.

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

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- Minimum BCOM LLB/ BA LLB Degree/ Post graduate Labour Law

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- Driven, Energetic, young and Agile/ Ability to work under pressure and meet deadlines
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- Review legal agreements to ensure that the statutory compliance requirements are met and risks have been mitigated.

- Articles obtained from a reputable firm.

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KEY REQUIREMENTS

- Demonstrate a good understanding of company and trust law and tax.
- Have demonstrable experience as commercial lawyer with a proven track record in a similar environment;
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- Minimum B.Com LLB and BA LLB Degree
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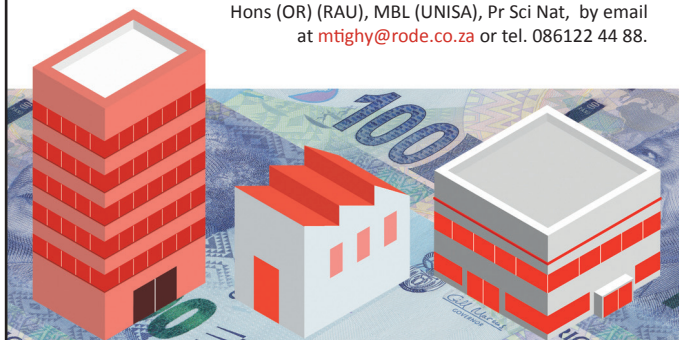
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