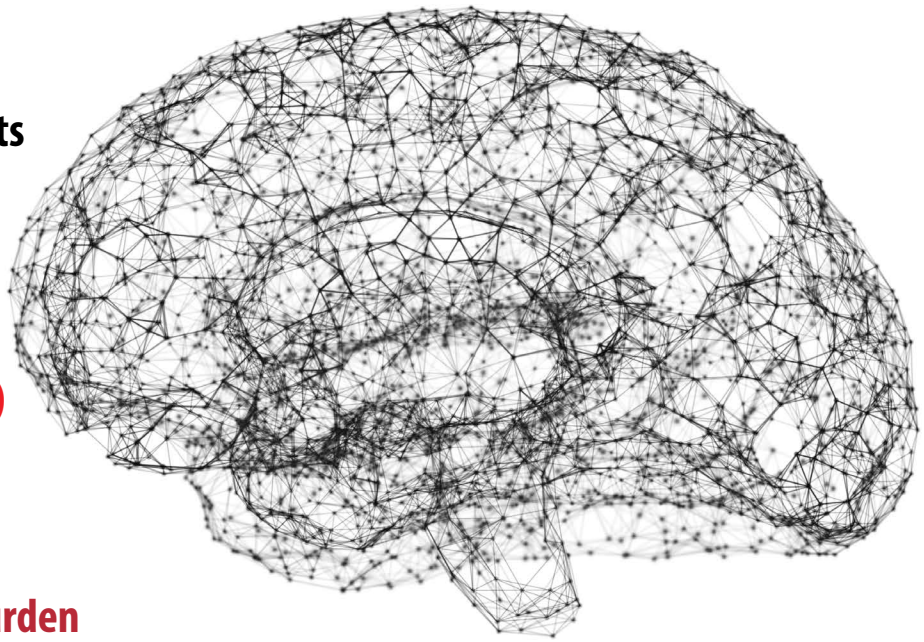
LAW SOCIETY OF SOUTH AFRICA

DE REBUS

THE SA ATTORNEYS' JOURNAL

SEPTEMBER 2022

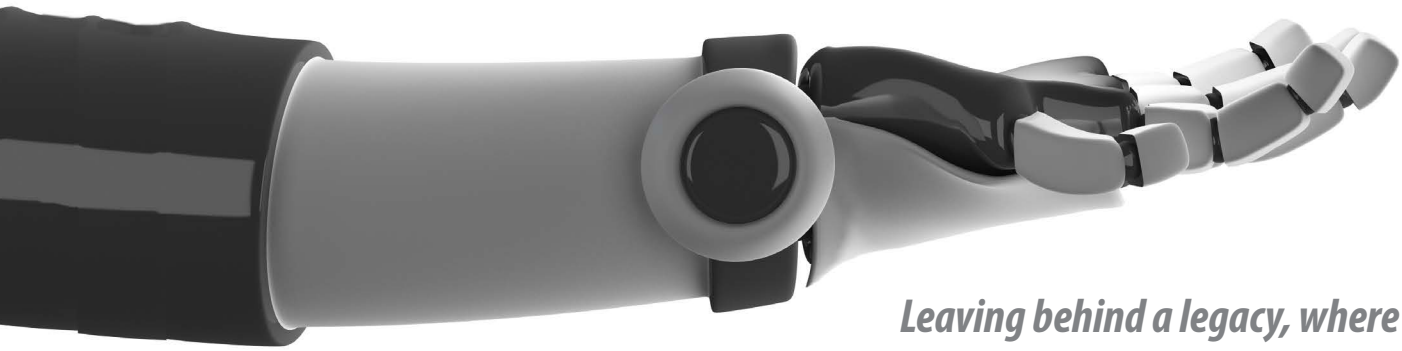
HAS POPIA ADEQUATELY PREPARED PEOPLE TO EXERCISE THEIR RIGHT NOT TO BE SUBJECT TO AUTOMATED DECISION-MAKING?



A discussion on the debt review process and conflicting judgments from South African courts

Public interest justification for mergers – the need for legal certainty in approach to s 12A(3)(*e*)

To speak or not to speak, that is the question: Does *prima facie* evidence place an evidentiary burden on the accused to lead evidence?



Leaving behind a legacy, where the legal system and society recognises women as individuals with their own rights

Ethical and liability considerations of a termination of the legal practitioner's mandate

Labour Court finds serious irregularities as presiding officer fails to apply her mind to the evidence before her

Talent approach for sustainable law firms

All practitioners and support staff are welcome to contact us for information about the following webinars, seminars and courses:

Basic Conveyancing three-day webinar
Webinar 13, 14 and 15 September 2022

The aim of the webinar is to provide a practical background on the work of a conveyancing assistant. On completion of the course, attendees should be able to cope on their own to a greater extent since the training is practice-orientated.

Virtual Hearings and Digital Deployment webinar
Dates: 16 September 2022
Registration closes: 15 September 2022

In this last series of the court room series, we will look at the virtual hearing, how to manage electronic files, and use technology in court to improve your presentation.

Accounts Management (Bookkeeping) (online course)
Dates: 19 September to 18 November 2022
Registration closes: 9 September 2022

The course is essential for all legal practitioners who intend to open their own practice and all legal support staff. It will also benefit practitioners who are currently practicing in their own firms. The course will impart a sound understanding of the basic business principles that will assist a practitioner to conduct a successful and profitable legal practice.

Rules of evidence webinar
Dates: 22 and 23 September 2022
Registration closes: 21 September 2022

This course is not merely about the rules of evidence. It is about how you can effectively apply the rules in a trial, and even in motion proceedings. This course will assist you with practical, tested techniques on how to present evidence in a manner that will persuade a judge to find in your favour. The course will also assist you with relevant skills, from taking instructions to presenting evidence in court and the presenter will teach you what not to do. A practical manual is distributed to all attendees and is intended to serve as a reference point when completing their work. A new section is added on how judges evaluate evidence; a useful guide for trial lawyers.

Child law (online course)
Dates: 3 October to 11 November 2022
Registration closes: 26 September 2022

This course will give legal practitioners easy access to the key concepts of Child Law as applied in the Family Courts and High Court. It will cover the following:

- Parental rights and responsibilities
- Children Court
- Children in need of care and protection
- Foster Care
- Hague Convention and Civil aspects of international child abduction
- Undocumented children
- Offences

National Credit Act webinar
Dates: 5 and 6 October 2022
Registration closes: 4 October 2022

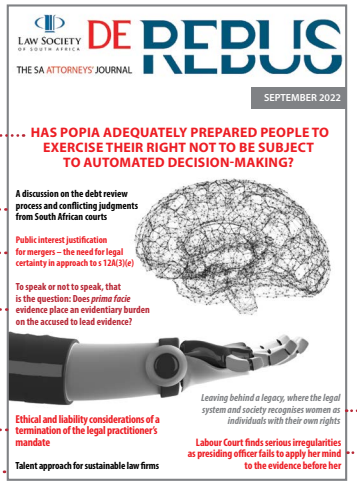
The annual National Credit Act webinar will provide a general overview of the Act and relevant regulations. A number of important recent decisions by the courts and national consumer tribunal will also be discussed.

E-mail: info@LSSALEAD.org.za • Tel: +27 (0)12 441 4600

DE REBUS
THE SA ATTORNEYS' JOURNAL

CONTENTS

September 2022 | Issue 632
ISSN 0250-0329



11 ..... HAS POPIA ADEQUATELY PREPARED PEOPLE TO EXERCISE THEIR RIGHT NOT TO BE SUBJECT TO AUTOMATED DECISION-MAKING?

18 ..... A discussion on the debt review process and conflicting judgments from South African courts

20 ..... Public interest justification for mergers – the need for legal certainty in approach to s 12A(3)(e)

13 ..... To speak or not to speak, that is the question: Does *prima facie* evidence place an evidentiary burden on the accused to lead evidence?

8 ..... Ethical and liability considerations of a termination of the legal practitioner's mandate

35 ..... Talent approach for sustainable law firms

15 ..... Leaving behind a legacy, where the legal system and society recognises women as individuals with their own rights

26 ..... Labour Court finds serious irregularities as presiding officer fails to apply her mind to the evidence before her

News articles on the *De Rebus* website:

- Youth should be activists of transformation and ask about the Legal Sector Codes
- Information Regulator intends to draft a guidance note on the interpretation of s 69 of POPIA
- Eradicating the barriers for young lawyers to enter the profession What do young legal professionals think about access to justice in South Africa?
- The significant and increasing cyber threat posed to law firms

11 Has POPIA adequately prepared people to exercise their right not to be subject to automated decision-making?

The Protection of Personal Information Act 4 of 2013 provides people with various procedural and substantive rights in relation to their personal information. Section 71(1) specifically prohibits the making of a decision based solely on automated processing. This provision is not primarily interested in data processing, but rather takes aim at a subsequent step, namely, the decision which flows from automated data processing. Notably, POPIA does not provide people with an express right of notification when they have been subject to automated decision making and decision-makers (machine or otherwise) are not duty-bound to notify individuals when they have been subject to a decision based exclusively on automated processing. Candidate legal practitioner, **Gilad Katzav**, therefore questions whether the legislature has properly placed people in a position to exercise their right not to be subject, under certain circumstances, to automated decision making.

Regular columns

FEATURES

EDITOR:
Mapula Oliphant
NDip Journ (DUT) BTech (Journ) (TUT)

PRODUCTION EDITOR:
Kathleen Kriel
BTech (Journ) (TUT)

SUB-EDITOR:
Kevin O' Reilly
MA (NMU)

SUB-EDITOR:
Isabel Joubert
BIS Publishing (Hons) (UP)

NEWS REPORTER:
Kgomotso Ramotsho
Cert Journ (Boston)
Cert Photography (Vega)

EDITORIAL SECRETARY:
Shireen Mahomed

EDITORIAL COMMITTEE:
Michelle Beatson, Peter Horn,
Mohamed Randera, Wenzile Zama

EDITORIAL OFFICE: 304 Brooks Street, Menlo Park, Pretoria. PO Box 36626, Menlo Park 0102. Docex 82, Pretoria.
Tel (012) 366 8800 Fax (012) 362 0969.
E-mail: derebus@derebus.org.za

***DE REBUS* ONLINE:** www.derebus.org.za

CONTENTS: Acceptance of material for publication is not a guarantee that it will in fact be included in a particular issue since this depends on the space available. Views and opinions of this journal are, unless otherwise stated, those of the authors. Editorial opinion or comment is, unless otherwise stated, that of the editor and publication thereof does not indicate the agreement of the Law Society, unless so stated. Contributions may be edited for clarity, space and/or language. The appearance of an advertisement in this publication does not necessarily indicate approval by the Law Society for the product or service advertised.

For fact checking, the *De Rebus* editorial staff use online products from:
- **LexisNexis** online product: MyLexisNexis. Go to: www.lexisnexis.co.za; and
- **Juta**. Go to: www.jutalaw.co.za.

PRINTER: Ince (Pty) Ltd, PO Box 38200, Booysens 2016.

AUDIO VERSION: The audio version of this journal is available free of charge to all blind and print-handicapped members of Tape Aids for the Blind.

ADVERTISEMENTS:
Main magazine: Ince Custom Publishing
Contact: Dean Cumberlege • Tel (011) 305 7334
Cell: 082 805 1257 • E-mail: DeanC@ince.co.za
Classifieds supplement: Contact: Isabel Joubert
Tel (012) 366 8800 • Fax (012) 362 0969
PO Box 36626, Menlo Park 0102 • E-mail: classifieds@derebus.org.za

ACCOUNT INQUIRIES: David Madonsela
Tel (012) 366 8800 E-mail: david@lssa.org.za

CIRCULATION: *De Rebus*, the South African Attorneys' Journal, is published monthly, 11 times a year, by the Law Society of South Africa, 304 Brooks Street, Menlo Park, Pretoria. *De Rebus* is circulated digitally to all practising legal practitioners and candidate legal practitioners free of charge and is also available on general subscription.

NEW SUBSCRIPTIONS AND ORDERS: David Madonsela
Tel: (012) 366 8800 • E-mail: david@lssa.org.za

SUBSCRIPTIONS:
Postage within South Africa: R 2 000 (including VAT).
Postage outside South Africa: R 2 200.

Help for legal practitioners

In October 2021, the International Bar Association published a report titled 'Mental Wellbeing in the Legal Profession: A Global Study'. The report revealed that one in three legal practitioners say their work has a negative, or extremely negative impact on their wellbeing. The report also notes:

- The impact of stigma: 41% would not discuss mental wellbeing concerns with their employer for fear it may have a negative impact on their career.
- A lack of training: 82% of institutions say they take mental wellbeing seriously – only 16% provide training for senior management.
- Twenty-eight percent want to see improved workplace culture to create a culture of mutual respect and address poor behaviour.
- The reasons why people do not speak out –
  - 32,1% fear being treated differently as a result;
  - 24,1% of employers do not sufficiently recognise mental wellbeing issues; and
  - 17,2% fear not being believed/taken seriously (for the full survey see: www.ibanet.org).

It is because of such reports that the Law Society of South Africa (LSSA) knows that many of its members are overwhelmed and dealing with anxiety, fear and even resilience fatigue. Please know that help is at hand. The LSSA has collaborated with PPS and the Reality Wellness Group to offer telephonic counselling and support.

The professional telephonic counselling service is available 24/7/365. It consists of:

- Unlimited telephonic counselling available nationally in all official languages.
- Face-to-face counselling is managed per intake; the general recommendation is between two to six sessions per incident (which will be for the member/employee's account).
- The service is also available to immediate family of the legal practitioner or their employee (spouse and/or children living under the same roof).

The wellness programme will be provided to a maximum of 5 000 legal practitioners per month, for a period of six months. Contact the Reality Wellness Group at: 080 112 2550 or e-mail: eppenage@realitywellness.co.za (please provide your practice number).

When you contact Reality Wellness Group you are subject to the terms and conditions of the Reality Wellness Group and the services that they provide. Below is a table of services on offer:

Mapula Oliphant – Editor

LSSA – services	
Call centre management	Twenty-four-hour trauma call centre offers personalised assistance to members and immediate family of members – 24/7/365 toll-free number.
Telephonic counselling	Twenty-four-hour trauma call centre offers personalised assistance to employees and immediate family members – unlimited telephonic inbound and outgoing.
Please Call Me service	Twenty-four-hour trauma call centre offers personalised assistance to employees and immediate family members – unlimited please call me service.
Financial guidance	Unlimited telephonic advice on finance matters, budgeting, debt management and debt counselling.
Healthcare, HIV and high risk	Nurses carry out follow up calls and share reminders, letting them know that someone cares and is checking in. This includes ongoing telephonic counselling and support, as well as assistance with registering onto treatment programmes.
COVID-19 support	All members and their families will be assisted with COVID-19 related queries and counselling, as well as referrals to the nearest testing locations.

The LSSA obtains and shares no data with the Reality Wellness Group. The only information shared is the number of people who use Reality Wellness Group's service. ❑

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.

- Please note that the word limit is 2 000 words. Upcoming deadlines for article submissions: 19 September; 17 October and 21 November 2022.

LETTERS TO THE EDITOR

PO Box 36626, Menlo Park 0102 ● Docex 82, Pretoria ● E-mail: derebus@derebus.org.za ● Fax (012) 362 0969

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

Plight of the paralegal

The word 'plight' is defined as: 'A dangerous, difficult, or otherwise unfortunate situation' (www.lexico.com, accessed 10-8-2022). The latter describes the position of paralegals in South Africa (SA) perfectly.

While SA is considered in many ways as a third world country, it is not, and particularly in the justice and legal systems, most certainly not. Yet the status and recognition of a paralegal as a worthy legal professional, is non-existent. The 'missing middle' is not even a term that can be used, they are just 'missing' from the justice and legal system altogether.

Yes, there are paralegals in SA, literally thousands of them. Ranging from junior to senior. They are specialists in the various fields of conveyancing, criminal law, civil law, community matters, social justice, debt collecting, and the like. Many are office managers, and, in many cases, the paralegal practically runs the practice for the legal practitioner.

Prior to the Legal Practice Act 28 of 2014 (the LPA) paralegals used to do what candidate legal practitioners do now, namely manage the files in court, handle clients, and paralegals were part of the team during the trial. Paralegals did research, wrote legal briefs and reports and were often the person who also trained the 'articled' attorney. They showed them the ropes, managed files, conducted client interviews, and drafted affidavits for eventual practice after they were admitted.

I have met many a legal practitioner who without their paralegal(s) would not have managed to achieve and attain what they have. Overnight, paralegals were instantly reduced to a position of no recognition and status at all.

With the introduction of court appearance rights being given to candidate legal practitioners, and allowing them to represent clients for fees, two actions occurred:

- One, is that paralegals were suddenly more 'expensive' than candidate legal practitioners, resulting in many paralegals either being dispensed with, or their previous workload being changed to secretarial or clerical work.
- The second seemed that the quality of legal work 'dropped'.

Candidate legal practitioners are inexperienced when they leave university, they have no practical knowledge or experience and are then introduced to the public and courts.

I have, sadly, seen a great amount of elitism and ego coming from many candidate legal practitioners, who often treat the paralegals – who have been doing their work for years and have vast experience and knowledge – as if they are of lower rank and not seeing them as legal professionals. Many candidate legal practitioners have been supported, coached, and guided through their 'new role' by exactly the person who used to do it before them, namely the paralegal.

I have been told more than once that when paralegals seek work they are asked why they should be hired 'when I can get two candidate attorneys for one paralegal'. I fail to understand the reasoning for allowing candidate legal practitioners to have the rights and the 'power' removed from the paralegals. The negative result is in my opinion quite evident.

On an interesting note, a Diploma in Law takes four years to complete, as does an LLB degree. The two are very similar in content. In the one you walk away and become a candidate legal practitioner and eventually a legal practitioner. The other you walk away with a Legal Professional Diploma that allows you to become part of the legal support staff, a secretary, or maybe an office manager in a law firm (once you have some experience).

Many paralegals become paralegals because they have the desire to be in the legal world, to be actively involved and too often they want to 'make a dif-

ference' in the social justice sector, or in their community, or just in justice overall. However, most struggle today to gain employment.

So many paralegals become despondent and walk away from the profession. Others realise the only way they can realise their dream is to study an LLB. Most of their previous years of study do not have credits that will apply, and they must, in a literal sense, start all over again, at double the cost and time. Understandably, many drop out weary, disappointed and in debt.

The LPA has been the death knoll for paralegals, the Department of Higher Education is the other 'guilty' party contributing to the 'plight of the paralegal'. Google the word 'paralegal' or 'legal diploma courses available in South Africa' and you will find there are a many. Yet, there is no recognised paralegal position, nor is it regulated or even clearly categorised in SA.

You will see posts advertised for paralegals, you will also see the exact same position advertised elsewhere as a legal secretary or a legal administrative clerk. Add the many studies you can do for a 'paralegal' and you will be fooled into thinking there is an actual paralegal position in the legal profession. There is not. There is the 'melting pot' with many titles.

What then is a paralegal?

The *Merriam-Webster* dictionary defines 'paralegal' as, 'relating to, or being a paraprofessional who *assists* a lawyer' (my italics) (www.merriam-webster.com, accessed 10-8-2022).

The *Collins* dictionary defines 'paralegal' as 'someone who *helps* lawyers with their work but is *not yet* completely qualified as a lawyer' (my italics) (www.collinsdictionary.com, accessed 10-8-2022).

The duties of a paralegal may include 'support[ing] other legal professionals, working in a variety of law firms and private, public sector and not-for-profit organisations. Paralegal duties would typically involve preparing legal documents, research, admin, providing quotes to clients, interviewing clients and witnesses, giving clients legal information, going to court and handling a case load of clients' (www.law.ac.uk, accessed 10-8-2022).

Remember the television series *Suits* (2011 – 2019) where, the now Duchess of Sussex, Meghan Markle, played the part of a paralegal? While in the United States they may not do any attorney work (in many other countries they can) they are senior to a candidate legal practitioner and the heart of the law firm.

Many countries have strong and dedicated paralegal regulations. Some countries, such as Canada, even allow paralegals to have their own practices (within guidelines of course).

A few years ago, I had the privilege of being invited to attend the Annual Conference of the Pan African Lawyers Union, which was held in KwaZulu-Natal. I met legal professionals from all over Africa. I was in awe to hear that most have official recognition for paralegals and that many have specific roles and functions in the judiciary, in firms and in court rooms. They also are utilised to perform vital functions at police stations, in communities, etcetera.

In 2017, I attended the Black Lawyers Association's 40th Conference and Annual General Meeting. I had had some discussions with the guest speaker, the Deputy Minister of Justice and Constitutional Development, John Jeffery, who referred to the National Forum on the Legal Profession having 'dumped' paralegals. He made a statement in his speech that night and stated that the biggest 'mistake' made regarding the LPA was to leave the paralegals out of it. And he was right.

I wonder how many people in the legal profession are aware that in the initial draft of the LPA, not only were paralegals included, they (paralegals) were also going to be allocated a seat on the Legal Practice Council. As the LPA was hashed and argued out over many years to follow, the paralegals were totally removed and dealt with in a few sentences that promised them their 'own' Act. Four years later little has been done in this regard.

Many people, including myself, have our views as to why paralegals were removed from the LPA.

Under the LPA, much paralegal work is now 'illegal', also causing a situation that the paralegals will not be able to get their own 'Act' – well not one of any worth. Why? Because the LPA would first need to be amended for this to happen. The only capacity the current LPA allows for the paralegals to have an Act and become recognised and regulated, is to render them no more than simple 'glorified' office staff and/or community paralegals.

Many have conveyed this same sentiment to me. In the process of removing the paralegals from the LPA, those responsible for this ensured that paralegals wings were permanently clipped and removed from the previous status they enjoyed, let alone giving them any more position or 'powers'.

After years of my attempting to address this with the role players, my correspondence has been met with either resistance or silence. It seems that paralegals will need to carve out their own space and challenge their right space.

Nanandi-Simone Albers is the Founder of the Paralegal Association of South Africa (PALSA).

❑

People and practices

Compiled by Shireen Mahomed

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

Gerard Vadivalu has been appointed as an associate in the Litigation Department.

Rishona van der Merwe has been appointed as an associate in the Property and Conveyancing Department.

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

❑

Why it is imperative that we build a more climate and disaster resistant South Africa

By Kamini Krishna and Ilan Lax

Weather patterns over the past five to ten years indicate that South Africa is increasingly vulnerable to the impacts of climate change. The World Meteorological Organisation (WMO), which is a specialised agency of the United Nations dedicated to international cooperation and coordination on the state and behaviour of the Earth's atmosphere, its interaction with the land and oceans, the weather and climate it produces, and the resulting distribution of water resources, states that in 2021 the global average temperature was 1,1˚C above the pre-industrial baseline (Rachel Russell 'Climate change: Global temperature could be warmest on record in one of the next five years, Met Office warns' (https://news.sky.com/, accessed 3-8-2022)). Their latest climate predictions reveal that global temperature will continue to rise with an even chance that one of the years between 2022 and 2026 will reach 1,5˚C above pre-industrial levels at the current rate of emissions (WMO 'WMO update: 50:50 chance of global temperature temporarily reaching 1.5˚C threshold in next five years' (https://public.wmo.int, access 4-8-2022)). The WMO further reported that temperatures would continue to rise for as long as greenhouse gases are emitted. The consequence of a higher temperature means that we can expect our oceans to become warmer and more acidic, sea ice and glaciers will continue to melt, sea level will continue to rise, and our weather will become more extreme (WMO (*op cit*)). More intense, frequent and severe weather events can be expected in the form of high-energy storms, floods and drought (Chris Makhaye 'KZN flood disaster: "Water was quickly rising and I saw that my house would fall"' (www.dailymaverick.co.za, accessed 4-8-2022)). KwaZulu-Natal is still recovering from the flash floods during April and May 2022, the biggest natural disaster to strike the country in recent years (Makhaye (*op cit*)). The flash floods were a catastrophe of unprecedented magnitude.

While the devastation of the recent flash floods was unparalleled, this natural disaster phenomenon is not new to the region. In October 2017, torrential rains and gale-force winds lashed the east coast of SA causing a rainfall explosion of 108 mm over 24 hours. The unrelenting rains left at least eight people dead and caused severe damage across KwaZulu-Natal (Richard Davies 'South Africa – Storm Leaves 8 Dead, Record Rain in Durban' (https://floodlist.com, accessed 4-8-2022)). A massive 3 500 tons of plastic were collected when two thousand bags of tiny plastic pellets were lost from a ship's container in the Durban port during the storm (Lethiwe Mdluli 'Nurdle beach clean-up efforts paying off' (www.ecr.co.za, accessed 4-8-2022)). In April 2019, flash floods struck again with a rainfall explosion of 165 mm over 24 hours, the heaviest the city experienced over 24 hours since 30 October 1985 (Wikipedia '2019 Durban Easter floods' (https://en.wikipedia.org, accessed 4-8-2022)). Environmental impacts recorded include raging flood waters, collapsed houses, massive destruction of the natural environment, unprecedented oil, plastic and sewerage pollution of the Durban harbour, beaches and ocean, power outages resulting from electric cable damage, and damage to infrastructure (Desmond D'Sa 'Durban floods: An open letter to President Cyril Ramaphosa' (www.dailymaverick.co.za, accessed 4-8-2022)). The most recent deluge measured rainfall of between 200 mm to 400 mm over a 24 hour period on 11 to 12 April 2022, which resulted in drownings, landslides, power outages, water shortages, and flooding of bridges, homes, and businesses (see South African Government 'National State of Disaster in numbers' (www.gov.za, accessed 4-8-2022) and Daily Maverick 'KZN floods: Read these stories about the scale, science and economic impact of the devastation' (www.dailymaverick.co.za, accessed 4-8-2022)). The explosive impact of the April downpour caused a humanitarian crisis and resulted in the declaration of a national state of disaster in the province (Des Erasmus 'Ramaphosa calls KZN floods a "catastrophe" as death toll climbs above 300' (www.dailymaverick.co.za, accessed 4-8-2022)). Six weeks later a further bout of intense rainfall caused more floods measuring a downfall of 240 mm over 24 hours in Mount Edgecombe (Richard Davies 'South Africa – Evacuations After More Flooding in KwaZulu-Natal' (https://floodlist.com/, accessed 4-8-2022)). The intensity and frequency of the rainfall are of particular concern. A research consortium of leading scientists, World Weather Attribution, claims that recurring flooding of this nature is a result of global warming (World Weather Attribution 'Climate change-exacerbated rainfall causing devastating flooding in Eastern South Africa' (www.worldweatherattribution.org, accessed 4-8-2022)).

The April and May 2022 disasters revealed the country's lack of preparedness, weak approach to climate adaptation and resilience and poor maintenance and mitigation measures. Approximately 461 fatalities were reported since the May deluge with 23 bodies remaining to be identified, more than 6 000 still homeless and more than 8 000 houses destroyed (Buhle Mbhele 'KwaZulu-Natal floods death toll rises to 461' (https://ewn.co.za, accessed 4-8-2022). 'As in all natural disasters, those who bear the heaviest burden are the poor and vulnerable' (Dhesigen Naidoo 'KwaZulu-Natal floods signal climate emergency and urgent need for adaptation measures' (www.dailymaverick.co.za, accessed 3-8-2022)). Research conducted by World Weather Attribution revealed that indigent and marginalised communities

were most affected by the recent floods, particularly informal settlements. The region's pre-existing structural vulnerabilities worsened the severity of the disaster in these communities. However, it is essential to note that even adaptation objectives designed to protect vulnerable people are undermined by the speed at which climate change appears to be accelerating. Therefore, urgent, and effective measures must be in place as soon as possible.

Durban's beaches were closed because of high sewerage, chemical and oil pollution from various sources, including a sludge overflow from the SAPREF oil refinery resulting in a long dark oil pollution stain along the beach immediately south of the refinery (Tony Carnie 'Oh crap! Prolonged closures likely for Durban's flood-polluted beaches' (www.dailymaverick.co.za, accessed 8-4-2022)). The UPL South Africa pollution control dam, designed to safely capture toxic and hazardous waste residue from the burnt UPL chemical and pesticide warehouse in Cornubia, Durban, overflowed from the heavy rains. An unspecified quantity of chemically contaminated wastewater was again released into the Ohlanga River and adjacent beaches (Tony Carnie 'UPL toxic chemical waste leaks on to Durban beaches again in heavy rains' (www.dailymaverick.co.za, accessed 4-8-2022)). A vast amount of waste and debris from the hinterland found its way into the rivers and ocean and surfaced on the shoreline. Animals were not spared the wrath of the flash flood. Hundreds were found either dead or homeless. Cows, snakes, frogs, dogs, cats, and donkeys were some of the animals impacted by the severe rains (Lisalee Solomons 'A cow, snakes, dogs and cats are just some of the animals washed away in KZN floods – SPCA' (www.news24.com, accessed 4-8-2022)). Plant life took a beating with uprooted trees and vegetation washed into the rivers.

The calls for government to take action to address the climate crisis have resulted in the formulation of a Climate Change Bill B9-2022. On 18 February 2022, the Bill was formally introduced to the National Assembly (Centre for Environmental Rights (CER) 'CER welcomes progress of Climate Bill in Parliament, calls for robust climate law' (https://cer.org.za, accessed 3-8-2022)). The Bill aims to ensure that SA has the statutory framework to respond to climate change by reducing greenhouse gas emissions and preparing a framework to adapt to the effects of climate change (Centre for Environmental Rights 'Webinars' (https://cer.org.za/, accessed 4-8-2022)). Once the Act is legislated, the state must take meaningful action on climate change adaptation and mitigation to ensure an environment that is not harmful to people's health and well-being. The Act should have adequate incentives, compliance and enforcement provisions with stringent penalties to reach the global net-zero human-caused carbon dioxide emissions by 2050 (according to the Intergovernmental Panel on Climate Change (IPCC), limiting global temperature increases to 1,5˚C means that 'global net human-caused emissions of carbon dioxide (CO2) would need to fall by about 45 percent from 2010 levels by 2030, reaching "net zero" around 2050' (IPCC 'Summary for Policymakers of IPCC Special Report on Global Warming of 1.5˚C approved by governments' (www.ipcc.ch, 24-2-2022)).

We need to hasten our response to the climate change crisis by promulgating an adequate legislative framework with effective incentives and rigorous compliance and enforcement implications if we want to curb the impact of further catastrophic natural disasters. According to most experts, curbing greenhouse gas emissions appears to be central to a proper and effective climate response. Other important strategies include reducing our dependence on fossil fuels, curbing excessive consumption, restoring natural ecosystems to promote carbon sequestration, and building a mindful citizenry.

A further important factor in this regard is ensuring a just transition from the fossil fuel dependant approach to energy needs and lifestyles, to a more equitable and climate-friendly approach that places the need to reduce consumption, limit waste and energy requirements, and the creation of meaningful green livelihoods at the centre of climate adaption measures.

The legal profession, particularly, has an important role to play in the climate crisis. The term 'attorney' is not just a title – it projects the ethos of a greater duty to society. It is common knowledge that many lawyers have a large carbon footprint. 'The legal profession must be prepared to play a leading role in maintaining and strengthening the rule of law and supporting responsible, enlightened governance in an era marked by a climate crisis' says the International Bar Association (IBA) (IBA 'IBA President: The legal profession must be prepared to play a leading role in climate crisis' (www.ibanet.org, accessed 4-8-2022)).

'In 2020, the IBA issued a climate crisis statement setting out actions lawyers could take to combat the emergency. These include engagement with policymaking, advising clients of climate risks and engaging with law schools to educate on legal aspects of the climate crisis and its impact on human rights' (Katie Kouchakji 'How the climate crisis is changing the legal profession' (www.ibanet.org, accessed 3-8-2022)). The IBA resolved, among other things, that lawyers should consider taking a climate conscious approach to problems encountered in daily legal practice, engage with legislative and policymaking efforts to address the crisis by considering a just transition towards carbon neutrality, support the removal of legal barriers to the reduction of carbon emissions, support proactive laws and policies to address future risks to vulnerable populations and encourage sustainable business models.

Perhaps it is time that the professional legal regulatory and governing bodies (the Legal Practice Council, the Law Society of South Africa and other structures) considered adopting concrete measures that would be the impetus for fostering a climate crisis legal mindset to set in motion the changes needed within the profession and society to promote appropriate and structured adaptation behaviour.

Thus, it is only through an integrated and multifaceted strategy that climate adaption measures and significant buy-in from the bulk of SA's population, that South Africans can hope to attain the global targets required to facilitate and safeguard our and future generations' safety and sustainability.

Kamini Krishna and Ilan Lax are members of the Law Society of South Africa's Environmental Affairs Committee. ❑

Fact corner

According to www.carbonbrief.org:

- The Paris Agreement on Climate Change was assented to by the National Assembly in 2016.
- The world's 14th highest emitter of greenhouse gases is South Africa (SA). Its excessive reliance on coal is primarily to blame for its CO2 emissions.
- The Climate Action Tracker declared SA's 'nationally determined contribution' as 'highly insufficient'.
- According to the National Planning Commission, South Africa's reliance on coal causes almost 80% of its emissions to come from energy supply. With a 30% export rate, South Africa is the fifth-largest coal exporter in the world.

Ethical and liability considerations of a termination of the legal practitioner's mandate

By Thomas Harban

The relationship between a legal practitioner and their client originates from the mandate given by the latter to the former. The relationship exists for as long as the mandate is in place. If the client terminates the mandate, the legal practitioner has a duty to withdraw as attorney of record and cannot take any further action purportedly in the pursuit of the terminated mandate. The mandate is the basis of the contractual relationship between the legal practitioner and the client and the authority on which the legal practitioner's action in the matter is based.

What, then, are the consequences if a legal practitioner continues acting in a matter after their mandate has been terminated by the client? Put differently, can a legal practitioner continue to act in a matter where their authority to act has been terminated?

The Legal Practice Act, Code of Conduct, and the Court Rules

Section 34(1) of the Legal Practice Act 28 of 2014 (the Act) provides that: 'An attorney may render legal services in expectation of any fee, commission, gain, or reward as contemplated in this Act or any other applicable law, *upon receipt of a request directly from the public for that service*' (my italics).

Paragraph 3.7 of the Code of Conduct for all Legal Practitioners, Candidate Legal Practitioners and Juristic Entities (the Code) published in terms of s 97(1)(*b*) of the Act provides that legal practitioners, including candidate legal practitioners and juristic entities shall '*respect the freedom of clients to be represented by a legal practitioner of their choice*' (my italics).

If a legal practitioner persists in acting in a matter where the client has terminated the mandate, that legal practitioner will thus be acting in violation of the Act and the Code.

Rule 16(2)(*a*) of the Uniform Rules of Court provides that '[any] party represented by an attorney in any proceedings may at any time, … terminate such attorney's authority to act and may thereafter act in person or appoint another attorney to act in the proceedings, whereupon such party or the newly appointed attorney on behalf of such party shall forthwith give notice to the registrar and to all other parties of the termination of the former attorney's authority, and if such party has appointed a further attorney to act in the proceedings, such party or the newly appointed attorney on behalf of such party shall give the name and address of the attorney so appointed.'

For proceedings in the other courts, regard must be had to the rules of the court in which the proceedings are being conducted. For example, see r 9 (Power of attorney or authorisation to act) of the Rules of the Constitutional Court, r 5 of the Rules of the Supreme Court of Appeal and r 52 and r 52A of Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa. It will be noted from the rules of the respective courts that the authority to act for the party concerned is central to authorisation of the attorneys representing the parties to the proceedings in those forums.

Some lessons from decided cases

- *Sayed NO v Road Accident Fund* 2021 (3) SA 538 (GP)

In *Sayed NO* the defendant's attorneys of record had played an active role in the proceedings but had, at some point before the hearing of the matter, played no further role in the proceedings yet failed to withdraw as attorneys of record and did not appear at the hearing. The broader context of this matter is that the Road Accident Fund (RAF) had decided to change its litigation model and terminated the mandates of the firms on its panel. That termination was challenged by several firms (see *Mabunda Incorporated and Others v Road Accident Fund; Diale Mogashoa Inc v Road Accident Fund* (GP) (unreported case no 15876/2020, 30-4-2020) (Davis J) and *Road Accident Fund and Others v Mabunda Incorporated and Others and related matters (Law Society of South Africa and Others as Intervening Parties)* [2021] 1 All SA 255 and *FourieFismer Inc and Others v Road Accident Fund; Mabunda Inc and Others v Road Accident Fund; Diale Mogashoa Inc v Road Accident Fund* (GP) (unreported case nos 17518/2020; 15876/2020; 18239/2020, 8-7-2020) (Hughes J)). The court in the *Sayed NO* matter did not have the benefit of an explanation from the defendant's attorneys concerned of the reasons for the stance that they had adopted.

Mahon J stated the following:

'An attorney's duty to withdraw

As a general principle, but subject to certain exceptions, whatever the nature of the matter at hand, a client is entitled at any time to put an end to the attorney and client relationship, and upon his doing so the attorney must accept the dismissal. This is a long-established principle in England and has been followed in South Africa and remarked upon as being implicit in our system of administration of justice.

In the handling of any matter which comes or is to come before any court an attorney must at all times act with proper respect for that court so as not in any way to impair its authority and dignity.

An attorney of record in litigation is no mere post box or conduit for the receipt and dispatch of documents. He plays a pivotal role in the progress of litigation, the functioning of courts and the administration of justice. The attorney's function is to understand his client's problem and, even where he knows that counsel will be briefed, to go as far as he reasonably can in the time available not only to grasp the facts, but also to investigate the legal questions involved. It goes without saying that these duties cannot be fulfilled where the attorney

has washed his hands of the matter and is present in name only.

It must be remembered that an attorney owes duties not only to his client, but also to the court and, indeed, to his opponents and their clients' (footnotes omitted).

The court considered the relevant portions of r 16 of the Uniform Rules of Court (paras 10 – 11) and held that:

'… an attorney, when acting for a litigant, is required to place himself on record in terms of [r 16]. Axiomatically, where that attorney ceases to act in the matter, he is similarly duty-bound to deliver a notice of withdrawal as attorney of record.

This serves an important purpose, not only for the parties involved but also for the protection of the attorney himself … .

…

[I]f an attorney should deliberately act in a manner which is at odds with his ethical duties in an effort to preserve his own financial self-interest, that would, in my view, render the attorney guilty of unprofessional conduct. It must be remembered that an attorney's profession is more than a mere commercial enterprise – it is a noble undertaking which carries with it the privilege of serving the administration of justice. An attorney's ethical obligations will always outweigh matters of financial or commercial expediency.'

The court found (at para 20), on the facts of the matter, that the defendant's legal practitioners were either required to withdraw timeously or to continue acting in the matter (even at their own financial risk). A copy of the judgment was intended to be delivered to the Legal Practice Council (LPC) for the LPC to consider investigating the conduct of the RAF's legal practitioners of record in all the matters before the court (para 24).

- *Legal Practice Council v Rubushe* (ECM) (unreported case no 181/2020, 7-6-2022) (Jolwana J)

Mr Rubushe, purportedly acting on a contingency fee agreement, had represented Mr Mfengwana in a claim against the RAF. The matter was before Plasket J (as he was then) where the court was requested to make a settlement agreement an order of court. Plasket J, in that matter (*Mfengwana v Road Accident Fund* 2017 (5) SA 445 (ECG)), *inter alia*, declared the contingency fee agreement entered into between Messrs Mfengwana and Rubushe to be in conflict with the Contingency Fees Act 66 of 1997 and set it aside. The registrar was also ordered to deliver a copy of the judgment to the then Cape Law Society.

The *Rubushe* matter, a sequel to the *Mfengwana* judgment, was before Jolwana and Govindjee JJ as an application launched by the LPC against Mr Rubushe (the respondent). For present purposes, I focus only on one aspect of the *Rubushe* matter, namely the respondent's conduct after he withdrew as Mr Mfengwana's attorney of record. In the judgment penned by Jolwana J, it is noted that after he had withdrawn as Mr Mfengwana's attorney of record, the respondent –

- charged for attendances including an opinion from counsel on the validity of his contingency fee agreement (at para 28.11 of the LPC's founding affidavit quoted in para 11 of the judgment);
- settled the party and party costs; and
- (through his correspondent attorneys) issued a warrant of execution against the RAF for payment of the amount claimed and received payment thereof into his trust account (para 14).

On this point, Jolwana J noted that:

'How an attorney, having withdrawn as an attorney of record, still considers himself or herself entitled to have a warrant of execution issued in that same matter, not for costs taxed and allowed but for the capital amount of the damages claimed is beyond comprehension. It is in fact clear that in withdrawing as an attorney of record in the matter the respondent merely sought, with connivance, to avoid having to comply with Plasket J's order issued on 28 November 2016. He, at the same time appropriated for himself, unlawfully, the right to pursue the Road Accident Fund for the capital amount which the Road Accident Fund was ordered to pay with an obvious intention, again, unlawfully, to retain R 204 889,17. This conduct on its own is of egregious proportions to say the least. It is, in my view, also a manifestation of dishonesty and deceitfulness on the part of the respondent.'

In so far as terminations of mandates and the duty to withdraw as attorney of record are concerned, regard can also be had to the following judgments:

- *Maclean v Lentz NO and Others* 2021 JDR 3131 (ECG); and
- *Macberth Attorneys Incorporated v South African Forestry Company SOC, Ltd and Others* 2022 JDR 0812 (GP).

Factors to be considered by legal practitioners

Once a law firm receives notice from a client that their mandate has been terminated, it is prudent to immediately withdraw as attorneys of record and to ensure that the notice of withdrawal complies with the court rules and is timeously served on all parties and filed with the court. In this regard, see *S v Ndima* 1977 (3) SA 1095 (N), *MacDonald t/a Happy Days Cafe v Neethling* 1990 (4) SA 30 (N), *Makuwa v Poslson* 2007 (3) SA (T) and *Transorient Freight Transporters Corporation v Eurocargo Co-ordinators (Pty) Ltd* 1984 (3) SA 542 (W).

Continuing to purportedly act for a client in a matter after the mandate has been terminated exposes the legal practitioners concerned to the risk of disciplinary action being instituted against them by the LPC.

The client may dispute liability for fees incurred after the mandate has been terminated. Furthermore, as happened in the *Maclean* case, the former client may seek to transfer liability for costs incurred after the termination to the firm.

Lastly, the client (and third parties) may look to the firm for indemnification of any losses suffered because of actions undertaken by the legal practitioner after the mandate has been terminated. Unscrambling the proverbial egg of consequences of unauthorised actions may well be a very expensive and complicated exercise. Consider, for example, circumstances where a settlement agreement made an order of court is sought to be set aside on the basis that the legal practitioner acting for one of the parties no longer had a mandate to act. If the analogy is extended to divorce proceedings the complications and list of possible permutations is very extensive.

The Legal Practitioners Indemnity Fund NPC Master Policy will not indemnify claims against legal practitioners in these circumstances as they are excluded from the policy, because such claims –

- will be for trading debts (clause 16(a));
- may arise from an order to pay costs *de bonis propriis* (clause 16(g));
- relate to legal services carried out in violation of the Act and the rules (clause 16(t)); or
- will be claims arising out of dishonesty or fraud (clause 18).

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

Can banks be held liable to a third-party creditor of an account holder for allowing funds held by them to be misappropriated by the account holder?

By Wandile Mbabane

Is your money or money to which you have legal claim to safe in cases where you have warehoused it in another bank account that does not belong to you? The short answer is yes, provided that the bank knows that you have acquired a legal right to those funds. In 2021, two interrelated questions were finally put to bed by the Supreme Court of Appeal in the case of *FirstRand Bank Limited v Spar Group Limited* [2021] 2 All SA 680 (SCA). These questions relate to the current position in South African law as it concerns third party security, specifically what a bank's liability is when a bank knows that a third party has a claim to funds located in its customers account and does nothing to protect the funds from the account holder making withdrawals. The second question relates to what specific claim the third party has against the bank if they conducted themselves as aforementioned?

In the ordinary course, once funds are deposited into a bank account it is common cause that the money credited becomes the bank's property. On receipt of the credit a legal duty is incurred by the bank to pay an amount equal to the credits received to either a third party of the depositor's choosing or to the bank account of the depositor directly. However, a third party who acquires a legal right and/or claim to the money in the bank account in question will take over the rights of the depositor to receive payment of the funds.

The courts have held that in instances where the bank has knowledge that its customer no longer has legal rights to the money credited in its account and continues to offset the customer's debts and allow the customer to appropriate those funds for their own interest, resulting in the customer being unduly enriched, the bank will be held to be joint wrong doers to the misappropriation committed by the customer.

In the *FirstRand Bank* case, Spar was engaged in an ongoing dispute with one of its Spar retailers, Umtshingo Trading 30 (Pty) Ltd (Umtshingo). Umtshingo owned and operated a KwikSpar and two Tops liquor vendors. Umtshingo kept a bank account for each outlet with FirstRand Bank (the bank) controlled by its director (Mr Paolo).

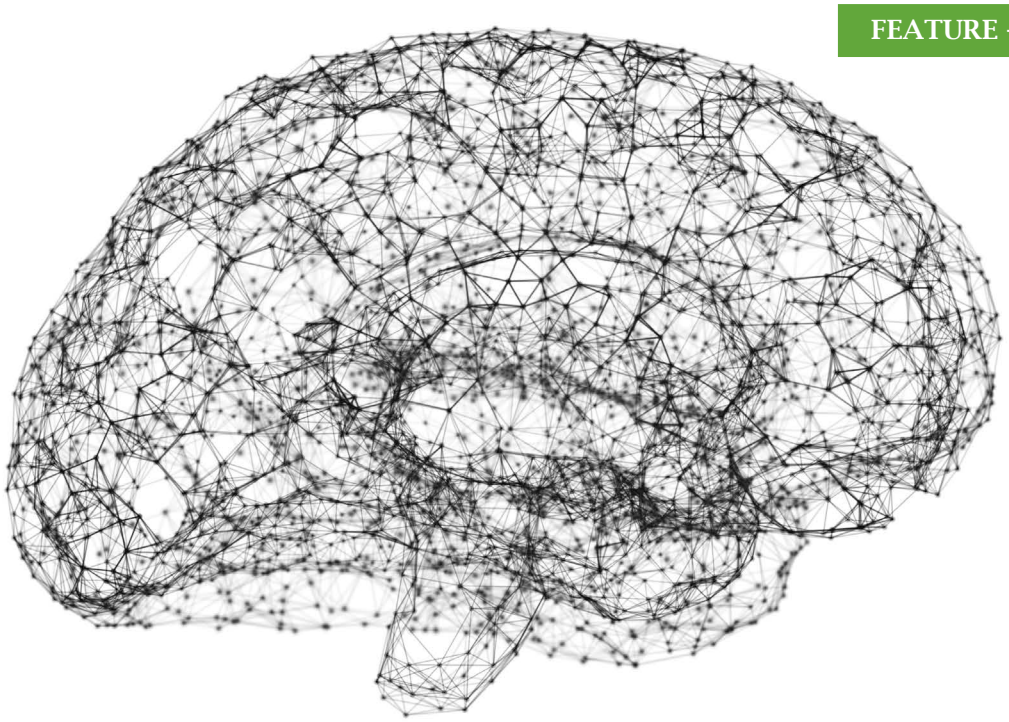
Through a notarial bond concluded with Umtshingo as security for the fulfilment of Umtshingo's obligations to it, Spar acquired a legal right in a provisional court order to take over the operations of Umtshingo's stores and receive the benefit of all revenues generated from the stores, which it enforced. However, speed point credit card payment devices used in the stores erroneously continued to allow revenues generated from the stores to be deposited directly into Umtshingo's designated accounts. In this period, Mr Paolo remained in control over two of these accounts and subsequently made significant payments to himself from them. In addition, the bank appropriated R 1 343 422,92 from the deposits in the accounts to settle another debt that Mr Paolo had with the bank. Spar sued the bank and Mr Paolo to recover the relevant amounts.

Before the court, Spar asserted that the bank should not have allowed Mr Paolo to disburse funds belonging to Umtshingo, since Mr Paolo had no claim to the funds. Spar also argued that the bank was not permitted to offset Umtshingo's debts that Spar had a preferential claim to through its rights flowing from the conclusion of the notarial bond.

The court held in favour of Spar, noting instances in which a bank has knowledge that a 'customer is not entitled to the funds which are credited to that customer's account where such funds legitimately belong to a third party who is not the account holder. Such third party is entitled to claim payment from the bank of the credit balance in the account' (see Jonathan Shafir 'Can a bank offset your debts with money that actually belongs to someone else?' (www.bizcommunity.com, accessed 5-8-2022)). Regarding the latter claim, the court held that a bank/client relationship is that of a debtor and creditor, in which case the bank is entitled to offset funds in a client's account against the client's debt to the bank. Spar was a third party to this relationship. There existed no relationship between the third party and the bank and accordingly third parties generally fall outside of this scope.

In the event that customers do not have any entitlement to money deposited into their account, and know that they do not, they may not make disbursements from the account in respect of credits derived from these funds. Such actions constitute theft. Banks that know that their customers do not enjoy such rights and permit them to make disbursements in these circumstances are jointly liable and will owe a legal duty to compensate the third party who was entitled to the deposited funds and who suffers loss due to the account holder's unlawful disbursements.

Wandile Mbabane *LLB (UNISA)* is a candidate legal practitioner at Legator McKenna Inc in Durban. ❑



Picture source: Gallo Images/Getty

Has POPIA adequately prepared people to exercise their right not to be subject to automated decision-making?

By Gilad Katzav

Transparency and accountability are enduring principles of any healthy system of governance and regulation. The Protection of Personal Information Act 4 of 2013 (POPIA) ostensibly seeks to regulate the personal data processing economy and it, too, muses over the 'constitutional values of democracy and openness' in its preamble. In fact, accountability and openness are necessary conditions for lawful processing. To that end, POPIA provides data subjects with various procedural and substantive rights in relation to their personal information. However, in a statute that is almost entirely concerned with lawful processing and the establishment of enforcement mechanisms thereto, s 71 of POPIA is notably peculiar. This provision is not primarily interested in data processing *per se*, but it rather takes aim at a subsequent step, namely, the decision which flows from automated data processing.

In general, and subject to a couple of derogations, s 71(1) prohibits the making of a 'decision', which affects the data subject in a legal or substantial manner where such a decision is based solely on the automated processing of personal information intended to provide a profile of the data subject (automated decision making is commonly referred to as 'ADM'). Importantly, POPIA frames the regulation of ADM not merely as a pro-

hibition, but also an enforceable right in terms of s 5(*g*).

Considering the stated ideals of transparency and accountability, I question – in this article – whether the legislature has properly placed data subjects in a position to exercise their right not to be subject, under certain circumstances, to ADM. To verbalise my main gripe in plain terms: A data subject cannot exercise a right without knowing that they are entitled to enforce the right in the first place. In other words, for a data subject to exercise the right not to be subject to ADM, it must logically follow that the data subject must know that she or he has been subject to an ADM.

This piece argues that the POPIA does not provide data subjects with an express right of notification when they have been subject to an ADM. That is to say, the decision-makers (machine or otherwise) are not duty-bound to notify the data subject when they have been subject to a decision based exclusively on automated processing. This, in my view, is a textual oversight and it will likely render the data subject completely oblivious to the 'black box' of an ADM and, as a result, s 71 will be left to languish in obscurity.

A right to know

It is trite that knowledge of the existence of a right must come *a priori* to the exercise of that right. In context, without first informing the data subject that a given decision emanates from the automated processing of their personal information, then the data subject cannot utilise the accompanying entitlements or safeguards in s 71. So, is there a duty of notification in respect of ADM?

Section 71 of POPIA

From an overview of s 71, it is clear that there is no express duty of notification. Perhaps it can be read-in from an interpretation of 'appropriate measures' intended to protect the data subject's legitimate interests as specified in s 71(2)(*a*)(ii) and 71(2)(*b*)? I will deal with each in turn.

First, an 'appropriate measure' in terms of s 71(2)(*a*)(ii) is conveniently fleshed out in subs (3). Read together, it states that the prohibition against ADM will not apply if the decision has been taken in connection with the conclusion or execution of a contract when there are appropriate measures in place to safeguard the data subject. 'Appropriate measures', in this context, require the responsible party to provide –

- an opportunity to make representations about the decision; and
- 'sufficient information about the underlying logic of the automated processing' in order to make the aforementioned representation.

In my view, there is nothing to indicate that a responsible party is required to notify the data subject of the ADM. At most, the responsible party is only compelled to provide for the occasion to make representation with sufficient knowledge of the underlying logic of the system. However, this certainly does not imply a duty to first notify the data subject that she or he may be entitled to make representation at the given opportunity.

Secondly, 'appropriate measures' in respect of s 71(2)(*b*) appears to have a comparatively wider meaning than in the contractual context. Accordingly, the prohibition against ADM will not apply when the given decision is governed by a law or a code of conduct, which contains appropriate measures to safeguard the data subject. Unlike s 71(3), which is applicable to contracts only, there is no further guidance (other than a circular cross-reference back to s 71) as to what is meant by 'appropriate measures' for codes of conduct in terms of s 60(4)(*a*)(ii). This, however, may aid the interpretation that could give rise to a duty of notification for ADM. I argue that absent undue interpretative constraints, a duty of notification is amenable to, and may be derived from, an 'appropriate measure' to safeguard the legitimate interests of the data subject. This is because if the overall purpose of the measure is to safeguard the data subject's legitimate interests, then it is surely axiomatic that the data subject should also know about the existence of these protective measures to utilise it. I echo the same view for an ADM, which is 'governed by a law' that specifies appropriate measures in this respect.

At the same time, however, we must be mindful that this duty of notification may only arise if we adopt a charitable approach to a purposive exercise of interpretation. Unlike the European Union's General Data Protection Regulation (Regulation (EU) 2016/679), which expressly provides that the data controller should inform the data subject about the 'existence of automated decision-making' in Article 13(2)(*f*), such a duty is not inherent in the POPIA's text. This may raise doubts as to whether or not a responsible party, or the decision-maker, is obliged to give notice that the given decision is an ADM and that the data subject may be entitled to alternative measures in terms of law or a code of conduct. Given this ambiguity, does the POPIA have any other explicit provisions to regulate notification duties?

Section 18 of the POPIA

Under the openness condition of lawful processing, s 18 deals directly with the responsible party's duties of notification. This provision sets out a multitude of instances in which the responsible party is required to take reasonably practicable steps to ensure that the data subject is aware of the collection of their personal information. Notably, s 18 is concerned with an early stage of data processing, namely the collection of personal information. Consequently, this provision is designed neither to give notification ex-post a decision, nor can it be used in instances when personal information is automatically processed in a way other than by its collection.

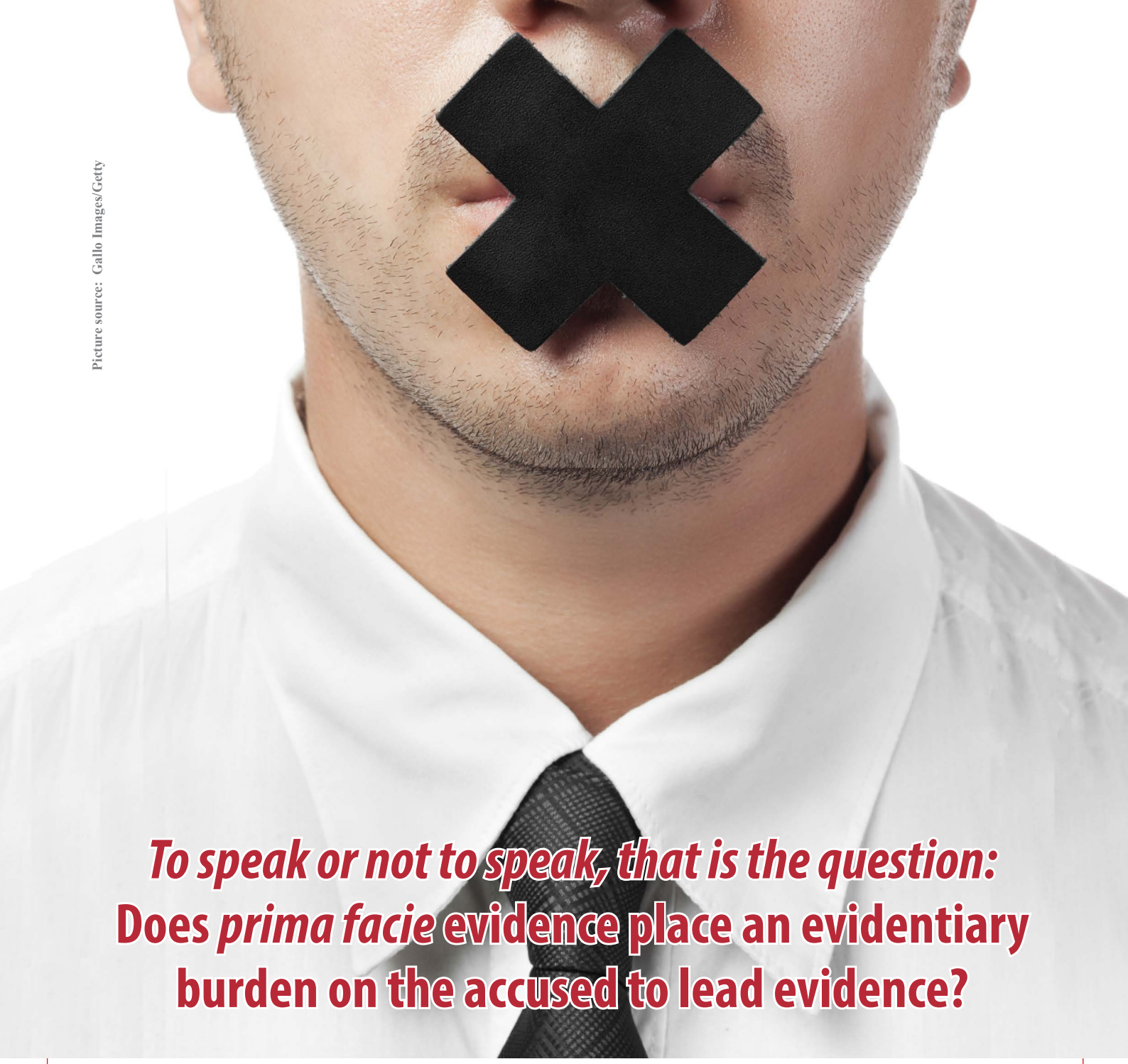
Understood correctly, the problem is self-evident: Notification in terms of s 18 is limited to a time where the personal information is collected or as soon as reasonably practicable after its collection. Whereas s 71 is framed further along the timeline; after the personal information has been processed and a decision made. It seems to me that the two provisions cannot be reconciled in a manner that would compel the decision-maker to provide notification regarding ADM. Therefore, in my view, s 18 does not provide a duty of notification in respect of an ADM.

Conclusion

It appears that to discover a duty of notification for ADM, a broad approach to 'appropriate measures' in terms of s 71(2)(*b*) of the POPIA needs to be adopted. However, even with such an approach, a duty of notification will be limited only to instances where the decision is governed by a code of conduct and/or by a law that provides for such measures. In all other cases of ADM, and particularly where contracts are the source of the automatic processing, there is no obligation on the responsible party to inform the data subject of the ADM. In the era of ubiquitous automation and machine learning, this raises serious threats to people's fundamental rights. None more so than to the basic rights concerning procedural fairness and the *audi alteram partem* doctrine.

In the end, responsible parties and decision-makers in South Africa are not required to disclose whether the decisions they have made are an ADM. Without, at the very least, a right of notification in respect of ADM, a data subject cannot rely on s 71 of the POPIA for protection. A legislative amendment may be necessary to release the true potential of s 71. For the time being, it remains all dressed up, but with no way to know.

Gilad Katzav *BCom LLB LLM (Wits)* is a candidate legal practitioner at Norton Rose Fulbright in Johannesburg.



Picture source: Gallo Images/Getty

To speak or not to speak, that is the question: Does *prima facie* evidence place an evidentiary burden on the accused to lead evidence?

By Mahlubandile Ntontela

The South African criminal justice system is one of the most constitutionally progressive justice systems globally and the progressive nature of the criminal justice system has its foundations in the Constitution. Section 35 of the Constitution guarantees certain rights to arrested, detained, and accused persons. The rights of detained, arrested, and accused persons include the right to a fair trial (s 35(3) of the Constitution). The right to a fair trial, in turn, consists of the right to be presumed innocent, to remain silent, and not to testify during trial proceedings (s 35(3)(*h*) of the Constitution). The right to be presumed innocent is a universally acclaimed right (Article 14(2) of the International Covenant on Civil and Political Rights) and is now entrenched in the South African jurisprudence. The right to remain silent has two dimensions (*S v Boesak* 2001 (1) SA 912 (CC) at para 24). The right to remain silent during the pre-trial stage is interpreted differently from the right to remain silent during a criminal trial. In criminal trials, legal practitioners must be careful on how they approach the defence case and how they advise their clients on the issue of a right to a fair trial and to be presumed innocent. This article gives guidance to legal practitioners on the practical approach to the rights to be presumed innocent and to remain silent when advising their clients in criminal trials.

The right to a fair trial

The right to a fair trial has always been a fundamental principle of South African law, even before the constitutional dis-

pensation (*S v Tyebela* 1989 (2) SA 22 (A) at para 29G-H). In establishing the right to a fair trial, the question is whether there was a deviation from the formalities, rules, and procedural principles that the law requires a criminal trial to be initiated or conducted (*S v Rudman and Another; S v Mthwana* [1992] 1 All SA 294 (A)). The right to a fair trial embodies the right to be presumed innocent, remain silent, and not testify during a trial (s 35 of the Constitution). The accused retains the right to a fair trial throughout the criminal proceedings.

The state's case and *prima facie* proof

During a criminal trial, the state must prove its case beyond a reasonable doubt, and the accused persons, in theory, do not have to prove their innocence. However, it is not practically correct that the accused person does not have the corresponding duty (due to the perceived protection offered by the right to be presumed innocent) during the trial proceedings. During a criminal trial, an accused person may carry an evidentiary burden that, failure to discharge, may put such an accused at risk of a conviction. As part of its duty, the state has to prove every element of the offence (with the evidence considered collectively) beyond a reasonable doubt. As the alleging party, the state leads evidence first in criminal proceedings. At the close of the state's case, the court must establish whether the state has established a *prima facie* case against the accused person. The term *prima facie* entails that if the proceedings ended immediately, that would be established, but new evidence could emerge that would alter the outcome if they continued further. In other words, *prima facie* proof is evidence calling for an answer (*Ex parte the Minister of Justice: In re Rex v Jacobson & Levy* 1931 AD 466 at 478). At the close of the state's case, where a *prima facie* case is required for the case to go further, is often where some defence practitioners and accused persons face challenges. Whenever there is evidence on which a court could or might, applying its mind reasonably, find for the state, a *prima facie* case has been established. In practice, where the state has failed to make a *prima facie* case against an accused, the court normally discharges the accused person in terms of s 174 of the Criminal Procedure Act 51 of 1977 (the CPA). The courts can either *mero motu* discharge the accused or do so on application by either party. It also happens, for whatever reason, that the court does not discharge the accused in terms of s 174 of the CPA. At this stage, some legal practitioners face challenges regarding the best approach to respond to the state's case.

The accused's case and the evidentiary burden

The accused person has several options in responding to the state in a defence case (SE van der Merwe in JJ Joubert (ed) *Criminal Procedure Handbook* 12ed (Cape Town: Juta 2017) at 346). Firstly, the accused can choose not to testify and refuse to call any witnesses. Secondly, the accused may decide to lead evidence in response to the state's case. Legal practitioners representing the accused must choose the options very carefully. The choice is not based on the question of fact but on the point of law. The legal practitioner must address whether the state has presented a *prima facie* case against the accused during its decision making on the defence's case. Where the state has shown *prima facie* proof of the commission of the offence, the accused carries an evidentiary burden to rebut the state's evidence. According to Zeffertt and other authors, the concept of evidentiary burden has two distinct features (David Theodor Zeffertt, James Grant and A Paizes 2ed *Essential Evidence* (Durban: LexisNexis 2020) at 37-38)). The first feature of the evidentiary burden is an onus on the person to lead evidence refuting the opponent's *prima facie* case. The second feature is the party's duty to begin and lead evidence to escape certain procedural consequences (Zeffertt *et al* (*op cit*) at 37-38). As evident from the two key features mentioned above, the accused's right to remain silent weakens and diminishes as soon as the state has presented a *prima facie* case against them. As the state leads the evidence and makes out a *prima facie* case, substantive and procedural rules justifiably limit some components of the accused's right to a fair trial. Some of the features restricted by the state's presentation of *prima facie* evidence are the right to remain silent and the right not to testify during the trial proceedings (s 35(3)(*h*) read with s 36 of the Constitution). The Constitutional Court also reiterates that the right to remain silent has a different application within the different stages of the criminal prosecution (*Boesak* at para 24). The nature of the right to remain silent during the pre-trial stages is different from the right to remain silent during a criminal trial where evidence is admitted into the court records (see s 35(1)(*a*) and 35(3)(*h*)). The courts have further held that an accused's right to choose whether to testify or not is not a violation of the right to silence (*Boesak* at para 22). Legal practitioners must advise clients who insist on remaining silent despite the overwhelming evidence of the risks inherent in exercising the right to remain silent. Where the accused person is unrepresented, the courts must communicate to such accused the consequences of opting not to lead evidence where the state has led *prima facie* evidence.

The fact that a client elects not to lead evidence where there is a *prima facie* case may have unintended consequences. In some instances, the court may be justified to conclude that, in the absence of a response to evidence that requires a response, the evidence is sufficient to establish the guilt of the accused (*Thebus and Another v S* 2003 (10) BCLR 1100 (CC) at para 56). In *Scagell and Others v Attorney-General of the Western Cape and Others* 1996 (11) BCLR 1446 (CC) at para 12, it was held that when an accused person has an evidential burden, there must be sufficient evidence to raise reasonable doubt to escape conviction. The state's *prima facie* case impacts the accused's election to testify and the quality of evidence required from the accused. The court in *S v Mathe* (GP) (unreported case no CC145/2017, 21-11-2018) (Sardiwalla J) at para 47 held that the evidentiary burden, in the presence of a *prima facie* case, was imposed on the accused and their evidence. The accused's evidence must sufficiently give rise to a reasonable doubt about the accused's guilt. Thus, before the criminal trial commencement, legal practitioners must sensitise their clients to the limits of the right to a fair trial in the event of the state presenting a *prima facie* case.

Conclusion

It is trite law that an accused has a universally acclaimed right to remain silent, integral to the right to a fair trial. However, the right is only absolute during the pre-trial stages, and 'it is impermissible for a court to draw any inference of guilt from the pre-trial silence of an accused person' (*Thebus* at para 58). During the criminal trial, the nature of the accused's right to remain silent is different. Where there's *prima facie* evidence against the accused at the close of the state's case, there is an evidentiary burden placed on the accused. The triggered evidentiary burden places an onus on the accused to lead credible evidence to rebut the state's case or risk a conviction. The courts must explain different interpretations to an unrepresented accused person during a criminal trial. Legal representatives also need to advise clients of the dangers of not leading evidence to create a reasonable doubt where the state has presented a *prima facie* case.

Mahlubandile Ntontela *LLB LLM PG-Dip Labour Law Practice (NMU) PG-Dip in Drafting and Interpretation of Contracts (UJ)* is a legal practitioner and lecturer at the University of Fort Hare. ❑

Leaving behind a legacy, where the legal system and society recognises women as individuals with their own rights

By Kgomotso Ramotsho

For the September Women in Law Feature, *De Rebus* news reporter, Kgomotso Ramotsho, interviewed legal practitioner and Director of the Women's Legal Centre (WLC), Seehaam Samaai. Ms Samaai is a feminist legal practitioner and activist who has been practicing as a legal practitioner since 2001. She holds an BProc LLM from the University of the Western Cape (UWC). She is the Director of the WLC, which is an African feminist legal centre that advances women's rights and equality through strategic litigation, advocacy, education, advice, and training. The WLC has a vision of women in South Africa (SA) who enjoy equal and substantive access to rights and its objective is to drive a feminist agenda and develop feminist jurisprudence based on an intersectional approach and with substantive equality as its foundation.

Ms Samaai was born and grew up in the Bo-Kaap, a small working-class community situated in the heart of gentrified Cape Town. She attended Vista High School in Cape Town and after studying, she completed her articles at the Legal Resources Centre and in 2002 she became a project legal attorney at Lawyers for Human Rights (LHR) within their farmworker tenure programme. From 2012 to 2016, Ms Samaai was a Director of Legal Administration in the Western Cape Regional Office of the Department of Justice and Constitutional Development and subsequently worked for the Foundation for Human Rights in their Strengthening of Civil Society and Access to Justice Programme. 'I was a lecturer for ten years in clinical legal education and Director of the UWC [University of the Western Cape] Law Clinic where I practically trained law students and candidate attorneys within a clinical law environment with the aim of inculcating principles of social responsibility and social justice,' Ms Samaai said. She added that she was a long serving Board Member and Chairperson of LHR and previously served on the Rural Legal Trust and the Association of University Legal Aid Institutions. Ms Samaai is also an active member and the Vice-Chairperson of the Western Cape branch of the South African Women Lawyers Association (SAWLA) and was nominated and elected in 2018 as the National Gender Convenor of the National Association of Democratic Lawyers.

Legal practitioner and Director of the Women's Legal Centre, Seehaam Samaai

Kgomotso Ramotsho (KR): Why did you choose to study law?

Sehaam Sammai (SS): At a young age I saw how the law disempowered those around me and how women (in particularly) were oppressed by the justice system. Women had no access to justice upon the dissolution of divorce or death of their spouses as they were only married in terms of Muslim rites, and they had no rights to their properties. Subsidies from government were accessed by these women but the city failed to transfer the properties on their names and their male spouses took advantage of this system by marrying two to three wives. Many women in my community had no choice but to accept their plight due to the economic inequities. My grandmother was also a second wife.

My grandfather was the local Bilal. She had to move to the Cape Flats after the owner of the flats wanted to upgrade the houses in Leeuwen Street, which had the effect of cancelling the rent control on the property. The owners also wanted to sell the property, which my family could not afford. My grandmother had no option but move to the Cape Flats. I experienced the effects of gentrification on my family.

I saw how the high cost of legal representation stopped poor working class communities from accessing justice and how the courts were used as a tool of oppression.

At a young age I became involved in civic politics, and I saw how communities could resist oppressive laws and policies through uniform civic and political actions. I come from a very strong civic background and believe strongly that non-governmental organisations (NGO) and civil society must amplify the voices and actions of communities. Democracy starts in our home and communities, and all have a collective obligation to build those structures within our communities. I always believed that education (my motto being: Each one teach one) empowers people on various levels and it provided women with better choices.

My parents strongly believed in education, and I wanted to use the law to empower poor working-class communities and women in particular to access their rights. I wanted to use the law as a vehicle for social change and to sensitise the law to the realities of women in my community and our townships.

KR: What does a typical day in the life of a director of the WLC look like?

SS: Stakeholder engagement, staff meetings and staff check-in; litigation strategy meetings; checking reports, funder proposals; networking; and personal community outreach. A big part I spend on community development projects to keep me centred to the communities who we serve.

KR: Your organisation deals with a lot of issues that women face daily in SA. From your point of view, working with these women on the ground, would you say women in SA have access to justice? Can they confidently say that they are protected by the laws in this country?

SS: Despite the extraordinary constitutional and rights-based developments in our country, 25 years into our democracy. South Africa still has a long way to go in challenging inequalities and achieving substantive justice for women. The failure of both the state and private institutions to fully realise the rights of women necessitates the continued and vital work of the WLC. Women are often disregarded by a legal system, which is designed by and for men; a system, which does not adequately protect them and their specific needs. Women who are marginalised and vulnerable are left with little support from this legal system. The disproportionate burden placed on women in different legal contexts manifests in cases of sexual harassment, Muslim personal law, violence against women, the denial of sex workers' rights, sexual and reproductive health and rights, and access to land and housing.

KR: One of the areas of focus for the WLC, is on sexual and reproductive health and rights of women. What are some of the big challenges women not only in SA, but in the continent of Africa are facing in regard to sexual and reproductive health and rights?

SS: Internationally, we have seen pushback against women's health and reproductive rights with United States (US) policy of Protecting Life in Global Health Assistance (the Global Gag Rule), which requires NGO's receiving US government funding to clarify that they do not engage in the promotion or provision of abortion services. The WLC's strategy is to raise awareness and train service providers on the Global Gag Rule, as well as continuing to strengthen ties between NGO's both internationally, regionally, and nationally to challenge the effects of the Global Gag Rule. We will also continue to hold the state accountable to ensure proper implementation of the Choice on Termination of Pregnancy Act 92 of 1996.

In terms of our Sexual and Reproductive Health and Rights programme, we find that women still face several challenges when it comes to having bodily autonomy and agency. Over the past year, the programme has focused its efforts on the proper implementation of the Choice on Termination of Pregnancy Act in SA within the broader global trend towards the conservative elimination of women's rights to sexual and reproductive health. We note with distress that the Act's poor implementation is a symbol of the relegation of women's sexual and reproductive health and rights. In the international arena, we have also begun work on the pushback and mitigation of the Global Gag Rule implemented by former US President Donald Trump. This essentially bars NGOs around the world who support or provide abortion services, from receiving US aid funding and the effects of the Trump administration can be seen on the recent *Dobbs v Jackson Women's Health Organisation* 597 US (2022) judgment, which has changed the tide of *Roe v Wade* 410 US 113 (1973).

KR: What has been one of the biggest victories for your organisation that has been a game changer for the rights of women?

SS: In terms of our Relationship Rights programme, we continue to be a reference point for issues surrounding the recognition of marriages and relationships regardless of religion, custom or sexual orientation. The programme has been dominated by the seminal Muslim marriages case, which sought to recognise Muslim marriages in South African law. In 2018, the Western Cape Division High Court (*Women's Legal Centre Trust v President of the Republic of South Africa and Others (United Ulama Council of South Africa and Others as* amici curiae*) and two related matters* [2018] 4 All SA 551 (WCC)) held, in this long-standing matter, that Muslim marriages ought to be recognised and ordered Parliament to do so within two years, which has recently been confirmed by the Constitutional Court (CC) (*Women's Legal Centre Trust v President of the Republic of South Africa and Others* (CC) (unreported case no CCT 24/21, 28-6-2022) (Tlaletsi AJ (Madlanga J, Madondo AJ, Majiedt J, Mhlantla J, Pillay AJ, Theron J, and Tshiqi J concurring)). The CC has found that Muslim women and children born from Muslim marriages are being discriminated against because their rights are not similarly protected to that of women and children in the Marriage Act 25 of 1961.

The CC has said that government has failed to address this discrimination by either amending existing laws or passing new laws.

The court has declared the Marriage Act and the Divorce Act 70 of 1979 inconsistent with the right to equality, the right to dignity and that it violates children's rights all set out in the constitution, because they fail to recognise Muslim marriages.

Section 6 of the Divorce Act, which makes provision for safeguarding of the interest of minor children in divorce proceedings is inconsistent with the Constitution because it does not safeguard the best interest of children born of Muslim marriages.

Section 7(3) of the Divorce Act, which makes provision for the division of assets and maintenance specifically in respect of marriages out of community of property is inconsistent with the constitutional right to equality, dignity and access to courts as set out in the Constitution, because it fails to provide for the redistribution of assets on the dissolution of a Muslim marriage when such distribution would be just.

KR: What is your coping mechanism, having to deal with women who are being oppressed or abused, or even killed?

SS: The WLC has a wellness programme

and I do obtain my own psychological support so that I can personally deal with the stresses and challenges of dealing with violence against women. I also locate myself in support groups of similar minded feminists to allow for debriefing and self-care.

KR: Given a chance in your next lifetime, would you do what you are doing today, fight for women's rights?
SS: I have a deep passion and love for justice, and I do think in my next lifetime I would continue fighting injustices.

KR: What is your daily motivation, what keeps you going?
SS: I can make a difference in someone's life. Pull as you rise because we are our sisters' keepers (the latter is SAWLA's motto on mentorship).

KR: What kind of legacy do you want to leave behind?
SS: A legal system and society, which is sensitive to the needs and lived realities of our women. A system which recognises women as individuals with their own rights and freedoms, and we attempt to assert this through our work.

KR: Where do you see yourself in five years? What can we expect from you?
SS: Working within the regional and international arena on women's rights issues.

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

A discussion on the debt review process and conflicting judgments from South African courts

By Limnandi Mtshemla

Picture source: Gallo Images/Getty

There have been several conflicting judgments pertaining to the debt review process. The conflicting judgments pertained to whether –

- a High Court has inherent jurisdiction to declare a consumer 'no longer over-indebted';
- courts have power to terminate the process;
- a High Court can be a court of first instance in matters of debt review; and
- a High Court can use its inherent power to put words into a text of legislation, which words are neither expressed nor implied by the legislature.

In *Magadze v ADCAP, Ndlovu v Koekemoer* (GP) (unreported case no 57186/2016, 2-11-2016) (Neukircher AJ), the applicants applied to be declared over-indebted in terms of s 86(1) of the National Credit Act 34 of 2005 (the Act). However, their applications were never confirmed in terms of s 87(1), that is in terms of a court order of the magistrate's court, but nonetheless they made necessary payments to their creditors and settled two of their debts, which resulted in an improvement of their finances. They sought to –

- terminate the debt review process;
- be declared no longer over-indebted; and
- remove their debt review status from the credit bureau.

Neukircher J enquired whether a s 71 remedy of a clearance certificate has the same effect as the court order envisaged in s 88(1)(*b*) of the Act. She found that a s 71 clearance certificate has the consequence of expunging a consumer's record from the credit bureau, whereas a s 88(1)(*b*) court order does not result to the expungement thereof. She thus held that, granting an order that falls short of expunging a credit record *in toto* would mean that s 71 carries more weight than an order of the court and such a situation would be untenable. In rejecting this, she held that the inherent jurisdiction of the High Court permits the declaration of no longer over-indebted, and the expungement thereof. Notably, at the time the order was granted, there was never an existing order that confirmed over-indebtedness. Accordingly, the court's order signalled that a High Court, by virtue of its inherent jurisdiction, can be a court of first instance in matters of this nature.

In *Mokubung v Mamela Consulting and Others* (GP) (unreported case no 87653/2016, 14-6-2017) (Mbongwe AJ) and in *Manamela v Du Plessis t/a Debt Safe and Others* (GP) (unreported case no 78244/2016, 21-6-2017) (Mbongwe AJ), Mbongwe AJ held that there is no provision for a withdrawal of a debt review in the Act but the National Credit Regulator's Guidelines for the Withdrawal from Debt Review, February 2015 (Withdrawal Guidelines), does provide a procedure of the withdrawal thereof. The tragedy he found was that the guideline is neither a supplement nor an amendment to the Act. Regardless of that, he confined himself with it and further exercised the High Court's inherent jurisdiction in granting the orders.

In *Du Toit v Benay Sager (NCRD2484) t/a Debt Busters and Others* (WCC) (unreported case no 16226/17, 17-11-2017) (Thulare AJ), the facts and prayers sought were similar to the cases above. It was argued that the Act did not accommodate situations summarised above thus creating a *lacuna* and warranted a High Court, by its inherent jurisdiction, to intervene. Following Mbongwe AJ in *Manamela,* counsel in the proceedings invoked the Withdrawal Guidelines, to advance his arguments. The court held that obtaining a clearance certificate in terms of s 71(5) of the Act enables the removal of the record of debt re-arrangement from the National Credit Register. However, a clearance certificate is not a withdrawal from debt review and even if a debt counsellor would attempt to withdraw a debt review process, he would be acting *ultra vires* (*Rougier v Nedbank Ltd* (GJ) (unreported case no 27333/2010, 28-5-2013) (Nobanda AJ)). Secondly, it found no *lacuna* in the Act by reasoning that there was a deliberate decision by the legislature and where a debt counsellor does not come to assist the consumer with the assessment in order to issue a clearance certificate, a Tribunal can be approached. In situations where there is no existing court or-

der declaring over-indebtedness due to failure of a debt counsellor to bring the proposal to the attention of the court for judicial oversight and the consumer's financials improve, it was held that the magistrate court's power to declare over-indebtedness is by implication conferred when it is given the jurisdiction by the Act. Therefore, a consumer can with the leave of the magistrate's court, in terms of s 86(9) apply for a hearing and 'must demonstrate circumstances and reasons that show that it is necessary, in the interests of justice and equity that the investigation should shift from the statutory body to the judicial authority, in its discretion' (*Du Toit* at para 26). In doing so, the consumer can produce evidence that would persuade the court to reject the findings of the debt counsellor.

It was further held that a debt counsellor; the National Credit Regulator; the National Consumer Tribunal and the magistrate's courts are central to consumer related matters. It therefore follows that statutory remedies must firstly be exhausted before approaching the courts. Thus, it was held that a High Court is not the forum of first instance on matters which both the Tribunal and the magistrate's courts should deal with. The tone of the judge, appeared to suggest that he could have granted the application, had the applicants first exhausted the available domestic remedies.

In *Phaladi v Lamara* 2018 (3) SA 265 (WCC), Binns-Ward J held that where an area of law is regulated by a statute, a court is under duty to interpret and apply the legislative enactments in a manner that promotes the spirit, purport, and objects of the Bill of Rights and in doing so it cannot demolish the language used by a legislature in a legislative text.

He held that where applicants have fulfilled all their obligations under their credit agreements that are subject to debt rearrangement that are not long-term agreements, they are entitled to obtain a clearance certificate in terms of s 71 of the Act and the effect of which is the expungement of the record of debt rearrangement from the records in the credit bureau. Endorsing Thulare AJ in *Du Toit,* he held that when they encounter any hurdles in attaining the clearance certificate, they have to approach the Tribunal as it is a forum of first instance. Counsel for the applicant, sought to argue by relying on s 88(1)(*b*) of the Act that 'the court has determined that the consumer is not over-indebted' would require to be read as 'the court has determined that the consumer is no longer over-indebted', thereby necessitating the word 'not' to be deleted and be replaced by 'no longer'. The judge espoused a contextual approach that the provision does entice that an application can be made to declare a consumer 'not over-indebted' and 'no longer over-indebted' and it neither envisages that a court can culminate a debt review process as the process is administrative, not *iudicialis.* He rejected the argument that 'not' over-indebted could be equated to 'no' longer over-indebted, under reasoning that if it would be construed so, he would be reading words into a statute where it is not necessary. The judge further endorsed Thulare AJ in *Du Toit,* when it was held that a magistrate's court is conferred with power to reject the proposal and a consumer is not presented from providing evidence that would be opposed to the initial findings of a debt counsellor in order to persuade the court to reject the debt counsellor's recommendations. Whereas, where a debt rearrangement has been confirmed, in whatever manner, the only way to exit it is in terms of s 71 read with s 88(1)(*c*) of the Act. The judge, however, unlike Thulare AJ, strictly confined himself to the requirements of s 71 when he said that 'to the extent that they do not qualify for relief under that provision, they are remediless. The courts are not empowered to craft a remedy that the statute does not allow for'.

In *Botha v Koekemoer t/a The Debt Expert 2 and Others; Mafakane v MSA Consultants t/a Consumer Financial Services and Others* (LP) (unreported case no 7723/2017; 750/2018, 11-5-2018) (Muller J) Muller J, contrary to Neukircher AJ in *Magadze* found that there is no provision in the Act which entitles a consumer to terminate the process once it has commenced. Secondly, the judge found that the Act neither implies nor expressly allows withdrawal of a debt review process. However, he further opined that a court cannot disregard a consumer's desire to withdraw from the process. Reinforcing the views of Binns-Ward J in *Phaladi* and those of Thulare J in *Du Toit* in paras 25 – 26, he said that a debt counsellor being intermedial to the process can provide a subsequent substantial information asserting a variation to the consumer's financial circumstances in order for the court to reject the application in its entirety. In dismissing the application, the judge, following *Phaladi* held that, 'courts do not have the inherent jurisdiction to disregard statutory provisions' and 'the applicants were at no time declared to be over-indebted by a competent court'.

The inconsistency in the judgments highlighted above landed in the hands of the Gauteng Division Judge President who in terms of s 14(1)(*a*) of the Superior Courts Act 10 of 2013 referred the uncertainties to the Full Court of the Division in the matter of *Van Vuuren v Roets and Others (Banking Association of South Africa and Others as* amici curiae*)* [2019] 4 All SA 583 (GJ). The Full Bench endorsing *Phaladi* and *Du Toit*, held that where there is no debt rearrangement order by the court despite findings of over-indebtedness by a debt counsellor, a consumer can submit additional information about his revived fortunes, whereupon the magistrate must conduct a hearing and thereafter decide whether to reject the recommendation or conclude that a consumer is not over-indebted.

Where there is an existing order, a consumer can exit by settling all his debts and can also by issue of a debt clearance certificate by a debt counsellor in terms of s 71 (provided that requirement of s 71(1)(*b*) are met) and if a debt counsellor refuses to issue same, the consumer may lodge a complaint with the Tribunal. Likewise, the court was also critical that if a consumer can satisfy s 71(1)(*b*) requirements, he can exit the debt review process, other than that, one cannot. The essence thereof was that no court has jurisdiction or power to order a release of a consumer from debt review. It was also held that neither the purpose nor the language of the text suggests a termination of a debt review process by any court. The Act merely created power for any court, by s 85, to set in motion a debt review process or itself to order a re-arrangement of a debtor's obligations.

Conclusion

It has been now settled that to withdraw from a debt review process subsequent to material change in finances, but where there is no debt rearrangement order from the magistrate, a consumer can apply and produce evidence in his favour, which would be contrary to the findings of a debt counsellor. A magistrate after conducting a hearing may rule in favour of the consumer. When there is an existing debt re-arrangement order and a consumer's financial position also changes to the better, in order for a consumer to exit the debt review, they can only approach their debt counsellor for a debt clearance certificate in terms of s 71 of the Act, provided that the requirement set out in s 71(1)(*b*) is strictly met and if a debt counsellor refuses, a complaint can be laid with the Tribunal as it is a forum of first instance. Lastly, a High Court is not a court of first instance in respect of debt review processes, as the Act confers no jurisdiction to it and it can neither use its inherent jurisdiction.

Limnandi Mtshemla *LLB (UFH) Compliance Management (UCT)* is a legal practitioner at Squire Smith & Laurie Inc in King William's Town. ❑

Picture source: Gallo Images/Getty

Public interest justification for mergers – the need for legal certainty in approach to s 12A(3)(*e*)

By Phuti Mashalane and Tebogo Maunye

One of the cornerstones of the South African Constitution is the achievement of equality. The duty to achieve a South Africa (SA) for all, is widely recognised by laws and regulations in keeping with the constitutional mandate. The integration of historically disadvantaged persons (HDPs) into the economy is one meaningful way of achieving this equality. The Competition Act 89 of 1998 (as amended), among other legislation, seeks to advance this constitutional mandate.

It is stated in the preamble to the Competition Act that the people of SA recognise the need for an economy that is 'open to greater ownership by a greater number of South Africans'. In fact, one of the purposes of the Competition Act is to 'promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons'. Hence, the promotion of a greater spread of ownership by HDPs is advocated when considering mergers. However, there appears to be no sufficient legal certainty as to what it entails, which is the focus of this article.

The need for legal certainty in approach to s 12A(3)(*e*)

Section 12A(3)(*e*) of the Competition Act states that:

'When determining whether a merger can or cannot be justified on public interest grounds, the Competition Commission or the Competition Tribunal *must* consider the effect that the merger will have on –

…

(*e*) *the promotion of a greater spread of ownership, in particular to increase the levels of ownership by historically disadvantaged persons*' (our italics).

What can be gleaned from this provision is that it is a prerequisite for competition authorities when assessing mergers to consider whether a merger can be justified on public interest ground(s). In fact, the competition authorities can and have in the recent past prohibited a merger purely based on substantial public interest grounds.

In the Shell South Africa (Pty) Ltd and Tepco Petroleum (Pty) Ltd merger, the Competition Tribunal was of the view that prohibiting mergers purely based on public interest should be saved for exceptional circumstances. The Tribunal stated that there should be 'considerable caution' applied when 'competition authorities use public interest as a basis for their intervention' in merger proceedings. But this gave rise to concerns that the competition authorities were reluctant to enforce a clearly defined purpose under the Competition Act and approved mergers that appeared to contradict this purpose. Amendments to the Competition Act were made and, accordingly, s 12A(3)(*e*) was introduced to address this issue.

A clear application of s 12A(3)(*e*) of the Competition Act was demonstrated in the ECP Africa Fund IV LLC and ECP Africa Fund IV A LLC and Burger King (South Africa) RF (Pty) Ltd and Grand Foods Meat Plant (Pty) Ltd (ECP Africa/Burger King) merger.

The Commission, in initially prohibiting the merger, cited that it lacked BEE credentials and that the merger as it was, would have a 'substantial negative effect on the promotion of a greater spread of ownership' (GN1823 *GG*46000/4-3-2022). This was because post-merger, the shareholding of HDPs in the target firms would drop from 68,56% (with 22,87% held by black women) to 0% ('Competition Commission prohibits merger on new public interest ground' (www.ensafrica.com, accessed 1-8-2022)). To get the approval, the acquiring firms agreed to set up an Employee Share Ownership Plan (ESOP) that would then take the shareholding of HDPs up to 5% post-merger in the target firms.

It is not sufficiently clear from the ECP Africa/Burger King merger and the provision in the Competition Act what percentage of HDP ownership would be considered sufficient for purposes of s 12A(3)(*e*). This brings about a lot of uncertainty for investors. One can reasonably opine, regarding the ECP Africa/Burger King merger, that it was a straightforward determination that the merger would give rise to a 'substantial negative effect on the promotion of a greater spread of ownership' by HDPs (GN1823 *GG*46000/4-3-2022).

But some cases may not be as clear as the ECP Africa/Burger King merger. One may then ask, how the 'effect on the promotion of a greater spread of ownership' will be determined by the competition authorities as required by s 12A(3)(*e*) (GN1823 *GG*46000/4-3-2022). Is it sufficient for the discretion to be exercised by the authorities or would it be more beneficial to bring about legal certainty by amending the Competition Act or issuing guidelines to clearly set out the

percentage that should be achieved?

The mining industry

The mining industry provides a helpful case study in this regard. To transform the industry to accurately capture the demographics of SA and advance equality and effective participation of HDPs, the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) was promulgated. The MPRDA has a similar provision to s 12A(3)(*e*) of the Competition Act. At s 100(2)(*a*) it states:

'To ensure the attainment of the government's objectives of redressing historical, social and economic inequalities as stated in the Constitution, the Minister must within six months from the date on which this Act takes effect develop a broad-based socio-economic empowerment Charter that will set the framework for targets and time table *for effecting the entry into and active participation of historically disadvantaged South Africans into the mining industry*, and allow such South Africans to benefit from the exploitation of the mining and mineral resources and the beneficiation of such mineral resources' (our italics).

The Broad-based Socio-Economic Empowerment Charter for the Mining and Minerals Industry, 2018, in giving effect to the MPRDA, specifies what percentage of ownership needs to be achieved to be compliant with the mandate to give effect to meaningful economic participation, integration into the mainstream economy, and effective ownership of the country's mineral resources by HDPs. It states, at s 2.1.1.1 that: 'An existing mining right holder who has achieved a minimum of 26% BEE shareholding shall be recognised as compliant for the duration of the mining right.'

The energy industry

In the energy industry, the Renewable Energy Independent Power Producer Procurement Programme (REIPPP) is the one programme that supports an increase in participation of HDPs through increase of, among other things, ownership level. The REIPPP 'is aimed at bringing additional megawatts onto the country's electricity system through private sector investment in wind, biomass and small hydro, among others' ('Renewable Independent Power Producer Programme' (www.gov.za, accessed 1-8-2022)). This is done through what is called Independent Power Producers (IPP) Procurement Programme where bidders are requested to submit proposals for a certain bid window. Bidders who are then picked to carry on with their projects are known as preferred bidders and their projects preferred bidder projects.

In each bid window, the IPP Procurement Programme sets out a given number of key economic development targets that are to be achieved by bidders. For 2021, the preferred bidder projects ought to have met a 49% South African entity participation. Twenty-five preferred bidder projects ensured 49,2% South African entity participation in line with the minimum requirement. Furthermore, a minimum target of 30% black people shareholding in the IPPs was also imposed. Against this minimum requirement, a 34,7% shareholding by black people in the IPPs was achieved.

Further to the 2021 bid window, a minimum target of 5% ownership by black women in the projects was also imposed and accordingly, a 7% of ownership by black women was met in the bid window. The clearly defined minimum targets of HDP ownership and participation in the IPP Procurement Programmes are to keep in line with transforming the energy industry and ultimately reaching the equality goals that are mandated by the Constitution.

The gas industry

In the gas industry, when one applies for a licence to construct or operate piped-gas facilities, for example, the applicant is required to provide information regarding the quantity and percentage of subcontracted work for companies with more than 50% ownership by South African HDPs. The gas regulator must then use this information to facilitate the addressing of historical inequalities.

One can, in this regard, reasonably opine that in the mining industry, energy industry and gas sector (contrary to the assessment of mergers in competition law) there is sufficient certainty as to what levels of ownership would be considered sufficient. A similar provision can be implemented regarding public interest considerations when assessing mergers, so that parties can have certainty pertaining to what percentage will achieve a greater spread of ownership by HDPs in the manner contemplated by the Competition Act.

Can public interest objectives be achieved via competition law?

The idea of achieving public interest objectives using competition law is not without its critics. The main purpose of the competition authorities is said to be to ensure competition within the South African economy. Prohibiting mergers due to public interest concerns, without any threat to market contestability, creates an undue tension between the two conflicting ideas.

While established with an understanding and appreciation of their speciality in mind, competition authorities, one can argue, are relegated to achieving political ideologies of the governing party. Another concern that can be raised in this regard is the implication of domestic policy on foreign investments. Though all in good faith, politicians should be careful when treading the fine line between legitimate policy objectives and potential foreign investments within given markets. It is argued these policies can result in deterring investments that may otherwise have had more positive effects on the market. This would have a knock-on effect on other public interest grounds, like employment. Deference should be shown to the duties of other regulators by the competition authorities.

Section 12A(3)(*e*) does not go far enough

Legal certainty and the rule of law principles go hand in hand in many jurisdictions around the world, including SA. The central tenet of these principles is that laws should be predictable and sufficiently clear for persons to go about their business knowing, with a given level of certainty, what legal consequences will follow.

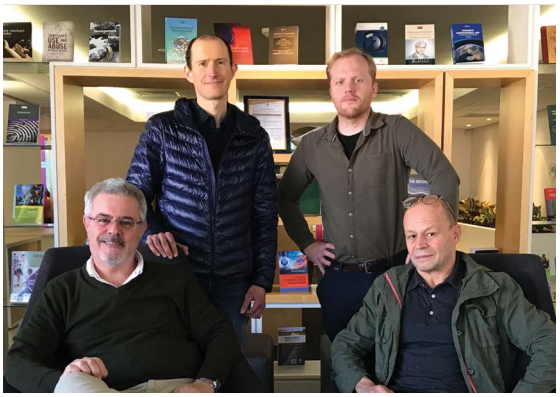
The gas, energy and mining industries seem to have fared well over the years and continue to attract a fair amount of investment, even with these requirements in place, seemingly because investors know beforehand what to expect. Although the introduction of s 12A(3)(*e*) of the Competition Act is widely and correctly welcomed, it appears that the challenge with the South African competition regulation will lie in the uncertainty of what percentage of ownership by HDPs need to be achieved. Investors will find this unworkable.

It would be prejudicial to parties if they find out (after expending sizeable resources) that their merger has been prohibited because it has a negative effect on the promotion of a greater spread of ownership by HDPs. It would help a great deal if investors knew beforehand what percentage of their business will need to be held by HDPs. This uncertainty may lead to undue waste of resources.

An amendment of the Competition Act or the issuing of guidelines specifying the percentage of ownership by HDPs that will be considered sufficient would create a level of certainty that the merging parties or investors need.

Phuti Mashalane *LLB (Cum Laude) (UL) Cert in Competition Law Cert in International Trade Law Adv Cert in Company Law I and II (Wits)* is a legal practitioner and Tebogo Maunye *LLB (UJ)* is a candidate legal practitioner at Lawtons Africa in Johannesburg. ❑

THE LAW REPORTS



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

July 2022 (4) South African Law Reports (pp 1–321); July 2022 (1) South African Criminal Law Reports (pp 1–121)

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
EqC: Equality Court
GJ: Gauteng Local Division, Johannesburg
GP: Gauteng Division, Pretoria
SCA: Supreme Court of Appeal
WCC: Western Cape Division, Cape Town

Advertising

Complaint about allegedly racist shampoo advert: In *Baba and Others v New Clicks Group Ltd and Another* 2022 (4) SA 141 (WCC) the WCC was confronted with the claim that a social media advert, which showed a picture of a black woman and the words 'dry and damaged hair' and 'frizzy and dull hair' and a picture of a white woman with the words 'fine and flat hair' and 'normal hair' was racist and unconstitutional, and specifically contravened ss 7 and 12 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Equality Act). The court, per Dolamo J ruled, however, that the applicants – several black women who were offended by the advert – did not establish that the advert amounted to 'discrimination' against them because they failed to show how they were personally disadvantaged by it. Nor did the advert show a clear intention to unfairly discriminate against black people. The WCC accordingly dismissed the application for an order declaring the advert to be racist and in breach of the Equality Act.

The power of Advertising Regulatory Board (ARB) to adjudicate complaints relating to advertising by non-members: In *Advertising Regulatory Board NPC and Others v Bliss Brands (Pty) Ltd* 2022 (4) SA 57 (SCA) the first appellant was the ARB the second and third appellants were Colgate-Palmolive (Pty) Ltd and Colgate-Palmolive Company (collectively, Colgate). The respondent was Bliss Brands (Pty) Ltd (Bliss).

Colgate and Bliss were competitors in the toiletries business. In December 2019, Colgate lodged a complaint with the ARB that Bliss had, in the manner of packaging of its Securex soap, breached the ARB's Code by exploiting the advertising goodwill and imitating the packaging architecture of Colgate's Protex soap. Although Bliss was not an ARB member, it did not object to its jurisdiction and participated fully in its hearings, taking the matter all the way to the ARB's final appeal committee (the FAC), which found in favour of Colgate.

After the FAC dismissed its appeal, Bliss Brands successfully applied to the GJ to review and set aside the FAC's decision. The GJ, having raised the constitutionality of the ARB's powers, struck down a clause of the ARB's memorandum of incorporation as unconstitutional because it permitted the ARB to decide complaints concerning adverts of non-members. The GJ, per Fisher J, also made several declarations, among them that the ARB had no jurisdiction over non-members in any circumstances and may not issue any rulings in relation to non-members or their advertising.

In an appeal by the ARB and Bliss the SCA found that the GJ had erred in distinguishing instead of following *Advertising Standards Authority v Herbex (Pty) Ltd* 2017 (6) SA 354 (SCA), binding precedent that established that the Advertising Standards Authority (the ARB's predecessor) could issue a ruling that was not binding on non-members) regarding any advert, regardless of by whom it was published, to determine on behalf of its members whether they should accept any advert before it was published or withdraw it afterwards.

In upholding the appeal, the SCA made the following observations:

- The right of freedom of expression entitled the ARB to refuse to publish advertising while the right to freedom of association entitled it to consider complaints about adverts by non-members.
- Its right to self-regulation entitled it to adopt rules and standards to regulate members' conduct in their dealings with the outside world.
- The right of freedom of association also embraced the right to dissociate, but here Bliss' right to do so did not give it an unfettered right to dictate to the ARB or its members how they should exercise their rights of association.

Children

An application by a non-parent for guardianship of a child who already has a guardian: The matter of *RC v HC* 2022 (4) SA 308 (GJ) concerned an application brought to the GJ for assignment to the applicant of joint guardianship in terms of s 24 of the Children's Act 38 of 2005 (the Act), as well as rights of contact and care in terms of s 23 of the Act, in respect of the four-year-old child (BC) of the respondent.

The application was brought in two

parts: In the part A before the court, the applicant sought to obtain a report of a clinical psychologist to determine whether it was in the interests of BC that the care, contact and guardianship be granted to him, and that he be awarded interim contact pending the determination of the substantive relief sought in part B. The applicant, a 52-year-old divorced chartered accountant, was not BC's father. Having met on Tinder, the parties were involved in a romantic relationship from 2017 to 2021. During this time the applicant developed a very close relationship with BC. He sought to continue contact with BC and with the respondent's other child, 11-year-old DC, after the termination of his relationship with the respondent. The respondent initially allowed the applicant contact but later changed her mind, believing that it was in the best interests of her family that the applicant not be present in her children's lives. She considered his relationship with BC to be 'obsessive' and was worried that it was alienating her from BC, and BC from DC.

The applicant, in response to the respondent's decision, and prompted by his purported concern that a separation from BC would harm their relationship and BC's psyche, launched the GJ proceedings.

Fisher J dismissed the application on the basis that the applicant did not have *locus standi*. The GJ remarked that the existence of a loving relationship between an older person and a child, which had parental hallmarks did not mean that the former automatically had the 'interest' in the child required by ss 23 and 24 of the Act. If a child was properly cared for by a primary caregiver like the respondent, there would need to be compelling motivation as to why another person should be accorded legal rights to the child. And in the case of an application under s 24(3) of the Act for guardianship of a child that already had a guardian, the aspiring guardian would have to show why the child's present guardian was unsuitable: On a purposive interpretation, the provisions of s 24(3) meant that, if the child had an available and capable guardian, there was no reason to appoint another. The applicant failed to satisfy either of these requirements and, therefore, lacked *locus standi*. The GJ found that it would in any event have refused the applicant's case, as far as care and contact rights were concerned, on the merits. The application was accordingly dismissed.

- See Maryna Burger 'The rights of the non-parent' 2022 (June) *DR* 10.

Companies

The reinstitution of business rescue after a final liquidation order: In *Mintails South Africa (Pty) Ltd v Mintails Mining SA (Pty) Ltd and Others* 2022 (4) SA 238 (GJ) concerned an application under s 131 of the Companies Act 71 of 2008 (the Act) for an order returning a company in liquidation (the first respondent, 'the company') to business rescue. The applicant was an 'affected party' as envisaged in s 128(1)(*a*) of the Act, being both the company's controlling shareholder (96%) and major creditor (R 1,3 billion). The company, represented by its provisional liquidators, filed a counter-application for an extension of their powers as envisaged in s 386(5) of the Companies Act 61 of 1973 (the 1973 Act) to enable them to secure the sale of the company's remaining assets (shares and claims on loan account held in one of its subsidiaries). This provision allows the court 'to grant leave to a liquidator to raise money on the security of the assets of the company concerned or to do any other thing which the court may consider necessary for winding up the affairs of the company and distributing its assets'.

The company – a miner of gold-bearing tailings – had been in business rescue between 2015 and 2018. But in 2018 the business rescue practitioner, fining himself unable to resolve a dispute about the company's substantial environmental rehabilitation liability to the Department of Mineral Resources (DMR), ruled that there was no reasonable prospect of rescue. This resulted in a final liquidation order being granted in September 2018.

By the time of the application under consideration, the company had been in final liquidation for more than three years. Its movable assets consisted of shares and claims on loan account in its subsidiaries, but the liquidators' powers were severely curtailed by statutory constraints on their ability to realise them. At the same time, the subsidiaries' own properties were being menaced by criminal elements (the so-called 'Zama Zamas'). The need for the liquidators to obtain an extension of their statutory powers to sell these assets became urgent when they received an offer for their purchase from Pan African Resources PLC (Pan African). Pan African's alleged willingness to assume the company's R 400 million liability to the DMR intensified the urgency. But the Master's four-month delay in granting the extension application resulted in further erosion in the value of the company's movable assets thanks to the ongoing depredations of the Zama Zamas.

The deponent to the applicant's papers, one Moolman, was a director of both the applicant and the company (before its liquidation). He contended on behalf of the applicant that business rescue was appropriate because the liquidation was at a 'stalemate', with the provisional liquidators being unable to wind up the affairs of the company due, *inter alia*, to statutory limitations on their powers and their alleged maladministration, delay, and ineptitude. The creditors would be in a better position in business rescue because the winding-down process would be quicker. The business rescue practitioners would have access to finance provided by the applicant and would be better equipped deal with the Pan African deal and the complexities of the company's structure, operations and assets than the liquidators. Defending their conduct, the liquidators stated that they had worked themselves ragged in a challenging liquidation to try and preserve value and a suitable return to the general body of creditors under trying circumstances.

Under s 128(1)(*h*) of the Act, 'rescuing' a company entails achieving either of the goals set out in the definition of business rescue in s 128(1)(*b*) of the Act. The primary goal was to facilitate the continued existence of the company and its recovery to a state of solvency. If this was not possible, the secondary goal was to ensure a higher return for creditors or shareholders than they would otherwise receive under liquidation. By the time the application was heard, it was not in dispute the primary goal was no longer achievable. Instead, the applicant pinned its hopes on getting a better deal for the company's creditors and shareholders by means of the successful completion of the Pan African deal (Pan African's offer was subsequently conditionally accepted by the liquidators). According to precedent, an applicant was required to make out its case for business rescue on either ground on a cogent evidential foundation, which the opposing parties contended was lacking in the present case. (The first respondent and an intervening party, who relied on the cession of an unpaid creditor's claim of Black Hawk Security Solutions, an affected party in the present proceedings that had rendered security services to the company post-liquidation).

The court, per Maier-Frawley J, refused the application for conversion to business rescue on the following grounds:

- It was not for the applicant to choose its preferred method of winding down the company's affairs. Moolman's opinions or reservations about the liquidators' ability was not a proper reason for taking the company out of liquidation, particularly since any savings on the costs of the liquidation process would be subsumed by new costs incurred in the business rescue scenario.
- The applicant's promise to assist only in a business rescue scenario and only on its own terms and in pursuit of its own financial interests was a half-baked one that offered only cold comfort.
- The liquidators had done their best to preserve value and negotiate the

disposal of assets in a way that would optimise proceeds, as evidenced by the Pan African transaction. The delays were due to the tardiness of the Master and statutory restraints on the liquidators' powers.

- A conversion to business rescue would mean that the liquidators and service providers who had worked for years without remuneration would become concurrent instead of preferent creditors, and, due to the size of the applicant's claim, receive a small or illusory dividend.
- No objective evidence was tendered in support of the applicant's argument that all creditors would receive a better dividend under business rescue.
- It was not clear how a liquidator would be less successful in realising a proper market value for the sale of company property than business rescue practitioner, particularly where a fair market value for company property had already been determined by the Pan African transaction.
- Uncertainties over pending court cases militated against business rescue, particularly over the company's R 400 million environmental rehabilitation liability to the DMR. Litigation could also follow in respect of the Black Hawk claim in respect of security services.
- The potential open-endedness of business rescue proceedings.
- Liquidators had statutory powers to enquire into irregularities that business rescue practitioners lacked.
- Business rescue practitioners would have to come to terms with a process that had been ongoing for years in order to do no more than what the liquidators were already doing.
- It was impossible to determine whether there was a reasonable prospect that the general body of creditors would receive an enhanced dividend under business rescue.
- The inference that the applicant was seeking, through the mechanism of business rescue, to improve its own position by depriving the liquidators of compensation for fees and administration costs.

The GJ granted the counterapplication on the following grounds: It was common cause that the company had to be wound down and its remaining assets sold. Without obtaining authorisation for an extension of their powers to enable a sale of the remaining company assets the liquidators would be hamstrung. Funds obtained from the sale of certain available assets would inure to the benefit of all creditors, including the applicant.

Constitutional law

Hate speech and recusal: The facts in *South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku and Another* 2022 (4) SA 1 (CC) were that the first respondent (Mr Masuku), while representing the second respondent (COSATU), made certain comments on a website and at a rally, referencing *inter alia* 'Zionists', which prompted the South African Jewish Board of Deputies to complain to the applicant (the Human Rights Commission) that they were hate speech.

Concurring, the Commission instituted proceedings in the EqC under the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Equality Act). The EqC ruled that the remarks were indeed hate speech under s 10(1) of the Equality Act and that they were not protected by s 16 of the Constitution. It directed Mr Masuku and Congress of South African Trade Unions (COSATU) to apologise to the Jewish Community.

Mr Masuku and COSATU appealed to the SCA, which set aside the EqC's order and replaced it with one dismissing the Commission's complaint. The SCA approached the matter by way of testing whether remarks were hate speech under s 16(2) of the Constitution. The SCA disavowed reliance on s 10(1) Equality Act because in its view the Commission had abandoned reliance on it and because s 10(1) might in addition be unconstitutional. The SCA reasoned that the statements implicated Zionism rather than Judaism, and that since Zionism was neither ethnic nor religious, the statements fell outside s 16(2). They were accordingly not hate speech. The Commission applied to the CC for leave to appeal the SCA's judgment while Mr Masuku and COSATU sought leave to cross-appeal the EqC's costs order against them.

The CC, per Khampepe J in a unanimous judgment, turned first to an application by Mr Masuku and COSATU for Chief Justice Mogoeng's recusal because he had in a webinar hosted by an Israeli newspaper professed his love of Israel.

The CC found that, viewed in context, the Chief Justice's statements did not give rise to a reasonable apprehension of bias.

The CC granted leave to appeal on the grounds that the matter implicated the interaction of ss 9, 10 and 16 of the Constitution, the interpretation of constitutionally mandated legislation, and the subsidiarity principle. It also implicated the important issue of the bounds of free expression.

The CC found that the SCA had erred in employing s 16(2) of the Constitution rather than s 10(1) of the Equality Act. Since the latter was promulgated to elaborate on s 16, subsidiarity applied. The SCA's conclusion that s 16(2) prohibited hate speech was also wrong: It simply delineated what was not protected by s 16(1), leaving it to the legislature to proscribe or not proscribe what s 16(2) deemed unprotected.

The CC noted that certain points pertaining to s 10 of the Equality Act had recently been clarified, these were that –

- s 10(1) required an objective test;
- subss (*a*) – (*c*) were conjunctive; and
- subsection (*a*) was impermissibly vague and hence unconstitutional.

This raised the question of how to decide whether the impugned words were hate speech. The test was whether the words, heard in their proper context by a reasonable person, would lead that person to conclude that they were based on a prohibited ground and intended to incite harm or propagate hatred. Given that the test was objective, the speaker and listener's understanding of the meaning of the words were irrelevant. A caveat, though, was that testimony of a member of the targeted group on the impact of the statements was relevant to the determination of a proper remedy.

The CC agreed with the EqC's findings that the first of Mr Masuku's statements referenced ethnicity (Judaism) and that a reasonable reader would have taken him to have clearly intended to incite harm and propagate hatred. The EqC's finding that s 10(1) was contravened, was therefore, unimpeachable. Correctly viewed, the statements did not implicate Jewish ethnicity or religion, thus rendering the EqC's findings unsupportable.

This left the cross appeal of the EqC's award of costs against Mr Masuku and COSATU. The CC ruled that it had to be upheld because they had raised a constitutional defence (the statements were political speech) and consequently the standard rule in constitutional litigation between the state and a private party applied: Each party was to bear their own costs.

In the result, the CC ordered that the SCA's order had to be set aside and substituted to the effect that the appeal against the EqC's order was dismissed, and the EqC's order amended to declare Mr Masuku's first statement alone to be a contravention of s 10(1). The CC also ordered Mr Masuku and COSATU to apologise for the statement.

Criminal law

Requisites for proper enquiry in terms of ss 77, 78 and 79 of Criminal Procedure Act 51 of 1977 (CPA): *Mafe v Acting Director of Public Prosecutions, Western Cape and Another* 2022 (2) SACR 54 (WCC) concerns an urgent application brought by the applicant for his release on bail pending further criminal proceedings, in which he also sought the review of the proceedings leading to his referral for psychiatric observation at the Valkenberg psychiatric facility for a period of 30 days.

The applicant was arrested on charges relating to the fire, which destroyed the

National House of Assembly on 2 January 2022. He presented as a homeless person and the arrest took place within the parliamentary precinct within a short period of the blaze. A district surgeon compiled a report on the following day and concluded that the applicant suffered from paranoid schizophrenia. The applicant appeared in the magistrates' court for the first time the day after that, but this report was not made available to the court or to the applicant's legal team. The applicant did indicate that he wished to apply for his release on bail and the matter was then postponed to 11 January 2022, but without any reference or inquiry into the applicant's ability to follow the proceedings. On that date, further charges were added, which placed the offences within the ambit of sch 6 to the CPA. The state also produced the single-page report of 3 January 2022 and requested that the applicant be referred for psychiatric observation at the Valkenberg psychiatric facility for a period of 30 days. This was the first time that the applicant and his counsel were made aware of the district surgeon's report. Counsel objected to the referral and persisted with the bail application. No ruling was, however, recorded by the magistrate in response to this application. The court also summarily accepted the medical assessment without granting the applicant the opportunity to present evidence in rebuttal and made a ruling that the state had produced *prima facie* evidence in terms of s 78 of the CPA, and accordingly referred the applicant for observation in terms of that section.

Wathen-Falken AJ (Hlophe JP concurring) examined the relevant provision of the CPA and concluded that s 78 required a court to make an assessment based on all the available facts which would be in the interests of justice, and which was aligned with the essence of s 35 of the Constitution. This was an evidential and factual determination, which was in some instances based on the adjudicator's own observations or in other instances based on medical evidence presented by either or both parties before court. It, therefore, followed that all evidence and facts had to be placed before the court for evaluation, and the magistrate had an obligation in terms of s 77 to record and note his observations of the applicant, which would best inform him whether the applicant was able to appreciate the nature of the court proceedings. This would best have been done through some degree of interaction with the applicant. The magistrate nevertheless forewent the opportunity to apprise himself of all the evidence before making the blanket referral. The order was accordingly not done in accordance with justice and was substantively and procedurally flawed. It resulted in a gross irregularity and had to be set aside.

The court further concluded that the record reflected that the magistrate did not at any stage respond to the applicant's plea to be heard on bail, thereby negatively affecting his rights entrenched in the Constitution. The applicant was entitled to apply for bail in the circumstances, and there was nothing preventing the magistrate from proceeding with such an application.

Other criminal law cases

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

- appeal by Director of Public Prosecutions against too lenient sentence;
- culpable homicide sentence;
- dealing in sentence for drugs;
- nature of harassment;
- imposition of sentence higher than prescribed minimum sentence;
- recusal of presiding officer due to inference of bias;
- lost, destroyed or incomplete records and the reconstruction of the same; and
- validity of arrest without warrant.

Revenue

The effect of statutory appeal under s 47(9)(e) of the Customs and Excise Act 91 of 1964 on High Court's review

jurisdiction: In *Cell C (Pty) Ltd v Commissioner, South African Revenue Service* 2022 (4) SA 183 (GP), the applicant (Cell C), in its main application, sought to appeal a tariff determination under s 47(9)(*e*) of the Customs and Excise Act 91 of 1964, which provides that 'an appeal against any [tariff] determination shall lie to the division of the High Court of South Africa having jurisdiction'. In its main application Cell C also sought the tariff determination's review, setting aside and variation retrospectively. This judgment concerned an interim application for an order in terms of r 30A of the Uniform Rules of Court to compel the Commissioner to dispatch a record in respect of the tariff determination sought to be reviewed under r 53.

Tolmay J held that s 47(9)(*e*) confined a taxpayer challenging a tariff determination to the wide-appeal remedy it provided – precluding an appellant bringing a wide appeal from instituting review proceedings. This was so because a wide appeal called for a total re-hearing which was not confined in any sense, providing an applicant with full access to justice. The need for review fell away when such an appeal was available and availing oneself of it excluded the possibility of a review. Since r 53 did not apply, the applicant's motion fell to be dismissed on the ground that there was no basis on which to compel the Commissioner to produce a record.

Other cases

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

- a bank's rights in respect of moneys fraudulently deposited into a bank account;
- anti-harassment orders:
- municipalities in default to Eskom;
- the appointment of liquidators;
- the constitutionality of building regulations;
- the effects of business rescue on company directors;
- the powers of a *curator bonis*; and
- the transmissibility of a claim for general damages.

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

By Kgomotso Ramotsho

Labour Court finds serious irregularities as presiding officer fails to apply her mind to the evidence before her

Department of Health, Western Cape v Twalo and Another [2022] 8 BLLR 741 (LC)

In the case of *Twalo,* the Department of Health in the Western Cape (applicant) brought an application to the Labour Court (LC) in terms of s 158(1)(*h*) of the Labour Relations Act 66 of 1995 (the LRA). The applicant sought to review and set aside decisions of the second respondent (the presiding officer) who presided over a disciplinary hearing at which Theophilis Twalo (the first respondent) faced five allegations of misconduct involving sexual harassment.

This was after the presiding officer in the matter found Mr Twalo guilty of only one of the five charges and considered an appropriate sanction to be a final written warning plus suspension without pay for two weeks, as she said the victim was not a credible witness. The Department submitted that reviews in terms of s 158 may be brought within six months of a party becoming aware of the presiding officer's decision, which was on 20 November 2020. After consulting those involved in the disciplinary hearing, the Department sought an opinion of the matter from their Legal Services Department (Legal Services) on 7 December 2020. It received an opinion on 18 December 2020, recommending that it brief counsel.

The LC said the Director: Labour Relations, Mr Roman, did nothing about the matter from 18 December 2020 to 20 January 2021 because – according to the Department – he went on leave from 22 December 2020 to 18 January 2021 and he and the Department were involved in the planning of the COVID-19 vaccine rollout. He handed the Legal Services opinion to an Assistant Director: Labour Relations, Mr Ngame, only on 20 January 2021. Mr Ngame again consulted with the various people involved in the hearing (even though, according to the Department, this was already done during November and December 2020) – only to do no more than to recommend on 15 February 2021 that the advice of Legal Services be followed and to brief counsel for a further opinion.

The LC added that a further submission was made on 19 February 2021 'in terms of the [Department's] protocol' to the Chief-Director: People Management who met with Labour Relations on 25 February 2021. That it was only then that 'permission was given,' the LC said it was unclear by who and to whom to instruct the State Attorney to brief counsel. The LC pointed out that the State Attorney briefed counsel on 3 March 2021, but it was only then that digital recordings were obtained for transcription. Counsel provided an opinion on 18 March 2021 and the initial papers in this matter were served on the other parties on 1 April 2021.

The LC said the explanation was poor and appears contrived in several respects. The LC said even though the Department had, during December 2020, discussed the matter in those disciplinary proceedings, the Department claimed that Mr Ngame had to do so again, after Mr Roman brought the matter to his attention on 20 January 2021. The LC said that there was an unreasonable delay and, even though it was not convinced that the explanation for the delay was sound and acceptable, the application had good prospects of success

and, therefore, the court should condone the delay in launching the review application.

The court looked at the review in terms of s 158(1)(*h*) of the LRA. The court said that the parties agreed that in its capacity as an employer, the state may review its decisions and acts in terms of s 158(1) of the LRA on 'such grounds as are permissible in law.' The LC, however, pointed out that Mr Bosch argued that while *Hendricks v Overstrand Municipality and Another* [2014] 12 BLLR 1170 (LAC) held that the state may rely on the Promotion of Administrative Justice Act 3 of 2000 (PAJA), the principle of legality, and the common law to review its decisions. The Constitutional Court in *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC) ruled that PAJA was not available to organs of state seeking to review its own decisions.

The LC said that Mr Bosch submitted that the Department is limited to the principle of legality and common law, and not PAJA, for this review. The LC pointed out that limited to the principle of legality and review in terms of the common law means that the test for the review is not one of reasonableness but confined to whether the decision sought to be reviewed was lawful and rational. The LC added that while the concepts of rationality and reasonableness overlap and rationality is an element of reasonableness, Mr Bosch submitted, the latter is of a higher standard and requires more intense scrutiny of administrative decisions. Thus, applying the principle of legality and the common law, rationality and not reasonableness should be basis of the review.

The LC added that Mr Bosch further submitted that if the court were not to accept that the test review in this matter is confined to the principle of legality and common law and thus the test of rationality rather than reasonableness, the test for reasonableness still requires a holistic survey of evidence to establish whether the decision-maker made a decision that a reasonable decision-maker could not make rather than, as the Department seeks, scrutinising and criticising the presiding officer's decision in piecemeal manner.

The LC pointed out that, even if *Gijima* does apply and reviews in terms of s 158(1)(*h*) are confined to the principles of legality and common law grounds of review, if administrative decision-maker fails to apply their mind to relevant material before them so that it affects the rationality of the decision, the decision stands to be reviewed as irrational. The LC said that in Craig Bosch and Anton Myburgh *Reviews in the Labour Courts* (Durban: LexisNexis 2016), the authors state that attacks on the rationality of a decision, 'reviews based on the principle of legality take us back to the [*Carephone (Pty) Ltd v Marcus NO and Others* [1998] 11 BLLR 1093 (LAC)] test'. Mr Bosch referred to the very useful test formulated in *Carephone*, namely 'is there a rational objective basis justifying the connection made by the administrative decision-maker between the material properly available to him [or her] and the conclusion he or she eventually arrived at?'

The LC noted that the presiding officer acquitted Mr Twalo of four charges, accusation one, three, four and five. The second allegations were that Mr Twalo had made verbal remarks of sexual nature to the victim.

Charge 2 stated that 'on or about 25 October 2019, you sexually harassed [the victim] in your office by making the following unwelcoming verbal remarks of sexual nature, "It seems it's not only your upper back, it's your lower back too. This means you are unable to perform in the bedroom and it is only kissing you can do".' The LC reproduced, the presiding officer's findings in full, and on charge two the finding by the presiding officer read:

'The guilty finding on charge 2 – You, Mr Twalo in your position as a senior administrative clerk [Human Resources (HR)], had full access to [the victim's] medical reports and the comment made about her abilities to perform with reference to her lower back problem, is a clear indication that you were fully aware of her condition and that you did make the comment to [the victim]. It is also very clear in the Departmental Sexual Harassment Policy in section 7.2.1 in determining whether conduct constitutes sexual harassment the following must be taken into account: 7.1.2.2 "whether the sexual conduct was unwelcome" which in this case it was'.

The LC said that the presiding officer's reasons for the sanction she considered appropriate are more detailed and some remarks are worth considering. The LC pointed out that for example:

'No evidence was given at the hearing, and this was a matter of the complaints word against you, as per the findings the complaint was found not to be a credible witness on the other charges as she omitted other stuff when she was interviewed by the [sexual harassment officer]. You have maintained throughout [that] you never made such derogatory remarks to the complainant.'

The LC said that presiding officers of disciplinary hearings are often laypeople and, when compared to Commission for Conciliation, Mediation and Arbitration commissioners, seldom legally trained and with less experience of adjudicating disputes. The LC added that those presenting evidence are also often laypeople. Thus, the decisions of presiding officers in disciplinary hearings must be assessed in that light. The LC said that still bearing these differences in mind, the factors that apply to the requirements that commissioners must 'issue an award with brief reasons', are useful in relation to the presiding officers at disciplinary hearings.

The LC pointed out that the Disciplinary Code and Procedures for the Public Service (the Disciplinary Code) provides that 'if the chair decides the employee has committed misconduct, the chair must inform the employee of the finding and the reasons for it'. The Constitution provides the right to anyone whose rights have been adversely affected by administrative action to give written reasons and PAJA creates a rebuttable presumption that administrative action was taken without good reason when an administrator failed to furnish adequate reasons when called on to do so.

The LC added that it is not necessarily reviewable if a commissioner or presiding officer fails to give reasons and especially if the decision follows findings already made in the award or ruling or are self-explanatory. On the other hand, decisions lacking reasons so that the rationale cannot be determined from other findings or is not self-explanatory, stand to be reviewed. The LC said although brief reasons will suffice, the failure to deal with each component of the dispute, it is important facets of the dispute, and factors of great significance or critical to the dispute, may give rise to the interference that a decision-maker failed to apply his or her mind to these factors and, if the failure caused the unsuccessful party to lose, the decision could be *prima facie* unreasonable.

The LC said that Mr Bosch correctly pointed out that the distinction between review and appeal must be maintained and as mentioned above, that challenging the presiding officer's findings decision in a piecemeal manner blurs that distinction. The LC added that its brevity aside, the presiding officer's findings are lacking in several respects. In respects of all the charges for which she acquitted the employee of guilt, she reasoned that, among other things the victim's testimony differed from her written complaint and her interview with the sexual harassment officer (regarding the third, fourth and fifth allegations). The LC pointed out that, yet the victim's written complaint was not before the presiding officer's reference to the 'written complaint' was erroneous. Not only does the presiding officer refer to the 'written complaint' twice, but Mr Twalo also seems to rely on it being distinct by, in relation to the first allegations, saying that the victim had given three versions regarding the alleged kiss.

The LC added that relying substantially on different versions as part of her reasoning for findings in favour of Mr Twalo, the presiding officer did not

mention the nature of these differences. The LC said that by failing to canvass the different version, she did not give any insight into the nature and extent the differences and how and why these differences resulted in her concluding in favour of Mr Twalo. The LC said that there were serious irregularities that showed the presiding officer's failure to apply her mind to the evidence before her or to have misconstrued the inquiry she was meant to have engaged.

The LC pointed out that sexual harassment hearings present various difficulties. Among these is the difficulty of weighing mutually exclusive versions – often presented only by the person who allegedly experienced sexual harassment and the alleged perpetrator. The LC added that sexual harassment cases also present factors, such as the severe distress, anxiety, embarrassment, shame, and stigma to persons who experience harassment and to alleged perpetrators. The LC said the presiding officer appears not to reflect appreciation for these factors.

The LC pointed out that most presiding officer's reasoning is respect of this charges deals with clauses from the Departmental Sexual Harassment Policy. The LC said that the only reasoning on which the presiding officer based her guilty finding was that Mr Twalo, as a senior HR administrative clerk, he had full access to the victim's medical reports and that he was, therefore, fully aware of her condition. The LC on discussing the findings in detail, said the presiding officer's decisions were neither rational nor reasonable and stood to be reviewed and set aside. However, the LC added that it disagreed with the primary relief the Department sought, namely, that the presiding officer's decision be set aside and replaced with an order that Mr Twalo is guilty of all allegations against him.

The LC said that in *Consol Ltd t/a Consol Glass v Ker NO and Others* [2002] 4 BLLR 367 (LC), Waglay J (as he then was) in considering whether an award should be corrected by the revising court or remitted back for a hearing, referred to the unreported matter *Emcape Thermopack (Pty) Ltd v CEPPWAWU* (unreported case no C509/99). The court identified four circumstances when it would be appropriate for a court to correct a decision –

'1. where the end result is foregone conclusion;

2. where a further delay would unjustifiably prejudice the applicant;

3. where the decision-making body has exhibited bias or incompetence; [and]

4. where the court is in a good position to make the decision itself.'

The LC said even though *Emcape Thermopack* concerned a review in terms of s 158(1)(*g*) of the LRA, the court found that there is no material difference between the provisions of s 145 and s 158(1)(*g*) regarding the power of the LC to correct an arbitration award set aside on review. The LC added that must also apply to s 158(1)(*h*). The LC noted that some of the above factors do not apply to the present case. The LC said the matter must be remitted to the Department for another presiding officer to determine whether Mr Twalo is guilty of all the allegations – including those in charge two – against him. The LC pointed out that it would better serve the interest of justice that another presiding officer determine the allegations holistically.

The LC made the following order:

'a. The decision of the second respondent made on 21 October and 10 November 2020 are reviewed and set aside.

b. The first respondent is to conduct a new disciplinary hearing presided over by a presiding officer other than the second respondent.

c. No order as to costs'.

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

By Jeniene Nadarajan, Johara Ally and Shanay Sewbalas

New legislation

Legislation published from 1 – 29 July 2022

Acts

Appropriation Act 7 of 2022
Date of commencement: 11 July 2022. GenN1145 *GG*46690/11-7-2022.
Criminal Law (Sexual Offences and Related Matters) Amendment Act 13 of 2021
Commencement of the Act. Amendment of ss 1, 2, 5, 12, 24, 30, 40, 42 – 50, 53, 56, 57, long title and index, substitution of ss 23, 25, 26, 41, 51, 54, insertion of part 5 (s 14A), 44B, 44C of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. Proc R79 *GG*47105/29-7-2022.
Customs and Excise Act 91 of 1964
Amendment of part 3 of sch 2 (no 2/3/63), part 2 of sch 4 (no 4/2/382) and part 3 of sch 2 (no 2/3/62). GN R2282 – GN R2284 *GG*47015/15-7-2022.
Second Adjustments Appropriation (2021/22 financial year) Act 6 of 2022
Date of commencement: 11 July 2022. GenN1144 *GG*46689/11-7-2022.

Bills and White Papers

Draft Constitution Eighteenth Amendment Bill, 2022
Explanatory summary published for comment. GenN1156 *GG*47049/19-7-2022.
Petroleum Products Amendment Bill, 2022
Notice of intention to introduce a Private Member's Bill into Parliament and invitation for comment. GenN1142 *GG*46688/8-7-2022.
Protection of Constitutional Democracy against Terrorist and Related Activities Amendment Bill B15 of 2022
Publication of the Explanatory Summary. GN2231 *GG*46649/1-7-2022.
Traditional Affairs General Amendment Bill B16 of 2022
Publication of explanatory summary. GN1168 *GG*47061/22-7-2022.

Government, General and Board Notices

Animal Diseases Act 35 of 1984
Animal Diseases Regulations: Amendment. GN2318 *GG*47133/29-7-2022.
Auditing Profession Act 26 of 2005
Amendments to the Code of Professional Conduct for Registered Auditors. BN303 *GG*46688/8-7-2022.
Banks Act 94 of 1990
Designation by the Prudential Authority of activities of an institution, which shall not be deemed to constitute 'the business of a bank' under para (*cc*) in s 1(1). GenN1169 *GG*47063/22-7-2022.
Notice by the Prudential Authority in terms of s 69(7): Ubank Ltd under curatorship. GenN1143 *GG*46688/8-7-2022.
Births and Deaths Registration Act 51 of 1992
Alteration of forenames in terms of s 24 and alteration of surnames in terms of s 26. GN2322 – GN2325 *GG*47133/29-7-2022.
Broad-Based Black Economic Empowerment Act 53 of 2003
Codes of Good Practice on Broad-Based Black Economic Empowerment: Draft Legal Sector Code. GenN1165 *GG*47061/22-7-2022.
Compensation for Occupational Injuries and Diseases Act 130 of 1993
Notice issued informing employers of Compensation for Occupational Injuries and Diseases Act (COIDA) compliance and intentions to conduct employer COIDA audits and employer site visits. GenN1149 *GG*47016/14-7-2022 and GenN1151 *GG*47018/14-7-2022.
Competition Act 89 of 1998
Notification of decision to approve merger. GenN1189 *GG*47133/29-7-2022.
Constitution
Amendment to s 6. GenN1156 *GG*47049/19-7-2022.
Currency and Exchanges Act 9 of 1933
Notice and order of forfeiture: Tantex Trading, Folly Trading, GLT Import and Export, Free E Manufactory, BNN Holdings. GenN1170 *GG*47085/25-7-2022, GenN1171 *GG*47086/25-7-2022, GenN 1172 *GG*47087/25-7-2022, GenN1175 *GG*47098/27-7-2022, GenN1178 *GG*47 106/29-7-2022 and GenN1155 *GG*47023/18-7-2022.
Customs and Excise Act 91 of 1964
Imposition of provisional payment (PP/165). GN R2285 *GG*47015/15-7-2022.
Disaster Management Act 57 of 2002
Extension of a National State of Disaster. Impact of Severe Weather Events. GN R2294 *GG*47048/18-7-2022.
Electoral Act 73 of 1998
Publication of reviewed list of candidates. GenN1176 *GG*47103/28-7-2022 and GenN1157 *GG*47052/20-7-2022.
Independent Communications Authority of South Africa Act 13 of 2000
Notice of public hearings of Discussion Document on the Optimisation of the Frequency Modulation Sound Broadcasting. GenN1173 *GG*47088/25-7-2022.
Justices of the Peace and Commissioners of Oaths Act 16 of 1963
Amendment notice under s 6 of the Act. GN2304 *GG*47061/22-7-2022.
Labour Relations Act 66 of 1995
Notice published by the Essential Services Committee in terms of s 71, read with s 70B(1)(*d*) of the Act. GenN1186 *GG*47133/29-7-2022.
Cancellation of Government Notice: Furniture Bargaining Council: The Main Collective Agreement. Bargaining Council for the Canvas Goods Industry (Gauteng): Extension to non-parties of the Main Collective Amending Agreement. GN R2314 and GN R2315 *GG*47107/29-7-2022.
Local Government: Municipal Electoral Act 27 of 2000
Municipal by-elections – 3 August 2022: Official list of voting stations. GenN1153 *GG*47020/15-7-2022.
Marine Living Resources Act 18 of 1998
Recognition of the Nearshore Survivors Association as an interest group in terms of s 8. GN2264 *GG*46688/8-7-2022.
National Environmental Management Act 107 of 1998
Adoption of the standard for the development and expansion of power lines and substations within identified geographical areas and the exclusion of this infrastructure from the requirement to obtain an environmental authorisation. GN2313 *GG*47095/27-7-2022.
Amendment of the s 24H Registration Authority Regulations, 2016. GN2320 *GG*47133/29-7-2022.
National Environmental Management: Waste Act 59 of 2008
Notice of extension of reporting period by identified producer responsibility organisations and producers to the extended producer responsibility online system until 31 August 2022. GN2328 *GG*47134/29-7-2022.
National Qualifications Framework Act 67 of 2008
Exceptions to the determination of the sub-frameworks that comprise the National Qualifications Framework. Withdrawal of GN768 *GG*45058/27-8-2021. GN2267 and GN2268 *GG*46688/8-7-2022.
Occupational Health and Safety Act 85 of 1993
Notice of exemption in terms of s 40 of the Act, read with reg 3(4) of the General Safety Regulations. GN R2240 *GG*46667/6-7-2022.
Notice regarding implementation of reg 8 of the Commercial Diving Regulations, 2022. GN R2241 *GG*46668/6-7-2022.
Notice of direction in terms of s 27(2) of the Act, read with reg 3(11) of the Commercial Diving Regulations: Renewal of diving entities previously issued by the Department of Employment and Labour. GN R2242 *GG*46669/6-7-2022.
Schedule of fees to register entities with the Department of Employment and Labour, as from 1 July 2022. GN R2317 *GG*47109/29-7-2022.
Plant Breeders' Rights Act 15 of 1976
Receipts of applications for plant breeders' rights. GN2300 *GG*47061/22-7-2022.

Prescribed Rate of Interest Act 55 of 1975
Prescribed rate of interest: Withdrawal of GN R1067. GN2326 *GG*47133/29-7-2022.
Public Finance Management Act 1 of 1999
Different categories of debt for interest rate applicable to debts owing to the state. GN2269 *GG*46688/8-7-2022.
Statement of the national revenue, expenditure and borrowings as at 30 June 2022 issued by the Director-General of the National Treasury. GenN1177 *GG*47104/29-7-2022.
Remuneration of Public Office Bearers Act 20 of 1998
Determination of salaries and allowances of Traditional Leaders, Members of National Houses and Provincial Houses of Traditional Leaders. Proc73 *GG*47125/12-7-2022.
Road Accident Fund Act 56 of 1996
Form RAF 1. BN302 *GG*46652/4-7-2022 and GN2235 *GG*46661/4-7-2022.
Road Accident Fund: Adjustment of statutory limit in respect of claims for loss of income and loss of support. BN310 *GG*47133/29-7-2022.
Skills Development Act 97 of 1998
National Apprenticeship and Artisan Development Strategy 2030. GN2303 *GG*47061/22-7-2022.
Special Investigating Units and Special Tribunals Act 74 of 1996
Referral of matters to existing Special Investigating Unit: OR Tambo District Municipality. Proc R80 *GG*47107/29-7-2022.
Referral of matters to existing Special Investigating Unit: Eastern Cape Department of Health and Midvaal Local Municipality. Proc R71 and Proc R72 *GG*46681/8-7-2022.
Standards Act 8 of 2008
Standards Matters. GenN1163 *GG*47061/22-7-2022.
Standards matters: New standards, revision standards and cancelled standards. GenN1190 *GG*47133/29-7-2022.
Tax Administration Act 28 of 2011
Reappointment of the 2017 – 2022 Panel of Tax Court Members. Proc R81 *GG*47107/29-7-2022.
The South African National Roads Agency Limited and National Roads Act 7 of 1998
Gauteng Freeway Improvement Project, Toll Roads: Publication of Tolls Errata. GN2316 *GG*47108/29-7-2022.
Water Services Act 108 of 1997
Disestablishment of Sedibeng Water, extension of area of Bloem Water and extension of area of Magalies Water. GN2310 – GN2312 *GG*47094/26-7-2022.
World Heritage Convention Act 49 of 1999
Amended format and procedure for nomination of World Heritage Sites. GN2251 *GG*46685/8-7-2022.

Legislation for comment

Allied Health Professions Act 63 of 1982
Regulations relating to the profession of therapeutic massage. GN R2296 *GG*47054/21-7-2022.
Architectural Profession Act 44 of 2000
Notice in terms of s 36(2): South African Council for the Architectural Profession: Draft Council nomination rules. BN311 *GG*47133/29-7-2022.
Auditing Profession Act 26 of 2005
Notice of request for public comments on proposed Independent Regulatory Board for Auditors Rule on Enhanced Auditor Reporting for the Audit of Financial Statements: Comments are requested by 5 October 2022. BN309 *GG*47061/22-7-2022.
Cybercrimes Act 19 of 2020
Invitation for comment. GN2292 *GG*47021/15-7-2022.
Department of Forestry, Fisheries and the Environment
Game Meat Strategy for South Africa, 2022: Consultation on the draft. GN2293 *GG*47024/18-7-2022.
Electricity Regulations Act 4 of 2006
As set out in s 6 of the Promotion of Administrative Justice Act 3 of 2000. Notice of intention to apply for expropriation. GenN1188 *GG*47133/29-7-2022.
Financial Intelligence Centre Act 38 of 2001
Section 43A(1) of the Act: Joint consultation in the notice on Draft Directive 6/2022 and Draft PCC 116 for consultation. GN2319 *GG*47133/29-7-2022.
Independent Communications Authority of South Africa Act 13 of 2000
Notice of public hearings of discussion document on the optimisation of the frequency modulation sound broadcasting. GenN1173 *GG*47088/25-7-2022.
Infrastructure Development Act 23 of 2014
Extension of deadline for submission of written inputs. GN2245 *GG*46675/1-7-2022.
International Trade Administration Act 71 of 2002
International Trade Administration Commission of South Africa: Deputy Chief Commissioner (five years). GenN1174 *GG*47097/27-7-2022.
Labour Relations Act 66 of 1995
Cancellation of registration of a trade union. GenN1159 *GG*47056/21-7-2022 and GenN1160 *GG*47057/21-7-2022.
Notice of intention to cancel the registration of a trade union: National Security Commercial and General Workers Union (LR2/6/2/766). GenN1187 *GG*47133/29-7-2022.
Notice of intention to cancel the registration of an employers' organisation. GN2281 *GG*47015/15-7-2022.
Meat Safety Act 40 of 2000
Invitation for comment on regulations for fees to be published under the Act. GN2255 *GG*46688/8-7-2022.
Merchandise Marks Act 17 of 1941
Invitation for comment on the prohibition on the use of certain words and emblems associated with the 2022 Rugby World Cup 7's to be hosted in South Africa. Gen N1135 *GG*46660/5-7-2022.
Invitation for comment on the 2022 Rugby World Cup 7's as a protected event. GenN1136 *GG*46660/5-7-2022.
National Environmental Management Act 107 of 1998
Consultations and proposed regulations. GN2234 *GG*46654/4-7-2022, GN2244 *GG*46674/6-7-2022,GN2239 *GG*46665/5-7-2022, GN2265 *GG*46688/8-7-2022, GN2272 *GG*47112/11-7-2022, GN2273 *GG*47112/11-7-2022 and GN2274 *GG*47112/11-7-2022.
National Environmental Management: Air Quality Act 39 of 2004
Draft eighth National Inventory Report for comment. GN2321 *GG*47133/29-7-2022.
National Environmental Management: Biodiversity Act 10 of 2004
Draft African Penguin Biodiversity Management Plan. GN2302 *GG*47061/22-7-2022.
National Water Act 36 of 1998
Review of the National Water Resources Strategy. GN2327 *GG*47133/29-7-2022.
Pan South African Language Board Act 59 of 1995
Call for comment: Provincial Language Committee. BN312 *GG*47133/29-7-2022 and BN306 *GG*47019/15-7-2022.
Petroleum Products Act 120 of 1977
Intention to introduce a price cap or a maximum price for 93 Octane petrol. GN2305 *GG*47061/22-7-2022.
Social Assistance Act 13 of 2004
Call for comment on the amendments to the regulations relating to COVID-19 Social Relief of Distress issued in terms of s 32, read with s 13, as amended. GN R2246 *GG*46680/7-7-2022.
South African Schools Act 84 of 1996
An extension of comment period for the amendments to the Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure. GN2249 *GG*46682/8-7-2022.
World Heritage Convention Act 49 of 1999
Call for nominations of suitable persons to be appointed as members of the iSimangaliso Wetland Park Authority Board. GN2309 *GG*47093/26-7-2022.

Rules, regulations, fees, and amounts

Architectural Profession Act 44 of 2000
Guideline for professional fees in terms of s 34(2). BN307 *GG*47019/15-7-2022.
Dental Technicians Act 19 of 1979
Regulations regarding the registration and training of student dental technicians and student dental technologists. GN R2248 *GG*46681/8-7-2022.
Financial Intelligence Centre Act 38 of 2001
Financial Action Task Force Electronic Funds Transfers Directive 1 of 2022. GN2291 *GG*47019/15-7-2022.

Financial Markets Act 19 of 2012
Approved amendment to the Johannesburg Stock Exchange Equities Rules – s 6. BN304 *GG*46688/8-7-2022.
Labour Relations Act 66 of 1995
Withdrawal of Code of Good Practice: Managing Exposure to SARS-CoV-2 in the Workplace, 2022. GN R2308 *GG*47062/22-7-2022.
Land Survey Act 8 of 1997
Prescription of the fees set out in the annexures, as the fees which shall be charged for products and services provided by the offices of the Chief Surveyor-General, Surveyors-General and Chief Directorate: National Geospatial Information. GN2289 *GG*47019/15-7-2022.
Liquor Products Act 60 of 1989
Limitation on the use of certain particulars in connection with the sale of liquor products: Amendment. GN R2247 *GG*46681/8-7-2022. Mead regulations, Wine of Origin Scheme, regulations and limitation on the use of certain particulars in connection with the sale of liquor products: Amendments. GN R2276 – GN R2279 *GG*47015/15-7-2022.
Medicines and Related Substances Act 101 of 1965
Regulations made in terms of the Act: Amendment. GN R2295 *GG*47053/21-7-2022.
Publishing Notification of Retention Fees Payment. GN R2297 *GG*47055/22-7-2022.
Medicines and Related Substances Act 101 of 1965
Regulations relating to a transparent pricing system for medicines and scheduled substances: Dispensing fee for pharmacists. GN2266 *GG*46688/8-7-2022.
Mineral and Petroleum Resources Development Act 28 of 2002
Amendment of the Mineral and Petroleum Resources Development Regulations, 2004. GN R2243 *GG*46673/6-7-2022.
National Environmental Management: Integrated Coastal Management Act 24 of 2008
General discharge authorisation in terms of s 69(2). GN2290 *GG*47019/15-7-2022.
National Heritage Resources Act 25 of 1999
Proposed revised schedule of fees for applications made to the South African Heritage Resources Agency. GN2307 *GG*47061/22-7-2022.
Petroleum Products Act 120 of 1977
Regulations in respect of the single maximum national retail price for Illuminating Paraffin. Maximum Retail Price for Liquefied Petroleum Gas. Amendment of the regulations in respect of petroleum products. GN R2236 – GN R2238 *GG*46664/5-7-2022.
Political Party Funding Act 6 of 2018
Multi-Party Democracy Fund. GenN1147 *GG*47123/12-7-2022.
Project and Construction Management Professions Act 48 of 2000
Mentorship Bundle Fee Structure for *Gazetting*. BN308 *GG*47061/22-7-2022.
Remuneration of Public Office Bearers Act 20 of 1998
Determination of upper limit of salaries of the premier, members of the Executive Council and members of the North West provincial legislature. Proc 73 *GG*47051/19-7-2022.
Rules Board for Courts of Law Act 107 of 1985
Amendment of Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa. GN R2298 *GG*47055/22-7-2022.
South African Weather Service Act 8 of 2001
Regulations regarding fees for the Provision of Aviation Meteorological Services. GN2275 *GG*47124/12-7-2022.
Special Investigating Units and Special Tribunals Act 74 of 1996
Referral of matters to existing Special Investigating Unit: National Department of Health and Provincial Departments of Health, and Newcastle Municipality. Special Tribunal. Amendment of Proc R37 of 2019. Proc R74 – R78 GG47055/22-7-2022.
Statistics Act 6 of 1999
Consumer Price Index: May – April 2022. GN1161 and GN1162 *GG*47061/22-7-2022.

Jeniene Nadarajan, Johara Ally and Shanay Sewbalas are Editors: National Legislation at LexisNexis South Africa. ❑

Employment law update

By Monique Jefferson

Vicarious liability for sexual harassment

In *CS and Another v Swanepoel and Others* [2022] 7 BLLR 660 (WCC) the second plaintiff in this matter, hereinafter referred to as the complainant, instituted a claim for damages alleging that when she was 12 years old she was raped in the staff toilet by the acting principal of the Vleiplaas Primary School. She instituted her claim for damages against the acting principal, the school, and the Member of the Executive Council (MEC) for Education of the Western Cape. The acting principal instituted a counterclaim for damages alleging that he was falsely accused of rape and had not been found guilty of disciplinary charges against him.

The court had to determine whether the acting principal was guilty of sexual assault and, as such, liable for damages to the complainant. The court also had to consider whether the Education Department (the Department) and the school would be liable for damages on the basis that there was a breach of a legal duty to protect the complainant from harm. The court, therefore, had to determine whether there was in fact a legal duty to protect the complainant and whether it was reasonable to impose liability on the school and department in the circumstances.

The onus was on the complainant to prove the alleged sexual assault on a balance of probabilities. The court found that the complainant had discharged this onus and proven that she had been raped by the acting principal. This was because her version was corroborated by two independent witnesses, who confirmed that on the day in question, they saw the complainant leave the staff toilet and the acting principal followed her out with a wash rag in his possession, as alleged by the complainant. It was found that there was no reason for the witnesses to lie about what they saw. The acting principal, on the other hand, was not a good witness and came across as evasive. Furthermore, there was evidence that the acting principal had previously been convicted of sexual assault in relation to a minor but had failed to declare this in his application for his position. The court held that the complainant succeeded in proving that the acting principal committed a delictual act in the form of a physical, bodily assault on her of a sexual nature, which caused her both physical, as well as psychological harm. Furthermore, it was evident that she was suffering from post-traumatic stress disorder because of the assault. The acting principal was accordingly liable for damages.

As regards the liability of the Department and school, the case was premised on an alleged omission to properly vet the acting principal and the wrongful, negligent breach of a legal duty to protect the complainant from harm. The court placed a lot of emphasis on whether there was a legal duty on the Department and school to properly vet the acting principal for criminal activity, particularly in light of the fact that the position entailed working with children. When the acting principal had initially applied for a position as an educator, he completed a Z83 application form, which is a generic form that is commonly used to apply for positions in the wider public service. On the Z83 form an applicant is required to disclose whether they have ever previously been found guilty of any criminal offence. There is no qualification that such an offence must have arisen in the course and scope of employment. The acting principal provided a negative answer in response to this question. Given his previous conviction for sexual assault, the acting principal conceded that this response had been wrong. He conceded that if he had answered the question correctly and had provided particulars of his previous conviction he would probably not have been appointed as his conviction would have had a negative impact on his suitability to work with children. However, he claimed that he had simply made a 'mistake' when completing the form and had not deliberately filled in the form incorrectly in an effort to hide his criminal record.

Reference was made to a number of cases where it was held that there is a legal duty to act positively to prevent harm, especially to children, as well as the common law principle that educators and those who are in charge of schools are under a duty to exercise the same level of care towards the children that have been entrusted to them *in loco parentis*, as a reasonably careful father or mother would towards their own children. The court held that the Department, as the employer of the acting principal, was under a legal duty to vet the acting principal before accepting him as its employee in order to ensure that he had the requisite qualifications to teach children and that he was a suitable and fit person to work with children who would not pose a potential threat to children. It was held that the Department should have identified the potential risk of children being sexually assaulted and it should have taken reasonable steps to prevent such harm by conducting a thorough screening and vetting of the acting principal. It was found that the department negligently failed to discharge that duty and the MEC should be held liable for the wrongful conduct that arose because of that failure.

As regards liability of the school, in terms of the South Africa Schools Act 84 of 1996 the school governing body was responsible for the governance of the school, and it was the Department that was responsible for its management. No evidence was lead that the school had any duty to screen and vet the acting principal prior to his appointment and, therefore, the school was not held liable.

In conclusion, the Department and the acting principal were held liable to the complainant for damages that she could prove. The acting principal was ordered to pay the costs of the application on the scale as between attorney and client and the Department on the party and party scale. The court also recommended disciplinary action and criminal prosecution in respect of the acting principal.

• See Law Reports 2022 (Aug) *DR* 20.

Dismissal for absence from work

In *Air Liquide (Pty) Ltd v Nkgoeng NNO and Others* [2022] 7 BLLR 636 (LAC), the employee was absent from work and was contacted by the branch manager regarding his whereabouts. The employee claimed that he was in fact on site and gave a description of his whereabouts,

but his branch manager could not find him there. The branch manager later phoned the employee and instructed him to come and see him. The employee alleged that he did go and see his branch manager but could not find him. The employee was dismissed for gross dishonesty for lying about being at work and gross insubordination for failure to obey an instruction to meet his branch manager. The employee referred a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) and the arbitrator accepted the employee's claim that he was at work. The dismissal was accordingly found to be substantively unfair, and reinstatement was ordered. This decision was based on the fact that the arbitrator accepted that a printout from the canteen was proof that the employee had been at work.

The employer took the matter on review to the Labour Court (LC) but the LC dismissed the review application. Both the CCMA and LC found that the printout from the canteen was proof of the employee's attendance at work as the veracity of the canteen printout had not been challenged. On the other hand, the employee had conceded that the depot was so small that there was no way his manager would not have seen him if he had been at work on that day. This printout was for the canteen and was not an actual attendance register for the worksite. Furthermore, no evidence was led regarding how close the canteen was to the worksite. Based on this, the Labour Appeal Court (LAC) held that no reasonable arbitrator could have reached this decision based on the printout from the canteen.

Furthermore, the CCMA arbitrator had made a finding that the employer's witnesses were unreliable, and the employee was a credible witness, but he set out no legal basis for making such a credibility finding. The LAC found that these findings were not rationally connected with the evidence. In this regard, the arbitrator failed to consider that the employee corroborated the evidence of the employer's witnesses and, therefore, the LAC was of the view that the employer's witnesses were more reliable than the employee. In this regard, the employee confirmed that he was not seen at work on the day in question, he confirmed that his manager had not seem him and that the workplace was so small that there was no way his manager would not have seen him if he was present. Furthermore, he confirmed that he had told his manager that he was at boiler four and that his manager had not found him at boiler four and that he did not go and see his manager after being requested to do so. He also confirmed that he only signed the attendance register the next day. The LAC found that this evidence led to a finding that the employee was not present at work and the LC should have found that the arbitrator's finding was not rationally connected to the evidence before him. This was, therefore, not a decision that a reasonable decision maker could make, and the arbitration award was set aside. The LAC found that the dismissal was substantively and procedurally fair and no order was made as to costs.

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

By Moksha Naidoo

Labour Court's jurisdiction in respect of contractual disputes

NEHAWU and Others v UNISA and Another (LC) (unreported case no J569/22, 21-6-2022) (Nukutha-Nkontwana J)

The employees wore two caps: They were all elected shop stewards within the structure of the applicant trade union, as well as employees of the University of South Africa (Unisa).

On 19 April 2022, Unisa served the employees with a notice of immediate suspension wherein they were given until 22 April 2022, to provide reasons why their employment should not be summarily terminated. Unisa's stance stemmed from allegations that the employees incited fellow employees to embark on an unprotected strike during which time, employees disrupted graduation ceremonies and the university's academic programmes. In addition, Unisa took the view that such conduct brought its name into disrepute.

On 6 May 2022, the employees were all served with a notice of termination.

On 18 May 2022, the union on behalf of the employees launched an urgent application, in terms of s 77(3) of the Basic Conditions of Employment Act 75 of 1997 (the BCEA), at the Labour Court (LC) seeking an order –

- declaring the dismissals of the employees invalid and of no force and effect;
- interdicting the employer from terminating the employment contracts without first following the employer's disciplinary code and recognition agreement with the union; or
- alternatively, reinstating the employees pending a determination of an unfair suspension disputed referred to the Commission for Conciliation, Mediation and Arbitration (CCMA) or an internal disciplinary process or an unfair dismissal dispute which would be referred to the CCMA.

The respondent raised two preliminary points, namely –

- the first dealing with urgency; and
- the second pertaining to the court's jurisdiction to hear the matter.

Urgency

The union launched its claim on 18 May 2022, some ten days after its members' employment contracts had been terminated. In its founding affidavit the union argued that it had no easy access to legal representatives. The court rejected this argument on grounds that the union was not a novice union.

The union further argued that it would not obtain substantial redress in due course (which in turn supported grounds for urgency) simply because the employer's argument was unlawful. The court, in relying on binding authority, rejected the notion that an alleged unlawful breach of an employment contract, automatically gives rise to urgency.

Lastly, on the issue of urgency, the union argued that pursuant to the financial hardship its members would face if the matter was not disposed of by way of urgency; was an additional factor, which warranted the court to dispense with the normal rules and deal with the matter on an urgent basis. The court noted that the general principle is that financial hardship does not induce urgency – the exception being, if the applicant can demonstrate exceptional circumstances that arise out of the financial hardship, such as losing one's home. On the papers before it, the union failed to show any exceptional circumstances that would justify the court to hear the matter on an urgent basis.

Having found that the matter ought to be struck off the role for lack of urgency,

the court nevertheless entertained the employer's second point *in limine* regarding jurisdiction.

Unisa argued that the union's case was essentially one wherein they challenged the fairness of their members' dismissals. While the union stated in its founding affidavit that the matter was launched within s 77(3) of the BCEA, the union failed to edify the court how the disciplinary code should be read into the employment contract as a term and condition of employment.

The court agreed with the employer's argument on this score and went further to state the fact that it had no jurisdiction to hear a claim wherein it is alleged that a dismissal is unlawful or invalid.

However, even if the code ought to have been read into the employee's respective contracts – a further hurdle for the union was that the contracts had already been terminated by the time the application was heard and, therefore, not susceptible to a contractual challenge.

In addressing this point further, the court referred with approval to the matter of *SAMWU v Tswaing Local Municipality and Others* (LC) (unreported case no J1230/20, 17-11-2020) (Moshoana J) where the LC in that matter stated:

'In my view where a contract of employment is terminated or cancelled, whether lawfully or unlawfully, fairly or unfairly, the jurisdiction of this court under section 77(3) cannot be invoked. In this regard, I am fortified by the language employed by the legislature. The word "concerning" is used as a preposition in a present continuous tense. If the legislature had in mind a matter involving a terminated contract, it could have used a verb like "concerned" … . Therefore, in my view, at the time the Labour Court hears and determines a matter, the contract must be still extant. My view obtains further substance and fortification from the phrase "irrespective of whether any basic condition of employment constitutes a term of that contract." Clearly a contractual dispute arises on the basis of the terms of an existing contract. Where a contract has been terminated or cancelled, its terms are no longer binding on the parties. In short a cancelled contract is incapable of being enforced unless the right to cancel is placed in dispute … . Contractually, the Municipality is entitled to terminate by simply giving one-week notice. If that is done, there can be no speak of breach and/or repudiation which will entitle the applicant to some contractual remedies. At its discretion the Municipality may terminate without notice and/or may hold a disciplinary hearing. In *Nyathi v Special Investigating Unit* [[2011] 12 BLLR 1211 (LC)], this court per Basson J stated the following:

"In principle therefore, an employer has the right contractually to terminate the contract. Whether the termination will also be fair is entirely a different question and not relevant in these proceedings. Where a contract is terminated unlawfully it will usually also constitute an unfair termination. The reverse is, however not always true."'

Applying the same principle on the facts before it, the court held that it lacked jurisdiction to hear the contractual dispute on the basis that the contracts were already terminated.

The court furthermore rejected the union's argument that the contractual claim emanated from the employees' constitutional right to fair labour practice. In doing so, the court applied the trite principle that an applicant cannot circumvent enabling legislation and rely directly on the constitution, unless the applicant makes out a case that the provision in the enabling statute is unconstitutional.

In a final attempt to argue the court's jurisdiction, the union put forward authority to justify the fact that the LC has jurisdiction in terms of s 158(1)(*a*)(iv) of the Labour Relations Act 66 of 1995 to declare a dismissal unlawful.

Referring to *Steenkamp and Others v Edcon Ltd (National Union of Metalworkers of SA Intervening)* (2016) 37 ILJ 564 (CC), the court rejected the notion that it had such power and authority.

The union then sought to ask for an interim order of reinstatement pending the finalisation of the CCMA disputes it had or would be referring. Adopting the approach set out in the Labour Appeal Court (LAC) decision of *De Beer v Minister of Safety and Security/Police and Another* [2013] 10 BLLR 953 (LAC) (wherein the LAC held that in light of the nature of the remedy of reinstatement, it is not possible to grant interim reinstatement without dealing with crucial aspects of the dismissal itself, albeit indirectly and furthermore a court cannot reinstate an employee unless the dispute is brought before it in terms of s 191 of the LRA); the court held:

'Given the fact that reinstatement is intrinsically final, it cannot be granted on interim basis. The LAC made it clear in *De Beer* that the Labour Court is debarred from pronouncing on the fairness of the dismissal when there has been no compliance with the jurisdictional requirements provided for in section 191 of the LRA.'

The application was dismissed with no order as to costs.

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

Recent articles and research

By Kathleen Kriel

Abbreviation	Title	Publisher	Volume/issue
BTCLQ	Business Tax and Company Law Quarterly	SiberInk	(2022) 13.1
Fundamina	Fundamina	Juta	(2021) 27.2

African constitutional law

Mujuzi, JD 'Mandatory bail in Uganda: Understanding Article 23(6) of the Constitution in the light of its drafting history' (2021) 27.2 *Fundamina* 38.

Maritime law

Surbun, V 'The pirate as *Hostis Humani Generis*: The illegitimate enemy' (2021) 27.2 *Fundamina* 67.

Regulation of medical profession

Wildenboer, L 'Raising the yellow flag: Legal regulation to contain the spread of smallpox and other contagious diseases in the Zuid-Afrikaansche Republiek' (2021) 27.2 *Fundamina* 87.

Tax Administration Act

Rudnicki, M 'Reportable arrangements under the TAA: An overview' (2022) 13.1 *BTCLQ* 27.

Tax exemptions

Seligson SC, M 'A purposive interpretation of the "qualifying purpose" exemption in sections 8E and 8EA of the Income Tax Act' (2022) 13.1 *BTCLQ* 7.

Tax liability

Clegg, D 'Source and the remote worker' (2022) 13.1 *BTCLQ* 1.

Traditional African Institutions

Mamashela, M 'The history of the creation of the customary law of marriage and divorce in the Natal Colony, Zululand and KwaZulu from 1869 to 1985' (2021) 27.2 *Fundamina* 1.

Value-Added Tax Act

Kruger, D 'VAT and the issue and redemption of tokens, stamps and vouchers' (2022) 13.1 BTCLQ 16.

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

Talent approach for sustainable law firms

By Melusi W Kubheka

We have recently seen the global commercial ecosystem being reorganised as the COVID-19 pandemic unleashed untold destruction on trade, lives, and livelihoods. The professional services industry was not spared from this destruction, especially the legal fraternity. Two years later, the pandemic has somewhat eased up, the economy is recovering, courts are now accessible, and we are seeing some degree of return to normality.

Even as we return to what may look like the pre-pandemic operating context, many are counting the cost of human capital on the pandemic. Together with a host of other forced business considerations on revenue and capital management, legal practitioners would be wise to rethink their approach to managing people, otherwise referred to in the business context as talent management. There is a lot that goes into managing your human capital than simply processing payments at month end.

This is especially true for legal practitioners who operate practices that employ several people in administrative and professional roles. Law firms have the potential to exist and continue to be viable practices even when the founding partners are no longer around. We must often think about what will happen if the principal in a law firm, is no longer in a position to work on a permanent basis due to retirement or death or even on a temporary basis due to incapacitation.

The answer lies in effective talent management approaches, and these rarely happen by luck. Deliberate efforts to hire the right talent, invest in their development and retain them are some of the building blocks of effective talent management. It is not a process that is suitable only to big business, but it is even more relevant to small and medium sized businesses who face a real threat of extinction due to unexpected talent constraints.

A law firm is as good as the people it employs and what sets one law firm apart from another is its ability to attract talented individuals and keep them productive and motivated over time. From an employee's perspective this requires the employer to answer the question of

'what is in it for me?' This concept is known as an employee value proposition. You may run a firm of three people, or 30 people and still need to consider the question of why employees would choose your firm as opposed to the one down the road. Only running a vanilla type of a firm, that just blends in with every other firm, does very little to attract talented individuals to your firm. The 'war for talent', a phrased popularised by the Mckinsey Consulting Firm in 2001 is just as relevant to professional services firms as to big corporate (Scott Keller 'Attracting and retaining the right talent' (www.mckinsey.com, accessed 3-8-2022)). The suggestion by Mckinsey is that every firm requires top talent to be successful and this cannot be attained passively. The firm must have a strategy and approach that is appealing to its intended talent pool for attraction and retention purposes. The emphasis is on the word 'choose' as opposed to being the only one hiring at the time. There are several differentiators that law firms may want to explore when it comes to building a unique employer brand instead of the generic approach.

Some of these initiatives may include the following:

- The type of work the firm engages in – criminal, civil, generic, community based, good of the nation at one end and highly complex commercial litigation on the other end. This aspect also talks to the purpose of the practice. No matter the type of work or assignments, it is important that candidates are clear about what their day-to-day engagements will entail to avoid disappointment and recruitment failures.
- The values and culture of the law firm. Is it an inclusive environment where each person is valued and given the space to contribute for instance; are results achieved at all costs or do values set the boundaries? What are the views on diversity for instance?
- The approach to developing people, investing in continuous professional development, providing critical experiences through how work gets assigned, and designing a clear career development path aligned to individual aspirations.
- By ensuring a competitive reward and remuneration system; ideally one that is linked to performance and contribution.
- By developing and adhering to documented policies and procedures to create an environment of transparency and trust.
- How are wins celebrated and how losses are remembered? Is there a punitive culture or one that fosters continuous learning from unsuccessful events, respect for individual dignity and encourage honest conversations?

The above are basics that the practice will need to think about in order to start the path to sustainability. These activities are not an end on their own, but aimed at achieving the following outcomes:

- Happy employees equal to happy clients. Your employees become your brand ambassadors, and this not only may lead to new business, but also other talented employees may be interested in joining your firm.
- Legal work is built on reputation, lasting relationships, and trust. Retaining your team for longer minimises the risk of losing clients as they 'follow the trusted practitioner' to wherever they may have gone to. Above that, the team learns to work well over time, building on each other's strengths and augmenting developmental areas. The system takes time to optimise and realise the return on time and money invested.
- The approach also enables you to plan for long term firm sustainability and start having quality succession conversations and plans. The plans may be about cover for critical jobs in the firm and future leadership/partnership opportunities. Development can also be linked overtime to building this succession pipeline.

The twist, however, is that the return derived from investing in talent development will only be limited by who you have recruited. This is one of those instances where the old adage rings true, 'you cannot force a horse to run faster than it has strength'. With the right interventions, individuals will certainly improve, however, it is imperative to have a clear understanding of what the talent pool looks like. Gone are the days of simply looking at an academic record to shortlist candidate legal practitioners and then at the interview ask them a few general questions to decide on who to hire. This is a person that may be with your firm for years to come; they will interact with your clients and other colleagues, more effort must be employed to ensure that there is a comprehension of the future growth and deployment potential to be exploited.

Needless to say, the above requires expertise in talent management and lawyers are not quite specialists in this area; neither do they have time. The cost of employing a full time Talent Management Practitioner may not be justifiable in a firm that employs a handful of individuals. The use of consultants as appropriate is a cost-effective alternative that can save you money and reputational harm in the long run. At the hiring stage, for instance, psychometric assessments may need to be conducted to determine the cognitive ability, personality, and aptitude of the candidate. While these come at a cost, they are essential for ensuring that the new hire fits in with the longer-term plans of the firm. This will also be applicable when considering who to develop for future leadership positions or succession. It must always be borne in mind that technical excellence does not always equate to leadership potential. We have seen many brilliant lawyers and even salespeople fail dismally at leading others and coordinating strategic priorities that guide the firm into the future.

Taking business management courses, even online, may bolster the firm's knowledge of talent management and so is attending conferences and seminars in this area. These are overheads and a small price to pay for ensuring sustainability of your practice. Simply ignoring the issue and hoping for the best may not be a fruitful exercise. This article does not solve the firm's talent problems, however, it is aimed at igniting an appreciation of how legal practitioners think about talent management and how it is built into their sustainability strategy.

Melusi W Kubheka *BA (UKZN) BA Hons (UNISA) LLB LDRP (Wits)* is a non-practicing legal practitioner in Johannesburg. ❑

YOUR LEGACY CAN CHANGE LIVES...

Many people would love to support a worthy cause, but may not have the disposable income to do so at this time in their lives.

When you are drafting your will, first take care of your loved ones, then please consider leaving a gift to SA Guide-Dogs Association for the Blind. A charitable legacy is exempt from Estate Duty.

Your legacy will give the gift of Mobility, Companionship and Independence.

For more information, please contact
Pieter van Niekerk
PieterV@guidedog.org.za or
011 705 3512

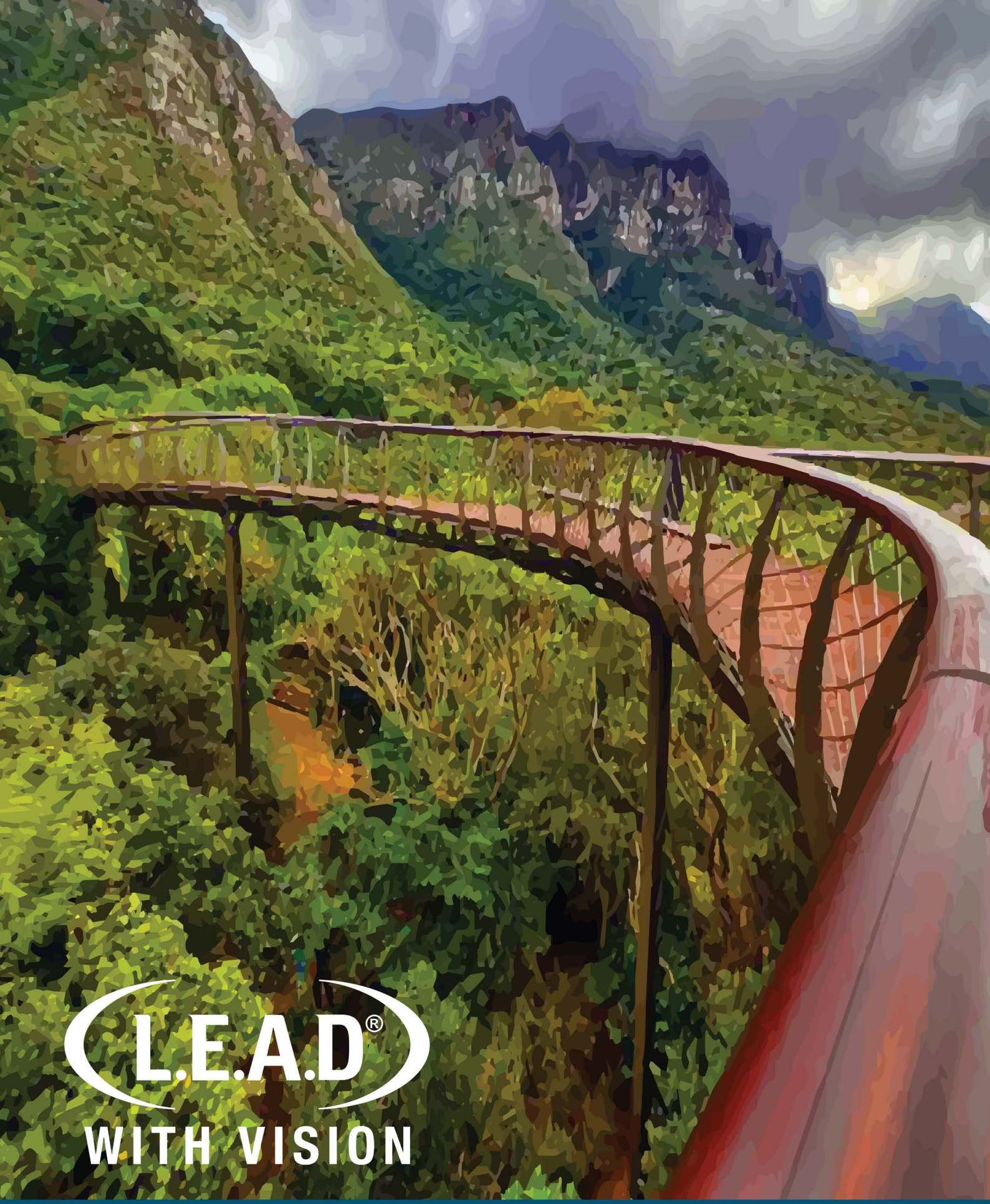
SOUTH AFRICAN GUIDE-DOGS PHOENIX CLUB

GUIDE-DOGS ASSOCIATION
South Africa

To find out more about the exclusive benefits of our Phoenix Club available to 55+ year olds, contact **Pieter**

@SAGuide_Dogs **SA Guide-Dogs** **@sa_guide_dogs**

Johannesburg - Tel: 011 705 3512 **Western Cape** -Tel: 021 674 7395 **Kwa-Zulu Natal** - Tel: 082 875 6244
E-mail: info@guidedog.org.za



The Kirstenbosch Centenary Tree Canopy Walkway, also known as *The Boomslang*, takes visitors on a 130 metre-long walkway, snaking its way through the canopy of the National Botanical Garden's Arboretum. The walkway is crescent-shaped and takes advantage of the sloping ground, touching the forest floor in two places and raising visitors to 12 m above ground in the highest parts. Kirstenbosch National Botanical Garden was established in 1913 to promote, conserve and display the extraordinarily rich and diverse flora of southern Africa. It was also the first botanical garden in the world to be devoted to a country's indigenous flora.

LAW SOCIETY OF SOUTH AFRICA

L.E.A.D® LEGAL EDUCATION & DEVELOPMENT