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DE REBUS

THE SA ATTORNEYS' JOURNAL

OCTOBER 2022

DOES THE RECOGNITION OF CUSTOMARY MARRIAGES AMENDMENT ACT DISCRIMINATE AGAINST WOMEN'S MARITAL PROPERTY RIGHTS?

Women's core struggle is against the values that drive our entire society and economic system

Exiting debt review: The conundrum of certainty in the how and when

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10 Does the Recognition of Customary Marriages Amendment Act discriminate against women's marital property rights?

Nozipho Lethokuhle Ndebele, LLM graduate discusses the amendments brought about by the Recognition of Customary Marriages Amendment Act 1 of 2021 (RCMAA) that came into operation on 1 June 2021. The author also explores the landmark rulings in *Gumede v President of the Republic of South Africa and Others* 2009 (3) BCLR 243 (CC) and *Ramuhovhi and Others (Maphumulo as Intervening Party) v President of the Republic of South Africa and Others (Trustees of the Womens' Legal Centre Trust as* Amicus Curiae*)* 2018 (2) BCLR 217 (CC), which challenged the constitutionality of s 7 of the Recognition of Customary Marriages Act 120 of 1998. The amendments brought about by the RCMAA successfully attempted to address the historical injustices faced by women, however, writes Ms Ndebele, one expects the legislature to engage further on certain issues that remain unclear and unresolved.

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The Maintenance Act 99 of 1998 states a maintenance officer may, in order to expedite an investigation into a complaint, direct the complainant and person against whom the maintenance order is made, appear on a specific time and date before him or her. The Act also stipulates that any person who fails to comply shall be guilty of an offence and liable on conviction to imprisonment not exceeding six months. Such matters are typically between a mother and the father of a minor child. Maintenance Officer, **Andrew Swarts**, writes that the reality unfortunately is that a respondent does not always adhere to the instructions and the uncertainty that prevails when a breach of a reg 3 directive occurs leaves the maintenance officer seemingly with no remedy.

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In *Rapp van Zyl Incorporated and Others v FirstRand Bank and Others* [2022] 3 All SA 437 (WCC) an attorney firm and its two directors claimed damages from FirstRand Bank for alleged defamatory statements. The defendants denied the statements were defamatory and pleaded that the statements were not unlawful as they were made on a privileged occasion. Legal practitioner, **Tshepo Mashile**, discusses the defence of qualified privilege and the three categories of statements which may enjoy qualified privilege. Furthermore, Mr Mashile describes how it is the event that is privileged and not the statement, namely, whether the statement is protected by privilege depends on whether it was relevant or pertinent to the occasion.

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20 Women's core struggle is against the values that drive our entire society and economic system

In this month's Women in Law, *De Rebus* News Reporter, **Kgomotso Ramotsho**, spoke to legal practitioner, **Ugeshnee Naicker**, who is a member of the Law Society of South Africa's Executive Committee, House of Constituents, Family Law and Alternative Dispute Resolution Committees, and the University and Section 35 Task Teams. Ms Naicker recounts what inspired her to begin practicing law, the many obstacles she had to overcome on the way, and the importance of perseverance regardless of what the future may bring.

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The need for cybercrime insurance

Since 1 July 2016, the Legal Practitioners' Indemnity Insurance Fund NPC (LPIIF) has excluded insurance cover for cybercrime related claims. This has raised many concerns from legal practitioners. In essence, the profession is concerned that public funds are insured for intentional misappropriation or theft and not insured for instances when theft arises due to the negligence associated with cybercrime.

The LPIIF provides a level of professional indemnity (PI) insurance cover to all practitioners in possession of a valid Fidelity Fund Certificate on the date that the cause of action arose. The LPIIF states that cybercrime is not a PI risk, but rather a business risk faced by all business enterprises and individuals – the risk is not unique to the practice of law or any other profession. The LPIIF has further stated that this is a business commercial risk that can be covered under various cyber risk and commercial crime products available on the market.

The current LPIIF Master Policy defines 'cybercrime' as:

'Cybercrime: Any criminal or other offence that is facilitated by or involves the use of electronic communications or information systems, including any device or the Internet or any one or more of them. (The device may be the agent, the facilitator or the target of the crime or offence)'.

Under the exclusions, clause 16 of the LPIIF Master Policy states:

'16. This policy does not cover any liability for compensation:

…

c) which is insured or could more appropriately have been insured under any other valid and collectible insurance policy available to the Insured, covering a loss arising out of the normal course and conduct of the business, or where the risk has been guaranteed by a person or entity, either in general or in respect of a particular transaction, to the extent to which it is covered by the guarantee. This includes but is not limited to Misappropriation of Trust Funds, Personal Injury, Commercial and Cybercrime insurance policies;

…

o) arising out of Cybercrime'.

On 21 September 2022, the Law Society of South Africa (LSSA) in collaboration with Marsh and iTOO held a webinar to provide insights into the emerging trends within the cyber environment. During the session, Cyber Specialist at Marsh Specialty, Justin Keevy, reported that since 2019 there has been a significant increase in ransomware (a type of malicious software designed to block access to a computer system until a sum of money is paid) attacks. Mr Keevy noted that a ransomware attacker only needs to be successful once, while legal practitioners need to be insured 100% of the time.

Speaking on Mimecast's The State of Email Security 2022 survey, Product Head: Cyber at iTOO Special Risks, Ryan van de Coolwijk, noted that the survey stated that –

- 75% of companies were impacted by ransomware attacks, which is up from 61%;
- 96% of companies were targets of e-mail related phishing attempts;
- shockingly, 23% of companies were providing ongoing cyber awareness training to their employees; and
- 80% believe that their company is at risk to inadvertent data leaks by employees.

Mapula Oliphant – Editor

The next webinar on cyber risk pitfalls will take place on 13 October 2022, practitioners should keep a look out for the invitation. The LSSA has recommended a cybersecurity policy be developed in collaboration with Marsh to members, for more information on this product, e-mail LSSA@Marsh.com (see also www.derebus.org.za).

❑

Would you like to write for *De Rebus*?

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

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

- Please note that the word limit is 2 000 words.
- Upcoming deadlines for article submissions: 17 October, 21 November 2022 and 23 January 2023.

Theft of trust money by legal practitioners – the consequences

By John Ndlovu

The legal profession has been regarded as an honourable profession from time immemorial and legal practitioners are generally held in high esteem by members of the public. In *Vassen v Law Society of the Cape of Good Hope* 1998 (4) SA 532 (SCA) at 538G, the court emphasised that the profession of an attorney is an honourable one and, as such, demands complete honesty, reliability, and integrity from its members. Practitioners are, therefore, obliged to be honest to their clients, the court, colleagues, and members of the public in general.

Despite the honour bestowed on the profession, there are a few instances in which the conduct of some practitioners is at variance with the high standard of honesty and truthfulness expected of them. The conduct of these errant practitioners has led to some members of the public believing that lawyers are generally liars and/or thieves. This is a misrepresentation of the truth, as it cannot be said that all lawyers are liars or thieves. There are, however, very serious consequences for legal practitioners whose conduct is found to have fallen short of the high standard of honesty required by members of the profession. The rules of the Legal Practice Council (the LPC) and the ethics of the profession create a myriad of infractions for which legal practitioners may be disciplined. This article will, however, only focus on the misconduct relating to the theft of trust money by legal practitioners.

Removal from the roll of legal practitioners

The LPC regulates all practitioners (attorneys and advocates) and all candidate legal practitioners. It is empowered in terms of s 6 of the Legal Practice Act 28 of 2014 (the Act) to develop norms and standards to guide the conduct of practitioners. Pursuant to its powers under the Act, the LPC has developed a Code of Conduct for all Legal Practitioners, Candidate Legal Practitioners and Juristic Entities and the Rules made under the authority of ss 95(1), 95(3) and 109(2) of the Act, which must be adhered to by all practitioners. Failure by a practitioner to comply with any provision of the Act or the rules may result in the legal practitioner concerned being hauled before the LPC's disciplinary committee.

Section 40 of the Act provides that if the disciplinary committee finds a practitioner guilty of misconduct it may, among others, advise the LPC to apply to the High Court for an order striking the practitioner's name from the roll, suspending them from practice or interdicting them from dealing with trust money. If the LPC is convinced that the legal practitioner concerned is no longer fit and proper to continue practice, it will apply to the High Court for an order as aforesaid. This is so because the High Court has the power to strike the name of a defaulting legal practitioner from the roll (s 31(1)(*a*) read with s 44(1) and (2) of the Act).

In terms of r 54.14.9 of the LPC, a firm must ensure that no account of any trust creditor is in debit. Furthermore, r 54.14.14 provides that withdrawals from a firm's trust banking account shall be made only to or for a trust creditor or as transfers to the firm's business banking account in respect of money due to the firm. It follows, therefore, that where a practitioner withdraws money from the trust banking account in contravention of these provisions, this will inexorably lead to a trust deficiency and the practitioner's conduct may constitute theft of trust funds.

Theft of trust funds by legal practitioners is a very serious offence and has far-reaching consequences for practitioners. South African courts have held that an attorney who dishonestly misappropriates trust funds is not a fit and proper person to continue practising as an attorney and deserves the ultimate sanction of strike-off (*Law Society of the Free State v Le Roux and Others* (FB) (unreported case no 3039/2014, 30-11-2015) (Molemela JP, Daffue J and Mia AJ)). In *South African Legal Practice Council v Bobotyana* [2020] 4 All SA 827 (ECG), the respondent stole trust funds amounting to more than R 2 million. The court held that the respondent's conduct was calculated, persistent and repugnant to the due and faithful discharge of his man-

date as an attorney. The court further remarked that where an attorney has been found to have acted dishonestly a court will not lightly conclude that striking off is not a fitting sanction. The respondent's name was accordingly struck from the roll of attorneys.

In *Legal Practice Council (KwaZulu-Natal Provincial Office) v Naicker and Another* (KZP) (unreported case number 2788/2019P, 6-11-2020) (Bezuidenhout AJ), the respondent stole the sum of R 1 million, which was deposited into his trust account in respect of the purchase of an immovable property. Shortly after the money was paid into his trust account the respondent made several unauthorised payments from the trust account contrary to the rules as discussed above. He passed the transfer and registered the property without having the funds in his trust account. Although the respondent subsequently paid the money back, the court held that such a payment does not mean that a wrong has been corrected. The court further held that when a person takes trust money, knowing that it is trust money, and then uses it for his own benefit, this constitutes theft. The court found that although the respondent's conduct had fallen short of the high standard expected of a practitioner, his character has not been shown to be inherently flawed. He was therefore suspended from practice for a period of two years instead of being struck off.

Criminal prosecution

A complainant or erstwhile client whose money was stolen by a legal practitioner has the right, not only to lodge a complaint with the LPC, but also to lay criminal charges with the South African Police Service (the police) against the practitioner concerned. It is not necessary for the victim of theft to await the outcome of any disciplinary inquiry by the LPC against the practitioner concerned before they can open a criminal case. The LPC – as the regulator – is also entitled to open a criminal case against a practitioner if it has reason to believe that a crime has been committed.

In terms of s 55 of the Act, the Legal Practitioners Fidelity Fund (the LPFF) is liable to reimburse persons (the claimants) who suffer financial loss as a result of theft of trust money or property by practitioners or their employees. Section 80 of the Act provides that once the LPFF has settled any claim in terms of s 55, the LPFF is subrogated, to the extent of the payment, to all the rights and legal remedies of the claimant against any practitioner or person in relation to whom the claim arose, or in the event of their death or insolvency or other disability, against any person having authority to administer their estate. The LPFF, therefore, steps into the shoes of the claimant and exercises all such rights and legal remedies as would normally be available to the claimant. The claimant has the right, among others, to lay criminal charges against the legal practitioner concerned and to institute civil proceedings to recover the stolen trust funds. The LPFF is also empowered in terms of s 63(1)(*i*) of the Act to institute private prosecutions for the misappropriation or theft of property or trust money in the event of the National Prosecuting Authority declining to prosecute defaulting legal practitioners. It is clear from the aforementioned that the LPFF does not only reimburse victims of theft of trust money by legal practitioners but is also actively involved in the criminal prosecutions of errant practitioners.

Some of the cases involving theft of trust money by practitioners are discussed below to demonstrate the attitude of South African courts towards thieving practitioners. In *Jayshree Baijnath v State* (KZP) (unreported case no AR320/18, 11-12-2020) (Chetty J (Mnguni J)) the appellant was convicted in the Durban Regional Court on one count of theft of an amount of R 644 989,72, which was entrusted to her in her capacity as an attorney. The salient facts of this case are briefly as follows: The appellant's client required assistance with a conveyancing instruction in which the client intended to purchase a house belonging to his mother. The appellant accepted the instruction but indicated to her client that the conveyancing aspect would be handled by another attorney, Ms Ramnarain. Transfer and registration of the property was affected, and Ms Ramnarain transferred the purchase price to the appellant using the banking details provided by the appellant, which happened to be that of the appellant's business bank account. The appellant failed to pay the money over to the seller, her client's mother. She gave numerous excuses and repeated promises of payment without any of these materialising. Eventually she signed an acknowledgment of debt in which she undertook to repay the money in instalments but had also failed to make any payment in terms of the said acknowledgment of debt. The court *a quo* sentenced her to six years' imprisonment, wholly suspended for a period of five years on condition, among others, that she paid the LPFF an amount of R 644 989,72, which the LPFF had paid to the seller. She was granted leave to appeal against her conviction. The state was also granted leave to appeal on the ground that the sentence imposed by the Regional Court was shockingly inappropriate and lenient. The appellant's appeal was dismissed and the state's cross-appeal against the sentence imposed by the Regional Court was upheld. The sentence imposed by the Regional Court was substituted with the sentence of five years direct imprisonment. The court was of the view that the court *a quo* had misdirected itself when it imposed a suspended sentence. The court stated as follows: 'In my view, the sentence imposed by the trial court pays lip service to the seriousness of the offence for which the legislature has seen fit to determine a mandatory minimum sentence, and the impact that misappropriation by attorneys of funds entrusted to them has on members of the public. It is settled law that a court of appeal will only interfere with the exercise of the discretion by a trial court if the exercise of such a discretion is vitiated by misdirection.' The court emphasised its disapproval of the lenient sentence imposed by the court *a quo* by referring to *S v Brown* [2015] 1 All SA 452 (SCA) at 121, where the court said the following: 'In my view, the sentence imposed by the court … tends toward bringing the administration of justice into disrepute. Less privileged people who were convicted of theft of items of minimal value have had custodial sentences imposed. We must guard against creating the impression that there are two streams of justice; one for the rich and one for the poor.'

In *Peffer v State* (ECP) (unreported case no CA&R206/07, 24-10-2007) (Froneman J), the appellant was convicted of the theft of trust money amounting to R 215 776 and was sentenced by the Specialised Commercial Crimes Court to six years' imprisonment (of which two years were conditionally suspended). The appellant appealed against the sentence on the ground that the regional magistrate misdirected herself in her judgment on sentence by finding that the appellant had a 'propensity in being involved in offences involving dishonesty'. In dismissing the appellant's contention and confirming the lower court's sentence Froneman J, as he then was, stated as follows: 'Even accepting Mr Wessel's submission that the previous convictions as recorded on the SAP 69 do not in themselves justify an inference of dishonesty in their commission, the appellant's own admission does. And what else does the fact that the appellant, very soon after the commission of the tax offences, embarked on a prolonged endeavour of stealing trust money from clients show other than sustained dishonesty? He did not stop until the matter was reported to the police and at no stage voluntarily attempted to recompense the persons who suffered as a result of his actions. His property was seized by the asset forfeiture unit, not offered by him for sale for the benefit of those who suffered from his theft'.

Recovery of the stolen funds

Any person who has suffered financial loss because of the theft of trust money by a practitioner is entitled to take whatever legal steps are necessary to recover the money, including the institution of civil proceedings against the legal practitioner concerned. As discussed above the LPFF is also entitled, in terms of its right of subrogation, to recover the amounts of claims it has paid in terms of s 55 of the Act. The legal practitioner will remain liable to repay the stolen trust funds irrespective of whether the funds were stolen by them, a co-director or any person in the employ of his firm. Section 19(3) of the Companies Act 71 of 2008 provides that the 'directors are jointly and severally liable, together with the company, for any debts and liabilities of the company as are or were contracted during their respective periods of office'. The directors of an incorporated law practice will, therefore, be liable, jointly and severally with the practice, to repay the stolen trust money if the theft occurred during their term of office as directors of the firm.

The recovery of the stolen trust funds can also occur in the context of criminal proceedings where the court makes an award of compensation to the victim of crime in terms of ss 300 or 297 of the Criminal Procedure Act 51 of 1977. An award of compensation in terms of s 300 has the effect of a civil judgment of the magistrates' court while an award in terms of s 297 is made as part of the condition of suspension of sentence.

Lastly, where a legal practitioner is convicted of theft of trust funds, the Asset Forfeiture Unit may apply to court for a confiscation order in terms of s 18 of the Prevention of Organised Crime Act 121 of 1998. A confiscation order under this section has the effect of a civil judgment of the court that made it. The proceeds of the sale of any property confiscated under this section may be used to recompense the victim of theft of trust funds (see *Peffer*).

Conclusion

Theft of trust funds by legal practitioners does not only result in untold hardships for the victims but also brings the legal profession into disrepute. Those legal practitioners who violate the rules and ethics of the profession by failing to uphold the highest standard of honesty, reliability and integrity should suffer the consequences of their nefarious actions. The requirements for re-admission of struck off practitioners should also be made more stringent to ensure that practitioners who have a propensity for stealing trust money do not find it easy to re-enter the legal profession.

John Ndlovu *BIur (UNIZULU) LLB (UP) Masters Cert (Labour Relations Management) (UJ)* is a Senior Legal Adviser at the Prosecutions Unit of the Legal Practitioners' Fidelity Fund in Centurion.

By Donald Msiza

Virtual commissioning in South Africa – understanding *FirstRand Bank Ltd v Briedenhann*

The matter in *FirstRand Bank Ltd v Briedenhann* 2022 (5) SA 215 (ECGq) was brought to the court by the plaintiff in application for a default judgment for money owed to it by the defendant in terms of a credit/loan agreement entered between the parties, of which the agreement was not in dispute before the court.

The court took issue with two affidavits submitted by the plaintiff in its papers. Particularly that the said affidavits were electronically signed and virtually commissioned and, therefore, invited the applicant to make submissions in relation to the acceptance or recognition by a court of a virtual mode of administration of oath. The applicant's submissions relied on the provisions of the Electronic Communications and Transactions Act 25 of 2002 (the ECTA) whose provisions govern the administration and acceptance of electronic signatures, particularly ss 13 and 18 of the ECTA.

The issue

The plaintiff in this matter had the affidavits in question deposed to and commissioned in the virtual 'presence' of both the deponent and commissioner using a secure document-signing system the plaintiff developed with LexisNexis. The system has video conferencing and document-encryption functions and allows the commissioner to satisfy themselves of the identity and understanding (in relation to the contents of the affidavit) of the deponent. Both parties can sign the affidavit, thereafter the deponent attaches their electronic signature, while the commissioner attaches their advanced signature as required by s 18(1) of the ECTA.

The court's main contention hinged on the Regulations Governing the Administration of an Oath or Affirmation promulgated in terms of s 10 of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963, in specificity, regs 1 through to 4. Regulations 3 and 4 read, respectively, as follows:

'3(1) The deponent shall sign the declaration *in the presence of the commissioner* of oaths.

(2) If the deponent cannot write he shall *in the presence of the commissioner* of oaths affix his mark at the foot of the declaration: Provided that if the commissioner of oaths has any doubt as to the deponent's inability to write he shall require such inability to be certified at the foot of the declaration by some other trustworthy person.

4(1) Below the deponent's signature or mark the commissioner of oaths shall certify that the deponent has acknowledged that he knows and understands the contents of the declaration and *he shall state the manner, place and date of taking the declaration.*

(2) The commissioner of oaths shall –

(*a*) sign the declaration and print his full name and business address below his signature; and

(*b*) state his designation and area for which he holds his appointment, or the office held by him if he holds his appointment *ex officio*' (court's italics).

The court's disposition on the interpretation of the said regulations is pivotal. It interpreted and understood reg 3(1) to mean that the 'deponent is required to append their signature to the declaration in the physical presence or proximity of the commissioner'. As relates to regs 2, 3, and 4, the court held: 'The process follows a logical sequence which requires the commissioner to satisfy themselves that the deponent understands the nature of the oath; administer it; obtain confirmation of the taking of the oath by signature on the document and thereafter, to append their signature with details of place, area and designation' and concluded that the whole process must take place in the presence of the commissioner, concluding that 'the plain meaning of the expression "in the presence of" within its context in regulation 3(1), requires that the deponent to an affidavit takes the oath and signs the declaration in physical proximity to the commissioner.'

The court further considered the applicant's reliance on the provisions of the ECTA, rightly agreeing with the said submissions that electronic signatures may be used on affidavits and advanced electronic signatures where so required by the law in terms of ss 13(3) and 18(1) of the ECTA. However, such usage of digital signatures on affidavits, the court held, is subject to deposition in accordance with reg 3(1).

Thus, the court was seized with the question: Whether, for purposes of reg 3(1), a video or virtual link is sufficient?

Previously decided cases

In answering the question as to whether the law makes provision for the virtual commissioning of affidavits in South Africa the court considered and analysed three leading cases, namely *S v Munn* 1973 (3) SA 734 (NC), *Mtembu v R* 1940 NPD 7 and *R v Sopete* 1950 (3) SA 769 (E). In all three matters the courts respectively held that the regulations are directive and in special circumstances, especially where failure to comply relates to form (and not substance) (see *Ladybrand Hotels (Pty) Ltd v Stellenbosch Farmers' Winery Ltd* 1974 (1) SA 490 (O)) the court may allow for deviation from their strict compliance.

The court further considered the decision in *Knuttel NO and Others v Bhana and Others* [2022] 2 All SA 201 (GJ) in which the court considered the admissibility of an affidavit deposed to by video-conferencing and held that 'the purpose of the declaration by the commissioner is to provide assurance that the deponent has indeed taken the oath, knows and understands its effect and is the person who signed the declaration'. However, the court noted that the finding in favour of admitting a virtually deposed affidavit in *Knuttel* was essentially *obiter* since the allegations set out therein were also set out in another affidavit which was 'properly' deposed and further that the deponent to the affidavit was COVID-19 positive.

The court, exercising its discretion to dispense with the strict compliance of the regulations insofar as they have been substantially adhered to, accordingly held that the two affidavits should be admitted, and the default judgment be granted as prayed for.

The decision of the court

The court held that considering the wreckage wrought by COVID-19 pandemic, technological innovation is important in facilitating the ease of commission and deposing to affidavits and by extension address 'the inherent risks associated with fraudulent document attestation in the ordinary manner and which the regulations seek to address'. However, that it is not for the court to legislate. The court held in this regard: 'However, where, as in the present situation, legislative action would be required to recognise and legitimise the use of technologies such as those proposed by the plaintiff, it is to the legislature or to the Minister of Justice in this case, that persuasion should be directed'. Accordingly, it held that in its opinion the plaintiff should have complied with the regulations, since unlike in *Knuttel*, neither the deponent nor the commissioner was COVID-19 positive and, therefore, rendering it impossible to physically administer the oath.

The court only admitted the affidavits because the regulations were substantially complied with, it said, in doing so that 'there can be no doubt that the evidence placed before me establishes that the purposes of regulation 3(1) have been met. To refuse to admit the affidavits would, of course, highlight the importance of adhering to the principle of the rule of law. … There is after all no doubt that the deponents did take the prescribed oath and that they affirmed doing so'.

Conclusion

In conclusion, the Justices of the Peace and Commissioners of Oaths Act and the relevant regulations have to be amended to be brought up to speed with the times of COVID-19 and beyond. The ECTA already provides for the speedier finalisation of the digital transactions through the provision of the usage of electronic signatures and where required by law, advanced electronic signatures, there is no reason why the Justices of the Peace and Commissioners of Oaths Act does not provide for the virtual deposition and subsequent commissioning of oaths within the framework of the ECTA, very much like the plaintiff in this matter does.

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Mandatory vaccination unlawful: Has the CCMA finally seen the light?

By Khwezi Mqoboli and Mziwamadoda Nondima

There is no question that the COVID-19 pandemic has caused serious havoc in the lives of many people around the world. Many companies and businesses have been affected and in their efforts to curtail the spread of the virus, many companies adopted mandatory vaccination policies for their employees and stakeholders. It is common cause that mandatory vaccinations have been opposed by many employees for a variety of reasons. In South Africa, for example, the opposition of vaccinations led to several disputes being referred to the Commission for Conciliation, Mediation and Arbitration (CCMA). These disputes emanate from the fact that employers terminated employment contracts of employees who refused to vaccinate. The CCMA has issued awards regarding mandatory vaccinations. In this article, we briefly explore the following questions:

- Has the CCMA reached a turning point regarding mandatory vaccinations?
- Going forward, will companies be justified or not justified for dismissing employees for failure to vaccinate?

Some previous CCMA arbitration awards

The case of *Mulderij v Goldrush Group* (CCMA) (case no GAJB24054-21, 21-1-2022) is one of the CCMA matters wherein the issue of mandatory vaccination was grappled with. In this matter, the employee was dismissed on the grounds of incapacity due to her refusal to accept the mandatory vaccine. She submitted that her refusal to vaccinate is based on her constitutional right to bodily and psychological integrity (s 12(2) of the Constitution). In reaching his decision, the commissioner took into consideration the steps that the employer put in place in developing the mandatory vaccination policy, which included the identifying of the risk and health hazards that the employees were exposed to and the consultations with the employees regarding the mandatory vaccination policy. The commissioner ruled in favour of the employer – that the dismissal was substantively fair. He held that the employee is permanently incapacitated due to her refusal to vaccinate and thus failed to participate in a safe working environment.

In *Bessick v Baroque Medical Pty (Ltd)* (CCMA) (case no WECT13083-21, 9-5-2022), the employee was dismissed for failure and/or refusal to comply with the employer's mandatory vaccination policy. The dismissal of the employee was based on operational grounds:

'The basis for the policy was to ensure that staff members were not infected by the virus and also to sustain the operations of the [employer] by attempting to prevent the transmission from unvaccinated non-vaccinated staff. The attempt was also to prevent absenteeism as a result of the virus' (at para 6).

The CCMA considered the employee's reasons for not taking the vaccination – that is, bodily integrity, medical condition, and the employee's belief that there has not been thorough research conducted on the vaccines. The commissioner held that the employee's reasons for opposing mandatory vaccination have no basis and ruled that the dismissal due to operational requirements was substantively and procedurally fair.

Can the CCMA ignore its previous awards?

The CCMA arbitration awards do not create precedent. This means that commissioners are not bound by previous awards. They can rule differently. For example, less than two months after the *Bessick* ruling, the CCMA found itself in the same situation with the same employer in the case of *Tshatshu v Baroque Medical (Pty) Ltd* (CCMA) (case no GAJB20811-21, 22-6-2022), where similar facts were dealt with, and it ruled differently. The employer submitted that any limitation on a constitutional right was justified in terms of s 36 of the Constitution.

In this ruling, the commissioner assessed the reasonableness of mandatory vaccination policies, considering the Constitution and government regulations. The commissioner stated that:

'When one considers the equality clause (section 9 of the Constitution), freedom and security of the person (section 12 of the Constitution), limitation of rights (section 36 of the Constitution), the lack of reasonableness of the rule, governments response to and the Regulation it issued, it becomes unmistakably clear that the right to issue any law of general application in respect of COVID-19 vaccinations rests with government. An employer has no right to formulate any COVID-19 vaccination mandates. It is the prerogative of government. … It follows that the dismissal of the applicant was substantively unfair'.

Has the CCMA reached a turning point regarding the mandatory vaccinations?

The previous awards – where the CCMA ruled that dismissal due to refusal to vaccinate was substantively fair – convinced most people, including companies, that mandatory vaccinations constitute justifiable limitation of the Constitutional rights. It seems, from the CCMA matters, that the core purpose for the adoption of compulsory vaccination is to ensure continuity of the service. Employers fear that unvaccinated employees would be infected and thus be forced to spend several days at home or hospital. This, in effect, affects productivity. Part of the argument advanced by the employers is that vaccinations protect the employee and those around them. This is factually not true. What is known is that vaccinations prevent the severity of the virus.

The latest CCMA award has ignited the debate. We are of the view that the CCMA finally saw the light. South African Labour Courts (LC) have not ruled on these matters. However, courts in some of the

foreign jurisdictions have ruled on mandatory vaccination and the CCMA could have expanded its discussion by considering foreign case law. For example, in *Ryan Yardley and Others v Minister for Workplace Relations and Safety and Others* CIV-2022-485-000001 [2022] NZHC 291, the New Zealand High Court held as follows:

'The evidence suggesting that the Omicron variant in particular breaks through any vaccination barrier means that I am not satisfied that there is a real threat to the continuity of these essential services that the [policy] materially addresses.

…

COVID-19 clearly involves a threat to the continuity of … services. That is because the Omicron variant in particular is so transmissible. But that threat exists for both vaccinated and unvaccinated staff. I am not satisfied that the [policy] makes a material difference, including because of the expert evidence before the court on the effects of vaccination on COVID-19 including the Delta and Omicron variants.

… The evidence shows that vaccination significantly improves the prospects of avoiding serious illness and death, even with the Omicron variant.'

The previous CCMA awards failed to consider the apparent aspect that were considered by the court in *Ryan Yardley* case. Whether one is vaccinated or not, they will still be infected by the virus. What the employers have done is thinking that, since the virus has been considered deadly, it would be justifiable to limit the constitutional rights of their employees without further considerations. Failure to successfully convince employees – to vaccinate – with concrete scientific evidence meant that employers had to make vaccination mandatory through internal policies. The employers failed to take cognisance of the concerns of their employees regarding the safety of the vaccines.

Conclusion

What is clear from these matters is that employers failed to properly justify the limitation of s 12(2) of the Constitution. The limitation clause in s 36 of the Constitution lays down a test (two-stage approach test). It does not appear as if this test was considered when the employers adopted their policies. Yes, the working environment must be safe, and it would suffice to have the vaccination policy and other measures to curb the effect of COVID-19. A flexible and carefully drafted vaccination policy would have prevented these disputes. Having said that, we are now sitting with some confusion – which award sets precedent? Going forward, are employers going to keep their mandatory vaccination policies? Reliance, for scrapping the policies, cannot be placed on the latest CCMA award because a CCMA award does not create a precedent. It is best that one of these awards (if not all) be taken on review so that we get a precedent from the LC.

Khwezi Mqoboli *BSocSci (Rhodes) LLB (Wits)* is a candidate legal practitioner in Pretoria and Mziwamadoda Nondima *BA LLB (Rhodes)* is a legal practitioner at Nondima Attorneys Inc in East London.

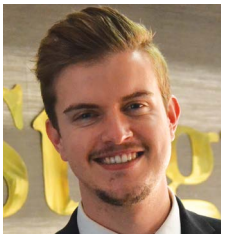
People and practices

Compiled by Shireen Mahomed

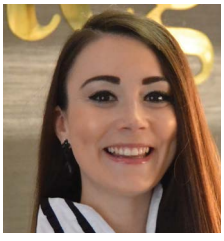
Stegmanns Inc in Pretoria has four new appointments.

Carna Labuschagne has been appointed as a senior associate in the Compliance Law Department.

Disemelo Tlali has been appointed as an associate in the General Litigation, Family and Labour Law Department.



Anrich van Stryp has been appointed as a professional assistant in the Commercial and Intellectual Property Law Department.



Suléne van Rensburg has been appointed as a professional assistant in the Property and Notarial Law Departments.

All People and practices submissions are converted to the *De Rebus* house style. Please note, five or more people featured from one firm, in the same area, will have to submit a group photo. For more information on submissions to the People and Practices column, e-mail: Shireen@derebus.org.za

Does the Recognition of Customary Marriages Amendment Act discriminate against women's marital property rights?

By Nozipho Lethokuhle Ndebele

The Recognition of Customary Marriages Amendment Act 1 of 2021 (the RCMAA) came into operation on the 1 June 2021. It amends s 7(1) of the Recognition of Customary Marriages Act 120 of 1998 (the RCMA) following the Constitutional Court (CC) judgments in *Gumede v President of the Republic of South Africa and Others* 2009 (3) BCLR 243 (CC) and *Ramuhovhi and Others (Maphumulo as Intervening Party) v President of the Republic of South Africa and Others (Trustees of the Womens' Legal Centre Trust as* amicus curiae*)* 2018 (2) BCLR 217 (CC).

Section 6 of the RCMA provides that 'a wife in a customary marriage has on the basis of equality with her husband and subject to the matrimonial property system governing the marriage, full status and capacity, including the capacity to acquire assets and to dispose of them, to enter into contracts and to litigate, in addition to any rights and powers that she might have at customary law'.

However, s 7(1) of RCMA provided that the proprietary consequences of a customary marriage entered into before the commencement of the Act (hereafter, old marriages) continued to be governed by customary law.

Section 7(2) sought to only regulate post-Act customary marriages (hereafter, new marriages) as being in community of property unless agreed otherwise (for example, by means of an antenuptial agreement).

Therefore, s 7(1) discriminated against women married prior to the commencement of the Act. Section 7 was a contradiction of s 6 of the RCMA because s 6 gives equal status to spouses but s 7(1) took it away by implying that the property of women in 'old' customary marriages would continue to vest in their husbands. As a result, several legal scholars criticised this discrimination.

JM Pienaar asserted that, despite a husband and wife being granted equal status

Picture source: Gallo Images/Getty

in s 6, the proprietary implications that had previously disempowered women remained unaltered for 'old' marriages that constituted the majority of customary marriages (JM Pienaar 'African customary wives in South Africa: Is there spousal equality after the commencement of the Recognition of Customary Marriages Act?' (2003) 14 *Stellenbosch Law Review* 256 at 264). As a result, Pienaar found the continued regulation of 'old' customary marriages by customary law, to have had an extremely negative impact on the position of women and considered it imperative for s 7(2) to be amended in order to similarly place women in 'old' customary marriages in the same proprietary position as those in 'new' marriages (Pienaar (*op cit*) at 271).

Thus, s 7(1) and (2) of the RCMA had disregarded many women who were already in customary marriages, as it only changed the proprietary position of post-Act customary marriages. As a result, these two provisions were constitutionally challenged in the *Gumede* (for pre-Act monogamous customary marriages) and *Ramuhovhi* (for pre-Act polygamous customary marriages) cases.

The *Gumede* case

In the *Gumede* case, Mrs Gumede and her husband concluded a customary marriage in 1968 that lasted for over 40 years. During the marriage, Mrs Gumede maintained the family household and children as her husband did not permit her to work (paras 6 – 7).

Before their divorce was granted, Mrs Gumede challenged first, s 7(1) of the RCMA that provided that 'the proprietary consequences of a customary marriage entered into before its commencement continued to be governed by customary law'. Secondly, she challenged the two provincial statutes (KwaZulu Act on the Code of Zulu Law 16 of 1985 and Natal Code of Zulu Law (published in Proclamation R151 of 1987)) that provided that the husband is the family head and owner of all family property, which he may use in his exclusive discretion. The interpretation of these codified provincial Acts meant that a wife in an 'old' customary marriage did not have any claim against the family property during or on the dissolution of the marriage (para 11). The parties in this case were subject to the KwaZulu Act which applied where they were domiciled and this codified customary law subjected a woman married under customary law to the marital power of her husband, who was the exclusive owner and had control over all family property (para 33).

The CC confirmed the High Court's decision that both the codified customary laws namely, the KwaZulu Act and Natal Code, were discriminatory on the listed ground of gender (para 34). This was based on the fact that these provisions discriminated between a wife and husband by subjecting only the wife in a customary marriage to unequal patrimonial consequences and also, the RCMA differentiated between a customary wife who was married before and after the Act (para 34). Therefore, the court held that the impact of the discrimination in s 7(1) and (2) is that it considered Mrs Gumede together with other customary wives married prior to the commencement of the Act as 'incapable or unfit to hold or manage property' and this excluded them from economic activities in 'economic activity in the face of an active redefinition of gender roles in relation to income and property' (para 35). Henceforth, the court found the codified customary laws governing marriages concluded prior to the enactment of the RCMA to strike at the very heart of the protection of equality and dignity that the Constitution affords to all, including women, as this marital property system rendered 'women extremely vulnerable by not only [depriving] them of their dignity but also rendering them poor and dependent' (para 36). The court held that the complete exclusion of a customary wife in the owning of 'family property unashamedly demeans and makes vulnerable the wife concerned'. Thus, it is discriminatory and unfair (para 46). Consequently, the High Court's order that the impugned provisions regulating the patrimonial consequences of 'old' customary marriages unfairly discriminated against women on grounds of gender was confirmed by the CC (para 49).

However, despite the court confirming the invalidity and unconstitutionality of the provisions impugned by the court *a quo*, it was held that such invalidity is limited to monogamous customary marriages, and it does not extend to pre-Act polygamous marriages. The court decided that 'polygamous [marriages] will be regulated by customary law until parliament intervenes' (para 56). One cannot help but wonder whether the court's hesitance in extending the same protection to polygamous marriages could have been because it foresaw the possible practical problems that may ensue when attempting to apply an in community of property system to polygamous marriages. The *Ramuhovhi* case later dealt with the discrimination insofar as it pertains to pre-Act polygamous marriages.

The *Ramuhovhi* case

In this case, the applicants were children of the deceased, their father was deceased and had been married to their respective mothers in terms of Venda customary law. As a result, the Venda customary law was applicable by virtue of s 7(1) of the RCMA.

In the court *a quo*, the applicants argued that due to the applicable Venda customary law and the application of s 7(1) that subjected pre-Act customary marriages to customary law rules, their mothers (customary wives) were excluded from ownership of the estate amassed by the deceased. It was submitted that this discrimination caused prejudice to the deceased's customary wives and children. As per the Venda customary law, the rights or control over marital property could not vest in the hands of wives (para 9).

The High Court found women in polygamous marriages to be continuously excluded from the management, control, and ownership of marital property. Section 7(1) of the RCMA was found to be discriminatory on grounds of gender, race, ethnic or social origin, insofar as it excluded women in polygamous marriages from the protection afforded to women in monogamous marriages (para 9).

The CC similarly found s 7(1) to first, unfairly discriminate against women in 'old' polygamous customary marriages, and secondly, to be inconsistent with the relevant human rights instruments and constitutional provisions of equality and dignity. It stated that 'not owning or having control over marital property renders wives in pre-Act polygamous marriages particularly vulnerable and at the mercy of husbands' (para 42).

The court held that the effect of s 7(1) was that it perpetuated inequality between husbands and wives in pre-Act polygamous customary marriages, which is what ss 6 and 7(6) aim to completely end (para 35). Since this perpetuation of inequality was considered to be similar to that of pre-Act monogamous customary marriages as per the *Gumede* decision, the court's reasoning had to apply equally to pre-Act polygamous customary marriages (para 36). This discrimination was found to violate women's right to dignity for being considered unfit to manage property as their husbands (para 38). Section 7(1) was found to limit the right to 'dignity and the right not to be discriminated against unfairly' (para 43).

The CC granted an interim order until the legislature intervenes and decided that both the husband and wife would have a joint and equal right to manage, control and own the house, whereas the husband and all wives will exercise joint control, management and ownership over the family property (para 71).

Therefore, s 7(1)(*a*) of the RCMA now regulates the 'proprietary consequences of a customary marriage … entered into before the commencement of this Act' by bestowing parties with joint and equal ownership to, and rights of management and control of, marital property.

Challenges that remain

Currently, 'customary marriages … are automatically in community of property' provided there is no antenuptial contract stating otherwise (para 31). Prof Papa Maithufi opined that an automatic com-

munity of property system in customary marriages may be contrary to the intention of the parties. This is because the parties may intend to conclude an antenuptial contract after the delivery of *lobolo* or transfer of the bride, when it is clear that the parties will conclude a customary marriage. The parties may find it too early to register their antenuptial contract before the marriage, so that they can avoid financial costs of an antenuptial contract should the marriage not be concluded. One solution may be to allow parties a period of three months to regulate their matrimonial property system after the delivery of *lobolo*, failing which an in community of property regime will automatically apply to their marriage (Aubrey Manthwa 'Lobolo, consent as requirements for the validity of a customary marriage and the proprietary consequences of a customary marriage – *N v D* (2011/3726) [2016] ZAGPJHC 163' (2017) 38 *Obiter* 438 at 443 – 444).

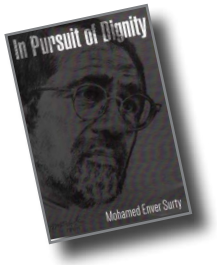
The RCMAA replicated the *Ramuhovhi* decision by providing terms such as '"joint and equal" ownership and rights of management and control', without explaining the terms or expanding on what the court granted as interim relief (Fatima Osman 'The recognition of Customary Marriages Amendment Bill: Much ado about nothing?' (2020) 137 *SALJ* 389 at 396). The provisions are unpalatable because of the failure to articulate the parameters of parties' rights, the consequences of the exercise of rights to property, and an explanation of how the order operates within the current marital proprietary regimes (Osman (*op cit*) 396). It, therefore, remains unclear whether the order created a community of property regime with several parties and whether parties have an undivided third or quarter share in the joint estate (Osman (*op cit*) 396).

Osman showed concern about the implementation of the Recognition of Customary Marriages Amendment Bill B12 of 2019 (now the RCMAA), in that the legislature failed to engage and clarify how contemporary assets (such as pension money, provident fund money or commercial property) would be classified (Osman (*op cit*) 402). This would result in courts having to classify property or individual's claims to property based on outdated official definitions of customary property. For example, house property was historically defined to include the earnings of the various members of the household, but currently, it will be absurd and unconstitutional for an individual's earnings to be owned, managed, and controlled by the married couple of the house (Osman (*op cit*) 403).

In conclusion, it is disappointing that it took more than 20 years for the amendment of the RCMA to take place despite the fact that its proprietary provisions had not sufficiently protected women in 'old' customary marriages. However, the amendment has successfully attempted to address the historical injustices faced by women and it is expected of the legislature to engage further on certain issues that remain unclear and unresolved.

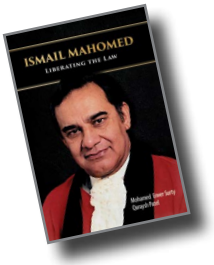
Nozipho Lethokuhle Ndebele *LLB LLM (Private law) (UFS)* is an LLM graduate in Cape Town. ❑

Book announcements



In Pursuit of Dignity
By Mohamed Enver Surty
Johannesburg: National Awqaf Foundation of South Africa
(2019) 1st edition
Price: R 240 (including VAT)
272 pages (soft cover)

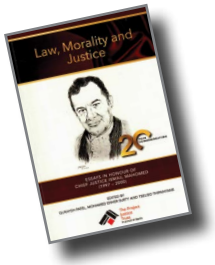
This book is a compelling and thoughtful collection of short stories that flows imperceptibly into a strong tale of a stalwart of our long struggle for freedom. It is an insight into South Africa today, yesterday and the future.



Ismail Mahomed: Liberating the Law
By Mohamed Enver Surty and Quraysh Patel
Johannesburg: The Project Justice Trust
(2020) 1st edition
Price: R 385 (including VAT)
462 pages (soft cover)

The human rights legacy of former Chief Justice, Ismail Mahomed, features in a biographical sketch. The book comprises four sections, namely:

- Commentary, preceded by a foreword by President Cyril Ramaphosa.
- Perspectives of Justice Mahomed by colleagues, friends, and family.
- A selection of Justice Mahomed's speeches that deal with a range of issues from philosophy to the Bill of Rights.
- A selection of some of Justice Mahomed's illuminating judgments.



Law, Morality and Justice – Essays in honour of Chief Justice Ismail Mahomed (1997 – 2000)
By Quraysh Patel, Mohamed Enver Surty and Tseliso Thipanyane (eds)
Cape Town: Juta
(2020) 1st edition
Price: R 300 (including VAT)
184 pages (soft cover)

This commemorative book is a limited edition print and comprises of essays as a special tribute to a person of towering intellect and moral vision. Former Chief Justice, Ismail Mahomed, was a visionary human rights lawyer long before the ethos of a Bill of Rights was introduced in our constitutional dispensation. The contributors, therefore, look at Justice Mahomed and his jurisprudence through the prism of human rights. ❑

Picture source: Gallo Images/Getty

What remedies do maintenance officers have against non-compliance when investigating complaints?

By Andrew Swarts

The two regulations that will form the crux of this article are reg 3(1) and reg 3(3) of the Maintenance Act 99 of 1998. Regulation 3(1) states: 'A maintenance officer may, in investigating a complaint and with due consideration to expediting the investigation of that complaint, direct the complainant and the person against whom a maintenance order may be or was made to –
(*a*) appear on a specific time and date before him or her; and
(*b*) produce to him or her on the date of appearance information relating to the complaint and documentary proof of the information, if applicable.'
Regulation 3(3) provides that: 'Any person who fails to comply with a direction contemplated in subregulation (1) shall be guilty of an offence and liable on conviction to imprisonment for a period not exceeding six months.'

The focus of this article

Section 6(1) provides that: 'Whenever a complaint to the effect – … has been made and is lodged with a maintenance officer in the prescribed manner, the maintenance officer shall investigate that complaint in the prescribed manner and as provided in this Act.' The prescribed manner, is in part, with reference to reg 3(1) of the Maintenance Act. This makes the investigating of every complaint compulsory. The investigation of the complaint bears significance to the fact that the caregiver of the minor child, usually the mother, approaches the court to assist in the maintenance matter between her and usually the father of the minor child. The direction in terms of reg 3(1) may be given by the maintenance officer in a manner the officer deems fit as contemplated by reg 3(2). A standard form for the initiation of the investigation, as contemplated by s 6(1) of the Maintenance Act, was formulated by the Department of Justice and is contained in Circular 05 of 2013: Directive by the Maintenance Officer: Regulation 3(1)(a) and 3(2)(a). This standard form, we refer to as the directive. The directive contains reg 3(1) and reg 3(3). The directive calls the parties to the s 6 enquiry for the maintenance officer to investigate the complaint. Regulation 3(1) is protected by reg 3(3) in order to enforce compliance with the directive that was given by the maintenance officer. The procedure after non-compliance of the directive is the subject of this article. There is no case law on the non-compliance with the reg 3 directive as opposed to s 31 of the Maintenance Act. The court indicated in detail in the case of *S v Magagula* 2001 (2) SACR 123 (T) how s 31 should be implemented and certain guidelines were put in place to deal with a matter that falls under s 31.

Uncertainty surrounding the implementation of reg 3

A directive is issued by maintenance officers during the investigation phase, and it is believed that on receipt of the directive the parties are called to the maintenance office in order for the maintenance officer to investigate the complaint. The reality unfortunately is that a respondent, who is a party to the application, does not always adhere to these instructions. The return of service by the Sheriff would indicate that the respondent was properly served but the respondent may still not attend the maintenance enquiry. The uncertainty that prevails when a breach of reg 3 directive does occur, leaves the maintenance officer seemingly with no remedy. The question is what now? How does the maintenance officer proceed in the case of non-compliance?

The court in *Ilsley v Lechoba and Another* (GJ) (unreported no 50748/10, 2-12-2011) (Meyer J) condemned the use of the subpoena during the investigation phase in the strongest terms. The court in *Lechoba* made no secret of its frustration when it gave voice on the use of the subpoena in the investigation phase of the maintenance enquiry. The presiding officer at para 7 called it 'irregular' and said that 'I am of the view that the irregularities to which I have referred constitute grave or gross irregularities'. Section 6(1) makes the investigation of every complaint compulsory and the court in *Lechoba* strongly objected to the use of the subpoena during the investigation phase of the enquiry, making the directive the right process document when initiating an investigation in terms of s 6(1).

Circumvention tactics by the maintenance office and the intervention by Department of Justice

Previously, the maintenance officer would issue a directive and the return of service would indicate that the respondent was properly served, and the respondent would still not attend to the enquiry in the maintenance office. The maintenance officer would then issue a subpoena and on non-compliance with the subpoena, a warrant of arrest would be requested to secure the respondent's attendance. This circumvention tactic was used to secure attendance. This type of action was already addressed and frowned on by the *Lechoba* decision. The maintenance court is mandated in terms of s 10(6) of the Maintenance Act, to 'conclude maintenance enquiries as speedily as possible and … ensure that postponements are limited in number and in duration', making the issuing of a subpoena after a properly served directive, counterproductive. The *Lechoba* case prompted the Department of Justice to intervene, and they issued Circular 07 of 2012: Directives by the Maintenance Officer: Regulation 3(1)(*a*) and 3(2)(2), warning all maintenance officers not to use the subpoena during the investigation phase of the maintenance enquiry.

Possible solution to implement reg 3(3)

The Maintenance Act provides for civil remedies in terms of s 26 and criminal remedies in terms of s 31 of the Maintenance Act. In *Young v Young* 1985 (1) SA 782 (C) the court held that the maintenance court is a hybrid of civil and criminal elements. In terms of s 38 of Criminal Procedure Act 51 of 1977 – to secure attendance at court proceedings – a warning, a summons or even an arrest may be affected. The directive issued by the maintenance officer served as a warning. The directive would instruct the respondent to attend the s 6 maintenance inquiries and for the Sheriff to serve a summons on the respondent after that, would do little to foster trust with the applicant.

Regulation 3(3) makes it a criminal offence in the event of non-compliance. The criminal sanction attached to the non-compliance explicitly states that, it is an offence not to adhere to the directive. In the Criminal Procedure Act 'offence' is defined as 'an act or omission punishable by law'. The authority is given to the magistrate to issue a warrant of arrest where a reasonable suspicion has been established that an accused has indeed contravened a legislative provision as indicated by s 43(1) of the Criminal Procedure Act. In terms of s 38(1) of the Criminal Procedures Act, one of the methods used to bring an accused who has committed an offense before court is a warrant of arrest.

The best illustration of how the directive and non-compliance was addressed was when the Western Cape took the lead in this matter. The National Prosecuting Authority issued an Internal Memorandum (Maintenance Matters: DOJCD Circular 7 of 2012) dated 4 March 2012. Chief Prosecutor Esther Cross of the Bellville Cluster in agreement with Senior Magistrates Isak Pieterse, Karen Botes and Janel Cochrane agreed that as an interim measure, the following would apply when a party does not comply with a directive, a maintenance officer will submit an affidavit and register a criminal docket at the nearest police station. The matter will be investigated in the normal course and pending on the outcome, a J175 or J50 warrant of arrest will be applied for. They realised that the non-compliance should be addressed, and that action must be taken.

Finality and certainty

The rule of law requires that legal certainty must prevail in order to adjudicate matters fairly and treat everyone equally before the law, so much so that in *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others (Council for the Advancement of the South African Constitution and Another as* Amici Curiae*)* 2021 (11) BCLR 1263 (CC) the court held that: 'Both finality and certainty are components of the rule of law, a founding value of our Constitution.'

The directive is a foundational process document that initiates the whole process that ultimately secures the much-needed relief the applicant approached the court for in the first place. Currently the maintenance offices still try to apply the *Lechoba* type of action to secure attendance, due to non-compliance of the directive during the investigation phase. The issuing of a warrant of arrest after non-compliance with the directive might be in place for a while in the Western Cape due to the intervention of some senior leadership, but the practice is not universal.

Conclusion

A portion of the preamble of the Maintenance Act reads: 'Whereas the Republic of South Africa is committed to give high priority to the rights of children, to their survival and to their protection'. When an applicant approaches the maintenance office and an investigation indicates that a need for maintenance indeed exists, the parties must be brought to court. It usually starts with the issuing of the directive. If the implementation procedure of the standard issued directive does not get proper recognition through intervention, finality and certainty cannot be attached to it, as required by the Constitution. The rights of children, their survival and protection cannot be guaranteed. The presiding officer would not be able to apply his mind to make an order, in terms of ss 15 and 16, implement attachment, nor consider imprisonment as contemplated by ss 26 and 31 of the Maintenance Act. As insignificant as this directive seems, if the procedure after non-compliance with the directive is not addressed as in the case of *Magagula*, the advantages of the maintenance legislative provisions fall away.

The maintenance offices still work on a 'hope and prayer' system. Hope the directive reaches the respondent on a day they are in a mood to receive such news and prays that they will attend the s 6 enquiry. This situation is unacceptable and should be addressed. The implementation procedure after non-compliance of the reg 3 directive is still one of the most elusive within the maintenance system. It can be seen as a weakness and the exploitation of that weakness will create an opportunity for respondents to take advantage or the weaknesses within the system, as indicated by *Bannatyne v Bannatyne (Commission for Gender Equality, as* Amicus Curiae*)* 2003 (2) SA 363 (CC). The weakness needs to be addressed.

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Picture source: Gallo Images/Getty

When are defamatory statements protected by qualified privilege?

By Tshepo Mashile

In the case of *Rapp van Zyl Incorporated and Others v FirstRand Bank and Others* [2022] 3 All SA 437 (WCC), Sher J had the occasion to consider the question whether defamatory statements (the court having found that such statements constituted defamation) made against attorneys in a founding affidavit filed in an application for an interdict (such application having been subsequently withdrawn against the attorneys) were protected by the defence of qualified privilege in a defamation suit brought by the attorneys against the applicant for the interdict (FirstRand Bank (the Bank)), its employee who had deposed to the founding affidavit, the firm of attorneys that represented the bank in the interdict application and the attorney who was responsible for the matter at the firm at that time.

Background

In the founding affidavit the plaintiff attorneys were accused of fraud and of abusing court proceedings. The attorneys, acting for judgment debtors, had addressed letters to several of the bank's foreclosure attorneys who were dealing with scheduled sales in execution. The letters 'sought to inform the bank, on behalf of the debtors concerned, that a surrender notice in terms of s 4(1) of the Insolvency Act [24 of 1936 (the Act)] had been published in the *Gazette* on a certain date and drew its attention to s 5(1) of the Act, … and the bank was requested in view thereof to confirm that the sales in execution which had been scheduled in respect of the debtors' immovable properties would be cancelled' (para 12). Some letters were sent a few days before the auctions were to be held, but in certain instances they were sent on the day of the auction itself. The attorneys were accused of 'utilising the machinery of the Insolvency Act for purposes for which it was never intended, by causing surrender notices to be published' without any actual intention of applying for the surrenders. It was averred that 'the notices were being published solely with the intention of stopping or cancelling sales in execution, which had been scheduled to take place in respect of properties on which [the bank] had foreclosed, thereby delaying the execution process to afford debtors … time to pursue "other avenues", instead of … sequestration' (para 13).

The defendants denied that the statements were defamatory (though they were found to be) and, in the alternative, pleaded that the statements were not unlawful as they were made during legal proceedings in the discharge of their right and duty to seek the relief, which they claimed in the application for the interdict and were relevant thereto, and were accordingly made on a privileged occasion.

The law: Qualified privilege

'In our [South African] law any protection which is extended on a so-called privileged occasion is qualified and not absolute. Thus, it may be lost if the speaker exceeds the bounds of what is considered permissible (either in regard to what is relevant or germane to the occasion or because their communication was not one made in the discharge of a right, duty or interest which they may have had in communicating the information concerned), or because it is considered that they were motivated by "malice"' (para 64).

'Three distinct and separate categories of statements which may enjoy qualified privilege are recognised in our law namely those made 1) in the discharge of a legal, moral, or social duty or a legitimate interest or 2) those made in the course of judicial or quasi-judicial proceedings and 3) those which constitute the publication of the proceedings of courts, parliament and certain public bodies. Insofar as the second category is concerned it is well-established that the privilege extends to litigants and their legal representatives as well as to witnesses and the presiding officer' (para 65).

There is a long line of authority in our

law 'that in relation to statements made in the course of legal proceedings, they are not only required to be relevant to the matter in issue but the maker thereof must also have a "reasonable foundation" or "reasonable cause" for making them' (para 67). 'In *Pogrund v Yutar* [1967 (2) SA 564 (A) at 569H-570E] a Full Bench of the Appellate Division held that this meant that in addition to showing that the defamatory statement was pertinent or germane to the occasion there also had to be "some" foundation for it in the evidence or the "surrounding circumstances", an approach that was confirmed in the appeal in [*Joubert and Others v Venter* 1985 (1) SA 654 (A) at 704B-D]' (para 68).

Defamatory statements made during legal proceedings by legal practitioners

In *Findlay v Knight* 1935 AD 58 at 72, 'the decision of the court *a quo* that, in the absence of any evidentiary foundation for the allegations, which he had made in the pleadings the defendant was not entitled to rely on the privilege as there had been no "reasonable foundation" for them, was upheld. Although the court recognised the wide latitude which is afforded to legal practitioners in the presentation of a case on behalf of a client it held with reference to the Roman-Dutch authorities, that in doing so he/she may only do that "which the case requires" and may not indulge in scandalous or libellous language "beyond the necessity of the case"' (para 71).

'Thus, it was not permissible for an advocate or attorney to plead defamatory statements which he/she knew to be false, or in respect of which they knew there was no proof, or where they did so recklessly, not caring whether the averments were true or false, and the pleader who did so was abusing the process of the court. Consequently, inasmuch as the allegations in question were made recklessly by the defendant, not caring whether they were true or false, or whether they could be proved or not, the privilege was not available to him' (para 71).

In *Van der Berg v Coopers & Lybrand Trust (Pty) Ltd & Ors* 2001 (2) SA 242 (SCA), 'the Supreme Court of Appeal held that there were no "hard and fast rules" and no "universally applicable formula", which applied to determine whether a defamatory statement which was made during legal proceedings could be said to have been relevant thereto, only guiding principles, and in the context of the defence relevance was not a concept which was capable of precise definition. It was not to be equated with the test for relevance in an evidential sense' (para 74). 'Essentially the determination of whether the material in question was relevant amounted to a value judgment, based on reason and common sense, which had its foundation in the facts and circumstances of each particular case' (para 74).

Court's finding

Truth, on its own, is not a defence. 'In the context of the defence of qualified privilege the truth or otherwise of a defamatory statement is only relevant to the question of whether there was malice shown … on the part of the defamer, which would thereby defeat the privilege' (para 80).

The interdict application, notwithstanding that it was subsequently withdrawn against the attorneys, was only brought approximately one year after their letters to the bank and one year after the bank had served them with a letter of demand for them to cease participating in the scheme run by the other respondents. 'In order to obtain such relief, the bank needed to show not only that its rights had previously been infringed by the [attorneys], but that it needed to be protected from them as there was a continuing, ongoing violation thereof, or at least an imminent threat of such violation. It was hardly going to succeed in obtaining such relief against the [attorneys] on the strength of a violation of rights which had taken place a year earlier and which had, on the face of it, ceased and was not ongoing at the time when the application was brought' (para 84). In such circumstances it cannot be claimed that the allegation of fraud was protected by qualified privilege, because in a broad sense it was relevant to the proceedings and the issues raised therein, or to the story which needed to be told. In the first place, there was no sufficient foundation in the information at disposal to the bank to make the necessary connection that was required a year earlier to allege not only that the attorneys were participating at the time in an ongoing, unlawful scheme but also that they were engaged in an ongoing fraud.

'An allegation that someone has engaged in fraud connotes that they acted criminally, and dishonestly. In its ordinary meaning, as understood by the average person, it accuses the person against whom it is directed of intentionally participating in the making of a false representation to another. The persons against whom such an accusation was directed were attorneys and colleagues of [the bank's attorney]. Accusing an attorney of fraud and of abusing court proceedings is a very serious allegation. It is not one to be made lightly, by anyone, least of all a colleague. On the information which [the bank's attorney] had available to him, given the [attorneys] limited involvement the fact that they had previously participated in the scheme did not necessarily, and only, imply that they did so with fraudulent intent. It was equally possible that they may have done so negligently, or even inadvertently, at the instance and on the instructions of [the other respondents]. Thus, caution was required, and some attempt should have been made to ascertain what the position was, before simply making an allegation that they were engaged in fraud' (para 87).

The court referred to a series of decisions (*Hill v Church of Scientology* [1995] 2 SCR 1130, *Botiuk v Toronto Free Press Publications Ltd* [1995] 3 SCR 3 and *Bent v Platnick* 2020 SCC 23) by the Canadian Supreme Court in which the court 'ruled against legal practitioners who made defamatory statements of and concerning colleagues and other professionals without ensuring that they had a proper foundation for doing so' (para 88). In *Hill*, the court 'pointed out that reputation has a particular significance for lawyers and is a "cornerstone" of their professional life, as a lawyer's practice is founded and maintained on a good reputation for professional integrity and trustworthiness and is of "paramount" importance to clients, other members of the profession and the judiciary, and the entire system of administration of justice depends upon a lawyer's reputation for integrity' (para 90). In *Bent*, 'the court held that in the light of the heightened expectation of reasonable due diligence which has historically been required of lawyers they are not entitled to rely on the privilege where they have been "indifferent" or reckless in relation to the averments which they make. Thus, unlike in the case of laypersons, a court will strictly scrutinise a lawyer's conduct in making a defamatory allegation, because lawyers are duty-bound to take reasonable steps before making statements that are defamatory, especially in cases involving other professional persons' (para 94).

'If one goes back to first principles it must be remembered that it is the occasion which is privileged and not the statement. Therefore, whether the statement is protected by the privilege depends on whether it was relevant or pertinent to the occasion and its purpose, which in this case was the seeking of an interdict in June 2012. The fact that the plaintiffs had previously participated in an unlawful scheme for a period of [two to three] months, a year earlier, was not relevant to the "occasion", which occurred a year later. In this regard it was held in [*Rhodes University College v Field* 1947 (3) SA 437 (A) at 464, 466-467] that the privilege cannot be relied upon on the basis that it was necessary to make the statements in question because they were simply made as part of the historical account of events' (para 96).

Lawyers need to consider carefully whether to include *prima facie* defamatory statements in court papers and should apply the tests laid down by the courts.

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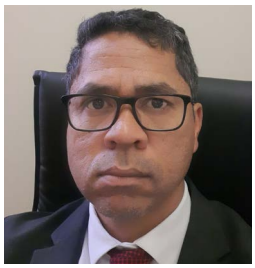
Picture source: Gallo Images/Getty

Exiting debt review: *The conundrum of certainty in the how and when*



By Wayne Raphels

The scheme of the debt review model in the National Credit Act 34 of 2005 (the NCA) was explained in better detail in the reported case of *Janse van Vuuren v Roets and Others and a Similar Matter* 2019 (6) SA 506 (GJ). It was a matter in which the Judge President of the Gauteng Division of the High Court, Dunstan Mlambo, referred to the Full Court, in order to obtain clarity on debt review applications and more specifically, on what steps are to be taken by consumers in order to exit the debt review process. The Full Bench consisted of Sutherland J, Carelse J and Maier-Frawley AJ. The reason for the referral was because there was a difference in the application of the law with regard to this particular aspect of exiting debt review, especially between the various divisions of the High Courts and more specifically concentrating on the decisions on this aspect in the Western Cape Division, particularly the cases of *Du Toit v Benay Sager (NCRD2484) t/a Debt Busters and Others* (WCC) (unreported case no 16226/17, 17-11-2017) (Thulare AJ) and *Phaladi v Lamara* 2018 (3) SA 265 (WCC).

The issue at hand

In respect of ss 71 and 87(1)(*a*), I raise the following:

- **Question 1:** Do either of the sections allow parties (the debt counsellor or the consumer) to bring applications to the magistrate's court to have previous orders rescinded?
- **Question 2:** Do either of the sections allow parties (the debt counsellor or the consumer) to approach the magistrate's court for a rejection of a restructuring application where no order was made by the magistrate's court?
- **Question 3:** Do either of the sections allow parties (the debt counsellor or the consumer) to approach the magistrate's court for the rejection of a restructuring application where no recommendation from the debt counsellor was put before the magistrate's court?
- **Question 4:** Do either of the sections allow parties (the credit providers or the consumer) to approach the magistrate's court for a rejection of a restructuring application where a recommendation, from the debt counsellor, which determined that the consumer was over-indebted, was put before the magistrate's court?
- **Question 5:** Do either of the sections or r 55 of the Magistrates' Courts Act 32 of 1944 (MCA) allow the debt counsellor or consumer to approach the magistrate's court for an order declaring the consumer no longer over-indebted?
- **Question 6:** If the answer to the above questions are in the negative, the further

question is then whether or not there is a *lacuna* in the NCA.

Case law

The *Phaladi* case is a judgment handed down by Binns-Ward J. Counsel for the applicant in this matter sought to rely on s 88(1)(*b*) and para 4.2 of the Explanatory Note to the Withdrawal Guidelines as issued by the National Credit Regulator. In his judgment, Binns-Ward J referred to the clearance certificate to be obtained under s 71, and stated: 'If they encounter problems in obtaining the relief to which they might contend they are entitled under s 71, their remedy lies in an approach to the National Consumer Tribunal [Tribunal]. It is only the Tribunal that is empowered to assist them at first instance. The process is an administrative one' (at para 17). Binns-Ward J stated at para 26 that: 'Section 87(1)(*a*) provides for a negative response by the court to the application brought before it. It is to that provision that s 88(1)(*b*) effectively cross-references. The Act most certainly does not contemplate an application to the magistrates' court for a declaration that the consumer is not over-indebted. Any such declaration would require a positive response to an application for which the Act makes no provision'.

Binns-Ward J further stated at para 27: 'In short, the NCA just does not make provision for the sort of application conjured in para 4.2 of the Explanatory Note'.

In the *Janse van Vuuren* case the court had regard to the contrasting cases of *Du Toit* and *Phaladi*. The court stated in para 32 that the debt counsellor in Nel's (one of the applicants in *Janse van Vuuren*) instance, namely where no rearrangement order has been made, may present the proposal to the magistrate together with additional information whereupon the magistrate will conduct a hearing in terms of s 87(1). It is unclear on what basis the honourable court came to this conclusion. The reason I pose this concern is because the basis for approaching the magistrate has changed entirely from being one of over-indebted to no longer being over-indebted. This as was stated in the *Phaladi* case and is not allowed for in the NCA. The debt counsellor in the *Janse van Vuuren* case made a determination that the consumer was over-indebted. The status of the consumer as determined by the debt counsellor in the *Janse van Vuuren* case is, therefore, completely different from the status of the consumer mentioned under s 87(1) of the NCA.

The *Phaladi* case is, therefore, the case to be cited with authority when dealing with the circumstances of a consumer who wants to exit the debt review process at a stage before any debt rearrangement order was made by the court. Section 87(1) refers to only two instances in terms of which the magistrate's court can reject a recommendation by a debt counsellor or can reject an application by a consumer as provided for under s 87(1)(*a*) of the NCA. These instances can be described as two legs of s 87(1) and can be set out as follows:

First leg

The debt counsellor accepted the application by the consumer and concluded that the consumer is not over-indebted and the debt counsellor then proceeded to 'recommend that the consumer and the respective credit providers voluntarily consider and agree on a plan of debt re-arrangement'. In the event that the respective credit providers and the consumer do not firstly accept the proposal from the debt counsellor and thus no consent to such proposal being given by either the consumer or the credit providers, then only in that instance will the debt counsellor refer the matter (make the proposal) to the magistrate's court with the recommendation. It is this recommendation by the debt counsellor, which can then be rejected under the first leg of s 87(1). It is important not to lose sight of the fact that the consumer is not over-indebted at this stage and never was. The court may then as per this first leg of s 87(1)(*a*) reject the proposal, which contains the recommendation which the debt counsellor originally made to the credit providers and the consumer. As stated before, it is important to note that this leg, therefore, still deals with the consumer who at that stage was not over-indebted.

Second leg

The debt counsellor after being approached by the consumer, rejects the application by the consumer to be placed under debt review. The debt counsellor after conducting an assessment, therefore, concludes that the consumer is not over-indebted. The consumer may (with leave of the court) apply to the magistrate court's for an order in terms of s 86(7)(*c*). The magistrate's court must conduct a hearing and after considering all the information before it (which will include the conclusion of the debt counsellor (whereby the consumer's application was rejected by the debt counsellor), the consumer's financial means, prospects and obligations) may reject the application by the consumer.

In both instances as mentioned in the two legs above, the consumer was not over-indebted.

Summary

The magistrate's court is a creature of statute. Therefore, if the magistrate's court is approached under s 87 a rejection is only possible if it falls into that criteria as demonstrated in the two legs above. It is clear that consumers, who fall outside the categories as stated in the two legs above, will have no recourse to approach the magistrate's court. The consumer also cannot rely on r 55 of the MCA and more specifically sub-r (1)(*j*)(iii) of the Rules regulating the Conduct of the Proceedings of the Magistrates' Courts (the Magistrates' Courts Rules), as the consumer at that particular stage was not opposed to the application by the debt counsellor. The problem the consumer has as highlighted above is actually self-imposed as the credit providers are 'forced' to receive re-structured payments before the court declared such a consumer over-indebted and confirms the restructured payment plan. In short r 55 of the Magistrates' Courts Rules does not allow for the consumer to approach the magistrate's court once the debt counsellor has acted pre-emptively by restructuring the payments to credit providers and effecting same to the particular credit providers before the magistrate's court has made such an order.

As stated in the *Phaladi* case by Binns-Ward J, the scheme under the NCA is a statutory concept. If any amendments are necessitated it will fall solely under the province of the Legislature. In s 71, the powers and duties of the debt counsellor are fully set out. The issues raised above do not fall under s 71 as the consumer's debt under those circumstances was not rearranged in terms of part D of ch 4 of the NCA. There is no *lacuna* in the NCA. In practice the situation or problem experienced above mostly occasioned by the debt counsellor asking the credit providers to accept the new instalments or payments as per the proposal before such proposal is made an order of court. It then happens that this informal restructuring leads to the consumer's financial situation improving before the debt counsellor approaches the court for an order. Under these circumstances the first respondent being the consumer will not have recourse to approach the magistrate's court under r 55(1)(*j*)(iii) of the Magistrates' Courts Rules.

Conclusion

In respect of the questions posed above, the answers in my view posed are as follows:

- **Question 1:** No. The NCA and the *Du Toit*, *Phaladi* and *Janse van Vuuren* cases are clear on this aspect that the procedure under s 71 of the NCA must be followed.
- **Question 2:** No. As stated by Binns-Ward J in the *Phaladi* case: 'The NCA just does not make provision for the sort of application conjured in para 4.2 of the explanatory note.' Also a proper reading of s 87(1) informs that the NCA does not allow for the

magistrate's court to attend to applications of this nature. The two legs under which applications or proposals may be rejected are succinctly set out above.

- **Question 3:** No. Powers executed by debt counsellor is purely administrative.
- **Question 4:** No. However, rules 31 and 32 of the Magistrates' Court Rules can be used by the parties to place the matter before the magistrate's court and to ask that application (for consumer to be declared over-indebted) be dismissed even if the applicant (debt counsellor) is not at court.
- **Question 5:** No. The court will not have jurisdiction to make such an order and an order dismissing such an application should be made. The function, which the court is asked to exercise is purely administrative in nature, and should be dealt with by the debt counsellor. The Tribunal can be approached if the debt counsellor is unwilling or unable to attend to same.
- **Question 6:** In conclusion, therefore, there is no *lacuna* in the law on the particular aspects raised above. It is important, however, to note that the debt counsellor must stay within the timeframes set out by the NCA and the regulations and bring the necessary applications within the prescribed time periods. Also just as important is the fact that no restructuring or debt rearrangement should be effected until the magistrate's court or Tribunal has made its order. If the debt counsellor complies and acts within the parameters of the NCA, then no difficulties will be experienced by the consumers, debt counsellors or credit providers in practice.

- See also: Limnandi Mtshemla 'A discussion on the debt review process and conflicting judgments from South African courts' 2022 (Sept) *DR* 18.

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Women's core struggle is against the values that drive our entire society and economic system

By Kgomotso Ramotsho

Legal practitioner Ugeshnee Naicker.

This month in our Women in Law column, we feature legal practitioner, Ugeshnee Naicker, who was born in the seaside town of Port Shepstone, located on the east coast of South Africa. She told *De Rebus* news reporter, Kgomotso Ramotsho, that her story is anything but conventional, as she has faced many challenges including the loss of her husband and ill health along the road. However, she added that she has also received great opportunities to work and serve in the profession.

Ms Naicker matriculated from Port Shepstone Secondary School. She started her law studies at the University of South Africa and then completed her LLB degree at the University of KwaZulu-Natal. Ms Naicker worked briefly as an intern at the Office of the Family Advocate before she secured her articles of clerkship at a firm in Port Shepstone. She pointed out that it took her almost two years and numerous rejections before she was able to secure a contract for her articles. Fortunately, for her, she was granted a contract at one of the best firms in Port Shepstone.

In 2012, Ms Naicker said she began her articles at Seethal Attorneys under the principalship and mentorship of Mr Gregory Larry Seethal. She added that Mr Seethal insisted that candidates do a period of two years of clerkship to be properly prepared for entrance into the profession. 'I am appreciative of this because I found great value in serving a period of two years. Articles are a time of rude awakening for any young person entering the profession. You quickly realise that the legal profession isn't the glamorous profession as portrayed in television series. You come to understand the true meaning of hard work, work ethic and deadlines. There is no easy way around it because it is a stage during which you are polished and groomed for entry into the profession,' Ms Naicker said.

Kgomotso Ramotsho (KR): How did you decide that you want to become a legal practitioner and why?

Ugeshnee Naicker (UN): I had no idea of what I wanted to pursue because of medical challenges that I faced during my matric year. Despite this and with great family support I persevered against all odds. It was at this time that I experienced the tragic consequences of poor medical care by professional doctors. Embedded in me already was a keen sense of justice as my father was an activist during the Apartheid era which spanned the Black Consciousness Movement and, thereafter, the Mass Democratic Movement. As a child I was taught about equality and justice, and it is these values that still guide me today.

When faced with such personal injustice I was determined to do something about it and to contribute to society and to bring about change.

KR: How long have you been practising as a legal practitioner, and in which area do you specialise in?

UN: In 2016, I opened my firm Naicker Attorneys in Port Shepstone. I focus on civil work in my firm, specialising in commercial law and the drafting of contracts, compliance, and family law.

KR: Please share your experience as a candidate legal practitioner with us.

UN: Like all other LLB graduates I too experienced the gap between LLB studies and the profession. Without a supportive team from your firm, it is a difficult gap to bridge for a candidate. My principal and the support staff at the firm provided me with this support.

It took a lot of personal strength and courage for me, as I once again faced

health challenges and debilitating health that affected my work performance. Fortunately for me my principal Mr Seethal would not allow me to fall or fail and instead he pushed me to complete my Board examinations and push on to complete my articles, for which I am very grateful.

KR: You were one of the youngest Council members of the Law Society, how did you manage to take on such a role at such a young age, especially being a female legal practitioner, as we know it is not easy for women to get important or leadership roles in the legal profession.

UN: My service to the profession began in 2016 when I was elected at the National Annual General Meeting (AGM) of the National Association of Democratic Lawyers (NADEL) to serve on the Young Lawyers Desk in the executive committee of NADEL. Under the Presidency of Mr Mvuzo Notyesi and the Secretary General, the late Judge Patrick Jaji, the NADEL executive were very forward thinking. They had already begun to empower women and young attorneys. In that year NADEL already boasted 50% of its executive posts being occupied by female practitioners. I later served as the Deputy Secretary of NADEL.

I had the privilege of representing NADEL at many conferences including the Women in Law Dialogue held by the Department of Justice and Constitutional Development and the Legal Education Conference held by the Law Society of South Africa (LSSA). Together with a selected group of young lawyers we represented NADEL at the Pan African Lawyers Union annual conference held in Durban and the Southern African Development Community Lawyers Association conference in Botswana. Serving NADEL also gave me the opportunity to work with very senior members of the profession and I was privileged to be part of the NADEL task team that researched and prepared representations to Parliament on the amendment of s 25 of the Constitution.

The Youth Desk initiated the legal representation programme for students arrested during the #FeesMustFall protests. I organised and hosted the first ever National Young Lawyers Summit hosted by NADEL in which young practitioners across the profession participated, giving young attorneys a voice.

It was also during this time that I was nominated to serve as a councillor on the then KwaZulu-Natal Law Society. I was one of the youngest councillors to serve on council under the guidance of Mr Asif Essa. At that time, I was appointed the NADEL Chief Whip at the KZN council. It was the learning experience of a lifetime.

I did, however, experience many challenges and hostile situations while serving on the council. At one time I was taken aside and warned that I should not accept the nomination to council because it might not be good for me in the future.

During this time the profession faced many contentious issues as we were ushering in the Legal Practice Act 28 of 2014 and the Legal Practice Council. Provincial Law Societies were engaged in National Forum negotiations. It was at this time that I learnt the importance of being able to stand up and defend organisational decisions without fear or favour. We were concerned with the transformation of the profession and making the best decisions with the future of the legal profession in mind.

I was and I have always been guided by organisational principles and my inner compass of justice and equality. It was a time of frank and robust debate, and it was not an easy time for anyone to be in leadership. It was Judge Jaji who taught me that in a collective every decision taken must be based on principle. Collective decisions must be owned and defended by yourself and the entire collective that you represent.

KR: You are very vocal regarding the struggles or challenges that women face in the legal profession. Not only the bad treatment that some receive but also the abuse that happens. What is it that you think can be done to address such issues?

UN: As a young attorney and a young woman serving in this role, I recall being called 'little girl'. Once I was even asked by one of the senior attorneys to make him tea. These are minor incidents compared to some of the horrific abuses that some women have faced in the profession. I have always been of the view that the struggle of women lawyers must be fought in the main and not in the periphery. In the past three years we have seen women leadership rise in the profession bringing the struggle of women to the forefront of the profession.

Our core struggle as women is against the core values that drive our entire society and economic system. While we fight to dismantle these oppressive values that favour male dominance, we must in the meantime have practical, tangible solutions. Especially for cases of abuse in the profession. The LSSA Women's Month Webinar series was a step in this direction. As a very basic principle, practitioners who abuse their power and exploit the weak bargaining power of junior and female practitioners must understand that this is the era of zero tolerance. We must work towards a solution that allows professionals to come forward in such cases while at the same preventing the abuse of such a complaints system.

KR: Do you think male legal practitioners are listening and recognise that women are equally hardworking and deserve recognition for their good work? And they can lead with excellence?

UN: In the governance structures of the profession there have been positive changes for female leadership. However, this is not true for the general body of the profession. While male practitioners may recognise that women are equally hardworking and deserve recognition, I believe that this also inspires fear in them. There are only so many seats at a table and only so many slices of the pie to go around. The legal profession has developed a culture of exclusion and practices for example where major contracts are sometimes concluded in bars, on golf courses and in the homes of the affluent.

We must be honest in recognising that our profession is extremely competitive. Women may be used as window dressing in companies and organisations or token leadership, this is unacceptable. The growth and development of other women may be deliberately stunted by other female practitioners who feel threatened. It is another challenge that we face as women.

Currently I serve as a representative in the LSSA Executive Committee and the House of Constituents. I serve on the Family Law and Alternative Dispute Resolution Committee and as a member of the Section 35 Task Team in responding to the recommendations of the South African Law Reform Commission. I also lead the LSSA Legal Education and Development University Task Team.

KR: What are some of the challenges that you have faced as a young female legal practitioner?

UN: As a leader and as a legal practitioner I have experienced many challenges. We work within the legal superstructure. At some point in time this superstructure was the basis upon which racial inequality was meted out upon the masses of our country and justified. It is also a system which has been slow to transform. Therefore, when you push for transformation of the profession including creating a profession that is empathetic towards the professionals who work in it, you encounter many challenges.

You will not always be recognised for your hard work and in some instances male counterparts will want to take recognition for your work. As a female legal practitioner, you will be compensated less than your male counterparts or not be offered partnership or directorship. Some clients will want to be represented by a male attorney rather than a female attorney despite your ability.

I have had the privilege of being mentored by some of the best leaders in the profession. I have also enjoyed great support from legal practitioners and from staff, support staff and management, male and female alike.

In leadership there are core principles that preserve the unity of the collective.

One of these principles is understanding that no matter how robust we debate topics in meetings and even when we cannot find each other on an issue, when we leave that space, we are not enemies, we are colleagues, and we are comrades. When you are in a position of leadership you must expect to be disliked. Leadership recognises that in this space it is a battle of ideas, and nothing should be taken personally.

It is always about execution, whether it is preparing for a meeting, for a case or even presenting at a seminar or organising a Young Lawyers Summit. Execution of an idea means dedicating hours and days of your time. Hard work is necessary in order to make execution possible.

KR: How do you stay grounded and yet so fierce and hardworking as a young female leader?

UN: The ideal that keeps me grounded is the dream that many people in our country fought for, including my father and that is the ideal of an egalitarian society free from inequality and poverty. At my core, I believe that there is no need for starvation and poverty at this level of development. If we can send a man to the moon surely there is no place in the world that aid and food cannot reach. If you cannot view all people as equals, you will be unable to demonstrate this value in real life.

KR: Do you have advice for female legal practitioners who might be out there, ready to give up, because they may feel that they have tried and done their best, but things are not getting better for them, they are not getting the recognition and respect they deserve, no matter how hard they work?

UN: My advice to young practitioners and female practitioners is to understand that we work within an unfair and unequal system and that it is up to us to bring about change and transformation. Persevere no matter what life may hurl at you. You may not always be recognised for your efforts and hard work. Servant leadership means that you do not need a position or recognition to lead. A true leader can lead from the periphery and live the change they want to see. You do this by executing even menial tasks to the best of your ability as your work is a representation of who you are and your value system. You do not need to be recognised to be the best at what you do.

KR: What keeps you going every day? What is your motivation to get up and make sure that people receive access to justice?

UN: I lost my father and my husband one year apart. In the face of hardship and tragedy, it is my baby daughter, my niece, my mother, and my sisters who have kept me alive and afloat and motivated. It is knowing that in as much as we are legal practitioners, leaders, and professionals we are also mothers, caregivers, and homemakers. We have homes to lead and children to rear. The continuation of a species and the values of a generation are also placed in our hands. When all is said and done, for us all, it is to love and family that we must return. We return to our humanity. The profession should ever grow in this value.

This time has also taught me about the reality in which we live every day and that access to justice is not only access to courts. Access to justice for everyday people is filling out forms at home affairs, access to clean drinking water, access to affordable food and electricity. It is the comfort of knowing that your sick loved one is in the care of competent doctors and nurses. Access to justice is not just the responsibility of about 31 000 practicing attorneys, it is the responsibility of an entire society, but it should begin with us as a profession to which the defence of the Constitution has been entrusted.

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THE LAW REPORTS

August [2022] 3 All South African Law Reports (pp 311 – 639); August 2022 (8) Butterworths Constitutional Law Reports (pp 907 – 1053)

By Merilyn Rowena Kader

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

Abbreviations

CC: Constitutional Court
ECG: Eastern Cape Division, Makhanda (Grahamstown)
FB: Free State Division, Bloemfontein
SCA: Supreme Court of Appeal
WCC: Western Cape Division, Cape Town

Agriculture and animals

Hunting and exporting of trophy animals: The first applicant in *Trustees for the time being of the Humane Society International – Africa Trust and Others v Minister of Forestry, Fisheries and the Environment and Others* [2022] 3 All SA 616 (WCC) (HSI-Africa) was the local chapter of an international organisation dedicated to the protection of animals. It sought an urgent interdict pending the review of a decision taken by the first respondent (the Minister) to fix a quota for the number of leopard, elephant and black rhinoceros that may be lawfully hunted in South Africa (SA) and later exported abroad as trophies by foreign hunters during 2022. The Minister was the National Management Authority responsible for the allocation of quotas in terms of regulation 3(2)(k) of the Regulations published under the National Environmental Management: Biodiversity Act 10 of 2004 (NEMBA) in respect of 'The Convention on International Trade in Endangered Species of Wild Fauna and Flora' (CITES Regs). CITES is a multilateral international treaty which was adopted by 21 countries in 1973. The overall purpose of CITES is to regulate the worldwide trade in endangered species of, *inter alia*, wild animals and plants. In terms of Article XI of CITES, the signatory parties meet from time to time in conference and take decisions, which then become binding on such member states affected thereby.

In terms of regulations issued under NEMBA, the black rhinoceros, leopard and elephant were respectively listed as 'endangered', 'vulnerable' and 'protected' species. A second set of regulations, the 'Threatened or Protected Species Regulations' (the TOPS Regs) aimed to address a wide range of issues relating to the protection of listed fauna and flora as contained in GN R151 *GG*29657/23-2-2007, including the control of the captive breeding of wild animals, the issuing of a host of permits for the control of, *inter alia*, game farms and hunting associations, and the hunting and protection of the wild populations of protected species. Thus, the permissible hunting of black rhinoceros, leopard and elephant for trophy purposes is strictly controlled within SA via a permit system. The Minister fixes the quotas for such hunting, while the MEC's have the authority to issue individual permits. All such hunting must comply strictly with the hunting methods listed in the TOPS Regs.

HSI-Africa submitted that in terms of reg 6(3)(c) of the CITES Regs, a permit may only be granted for the export of any protected specimen once the scientific authority has evaluated the proposed quota, and, importantly, has made a non-detriment finding (NDF). Regarding the 2021 quota for leopards, HSI-Africa was critical of the evaluation of the scientific authority report. Regarding black rhinoceros, HSI-Africa stated that while a draft was circulated, no final NDF was submitted by the scientific authority for the 2021 quota.

Gamble J held that the requirements for the granting of an interim interdict *pendent lite* are establishment of a *prima facie* right to the relief sought; a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right; the balance of convenience favours the granting of the interim relief; and that the applicant has no other remedy.

HSI-Africa argued that the Minister's advertising for consultation in relation to the fixing of a quota in a particular year and then applying the determination of the outcome of that consultative process in a subsequent year was impermissible. The court agreed that it was manifestly unfair to invite a party to consult on an issue in which the decision-maker is statutorily time bound and then for her to apply that participative process to a time period in respect of which there has been no consultation. HSI-Africa thus established a *prima facie* right to the relief sought. The remaining requirements for the interim interdict were also established, and such relief was granted.

Banking and finance

Customer and banker relationship: In 2016, Nedbank requested certain information in respect of Houtbosplaas and TBS Alpha (its customers at the time) ostensibly pursuant to the provisions of the Financial Intelligence Centre Act 38 of 2001 (FICA). The bank sought to be provided with copies of the trust deeds of four trusts, each holding one preference and ordinary shares in the companies. The companies' reluctance to provide one of the trust deeds on grounds of invasion of privacy led to an impasse causing the companies to instruct Nedbank to close the accounts and transfer all funds held therein to another bank. Nedbank refused and froze the accounts until the trust deed was furnished, and only closed the accounts in July 2017. The companies then successfully sued Nedbank for damages (ie, *mora* interest) for failing to give immediate effect to their instructions.

The High Court held that Nedbank was not justified in law to require a copy of the withheld trust deed, as none of the trusts exercised 25% voting rights at the companies' general meetings. The court held that nowhere does the Act require bank clients to provide verification documents to a bank when requested to do so.

In *Nedbank Limited v Houtbosplaas (Pty) Ltd and Another* [2022] 3 All SA 361 (SCA), the issue revolved around the sole

question of whether Nedbank was entitled, under FICA, to certified copies of the trust deeds of the four trusts, which were not customers of Nedbank. If that question was answered in the negative, a secondary issue would be whether Houtbosplaas and TBS Alpha were entitled to damages by way of *mora* interest because they were deprived of the use of their funds, withheld by Nedbank in the face of unequivocal instructions by the two companies to release the funds, for some five months.

The outcome of the appeal hinged on the proper interpretation of s 21(2) of FICA, which states that: 'If an accountable institution had established a business relationship with a client before this Act took effect, the accountable institution may not conclude a transaction in the course of that business relationship, unless the accountable institution has taken the prescribed steps –

(*a*) to establish and verify the identity of the client'.

The court found that s 21(2), properly construed consistently with its manifest purpose, did not, on the facts of this case, apply at the time when Nedbank sought to invoke it.

The sole question to decide insofar as the respondents' claim for *mora* interest was concerned was whether there was any lawful justification for Nedbank to restrict the accounts. Nedbank was shown to have been wrong in its reasons for restricting the accounts, and the respondents were entitled to *mora* interest. The appeal was dismissed.

Constitutional law

Substantive requirements for lawful secondary strike: After the Labour Court interdicted numerous secondary strikes at ten mining companies in support of a primary strike at Sibanye Gold, application was made by the Association of Mineworkers and Construction Union (AMCU) and its members for leave to appeal. AMCU argued that the interpretation of s 66(2)(*c*) of the Labour Relations Act 66 of 1995 (LRA) by the Labour Courts, which imputes a proportionality assessment that considers the harm suffered by secondary employers, does not accord with the language of the provision.

In the majority judgment in *Association of Mineworkers and Construction Union and Others v AngloGold Ashanti Ltd t/a AngloGold Ashanti and Others* 2022 (8) BCLR 907 (CC), the appeal turned on the substantive requirements for lawful secondary strikes in terms of s 66(2)(*c*), the dispute related primarily to the interpretation and application of that section, which provides that: 'No person may take part in a secondary strike unless –

…

(*c*) the nature and extent of the secondary strike is reasonable in relation to the possible direct or indirect effect that the secondary strike may have on the business of the primary employer.'

The analysis of s 66(2)(*c*) began with an appreciation that the LRA seeks to give effect to s 23 of the Constitution. Apart from undertaking an interpretation and application of s 66(2)(*c*), the court examined the provisions of s 23 of the Constitution and discussed the role of collective bargaining in labour relations. Also traversed was the way South Africa gives effect to the constitutional right to strike in the LRA.

While emphasising the importance of collective bargaining, the court warned that no right, including the right to strike, is absolute. Limitations on the right to participate in a secondary strike arise from both the Constitution and the LRA, although any limitation must comply with s 36 of the Constitution. The scheme of the Act, in regulating strikes, aims to provide clear procedural requirements. Once they are met, employees may lawfully embark on peaceful strikes. Secondary strikes replicate the preeminence of collective bargaining and the right to strike. Once a trade union fulfils the formal requirements prescribed in s 66(2)(*a*) and (*b*), para (*c*) stipulates the substantive requirements. Unlike the broad scope of common law interdicts, the text of s 66(3) narrows the grounds for interdicts. The procedural requirements for a strike are far more onerous than for a secondary strike.

The court found that s 66(2)(*c*) imports a proportionality analysis as the requirements of proportionality and reasonableness in respect of secondary strikes provide safeguards for secondary employers. In this case, the secondary strike was not reasonable.

Constitutional law

Limitation on constitutional rights by ban on sale of tobacco during the National State of Disaster: Part of the government's response to the COVID-19 pandemic was a series of regulations made by the Minister of Co-operative Governance and Traditional Affairs under s 27(2) of the Disaster Management Act 57 of 2002 (the Act) – including a prohibition on the sale of tobacco products, e-cigarettes, and related products. The respondents were farmers, processors, manufacturers, retailers, and consumers, situated at every level of the supply chain for tobacco and related products. In June 2020, they launched an urgent application in the High Court for an order declaring that reg 45 published in GN608 *GG*43364/28-5-2020, which prohibited the sale of tobacco and related products, except for export, unconstitutional and invalid. The prohibition applied during Alert Level 3 of the National State of Disaster. According to the respondents, reg 45 limited the constitutional rights to dignity, privacy, freedom and security of the person, choice and practice of a trade or occupation freely, and protection against deprivation of property.

The respondents' challenge to the regulation was upheld in the High Court, which found that reg 45 did not reduce the strain on the health system, and was, therefore, not shown to further the objectives in s 27(2)(*n*) of the Act.

That led to an appeal in *Minister of Co-operative Governance and Traditional Affairs and Another v British American Tobacco South Africa (Pty) Ltd and Others* [2022] 3 All SA 332 (SCA).

As it was clear that the rights implicated were limited, the appellants argued that reg 45 was reasonable and justifiable under s 36 of the Constitution. The determination of the constitutionality of reg 45 involved a two-stage analysis. The respondents were required to establish that the regulation limited one or more fundamental rights and if they did so, the burden shifted to the appellants to justify the limitation in terms of s 36(1) of the Constitution. The s 36 limitation inquiry requires a balancing of two sets of interests. On the one hand, there is the right that is limited. To be considered are its nature; its importance in an open and democratic society based on human dignity, equality, and freedom; and the nature and extent of the limitation. On the other hand, there is the importance of the purpose of the limitation. What must be assessed overall, is whether the limitation is proportional and whether it is reasonable having regard to its purpose and effect.

The court considered the concerns raised by the appellants in justification of the tobacco ban and found that the ban was not shown to effectively address those concerns. There was no scientific justification for the continued ban on the sale of tobacco products. Furthermore, the purpose behind reg 45 was found not to outweigh the limitation of the rights. Instead, reg 45 was an unjustifiable limitation of the rights to dignity, and bodily and psychological integrity. The extent to which reg 45 limited the rights in issue, particularly given the lack of factual and scientific evidence to support its promulgation, was disproportionate to the nature and importance of the rights infringed. The appeal was accordingly dismissed.

Criminal law and procedure

Rape of minor – applicability of prescribed minimum sentence: Alleging that between 11 and 13 October 2021 the accused unlawfully and intentionally committed acts of sexual penetration

with a ten-year-old girl, the Director of Public Prosecutions (DPP) for the Eastern Cape Division, prosecuting for and in the name of the state, preferred a rape charge against the accused. As the complainant in *S v SN* [2022] 3 All SA 497 (ECG) was under the age of 16 and had been raped more than once, the DPP sought to have the prescribed minimum sentence of life imprisonment imposed in terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

The accused pleaded guilty to the charge and signed a statement in terms of s 112(2) of the Criminal Procedure Act 51 of 1977, admitting the facts surrounding the rape of the complainant.

The court (per Norman J) having satisfied itself that the accused understood the importance of his statement, convicted him as charged.

On the issue of sentence, the accused testified in mitigation of sentence and requested a sentence of 20 years' imprisonment instead of life imprisonment. Seeking the court's mercy, he expressed remorse and apologised for his actions. On the other hand, the state advanced aggravating factors including the age of the complainant, and the breach of the trust she had placed in the accused.

Section 51 of the Criminal Law Amendment Act 105 of 1997 provides for discretionary minimum sentences for certain serious offences. In terms of s 51(3) (*aA*), the complainant's previous sexual history; an apparent lack of physical injury to the complainant; the accused's cultural or religious beliefs about rape; and any relationship between the accused person and the complainant prior to the offence being committed shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence. The court also referred to the constitutional protection offered to children, which is echoed in the Children's Act 38 of 2005.

Finding that the accused had displayed genuine remorse, the court held that substantial and compelling circumstances existed, which warranted deviation from the imposition of life imprisonment. One of the factors undergirding that conclusion was the fact that the accused had been stabbed by his brother and assaulted by the community on his crime being discovered.

As the accused had a clean criminal record for the previous 15 years, he was found to be a candidate for rehabilitation.

The court made an order facilitating the complainant receiving therapy for her trauma and sentenced the accused to 25 years' imprisonment.

Delict

Defamation – defence of qualified privilege: In *Rapp van Zyl Incorporated and Others v FirstRand Bank and Others* [2022] 3 All SA 437 (WCC), a firm of attorneys and its two directors claimed damages from the first defendant bank (FirstRand) and one of its employees, arising from alleged defamatory statements made. The defendants denied that the statements were defamatory and, in the alternative, pleaded that the statements were not unlawful having been made on a privileged occasion.

The fourth defendant (Meintjies) was an attorney employed by the third defendant. He regularly advised FirstRand on insolvency applications, including applications for voluntary surrender, which were brought by debtors who had mortgage loans with it. He became suspicious about certain notices of intended surrender of debtors' estates and became convinced that these were part of a concerted and deliberate stratagem to frustrate judgment creditors, such as the bank from being able to execute against their debtors, and he suspected that the notices emanated from a common, organised source. On discovering the identity of that source, he informed them that they were utilising the machinery of the Insolvency Act 24 of 1936 for purposes for which it was never intended, by causing surrender notices to be published whereby creditors were being notified that applications would be made for the voluntary surrender of debtors' estates, without any actual intention of applying for such surrenders. Based on information before Meintjies, he concluded that the defendants were complicit in that.

Meintjies did not contradict himself in any material respect and stuck to his version in cross-examination and it could not be said that there were any material improbabilities in the evidence which he gave. On the other hand, the second and third plaintiffs were not satisfactory witnesses. The court expressed scepticism about their alleged ignorance of the true intention of the voluntary surrender applications.

The test in determining whether a statement is defamatory is an objective one. In the first place the court is required to establish the ordinary or natural meaning thereof, being the meaning which the reasonable reader of ordinary intelligence would attribute to the words under scrutiny, in their context. Thereafter, it must be determined whether the ascribed meaning of the words used would have the effect of injuring the plaintiff's reputation by lowering her in the estimation of right-thinking members of society. Confirming that Meintjies' statement was defamatory of the plaintiffs it was rebuttably presumed that the publication was made intentionally (*animo iniuriandi*) and that it was wrongful/unlawful. The sole defence, which was raised was one of qualified privilege. Any protection, which is extended on a so-called privileged occasion, is qualified and not absolute.

Applying the legal principles, the court found that the defendants, particularly Meintjies, did not do what was reasonably expected of them and acted recklessly. Their joining the plaintiffs as respondents on the basis that, as of June 2012, they were participants in the unlawful scheme, was not reasonably appropriate. Defendants were held liable for plaintiffs' damages.

- See Tshepo Mashile 'Qualified privilege: defamatory statements made by lawyers during legal proceedings' 2022 (Oct) *DR* 15.

Local government

Appointment of managers to municipality under administration: By virtue of ss 154 and 155 of the Constitution, the applicant (the Member of the Executive Council (MEC)) in *Member of the Executive Council for the Department of Co-Operative Governance and Traditional Affairs: Free State v Maluti-A-Phofung Local Municipality and Others* [2022] 3 All SA 403 (FB), as the executive authority of the Free State Provincial government, was responsible for co-ordination, monitoring and support of municipalities in the province. In this case, the MEC sought to have the court review and declare on the alleged unlawful appointment of the second and third respondents on alleged unlawfully increased remuneration packages and the resultant unlawful drawing of the salaries.

The first respondent was a municipality, which had been placed under administration by mandatory intervention. Consequently, only the administrator had the authority to contract on behalf of the municipality with the second and third respondents.

The respondents acknowledged the standing of the MEC to bring a matter concerning the appointment of a municipal manager to court but complained about the unreasonable delay in doing so in this case.

It was held that, s 152 of the Constitution sets out the minimum standards applicable to a municipality in the execution of its duties.

In explaining the delay in bringing the present application, the MEC referred to attempts to afford the respondents sufficient opportunity to remedy the situation, and to the obstructive conduct of the respondents regarding the administrator's attempts to discharge his duties. The allegations against the respondents were serious and the conduct of all the parties in dragging their feet in bringing the matter to court brought the administration of justice into disrepute. In that light, the court was constitutionally obliged to excuse the delay and hear the matter.

The first issue addressed by the court was whether the contracts entered by the respondents were legal on the facts and the applicable legal framework. At the relevant time, the municipality had been experiencing a financial crisis and was in serious and persistent breach of its obligations to provide basic services or meet its financial commitments. The administrator was required to scrutinise all budgetary matters. He had investigated the appointments of the second and third respondents and fixed a salary range for such appointments. However, the second and third respondents were appointed without the knowledge, involvement, or ratification of the administrator – and at variance with the remuneration scale determined by him. That was illegal and *ultra vires* the intervention. Even after realising that their contracts were not legal, the second and third respondents allowed the unlawfulness to persist without seeking to rectify the situation. The consequence of the finding that the contracts were unlawful was that any salary or remuneration pursuant thereto were also *ultra vires* and falling to be set aside.

That left for the court's determination, the question of the remedy in law for the illegal contracts concluded by the respondents.

Applicable to a public interest case, such as this, was the local government legislative regime, regulating the powers and function of the municipal council and its resolutions, which were subject to salary determinations by the Minister of Co-operative Governance and Traditional Affairs. In terms of the rule of law and the Constitution, the fixing and payment of exorbitant salaries, which were *ultra vires* and in defiance of the needs of the people and constitutional governance, will be illegal in terms of s 2 of the Constitution.

Having regard to s 41 of the Constitution, which vests a court with a discretion to hear a matter even if not satisfied that the parties have made every reasonable effort to settle the dispute, the MEC could not be said to be non-suited by the provisions of the Intergovernmental Relations Framework Act 13 of 2005.

Both impugned contracts were set aside and the payment in excess of that permitted was to be repaid by the second and third respondents.

Other cases

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

- application for review of decision to seize goods;
- appointment of municipal managers and acting municipal managers;
- ban on alcohol sales during national state of disaster;
- default judgment dissolving partnership;
- right to have access to adequate housing; and
- right to protest.

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By
Maboku
Mangena

Is *res judicata* an important legal principle supported by public policy and public interest considerations?

Minister of Police v Van Der Watt and Another (SCA) (unreported case no 1009/2021, 21-7-2022) (Tsoka AJA (Petse DP and Plasket and Mothle JJA and Salie-Hlophe AJA concurring))

On 21 July 2022, the Supreme Court of Appeal (SCA) delivered a judgment in the *Van Der Watt* matter. The minister sought to resile from the settlement agreements concluded by his legal representatives on the basis that they (both the attorney and counsel) did not have a mandate to enter into the impugned agreements.

On the reading of the SCA judgment, it appears incontrovertible that the legal representatives did not have the requisite authority and mandate to conclude the settlement agreements. It is accepted that the Minister of Police (the Minister) had throughout the period the matter was in court evinced an unwavering and unambiguous commitment to dispute liability. He also took steps to ensure that all his witnesses attended court to testify on his behalf. The legal representatives ignored all these efforts and went on a frolic of their own and compromised the claim.

Aggrieved by the conduct of the legal representatives, the Minister approached the High Court to have the consent orders rescinded on the basis that they were granted in his absence. For this contention, he pivoted his case on the provisions of r 42(1)(*a*) of the Uniform Rules alternatively the common law. The application was dismissed and on a petition to the SCA it served before a full court and suffered the same fate.

Undeterred, the Minister once again successfully petitioned the SCA to have a fresh look on the matter. The SCA gave a short shrift to the Minister's submission and declined to consider him a candidate for protection under r 42. The court ruled him unsuited because in its interpretation of the rule, an applicant for rescission must have been absent when a judgment or the order was granted. Given the fact that the Minister was legally represented and that the order was consented to, it cannot be argued that he was absent within the meaning of the rule. To argue otherwise will violate the legal principle of *res judicata* which is predicated on respect for court orders and finality of litigation. Was the court correct? I doubt it.

The general principles governing the rescission of judgment are often said to be trite. They are trite because they have been the subject of many judgments and case law is replete with them both pre- and post the adoption of the new Constitution. The latest and detailed exposition on the subject was given by the Constitutional Court (CC) in the matter of *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others (Council for the Advancement of the South African Constitution and Another as* Amici Curiae*)* 2021 (11) BCLR 1263 (CC).

In *Zuma*, the CC emphasised that a party who chooses to absent themselves deliberately and intentionally from the properly constituted proceedings cannot avail themselves of the protection provided for under r 42 of the Uniform Rules. This emphasis is a confirmation of an important principle of our law that says no man should be adjudged in his absence. It is a protection and an insulation of the legal system from the possible abuse by those who may want to disintegrate it by obviating court orders for their own selfish end.

What the CC tells us is that the meaning of 'absence' in r 42 is not literal. A court inquiring into the circumstances under which a court order was obtained is engaged in a legal interpretative process with a sole purpose of ensuring that justice is done.

Indeed, a hallmark of a just judicial system is the observance of the rules of natural justice, namely, *audi alteram partem*. Legal practitioners as officers of the court play a pivotal role in this regard. The court relies on their forensic skills in ensuring an expeditious resolution of disputes in compliance with the Uniform Rules of Court. This reliance is not difficult to fathom. It arises out of the fact that as officers of the court, legal practitioners know that they should at all material times act with requisite honesty and diligence. The rules of their profession require them to treat the interests of their clients as paramount subject to their duty to the court. It is, therefore, unimaginable that a legal practitioner can betray a trust reposed in them by a member of the public. It goes against all the ethical teachings of the profession.

As a general rule, a legal practitioner does not have an untrammelled right to conclude an agreement on behalf of a client without a mandate. This being a general rule, there are exceptions as numerous case law attests. Each case should, therefore, be treated on its own merits. What should, however, not be done is to take an exception and make it a general rule as both the High Court and the SCA seem to have done in this case.

In my opinion, both the High Court and the SCA were wrong to refuse the Minister a rescission order on the basis that he was represented during the granting of the two 'consent' orders. The purported 'presence' is in fact a subversion of justice engineered by his own legal representatives and should not be countenanced by a legal system which values fair trial rights and its twin sister of the right to access the courts.

I accept that Mr Van der Watt and his legal team together with the court did not know that the legal representatives did not have the requisite authority to bind the Minister. What I do not accept is that the absence of this knowledge at the time of the granting of the order should be elevated to an impenetrable defence of *res judicata* based on ostensible authority and trample the minister's right to have his day in court. Adherence to these principles in this circumstance is too heavy a price to pay and is certainly not proportional to the prejudice Mr Van der Watt would have suffered if the court had granted the rescission. Any prejudice suffered would have been adequately catered for by an appropriate costs order. In any case an applicant for rescission seeks indulgence.

The above notwithstanding, *res judicata* is an important legal principle supported by both public policy and public interest considerations. At its heart is the desire to ensure finality of judgments, the creation of legal certainty required for the enforcement of court orders as well as the prevention of the abuse of court processes. It does not preclude the court in the exercise of its judicial power to ensure that justice is done between man and man.

As I understand it, the overriding consideration in the exercise of a judicial discretion in rescission proceedings is the interests of justice. This objective could still have been achieved without offending this cardinal principle. This is so because it cannot be fair to declare a man a winner in a race where another man was deliberately incapacitated, and the rules were manifestly ignored albeit by his chosen lawyers.

I appreciate that the Minister chose the legal practitioners to represent him and should not easily be allowed to disown them whimsically. This does not, in my view, mean that it is in all cases that a litigant will be bound by the conduct of their attorney. There are limits beyond, which a legal practitioner cannot go. A legal practitioner who deliberately fails to execute a client's clear instructions and act to their detriment cannot be held to be acting for that client. To argue that such a client is represented and, therefore, 'present' in court when a 'consent' order is granted as in this case defies both logic and common sense. To apply *res judicata* in these circumstances does not only promote form over substance but is also mechanical.

The CC rejected a mechanical application of *res judicata* in *Molaudzi v S* 2015 (8) BCLR 904 (CC). The rejection was anchored on the public duty of the court to maintain a balance between 'public interest in finality of litigation with the public interest of ensuring a just result on the merits' (para 24). Its roots lie in 'good sense and fairness' (see *Ascendis Animal Health (Pty) Ltd v Merck Sharpe Dohme Corporation and Others* 2020 (1) BCLR 1 (CC) at para 112).

In the same way that the CC told us in *Zuma* that 'absence' is not literal, 'presence' should also be accorded a legal meaning. Doing so is not only giving effect to a right of access to the court but is in full accord with the notion of a right to a fair trial enshrined in the Constitution. It makes good sense and ensures fairness. I am fortified in my view by the Labour Court judgment of Moshoana J in *SACCAWU obo Mapakela and Others v Transem (Pty) Ltd* (LC) (unreported case no JS 155/17, 27-1-2022) (Moshoana J) at para 10 and 15.

A litigant who is represented by a legal practitioner who acts dishonestly and deliberately misleads the court as to his authority to bind the client is as good as being unrepresented. A court of law exercising a judicial discretion in the determination of the conflicting rights of access to the court and its duty to vindicate the sanctity of its orders would ordinarily be intolerant of dishonesty and a betrayal of trust, which the public repose on the admitted and enrolled practitioners.

That the Minister was denied access to the court, as well as the right to a fair trial admits of no contest. The refusal was based on a rigid and mechanical application of the *res judicata* principle in circumstances where it was not only inappropriate but manifestly unfair. This is inimical to the court's public duty to ensure a just result in the adjudication of the merits. Lord Denning probably did not have this kind of situation in mind when he penned his seminal judgment on ostensible authority.

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Who can and cannot represent companies in South African courts?

By Michael Kabai

Investec Securities (Pty) Ltd v Corwil Investments Holdings (Pty) Ltd and Others (GJ) (unreported case no 2021/11126, 20-7-2022) (Wepener J)

Perhaps it will be helpful to begin with the 1960s case of *Battle v Irish Art Promotion Centre Ltd* 1968 IR 252 (SC), as a backdrop for this article. In the *Battle* case, the managing director of a company filed an *ex parte* application to be allowed to defend the company against the plaintiff's claim. The Supreme Court of Ireland established the common law principle that stipulates that a company may only be represented in court or make an appearance as a party to legal proceedings through a solicitor or counsel. The Supreme Court of Ireland disallowed the managing director and majority shareholder from appearing in court on behalf of the firm personally. The term 'Rule in Battle' was invented, and it states that corporate entities may only be represented by lawyers who have a formal right of audience in court proceedings, not by non-lawyer directors or shareholders.

According to the Supreme Court of Ireland, this rule may be deviated from in 'exceptional circumstances' where the interests of justice require it. However, the court has noted that, for example, lack of available funds in a company to obtain legal representation does not constitute exceptional circumstances. The Rule in Battle is still in effect in Ireland and is recognised in other common law countries, such as the United Kingdom, Australia, and Canada.

In the South African *Investec Securities* case, Investec applied to the court for a declarator barring the third respondent, Mr Nathan Hittler, from acting on behalf of the first and second respondents (Corwil Investments) in any legal proceedings between Investec and Corwil Investments. Investec contended that because Mr Hittler was not an attorney or advocate, he cannot represent Corwil Investments. Furthermore, Mr Hittler was not director of Corwil Investments.

But this was not the first time the parties had a case heard on the similar subject. The other matter that was discussed previously heard by the court was in *Corwil and Investec (Corwil Investments Holdings (Pty) Ltd and Another v Investec Securities (Pty) Ltd* (GJ) (unreported case no 11126/2022, 5-4-2022) (Manoim J)), in which the court made it clear that Mr Hittler could not represent Corwil Investments as he was not an advocate or attorney. Despite the decision that was handed down on 5 April 2022, Mr Hittler continued to file papers ostensibly as a representative of Corwil Investments. Mr Hittler claimed that he acted as a representative or agent of Corwil Investments with the approval of its board. Mr Hittler also stated during the hearing that he planned to file additional documents on behalf of Corwil in the future.

The court ruled in favour of Investec once more and granted a declarator, effectively barring Mr Hittler from filing additional documents on behalf of Corwil in the future. The court also ruled that all of Mr Hittler's actions, which purported to be taken on behalf of Corwil, were improper, as were all the documents he filed in that capacity.

The question here is whether a person – who is not qualified as an advocate or attorney – can represent a company in court? As previously stated, the Rule in Battle is still in effect in many other common law jurisdictions and in those jurisdictions, it is very clear that corporate entities may only be represented in court by legal practitioners with a formal right of audience, not by non-legal practitioner directors or shareholders. The South African courts appear to have followed suit and not deviated from the Rule in Battle.

The *Manong and Associates (Pty) Ltd v Minister of Public Works and Another* 2010 (2) SA 167 (SCA) case is one of the important South African cases on this issue, where the managing director of the company signed the heads of argument on behalf of the company and purported to represent it before the court. What is known as the right of audience on behalf of the company before it. The court then decided that the company cannot conduct a case before it except by the appearance of counsel on its behalf. However, what is interesting about the case is that it seems to open the door for the possibility in the future to relax this common law rule where administration of justice may require this. The court held that 'superior courts have a residual discretion in a matter such as this arising from their inherent power to regulate their own proceedings' (para 10). The court also contended that such a discretionary power is consistent with the Constitution. The court emphasised that discretionary audience should be regarded as a reserve or occasional expedient, because, given the increasing complexity of litigation, the rule may be as strongly required today as it ever was, and there may be circumstances in which 'an unqualified and inexperienced person may do more harm than good to the corporate litigant that he purports to assist' (para 13). The court refrained from developing a test for exercising the court's inherent power because it believed that such cases could be confidently left to the good judgment of the judges involved. It did, however, hold that in each such case, leave must first be sought through a properly motivated, timely filed formal application demonstrating good cause why the rule prohibiting non-professional representation should be relaxed in that particular case.

The Supreme Court of Appeal in the *Manong* case did not really deviate from the common law rule. Like the Supreme Court of Ireland, it also pointed out that in the future it may deviate from this rule in exceptional circumstances where the interests of justice require it.

In conclusion, a company formed 'under the Companies Act has its own legal personality' and the authority to bring 'legal proceedings in its own name' (Garreth O'Brien, Frances Bleahene and Heather Mahon 'Legal Proceedings: The Importance of Company Authorisation and Representation' (www.mccann-fitzgerald.com, accessed 4-9-2020)). Problems can arise, however, when legal action is taken on a company's behalf, with or without the company's formal authorisation, and the representative in the legal proceedings is neither an attorney nor an advocate. Despite the fact that the courts have decided to uphold the common law rule, they have left the door open for possible exceptions if the interests of justice so warrant.

The rule appears to be here to stay, and any deviation from it may necessitate the applicant demonstrating exceptional circumstances that justify the courts deviating. As the Supreme Court of Ireland pointed out, a lack of funds to pay a legal representative, for example, may not be considered an exceptional circumstance by the courts.

As a juristic person, the company cannot thus represent itself in legal proceedings.

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By Kgomotso Ramotsho

The Constitutional Court did not confirm the declaration made by High Court that s 24(2) of the LPA is unconstitutional

Chakanyuka and Others v Minister of Justice and Correctional Services; Rafoneke and Another v Minister of Justice and Correctional Services (CC) (unreported case no CCT 315/21, CCT 321/321 and CCT 06/22, 2-8-2022) (Tshiqi J (Kollapen J, Madlanga J, Majiedt J, Mathopo J, Mhlantla J, Mlambo AJ and Unterhalter AJ concurring))

The Constitutional Court (CC) of South Africa (SA) dismissed the application in the matter of *Rafoneke* after the applicants approached the court and submitted that the provisions of s 24 of the Legal Practice Act 28 of 2014 (the LPA) creates an absolute bar to enter the legal profession by persons who hold visas and permits that allow them to live and work in SA. Furthermore, that a court or functionary seized with an application for admission as a legal practitioner has no discretion to authorise the admission of a duly qualified person who has no citizenship.

As per Musi JP's decision in *Rafoneke v Minister of Justice and Correctional Services and Others and a related matter (Free State Association of Advocates as* Amicus Curiae*)* [2022] 1 All SA 243 (FB), s 24 shall read as follows:

'24. Admission and enrolment

(1) A person may only practise as a legal practitioner if he or she is admitted and enrolled to practise as such in terms of this Act.

(2) The High Court must admit [~~to practise~~] a person *as a legal practitioner and authorise the Council to enrol such person as a legal practitioner, conveyancer, or notary, if the person upon application satisfies the court that he or she* –

(*a*) is duly qualified as set out in section 26;

(*b*) is a –

(i) South African citizen; or

(ii) permanent resident in the Republic;

(*c*) is a fit and proper person to be so admitted; and

(*d*) has served a copy of the application on the Council, containing the information as determined in the rules within the time period determined in the rules' (court's italics).

Among the submissions the applicants made, the CC said that the applicants argued that this differentiation bears no rational connection to a legitimate governmental purpose because, irrespective of the fact that the immigration laws allow them to take up employment in the country, they are still not eligible for admission and enrolment as legal practitioners. The CC added that the applicants added that should the CC accept the proposition of the Minister of Justice and Correctional Services that the provisions are meant to optimise opportunities for law graduates who are citizens and permanent residents. It is not a legitimate governmental purpose, and it is not likely to be achieved.

The CC said that the applicants submitted that it should consider the fact that the relief sought is not designed to permit a blanket admission of foreign legal practitioners to the profession. But instead restricted only to those who hold the right to work and reside in SA but who, due to the onerous legislative requirements of the Immigration Act 13 of 2002, can never obtain permanent residency status, and those who can only qualify for permanent residence after a certain period.

The CC added that the applicants argued that the differentiation amounts to discrimination. The applicants further submitted that the discrimination is based on an analogous ground of nationality or citizenship and thus on an attribute or characteristic that has the potential to impair their dignity and severe impact on their ability to obtain employment in the legal profession. The CC pointed out that the applicants argued that consequently the discrimination amounts to unfair discrimination as their rights to equality and dignity are infringed. The applicants contend further that the limitation of their rights is not justifiable under s 36 of the Constitution.

On 16 September 2021, the Free State Division of the High Court in Bloemfontein, declared s 24(2) of the LPA unconstitutional and invalid to the extent that it does not allow foreigners to be admitted and authorised to be enrolled as non-practising legal practitioners. This was after Relebohile Cecilia Rafoneke and Sefoboko Phillip Tsuinyane (the applicants) decided to challenge the constitutionality of s 24(2) of the LPA, after their applications to be admitted as attorneys of the High Court in the Free State Division were dismissed because they were neither South African citizens nor lawfully admitted to the country as permanent residents. The applicants are both citizens of the Kingdom of Lesotho, who studied at the University of the Free State, where they respectively obtained LLB degrees. The applicants entered articles of clerkship, completed their practical vocational training, and passed the competency-based examinations for attorneys (see Kgomotso Ramotsho 'The High Court must admit a non-citizen as a legal practitioner if they have satisfied the requirements of the Legal Practice Act' 2021 (Nov) *DR* 40).

The CC said that it should be determined whether the state, in enacting s 24(2), is effectively regulating the legal profession in an arbitrary manner or manifest 'naked preferences' that serves no legitimate governmental purpose. The CC pointed out that if it concludes that this is so, it will have to conclude that impugned provisions are inconsistent with s 9(1) of the Constitution. The CC added that to access the rationally of the decision, the provisions of s 24(2) cannot be considered without due regard to s 22 of the Constitution, which, as already stated, empowers the state to regulate the profession and trade.

The CC said that what is significant about the provisions of s 24(2) of the

LPA is that, to extend that it restricts the right to be admitted as a legal practitioner to citizens, it reflects the same restriction contained in s 22 of the Constitution. The CC added that it should, however, be highlighted that because citizens have a right of choice under s 22, the state, in enacting legislation, is required to respect this right. The CC pointed out that there is no issue that the LPA does so. The CC said that the legislature is, therefore, at liberty to decide how far to extend admission into the legal profession.

The CC said the fact that non-citizens do not have rights that accrue under s 22, does not mean they are not entitled to enter certain categories of professions in SA. However, the CC added that there is nothing stopping the Legislature from barring such entry. The CC said that s 24(2) is, however, more expansive that s 22 of the Constitution as it, in regulating entry into the legal profession, also permits permanent residents to be admitted. The expansive nature of the provision is not being attacked, but it has been argued that there is no rational basis for the differentiation between permanent residents and other non-citizens. The CC pointed out that counsel for the *amici* submitted that the protection provided by s 22 of the Constitution and s 24(2) of the LPA should be extended to foreigners who are ordinarily residents in SA with the right to work.

The CC said that the problem with the submission in this regard is that the distinction between foreigners who have been granted permanent residence in SA and those who have not, is exactly the fact that these other groups have not been granted the same status as permanent residents. The CC added that the difference in statues carries different rights and corresponding obligations. The CC pointed out that the rationale for accepting permanent residents is that they have been granted a right to live and work in SA on a permanent basis, subject to the country's immigrations laws.

The CC said it can thus be concluded in this regard that to the extent that s 24(2) mirrors the provisions of s 22, it cannot be said to be unconstitutional, but that to the extent that it extends the protection to other non-citizens, this is a governmental policy that cannot be said to be irrational or arbitrary. The CC pointed out that the applicant's employability in different capacities that do not require admission as a legal practitioner is not curtailed by s 24(2)(*b*) of the LPA as currently framed. The CC pointed out that they are, therefore, not left destitute with no alternative sources of employment to chooses one's vocation and as such this cannot be held to amount to unfair discrimination, as this right does not fall within a sphere of activity protected by a constitutional right available to foreign nationals such as the applicants.

The CC said that the discrimination is not unfair; that there is not violation of s 9(3) or s 9(4). The CC pointed out that considering this conclusion it is not necessary to determine whether the discrimination is justified. The CC dismissed the appeal. The CC added that the application for confirmation of constitutional invalidity falls to be dismissed.

The CC made the order that the appeal against the order of the Free State Division of the High Court, Bloemfontein is dismissed.

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By Shanay Sewbalas and Johara Ally

New legislation

Legislation published from 4 August – 2 September 2022

Acts

Border Management Authority Act 2 of 2020
Commencement of the Act. Commencement of ss 1 – 6, 13 – 23 and 28 – 41. Proc 86 *GG*46723/15-8-2022.

Child Justice Amendment Act 28 of 2019
Commencement of the Act. Amendment of ss 1, 4, 5, 7, 9, 34, 35, 40, 41, 43, 49, 52, 58, 67, 71, 96, Table of Contents and substitution for the expression 'appropriate adult', wherever it occurs, of the expression 'appropriate person', substitution of ss 8, 10 – 12, 27 and 92 of the Child Justice Act 75 of 2008. Proc R2400 *GG*46752/19-8-2022.

Compensation for Occupational Injuries and Diseases Act 130 of 1993
Amendment of sch 4 of the Act. GenN1264 *GG*46847/2-9-2022.

Criminal and Related Matters Amendment Act 12 of 2021
Commencement: 5 August 2022 of the Criminal and Related Matters Amendment Act, 2021. Amendment of ss 59, 59A, 60, 158, 161, 170A, 299A, 316B, sch 1, part II of sch 2, sch 7 and 8 and substitution of s 68 of the Criminal Procedure Act 51 of 1977. Insertion of 51A, 51B and 51C of the Magistrates' Courts Act 32 of 1944. Amendment of part I, II and III of sch 2 of the Criminal Law Amendment Act 105 of 1977. Insertion of ss 37A, 37B and 37C of the Superior Courts Act 10 of 2013. Proc R75 *GG*47198/4-8-2022.

Customs and Excise Act 91 of 1964
Amendment of sch 1 part 1. GN R2384 *GG*46736/19-8-2022 and GN R2435 *GG*46839/2-9-2022.
Amendment of sch 1 part 1, part 2A, part 7A and sch 6 part 1A. GN R2354, GN R2355 and GN R2357 *GG*47199/5-8-2022.

Foreign Service Act 26 of 2019
Commencement of s 4(3). Date of commencement: 25 August 2022. Proc87 *GG*46760/24-8-2022.

Local Government: Municipal Systems Amendment Act 3 of 2022
Commencement of the Act. Pending amendment of ss 1, 57, 66, 67, 72, 106, 120, sch 1, pending substitution of ss 54A, 56, 57A, 71, pending insertion of s 71B. GenN1233 *GG*46740/17-8-2022.

Medicines and Related Substances Act 101 of 1965
Amendment of sch 2. GN R2412 *GG*46789/26-8-2022.

Bills and White Papers

Deeds Registries Amendment Bill, 2022
Deeds Registries Amendment Bill. GenN1241 *GG*46788/25-8-2022.

Drugs and Drug Trafficking Act 140 of 1992
Publication of explanatory summary of the Drugs and Drug Trafficking Amendment Bill, 2022. GenN1196 *GG*47193/4-8-2022.

Extradition Bill, 2022
For comment. GenN1239 *GG*46758/23-8-2022.

Financial Matters Amendment Bill
Publication of explanatory summary. GN2377 GG46705/12-8-2022.
General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Bill
Publication of explanatory summary. GN2393 *GG*46744/18-8-2022.
Municipal Fiscal Powers and Functions Amendments Bill, 2020
General Notice Explanatory Memo August 2022. GN2389 *GG*46739/19-8-2022.
Prevention of Illegal Eviction from and Unlawful Occupation of Land Amendment Bill, 2022
Notice of Intention to Introduce a Private Members Bill and Invitation for comment on the Draft Bill. GenN1267 *GG*46847/2-9-2022.
Remote Gambling Bill, 2022
Notice of intention to introduce a private member's Bill and invitation for comment on the Draft Bill. GenN1268 *GG*46847/2-9-2022.
Unlawful Entry on Premises Bill, 2022
Invitation for comment. GenN1219 *GG*46705/12-8-2022.

Government, General and Board Notices

Agricultural Products Standards Act 119 of 1990
Food Safety Agency (Pty) Ltd: Inspection fees increase for 2022/2023 for processed meat products. GenN1220 *GG*46705/12-8-2022.
Air Service Licensing Act 115 of 1990
Application for the grant or amendment of Domestic Air Service Licence. GenN1254 *GG*46798/26-8-2022.
Auditing Profession Act 26 of 2005
Registration of registered auditors and registered candidate auditors. BN315 *GG*46705/12-8-2022.
Child Justice Act 75 of 2008
Revised National Instruction published for general information. GN2429 *GG*46836/30-8-2022.
Collective Investment Schemes Control Act 45 of 2002
Suspension of certain provisions of the CoreShares Index Tracker Collective Investments Scheme Deed. GenN1261 *GG*46844/2-9-2022.
Companies Act 71 of 2008
Notice of introduction of Online Filing of Location of Company Records. GN2390 *GG*46739/19-8-2022.
Companies and Intellectual Property Commission
Notice of introduction of Online Assurance of Foreign Nationals by the Companies and Intellectual Property Commission. GN2427 *GG*46798/26-8-2022.
Compensation for Occupational Injuries and Diseases Act 130 of 1993
Increase in monthly pensions. GenN1264 *GG*46847/2-9-2022.
Criminal Procedure Act 51 of 1977
Declaration of peace officers in terms of s 334: Transnet. GN2346 *GG*47197/5-8-2022.
Determination of persons or category or class of persons who are competent to be appointed as intermediaries. GN R2418 *GG*46795/26-8-2022.
Electronic Communications Act 36 of 2005
Application for the amendment of an Individual Commercial Sound Broadcasting Service (I-CSBS) Licence by Primedia Holdings (Pty) Ltd in respect of 567 Cape Talk t/a Cape Talk and 94.7 Highveld Stereo, in terms of s 10 of the Act. GenN1265 *GG*46847/2-9-2022 and GenN1226 *GG*46739/19-8-2022.
Applications for the Transfer of Ownership of Individual Electronic Communications Service and Individual Electronic Communications Network Service Licences from Q-KON South Africa (Pty) Ltd to Q-KON Service Provider (Pty) Ltd. GenN1216 *GG*46702/11-8-2022.
Notice for amendment I-CSBS and radio frequency spectrum for Smile 90.4 FM. GenN1218 *GG*46705/12-8-2022.
Notice of the oral public hearings to be held in respect of the Draft Amendment Regulations regarding Standard Terms and Conditions for Individual Licences, under ch 3 of the Act. GenN1238 *GG*46757/23-8-2022.
Notice of transfer for Zomerlust. GenN1243 *GG*46791/26-8-2022.
Employment Services Act 4 of 2014
Notice of the Productivity SA Annual General Meeting: Date 16 September 2022. GenN1251 and GenN1252 *GG*46798/26-8-2022.
General and Further Education and Training Quality Assurance Act 58 of 2001
Publication of names of persons to serve as members on the Sixth Umalusi Council period 8 June 2022 until 7 June 2026. GN2337 *GG*47185/3-8-2022.
Higher Education Act 101 of 1997
Institutional Statute: Sefako Makgatho Health Sciences University. GN2373 *GG*46705/12-8-2022.
Higher Education Act 101 of 1997
Publication of a notice of intent to cancel the registration of City Varsity (Pty) Ltd, Damelin (Pty) Ltd, ICESA City Campus (Pty) Ltd and Lyceum College (Pty) Ltd as a private Higher Education Institution. GN2387 *GG*46739/19-8-2022.
Immigration Act 13 of 2002
Opening of all ports of entry. GN2380 *GG*46710/15-8-2022.
International Trade Administration Act 71 of 2002
Notice of conclusion of an investigation into alleged dumping of frozen bone-in portions of fowls originating/imported from Brazil, Denmark, Ireland, Poland and Spain. GenN1179 *GG*47156/1-8-2022 and GenN1209 *GG*47201/5-8-2022.
Interpretation Act 33 of 1957
Section 15 of the Act: Standard for the publication of the Master List of Education Institutions in the Post-School Sector, 2022. GenN1217 *GG*46705/12-8-2022.
Justices of the Peace and Commissioners of Oaths Act 16 of 1963
Amendment notice under s 6 of the Act. GN2376 *GG*46705/12-8-2022.
Labour Relations Act 66 of 1995
Motor Industry Bargaining Council: Extension of period of operation of the Motor Industry Provident Fund Collective Agreement to non-parties. Extension of period of operation to non-parties of the Autoworkers Provident Fund Collective Agreement. Extension of period of operation to non-parties of the Motor Industry Administrative Fund Collective Agreement. GN R2405, GN R2406 and GN R2407 *GG*46761/24-8-2022.
Labour Relations Act 66 of 1995
Registration of a trade union: National Union of Call Centres of South Africa. GN2333 *GG*47179/2-8-2022.
Notice of intention to cancel the registration of an employers' organisation. GNR2352 *GG*47199/5-8-2022.
Medicines and Related Substances Act 101 of 1965
Notification of registration of medicines in terms of s 17. GN R2382 *GG*46736/19-8-2022.
Merchandise Marks Act 17 of 1941
Prohibition on the use of certain words and emblems associated with the 2022 Rugby World Cup 7's to be hosted in South Africa (SA). GenN1235 *GG*46753/19-8-2022.
Declaration of the 2022 Rugby World Cup 7's as a protected event. GenN1236 *GG*46754/19-8-2022.
National Education Policy Act 27 of 1996
2024 School Calendar for Public Schools. GN2339 *GG*47192/4-8-2022.
National Environmental Management Act 107 of 1998
Establishment of the National Environmental Consultative and Advisory Forum. GN2394 *GG*46746/18-8-2022.
Environmental Impact Management Services (Pty) Ltd: Notification regarding the process for the Environmental Authorisation application for the proposed Searcher Seismic Survey Basic Assessment Project. GenN1231 *GG*46739/19-8-2022.
National Water Act 36 of 1998
Mzimvubu-Tsitsikamma Water Management Area (WMA7) in the Eastern Cape Province: Limiting the use of water in terms of s 6 of sch 3: For urban, agricultural, and industrial (including mining) purposes. GN2458 *GG*46847/2-9-2022.
Reserve determination for water resources of the Breede-Gouritz Water Management Area. GN2428 *GG*46798/26-8-2022.
Public Finance Management Act 1 of 1999

Announcement or call of interest for potential beneficiaries of the demonstration pilot projects on the use of non-ozone depleting substances, low-global warming potential technologies different applications in the refrigeration and air-conditioning sector. GN2417 *GG*46793/26-8-2022.

Social Service Professions Act 110 of 1978

Notice in terms of s 5(7) members to serve on the fifth South African Council for Social Service Professions, fifth Professional Board for Social Work and fourth Professional Board for Child and Youth Care Work. BN316 *GG*46705/12-8-2022.

South African Geographical Names Council Act 118 of 1998

Publication of Official Geographical Names. GN2416 *GG*46792/26-8-2022.

Publication of Official Geographical Names: Nelson Mandela Freedom Road (change of name from Main Road 201 (R301)). GN2385 *GG*46737/17-8-2022.

Spatial Planning and Land Use Management Act 16 of 2013

Swartland Municipality (Western Cape). GenN1253 *GG*46798/26-8-2022.

Special Investigating Units and Special Tribunals Act 74 of 1996

Referral of matters to existing Special Investigating Unit (SIU). Proc R88 *GG*46789/26-8-2022.

Referral of matters to existing SIU. Proc 82 *GG*47197/5-8-2022.

Referral of matters to existing SIU and Special Tribunal and SIU: University of Fort Hare. Proc R83 and Proc R84 *GG*47199/5-8-2022.

Referral of matters to existing SIU: Mogale City Local Municipality. Proc R85 *GG*46700/12-8-2022.

Superior Court Act 10 of 2013

Rationalisation of areas of jurisdiction and judicial establishments of the divisions of the High Court of SA. GN2392 *GG*46743/18-8-2022.

Determination of persons or category or class of persons who are competent to be appointed as intermediaries. GN R2419 *GG*46796/26-8-2022.

Certificate of competency to be appointed as an intermediary in the schedule. GN R2420 *GG*46797/26-8-2022.

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

Declaration of existing Provincial Road – R61 as National Road R61 Section 8. GN2358 *GG*47200/5-8-2022.

Use of Official Languages Act 12 of 2012

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Amendment of rules (DAR 237). GN R2415 *GG*46789/26-8-2022.

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Regulations: Unmounted Artificial Teeth: Amendment. GN2425 *GG*46798/26-8-2022.
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Pharmacists providing Family Planning Services (Reproductive Health Services). BN314 *GG*47197/5-8-2022.
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Regulations relating to establishment, varieties, plants and propagating material: Amendment of table 8. GN R2411 *GG*46789/26-8-2022.
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Amendment of the Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of SA. GN R2434 *GG*46839/2-9-2022.
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Invitation for the comment on the Draft Block Exemption Regulations for Small, Micro and Medium-Sized Businesses, 2022. GN R2431 *GG*46838/31-8-2022.
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Memorandum communicates the Authority's intentions to initiate the second phase of the licensing process and to make available radio frequency spectrum to prospective licensees to provide mobile broadband wireless access services in the low and mid-radio frequency bands. GenN1225 *GG*46738/17-8-2022.
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Amendments to the Automotive Production and Development Programme Phase 2. GN2336 *GG*47184/3-8-2022.
Draft notice for public comment on exportation of ferrous and non-ferrous metals. GN1202 *GG*47197/5-8-2022.
Draft notice for public comment on import and export control. GenN1204 and GenN1203 *GG*47197/5-8-2022.
Invitation for public comments: Draft Policy proposals on measures to restrict trade in ferrous and non-ferrous metals. GenN1205 *GG*47197/5-8-2022.
Invitation for public comment: Draft Policy proposals on measures to restrict trade in ferrous and non-ferrous metals. GenN1210 GG47202/5-8-2022.
Draft notice for public comment on exportation of ferrous and non-ferrous metals. GenN1211 *GG*47202/5-8-2022.
Draft notice for public comment on export control. GenN1212 *GG*47202/5-8-2022.
Draft notice for public comment on import control. GenN1213 *GG*47202/5-8-2022.
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Cancellation of registration of a trade union: South African Private Security Workers Union. GN2365 *GG*46705/12-8-2022.
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Notice of cancellation of registration of trade union. GN2422 *GG*46798/26-8-2022.

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Call for nomination of candidates to serve on the National Archives Advisory Council, Pretoria 2023 – 2025. GN 2360 *GG*47206/8-8-2022.
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Proposed 2025 School Calendar for comment. GN2338 *GG*47191/4-8-2022.
National Environment Management: Biodiversity Act 10 of 2004
Proposed public meeting and comments on the proposed extension of False Bay white shark cage diving operating area – inshore area near Strandfontein Beach, Western Cape. GN2456 *GG*46847/2-9-2022.
National Environmental Management: Air Quality Act 39 of 2004
Consultation on Proposed Regulations for Implementing and Enforcing Priority Area Air Quality Management Plans. GN R2353 *GG*47199/5-8-2022.
National Environmental Management: Protected Areas Act 57 of 2003
Consultation on the intention to declare certain properties situated in the Western Cape Province to be part of the existing Agulhas National Park, Karoo National Park and Table Mountain National Park. GN2366, GN2370 and GN2372 *GG*46705/12-8-2022.
Consultation on the intention to declare land situated in the Northern Cape Province specified in the notice as part of the existing Augrabies National Park and Mokala National Park. GN2367 and GN2371 *GG*46705/12-8-2022.
Consultation on the intention to declare land situated in the Eastern Cape Province as part of the existing Camdeboo National Park. GN2368 *GG*46705/12-8-2022.
Consultation on the intention to withdraw the National Park Status of Groenkloof National Park in terms of the Act. GN2369 *GG*46705/12-8-2022.
Appointment of the Ministerial Task Team to identify and recommend voluntary exit options and pathways from the Captive Lion Industry. GN2379 *GG*46706/12-8-2022.
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Revision of the National Pricing Strategy for Water Use Charges of s 56(1). GN2350 *GG*47197/5-8-2022.
Pan South African Language Board Act 59 of 1995
As amended by Act 10 of 1999: Correction notice: Call for comments. BN320 *GG*46798/26-8-2022.
Plant Breeders' Rights Act 15 of 1976
Receipts of applications for Plant Breeders' Rights. GN2446 *GG*46847/2-9-2022.
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Standards Matters. GenN1269 *GG*46847/2-9-2022.
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Shanay Sewbalas and Johara Ally are Editors: National Legislation at LexisNexis South Africa.

Employment law update

By Nadine Mather

Defamatory statements made by an employer

In *Munthali v Passenger Rail Agency of South Africa* [2022] 8 BLLR 769 (GP), the applicant was employed by the Passenger Rail Agency of South Africa Development Foundation (PRASA) as Chief Executive Officer. The applicant was suspended with immediate effect and PRASA announced her suspension by publishing an internal statement to approximately 15 000 employees. The internal statement stated, among other things, that the suspension was 'in line with the commitment to good corporate governance and the eradication of irregularities with[in] the organisation' but added that PRASA presumes innocence until due process has been completed (the Internal Statement).

A year later, and without any disciplinary proceedings having been instituted against the applicant, the applicant was notified that her suspension had been lifted and that she was to remain on paid leave pending a resolution between the parties. PRASA did not inform employees of the withdrawal of the applicant's suspension, nor was a resolution between the parties forthcoming. Instead, approximately six months later, the applicant was notified that her employment contract was terminated with immediate effect.

PRASA then published a media statement announcing, among other things, that on an analysis by PRASA of the employment contracts of executives, it became apparent that some of them ought to have left PRASA years ago. With reference to the applicant, the statement recorded that she had been on suspension for alleged misconduct and that her contract ought to have been terminated on the expiry of a five-year term (the Media Statement).

The applicant challenged the fairness of her dismissal and, as a result, the Labour Court ordered PRASA to reinstate the applicant retrospectively. Thereafter, the applicant instituted a claim against PRASA for damages, alternatively loss of earnings, arising from the publication of the

Internal Statement and Media Statement. According to the applicant, the statements were wrongful and defamatory.

PRASA raised an exception to the claim on the basis that the applicant's particulars of claim did not disclose a cause of action against PRASA. In this regard, PRASA alleged that readers could not have understood the Internal Statement nor the Media Statement to suggest that the applicant was guilty of misconduct or that she had done anything wrong, and that her reputation and good name could not have been tarnished.

The court noted that to determine whether a statement is defamatory and, therefore, *prima facie* wrongful entails a two-stage inquiry. The first inquiry is to determine the ordinary meaning of the statement. The second inquiry is to determine whether the meaning is defamatory. The test is objective. In determining the meaning of a statement, the court must take account not only what the statement expressly conveys, but also what a reasonable person may infer from it.

The applicant contended that the meaning assigned to the Internal Statement was that she was suspended in line with 'the eradication of irregularities', the inference being that the applicant's suspension was because of something improper. Further, because the Internal Statement was provided to approximately 15 000 employees, it was the intention of PRASA to defame the applicant by diminishing the applicant's standing with her subordinates.

PRASA, on the other hand, contended that the purpose of the Internal Statement was to notify employees that the applicant had been put on 'precautionary' suspension. In these circumstances, employees could not have understood that the applicant was guilty of misconduct. Further, that because it acted on the presumption of the applicant's innocence until due process had been completed, it could not have been understood to defame the applicant.

The court found that PRASA had attempted to import the word 'precautionary' before the word 'suspension', thereby creating its own narrative. However, the word 'precautionary' did not appear in the Internal Statement and PRASA had relied on its intention when publishing the Internal Statement to dictate the meaning thereof. This was, however, misplaced. Further, the court found that the announcement of the suspension of a high-ranking executive with immediate effect, objectively viewed, may not leave the esteem, which the applicant once enjoyed in place. Consequently, the Internal Statement could undermine the applicant's status, good name, and reputation within PRASA.

Turning to the Media Statement, PRASA contended that it was published in good faith as the PRASA board was under the impression that the applicant's contract had lapsed and that the reference to the applicant's suspension was factually accurate. The court, however, found that the ordinary meaning of the words and the structure of the Media Statement provided that the applicant was one of the executives who knowingly and unlawfully overstayed her welcome. In addition, the Media Statement had been widely published without any attempt to verify the allegations and suggested that the applicant's conduct was so serious that she had to be suspended. This would impact the esteem the applicant had enjoyed as a high-ranking executive in the eyes of her colleagues.

Accordingly, the court held that both the Internal Statement and Media Statement were defamatory and dismissed PRASA's exception with costs.

Does a reinstatement order only apply once an employer has agreed to take the employee back into service?

In *Fidelity Fund Security Services v Ngqola* [2022] 8 BLLR 705 (LAC), the employee was employed as a security officer by Fidelity Fund Security Services (the Employer). Pursuant to her appointment, the employee was reprimanded for poor work performance and transferred to another site and post at a lower salary. She was advised that should she not accept the transfer; her employment would be terminated. The employee failed to report for duty at the new site and was consequently dismissed by the Employer.

The employee referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). The CCMA arbitrator found that the dismissal was both procedurally and substantively unfair and ordered the Employer to reinstate the employee and to pay the employee her arrear salary from date of dismissal.

The employee thereafter reported for duty at the Employer's workplace. When she did so, she was told that she could not resume work because the Employer was taking the CCMA award on review but offered her a settlement of R 20 000, which she rejected. The CCMA award was then made an order of court. Approximately a year later, and just before the Sheriff served a writ of execution for the employee's arrear salary, the Employer filed its review application. After a further three years, the Employer filed an application for rescission of the court order. Both the review and rescission applications were dismissed during the following year.

As a result, the Employer addressed a letter to the employee requesting her to report for duty. When she did so, the employee was required to sign a new contract in a lower position and with a reduced salary. The employee's attorneys contended that this amounted to re-employment rather than reinstatement and the employee declined to sign the new contract. Shortly thereafter, the employee tendered her resignation.

The employee then approached the Labour Court (LC) seeking an order directing the Employer to pay her arrear salary from the date of her dismissal. The LC gave effect to the arbitration award but found that the employee was not entitled to payment during the short period in which she did not tender her services. Disgruntled with the outcome, the Employer took the judgment on appeal to the Labour Appeal Court (LAC).

Before the LAC, the Employer argued that the employee was never reinstated. It contended that the contract of employment, which gave rise to payment of the employee's salary, only came about once the employee tendered her services and the Employer accepted the tender allowing her to resume duties. As the Employer had not accepted the tender of the employee's services, the employee was never reinstated and, therefore, was not entitled to any arrear payments.

The LAC noted that more than 11 years had passed since the Employer was ordered to reinstate and compensate the employee. For over 14 months, the Employer did nothing except to deny the employee the right to resume her duties. The Employer delayed the filing of both its review and recission applications. Further, it never appealed against the dismissal of its applications, yet still did not comply with the court order.

The LAC found that the argument advanced by the Employer overlooked the following facts –

- the employee had reported for duty and tendered her services shortly after the award was made. The Employer did not, however, allow her to resume her duties;
- as the Employer had not furnished security, its review application did not suspend the operation of the court order to reinstate the employee. Until the order was set aside or suspended, it remained binding on the Employer; and
- the Employer's attorneys had assured those of the employee that she would be placed at head office until a suitable position could be found for her. This clearly amounted to reinstatement.

Considering the above, the LAC held that the Employer could not deny that the employee was reinstated. Her employment contract had ensued until her date of resignation. Consequently, the LC's judgment could not be faulted.

Turning to costs, the LAC held that the exception in labour proceedings to the general rule that costs follow the result is essentially to keep the relationship between the parties intact. This was not applicable in the present matter as the employee had resigned. It was clear to the LAC that the Employer's wilful refusal to comply with the court order and its deliberate delaying tactics merited sanction. The Employer had been 'hell-bent' on exhausting and draining the employee emotionally and financially, resulting in her resignation. It would be unequitable and unfair to burden the employee with any costs incurred by defending the appeal.

The LAC dismissed the appeal with costs.

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By Moksha Naidoo

Exception to piecemeal reviews

Super Group Trading (Pty) Ltd t/a Supergroup Dealerships v NUMSA obo Carolus and Others (LC) (unreported case no C06/2021, 22-7-2022) (Leslie AJ)

The first respondent, trade union referred an unfair dismissal dispute to the bargaining council, the Dispute Resolution Centre of the Motor Industry Bargaining Council. Arbitration was set down for 10 December 2020. On 8 December 2020, the union wrote to the bargaining council and applicant, advising that the official who was scheduled to attend the arbitration had taken ill and, therefore, a request for postponement was made. In addition, the union stated that all union officials were engaged in other matters on the day. Attached to the letter was a medical sick note confirming the trade union official was booked off.

On the same day the applicant responded, opposed the request for postponement.

On 10 December 2020, the applicant's attorney, together with witnesses, attended the arbitration. Neither the dismissed employee nor any official from the union were in attendance.

On 24 December 2020, the arbitrator delivered a ruling postponing the matter. In his ruling the arbitrator found that it stood to reason that the employee did not attend the arbitration having been informed of the official's medical incapacity had hence his absence was not wilful.

Presumably, before the arbitration commenced, alternatively before it concluded; the applicant launched an application to have the ruling set aside. The matter was unopposed.

At the hearing the court began by dealing with s 158(1B) of the Labour Relations Act 66 of 1995, which states:

'The Labour Court may not review any decision or ruling made during conciliation or arbitration proceedings conducted under the auspices of the Commission or any bargaining council in terms of the provisions of this Act before the issue in dispute has been finally determined by the Commission or the bargaining council, as the case may be, except if the Labour Court (LC) is of the opinion that it is just and equitable to review the decision or ruling made before the issue in dispute has been finally determined'.

In terms of this section, the general rule is that the LC would refrain from hearing an application to review a ruling, until such time as the dispute itself (be it an unfair dismissal or unfair labour practice dispute) had been finally determined and an award to such an effect had been delivered. The purpose of the section was to deter parties bringing piecemeal review applications which ultimately resulted in arbitrations being stayed pending the review of a ruling being finalised.

The court, however, noted that the exception to the general rule was when there were exceptional circumstances, which rendered the court's intervention, prior to the arbitration being finalised, just and equitable.

As to the notion of 'just and equitable', the court aligned itself with a Constitutional Court decision (*Electoral Commission v Mhlope and Others* 2016 (5) SA 1 (CC)) wherein the court held: 'Whatever considerations of justice and equity point to as the appropriate solution to a particular problem, it may justifiably be used to remedy that problem.'

Referring to the bargaining council's rules, wherein it is stated that an arbitrator must dismiss a dispute if the referring party does not attend arbitration proceedings and adopting the approach of just and equitable as set out above, the court held:

'I am satisfied that it would be just and equitable to entertain the review application at this stage of the proceedings. But for the postponement, the matter would have been dismissed on 10 December 2020. If the applicant were to be compelled, nevertheless, to await the final outcome of the arbitration before approaching this court for relief, it would effectively lose its right to challenge the postponement ruling. For all intents and purposes, the postponement ruling would be moot. This distinguishes this case from other interlocutory rulings where, for example, an arbitrator has determined that he or she has jurisdiction, which can always be revisited by a reviewing court once the merits of the dispute have been finally determined.'

The court went further to consider the merits under circumstances where it was within the arbitrator's discretion to grant postponement or not.

Having been alive to the fact that the applicant opposed the postponement, yet by simply not attending proceedings, the first respondent's approach, as stated by the court, was that the postponement was going to be granted as a matter of course. However, this was an incorrect attitude when requesting postponement. A request for postponements is not for the taking and is always subject to the discretion of the decision-maker.

In the absence of the employee or any other official from the union, the arbitrator's findings were purely speculation. Additionally the arbitrator simply accepted the union's version that all its other officials were not available to attend the arbitration, as being factually correct.

In conclusion the court held:

'It makes a mockery of the dispute resolution process that a postponement could have been granted in these circumstances. The arbitrator's ruling to this effect was so unreasonable that no reasonable decision-maker could have made it, and it falls to be reviewed and set aside on this ground.'

The postponement ruling was set aside and replaced with a finding that the applicant's unfair dismissal dispute be dismissed. There was no order as to costs.

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By Kathleen Kriel

Recent articles and research

Abbreviation	Title	Publisher	Volume/issue
JACL	Journal of Anti-Corruption Law	University of the Western Cape, Faculty of Law	(2020) 4 (2021) 5
JCLA	Journal of Comparative Law in Africa	Juta	(2022) 9.1
JJS	Journal for Juridical Science	University of the Free State, Faculty of Law	(2021) 46.2
JLSD	Journal of Law, Society and Development	University of South Africa Press	(2020) 7

Anti-corruption efforts

Lukiko, LV; Kilonzo, C and Kimela, H 'Tanzania's post-independence anti-corruption efforts: Examining the Prevention and Combating of Corruption Bureau's (PCCB) role during Magufuli's Regime' (2020) 4 *JACL* 32.
Sinhanya, B and Ngumbi, E 'The viability of lifestyle audits as an emerging anti-corruption tool in the public sector: Concepts, essentials and prospects' (2020) 4 *JACL* 80.

Children's rights

Nanima, RD 'An evaluation of the adequacy of the African Charter on the Rights of the Child concerning economic crimes in armed conflict' (2020) 4 *JACL* 58.

Contemporary constitutional jurisprudence

Okpaluba, C and Maloka, TC 'Recusal of a judge in adjudication: Recent developments in South Africa and Botswana' (2022) 9.1 *JCLA* 67.

Court-annexed mediation

Muller, EC and Nel, CL 'A critical analysis of the inefficacy of court-annexed mediation (CAM) in South Africa – lessons from Nigeria' (2021) 46.2 *JJS* 26.

COVID-19

Chidongo, P 'Internal strategies and mechanisms for combating corruption during the COVID-19 pandemic in Zambia: A linguistic turn' (2021) 5 *JACL* 23.
Meini, B 'The proliferation of corrupt activities in public health systems during the global COVID-19 pandemic' (2021) 5 *JACL* 1.
Mukiibi, P 'Corruption during the COVID-19 crisis response in Uganda and its implications for the right to health' (2021) 5 *JACL* 84.
Phakathi, M 'The Alexandra Township de-densification project during the COVID-19 crisis: Challenges and potential lessons' (2021) 5 *JACL* 63.

Crime statistics

Du Plessis, W; Pienaar, J; Koraan, R and Stoffels, M 'Unrest and violence: 2019' (2020) 7 *JLSD*.

Criminal law and restorative justice

Van der Linde, DC 'An overview of the sentencing regime for gang members under the prevention of Organised Crime Act 121/1998 and the potential for restorative justice' (2021) 46.2 *JJS* 56.

Criminal law

Sanger, C 'The symbiosis between the criminalisation of sex work and corrupt policing in sex work in South Africa' (2021) 5 *JACL* 41.
Tshehla, B 'Police officers' discretion and its (in)adequacy as a safety valve against unnecessary arrest' (2021) 46.2 *JJS* 80.

Criminal proceedings

Martial, TSH '*Le mensonge dans le procès pénal: Analyse a partir du droit Camerounais*' (2022) 9.1 *JCLA* 130.

Cybercrime

Abodo, JF 'Keynote address at the Third Virtual Economic Crimes and Cyber Crimes Conference' (2021) 5 *JACL*.
Eboibi, FE 'Cybercriminals and Nigerian Cybercrimes Act 2015: Conceptualising computers for cybercrime justice' (2020) 4 *JACL* 1.

International administrative law

Kuwali, D and Silungwe, CM 'Horizontal accountability: Bottom-up oversight of public duty bearers in Malawi' (2022) 9.1 *JCLA* 1.

International constitutional law

Mujuzi, JD 'The Constitutional Court of Uganda: Blurring/misunderstanding its jurisdiction' (2022) 9.1 *JCLA* 24.

International human rights

Imam, I and Egbewole, WO 'Weakening national judicial institutions and the rescue mission of regional courts: A critical assessment of the ECOWAS Community Court of Justice' (2020) 7 *JLSD*.
Umenze, NS 'The trajectory of illicit waste trade in Africa: Implications for human rights and sustainable development' (2020) 7 *JLSD*.

International jurisprudence

Eyongndi, DTA and Ilesanmi, SI 'Territorial jurisdiction of the National Industrial Court of Nigeria (NICN) and the requirement of endorsing originating processes under the Sheriffs and Civil Process Act (SCPA) determined' (2022) 9.1 *JCLA* 162.
Nwapi, C; Egbebu, EJ and Akazua, T 'Discretion in the exercise of jurisdiction in conflict cases in Nigeria' (2022) 9.1 *JCLA* 94.

Judicial conduct and ethics

Swanepoel, CF 'Judicial probity and ethi-

cal standards: The Judicial Conduct Tribunal's decision on Judge President John Hlope' (2021) 46.2 *JJS* 120.

Restorative justice

Mokomane, RB 'Restorative justice as another way of dealing with bullying in South African schools' (2020) 7 *JLSD*.

Socio-criminogenic risk factors

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How do we control the cyberattack beast?

By Tshepang Motaung

Most companies believe that because they are small in size, they will never have to face a cyberattack. Hackers and cybersecurity criminals target every kind of business, as long as there is something of value, which includes assets, such as business plans, contracts, employee log in details, equipment designs, new product information and clients.

Once an attack has occurred most directors find themselves faced with difficult questions from insurance companies and shareholders, including questions regarding the measures they took to protect the company against the complex and evolving beast. An inadequate answer could lead to claims not being honoured. Not only do companies have to repair their reputational damage, they also need to deal with the financial impact of a cyberattack as well.

Guiding principles to strengthen cyber risk oversight

A director needs to –

- 'understand and approach cybersecurity as a strategic, enterprise risk', not just a risk that the information technology (IT) department needs to focus on;
- 'understand the legal implications of cyber risks as they relate to their company's specific circumstances';
- have access to cybersecurity experts and have regular discussions with management about cyber risk threats in the business. This could be a standing agenda item at the board meeting and the topic needs to be given enough time so the board members can consider all material matters. Another option would be to spend time outside the board meeting with the IT team, or bringing in an independent expert to assess the company's information management systems;
- set expectations for an enterprise-wide cyber risk management framework with enough staff members and a reasonable budget; and
- have regular board and management roundtable discussions about cyber risk, financial exposure to risk, risk log updates and risk mitigation strategies such as insurance cover, which includes media liability, privacy regulatory defence costs/fines, reputation-based income loss and cybercrime (see Larry Clinton, Josh Higgins and Friso van der Oord *Cyber-Risk Oversight 2020: Key Principles and Practical Guidance for Corporate Boards* (National Association of Corporate Directors 2020)).

Suggestions a board member could make to lead senior management in the right direction

One of the first things an auditor or an insurance claims assessor would ask for – to check if a director has taken their fiduciary duty into account when the cyberattack occurs – is the historical board meeting minutes. Approved minutes reflect matters that the board members raise and help to protect directors against liability.

A few questions that a director could raise during a meeting include:

- What steps are followed after a critical incident and how does the company mitigate loss after a cyber-attack (incident response)?
- What are the most valuable assets and how does the IT system interact with those assets (adequate protection of assets)?

- Do the board meeting minutes reflect occasions when cybersecurity was present on the agenda (updates on risks, mitigation strategies and the development of the company's cybersecurity program)?
- Is cybersecurity included in the areas of expertise that are considered by the board, does it appear in at least one board member's biography?
- Can all cyber risk related oversight responsibilities be assigned to a specific committee (audit, risk, technology) and discuss only material issues at the quarterly board meeting?
- Does the IT team collaborate with compliance so that IT legislative updates are taken into account when developing the enterprise-wide cyber risk management framework?
- How does the business measure the impact of cybersecurity incidents? Every business needs to assess the reputational damage and associated impacts, which includes reactions from shareholders, media, and investors.

The feedback given to the board members needs to be relevant to the audience, management is encouraged to use summaries, visuals, and less technical jargon. The aim should not be to overload the audience with information but rather to convey meaning and highlight changes. Management could also show performance against competitors and indicate the impact on the business with regards to costs and market share. Conversations in the boardroom should be based on the theme of enabling discussions and dialogue even when the topic is tricky.

Complete protection is an unrealistic target, cybersecurity is a serious business level risk, which needs to be continuously monitored. Directors need to consider their fiduciary responsibility and communicate regularly with management about any new cybersecurity developments in the company and the industry they operate in.

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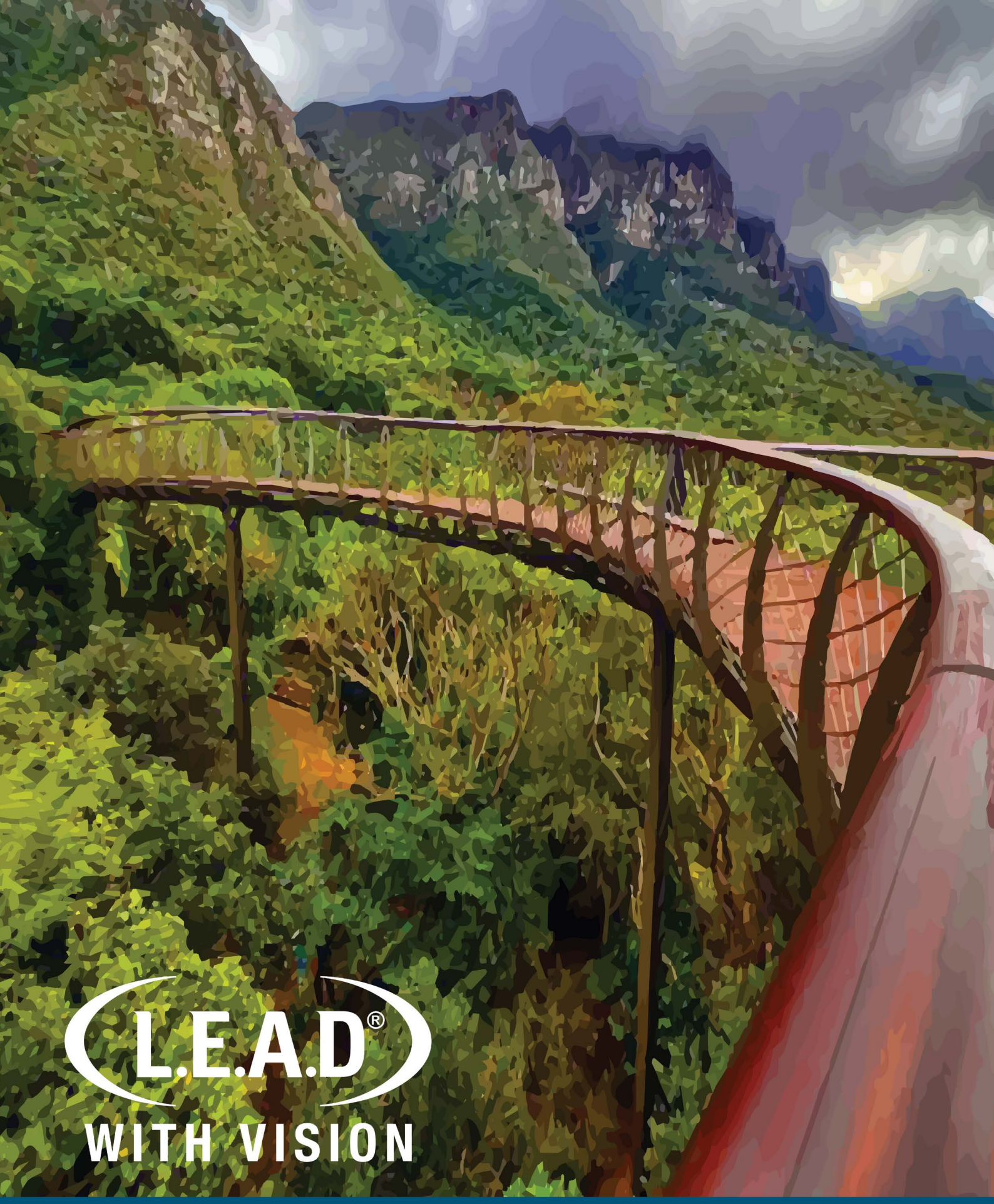

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