LAW SOCIETY OF SOUTH AFRICA

DE REBUS

THE SA ATTORNEYS' JOURNAL

AUGUST 2022

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Regular columns

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The advancement of female legal practitioners

The year is 2022, are we any closer to attaining the goal of ensuring that female legal practitioners receive the same opportunities as their male colleagues? The January 2022 statistics of the legal practitioners' profession show that female legal practitioners make up 43% of the legal practitioners's profession. Although the percentage of female legal practitioners has increased compared to pre-1994 numbers, female legal practitioners still do not have the same access to opportunities as their male counterparts.

Letty Cottin Pogrebin noted that 'when men are oppressed, it's a tragedy. When women are oppressed, it's tradition'. One way to ensure that this 'tradition' is curbed is to deal with the misconceived stereotype that suggests that female legal practitioners are less capable of doing their job. When the opportunity arises, more female legal practitioners are availing themselves for positions of influence in the profession. It is these instances that will correct the false notion that female legal practitioners cannot do their job as well as their male counterparts. What female legal practitioners need to guard against is the 'imposter syndrome', where they do not avail themselves for positions of influence because they believe they are not good enough to be in the profession.

A 2019 survey conducted by the International Bar Association (IBA) showed that South Africa has the worst rates of bullying and harassment within the industry. The IBA survey revealed that approximately 75% of the female respondents have been bullied in the workplace. In the survey, 43% of the female legal practitioners stated that they have experienced sexual harassment in the workplace (see 'Us Too? Bullying and Sexual Harassment in the Legal Profession' (www.ibanet.org, accessed 25-7-2022)). These are some reasons why female legal practitioners do not feel welcomed in the profession and therefore do not want to stay in the profession.

According to Dr Tamlynne Meyer's PhD thesis, women lawyers, particularly black women, are still underrepresented in the legal profession and struggle to advance to senior positions (Dr Tamlynne Meyer 'Reaching for partnership: An intersectional study of occupational closure among women attorneys in South Africa' (PhD thesis, Stellenbosch University, 2021). Dr Meyer examined how and why marginalisation of female legal practitioners, particularly black female legal practitioners, persists despite the elimination of formal barriers and the adoption of laws and policies aimed at transforming the industry. In this sense, she posed two crucial questions: How far has the industry been feminised, and what barriers do women face in advancing their careers?

Dr Meyer gathered the quantitative data for her dissertation study using statistics from the Law Society of South Africa's LEAD database in order to perform a descriptive and forecasting analysis using the factors of gender and race. She spoke with female legal practitioners to better understand the complexities of the issues that eventually obstruct their career prospects and how they come to feel alone and marginalised in the workplace.

The existence of women in the field, according to Dr Meyer, does not transfer into their having a voice to actively promote any significant change. This is due to a culture that silences women's voices in the field as well as the fact that they do not hold positions of responsibility that would allow them to have a contributing voice. Dr Meyer argues that real change in the legal profession must go beyond merely adhering to regulations and numerical goals. Dr Meyer contends that a revolutionary and inclusive agenda for women in the legal profession requires more creativity than the adoption of rules, regulations, and quantitative goals.

Mapula Oliphant – Editor

Dr Meyer states: 'To facilitate any meaningful change in the profession, we need to understand and interrogate how these are produced, maintained and reproduced. We will have to engage with subjective experiences of female lawyers, gender, racial and class regimes, how they interact with professional cultures and practices, and the societal perceptions and expectations placed on different groups. We also need to engage innovatively and address the perceptions and attitudes of legal practitioners, management, clients and women themselves, as they are central in fostering the transformation project of the profession.'

Strides have been made to ensure that female legal practitioners are represented in the profession and advance in the profession, however, more progress is needed. This will entail having a complete culture change in the profession that targets misconceptions that negatively impact on the advancement of women in the profession.

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.

Decorum of legal practitioners

I refer to a recent press report of the fact that the Legal Practice Council (LPC) cleared advocate Dali Mpofu SC of misconduct for the 'shut up' incident, which occurred at a hearing before the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State before then Deputy Chief Justice (now Chief Justice) Raymond Zondo.

The report follows hot on the heels of a letter sent to all legal practitioners reminding all of the necessity of legal practitioners to act with professionalism and decorum in our courts as failure to do so is a contravention 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.

I was somewhat alarmed when reading the press report to the effect that Mr Mpofu SC was cleared of misconduct. The incident was screened on national television and coincidentally I was watching it at the time and although Justice Zondo appropriately rebuked Counsel, I found that in so doing he acted with restraint.

The press report following the letter to legal practitioners from the LPC referred to above seemed to indicate that the dissemination of the letter arose out of the conduct of advocates appearing in the controversial high-profile case in relation to the Senzo Meyiwa murder. Whether or not this is correct, is a matter of speculation in which I refrain from engaging.

Having regard to the large amount of publicity surrounding the incident of Mr Mpofu SC, irrespective of whether he was provoked or not, as well as those involving Counsel on the Meyiwa murder trial, is, in my view, appropriate and necessary to remind legal practitioners of the importance of acting professionally and with decorum and respect not only towards judges, magistrates, judicial officers and presiding officers in any court or tribunal, but towards one's colleagues and members of the public at all times.

Furthermore, when in an adversarial environment, correspondence must also be exchanged with the same degree of courtesy and respect. I have had occasion to have received correspondence from colleagues which contain the sentence 'Your letter under reply is noted and viewed with the contempt it deserves'. I find such letters unnecessary and unworthy of our profession.

I have no difficulty with litigation being conducted aggressively, fearlessly, and uncompromisingly. However, at no stage should a legal practitioner or a colleague or member of the judiciary, magistracy, or a presiding officer be treated with discourtesy and lack of respect.

Leslie Kobrin *Dip Iur (Wits) Dip Bus Man (Damelin)* is a consultant legal practitioner at Bove Attorneys Inc in Johannesburg.

An explanation of the insurance cover available to legal practitioners

I read the article by Mr Sipho Nkosi, 'Do you have adequate cover for your law firm?', which I have noted is no longer available on the *De Rebus* website. However, some readers may have had sight of the article before it was withdrawn, and it is against that background that I have drafted this letter. Some of the contents of Mr Nkosi's article warrant a reply.

Losses arising from theft

Fidelity insurance cover (sometimes called a fidelity guarantee policy) indemnifies a legal practice for losses arising from theft of the firm's own funds (namely, funds in the firm's business account). Fidelity insurance cover has nothing to do with the Legal Practitioners' Fidelity Fund (Fidelity Fund) or with losses arising from the theft of trust

money or property. Losses arising from the theft of trust funds are indemnified by a misappropriation of trust money policy, which is a separate and distinct policy from a fidelity guarantee policy.

The Fidelity Fund is a statutory client-protection fund, which subject to the provisions of the Legal Practice Act 28 of 2014 (the LPA), indemnifies a person who has suffered a loss arising out of the theft of money or property entrusted to the legal practice. The Fidelity Fund has nothing to do with the risks indemnified under a fidelity guarantee policy and the fact that the word 'fidelity' appears in the name of that entity and the separate and distinct insurance policy must not be construed to mean that there is a link between the two. There is no link. The Fidelity Fund does not indemnify legal practitioners for any losses and practitioners thus cannot regard the indemnity provided by that institution to members of the public as part of the insurance cover afforded to their respective practices.

When advising a party who has suffered a loss arising from the theft of funds entrusted to a legal practitioner, regard must be had to ss 55, 56, 57 and 79 of the LPA. The Fidelity Fund's exclusions and limitations of liability are thus wider than stated in the article under reply.

Other policies that legal practitioners can consider purchasing to indemnify their practices for losses arising from theft or other criminal acts are, for example, commercial crime policies and policies that indemnify practices for criminal or civil liability arising from employee dishonesty. The wording of the respective policies must be studied carefully for the practitioners to understand what events are insured (and the extent of cover) under each policy. You must look beyond the name of the policy and consider what risks are covered by the insuring clause.

I note that Mr Nkosi has referred to s 19(3) of the Companies Act 71 of 2008 in respect of the joint and several liability of directors and shareholders with the juristic entity. Incorporated practices must have regard to s 34(7) of the LPA in this regard which prescribes that:

'(7) A commercial juristic entity may be established to conduct a legal practice provided that, in terms of its founding documents –

…

(*c*) all present and past shareholders, partners or members, as the case may be, are liable jointly and severally together with the commercial juristic entity for –

(i) the debts and liabilities of the commercial juristic entity as are or were contracted during their period of office; and

(ii) in respect of any theft committed during their period of office.'

It is trite that legal practitioners who do not practice in commercial juristic entities (incorporated entities in terms of s 8(*c*) of the Companies Act) will be personally liable (jointly and severally liable in the case of a partnership) for the debts of the practice and for any theft committed during their period in office.

Professional Indemnity (PI) cover

The decision in *Attorneys Fidelity Fund Board of Control v Mettle Property Finance (Pty) Ltd* 2012 (3) SA 611 (SCA) referred to in Mr Nkosi's discussion of PI cover relates to a claim against the Fidelity Fund (then known as the Attorneys Fidelity Fund) arising out of the theft of money purportedly entrusted to an attorney. That case did not deal with a PI claim. The Legal Practitioners' Indemnity Insurance Fund NPC (the LPIIF) was not a party to those proceedings and the sentence quoted in the article was not a reference to a limitations of the indemnity provided by the LPIIF to insured legal practitioners in terms of its Master Policy but, rather, a reference to the limitations of the statutory indemnity provided by the Fidelity Fund to members of the public for losses arising from the theft of monies or property entrusted to attorneys. The *dictum* in the *Mettle* case can thus not be extended to the LPIIF. The statements by Mr Nkosi on the LPIIF policy in reference to the *Mettle* case are thus, with respect, incorrect.

The LPIIF only indemnifies legal practitioners who are actually in possession of an Fidelity Fund Certificate (FFC) on the date that the cause of action arose. The legal practitioner(s) concerned must have a FFC at the time of the circumstance, act, error or omission giving rise to the claim in order to fall within the definition of insureds in terms of the LPIIF policy (clauses XVI and 5 of the LPIIF policy). The requirement to possess the FFC is thus peremptory. The LPIIF will not provide insurance cover to a practitioner who, though obliged to possess an FFC, has not in fact been issued with one. The statement that the 'LPIIF's primary purpose is to provide all legal practitioners who are obliged to be in possession of a Fidelity Fund Certificate (FFC) with a primary level of professional indemnity' is thus, with respect, also not correct. A practitioner who is obliged to practice with an FFC but practices without such a certificate is thus not covered by the LPIIF.

The LPIIF does not issue insurance certificates to legal practitioners as alleged in the article. The LPIIF's position in this regard is stated on its website (https://lpiif.co.za/) and on page 8 of the May 2022 edition of the Risk Alert Bulletin (www.derebus.org.za).

It is, with respect, also not correct that legal practitioners applying for FFCs are now required to make a contribution to the LPIIF insurance premium. Since inception of the company in 1993, the LPIIF's premium has been exclusively paid by the Fidelity Fund. The Fidelity Fund has not exercised its rights in terms of s 74(1)(*a*) of the LPA and r 51 to seek a contribution from legal practitioners for the insurance premium paid to the LPIIF.

The PI model for trust account practitioners in South Africa (SA) is that the LPIIF provides the primary layer of insurance to such practitioners in terms of one Master Policy issued annually. The LPIIF does not issue individual policies to the insured practices. Insured practitioners may then, applying their own discretion and according to the individual requirements of each practice, purchase addition PI cover in the commercial market. This is commonly referred to as 'top-up insurance cover'. There is no 'qualifying insurance' model in SA and what is stated in the article in this regard is thus, with respect, incorrect.

Cyber liability cover

Liability arising from cybercrime is excluded from the LPIIF policy (clauses IX, 16(c) and 16(o)). Where the firm has purchased cyber risk cover in the commercial market, the policy wording must be carefully studied in order to understand the risks indemnified by such policies. Some policies, for example, exclude losses where there has been a hacking of the firm's information technology system, others prescribe the minimum internal risk measures that must be implemented in the firm while others insist on a verification system before payments are made in order to mitigate the risk of business e-mail compromise losses. Rule 54.13 also obliges the firm to verify the bank account details provided to it, and any subsequent change to the banking details, before making any payment.

Conclusion

It is hoped that what is stated above addresses any misconceptions (or confusion) that may have arisen from the article under reply.

When purchasing insurance cover in the commercial market for your practice, it is advisable to use a broker or intermediary who has knowledge and experience of the insurance model in place for legal practitioners in SA, understands the risks flowing from legal practice and who can advise you correctly.

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

By Lizette Burger

Happenings at the Property Law Committee meeting

The Law Society of South Africa's (LSSA) Property Law Committee (the Committee) met on 7 June 2022 to consider an array of issues pertaining to its field of expertise. Some of the key issues considered were:

• Development regarding the Electronic Deeds Registration System

The Electronic Deeds Registration Systems Act 19 of 2019 provides for the development, establishment and maintenance of an electronic deeds registration system (eDRS) to replace the current paper-based registration system. Only s 2 of the Act is currently operational. In terms of the Act, the Chief Registrar of Deeds (CRD) is charged with establishing, developing and maintaining the system. Extensive discussions have taken place between representatives of the Committee and the Banking Association of South Africa (BASA), service providers in the electronic conveyancing field, LAWTrust and others, with a view of determining a practical approach to the development of an eDRS, and to provide meaningful and concise input into the process being followed by the CRD. Ongoing collaboration is taking place to ensure the development of advanced electronic signatures, and the management of proper data systems to facilitate the secure and practical employment of such signatures. Electronic presentations were prepared for discussion with all role players and the CRD.

The Committee was further represented at three sittings of NEDLAC's Task Team on the Deeds Registries Amendment Bill, and took the opportunity to express the profession's views on various aspects of the proposed amendments. This included, amongst others, a proposal for the extension of the Deeds Registries Regulations Board, the formal recording of land tenure rights in the Deeds Office, and the imposition of criminal sanctions in the event that a preparation clause is signed by someone who is not an admitted conveyancer.

Further developments in all of the above are closely monitored.

• Property Practitioners Act and Regulations

The Property Practitioners Act 22 of 2019 and Regulations, which replace the Estate Agency Affairs Act 112 of 1976, came into operation on 1 February 2022.

Practitioners are urged to apprise themselves of the provisions of the Act. Some of the provisions are of concern to the Committee and the Committee is considering making submissions for an amendment of the Act. Practitioners are welcome to submit their comments on the Act to the LSSA, for possible inclusion in the submission.

Section 56(5) is of particular concern and places conveyancers in a difficult position. Sections 47 and 48 of the Act compels property practitioners to hold a valid Fidelity Fund Certificate (FFC), failing whereof they may not be entitled to their remuneration. Section 56(5) prohibits conveyancers from paying remuneration to property practitioners who have not provided them with a certified copy of their FFCs, valid on the date of the transaction and the date of payment.

The Committee noted that property practitioners have six months from date of implementation of the Act in which to register with the Property Practitioners Regulatory Authority (PPRA) for a valid FFC. The Committee also noted that there appears to be a delay at the PPRA with the issuing of FFCs and resolved to request a meeting with the PPRA to consider a way forward, which may include a joint approach to the authorities for a moratorium.

• Service level agreements of banks

The service level agreements between banks and conveyancers have been of concern for quite a while, particularly the requirement that legal practitioners must invest substantial amounts with particular banks to remain on the banks' panel and the manner in which they set up their conveyancing panels. The LSSA brought these issues to the attention of the Competition Commission some time ago. The Competition Commission then embarked on a process of engagement with key stakeholders, including the banks and the LSSA.

The Committee noted that the Competition Commission has issued a document entitled 'Practice note on the promotion of competition and inclusion in supplier panels in banks and insurers'. Although some of the concerns have been addressed in this document, there are still outstanding issues, notably the banks' briefing patterns. The Committee resolved to seek an audience with BASA to discuss this.

• Conveyancing fees guidelines

The new conveyancing fees guidelines, effective from 16 May 2022, are available on the LSSA's website at www.lssa.org.za.

• South African Revenue Service

The Committee, together with the LSSA's Tax and Exchange Control Committee and Deceased Estates, Trusts, Planning and Insolvency Committee, met with the South African Revenue Service (Sars) in February 2020 to discuss several issues. These included problems associated with transfer duty assessments/exemptions, such as the Sars turnaround time, the inordinate delay to contact call centres; and the inability of call centre agents to render any meaningful assistance to transfer duty queries.

The Committee noted that their experiences are much the same, with the same frustrations, such as waiting for supporting documents to be investigated and receipts to be released for matters queried. It was also noted the strike had a negative impact on Sars's service delivery.

A further meeting will be set up with Sars.

The LSSA regularly receives communiques from Sars, which we bring to the attention of practitioners via our social media platforms and newsletters. Practitioners are urged to follow us on:

- **Facebook:** Law Society of South Africa
- **Twitter:** LawSociety_SA
- **LinkedIn:** Law Society of South Africa
- **Instagram:** thelawsocietyofsouthafrica

• Sectional Titles Regulation Board meeting

The Sectional Titles Regulation Board meeting will be held on 8 September 2022.

• Deeds Registries Regulation Board Meeting

The next Deeds Registries Regulation Board meeting will be held on 25 August 2022, and two representatives of the LSSA will attend on behalf of the Committee.

• Chief Registrar's Conference 2022

The 2022 Chief Registrar's Conference will be held in October 2022 on a date still to be determined, probably in Mpumalanga. The closing date for items for discussion is fast approaching (normally before the end of July each year), and such items should be raised by the various conveyancing committees at the seats of the various Deeds Offices through their local Registrars and/or practice committees. Items should be in the format of a question, with a proposed resolution, as well as a short motivation for the resolution.

Lizette Burger is the Professional Affairs Senior Manager at the Law Society of South Africa.

No funds does not mean no risk

By
Thomas
Harban

There are many instances in legal practice where legal practitioners are not timeously placed in funds to pursue the matters in which they are instructed to finality. The clients concerned may have made undertakings to place the legal practitioner in funds but may not have complied with such undertakings. The legal practitioner is put in the difficult position where they either must, for example, apply for a postponement of a pending trial or appeal as they are unable to proceed with the matter due to the lack of funds, which is commonly articulated as 'a lack of instructions'. In some instances, the legal practitioner may have to consider withdrawing from the matter for the same reason. The point made in this article is that an election must be made by the legal practitioner as early as possible, failing which they will have to face the risks that flow from remaining on record and running the matter until the date of the hearing while knowing that they have not been placed in funds. When placed in that invidious position, a legal practitioner should consider their professional duties and the likely risks. Whatever your ultimate decision is in the circumstances, report to the client and your opponent timeously and file the appropriate notice to withdraw with the court. If the decision is to apply for a postponement of the matter, that should also be communicated as soon as possible.

The professional duties of legal practitioners

It is trite that legal practitioners owe professional duties to their clients, the courts and to third parties (see *Sayed NO v Road Accident Fund* 2021 (3) SA 538 (GP) at para 9).

The Code of Conduct for all Legal Practitioners, Candidate Legal Practitioners and Juristic Entities (the Code) published in terms of s 97(1)(*b*) of the Legal Practice Act 28 of 2014 (the Act) provides that:

'3. Legal practitioners, candidate legal practitioners and juristic entities [established to conduct a legal practice as an attorney, as contemplated in s 34(7) of the Act and a limited liability legal practice as contemplated in s 34(9) of the Act] shall –

3.1 maintain the highest standards of honesty and integrity;

…

3.3 treat the interests of their clients as paramount, provided that their conduct shall be subject always to –

3.3.1 their duty to the court;

3.3.2 the interests of justice;

3.3.3 observance of the law; and

3.3.4 the maintenance of the ethical standards prescribed by this code, and any ethical standards generally recognised by the profession;

…

3.11 use their best efforts to carry out work in a competent and timely manner and not take on work which they do not reasonably believe they will be able to carry out in that manner;

3.12 be entitled to a reasonable fee for their work, provided that no legal practitioner shall fail or refuse to carry out, or continue, a mandate on the ground of non-payment of fees and disbursements (or the provision or advance cover thereof) if demand for such payment or provision is made at an unreasonable time or in an unreasonable manner, having regard to the particular circumstances;

….

Part III

Conduct of Attorneys

….

20.3 If, after an attorney has accepted an instruction to appear in court on behalf of a client, any circumstances arise that imperil the proper discharge of his or her duties of diligence, he or she shall, once such eventuality is apparent, especially in relating to trials, report such circumstances to the client to facilitate timeous steps to inhibit prejudice to the client and facilitate a successor to be instructed in time to take over the instructions.'

Late applications for postponements or withdrawals

There are several cases chronicling the consequences of a failure to timeously make an election to withdraw from a matter or to apply for a postponement due to a lack of funds.

In *Ngcobo v Union & South West African Insurance Co Ltd* 1964 (1) SA 42 (D) the plaintiff had failed to place her attorneys in funds. The attorneys had intended to apply for leave to withdraw but the plaintiff had not been notified. The plaintiff's attorneys had notified the defendant's attorneys the day before the trial of their intention to withdraw as the attorneys of record. A postponement was applied for as the plaintiff had not been notified of the trial date. The attorneys had not, at any time, been in direct communication with the plaintiff, but communicated with her through her agents who were a firm of third-party insurance consultants (p 43). The agents indicated to the court that they had spoken to the plaintiff – almost two months before the trial date – and notified her that the attorneys would withdraw if they were not placed in funds before the date of the trial. Even on the assumption that the plaintiff was not aware of the trial date, her ignorance, in the court's judgment, was 'largely due to the lack of interest which she herself displayed in the proceedings' (p 44A). The court noted (p 44C) that the plaintiff's attorneys had ample time to withdraw in accordance with the procedure set out in the rules but did not do so. They had informed the defendant's attorneys on the date before the trial of their intention to withdraw as attorneys of record. However, the attorneys did not persist with the application to withdraw as notice had not been given to the plaintiff herself (p 44E). The court directed that a copy of the judgment be sent to the Secretary of the then Natal Law Society (p 44H).

The matter of *S v Ndima* 1977 (3) SA 1095 (N) concerned an appeal from the magistrate's court. The appellant was not represented on the date of the appeal. On the date of the hearing, counsel appearing for the state contacted the appellant's attorneys of record telephonically. A clerk in the attorney's office gleaned from the file that counsel had not been briefed for the appeal and that the attorneys were not doing anything about it as they had not been placed in funds. This was conveyed to counsel ap-

pearing for the state during the phone call. The attorneys had not, however, withdrawn from the case, or informed the appellant that his appeal would not proceed on the date. It was not clear whether the appellant was aware that his appeal was due to be heard on that day or that no counsel was in court to represent him. Didcott J (then sitting in the Natal Provincial Division) explained the impact on the workload of judges and the then Attorney-General's staff (now the National Prosecuting Authority) if they were not informed timeously that an appeal would not be proceeding. The court also pointed out that it was not only inconvenient, but also highly discourteous to the court and the team appearing for the state, to read records where the case would not be proceeding (p 1096F-G). The court stated that:

'It is quite plain that an attorney must, if he is going to withdraw from a case, withdraw from it timeously and inform his client that he is withdrawing so that the client can make other arrangements or, if there are none which he can make and if he wishes to do so, so that he may appear in person to argue his appeal. If an attorney wishes to carry on hoping that at the last minute he will be given funds and does not wish to withdraw at an earlier stage of the case because he will jeopardise his chance of being paid, then he must be willing to take the risk that he will find himself financing the appeal and go on with it' (p 1097).

In *Kara NO and Others v Department of Land Affairs* 2005 (6) SA 563 (LCC) the claimants' legal representatives sought a postponement due to their non-preparedness for the resumption of the trial and difficulties in funding their legal costs (para 4). The court detailed how postponements not sought timeously affected its operations. Citing the *Ngcobo* and *Ndima* judgments, respectively, the court stated at para 6 that a 'lack of funding is not a sufficient reason for a last-minute postponement application. A practitioner who has insufficient funding must withdraw or apply for a postponement *in good time*. If he does not, he must continue representing his clients at his own risk' (emphasis in the original). Meer J also sounded a warning to practitioners litigating in the Land Claims Court that they 'would do well to take cognisance hereof and to apply well in advance for postponements' (para 7). That warning, in my view, should be heeded by practitioners litigating in all courts.

Suggested measures to mitigate this risk

Explain to the client as early as when you accept the instruction that you may need to either withdraw or apply for a postponement if you are not placed in funds. Document this in file notes and in correspondence sent to client to confirm this. A prominent note in this regard in your letter of engagement will also go a long way to protect your interests and those of the client.

Where the client may face a possible order to pay costs, this must also be explained to the client and documented. Though s 35 of the Act has not come into effect yet, legal practitioners will be well advised to have regard to the provisions of that section, which prescribe what must be explained to the client in respect of the estimate of costs.

Trial dates and dates for the hearing of appeals are allocated months in advance and communication in this regard is sent to the parties. You thus have sufficient time to discuss the funding issues with your client well before the date of the hearing.

If the client has made undertakings to place you in funds by a specified date, also record that and communicate with your client when that date arrives if your client has not complied with the undertakings.

Do not compromise your professional duties to your client, the other parties, the court, and the administration of justice. Remember to comply with your obligations in terms of paras 3.12 and 20.3 of the Code in particular.

If you decide to withdraw from the matter, give timeous notice to your client, the other parties, and the court. If there are any further steps that must be taken to pursue the matter or a court date looming, record this in the correspondence that you send to the client. Explain to the client that your withdrawal from the matter is not to be construed as a termination of the underlying litigation.

The fact that you have not been placed in funds does not extinguish your potential liability to the client while you still act for that client. Ensure that you have taken steps to mitigate the potential risks.

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Removing the sword of Damocles: Do claims for damages from competition law infringements prescribe?

By Quentin du Plessis and Layne Quilliam

In 2013, 15 construction companies settled allegations of collusive tendering with the Competition Commission (the Commission) in terms of the Commission's Construction Fast Track Settlement process. These firms admitted to rigging numerous bids, including bids for public infrastructure and World Cup stadia, to give the illusion of a competitive tender process to the client (Corruption Watch 'Construction firms settle collusive tendering cases with R 1.5 billion in penalties' (https://corruptionwatch.org.za,

accessed 2-7-2022)). Almost a decade later, can these clients still claim damages from these firms for not submitting competitive bids, or have their claims prescribed?

This question is analysed below by describing the relevant provisions of the Competition Act 89 of 1998 and Prescription Act 68 of 1969 together with relevant case law. This legal framework is then applied to claims for damages resulting from contraventions of the Competition Act to determine whether such claims are susceptible to prescription in terms of the Prescription Act.

Relevant legal provisions

• Competition Act

Section 65 of the Competition Act provides that a person who has suffered loss because of a prohibited practice, such as collusive tendering or price fixing (prohibited practice) may claim damages from the firm that engaged in the prohibited practice (infringing firm). The person's right to claim damages only arises when the Competition Tribunal or Competition Appeal Court (the competition authorities) finds that the infringing firm contravened the Competition Act by engaging in a prohibited practice. Following this declaration, the person harmed by the prohibited practice may only institute proceedings with a certificate from the competition authorities confirming the infringing firm's conduct as a contravention of the Competition Act.

The person claiming damages may also claim interest on those damages. Section 65(10) indicates that 'interest on a debt in relation to a claim for damages in terms of this Act' commences from when the above certificate is issued.

• Prescription Act

Section 11 of the Prescription Act sets out the periods of extinctive prescription for certain debts. Section 11(*d*) provides a catch-all provision, according to which any debt, not specifically mentioned in the section, prescribes after three years. Section 12 regulates when prescription commences. Section 12(1) indicates that prescription will commence as soon as the debt is due. In *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC) the Constitutional Court confirmed that 'debt' in this context means something 'owed or due: something (as money, goods or service) which one person is under an obligation to pay or render to another' (at para 85). Such a debt becomes due when a creditor is aware of the minimum facts that are necessary to institute the claim (*Minister of Finance and Others v Gore NO* 2007 (1) SA 111 (SCA) at para 17). In other words, when everything has happened which entitles the creditor to institute the claim (*Truter and Another v Deysel* 2006 (4) SA 168 (SCA) at para 16). Based on this understanding, a debt is not yet due where there is a legal impediment preventing the creditor from instituting the claim. However, the courts have held that a creditor cannot postpone the commencement of prescription by its own action or inaction when faced with a surmountable obstacle to its claim (see *Frieslaar NO and Others v Ackerman and Another* (SCA) (unreported case no 1242/2016, 2-2-2018) (Petse JA (Seriti and Mocumie JJA and Mokgohloa AJA concurring)) at para 41).

Section 12(3) provides further that 'a debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises'. However, a creditor is deemed to have such knowledge of the debtor and the debt if they could have acquired such knowledge through reasonable care.

Can competition law damages prescribe?

A claim for damages resulting from a prohibited practice is a claim for money that the infringing firm owes the person who suffered loss from the prohibited practice. In *Nationwide Airlines (Pty) Ltd (in liquidation) v South African Airways (Pty) Ltd* 2016 (6) SA 19 (GJ) such a claim was classified as delictual (at para 1). It follows that a claim for damages resulting from a prohibited practice is a 'debt' as contemplated by the Prescription Act. Section 65(10) of the Competition Act supports this finding, as it expressly refers to such a claim for damages as a 'debt' in relation to interest on that debt.

This debt becomes due when the competition authorities find that the infringing firm has contravened the Competition Act. The decision of the competition authorities will identify the infringing firm and describe its conduct as a prohibited practice. In terms of s 12(3) of the Prescription Act, the creditor could be deemed to have knowledge of this information as the competition authorities publish their decisions containing this information, which can be accessed online by exercising reasonable care. This information, together with the knowledge of the damage suffered, should be sufficient information to institute a claim for damages.

The requirement of a certificate in s 65 of the Competition Act does not preclude prescription from commencing. Section 65's requirement for a certificate does bar the claim for damages until the competition authorities certify that the conduct constituting the basis for the proposed action has been found to be a prohibited practice. However, this legal impediment is not outside of the creditor's control. The creditor is at liberty to request such a certificate at any time after the competition authorities' decision. In this way, prescription would run from the competition authorities' decision and an apathetic creditor cannot prevent the commencement of prescription by its own inaction.

Based on the above, the Prescription Act does apply to claims for damages contemplated by s 65 of the Competition Act. Pursuant to s 11 of the Prescription Act, s 65 claims for damages are susceptible to prescription three years after they fall due. It follows that claims for damages against the construction firms that settled in 2013 have prescribed in terms of the Prescription Act.

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Amendment versus substitution: *Applying s 270 of the Criminal Procedure Act in the interest of justice*

By Kowie Schutte and Dr Llewelyn Curlewis

The recent decision from the Limpopo Division High Court in Polokwane in *S v Modimolla* (LP) (unreported case no 02/2022 A290/2021, 18-2-2022) (Muller J) illustrates both the commitment of the magistracy to the administration of justice and the ability of the judiciary to self-correct when necessary. In a special review, Muller J (Makgoba JP concurring) considered whether the matter was conducted in accordance with justice. In this analysis we, however, suggest an alternative approach to that of the High Court.

The accused, who enjoyed legal representation, tendered a guilty plea to a charge of contravening s 39(1)(*k*) of the Arms and Ammunition Act 75 of 1969 (the Act) of an offence that was committed on 2 May 2021. The issue is that the Act had been repealed and replaced by the Firearm Controls Act 60 of 2000 (the FCA) with effect from 1 July 2004, some 16 years earlier (see s 153 of the FCA). The magistrate, however, convicted the accused of contravening the provisions of s 39(1)(*k*) of the Act. Before the passing of sentence, the charge sheet was replaced by agreement between the parties with one citing a contravention of s 120(8)(*b*) of the FCA. The accused was then again convicted, but now of the latter offence.

Section 39(1)(*k*) of the Act and s 120(8) of the FCA both criminalise the loss of a firearm, or the loss through theft, due to a failure to properly lock it away in a prescribed safe, alternatively due to a failure to take reasonable steps to prevent such a loss. The synergy and similarities between the two pieces of legislation is evident and was accepted by the court, *in casu* (at para 10). The FCA, in fact, also acknowledges this synergy, as it regulates the transition from the Act in sch 1. It provides that despite the Act having been repealed, any person who, before such repeal, committed an act or omission, which constituted an offence under the Act, and which constitutes an offence under the FCA, may after the FCA takes effect be prosecuted under the FCA.

Section 86 of the Criminal Procedure Act 51 of 1977 (the CPA)

Section 86 of the CPA provides for the amendment of a defective charge if it appears that the averments are not aligned with the evidence, that words are omitted or included, which should have been included or excluded, or where there is any error in the charge. The court is empowered to amend at any time prior to judgment, if there is 'no prejudice' to an accused. In *S v Kruger en Andere* 1989 (1) SA 785 (A) the court defined an 'amendment' as the retention of a measure of that which is amended. A distinction should also be made between ss 86 and 88, both sections aiming to achieve more or less


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the same results, but with totally different application and requirements in law. This article exclusively deals with the first mentioned.

Section 270 of the CPA provides that whenever the evidence presented at a criminal trial fails to prove the elements of the offence so preferred but proves the commission of an offence which by the nature of the latter's essential elements is incorporated in the original offence so charged, a conviction may follow for the offence so incorporated. The only qualification is that the original offence may not be an offence referred to in Chapter 26 of the CPA.

The difference between an amendment and a substitution is not easy to define (see *Kruger*). There is a wealth of cases supporting this notion.

In *S v Mahlangu* 1997 (1) SACR 338 (T) Stafford J (Van der Walt DJP and Van der Merwe J concurring) considered a matter referred for special review in terms of s 304(4) of the CPA. The issue was the conviction on a charge of bribery. The accused was also represented by an attorney in that matter. The common law offence of bribery had already been repealed almost four years before the commissioning of the offence created by s 1(1)(*a*)(i) of Corruption Act 94 of 1992. With reference to two unreported judgments, *S v Shongwe* (TPD) (unreported case no A563/94, 5-4-1994) and *S v Tshabalala* (TPD) (unreported case no A500/93, 30-3-1993), wherein both held that an 'amendment' from the common law offence of bribery to the subsequent statutory offence, constitutes a substitution rather than an amendment, the court strongly disagreed. The court emphasised that each case should be judged on its own merits and found that the statutory offence of corruption is essentially the same as the common law offence of bribery. Therefore, the court ruled that an amendment would not constitute a substitution in that instance. The reviewing court is empowered to grant an amendment. The court then investigated the issue of prejudice and found none. The court also considered practical implications if such an order was to be refused. This would ordinarily entail a new trial, with possibly the exact same result. This, according to the court, would ultimately have been more prejudicial to the accused.

In *S v Motha* 2012 (1) SACR 451 (KZP) the accused was arraigned on the common law offence of rape instead of contravening s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the SOA). The court found that the averments in the charge sheet constituted the statutory offence. As such, the accused was not charged with a non-existent offence, and the charge sheet could have been amended. The court was clear that on the strength of s 68 of the SOA the crime of rape was not abolished, but merely that the common law related thereto, was. The new statutory offence expanded on the common law crime of rape. An act of sexual penetration was alleged, the only aspect missing was the reference to s 3 of the SOA. The court held that the amendment fell within the ambit of s 86 of the CPA. The Supreme Court of Appeal came to a similar conclusion in *S v Nedzamba* 2013 (2) SACR 333 (SCA) and held that the omission of s 3 of the SOA was not fatal. To hold otherwise would be to elevate form above substance, which would bring the administration of justice into disrepute.

Section 270 CPA

We have already referred to the implications of s 270 of the CPA above. In this regard, s 270 CPA operates as a catch all provision.

The court in *S v Amas* 1995 (2) SACR 735 (N) correctly held that a conviction on contempt of court was not competent on a charge of contravention of s 1(1) of the General Law Further Amendment Act 93 of 1962, on the strength of s 270 of the CPA, as the essential elements of the latter were absent in the charge sheet.

In *S v Van Ieperen* 2017 (1) SACR 226 (WCC) Binns-Ward J correctly found that a conviction in terms of s 270 CPA on a charge of *crimen iniuria* on the primary count of contravening s 5(1) of the SOA is untenable as the primary charge is an offence referred to in s 261 of the CPA.

In *S v Kok* 2015 (2) SACR 637 (WCC) Henney J confirmed the theft conviction where the accused was originally charged with fraud by employing s 270 CPA. Michael Millar holds a different opinion, justifiably so, as all the essential elements of theft are not included in the elements of fraud (M Miller 'Is theft a competent verdict on a charge of fraud?' 2014 (Oct) *DR* 59). The South Gauteng High Court in *S v MM Makhosazane* (GJ) (unreported special review Ref 103/16 D 332/15, 28-9-2016) considered a conviction of the supply of a scheduled substance in terms of s 3 of the Drugs and Drug Trafficking Act 140 of 1992 (the DTA) competent to a charge of dealing in drugs in terms of s 5(*b*) of the DTA. Ephedrine is listed in sch 1 as a scheduled substance and is neither a dangerous, nor an undesirable dependence producing substance. The subject matter of the charge is not a drug, and not listed in the same schedule of the Act. The essential elements of s 3 is, therefore, not included in the original charge. The conclusion on review cannot be reconciled with the decisions in *Amas* and *Van Ieperen.*

Discussion of *Modimolla*

The state informed the court that the accused was charged with 'negligent loss of a firearm' (para 4). The accused was at all material times aware of the allegations against him. It is common cause that the accused was erroneously convicted of contravening the repealed s 39(1)(*k*) of the Act. The second issue is that s 86 of the CPA permits a court to allow an amendment, but only prior to judgment. In this regard, the amendment after the first conviction was therefore irregular. The second 'conviction' must as a result suffer the same fate and had to be set aside.

The court concluded that after the

conviction the magistrate was *functus officio* (para 20). The judgment fails to consider the possible application of s 113 of the CPA empowering the magistrate, upon realising the issue at hand, to enter a plea of not guilty. It would then have opened the door for the state to apply for an amendment.

The reviewing court makes the statement that the accused was charged with a statutory offence, which no longer constitutes a crime. The offending act underlying the prosecution is, however, still an offence. Therefore, this is not a matter of *nullum crimen sine lege* (no crime without a law).

The court further argues that an amendment in terms of s 86 of the CPA would amount to a substitution. In support thereof, it relies on *S v Barketts Transport (Edms) Bpk en 'n Ander* 1988 (1) SA 157 (A). In the *Barketts* matter the state sought to amend a charge in terms of s 31(1)(*a*) of the Road Transportation Act 74 of 1977 (the RTA), the unlawful conveyance of goods, by substituting it with contravening s 31(1)(*b*) of the RTA (the transportation of goods contrary to the terms of a transportation permit). These are two distinct offences as highlighted in the *Mahlangu* matter. In the matter at hand, we are dealing with exactly the same offence, only couched in different superseding pieces of legislation. The amendment would not have constituted a substitution. This approach is supported by *Mahlangu, Motha* and *Nedzamba.*

Muller J further argues that s 35(3)(*l*) of the Constitution acknowledges the right to a fair trial, which includes the right not to be convicted for an act that was not an offence under national law at the time it was committed (para 20). However, the offending conduct was indeed a crime at the time when it was committed.

The court failed to consider the operation of s 270 of the CPA. Statutory negligent loss of a firearm is not listed in Chapter 26 of the CPA, and the essential averments for contravention on s 120(8) of the FCA is included in the charge sheet by the court's own observation (para 10). As a court on review has wide powers in terms of s 304 of the CPA, a different approach was available to the court. The following facts are crucial to the matter:

- The accused was represented.
- He tendered a plea of guilty to 'negligent loss of a firearm'.
- He consented to the 'amendment' and would not have conducted his defence any differently.
- He would suffer prejudice if the matter were referred for a trial *de novo* that would yield the same result.

Conclusion

Both s 86 and s 270 of the CPA provide safety nets, but only within the limited parameters of the enabling provisions. The 'amendment' in *Modimolla* falls squarely within the parameters of s 86 of the CPA. The accused would have suffered no prejudice had the court allowed the amendment and convicted him or, in the alternative, if the court convicted him of contravening s 120(8)(*b*) of the FCA in terms of s 270 of the CPA. In both scenarios, the court would have elevated substance above form in the best interests of the administration of justice.

The pragmatic approach adopted in *Mahlangu* is to be preferred above the formalistic approach in *Modimolla.* Whenever an opportunity presents itself to apply s 270 of the CPA, it should be taken in the interest of justice – an opportunity unfortunately missed in *Modimolla.*

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Dealing with the red tape of a dismissal or unfair labour practice dispute within local government

By Mpho Manyikana

Section 191(1)(*a*) of the Labour Relations Act 66 of 1995 (LRA) is very clear that in the event of a dispute about the fairness of a dismissal or about an unfair labour practice, the dismissed employee or the employee alleging the unfair labour practice may refer the dispute either to the Bargaining Council or to the Commission for Conciliation, Mediation and Arbitration (CCMA), whichever the case might be. The provisions of s 191(1)(*a*) require no further elaboration.

For purposes of the subject matter, s 191(1)(*b*) is more relevant and is the one that necessitated that I wrote this article. Section 191(1)(*b*)(i), in relation to dismissal disputes, provides that the referral of the dispute must be made within '30 days of the date of a dismissal or, if it is a later date, within 30 days of the employer making a final decision to dismiss or uphold the dismissal'. Section 191(1)(*b*)(ii) in relation to unfair labour practice disputes, provides that the referral of the dispute must be made within '90 days of the date of the act or omission which allegedly constitutes the unfair labour practice or, if it is a later date, within 90 days of the date on which the employee became aware of the act or occurrence' (of the unfair labour practice).

From the above-mentioned, it is crystal clear that legislation prescribes time frames within which dismissal and unfair labour practice disputes must be referred. The use of the word 'must' in s 191(1)(*b*) dictates that the time frames prescribed for the referral of the disputes are peremptory. Failure to refer these disputes within their respective prescribed time frames would render the referral to be out of time and therefore, a condonation application would have to be made as permitted in terms of s 191(2).

The Main Collective Agreement and Constitution of the SALGBC

The Main Collective Agreement concluded by parties to the South African Local Government Bargaining Council (the SALGBC), which at the date of writing this article, was applicable, contains in clause 13 thereof, a Grievance Procedure, which is deemed to be a condition of service (for employees within the local government sector). This Grievance Procedure has a three steps process. These steps are basically as follows:

- **Step one:** The employee is in the first instance required to lodge their grievance or complaint in writing with their immediate supervisor.

- **Step two:** If the grievance or complaint is not resolved within ten days of its referral to step one, then the employee may proceed to refer same to step two where it would be attended to by the Head of Department.
- **Step three:** If the grievance or complaint is still not resolved at step two, the employee may proceed to refer it to step three where it would be attended to by the Municipal Manager or their nominee.

If the grievance could still not be resolved to the satisfaction of the aggrieved party at step three, sub-clause 13.4.5 provides that 'that party may refer the grievance to the council for adjudication provided that a dispute has been declared and the party is entitled in law to declare such a dispute'. For some reason, sub-clause 13.4.5 is the only sub-clause under clause 13, which refers to 'the aggrieved party', and not to the 'employee' like the sub-clauses preceding it. However, this distinction is not relevant for purposes of this article.

The adopted Constitution of the SALGBC, which goes hand in hand with the Main Collective Agreement, provides under clause 12.3 thereof, as follows:

'12.3 A referral of a dispute to the Council for Conciliation *must be made within the time period prescribed in the Act*, or any other legislation that confers jurisdiction upon the Bargaining Council *provided that in the case of a dispute about the fairness of a dismissal the dismissed employee must refer the dispute within 30 (thirty) days from the date on which internal procedures are exhausted or within 90 (ninety) days from the date of dismissal* if internal procedures have not been exhausted by that time' (my italics).

The provisions of clause 12.3 of the Constitution are very specific that a dispute must be referred within the time-period prescribed in the Act, which in this case, is the LRA. In terms of the above provision, it is only a dispute about dismissal, which the Constitution of the SALGBC requires that must first be dealt with through internal processes (the grievance procedure) and must be referred to the SALGBC within 30 days after the internal processes have been exhausted. In my view, this provision is in contrast to the provisions of s 191 of the LRA. The previous dispute referral form of the SALGBC also provided in the column with 'Date of Referral', that dismissal disputes must be referred within 30 days from the date internal procedures are exhausted, or within 90 days from the date of dismissal if internal procedures have not been exhausted. The form currently in use provides that unfair labour practice disputes must be referred within 90 days, and unfair dismissals within 30 days (as prescribed in terms of s 191 of the LRA).

Conversely, the previous form contained no requirement that internal processes must first be exhausted when it comes to referral of an unfair labour practice dispute. If indeed it was intended that even an unfair labour practice dispute had to first go through internal processes before it could be referred to the SALGBC, surely the Constitution of the SALGBC would have been very specific in that regard, as it did with dismissal disputes. The fact that there is no such provision, and the fact that the requirement for referral of dismissal disputes to a grievance procedure has now been removed from the SALGBC forms, confirm that it was not a requirement for disputes other than dismissal disputes to first be referred to a grievance procedure before they could be referred to the SALGBC, and also that it is no longer a requirement for a dismissal dispute to be referred to a grievance procedure first. This similarly applies to unfair labour practice disputes. In fact, the new dispute referral form is very specific that an unfair labour practice or unfair dismissal case, which is referred outside the statutory 90 and 30 days respectively must be accompanied by a condonation application. This simply confirms that it is not a requirement that unfair labour practice and unfair dismissal disputes must first be referred to a grievance procedure and all steps be exhausted before they can be referred to the bargaining council.

Arbitrators' jurisdictional rulings

In *IMATU obo Jeffery Khoza v Greater Giyani Local Municipality* (case no LPD051909, 7-10-2019), the employer had raised a point *in limine* to the effect that the unfair labour practice dispute was referred to the SALGBC prematurely in that the employee did not lodge a grievance and exhaust all the three steps, before referring the dispute to the SALGBC. The Commissioner ruled that there is no requirement that the employee must first exhaust internal remedies before referring an unfair labour dispute to the SALGBC. In *IMATU obo Mitch Matthys and Others v City of Tshwane Metropolitan Municipality* (case no GMD031809, 26-9-2019), the Commissioner also ruled that there was no requirement for a party to first exhaust internal processes before referring an unfair labour practice to the SALGBC. In the above case, the Commissioner at para 20 stated the following, *inter alia*:

'The LRA does not state that an unfair labour practice must be referred once the parties have exhausted internal processes. That would, to all intents and purposes, defeat the intent and spirit of the LRA. As the unfair dismissal and unfair labour practices are disputes of rights, nothing prevents an aggrieved person to refer the dispute to the SALGBC before having dealt with it at the workplace'.

Based on what I have stated in the preceding paragraphs, I fully agree with the Arbitrator's findings in the abovementioned two cases. There are, however, other Commissioners of the SALGBC who are of the view that employees within the local government sector can only refer a dispute to the SALGBC once they have exhausted the grievance procedure. Some of those Commissioners who share this view rely on the decision in *City of Johannesburg Metropolitan Municipality v South African Municipal Workers Union obo Matsheka and Others* (LC) (unreported case no JR214/2016, 14-12-2017) (Sedile AJ).

The *Matsheka* case

In this case, the material facts were briefly that although an aggrieved employee lodged an internal (formal) grievance before referring her dispute to the SALGBC and went through the step one and step two processes of the grievance, she however, did not proceed to step three once her grievance remained unresolved at step two. In a review application launched by the employer, Sedile AJ found that because the employee did not follow the three step process, the dispute was, therefore, referred to the bargaining council prematurely. Sedile AJ at para 21 stated the following, *inter alia*:

'The second and third respondents were obliged and bound to apply the provisions of the [Main Collective Agreement] and which they failed to adhere to. The third respondent is obliged to exhaust all the processes as prescribed by the [Main Collective Agreement] before any dispute can be adjudicated by the second respondent'.

In my view, the court's finding to the effect that the grievance procedure must be exhausted before a dispute could be referred to the SALGBC goes completely against the provisions of s 191 of the LRA, as well as against the provisions of clause 12.3 of the SALGBC Constitution. To the extent that the decision in the *City of Johannesburg* case is to the effect that an employee cannot refer their dispute to the bargaining council before exhausting the grievance procedure, then I submit, with respect, that based on what I have stated at the beginning of this article, this case was wrongly decided.

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Building common-law principles of trust law: *One cannot transfer more rights than one has*

By Marietjie Du Toit

Picture source: Gallo Images/Getty

This article discusses the substantive gender inequality and unfair discrimination in trust law disputes. The cornerstone of trust law is the common law. In the event of divorce – many an equal contributor to the trust fund is prejudiced by the absence of any protection clauses contained in the trust deed.

Furthermore, prejudice and inequality prevail as a result of wrong decisions made by the courts and the questionable stare decisis doctrine. For example, the decision in the appeal case of *WT and Others v KT* 2015 (3) SA 574 (SCA), as ordered by a Full Bench of the Supreme Court of Appeal, where the foremost and leading common-law principles of trust law are ignored. In the following *stare decisis* case of *Du Toit v Du Toit and Others* (FB) (unreported case no 2792/2015, 22-6-2016) (Daffue J) the *WT v KT* ruling was followed with the result of immense financial loss for one of the parties.

The deceptive definition of a 'trust' as determined by s 1 of the Trust Property Control Act 57 of 1988 provides a loophole for founders of family trusts where the couples are married in community of property or with an accrual matrimonial property regime. The definition states that a trust is the 'ownership in property of one person', which is not what it is in these regimes. Section 1 of the Constitution provides the following values:

'(*a*) Human dignity, the achievement of equality and the advancement of human rights and freedoms;

(*b*) Non-racialism and non-sexism'.

This provides certainty and more ammunition in the legal arsenal concerning the protection of the human rights of equal contributors to family trust funds.

Academic authorities state that the validity of 85% of trusts in South Africa (Prof Willie van der Merwe 'How do I … ? Administer a Trust after Creating it' Paper presented at trust seminar (October 2010)) and 75% of Canadian trusts (Mathew Conaglen 'Sham Trusts' (2008) 67(1) *Cambridge Law Journal* 176), may be in question, due to the extent of arbitrary control exerted by its founders. It is stated by Mervyn Dendy that:

'Common-law rules and principles formulated by, for example, courts in decided cases are also subject to constitutional scrutiny, and may thus be modified or, in the last resort, set aside in the light of the Constitution' (Mervyn Dendy 'In the light of the Constitution – I: The supremacy of the Constitution' 2009 (Jan/Feb) *DR* 60).

In this modern legal era, accountability is preferred to authority. According to Dendy it follows that s 39(3) of the Constitution 'overrides' any legal principles or rules that are in conflict with the Bill of Rights. In this regard, it is important to mention the invalid and unfair discriminatory clauses that are included in trust deeds as well as deeds of settlements in the event of divorce.

As the common law forms the cornerstone of trust law (Walter Geach and Jeremy Yeats *Trusts: Law and Practice* (Cape Town: Juta 2008)) the following maxims are discussed and are of significant importance in context of a valid agreement and in improving the necessary protection of property rights of equally contributing spouses in trust law.

- *Nemo plus iuris ad alium transferre potest, quam ipse haberet.*

The absence of the application of this common law principle in the creation of a trust regarding the transfer of jointly owned property, is disturbing and alarming. The non-existence of legal principles, which are meant to protect the property rights of the other spouse in joint and accrual matrimonial regimes requires urgent attention under the equitable rule of law, including the protection as regulated by the constitutional values in s 1 of the Constitution. Latin maxims are to be applied, in order to endorse a statement in research. The primary issue concerns the correctness of the phrase and its origin (Franciszek Longchamps de Bérier 'Remarks on the methodology of private law studies: The use of Latin maxims as exemplified by *nemo plus iuris*' (2015) 21 *Fundamina* 63).

It is of paramount importance, that one should have a clear understanding of the *nemo plus iuris ad alium transferre potest, quam ipse haberet* (VG Hiemstra and HL Gonin *Trilingual Legal Dictionary* (Cape Town: Juta 1992) at 236: 'No one can transfer more rights to another than he himself has') maxim, also known as 'the golden rule' in the common law of

property, as applied to the 'law of things' by the Roman jurists. This legal principle focuses on the rights of beneficiaries in an *inter vivos* discretionary family trust and in particular the right in title of a founder in a joint property regime.

In the everyday use of Latin maxims, the legacy of the Roman law as the foundation of the common law is acknowledged. The Roman law fully respected the *nemo plus iuris* rule regarding personal rights (De Bérier (*op cit*) at 78). The maxim was first used by Ulpian at the beginning of the third century AD and was applied within the context of the law of succession, where the rule developed dynamically as a result of the activities of the jurisdictional magistrate (De Bérier (*op cit*) at 69 – 70).

Ulpian (De Bérier (*op cit*) at 71 – 72) found it absurd for someone for example, the founder/trustee to whom an estate has been bequeathed, to have stronger rights than the heir or the testator himself would have had, if he had accepted the inheritance. This fact brings into dispute, the arbitrary clauses for the benefit of the founder as a trustee and as a beneficiary (eg, in deeds of settlement), as well as the testamentary prerogative clauses for the benefit of the founder's estate, while ignoring the material fact that joint assets have been transferred. De Bérier writes that F Schulz goes even further, stating that Ulpian's wording may have actually meant, that it was legally unacceptable for an heir (the founder) to transfer greater rights to someone else (the trustee of the trust), than he would have had if he had accepted the inheritance (De Bérier (*op cit*) at 71). Furthermore, De Bérier writes that Ulpian's contemporary, the ancient jurist, Paul, held the same view: 'I ought not to be in a better position than the person from whom the right passes to me' (De Bérier (*op cit*) at 72). De Bérier notes that Reinhard Zimmerman states:

'First of all, we have to remember … [that in its structure] the contract of sale contained everything that was necessary to transfer ownership except [the act of delivery by] *traditio* (or *mancipatio*). Once the object was handed over (or mancipated), and provided the vendor himself had been owner, ownership passed' (De Bérier (*op cit*) at 76).

Paul states further that *nemo sibi ipsum,* the equivalent to *nemo plus iuris*, was well established and documented in ancient Roman law, adding that 'no one can change for himself the title by which he possesses something' (De Bérier (*op cit*) at 79-80). In Roman Law this maxim was also of great significance in the Law of Obligations. Ulpian (De Bérier (*op cit*) at 75) elaborate on it, as follows:

'Delivery should not and cannot transfer to the transferee any greater title than resides in the transferor. Hence, if someone conveys land of which he is owner, he transfers his title; if he does not have ownership, he conveys nothing to the recipient. Now whenever ownership is transferred, it passes to the transferee to the same extent to which it was held by the transferor.'

The statement confirms the fact that the founder in a joint or accrual matrimonial regime does not have the right in terms of the law, to create the trust, by means of a transfer of 'ownership in property of one person' (s 1 of the Trust Property Control Act. F Du Toit *South African Trust Law: Principles and Practice* (Cape Town: LexisNexis 2007) at 60 states that 'the ownership in property of one person' refers to the property of the founder). Both spouses, (same can be said for spouses married with the accrual system) have to be involved in the process of creating the trust, with equal financial interest in the form of a certificate or a share in the procedure (the Companies Act 71 of 2008 defines 'share' as 'one of the units into which the proprietary interest in a profit company is divided'). A founder as a spouse in a joint matrimonial regime cannot, therefore, under the rule of law transfer arbitrary power to himself or herself, by including subjective beneficial provisions in trust deeds.

A family trust is a legal institution of fiduciary obligations towards the beneficiaries and not for the benefit of only one beneficiary, being the founder himself or herself in a joint matrimonial regime. Such conduct will bring us back to the verdict of Van den Heever JA in the minority judgment in *Crookes, NO and Another v Watson and Others* [1956] 1 All SA 227 (A) at 243 – 244 where the concern for the misuse and abuse of this trust legal institution was stated by the judge.

- *Quod ab initio non valet in tractu temporis non convalescit.*

This Latin maxim holds that whatever is void from its beginning does not gain validity by the effluxion of time (Hiemstra and Gonin (*op cit*) at 270). This maxim could include any agreement or act with an unlawful intention. It is trite law, that no legal outcome flows from an illegitimate act. In *Crookes* at 244 it was held by Van den Heever JA that:

'I can think of no principle of our law according to which the individual can during his lifetime unilaterally sequester a portion of his estate and dedicate it to certain ends. I have especial difficulty in seeing how he can in that manner irrevocably benefit persons not as yet conceived. If he performs an act purporting to do these things, I have some difficulty in seeing how he himself can inhibit his autonomy.'

When the definition of a trust as set out in s 1 of the Trust Property Control Act is scrutinised, the consequences for one of the spouses in a community or accrual of property regime, will prejudice both property and personal rights. Thus, the founder, who transfers all the property as if the title vests in himself or herself alone, could well be guilty of an attempt at fraud and theft, or unjustified enrichment and thus without any legal ground to stand on.

- *Delegatus delegare non potest.*

In his article on the use of Latin maxims, De Bérier (*op cit*) at 66 quotes the famous second century AD jurist, Julian, who declared that a power in obligation to administrative justice, should only be delegated to another, where the power vests in him or her (the founder/trustee) personally and not through the favour of another. Therefore, the ancient root of the maxim lies in the domain of power possessed by the one who delegates the power. He further declares 'the structural impossibility' to delegate power that had been delegated.

Conclusion

A fundamental characteristic of South African constitutionalism is the principle of respect for the law. The issues of the past, namely before 1994 and the adoption of the Constitution, underscore the fact that the rule of law *per se* does not provide enough protection for the necessary rights of individuals in the *jus publicum.* To solve this injustice, the Constitution, including a Bill of Rights for the protection of the values of equality, human dignity and the advancement of human rights and freedoms, was adopted. These values are rooted in s 1 of the Constitution and promote the objectives of public policy constituted in good faith, reasonableness, fairness and *ubuntu* in conduct and agreement.

The supremacy of the Constitution was communicated strongly and unmistakably by Chaskalson P in *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) at para 44:

'There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.'

A *caveat*

Choose the right foundation … and do not build on sand. The tide of justice may easily sweep your sandcastle away.

Marietjie Du Toit *LLB (Unisa) LLM (NMU)* is an accredited mediator of the Social Justice Foundation in Mossel Bay.

Young women must go out into the world and exceed their own goals

By Kgomotso Ramotsho

Legal practitioner and Chairperson of the Legal Practitioners' Fidelity Fund, Peppy Kekana believes that young women should learn, empower themselves, set no limits and then go out into the world and exceed their own goals.

In this month's Women in Law article, *De Rebus* news reporter, Kgomotso Ramotsho, spoke to legal practitioner and Chairperson of the Legal Practitioners' Fidelity Fund (LPFF), Peppy Kekana, about her life in the legal profession.

Ms Kekana was born and raised in Madidi in the North West Province. She said that she absolutely loves life and believes that one should continuously focus on the positive. As a wife, mother, entrepreneur and mentor, Ms Kekana said living a life that is balanced holistically is extremely important to her. 'When I am not at work, I love spending time with my family and friends, I enjoy good food, exploring new and fun activities and celebrating life,' Ms Kekana added.

Ms Kekana attended high school at Dr AT Moreosele High School in Mabopane in Pretoria. Her academic credentials include a BProc (Unin), LLB (Vista) and Certificate in Management of Petroleum Policy and Economics (Wits). She was admitted as an attorney in 1994, following which she was appointed as a legal advisor at the Health Profession Council of South Africa until 1996. She later joined Seriti, Mavundla and Partners as an associate and was made director in 1998. From 2000 to 2002, she served as a director at Huntley Kekana Seth.

Ms Kekana pointed out that the biggest highlight of that period for her, was her involvement in the restructuring of arms manufacturing giant Denel. 'I was appointed as an Acting Judge of the Gauteng Local Division of the High Court in Pretoria from 2006 to 2018 and she was a Board Member of the South African Restructuring and Insolvency Practitioners Association and a Director at National Liquidators SA (Pty) Ltd,' Ms Kekana said. She added that she was appointed by the Pretoria High Court, on application by the Financial Services Board as a Curator of the Municipal Councillors Pension Fund in December 2017. Her other areas of expertise include insolvency law; corporate and commercial litigation; litigation in personal injury matters; investigations and compliance reviews; insurance law; litigation in medical malpractice; corporate governance; and pension law.

KR: KHR Inc is celebrating its 20th anniversary this year, how did you and your partners manage to successfully run your law firm for such a long time?

PK: From the onset, KHR Inc's primary goal has always been to make legal representation accessible to as many people as possible across the board. That has always been our goal and in order to achieve this goal, KHR Inc has always applied a multiangled client centric approach when assessing matters, which assists our clients in making qualitative and cost-effective decisions. This *ubuntu* based approach that is infused with professionalism and competent staff, comes from the understanding that every client matters – from large corporates to individuals. This has been our mantra for the past 20 years and continues to be our core values. That is why our services are tailor-made to meet the unique requirements of every client. We are conscious of the need to produce favourable outcomes for our clients, while ensuring that the costs of legal proceedings are kept to a minimum. We also offer a wide range of services including commercial law, insolvency law, personal injury law and family law and this a big part of what kept us going. KHR Inc also has its very own Recoveries Department. This

department is a call centre facilitating both inbound and outbound calls and is responsible for corporate and individual debt collections. Our Recoveries Department is committed to efficient turnaround times, and we place a high value on quality decision-making systems to generate an increased revenue return for our clients.

To summarise, our professional *ubuntu* based approach has kept us going and even when we decided to rebrand in order to celebrate our 20 years of existence; we ensured that these values that have always carried KHR Inc throughout the two decades are well illustrated in our new logo and new corporate identity. Simply put, our new logo tells a story of who KHR Inc is today. A story of integrity, Africanism, justice, *ubuntu*, professionalism and consistency. KHR Inc was built on this rock-solid foundation and that is how it has managed to not only endure but to thrive under difficult circumstances such as the COVID-19 pandemic.

KR: What is the one biggest lesson learned in running your own firm that changed your thinking or shaped you?
PK: The biggest lesson that I have learned from running my own firm is that there is always room to learn more and to do better. In essence, we must always be open towards learning and bettering ourselves in whichever space that we occupy in life. As a person, you must always keep it in mind that, just because you have succeeded, does not mean that you should stop trying to improve yourself as a person and as a leader. We must never stop being teachable in life. Furthermore, being in a challenging situation does not mean that you should be resigned to your fate. It is also very important to pause and celebrate the small wins along the way.

KR: What is the biggest challenge that the LPFF is currently dealing with, in regard to claims?
PK: One of the biggest challenges is that the attorneys that clients complain about, do not hold a Fidelity Fund Certificate (FFC). The public must be aware that all practising attorneys and advocates in South Africa must be registered on the practising roll at the Legal Practice Council. Therefore, this information needs to be readily available to the public.

The public also needs to know that it is the responsibility of the client to confirm that an attorney or advocate is on the practising roll, and that a legal practitioner is in possession of an FFC. Most importantly, the public needs to be educated regarding how to enquire as to whether a legal practitioner is certified or not. The process needs to be simple and easy to use to ensure that the information is available to everyone who needs it, regardless of their level of education or their socio-economic status. This is important because knowledge of the latter will determine whether the claim gets paid or not, should you lodge a complaint regarding the services of a legal practitioner whom you were aware did not possess the certificate at the time you entrusted money or property to.

KR: The numbers of claims at the LPFF are said to be rising fast compared to ten years ago, which measures are you as the LPFF putting in place to try and curb corruption that some legal practitioners commit?
PK: One of the measures that the LPFF has put in place, is to bring as much awareness of our services to the public, as well as to educate and empower the public regarding their rights when it comes to legal practitioners and the services that they provide to the public. Knowledge is power and once the public knows what to look out for, or what recourse is available to them, in case they fall victim to legal practitioners mishandling their funds; the quality of the legal services rendered as well as the integrity of this noble profession will maintain its high standards.

KR: Which generation of legal practitioners are claims being lodged against and why do you think this is happening?
PK: In the past two years, the LPFF has experienced a spike in the number of claims received. This is attributable to a combination of issues, namely, the economy that took a dive when COVID-19 hit our shores, lifestyle issues for some attorneys and lack of adequate training for other attorneys. Therefore, it cuts across all the generations of practising attorneys.

KR: As a female legal practitioner in a leadership position, how do you deal with people who are still of the view that women need to be in the background and not be as vocal as their male colleagues in the legal profession?
PK: I do not entertain that kind of backward thinking. For a very long time, women have proven that they can lead effectively in any industry. It has never made sense for society to think that women make weaker leaders based on their gender. Some of the most powerful, impactful, and successful leaders are women because they have used their voices and have refused to be in the background or play second best to men.

This backward thinking, together with the following two historical factors, hinders transformation in the legal sector:

Firstly, an economy that is not growing fast enough to be able to sustain the whole legal profession and black legal practitioners who are reduced to doing general legal work with very little rewards. Lucrative legal work seems to be the preserve of the historically economically advantaged.

Secondly, a failure on the part of business and society in general, to embrace and develop black female legal skills as it were. Big businesses continue to brief primarily male practitioners. The majority of the legal sector prefer to brief and to do business with either male or more prominent female legal practitioners, thus failing the majority who then do not acquire specialised skills that would make them visible and valuable to society in general. This is hopefully going to be cured by the Legal Services Charter which we hope will ensure an equitable briefing pattern which embraces every practitioner and in particular black females.

KR: Are you receiving support from male counterparts and how does it make you feel that there are men who are in support of women in the profession? Men who think women can be in leading positions and do a great job?
PK: Yes, I have always received support from my male colleagues, and this has led me to realise that there are wise men out there that do not discriminate against their women counterparts. Those who used to have sexist views are becoming wise and are waking up to reality. I am truly grateful to have worked with men such as Mr Mbusi Radebe who have always viewed me as their equal and have never second guessed my capabilities and expertise.

KR: The current state of the legal profession, is it that you had imagined it would be, when you were still a young legal practitioner?
PK: No, it has taken me far too long to be where I am today. I am also of the view that as women, we are still not anywhere near where we should be in terms of the number of women leading in the profession.

KR: It is women's month, do you have women that you look up to, both in your personal and professional life? Please name two and briefly tell us how and why they inspire you?
PK: My principal, the late Ms Tshegofatso Monama. When I entered the legal profession as a candidate attorney, I was already a mother of a three-month old baby. Ms Monama assured me that I have what it takes to complete my articles of clerkship and that she will make sure that I pass and become an attorney. Ms Monama shared tips of how to navigate being a candidate attorney and a mother to my children with me.

My late grandmother, who celebrated our achievements, and believed in us as girl children. I saw her managing our household, while my grandfather was a migrant worker.

KR: What do you think about the calibre of the women that come after your generation, are they strong women? Do you think they can continue the fight, in making sure women occupy spaces, leadership roles, have a seat in the highest tables?
PK: The calibre of women today is different from when I was younger. Women today are very educated, which makes them more empowered to either demand or occupy spaces on existing tables, as well as to build their own tables. I see more and more young women being unapologetic about taking on leadership roles. They are outspoken, they set high goals for themselves, and they are bold and fight for what they believe in. Most importantly, I see young women fighting for each other and empowering each other. They definitely are continuing to fight the good fight.

KR: What kind of mentorship do you think the young women in the legal profession need?
PK: Young women need the kind of mentorship that opens up their minds to the many available legal career fields that they can choose to practice in, and their eyes need to be opened to the fact that they cannot fall for the fictitious narrative that the field of corporate law is for males, while females should follow the family law route. There is enough room for everybody, and women do equally great work to males in any legal field, if not better. This is what needs to be taught to our young women.

KR: If you would be given an opportunity to address a room full of young women, what would you say to them?
PK: I would tell young women that it is important for them to understand that their femininity is not a weakness and that a woman that does not allow herself to lose her identity as a woman, becomes a very powerful leader in every space that she occupies. They need to understand that they do not need to turn themselves into cheap imitations of men in order to be effective leaders. They must go out there and learn, empower themselves, set no limits and then go out into the world and exceed their own goals.

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

THE LAW REPORTS

By Merilyn Rowena Kader

June [2022] 2 All South African Law Reports (pp 607–924); June 2022 (6) Butterworths Constitutional Law Reports (pp 661–785)

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

Administrative law

Remedy in review proceedings: The Strategic Fuel Fund Association NPC (SFF) is a wholly owned subsidiary of the Central Energy Fund SOC Limited (CEF). Its facilitation of the rotation of South Africa's strategic stock of some 10 million barrels of crude oil, and transactions that followed led to a review application. The impugned transactions involved the sale by SFF, acting through its then CEO, Mr Gamede, of the strategic stock to various of the first to eighth respondents. The SFF brought the review application under the doctrine of legality, and the CEF applied for review in terms of the Promotion of Administrative Justice Act 3 of 2000.

Despite finding that the appellants had delayed unreasonably in bringing the review application, the High Court condoned the delay and declared the impugned decisions invalid based on their clear and indisputable illegality. It held the SFF to be culpable, rejecting the submission that Mr Gamede was solely to blame. As the fourth, sixth and seventh respondents were innocent parties, the High Court set aside their contracts subject to payment of compensation for out-of-pocket expenses.

The question on appeal in *Central Energy Fund SOC Ltd and Another v Venus Rays Trade (Pty) Ltd and Others* [2022] 2 All SA 626 (SCA) was whether the relief granted by the High Court was just and equitable.

A court in review proceedings has a wide discretion to craft an appropriate remedy based on what is just and equitable in the circumstances. The remedy must be fair to all those affected by it, and yet effectively vindicate the rights violated.

Courts must be guided firstly by the corrective principle, that neither contracting party should unduly benefit from what has been performed under a contract that no longer exists. The second guiding principle is the 'no-profit-no-loss' principle. While innocent parties are not entitled to benefit from an unlawful contract, they are not required to suffer any loss because of the invalidation of a contract. The court's remedial discretion may only be interfered with on appeal if at odds with the law.

The court rejected the appellants' contention that a claimant for compensation must initiate its own proceedings, confirming that application proceedings were appropriate in this case. The appellants' attempt to challenge the cost order against them was unsuccessful.

Corporate and commercial

Company law – approval of scheme of arrangement by shareholders: The first respondent (Distell) in *Sand Grove Opportunities Master Fund Ltd and Others v Distell Group Holdings Ltd and Others* [2022] 2 All SA 855 (WCC) proposed a scheme of arrangement to its shareholders, entailing restructuring of its business. The eventual outcome of the scheme of arrangement was that Distell would delist and the second respondent (Heineken) would hold a minimum of 65% of its issued share capital. The scheme required approval by the Takeover Regulation Panel established in terms of s 196 of the Companies Act 71 of 2008.

At a meeting convened to vote on the scheme, the scheme was approved by a majority of Distell shareholders. Section 115(3)(*b*) of the Act provides that a company may not proceed to implement a resolution without the approval of a court where any person who voted against the resolution obtains leave to apply to court for review of the transaction.

The applicants, who claimed to be the beneficial owners of 3,72% of the issued ordinary shares in Distell that were votable, sought leave in terms of s 115(3)(*b*) to apply for review of the shareholders' resolution accepting the scheme of arrangement. The applicants (referred to collectively as Sand Grove) were investment funds. The respondents disputed Sand Grove's standing to bring the application, stating that only registered shareholders have voting rights for the purpose of any resolution required in terms of s 115 and only registered shareholders who voted against the proposed transaction are entitled to bring proceedings for the review of a shareholders' decision to approve the transaction.

It was held that, as the applicants had beneficial ownership of the shares, but none of the funds was the registered holder of such shares, the first issue to be determined related to their standing to bring the proceedings in terms of s 115 of the Act. The court referred to the principle of company law that a company concerns itself only with the registered holders of its shares and agreed with the respondents that the Sand Grove funds, as holders of beneficial rights in shares registered in another party's name, were not persons entitled to exercise voting rights at the meeting. They therefore lacked standing to bring the application.

The problem regarding standing gave rise to an application by the nominee companies who were the registered holders of the shares, for leave to intervene in the proceedings as co-applicants. However, s 115(3)(*b*) prescribes a ten-business-daytime limit for the nominee companies to challenge the resolution. That period had elapsed before they lodged their applications for leave to intervene. The court held that it had no power to condone the non-compliance with the time limit, and the application for leave to intervene was dismissed.

Sand Grove also applied for leave to amend their notice of motion by the insertion of a claim for orders declaring that the meeting at which the resolution was adopted was not properly constituted and, therefore, invalid and void, and that the resolution purportedly adopted at it was accordingly also void. The court rejected the submission that where different classes of securities were affected by a proposed scheme, separate meetings had to be convened of the holders of each class of security.

Even if the applicants did have standing, the court would not have found that they had made out a case for review based on their submissions.

The application for leave in terms of s 115(6) to apply for a review of the scheme of arrangement was refused.

Criminal procedure

Right of appeal against mistakes of law: In *Director of Public Prosecutions, Free State v Mokati* [2022] 2 All SA 646 (SCA), the respondent was found to have forcibly had sexual intercourse with a 21-year-old female, and robbery. The victim was prescribed antibiotics and anti-retrovirals after she reported the rape but died a few weeks later. The respondent was convicted of rape and robbery with aggravating circumstances. The Director of Public Prosecutions appealed against the sentence of 10 years' imprisonment for the rape count. It also reserved certain questions of law in terms of s 319 of the Criminal Procedure Act 51 of 1977 (CPA), in respect of the acquittal of the respondent on the murder count and contended that a competent verdict would have been culpable homicide. The respondent cross-appealed against his conviction and sentence in respect of the rape and robbery counts.

The majority held in considering the appeal against conviction on the rape and robbery counts, that in the absence of material misdirection by the trial court, its findings of fact are taken by the appeal court to be correct and will only be disturbed if they are clearly wrong. The trial court's conviction of the respondent on the two counts was confirmed as correct and the respondent's cross-appeal failed.

The court then turned to the appeal by the state on the questions of law reserved in terms of s 319 of the CPA. The state has a right of appeal only against a trial court's mistakes of law, not its mistakes of fact. Section 319(1) provides that the question of law must arise on the trial in a superior court; and the reservation may be made by the court of its own motion or at the request of the prosecutor or the accused, in which event the court should state the question reserved and direct that it be entered in the record.

The trial court's conclusion that the state had failed to discharge the onus of proof was based on a finding that the deceased's use of different medication could have caused clotting to cause her death. It reasoned that the respondent could not have foreseen the chain of events that ultimately led to the deceased's death. That was not a conclusion of law. The remaining reserved questions relating to the evaluation of expert evidence and to the state's complaint that the trial court failed to consider its concession, and submission, on the proven facts, that the respondent was guilty of culpable homicide, not murder. Those were also not questions of law, and the trial court erroneously granted leave in that regard.

In the appeal against sentence, the state submitted that the ten-year prison sentence for rape was shockingly lenient and thus inappropriate. That was the prescribed minimum sentence in terms of s 51(2)(*b*) of the Criminal Law Amendment Act 105 of 1997. The court agreed that the sentence was lenient and explaining its discretion to impose a sentence above the minimum prescribed one, held that for the sentence on the rape count the sentence be increased to 18 years' imprisonment. A cross-appeal by the respondent was dismissed.

In the minority judgment, the point of departure was the substituted sentence and the reasoning underpinning it.

Intellectual property

Removal of trade mark from register: The appellant (LA Group) and first respondent (Stable) were competitors in retail clothing. The High Court's order for the removal of 46 of the appellant's trade mark registrations from the register of trade marks, in terms of ss 10(2)(*a*), (*b*) and (*c*), 10(13) and 27(1)(*a*) and (*b*) of the Trade Marks Act 194 of 1993, led to the appeal in *LA Group (Pty) Ltd v Stable Brands (Pty) Ltd and Another* [2022] 2 All SA 678 (SCA).

Stable had challenged LA Group's trade mark registrations on the basis that all the registrations were entries wrongly made in terms of s 24 of the Act. The court cancelled the registrations on various grounds, including that–

- the marks were not capable of being distinguished;
- the marks were descriptive and non-distinctive and had become customary in the *bona fide* and established practices of the trade;
- the marks had been in non-use for five years or longer;
- the mark's registration, without a genuine intention to use, coupled with non-use; and
- the likelihood of confusion or deception arising from the manner in which the registrations had been used.

The trade marks consisted of the word 'POLO'. In terms of s 10(2)(*a*), a trade mark, which is not capable of distinguishing within the meaning of s 9 is liable to be removed from the register. Where a trade mark consists of words that are merely descriptive of goods or services in a particular class, that mark is not inherently capable of distinguishing the goods or services of a particular person in that class. Stable submitted that to the public, the word 'polo' was incapable of fulfilling the function of a trademark, and in the mind of the consumer, 'polo' was not exclusively associated with the appellant. The court had regard to the prior use of the trade mark, and found that the mark had been used continuously for a long time since its registration in 1976. The marks had become firmly established in South Africa. The general public would identify goods bearing the POLO trade marks as originating from the appellant. It was established that the trade marks had become distinctive through their use and were not liable to be removed from the register.

The appeal against removal in terms of s 27(1)(*a*) or (*b*) of the Act (relating to non-use for five years or longer and registration without a genuine intention to use) succeeded only in respect of some of the trade marks.

Section 10(13) provides that 'a mark which, as a result of the manner in which it has been used, would be likely to cause deception or confusion', is liable to be removed from the register. That led to Stable's reference to LA Group's use of a mark substantially similar to that of the international Ralph Lauren POLO brand. The High Court erred in its construction of s 10(13). It did not consider the appellant's manner of use of its own trade marks. Instead, it compared the appellant's trade marks to those of Ralph Lauren.

The majority judgment concluded that Stable had not established that 46 of the appellant's trade marks were liable to be removed from the register.

Immigration

Denial of entry of foreigner into country: In *Breukel and Another v Department of Home Affairs and Another* [2022] 2 All SA 787 (WCC), the second applicant (Ms Serrano) was a citizen of Venezuela who was in a permanent life partnership with a SA citizen (Ms Breukel).

Ms Serrano travelled to South Africa (SA) in December 2021. She was denied entry by immigration officials because her passport contained an extension document used by the Venezuelan government to extend the validity of the passport. The applicants adduced evidence showing that the Venezuelan government has for several years not issued new passports to replace expired passports. Instead, it renews passports by inserting an extension document into the expiring passport.

On being denied entry, Ms Serrano was detained in a holding facility. After consulting with a lawyer, she lodged an application in terms of s 8 of the Immigration Act 13 of 2002 to review the decision denying her entry into the country. The applicants applied to have Ms Serrano released from custody, and for her to be allowed into SA pending the Minister's decision on her application. The court granted an interim order allowing Ms Serrano to reside with Ms Breukel, while she waited for the decision. That led to the respondents launching a reconsideration application. In that application, they also raised various technical points including

that the applicants did not comply with the provisions of s 35 of the General Law Amendment Act 62 of 1955 by not providing the respondents with at least 72 hours' notice of the proceedings to be instituted; and that Ethiopian Airlines was not joined as an interested party.

It was held that while s 35 of the General Law Amendment Act is peremptory, a court is given the discretion to allow a lesser period of notice depending on the circumstances. Given the urgency found to have existed, the period of notice given to the respondents was reasonable *in casu*. The non-joinder point was also dismissed as at the stage when the main application was launched, Ms Serrano was in the custody of the Department of Home Affairs.

On the merits, the court discussed s 35(10) of the Immigration Act 13 of 2002, which states that the person in charge of the conveyance is responsible for the detention and removal of any person who was on the conveyance but is refused admission into the Republic. However, Ethiopian Airlines ceased being responsible for Ms Serrano when immigration officials removed her to consult with her attorney and then detained her in a holding facility. From then on, the Department was the entity responsible for her.

The main issue for determination was whether there was legal justification for permitting Ms Serrano to enter the country while she persisted with her review application. The court found that a case had been made out for Ms Serrano's release from the holding facility and her entry into SA pending the finalisation of the review.

Labour law

Collective bargaining: In *National Education Health and Allied Workers Union v Minister of Public Service and Administration and Others and related matters* 2022 (6) BCLR 673 (CC) the applicants were trade unions with members employed in the Public Service.

In 2018, the state concluded a collective agreement with trade unions who were parties to the Public Service Co-ordinating Bargaining Council. The agreement contained three clauses which regulated wage increases for Public Service employees for the years of 2018/2019, 2019/2020 and for 2020/2021, respectively clauses 3.1, 3.2 and 3.3. The increases agreed on for 2018/2019 and 2019/2020 were implemented. In respect of the third year, however, the state asked the trade unions to agree to a revision of the agreement on the basis that the cost of implementation would be unaffordable for the state. The trade unions declined to agree. The previously agreed wage increases for that year (clause 3.3) were not implemented. A dispute was referred to the Bargaining Council. It remained unresolved at conciliation. Applicants referred the dispute to arbitration. Before the arbitration could be finalised, applicants launched an application in the Labour Court seeking an order to compel the state to comply with clause 3.3 of the collective agreement for the 2020/2021 financial year. The state launched a counterapplication seeking declaratory relief regarding the legality of the collective agreement and its enforcement. By agreement the Labour Appeal Court (LAC) was requested to hear the matter as a court of first instance in terms of s 175 of the Labour Relations Act 66 of 1995. The LAC granted that request.

The state contended that the collective agreement was invalid and unenforceable because it was concluded in contravention of the Public Service Regulations (promulgated in GN R877 *GG*40167/29-7-2016) read with ss 213, 215 and 216 of the Constitution. Regulation 78 empowers the executive authority to engage in negotiations and conclude collective agreements on behalf of the state. It requires, however, that in entering into such collective agreements the executive authority must 'meet the fiscal requirements contained in regulation 79'. Regulation 79 provides that the state can enter into a collective agreement only if –

'(*a*) he or she has a realistic calculation of the costs involved in both the current and the subsequent fiscal year;

(*b*) the agreement does not conflict with the Treasury Regulations; and

(*c*) he or she can cover the cost –

(i) from his or her departmental budget;

(ii) on the basis of a written commitment from the Treasury to provide additional funds; or

(iii) from the budgets of other departments or agencies with their written agreement and Treasury approval'.

It emerged that none of these requirements had been met.

Applicants had contended in the LAC that the National Treasury and the Minister of Finance were nevertheless bound because the Cabinet had approved the draft agreement, which later became the collective agreement in question. It was argued that because the Minister of Finance was the political head of the National Treasury and, as a member of the Cabinet, had participated in the relevant Cabinet decision, it had to be inferred that there had been Treasury approval for the proposal. The Cabinet, they argued, must necessarily have considered ways in which it would raise the necessary additional funding required for the implementation of the collective agreement.

The LAC found on the facts that the 'cost of the collective agreement could not be covered solely' from the Minister of Public Service and Administration's budget; that the Treasury had not provided a written commitment to guarantee additional funding; and no further agreements were made by other departments or agencies in accordance with reg 79. It also found evidence (in the form of a letter written by the Minister of Finance) that showed 'the absence of any commitment by National Treasury of the kind required expressly by regulation 79'. The LAC found that the fact that the Cabinet appeared to have sanctioned the collective agreement did not constitute compliance with the express wording of regs 78 and 79. The collective agreement had been concluded in contravention of those regulations. Clause 3.3 of the agreement (dealing with wage increases for the year 2020-2021) was unlawful for violating ss 213 and 215 of the Constitution and the impugned regulations. The LAC dismissed the application.

Ten trade unions lodged separate applications to the Constitutional Court (CC) for leave to appeal against the judgment of the LAC. They were consolidated for hearing. The Department of the Public Service and Administration and the Minister of Finance opposed the applications.

The CC unanimously granted leave to appeal but dismissed the appeal.

The CC identified the issue as whether the non-compliance with regs 78 and 79 rendered clause 3.3 of the collective agreement invalid and unenforceable. Regulations 78(2) and 79(c) created jurisdictional facts, which had to exist prior to the Minister's exercise of power to negotiate and conclude collective agreements on behalf of the state. If those requirements were not met, the Minister, if he acted, would do so without legal authority. It was clear that *in casu* the jurisdictional facts were not present. The fact that there had been Cabinet approval could not have had the effect of authorising the Minister to legally conclude a collective agreement in contravention of the provisions of regs 78 and 79. Non-compliance with the requirements of regs 78 and 79 rendered the resultant collective agreement between the state and the trade unions invalid and unlawful, and thus unenforceable.

Personal injury/delict

Claim for damages for sexual assault perpetrated by teacher: The plaintiffs in *CS and Another v Swanepoel and Others* [2022] 2 All SA 810 (WCC) claimed damages arising from the alleged sexual assault of the second plaintiff (the plaintiff) by the first defendant some ten years before. The plaintiff was at the time a 12-year-old learner at the school where first defendant was acting principal, and her class teacher.

In a counterclaim, the first defendant claimed damages from the plaintiff, on the basis that she had wrongfully and maliciously set the law in motion by laying a false charge of rape against him.

The court, as per Sher J, held that the plaintiff bore the onus of proving the alleged sexual assault on her by the first defendant, on a balance of probabilities. The court found her to have amply discharged that onus. Her testimony was compelling and was corroborated in material respects by the evidence of two independent witnesses. By contrast, the first defendant was an unimpressive witness. The court took issue with a disciplinary hearing at which the first defendant was exonerated. From an evidentiary point of view, the plaintiff's evidence as to what the first defendant had allegedly done to her was not controverted or refuted and should have been accepted. However, from the reasons which she gave for her findings, the presiding officer did not appear to consider that the first defendant had failed to testify and had thus failed to put up any evidence to refute the plaintiff's evidence. The court pointed to various irregularities in the proceedings leading to a failure of justice. The first defendant's evidence was rejected, insofar as it was at odds with the evidence, which was tendered by the plaintiff.

The court found the plaintiff to have discharged the onus of proving the sexual assault, constituting a delictual act, by the first defendant. The first defendant was thus liable to her in delict for damages.

The liability of the remaining defendants was predicated on an alleged omission relating to the wrongful and negligent breach of a legal duty, which allegedly rested on them, to protect the plaintiff from harm. Where harm is caused as a result of an omission, liability does not follow automatically, as *prima facie* an omission is not regarded as wrongful unless there was a legal duty on the person who caused the harm to have acted in a particular manner, instead of sitting back and omitting to do so. Whether such a duty existed in a particular case is an issue which must be determined judicially, on the basis of criteria, which include public and legal policy, and constitutional norms. The state has a legal duty to protect and not to harm the children who are entrusted to its care on a daily basis, in public schools. In the context of the pleadings in this matter, that general duty includes the duty to protect (or to take reasonable steps to protect) children from exposure to sexual assault and molestation. The sexual assault committed by the first defendant was sufficiently closely linked to the educational business of his employer, and as such, fell within the ambit of vicarious liability. The Department was also found not to have vetted the first defendant before employing him. Had it followed its own protocols and done that, his criminal record, relating to sexual assault, would have been revealed. Its failure constituted negligence, as a result of which the second defendant was held liable with the first defendant for plaintiff's damages.

Other cases

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

- application for leave in terms of s 115(3)(*b*) of the Companies Act 71 of 2008 to apply for review of shareholders' resolution;
- claim for damages, plea of prescription;
- extinctive prescription, plaintiff not requiring knowledge of specific duties of auditors where it had knowledge of facts leading to reasonable suspicion of possible negligence;
- private regulatory body, jurisdiction;
- proceedings for judicial review under s 7(1) of the Promotion of Administrative Justice Act 3 of 2000;
- refusal by head of provincial health department to issue Letters of Support required for accreditation of nurses; and
- summary judgment, provisions of r 32 of the Uniform Rules of Court.

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By Stanley Malematja

It is unconstitutional to impose a levy on the constitutional right to protest

The Right to Know Campaign and Others v City Manager of Johannesburg Metropolitan Municipality and Another (GJ) (unreported case no 49197/2021, 10-6-2022) (Victor J)

On 26 April 2022 the Gauteng Local Division High Court in Johannesburg heard an application by the Right2Know Campaign brought against the City Manager of Johannesburg Metropolitan Municipality and Chief of the Johannesburg Metropolitan Police Department. The court had to decide, *inter alia*, whether charging a levy on any person who intended to exercise their constitutionally guaranteed right to protest is in line with the Constitution and whether the City of Johannesburg's Tariff Determination Policy (the Policy) is *ultra vires* the Regulation of Gatherings Act 205 of 1993 (the Gatherings Act).

On 10 June 2022, Victor J handed down a judgment which, *inter alia*, found that 'the levying of fees in terms of City of Johannesburg Tariff Determination Policy for the holding of gatherings, assemblies, demonstrations, pickets and to present petitions is declared unconstitutional'.

Overview of the Gatherings Act

The Gatherings Act regulates s 17 of the Constitution, which provides that 'everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions'. The provisions of s 3 of the Gatherings Act requires a convener to give notice in writing to the responsible officer seven days or no less than 48 hours prior to the intended of the protest. Where notice is given no less than 48 hours but later than seven days, the convener must provide reasons for failure to comply with the seven days' notification period. It is important to note that the Constitutional Court in the case of the *Mlungwana and Others v S and Another (Equal Education and others as* amici curiae*)* 2019 (1) BCLR 88 (CC) did not exempt anyone from giving in terms of s 3 of the Gatherings Act prior to a protest.

The provisions of s 3 of the Gatherings Act enlists requirements, which must be fulfilled, and the payment of a fee is not one of them. This alone goes to prove that the Policy is *ultra vires* the Gatherings Act. According to the provisions of s 4 of the Gatherings Act, if a responsible officer deems it necessary, they shall within 24 hours of receiving a convener's notice, notify such a convener regarding a meeting 'for negotiations on any aspect of the conduct'. Section 4(2)(*c*) of the Gatherings Act provides that at the said meeting, discussions shall be held on the contents of the notice, amendments or additions and the conditions, if any. Section 4(2)(*d*) of the Gatherings Act provides that 'the responsible officer shall endeavour to ensure that such discussions take place in good faith'.

Factual overview

On 23 October 2020, members of the applicant exercised their constitutional right to protest. Prior to the protests, the convener gave adequate notice to the second respondent (responsible officer) and was subsequently notified and invited to a meeting in terms of the provisions of the s 4 of the Gatherings Act. Immediately after the meeting, the second respondent instructed the convener to go to a particular office where a payment of R 297 was requested. When the convener questioned why the constitutional right to protest is subject to a fee, the response that the convener received was that the fee was to ensure the protection of the participants of the protest by law enforcement officers.

The convener was obviously unsettled by the response and was of the view that the fee is a barrier to the right to protest. This is so, *inter alia,* because the Preamble of the Gatherings Act provides that 'whereas every person has the right to assemble with other persons and to express his views on any matter freely in public and to enjoy the protection of the state while doing so'. Nowhere in the Gatherings Act does it state that the protection of participants of a protest is subject to a payment of a fee. As a result, the applicant argued, before the High Court, that the subjecting the imposition of a fee limits the constitutional right to protest.

The court's findings

Although the court did not expand on the s 36 of the Constitution analysis, it nevertheless stated that the Policy would not survive constitutional muster. The court held that the only qualifier to the constitutional right to protest is 'peaceful' and 'unarmed', thus subjecting this fundamental human right to a fee is not in line with our constitutional values. The constitutional right to protest speaks to the nature of our democracy and further linked to the struggles against the overthrown Apartheid regime.

The court further noted that the Gatherings Act is the primary and principle legislative framework, which governs the right to protest as enshrined in s 17 of the Constitution. Furthermore, the court with reference to s 14 of the Gatherings Act found that the Gatherings Act shall prevail over the Policy of the first respondent. The court went further to state that the Gatherings Act imposes requirements on the right to protest. Considering that, any condition or requirement such as a payment of a fee, that would hinder unarmed and peaceful people to protest and enjoy the protection of the state while doing so, is not in conformity with the Constitution.

While there are limits to the right to protest, a requirement whose impact is the outright ban on the right to protest has no place in South Africa's constitutional democracy. Those whose economic status bars them from paying a fee are at a greater risk of being excluded. Imposing a levy on the right to protest is repressive. The first respondent has no power and authority to subject access to fundamental human rights, such the right to protest, to the ability to pay a fee. The right to protest is guaranteed to everyone, whether 'young or old, poor or rich, educated or illiterate, powerful or voiceless' (*Mlungwana* at para 43).

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By Kgomotso Ramotsho

The burial of a pre-viable or terminated foetus falls outside of Births and Deaths Registration Act's scope

Voice of the Unborn Baby and Another v Minister of Home Affairs and Another (CC) (unreported case CCT120/21, 15-6-2022) (Tlaletsi AJ (Madlanga J, Madondo AJ, Majiedt J, Mhlantla J, Rogers AJ, Theron J and Tshiqi J concurring))

In the *Voice of the Unborn Baby* matter the voluntary associations the Voice of the Unborn Baby NPC and the Catholic Archdiocese of Durban (the applicants) approached the Constitutional Court (CC) seeking confirmation of an order of the Gauteng Division of the High Court, which declared s 20(1), read with the definition of 'still-birth' in s 1, and s 18(1) to (3) of the Births and Deaths Registration Act 51 of 1992 (the Act), as well as reg 1 of the Regulations Relating to the Management of Human Remains (Regulations) in terms of the National Health Act 61 of 2003 inconsistent with the Constitution insofar as they prohibit the burial of foetal remains other than in cases of a still-birth. In addition to the confirmation application, an application for leave to appeal has also been noted against the judgment and order of the High Court.

In the High Court the applicants challenged the constitutionality of s 20(1), read with s 1 and s 18(1) to (3) of the Act, as well as reg 1 of the Regulations on the basis that they infringe the rights to privacy, dignity, religion, and equality of prospective parents who have suffered pregnancy loss through miscarriage or conscious human intervention. The applicants submitted that there is no justification for the distinction between the burial of the foetal remains of a pregnancy loss through miscarriage or induced pregnancy loss by human intervention and pregnancy loss through still-birth. They further submitted that there is no legitimate governmental purpose served by depriving these prospective parents the option of burial.

The respondent submitted that there was no legal or scientific justification for why the law should recognise the right to bury a foetus that is less than 26 weeks on termination of pregnancy or induced pregnancy loss. The emotional attachment of the prospective parents does not mean that a legal right to bury the foetus exist. The respondents further submitted that the emotional and psychological trauma suffered by the prospective parents does not give rise to the infringement purpose served by the regulating aspects relating to the burial of a dead foetus.

The Women's Legal Centre Trust and Wish Associates were admitted as *amici curiae* in the High Court and in some of their submissions, they submitted that the blanket foetal burial rights would burden the designated facilities, undermine the confidentiality provisions of the Choice on Termination of Pregnancy Act 92 of 1996, and create additional barriers to accessing facilities that offer services under the Choice on Termination of Pregnancy Act. The *amici curiae* also submitted that that if the declaratory order was to apply to the people seeking voluntary termination of pregnancy under the Choice on Termination of Pregnancy Act, the order should include provisions to ensure that the right does not disproportionately interfere with pregnant women's rights to access termination of pregnancy procedures.

The High Court concluded that the impugned provisions of the Act are inconsistent with the Constitution and invalid to the extent that they exclude the issuance of a still-birth notice in the case of a pregnancy loss other than still-birth. This declaration of invalidity did not, however, apply in the case of a pregnancy loss through human intervention. In the CC, the issue was whether the High Court's declaration of invalidity should be confirmed. The CC said that the High Court declared that s 20(1), read with s 1, and s 18(1) to (3) of the Act are inconsistent with the Constitution insofar as they prohibit the burial of foetal remains other than in cases of a still-birth (in other words, the remains of a pre-viable or terminated foetus).

The CC added that confirmation is not there for taking. The CC pointed out that it must satisfied that the impugned provisions are unconstitutional. Therefore, whether the High Court's order should be confirmed depends on whether the provisions of the Act actually prohibit the burial of pre-viable foetal remains (the interpretation issue); and, if so, whether those provisions limit any of the right in the Bill of Rights and whether any such limitation is justified in terms of s 36(1) of the Constitution (the constitutional validity issue). The CC said in view of the conclusion it reached on the interpretation issue, which is that the Act does not prohibit the burial of a pre-viable or terminated foetus, the constitutional validity issues does not arise. The CC added that it is significant to recall the purpose for which the Act is intended to serve, namely, that its purpose is to regulate the registration of births and death and to provide for matters connected therewith.

The CC pointed out that s 20(1) of the Act provides that: 'No burial shall take place unless notice of the death or still-birth has been given to a person contemplated in section 4 and he or she has issued a prescribed burial order'. The CC added that of relevance to this matter is s 1 of the Act, which defines the words 'burial', 'corpse' and 'still-birth'. 'Burial' is defined as 'burial in earth or the cremation or any other mode of disposal of a corpse'. 'Corpse' is defined as 'any dead human body, including the body of any still-born child'. 'Still-born' is defined in relation to a child, as meaning 'that it has had at least 26 weeks of intra-uterine existence but showed no sign of life after complete birth'. Section 1 further provides that 'still birth' in relation to a child, has corresponding meaning.

The CC said that having regard to these definitions, it is clear that s 20(1) of the Act only requires a burial order for the burial of any corpse namely, either a dead human body or a still-born child. The CC added that a pre-viable foetus is

not a still-born child, as such foetus will not have had 26 weeks of intra-uterine existence. The CC said it is unnecessary to decide whether the termination of a pregnancy of a viable foetus by human intervention results in a 'still-birth' for purpose of the Act. The CC noted that part of the evidence was medical evidence to explain why this approach was followed.

The CC said that all that it can say is that if this approach to the definition of 'still-born' is correct, burial orders may, indeed must, be obtained before burying such foetal remains, and this after all is the relief sought by the applicants. The CC added that this approach is incorrect, the Act simply does not apply, meaning that there is no prohibition in the Act against the burial of such foetal remains. The CC further said that in the absence a clear prohibition of the interment or cremation of a pre-viable or terminated foetus, and in the face of the command in s 39(2) of the Constitution, an interpretation of the Act that commends itself is one that leaves untouched any right which parents may have to interment or cremate their pre-viable foetus.

The CC added that while it may be true, as the applicants argued, that throughout the years the practice has been to deny parents this right in the apparent belief that this is what the law provides, this matters not. The Act simply contains no such prohibition. The impugned provisions of the Act do not provide for a foetal burial other than in cases of still-birth. The CC pointed out that the High Court declared the impugned legislation constitutionally invalid in the mistaken understanding (held by the litigants as well) that the Act applies to and regulates the burial of pre-viable foetus. The CC added that the relevant sections of the Act cannot be declared inconsistent with the Constitution because of such omission. The CC said the declaration of invalidity can, therefore, not be sustained.

The CC noted that where the foetal remains are evacuated or removed from the mother outside of a healthcare environment, there may still be other restrictions, for example, limitations imposed by municipal regulations. The content and validity of any such regulations are not subject of the present litigation. The CC said that all that can be said is that if there is no other legal impediment to the burial of pre-viable foetal remains, the Act does not stand in the way of that burial.

The CC said that in a cross appeal, the Catholic Archdiocese contended that the declaration of invalidity made by the High Court should be extended to cases of pregnancy loss due to an inducement. The CC pointed out that given that the declaration of invalidity order will not be confirmed, the cross-appeal falls away. The CC looking at whether the High Court's declaration, that definition of 'corpse' and 'human remains' are inconsistent with the Constitution, should be confirmed. The CC said that the Voice of the Unborn Baby NPC argued that the regulations do not make provision for the burial of a pre-viable foetus. Because regulations are not Acts of Parliament, their validity or otherwise is not subject to confirmation by it. The CC pointed out that it is, therefore, necessary to confirm the High Court's order in terms of which reg 1 of the Regulations was declared to be inconsistent and invalid.

The CC said that the applicants correctly submitted that the High Court misapplied the *Biowatch* principle (see *Biowatch Trust v Registrar, Genetic Resources, and Others* 2009 (6) SA 232 (CC)). That it declined to award costs in favour of the applicants, despite their success in that court. The CC pointed out that it is careful not to be too eager to interfere with costs order of other courts. However, because of the misapplication of *Biowatch* it is entitled to interfere with the High Court's costs order. The CC said the applicants were successful in the High Court and the respondents should have been ordered to pay their costs. The CC added that the failure not to make such an order or provide reasons, therefore, was thus a misapplication of the *Biowatch* principle, and a material misdirection. The CC said the costs order of the High Court should subsequently be set aside. However, in the light of it finding the applicants should not have succeeded in the High Court.

The CC pointed out that the applicants asked for it to confirm the High Court's order for constitutional invalidity and they have been unsuccessful. The CC therefore said that each party must pay its own costs.

The following order was made:

'1. The order of the High Court declaring section 18(1) to (3) of the Births and Deaths Registration Act constitutionally invalid is not confirmed.

2. The order of the High Court declaring section 20(1) of the Births and Deaths Registration Act constitutionally invalid is not confirmed.

3. The orders of the High Court are set aside and replaced with the following:

…

4. The cross-appeal by the second applicant falls away.

5. The rule 31 applicants by the first respondent and the first and second *amici curiae* are dismissed.

6. In this court, each party must pay its own costs'.

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

By Lauren Lloyd, Lizelle Rossouw, Jeniene Nadarajan and Johara Ally

New legislation

Legislation published from 6 June – 1 July 2022

Acts

Division of Revenue Act 5 of 2022
Date of commencement: 15 June 2022. Repeals the Division of Revenue Act 9 of 2021 except ss 15 and 25, which are repealed with effect from 1 July 2022. Repeals the Division of Revenue Amendment Act 17 of 2021. GenN1086 *GG*46549/15-6-2022.

National Environmental Management Laws Amendment Act 2 of 2022
Date of commencement: To be proclaimed. Pending amendment of the National Environmental Management Act 107 of 1998, National Environmental Management: Protected Areas Act 57 of 2003, National Environmental Management: Biodiversity Act 10 of 2004, National Environmental Management: Air Quality Act 39 of 2004, National Environmental Management: Integrated Coastal Management Act 24 of 2008 and the National Environmental Management: Waste Act 59 of 2008. GN2203 *GG*46602/24-6-2022.

National Forests Amendment Act 1 of 2022
Date of commencement: To be proclaimed. Pending amendment of ss 2, 7, 8, 14, 15, 17, 23, 34, 35, 36, 37, 47, 58, 62, 63 and 65 in the National Forests Act 84 of 1998. Pending insertion of s 2A and ch 6A (ss 57A to 57E) in the National Forests Act 84 of 1998. Pending substitution of s 61 of the National Forests Act 84 of 1998. GN1131 *GG*46650/1-7-2022.

Customs and Excise Act 91 of 1964
Amendment of part 1 of sch 1 (no 1/1/1686). GN R2137 *GG*46507/6-6-2022.
Amendment of part 1 of sch 2 (no 2/1/61), part 3 of sch 6 (no 6/3/61), part 3 of sch 6 (no 6/3/60), part 5A of sch no 1 (no 1/5A/174) and part 5A of sch 1 (no 1/5A/173). GN R2143 – GN R2147 *GG*46520/10-6-2022.
Amendment of sch 1 part 1 (no 1/1/1687 and 1/1/1688), sch 1 part 2B (no 1/2B/170), sch 1 part 3E (no 1/3E/30), sch 3 part 1 (no 3/1/746), sch 6 part 1C (no 6/1C/18), sch 6 part 1B (no 6/1B/17), sch 6 part 3 (no 6/3/62) and sch 5 (no 5/120). GN R2163 – GN R2171 *GG*46553/17-6-2022.
Amendment of sch 6 part 2 (no 6/2/6) and sch 4 part 1 (no 4/1/379). GN R2186 and GN R2187 *GG*46589/24-6-2022.

Value-Added Tax Act 89 of 1991
Amendment of para 8 of sch 1 in terms of s 74(3)(*a*) to amend Item 406.00. GN R2185 *GG*46589/24-6-2022.

Bills and White Papers

Draft Mine Health and Safety Amendment Bill, 2022
Publication for comment. GN1086 *GG*46546/15-6-2022.

Independent Municipal Demarcation Authority Bill, 2022
Publication of the Explanatory Summary of the Bill. GenN1088 *GG*46552/15-6-2022.

Government, General and Board Notices

Agricultural Product Standards Act 119 of 1990
Standards and Requirements Regarding Control of the Export of Maize Products: Amendment. GN2173 *GG*46554/17-6-2022.

Child Justice Act 75 of 2008
Invitation for applications for the accreditation of diversion programmes and diversion service providers. GN2158 and GN2159 *GG*46543/10-6-2022.

Commissions Act 8 of 1947
Amendment to the terms of reference of the Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State. Proc 68 *GG*46559/17-6-2022.

Construction Industry Development Board Act 38 of 2000
Findings and Sanctions of the Investigating Committee published in terms of the Construction Industry Development Regulations, 2004 (as amended). BN296 *GG*46543/10-6-2022.

Correctional Services Act 111 of 1998
Delegation by the Minister of Justice and Correctional Services. GN2174 *GG*46554/17-6-2022.

Dental Technicians Act 19 of 1979
Notice in terms of s 36(8)(*c*). GN2225 *GG*46649/1-7-2022.

Department of Trade, Industry and Competition
International Trade Administration Commission of South Africa. GN1087 *GG*46550/15-6-2022.

Electoral Commission Act 51 of 1996
Registration of political parties (registered between 18 February 2022 to 13 June 2022). GenN1094 *GG*46574/20-6-2022.

Electronic Communications Act 36 of 2005
Guidelines: Procedure to follow to obtain permission to use the Go Digital Trademark. GN2205 *GG*46619/24-6-2022 and GN2204 *GG*46603/24-6-2022.
Invitation to pre-register for Community Television Broadcasting Service and Radio Frequency Spectrum Licences for Multiplex 1 Frequencies. GenN1111 *GG*46629/30-6-2022.
Notice of public hearings on the draft regulations regarding advertising, infomercials and programme sponsorship 2022. GN2148 *GG*46521/10-6-2022.

Films and Publications Act 65 of 1996
Guidelines to be referred to in the classifications of films, games and certain publications. GN2218 *GG*46649/1-7-2022.

Financial Markets Act 19 of 2012
Approved amendments to the Johannesburg Stock Exchange (JSE) Debt Listing Requirements – Sovereign Issuers. BN292 *GG*46543/10-6-2022.

Higher Education Act 101 of 1997
Statute of the North-West University. GN2194 *GG*46598/24-6-2022.

International Trade Administration Act 71 of 2002
Policy Directive issued in terms of s 5, on amendments to the Automotive Production and Development Programme Phase 2 (APDP2). GN2210 *GG*46644/1-7-2022.

Labour Relations Act 66 of 1995
Code of practice: Managing exposure to SARS-CoV-2 in the Workplace, 2022. GN R2191 *GG*46596/24-6-2022.
National Bargaining Council for Hairdressing, Cosmetology, Beauty and Skincare Industry: Extension of period of operation of the main collective agreement. GN R2141 *GG*46517/10-6-2022.

Magistrates Act 90 of 1993
Determination of salaries and allowances of magistrates. Proc 70 *GG*46621/28-6-2022.

Marketing of Agricultural Products Act 47 of 1996
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Lauren Lloyd, Lizelle Rossouw, Jeniene Nadarajan and Johara Ally are Editors: National Legislation at LexisNexis South Africa. ❑

Employment law update

By Nadine Mather

'Trial by ambush' – can an employee be reinstated without formally seeking reinstatement?

In *Real Time Investments 158 t/a Civil Works v Commission for Conciliation, Mediation and Arbitration and Others* [2022] 6 BLLR 524 (LAC), the employee, employed by Real Time Investments 158 (the Company) as a general worker, was involved in a physical altercation with a colleague over money outside the gates of the Company's premises shortly after working hours. As a result of the altercation, the employee was dismissed for gross misconduct.

Aggrieved by his dismissal, the employee referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). The CCMA commissioner found that the employee's dismissal was procedurally and substantively fair. Thereafter, the employee instituted a review application in the Labour Court (LC) in which he sought an order –

- reviewing and setting aside the CCMA award;
- referring the matter back to the CCMA for a hearing *de novo*; and
- 'further and/or alternative relief'.

The Company elected not to appear to oppose the review application since, at worst for the Company, the matter would be remitted to the CCMA, and it would save the Company from incurring unnecessary costs.

The LC found that the CCMA award was reviewable on the basis that the physical altercation happened outside the Company's premises after working hours, and there was no evidence that the business of the Company had been affected by the altercation. Thus, it was not reasonable for the CCMA to have found that the employee committed any misconduct. The LC went on to find that since there was no evidence why the employee should not be reinstated, and reinstatement was 'the primary remedy', it had to be ordered in circumstances where the employee was not guilty of any work-related misconduct.

The LC accordingly reviewed and set aside the CCMA award, replacing it with an order that the dismissal of the employee was substantively unfair. It further ordered the Company to retrospectively reinstate the employee from date of his dismissal.

Upon becoming aware of the order, the Company took the matter on appeal to the Labour Appeal Court (LAC). In this regard, the Company contended that it did not appear to oppose the review application because the employee had not sought reinstatement. Acting on the advice of the employer's organisation representative and an advocate, as far as the Company was concerned, if the award was set aside, at worst the matter would have been referred back to the CCMA for a fresh hearing. It argued that the LC should not have ordered reinstatement in circumstances where the employee did not seek such relief.

The LAC found that the unfairness of what had occurred on review was obvious, namely, the employee had not sought reinstatement in his review application and the Company had not been notified that such an order may be granted. The LC could not grant such an order without at least ensuring that the Company was aware that such relief was sought or contemplated and had been afforded a reasonable opportunity to respond to the granting of such relief.

It was accordingly not unreasonable for the Company to assume that, at worst for it, the matter would be remitted to the CCMA and that an order for reinstatement would not be granted in circumstances where the employee did not seek such relief. The request in the employee's application for 'further and/or alternative relief', could hardly have served that purpose.

The LAC held that fairness is paramount and the so-called 'trial by ambush' has always been deplored. It is trite that court pleadings serve to define the issues, which are to be adjudicated upon by the court. An applicant is not only required to state the relief sought but to make out a case for such relief. In this matter, the employee specifically did not seek reinstatement in his pleadings and thus did not raise it as an issue to be decided by the court. A pleading is intended to enable the other party to fairly and reasonably know the case it is called upon to respond to.

In the circumstances, reinstatement had been unfairly granted and the Company had fallen victim to an ambush. Practicality demanded that the entire judgment of the LC be set aside because consideration of whether reinstatement should be granted depended on all the relevant facts.

The appeal was upheld and the entire order of the LC was set aside. The matter was referred back to the LC to be heard on an opposed basis before a different judge.

Refusing an offer of alternative employment

In *Reeflords Property Development (Pty) Ltd v De Almeida* [2022] 6 BLLR 530 (LAC), the employee was employed by Reeflords Property Development (the Company) as operations coordinator of the Company's sales department. Upon returning from maternity leave, the employee was called to a meeting and given a week to consider a proposal that she be transferred from the sales department to the development department. Upon learning that certain of her functions had already been allocated to the new head of the sales department, the employee was advised that the transfer would take place and she would be required to perform marketing functions going forward.

The employee lodged a grievance relating to the transfer and contended that it amounted to a demotion. She requested that she be reinstated into the position that she enjoyed prior to her taking maternity leave. A short while later she was given a retrenchment notice in terms of s 189 of the Labour Relations Act 66 of 1995 (the LRA) advising her that given the restructuring of the Company's operations, her sales position had become redundant.

During consultation, it was proposed that the employee be employed in an alternative position of marketing executive. Given that the employee lacked the necessary skills for the position, the employee agreed to be employed as marketing executive on condition that she receive marketing training and she be paid a travel allowance at the Automobile Association of South Africa mileage rates. The employee was thereafter offered an employment contract for the new posi-

tion, which made no provision for the training or a travel allowance. As a result, she refused to accept the marketing position on the basis that it was not a reasonable alternative. The employee was subsequently retrenched.

The employee referred an unfair dismissal dispute, claiming that her dismissal was automatically unfair for a reason related to her pregnancy or otherwise substantively and procedurally unfair.

The Labour Court (LC) granted the Company absolution from the instance in respect of the automatically unfair dismissal claim. However, the LC found the dismissal to be substantively unfair because the Company had failed to establish that the employee had unreasonably refused an offer of alternative employment, and procedurally unfair, because she had not been adequately consulted before being transferred to her new post. The Company was ordered to pay the employee compensation in the amount of six months' remuneration and to pay certain of her costs.

On appeal, the Company contended that the LC had erred in finding that the retrenchment was substantively and procedurally unfair since the employee had accepted the alternative marketing executive position yet thereafter unreasonably refused to accept the position, and that costs should not have been granted against it. The employee contended that she would have accepted the alternative position had her conditions been met and that consequently no reasonable alternative was provided to her.

With reference to s 189(2) of the Labour Relations Act 66 of 1995, the Labour Appeal Court (LAC) noted that to be meaningful, consultation in the context of a contemplated retrenchment must be genuine and engaged in with the purpose of seeking alternatives to retrenchment. The LAC found that the employee had not been consulted adequately on the restructuring. Further, the alternative offer of employment presented by the employee was reasonable and had seemingly been accepted by the Company until it suddenly backtracked by rejecting the employee's conditions for accepting the new position.

No explanation was provided by the Company as to why it had omitted the conditions from the employment contract nor why it did not offer to correct the terms of the contract. The Company did so at its own peril. In refusing to adhere to the terms of the agreement reached with the employee, the LAC found that the Company had acted both in bad faith and unfairly. The offer of the alternative position without training and a travel allowance was not a reasonable one and, as a result, the employee's retrenchment was substantively and procedurally unfair.

In the circumstances, the LAC held that there was no basis upon which to interfere with the LC's finding and compensation award. The LAC, however, set aside the order of costs on the basis that it did not accord with the general rule that costs do not ordinarily follow the result in labour matters.

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Vaccine mandates at work

By Tinotenda Mparutsa

Employers have a duty to take reasonable care of the health and safety of their employees in all circumstances of employment. As the COVID-19 pandemic evolves, this duty includes the prevention of the spread of the virus in the workplace. Vaccines are effective tools, in most cases, to mitigate infection and transmission of the virus. Understandably, some employers have implemented vaccine policies to provide a safe workplace for their employees. However, there are reasons that not all employees are willing or able to comply with vaccine mandate policies.

The case law on vaccine mandates in the workplace can best be described as developing. Notwithstanding, progress has been made. Briefly outlined below are some noteworthy cases of the progress.

Severance pay

In *Bessick v Baroque Medical (Pty) Ltd* (CCMA) (unreported case no WECT13083-21, 9-5-2022), the employer implemented a compulsory COVID-19 vaccination policy as an operational requirement. The business of the employer is an essential service that supplies medical devices to various medical institutions. The applicant refused to vaccinate based on medical, personal and religious reasons, as well as her 'constitutional right to bodily integrity' (para 41). Alternative employment could not be secured for the applicant; therefore, she was dismissed for reasons based on the employer's operational requirements. The applicant referred her dismissal to the Commission for Conciliation Mediation and Arbitration (CCMA) for arbitration. The Commissioner had to determine whether the applicant was unfairly dismissed, only the substantive fairness of the dismissal was challenged, and if so, whether she was entitled to severance pay.

The decision

The applicant did not challenge the risk assessment and the vaccination policy. Notwithstanding, 'the Commissioner found that the risk assessment conducted by the [employer] as well as the mandatory vaccination policy … [were in accordance with] the Consolidated Direction on Occupational Health and Safety Measures in Certain Workplaces [the Direction]' (Sibusiso Dube 'South Africa: CCMA finds retrenchment of employee and non-payment of severance for refusing to comply with vaccination policy fair' (www.bowmanslaw.com, accessed 3-7-2022)). The Commissioner held that

alternative employment for the employee was not feasible because the employer required all staff members to vaccinate. Therefore, the applicants' dismissal was substantively fair. In regard to all other objections put forward by the applicant against the vaccination policy, the Commissioner found no justifiable basis. Consequently, the applicant's decision not to adhere to the vaccination policy was 'unreasonable' and she was thus 'not entitled to any severance pay' (para 79).

Unpaid leave and loss of income

Section 73A of the Basic Conditions of Employment Act 75 of 1997 (BCEA) applies to the referral of disputes relating to any failure to pay an amount owing to a person who earns below the threshold in terms of the BCEA, the National Minimum Wage Act 9 of 2018, a contract of employment, a sectoral determination, or a collective agreement. In *Cousins v Bill Buchanan Association* [2022] 1 BALR 46 (CCMA), the employee's attendance at work was disturbed by the COVID-19 pandemic and the civil unrest that took place in KwaZulu-Natal, in July 2021. The employee referred a claims dispute to the CCMA in terms of s 73A of the BCEA. Therein, she claimed that her employer owed her money for COVID-19 tests, deductions from her unpaid leave and loss of income. The Commissioner had to determine whether the costs incurred by the employee fell under the scope of s 73A of the BCEA.

The decision

The Commissioner held that s 73A of the BCEA does not extend to the employee's claim for the cost of her COVID-19 tests or loss of income as the section only covers payment for which it expressly provides. The Commissioner also held that the employee could not claim for unpaid leave from her employer as she had exhausted her sick leave days and did not report for duty during the unrest. Notwithstanding, the Commissioner found that the employee could apply 'for an illness benefit in terms of clause 4 of the Directive issued on 25 March 2020 on the COVID-19 Temporary Employer Relief Scheme' (para 13). The CCMA dismissed the employee's case.

Conclusion

With no end in sight to the COVID-19 pandemic, disputes pertaining to vaccine mandates are most likely to continue percolating through to the CCMA and the courts. The above case decisions reveal that the importance of context cannot be understated when assessing the reasonableness of one's conduct in any dispute pertaining to vaccine mandates at work. Employers should remain aware of these decisions as they provide much needed guidance on how to implement vaccine mandates.

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Recent articles and research

By Kathleen Kriel

Abbreviation	Title	Publisher	Volume/issue
Advocate	Advocate	General Council of the Bar	(2022) 35.1
AMTJ	African Multidisciplinary Tax Journal	Juta	(2021) 1 (2022) 2
BTCLQ	Business Tax and Company Law Quarterly	SiberInk	(2021) 12.4
CILSA	Comparative and International Law Journal of Southern Africa	Juta	(2020) 53.3
DJ	*De Jure*	University of Pretoria	(2022) 55
EL	Employment Law Journal	LexisNexis	(2022) 38.3
ILJ	Industrial Law Journal	Juta	(2022) 43
ITJ	Insurance and Tax Journal	LexisNexis	(2022) 37.1 (2022) 37.2

Alternative dispute resolution

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Basic education

Kamga, S 'Monitoring the realisation of the right to basic education: The South African jurisprudence and structural-process-outcome indicators' (2020) 53.3 *CILSA* 109.

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Constitutional law

Brooks, R 'Confessions and a fair trial' (2022) 35.1 *Advocate* 58.

Ngcukaitobi, T 'Our book of redemption: On the origins of Constitutionalism in South Africa' (2022) 35.1 *Advocate* 30.

Van der Westhuizen, M 'The Constitutional Court – looking back and looking forward: The ghost of Phila Ndwandwe' (2022) 35.1 *Advocate* 54.

Controlled foreign company

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COVID-19

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Understanding economic abuse from a domestic violence perspective

By Eugene Opperman

Economic abuse is seldom spoken about, yet it is a very endemic issue experienced by many survivors of domestic violence. The popular misconception that domestic violence only entails physical assault is supported by the fact that courts wrongly address only the physical elements of assault under the umbrella of domestic violence. Unfortunately, this silent, and just as dangerous form of violence, is often seen as a less serious form of abuse in that only the physical assault element of domestic violence is addressed and recognised. This can be attributed to a lack of knowledge from court staff, overworked staff and even societal pressures and influences.

The Domestic Violence Amendment Act 14 of 2021 (the Act) recognises economic abuse as the deprivation of economic or financial resources to which an abused is legally entitled to or which the abused requires out of necessity. According to the definition in the Act, this could include tuition expenses, household necessities for the abused, repayments of a mortgage bond or payment of where the abused and abuser share a residence or accommodation. It is, furthermore considered, abuse where the abuser disposes of household goods or other property of the abused without their consent or the use of the financial resources of the abused without their consent.

The definition extends to the coercion of the abused to relinquish control over their possessions in favour of the abuser or to sign any legal document that would authorise the abuser to manage or control the financial affairs of the victim or abused.

Coercive and controlling behaviour is the core of most economic abuse and it addresses a gendered pattern of behaviour with the intention to make a person subservient and dependent through isolation, manipulation, constant fear, intimidation (also recognised as an act of domestic violence) and to take away the inherent freedom and human rights that the victim or abused might have. According to Evan Stark these coercive tactics affect dominance by the abuser in three ways: 'Exploiting a partner's capacities and resources for personal gain and gratification, depriving her of the means needed for autonomy or escape, and regulating her behaviour to conform with stereotypic gender roles' (E Stark *Coercive Control: The Entrapment of Women in Personal Life* (New York: Oxford University Press 2007)).

Since these 'silent' forms of domestic abuse are mostly unnoticeable and under the radar for the untrained eye, the scars of such abuse lingers for much longer periods than physical abuse.

Very little local research has been found with regard to economic abuse, which is concerning as the United Nation (UN) General Assembly's Resolution on the 'Elimination of Domestic Violence against Women' (A/RES/58/147) concedes that 'domestic violence can include economic deprivation'. The UN Secretary-General's 'In-depth study on all forms of violence against women' (A/61/122/Add.1) asserts that economic abuse and exploitation are expressions of violence 'that require greater visibility and attention'.

Victims of economic abuse all over South Africa (SA) experience financial dependency that is fuelled by them being denied access to their bank accounts, being excluded in marital decisions regarding finances that directly impacts the family and not having enough money to buy necessities or to pay bills. In many instances victims are forced to report on every cent spent, to co-sign and be accountable for debts of an abusive partner. One of the most prominent forms of economic abuse is where the abuser can control not only the abused, but also additional people such as dependants of the abused. This is often seen in matters of arrear children maintenance where the abuser not only abuses their spouse but in effect their children as well.

Apart from economic abuse, the Act recognises controlling behaviour as a form of domestic abuse where such behaviour has the effect of making the victim or abused dependent on or subservient to the abuser by 'isolating them from sources of support, exploiting their resources and capacities for personal gain, depriving them of the means needed for independence, resistance and escape and regulating their everyday behaviour' (UK Says No More 'Coercive and controlling behaviour' (https://uksaysnomore.org, accessed 8-7-2022)).

Such controlling behaviour will have a long-term negative impact on the ability of the abused to leave their abuser as the cycle of abuse will get worse with ongoing and renewed secondary emotionally and psychological exploitation of the abused the longer, they stay in the relationship. It is not uncommon for such victims to display physical symptoms of stress, anxiety and malnutrition in an effort to cope with their abuse.

The realisation that the abuse, especially financial abuse, may not stop after such an abused person leaves an abusive relationship is a further contributing factor for many abused people to stay in an abusive relationship.

Dr Nicola Sharp-Jeffs indicates that there are three recognisable factors, which may adversely impact on a victim or abused person's economic well-being. This includes, but is not limited to: 'Using male privilege to exploit women's existing economic disadvantage; causing woman to incur costs as a result of domestic violence; and using economic abuse to deliberately threaten women's economic security' (Nicola Sharp-Jeffs 'What's yours is mine: The different forms of economic abuse and its impact on women and children experiencing domestic violence' (MA thesis, London Metropolitan University, 2008) (www.refuge.org.uk, accessed 8-7-2022).

In SA, economic abuse is experienced mostly by women in disparaging domestic relationships and does not differentiate by upbringing, religion or income group. However, women in poorer communities are more vulnerable when it comes to economic exploitation due to cultural and traditional values.

The Domestic Violence Act 116 of 1998 does not clearly distinguish between economic and financial abuse and these terms are mostly used interchangeable. Dr Sharp-Jeffs defines these two notions and states that economic abuse addresses the behaviour of the abuser over the victim's economic freedom, such as re-

stricting of access to money or necessary resources such as clothing and food and even denying the abused partner education or work, whereas financial abuse can be interpreted as a subcategory of economic abuse where the abuser uses money in order to limit and control an abused partner's present and future actions. This occurs when the abuser uses the money or bank cards of the abused, gambles with the money of the abused or spends it for their personal gain only.

Judy L Postmus, Sara-Beth Plummer, Sarah McMahon, Nadine Shaanta Murshid and Mi Sung Kim note three different forms of economic abuse, namely –

- sabotaging how the victim acquires money and economic resources;
- restricting how money and economic resources are used by the victim; and
- exploitation on the victim's ability to maintain economic resources (Judy L Postmus, Sara-Beth Plummer, Sarah McMahon, Nadine Shaanta Murshid and Mi Sung Kim 'Understanding economic abuse in the lives of survivors' (2011) *Journal of Interpersonal Violence* (www.researchgate.net, accessed 8-7-2022)).

Realistic applications of how economic abuse is used by an abuser to threaten their economic security and chance to become self-sufficient by controlling the victim's financial resources might include –

- interfering with the victim's efforts to maintain or to obtain employment to become self-sufficient (this could also include contact harassment of the victim at their work);
- excluding the victim from family financial decisions or not allowing them access to finances by only giving them an allowance;
- controlling behaviour to make the victim ask or beg for money, or taking their money that they have earned;
- demanding an account of everything the victim buys by insisting on receipts;
- not allowing the victim's name to be on accounts, which would allow them to build a credit record;
- humiliating and making fun of the victim's financial contribution and saying it is worthless or not enough (Dr Amanda M Stylianou 'Economic abuse within intimate partner violence: A review of the literature' (2018) 33 *Violence and Victims* (https://connect.springerpub.com, accessed 8-7-2022)).

Economic control is the exploitation of the abuser where they prevent the 'victim from having access to or knowledge of the finances and from having any financial decision-making power' by some of the following actions –

- controlling and limiting access to financial resources of the victim, even 'withholding or hiding jointly earned money' or controlling how the household income is spent;
- 'denying the victim access to necessities, such as food, clothing', a place to live and/or medications or withholding child maintenance;
- racking up debt on shared accounts or joint credit cards; and
- 'tracking the victim's use of money' or 'preventing the victim from having access to a bank account' (Dr Stylianou (*op cit*)).

Employment sabotage is the behaviour of the abuser that prevents the victim from obtaining or maintaining employment by 'forbidding, discouraging, or actively interfering with the victim's employment and/or educational endeavours' and 'obstructing [the] victim from receiving other forms of income such as child support, public assistance, or disability payments' (Dr Stylianou (*op cit*)).

When an abuser purposefully behaves in a manner 'aimed to destroy the victim's financial resources or credit [worthiness]', it is considered economic exploitation (Dr Stylianou (*op cit*)). This could be done by stealing money, the victim's ATM card or their South African Social Security Agency card, or 'opening or using a victim's line of credit without permission' or 'refusing to pay bills or running up bills under the name of the victim or his or her children' (Dr Stylianou (*op cit*)).

Despite the serious long-term grievous impact of economic abuse and other non-physical acts of domestic violence, the police, prosecutors, judges, magistrates, and victim's themselves continue to emphasise physical assault as above other forms of domestic violence.

On the one side, 'economic abuse can contribute to a lifetime of economic struggle' for the victims and they could be left destitute, without a place to stay, 'unemployed, and unable to access resources' and means to rebuild their lives (Canadian Center for Women's Empowerment 'What is economic abuse?' (https://ccfwe.org, accessed 8-7-2022)). On the other side, it might result in the abused partner staying for a longer indefinite period with the abuser, which is an 'ideal' situation for further abuse.

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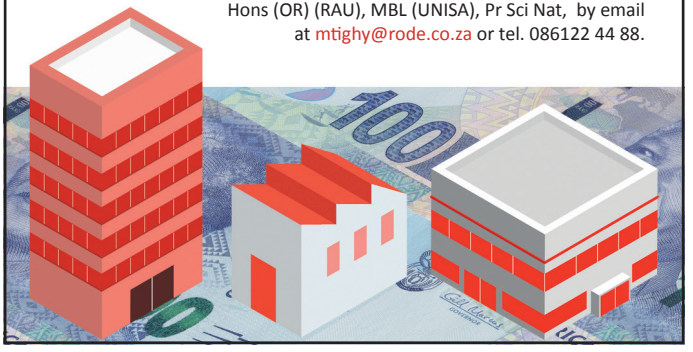

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