LAW SOCIETY OF SOUTH AFRICA

DE REBUS

THE SA ATTORNEYS' JOURNAL

JANUARY/FEBRUARY 2023

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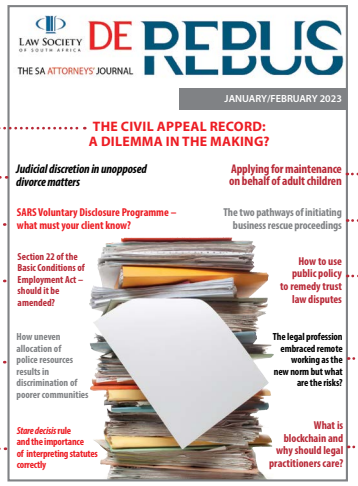

January/February 2023
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11 The civil appeal record: A dilemma in the making?

The inclusion of unnecessary pages in a civil appeal record has caused the Supreme Court of Appeal recently to repeat its warning to practitioners to apply their minds when assembling civil appeal records, writes legal practitioner, **Danie Schutte** and legal practitioner and Senior Lecturer, **Dr Llewelyn Curlewis**. The authors argue that, among other things, the inclusion of unnecessary pages cause wasted expenditure, prejudices judges' time management, and increases storage costs. To remedy this, Mr Schutte and Dr Curlewis provide a step-by-step guide to compiling a civil appeal record.

14 Section 22 of the Basic Conditions of Employment Act – should it be amended?

The impact of the COVID-19 pandemic has had dire consequences for employees because the sick leave cycle provided in s 22 of the Basic Conditions of Employment Act 75 of 1997 (BCEA) was insufficient. Senior Lecturer, **Dr Nombulelo Queen Mabeka**, discusses a number of judgments in which employees were dismissed for excessive use of sick leave. She writes that in one example the Labour Court considered the provisions of s 22 of the BCEA and held that the employer's decision to dismiss the employees was correct. Dr Mabeka writes that the time has now come to amend the stipulations of s 22 of the BCEA to accommodate both employers and employees.

17 Applying for maintenance on behalf of adult children

In *Z v Z* 2022 (5) SA 451 (SCA) the mother of two adult children applied for maintenance in divorce proceedings. The father entered a special plea against the maintenance claim stating that the adult children can claim maintenance on their own behalf and should not be included in the divorce proceedings. The court dismissed the defendant's special plea. Mediator, **Natalie Ruiters**, writes that hopefully now maintenance officers will be able to use this judgment to reject non-custodial parent's applications for discharge of maintenance orders based on the minor child turning 18.

Regular columns

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Calling all attorneys to attend the Provincial Associations' meetings

Since 2019, the Law Society of South Africa (LSSA) has been holding meetings for the establishment of provincial attorneys' associations in the nine provinces of South Africa. The establishment of provincial associations is set out in the preamble of the LSSA constitution, which states:

'We, the representatives of legal practitioners in South Africa, the Black Lawyers Association, the National Association of Democratic Lawyers, the Independent Lawyers Associations from the nine provinces of South Africa as the constituent members of the Law Society of South Africa, in recognising the changes brought about by the Legal Practice Act [28 of 2014]:

- having realised the impact of the Legal Practice Act and agreed to the restructuring of the legal profession and its governing bodies and having adopted the principles contained herein;
- having agreed in principle to the creation of a national voluntary structure with a national executive body to represent the profession;
- having agreed that the new national structure shall be neither unitary nor federal but could comprise elements of both;
- having co-operated formally since July 1996 via an agreement between the Black Lawyers Association, the National Association of Democratic Lawyers, the Law Societies of the Free State, KwaZulu-Natal, the Northern Provinces, and the Cape Provinces; and
- having decided to further transform the governance and representation of the legal profession in South Africa;
- having noted that the provincial law societies will cease to exist, the local associations or circles will form a provincial lawyers' association in each province. These associations shall consist of the Black Lawyers Association, the National Association of Democratic Lawyers, and the independent constituents. The independent attorneys of each of the provincial associations shall nominate a provincial representative to the House of Constituents;
- having noted that the Legal Practice Act places the regulatory functions with the Legal Practice Council;
- commit ourselves to building a transformed organised legal profession which is non-racial, non-sexist, democratic, representative, transparent and accountable to all whom it serves and the public at large; and to that end we shall strive to advance the interests of women, the youth and people living with disabilities;
- commit ourselves to protecting and advancing the rights and interests of our members in relation to the regulatory activities of the Legal Practice Council and other authorities; and
- commit ourselves to influence the transformation of the economic structure in South Africa in order to advance the interest of our members, particularly the previously disadvantaged' (see www.LSSA.org.za, accessed 30-1-2023).

In 2023, the LSSA is coordinating meetings of the various Provincial Associations. The objective is to ensure that practical activities for the benefit of practitioners are effective and address the concerns and challenges facing practitioners within the region. In addition, the meeting will advise on assistance required and report on activities that address practitioners' challenges at a local level (issues on the ground).

The Provincial Association meetings will be held for the benefit of local practitioners. All practitioners in the particular province are invited to the meeting, so that they can be informed on the progress and activities of the association, which is in the interest of all practitioners in the province, wherever they are based.

Members of the LSSA House of Constituents/Council from the Provinces will avail themselves to attend the meetings. The LSSA's Executive Director, Anthony Pillay, will also attend these meetings to talk to and listen to members and the Association and offer assistance and guidance where needed.

Many towns still have their local associations active, and provinces must include these members in their communications and engagements. All

Mapula Oliphant – Editor

meetings will be held at 4 pm. The meeting will be hybrid (physical and virtual via ZOOM) to encourage participation.

Venue details will be circulated where these are not yet confirmed:

- 2 February 2023 – Mpumalanga, Middelburg – Middelburg Country Club.
- 7 February 2023 – Limpopo, Polokwane – Park Inn by Radisson.
- 9 February 2023 – KwaZulu-Natal, Durban – Durban Country Club.
- 14 February 2023 – Western Cape, Cape Town – SunSquare Cape Town City Bowl.
- 21 February 2023 – Eastern Cape, East London – Hemingways.
- 2 March 2023 – Northern Cape, Kimberley – Ambassador Lodge.
- 7 March 2023 – North West – TBC.

The LSSA has agreed that where there are Task Team meetings (Association not yet established), practitioners within the province are invited to participate in meetings, physically where possible or via the ZOOM option. All meetings are hosted by the Provincial Executive or Task Team members (where applicable). Kindly extend this invitation to fellow practitioners or colleagues. Practitioners are urged to join their provincial association as it is in their best interest.

The legal profession embraced remote working as the new norm but what are the risks?

By Cledwin Dzinamarira

The global COVID-19 pandemic has led to a sudden change in the way many organisations work, and the legal profession is not an exception to this new normal. This has resulted in a drastic increase in employees who have little or no previous experience inworking remotely. The purpose of this article is to interrogate the risks or challenges posed by remote working using technology in the legal profession. According to MH Olson and SB Primps working from home or remote working refers to 'organisational arrangements which are enabled by technological advancements that allow employees to work at home on a regular basis, as a substitute for attendance at the normal workplace' (Olson and Primps 'Working at home with computers: Work and nonwork issues' (1984) 40 *Journal of Social Issues* 97). Those involved in working remote rely on information technology and telecommunications in executing their duties.

Zia Qureshir argues that technological advancements and rapidly shifting economic norms have transformed and shaped the way the legal profession functions (Z Qureshi 'How digital transformation is driving economic change' (www.brookings.edu, accessed 14-12-2022)). Unfortunately, the existing regulatory restraints and public policy considerations within the legal profession are not keeping up with technological advancements, hence exposing the profession to various challenges as discussed in this article.

Cybersecurity risk

With the recent developments in technology and growth in its use, the storage of information online or in the cloud has become a common phenomenon. The American Bar Association 2021 Legal Technology Survey Report (2021) submitted that, although this method of storing information has proven to be very effective, the challenge of cyber breaches and data theft has also been on the rise. Interestingly, law firms have also become targets of cyber criminals that perpetrate these infractions.

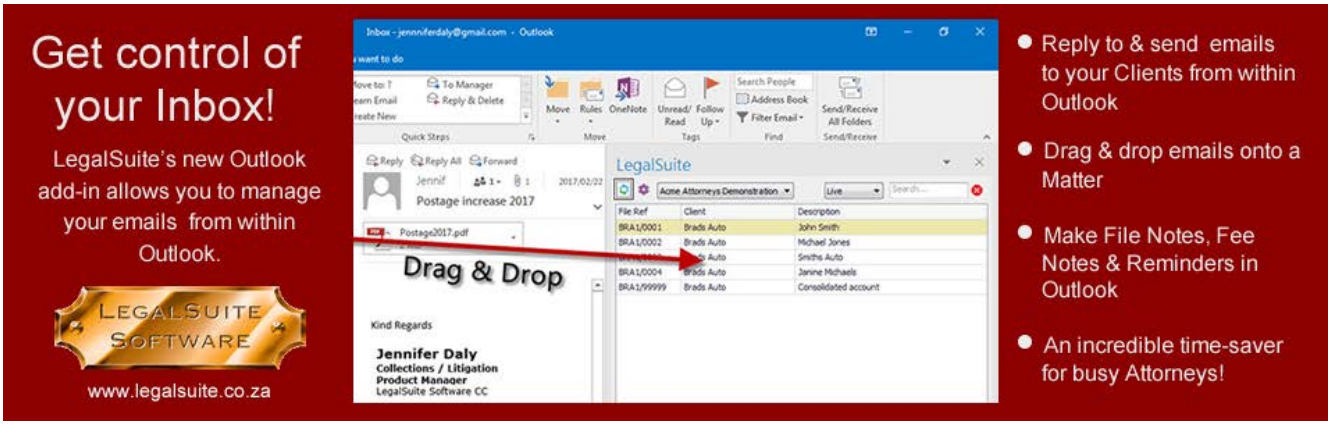
The growth in technology has led to a sudden shift in the storage of information from physical storage systems to online storage platforms. Individuals and organisations are now beginning to save their information online and the reasons for this development are not farfetched. This requires them to have protection against the criminal or unauthorised use of electronic data.

The outbreak of COVID-19 has also encouraged and facilitated an increase in the online storage of information by law firms. This emerged as the various lockdown orders halted the movement of goods and persons and as a result, several organisations and businesses have had to work and operate remotely. To be able to access relevant data and work effectively, while working remotely, many organisations have had to adopt several digital means of storing their relevant data.

However, the storage of information through online and digital means does not occur without some challenges. Indeed, with the increase in online and digital storage of information, cyber-attacks and data breaches by cyber criminals are now a very common phenomenon in the world today. Cyber-attacks mainly occur without the knowledge and consent of their victims (S Ugboaja, M Osuo-Genseleke and C Chigozie-Okwum 'Cyber-attacks: A literature Survey. 2nd International Conference on Education and Development' (2019) (www.researchgate.net, accessed 2-12-2022)). Additionally, the cybercriminals either utilise these accesses and information they get, for their personal use or sell them to other persons who may require them.

Although cyber threats are mostly preventable, it is impossible to fully eliminate them. Therefore, it is salient for law firms to have an idea of the possible cybersecurity risks that they are highly susceptible to. Cyber breaches can occur in various forms, but the ones that commonly affect law firms include ransomware, which attacked DLA Piper in 2017 (TitanFile 'DLA Piper ransomware hack: What can we learn from it?' (www.titanfile.com, 14-12-2022)), virus, malware, phishing (A Namaya, A Cullen, I Awan and J Disso 'The world of malware: An overview' (www.researchgate.net, accessed 14-12-2022)) and trojan (AG Johansen 'What is a Trojan? Is it a virus or is it malware?' (https://us.norton.com, 14-12-2022)).

To this end, law firms and lawyers need to pay more attention to their cy-



bersecurity. With the growing rate of cyber breaches, law firms cannot afford to be careless with the information of their clients within their possession. Procedures and protocols must be established by these law firms to ensure cyber hygiene.

Confidentiality risk

The legal profession's existence is hinged on the principle of 'lawyer client confidentiality' and it is the clients' expectation that all the information they share with their lawyers is protected through this principle. Legal practitioners receive, private, personal, and confidential information from their clients. The clients must disclose to them information that has not yet been made public or which is of a private and confidential nature. In other words, the legal practitioners must receive full information and instructions from their clients to render their services effectively. The High Court in the case of *Baker v Campbell* (1983) 49 ALR 385 held that disclosing such information to third parties or the public would cause potential or actual loss, harm and/or prejudice to clients. It is for the protection of clients that the legal privilege accorded to legal practitioners and client communication is recognised and enforced by law (see *S v Safatsa and Others* 1988 (1) SA 868 (A) at 878 – 887).

As noted in K Wagner and C Brett 'I heard it through the grapevine: The difference between legal professional privilege and confidentiality' 2016 (Sept) *DR* 22, to protect the sanctity of the attorney-client privilege and minimise in-roads into that privilege, legal practitioners are required to operate on premises that sufficiently offer attorney-client confidentiality and privacy. Most legal practitioners' governing bodies inspect any proposed premises before the commencement of business or any proposed change of premises to ensure compliance with the above requirements.

When consultations are carried out remotely, there are no guarantees of privacy and confidentiality. The possibility is so high for an employee to leave an important file on a table in a shared household, forward information to their personal e-mail account to print using their home printer, and use unsecured Wi-Fi networks, all of which leave the firm's data at risk. Meetings discussing confidential or sensitive business information are being conducted over third-party communication platforms.

Halpern & Scrom Law observed that when legal practitioners are working in the office, the above 'concerns are mitigated because employers can exercise control through overseeing employees, maintaining physical control over documents, domains, files, and electronic devices, and ensuring that employees utilize the employer's own secure network. Also, meetings with employees or clients are conducted in the privacy of the employer's office' (Halpern & Scrom Law 'Maintaining confidentiality when working remotely' (www.halpernadvisors.com, accessed 14-12-2022)).

In the case of *Smash Franchise Partners, LLC v Kanda Holdings, Inc* (2020 WL 4692287 (Del. Ch. Aug. 13, 2020)) the court held that it is high time that the legal profession adopts and enforces well-documented remote work procedures to ensure that employees protect confidentiality and continue to maintain the integrity of the legal profession. The procedures include choosing a safe, secure video-conferencing application, prohibiting employees from using certain unsecured programs and applications to communicate with other employees, collaborate on projects, or upload information (ie, personal e-mail address, unsecured Wi-Fi networks, or consumer cloud storage), and keeping an up-to-date log of all devices that are being used to work remotely to access the employer's network and confidential information, regardless of personal or company ownership (Halpern & Scrom Law (*op cit*)).

Moonlighting risk

Remote working increases the risk of moonlighting. 'Moonlighting' may be defined as the practice of working for another organisation while committing oneself to one company as the primary workplace typically without the employer's knowledge (Varum Bhagat 'Is Employee Moonlighting a Problem in the Age of Remote Working?' (2022) (https://customerthink.com, accessed on 2-12-2022)). If an employee undertakes moonlighting without notifying their employer, critical issues arise, including reduced visibility of potential risk for the company, and conflicts of interest with the organisation's policies and activities (Kelly-Ann McHugh 'Outside Business Activity: Putting the Spotlight on Moonlighting' (https://mco.mycomplianceoffice.com, accessed 14-12-2022). According to KPMG, there are two types of moonlighting (KPMG 'The moonlighting dilemma' (https://assets.kpmg, accessed 14-12-2022)). The first one is called 'zero or minimal overlap of time/professional commitments between the sources of employment an individual has' (KPMG (*op cit*)). There is less risk in this situation as the employee normally abides by the 'ethical construct of the corporate culture' (KPMG (*op cit*)). The second type, which presents high risk is called 'conflicted moonlighting'. This type violates 'time, professional, ethical or code of conduct commitments towards both the concurrent sources of employment along with direct or apparent conflict of interest. Instances of conflicted moonlighting are on the rise across [the legal sector] and [are] a common concern amongst employers' (KPMG (*op cit*)).

In legal practice, moonlighting is generally not allowed as it amounts to dishonourable and unprofessional conduct and violates the conditions on which practicing certificates are granted. A practicing certificate is offered to a legal practitioner working under a specific law firm. Once granted a legal practitioner is not allowed to do work for any other employee other than the specific law firm in question. In Zimbabwe moonlighting contravenes work ethics in terms of the Legal Practitioners Act (chapter 27:07). The introduction of remote working has made it difficult for law firms to properly supervise legal practitioners in order to protect against loss of business and protect their reputation.

Billing system

Remote working and its 'increasing use of advanced technology has possible ramifications on charges to clients'. 'Digitalisation changes the business model of law firms: The traditional model is that law firms sell time, whereas now that the machines use less time the firms will need to move towards selling value' (Dr F Strumia and Dr S Kebbell 'Technology: Implications on the nature of legal practice and the role of the international legal profession' (www.sheffield.ac.uk, accessed 14-12-2022)).

The existing 'time-based billing structure [is] incoherent and unreflective of work conducted in firms [and fails] to adequately adapt to the utilisation of both humans and technologies in producing legal advice' (Dr Strumia and Dr Kebbell (*op cit*)). 'The current business model of firms to sell time is not, … in keeping with this new method of supplying work and could lead to subsequent profit loss for firms. Investment in technology is undeniably costly, and this facet of service provision must be viably incorporated into billing models' (Dr Strumia and Dr Kebbell (*op cit*)). The future of law firms to sell work should be based on its quality, rather than the time and relevant seniority of the lawyer rendering such services (Dr Strumia and Dr Kebbell (*op cit*)).

Closely related to the above challenge is the risk that the 'performance' of an employer working remotely is less visible (DE Bailey and NB Kurland 'A review of telework research: Findings, new 3 directions, and lessons for the study of modern work' (2002) 23 *Journal of Organizational Behavior* 383). It is harder to see the amount of work and effort put into a job by the employee, and the time spent on work. Even if a person has been working for a long time on a particular

matter, they may not receive a benefit proportionate to those they would have received from a supervisor in traditional work where the effort would have been noticed and appreciated (Bailey and Kurland (*op cit*)).

Client discrimination

Working from home implies that the demographic group of those who are digitally literate is the one that benefits. Walk-in clients that do not appreciate technology are at a disadvantage as they will face difficulty in accessing justice. There is a great risk of leaving out those people in remote areas who do not have the technological infrastructure. This in turn violates the right to equality, protection of law and access to justice (T Mahleka 'Can technology be leveraged to improve access to justice' (www.humanrightspulse.com, accessed 14-12-2022)). Therefore, a limitation of access to justice is created because of remote working.

'There is little evidence of the use of technology in the judicial systems of developing countries. Even when technological innovations are operating outside of traditional judicial systems and offering viable alternatives, when thinking globally and considering that certain targets such as [Sustainable Development Goal 16] look to achieve access to justice for all, then one inevitably has to consider access to technology itself' (Mahleka (*op cit*)). The risk of leaving out part of societies' less privileged and less technologically literate is amplified by remote working. Firstly, it affects them through the cost of utilising online systems which require expensive internet connectivity. Secondly, it puts a limitation on those that are not computer literate. The United Nations Sustainable Development Goal 16 'focuses on peace, justice, and strong institutions. This goal is meant to be achieved by promoting peaceful and inclusive societies for sustainable development, ensuring access to justice for all, and building *effective, accountable, and inclusive institutions at all levels*' (Mahleka (*op cit*)). This is threatened by remote working.

Inspections

According to the International Bar Association: Regulation of Lawyers' Compliance Committee, law societies must ensure that law firms update information relating to practice and business – for instance, trust accounts, bookkeeping, and annual reports. Auditors' reports should be readily available for inspection. Legal practitioners must also operate on premises that protect the integrity of the legal profession. Remote working presents a major risk as law professional bodies find it difficult to carry out regular inspections to ensure regulatory compliance.

Conclusion

Technological advancements, which have occurred in the recent past indicate that the legal profession is undergoing a transformation. It cannot be denied that these technological advancements bring about enormous changes that threaten the legal profession. The findings suggest using technology while working remotely poses cyber security risks, confidentiality risks, moonlighting risks, billing system risks, access to justice risks, and compliance risks.

Technological innovations in the legal profession have been viewed as evolutionary rather than disruptive, and as a result, adaptation to change has been slower compared to other businesses. With the rate at which technology is evolving, however, embracing technology in the legal profession is no longer an option. The numerous risks or challenges highlighted above have arisen due to the widespread use of technology necessitate proactivity on the part of the legal profession the world over.

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Legal firms breached as data sold on dark web markets

By Rosanna Hayes

The risks associated with cyber extortion engulf every industry as cyberattacks make the headlines daily, and as cybercrime hits pandemic levels, we see a shift to data theft and extortion as criminal gangs grasp the opportunity for huge financial gains; their sights set on industries most likely to fold. The wealth of sensitive and confidential data retained by law firms draws the attention of threat actors, with details on intellectual property, trade secrets, evidence, mergers, and financial information up for grabs. This enticing data offers huge financial reward either through interception of client funds, or extortion and ransom potential, as those most affected by reputational harm and litigation are deemed likely to pay.

Business e-mail compromise and ransomware are substantial risks to the legal sector, with data breaches a likely result in both. And since South Africa's (SA's) introduction of the Protection of Personal Information Act 4 of 2013 (POPIA) in July 2020, the risk of litigation and reputational harm is increased, with public and private bodies regulated in the protection of personal information. POPIA imposes statutory penalties for violations of the law with 'a fine or to imprisonment for a period not exceeding 10 years, or to both a fine and such imprisonment' for those found negligent.

Noncompliance may not be the overriding financial concern for business in the region as highlighted in the IBM Cost of a Data Breach Report 2022 (www.ibm.com, accessed 10-1-2023). The survey found that the average cost to organisations in SA was R 40,2 million per breach, this grew to R 46 million in 2021, and R 49,25 million last year. Eighty-three percent of the organisations studied had experienced more than one data breach, with just 17% claiming this was their first incident. Investigations revealed the initial attack vectors of data breaches were through accidental data loss, cloud misconfiguration, phishing, insider threats, and stolen or compromised credentials.

However, organisations remain unprepared, as highlighted in the American Bar Association 2021 Legal Technology Survey Report (David G Ries '2021 Cy-

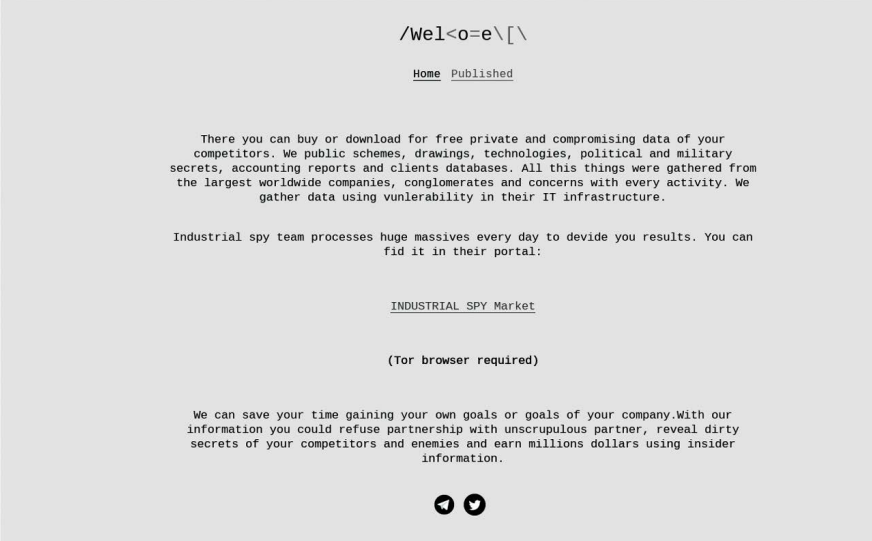
bersecurity' (www.americanbar.org, accessed 10-1-2023)). Twenty-five percent of the respondents reported their law firm had been breached, and yet only 27% reported they had a full security assessment. Further studies as outlined in the global State of Cloud Security 2020, found that 59% of South African breaches were through stolen credentials (Sophos 'The State of Cloud Security 2020' (www.sophos.com, accessed 10-1-2023)). POPIA requires that in the event of a data breach, businesses inform the Information Regulator, as well as the person or persons whose data has been compromised as soon as reasonably possible. And so, it is crucial that organisations in the region, in particular law firms, have a clear, effective, and robust incident response plan in place.

STORM Guidance has been observing the situation for some time, and while attending to several diverse cyber incidents in the last year or two, noted an overwhelming rise in the extortion of data as the primary leverage against victims. Echoing concerns over data security, we have seen these attacks carried out using various malware or phishing methods, with extracted sensitive information then sold to cyber criminal's black-market websites. These illegal trading sites, such as Industrial Spy market, now have an expanse of data that is bought and sold at a profit, exploiting stolen personal information for tremendous financial gain. Access to breached databases are supporting a wealth of criminality, with lucrative information such as account credentials, personally identifiable information (PII), credit card details, passports, medical records, National Insurance (NI) numbers, drivers' licences, and more.

Using a ransomware-style extortion process, breached data is made available to buyers in an auction-style bidding war, and victims are given the details of where they can subscribe, and with any luck, outbid other players. Dark web marketplaces are a breeding ground for government intelligence, detailed voter databases, trade secrets, and critical infrastructure networks, igniting geopolitical concerns in what is now one of the greatest threats to the global economy.

What can organisations do to address data extortion risk?

It is important for law firms to understand that they are not immune to incidents involving a data breach. Basic measures can be taken to improve defences, such as applying multi-factor authentication (MFA), setting up network segmentation, disabling macros so that they are not exploited in phishing e-mails, and ensuring backups are stored offline. And in our continuous efforts to remain one step ahead of cybercriminals, STORM has been working towards solutions to the shift in threat actor behaviour. Our research on the dark web and these illegal trading sites gave us a true insight into the extent of the issue, and this knowledge led to the development of a new dataset analysis tool, providing an additional layer to operational security protocol. There was a clear urgency for a solution to the imminent reality of a data extortion epidemic, and with little out there to support the economy in addressing this threat, innovation was crucial.



Industrial Spy's homepage can be seen in the image above, reflecting sales tactics and the availability of social media networking.

Through the immersive investigation of dark web markets and the dedication of STORM's team of digital forensics investigators and cybersecurity specialists, 'CyberDiscover' was created, transforming the cybersecurity market (www.stormguidance.com). The new tool brings a cutting-edge development to security controls, a creation that forms the basis of an organisations data security toolset for a proactive approach to data privacy and protection. The latest development enables organisations to safeguard their sensitive information, limiting the probability of litigation, while minimising the need for human intervention. CyberDiscover intuitively seeks out sensitive information contained within large datasets, for example, filesystems, mailboxes, and other repositories, using an integrated process of data analysis and artificial intelligence. With the addition of a dedicated PII team, automated results are supported with in-depth manual analysis, using specialist skills to dig deeper where needed. Sensitive data is rapidly identified before it falls into the wrong hands, and with findings catalogued into filterable results, the tool assists in painlessly improving the process of data management and protection.

Due to the regulatory requirements of POPIA, businesses must report cyber incidents to the Information Regulator and affected data subjects, and assisting in this process, CyberDiscover can be utilised to act fast in notifying victims. In the unfortunate event of a breach, it rapidly extracts PII from stolen datasets, and incorporates a fully integrated notification tool that enables customised e-mails to send in bulk. Given the current cyber threat landscape, this new solution may well become indispensable.

Industrial Spy market – an inside perspective

STORM investigators noticed the gradual change in the pattern of criminal activity some time ago, and in predicting the shift to data ransom and extortion, initiated research into dark web marketplaces. The phenomenal speed at which the black market accelerated gives testament to the fact that data extortion should now be considered the number one cyber threat to all businesses. To corroborate this claim, this article demonstrates evidence taken from underground networks during our research, exposing screenshots of boundless data, the gravity of its sensitivity, and the enormity of its worth.

Exploring the criminal activity in some depth, we paid particular focus to the Industrial Spy market which advertised that it sold data such as 'public schemes, drawings, technologies, political and military secrets, accounting reports and client's databases' to buy or download for free. The site claims to provide data 'gathered from the largest worldwide companies, conglomerates and concerns with every activity'. Categorised into three sections, the marketplace offers 'Premium', 'General', and 'Free', list-

ing options, each with their own rules. Victims of data extortion are told that their information is available within the 'Premium' marketplace, where they will have seven days to buy their data if they are not outbid. If it is bought within the seven-day period, once it is downloaded by the buyer, Industrial Spy claim that it will be completely deleted from their servers. However, if the time is lapsed, the listing will move into the 'General' marketplace, where it will be available at a much-reduced premium, to 'multiple clients', and it will never be deleted from their servers. In time, this data will then move into the 'Free' marketplace where it will be accessible to all.

Trade secrets, manufacturing diagrams, and political and military secrets are among the stock: Some data is sold in the millions. With listings such as '$150,000 blackmail method ++ new ++ 2022 clone', this is the place to go for criminals looking to breach systems themselves, and it seems, where little technical skill is needed.

An example attack method listing that demonstrated the easy gains offered by a career in cybercrime claimed, 'the method is straight up, to the point, not much experience is needed, just a basic sense of e-mails and usage of the software such as Ghostmailer (spoofs e-mails) and Massive Mailer (mass e-mail sender)'. While investigating, STORM found huge volumes of 'Fullz' data available to the next bidder. Fullz is the name used by cybercriminals for 'full' data packages containing information such as a person's name, address, NI number, driver's license, bank account credentials, and medical records, among other details: In other words, their 'full information'. Fraudsters use this information to impersonate the victim, using their financial reputation for identity theft and fraud.

The data is normally obtained through corporate and institutional data breaches, with the insurance, legal, commercial, and financial sectors the most common targets due to the sensitivity of the data they hold. The impact of these breaches affects not only the financial reputations and bank balances of the victims, but also the resultant reputational harm, lost revenue, and legal damages caused to the breached organisation.

Will paying ransoms protect stolen data from re-entering dark web markets?

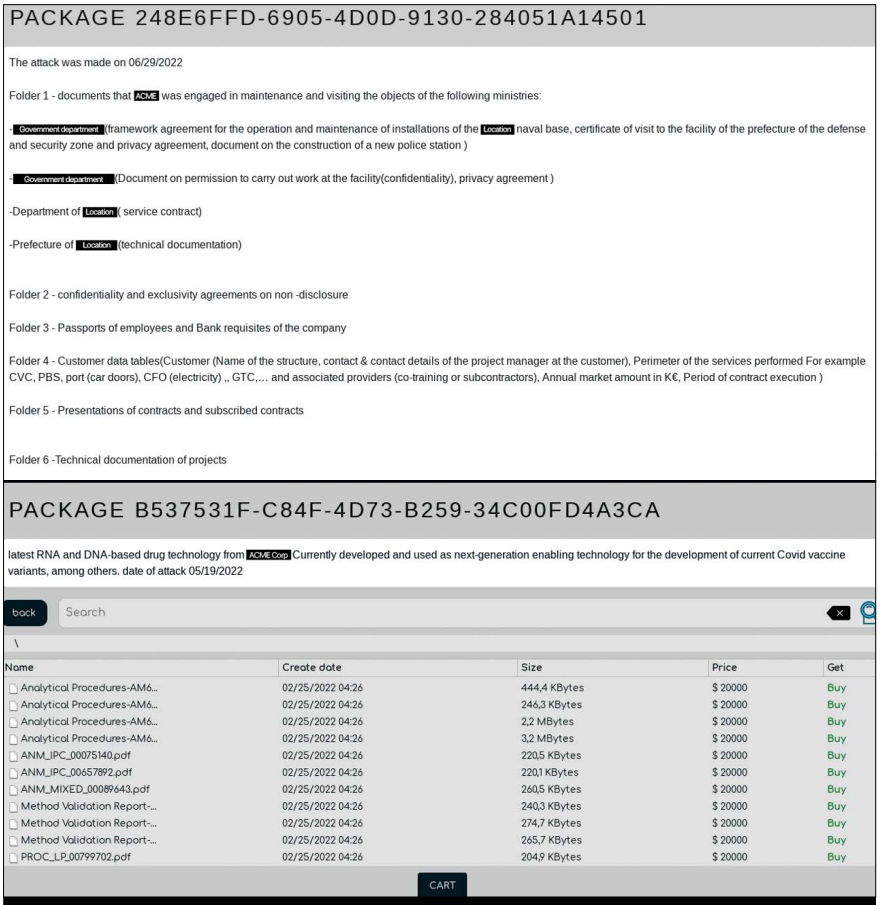
When it comes to the payment of data extortion ransoms, it is suspected that threat actors are not always honouring their assurances of deleting the data after it is returned to its victim. The ease of data re-packaging makes it extremely unlikely that listed data can be traced back to its original breach. With the opportunity of substantial further gains, surely it would be naïve to believe that criminals would not seek to continue to profit from the results of their activities. Evidence to substantiate such a theory would destroy the reputation of the whole data extortion market, but with such anonymity, why would they not trade the data, or a subset of it, in situations where it cannot be originated?

We do, however, have widely publicised reports of threat actors targeting former victims who paid their ransoms. An article by ZDNet unravelled the bitter truths behind the scenes of a ransomware attack, with reports demonstrating that only 54% of victims regained access to data and systems after paying ransom demands, and another third were stung with additional payment demands before they received the decryption key (Danny Palmer 'Ransomware victims are paying up. But then the gangs are coming back for more' (www.zdnet.com, accessed 10-1-2023)).

Unknowingly, subjects of a breach will go about their business as usual, oblivious to the fact an attacker has compromised their systems. Threat actors will lurk inside a network for weeks or months prior to their attack, gaining all the necessary controls and permissions should they wish to return and initiate future attacks. And with no real assurance that payment will give relief, the threat to business reputation and survival is vast, as demonstrated in a further article by ZDNet, where the target gave in to extortion demands, but the BlackMatter group still leaked the data a few weeks later (Danny Palmer 'This company paid a ransom demand. Hackers leaked its data anyway' (www.zdnet.com, accessed 10-1-2023)).

In the Coveware Quarterly Ransomware Report, some ransomware groups were found to leak stolen data after ransoms were paid (Coveware 'Ransomware Demands continue to rise as Data Exfiltration becomes common, and Maze subdues' (www.coveware.com, accessed 10-1-2023)). In these instances, victims were given fake data as proof of deletion, and others were offered no false pretences when they were re-extorted using the very data they had paid not to be released. Example cases include:

- Sodinokibi: Victims paid and were re-extorted weeks later with the same data set.



The images above give an idea of the information available for sale, the gravity of some of this information, and an idea of listing prices.

- Netwalker: Victims paid but the data was posted anyway.
- Mespinoza: Victims paid but the data was still leaked.
- Conti: Victims were shown fake files as proof of deletion.

The value of client data held by legal firms further increases the chances of it being leaked regardless of the action taken to prevent this from happening. This puts the sector in very real danger of litigation, however robust their incident response plans may be. Data breaches can result in fines of up to $10 million, and we already know that the clients of law firms are likely to sue if their data is leaked. It is imperative that legal firms identify their sensitive data and improve data management before it falls into the wrong hands. As the likes of Industrial Spy quite rightly quoted: 'He who owns the information, owns the world' (Nathan Mayer Rothschild), bringing the true value of CyberDiscover into the spotlight of public interest.

Cybersecurity specialists, STORM Guidance (www.stormguidance.com), welcome enquires from LSSA members looking to know more about CyberDiscover, and how it can help them safeguard their sensitive data. You can read more about the service here: www.stormguidance.com/cyberdiscover.

Rosanna Hayes is Head of Communications at STORM Guidance in London.

LAW SOCIETY OF SOUTH AFRICA
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By Minenhle Nzimande

Is a parent allowed to claim maintenance on behalf of adult children and is there a need for a separate court application?

In the case of *Z v Z* 2022 (5) SA 451 (SCA), the applicant, Mrs Z (the mother) married the respondent Mr Z (the father) on 10 January 1995, and two major children were born from that marriage: A son, R (born 21 May 1997) and a daughter, B (born 13 March 1999).

Over time, Mr and Mrs Z's marriage deteriorated to the point that the respondent moved out of the matrimonial home in April 2018.

A year later, on 9 April 2019, Mrs Z filed divorce proceedings in the Eastern Cape Local Division of the High Court in Gqeberha (Port Elizabeth) seeking a decree of divorce, and maintenance for herself, as well as for R and B.

Although both R and B were still dependent on their parents and because they were above the age of 18 years, the law considered them to have majority status, with full legal status as adults.

Mr Z filed a special plea, a preliminary defence in a case that, if upheld has the effect of removing one of the grounds of the legal claim, or the legal claim entirely. In his special plea, Mr Z objected to Mrs Z claiming maintenance on behalf of both R and B as they were now above the age of 18 and of majority status. This new legal status, he argued, meant that Mrs Z does not have the authority to claim maintenance on their behalf and they must do so themselves.

In response to this special plea and to support her claim for maintenance on behalf of her children, Mrs Z relied on s 6 of the Divorce Act 70 of 1979, which provides:

'A decree of divorce shall not be granted until the court –

(*a*) is satisfied that the provisions made … with regard to the welfare of any minor or dependent child of the marriage are satisfactory or are the best that can be affected in the circumstances.'

The issue before the High Court was whether, properly interpreted, Mrs Z could claim maintenance on behalf of her son and daughter. The High Court upheld Mr Z's special plea, finding that s 6 does not allow Mrs Z to claim maintenance on behalf of her children, and therefore, dismissed Mr Z's case on this issue.

Mrs Z took the case on appeal to the Supreme Court of Appeal (SCA).

The SCA judgment

In its judgment, the SCA noted that there are several conflicting judgments on whether, during divorce proceedings, a parent is allowed to claim maintenance on behalf of financially dependent children aged 18 and above. Some judgments have said they can, while others have said they cannot. It was, therefore, important for the SCA to resolve the issue, particularly because divorced mothers often carry the financial burden of parenting alone.

Writing for the unanimous court, Meyer AJA emphasised that a parent's duty to maintain a child does not end at the termination of a marriage through divorce or when a child reaches a certain age, and that both parents share the duty equally.

Meyer AJA explained that a parent's *locus standi* (legal standing) to claim maintenance on behalf of their children in divorce cases is linked to the power s 6 gives the court to make any order it deems fit. For the court to carry out this power and make the maintenance order, the parent will have to put facts before the court about the child's needs and circumstances, the best method of paying the maintenance (eg, to a school, directly to the parent, in a lump sum or instalments).

The SCA also held that the ordinary grammatical meaning of 'child' and 'dependant' support an interpretation of s 6 that allows a parent to claim on behalf of dependent children, even if they are over the age of 18. A contrary interpretation would result in an absurdity, as the onus is on the parents to satisfy the court that the maintenance needs of the children are taken care of before a divorce order is granted.

The court also referred to the practical reality that most children above the age of 18 would still not have completed their education, many would still not have found employment, and they would still be dependent on their parent, often the mother. Furthermore, most adult children refuse to institute legal action to claim maintenance from their fathers, further burdening the mother.

An interpretation of s 6 denying the mother legal standing to claim maintenance would also implicate the child's right to human dignity.

Despite finding that s 6 of the Divorce Act allows a parent to claim maintenance on behalf of a child above the age of 18, Meyer AJA emphasised that there is still no legal impediment preventing the child from claiming maintenance against an errant parent in terms of the Maintenance Act 99 of 1998.

Ultimately, the SCA upheld Z's appeal and set aside the High Court order on the special plea. That means that the case will proceed to determine the divorce and the maintenance of the two children.

Value

The immediate impact of the SCA's judgment is a development of the law by clarifying that s 6 of the Divorce Act allows a parent of dependent children to claim maintenance in divorce proceedings despite them having reached the age of 18. This is a great relief to thousands of women who find themselves alone in taking care of their children during a divorce. It also relieves children of the burden of a perception that they are taking a stance against the other parent.

Minenhle Nzimande is a final year LLB student at Nelson Mandela University and a volunteer at Annali Erasmus Incorporated Attorneys, which represented Mrs Z in the case. Mr Nzimande writes in his personal capacity.

The civil appeal record: A dilemma in the making?

Picture source: Gallo Images/Getty

By Danie Schutte and Llewelyn Curlewis

The inclusion of unnecessary pages in a civil appeal record caused the Supreme Court of Appeal (SCA) recently to repeat its warning to practitioners to apply their minds when assembling civil appeal records (see *Minister of Police v Mzingeli and Others* (SCA) (unreported case no 115/2021, 5-4-2022) (Hughes JA (Petse DP, Van der Merwe JA, and Tsoka and Makaula AJJA concurring)).

The extent of the problem

Examples of deplorable civil appeal records are plentiful in our jurisprudence:

- In *Government of the Republic of South Africa v Maskam Boukontrakteurs (Edms) Bpk* 1984 (1) SA 680 (A), approximately 350 pages of invoices and statements were found to be unnecessary.
- In *Salviati & Santori (Pty) Ltd v Primesite Outdoor Advertising (Pty) Ltd* 2001 (3) SA 766 (SCA), the inclusion of documents not referred to in the lower court, annoyed the court.
- In *Rabie v De Wit* 2013 (5) SA 219 (WCC), approximately 70% of the appeal record was unnecessary.
- The inclusion of, *inter alia,* the transcribed versions of the oral arguments in the court *a quo*, irked the court in *Nkengana and Another v Schnetler and Another* [2011] 1 All SA 272 (SCA).
- In *Muller v De Wet NO and Others* 2001 (2) SA 489 (WLD), only about 100 of the 694 pages, were found to be necessary.
- In *Jeebhai and Others v Minister of Home Affairs and Another* 2009 (4) SA 662 (SCA), only three of the 12 volumes were necessary. The appeal record was in a 'lamentable state' due to the 'deplorable, flagrant and indeed intolerable conduct' of the practitioner according to the court.
- A mathematician, deeply versed in the chaos theory would, according to the court, be required to understand the appeal record in *Premier, Free State, and Others v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA).

The rationale for a proper civil appeal record

The rationale for properly compiling a civil appeal record is obvious:

- Unnecessary pages cause wasted expenditure, prejudices judges' time management, and increases storage costs (see *Muller*).
- In *Kham and Others v Electoral Commission and Another* 2016 (2) SA 338 (CC), the court warned that unnecessary pages aggravate the burden of reading, while the incorrect exclusion of documents could contribute to courts finding on a set of facts different to that proven in the court *a quo*.
- An improper appeal record causes 'unnecessary effort, distraction, vexation and confusion' (see *Jeebhai*).

The reasons for the persistence of the problem

The question is: Why does this problem continue to persist, almost 40 years after *Maskam Boukontrakteurs*? The reasons appear to us to be multi-levelled:

- In 'What irritates judges?' (2001) *Advocate* 24, Judge Harms wrote that the number one rule to keep appeal judges happy is to know the rules, including rules regarding the civil appeal record. In general, he says, practitioners are not conversant with the rules and do 'not bother to determine' what they are. His advice is that practitioners should read the rules on at least two occasions, firstly when applying for leave to appeal and then again when filing the notice of appeal. Yazbek also urges practitioners to acquaint themselves with the rules (Peter Yazbek 'Going on appeal' 2001 (Nov) *DR* 38).
- Practitioners should note that a lack of knowledge of rules is in breach of the clause 3.13 of the Code of Conduct of Legal Practitioners, Candidate Legal Practitioners and Juristic Entities, since practitioners must 'remain reasonably abreast of legal developments, applicable laws and regulations, legal theory and the common law, and legal practice in the fields in which they practice.'
- In *Salviati* the court found that the practitioner failed to apply his mind when compiling the civil appeal record.
- In *Maskam Boukontrakteurs* the court warned that the failure to include only necessary documents in the civil appeal record amounts to a breach of the fiduciary duty towards the client.
- Judge Harms (*op cit*) also explains, on a lighter note, that it is practitioners' attitude to punish the judges of appeal by letting them read unnecessary documents. These practitioner's intention is to '*Laat die … lees*,' (Let the … read), where the omitted word does not leave anything to the imagination.

Lack of knowledge of the rules and the failure to apply their minds appear to be the main reasons for sub-standard civil appeal records. However, this article investigates whether the rules are vague and if so, whether that could contribute to non-compliance with the rules regulating civil appeal records. The article examines the rules of civil appeals to the SCA, the Full Bench of a division of the High Court and to the High Court (the latter being from the magistrates' court or regional court).

Before compiling a civil appeal record, first, sort in chronological order, all the pleadings, notices, exhibits, transcriptions, judgments, reasons, and any other documents exchanged in the matter in the court(s) *a quo* (this bundle, herein referred to as the consolidated bundle, will undergo changes before eventually becoming the civil appeal record).

Civil appeals to the SCA

• Step 1

Remove all documents *not essential* for the determination of the appeal (see r 8(6)(j) of the Rules Regulating the Conduct of the Proceedings of the Supreme Court of Appeal (the SCA rules). In *Mzingeli* the SCA took issue with the filing of *unnecessary* documents.

• Step 2

Unless essential for determination of the appeal, in terms of r 8(6)(j) of the SCA rules, the practitioner *must exclude* from the consolidated bundle –

- the opening address;
- the argument;
- formal documents;
- discovery affidavits and the like;
- identical duplicates of any document; and
- colour photographs.

• Step 3

In terms of r 8(6)(h) of the SCA rules, *include*, if not already included the following –

- the judgment and order appealed against;
- the judgment and order giving leave to appeal; and
- the notice of appeal.

Include colour photographs, but only after requesting the respondent for their inclusion (see r 9(a)(ii) of the SCA rules). It is advisable to include them in the event of a dispute since the appropriateness might be the subject of debate at the hearing of the civil appeal.

Include the court *a quo's registrar's certificate* that the civil appeal record is correct (see r 8(5) of the SCA rules).

Civil appeals to the Full Bench of the High Court

• Step 1

Exclude all *formal* and *immaterial* documents from the consolidated bundle (see r 49(7)(a) of the Uniform Rules of Court).

• Step 2

The practitioner *may exclude* the following documents in terms of r 49(9) of the Uniform Rules, if they have no bearing on the point in issue in the civil appeal –

- exhibits; and
- annexures.

The practitioner *may exclude* in terms

of r 49(9) of the Uniform Rules immaterial portions of lengthy documents.

• Step 3

Include, if not already included the following:

- In terms of r 49(9) of the Uniform Rules, the *signed agreement* between the parties to exclude exhibits, annexures, and immaterial parts of lengthy documents. If not agreed on, it is advisable to include the documents setting out the dispute since the issue of the documents' costs may arise during the civil appeal.
- A *complete index* of the documents remaining in the consolidated bundle (see r 49(7)(a) of the Uniform Rules).
- The *list of excluded* formal and immaterial documents (see r 49(7)(a) of the Uniform Rules).

Civil appeals to the High Court

• Step 1

Exclude all documents that are *unnecessary* for the hearing of the civil appeal (r 50(7)(c) of the Uniform Rules).

• Step 2

In terms of r 50(8)(a) of the Uniform Rules, the practitioner *must exclude* the following documents, *unless they affect the merits of the civil appeal* –

- subpoenas;
- notices of enrolment;
- consents to postponements;
- schedules of documents;
- notice to produce or to inspect; and
- any other document of a formal nature.

Unless they have a bearing on the point in issue on appeal, exclude from the consolidated bundle – in terms of r 50(8)(b)(i) of the Uniform Rules – the following:

- any exhibit; and
- any portion of the record.

• Step 3

Include, if not already included the following:

- A *complete index* of the (remainder) of the consolidated bundle (see r 50(7)(c) of the Uniform Rules).
- *A certificate of correctness* by the person who prepared the civil appeal record (see r 50(7)(c) of the Uniform Rules).
- A *list of excluded documents* referred to in r 50(8)(a) of the Uniform Rules.
- The *written agreement* between the parties to exclude exhibits or part of the record which have no bearing of the point in appeal (see r 50(8)(b)(ii) of the Uniform Rules).

Discussion

The test for inclusion of documents, set out in the respective first steps above, differ from *essential* (SCA), to *material* (Full Bench), to *necessary* (High Court). In the Constitutional Court, practitioners may only include in the record documents that are *relevant* to the issues to be determined on appeal (see r 20(1)(b) of the Constitutional Court Rules). There exists no logic reason for setting different tests or expressing them differently, in circumstances where all the tests surely aim to achieve the same object; to place the minimum documents before the court of appeal required to pronounce on the correctness of the court *a quo's* order. The 'essential test' set in the SCA is preferable because all essential documents will in any event be material and necessary.

The documents specifically earmarked for exclusion differ from court to court, a fact which is obvious when comparing the various second steps. Again, the reason for the difference is unclear.

The dilemma explained with a practical example

The dilemma facing legal practitioners is amplified by the following example: The plaintiff in an unlawful arrest and detention matter appeals to the High Court against the dismissal of his claims by the magistrate. The only issue on appeal is whether the arresting officer entertained a suspicion, which rested on reasonable grounds.

- The summons and particulars of claim are clearly necessary and meet the first threshold. However, may the practitioner exclude the summons, a formal document?
- On the last page of the plea appears only the acknowledgement of receipt. The plea, as one document, is clearly necessary. The question arises whether the practitioner may exclude the last page thereof?
- May the practitioner exclude the transcribed opening addresses in terms of r 50(8)(b)(i) of the Uniform Rules, they being part of the record with no bearing on the point in issue? In the SCA, the exclusion thereof is mandatory (see r 8(6)(j) of the SCA rules).
- May the practitioner exclude the transcription of the judgment dismissing the application for absolution from the instance?
- May the practitioner exclude the transcribed version of the opposed application for postponement since r 50(8)(a) of the Uniform Rules only deals with agreed postponements?
- May the practitioner exclude the transcriber's certificate? The rules are silent in this regard.
- The court *a quo* accepted into evidence the appellant's warning statement to the police. The statement consists of 12 pages and is relevant because the appellant chose to remain silent, a fact also admitted to by the appellant in the court *a quo*. The practitioner may not exclude the exhibit in terms of r 50(8)(b)(i) of the Uniform Rule because it is relevant to the dispute. May the practitioner exclude it because of the admission thereof?
- In a civil appeal to the Full Bench, may the practitioner exclude parts of the statement on the basis that they constitute immaterial parts of a lengthy document (r 49(9))? In any event, when does a document become a lengthy document?
- The court *a quo* accepted into evidence the prescribed letter of demand. The same document is an attachment to the particulars of claim. In the SCA, the practitioner must exclude identical documents. The scenario in the High Court is unclear.
- In terms of r 7(2) of the Uniform Rules, an appellant must file a *power of attorney* when requesting a date for hearing of the civil appeal, unless the State Attorney is the instructing attorney. Rule 7(2) does not oblige the inclusion of the power of attorney but read with r 50(4)(a) it indirectly instructs the appellant to file the power of attorney with the registrar. Must the power of attorney form part of the appeal record? (In civil appeals to the full bench r 49(6)(a) indirectly instructs the filing of the power of attorney).

In terms of r 51(10) of the Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts the registrar of the regional court or the clerk of the court must send a certified copy of the civil appeal record to the High Court. In practice, however, this does not happen. Must the appellant include this certificate in the civil appeal record?

Conclusion

Practitioners are substantially to blame for improper civil appeal records, but their plight might become somewhat alleviated with the introduction of more detailed and explicit rules, like those of the SCA which can be improved by and synchronised with, those of the other courts. The clearer our rules become the more concise and better organised our resultant civil appeal records.

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Section 22 of the Basic Conditions of Employment Act – *should it be amended?*

By
Dr Nombulelo
Queen
Mabeka

In March 2020, when the first case of COVID-19 was confirmed by government, many thought it was just a dream, however, this became a reality. The different variants caused tremendous changes in employment law because some employees were affected by these variants and had to quarantine after being infected. Some used all their sick leave because of the various variants during the pandemic. Employers were accommodating after the restriction of level 5 was lifted in that they allowed employees to work from home. Some employers continue to allow remote working to safeguard the employees from the risk of being infected on their premises. The reality is that the pandemic is still with us, and no one knows when it will end, if it will end at all.

With that said, the impact of the pandemic has dire consequences for employees because the sick leave cycle that is provided in s 22 of the Basic Conditions of Employment Act 75 of 1997 (the BCEA) is not enough. This stipulation provides that employees be entitled to one-day sick leave after 26 days. There is no doubt in my mind that when the legislature drafted this provision it intended to preserve employment. A lot has changed since the provision was drafted and the pandemic itself is a classic example of the reason for a call to modify s 22 of the BCEA to preserve jobs. Some employees were dismissed based on incapacity that was caused by the pandemic. Authors, such as Ndlovu and Tshoose argue that there are times when employees take unpaid sick leave because their sick leave cycle is exhausted (Lonias Ndlovu and Clarence Itumeleng Tshoose 'COVID-19 and employment law in South Africa: Comparative perspectives on selected themes' (2021) 33 *SA Merc LJ* 25). The impact of this on employees has dire financial consequences. Some employees have children and financial obligations to honour. Taking unpaid sick leave puts these employees in serious debt situations and some take longer to financially recover. Some have lost their houses because they cannot afford to pay their bonds, or they go through a debt review process because of taking unpaid sick leave due to mutating variants. These two

Picture source: Gallo Images/Getty

authors affirm that the pandemic affects the employment relationship. They further assert some employers are more sympathetic towards their employees because they permit them to take special leave when they become infected by COVID-19.

Caitz supports Ndlovu and Tshoose's averments that employees take unpaid sick when they suffer from mental diseases because they must be hospitalised for a long time (Karin Calitz 'Burnout in the Workplace' (2022) 43 *Obiter* 132). This author further indicates that excessive use of sick leave hinders on the employment relationship. Academic employers have employees that have scarce skills. It takes a long time to develop an employee from a lecturer to a full professor.

The pandemic, unfortunately, does not choose who should or should not be infected. Academics also become infected and ought to take sick leave to quarantine and this affects their sick leave cycle. The academic employers cannot afford to lose these employees because they have scarce skills. Many employers resorted to remote working to accommodate infected employees and to mitigate the risk of infection.

However, it is evident that not all employers can allow employees to take special leave due to the nature of their business. The retail industry cannot afford to allow employees to take special leave. The type of industry requires employees to be hands-on and be physically at work so that the business can fully operate (OECD 'COVID-19 and the retail sector: impact and policy responses' (www.oecd.org, accessed 11-8-2022). Granting special leave to employees in retail industry results in financial loss to the respective companies. In the case of *Jayaprakas a/l Ramadass v Anytime Sdn Bhd* (Award 24 of 2022), it was confirmed that a retrenchment of a retail employee during the pandemic was justified (Donovan & Ho 'Case spotlight: Redundancy of retail employee due to COVID-19 upheld' (https://dnh.com.my, accessed 5-9-2022)). Dr Opute, Prof Iwu and Dr Adeola *et al* confirm that the pandemic 'paralysed the global economy' and this led to 40 000 job losses in South Africa (Dr AP Opute, Prof CG Iwu, Dr O Adeola, Dr VV Mugobo, Dr OE Okeke-Uzodike, O Fagbola and Prof O Jaiyeoba 'The COVID-19-pandemic and implications for businesses: Innovative retail marketing viewpoint' (2020) 16 *The Retail and Marketing Review* 85).

The Labour Court (LC) has shown that as much as it is sympathetic towards employees, employers are entitled to dismiss employees when sick leave is exhausted after all processes of incapacity are followed. The relevant case that illustrates the approach that courts follow is that of *General Motors SA (Pty) Ltd v National Union of Metalworkers of SA and Others* (2018) 39 ILJ 1316 (LC). Briefly, in this case, two employees were dismissed based on capacity after excessive use of sick leave. The employer in question has a policy that entitles employees to take 30 days' sick leave. The employees were counselled before the dismissal. These employees referred their matter to the Commission for Conciliation, Mediation and Arbitration (CCMA). They could not reach an agreement in conciliation; the matter had to be arbitrated. The arbitrator concluded that the employees were unfairly dismissed because the employer only relied on the contractual duties as opposed to addressing incapacity in terms of the legislation. As a result, the arbitrator decided that the employees should be reinstated. The employer was not happy about this decision. It re-

ferred the matter to the LC for review. The LC considered the provisions of s 22 of the BCEA and held that employer's decision to dismiss the employees was correct. In coming to its conclusion, the LC referred to the decision of the Labour Appeal Court (LAC) in the case of *AECI Explosives Ltd (Zomerveld) v Mambalu* [1995] 9 BLLR 1 (LAC), which confirmed that continuous 'absence from work' warrants a dismissal after considering certain factors such as 'recurrence'.

It is significant to make a distinction between the approach followed by the arbitrators and the LC and the LAC. It is observed that the CCMA arbitrators are more sympathetic towards employees when it comes to dismissal cases based on incapacity caused by excessive use of sick leave. The arbitrators tend to be flexible and more sympathetic towards employees when it comes to dismissals after excessive use of sick leave.

This is illustrated in cases such as *Mofokeng and KSB Pumps* (2003) 24 ILJ 1756 (BCA), where the arbitrator concluded that employers must first comply with provision of the Labour Relations Act 66 of 1995 before resorting to dismissal.

Further, the arbitrators are harsh on employers who do not follow due process before dismissing employees for excessive use of sick leave. The relevant case that shows this is that of *Mofokeng*.

In *Bosal Afrika (Pty) Ltd v NUMSA obo Itumeleng Mawelela* (LC) (unreported case no JR 839/2011, 8-2-2018) (Mahosi AJ), an application was brought before the court to review a decision made by the arbitrator to reinstate the employee who was dismissed by the employer. The employee has a history of 'absenteeism'. This employee had a chronic illness that caused the use of excessive sick leave. The LC referred the matter back to the CCMA after considering the evidence presented. This court was of the view that the arbitrator did not properly think the decision through.

In another matter in *Beck/Parmalat* SA *(Pty) Ltd* [2021] 2 BALR 131 (CCMA), an employee who had applied for unpaid leave was dismissed at the time South Africa was under level five restrictions. The employee worked in the laboratory, and she did not go to work because she feared she would be infected if she did. She did this to shield her family from the infection. The employer refused to grant her the leave and when she did not come to work, the employer dismissed her for 'absence without leave'. The arbitrator considered the fact the pandemic was viewed as a disaster, which affected many employees and concluded that the employer was too harsh. Thus, the arbitrator re-instated the employee.

An analysis of case law indicates that arbitrators have different approaches than the courts. The case law also shows that it is reality that employers do dismiss employees for incapacity when sick leave is exhausted. Given the fact that the pandemic is a disaster that constantly mutates and presents itself in various variants, regardless of the fact that employees are vaccinated, it is time to review the provisions of s 22 of the BCEA. This is said because there is no indication from scientists that there will be an end to the existence of the virus and its variants. Instead of dismissing employees on the grounds of incapacity due to excessive use of sick leave caused by pandemic infections, the legislature should consider increasing the amount of sick leave to at least 72 days over a three-year cycle. This will ensure that jobs are preserved, and the scarce skilled employees are retained and protected from dismissals, and this will preclude employees financial strain caused by taking unpaid sick leave. The high employment rate further calls for a review of s 22 of the BCEA.

'The World Health Organisation provides statistics of 80 000 and 180 000 health employees who lost their lives due to the COVID-19 pandemic.'

When employees are dismissed due to excessive sick leave taken due to COVID-19, they fall within unemployment statistics. It is argued that the pandemic is a disease that is not caused by negligence of employees. Therefore, they do not deserve to be dismissed after exhausting their sick leave, particularly in the health industry where employees contract the virus from the patients that they treat. These employees deserve to continue to work because the nature of their jobs poses a risk to them.

This risk should be mitigated by increasing the numbers of days that employees are entitled to in terms of the stipulations of s 22 of the BCEA. There is evidence that proves that the pandemic resulted in loss of lives of many health employees who put their own lives at risk by looking after patients who were infected.

The World Health Organisation (WHO) affirmed that there are doctors and other health employees who died due to the pandemic (World Health Organisation 'Health and Care Worker Deaths during COVID-19' (www.who.int, accessed 11-8-2022)). The WHO provides statistics of 80 000 and 180 000 health employees who lost their lives between January 2020 to May 2021 due to the pandemic. The WHO also support the author's averment that these health employees deserve to be shielded. Therefore, the government cannot just turn a blind eye on the reality that the number of sick days that are provided in s 22 of the BCEA are no longer enough to suit the needs of employment law. There is no doubt that the excessive sick leave affects the relationship between the employer and the employee, but I submitted that the pandemic is the cause of the damage in the relationship and this is not a fault of the employees. Some of these employees contract the virus from their employers' premises, regardless of the fact that they have been vaccinated.

There is evidence that proves that the most common variant that affects the health employees is SARS-CoV-2 (MF Chersich, G Gray, L Fairlie, Q Eichbaum, S Mayhew, B Allwood, R English, F Scorgie, S Luchters, G Simpson, MM Haghighi, MD Pham and H Rees 'COVID-19 in Africa: Care and protection for frontline healthcare workers' (https://globalizationandhealth.biomedcentral.com, accessed 11-8-2022)). This is due to the fact that health employees are the first people to deal with infected patients and the nature of their jobs requires them to do so. The question that I ask is, why must they be dismissed because they exhausted their sick leave and special leave granted by health employers over and above the days, they are entitled to in accordance with s 22 of the BCEA? These health employees should not be prejudiced in any way because of the nature of their jobs. Evidently, the time has come to amend the stipulations of s 22 of the BCEA to accommodate both employers and employees. Employers will benefit from the amendment because their scarce skilled employees will be retained but they should be entitled to refer their employees to other medical practitioners where there is a history of abuse of sick leave. In conclusion, employees will also benefit from the modification because they do not have to worry about disciplinary inquiries or dismissal because they exhausted their sick leave and this will reduce the unemployment rate and poverty.

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Applying for maintenance on behalf of adult children

By Natalie Ruiters

In my observations of maintenance courts, I observed that maintenance officers opt for the discharge of maintenance orders when minor children turn 18 years old and are deemed as young adults in terms of s 17 of the Children's Act 38 of 2005. The recent Supreme Court of Appeals (SCA) decision of *Z v Z* 2022 (5) SA 451 (SCA) is discussed in line with the National Strategic Plan on Gender-Based Violence and Femicide (NSP on GBVF) pillar five governmental policy and the recent South African Law Reform Commission (SALRC) Discussion Paper 157 on the Review of the Maintenance Act 99 of 1998.

The SCA on 21 July 2022 in a unanimous decision of *Z v Z* dispelled the notion that mothers cannot apply for maintenance on behalf of their young adult children above the age of 18. It is trite law that the duty of a parent to support a dependent child does not come to an end at any particular age, even the attainment of majority, but continues until the child becomes self-supporting or independent as was found in *Bursey v Bursey and Another* 1999 (3) SA 33 (SCA), *Ex parte Jacobs* 1982 (2) SA 276 (O) and *Lambrakis v Santam Ltd* 2000 (3) SA 1098 (W).

In the Eastern Cape Local Division, Port Elizabeth decision the High Court upheld a special plea entered by a respondent during divorce proceedings that young adults aged 25 and 23 respectively should claim maintenance on their own behalf. This notion is still upheld by maintenance courts in South Africa (SA) where young adults reached the magical age of majority, as noted in s 17 of the Children's Act, that they should enter the maintenance courts on their own behalf to claim maintenance.

The SCA unanimous decision is welcomed considering the SALRC Discussion Paper 157 where the Commission in ch 5 discussed the *locus standi* of major children. During three days of vigorous debate, it seems as if an amendment to the Maintenance Act 99 of 1998 will soon be introduced by the SALRC to Parliament's Portfolio Committee on Justice and Correctional Services.

In the *Z v Z* case the mother of two adult children, aged 25 and 23, applied for maintenance in divorce proceedings. The father did not dispute the divorce claim but entered a special plea against the maintenance claim stating that the adult children can claim maintenance on their own behalf and should not be included in the divorce proceedings. The Port Elizabeth High Court upheld the special plea that led to the appeal to the SCA.

Meyer AJA in the unanimous judgment referred to the s 6 of the Divorce Act 70 of 1979 provision that provides for mothers to safeguard the interest of dependent and minor children. Nowhere in s 6 does the Act discriminate between major and minor children but uses the word 'dependent' children. The Maintenance Act does not define an applicant or who should be maintained but states in s 2 that: 'The provisions of this Act shall apply in respect of the legal duty of *any person* to maintain *any other person*' (my italics). Despite the s 2 provision it has become a custom among maintenance staff in SA to *ex lege* discharge divorce maintenance order in an interpretation of divorce clause providing for maintenance until the minor children becomes adults or self-sufficient – which-

ever comes first – which means where a child turns 18, a non-custodial parent will approach the maintenance courts with discharge orders. In some cases, attorneys advise their clients to stop payments without a court order that directs the discharge of such divorce maintenance orders.

The conflicting position regarding adult children

The SCA noted the 'conflicting High Court decisions on the question of whether a parent has *locus standi in judicio* to claim maintenance' (para 6). The apex court referred to cases where the High Courts upheld custodian parents do have the right to claim maintenance on behalf of young dependent adult children in *JG v CG* 2012 (3) SA 103 (GSJ); *AF v MF* 2019 (6) SA 422 (WCC) and *SJ v CJ* 2013 (4) SA 350 (GSJ). The court also referred to conflicting cases where High Courts found custodian parents do not have the right to claim maintenance on behalf of young dependent adult children in *Smit v Smit* 1980 (3) SA 1010 (O) and *Butcher v Butcher* 2009 (2) SA 421 (C).

The court further considered the case of *Bursey* that provides that the duty to maintain does not terminate when the child reaches a particular age but continues after the attainment of the age of majority.

The SCA found in its 'interpretation of s 6 of the Divorce Act that [excluding] a claim for maintenance by a parent on behalf of a dependent child who has attained majority would not preserve its constitutional validity and result in absurdity. It would implicate the constitutionally entrenched fundamental rights to human dignity, emotional well-being and equality' (para 16). The court addressed the South African reality of 18-year-old young adults still being at school and unemployed, and young adults often needing time to obtain employment and financial independence. 'Such interpretation of s 6 of the Divorce Act would in a given case result in the absurdity that a parent, usually the mother, in divorce proceedings claims maintenance for a school-going minor child from the other divorcing parent but would have no standing to claim maintenance for and on behalf of another school-going child of the marriage, simply because he or she has attained the age of 18' (para 16). The apex court further found such an interpretation 'would also implicate the dependent major child's fundamental right to equality' (para 16).

Psychological position of young adult children

Young adults turning 18 do not magically become independent adults by attaining the age of majority as seen in s 17 of the Children's Act. In the South African context 18-year-olds are still completing their final year of secondary schooling and still dependent on the financial assistance of both parents. The SCA acknowledged 'most children are not financially independent by the time they attain majority at the age 18: Many have not even concluded their secondary education and only commence their tertiary education or vocational training after they have attained the age of majority' (para 16). Young adults do not have the psychological maturity or emotional grit to defend the food bill or electricity bill being more than what he or she was used to while being in the communal family home. Children do not have the maturity to explain expenses incurred during the course of a month in the household that a custodial parent can easily explain and verify in bank statements and expenditure receipts.

The SCA noted that 'dependent children should also remain removed from the conflict between their divorcing parents for as long as possible unless they elect to themselves assert their rights to the duty of support. It is undesirable that they should have to take sides and institute a claim together with one parent against the other; they should preferably maintain a meaningful relationship with both their parents after the divorce. The institution of a separate claim for maintenance by an adult dependent child against his or her parent or parents would further lead to a piecemeal adjudication of issues that arise from the same divorce and are intrinsically linked to other issues in the divorce action, such as claims for maintenance for spouses and other minor children born from the marriage. Further, the invidious position of an indigent adult child in this situation is clearly evident' (para 17).

The SCA quoted Professors J Heaton and H Kruger *South African Family Law* 4ed (Durban: LexisNexis 2016) and 'summarise the prejudicial position faced by young adult children when s 6 of the Divorce Act is improperly interpreted, thus: "Firstly, it is generally accepted that it is undesirable for children to become involved in the conflict between the divorcing parents by being joined as parties in divorce proceedings. Secondly, the adversarial system of litigation still forms part of the divorce process. Although our courts permit a relaxation of the adversarial approach in cases involving children, this approach does not benefit young adults as they are no longer children. Thirdly, it may be very awkward for the parent with whom the child lives to expect the adult child to pay over some of the maintenance received as a contribution to the child's living expenses. Further, some adult dependent children refuse to institute their own maintenance claims, thereby placing an even heavier burden on the parent with whom they reside, who is usually the mother. This further exacerbates the already vulnerable position many women find themselves in after divorce' (para 18).

The apex court concluded the interpretation of s 6 of the Divorce Act by quoting Professor M de Jong who also advocated a similar interpretation of s 6 of the Divorce Act. The court quoted Prof de Jong where she advocates: 'In the context of family law, policy considerations therefore include the values of equality and non-discrimination and the obligation of parents to maintain their children in accordance with their ability, as well as the needs of the children. Other policy considerations that should accordingly be taken into account are the following: The fact that adult dependent children's general reluctance to get involved in litigation against one of their parents and institute their own separate maintenance claims upon their parents' divorce may perpetuate and exacerbate women's social and economic subordination to men and real inequality of the sexes; the fact that the duty to support their minor children should be borne equally by both parents; and possibly the fact that it could have negative repercussions for adult dependent children if their maintenance claims were to be adjudicated in isolation or after the date of their parents' divorce' (para 19).

Conclusion

The NSP on GBVF provides in pillar 5 for 'strengthened child maintenance and related support systems to address the economic vulnerability of women'. Where adult children do not have a good relationship with the non-custodial parent such strained relationships might lead to resentment and reluctance to enter the maintenance system. Where such reluctance occurs, it might place further financial strain on women and lead to further economic impoverishment of women.

The judgment of *Z v Z* will go a long way in anticipation of the Parliamentary debate on the Maintenance Amendment Bill B17 of 2022 that might only be introduced into Parliament during the 2023 Parliamentary sessions. Hopefully maintenance officers will be able to use the *Z v Z* decision to reject non-custodial parent's applications for discharge of maintenance orders based on the minor child turning 18 and being deemed an adult in terms of s 17 of the Children's Act.

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Picture source: Gallo Images/Getty

Judicial discretion in unopposed divorce matters

By Clement Marumoagae

This article discusses the way some presiding officers – in various divisions of the High Court and different magistrates' courts – adjudicate unopposed divorce proceedings and unnecessarily remove matters from the rolls. These presiding officers overemphasise technicalities and compliance with rules and directives to remove matters from the roll even where orders can easily be granted through positive exercise of discretion. It is difficult to understand why some presiding officers rigidly approach non-compliance with court rules and directives where parties have settled their divorce disputes.

Parties are generally encouraged to amicably resolve their divorce disputes. Divorce practitioners also attempt to assist their clients to resolve their disputes through negotiations, to avoid prolonged adversarial litigations, which is costly, lengthy, and destructive to spouses' relationships. Spouses may also try an amicable settlement of their disputes through mediation. While both spouses may wish to divorce, they may differ on how the care, contact, maintenance, guardianship, and marital property should be addressed. These and other marital issues may justify spouses engaging in negotiations or subjecting themselves to mediation. Mediation can be provided by the Family Advocate or any of the several private mediators (Magdelene De Jong 'International trends in family mediation – are we still on track?' (2008) 71 *THRHR* 454 at 468). In settlement negotiations and mediation, those guiding spouses aim to assist them to reach negotiated settlements of their disputes. In *Ex parte: PJLG and Another; In re: PJLG and Another* [2013] 4 All SA 41 (ECG) at para 1, the court held that '[t]he usual outcome of such a negotiated settlement is the conclusion of an agreement, for the terms of the settlement to be recorded in a written document, and for it to be made an order of the court. The record of this agreement or contract is commonly referred to as a settlement agreement, a deed of settlement or a consent paper'. In *MB v NB* 2010 (3) SA 220 (GSJ) at para 50, Brassey AJ noted that settlement negotiations in divorce proceedings between legal advisers are frequently fruitful.

Once parties have signed their settlement agreement and the court found nothing unquestionable with their agreement, it is unlikely that the court will reject such a settlement agreement. In practice, parties can resolve their disputes a few days before the day of trial or on the date of trial and submit the settlement agreement to the presiding officer during oral presentation. The process in the Gauteng Division of the High Court is a bit different and does not allow for this practical eventuality. The Judge President's Consolidated Directive (Revised – 18 September 2020 Consolidated Directive) dated 11 June 2021 (the Consolidated Directives) at para 41 states that:

'All matters that are enrolled on the trial roll and which become settled should be removed from the trial roll. These matters should be set down on the Settlement Roll and are subject to the provisions of Chapter 9 (paragraphs 52 to 64) of revised Directive 1 of 2021. The matters shall be dealt with in the identical fashion to the Judicial Case Management Meetings/Case Management Conferences under the conditions described above'.

This means that if a divorce matter placed on an opposed roll becomes settled a few days before or on the date of the trial, the matter must be removed from the roll to be enrolled on the unopposed roll. Paragraph 47 of the Consolidated Directives specifically states that family matters '… that are settled before the set down date, in terms of this directive, must:

47.1 be removed from the trial roll and set down for disposal in the Settlements Court'.

There is a dedicated court dealing with settled family disputes in the two divisions of Gauteng. It appears that every settled family matter, irrespective of when it was settled, must be heard by these courts. The challenge is that having regard to the number of matters dealt with by the two divisions in Gauteng,

the matter will have to be finalised at a later date. This can be a month or more later from the original date of the opposed roll. This matter will now have to queue behind other unopposed matters, which have been submitted to the relevant Registrar. It is not entirely clear what disqualifies the judge dealing with the opposed roll from finalising the matter that has become settled and that matter to be referred to the settlement court. With respect, apart from the administrative burden associated with applying for a hearing date, this is one of the ways of increasing the workload and retaining matters unnecessarily on the roll. When papers are in order, unopposed divorce applications are quick and judges dealing with opposed divorce rolls can easily dispose of 'opposed' matters that have recently become settled. There is no need for these matters to be removed from the opposed roll and placed on the settlement roll.

In terms of para 101.4 of the Consolidated Directive, '[t]hirty (30) unopposed divorce applications [are allocated] per judge, with [two] judges allocated to the divorce roll every Friday'. There is no readily available data dealing with how many orders for settled matters are granted on average per week since the establishment of settlement courts in Gauteng. There are regular and helpful directives issued by the Judge President or Deputy Judge Presidents in Gauteng, none of which have addressed the settlement courts. On 6 June 2022, a Directive for the Family Court in the Johannesburg High Court was issued. Paragraph 6 merely confirmed that the family court shall not hear unopposed divorces, which shall continue to be heard on Fridays by settlement courts.

The conduct of some of the judges (and acting judges) in unopposed matters needs to be evaluated. There is an urgent need for the leadership of the Gauteng Division to pay attention to the settlement courts and determine whether they are playing the role they were envisaged to play. In particular, the leadership must assess whether these courts, at times, do not unnecessarily increase the workload of these two divisions by removing matters that can be finalised from the roll based on technicalities. It cannot be disputed that judges can show their displeasure against legal representatives that are either inadequately prepared or failed to comply with the rules and directives of court. Regarding practice directives, para 6 of the Consolidated Directive mandates that before the matter is allocated a hearing date, a directive compliance declaration or certificate where compliance with the Consolidated Directive is certified and details are provided on how this directive is complied with. When the date is allocated, a judge's secretary will provide further directives on behalf of the presiding judge that should be followed. Some of these directives are that the marriage certificate is to be certified, the Family Advocate's endorsement is to be made available, the word version of the draft order and settlement agreement is to be e-mailed to the judges' secretary by a specific date and that any document that is uploaded on CaseLines after the CaseLines bundle has been frozen is to be done with the permission of the presiding judge. It cannot be denied that the Consolidated Directive and further judge's directive are meant to ensure that the matter runs smoothly and that legal representatives should comply therewith.

The challenge, however, is when any non-compliance with these directives leads to the removal of an unopposed divorce matter from a settlement roll that can easily be finalised, notwithstanding the identified non-compliance. The extent to which the presiding judge can overlook the identified non-compliance when all or some of the documents are placed before him or her that can enable him or her to dispose of the matter, is not clear in the settlement court. In *ABSA Bank Limited v Wu Chongguang and Another* (GJ) (unreported case no 39305/2013, 14-3-2014) (Wepener J) at para 15, Wepener J held that '[a]ttorneys who wish to deliberately disregard their duties to the court are, in my view, contemptuous of the very court they are required to assist to bring matters to a successful conclusion'. Further that '[h]aving regard to the behaviour of the applicant's attorney and due to the deliberate failure to comply with the practice directive, the matter is removed from the roll. This matter may not be re-enrolled unless there is compliance with the practice directive of this division'. In this case, there was a constitutional right that was implicated, and the practice directive required that in an application for default judgment and declaring immovable property executable, the legal representative should file an affidavit stipulating personal service to the person whose house was about to be taken. In unopposed divorce proceedings, there is no clear constitutional right that is implicated that justifies the removal of matters that can easily be finalised from the roll.

In relation to unopposed divorces where not only both parties are before the court, but also their settlement agreement and uncertified marriage certificate is before the court, it is not clear whether the judge presiding in the settlement court is entitled to remove the matter from the roll on the basis that the marriage certificate is not certified as required by the directive. With respect, this is absurd and can easily be regarded as abuse of judicial discretion. It is also not clear whether the presiding officer, where any of the papers required to dispose of the matter are uploaded onto CaseLines without their permission after the CaseLines bundle has been frozen, is entitled to exercise discretion to remove the matter from the roll based on non-compliance with the directive by their secretary. In civil marriages, it is not entirely clear whether the presiding judge can remove the matter from the roll where a marriage certificate has not been uploaded on CaseLines when both parties are before the court, none of whom is disputing the marriage and all other documents have been placed before the court to dispose of the matter. Customary marriages can be proven by other means other than marriage certificate (*LNM v MMM* (GJ) (unreported case no 2020/11024, 11-6-2021) (Siwendu J) at para 8). There appears to be no reason for the insistence on marriage certificates in civil marriages where such certificates have been lost or misplaced, particularly where there is no dispute regarding the marriage and proper motivation was given in the supporting affidavit. It is difficult to understand why, when all or most of the documents that can enable the presiding officer to grant a divorce order are available, they would prioritise non-compliance with the directive and burden parties with applying for a hearing date again. I submit that this amounts to unnecessarily burdening the already heavy unopposed rolls where matters that can be disposed of are removed from the roll and unnecessarily kept alive.

In conclusion, the Constitutional Court in *PFE International and Others v Industrial Development Corporation of South Africa Ltd* 2013 (1) SA 1 (CC) at para 30, held that 'superior courts enjoy the power to regulate their processes' considering the interests of justice and where necessary can depart from their own rules. If these courts can deviate from their own rules, they can also deviate from their directives and disregard non-compliance in unopposed divorce matters in the interest of justice. Judges presiding over unopposed divorce rolls must self-evaluate and honestly reflect on whether matters they remove from the roll, deserve to be removed or should be finalised despite non-compliance with directives. This should not be interpreted as a call for lawyers to disregard court directives. Presiding officers in their 'urge to punish' legal representatives that failed to comply with directives, should never disregard the human beings represented by these lawyers, for they are entitled to have their settled divorce disputes finalised where that is possible, irrespective of their legal representatives' non-compliance with court directives.

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Picture source: Gallo Images/Getty

How uneven allocation of police resources results in discrimination of poorer communities

By Hoitsimolimo Mutlokwa

Section 9(3) of the Constitution prohibits unfair discrimination against anyone. This article aims to unpack the most recent judgment handed down by the Constitutional Court (CC) on 19 July 2022 relating to unfair allocation of policing resources in South Africa (SA), thus resulting in unfair discrimination. The article further aims to show that systematic discrimination has seen less allocation of police resources among poorer communities in the settlement of Khayelitsha in Cape Town. Generally, SA is ranked as one of the most violent societies. Murder, robbery, rape, femicide, and domestic violence occurs at alarming levels. Cities such as Cape Town rank among the 50 most violent cities in the world with the likes of some Latin and Central American cities being countries that are not in any form of civil war or civil unrest (Nicole McCain 'Cape Town ranks top in SA as one of 50 most violent cities in the world' (www.news24.com, accessed 5-12-2022)). Although the application brought before the courts focussed on lack of policing resources in Cape Town, it is worth pointing out that this judgment also fits into the reality of the situation across SA. The case discussed is *Social Justice Coalition and Others v Minister of Police and Others* 2022 (10) BCLR 1267 (CC).

Background – Khayelitsha Commission of Inquiry

The build-up to the case emanated from the Safety and Justice Campaign launched in 2003 by the Treatment Action Campaign (TAC) to end the rise in violent crime around the townships in Cape Town. This campaign was also motivated by the rise in murders of TAC activists, which resulted in poor investigation and prosecution. The TAC, Social Justice Coalition (SJC) and Equal Education (EE) launched numerous demonstrations against the continuous failures by the Khayelitsha police to launch effective investigations. As a result, a formal complaint was lodged in 2011 with the Premier of the Western Cape Province by both the SJC and EE. This resulted in the launch of the Khayelitsha Commission of Inquiry. The Commission of Inquiry spent 37 days receiving testimonies from members of the community deeply affected by crime, members of the South African Police Service (SAPS), and people with expertise on policing. Expert evidence from the report showed that crime was under-reported in Khayelitsha and three areas in Khayelitsha had high levels of murder. This investigation was based on analysing the allocation of police resources in reference to the population and crime. The commission released its findings in 2014 indicating that SAPS allocation of police resources was 'systematically biased against poor, black communities, resulting in the under staffing of police stations which serve the poorest areas in Cape Town'.

After releasing these findings, the SJC and EE sought to engage with SAPS, the Minister of Police, and the national commissioner on the way forward in implementing the recommendations of the Commission of Inquiry. But this engagement fell on deaf ears, as SAPS and the Minister of Police appeared disinterested.

Case before the Equality Court

It was for this reason that the applicants approached the Equality Court to seek a declaration in 2016 that the allocation of police resources in the Western Cape unfairly discriminated against black and poor people. The equality court, using the Commission's report and findings and the experts' evidence, confirmed 'that the unequal distribution of resources led to the insufficient allocation of resources to Khayelitsha Police Stations'. The equality court further emphasised that crimes in Khayelitsha were underreported. The high incidence of poverty in Khayelitsha fell within the meaning of poverty, as such the following elements were listed to:

'(a) cause or perpetuate systemic disadvantage;

(b) undermine human dignity;

(c) adversely affect the equal enjoyments of a person's rights and freedoms in a serious manner that is comparable to discrimination on any of the prohibited grounds.'

The Equality Court concluded that affluent residential areas, which white people dominate had a higher police station ration compared to the poorer areas were black people mostly resided. But the Equality Court declined to grant any declaratory order for allocation of resources on the grounds that the unfair discrimination challenged was based on race and poverty and not gender. In other words, the equality court, postponed on the remedy and as result of such post-

ponement the applicants were forced to approach the CC in April 2021 after refusal or delay by the Equality Court to grant this remedy.

Case before the CC

The applicants sought a declaratory order which the Equality Court refused to grant a remedy in the CC. Two of the issues dealt with by the CC of relevance to this case are –

- whether the constitutional court had the power to grant the declaratory relief; and
- merits and remedy.

On the first issue, the court considered that there had been a 'constructive' refusal by the Equality Court to grant a remedy. Therefore, this was the appropriate means of ensuring that the CC gave an order. The court relied heavily on the decision of *Minister of Health and Another v New Clicks SA (Pty) Ltd and Others (Treatment Action Campaign and Innovative Medicines SA as* Amici Curiae*)* 2006 (1) BCLR 1 (CC) a point of reference on the basis that applicants, in this case, had been refused an order in the High Court and, therefore, sought an order in the Constitutional Court. In this instance, the court held that: 'An unreasonable delay in dealing with an application for leave to appeal interferes with a litigant's constitutional right to have access to court.'

The bulk of the address by the court dealt with the right of access to court, fair hearing and how such right must be protected without any undue delay. This also includes the constitutional obligation to deliver judgment without undue delay, in terms of ss 8(1) and 237 of the Constitution. Interpreting s 39(2) in the Bill of Rights is important because it must be done in an open and democratic society based on human dignity. This ensures that a matter is dealt with impartiality. The court also confirmed the case of *S v Basson* 2005 (1) SA 171 (CC), where the court refused the right to grant an appeal because the law did not provide for it. Furthermore, the court referred to the case of *Oosthuizen v Road Accident Fund* 2011 (6) SA 31 (SCA) where it was held that the inherent power to grant an order was only possible where the court had jurisdiction, but is faced with procedures, which do not have solutions to deal with the problem at hand. Despite this importance emphasised by the court that it would be unjust to have a delay over the outcome in the Equality Court being enforced by the CC, it had no power to make such a declaratory order. The courts justification for such refusal to grant this declaratory order was based on the fact that this would jeopardise the relationship between the courts because in this instance there was no indication that integrity and independence of the judiciary were being compromised.

Moving on to the remedy of case, the court emphasised that deciding on a suitable remedy was the outstanding issue in this litigation. Such remedy had to be done in an expeditious manner. The court considered that when the matter was before the Equality Court, it was required that the respondent came up with a remedial plan, such remedial plan should have dealt with unfair discrimination that the Equality Court found. Furthermore, such a remedy must have acknowledged the inputs of the expert. This remedy required deliberation, such as an equitable outcome that it be referred to the Equality Court for determination. The court gave the Equality Court 90 days to come up with a remedy considering the experts' written submissions.

Critical analysis of the CC decision

This case before the CC presents a missed opportunity to investigate the reality of the ever-increasing crime statistics as a serious cause of concern in Khayelitsha. As can be seen from the above discussion, it is felt the court dwelt too much on justifying why it was not the responsible forum to give a declaratory order. One of the reasons as can be seen repeatedly from the judgment was the judicial independence was not any form of compromise and, as such, the law did not provide any authority in the circumstance for the CC to provide any declaratory order. In the year 2022 alone, people having died mysteriously from shootings, among other members of the community. There is a growing culture of not reporting crimes because of the fear of being targeted by criminals. Judging from their previous experiences of the current police handling their cases, the community knows that the cases may not go anywhere. Like in many urban areas across SA, it is not so uncommon that in places, such as Khayelitsha, people in the community have resorted to vigilantism despite knowing it is wrong to take the law into their own hands. The national government confirms that between March 2022 and 8 June 2022, reported murders resulting from mass shooting are said to total 26. Exactly two days before the CC delivered its judgment, the Western Cape police reported two incidents of triple and double murders in unknown circumstances that occurred in different parts of Khayelitsha on 17 July 2022. The national government confirms that since September 2020, fatal shootings have amounted to 51 murdered people. The number could be much higher if unreported murder incidents are considered because residents in Khayelitsha have no confidence in the policing system. The recent judgment did not consider the rise in people forming groups that end up fighting among themselves over who is entitled to protecting foreign tuck shops from common robberies. One such incident resulted in the death of six people, which is believed to be an argument among two extortionist gangs fighting over territory.

A failure on the part of the national government to adequately provide police stations 28 years into democracy amounts to unfair discrimination as seen in s 9(3) of the Constitution. It is rather to the prejudice of the residents in parts of Khayelitsha, which are distant to police stations, the court clearly acknowledged the problem but refused to take the stance of making an order. The judgment does not also take into consideration the rise in people living in informal settlements. Police are generally reluctant to come to these places because of poor lighting and narrow roads, fearing risk of their own lives. The only glimmer of hope is the awaited outcome for remedy to be decided and confirmed in the Equality Court as per the CC ruling during this 90-day period, which may also be affected by postponements as is quite common in the justice system. Besides awaiting the outcome of the current remedial order from the Equality Court, the local authorities are responsible for ensuring that the 'right to the city' concept is implemented to augment the national sphere of government in promoting and implementing public safety. This could be seen by ensuring that neighbourhood watch committees are fully supported, street lighting is adequately provided, and informal settlements are regularised and upgraded in permanent places. This will reduce the systemic inequalities arising from the past as confirmed by both the inequality court and constitutional courts.

Conclusion

Considering this significant judgment, only time will tell if the respondents come up with a remedial plan that the Equality Court will have to confirm before the end of the 90 days. Only hope can be anticipated in the circumstances where shockingly high crime levels go unreported and poorly investigated because of overburdened stations in Khayelitsha. This article has aimed to show that the problem needs an urgent solution to make public safety a guaranteed reality in line with the prevention of unfair discrimination as per s 9(3) of the Constitution.

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Picture source: Gallo Images/Getty

Stare decisis rule and the importance of interpreting statutes correctly

By Desmond Francke

Stare decisis is integral to the rule of law. The term stems from the Latin maxim *stare decisis et non quieta movere*, which means to stand by decisions and not to disturb settled matters. At its core, the doctrine engages the principles of certainty and correctness, which at times pursue contradictory aims. '*Stare decisis* brings important benefits to constitutional adjudication that balance predictability and consistency with changing social circumstances and the need for correctness' (*R v Sullivan* 2022 SCC 19 (CanLII)). An incorrect 'decision by a court is more difficult to repair and may require legislative intervention' (*Sullivan*). Much has been said about the *Mahlase v S* (SCA) (unreported case no 255/1211, 29-11-2013) (Tshiqi JA (Lewis and Theron JJA concurring)) decision delivered by Tshiqi JA.

In para 9 the court said: 'The second misdirection pertained to the sentence imposed for the rape conviction. The court correctly bemoaned the fact that Ms D M was apparently raped more than once and in front of her colleagues. The learned judge however overlooked the fact that because accused 2 and 6, who were implicated by Mr Mahlangu, were not before the trial court and had not yet been convicted of the rape, it cannot be held that the rape fell within the provisions of Part 1 Schedule 2 of the Criminal Law Amendment Act [105 of 1997] (where the victim is raped more than once) as the High Court found that it did. It follows that the minimum sentence for rape was not applicable to the rape conviction and the sentence of life imprisonment must be set aside.'

The finding of the court compelled the Legislature to amend the Criminal Law Amendment Act with the enactment of Criminal and Related Matters Amendment Act 12 of 2021 and specifically the amendment of Part I of sch 2 to Act 105 of 1997, as amended by s 37 of the Judicial Matters Amendment Act 62 of 2000 and s 27 of the Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004, s 68

of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, s 5 of the Criminal Law (Sentencing) Amendment Act 38 of 2007, s 22 of the Judicial Matters Amendment Act 66 of 2008, s 48 of Prevention and Combating of Trafficking in Persons Act 7 of 2013 and s 25 of the Judicial Matters Amendment Act 8 of 2017 that enacts rape –

'(*a*) when committed –

(i) in the circumstances where the accused is convicted of the offence of compelled rape and evidence adduced at the trial of the accused proves that the victim was also raped –

(*aa*) as contemplated in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, by any co-perpetrator or accomplice; or

(*bb*) by a person, who was compelled by any co-perpetrator or accomplice, to rape the victim, irrespective of whether or not the co-perpetrator or accomplice has been convicted of, or has been charged with, or is standing trial in respect of, the offence in question.'

It is unwise for a court to bind all other courts with an incorrect approach to legislation. 'It is better to revisit precedent than to allow it to perpetuate an injustice' (*Sullivan*).

The importance of the preceding paragraph prompted me to write this article based on my article 'Parents who assault their children – the inconsistency of applying s 297(4) of the Criminal Procedure Act' 2021 (June) *DR* 20 and a subsequent article that was written by Garth Davis, a regional magistrate at the Durban Magistrate's Court (Garth Davis '*Hildebrand* and *Seedat* – The importance of the law of precedent or *stare decisis*' 2022 (Aug) *e-Mantshi* 19). Davis holds the view that 'the effect of a finding in terms of section 51(3) [of the Criminal Law Amendment Act] was that section 51(5) was no longer applicable and that the court was free to impose any sentence' provided the court finds 'substantial and compelling circumstances exist' (Davis (*op cit*)). His belief is based on the *Hildebrand v State* (SCA) (unreported case no 00424/2015, 26-11-2015) (Bosielo JA (Tshiqi and Swain JJA concurring)) case. Davis reasons *S v Seedat* 2017 (1) SACR 141 (SCA) does not overrule the *Hildebrand* decision. I agree with the outcome of the *Hildebrand* decision, but not on the reasoning of the court in so far as a finding in terms of s 51(3) of the Criminal Law Amendment Act that it substantial and compelling circumstances exist as it makes s 51(5) redundant.

I agree with Davis's reasoning in so far as to what *stare decisis* is not his conclusion, but do not agree in so far as the redundancy of s 51(5) is concerned. The reasoning concerning the *Hildebrand* decision is wrong insofar as the provisions of the Criminal Law Amendment Act are concerned. I say this for several reasons. It is important to understand the purpose of the legislation as part of my reasoning why I hold the view the reasoning in *Hildebrand* is wrong.

It is indeed so that the Criminal Law Amendment Act is not well-drafted legislation. It has been described as an Act that 'purports to cover the field of serious crime in no more than a handful of blunt paragraphs' (see *Vilakazi v S* [2008] 4 All SA 396 (SCA)). 'The modern approach to statutory interpretation mandates that statutes be read with an eye toward harmonizing their text, context, and purpose' (Mark Mancini 'The purpose error in the modern approach to statutory interpretation' (2022) 59 *Alberta Law Review* 919). 'Jurists [and courts specifically] can stray from the modern approach by prioritizing abstract statutory purposes over the specific legal rules by which an act pursues these objectives' (Mancini (*op cit*)). It has been described as a purpose error. 'Two factors generally drive the commission of the purpose error. First, the definition of the statutory purpose at an unduly high level of abstraction. Second, the failure to qualify a statute's primary purpose by considering other competing secondary purposes that the act also aims to achieve' (Mancini (*op cit*)). 'There is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament' (Derek Sinko 'The use of "use": Legislative intent, plain meaning, and corpus linguistics' (https://papers.ssrn.com, accessed 11-12-2022)). 'What courts "must interpret is the text through which the legislature seeks [its objective]"' (Mancini (*op cit*)).

The purpose of the Criminal Law Amendment Act 105 of 1997 states 'to provide for minimum sentences for certain serious offences; and to provide for matters connected therewith'. The purpose of the legislation will not provide all the answers. An understanding of the words 'in context and as applied to facts is the core interpretive task. Words at certain levels of generality will indicate different legal rules and purposes, and courts should pay close attention to how the legislature chooses to "set meaningful boundaries on the purposes it wishes courts … to pursue' (Mancini (*op cit*)). 'The language is the focus: It can be "precise and narrow"' regarding minimum sentences for serious offences (Mancini (*op cit*)). The why and how are contained in the phrase 'to provide for matters connected with it'. It is the why and how that is the central focus of this article.

Subsection 51(3)(*a*) provides that: 'If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence'. An ordinarily grammatical meaning of the word 'lesser' does not mean 'any' as stated in the *Hildebrand* case (see para 8). The words 'lesser' and 'any' are not synonymous words. Courts are not mandated to read words or amend words into statutory provisions. The reasoning in the *Hildebrand* case is not a logical proposition. Neither is it consistent with the grammatical structure of s 51(3) of the Criminal Law Amendment Act. Parliament has clearly expressed the intention that the punishment imposed under s 51 of the Act is a minimum punishment. This express language ousts the general discretion of the sentencing court to select the form (type of sentence) and it limits the degree of punishment. I cannot, therefore, accept that Parliament intended the subsection to be so interpreted as stated in the *Hildebrand* case.

The *Hildebrand* reasoning insofar as s 51(3) of the Act is, with respect, framed at a high level of abstraction and in isolation from the Legislative intention which is stated above. It disqualifies s 51(5) of the Criminal Law Amendment Act without any substance or flawed reasoning. In *Hildebrand*, Bosielo JA states: 'It should be clear that s 51(5) refers to "a minimum sentence imposed in terms of this section". Self-evidently, this section does not apply to sentences imposed after a finding that substantial and compelling circumstances exist, because such a sentence is not one imposed in terms of s 51. The sentence imposed by the regional magistrate accordingly did not fall within the restrictive provisions of s 51(5)' (para 10). Section 51(5) reads 'the operation of a minimum sentence imposed in terms of this section shall not be suspended as contemplated in section 297(4) of the Criminal Procedure Act [51 of 1977]'. The use of the word 'minimum' in the *Hildebrand* case is an addition that does not form part of s 51(5) of the Criminal Law Amendment Act. There is nothing in the Criminal Law Amendment Act to even suggest s 51(5) as being qualified by another specifically s 51(3) as found by the *Hildebrand* decision. The interpretation is not consistent with the explicit wording and grammatical construction of the subsection. It is important to emphasise that a naked text (s 51(3)) cannot be the sole determinant on which the meaning of a statute is determined by a court because it will not capture the entirety of legislative expression.

I deem it important to elaborate on the *stare decisis* rule based on Davis's opinion and *S v Dawjee and Others* [2018] 3 All SA 816 (WCC). Respectfully, I disagree with the statement made by Davis that the effect of a finding in terms of s 51(3) makes s 51(5) of the Act redundant and, therefore, *Seedat* has no relevance. Tshiqi JA states: 'If it were the intention of the High Court to invoke the provisions of s 297(4), it could do so, as it had already accepted that there were substantial and compelling circumstances that justified a deviation from the prescribed minimum sentence. However, in order for that sentence to be competent, the court would have to impose a sentence for a specific term of imprisonment' (para 36). Tshiqi JA specifically discusses s 51(3) of the Criminal Law Amendment Act and its consequences if a finding was made substantial and compelling circumstances exist. *Hildebrand* concludes that if substantial and compelling circumstances exist, s 51(5) of the Criminal Law Amendment Act does not apply. *Seedat* concludes that for the sentence to be competent even though substantial and compelling circumstances exist, the court must impose a specific term of imprisonment in terms of s 51(5) of the Criminal Law Amendment Act and s 297(4) of the Criminal Procedure Act. To simplify it, both cases reached their decision based on an interpretation of s 51(3) of the Criminal Law Amendment Act (the how and why I referred to the above in this article) and the consequences of it, to wit s 51(5) of the Criminal Law Amendment Act. Strengthening my stance Bosielo JA said in *Director of Public Prosecutions, North Gauteng v Thabethe* 2011 (2) SACR 567 (SCA) at para 23: 'It is true that s 51(5)(*a*) … precludes a sentencing court from suspending a sentence imposed in terms of this Act. It follows that the court below erred in having the sentence wholly suspended'. Interestingly Bosielo JA wrote *Thabethe* and the subsequent *Hildebrand* decisions reaching different conclusions on an interpretation of s 51(3) and s 51(5) of the Criminal Law Amendment Act. It is specifically his divergent views of interpreting s 51(5) that must be of concern.

'The principle of judicial comity – that judges treat fellow judges' decisions with courtesy and consideration – as well as the rule of law principles supporting *stare decisis* mean that prior decisions should be followed' (*Sullivan*). 'Courts should only depart from binding decisions issued by a court of coordinate jurisdiction in three narrow circumstances:

1. The rationale of an earlier decision has been undermined by subsequent appellate decisions' (*Sullivan*). A court 'need not follow a prior decision where the authority of the prior decision has been undermined by subsequent decisions. This may arise in a situation … [that is] inconsistent with, a decision by a higher court' (*Sullivan*). I discussed the *Thabethe* and *Hildebrand* decisions.

'2. The earlier decision was reached *per incuriam* ("through carelessness" or "by inadvertence")' (*Sullivan*). 'The standard to find a decision *per incuriam* is well-known: the court failed to consider some authority such that, had it done so, it would have come to a different decision because the inadvertence is shown to have struck at the essence of the decision' (*Sullivan*). At the fear of repetition, it is important to stress I agree with the outcome of the *Hildebrand* decision based on the proportionality principle and not the interpretation of s 51(3) and the consequences flowing from it to wit s 51(5) of the Criminal Law Amendment Act.

'3. The earlier decision was not fully considered, eg, taken in [important] circumstances' (*Sullivan*).

Davis is spot on with his remarks, *Seedat* does not refer to *Hildebrand* and neither does *Hildebrand* refer to *Thabethe*. The three decisions, however, discussed the provisions of the Criminal Law Amendment Act and specifically s 51(3) the (how and why.) It is for these reasons I hold the view that because of the how and why the importance of *Thabethe* and *Seedat*. It is important to appreciate that *stare decisis* can be conceptualised in two distinct categories: Horizontal and vertical. Horizontal *stare decisis* requires a court to follow its own previous decisions unless exceptional circumstances warrant changing the law. In contrast, vertical *stare decisis* requires lower courts to follow higher courts' binding decisions. For the law to evolve and remain the 'living tree' vital to the context of the times it operates in, it is appropriate for lower courts to periodically revisit issues previously decided by higher courts. A legal precedent may be revisited if new legal issues are raised as a consequence of significant developments in the law, or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate. *Hildebrand* with respect cannot be followed as it is not based on a correct interpretation of s 51(5) of the Criminal Law Amendment Act. Jurists must avoid following *Hildebrand* as it will follow the controversy created by the *Mahlase* decision.

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SARS Voluntary Disclosure Programme – what must your client know?

By Samuel Mariens

On 28 June 2021, the South African Revenue Service (Sars) issued version 2 of its External Guide: Voluntary Disclosure Programme (the Guide). The Guide provides that the purpose of Sars's Voluntary Disclosure Programme (VDP) is to encourage taxpayers to voluntarily take steps to regularise their tax affairs with the incentives of –

- confidentiality (regarding the information submitted during the VDP process); and
- VDP relief (such as the avoidance of penalties).

Brief summary of the facts

In *Purveyors South Africa Mine Services (Pty) Ltd v Commissioner for the South African Revenue Service* (SCA) (unreported case no 135/2021, 7-12-2021) (Mathopo JA (Petse AP, Schippers, Mokgohloa JJA and Molefe AJA concurring)), Purveyors South Africa Mine Services (Pty) Ltd (the taxpayer) entered into a suite of agreements (with cross-border obligations), in terms of which the taxpayer would operate air charter services in respect of an aircraft. The aircraft was stationed at OR Tambo International Airport when it was not in use. Pursuant to a technical opinion received by the taxpayer from its professional advisors, the taxpayer engaged in correspondence with Sars regarding the regularisation of value-added tax (VAT) supposedly due by the taxpayer in respect of the import of the aircraft. During the exchange of correspondence, an official of Sars communicated to the taxpayer that, *inter alia*, the taxpayer was liable for VAT and penalties. The taxpayer obtained a second opinion, wherein its professional advisors (against the backdrop of their initial opinion) agreed with Sars's position regarding the taxpayer's liability for VAT. No further steps were

taken by the taxpayer until approximately a year later, when the taxpayer applied to Sars for VDP relief in terms of s 226 of the Tax Administration Act 28 of 2011 (TAA). Sars, placing reliance on s 227, rejected the taxpayer's voluntary disclosure application (VD Application) because the facts contained therein had been previously disclosed and, thus, were not unknown to Sars.

The dispute progressed to the Gauteng Division of the Hight Court who – in dismissing the taxpayer's VD Application – found that an element of compulsion was present at the time the taxpayer sought VDP relief (thereby indicating an absence of volition by the taxpayer). The taxpayer appealed the High Court's decision to the Supreme Court of Appeal (SCA). The SCA expressed that the issue to be decided was whether Sars's rejection of the taxpayer's VD Application on the grounds of noncompliance with s 227 was legally sound.

The taxpayer's contentions

The taxpayer contended that its historical exchanges of correspondence with Sars was irrelevant in the administrative decision-making process because the exchanges had no formal or binding effect on the taxpayer's views expressed therein. The taxpayer contended that the VD Application had to be decided at the time it was made. The taxpayer contended that Sars's prior knowledge of the taxpayer's liability, which arose from the prior exchanges of correspondence did not bar the taxpayer from disclosing the default concerned nor did it affect the validity and voluntariness of its VD Application. In interpreting the term 'disclosure' in s 227 of the TAA, the taxpayer relied on commentary from legal authors to support its contention that the information disclosed was not required to be new or information, which was unknown to Sars at the time the VD Application was brought.

Sars's contentions

Sars contended that it was aware of the facts disclosed by the taxpayer in its VD Application relating to the disclosed default. In amplification, Sars submitted that its customs officials had previously warned the taxpayer that the aircraft had to be declared in South Africa and that VAT would be levied thereon. Furthermore, Sars contended that its confirmation of the taxpayer's liability prompted the taxpayer's endeavour to escape looming liability for VAT, penalties and interest. Consequently, Sars argued that the VD Application did not satisfy the requirements of s 227 because it was not voluntary.

Statutory requirements

Section 227 of the TAA sets out the following requirements for an applicant's voluntary disclosure to be valid, namely:

- Own volition: The disclosure must be voluntary (ie, unprompted and not made out of fear or compulsion).
- Timeframe: The applicant's disclosed default must not relate to a similar default disclosed by the applicant within the preceding five years.
- Content: The disclosure must be full and complete in all material respects.
- Conduct: The disclosure must involve conduct referred to in column 2 of the understatement penalty table set out in s 223 of the TAA.
- No refund: The disclosure must not result in Sars becoming liable to refund the applicant.
- Form and manner: The applicant must make the disclosure in the prescribed form and manner.

Interpretation of s 227 of the TAA

The SCA observed that the appeal turned on the correct interpretation of s 227 of the TAA. In *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] 2 All SA 262 (SCA), the SCA instructed that, when interpreting statutes, the interpreter must consider the language of the provision considering the ordinary rules of grammar and syntax. In the *Purveyors* case, the SCA observed that, key to the interpretation of s 227, was to determine the meaning to be ascribed to the words 'voluntary' and 'disclosure'. The SCA relied on the dictionary definition of the aforementioned words in order to purposively interpret the provision.

Onus

The SCA applied a textual interpretation and found that the onus rested on the applicant to establish on a preponderance of probabilities that its VD Application had been brought voluntarily. The SCA found that determining whether a VD Application was brought on an applicant's own volition or prompted by compulsion was a question of fact, which entailed an examination of the prevailing circumstances precipitating the VD Application. In *Reed v Minister of Finance and Others* 81 SATC 383, the court (also the Gauteng Division of the High Court) expressed that an applicant's disclosure

must constitute a voluntary disclosure to qualify for VDP relief. The court expressed that, in making the administrative decision, the Sars official had to inquisitorially determine whether the specific disclosure was voluntary as a matter of fact. The court observed that there are no prescribed procedures, which the Sars official had to follow in the process of conducting her factual inquiry. It is my view that the Sars official, in making the administrative decision, must be guided by the requirements of s 227 (which may, for procedural purposes, entail a formalistic or checklist approach).

Legislature's intention

The SCA inferred from the language used in s 227, that the legislature intended to bar disclosures, which were –

- not voluntary; and
- not complete in all material respects.

The SCA held that the mischief sought to be removed by the enactment of the section was to guard against a situation where an errant taxpayer makes disclosures to Sars in the process of obtaining informal advice regarding its compliance status and, following the communication of the adverse outcome arising from the disclosures, attempt to escape fiscal liability by bringing a VD Application containing the same disclosures. The SCA held that the purpose of s 227 of the TAA is to afford a *bona fide* errant taxpayer immunity by voluntarily confessing its default to Sars (fully in all material respects), which default Sars has no knowledge of at the time it is informed, in order to enhance fiscal compliance.

Sensible meaning to be preferred

In *Endumeni*, the SCA instructed that, when interpreting statutes, the interpreter must prefer a sensible meaning to be ascribed to the subject material and not one, which would result in an insensible or unbusinesslike outcome, or which would undermine the clear purpose of the enactment. The SCA found that s 227 of the TAA is not a penalty provision and, therefore, its application is aimed at aiding errant taxpayers to rectify their defaults (ie, liabilities, and/or misstatements or omissions in their tax declarations) by regularising their tax affairs. The SCA held that to grant VDP relief in accordance with the taxpayer's interpretation of s 227 of the TAA would conflict with the intention of the legislature and the mischief, which the enactment sought to cure. The SCA observed that an errant taxpayer who is aware of its default would only take steps to rectify its default when it is clear that Sars intends to hold such errant taxpayer accountable, which would disincentivise an errant taxpayer from making a full and frank disclosure of its defaults which are unknown to Sars. The SCA held that its acceptance of the taxpayer's interpretation would defeat the purpose for which the section was introduced (or undermine the clear purpose of the enactment as expressed in *Endumeni*) and bring about an anomalous result (or result in an insensible or unbusinesslike outcome as expressed in *Endumeni*).

The SCA's finding

After examining the prevailing circumstances precipitating the VD Application, the SCA found that –

- the taxpayer had been informed of its liability for VAT and penalties for the aircraft and that such liability would not be waived by Sars;
- the taxpayer had failed to produce any invoice which recorded that the consideration payable in respect of the lease of the aircraft was exclusive of VAT; and
- based on the prior exchange of correspondence, it was evident that –
  - the taxpayer did not dispute that it had received any import VAT on the lease of the aircraft;
  - Sars had warned the taxpayer about the implications of its non-compliance;
  - the taxpayer was prompted to rectify its non-compliance by Sars' warning and the opinions received from its professional advisors;
  - the taxpayer was aware that penalties would be levied because of its default; and
  - the VD Application was motivated by the taxpayer's endeavours to escape its looming liability and not to voluntarily confess its default.

The SCA held that the taxpayer did not discharge the onus of establishing on a balance of probabilities that its VD Application measured up to the requirements of s 227 of the TAA. Consequently, the SCA held that the taxpayer's disclosures did not fall within the realm of VDP relief and, therefore, the taxpayer's VD Application could not be recognised as voluntary.

Conclusion

A taxpayer seeking VDP relief is required to take Sars into their confidence and make a full disclosure out of its own volition and in respect of a default which Sars is unaware of at the time of disclosure. The SCA's judgment records that the first time the taxpayer reached out to Sars to disclose its default occurred on 30 January 2017; and Sars is recorded to have responded to the taxpayer's e-mail on 1 February 2017. The SCA's judgment further records that customs officials from Sars advised the taxpayer that, *inter alia*, VAT ought to be paid in respect of the aircraft on 1 February 2017. The SCA's judgment does not disclose when the customs official gained knowledge of the taxpayer's default (as well as whether their knowledge was independently developed). Considering the chronology of events set out in the SCA's judgment, it is unclear whether Sars' factually gained knowledge of the taxpayer's default prior to the taxpayer's first e-mail on 30 January 2017 (as contended by Sars). Although the SCA's judgment records that the taxpayer effectively dragged its feet for approximately a year before bringing its VD Application, it is noteworthy that Sars similarly did not take any steps to collect the unpaid VAT and levy penalties and interest. The lesson to be taken from *Purveyors* is that if the taxpayer, instead of engaging in correspondence with Sars, immediately brought its VD Application on receiving PricewaterhouseCoopers's first opinion, the taxpayer would have likely been granted VDP relief. A taxpayer desirous of applying for VDP relief may submit a VD Application to Sars via eFiling or at a branch office.

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How to use public policy to remedy trust law disputes

By Marietjie du Toit

'A fundamental characteristic of South African constitutionalism is the principle of respect for the law' as confirmed by P De Vos, W Freedman, D Brand, C Gevers, K Govender, P Lenaghan, D Mailula, N Ntlama, S Sibanda and L Stone in *South African Constitutional Law in Context* (Cape Town: Oxford 2015) at 78) (see Marietjie Du Toit 'Building common-law principles of trust law: One cannot transfer more rights than one has' 2022 (Aug) *DR* 15). 'The supremacy of the Constitution was communicated strongly and unmistakably by Chaskalson P in *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) at para 44: "There is only one system of law. It is shaped by the Constitution, which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control"' (Du Toit (*op cit*)).

Our laws (both common and legislative) are an expression of public policy. Although public policy often comprises unwritten principles on which social laws are established, all contracts or forms of conduct remain subordinate to the rule of law. In the opinion of RH Christie and V McFarlane (*The Law of Contract in South Africa* (Durban: LexisNexis 2006) at 17), and J Voet (*The Selective Voet, being the Commentary on the Pandects* (Durban: LexisNexis) 2 14 16), public policy is an effective, flexible and tested concept in South Africa to achieve all the consequences of good faith in conduct and contract and to achieve them with additional certainty. Voet accepted public policy as a test for the validity of contracts.

'The objectives of public policy [as] constituted in good faith, reasonableness, fairness and *ubuntu* in conduct and agreement' are rooted in the constitutive values of s 1 of the Constitution (Du Toit (*op cit*)). Adopted into the Constitution, is the Bill of Rights (BOR) 'for the protection of the values of equality, human dignity and the advancement of human rights and freedoms' (Du Toit (*op cit*)). By accepting the Constitution and the BOR as a consistent decree of public policy, the courts will have no difficulty declaring a contract which infringes on a provision in the BOR as invalid and unenforceable. The development of the concept of public policy can be seen as an ongoing process, which continues to define the concept.

I Currie and J De Waal (*The Bill of Rights Handbook* (Cape Town: Juta 2005) at 704), state that the rule of law establishes the fundamental principle that anyone may challenge the legality of any law or conduct. The first constitutional challenge to contractual terms was brought before the court in the case of *Barkhuizen v Napier* 2007 (5) SA 323 (CC) at para 59, where the verdict by Ngcobo J affirms the 'inequality of bargaining power'.

In *Beadica 231 CC and Others v Trustees, Oregon Trust and Others* 2020 (5) SA 247 (CC) at para 13, the proper role of fairness, reasonableness, good faith and *ubuntu* in contract law was scrutinised by the Constitutional Court (CC). The appeal focused on the extent to which a court may refuse to enforce apparently valid contractual terms on the basis that the enforcement would be against public policy. Froneman J holds in *Beadica* at para 123, that 'freedom of contract can thus never be absolute'. He also held that 'freedom of contract is not the only principle of [the] law of contract'. 'The individualism of [the] law of contract is one that takes account of the reasonable expectations of the parties' contracting as well as the expectations of the wider community (*Beadica* at para 177). The present constitutional concept of *ubuntu* as a value of public policy must be understood as the neces-

sity to do simple justice between the individuals contracting. Thus, the concept of *ubuntu* adds constitutional value and substance to the law of contract as ruled in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (3) BCLR 219 (CC) at para 71.

The property rights of both contributing spouses in a joint and for that matter other matrimonial regimes must be protected against unconstitutional infringements on personal and property rights. It speaks for itself that by reasoning of the court in *Beadica* at para 231, the values honoured by public policy and *ubuntu* must also be reflected in decisions made by trustees in relation to the control of the fiduciary office. The principle of *ubuntu* provides a more expansive analysis and include the inequality of bargaining power.

In making a ruling based on public policy (the legality of contract, conduct and agreement), the decision of the court is strengthened by the protection in the BOR. Christie and McFarlane ((*op cit*) at 343-349) state that 'public policy is a matter of fact and not law', and transforms with the general consciousness of *boni mores* and the opinion of social justice as distinguished by the community. If the court finds that the limitation of rights is not justifiable and the infringement is to the prejudice of one party, the infringement cannot be protected. Therefore, those provisions, as included in trust deeds and deeds of settlement, must be declared unconstitutional and invalid and, therefore, *contra* public policy.

The four foremost principles fundamental for the protection of personal rights in trust deeds and deeds of settlement are equality, human dignity, freedom of association and property rights. Section 9 of the Constitution is a fundamental component of the transformative Constitution, based on the grounds of unfair discrimination provided for in subs 9(3). JD Sinclair and J Heaton *The Law of Marriage* (Cape Town: Juta 1996) at 206, state that the implications of the BOR for family law guarantee equality and equal protection as well as 'the outlawing of unfair discrimination based on criteria' such as gender and religion. The same is true of clauses which protect rights such as human dignity. Sinclair and Heaton (*op sit*) agree with Catharine MacKinnon that the questions of equality and of gender are questions of the distribution of power and hierarchy rather than of difference. They regard the questions of sex inequality as questions of systemic dominance. Sinclair and Heaton ((*op cit*) at 53-65 and 277) mentioned Deborah Rhode, who advises a movement away from conventional inequality analysis based on gender differences to an approach based on 'gender disadvantage'. The authors make the significant statement that this approach invites dialogue about 'consequences rather than motives'. They also claim that the remedy of unjustified enrichment is also available.

The campaign for formal equality has been more successful in Canada, with its Canadian Charter of Rights and Freedoms of 1982. However, the first 35 sex discrimination cases under the Charter seemed not to have provided much encouragement. Elizabeth Sheehy, as quoted by Sinclair and Heaton ((*op cit*) at 42-43), observes the cases of *R v Seaboyer*; *R v Gayme* (1991) 48 OAC 81 (SCC). She states that those cases clearly show that 'the right to speak and make an argument does not include a corresponding obligation on the part of judges to listen, to understand, or even to answer feminist analysis', with the consequence that 'women's legislative gains are being invalidated.'

Section 10 of the Constitution stipulates that the value of dignity is a central value of the rule of law and De Vos *et al* ((*op cit*) at 418) affirm that human dignity can be described as the most outstanding value and the cornerstone of the Constitution and the BOR. In *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC) at para 30, it was held that all people possess the same degree of human dignity, human dignity also includes respect. Human dignity is a fundamental right, and as a fundamental value it has a residual or permanent function, which indicates that it applies where many of the more specific rights do not apply. This principle was stated in *Advance Mining Hydraulics (Pty) Ltd and Others v Botes NO and Others* 2000 (2) BCLR 119 (T) at 127.

In *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) at para 29, O'Regan J held that the right to dignity must protect marriages and family life. De Vos *et al* ((*op cit*) at 457) states that the right to human dignity implies and defines an expectation to be protected from conditions or treatment that infringes on and contravenes the subject's sense of their worth in society, decreeing those human beings must be treated as unique individuals rather than representatives of the species. Justice Chaskalson in 'Dignity as a Constitutional Value: A South African Perspective' (2011) 26 *American University International Law Review* 1377 quoted the case of *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497 at para 53, predicting that the norm establishes self-respect and self-worth and is violated when groups or individuals are devalued and ignored. In the case of *King NO and Others v De Jager and Others* 2021 (5) BCLR 449 (CC) at para 237, Victor AJ concludes with the following:

'I will conclude with the importance of how the now constitutionally integrated value and norm of *ubuntu* applies. As outlined above, the facts in this case demonstrate a disregard for the dignity and value of women heirs. This court has affirmed *ubuntu* as a principle in our law which should inform all forms of adjudication. At the heart of *ubuntu* is the idea that a society based on human dignity must take care of its most vulnerable members and leave no one behind. It emphasises the adage that none of us are free until all of us are free.'

To verify the discussion above, depriving one of the spouses of his or her life savings and labour is cruel and inhuman and can, under the right to human dignity, not be justified or rational.

Section 18 of the BOR upholds the right that 'everyone has the right to freedom of association'. This section is discussed in connection with the deed of settlement and limitation clauses on freedom of association as stipulated in the amendment of the trust deed in the event of divorce. Such clauses include the forfeiture of allocations as determined in the deed of settlement or the excluding as beneficiary in the case of a new relationship or a second marriage. According to Currie and De Waal ((*op* cit) at 420) in *Democracy in America* (1835) at 222, Alexis de Tocqueville wrote around 170 years ago that 'no one, and certainly no legislator, may attack the right to freedom of association without distorting the very foundations of society'. The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, is the legislation developed to protect the right to freedom of association.

Section 25 of the BOR specify the right to property. Currie and De Waal ((*op cit*) at 538), affirm the right as 'full ownership'. The CC held that the fundamentals of ownership can be seen as a bundle of rights and constitutes plenary ownership as ruled in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) at para 100. Yacoob J states in *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as* Amici Curiae*)* 2005 (1) SA 530 (CC), that 'substantial interference or limitation that goes beyond the normal', and excludes the use

and enjoyment of property, would in an open, democratic society amount to deprivation and infringement on property rights. The question that could be asked is: What is the ambit of conduct that could be defined as not normal? Would it be normal, for instance, for the court to strip one spouse of all the protection provided for by the BOR and, in particular, the protection contemplated in s 25, as has happened in the divorce cases of *WT and Others v KT* 2015 (3) SA 574 (SCA) and *Du Toit v Du Toit* (GP) (unreported case no 59114/16, 21-11-2017) (Rabie J)?

The recognition of individual and property rights and the 'underlying moral or value choice' in *Beadica* at para 231, as protected by public policy in contracts, are further strengthened by the BOR. It is claimed that it is the duty of courts to develop the common law pertaining to the division of joint assets transferred to a family trust. Uncertainty contributes to unlawful contracts, agreements, and conduct, and needs the urgent attention of the judiciary and the legislator.

In conclusion, the constitutional values provide constitutional protection for the rights and freedoms of trust fund contributors in the event of divorce. Therefore, the prudence of public policy can no longer be dismissed by the legislator and the courts.

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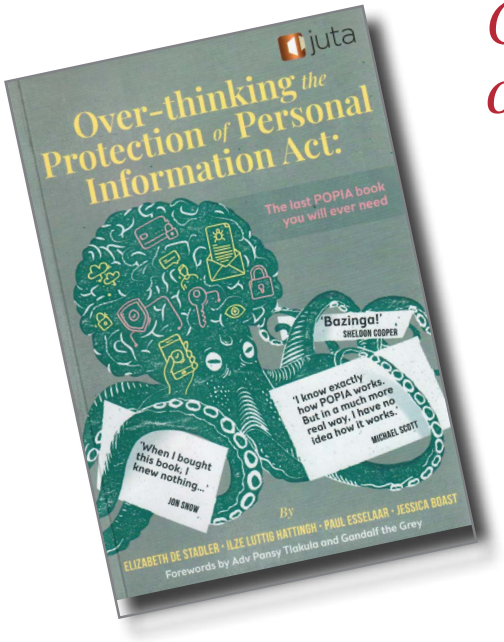

Over-thinking the Protection of Personal Information Act: The last POPIA book you will ever need

By Sarah De Jager (ed), Elizabeth De Stadler; Ilze Luttig Hattingh; Paul Esselaar and Jessica Boast
Cape Town: Juta
(2021) 1st edition
Price: R 609 (including VAT)
752 pages (soft cover)

By Ricardo Wyngaard

If you have any questions on the Protection of Personal Information Act 4 of 2013 (POPIA), your go-to resource should be *Over-thinking the Protection of Personal Information Act: The last POPIA book you will ever need.*

The authors have turned a daunting and technical legal topic into an enlightening and pleasant voyage. They constantly guide the reader by switching between legal concepts, the international landscape, key points, practical application, and tricky areas. They even introduced comedy. The authors are like proficient guides helping the readers to scale the POPIA-mountain while encouraging them to regularly pause while they appreciate and embrace the surrounding scenery.

The book starts off with critical contextual information aimed at helping the reader to understand the broader context within which POPIA exists. It emphasises that effective POPIA compliance can only happen through effective organisational integration. Throughout the book, the authors meticulously guide the reader through diverse organisational aspects that are related to POPIA. They offer diverse and numerous practical educational tools to unpack legal jargon and to aid mindful compliance.

POPIA has changed the interface between corporate governance and privacy. This book is designed at helping responsible parties to navigate the intricacies of processing personal information in terms of POPIA. It is a game-changer tool in the quest to become POPIA-compliant. The book has 20 chapters that are spread out over 700 pages. It addresses all the pertinent POPIA topics in a comprehensive and understandable manner.

This book should be compulsory reading for all information officers who will hardly need additional resources to navigate POPIA. This book may very well be *the last POPIA book you will ever need.*

Ricardo Wyngaard is the Senior Legal Officer at the Law Society of South Africa.

The two pathways of initiating business rescue proceedings

By Njabulo Kubheka

Picture source: Gallo Images/Getty

The interpretation of statutes or to be more precise, the judicial understanding of the legal rules, deals with those rules and principles which are employed to construct the correct meaning of the legislative text to be applied in legal disputes' – Clive Brian Jaars 'Constitutional interpretation of statutes in the Republic of South Africa' (www.researchgate.net, accessed 12-12-2022).

There are two pathways in which business rescue proceedings may be initiated, the first one is by way of a resolution by the board of directors of the company in terms of s 129 of the Companies Act 71 of 2008 (the Act) and the second one is by way of application to court by an affected person.

The commencement of business rescue proceedings by an order of court is regulated by s 131 of the Act. 'Section 131(1) of the Act provides that', 'an affected person may apply to court at any time for an order placing the company under supervision and commencing business rescue proceedings', 'unless a company has adopted a resolution' as contemplated in s 129 of the Act (LLGV 'Business Rescue Proceedings' (https://thoughtcapitaltest.co.za, accessed 12-12-2022)).

The Act also makes provision for instances where an application in terms of s 131 would have the effect of suspending the liquidation proceedings. Section 131(6) states that 'if liquidation proceedings have already been commenced by or against the company at the time an application is made … , the application will suspend those liquidation proceedings until –

(*a*) the court has adjudicated upon the application; or

(*b*) the business rescue proceedings end, if the court makes the order applied for'.

The term 'at the time an application is made' is not defined in the Act. As a result, various interpretations have been adopted by the courts over the years in an attempt to provide a reasonable and correct interpretation of what these words mean. 'What some considered constituting the "making" of a business rescue application is … the mere lodging' 'with the Registrar and the' issuing 'of the business rescue application' while other courts have opted for the view that

'both the lodging and issuing of the business rescue application as well as due compliance with the service and notification requirements of ss 131(2)(*a*) and (*b*) of the Companies Act, are required for the suspension of the liquidation proceedings to take effect' (*Nedbank Ltd v Liberty Moon Investments 82 (Pty) Ltd* (GJ) (unreported case no 2021 / 4629, 6-6-2022) (Molahlehi J); *Taboo Trading 232 (Pty) Ltd v Pro Wreck Scrap Metal CC and Others* 2013 (6) SA 141 (KZP)).

Mere lodgement of the business rescue application papers approach

Satchwell J in *Standard Bank of South Africa Ltd v Gas 2 Liquids (Pty) Ltd* 2017 (2) SA 56 (GJ) at para 13 stated: 'Respondent's counsel referred me to *Blue Star Holdings (Pty) Ltd v West Coast Oyster Growers CC* 2013 (6) SA 540 (WCC) where a business rescue application lodged with the registrar that very day had been handed up to the court, which was to hear a winding-up application. The court found that the operative phrase for consideration was in section 131(6) "at the time an application is made" and that the word "made" must be given its ordinary meaning in the context in which it appears in the statutory setting. … The court found that a functional approach to section 131(6) led to the obvious conclusion that "the lodging of the [business rescue] application with the Registrar for the issue thereof constituted "making" the application and the commencement of proceedings to place the company under business rescue'.

In *African Global Holdings (Pty) Ltd and Others v Lutchman NO and Others (Commissioner for the South African Revenue Service and Another as Intervening Parties) and a related matter* [2020] JOL 48410 (GJ) at paras 135 – 166, the court held that 'the Act … draws a distinction between those who need to be served and those who need to be notified. The two places where "the application" has to be "served" … are "on the company" and on the [Companies and Intellectual Property Commission]'. The court further held that 'the keywords in section 131(6) are "at the time an application is made in terms of subsection (1), the application will suspend …'. The court stated that these words 'must be read with the words "business rescue proceedings begin when … an affected person applies to the court" in section 132(1)(*b*) and 'apply to court' in section 131(1)'. The court had to consider 'what meaning would the words used in section 131(6) in grammar and syntax convey to (a reasonable person) having all contextual knowledge, considering the purpose of the legislation, namely, to suspend the winding-up process?' In this regard, the court held that 'this process would have required, in part, a contextual analysis of sections 131(1), 131(2), 131(4), and 131(6), including the words "at the time an application is made" and of "the application will suspend those liquidation proceedings" in section 131(6)'. The court stated that 'part of [the] context is that in our law an application is made when issued, and no express conditions have been built into the legislation before the application would have the legislative effect'. The court held that 'the wording of section 131(6) of the [Act] is clear, and leaves no room for adding conditions thereto in an interpretative exercise'. The court concurred with *Blue Star Holdings* and ruled that 'an application is made when it is issued', namely, 'the lodging of the application with the registrar for the issue thereof constituted the "making" of the application'.

Lodging and issuing of the business rescue application, as well as due compliance with the service approach

In *Taboo Trading* the court held that 'suspension of the liquidation proceedings, as contemplated by s 131(6) of the Companies Act, has significant consequences, in the context where liquidation proceedings had already commenced. Clearly, such suspension may and probably will in most instances have a disruptive effect on the liquidation proceedings. Any delay in the hearing of a pending liquidation application may in some instances have the result that a

company or close corporation continue trading in insolvent circumstances' (para 11). The court, therefore, held that 'a business-rescue application is thus only to be regarded as having been made once the application has been lodged with the Registrar, has been duly issued, a copy thereof served on the Commission, and each affected person has been properly notified of the application'.

In *Gas 2 Liquids* at para 22 and 23 the court held that 'where there is no service upon the provisional liquidator of the application for business rescue, the provisional liquidator may have absolutely no knowledge of that business rescue application. In fact, knowledge alone would be insufficient. The provisional liquidator is entitled to service in terms of section 131 of the Act. Absent such service, the provisional liquidator does not officially know that he or she is "suspended" in his or her duties and powers if such suspension of the liquidation proceedings were to eventuate solely by reason of lodgement of papers at court and issue of a case number'.

The other reasons that the courts have provided for adopting this approach is that 'provisional liquidators have, in terms of the Act, those powers statutorily granted to them, those which the Master may specially confer and those which they are granted by the court. They cover a wide range of activities. These may include the carrying on of a business, institution or defense of legal proceedings and the sale (or even the acquisition) of assets. Pursuant to the exercise of such powers, the provisional liquidator may operate on banking accounts, receive, and disburse funds, remunerate employees, conclude contracts and generally carry out the duties of the directors of the company in liquidation'.

Settled position by the SCA

The clarity on the question of when a business rescue application is 'made' in terms of s 131(6) of the Act has been recently settled by the Supreme Court of Appeal (SCA) in the case of *Lutchman NO and Others v African Global Holdings (Pty) Ltd and Others and a related matter* [2022] 3 All SA 35 (SCA), which was on appeal from the Gauteng Local Division of the High Court in Johannesburg.

In this case, African Global Operations (Pty) Ltd (Global Operations), one of the subsidiaries of the Bosasa Group was placed under voluntary winding-up in terms of s 351 of the Companies Act 61 of 1973 together with ten other subsidiaries wholly owned by the Bosasa Group. The directors of Global Operations sought to declare the special resolutions placing Global Operations under liquidation and the appointment of provisional joint liquidators' null and void. The High Court granted the relief sought by the Bosasa Group. The joint liquidators were granted leave to appeal, and the SCA overturned the decision of the High Court and dismissed the application with costs. This meant that Global Operations and the other subsidiary companies remained under voluntary winding-up. The Bosasa Group then launched an application placing six companies of the Bosasa Group under business rescue proceedings in terms of s 131(1) of the Act. One of the questions that had to be decided by the SCA was 'when is a business rescue application "made" within the meaning of s 131(6)' of the Act.

The court noted that 'there are conflicting High Court judgments on when a business rescue application is "made" within the meaning of section 131(6) of the Companies Act'. The court held that the correct interpretation is that 'a business rescue application must be issued, served on the company and the Commission, and each affected person must be notified of the application in the prescribed manner, to meet the requirements of section 131(6) in order to trigger the suspension of liquidation proceedings that have already commenced'.

The court held that 'a proper interpretation of the word "made" in isolation, in the context of section 131 as a whole … , in the context of the Companies Act as a whole (especially the nature and purpose of business rescue proceedings *vis-à-vis* those of winding-up proceedings as well as section 132(1)(*b*)), and the apparent purpose to which s 131(6) is directed, its meaning becomes clear'. The court held that 'significant consequences ensue upon the commencement of liquidation proceedings', 'where there is no service upon the provisional liquidator of the application for business rescue, the provisional liquidator may have absolutely no knowledge of that business-rescue application. In fact, knowledge alone would be insufficient. The provisional liquidator is entitled to service in terms of section 131 of the Act'. If there is no 'such service, the provisional liquidator does not officially know that he or she is "suspended" in his or her duties and powers if such suspension of the liquidation proceedings were to eventuate solely by reason of lodgement of papers at court and the issue of a case number'. The court held that 'an interpretation that the word "made" in section 131(6) is used to denote the mere issuing of the business rescue proceedings and thereby triggering the suspension of the liquidation proceedings … results in absurdity, militates against logic, leads to an insensible or unbusinesslike result, and undermines the purpose of the section'.

Conclusion

I submit that the approach adopted by the SCA in its judgment is the correct one as far as the practical legal proceedings of both liquidation and business rescue are concerned. This judgment is significant as it illustrates the meaning of 'making' an application in terms of s 131(6) of the Act. The accepted principle with regards to these applications is that they 'must be issued, served on the company and the Commission, and each affected person must be notified of the application in the prescribed manner, to meet the requirements of section 131(6) in order to trigger the suspension of liquidation proceedings that have already commenced'.

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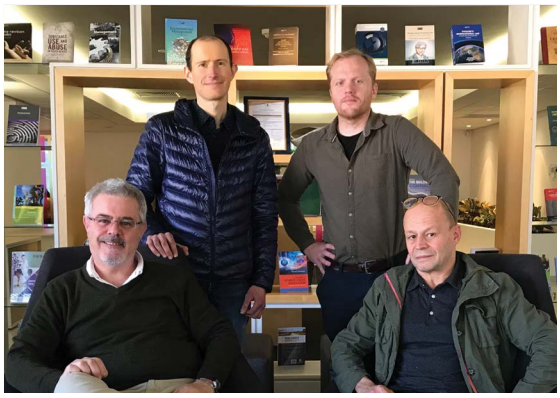

By Johan Botha and Gideon Pienaar (seated); Joshua Mendelsohn and Simon Pietersen (standing).

November 2022 (6) South African Law Reports (pp 1 – 321); November 2022 (2) South African Criminal Law Reports (pp 459 – 568)

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
ECP: Eastern Cape High Court, Port Elizabeth (now Gqeberha)
FB: Free State Division, Bloemfontein
GJ: Gauteng Local Division, Johannesburg
GP: Gauteng Division, Pretoria
LP: Limpopo Division, Polokwane
SCA: Supreme Court of Appeal
WCC: Western Cape Division, Cape Town

Arbitration

'Accidental slips' by arbitrator: The matter of *Kruinkloof Bushveld Estate NPC v Chairperson, Panel of Appeal Arbitrators and Others* 2022 (6) SA 236 (GJ) concerned an application for the review and setting-aside, under s 33 of the Arbitration Act 42 of 1965, of an arbitration award. The applicant was a homeowners' association, Kruinkloof Bushveld Estate NPC. It had been involved in a dispute with the third respondent, Ms Adlam, concerning the latter's liability to pay Kruinkloof an amount of R 1,4 million in monthly levies, penalty levies and interest arising from its membership for Kruinkloof. That dispute went to arbitration, at the conclusion of which, the appointed arbitrator, Mr Amm, found in favour of Kruinkloof. An appeal panel partially reversed Mr Amm's finding, holding that Ms Adlam was only liable for payment of 'monthly levies', and not penalty fees. Presently, Kruinkloof sought to set aside the Appeal Panel award. *Inter alia*, Kruinkloof argued that the Appeal Panel, in also ordering Kruinkloof to pay costs of previous arbitration proceedings to which it was not a party, namely those in which Ms Adlam had sought to cancel the purchase of the property (falling within the Kruinkloof estate), exceeded its powers. Ms Adlam, for her part, argued that the Appeal Panel's ruling in this regard constituted a 'clerical mistake or [. . .] patent error arising from [an] accidental slip' envisioned in s 31(2) of the Arbitration Act, and accordingly could be corrected.

The GJ (per Opperman J), in addressing the above, considered in detail the concept of an 'accidental slip' insofar as it related to arbitral awards, and looked closely at both South African and English law for guidance. 'Accidental slip' by an arbitrator, the court ruled, were those 'affecting the expression of the tribunal's thought, not an error in the thought process itself'. The 'accidental slip' rule could be relied on to 'to give effect to the original intention' of the tribunal; it could not be used, however, to permit the revision of a judgment on the grounds of the presiding officer having 'second thoughts', or to correct errors arising from a tribunal's incorrect assessment of the evidence before it, or its misconstruing or failing to appreciate the law. The court found that the Appeal Panel's ruling that Kruinkloof pay the costs of unrelated arbitration proceedings to which it had not been party amounted to an accidental slip and could indeed be corrected to reflect the true intention that Kruinkloof be liable only for the costs of the hearing under consideration, that is, the appeal.

The court accordingly dismissed the review application and allowed for a correction under s 31(2) of the Appeal Panel's award to correctly reflect its intention.

Criminal law

Jail time for bribe-taking traffic officer: *S v Ramphelo* 2022 (2) SACR 560 (LP) concerns the appeal of a traffic officer against her conviction for contravening s 4(1) of the Prevention and Combating of Corrupt Activities Act 12 of 2004 and sentence of two years' imprisonment.

The police service had received many complaints of traffic officers demanding gratification from road users to ignore traffic offences and decided to conduct an operation to weed out the practise. During a trap the appellant and a colleague (her erstwhile co-accused) accepted a sum of R 150 to ignore a traffic offence committed in their presence. The entire incident was digitally recorded.

The LP (per Kganyago J, Naude-Odendaal J concurring) could find no grounds to interfere with the conviction and dismissed the appeal on this score. As to the sentence, the court noted that the appellant was a single mother of three children for whom she was the primary caregiver but emphasised that a high degree of professionalism, morals and honesty was expected of law-enforcement officers. If they were also involved in corrupt activities the campaign against reducing accidents on the roads and getting road users to obey the rules of the road, would never be won. Consequently, despite the presence of mitigating factors, the sentence had to be confirmed.

Intimidation Act 72 of 1982 not intended for trivial incidents: The case of *S v White* 2022 (2) SACR 511 (FB) concerns a review of a conviction and sentence for

contravening of s 1(1)(*a*) of the Intimidation Act 72 of 1982.

The accused had pleaded guilty to the charge and was sentenced to a fine of R 1000 or six months' imprisonment, wholly suspended for a period of five years. It appeared that the conviction had been based on a threat to kill if the complainant did not stop dating a certain named woman.

The FB (per Daffue J, Molitsoane J concurring) criticised the use of the Intimidation Act for such a trivial matter, indicating that the section ought to be used only in deservingly serious matters. The crime of intimidation was never intended to be applicable to the usual threats that appeared every day between members of the public, but with no real consequences or harm. The purpose was rather to punish people who intimidated others to conduct themselves in a certain manner, such as not to give evidence in court, not to support a certain political organisation, not to pay their municipal accounts or to support a strike action. A further issue was the application of the provision where English was clearly not the mother tongue of any of the role players. This led to problems with the interpretation of the charge-sheet and the allegation contained therein. In such circumstances there was ample opportunity for confusion, not only about language, but more importantly, legal principles such as whether the accused really understood the offence of intimidation. The conviction and sentence were, therefore, set aside.

Other criminal law cases

Apart from the cases summarised above, the November SACR also contained cases dealing with –

- licensing of arms and ammunition;
- seat of the High Court;
- hearsay evidence;
- evidence at trail-within-trial; and
- separation of trials.

Divorce

Accrual – declared value conclusive proof of commencement value unless attacked on common-law grounds: In the case of *DM v CM* 2022 (6) SA 255 (GJ) the GJ (per Strydom J) dealt with whether an accrual was payable by the defendant to the plaintiff in their divorce action. The parties were married out of community of property, in terms of an antenuptial contract incorporating the accrual system as provided for in ch 1 of the Matrimonial Property Act 88 of 1984. Plaintiff had declared a commencement value of nil, and defendant one of R 68 746 000.

It was common cause that the declared commencement value of the defendant's estate, adjusted with the consumer price index, exceeded the value of his estate at the time of divorce, so that it showed no accrual. Plaintiff's case was she was entitled to prove that the defendant had overstated his estate's commencement value. In this regard she initially claimed (in her plea to the defendant's later abandoned counterclaim) that the declared commencement value was 'false', but later amended her plea to a denial that it was 'accurate'. She also claimed that he had alienated assets with the sole purpose of reducing her accrual claim. From these contentions arose the following issues –

- under what circumstances a party may challenge a declared commencement value; and
- proof that alienation of assets affected the accrual calculation at the date of dissolution of the marriage.

As to the first issue, the GJ held that the commencement value was not merely *prima facie* proof but conclusive – unless attacked on common-law grounds. For that reason, a court would not consider evidence which was led to prove the inaccuracy of such value, unless a case were made out on common-law grounds such as for contractual remedies pursuant to misrepresentation, fraud, duress, or undue influence, etcetera. The remedy of rectification would also be available if the requirements for such a rectification of an antenuptial contract were met. The plaintiff, not having pleaded any of these recognised common-law grounds, the declared commencement value was conclusive.

As to the second, the GJ held that the intention with which the alienation took place was the determining factor. If it were made to frustrate the accrual claim of a spouse, the value of the asset would be deemed to be part of the alienating spouse's estate. In this case, the GJ concluded, the plaintiff had failed to prove that defendant deliberately and intentionally disposed of assets to negatively affect the plaintiff's accrual claim.

Domestic violence

Man accused per SMS of being responsible for breakdown of his marriage, infidelity and not loving his child was not victim of domestic violence: If you are involved in a fiercely contested divorce and your spouse sends you a few SMSs in which she accuses you of being the cause of the breakdown of the marriage, of not loving your child, of withholding her medication and of infidelity, you are not by dint of them a victim of the sort of activity the Domestic Violence Act 116 of 1998 seeks to supress. This was confirmed by the SCA on appeal from the FB in *DVT v BMT* 2022 (6) SA 93 (SCA). The SCA (per Smith AJA (Dambuza JA, Nicholls JA, Hughes JA and Savage AJA concurring)) agreed with the FB's findings that the intermittency of their sending and their relative innocuousness meant that the SMSs could not be said to amount to the emotional, verbal or psychological abuse or harassment the Act required for a finding of domestic violence and the making of a protection order. The SCA pointed out that the complainant was acting not *bona fide* and guilty of abusing his superior economic position to harass his spouse and ordered him to pay the costs of the appeal.

Execution against the state

Attaching state assets – whether state money can be attached to satisfy court orders against it: The present matter, cited as *MEC, Department of Public Works and Others v Ikamva Architects and Others* 2022 (6) SA 275 (ECB), heard before a Full Bench of the Bhisho High Court constituted by Van Zyl DJP (Tokota J and Govindjee J concurring), concerned the interpretation of s 3 of the State Liability Act 20 of 1957, which deals with the satisfaction of final court orders against the state sounding in money. The provision was recently amended, in light of constitutional court authority, to eradicate the blanket restriction that previously prevented a judgment creditor from being able to execute against the state in the manner provided in the Uniform Rules of Court. Section 3 now permitted the attachment of 'movable property' belonging to the state if certain preliminary steps had been taken. The first and second applicants were, respectively, the Member of the Executive Council (MEC) for the Department of Public Works and Infrastructure and the MEC for the Department of Health. Presently, they sought, as a matter of urgency, an order for the setting-aside of *inter alia* writs issued against them in satisfaction of a default judgment in the sum of R 41 031 279,58 granted in favour of the first respondent, Ikamva Architects; alternatively for the stay of the writs, pending the final determination of a self-review application they had launched previously. One writ in question directed the sheriff to attach the Department of Health's bank account. The applicants argued for the unlawfulness of the writ on the grounds that s 3 of the State Liability Act did not in their view permit the attachment of state money in execution of a money judgment. That question formed the focus of dispute between the parties.

The ECB held that, contrary to the Departments' argument, s 3 of the State Liability Act, properly interpreted, did indeed allow for the attachment of incorporeal movables belonging to the state, such as a bank account, in satisfaction of a money judgment against it. In explanation the ECB held that the legislature, in enacting changes to s 3, must be taken

to have been aware that the execution of a money judgment took place in terms of the Uniform Rules of Court, and that those rules authorised the attachment of both corporeal and incorporeal movables in satisfaction of a money judgment. If the legislature intended to limit the notion of 'movable property' in the Act to corporeal movables, one would have expected it to say so expressly. The court stressed that the section permitted the attachment of 'any movable property' owned by the state, and there was no reason why the phrase should be limited to corporeal movables. As to the potential disruption of the functioning of state departments through the attachment of bank accounts, the ECB referred to the safeguards built into s 3, in particular that the sheriff and a department official may agree in writing on movable property that may not be removed; and an interested party may, before the attached movable property was sold in execution of the judgment debt, apply for a stay.

Ultimately, the court still found the writ relating to the bank account to be invalid, for want of compliance with other aspects of the Uniform Rules of Court. The other writs were found to be valid. The court nevertheless elected to stay further execution pending final determination of the self-review application.

Gambling

Compulsive gambling grief – the delictual liability of a casino owner for losses incurred by a compulsive gambler and 'excluded person': In *Essack and Another v Sun International South Africa (Pty) Ltd and Others* 2022 (6) SA 221 (GJ) the GJ (per Bester AJ) was confronted with the following factual situation: The first plaintiff, Essack, a problem gambler and designated 'excluded person', sustained gambling losses to the tune of R 5,2 million when he was, despite his excluded status, allowed to gamble at the defendant's Sun City casino (although this was not specifically pleaded, he claimed that the exclusion was done at his own request). It appeared that the casino allowed him to use his wife's (the second plaintiff's) card on the basis that his own card was banned. Essack claimed his losses as damages from the defendant, arguing that the casino had, instead of complying with its duty to stop him, encouraged him to gamble and lose a fortune.

Essack advanced two causes of action –

- the casino's breach of its statutory duties under the Northwest Gambling Act 2 of 2001; and
- its breach of common-law duty of care (Aquilian liability). The alleged common-law duty allegedly breached by the casino was that of ensuring that Essack did not enter the casino to gamble. The casino excepted to the claim on the ground that it did not disclose a cause of action.

In upholding the exception, the court ruled that the statutory duties imposed on the casino were for the benefit of the community, not compulsive gamblers like Essack, who was the author of his own misfortune. The proposition that the regulations imposed a duty on the casino implied that a compulsive gambler could retain his winnings when transgressing the regulations but hold the casino liable for his losses, which would not serve neither the purpose of the provision nor the public interest. In respect of the Aquilian claim the GJ pointed out that none of the authorities relied on by Essack, showed that there had been a shift in the *boni mores* in favour of recognising a claim as pleaded by him. So Essack failed to plead sufficient allegations to sustain either his statutory or his Aquilian claim. (Plaintiffs' counsel conceded that the allegations did not support the second plaintiff's claim that the casino should have safeguarded her card against abuse by the first plaintiff.)

Local authority

Scope of municipal legislative competence: *Govan Mbeki Local Municipality and Another v Glencore Operations South Africa (Pty) Ltd and Others* 2022 (6) SA 106 (SCA) concerned the legality of similarly crafted municipal by-laws, promulgated by three different municipalities, each barring transferors of property from applying to the registrar of deeds to register transfer, without the municipality's prior certification of compliance with municipal by-laws on spatial planning, land-use management and building regulation conditions or approvals. In an appeal by two of the municipalities against a High Court decision declaring these restrictions unconstitutional and invalid, the SCA held that the by-laws exceeded the legislative competence – in the context of municipal planning and within the framework legislation of the Spatial Planning and Land Use Management Act 16 of 2013 (SPLUMA) – of the respective municipalities, and thus offend the principle of legality. In this regard, it was held that SPLUMA, as the framework legislation authorising by-laws to regulate, control and enforce municipal planning in land-use schemes, laid down the limits within which municipalities may legislate; and although it afforded a municipality a wide discretion to invoke enforcement for non-compliance, the system of enforcement envisaged in s 32 of SPLUMA did not provide for imposing a restriction of the transfer of land. A further reason, it was held, was that the competence with regards to deeds registration was not a municipal function but that of national government. The appeals were accordingly dismissed.

Practice

Mass prison assaults – can the 138 victims join to sue the responsible minister: In a summons sued out of the ECP, 138 prisoners claimed damages from the Minister of Justice and Correctional Services stemming from alleged assaults on them by warders at St Albans Medium B Correctional Centre on two consecutive days late in March 2014. Different injuries and *sequelae* were pleaded for each plaintiff and each plaintiff claimed R 500 000 in general damages. The plaintiffs annexed 138 separate sets of particulars to the summons. This prompted the Minister to enter a special plea that the plaintiffs were guilty of a fatal misjoinder because the individual claims did not depend on the determination of substantially the same question of law or fact. The Minister argued that precedent suggested that under the common law several plaintiffs with separate causes of action could jointly sue the same defendant. The ECP upheld the special plea and dismissed the plaintiffs' claim. The plaintiffs appealed to the SCA.

In its judgment, reported as *Alberts and Others v Minister of Justice and Correctional Services* 2022 (6) SA 59 (SCA), the SCA (per Gorven JA (Saldulker JA, Zondi JA, Makgoka JA and Plasket JA concurring)) ruled that there was no reason why the annexure of several documents containing the particulars of each plaintiff's claim should result in the dismissal of all the claims – after all, if a single, composite set of particulars had been annexed, the action would simply have included paragraphs describing each plaintiff's claim in turn. The SCA pointed out that the Minister's reluctance to press this point on appeal made sense, particularly since an overly formal approach to pleadings had consistently been discouraged by the courts. If there was an irregularity, it was not a fatal one that warranted the dismissal of the claims. The SCA emphasised that while the default position at common law was that plaintiffs could not join to sue a defendant on separate causes of action, an exception was made where convenience dictated that they be heard together. Since the legal issues were the same for each action, the only remaining question was whether the pleaded facts amounted to 'substantially' the same questions of fact, which would arise in the notionally separate actions. This required a significant overlap, which was present. The SCA accordingly found that the joinder of the plaintiffs in one action was appropriate and inoffensive, and that the ECP should have dismissed the special plea.

Prescription

Negligent auditor – when prescription begins to run: In *WK Construction (Pty) Ltd v Moores Rowland and Others* 2022

(6) SA 180 (SCA) the court, per Gorven JA (Petse DP, Nicholls JA, Hughes JA and Tsoka AJA concurring) held that the appellant construction company (WK) had employed as financial director one Mr Maartens, who between 2006 and 2013 defrauded WK by posting fraudulent entries in its books. Over that same period the respondents, a partnership of auditors (then known as Mazars) was retained by WK, and in each year failed to detect the transactions, issuing clean audits.

On 23 August 2016, WK served summons on Mazars, alleging breach of their auditing contract. Mazars raised a special plea of prescription, which was upheld by the KZD. WK appealed to the SCA. The appeal involved the application of s 12(1) and s 12(3) of the Prescription Act 68 of 1969, which provides, respectively, that 'prescription shall commence to run as soon as the debt is due' and that 'a debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care'.

The question was when WK had acquired actual or deemed knowledge of the facts giving rise to the debt. If this was before 23 August 2013, then debt had prescribed on 23 August 2016, that is, before the commencement of the action. This required an assessment of what comprised sufficient knowledge in cases of professional negligence.

WK, while conceding that it was aware of Mr Maartens' fraud before 23 August 2013, nevertheless argued that it at this point lacked knowledge of the facts giving rise to liability on the part of Mazars, which according to WK included the knowledge that the money could not be recovered from the primary debtor, Maartens. WK argued in this regard that Mazars did not prove that WK knew it could not recover from Maartens.

The SCA began by rejecting WK's argument that, for prescription to begin, knowledge of the primary debtor's inability to pay was required. The SCA ruled that a claim for indemnification was triggered when the loss for which the indemnity was obtained had occurred, and not before that. The SCA also rejected WK's second argument, namely that knowledge of the applicable accounting standard and of its breach was required, pointing out that the facts required to be known were merely those objectively grounding a suspicion of negligence, and that WK was already aware of such facts before 23 August 2013. The SCA accordingly confirmed KZD's finding that the claim had prescribed.

Trucking accident claim: When prescription of a claim to an indemnity began to run: *Magic Eye Trading 77 CC t/a Titanic Trucking and Another v Santam Ltd and Another* 2022 (6) SA 120 (SCA) dealt with the right of an insured to claim indemnity from its insurer. The SCA (per Nicholls JA (Cachalia JA, Zondi JA, Gorven AJA and Hughes AJA concurring)) had to decide when prescription began to run in respect of the claim brought by the second respondent, Imperial Cargo (Pty) Ltd, for damage caused to its truck by an employee of Magic Eye Trading 77 CC t/a Titanic Trucking (Magic Eye Trading). When the accident occurred, the insured held an insurance policy with Santam, which provided for indemnity insurance against loss suffered by way of liability to third parties. In the WCC Magic Eye Trading joined Santam as a third party, seeking a declaratory order stating that if Imperial Cargo succeeded in its claim, Santam would have to indemnify Magic Eye Trading. Santam argued that Magic Eye Trading's claim for indemnity had prescribed because its cause of action had arisen when the accident occurred, which was more than three years before Sanlam was joined. The WCC agreed and found in favour of Santam. On appeal to the SCA, Magic Eye Trading argued that its right to approach the court for a declaratory order could not have prescribed

before its liability to Imperial Cargo had been finally determined and quantified. The SCA agreed with Magic Eye Trading, ruling that a claim for indemnification had to be for a fixed or specific amount: If the amount had not yet been determined (either by agreement or court order), the claim did not exist. Magic Eye Trading's claim for indemnification, contingent as it was on it being found liable, had in fact not arisen and prescription had not even begun to run. In view of this, the SCA upheld the appeal and substituted the WCC's order with one dismissing Santam's special plea.

Other civil cases

Apart from the cases and material dealt with above, the September SALR also contained cases dealing with –

- costs on appeal;
- curators' accounts;
- prescription of an enrichment claim;
- own-share purchases by companies;
- value-added tax;
- housing for retirees;
- High Court jurisdiction;
- the Pension Funds Adjudicator;
- Financial Intelligence Centre Act 38 of 2001 verification; and
- enrolment of foreign legal practitioners.

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THE LAW REPORTS

By Merilyn Rowena Kader

December [2022] 4 All South African Law Reports (pp 621 – 926); March – August Judgments Online

Abbreviations:

ECG: East Cape Division, Grahamstown
GJ: Gauteng Local Division, Johannesburg
GP: Gauteng Division, Pretoria
LC: Labour Court
SCA: Supreme Court of Appeal

Civil procedure

Requirements to successfully oppose summary judgment: The plaintiff (Nedbank) in *Nedbank Limited v Uphuhliso Investments and Projects (Pty) Limited and Others* [2022] 4 All SA 827 (GJ) had granted the first defendant (Uphuhliso) an overdraft facility, as well as a medium-term loan facility in the amount of R 1,6 million repayable over 60 months. Uphuhliso breached the agreement by exceeding the limit of the overdraft facility, alternatively by failing to meet its obligations in terms of the agreement. Nedbank directed a letter of demand calling on Uphuhliso to make payment of the excess on the overdraft facility within ten business days, failing which, the agreement would be cancelled, and the full outstanding amount would become immediately due and payable. It averred that it then did cancel the agreement. In the present application, it sought summary judgment against Uphuhliso as principal debtor and against the second to fourth defendants as sureties.

Apart from alleging that the agreement contained an implied or tacit term that the defendants would only need to repay the money to Nedbank if the business remained sufficiently profitable to enable them to do so, and that they were prevented from being profitable by the impact of the COVID-19 pandemic. For the rest, blanket denials containing no detail were advanced. There was also a marked divergence between the defences raised by the defendants in their affidavit resisting summary judgment and what was contained in their plea.

Legal principles applicable to determining summary judgment proceedings, particularly where there is a divergence between the plea and the affidavit resisting summary judgment in the defences were raised.

The court held that r 32(3) of the Uniform Rules of Court, before its amendment, required that the affidavit by the defendant or of any other person who could swear positively to the fact that the defendant had a *bona fide* defence to the action, fully disclose the nature and grounds of the defence and the material facts relied on. Notwithstanding the amendments to r 32 with effect from 1 July 2019, what is required of an affidavit in r 32(3)(b) remains the same. However, it could not be less than was required of the defendant previously as the defendant under the new rule must first have delivered a plea. The amendment does not now require of a defendant to necessarily plead in its plea more than it previously would have had to. But given the requirement of a resisting affidavit to disclose fully the nature and grounds of the defence and the material facts relied on therefore, which is now to be delivered after the delivery of a plea, a court will more closely scrutinise a denial in a plea, as read with what is set out in a resisting affidavit to substantiate or flesh out that denial, to ascertain whether there is a triable issue that would justify leave to defend being granted. The plea, as read with the resisting affidavit, and due regard being had to any divergence between them, would have to be considered in assessing whether it constitutes bald averments and sketchy propositions insufficient to stave off summary judgment.

The defendants did not amend their plea to ensure they met with the abovementioned requirements. They could not, at summary judgment stage, advance defences that were not raised in their plea. Their failure to raise a genuine triable issue led to summary judgment being granted.

Corporate and commercial

Enforcement of restraint of trade agreements: In *Pronto Computer Solution (Pty) (Ltd) v Van der Merwe and Others* [2022] JOL 54859 (MM), the applicant sought to restrain the first, third and fourth respondents from being employed by the second respondent and to compel them to comply with the confidentiality and restraint obligations in their employ-

ment agreements. An order was also sought preventing the respondents from soliciting business and/or employees from the applicant, and to deliver to the applicant all confidential information belonging to the applicant.

The first, third and fourth respondents were at one stage employees of the applicant, involved in the sale of the applicant's products and services. During their employment they signed employment contracts that included restraint of trade undertakings. After his resignation, the first respondent approached companies that had been serviced by the applicant. His explanation for that was that the said companies were his customers before he had assumed employment with the applicant. He also alleged that there was no confidential information to protect.

The court held that all that an applicant needs to show is that there is secret information to which the respondent had access and which the respondent could transmit to the new employer should he desire to do so. Where the ex-employer seeks to enforce a restraint against an ex-employee, a protectable interest recorded in a restraint, the ex-employer does not have to show that the ex-employee has utilised information confidential to it; it is sufficient to show that the ex-employee could do so.

The applicant succeeded in establishing that it had trade connections requiring protection, that the employee respondents had access to those connections, and that the first respondent had approached the applicant's clients after leaving the applicant's employ. The respondents failed to show that the restraint of trade was unreasonable. The application succeeded.

Criminal law and procedure

Appeal against convictions – admissibility of hearsay evidence: The appellants were charged with –

- contravention of s 9(1)(*a*) of the Prevention of Organised Crime Act 121 of 1998 (POCA);
- two counts of robbery with aggravating circumstances;
- five counts of murder;
- kidnapping;
- attempted extortion; and
- contravention of s 18(2)(*a*) of the Riotous Assemblies Act 17 of 1956, being a conspiracy to commit kidnapping – a charge that was not preferred against the third appellant.

The first count related to the alleged participation of the accused in organised criminal gang activity in contravention of s 9 of the POCA. It was alleged that as part of a pattern of such activity, the accused either individually or collectively committed the various offences set out in the indictment.

The prosecution alleged that in November 2007, the four deceased in four of the murder counts were robbed of a motor vehicle, four cell phones and two firearms. They were then murdered and buried in a shallow grave. It was further alleged that in March 2008, the accused allegedly kidnapped another person and robbed him of his bakkie and a cell phone before killing him.

The appellants appealed against their convictions in *Qurashi and Others v S* [2022] 4 All SA 295 (SCA).

It was held that the breaking down of a body of evidence into its component parts is a useful aid to a proper understanding and evaluation of it, but in doing so, the court must guard against a tendency to focus too intently on the separate and individual parts.

The appeal rested on the following main foundations –

- the admission of evidence, which was said to have been obtained unconstitutionally and which infringed the appellants' right to privacy and to a fair trial;
- the admission of hearsay evidence and the prominent role that such evidence played in the conviction of the appellants; and
- the credibility findings made by the trial court in favour of the prosecution witnesses and against the appellants.

None of the defences were found to be sustainable. The court explained the principles of hearsay evidence. Section 3(4) of the Law of Evidence Amendment Act 45 of 1988 refers to statements either oral or written, whose probative value depends on the credibility of another independent person not testifying before court. There were sufficient safeguards in the evidence, viewed holistically, that satisfied the court as to the reliability of the hearsay evidence tendered by each of the witnesses.

Finding the evidence against the appellants to be damning, the court dismissed the appeal.

Family law and persons

Validity of maintenance order: The parties entered into an antenuptial contract (ANC) prior to their marriage, declaring their marriage to be out of community of property with the exclusion of the accrual system. After registration of that contract and before the marriage, they entered into another agreement providing, *inter alia*, for lifelong maintenance for the appellant in the event of divorce or the death of the respondent. On their divorce, the appellant sought to enforce that agreement. In *Botha v Botha* [2022] JOL 55412 (SCA), the appellant appealed against the High Court's declaration that the agreement was unenforceable.

According to the appellant, there was no conflict between the terms of the ANC and the impugned agreement – they co-existed and remained valid as two distinct and separate legal instruments.

The primary objective of the ANC was not to create obligations, but to determine the matrimonial property system between spouses. In that context, the ANC was not a contract. The impugned agreement did not purport to vary the ANC. The two legal instruments could co-exist because an ANC regulates the matrimonial regime of the parties *stante matrimonio* only, whereas the agreement had no bearing at all on the nature of their matrimonial regime. Their estates remained separate. Thus, the provisions of the ANC would remain intact and would be applicable on their divorce despite the appellant's entitlement to enforce the terms of the agreement.

The High Court's finding that the second agreement constituted an impermissible attempt to vary the parties' matrimonial regime contrary to s 21 of the Matrimonial Property Act 88 of 1984 was fundamentally flawed. The High Court also erred in finding that the agreement was not enforceable under s 7(1) of the Divorce Act 70 of 1979 in that it deprived the divorce trial court of its discretion in terms of s 7(2) of that Act. The court has no duty to protect the interests of parties in an agreement regulating payment of maintenance.

Insolvency

Dispositions without value: In *Van Wyk Van Heerden Attorneys v Gore NO and Another* [2022] 4 All SA 649 (SCA), three deposits were made into the trust account of the appellant, a firm of attorneys, from the account of a company (Brandstock). On the provisional winding-up of Brandstock, the respondents, as liquidators, applied to have the deposits set aside under s 26(1)(*b*) of the Insolvency Act 24 of 1936. The appellant appealed against the High Court's granting of the order sought by the liquidators.

Section 26(1)(*b*) provides that every disposition of property not made for value may be set aside by the court if such disposition was made by an insolvent within two years of the sequestration of his estate, and the person benefited by the disposition is unable to prove that, immediately after the disposition was made, the assets of the insolvent exceeded his liabilities. As the deposits took place less than two years prior to the winding-up of Brandstock, they fell within the ambit of s 26(1)(*b*). The elements required to set aside a disposition under s 26(1)(*b*) were set out in the judgment.

The court referred to the legal principles concerning the position of bank accounts in general and trust bank ac-

counts, in particular, of attorneys. General banking principles are clear that the bank owns the money deposited into accounts held with it. The bank owns the money but is obliged to comply with instructions of the account holder concerning a positive balance in the account. Account holders thus have the power of disposal over the credit balance of funds held by the bank on their behalf. Money deposited into attorneys' trust accounts gives rise to the same relationship with the bank as with any account holder. The bank is indebted to the attorney and no other party. No one else is entitled to instruct the bank on how to deal with it. At the same time, the credit balance in trust accounts is held by the attorney on behalf of particular clients. Attorneys operate on their trust accounts as principals and not as agents. That is because only they can instruct a bank to dispose of amounts to the credit in that bank account since clients have no legal relationship with the bank concerning that account. Relevant for purposes of the present case, was that the power to operate a trust account does not determine whether a deposit into that account amounts to a disposition to the attorney.

The approach in our law to what constitutes an impeachable disposition is a matter of interpretation. A sensible meaning is to be preferred to one that leads to insensible or un-business like results or undermines the apparent purpose of the document. The point of departure is the language of the provision.

At the heart of s 26(1)(*b*) was the requirement that the party to whom the disposition was made is put to the proof that immediately after the disposition was made, the assets of the insolvent exceeded his liabilities. Only the person who benefited from the disposition bears that onus. The construction of the section does not allow for liability to attach to one who did not benefit by it. The first of the three deposits in this case did not benefit the appellant, as the firm simply acted on the instructions of its client and acted as a conduit in the onward transmission to the entity which did benefit. The appeal was upheld in respect of that deposit.

The remaining two deposits, however, insofar as they were used to settle amounts owed to the appellant, meant that the appellant attracted the onus of proving that Brandstock's assets exceeded its liabilities at the time of deposits were made. As that had not been proved, the appeal in respect of those two deposits was dismissed.

Labour and employment

Fairness of dismissal: In *Austin-Day v ABSA Bank Ltd and Others* [2022] JOL 53109 (LAC), the first respondent was a branch manager employed by the applicant bank. She was dismissed on 30 November 2016, following allegations of misconduct. She lodged a complaint with the third respondent (the Commission for Conciliation, Mediation and Arbitration (CCMA)) alleging unfair dismissal. The second respondent, as arbitrator, found that the dismissal was substantively unfair and ordered the bank to reinstate her with back pay. The applicant launched the present application for review. On the day of the hearing, the parties presented the allocated judge with a consent order, which was ultimately made an order of the Labour Court. The order had the effect of remitting the dispute for a further hearing and postponing the present review application. The parties returned to arbitration and held a further hearing confined to what the parties referred to as the second charge. Subsequent thereto, the challenged award gave rise to a supplementary award. The parties then sought to supplement their respective cases. After hearing submissions, the court reserved judgment.

The CCMA and the appointed arbitrator become *functus officio* once a final and binding award is issued. The CCMA cannot revisit the process of attempting to resolve the dispute once an award, which is aimed at resolving the dispute, is issued. The Labour Court is empowered by s 145(4)(*b*) of the Labour Relations Act 66 of 1995 to make an order it considers appropriate about the procedure to be followed to determine the dispute.

The court declined to consider what happened in the so-called second arbitration, as the matter could have simply been postponed instead of being referred for a second arbitration.

Having regard to the evidence, and the arbitrator's findings, the court found that the first respondent was clearly guilty of misconduct as alleged. The award was set aside and replaced with an order that the dismissal was substantively fair.

Legal practice

Striking of advocate's name from roll – application by layperson: In *Mavudzi and Another v Majola* [2022] JOL 54975 (GJ), the applicants were both laymen, and were accused persons, held in custody, in a pending criminal trial. The first respondent (Majola) was the lead prosecutor in their case, which had been running since 2019. The second respondent was the Legal Practice Council (LPC), which is the primary regulatory body exercising disciplinary oversight of the legal profession, and with whom the first applicant lodged a complaint about Majola shortly before launching the present proceedings.

The court had to decide whether to strike the name of Majola, off the Roll of Advocates on the grounds of gross unprofessional conduct. The premise of the allegation was that another court had made a finding that Majola misled a court in the hearing into the lawfulness of the warrant of arrest issued against the first applicant. Majola denied having committed any such impropriety.

An act of deliberately misleading a court can be, if serious, a proper ground for a striking off. A court may not risk making material criticisms of a legal practitioner without a proper opportunity for that practitioner to be heard in respect of the allegations of misconduct. The court had regard to the statements made by the judge against Majola in the case relied on by the applicants. The judgment could not be relied on to find an application to strike off Majola's name from the Roll of Advocates. Because the premise of the relief sought were those remarks or findings, the application had to fail for want of a proper foundation.

The court also found no known precedent for laymen bringing an application for the striking off of a legal practitioner. It is inappropriate for any lay person to apply *ab initio* to the courts for a striking off of the name of a legal practitioner from the roll, except in certain specified circumstances. A complaint of misconduct against a legal practitioner must be lodged with the LPC or any one of the voluntary regulatory bodies of legal practitioners. Only where a regulatory body is itself delinquent in performing its functions in addressing a complaint, would it be appropriate for a lay person to approach the court for appropriate relief.

The application was dismissed.

Personal injury/delict

Liability of Road Accident Fund: The respondent in *Member of Executive Council for Roads and Public Works, Eastern Cape v Yeomans* [2022] JOL 54991 (ECG) was driving a truck owned by his employer and was injured in an accident. Alleging that the cause of the accident was the negligence of the Department of Roads and Public Works of the Eastern Cape Government, he sued the appellant (the MEC) and the Road Accident Fund (the Fund) for damages as the accident was caused by the negligence of the owner of the truck and/or its employees. The owner failed to ensure that the truck was in a roadworthy condition, and instructed the respondent to travel without having taken reasonable steps to remedy a problem with the truck's brakes.

The Fund raised a special plea that any liability it bore to compensate the plaintiff could only arise from a reliance on a wrongful act of the owner of the truck or

its employees as contemplated in s 17(1) of the Road Accident Fund Act 56 of 1996 (RAF Act), and because the owner of the truck was also the employer of the plaintiff, and its liability to compensate the plaintiff in that capacity was excluded by the provisions of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA), the Fund was not liable to compensate the plaintiff for any damages arising from the accident. The respondent consequently obtained leave to withdraw his claims against the Fund. That left the MEC as the only remaining defendant in the action.

The present appeal was against the trial court's finding that the Department's negligence was the sole cause of the conduct. Contending that the conduct of the owner of the truck contributed to the accident, the MEC argued that the contributory negligence of the owner meant that the exclusive liability to compensate the respondent had to be found to lie with the Fund.

It was held that on an interpretation of ss 19(a) and 21 of the RAF Act together with s 35(1) of COIDA, the respondent's acceptance that the Fund was not liable to compensate him for his injuries, was correct. Concluding that the respondent was entitled to choose to recover the full amount of his loss from the MEC, the court dismissed the appeal.

Property

Donations *inter vivos* of property which donor does not own: As executor of the deceased estate of Magana Ntoli, the applicant in *Morewane NO v Rampoto NO and Others* [2022] JOL 55151 (GJ) sought a declaration that certain immovable property had been validly donated to the deceased by a third party (Jacob Rampoto), and that the property be transferred to the deceased estate. The first respondent was the executor of Jacob Rampoto's deceased estate. At the time the donation was made, Jacob Rampoto was not yet the owner of the property. The central question in the matter was whether the donation of the property by Jacob Rampoto was valid, even though he was not yet owner.

It was held that the relevant deed of transfer recorded that the property was transferred from the fourth respondent to Jacob Rampoto, in terms of s 13(1) of the Upgrading of Land Tenure Rights Act 112 of 1991. Transfer could only have been affected in terms of that section if the fourth respondent was satisfied that Jacob Rampoto held some type of land tenure right to the property, and that his right was capable of being converted to ownership. Therefore, Joseph Rampoto's heirs could not have had any right to the property, and Jacob Rampoto was entitled to dispose of the property as he wished.

A donation is an agreement which is induced by pure benevolence whereby a person who has no legal obligation to do so, undertakes to give something to another person, and in respect of which gift the donor receives no consideration. Roman-Dutch authorities recognised that a person could donate property, which they will only own at some future moment in time. There is no impediment to a person donating something that he does not own at the time of donation.

The donation agreement was consequently declared valid, and transfer of the property was ordered as sought by the applicant.

Property

Sale of immovable property – lack of consent of spouse – marriage in community of property: At the time of the sale of immovable property from the first respondent to the fourth and fifth respondents, the written consent of the applicant, who was married to the first respondent in community of property, was not obtained. The present application was for an order declaring the sale and subsequent transfer unlawful for want of compliance with s 15(2)(*a*) of the Matrimonial Property Act 88 of 1984.

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It was held in *Matini v Matini and Others* [2022] JOL 53972 (GP) that s 15(2)(*a*) requires a spouse married in community of property to obtain the written consent of the other spouse to alienate immovable property forming part of the joint estate. Section 15(9)(*a*) of the Act provides an exception to the rule. In terms of the section, when a spouse enters a transaction with a person contrary to the provisions of, *inter alia*, s 15(2)(*a*) and that person does not know and cannot reasonably know that the transaction is being entered into contrary to that provision, it is deemed that the transaction concerned has been entered into with the required consent.

The burden of bringing s 15(9)(*a*) into play rested on the first respondent, who was seeking to rely on the validity of the sale agreement. The question was whether it is reasonable to assume that the fourth or fifth respondents knew that consent for the proposed sale was lacking and could not reasonably have known that consent had not been given. The court found that since the fourth and fifth respondents knew that the applicant wanted nothing to do with the property, it was reasonable for them to have assumed that the applicant would have had no objection to the first respondent entering a transaction to dispose of the property. It was accordingly reasonable for the fourth and fifth respondents to have assumed that whatever consent the first respondent needed to deal with the property had been obtained. The court was satisfied that the sale agreement fell within the ambit of s 15(9)(*a*) and accordingly had to be deemed to have been entered into with the consent of the applicant.

The application was dismissed with costs.

Other cases

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

- claims against an admiralty fund;
- doctrine of ripeness;
- extradition proceedings;
- infringement of trademarks;
- Islamic marriage – requirements for divorce;
- litigation between government and private party seeking to assert a constitutional right;
- obstruction of tax collection;
- regulation of outdoor advertising; and
- rights of minority shareholders – s 163 of the Companies Act 71 of 2008.

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High Court violates Constitution for not granting an opportunity to have case heard in a public court

By Kgomotso Ramotsho

Samuels v South African Legal Practice Council (formerly Law Society of the Northern Provinces) (SCA) (unreported case no 1112/2021, 7-12-2022) (Petse DP; Mothle JA; and Daffue, Windell and Siwendu AJJA)

In the case of *Samuels*, the Supreme Court of Appeal (SCA) upheld the appeal and referred the matter back to the High Court for determination by a differently constituted Bench. This was after the appellant, one, Paulus Lepekola Samuels went to the SCA after the High Court did not grant him an opportunity to have his case heard in a public court.

Ms Lydia Mabaso, instructed the appellant to act as her attorney in prosecuting a claim for compensation against the Road Accident Fund (RAF) for injuries she sustained in a motor vehicle accident on 26 December 2007. The appellant and Ms Mabaso concluded a written contingency fee agreement, entitling the appellant to receive 25% of the proceeds of the claim. The action against RAF was set down twice for hearing in the High Court. At the first hearing, a settlement agreement was reached with the RAF for payment of the past medical expenses and general damages in the amount of R 170 657,40. And at the second hearing on 5 February 2015 (a year later) the remaining part of the claim for the loss of earnings was settled in the amount of R 206 300,60.

A complaint filed by Ms Mabaso to the then Law Society of the Northern Provinces (the LSNP), detailed the unsuccessful inquiries from the appellant about the payment from RAF and failed correspondence from a law firm to the appellant, which went unanswered. According to the court papers, during the period between the two settlement agreements in February 2014 and February 2015, and after February 2015, Ms Mabaso had made repeated inquiries from the appellant concerning the payment of the amounts settled in court with the RAF. However, in respect of both payments the appellant failed to account to her, repeatedly informing her that his office had not received the payments due from the RAF.

Ms Mabaso, in both instances, inquired directly from the RAF, who confirmed that the payment of the February 2014 settlement had been made to the appellant's trust account in July 2014. When Ms Mabaso conveyed that information to the appellant, he informed her that he was not aware of the payments made into his trust account and that he would verify. Four months later, the appellant, in a letter dated 20 November 2014, confirmed to Ms Mabaso that the R 170 657,40 had been received from the RAF. The appellant further informed Ms Mabaso that the amount 'has been appropriated to fees and disbursements and the balances of our fees and disbursements will be taken from the last settlement of loss of earnings'. Ms Mabaso received no compensation in respect of the first payment effected by the RAF. The payment in respect of the outstand-

ing claim for loss of earnings – settled in February 2015 – followed the same pattern.

Ms Mabaso confronted the appellant with regards to confirmation made to her by the RAF of the second payment. The appellant confirmed receipt of the money but indicated that the amount had not been cleared by the bank yet and that he was waiting for the bill of costs from the cost consultants before scheduling a meeting with Ms Mabaso. This was almost a month after payment had been received. On 5 October 2015, Ms Mabaso lodged a complaint with the LSNP. The Investigating Committee of the LSNP (the Committee) sent a letter dated 2 November 2015 to the appellant, and a reminder letter dated 9 December 2015, informing the appellant of the complaint, and requesting a response.

The appellant responded on 11 January 2016. On 29 June 2016, the Committee, having considered the complaint and the appellant's response, decided to charge the appellant with contravention of various rules governing the attorney's profession. The Committee further recommended that the LSNP's Monitoring Unit must obtain consent from the Council of the LSNP (the Council) to conduct an inspection of the appellant's accounting records. The appellant was informed of these charges on 8 July 2016. On 27 July 2016, the appellant issued summons against Ms Mabaso for an amount of R 1 million for defamation arising from the fact that she had lodged a complaint with the LSNP, as well as for allegedly having made disparaging statements against the appellant in the media, attacking his character.

On 23 February 2017, the LSNP launched an urgent application in the High Court, for the appellant's name to be struck off the roll of attorneys, alternatively that he be suspended from practicing as an attorney. The application consisted of two parts, namely, Part A and Part B. Part A of the application was placed on the roll of urgent applications (urgent court) and was heard on 23 March 2017. The judgment (per Tlhapi J) was delivered on 21 July 2017, granting an order suspending the appellant from practicing as an attorney with ancillary relief, pending the hearing of Part B. The appellant, aggrieved by the outcome, successfully applied for leave to appeal the order of suspension by the urgent court and that order was granted on 12 March 2018.

The appellant duly lodged the appeal on 16 April 2018 to the Full Court. As at the hearing of the appeal against the order in Part B, the appeal against his suspension in the Full Court lodged in April 2018 was still pending. Two years after the appellant noted and failed to prosecute the suspension order on appeal, the LSNP placed the Part B application, on the normal High Court roll of opposed matters, initially on 7 May 2019, where it was postponed *sine die*. Thereafter, on 15 October 2019 it was set down for hearing on 30 April 2020. The High Court ordered that the appellant's name be struck off the roll of attorneys. On 27 May 2021, the appellant unsuccessfully applied to the High Court for leave to appeal.

'The SCA said that from its observation the first proposal for the "meeting via Zoom" was an initiative of the High Court, not of the appellant. The SCA added that the proposed meeting came after Mokose J had declined to consider the appellant's request for postponement in the form of an e-mail.'

On 24 August 2021, the appellant turned to the SCA, which granted him leave to appeal the High Court order in Part B. In his first ground of appeal the SCA said that the appellant contended both in the notice of appeal and his heads of argument that the High Court refused to grant him postponement of the proceedings. The SCA added that he further contended, invoking s 34 of the Constitution, that refusal denied him his fundamental right to have his case presented and argued in court. The appellant failed to notify the LSNP of his intention to oppose Part B and failed to deliver an answering affidavit within the time frames stated in the notice motion.

When the SCA considered the appellant's appeal, he had neither delivered any notice to oppose nor an answering affidavit in respect of Part B. The SCA pointed out that the appellant was not on record as opposing Part B of the application. The SCA added that, secondly, on 15 October 2019, almost two years after suspension order under Part A, the LSNP delivered a notice of set down of Part B, scheduled for hearing the following year on 30 April 2020. Approaching the date of hearing for part B, the lackadaisical conduct of the appellant became evident. Notwithstanding his career being at risk. The appellant failed to appoint an attorney timeously, he failed to file his heads of argument on or before 14 April 2020 as was required of him.

The SCA said that the High Court, in refusing the appellant's application for leave to appeal the order under Part B, expressed its view on the appellant's conduct concerning the pending appeal against the order of his suspension as follows: '(3) It is common cause that the application for leave to appeal in the matter had lapsed *for more than two years and when it was revived, the matter was postponed for the applicant to file his papers and that was done*. It also common cause that at the time obtaining the date of 1 December 2021 for the hearing of that matter, *the correct procedure had still not been followed in that the heads of argument and practice note had not been filed*.'

The SCA added that the appellant was set on delaying the expeditious conclusion of this matter for as long as it would take. That, first he put his suspension on hold by lodging an appeal he was not prepared to prosecute for two years. Second, he lurched on the COVID-19 lockdown, in the attempt to secure a postponement for Part B application, when in fact, even two years, he was still not on record as intending to do so. The SCA pointed out that the appellant tendered no explanation as to why he did not deliver a substantive application for postponement. The SCA added that the appellant failed to deliver a substantive application for the postponement, because he had no valid reason to place before the High Court in support thereof. The SCA said that the appellant was not honest with both the High Court and the SCA. The SCA referred to the remarks of Malan JA in *Law Society of the Northern Provinces v Sonntag* 2012 (1) SA 372 (SCA), where he wrote:

'The conduct of the respondent [the attorney] in defending the charges brought against her was wholly unsatisfactory. … The various defences and the manner in which they were raised by the respondent cannot be said to evince complete honesty and integrity'. The SCA said that the reasons aforesaid, the ground on appeal that the High Court denied him an opportunity to present his defence, has no merit and it falls to be rejected. The appellant contended in a second ground of appeal that the High Court application was launched contrary to an agreement he had with the legal officer of the LSNP. He stated that he had agreed with the LSNP that any matter concerning the complaint lodged by Ms Mabaso, including the decision by the Council to authorise an inspection of his accounting records, would be held in abeyance, pending the adjudication of a defamation action he had instituted against Ms Mabaso. The SCA pointed out that put differently, the appellant's argument was that the defamation matter rendered the entire investigation of the complaint by Ms Mabaso *sub judice*.

The SCA said in concluding that the High Court denied the appellant the right

to be heard, the second judgment refers to s 34 of the Constitution and relied extensively on case law on the subject. However, the case law authorities cited are applicable in this instance, due to the absence of evidence, namely, factual averments made on oath and presented as evidence in the SCA. The SCA added that the entire narrative or version of the appellant on the ground of this ground of appeal, 'is inferred from e-mails improperly inserted in the record, in breach of an established authority of this court in [*Minister of Land Affairs and Agriculture and Others v D & F Wevell Trust and Others* 2008 (2) SA 184 (SCA)]'. The SCA added that there is no factual evidence on which it could apply authorities on s 34 of the Constitution as they are cited in the second judgment.

The SCA said that the appellant had failed to set out his case on affidavit, which would constitute both pleadings and evidence in support of his ground of appeal. The SCA added that, even if the e-mails were admissible, they do not provide proof that the appellant was denied a right to be heard. On 23 April 2020, seven days before the hearing, a second e-mail was sent by Mr John Njau to Mokose J. In that two-page e-mail Mr Njau, on behalf of the appellant requested that the High Court grant a postponement of hearing. The SCA pointed out that the second e-mail stated that the appellant's attorneys were appointed on 3 March 2020. Further, that Mr Röntgen, aged 85, and apparently the attorney dealing with the applicant's matter, was a high-risk person to contract the COVID-19 virus.

The SCA said that from its observation the first proposal for the 'meeting via Zoom' was an initiative of the High Court, not of the appellant. The SCA added that the proposed meeting came after Mokose J had declined to consider the appellant's request for postponement in the form of an e-mail. The SCA pointed out that it is important to note that in the second e-mail the appellant neither requested audience with the court in any manner or form nor a case management as an alternative, in terms of the COVID-19 Directives of the Judge President, Gauteng Division of the High Court. The SCA, further, said that the Judge's secretary requested contact details necessary to establish a link for the Zoom meeting, she was provided with a cellular phone number of Mr Röntgen, and not an e-mail address. The SCA added that there is no mention in the e-mails or any affidavit as to why Mr Njau and/or the appellant did not attend court personally or request a teleconference with the judges, linking all participants on 30 April 2020 to plead for the postponement.

At the SCA, Daffue AJA (Windell AJA concurring) said there is no quibble with the first judgment's exposition of facts, nor the summary of the legal principles applicable. The SCA said the appeal must succeed and the matter should be referred to the High Court insofar as the appellant's right to a fair public hearing before a court of law in terms of s 34 of the Constitution had been violated. The SCA pointed out that the High Court's findings were clearly wrong for three reasons. First, although it acknowledged that the matter was opposed, it is not correct that the appellant 'chose not to appear and present his case before the court'. That neither the appellant nor the LSNP was informed that the application would be dealt with 'on paper' and without the benefit of oral argument. The SCA said that the High Court informed the appellant's attorney and the LNSP's Counsel that the matter would be heard virtually on the Zoom platform.

Secondly, the SCA added that the High Court was not entitled to deal with the matter 'on paper' without hearing oral arguments. The SCA pointed out it is only in terms of s 19(*a*) of the Superior Courts Act 10 of 2013 that a High Court exercising appeal jurisdiction has the power to dispose of an appeal without hearing oral arguments. The SCA said that in dealing with matter 'on paper', the High Court failed to consider the appellant's answering affidavit and erroneously found that the appellant 'failed to place any evidence' before it to challenge the LSNP's allegations 'which remained undisputed'. The SCA added that as set out above, the appellant filed an answering affidavit in opposition of Part A and Part B of the application.

Thirdly, the SCA said that the appellant was not given an opportunity to 'present his arguments before court on 30 April 2020 through [virtual] platforms or other electronic means of hearing of matters'. The SCA pointed out that s 34 of the Constitution provides that '[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum'.

The SCA made the following order:

'1. The appeal is upheld and the order of the High Court dated 17 June 2020 is set aside.

2. The application is referred back to the High Court for determination by a differently constituted bench.

3. The appellant to pay the respondent's costs of this appeal.'

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

By Shanay Sewbalas and Johara Ally

New legislation

Legislation published from 14 November – 9 December 2022

Acts

Customs and Excise Act 91 of 1964
Amendment to Part 1 of sch 3 (no 3/1/748). GN R2742 *GG*47519/18-11-2022.

Division of Revenue Amendment Act 15 of 2022
Amends s 7, Column A of schedules 1 and 2, Column A of Part A of sched 4, Column A of Part B of sch 5, Column A of Part B of sch 6 and Columns A of Parts A and B of sch 7 of the Division of Revenue Act 5 of 2022. Date of commencement: 6 December 2022. GenN1486 *GG*47662/6-12-2022.

Financial Sector and Deposit Insurance Levies (Administration) and Deposit Insurance Premiums Act 12 of 2022
Pending repeal of s 30R of the Pension Funds Act 24 of 1956. Pending substitution of s 35 of the Banks Act 94 of 1990. Pending substitution of s 31 of the Mutual Banks Act 124 of 1993. Pending amendment of s 22(1) of the Financial Advisory and Intermediary Services Act 37 of 2002. Pending amendment of ss 1, 58(1)(*g*), 238, 239, 241, 244, 245, 246, 248, 288, 301 and arrangement of sections, pending substitution of ss 166BG, 237, 240, 242, 243, pending insertion of s 247(2)(aA) and sch 5 of the Financial Sector Regulation Act 9 of 2017. Date of commencement: 6 December 2022. GN1512 *GG*47696/9-12-2022.

Financial Sector and Deposit Insurance Levies Act 11 of 2022
Date of commencement to be proclaimed. GN 1511 *GG*47695/9-12-2022.

Bills and White Papers

Comprehensive Maritime Transport Policy Inspired Initiative: Pre-Draft South African Shipping Company Bill, 2022
GenN1458 *GG*47565/24-11-2022.

Constitution Eighteenth Amendment Bill, 2022
Publication of explanatory summary. GenN1498 *GG*47665/9-12-2022.

Divorce Amendment Bill, 2022
Notice of intention to introduce a Private Member's Bill into Parliament and invitation for public comment. GenN1420 *GG*47526/18-11-2022.

Insourcing Bill, 2022
Notice of intention to introduce a Private Member's Bill into Parliament and invitation for public comment. GenN1422 *GG*47526/18-11-2022.

Repeal of the Transkeian Penal Code Bill, 2022
Publication of explanatory summary. GenN1482 *GG*47637/2-12-2022.

Responsible Spending Bill, 2022
Notice of intention to introduce a Private Member's Bill into Parliament and invitation for comment. GenN1421 *GG*47526/18-11-2022.

Sexual Offences Act 23 of 1957
Criminal Law (Sexual Offences and Related Matters) Amendment Bill, 2022: Invitation for public comment. GenN1509 *GG*47693/9-12-2022.

Government, General and Board Notices

Agricultural Product Standards Act 119 of 1990
South African Meat Industry Company. GenN1474 *GG*47632/2-12-2022.

Banks Act 94 of 1990
Notice by the Prudential Authority in terms of s 54(1)(*b*) of the Act. GenN1423 *GG*47526/18-11-2022.

Commissions Act 8 of 1947
Amendment to terms of reference of the Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State. Proc 92 *GG*47525/16-11-2022.

Companies Act 71 of 2008
Companies and Intellectual Property Commission. GN2739 *GG*47512/14-11-2022.
Companies and Intellectual Property Commission (Guidance Note 4 of 2021): To guide the clients on requirements pre- and post-registration of a prospectus. GN R2762 *GG*47556/25-11-2022.

Compensation for Occupational Injuries and Diseases Act 130 of 1993
Notice issued by the Compensation Commissioner under the Act: Employers flagged for the Audit 2021. GenN1464 *GG*47574/28-11-2022.
Notice issued by the Compensation Commissioner under the Act: Reminder to submit outstanding 2021 and prior years ROE's. GenN1465 *GG*47575/28-11-2022.
Final reminder for the submission of 2021 and prior years outstanding Return of Earnings. GenN1466 *GG*47576/28-11-2022.

Copyright Act 98 of 1978
Section 9A of the Act read with s 5(1)(*b*) of the Performers Protection Act 11 of 1967: Accreditation of Imbokodo Performance Rights to act as a Representative Collecting Society. GN2791 *GG*47559/25-11-2022.

Criminal Procedure Act 51 of 1977
Declaration of peace officers in terms of s 334 of the Criminal Procedure Act: Investigators for the Investigating Directorate. GN R2849 *GG*47669/9-12-2022.

Criminal Procedure Act 51 of 1977
Declaration of Peace Officers Members of the Border Management Authority (Border Guards) in terms of s 334 of the Act. GN R2828 *GG*47634/2-12-2022.

Department of Women, Youth and Persons with Disabilities
Annual progress report on implementation of the White Paper on the Rights of Persons with Disabilities, 2017-2020: Approved by Cabinet, May 2022. GN2753 *GG*47526/18-11-2022.
Final research report impact of COVID-19 on persons with disabilities. GN2752 *GG*47526/18-11-2022.

Electoral Act 73 of 1998
Publication of reviewed lists of candidates. GenN1411 *GG*47521/15-11-2022.

Electoral Commission Act 51 of 1996
Registration of Political Parties (Registered between 14 June - 30 November 2022). GenN1483 *GG*47652/5-12-2022.

Electronic Communications Act 36 of 2005
Erratum Notice to the Draft Radio Frequency Assignment Plan for the Frequency Band 335.4 to 380, 440 to 450 and 1518 to 1525 MHZ in terms of reg 3 of the Radio Frequency Spectrum Regulations, 2015. GN2832, GN2833 and GN2834 *GG*47654/5-12-2022.

Environmental Impact Management Services
Notification regarding opportunity to participate in an environmental authorisation application process for the proposed TGS Geophysical Survey Basic Assessment Project, located offshore extending from approximately 120 km offshore of St Helena Bay to 230 km offshore of Hondeklip Bay, off the West Coast. GenN1418 *GG*47526/18-11-2022.

Financial Advisory and Intermediary Services Act 37 of 2002
Amendment of the Qualifications, Experiences and Criteria for approval as Compliance Officer, 2022. GN2815 *GG*47632/2-12-2022.

Financial Intelligence Centre Act 38 of 2001
Amendment of schedules 1, 2 and 3. GN2800 *GG*47596/29-11-2022.

Income Tax 58 of 1962
Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting. GN2789 *GG*47559/25 November 2022.

Infrastructure Development Act 23 of 2014
Section 8(1)(*a*) read with s 7(1): Presidential Infrastructure Coordinating Commission Council: Strategic Integrated Projects. GN2835 *GG*47658/6-12-2022.

International Trade Administration Commission of South Africa
Notice of initiation of sunset review of the anti-dumping duties on clear float glass originating in or imported from the Republic of Indonesia. GenN1425 *GG*47526/18-11-2022.
Labour Relations Act 66 of 1995
Bargaining councils accredited to conduct conciliation and arbitration, subject to conditions where applicable (renewal of accreditation as well as the subsidy amount payable per closed case is R 736,75 as from 1 April 2022 (for 2022/2023 financial year only)). GenN1472 *GG*47632/2-12-2022.
Private agency accredited to conduct conciliation and arbitration, subject to conditions where applicable (renewal of accreditation of private agency). GenN1473 *GG*47632/2-12-2022.
Motor Ferry Industry Bargaining Council of South Africa: Extension to Non-Parties of the Main Collective Agreement. GenN1496 *GG*47665/9-12-2022.
Notice published by the Essential Services Committee in terms of s 71, read with s 70(B)(1)(*d*) of the Act. GenN1497 *GG*47665/9-12-2022.
Application for variation of registered scope of a Bargaining Council for the Fishing Industry. GN R2847 *GG*47669/9-12-2022.
National Bargaining Council for the Clothing Manufacturing Industry: Extension to non-parties of the Main Amending Collective Agreement. GN R2848 *GG*47669/9-12-2022.
National Bargaining Council for the Road Freight and Logistics Industry: Extension to non-parties of the Main Collective Amending Agreement. GenN1454 *GG*47559/25-11-2022.
Notice published by the Essential Services Committee in terms of s 71, read with s 71(8) and s 71(8), read with s 71(9): Erratum of GN122 *GG*44293/19-3-2021. GenN1413 and GenN1414 *GG*47526/18-11-2022.
National Bargaining Council of the Leather Industry of South Africa: Extension to non-parties of the Tanning Section Collective Amending Agreement. GN R2740 *GG*47519/18-11-2022.
Marine Living Resources Act 18 of 1998
Repeal of designation of posts in an organ of state of which the incumbents are Fishery Control Officers. GN2796 *GG*47568/25-11-2022.
Mineral and Petroleum Resources Development Act 28 of 2002
Invitation for proposals to conduct seismic acquisition, seismic reprocessing and/or acquisition and processing of any other geophysical, geological or geochemical data offshore of South Africa. GN2755 and GN2756 *GG*47530/18-11-2022.
National Environmental Management Act 107 of 1998
Extension of the suspension notice on the implementation of the regulations to domesticate the requirements of the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, by a further 120 days. GN2757 *GG*47535/18-11-2022.
Ministerial task team to identify and recommend voluntary exit options and pathways for the captive lion industry. GN2846 *GG*47666/7-12-2022.
National Environmental Management: Biodiversity Act 10 of 2004
Inclusion of 17 succulent plant species and one succulent plant genus in appendix III of the Convention on International Trade in Endangered Species of Wild Fauna and Flora. GN2825 *GG*47633/1-12-2022.
Revised National List of Ecosystems that are threatened and in need of protection. GN2747 *GG*47526/18-11-2022.
National Heritage Resources Act 25 of 1999
Declaration of the Boomplaats Rock Engraving Site Complex situated on farms in Lydenburg; Mpumalanga as a National Heritage Site. GN2749 *GG*47526/18-11-2022.
National Water Act 36 of 1998
Establishment of the Vaal Orange Catchment Management Agency through extension of the boundaries and operational area of the Vaal River Catchment Management Agency to include Orange Water Management Area in terms of the Act. GN2792 *GG*47559/25-11-2022.
Establishment of the Breede-Olifants Catchment Management Agency through extending the boundary and area of operation of the Breede-Gouritz Catchment Management Agency in Western Cape Province. GN2793 and GN2795 *GG*47559/25-11-2022.
Reserve determination for water resources of the Umzimvubu catchment. GN2751 *GG*47526/18-11-2022.
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 R2837 - GN R2839 *GG*47661/6-12-2022.
Promotion of Access to Information Act 2 of 2000
Section 14 Manual (seventh version) of the Act: Promotion of Access to Information Act Manual: Limpopo Provincial Treasury. GenN1504 *GG*47672/8-12-2022.
South African Reserve Bank Act 90 of 1989
The dimension of, design for, and compilation of the fourth decimal coin series. GenN1463 *GG*47571/25-11-2022.
Special Investigating Units and Special Tribunals Act 74 of 1996
Amendment of Proc R39 of 2020. Proc R95 *GG*47634/2-12-2022.
Referral of Matters to Existing Special Investigating Unit: Department of Water and Sanitation. Proc R96 *GG*47634/2-12-2022.
Amendment of Proc 11 of 2018, as amended by Proc R3 of 2020. Proc R97 *GG*47634/2-12-2022.
World Heritage Convention Act 49 of 1999
Proclamation of land situated in the Eastern and Western Cape Provinces as part of the Cape Floral Region Protected Areas World Heritage Site. GN2816 *GG*47632/2-12-2022.

Rules, regulations, fees and amounts

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

Employment law update

By Moksha Naidoo

The LC jurisdiction in terms of s 77(3) of the BCEA

South African Municipal Workers obo Morwe v Tswaing Local Municipality and Others (LAC) (unreported case no JA12/21, 27-9-2022) (Sutherland JA with Waglay JP and Kathree-Setiloane AJA concurring).

The appellant union, acting on behalf of its member Mr MD Morwe (employee), launched an urgent application out the Labour Court (LC) seeking an order that –

- in terms of s 77(3) of the Basic Conditions of Employment Act 75 of 1997 (BCEA), the first respondent's (employer) decision to terminate the employee be declared unlawful; and
- in terms of s 77A(*e*) of the BCEA, the employee be reinstated with immediate effect pending the employer instituting a disciplinary inquiry.

In the notice of motion, as well as in the founding affidavit, the employee disavowed any reliance of the Labour Relations Act 66 of 1995 (LRA) and stated the application was brought within the provisions of his employment contract.

The thrust of the employee's argument was that he had a right to be subjected to a disciplinary inquiry, hearing prior to the termination of his employment contract.

The LC dismissed the application, on grounds that it lacked jurisdiction. The court found that its jurisdiction to hear a contractual dispute in terms of s 77(3), was limited to instances where the employment contract was alive at the time the application was launched. In this case, it was common cause the employee had been dismissed, axiomatic to which, his employment contract had ended.

In its reasoning, the LC held:

'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". The dictionary meaning of the word "concerning" is "regarding; touching; in reference or in relation to; or about". 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 sustenance and fortification from the phrase "irrespective of whether any basic condition of employment constitutes a *term of that* 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."'

Turning to specific performance in terms of s 77A(*e*), the LC was willing to accept its stance on jurisdiction, as recorded above, was incorrect and that the court did indeed have jurisdiction to entertain the claim. Notwithstanding this assumption, the LC found that the right to procedural fairness (*in casu* a disciplinary inquiry) fell squarely within the confines of the LRA and thus had no place in a contractual dispute.

On appeal, the Labour Appeal Court (LAC) found the LC's approach on jurisdiction, was incorrect. The LAC held that that s 77(3) does two things. It firstly confers the LC's concurrent jurisdiction with the High Court and secondly, it limits the scope of the concurrency to matters concerning an employment contract.

Elaborating on the text used in s 77(3) the LAC held:

'What this must mean is that whatever a civil court could hear "concerning a contract of employment" is what the Labour Court could hear. The word "concerning" and the use of the present tense does not point towards the scope of jurisdiction being only in respect of contracts which it is common cause are extant. A controversy about whether or not a contract has been cancelled validly or has been breached remains a dispute "concerning a contract of employment". This is the ordinary grammatical meaning of the phrase and, perhaps more importantly, from the perspective of a purposive interpretation, any other understanding would result in an absurdity. The notion that the civil courts can hear matters about the disputed validity of the termination of a contract and the concurrent jurisdiction of the Labour Court did not extend to that category of dispute would make a mockery of concurrency."'

Thus, according to the LAC, an employment contract that has been terminated, does not in itself, present a bar for employees approaching the LC in terms of s 77(3).

Following this conclusion, the LAC held that the LC did have jurisdiction to hear the employee's claim.

Turning to the issue of specific performance, in terms of s 77A(*e*), the question before the LAC was whether the employee had a contractual right to disciplinary inquiry.

In an attempt to establish this right, the employer relied on clause 5.5 of his employment contract.

The relevant clause reads:

'5.5 The Council will be entitled to terminate your employment without notice in compliance with the relevant labour legislation, as amended, and in terms of the Human Resources Policies and Procedure Manual, which *may* include a disciplinary hearing, if you –

5.5.1 commit any serious or persistent breach of any of the provisions of this agreement;

5.5.2 are guilty of any serious misconduct or deliberate neglect in the discharge of your duties under this agreement;

5.5.3 are guilty of any other conduct which will justify summary dismissal at common law' (my italics).

As a general starting point, the LAC observed that a clause in an employment contract, which expressly yields to the LRA, and its norms is merely a 'decorative surplusage'. This so, on the understanding that one cannot contract out the obligations of the LRA.

In terms of clause 5.5, the word 'may' cannot be interpreted as the employee having a right to a disciplinary inquiry. From a policy point of view, the LAC went further to say there is no obligation on a court to strain to find that the procedures and remedies under the LRA are incorporated into an employment contract.

The LAC found merit in the LC conclusion that procedural fairness should not be read as an implied or tacit term, into an employment contract, as was the finding by the Supreme Court of Appeal in certain judgments. However, this does

not leave the door closed for a term being incorporated into an employment contract which specifically sets out the procedural requirement, which must be adhered to prior to termination. However, on the facts before it, clause 5.5 did not lend itself to the notion that a disciplinary inquiry was mandatory, but rather an inquiry was permissive.

The LAC resolved that clause 19.3 of the employment contract did not likewise come to the aid of the employee. In terms of that clause, any disciplinary action, which is held must be done in terms of the procedures of the disciplinary code. This clause did not create a right to a hearing, but rather it created a right to a hearing, as set out in the disciplinary code, only after the employer has decided to hold a disciplinary inquiry.

While the remedy of specific performance is discretionary – the fall out between the employee and municipality, as described on the papers, meant that specific performance would not be an appropriate remedy even if the employee was able to establish a right to a disciplinary inquiry. The alternate remedy ought to have been damages, which the employee never sought on the papers.

The appeal was dismissed with costs.

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By Monique Jefferson

Deductions from remuneration

In *National Education, Health and Allied Workers' Union obo Mamogale and Others v North West Department of Community Safety and Transport Management and Another* [2022] 11 BLLR 1041 (LC) the Labour Court (LC) had to determine the lawfulness of certain deductions made from employees' salaries. In this case, the employees were employed as traffic officials in terms of a two-shift system. The Department then replaced this system with a three-shift system, but the employees refused to obey the instruction to work according to this new shift arrangement. They were willing to tender their services as per the old shift system, which would have entailed some overlapping of hours, but they were not issued with the keys to the traffic vehicles by the Department and, therefore, could not tender their services. The employees were informed that the principle of 'no work, no pay' would be implemented until they complied with the new shift arrangement. They were nevertheless still paid their normal salaries for April and May 2022. However, at the end of June 2022 their payslips reflected that an amount would be deducted from their salaries to offset the overpayments that had been made in respect of April and May. An urgent application was launched by the union on behalf of the employees seeking an order to direct the Department not to make any further deductions from their salaries and to reimburse the employees for those deductions that had already been made by the Department.

It was argued on behalf of the employees that the deductions were unlawful and in breach of s 34 of the Basic Conditions of Employment Act 75 of 1997 (BCEA) because the employees had not agreed to the deductions. Furthermore, it was alleged that the employees would have tendered their services but were prevented from doing so by the employer who withheld the tools of the trade and that this accordingly constituted an unlawful lock-out.

The employer relied on the decision in *Mpanza and Another v Minister of Justice and Constitutional Development and Correctional Services and Others* [2017] 10 BLLR 1062 (LC) to justify the deduction. The LC found that the circumstances of this case were distinctive to the facts of the *Mpanza* case as in the *Mpanza* case the employees had been afforded a proper opportunity to make representations. Furthermore, the *Mpanza* case was not a case where the employees had been paid their normal remuneration and then deductions were made from their salaries thereafter as was the case in this case. The LC remarked that it would have been in order for the employer to have applied the 'no work, no pay' principle and not have paid the employees during the month that it fell due. The issue here was that the employees had been paid their salary and the employer was now trying to recover these amounts through a deduction from salary.

It was held that there was no law, collective agreement, or award, which authorised the employer to deduct the amounts from the salaries without the written consent of the employees as contemplated in s 34 of the BCEA. The deductions accordingly did not comply with s 34 of the BCEA and were unlawful and the employer was ordered to repay these amounts to the employees. As regards the allegation that the employer's withdrawal of the tools of the trade amounted to a lock-out, it was held that this was not a lock-out and, therefore, the only relief for the employee was an interdict of the deductions for April to June 2022 and the repayment of the deductions already made. The employer was still entitled to institute civil proceedings to recover the undue portions of the salary from the employees.

In *Gqithekhaya and Others v Amathole District Municipality* [2022] 11 BLLR 1066 (ECL) the employees had participated in an unprotected strike but were paid their normal salary in the normal course in respect of the strike period. Approximately five months later, the employees received a notice informing them that the remuneration they had been paid during the strike would be deducted from their salaries on the basis of the 'no work, no pay' principle.

The employees instituted an urgent application seeking an order to restrain the employer from making the deductions and to direct the employer to repay the amounts that had already been deducted.

The employer argued that it was entitled to make the deductions as the strike had been unprotected. The employer argued that it was simply applying the common law doctrine of set-off. As regards the delay in recovering the amounts, the employer alleged that it took time to determine who the employees were who participated in the strike and were not entitled to be paid due to the large number of employees involved.

The court held that the principle of 'no work, no pay' applied to both protected strikers and unprotected strikers. Therefore, strikers are not entitled to be remunerated and should be required to reimburse the employer for amounts paid to them when they did not tender their services. It was held that in this case the delay in the employer implementing the 'no work, no pay' principle was justified given the vast number of strikers. The employer was, therefore, entitled to recover these amounts and the normal timelines for prescription applied.

The court, however, held that even though the amounts were paid to the

employees who participated in the strike in error the employees should have been afforded an opportunity to make representations on the amounts involved and how the employer should attempt to recover these amounts. It was held that the fact that the employer mistakenly thought that the employees did not participate in the strike and, therefore, paid the employees erroneously was not the type of error contemplated in s 34(5) of the Basic Conditions of Employment Act 75 of 1997 (BCEA), which was when there is an error in the actual calculation of the remuneration, which permits an employer to make such a deduction without consent. The court also remarked on the fact that the deduction must be limited to one-quarter of the loss or damage, and this requires a fair process to be followed with the employee in which the employee is afforded a hearing. It was held that there had been a breach of the BCEA as the employees had not been afforded an opportunity to make these representations.

It was held, however, that the employees were indebted to the employer under common law and, therefore, the employer was entitled to recover the amounts paid to the employees under common law until the debt has been extinguished.

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By Kathleen Kriel

Recent articles and research

Abbreviation	Title	Publisher	Volume/issue
Acta Juridica	Acta Juridica	Juta	(2022)
Advocate	Advocate	General Council of the Bar	(2002) 35.2 (2022) 35.3
AHRLJ	African Human Rights Law Journal	Centre for Human Rights, Department of Law, University of Pretoria	(2022) 22.1 (2022) 22.2
AYIHL	African Yearbook on International Humanitarian Law	Juta	(2021)
BTCLQ	Business Tax and Company Law Quarterly	SiberInk	(2022) 13.2 (2022) 13.3

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

What is blockchain and why should legal practitioners care?

By Emmie de Kock

In October 2019, the Minister of Justice and Correctional Services, Ronald Lamola announced that 45 000 trust files had gone missing from the Pretoria Master's Office (Linda Ensor 'Pretoria Master's Office missing 45,000 trust files' (www.businesslive.co.za, accessed 8-12-2022)). Apparently, these files were 'destroyed during a storm that caused the roof of the storage facility to be blown off' (Ensor (*op cit*)).

'This … led to a backlog as dummy files needed to be opened' (Ensor (*op cit*)). This crisis was 'exacerbated by the fact that before 2013 files were not kept on an automated system and clients do not have copies of all documents [in order] to open dummy files' (Ensor (*op cit*)).

This announcement was shocking and disappointing, especially considering that technology had not been employed to record files prior to 2013.

To maintain law and order, it is essential that we must be able to trust government and public registries to keep safe and accurate records. However, trust is fading, especially if we continue to depend on registration systems, which still take place manually.

In particular, an area, which needs this change is the Deeds Office. Although the Electronic Deeds Registration Systems Act 19 of 2019 has been published, it will only come into operation when the President fixes a date by proclamation in the *Government Gazette*. Our current system is dependent on the integrity and the correct performance of the functions of conveyancers and the deeds registries' employees.

Technology is evolving fast and every day, while the legal sector is unfortunately famous for resisting technological changes or being slow to catch up with other businesses. However, legal practitioners who take charge now could speed up the process.

What is blockchain?

'Blockchain was first introduced in 2008' as the technology supporting bitcoin transactions (Robert Sheldon 'A timeline and history of blockchain technology' (www.techtarget.com, accessed 8-12-2022)). 'Governments, businesses and other organisations are researching and deploying blockchain technology to meet a variety of needs – most of which have nothing to do with digital currency' (Sheldon (*op cit*)).

But what is meant by blockchain? 'Blockchain is a system of recording information' relating to transactions in blocks 'in a way that makes it difficult or impossible to change' or hack the information (Euromoney Learning 'What is blockchain?' (www.euromoney.com, accessed 8-12-2022)). The blocks are linked to form a digital chain, and as the transactions increase, the chain grows. It works like a digital ledger, as the technology records, duplicates, and shares transactions on the entire network of computer systems represented on the particular blockchain. 'Every time a new transaction occurs on the blockchain, a record of that transaction is added to every participant's ledger' (Euromoney Learning (*op cit*)). The term 'DLT' (Distributed Ledger Technology) is used to refer to this decentralised type of database, which is managed by multiple participants. Blockchain 'transactions are recorded with an immutable cryptographic signature called a hash' (Euromoney Learning (*op cit*)). 'The ledger itself can also be programmed to trigger transactions automatically' (Francisco Guillén 'How the blockchain works' (www.blocktac.com, accessed 8-12-2022)).

Considering our fight against corruption in South Africa (SA), and that documents necessary to enforce rights often go missing, blockchain technology certainly offers a solution, as transactions can be recorded efficiently in a permanent and verifiable way. Imagine, how different our state funds may be managed, if tender transactions were to be recorded on a blockchain for transparency.

When will blockchain be used?

Unfortunately, according to the *Harvard Business Review*, 'true blockchain-led transformation of business and government … is still many years away' (Marco Iansiti and Karim R Lakhani 'The truth about blockchain' (https://hbr.org, accessed 8-12-2022)). The reason for this is that 'blockchain is not a "disruptive" technology, which can attack a traditional business model with a lower-cost solution … quickly. Blockchain is a *foundational* technology: It has the potential to create new foundations for our economic and social systems' (Iansiti and Lakhani (*op cit*)).

Regardless of how slow the South African economic and social systems will adapt to blockchain technology, as jurists, we must look ahead to be able to lead our profession, position ourselves as experts to advise role players and protect our clients' rights and interests.

How could blockchain change legal services?

Although the age of blockchain may change the traditional role of a lawyer, it will simultaneously offer entirely new practice opportunities – but only for legal practitioners who are progressive enough to familiarise themselves with blockchain technology. Will your legal practice regard blockchain technology as a threat or opportunity?

Blockchain will improve cost savings, automation, integrity of data and make legal services more accessible and transparent for clients. Only legal practitioners who will be open to embrace these changes and adapt to blockchain technologies will reap the benefits of exploring new practice opportunities.

Blockchain has the potential to impact on various aspects of legal services. In particular, relating to 'smart contracts', recording and valuing of intellectual property and recording transactions to land and real estate properties.

'*Smart contracts* are simply [computer] programs stored on a *blockchain* that run when predetermined conditions are met' (IBM 'What are smart contracts on blockchain?' (www.ibm.com, accessed 8-12-2022)). According to Wikipedia, 'vending machines are mentioned as the oldest piece of technology', which works on the basis of a smart contract (Wikipedia 'Smart contract' (https://en.wikipedia.org, accessed 8-12-2022)).

Considering opportunities for entrepreneurs in this fourth industrial revolution era, it is likely that legal practition-

ers will increasingly be required to advise on the law and legal conditions relating to smart contracts. For example, imagine how easy it will make life for a property manager of numerous lease transactions if these transactions were to be concluded as smart contracts, which could automatically collect and pay monthly rent and commission. Smart contracts will lower the cost of such transactions, which could increase the demand and overall accessibility to these type of legal services.

Blockchains may further provide for built-in arbitration procedures, which will save a lot of costs on dispute resolution, which rules must obviously be coded with the help of competent legal practitioners.

Furthermore, as a blockchain will have a built-in authentication process, it may unfortunately substitute the function of notaries. However, the integrity and safe keeping of such relevant authenticated documents will be enhanced.

What will drive the change to blockchain?

It is expected that the South African economic and financial sectors will first move to blockchain technologies, as banks worldwide must decide on policies on accepting or managing cryptocurrencies for payment and their status as stand-alone currencies.

For example, in Australia, it is apparently already increasingly common to find businesses, including law firms that accept cryptocurrency as a form of payment. Early in 2022, the Nigerian government further adopted blockchain technology 'to launch a nation-wide wallet which will enable the international commercialisation of all [intellectual property] forms being created and registered within the country, both locally and internationally' (Cision PR Newswire 'Nigeria to launch major crypto initiative, IP Exchange Marketplace and Wallet, on Algorand in partnership with Developing Africa Group and Koibanx' (www.prnewswire.com, accessed 8-12-2022)).

Due to the technical nature of blockchain, it enhances trust in record keeping and financial transactions. The fact that a blockchain offers an unbreakable trust could drive people to demand the use of it. However, will this be the case in SA? Although blockchain will be the ideal technology to replace some government functions to make official record keeping more efficient, accurate and trustworthy, initially it is likely to be met with resistance as it may lead to the retrenchment of many government workers.

Legal practitioners who are aware of these changes and are prepared to learn about these technology developments will take the lead and make their careers and legal practices future-proof.

How will your legal practice adapt?

Change always requires momentum. To move forward during these changing times, it is recommended that legal practitioners belong or form interest groups to make progress in this new practice development area faster together. If there is sufficient interest, such interest groups could help drive the necessary change in the profession to help modernise faster by adopting available technologies, which could make justice more attainable and save us all time and costs.

Although there may only be a few legal practitioners currently specialising or interested in technology law, legal practitioners are encouraged to learn of new legal practice areas and expanding legal services as opportunities as needs arise. There is no doubt that top legal practitioners will always be in demand.

Not far in the future, and perhaps it has already started happening, attorneys helping with divorces, deceased estates or transfers of properties may get instructions involving the transfer of division of cryptocurrencies in blockchains. Also, no doubt that legal practitioners assisting businesses are starting to get more queries about smart contracts.

There appears to be a big hype about blockchain on and off in the media and there is still so much to learn. It is hoped that this article starts to give colleagues an understanding of the potential of blockchain technology and for ideas how to plan for new legal practice development areas to support technology transactions in SA.

Emmie de Kock *BLC LLB (cum laude)* is a Lawyer Coach and Managing Director of LawyerFirst Coaching & Consulting t/a Lawyers Working Smart.

Public and private bodies: What is the difference?

By Kirsten Carstens

This article aims to advance the distinction and narrative between public and private bodies. These differences reiterate the distinction between not only the function of the bodies but also the powers conferred on them. This article's length and breadth are also not narrowed to fit a specific *causa* or scenario. It aims to declare the law, that is, and not to advance a new set of ideas and norms. The rule of law that governs this distinction is a fundamental principle in our law which has been crisply advanced in numerous authorities (see *Pharmaceutical Manufacturers Association of SA and Others; In Re: Ex Parte Application of President of the RSA and Others* 2000 (3) BCLR 241 (CC) at para 39).

What is this difference?

Public bodies responsible for exercising public powers are required to act strictly within the powers that have been conferred on them. The law must authorise all decisions, acts and the like.

Private individuals may, however, do as they wish, provided the law does not expressly prohibit it.

Why is the difference significant?

The difference is not only the lens used to distinguish how the law is applied to them but also the cornerstone of the rule of law. Even though public bodies and private persons are subject to the rule of law, the approach to what may or may

not be done by them is fundamentally different.

The authorities and the relationship(s) between private and public bodies

At para 11 in the matter of *Chief Lesapo v North West Agricultural Bank and Another* 2000 (1) (SA) 409 (CC), Mokgoro J emphasised: 'No one is entitled to take the law into her or his own hands. Self-help, in this sense, is inimical to society in which the rule of law prevails, as envisaged by s 1(*c*) of our Constitution'. Furthermore, C Hoexter in *Administrative Law in South Africa* 2ed (Cape Town: Juta 2012) at 139 explains that: 'The courts are there to keep the state and its officials within the bounds of their powers and to protect citizens from excesses of power'. This view is premised on the basis that: Individuals may do as they wish, provided that whatever these limitations impose, it is not expressly prohibited by the law.

Furthermore, in *R v Somerset County Council, ex parte Fewings and Others* [1995] 1 All ER 513 at 524, the court grappled with this same question of what the relationship is, which these bodies experience with each other.

The court confirmed that while private persons are free to do anything they want, the law does not prohibit, public bodies, on the other hand, may only act within the powers that are bestowed on them. Laws J further held that: 'Public bodies and private persons are both subject to the rule of law; nothing could be more elementary.' Private persons may do anything the law does not prohibit, a private person is not shackled by affirmative justification for the actions he seeks to conquer or 'must burrow in the law books'. The rule is, however, the opposite for public bodies and any action 'must be justified by positive law'.

Conclusion

Considering our constitutional dispensation, these fundamental principles, as Laws J explains it in *Somerset Country Council*, need to be enunciated and made more apparent among the public and legal practitioners alike.

The notion that the state can act without fear, favour or prejudice also applies to the private person. They may trade, sell, contend and advance their personal dreams and aspirations (without fear) in both social and economic spheres, albeit within the premise and spirit of our laws and customs.

The distinction is crucial as it traverses what power the state can (actually) exercise, as confirmed by legislation, and what the individual can do in response to that discretion and exercising of power.

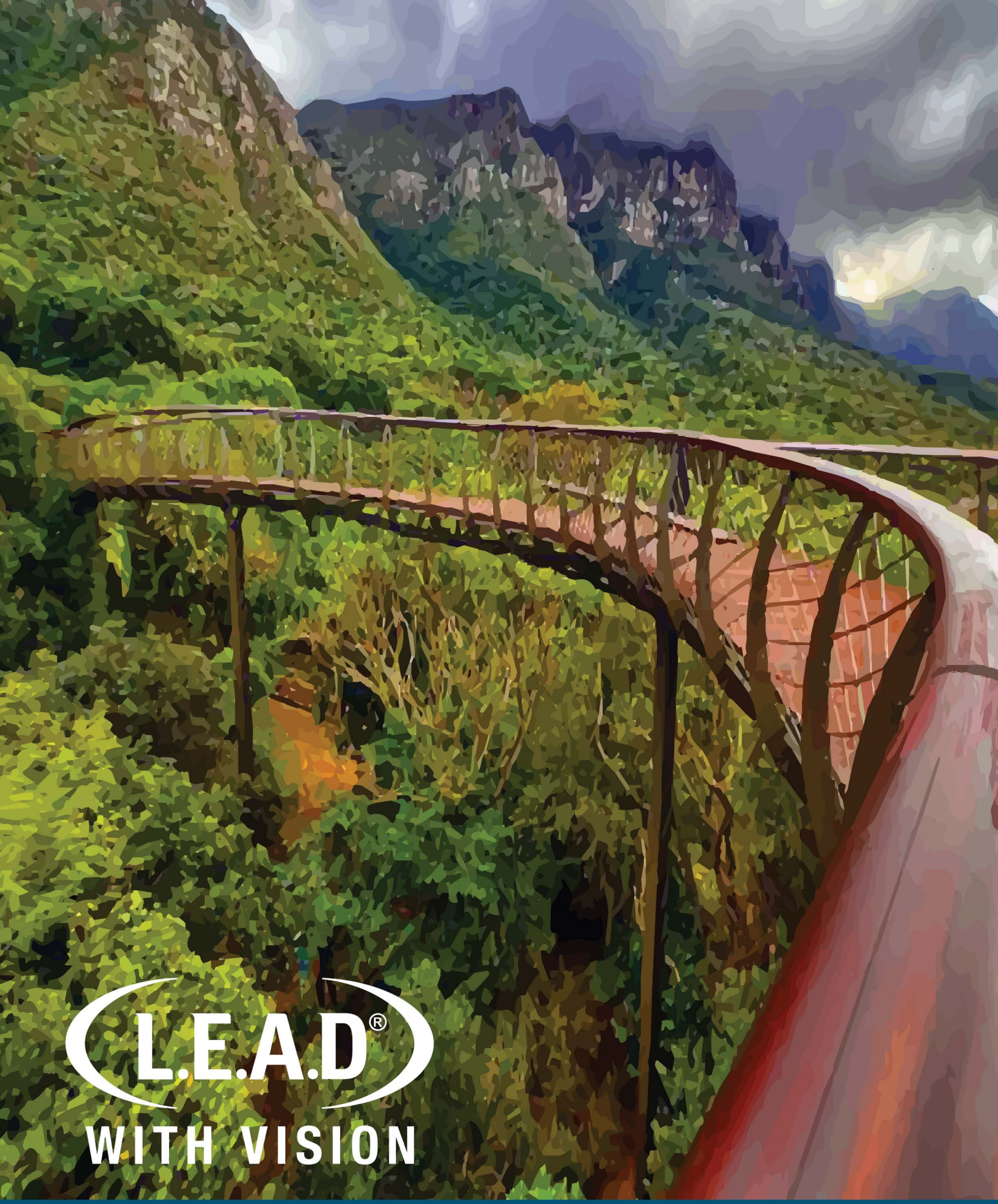
The rule of law is not only a mechanism the state can use to decide what its citizens may do or not do, but it also serves as a safeguard and high watermark to which citizens can hold the state or municipalities responsible for their actions.

In *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* [2004] 3 All SA 1 (SCA) at para 32, Howie P and Nugent JA elaborated on this principle, stating 'the rule of law a statute will generally not be interpreted to mean that a subject is compelled to perform or refrain from performing an act in the absence of a lawful basis for that compulsion'.

In closing, the distinctions between private and public bodies are valuable for many reasons. This distinction must be woven into the fundamental makeup of every legal practitioner's legal toolbox. Every argument, in essence, must first, recognise this distinction and apply to the law correctly. The distinction safeguards the legal practitioner from choosing the incorrect avenue to advance their client's case and lays the foundation to rebut an incorrectly advanced argument.

Although a simple distinction, it is a core principle of our law embodied by our constitutional dispensation to hinder the abuse of power and advance the individual(s) liberty.

Kirsten Carstens *BA LLB (UP)* is a candidate legal practitioner at Otto Krause Inc in Johannesburg. ❑



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

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