

CHATTING WITH CHATGPT: WILL ATTORNEYS BE ABLE TO USE AI TO DRAFT CONTRACTS?

*To PAJA or not to PAJA that is the question?
Is the avoidance of PAJA justified?*

Eliminating sexual harassment in the
workplace – #TimesUp for employers

**The 'any court' conundrum – revisiting
s 16(2) of the Maintenance Act**

**Opting out: How does POPIA
impact telemarketing?**

*An aggrieved party
affected by a
decision – where
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Section 3(1)(b)
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open for interpretation to
be a requirement

**SCA says insulting, vulgar and
disparaging language by a legal
practitioner cannot be tolerated**

**Eeny, meeny, miny, moe, to which court will
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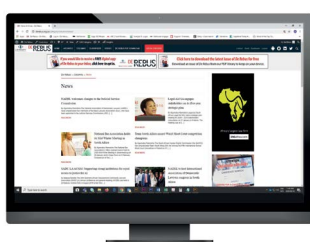


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FEATURES

12 Chatting with ChatGPT: Will attorneys be able to use AI to draft contracts?

OpenAI's development of ChatGPT has introduced the world to the potential of artificial intelligence and its impact on various industries, including the legal profession. ChatGPT is a tool that provides information in real-world settings and has the potential to disrupt legal education and the practice of law. Significantly, there are concerns about ChatGPT's impact on jobs. To test its capabilities, **Prof Michele van Eck**, asked the chatbot a series of questions to see whether it is truly a threat to the function of an attorney as a contract drafter.

15 Opting out: How does POPIA impact telemarketing?

South African law has been regulating direct marketing for over two decades, through various Acts including the Consumer Protection Act 68 of 2008 (CPA), Electronic Communications and Transactions Act 25 of 2002, and Protection of Personal Information Act 4 of 2013 (POPIA). This has resulted in an overlapping legislative framework that imposes both opt-in and opt-out regimes. Notably direct marketing under the CPA is generally permissible unless the consumer opts out and in contrast, if the direct marketing falls under POPIA it is generally prohibited unless the consumer opts in. Candidate legal practitioner, **Gilad Katzav**, writes that the topic of direct marketing remains a thorny issue in the realm of consumer and privacy law.

17 To PAJA or not to PAJA that is the question? Is the avoidance of PAJA justified?

What particular actions qualify as administrative action is determined by reference to jurisprudence. Section 33 of the Constitution and the definition of 'administrative action' in the Promotion of Administrative Justice Act 3 of 2000 (PAJA) are key considerations. Legal practitioner, **Igor Szopinski**, observes that of particular concern is the inconsistency in which the courts interpret this and how often the constitutional principle of legality as a basis for review is relied on, with little thought given to PAJA. Mr Szopinski writes that in theory this option should not be available where the conduct that is challenged in review amounts to administrative action.

19 Eliminating sexual harassment in the workplace – #TimesUp for employers

Legal practitioner, **Mmathabiso Khalema**, notes that historically, there has been a culture of stigmatising women who speak out against gender-based violence. Recent developments in case law and legislation on sexual harassment indicate that the culture of labelling women as vindictive may be coming to an end. Ms Khalema traces the development of sexual harassment jurisprudence through court judgments and highlights recent developments in case law and legislation on sexual harassment. Furthermore, she emphasises the importance of having a sexual harassment policy as a critical part of an employer's operations.

EDITOR:

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

PRODUCTION EDITOR:

Kathleen Kriel
BTech (Journ) (TUT)

SUB-EDITOR:

Kevin O'Reilly
MA (NMU)

SUB-EDITOR:

Isabel Joubert
BIS Publishing (Hons) (UP)

NEWS REPORTER:

Kgomotso Ramotsho
Cert Journ (Boston)
Cert Photography (Vega)

EDITORIAL SECRETARY:

Shireen Mahomed

EDITORIAL COMMITTEE:

Michelle Beatson, Peter Horn,
Mohamed Rander, Wenzile Zama

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

DE REBUS ONLINE: www.derebus.org.za

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Cell: 082 805 1257 • E-mail: DeanC@ince.co.za

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ACCOUNT INQUIRIES: David Madonsela

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

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Applications to PVT Schools with foreign law degrees

Recently, there has been numerous applications to the Legal Education and Development's Practical Vocational Training School for Legal Practice (PVT School) nationally by persons in possession of foreign law degrees or degrees not attained in South Africa. In terms of s 26(1) (b) of the Legal Practice Act 28 of 2014 (LPA), an individual may only apply to be admitted as a legal practitioner if they are in possession of either an LLB degree from a South African university or a foreign law degree that is recognised by South African Qualifications Authority (SAQA) as being 'equivalent to' such an LLB degree.

In terms of the PVT School application form for admission LEAD can accept and register a candidate

to attend the PVT School with a foreign law degree if the degree is equivalent to a South African LLB degree after being evaluated by SAQA.

This is also stated on the PVT School application form at page 6, para B column three.

For some law degrees of foreign universities, their degree is, according to the SAQA Certificate of Evaluation, evaluated as being a 'closest comparable degree to a South African Bachelor of Laws' degree and the words 'closest comparable' is thus utilised instead of the word 'equivalent to' as prescribed in the LPA.

A South African LLB degree necessitates the obtaining of a minimum of 480 credits within such a degree. It may, therefore, become necessary for candidates to approach a uni-

versity within South Africa to peruse their detailed academic record to ascertain, which modules would need to be completed for the full 480 credits to be obtained.

Once the candidate qualifies to attain the LLB degree from the nominated tertiary institution, this is what will need to be supplied to the PVT School for admission, as well as for admission as a candidate legal practitioner - due to the fact that a 'closely comparable' degree is indeed not an 'equivalent degree' to the LLB degree.

Michelle Beatson is Principal of the Legal Education and Development School for Legal Practice in Pretoria. Ms Beatson is also a member of the *De Rebus* Editorial Committee.

Would you like to write for *De Rebus*?

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

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

- Please note that the word limit is 2 000 words.
- Upcoming deadlines for article submissions: 17 April; 22 May; 19 June and 17 July 2023.

LETTERS TO THE EDITOR

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

Whether maintenance for minor children could be awarded retrospectively or retroactively in a proper case?

The Maintenance Act 99 of 1998 does not provide for retrospective or retroactive maintenance orders.

However, s 18(2)(b) of the Maintenance Act provides for '[making] such other order as the maintenance court may consider appropriate in the circumstances of the case'.

The wording of s 18(2)(b) is open for interpretation as to whether '[making] such other order as the maintenance court may consider appropriate' includes orders retrospectively or retroactively.

In the case of *Harwood v Harwood* 1976 (4) SA 586 (C) at 588E the court held that retrospective or retroactive orders were possible in matters relating to maintenance in terms of the common law and that such orders are not ousted by the silence in this regard in the provisions of r 43 of the Uniform Rules of Court. This issue was decisively pronounced on in the decision of *Herfst v Herfst* 1964 (4) SA 127 (W) at 127-128A-B.

In the case of *S v Frieslaar* 1990 (4) SA 437 (C) the court held that if an existing maintenance order is replaced, the order may have a retroactive effect, provided that this is stated in the order.

The alternative to the common law position is s 8(1) of the Divorce Act 70 of 1979, which provides for: 'A maintenance order or an order in regard to the custody or guardianship of, or access to, a child, made in terms of this Act, may at any time be rescinded or varied or, in the case of a maintenance order or an order with regard to access to a child, be suspended by a court if the court finds that there is sufficient reason therefor'.

In the case of *Reid v Reid* 1992 (1) SA 443 (E) at 447B-C the court held that: 'When the consent paper is then made an order of court, *res judicata* is established on the just amount payable as maintenance.' 'Thus, any rescission, variation, or a suspension of the maintenance order granted earlier becomes a new dispute between the parties where the original order granted may form the basis of any new contemplated action' (Celeste Frank and Jordan Dias 'Case summary: *SA v JHA and Others* 2021 (1) SA 541 (WCC)' (www.schindlers.co.za, accessed 1-3-2023)).

In the case of *Georghiades v Janse van Rensburg* 2007 (3) SA 18 (C) at 22D the court held that '[s 8 of the Divorce Act] was introduced so as to authorise the court to amend maintenance orders on good cause shown, so as to enable spouses to come to court "to redress injustices occasioned by a maintenance order which no longer fits the changed circumstances"'. 'Having considered the

applicable legal principles, the court was of the view that once a maintenance order, which formed part of a consent paper, was made an order of the court, it was a judgment like any other. By virtue of the fact that it imposes a monetary obligation, it is, accordingly, a "judgment debt" for the purpose of section 11(a)(ii) of the Prescription Act [68 of 1969] ... which, accordingly, attracts a 30-year prescription period' (Frank and Dias (*op cit*)).

Concluding remarks

The problems with the maintenance system in South Africa are well documented, namely with the wide and unpredictable discretion of the court in making maintenance awards.

I submit that the time has come for the South African Law Reform Commission and the Department of Justice and Constitutional Development to research the problems experienced in the maintenance system comprehensively and to look afresh at reforming and developing the law as a whole.

Kobus Brits LLB (*cum laude*) (Unisa)
is the office manager at
Theron Inc in Johannesburg.
Mr Brits writes in his
personal capacity.

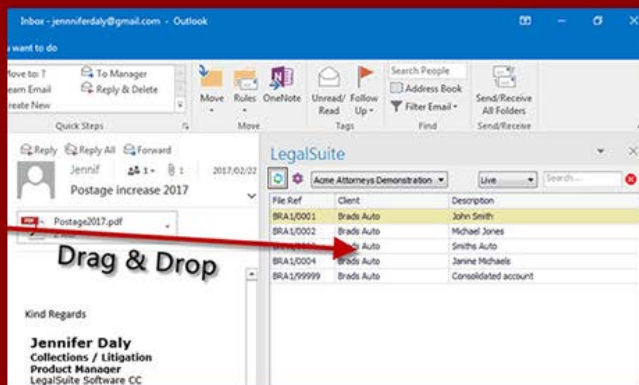


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By
Joel
Zinhumwe

Bad habits to avoid as a legal practitioner in practice

Becoming a successful legal practitioner in practice demands recognition of significant aspects of running a business. What separates those that will make it and those that will not, lies in knowing the importance and value of key components of running a business. There is a common phrase that says, 'practice makes perfect'. Practicing basic and good important habits in business is very crucial to the success of any business, regardless of its size and/or its nature. I have had the opportunity to perform inspections and investigations of legal practitioners' trust account records across the country and have learned a lot about some of the bad habits that legal practitioners should avoid.

Not valuing the importance of keeping real time updated trust accounting records

Maintaining regular and proper trust accounting records as frequent as possible is an essential ingredient to the success of any business. It is important to develop a good habit of always keeping your accounting records updated. That way you will always be on top of things and aware of every transaction in your accounts. Rule 35.9 of the Rules for the Attorneys' Profession prescribes that legal practitioners must update their trust accounting records monthly. Doing inspections and investigations of trust accounting records over the past years, I have noted that most law firms prefer to prepare their trust accounting records after the completion of a financial year end period. Some legal practitioners say it is costly to have trust accounting records prepared monthly and/or updated in real time because they do not see the value in it. Maintaining of proper trust accounting records is as important as performing any other key aspect of your business. It should never be trivialised because once a bad habit is developed, it will always end badly for the firm. Below are some of the points that can be avoided when trust accounting records are maintained regularly.

- Firstly, avoid having to deal with trust debit balances before you make any

payment for a specific client trust ledger, you can always have a sneak peek of your client trust ledger account balance, or your accountant/bookkeeper can print the trust ledger balance for you. By definition, a trust ledger debit balance occurs when more payments are made for a particular client trust ledger than the actual trust money deposited by that client. It is important to practice good habits of avoiding instances where you find yourself having to explain to auditors or the Legal Practice Council Disciplinary Committee on how certain trust ledger debit balances occurred.

Risk implication for the law firm:

- It will result in trust shortages for the law firm.
- It will result in qualified financial audit reports for trust accounts.
- Secondly, always identify unidentified deposits as early as possible. Unidentified deposits refer to the funds deposited into the trust bank account from a client or individual that has no mandate with the legal firm to do so. This happens because of a mistake or due to money laundering schemes. Some legal firms always have significantly huge positive trust bank balances and in the absence of a real time and updated accounting records, it is easier for a legal practitioner to fail to identify such deposits. For example, where such deposits were made for money laundering purposes and the legal practitioner fails to identify such amounts in their trust bank account in a reasonable time. It might be difficult to prove their case of innocence when asked by authorities, especially in cases where you might have used those funds unknowingly and your trust accounting records are proved to have had a trust shortage/deficit as at the period end.

Risk implication for the law firm:

- Failure to detect duplicate payments into the trust bank accounts.
- Failure to detect money laundering schemes through your trust bank account.
- It gives a false trust bank balance for trust creditors.

- Thirdly, avoid having to deal with the effects of trust deficits or shortages. A trust deficit or trust shortage occurs when total trust creditors or liabilities exceed total trust funds for the legal firm as at a particular financial period end. The effects of trust deficits are so detrimental to the practice, especially in a situation where the law firm is unable to give an explanation that is acceptable and valid. In cases, where a law firm prepares its trust accounting records after a financial year end (12-month period), it then becomes more difficult to provide acceptable reasons for the occurrence of a trust shortage. The Legal Practice Act 28 of 2014 allows law firms to report an instance of trust deficits and the reason there of. Practicing good habits of regular preparation and updating of trust accounting records in real time, will enable the law firm to quickly identify such instances, investigate the reasons thereof and remediate the situation.

Risk implication for the law firm:

- It may result in the closure of the law firm.
- It will result in qualified financial audit reports for trust accounts.
- Results in bad reputation for the law firm.

Not valuing the importance of having proper and clear business processes and internal controls

According to software company Appian: 'A business process is a collection of linked tasks that find their end in the delivery of a service or product to a client. A business process has also been defined as a set of activities and tasks that, once completed, will accomplish an organizational goal' (Appian 'Business Process Definition' (<https://appian.com>, accessed 7-3-2023)). Wikipedia states: 'Internal control involves everything that controls risks to an organisation' (Wikipedia 'Internal control' (<https://en.wikipedia.org>, accessed 7-3-2023)).

Most law firms do not have clearly defined business processes as it is some-

thing that is not considered to be of importance. However, in the absence of proper business processes, legal practitioners usually develop bad habits in such environments, such as follows:

- **Thinking you can do it all yourself.**

Most legal practitioners find it difficult to delegate work to other people because they think that no one can do the job as well as they can. That is a bad habit to let yourself do everything because sooner or later it will become overwhelming.

- **Hiring of friends and relatives as employees.**

Managing a friend or relative can be awkward and can result in inefficiencies and undermining of business processes put in place. In most cases, legal practitioners become too trusting and thereby weaken the internal control measures put in place.

- **Choosing the wrong business partner.**

Having the right business partner is crucial for the success of any business and it is common to enter a partnership in the world of business. But it is difficult to select a good fit yourself and your

law firm. The fact that someone is your friend, or someone is a family member, will not guarantee you success or mean that they are necessarily right for you and your business. A business partnership is like a marriage, which means that there will be disagreements and fights, but they are necessary. However, these disagreements should be resolved in a way that shows clear and sound reasoning.

- **Neglecting business finances.**

Regular checking of business financial records is significantly important for your business, and it will help you know whether you are being profitable or not. It helps to review areas that have a lot of cashflow and areas which you need to reduce your spending on.

Implications of bad habits by legal practitioners

Bad habits results in severe implications for both legal practitioners and law firms. It is significantly important that as legal practitioners you do everything possible to ensure that the important key aspects of the business are adhered to. Such implications include the following –

- disciplinary hearing;
- suspension;
- fines;
- striking off; and
- prosecution.

In conclusion, just because bad habits may be inevitable and easily justified, it does not mean you have to make the same ones everyone else does. It is the boring stuff that matters the most in business. Taking steps to avoid bad habits frequently made by legal practitioners is part of this process. As Eric Ries puts it: 'Success can be engineered by following the right process, which means it can be learned' and good habits can be practiced (Eric Ries *The Lean Startup* (New York: Crown Business 2011)).

Joel Zinhumwe (FP) SA CFE BCompt (Hons) Accounting Science/CTA (Unisa) BCom (Hons) Accounting (MSU) is a Practitioner Support Supervisor at the Legal Practitioners' Fidelity Fund in Centurion.



By
Prof Ciresh
Singh

Eeny, meeny, miny, moe, to which court will foreclosures go? (Part 3): The Constitutional Court has confirmed the position

Some may recall the articles 'Eeny, meeny, miny, moe, to which court will foreclosures go? A brief analysis of recent foreclosure proceedings and a consideration of the need for specialised foreclosure courts in SA' 2019 (Oct) *DR* 31, and 'Eeny, meeny, miny, moe, to which court will foreclosures go? (part 2): The SCA has spoken' 2021 (Sept) *DR* 29, which dealt with the issue of the jurisdiction of foreclosure matters in the magistrates' court and High Court. The crux of these articles dealt with the cases of *In re: Nedbank Limited v Thobejane and related matters* [2018] 4 All SA 694 (GP), and *Nedbank Limited v Gqirana NO and Another and related matters* [2019] 4 All SA 211 (ECG), and the burning issue of which court held jurisdiction over foreclosure proceedings.

These cases have since been appealed all the way to the Constitutional Court (CC). On 9 December 2022, the CC deliv-

ered judgment on the appeal in *South African Human Rights Commission v Standard Bank of South Africa Ltd and Others* (CC) (unreported case no CCT 291/21, 9-12-2022) (Madlanga J (Kollapen J, Majiedt J, Mathopo J, Mhlantla J, Theron J, Tshiqi J and Unterhalter AJ concurring)) confirming the mandatory jurisdiction principle and finding that once a High Court is seized with jurisdiction it is bound to hear a matter, even if the matter falls within the jurisdiction of the magistrates' court. This essentially means that banks are now entitled to bring their foreclosure applications before the High Court, even if the magistrate's court has jurisdiction over the matter. The paragraphs below provide a background into the matter and summarises the findings of the CC.

Summaries of High Court decisions

In *Thobejane*, the Full Bench of the Gaut-

eng Division of the High Court held that all the matters falling within the jurisdiction of the magistrates' court must be heard before the magistrates' court and not the High Court. The Full Bench found that the advent of the Constitution introduced access to justice as a primary consideration during court proceedings and this approach required the High Court to regulate their own processes regarding this right. The court held that it would be an abuse of process and contrary to the principles of access to justice to allow a matter, which could be decided in the magistrates' court, which was geographically closer and financially viable for a consumer, to be heard in the provisional division simply because it had concurrent jurisdiction.

In *Gqirana*, the Full Bench of the Eastern Cape Division of the High Court in Grahamstown found that the right to access to justice in s 34 of the Constitution, and the principles of the National Credit

Act 34 of 2005 (NCA) affords equality and access to justice to financially and previously disadvantaged persons. Accordingly, the NCA [see ss 90 and 172 of the NCA], properly interpreted through the prism of the Constitution, provided that the magistrates' court be the court of first adjudication of all NCA matters (including foreclosures) to the exclusion of the High Court. In other words, the High Court found that the principle of access to justice required all NCA matters to be brought before the magistrates' court, save only if there are exceptional circumstances justifying otherwise' (C Singh 'Eeny, meeny, miny, moe, to which court will foreclosures go? (Part 2): The SCA has spoken' 2021 (Sept) DR 29).

The Supreme Court of Appeal (SCA) decision

The effect of the *Thobejane* and *Gqirana* judgments dictated that all foreclosure proceedings, irrespective of the monetary amount claimed, had to be brought before the magistrates' court. This ruling sparked controversy in the mortgage debt enforcement industry and forged a movement to appeal these decisions. On 25 June 2021, the SCA handed down judgment in *Standard Bank and Others v Mpongo and Others and a related matter (South African Human Rights Commission and Others as Amici Curiae)* [2021] 3 All SA 812 (SCA). The SCA confirmed that the High Court has no power to refuse to hear a matter falling within its jurisdiction on the ground that another court has concurrent jurisdiction. The court further confirmed that it was not an abuse of process for a plaintiff to choose which court to litigate from as they are entitled to this right and 'there is no obligation in law on financial institutions to consider the cost implications and access to justice of financially distressed people when a particular court of competent jurisdiction is chosen in which to institute proceedings' (para 88). 'The court held that the provisions of the NCA affirmed that the High Court has concurrent jurisdiction with the magistrates' court and there was no cogent reason to oust the jurisdiction of

the High Courts. Accordingly, the High Court was obliged to entertain all matters [brought before it] falling within the jurisdiction of the magistrates' court. The SCA further held that as drastic an event such as the repossession of a person's home ought, as a matter of policy, to enjoy the scrutiny of the High Court rather than the magistrates' court (Singh (*op cit*)).

The Constitutional Court's decision

The South African Human Rights Commission appealed the SCA's decision to the CC. In a relatively short judgment, the CC unequivocally confirmed the mandatory jurisdiction principle and held that a court is bound to entertain a matter properly brought before it falling within its jurisdiction. The court rejected the view that the High Court possessed the liberty or discretion to refuse to hear matters, and the apex court confirmed the principle that our courts are bound to hear matters falling within its jurisdiction and are not entitled to decline to hear matters properly brought before it, unless there is an abuse of process. The court further confirmed that although s 34 provides for the right to access to courts, it does not guarantee a choice of forum or court to access justice. The mandatory jurisdiction principle confirms that a High Court cannot run away from matters that fall within its jurisdiction, accordingly, the High Court was entitled and obliged to hear all foreclosure matters before it.

Importantly, the CC did take concern with the observations by the High Court, namely: The over-clogging of the court rolls and delay in administration and orders. In particular, during foreclosures, which involve a fight over the retention of one's home, the court is required to undertake several assessments, in most instances in the absence of the debtor due to geography and financial means. Hence, the court found it necessary to refer these concerns to the Minister of Justice and Correctional Services.

Conclusion

It has now been accepted and confirmed

that foreclosure proceedings can be brought before the High Court as it has concurrent jurisdiction with the magistrates' court, however, the controversy of the above judgments have brought to light the need for certainty and specialisation during foreclosure proceedings. Although the CC judgment did not expressly mention anything about foreclosure proceedings and the impact and constitutional rights implicated during such an application, the court did express concern over the foreclosure process and the absence of the debtor to such proceedings. I submit that an opportunity was missed by the court to make a clear declaration regarding the status of foreclosure proceedings and its place in the judicial system.

The foreclosure against a home involves a complex analysis of legal, financial, and factual circumstances coupled with the interaction of competing constitutional rights of homeowners and creditors. Accordingly, such complex issues justify these cases being heard before specialised courts and judges' (Singh (*op cit*)). Accordingly, I submit that the need may have arisen for the establishment of specialised foreclosure courts and/or rolls, within the High Court, and a Foreclosure Act to govern the execution process against a home (see C Singh *A critical analysis of the home mortgage foreclosure requirements and procedure in South Africa and proposals for legislative reform* (published PhD thesis, UKZN, 2020) and C Singh 'To foreclose or not to foreclose: Revealing the "cracks" within the residential foreclosure process in South Africa' (2019) 31(1) *South African Mercantile Law Journal* 145, for proposals on a Foreclosure Act and Foreclosure Courts).

Professor Ciresh Singh LLB LLM PhD (Law) (UKZN) is a Law Professor at the University of South Africa.

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By
Sechaba
Mchunu

An aggrieved party affected by a decision – where to go if you intend to review a decision by the Competition Commission?

On 27 October 2022 the Constitutional Court (CC) in *Competition Commission of South Africa v Group Five Construction Ltd 2023 (1) BCLR 1 (CC)*, handed down judgment to answer the question of whether the High Court or the Competition Tribunal and Competition Appeal Court had exclusive jurisdiction to review a decision taken by the Competition Commission.

The CC in a split decision had to consider whether a party affected by a decision of the Competition Commission (the Commission) could review such a decision in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) or the principle of legality through the High Court as opposed to the Competition Tribunal (the Tribunal) or Competition Appeal Court.

The appeal to the CC is pursuant to a unanimous decision by the Supreme Court of Appeal (SCA), which held that the Commission's decision could be reviewed in terms of PAJA or legality by the High Court.

The law

Section 62 of the Competition Act 89 of 1998 (the Act) characterises the jurisdiction of the Tribunal, Competition Appeal Court and court in respect of matters falling under the Act. Section 6 of PAJA provides for a judicial review of an administrative action. The principle of legality is a common law vehicle to review an administrative action.

Salient facts

This matter concerns itself with a complaint referred to the Tribunal on 12 November 2014 by the Commission. The complaint was against Group Five Construction Limited (Group Five) and other companies for possible collusion in the process of tender bidding in respect of stadium construction works for the 2010 FIFA World Cup.

The primary allegations were that Group Five and other companies had engaged in prohibited and anti-competitive practices in contravention of s 4(1)(b)(i) and (ii) of the Act in that –

- projects for the construction of various stadiums had been allocated between themselves;

- cover prices were agreed among themselves and submitted thereafter; and
- the alleged cartel had recovered net profits of 17,5% per project.

Pursuant to receiving the complaint from the Commission, Group Five launched a review application out of the High Court against the Commission in terms of PAJA and alternatively legality.

Group Five sought to review, set aside, and declare invalid the Commission's decision to refer the complaint to the Tribunal and/or seek a sanction against it, on the basis that the Commission had granted it immunity from prosecution through its Corporate Leniency Policy. Group Five argued that the Commission's conduct to refer the complaint to the Tribunal and seek sanctions against it 'was oppressive, vexatious and motivated by bad faith.'

The High Court

In response to the review application, the Commission launched an application to declare and set aside the review proceedings instituted by Group Five on the basis that they constitute an irregular step in that the High Court lacked the jurisdiction to hear the matter.

The Commission's main contention was that the Tribunal and Competition Appeal Court had exclusive jurisdiction in accordance with s 62(1)(a) of the Act to consider and adjudicate on issues raised in the review application.

The High Court held that the Tribunal and Competition Appeal Court's exclusive jurisdiction was only confined to matters relating to the interpretation and application of chapters 2,3 and 5 of the Act.

The High Court further held that the claimed exclusive jurisdiction was ousted in matters concerning 'a challenge to the lawfulness and validity of a referral.' In such matters, the High Court had the necessary jurisdiction to adjudicate on the matter.

The SCA

Undeterred, the Commission appealed the judgment of the High Court to the SCA. The SCA dismissed the appeal with costs having found that the Commission's challenge of jurisdiction had no merit.

The SCA confirmed the High Court's view in that s 62(2)(a) of the Act empowers the High Court with the requisite jurisdiction to determine whether it has jurisdiction to consider to the review application.

The SCA held that the issues raised by Group Five in the review application do not fall within the exclusive jurisdiction of the Tribunal and Competition Appeal Court as envisaged by s 62(1)(a).

The SCA was also of the view that the issues raised by Group Five in the review relate to the lawfulness and validity of the initiation and referral of the complaint to the Tribunal. The SCA expressed that such issues relate to the principle of legality, which unbolts the jurisdiction of superior courts. The issues were not considered to be of a specialist competition law nature which require the exclusive attention and jurisdiction of the Tribunal and Competition Appeal Court.

Consequently, it was held that the High Court had jurisdiction to hear the review application.

The CC

The judgment of the SCA was then appealed against in the CC.

The CC had to consider and analyse s 27(1), s 62(1) to (3) of the Act and s 6 of PAJA to determine whether the High Court was empowered to adjudicate on a competition law related review application.

Section 27(1)(c) of the Act elucidates the review powers of the Tribunal in relation to a decision by the Commission.

Section 62(1)(a) provides that: 'The Competition Tribunal and Competition Appeal Court share exclusive jurisdiction in respect of the ... :

(a) Interpretation and application of chapters 2,3 and 5'.

Section 62(2)(a) provides that the Competition Appeal Court and the court have jurisdiction to hear matters relating to whether they have jurisdiction to adjudicate on an action taken or proposed to be taken by the Commission or Tribunal.

Section 62(3)(b) states that: 'The jurisdiction of the Competition Appeal Court –

...

(b) is neither exclusive nor final in re-

spect of a matter within its jurisdiction in terms of subsection (2).'

The CC emphasised that the above provisions, which are at the heart of the issues in the matter must be given their proper and ordinary meaning. Reliance was placed on *Cool Ideas 1186 CC v Hubbard and Another 2014 (4) SA 474 (CC)* in providing the approach to statutory interpretation.

The CC found that s 62(2)(a) allows the High Court entry into the competition law sphere to resolve a non-competition law issue. Flowing from that determination was a key consideration as to whether the Tribunal or Competition Appeal Court are clothed with the requisite jurisdiction to adjudicate review proceedings in terms of PAJA or legality.

The CC held that the Tribunal lacks the jurisdiction to adjudicate review proceedings in terms of PAJA or legality. However, it was held that the Competition Appeal Court, which embodies a similar status to that of a High Court has jurisdiction to adjudicate reviews in terms of PAJA or legality when having regard to s 62(2).

The CC confirmed that the review application by Group Five does not fall within the exclusive jurisdiction of the Tribunal and Competition Appeal Court as contemplated by the Act. The CC re-

affirmed the SCA's stance that the Commission's conduct and decision constitutes the exercise of public power.

The CC clarified that the review proceedings launched by Group Five are brought under PAJA alternatively under legality and that such proceedings challenge the authority of the Commission to act in the manner that it did. The CC emphasised that the issues at hand relate to powers and legality, which fall within the jurisdiction of superior courts. In the court's view, the grounds of review are not linked to competition law matters, which attract the exclusive jurisdiction of the Tribunal and Competition Appeal Court.

The CC held that since the review application concerns itself with issues of legality as opposed to competition law, the Tribunal had no jurisdiction to consider and hear the review. The CC further held that High Court and Competition Appeal Court had concurrent jurisdiction to adjudicate on the review.

As a result, the appeal was dismissed.

Conclusion

The Commission is a public body and thus exercises public power when making a decision. An aggrieved party wishing to challenge the authority and validity of the Commission's exercise of its

power must do so in terms of PAJA or the principle of legality through the relevant superior court, alternatively the Competition Appeal Court. The Act empowers both courts with concurrent jurisdiction to adjudicate on such a matter.

The CC has made it clear that the Tribunal and Competition Appeal Court do not have exclusive jurisdiction to adjudicate PAJA or legality reviews concerning a decision taken by the Commission.

When considering to review a decision taken by the Commission, a party ought to determine whether the grounds of review raise a competition law issue or attack the way the Commission has conducted itself. If the latter applies, then the Tribunal has no jurisdiction to entertain the review, and the relevant superior court and Competition Appeal Court have jurisdiction. If the former applies, then the review may be subject to the exclusive jurisdiction of the Tribunal and Competition Appeal Court.

Sechaba Mchunu LLB (UKZN) is a legal practitioner and member of the Johannesburg Society of Advocates in Johannesburg. □



By Deon
Henry
Ruiters

The 'any court' conundrum – revisiting s 16(2) of the Maintenance Act

Section 16(2) of the Maintenance Act 99 of 1998 provides that 'any court' – including a children's court – can issue a maintenance order.

South African courts, like the divorce courts, issue interim financial relief to vulnerable parties during divorce proceedings – in r 43 of the Uniform Rules of Court and r 58 of the Magistrates' Courts Rules.

The Domestic Violence Act 116 of 1998 provides for emergency monetary relief in s 7(4), which states: 'The [domestic violence] court may order the respondent to pay emergency monetary relief having regard to the financial needs and resources of the complainant and the respondent, and such order has the effect of a civil judgment of a magistrate's court.'

The Children's Act 38 of 2005 provides for maintenance in ss 33(3) and 161. Parenting plans can provide for maintenance as provided in s 33(3), while foster parents taking care of a foster child can apply for financial relief in an s 161 contribution order.

If one looks at children's courts and domestic violence courts statistics, these monetary orders are glaringly absent since most courts in South Africa shy away from making these monetary awards and refer maintenance matters to maintenance courts, which leads to the overcrowding of maintenance court rolls nationally.

I have observed divorce courts who refer spousal maintenance and child maintenance to maintenance courts by rather putting the burden of negotiating spousal maintenance orders with no token

maintenance award on the maintenance court rolls than assisting divorced women during divorce proceedings. Child maintenance matters can take weeks or months to conclude after the divorce proceedings took its own toll of time on a desperate mother for financial assistance from fathers. It is recommended that divorce courts provide for token maintenance (nominal maintenance) – see *Butner v Butner 2006 (3) SA 23 (SCA)* or rehabilitative maintenance for indigent mothers to help them during the rehabilitative phase post-divorce instead of exacerbating overburden maintenance court rolls.

Since all South African courts have the statutory authority to make maintenance orders it is a strange phenomenon that courts do not make these orders but rather refer maintenance matters to an

overburdened maintenance system.

Bail courts are *sui generis* in nature and can make any order including a maintenance order. Over the past few years, I have been advocating for a maintenance order to be considered by bail courts in domestic violence and sexual offences matters where the accused is a father or stepfather, and the criminal offence was perpetrated against another family member in the same household. I observed how mothers come to domestic violence courts and sexual offences courts to withdraw criminal charges against accused because their only source of income is incarcerated or refuses to contribute to rent or other necessities after their release on bail. If bail courts when hearing evidence of affordability of a bail amount can enquire regarding maintenance of the complainant or the family that the accused form part of – it might lead to more mothers and complainant pursue their domestic violence or sexual offence matter with no fear that their source of survival will be withdrawn from them.

In reprisal to filing a criminal case against a suspect the accused will refuse to contribute to the same household he once paid rent and contributed to food. Once released from the criminal courts on bail with a bail condition that the accused should not be in contact with the family member who filed the case against them – there will be little chance of success in securing much needed maintenance from the suspect while the criminal matter is pending. Some accused use the bail conditions as reason for not contributing to maintenance. If a bail magistrate while hearing the facts of the criminal case realise there might be reprisal or retaliation by an accused – the bail court can impose a bail condition that the accused continue his contributions to rent, groceries and school fees of his children or stepchildren despite the criminal matter brought against him by one of the family members dependent on the accused for financial assistance.

There is absolutely no reason why a domestic violence court cannot make

an ‘emergency monetary relief’ order in terms of s 7(4) of the Domestic Violence Act.

There is absolutely no reason why a children’s court cannot make a maintenance order in an s 33 parenting plan.

The question remains, why are courts reluctant to make these maintenance orders?

Some courts will argue no proper financial enquiry was conducted to make a proper finding regarding the financial liability of parties. Section 10(6) of the Maintenance Act provides that a court can grant interim financial relief during any enquiry after hearing evidence relating to affordability, or an offer made by a respondent. During these s 10 proceedings pending a final order, a court is given the authority to make an interim order even where all evidence have not been heard but can consider an offer of the respondent as an interim order.

The divorce courts in High Courts and regional courts can consider interim financial relief based on evidence placed before it by the parties and consider these financial relief orders pending a final divorce order that can amend the interim financial orders.

In a similar fashion, a children’s court can consider maintenance in a s 33 parenting plan based on an offer by the non-custodial parent based on affordability that be reviewed later by a maintenance court – if there is some form of financial relief pending the finalisation of a final order.

Where a respondent makes an offer to any court to provide financial relief there is no reason why a court cannot consider and make such financial relief orders. If the father makes such an offer during the s 33 parenting plans process – the mediator or advocate can include such offer in the parenting plan that can easily be amended by a maintenance court at any stage after the parenting plan was made an order of court.

In domestic violence matters an emergency financial relief order can easily be reviewed and amended by a maintenance court.

In criminal bail matters, the bail court can easily review and amend the bail conditions, or the maintenance court can amend the maintenance order.

The enforceability of children’s court parenting plans has been questioned by some legal practitioners stating it is not a ‘maintenance order’ since it was made in a domestic violence court, children’s court or bail court but s 1 of the Maintenance Act defines a ‘maintenance order’ as meaning ‘any order for the payment, including the periodical payment, of sums of money towards the maintenance of any person issued by any court in the Republic, and includes, except for the purposes of section 31, any sentence suspended on condition that the convicted person make payments of sums of money towards the maintenance of any other person’. So why an s 33 parenting plan with a maintenance order is not regarded by some courts as maintenance order is a mystery.

It is recommended that the legal fraternity, including presiding magistrates, attorneys, advocates, and mediators include maintenance clauses in proposed parenting plans. Public prosecutors in domestic violence matters and bail court proceedings can consider interim financial relief for vulnerable women and children where these gender-based violence offences occurred in a family setting that might be disrupted by removing the offender from the common household. There is no reason why a public prosecutor cannot consult with a complainant and obtain evidence on expenses and present such evidence to a presiding officer to make an interim maintenance order in domestic violence courts or bail courts.

Deon Henry Ruiters *Blur (UWC)* is a Senior Maintenance Prosecutor in the Sexual Offences and Community Affairs Unit at the National Prosecuting Authority Western Cape Office in Cape Town.




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Chatting with ChatGPT: *Will attorneys be able to use AI to draft contracts?*

Prof
Michele
van Eck

Picture source: Gallo Images/Getty



OpenAI's development of ChatGPT has opened the world to the wonders of technology and the potential of artificial intelligence (AI). ChatGPT is a tool that provides information in a real-world setting. It is changing the way in which things are done and has the potential to disrupt both legal education and the way the law is practised. As there has been much media attention about this technology, particularly the claims that ChatGPT is a threat to jobs, I decided to test the capabilities of ChatGPT to see whether it is truly a threat to the function of an attorney as a contract drafter. In this process, I investigated whether the function of an attorney (as a contract drafter) was at risk to be replaced by this technology. In doing so, I asked ChatGPT a series of questions, the first was a relatively easy question that a law graduate should be able to answer, and each follow-up question progressed in difficulty and complexity until finally testing ChatGPT's capabilities in an exercise that a seasoned contract drafter should be able to navigate.

Difficulty level one: Novice drafter

The first question asked was to test the accuracy of the chatbot's ability to answer a practical question faced by an inexperienced contract drafter or a law graduate. I posed the following question to ChatGPT: 'My client is concerned that future amendments to the contract may be agreed to verbally but that there would be no written record of such agreements to amend the contract. What clause can I include in a contract to address my client's concern and provide an example of such a clause?'

Chatbot GPT's response was legally correct and read as follows:

'Here's a sample clause that addresses the concern of future verbal amendments to the contract:

"This agreement may only be amended in writing and signed by both parties. No verbal agreement or understanding shall alter or modify the terms of this agreement."

This clause ensures that any changes

or additions to the contract are documented in writing and signed by both parties, providing a clear and undisputed record of any amendments to the contract.'

Difficulty level two: Competent drafter

An astute contract drafter would have noticed that the non-variation clause (or amendments clause) that ChatGPT provided did not consider the nuances of the law involved in drafting such a clause. This notwithstanding, what makes ChatGPT unique is that it recognises previous questions and interactions. Therefore, my second question was a follow-up question to test how it would respond to changing its draft clause and I asked the following: 'Amend the draft clause you provided earlier to exclude the application of the Electronic Communications and Transactions Act of 2002'.

The exclusion of the application of the Electronic Communications and Transactions Act 25 of 2002 (ECTA) follows from the use of electronic signatures in the matter of *Spring Forest Trading CC v Wilberry (Pty) Ltd t/a Ecowash and Another* 2015 (2) SA 118 (SCA) and such exclusions of the ECTA have become common drafting practices in South African contracts. Although there are several ways to exclude the application of the ECTA, ChatGPT's attempt was commendable, especially considering ChatGPT is not specifically designed to be a legal tool. The chatbot provided the following amended clause:

'This agreement may only be amended in writing and signed by both parties. No verbal agreement or understanding shall alter or modify the terms of this agreement. The provisions of the Electronic Communications and Transactions Act of 2002 shall not apply to any amendment of this agreement.'

Difficulty level three: Seasoned drafter

Up to this point, ChatGPT performed well. However, I also wanted to test the chatbot's ability to address nuanced drafting practices (which a seasoned contract drafter would be able to navigate), specifically that of entrenching the formalities of writing within the non-variation clause by applying the Shifren principle. Here ChatGPT showed the first signs of difficulty. Not only did it not appreciate the meaning of the Shifren principle, it could also not correctly identify nor apply the Shifren principle to the non-variation clause. When asked to explain what the Shifren principle is, the chatbot provided the following:

'The Shifren principle, or "No Oral Modification" (NOM) clause, is a legal principle that states a written contract can only be amended in writing and

not orally. It means that any changes to a written contract must be agreed to in writing and signed by all parties involved. The principle provides certainty and prevents disputes by ensuring that all changes to a contract are documented and agreed upon by all parties. The Shifren principle derives its name from the 1932 English case of *Shifren v. Spiro* and has since been applied in many jurisdictions around the world, including the United States, Canada, and Australia, to protect against fraudulent or mistaken claims of an oral agreement to modify a written contract'.

ChatGPT response references the incorrect case, application and jurisdiction as the source of the Shifren principle. The Shifren principle actually relates to the entrenchment of the formality of writing and signature within the non-variation clause itself and originates from the case of *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere* 1964 (4) SA 760 (A). The application of the Shifren principle in written contracts have, to a large extent, become standard practice in drafting non-variation clauses. However, ChatGPT's difficulty may stem from the fact that the *SA Sentrale Ko-op Graanmaatskappy Bpk* case was both old and was reported in Afrikaans. This notwithstanding, ChatGPT fared much better when discussing the implications of the post-constitutional recognition of non-variation clauses in the case of *Brisley v Drotzky* 2002 (4) SA 1 (SCA). However, it again failed to appreciate the requirement for such formalities to be entrenched in the non-variation clause itself. When asked what the *Brisley* case said about the Shifren principle, the chatbot responded with the following:

'*Brisley v Drotzky* is a South African case that confirmed the application of the *Shifren* principle. The court held that an oral agreement to extend the deadline for the payment of a purchase price was not binding because the written contract required any modifications to be in writing and signed by both parties. The decision reinforced the importance of complying with the formalities of a written contract in South African law and highlighted the need to avoid relying on unverifiable oral agreements. The case serves as a reminder that the *Shifren* principle is a fundamental principle of contract law that applies in many jurisdictions and upholds the integrity of written contracts'.

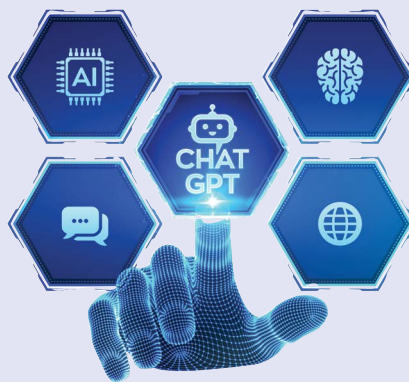
ChatGPT incorrectly refers to the facts of the *Brisley* case as the non-variation clause did not relate to a contract of sale, as implied with the words 'purchase price', but rather relates to a contract of lease. Again, the inaccuracy of the response may be influenced by the case being reported in Afrikaans.

ChatGPT's version

- 9.1 [The Supplier] won't be responsible for any loss or damage the client might suffer during or as a result of their services unless it was directly caused by the gross negligence or theft of [the Supplier's] employee while on the job. In that case, [the Supplier]'s maximum liability is R 20 000 for drop cash services and R 100 000 for other services. [The Supplier] also won't be responsible for any loss or damage caused by threats to their employees or their families.
- 9.2 Unless specified in the agreement, [the Supplier] has no other responsibilities for any loss or damage. If the client breaches the agreement, [the Supplier] won't be obligated to fulfil its duties until the breach is fixed.
- 9.3 If the client or their employees cause loss or damage due to a breach of the agreement, [the Supplier] won't be responsible for it.
- 9.5 [The Supplier] won't be responsible for any indirect loss or damage.
- 9.6 The client is responsible for the security of their premises and if there is a loss on their premises due to criminal conduct that wasn't caused by [the Supplier], they will bear the risk of the loss and not [the Supplier].
- 9.7 [The Supplier]'s responsibility for any loss starts when they physically collect the money and ends when they physically deliver it. Their responsibility won't continue after delivery.
- 9.8 [The Supplier] won't be responsible for shortages in a container if it wasn't tampered with.
- 9.9 The client must immediately notify [the Supplier] of any loss and provide written confirmation within 24 hours. [The Supplier] won't be responsible for any claim unless written notice is given within 3 months and legal action is taken within 12 months of the event.

Experienced (human) drafter's version

- 9.1 We [the Supplier] will be responsible for the risk in the goods from when we collect the money until it is delivered. Notwithstanding this, we will not be liable for any loss suffered or claim brought by yourselves, unless –
- 9.1.1 such loss or claim arises as a result of gross negligence or theft by our employees acting within the scope of their duties;
- 9.1.2 such loss is reported to us within 24 hours of you becoming aware of such loss; and
- 9.1.3 you notify us in writing of any claim within three months and issue us with summons within 12 months from the date of the event giving rise to a claim. 9.2 Subject to clause 9.1, should we be found liable then our liability will at all times exclude consequential and indirect losses and damages and our liability will be limited to R 20 000 for drop cash services and R 100 000 for all other services.
- 9.3 We will be relieved of our obligations in terms of this agreement if you or your employees breach this agreement and fail and/or refuse to remedy such breach within reasonable period of time.



clause (see blue block) that an experienced (human) contract drafter provided using plain language principles.

Although ChatGPT has the potential of redrafting the clause in plain language, clearly the version from an experienced (human) drafter is more refined and polished.

Concluding remarks

These short exercises highlighted that ChatGPT (and similar chatbots) has the potential of changing drafting practices, but the fear of such technology replacing attorneys as contract drafters is premature. As illustrated at levels three and four (above), the technology is not yet at the level of sophistication to truly provide a nuanced understanding of contracts and the drafting thereof. Therefore, it is safe to say that the attorneys' function as contract drafters are (for the time being) still safe and not under threat by ChatGPT.

Prof Michele van Eck *BCom (Law) (RAU) LLB LLM (UJ) LLD (UP) BTh (SATS)* is an Associate Professor and head of the Department of Private Law at the University of Johannesburg.



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Difficulty level four: Master drafter

Although ChatGPT failed at level three of this exercise, there was one more exercise to establish ChatGPT's proficiency in drafting contracts and its ultimate threat to attorneys. I asked ChatGPT to redraft a lengthy contractual clause found in

G4s Cash Solutions (SA) (Pty) Ltd v Zandspruit Cash & Carry (Pty) Ltd and Another 2017 (2) SA 24 (SCA) at para 4 into plain language so that an average person with no legal knowledge and minimal commercial knowledge would be able to understand the meaning of the clause. To compare ChatGPT's performance, I have included a version of the redrafted

Opting out: How does POPIA impact telemarketing?

By
Gilad
Katzav

Regulating direct marketing is a familiar endeavour for South African law. This marketing practice has garnered the attention of our legislature for over two decades: From the provisions of the Consumer Protection Act 68 of 2008 (CPA) and its Regulations, to the Electronic Communications and Transactions Act 25 of 2002 and, now again, in the Protection of Personal Information Act 4 of 2013 (POPIA), direct marketing is proving to be a thorny issue in the body of consumer and privacy law. For context, we have an overlapping legislative framework, which simultaneously imposes both opt-in and opt-out regimes. This means that if the direct marketing falls under the CPA provisions, the point of departure is that direct marketing is generally permissible unless the consumer exercises their right of refusal (commonly known as opting-out). In contrast, if the direct marketing falls under the provisions of POPIA, the starting point is that the direct marketing is generally prohibited unless the two grounds of exception apply (commonly known as opting-in).

Fortunately, if you do some basic research into this topic, you will come across guidance to help navigate the different rules relating to direct marketing. However, there is one aspect that is written almost as if it is a throw-away point already long-settled in law, which is the assertion that telemarketing does not fall within the opt-in regime under s 69 of POPIA.

In this article, I question whether this assumption stands on well-founded

grounds. As will be argued, person-to-person telephone marketing can be covered under ‘electronic communication’ as defined in POPIA, provided it is recorded. I start with an overview of s 69 of the POPIA, followed by an examination into the definition of ‘electronic communication’. I then critically unpack the arguments, which seek to exclude telemarketers from the opt-in regime and explain why such views are not definitive of the issue. Ultimately, I submit that a telemarketing practice can fall within the opt-in regime under s 69 of POPIA.

Section 69 of POPIA

Section 69(1) of POPIA states that ‘the processing of personal information of a data subject for the purpose of direct marketing by means of any form of electronic communication, including automatic calling machines, facsimile machines, SMSs or e-mail is prohibited unless the data subject –

(a) has given his, her or its consent to the processing; or

(b) is, subject to subsection (3), a customer of the responsible party.’

Understood correctly, s 69 of POPIA regulates a specific form of direct marketing, namely direct marketing via electronic communications. The provision expressly includes several examples of electronic communication, but it is notably a non-exhaustive list. It imposes an ‘opt-in’ regime when electronic communication is used for the purpose of direct marketing. Therefore, it is imperative for any responsible party who wishes to engage in direct marketing to grapple with the meaning of ‘electronic communication’ as it will determine whether the opt-in scheme of POPIA will apply.

Electronic communication

Section 1 of POPIA defines ‘electronic

communication’ as ‘any text, voice, sound or image message sent over an electronic communications network which is stored in the network or in the recipient’s terminal equipment until is collected by the recipient’.

From this definition, there are three main considerations for telemarketers. Each will be dealt with in turn.

• Sending a voice message

What is immediately apparent is that a telephone call will constitute the sending of a voice message. This can be deduced from the fact that automatic calling machines are expressly included under s 69 of POPIA, which indicates that telephonic communication is a ‘voice message’. There is also recent judicial authority to support this view. In *Samsung Electronics SA (Pty) Ltd v The Commissioner for the South African Revenue Services 2022 JDR 2654 (SCA)*, the court held that smartphones are ‘simply an evolved and more advanced cellphone than earlier cellphones’. This evolution includes ‘digital telephony ... where voice is digitised and transmitted as data’. In other words, the court explained that when we speak into our phones, our voice is converted into a digital message. That message makes its way through intermediaries (such as cellphone towers) and it is eventually transmitted to the recipient’s telephone to be reconstructed as an audible ‘voice message’.

Some may push back to say that sending a ‘voice message’ envisages some sort of a singular package form of direct marketing. In other words, you receive a single message, which promotes a product or service and a person-to-person telephone call does not comfortably fit into that kind of idea. In support of this position, they may point to the fact that automatic call machines are expressly included in s 69 of POPIA and the distinguishing feature about that form of

telephonic communication is that there is no element of reciprocity. There is no chance of any dialogue and the data subject cannot tell the automatic machine to stop. It is a once-off message.

In response, I proffer two main reasons why this view is wrong. First, there is nothing inherent in the definition of electronic communications to exclude reciprocity or dialogue. Put differently, there is no obvious indication that any given direct marketing communication is not a 'message' for the purposes of s 69 of POPIA simply because there is also accompanying reciprocal dialogue. Secondly, even if we accept that the meaning of electronic communication requires a 'once-off' message, this actually does not result in the exclusion of telemarketing. This is because the act of direct marketing is triggered the moment the telemarketer approaches the data subject for the purposes of, *inter alia*, promoting goods and services over the telephone. Whatever happens after that is beside the point – whether I engage further or simply decide to end the call – the voice message has been sent.

• Electronic communications network

Next, what is the meaning of an 'electronic communications network'? Although there is no guidance or definition for the phrase under POPIA, it is defined in the Electronic Communications Act 36 of 2005 as 'any system of electronic communications facilities (excluding subscriber equipment), including with-out limitation –

...

(c) mobile systems;

... and;

(f) other transmission systems, used for conveyance of electronic communications'.

Furthermore, the court in *Samsung Electronics SA* explained that the objective characteristic of the modern cell phone reveals that it is still a 'telephone facility network' which has, on the one end, an audible speaker for the operator to listen to communication and, on the other end, a microphone to receive speech from the operator's mouth.

In the end, we need only apply the ordinary meaning to 'electronic communications network' to find that telemarketing practices will fall within its ambit without any linguistic difficulty.

• Storage

Finally, in order for direct marketing to constitute 'electronic communication', the message sent over the electronic communications network must be stored either in the network or in the recipient's terminal equipment for collection at a later stage. 'Storage' of the message is, therefore, an essential and necessary element to the definition of electronic communication.

In the context of direct marketing by way of telephonic communication, the

medium is not the message. Once we establish that the message is direct marketing, and the medium chosen to convey the message is telephony, then we are positioned to uncover the full extent of the telemarketing red herring. This is because exactly who sends the message is immaterial and inconsequential to the definition of 'electronic communication'. Accordingly, it must follow that the application of s 69 of POPIA is not contingent on whether the telephone call is made by human or machine. In my view, the real crux of the issue lies in whether or not the message is stored in the network or in the recipient's terminal device. It is my submission that telemarketers will satisfy the storage element of 'electronic communication' when they record their telephone calls for the purpose of direct marketing; bearing in mind that s 50(3) of the CPA states that, where consumer agreements are not in writing, suppliers are required to keep a record of transactions entered into over the telephone or any other recordable form.

Recommendations of the SA Law Reform Commission

During the early stages of drafting the Protection of Personal Information Bill, the legislature received the South African Law Reform Commission's (the Commission) 'Project 124: Privacy and Data Protection' report. This report was the product of a thorough and wide-ranging consultation process, which collated the opinions, concerns and recommendations from various stakeholders as to what Parliament ought to consider before finally enacting POPIA. Interestingly, the report refers to the government's policy to promote the telemarketing industry by attracting investment, creating jobs and permitting tax-break incentives. Accordingly, the report recommended that telemarketing practices should fall under the opt-out regime in terms of the CPA, rather than the opt-in regime under POPIA. For this reason, some rely on this report to assert that POPIA strategically excluded telemarketing from the scope of s 69.

In response, there are two reasons why maintaining this position is erroneous. The first relates to the nature of the Commission's report. We must always bear in mind that the Commission's mandate is to consult, research and provide recommendations on the draft Bill. While the pre-legislative background may aid the interpretation of POPIA, we should caution against over-reliance on the Commission's report as an authoritative source of interpretation. The reason why heavy reliance on the Commission's report is misplaced is because it runs the risk of presuming that Parliament simply accepted the report's recommendations.

This brings me to my next point.

The recommendations of the Commission were not blindly adopted by Parliament without alterations. If we engage in legislative interpretation by way of reverse engineering, then we do so consistently throughout the exercise. Importantly, the Commission's report recommended that the new opt-in regime under POPIA should only apply to automated calling machines, faxes, electronic mails and SMS's used for direct marketing. Furthermore, the report suggested that the direct marketing provision be drafted in the following terms: 'The processing of personal information of a data subject for the purpose of direct marketing by means of automatic calling machines, facsimile machines, SMSs or electronic mail is prohibited unless the data subject ...'. I wish to draw attention to the fact that when POPIA was finally enacted, the legislature added the crucial concept of 'electronic communication' to the provision and it also broadened its scope by inserting 'including' before listing automatic calling machines, faxes etcetera.

What we gather from this exercise is that Parliament clearly sought to widen the scope of the opt-in regime relative to what the Commission had initially recommended. This is precisely why it is unacceptable to place heavy reliance on the Commission's report as a source of statutory interpretation. It is entirely within the legislature's power to widen, narrow, alter, accept and/or reject the Commission's recommendations. There is an abundance of authority as to how we go about interpreting legislation, which need not be covered in this piece. Suffice to say that we interpret legislation holistically, with an eye on protecting and promoting constitutional imperatives. It may be permissible to look at the pre-legislative background and context to aid the interpretation, but this exercise must be done very carefully to avoid the mistake of invoking authority in the draft of the legislation without a consistent comparison to the statute in its final form.

Conclusion

I have demonstrated the telemarketing practices will fall under s 69 of POPIA, provided the communication is recorded. If I am correct, telemarketers will have to comply with the more stringent opt-in provisions under POPIA as opposed to the opt-out regime in the CPA. This is something I urge the industry to seriously consider and to weigh its options going forward.

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



To PAJA or not to PAJA that is the question? Is the avoidance of PAJA justified?



By
Igor
Szopinski

The question whether a particular action qualifies as administrative action is determined by reference to jurisprudence that establishes the meaning of this term in s 33 of the Constitution and the definition in s 1 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) are key considerations.

However, the courts have not been consistent in interpreting the above and have often relied on the constitutional principle of legality as a basis for review, without giving much thought to PAJA.

In theory, this option should not be available where the conduct that is challenged in review amounts to administrative action. In the case of *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* 2006 (2) SA 311 (CC), Ngcobo J stated the position clearly as follows:

‘Where, as here, the Constitution requires Parliament to enact legislation to give effect to the constitutional rights guaranteed in the Constitution, and Parliament enacts such legislation, it will ordinarily be impermissible for a litigant to found a cause of action directly on the Constitution without alleging that the statute in question is deficient in the remedies that it provides. Legislation enacted by Parliament to give effect to a constitutional right ought not to be ignored.’

It follows that where action amounts to administrative action, a person wanting to challenge such action in review proceedings, must do so under PAJA and cannot rely on the legality principle. The courts have, however, not been consistent in following this principle. One continues to find judgments in applications for review of administrative action where judges do not engage with the question of whether the relevant action amounts to administrative action with the consequence that PAJA must be followed or where judges expressly state that it does not matter whether the ac-



Picture source: Gallo Images/Getty

tion amounts to administrative action, because the principle of legality would nevertheless apply.

In *Malema and Another v Chairman, National Council of Provinces and Another* 2015 (4) SA 145 (WCC); [2015] 2 All SA 728 (WCC) the court held: ‘In [my] view ... I consider that it is unnecessary to determine the applicability of PAJA since it was common cause that first respondent’s rulings were, at the very least, subject to review under the principle of legality’.

This reasoning is not entirely arbitrary, as in a prior case of *Albutt v Centre for the Study of Violence and Reconciliation, and Others* 2010 (3) SA 293 (CC), the Constitutional Court (CC) (the very same court as in the *New Clicks* case and the very same judge) held that ‘there was no need to resort to the PAJA at all where the legality principle was capable of resolving a dispute. More than that, it criticised the court below for engaging in the administrative action inquiry, a merely “ancillary” question that there was no need for the court to “reach” precisely because the case could be resolved by the legality principle (paras 82 – 83)’ (Professor Cora Hoexter ‘South African Administrative Law at a Crossroads: The PAJA and the Principle of Legality’ (<https://adminlawblog.org>, accessed 30-1-2023)).

In truth, ‘the *Albutt* approach under-

mined the principle of democracy and the separation of powers. This is because the legislature has, in PAJA, articulated the standards of natural justice required when the President’s exercises of public power do amount to administrative action. By failing to consider whether those standards were applicable, the court disregarded the legitimate role of the legislature in setting those standards. Moreover, the court’s failure to justify, properly, on substantive grounds, the basis upon which it would not apply PAJA, undermined the separation of powers. ... [T]he court detracted from constitutional supremacy, in that PAJA is the constitutionally mandated legislation that gives effect to s 33 of the Constitution which courts *must* invoke when reviewing the exercise of public power that amount to administrative action’ (Melanie Murcott and Werner van der Westhuizen ‘The ebb and flow of the application of the Principle of Subsidiarity – critical reflections on *Motau* and *My Vote Counts*’ (2015) 7 CCR 43).

Likewise, ‘the court’s choice of legality rather than PAJA, as a basis for reviewing the President’s conduct, appears arbitrary’ (Murcott and Werner van der Westhuizen *op cit*).

‘In *Valuline CC v Minister of Labour* [(2013) 34ILJ 1404 (KZP)], the Minister of Labour exercised her power in terms of the Labour Relations Act 66 of 1995

to extend a collective agreement to non-signatories in the clothing manufacturing industry. The litigants challenged the Minister's decision on the [basis] of both the principle of legality and PAJA. Koen J, however, found it "irrelevant" to determine whether the conduct in question amounted to administrative action, and consequently whether PAJA was applicable, since the conduct fell to be reviewed under the principle of legality. In following the *Albutt* approach, Koen J's selection of legality as a basis to review the Minister's conduct, disregarded the legitimate role of the legislature in enacting PAJA so as to give effect to s 33 of the Constitution' (Murcott and Werner van der Westhuizen (*op cit*)).

I can understand clearly why the courts are reluctant to apply PAJA. Apart from its complicated definition of administrative action (see the case of *Minister of Defence and Military Veterans v Motau and Others* 2014 (5) SA 69 (CC)) where I believe the applicants were unfairly treated for relying on PAJA and sent home precisely because of the 'complicated definition of administrative action, the PAJA imposes unpopular procedural rules on applicants for judicial review: An outer limit of six months for making the application (section 7(1)) and a stringent duty to exhaust internal remedies first (section 7(2)). By contrast, legality review attracts more indulgent common-law versions of these rules, which adds to its allure' (Hoexter (*op cit*)).

Regarding *State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd* [2016] 4 All SA 842 (SCA), Hoexter (*op cit*) comment as follows:

'The applicant, [State Information Technology Agency (SITA)], asked the court to set aside as unlawful SITA's own decision to enter into a contract with *Gijima* pursuant to a procurement process. Being seriously out of time, SITA ignored the PAJA and its inconvenient time limit and relied on the legality principle instead. The court below held that it was not entitled to avoid the PAJA, and a majority of the SCA agreed Cachalia JA said (paras 38 and 44):

"In my view, the proper place for the principle of legality is to act as a safety net or measure of last resort ... [W]hen PAJA does apply, litigants and the courts are not entitled to bypass its provisions and rely directly on the principle of legality."

The majority rejected SITA's argument, that as an organ of state, it was not bound by the PAJA and/or by section 7(1), and was thus free to use the legality principle. The minority, on the other hand, seemed to accept this argument, and deplored the majority approach as "slavish adherence to formalism" and as "compromising substance" (para 55). But the minority may not have been entirely convinced of its own position: it veered

from asserting confidently that the use of legality was "the proper route to take in this case" (para 68) to the weaker claim that it would be "in the public interest to allow SITA to vindicate ... the principle of legality and not to thwart it by procedural technicalities" (para 70). And that claim had a hollow ring in any event, for on the majority view SITA's true reason for going to court was not to vindicate legality but the dishonourable and self-interested one of avoiding arbitration of a dispute about payment (para 39). The majority aptly quoted Boonzaier's observation [Leo Boonzaier 'Good reviews, bad actors: The Constitutional Court's procedural drama' (2015) 7 CCR 1] that officials are capable of acting "antithetically to the rule of law even as they purport to assert legality". A noteworthy feature of *Gijima* is the absence of any reference to *Albutt* and *Motau* (Hoexter (*op cit*)).

Professor Hoexter (*op cit*) wrote this prior to the matter being heard in the CC. It is, however of material significance, because the SCA's ruling is in line with *New Clicks* and I believe it to be correct. However, *Gijima* at the CC (*State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC) takes a completely unfounded turn around to the *New Click* principle and to what the SCA held. The court rules that PAJA is not applicable here. Another example of bypassing legislation. The court's reasoning is as follows:

The 'everyone' referred under s 33(1) (Bill of Rights) does not include the state. Moreover, s 33(3)(b) specifically provides that 'national legislation must be enacted to give effect to these rights, and must ... impose a duty on the state to give effect to the rights' provided under s 33(1) and (2). The state cannot be a beneficiary of the rights and bearer of the corresponding obligation that is intended to give effect to this right (see para 27). Put differently, from whom would an organ of state (whose own decision is the subject of its concern) expect lawful, reasonable and procedurally fair administrative action? From whom could it request reasons?

The court, therefore, concluded that an organ of state does not have a choice. If it would like to have its own decision reviewed: PAJA is simply not available, and it must proceed by relying on the principle of legality.

Professor Cora Hoexter in her 2019 Advanced Administrative Law class at the University of the Witwatersrand, which I attended, criticised the CC's judgment on the following basis:

'I don't believe the state should have interest that does not coincide with public interest! Therefore, the state should be able to bring a review in terms of PAJA in the interest of the public!'

Therefore, I conclude that *Gijima* is but another example of bypassing PAJA.

I do not believe it is necessary for me to list every single case in which PAJA was bypassed, these are many. I have already demonstrated above that the courts simply avoid PAJA.

I am not in favour of PAJA for the reasons I have mentioned above. I believe it is a poor piece of legislation that not only sends innocent parties packing, but does not give effect to s 33 of the Constitution. I believe the drafters failed to apply their mind to the matter when drafting the Bill as well as I believe parliament failed to apply their minds to the matter when enacting it. However, this article is not about this issue. I am stating this purely because I want it to be clear that it is with a heavy heart, I conclude that avoidance of PAJA is not justified or at least correct. The fact that difficult questions arise, does not seem a sufficient reason for avoiding PAJA.

The principle of legality is obviously an important development in the court's jurisprudence. PAJA both explicitly excludes executive and legislative decisions, as well as other important exercises of public power (*Motau*), from its ambit. Added to this, the legislation presents courts with the difficult task of deciding what constitutes 'administrative action'. The possibility that significant decisions of public authorities are unreviewable is unthinkable, and so the principle of legality fills a potential gap of accountability. PAJA it seems will never be brought in line with s 33 of the Constitution purely because of the way our courts have interpreted the meaning of 'administrative action'.

I believe the right thing to do in future cases is to argue that PAJA is not in line with s 33 of the Constitution. It will be no easy task.

In the recent case of *Walus v Minister of Justice and Correctional Services and Others* 2023 (2) BCLR 224 (CC) the court held at para 33:

'The decision of the High Court in respect of which the applicant applies for leave to appeal relates to a review application under the Promotion of Administrative Justice Act (PAJA) – which gives effect to section 33 of the Constitution. This renders this matter a constitutional matter. Accordingly, this court has jurisdiction.'

While for the purposes of jurisdiction that may be so, this type of assumption holds little weight in light of the courts and especially the constitutional court defining 'administrative action'. It is, therefore, highly doubtful to state that PAJA gives effect to s 33 of the Constitution.

Igor Szopinski LLB, Cert. Adv. Inter. Trade Law, PGDip (Wits) is a legal practitioner at Lusenga Attorneys Inc in Johannesburg. □

SEXUAL HARASSMENT

Picture source: Gallo Images/Getty

Eliminating sexual harassment in the workplace – #TimesUp for employers

By
Mmathabiso
Khalema

Holmes JA in *S v Snyman* 1968 (2) SA 582 (A) likened complainants in sexual assault cases to accomplices in crime and described them as having a 'deceptive facility for convincing testimony'. This statement was made to justify his support for the application of the cautionary rule, which was premised in the belief that, 'women are habitually inclined to lie about being raped' (*S v J* 1998 (2) SA 984 (SCA)). Historically, there has been a culture of labelling women as vindictive when they speak out against gender-based violence. Recent developments in case law and legislation on sexual harassment serve as an indicator that the time for that culture, may well be up. This article briefly traces the development of sexual harassment jurisprudence through court cases, discusses the legal framework on workplace sexual harassment, and underscores the importance of having a sexual harassment policy as a critical part of an employer's operations.

Early development in what constitutes sexual harassment

The early jurisprudence in sexual harassment cases in South African courts, mostly involved employees who were

dismissed for sexually harassing co-employees. Many of the cases dealt with whether the alleged harassers had been unfairly dismissed and whether their conduct constituted sexual harassment. From there the courts established one of the foundational principles, namely that a single incident is sufficient to amount to sexual harassment. The theme of a power differential between perpetrator and complainant also features in the earlier cases.

The case of *J v M Ltd* (1989) 10 ILJ 755 (IC) is often referred to as the first ever reported case on sexual harassment in South Africa (SA). In this case, the court upheld the dismissal of a senior executive employee who was asked to resign after being found guilty of sexually harassing several of his female co-workers. Here, the court described sexual harassment as 'unwanted sexual attention in the employment environment'. Although there was no legislation at the time, which dealt specifically with sexual harassment in the workplace, the court recognised the devastating effect that sexual harassment has on its victims. It commented that sexual harassment violates the right to bodily integrity and personality, and that it 'creates an intimidating, hostile and offensive work environment'. The court also established that a single incident could constitute sexual harassment.

Also heard in 1989, was *Mampuru v Putco* (IC) (unreported case no NH11/2/2136, 24-9-1989) in which the Industrial Court held that the dismissal of an employee who had been dismissed for sexually harassing his female co-

workers was fair. The dismissed employee apparently 'had an "intimidating attitude" towards female employees, thus frightening them into not complaining for fear that they would be dismissed' (D Zalesne 'The effectiveness of the Employment Equity Act and the Code of Good Practice in Reducing Sexual Harassment' (2001) 17 SAJHR 503).

The *Campbell Scientific Africa (Pty) Limited v Simmers and Others* [2015] JOL 34906 (LAC) case involved a once-off incident, which occurred on a business trip outside office hours. The Labour Appeal Court (LAC) found that although the parties were not direct co-employees, and the incident was a once-off, Simmers had violated the complainant's right to equality by making unwelcome advances towards her in the workplace. It found that there was a power differential based on Simmers' age and gender. The LAC stated that it wished to communicate the seriousness of sexual harassment and the fact that it will not be tolerated and will be met with the harshest penalty.

Vicarious liability and the employer's duty to provide a safe working environment

In *Grobler v Naspers Bpk en 'n Ander* (2004) 25 ILJ 439 (C) the common law concept of vicarious liability made its way into the sexual harassment jurisprudence. Grobler was sexually harassed by her immediate supervisor while employed by Naspers. She suffered an emotional breakdown and as a result could no longer work. She instituted a claim

against her employer in the High Court, claiming that the employer had failed to provide a safe working environment and was thus vicariously liable for her supervisor's actions and the damages she suffered. On appeal in *Media 24 Ltd and Another v Grobler* [2005] 3 All SA 297 (SCA) the court confirmed that an employer is required to take reasonable measures to prevent sexual harassment and if there is a failure to provide such protection, the employer will be liable to compensate a victim for harm suffered. The Supreme Court of Appeal held that in terms of the common law, employers owe their employees a duty of reasonable care for their safety, which duty not only extends to physical safety, but also psychological harm, which may manifest itself in the form of sexual harassment. Time and again, employers who are found lacking in the way they handle or fail to handle cases of sexual harassment in their workplaces, have been held to account, vicariously.

Unmasking sexual harassment's true essence: It is a display of power

More recent cases, which have added to the jurisprudence include *Erasmus v Beyers Naude Municipality* (ECG) (unreported case no 828/2011, 13-4-2021) (Kroon AJ) and the Constitutional Court (CC) ruling handed down in *McGregor v Public Health and Social Development Sectoral Bargaining Council and Others* 2021 (5) SA 425 (CC). The pronouncements made by the judiciary in these cases send out a crystal-clear message that sexual harassment has no place in the workplace and it will not be tolerated. In the former case, the employer, a municipality in the Eastern Cape, failed to address complaints of sexual harassment and was ordered to pay R 3 998 955 to the complainant. This further entrenches employers' vicarious liability for failing to put in place proper measures to address sexual harassment. In the latter case, the CC significantly reduced the amount of damages, which had been awarded to a senior employee of the Western Cape Department of Health who was found guilty of sexually harassing an intern under his supervision. He had been brazen enough to appeal due to a minor deviation in the disciplinary procedure. The court highlighted the fact that sexual harassment is often about a display of power. Khampepe J said, 'at its core, sexual harassment is concerned with the exercise of power and in the main reflects the power relations that exist both in society generally and specifically within a particular workplace'. This sentiment is backed by extensive research which shows that sexual harassment has less to do with sex than it does power and fear. It is a way to keep women "in their place".

The legal framework addressing sexual harassment

The legal framework regulating sexual harassment consists of common law, the Constitution, the Labour Relations Act 66 of 1995 (LRA), the Employment Equity Act 55 of 1998 (EEA), as well as the Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace (The Code).

Common law

At common law, all employees have the right to security, dignity, and equal treatment. Before any specific legislation was passed, employers had the common law duty to provide a safe working environment, free of hostility. At common law, employers can be held vicariously liable for failing in their duty to provide a safe working environment where they are aware of the existence of sexual harassment.

The Constitution

The Bill of Rights guarantees a multitude of rights for everyone. In the context of sexual harassment these rights include the rights to equality and freedom from discrimination (s 9) and the right to dignity (s 10). In *J v M* the court recognised that sexual harassment violates the right to integrity of body and personality (s 12). Section 23 guarantees 'the right to fair labour practices'. Various pieces of legislation have been enacted to give effect to these rights.

Labour Relations Act

The LRA is particularly applicable in cases of sexual harassment where there are claims of unfair labour practices and unfair dismissals. If an employee is dismissed on one of the listed grounds in s 187, the dismissal will be deemed to be automatically unfair. This might happen, for example, where an employee is dismissed because they reported sexual harassment – such as was the case in *Lynne Martin-Hancock v Computer Horizons* (unreported case no NH 11/2/14268, 10-1994). Section 186(1) also states that an employee may resign and claim constructive dismissal where an employer fails to address a report of sexual harassment.

Employment Equity Act

The purpose of the Act is to bring about equity in the workplace by promoting fair treatment through putting an end to unfair discrimination. Section 6 specifically prohibits any form of harassment and defines harassment as unfair discrimination. Section 60 of the Act codifies vicarious liability and places a duty on the employer to take action in reported incidents of sexual harassment.

It states that if the employer fails to take the necessary steps and the sexual harassment by an employee is proven, the employer must be held liable as though the employer contravened the relevant provision.

The Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace

The Code came into effect in March 2022 and repeals the Amended Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace. The Code is published in terms of the Employment Equity Act and follows the ratification by South Africa of the International Labour Organisation's (ILO) Convention Concerning the Elimination of Violence and Harassment in the World of Work in November 2021. Some of the features of the new Code include the following –

- while 'sexual harassment' is not defined in the EEA, the Code provides a definition of 'sexual harassment';
- it makes it clear that employers have an obligation to 'take proactive and remedial steps to prevent all forms of harassment in the workplace'.
- employers are required to include the issue of harassment in orientation and training programmes in an accessible manner;
- it provides a 'minimum' of the statements to be included in an employer's harassment policy;
- it refers to other legislation, which employers are required to comply with in order to prevent harassment in the workplace. These include the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, the Labour Relations Act, the Occupational Health and Safety Act 85 of 1993, and the Protected Disclosures Act 26 of 2000;
- it not only applies to employees in a formal workplace. It also applies to apprentices, volunteers, job applicants, interns, suppliers, contractors and even customers. The protection of employees is extended to work-related trips, training or social activities, work-related communications, and employer-provided accommodation; and
- it provides detailed procedures as to how employers are required to handle reports of sexual harassment, providing for confidentiality and even additional sick leave for victims.

Conclusion

South Africa's jurisprudence on sexual harassment in the workplace has, no doubt, come a long way. It has pro-

gressed from an era where judges stated in judgments that they considered women to be 'inclined to lie', to having the CC characterise sexual harassment as a display of power. The many pieces of legislation, which have been enacted to address sexual harassment, continue to play a critical role in addressing sexual harassment with the seriousness and urgency it deserves. Studies still indicate that a number of victims do not report sexual harassment for fear of reprisal and victimisation. The more recent case

law involving organs of state and municipalities shows that sexual harassment is an issue that affects society at large, and the workplace is but a microcosm of that society. Tax and ratepayers are directly affected when an organ of state neglects to have a sexual harassment policy in place and is ordered to pay damages to a victim.

It goes without saying, a solid sexual harassment policy that is properly drafted in line with the Code and clearly communicated, is a beneficial tool to create a

better working environment and limit an employer's liability. Moreover, it is likely to embolden victims and discourage would-be perpetrators. Time is indeed up, and employers must not be found wanting.

Mmathabiso Khalema LLB (UFS) Cert in Contract and Commercial Law (UCT) is a legal practitioner at Madi-nane SJ and Associates in Johannesburg. □

Companies and Intellectual Property Commission e-Services and BizPortal platforms

On 9 January 2023, the Companies and Intellectual Property Commission (CIPC) launched the new CIPC e-Services and BizPortal platform for purposes of transacting with their office by way of debit or credit card. The CIPC is attempting to move away from the declining method of payment. However, when the platforms went live on the aforementioned date, stakeholders were unable to transact as the new platforms were flawed and dysfunctional.

Business came to a complete halt and the Company Law and Liquidation Committee of the Law Society of South Africa (LSSA) stepped in and intervened on behalf of the legal profession.

The new transactional platforms were

launched by the CIPC without proper testing and without a proper consultation with various stakeholders, which resulted in serious transactional errors that the CIPC's IT department could not resolve.

After considerable pressure from the LSSA and the possible threat of a *mandamus* application, the CIPC on 26 January 2023 agreed to migrate back to the old platform. The CIPC then proceeded to shut down the new e-Services and BizPortal platforms on the weekend of 21 – 22 January 2023.

The migration back to the old platform resulted in legal practitioners once again being able to transact efficiently and seamlessly with the CIPC.

The CIPC is still working relentlessly

to test the systems to ensure that, once the newly built e-Services and BizPortal platforms are launched, the hiccup that occurred on 9 January 2023 will not be repeated.

The Commissioner of the CIPC, Rory Voller, has assured the LSSA that going forward a proper consultation process will be followed with all stakeholders, before the new systems are re-designed or re-launched to avoid a repetition of the serious challenges, which the legal profession and business community faced with the introduction of the dysfunctional platforms.

The LSSA will keep legal practitioners posted as to developments.

□



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THE LAW REPORTS



By
Marilyn
Rowena
Kader

February [2023] 4 All South African Law Reports (pp 299 – 577); January – February 2023 Judgments Online

Abbreviations:

ECP: Eastern Cape Division, Gqeberha (formerly Port Elizabeth)

FB: Free State Division Bloemfontein

GJ: Gauteng Local Division, Johannesburg

MM: Mpumalanga Division, (Main Seat) Mbombela

SCA: Supreme Court of Appeal

WCC: Western Cape Division, Cape Town

Civil procedure

Failure to amend particulars of claim to reflect true basis of case: Plaintiff in *Lehlela v Minister of Police* [2023] 1 All SA 438 (WCC) alleged she had been unlawfully shot in the right eye by members of the police (SAPS) and sued for damages. The incident occurred during a riot in August 2011, in which police in Grabouw were called on to control and disperse an armed gathering of over 1 000 people. Police were accused of having breached the duty of care they owed to the plaintiff by failing to handle their firearms with proper consideration for safety of members of the public; and failing to avoid the shooting of the plaintiff when by the exercise of reasonable care, they should have done so.

Defendant denied that injury was sustained because of any conduct by SAPS. Alternatively, it was pleaded that the SAPS members in question had acted out of necessity; that the plaintiff had voluntarily assumed the risk; and that her own negligence had contributed to the injury she sustained. It was argued that the plaintiff had knowledge of the risk in approaching the gathering and, therefore, consented to the possibility of injury or failed to exercise reasonable care (the further alternative defence of contributory negligence).

The evidence suggested that she had passed at least alongside the protesters at a time when they had already begun an assault on the SAPS members. The plaintiff must have heard shots being fired even before she left her home but proceeded towards the scene of the protests.

The manner in which the plaintiff had pleaded her case was critical. She had

specifically pleaded dereliction of duty by SAPS but relied in her testimony on the actions of a community patrol unit (the 'POP unit'). The particulars of claim were not amended to reflect the true basis of the case, with the result that the defendant was provided with no factual basis alerting him of the case he would later be required to meet.

Finally, the police were found to have acted out of necessity when discharging their firearms containing rubber bullets. As shown above, the plaintiff also voluntarily assumed the risk of injury, whether at the hands of one or more of the protesters or the SAPS members acting out of necessity. In the premises, her claim was dismissed.

Rule 33(4) application – application for separate adjudication of special plea: In *MEC for Public Works, Roads and Transport, Free State Province v Van der Merwe and Others; In re: Van der Merwe v MEC for Public Works, Roads and Transport, Free State Province and Others* [2023] 1 All SA 154 (FB), the plaintiff instituted action against the first defendant (the MEC) for damages she suffered as a result of an accident which occurred on a provincial road. At the time of the accident, the first respondent/plaintiff was driving the bakkie in the course and scope of her employment. The action was contested by the MEC and after the parties agreed that the adjudication of the merits and quantum be separated in terms of r 33(4), the matter went on trial in relation to the merits. The court held the MEC liable to the plaintiff for 100% of her agreed or proven damages. Two interlocutory applications filed by the MEC were granted, leading to the joinder of the Compensation Commissioner appointed under s 2(1)(a) of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 and the Minister of Labour and Director-General of the Department of Labour who administered the latter Act. It was common cause that the plaintiff submitted claims to the Compensation Commissioner, who accepted liability to compensate the plaintiff for her reason-

able medical expenses and her loss of earnings.

The MEC, in terms of r 33(4), sought to have a special plea separated and adjudicated before any other issues in the trial on quantum of the claim. The special plea stated that in terms of s 36(2) of the Compensation for Occupational Injuries and Diseases Act, when awarding damages in an action referred to in s 36(1)(a) thereof, the court shall have regard to the compensation paid in terms of the Act. The MEC contended that consequently, all payments made and to be made in the future to the plaintiff in terms of the Act should be considered by the court, reducing the damages commensurately. The plaintiff replied that her claims for medical aid and essential help would terminate with effect from date of the court's award, and she would thenceforth seek compensation in respect of future hospital, medical and related expenditure and essential help from the MEC, and not from the Compensation Commissioner.

Rule 33(4) provides that where it appears to the court *mero motu* that there is a question of law or fact, which may conveniently be decided either before any evidence is led or separately from any other question, the court may make an order directing the disposal of such question in such manner as it may deem fit, and may order that all further proceedings be stayed until such question has been disposed of, unless convenience dictates otherwise. The Supreme Court of Appeal has in recent times adopted a strong view that the convenient and expeditious disposal of litigation is not always achieved by separating the issues but often best served by ventilating all the issues at one hearing. Therefore, it is incumbent on both parties to place all relevant information before the court to enable it to exercise its discretion.

The potential merits of the second special plea constituted an arguable issue for purposes of a separate hearing should the r 33(4) application be successful. However, the adjudication of the special plea would require extensive evidence and a separate hearing would not short-

en the proceedings. It would also lead to the overlapping and/or duplication of evidence, including expert evidence. The r 33(4) application was accordingly dismissed.

Absolution from the instance: In *Van Zyl NO obo AM v MEC for Health, Western Cape Provincial Department of Health* [2023] 1 All SA 501 (WCC) action was instituted by a *curator ad litem* on behalf of a patient seeking to recover damages from the defendant, who bore responsibility for any acts or omissions by staff at the hospital treating the patient, resulting in injury and damages. The patient suffered brain damage when being revived from anaesthetic at the hospital. The patient appealed against the trial court's granting of absolution from the instance.

Absolution was granted solely on the basis that the plaintiff had failed to adduce sufficient evidence to make out a case for negligence on the part of the defendant. The court discussed principles and the approach on appeal against an order for absolution. The authorities confirm the low threshold of proof in applications for absolution, with the enquiry being merely whether a *prima facie* case has been set up by the plaintiff.

The court addressed the function of an expert witness in a matter such as this. Such functions are threefold. First, where the experts have themselves observed relevant facts, that evidence will be evidence of fact and admissible as such. Second, expert witnesses provide the court with abstract or general knowledge concerning their discipline, that is necessary to enable the court to understand the issues arising in the litigation. Thirdly, they give evidence concerning their own inferences and opinions on the issues in the case and the grounds for drawing those inferences and expressing those conclusions. The court must be satisfied that such opinion has a logical basis. Expert opinion evidence should only be excluded when it impacts adversely on the right to a fair trial.

In this case, the evidence established that the doctor treating the patient did not act appropriately and timeously. The court *a quo* ought to have found that the plaintiff had made out a *prima facie* case of negligence.

The appeal was thus upheld.

Property

Lease agreement – right of pre-emption: Respondent (Dahlia) was the owner of a farm which consisted of eight portions. The appellant (Platteklouf) owned an adjoining farm. In April 2018, Dahlia and Platteklouf entered into a lease agreement in terms of which Platteklouf rented two portions of Dahlia's farm. The lease agreement provided for a right of pre-

emption (clause 10) in Platteklouf's favour. In terms of a deed of sale concluded on 7 April 2020, Dahlia sold the farm to a third party (Swellendam Plase). On finding out about the sale, Platteklouf claimed specific performance of the right of pre-emption. It approached the High Court for compliance with the relevant clause in the lease agreement. The court dismissed the application, resulting in an appeal.

On appeal in *Platteklouf RMS Boerdery (Pty) Ltd v Dahlia Investment Holdings (Pty) Ltd* [2022] JOL 56580 (SCA), the first question was whether the sale of the farm gave rise to an obligation on the part of Dahlia to make an offer to Platteklouf in terms of clause 10. The answer depended on an interpretation of clause 10 in terms of the ordinary well-known principles of construction of contracts. It had to be determined whether clause 10 meant that the right of pre-emption would only be activated if Dahlia received an offer for the two portions on their own. The High Court's finding that the rights of the appellant in terms of clause 10 had been activated was confirmed on appeal.

On the issue of remedy, however, the court parted ways with the High Court. In terms of clause 10, Platteklouf had no more than the right of first refusal to purchase the two portions of the farm. Its offer had to be the same or not less favourable than that which a *bona fide* third party offered in respect of the two portions. Thus, Dahlia was contractually obliged to determine in good faith what portion of the Swellendam Plase offer pertained to the two portions and to offer that to Platteklouf. Dahlia was ordered to deliver its offer to Platteklouf accordingly.

Family law and persons

Divorce – r 43 application: Against the backdrop of acrimonious divorce proceedings, the court had to decide on an r 43 application brought by the applicant in *HSH v MH* [2023] 1 All SA 413 (GJ). The interests of the parties' three children and the applicant's need for interim maintenance were considered.

The high level of parental conflict heightened the need to protect the children, particularly as the conflict had resulted in various behavioural problems. Section 6(4) of the Children's Act 38 of 2005 provides that in any matter concerning a child, an approach which is conducive to conciliation should be followed. Delay in any decision to be taken must be avoided as far as possible. The court appointed a social worker to deal with the high level of conflict between the parties and ordered that the children's primary residence be with the applicant.

In deciding on interim maintenance, the court took note of the disparate financial means of the parties, with the applicant clearly unable to live or litigate

at the same level as the respondent. Applicant's entitlement to maintenance had to be assessed having regard to the standard of living enjoyed by the parties during the marriage. The monthly amount of R 104 000 claimed was reasonable in the circumstances.

The main aspect addressed was the request for a contribution to legal costs. Rule 43 of the Uniform Rules of Court provides an interim remedy to assist an applicant for a limited period before a divorce is finalised, in respect of, *inter alia*, a contribution to legal costs. Rule 43 ensures that neither party is prejudiced during the divorce proceedings by a lack of resources to maintain a reasonable standard of living, or to pursue their case in the main action.

It has been established in case law that there is no reason why an applicant may not be entitled to all of her costs, so that the parties are able to place their case before the court on an equal footing. In circumstances where one party causes the other to bear unnecessary costs, entitlement to full costs would be negatively impacted. The respondent was ordered to pay an amount of R 830 000 as a contribution towards applicant's legal costs within 10 days of the order.

Personal injury/delict

Unlawful arrest and detention – lawfulness of arrest without warrant: In *Lifa v Minister of Police and Others* [2023] 1 All SA 132 (GJ), the plaintiff (Mr Lifa) claimed delictual damages from the defendants based on unlawful arrest and detention, and malicious prosecution. The defendants were the Minister of Police, the Minister of Justice and Correctional Services and the National Prosecuting Authority. The claim relating to malicious prosecution was withdrawn. The issues for determination were whether or not Mr Lifa's arrest by a member of the SA Police Services and the subsequent detention was unlawful and, if so, the determination of damages. Only the Minister of Police remained potentially liable for those damages.

Section 40(1)(b) of the Criminal Procedure Act 51 of 1977 deals with arrest without a warrant. A peace officer may, without warrant, arrest any person whom he reasonably suspects of having committed an offence referred to in schedule 1, other than the offence of escaping from custody. The law pertaining to arrest without warrant has been described as requiring –

- that the jurisdictional prerequisites for subs 40(1)(b) be present;
- awareness by the arrestor that he has a discretion to arrest; and
- exercise of such discretion with reference to the facts.

There is no jurisdictional requirement that the arresting officer should consider

using a less drastic measure than arrest to bring the suspect before court. When a peace officer has an initial suspicion, steps must be taken to have it confirmed in order to make it a reasonable suspicion before the peace officer arrests. The discretion to arrest must be properly exercised. In objectively determining when an arrestor has acted arbitrarily the court should consider whether he applied his mind to the matter or exercised his discretion at all. The onus rests on the arrestor to prove that the arrest was objectively lawful. That onus was not discharged in this case.

The court identified the period for which damages should be awarded, and awarded Mr Lifa R 600 000 in damages.

Claim for damages – malicious prosecution: The plaintiff in *Mdhlovu v National Director of Public Prosecutions* [2023] 1 All SA 458 (MM), a regional court prosecutor, having formed the view that a case handed to him suffered insurmountable contradictions in the facts, exercised his discretion to withdraw the charges in the matter. He was subsequently criminally charged for his action but was found not guilty at his trial and was discharged in terms of s 174 of the Criminal Procedure Act 51 of 1977. He sued the National Director of Public Prosecutions (NDPP) based on his alleged malicious prosecution

by the NDPP, acting through its employees who had acted within the course and scope of their employment.

In order to succeed on the merits with a claim for malicious prosecution, a plaintiff must prove that the –

- defendant set the law in motion, namely, instigated or instituted the proceedings;
- defendant acted without reasonable and probable cause;
- defendant acted with ‘malice’ or *animus iniuriandi*; and
- prosecution had failed.

In considering whether the NDPP had acted with reasonable and probable cause and with malice, the court noted the acknowledgment by the prosecutor acting on behalf of the state that the plaintiff should have been called to a disciplinary enquiry instead of being criminally charged.

The *actio iniuriarum* is a cause of action whereby a plaintiff can claim for injuries to his person, dignity or reputation, where the injury is committed wrongfully and with *animus iniuriandi* (intentionally). It is not sufficient for a defendant to merely deny *animus iniuriandi*. He must allege and prove the factual basis for the absence thereof.

In order to succeed in an action for malicious prosecution, a plaintiff must prove that the –

- defendant instituted or instigated the proceedings;
- defendant acted intentionally or with *animus iniuriandi*;
- defendant acted without reasonable and probable cause;
- defendant was actuated by an improper motive or malice;
- prosecution has failed or has been terminated in the plaintiff’s favour; and
- plaintiff suffered damages.

Both the requisite objective and subjective elements in respect of the NDPP’s *animus iniuriandi* were present in this matter. The court found that the plaintiff had proved on a balance of probabilities that the NDPP’s deputy acted with *animus iniuriandi*, and that no defence was established.

The NDPP was held liable to the plaintiff, under the *actio iniuriarum*, for the damages caused to the plaintiff’s personality and *dignitas* through his malicious prosecution.

Claim for damages – medical negligence: The plaintiff in *Williams v Member of the Executive Council, Department of Health, Eastern Cape and Another* [2023] 1 All SA 562 (ECP) claimed compensation from the defendants, respectively the provincial health department and the medical superintendent, after her husband died on falling from the fifth floor of a public



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hospital. On being admitted to the hospital, the deceased was identified as having a history of alcohol abuse, displaying irrational behaviour, suffering from chronic alcoholic liver disease and demonstrating clear signs of severe alcohol withdrawal.

The issues of negligence and causality would be tried separately from, and prior to, the remaining issues in the action. The treating medical and nursing personnel were under a legal duty to provide the deceased with adequate and timeous medical treatment with such professional skill and care as may reasonably be expected of reasonable medical and nursing personnel in similar circumstances, failing which, it was reasonably foreseeable that the deceased would wander around the hospital in a state of psychosis and confusion, while having visual and auditory hallucinations and alcohol withdrawal delirium.

The only oral evidence tendered at trial was that of the parties' respective expert witnesses. In considering the expert evidence adduced, the court reminded that it is the court's task to determine issues of fact and not that of an expert witness. The key function of an expert witness is to guide the court in its decision-making process on questions which fall within the ambit of the expert's specialised field of knowledge. The court was satisfied that the factual basis on which the respective expert witnesses expressed their opinions, was not in dispute between the parties. A conflict did arise in the experts' analysis of the established and/or common cause facts; and regarding the accepted standard of care/treatment by a medical practitioner in certain circumstances. The opinion advanced by an expert witness must be properly motivated. Where the court is presented with competing opinions, it is incumbent on it to carefully consider the underlying reasoning of the respective experts to enable it to choose which of the opinions to adopt, if any, and to what extent. In doing so, the court, after a careful evaluation of the expert testimony, is required to justify its preference for one opinion over the other.

Negligence will be established if a reasonable person would foresee the reasonable possibility of his conduct injuring

another and causing him patrimonial loss and would have taken reasonable steps to guard against the occurrence of harm. The established test relating to the *diligens paterfamilias* was set out by the court. The onus rested on the plaintiff to establish the presence of negligence. The court found that negligence on the part of the hospital staff was established, as was causation.

The defendants were held liable, jointly, and severally, for plaintiff's proven damages.

Wills, trusts and estates

Sale to company owned by trustees, of shares owned by trust: In *Kuttel v Master of the High Court (Western Cape Division) and Others* [2023] 1 All SA 17 (SCA), the applicant's father had created a trust in which applicant and his brothers were beneficiaries. Although his brothers were trustees in the trust, the applicant was not. In 2012, the trustees decided to restructure the trust's assets. One of the transactions involved the sale by the trust of its shares in a company owned by his brothers. The applicant challenged the validity of that transaction, objecting to not having been informed of the transaction and taking issue with the trustees' decision to sell the shares. The High Court dismissed his application to set aside the sale of the shares. In seeking leave to appeal, the applicant relied on the modern custom of requiring a court's confirmation when a trustee purchases immovable property from a trust. He argued that the transaction was invalid for failure to comply with such practice; that the transaction was not open and *bona fide*; and that he was treated unequally.

The custom of obtaining a court's confirmation was a rule of practice that only related to the purchase of immovable property. The applicant attempted to bring the sale of shares transaction within the practice by arguing that the sale of shares, when the company concerned owned immovable property, was akin to the sale of the company's immovable property. That proposition was rejected by the court.

Where a co-trustee obtains the consent

of their co-trustee to purchase trust property, the sale must be open and *bona fide*. Evidence of how the trustees in this case took their decision regarding determination of the purchase price, was adduced. The court accepted that the method employed reflected fair market value for the shares. It was clear that the trustees had satisfied themselves that the transaction was open and *bona fide*.

That left the allegation by the applicant that he had been treated unfairly, leading to the voidability of the sale transaction. Trustees have extensive powers to realise assets or investments, and in terms of the trust deed were given a wide discretion as to how they performed their functions. The trust deed did not require notice to or the consent of the beneficiaries. It only required that the trustee concerned disclosed his interest to the other trustees before any contract was concluded. To the extent that it might be said that the applicant was treated differently to his brothers, that differentiation was held to be justified, and not unfair. The application was dismissed.

Other cases

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

- bill of costs – taxation – review;
- civil procedure – evidence – expert opinion;
- criminal law and procedure – drug offences – cultivation of cannabis;
- legal practice – attorney – misconduct – application for striking from roll; and
- personal injury/delict – unlawful arrest and detention.

Merilyn Rowena Kader LLB (Unisa)
is a Legal Editor at LexisNexis in Durban.



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By
Mulalo
Tshililo

Section 3(1)(b) of the Recognition of Customary Marriages Act too open for interpretation to be a requirement

Lijane v Kekana and Others (GJ) (unreported case no 21/43942, 3-1-2023) (Wilson J)

The Recognition of Customary Marriages Act 120 of 1998 (the RCMA) provides for the requirements of valid customary marriages in South Africa. Section 3(1)(b) provides that ‘the marriage must be negotiated and entered into or celebrated in accordance with customary law’. This article seeks to provide an objective opinion and an analysis of the judgment in the *Lijane* case.

Background

The case between the parties was an opposed application, in which Mr Lijane sought an order declaring that he indeed had entered into a valid customary marriage with Gracious Katrinah Sauls (the deceased) on 27 and 28 August 2016. The respondents (Solomon Kekana, the Sauls family’s principal representative in the negotiations, and the deceased’s two children from a previous relationship) opposed the application on the basis that the marriage was not negotiated and entered into or celebrated in accordance with customary law.

What is customary law and what does s 3(1)(b) entail?

Section 1 of the RCMA defines ‘customary law’ as ‘the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples’. The phrase ‘negotiated and entered into or celebrated in accordance with customary law’ basically entails those customs and procedures, be it cultural rituals or traditions that are required to be performed either for the bride by the groom’s family or for the groom by the bride’s family must have been done, for the marriage to be recognised as a valid customary marriage according to the prospective spouses’ respective cultures. In *Moropane v Southon* [2014] JOL 32177 (SCA), the court stated that this requirement entails examining whether the customs, traditions, or rituals, that must be observed in the negotiations and celebrations of customary marriages, have been complied with.

However, are these customs, traditions or rituals culturally observed in different communities, the determining factors as to the validity of customary marriages? In *Mbungela and Another v Mkabi and Others* [2020] 1 All SA 42 (SCA), the court held that the handing over of a bride ‘is an important but not necessarily a key determinant of a valid customary marriage’. The court stated further that it cannot be placed above the couples’ clear volition and intent where their families, who come from different ethnic groups, were involved in, and acknowledged the formalisation of their marital partnership and did not specify that the marriage would only be validated on bridal transfer. The position in this suggests that such a marriage will only be invalid where both families have agreed, either verbally or in writing that the validity of the customary marriage between the prospective spouses will only be valid on handing over of the bride to the groom’s family. The *Mbungela* case seems to have changed the position in *LS v RL* 2019 (4) SA 50 (GJ), in which it was held that the practice of handing over of the bride to the groom’s family can no longer be considered a prerequisite for the validity of a customary marriage. Although the handing over of the bride prerequisite seems to have been disposed of, if such requirement is in writing, then it must be complied with for the customary marriage to be valid. The *Mbungela* case, like as in many cases, including the present case on the requirements of a valid customary marriage only adds to complexity of these requirements.

In the *Lijane* case, there were quite a number of contentions by the respondents, including that the bride was not properly handed over to the groom’s family, the fact that the bride was not dressed in Basotho traditional clothing by the applicant’s family, that there was non-payment of the *lobolo* price, which in many cultures forms an integral part of the negotiations and celebrations of the customary marriages between prospective spouses and lastly that the parties could not conclude a customary marriage under customary law, simply

because they are interracial. In this case, the court held that despite the contentions by the respondents that certain customs and traditions were not performed, the same respondents accepted throughout that Mr Lijane and the deceased intended to marry, and that not only did they intend to marry, but their families also intended to conclude a customary union according to Basotho tradition.

The judgment in *Lijane* is a clear indication that unless the parties contesting the validity of a customary marriage between two spouses can present the strongest evidence to persuade the court that the integrity or rather the validity of an otherwise valid customary marriage could turn on what the court considered to be ‘minor’ details. In this present case, the requirement in s 3(1)(b) has been summed up to ‘what were the true intentions of the prospective spouses’ rather than whether the customary marriage was indeed ‘negotiated and entered into or celebrated in accordance with customary law’ and in the absence of persuasive and strong evidence, the former seems to be the point of inquiry into the validity of an existing customary marriage.

Conclusion

From the judgment of the *Lijane* case, it appears that the intentions of the parties, including their families will be the determining factor as to whether there was a valid customary marriage concluded or not. Each case should be decided on its own merits. As customary law continues to evolve and change with time and impact the values, customs and norms of our indigenous cultures, the question is whether it was judicious for the legislature to leave the door open for various communities to give differing context to s 3 (1)(b) of the RCMA?

Mulalo Tshililo LLB (Univen) is a legal practitioner at Selamolela Inc in Louis Trichardt.





By
Siboniso
Kunene

Interest in arbitration awards

Malatji v Minister of Home Affairs and Another (2018) 39 ILJ 2684 (LAC)

Often when a litigant is successful at the arbitration of their labour dispute the arbitrator may award the litigant a sum of money as compensation. In certain labour disputes, such as those where it is found that an employee was unfairly dismissed the arbitrator makes a ruling that they be compensated a certain sum of money. Most employees often do not know that they are also entitled to interest from their monetary award.

The entitlement to interest from monetary awards is found in s 143(2) of Labour Relations Act 66 of 1995. The section provides that: 'If an arbitration award orders a party to pay a sum of money, the amount earns interest from the date of the award at the same rate as the rate prescribed from time to time in respect of a judgment debt in terms of section 2 of the Prescribed Rate of Interest Act, 1975 (Act No 55 of 1975), unless the award provides otherwise.'

However, the issue of how much interest the employee is entitled to and when the interest begins to accrue is often not simple to determine, as it seems in terms of s 143(2). It is often common that the employer reviews the arbitration award at the Labour Court (LC). In the past, the LCs have had to determine when the interest in monetary arbitration awards subject to review become due. The leading case on the issue of the accrual of interest in matters subject to review at the LC is the case of *Malatji v Minister of Home Affairs and Another* (2018) 39 ILJ 2684 (LAC).

In *Malatji* it was held by the LAC that: 'Mora interest can only be levied and would accrue once the amount of compensation is ascertained or easily ascertainable. To my mind where the award is subject to review, it cannot be said that the quantum is readily ascertainable and that the time for performance by the debtor is fixed. This is so because there is no obligation on the debtor, under those circumstances, to pay the debt.'

In *Malatji* it was further held at para 19 that: 'In conclusion, the judgment creditor would only be entitled to the payment of interest *a tempore morae* on the unliquidated claim from date of the award, if the award is not challenged through the review process, or from date

of the judgment on review pursuant to the court's determination of the quantum of the claim.'

The case of *Top v Top Reizen CC* (2006) 27 ILJ 1948 (LC) dealt with the issue of payable interest in an arbitration award being made an order of the court. At para 21, Van Zyl AJ held that: 'The effect of s 143(2) is that an award of any sum of money automatically attracts post-award interest at the rate set by the statutory instruments made under the Prescribed Rate of Interest Act, unless the arbitrator specifies that the award shall not carry interest. It is clear that s 143(2) does not depart from the common-law position in that interest commences to run from the date on which the debtor's claim was ascertained.'

The legal authority set in the cases of *Malatji* and *Top* to simplify the legal position as to when interest begins to accrue in arbitrations awards where a sum of money is awarded to an employee. In simple terms, if the award is not subject to a review, then the awarded sum accrues interest from the date of the award at the then applicable legal interest rate until final payment. However, if the arbitration award is subject to a review it is

only once the review is no longer pending before court that the interest begins to accrue at the then-current legal interest rate.

In conclusion, litigants need to ensure that they approach a legal practitioner that will be able to assist them insofar as determining the correct interest rate they are entitled to in their monetary arbitration award. The process and the determination of payable interest might appear simple. However, it is often complicated by lengthy litigation proceedings, which often make it difficult to determine when the interest begins to accrue. An example of this is when the review of an arbitration award becomes deemed withdrawn. It can be difficult to determine when the interest, under those circumstances, begins to accrue.

Siboniso Kunene LLB (UKZN) is a legal practitioner and legal manager at Totalgaz a division of TotalEnergies in Cape Town.



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By
Kgomotso
Ramotsho

SCA says insulting, vulgar and disparaging language by a legal practitioner cannot be tolerated

Gaone Jack Siamisang Montshiwa (Ex Parte Application) (SCA)
(unreported case no 672/2021, 3-3-2023)
(Siwendu AJA (Van der Merwe JA concurring))

In a case of *Montshiwa*, the Supreme Court of Appeal (SCA) dismissed an application brought by the applicant, Mr Montshiwa. This was after the dismissal of the application for a leave to appeal led to a petition at the SCA. Mr Montshiwa had sought to be admitted by the North West Division of the High Court, Mahikeng (the High Court) as a legal practitioner in terms of s 24 of the Legal Practice Act 28 of 2014 (LPA). The judgment notes a practice has developed in certain Divisions of the High Court that matters concerning the admission of legal practitioners are heard by two judges.

The court said that over a sustained period, Mr Montshiwa had made disparaging allegations against many of the judges of the High Court. As a result, the Judge President of that High Court specially constituted a Full Bench comprising of judges from outside the division to hear Mr Montshiwa's application for admission. The court pointed out that Mr Montshiwa entered into a contract of articles for five years with Mr Lavelle Winston Vere of Vere Attorneys as his principal while studying for his LLB (the first contract). He resigned from the firm after a period of a year and 11 months. The court added that the departure was not on good terms. Mr Montshiwa entered a new contract of articles with Moetsi Maredi Attorneys Inc, and Mr KA Moetsi was his new principal (the second contract).

The court pointed out that Mr Montshiwa's first contract was registered in terms of s 5(1) of the Attorneys, Notaries and Conveyancers Act 29 of 1984 with the then Law Society of Bophuthatswana under contract number 24/2014. His second contract was regulated by the Attorneys Act 53 of 1979 (AA) as amended, was registered with the Law Society of Northern Provinces on 17 May 2017 under contract number 1531/2017, approximately nine months after its conclusion.

The court said that Mr Montshiwa left

the employ of Moetsi Maredi Attorneys Inc in March 2018. The court added that at the time of his application for admission, the LPA had come into effect, the upshot being that s 24 read with s 26 applied to the requirements for his admission. The provisions prescribe the requirements for admission and enrolment of legal practitioners in South Africa. They include South African citizenship, minimum academic qualifications, fitness for admission as a legal practitioner, and necessary practical vocational training as a candidate legal practitioner. The court pointed out that it is the last three requirements that became contentious in relation to Mr Montshiwa.

The court said that in his application of admission, Mr Montshiwa sought the following order in the High Court:

'1. Joinder of the two contracts of articles registered with Law Society of Bophuthatswana under article number 24/14 and the Law Society of the Northern Provinces under registration number 1531/2017;

Condonation for three years and seven months service of period for articles.'

The court added that this order was sought on the basis that the two contracts of articles of clerkship covered the period prescribed to qualify for admission as a legal practitioner. The court said according to Mr Montshiwa the contract that he concluded with Mr Vere was registered with the Law Society on 2 September 2014 and was interrupted when he resigned from Mr Vere's employment on 5 August 2016. The second contract was concluded with Mr Moetsi on 6 August 2016 and was registered with the Law Society 'within two months' of the date in conclusion thereof. According to Mr Montshiwa, Mr Vere refused to sign the cession of the first contract to Mr Moetsi, hence there was no evidence in relation to the relevant period as to whether he was a fit and proper person for admission as a legal practitioner. The High Court found that Mr Montshiwa's had failed to explain certain discrepan-

cies regarding the dates on which his contracts of articles of clerkship were concluded. The court was not satisfied that Mr Montshiwa had met the requirement for a structured work course during the period of serving articles or 12 months thereafter. The court found that Mr Montshiwa was not fit and proper to be admitted as a legal practitioner.

In the North West Division of the High Court, Mahikeng judgment by Olivier J (Mbhele J concurring), the High Court dismissed Mr Montshiwa's application. Dissatisfied with the outcome, he approached the High Court for leave to appeal, which was similarly dismissed. On 29 March 2021, Mbhele J, solely considered the application for leave to appeal and refused it in a judgment delivered on 31 May 2021. The dismissal of the application for leave to appeal led to a petition to the SCA. The SCA said that on 26 August 2021, the application was referred for oral argument in terms of s 17(2)(d) of the Superior Court Act 10 of 2013. Mr Montshiwa was directed to address the court on merits of the appeal.

In addition, at the request of the judges who considered the petition, the Registrar despatched a directive to the Legal Practice Council (the LPC) to make representations on merits of the application. Counsel representing the LPC referred to the fact that the court that dismissed the admission application was not constituted in the same manner as the court that heard and dismissed the application for leave to appeal. The counsel argued that the application was not properly before the SCA. The SCA pointed out that the controversy is whether there is 'a valid decision' refusing leave by the High Court within the contemplation of the Superior Courts Act, and whether the application is properly before the SCA. In other words, did the denial of the leave to appeal by Mbhele J, sitting as a single judge, render her decision and order a nullity, and whether, as a consequence, the SCA lacks the jurisdiction to consider the application? The SCA said that

this cast a shadow of doubt on the validity of the directive issued on 26 August 2021 inviting Mr Montshiwa to address it in terms of s 17(2)(d). The SCA pointed out that s 17(1) of the Superior Courts Act informs that the challenge before it and states that ‘the judge or judges’ who heard the case at first instances may only grant leave to appeal if they are of the opinion that the appeal would have reasonable prospects of success, or that there is some compelling reason why the appeal should be heard.

The SCA added that s 17(2)(d) prescribes the constitution of the court to which may validly consider an application for leave to appeal. The SCA said that the section bestows competence on ‘a judge or judges.’ The SCA added that the conclusion that the application for leave to appeal heard in terms of s 17(2)(a) is to be heard by a full court by virtue of s 14(6). The SCA referred to s 14(5) that reads:

‘(5) If, at any stage during the hearing of any matter by full court, any judge of such court is absent or unable to perform his or her functions, or if a vacancy among the members of the court arises, that hearing must –

(a) if the remaining judge constitute a majority of the judges before whom it was commenced, proceed before such remaining judges; or

(b) if the remaining judges do not constitute such majority, or if only one judge remains, be commenced *de novo*, unless all the parties to the proceedings agree unconditionally in writing to accept the decision of the majority of the remaining judges or of the one remaining judge as the decision of the court.’

The SCA said the point of departure is whether despite the nullity of the decision by the High Court, the SCA has an inherent power under s 173 of the Constitution to deal with application for leave to appeal. The SCA added that the judgment by Dambuzza ADP stresses that the Constitution gives it the power to regulate its process and said they should do so to prevent prejudice to Mr Montshiwa, as the matter would be ultimately referred to it. The SCA said that moves from the premise that an application for leave to appeal engages the ‘procedures and processes’ of the court. The SCA said that it functions in terms of the Superior Courts Act, the national legislation envisaged by s 171 of the Constitution, which prescribes –

- the jurisdiction requirements;
- the process; and
- the threshold for granting an application for leave to appeal to the SCA.

In *Pharmaceutical Society of South Africa and Others v Tshabalala-Msimang and Another NNO; New Clicks South Africa (Pty) Ltd v Minister of Health and Another* 2005 (3) SA 238 (SCA), the SCA

affirmed that although ‘like the Constitutional Court and High Courts, [it] has the inherent power to protect and regulate its own process, that “does not extend to the assumption of jurisdiction not conferred upon it by statute.”’ The SCA added that several decisions by it consistently affirm that absent leave being granted, it lacks jurisdiction to entertain an appeal. The SCA pointed out that the decision in *Absa Bank Ltd v Snyman* [2015] 3 All SA 1 (SCA) illustrates this point. The SCA said that in this instance, the prejudice Mr Montshiwa will suffer is partly self-created as it should have been evident to him at the hearing of the application for leave to appeal that the court was properly constituted.

The SCA said it could only have jurisdiction in terms of s 17(2)(b) of the Superior Courts Act. Adding that the jurisdictional requirement is that leave was refused by a properly constituted court, in fact or constructively. The SCA pointed out that as there is no dispute that there was no constructive refusal of leave and that the order purporting to refuse leave is nullity, the necessary jurisdictional requirement is absent. The SCA said that the improper composition of the court dealing with the leave to appeal renders the judgment a nullity, which cannot be sanctioned. The SCA added that the same applies to the order referring the application for leave to appeal for oral argument. The SCA struck the application from the roll with costs.

Dambuzza ADP (Nicholls JA and Chetty AJA concurring), said that after reading the judgment prepared by Siwendu AJA. Although he agrees that the proceedings in the application for leave to appeal were irregular and the consequent order of the High Court is a nullity, he did not agree that Mr Montshiwa should be sent back to the High Court for a fresh application for leave to appeal.

Dambuzza ADP said in his view this is the case in which the SCA should exercise its inherent powers under s 173 of the Constitution to regulate its process by considering the merits of the application for leave to appeal and, if it deems appropriate, the appeal, and decide thereon. Dambuzza ADP said that the purpose for the threshold and procedure laid out in s 17 of the Superior Courts Act is to regulate the appeal process in the SCA for the SCA’s benefit, by ensuring that the SCA’s resources are not wasted on meritless appeals or cases that are not sufficiently important to occupy the attention of the SCA.

Dambuzza ADP added that the underlying principle is that courts are bestowed with inherent powers to administer justice, including avoidance of multiple fruitless court proceedings between the same parties. Dambuzza ADP said that under the first judgment Mr Montshiwa

must return to the High Court for that court to comply with the relevant statutory prescriptions. He added that whatever judgment the reconstituted High Court will render, the matter will, in all probability, return to the SCA, either for a further application for leave to appeal or for an appeal. Dambuzza ADP pointed out that all this in circumstances where Mr Montshiwa did comply with the requirements under the Superior Courts Act in relation to the application for leave to appeal process. Dambuzza ADP said that it seems to him that grave injustice will result from such a judgment, and the waste of both his and the courts’ resources will be completely unjustified.

Dambuzza ADP pointed out that the correct standard was that of reasonable prospects of success. He said that the SCA held that to strike the appeal from the roll, only for the appellants to retrace their steps to the High Court for leave to appeal and, if refused leave, back to the SCA for the repeat hearing of an issue that had been fully argued would be a gross technicality and waste of resources. Dambuzza ADP asked whether Mr Montshiwa then made out a proper case for an order granting leave to appeal? He said that he is not persuaded that another court will reach a different decision from that of the High Court. He added the requirements specified in the LPA for admission as a legal practitioner are set out in the first judgment.

Dambuzza ADP said that the courts in South Africa and elsewhere have identified certain qualities for a fit and proper person as envisaged in the LPA. He added the expression ‘fit and proper’ is not defined in the LPA. He added that there is no single test for determination of what constitutes a fit and proper person for purposes of admission into the legal profession. He pointed out that s 5 of the LPA, however, sets out one of the objectives of the Act as to ‘determine, enhance and maintain appropriate standards of professional practice and ethical conduct of all legal practitioners and all candidate legal practitioners’. He added that in terms of s 24(2)(c) of the LPA, only fit and proper persons may be admitted by courts as legal practitioners.

Dambuzza ADP said that it appears from the record, apart from the discrepancies relating to his vocational training, Mr Montshiwa’s conduct, as demonstrated throughout his application for admission as a legal practitioner, and prior thereto, falls far short of degree of integrity, dignity, honesty, and respect expected of an officer of the court. He added that the LPC referred to numerous instances of conduct that has no place in the application for admission as a legal practitioner. Dambuzza ADP said that it is apparent from these that Mr Montshiwa’s appreciation of the process, pro-

cedures, and decorum of South African courts is woefully deficient.

Dambuza ADP referred to some of the incident involving Mr Montshiwa. One of them, Dambuza ADP noted was when Jerry Sithole, an attorney practicing in Mmabatho, filed a notice to oppose his application for admission, Mr Montshiwa responded with an “Opposing affidavit to the Notice to Oppose” in which he contended that Mr Sithole’s opposition was premature, resulted from “bitterness and stupidity”, and was an “idiotic move ... motivated by stupidity.”

Dambuza ADP added that the Judge President of the North West Division of the High Court at the time, Leeuw JP was not spared from Mr Montshiwa’s tirade. Dambuza ADP said that Mr Montshiwa berated the JP for constituting a full bench of judges from outside her divi-

sion. He complained that the JP’s leadership was a mockery; and undertook to ensure that ‘Mashangu Leeuw JP, my enemy will never get away with any unlawful conduct that she may try.’ He added that the removal of Mr Montshiwa’s application for admission from the High Court roll on 20 March 2022 by Pietersen AJ led to a complaint by Mr Montshiwa against the judge to the Minister of Justice and Correctional Services and Judicial Services Commission.

Dambuza ADP said Mr Montshiwa also directed insults at the judges who heard his application for admission and accused them of bias and collusion with the Judge President against him. Dambuza ADP added that Mr Montshiwa’s conduct demonstrates his lack of appreciation of the ethos and principles that govern the legal profession and the

courts of South Africa. Dambuza ADP said that Mr Montshiwa does not dispute the conduct and utterances attributed to him. He pointed out that Mr Montshiwa only maintains that his conduct is not inappropriate. Dambuza ADP said the conduct demonstrates a predisposition to bouts of extreme anger and disrespect. Dambuza ADP added that against this background no other court would find differently from the decision of the High Court.

He consequently dismissed the application for leave to appeal with costs.

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
30 January – 24 February 2023*

Acts

Criminal Law (Forensic Procedures) Amendment Act 8 of 2022

Commencement of the Act. Proc 116 GG48107/24-2-2023.

Customs and Excise Act 91 of 1964

Imposition of Provisional Payment (PP/167). GN R3021 GG48013/10-2-2023.

Amendment to part 1 of sch 1 (no 1/1/1895). GN R3061 GG48067/17-2-2023.

Public Service Act 103 of 1994

Amendment of sch 2: Western Cape Province. Proc 115 GG48103/23-2-2023.

Bills and White Papers

Division of Revenue Bill B2 of 2023

Notice of introduction in National Assembly of Division of Revenue Bill for 2023/24 financial year and publication of Explanatory Summary of Bill. GN3028 GG48017/10-2-2023.

Electoral Commission Amendment Bill, 2023

Notice of intention to introduce a Private Member’s Bill and invitation for comment. GenN1602 GG48017/10-2-2023.

Heraldry Act 18 of 1962

National Heraldry Bill. GN3083 GG48104/24-2-2023.

Government, General and Board Notices

Auditing Profession Act 26 of 2005

The adoption of the International Auditing and Assurance Standards Board’s 2021 handbooks. BN394 GG48017/10-2-2023.

Banks Act 94 of 1990

Withdrawal of authorisation granted in terms of s 18A to conduct business of a bank by means of a branch in South Africa: ICICI Bank Ltd. GenN1603 GG48017/10-2-2023.

Consent granted in terms of s 34 for a foreign institution to establish a representative office within South Africa: Deutsche Bank (Suisse) SA. GenN1604 GG48017/10-2-2023.

Basic Conditions of Employment Act 75 of 1997

Determination: Earnings threshold. GN3067 GG48092/20-2-2023.

Broad-Based Black Economic Empowerment Act 53 of 2003

Amendment Act 46 of 2013: Invitation to submit applications for a Department of Agriculture, Land Reform and Rural Development Quota Import Permit in terms of the Rebate Item 460.03/0207.14.9/01.07. GN3014 GG47985/3-2-2023.

Companies Act 71 of 2008

iXBRL: Depreciation of 2016 and 2019 Taxonomy Entry Points on 1 July 2023. GN3085 GG48104/24-2-2023.

Compensation for Occupational Injuries and Diseases Act 130 of 1993

Opening of 2022 Return of Earnings Season and Maximum Earnings and Minimum Assessment notices. GenN1616 and GenN1617 GG48065/17-2-2023.

Competition Act 89 of 1998

Notice of designation in terms of s 10(3) (b)(iv). GN R2993 GG47975/31-1-2023.

Notice of extension granted: Online Intermediation Platforms Market Inquiry. GN3062 GG48068/17-2-2023.

Disaster Management Act 57 of 2002

Classification and declaration of a National State of Disaster: Impact of Severe Electricity Supply Constraint. GN3019 and GN3020 GG48009/9-2-2023.

Classification and declaration of a National State of Disaster: Impact of floods due to inclement weather. GN3035 and GN3036 GG48036/13-2-2023.

Division of Revenue Act 5 of 2022

Publication of allocations and frameworks. GN3015 GG47987/3-2-2023.

Electoral Act 73 of 1998

Publication of reviewed lists of candidates. GenN1591 GG47988/3-2-2023.

Income Tax Act 58 of 1962

Further information required in terms of s 18A(2)(a)(vii) for purposes of a receipt issued under s 18A(2)(a). GN3082 GG48104/24-2-2023.

International Phytosanitary Prescripts

Tariffs in accordance with international phytosanitary prescripts relating to export control provisions. GN R3057 GG48067/17-2-2023.

Labour Relations Act 66 of 1995

National Bargaining Council for the Electrical Industry of South Africa: Extension of period of operation of the Collective Bargaining Levy Agreement. GN3025 GG48017/10-2-2023.

Bargaining Council for the Food Retail, Restaurant, Catering and Allied Trades: Renewal of period of operation of the Main Collective Agreement to Non-parties. GN3068 GG48093/21-2-2023.

Renewal and Extension of Bargaining Councils. GenN1628 GG48104/24-2-2023.

Long-Term Insurance Act 52 of 1998
Penalty for failure to furnish authority with returns. GN3078 GG48104/24-2-2023.

Marketing of Agricultural Products Act 47 of 1996

Invitation to register as a directly affected group. GenN1585 GG47983/3-2-2023.

Medical Schemes Act 131 of 1998
Council for Medical Schemes. GenN1601 GG48017/10-2-2023 and GenN1612 GG48062/17-2-2023.

National Education Policy Act 27 of 1996

2025 calendar for public schools. GN2991 GG47972/31-1-2023.

National Environmental Management Act 107 of 1998

Release of land for non-forestry purposes in terms of ss 50(3) and (4). GN3017 GG47998/6-2-2023.

National Environmental Management: Biodiversity Act 10 of 2004

List of terrestrial species and freshwater species that are threatened or protected, restricted activities that are prohibited and exempted. GN3012 GG47984/3-2-2023.

Repeal of the notice amending the alien and invasive species list and list of critically endangered, endangered, vulnerable and protected species, and amendment and commencement of the notice prohibiting the carrying out of certain restricted activities involving rhinoceros horn, and the regulations pertaining to trade in rhinoceros horn. GN3013 GG47984/3-2-2023.

National Environmental Management: Waste Act 59 of 2008

Notice of decisions on applications received in terms of reg 6(4) of the Waste Exclusion Regulations, 2018, for the exclusion of a waste stream or a portion of a waste stream from the definition of waste for beneficial use. GN3075 GG48101/22-2-2023.

National Forests Act 84 of 1998

Release of land for non-forestry purposes in terms of ss 50(3) and (4) of the Act. GN3016 GG47997/6-2-2023.

Public Service Act 103 of 1994

Amendment of sch 2 to the Public Service Act, 1994: Free State Province. Proc 113 GG47983/3-2-2023.

Short-Term Insurance Act 53 of 1998

Penalty for Failure to Furnish Authority with Returns. GN3079 GG48104/24-2-2023.

Spatial Planning and Land Use Management Act 16 of 2013

Notice of the approved National Spatial Development Framework in terms of s 13(5) of the Act. GenN1581 GG47979/1-2-2023 and GenN1594 GG47999/1-2-2023.

Emfuleni Land Use Scheme to give effect to the Act. GenN1595 GG48001/8-2-2023.

Special Investigating Units and Special Tribunals Act 74 of 1996

Amendment of Proc R36 of 2019. Proc R114 GG48067/17-2-2023.

The Sugar Industry Agreement, 2000

As amended: Notice under Clause 82 of the Sugar Industry Agreement, 2000 as amended. GN3086 GG48104/24-2-2023.

Rules, regulations, fees, and amounts

Agricultural Pests Act 36 of 1983

Amendment of the Regulations R 111 of 27 January 1984. GN R3055 GG48067/17-2-2023.

Control measures: Amendment in schedule. GN R3056 GG48067/17-2-2023.

Agricultural Products Standards Act 119 of 1990

Regulations relating to the Protection of Geographical Indications and Designations of Origin used on agricultural products intended for sale. GN R3023 GG48015/10-2-2023.

Airports Company Act 44 of 1993

Publication of airport charges. GenN1582 GG47980/1-2-2023.

Animal Identification Act 6 of 2002

Regulations: Amendment. GN3076 GG48104/24-2-2023.

Architectural Profession Act 44 of 2000

Section 36(1) of the Act: Rules: Continuing Professional Development and Renewal of Registration. BN390 GG48012/10-2-2023.

Competition Act 89 of 1998

Guidelines on the Exchange of Competitively Sensitive Information between Competitors under the Act. GN3084 GG48104/24-2-2023.

Dental Technicians Act 19 of 1979

Notice regarding annual fees payable to the Council. GN3073 GG48099/22-2-2023.

Health Professions Act 56 of 1974

Health Professions Council of South Africa: Rules relating to fees payable to Council and Board Notice relating to annual fees. BN398 and BN399 GG48035/13-2-2023.

Higher Education Act 101 of 1997

Section 32 of the Act: Durban University of Technology Amended Statute. GN3027 GG48017/10-2-2023 and GenN1611 GG48062/17-2-2023.

Independent Communications Authority of South Africa Act 13 of 2000

Annual forecast of licence fees for 2022 - 23 by Broadcasting and Electronic Communications Services and Electronic Communications Network Services Li-

cences. GenN1600 GG48016/10-2-2023.

International Trade Administration Act 71 of 2002

Guidelines, Rules and Conditions pertaining to titanium dioxide for use in the manufacture of paints, varnishes and prepared driers valid for a period of 30 months from date of implementation being 20 January 2023. GenN1587 GG47983/3-2-2023.

Medical Schemes Act 131 of 1998

Adjustment to fees payable to brokers. GenN1629 GG48104/24-2-2023.

National Environmental Management Act 107 of 1998

Regulations to domesticate the requirements of the Rotterdam Convention on the prior informed consent procedure for certain hazardous chemicals and pesticides in international trade. GN3072 GG48098/21-2-2023.

National Environmental Management: Biodiversity Act 10 of 2004

Regulations pertaining to threatened or protected terrestrial species and freshwater species. The national norms and standards for the management of elephants and trophy hunting of leopards. GN3009 - GN3011 GG47984/3-2-2023.

National Health Act 61 of 2003

Regulations relating to the surveillance and the control of Notifiable Medical Conditions: Amendment. GN3007 GG47983/3-2-2023.

National Minimum Wage Act 9 of 2018

Amendment of the national minimum wages. GN3069 GG48094/21-2-2023.

National Railway Safety Regulator Act 16 of 2002

Determination of permit fees. GN3053 GG48062/17-2-2023.

Amendment of regulations on notifiable railway occurrences, 2022 by replacement of Appendix A Table 1 to GG46471. GenN1614 GG48062/17-2-2023.

National Small Enterprise Act 102 of 1996

Final National Integrated Small Enterprise Development Strategic Framework. GN3054 GG48063/17-2-2023.

Occupational Health and Safety Act 85 of 1993

Promulgation of Major Hazard Installation Regulations, 2022. GN R2989 GG47970/31-1-2023.

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 R2994 - GN R2996 GG47976/31-1-2023.

Plant Breeders' Rights Act 15 of 1976

Regulations relating to Plant Breeders' Rights: Amendment. GN3024 GG48017/10-2-2023.

Postal Services Act 124 of 1998

Fees and charges for postal services. GN3051 GG48062/17-2-2023.

Project and Construction Management Professions Act 48 of 2000

South African Council for the Project and Construction Management Progressions Policy on accreditation, guideline professional fees and the recognition of new specified categories of registration. BN391 - BN393 GG48017/10-2-2023.

Promotion of National Unity and Reconciliation Act 34 of 1995

Regulations relating to assistance to victims in respect of higher education and training. GN R3060 GG48067/17-2-2023.

Public Audit Act 25 of 2004

Audit directive for 2023. GN3018 GG48000/8-2-2023.

Public Finance Management Act 1 of 1999

Rate of interest on government loans. GenN1630 GG48104/24-2-2023.

Road Accident Fund Act 56 of 1996

Adjustment of statutory limit in respect of claims for loss of income and loss of support. BN396 GG48017/10-2-2023.

Rules Board for Courts of Law Act 107 of 1985

Amendment of the Rules Regulating the Conduct of the Proceedings of the Supreme Court of Appeal. GN R3059 GG48067/17-2-2023.

Small Claims Courts Act 61 of 1984

Repeal of the Rules Regulating Matters in Respect of the Small Claims Court, published under GN R1893 GG9909/30-8-1985. GN R3058 GG48067/17-2-2023.

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

Huguenot, Vaal River, Great North, Tsitsikamma, South Coast, North Coast, Mariannhill, Magalies, N17 and R30/R730/R34 Toll Roads. N1 and N4, N3 Cedara to Heidelberg Gauteng and N4 Hans Strydom Interchange (Pretoria) to the Gauteng/Mpumalanga Border and Maputo Development Corridor Toll Roads: Platinum Toll Road: Publication of the amounts of toll for the different categories of motor vehicles, and the date and time from which the toll tariffs shall become payable. GN3031 - GN3034 GG48018/10-2-2023.

Statistics South Africa

Advertisement of the Consumer Price Index December 2022 figure. GenN1586 GG47983/3-2-2023.

Veterinary and Para-Veterinary Professions Act 19 of 1982

Rules relating to the practising of para-veterinary profession of veterinary physiotherapist. GenN1626 GG48104/24-2-2023.

Legislation for comment

Allied Health Professions Act 63 of 1982

Regulations relating to disciplinary inquiries. GN3006 GG47983/3-2-2023.

Architectural Profession Act 44 of 2000

Accreditation policy. BN400 GG48104/24-2-2023.

Basic Conditions of Employment Act 75 of 1997

Extension of the notice of the investigation into the wages and conditions of employment of community health workers. GN R2997 GG47982/2-2-2023.

Civil Aviation Act 13 of 2009

Civil Aviation Regulations, 2011. GN3015 GG47996/6-2-2023 and GN3040 GG48061/16-2-2023.

Civil Aviation Amendment Act 22 of 2021

Erratum: Invitation by the Minister of Transport for application or nomination for appointment to the Aviation Safety Investigation Board and the Civil Aviation Appeal Committee. GenN1609 and GenN1610 GG48034/13-2-2023.

Competition Act 89 of 1998

Publication of the fresh produce market inquiry terms of reference in terms of s 43(b), as amended. GN3037 GG48037/14-2-2023.

Cooperative Banks Act 40 of 2007

Notice of intent to cancel National Association for Cooperative Financial. GN3080 GG48104/24-2-2023.

Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972

Regulations relating to the labelling and advertising of foodstuffs. GN R2986 GG47965/31-1-2023.

Health Professions Act 56 of 1974

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Regulations relating to: The registration of intern arts therapists in drama; names that may not be used in relation to the profession of optometry and dispensing opticians: Amendment; the qualifications for registration of biokineticists: Amendment; defining the scope of the profession of orthopaedic footwear technicians. GN3001 - GN3004 GG47983/3-2-2023.

Independent Communications Authority of South Africa Act 13 of 2000

Notice for received applications for pre-register for Community Sounds Broadcasting Service and Radio Frequency Spectrum Licences. GenN1583 GG47981/1-2-2023.

Second Draft Radio Frequency Spectrum Assignment Plan for the frequency band 450 MHz to 470 MHz, 825 to 830 MHz and 870 MHz to 875 to 875 MHz and 1427 MHz to 1518 MHz for public consultation. GN3064 GG48078/20-2-2023.

Labour Relations Act 66 of 1995

Extension of period of operation of the main collective agreement. GN2985 GG47963/30-1-2023.

Notice of intention to cancel the registration of an employers' organisation. GenN1580 GG47969/31-1-2023.

Local Government: Municipal Systems Act 32 of 2002

Standard draft by-laws for deployment of electronic communications facilities. GN3087 GG48113/24-4-2023.

Marketing of Agricultural Products Act 47 of 1996

Application for the amendment of the statutory measures in the wine and brandy industry. GenN1584 GG47983/3-2-2023.

Breeding levies on winter cereals for comments. GenN1627 GG48104/24-2-2023.

Medicines and Related Substances Act 101 of 1965

General regulations made in terms of the

Act: Amendment. GN3026 GG48017/10-2-2023.

Merchandise Marks Act 17 of 1941

Invitation for comment on the prohibition on the use of certain words and emblems associated with the Cape Flora. GenN1592 GG47989/3-2-2023.

Invitation for comment on the prohibition on the use of certain images of coins of the South Africa Reserve Bank. GenN1593 GG47995/6-2-2023.

National Education Policy Act 27 of 1996

Proposed 2026 calendar for public schools for comment. GN2992 GG47973/31-1-2023.

National Environmental Management: Biodiversity Act 10 of 2004

Extension of the commenting period on the draft Multi-Species Biodiversity Management Plan for Vultures. GN2988 GG47968/31-1-2023.

National Environmental Management: Waste Act 59 of 2008

Consultation on the Draft Household Hazardous Waste Management Strategy. GN2987 GG47967/31-1-2023.

National Water Act 36 of 1998

Proposal for the establishment of Makhathini Lower Pongola Water User Association, KwaZulu-Natal Province. GN3022 GG48014/10-2-2023.

Proposal for the establishment of the Limpopo-Olifants Catchment Management Agency. GN3029 GG48017/10-2-2023.

Non-Profit Organisations Act 71 of 1997

Invitation for comment on the proposed regulations within 30-days from the date of publication of this notice. GN3071 GG48096/21-2-2023.

Nursing Act 33 of 2005

Regulations relating to the distinguishing devices for nurses and midwives. GN3005 GG47983/3-2-2023.

Pharmacy Act 53 of 1974

Regulations relating to the election of members of the South African Pharmacy Council: Amendment. GN3000 GG47983/3-2-2023.

Protection of Personal Information Act 4 of 2013

Rules and procedure for referring complaints for a finding by the Enforcement Committee, 2023. GN3052 GG48062/17-2-2023.

Public Finance Management Act 1 of 1999

Draft National Water Resource Infrastructure Agency Bill: Extension for invitation for comment until 17 March 2023. GN3030 GG48017/10-2-2023.

Public Service Act, 1994 (Proclamation 103 of 1994)

Draft Public Service Regulations: For comment. GenN1631 GG48104/24-2-2023.

Rationalisation of Areas of the High Court

Extension for written submission until 28 February 2023. GN3063 GG48069/17-2-2023.

Social Assistance Act 13 of 2004

Amendments to the regulations relating to COVID-19 Social Relief of Distress: For comment. GN R3038 GG48056/14-2-2023.

Spatial Planning and Land Use Management Act 16 of 2013

Notice of the draft Eastern Seaboard Regional Spatial Development Framework. GenN1622 GG48091/20-2-2023.

Water Services Act 108 of 1997

The draft Water and Sanitation Services Policy on Privately Owned Land. GN3039 GG48057/15-2-2023.

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

Compiled by
Shireen
Mahomed

People and practices

Stegmanns Inc in Pretoria has two new appointments.



Marichelle Kuyper has been appointed as a Professional Assistant in the Commercial and Intellectual Property Law Department.



Tremayne Naicker has been appointed as a Professional Assistant in the Legal Recoveries and Construction Law Department.

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

Employment law update



By
Monique
Jefferson

Disciplinary action for testing positive for cannabis in the workplace

In *SGB Cape Octorex (Pty) Ltd v Metal and Engineering Industries Bargaining Council and Others* [2023] 2 BLLR 125 (LAC), an employee was dismissed for smoking dagga while at work. The employee was a supervisor, and his manager received a tip off that this employee had been smoking dagga on the premises. The employee was called to the manager's office and confronted with the allegation, but he denied smoking drugs. A blood test was then conducted and demonstrated that dagga was in fact present in the employee's bloodstream. The employee was also subjected to a second saliva test, which confirmed that he had tested positive for dagga. The employee was suspended and subsequently charged with testing positive for dagga. After a disciplinary hearing the employee was dismissed. The employee then referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). The CCMA found that the dismissal was substantively unfair and ordered reinstatement based on the following findings –

- the employee had pleaded guilty to smoking dagga after the test results;
- the employee had more than four years' service with the employer and had a clean disciplinary record;
- this was the employee's first offence;
- there was no evidence that the employer had suffered any prejudice or that the employee's conduct had prejudiced anybody's safety in the workplace;
- the employee had been promoted to a supervisor position;
- there was no reason to believe that the

employee would repeat the misconduct despite the fact that the employee said that he was addicted to dagga; and

- the relationship with the employer was capable of being restored.

The employer instituted review proceedings in the Labour Court (LC) but the LC dismissed the review application. On appeal to the Labour Appeal Court (LAC), the employer argued that dismissal was the appropriate sanction because the employee had been dishonest and there was a zero-tolerance policy in relation to the use of drugs in the workplace. The LAC considered the fact that the employee had initially denied smoking dagga until such time that he tested positive for dagga, which amounted to dishonesty. It did not agree with the CCMA that regard should be had for the fact that the employee pleaded guilty and remarked that this should be a neutral factor when the evidence against the employee makes the matter an open and shut case. Regarding the fact that the employee had a clean record and this was a first offence, it was held that the policy made it clear that a first offence could attract a sanction of dismissal. Furthermore, the employer had been consistent in imposing dismissal as a sanction for similar offences. In regard to the prejudice suffered by the employer, the LAC found that the employer had suffered prejudice because its rule had been breached. It was held that employers are entitled to adopt their own rules and establish a standard of conduct for employees. The rule in these circumstances was justifiable given the fact that the employees work on heights and the employee was working on the eighth or ninth level on the day in question. As regards the fact that the employee had been promoted to a supervisor position, this was actually found to be an aggravating factor as trust had been placed in him to ensure that rules are obeyed, and he should have been leading by example. Furthermore, the evidence suggested that the employee would commit the misconduct again in the future as on his own admission he was addicted to drugs. It was accordingly found that the employee was aware of the rule, such rule was reasonable and had been consistently applied and, therefore, dismissal was justifiable in the circumstances. The LAC was, therefore, of the view that the CCMA's assessment of this was matter was unreasonable. The appeal was accordingly upheld.

In *National Union of Metalworkers of South Africa obo Nhlabathi and Another v PFG Building Glass (Pty) Ltd and Others* [2023] 2 BLLR 142 (LC) two employees who were employed as operators were dismissed for misconduct based on testing positive for cannabis in the workplace. The employees were charged with testing positive for cannabis and pleaded guilty to the charge at a disciplinary hearing but argued that there was no rule against testing positive for cannabis in the workplace. The employees were dismissed and challenged the substantive fairness of their dismissal arguing that dagga is not a drug but is a herb and furthermore that the Constitutional Court (CC) in *Minister of Justice and Constitutional Development and Others v Prince (Clarke and Others as Intervening Parties, Doctors for Life International Inc as Amicus Curiae) and related matters* 2018 (10) BCLR 1220 (CC) had decriminalised the private use of dagga with the effect that the use of dagga is permissible and any employer policy to the contrary is unconstitutional. The procedural fairness of the dismissal was not challenged as a disciplinary enquiry had been convened. The employer argued that it had a zero-tolerance rule against mind-altering substances and that the disciplinary code provided for dismissal for a first offence of being under the influence of alcohol or drugs within the workplace. The reason for this rule was that the workplace is dangerous as there is a high proportion of gas, large forklifts, extremely hot processes, and dangerous chemicals. Furthermore, the employer has a duty to provide a safe working environment and it wanted to protect employees and equipment from the negative consequences that may flow from someone who is working under the influence of alcohol or drugs. There is also a risk that employees under the influence of alcohol or drugs will not be able to perform their duties to the required standards. The arbitrator upheld the dismissals.

On review, the Labour Court (LC) had to consider whether the CC rendered the employer's policy unconstitutional. The LC held that although the CC found that certain provisions relating to private use of cannabis infringed the right to privacy it still found that dagga was a harmful drug and it did not afford any protection to employees who infringe the employer's policies in relation to the use of such drugs. Therefore, the CC decision does not prevent employers from taking disciplinary action against offenders of their disciplinary codes. The LC further held that the normal mitigating factors do not apply to breaches of zero-tolerance policies that relate to health and

ers [2023] 2 BLLR 142 (LC) two employees who were employed as operators were dismissed for misconduct based on testing positive for cannabis in the workplace. The employees were charged with testing positive for cannabis and pleaded guilty to the charge at a disciplinary hearing but argued that there was no rule against testing positive for cannabis in the workplace. The employees were dismissed and challenged the substantive fairness of their dismissal arguing that dagga is not a drug but is a herb and furthermore that the Constitutional Court (CC) in *Minister of Justice and Constitutional Development and Others v Prince (Clarke and Others as Intervening Parties, Doctors for Life International Inc as Amicus Curiae) and related matters* 2018 (10) BCLR 1220 (CC) had decriminalised the private use of dagga with the effect that the use of dagga is permissible and any employer policy to the contrary is unconstitutional. The procedural fairness of the dismissal was not challenged as a disciplinary enquiry had been convened. The employer argued that it had a zero-tolerance rule against mind-altering substances and that the disciplinary code provided for dismissal for a first offence of being under the influence of alcohol or drugs within the workplace. The reason for this rule was that the workplace is dangerous as there is a high proportion of gas, large forklifts, extremely hot processes, and dangerous chemicals. Furthermore, the employer has a duty to provide a safe working environment and it wanted to protect employees and equipment from the negative consequences that may flow from someone who is working under the influence of alcohol or drugs. There is also a risk that employees under the influence of alcohol or drugs will not be able to perform their duties to the required standards. The arbitrator upheld the dismissals.

safety. Therefore, the length of service of the employees, a clean disciplinary record and whether or not the employees actually presented a danger on the day they tested positive was irrelevant because there was a zero tolerance policy. In this regard, it was found that the only test that would need to be applied to determine whether disciplinary action can

be taken in respect of breach of a zero-tolerance policy is whether:

- the employees were aware of the rule;
- whether the rule was consistently applied; and
- whether the rule was justifiable in the circumstances.

The employees were aware of the rule as they had received training on the pol-

icy. The dismissal was found to be fair in the circumstances and the review application was dismissed.

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



By
Moksha
Naidoo

The LRA v the CCMA Rules

Valinor Trading 133 CC t/a Kings Castle v CCMA and Others (LC) (unreported case no JR292/19, 3-2-2023) (Moshoana J)

Section 191(5A)(c) of the Labour Relations Act 66 of 1995 (LRA) states that unless a party has objected to a con-arb process, arbitration must commence immediately after conciliation.

Rule 17(2) of the Rules for the Conduct of Proceedings before the Commission for Conciliation, Mediation and Arbitration (the Rules) states that a party who wishes to object to the con-arb process, must file an objection seven days prior to the matter being set down for con-arb.

The question before the court was whether an objection filed within seven days of the con-arb, and thus in breach of r 17(2); can nevertheless be a lawful objection contemplated in s 191(5A)(c).

The applicant had a relationship with the third respondent (De Jager). On the applicant's version, De Jager was an independent contractor, while De Jager claimed to be the applicant's employee.

At the end of this relationship, De Jager claimed he was dismissed and referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). Con-arb was set down for 10 September 2018. On 7 September 2018, three days before the con-arb process, the applicant filed an objection to arbitration commencing immediately after conciliation. On 10 September 2018, the second respondent (the arbitrator) noted the objection to arbitration but found that because it was filed within

seven days of the con-arb process, it was not valid.

The arbitrator continued to arbitration and heard De Jager's claim in the absence of the applicant and, thereafter, delivered a default award.

The applicant's application to rescind the default award was dismissed (first rescission ruling). The applicant made a second application to rescind the first rescission ruling, which suffered the same fate (second rescission ruling).

The applicant approached the Labour Court to set aside both rescission rulings.

As stated, the question before the court was whether a commissioner could ignore the objection filed on the basis that it was filed in breach of r 17(2).

Having examined s 191(5A)(c), the court interpreted this section to mean that once a party objects to the con-arb process, then arbitration cannot commence immediately after conciliation. The section itself was silent on any time frame in which such an objection must be filed.

Importantly, any section must be interpreted within the prism of the constitution. Section 34 of the Constitution gives everyone, including the applicant, a right to have their dispute resolved by application of the law in a fair manner.

The court reiterated the point that the Rules cannot trump legislation. The Rules are there for the convenience of the court and not the other way round. Thus, a commissioner cannot be a 'captive of the time frames prescribed in the Rules' and in so doing, act contrary to what the LRA states.

The court held:

'Rules deal with form and the Act deals with substance. Substantively, the LRA does not allow arbitration to proceed where another party had objected. Rule 17(2) provides that a party that intends to object to a dispute being dealt with in terms of section 191(5A), must deliver a written notice to the Commission and the other party, at least seven days prior to the scheduled date in terms of sub-rule (1). Read within the context of the Rules and the LRA, it does not follow that a notice not given at least seven days renders the objection defective to a point of the objection being ignored. Any other reading rendering the objection ineffective will be in conflict with the clear provisions of the section in particular the phrase "in respect of which no party has objected".

...

Therefore, in my considered view, an objection equals no commencement of arbitration immediately. A party who objects acquires the right not to have the arbitration proceedings to commence. Such a right cannot be taken away by the Rules nor be ignored by a commissioner.'

The court went further to say that the Rules do not state that an objection filed within seven days of the con-arb is invalid, as what the arbitrator found.

When the arbitrator continued to hear the matter in default, he did not do so in terms of s 138(5) of the LRA, which gives a commissioner the discretion to continue the arbitration when the party who did not refer the matter, 'failed to appear'.

The court found that the applicant did not fail to appear at the arbitration, but rather the arbitration, in light of the objection, ought not to have commenced. Put differently, if the arbitration was unlawful, there cannot be talk about a failure to appear at the arbitration.

The result being that the arbitrator was not empowered by the LRA nor the Rules to continue to arbitration after the certificate was issued.

The court reaffirmed the view that when a commissioner exercises a statutory function, which a party feels aggrieved in respect of; then the appropriate remedy is to review the conduct of the commissioner in terms of s 158(1)(g) of the LRA. The applicant chose to rescind the default judgment.

Addressing the second rescission ruling, the court quickly disposed of the ruling on grounds that the arbitrator was *functus officio* in ruling on the second rescission application once he gave his ruling on the first application.

Regarding the first rescission application, on the notion that the arbitration was unlawful, it stood to reason that the arbitrator's rescission ruling was invalid in law and hence reviewable.

The court set aside both rulings and replaced them with a finding that the default award is rescinded.

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

By
Kathleen
Kriel

Recent articles and research

Abbreviation	Title	Publisher	Volume/issue
<i>ILJ</i>	Industrial Law Journal	Juta	(2022) 43 (2023) 44
<i>JLSD</i>	Journal of Law, Society and Development	University of South Africa Press	(2021) 8
<i>LDD</i>	Law, Democracy and Development	University of the Western Cape, Faculty of Law	(2022) 26

Climate justice

Nkrumah, BK 'Ecojustice: Reframing climate justice as racial justice' (2021) 8 *JLSD*.

Constitutional law

Ntsoane, L and Manthwa, A 'Succession to kingship in the Bapedi Ethnic Group – cultural intricacies of post-conquest South Africa and the impact of the Constitution' (2021) 8 *JLSD*.

COVID-19 pandemic

Du Plessis, W; Pienaar, JM, Koraan, R and Stoffels, M '2020 Measures to address violence and unrest in a time of COVID-19' (2021) 8 *JLSD*.

Lurie, L and Begas, RS 'Access to the labour courts in Israel during the COVID-19 crisis' (2023) 44 *ILJ* 51.

Mokofe, WM 'From precarity to pandemic: How the COVID-19 pandemic has exacerbated poverty, unemployment, and inequality in South Africa' (2022) 26 *LDD* 395.

Phillips, J; Makuwa, A and Gaibie, S 'COVID-19 mandatory vaccinations in the workplace: A developing jurisprudence' (2022) 43 *ILJ* 2163.

Tenza, M 'Investigating the possibility of dismissing an employee on account of breach of COVID-19 regulations' (2021) 8 *JLSD*.

Criminal law

Phooko, MR 'Existential threats to the International Criminal Court: Making sense of the convergence of disparate geo-political interests and ideological positions' (2021) 8 *JLSD*.

Customary law

Hassan, E 'African customary dispute resolution vs alternative dispute resolution for juvenile crime in Ghana' (2021) 8 *JLSD*.

Employment Equity Amendment Bill

Collier, D 'The Employment Equity Amendment Bill B14B – 2020: Innovating

towards equity or kicking the can down the road?' (2023) 44 *ILJ* 1.

Fiscal incentives

Oluyaju, O and Rotich, NC 'Fiscal incentives in Kenya's free zones: To what extent are they consistent with the WTO rules on subsidies?' (2022) 26 *LDD* 219.

International law

Bello, M and Snyman-Van Deventer, E 'Reconceptualising sovereign debt in international law' (2022) 26 *LDD* 250.

Judiciary

Bidie, S; Ntlama-Makhanya, N and Phe-la, A 'The role of the judiciary to construct a concise and balanced judgment on the right to life vis-à-vis economic life of persons: Some thoughts on *Mohamed v President of the Republic of South Africa* 2020 (7) BCLR 865 (GP) and *De Beer v Minister of Co-operative Governance and Traditional Affairs* 2020 (11) BCLR 1349 (GP)' (2021) 8 *JLSD*.

Labour law – discrimination

Van Staden, M and Boniface, A 'Pregnancy and marital status discrimination' (2022) 43 *ILJ* 1473.

Labour law – dismissals

Newaj, K 'The use of contractual recourse in dismissal disputes: Settling the dilemma' (2022) 43 *ILJ* 2189.

Labour law – equal pay

Coleman, TE and Mpedi, LG 'Towards the practical realisation of the concept of equal pay for equal work in Ghana: Some comparative lessons from South Africa and the United Kingdom' (2023) 44 *ILJ* 28.

Labour law

Smit, DM and Stopforth, G 'An overview of categories of vulnerability among on-demand workers in the gig economy (Part 1)' (2022) 26 *LDD* 364.

Property tax regimes

Botes, M 'Aantekening: Denkbeeldige insetbelasting op tweedehandse vaste eiendom: Te goed om waar te wees, of nie goed genoeg nie?' (2022) 19(2) *LitNet* 492.
Van Zyl, F and Fritz, C 'Different cities, different property-tax-rate regimes: Is it fair in an open and democratic society?' (2022) 26 *LDD* 311.

Public procurement

Vinti, C 'An evaluation of the "designation" of products, sectors and industry for local production and content under the Preferential Procurement Policy Framework Act 5 of 2000' (2021) 8 *JLSD*.

Refugee law

Nyakabawu, S 'Legal violence: Waiting for Zimbabwe Exemption Permit in South Africa' (2021) 8 *JLSD*.

SADC Tribunal

Shumba, T 'Rising from its ruins? The Southern African Development Community (SADC) Tribunal' (2022) 26 *LDD* 287.

Socio-economic rights

Majiedt, S 'Forum contribution: "Dreams and aspirations deferred?": The Constitutional Court's approach to the fulfilment of socio-economic rights in the Constitution' (2022) 26 *LDD* 1.

Transitional justice – Africa

Teshome, MZ 'Confronting past atrocities: A critical analysis of the defunct Ethiopian Reconciliation Commission' (2022) 26 *LDD* 342.

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

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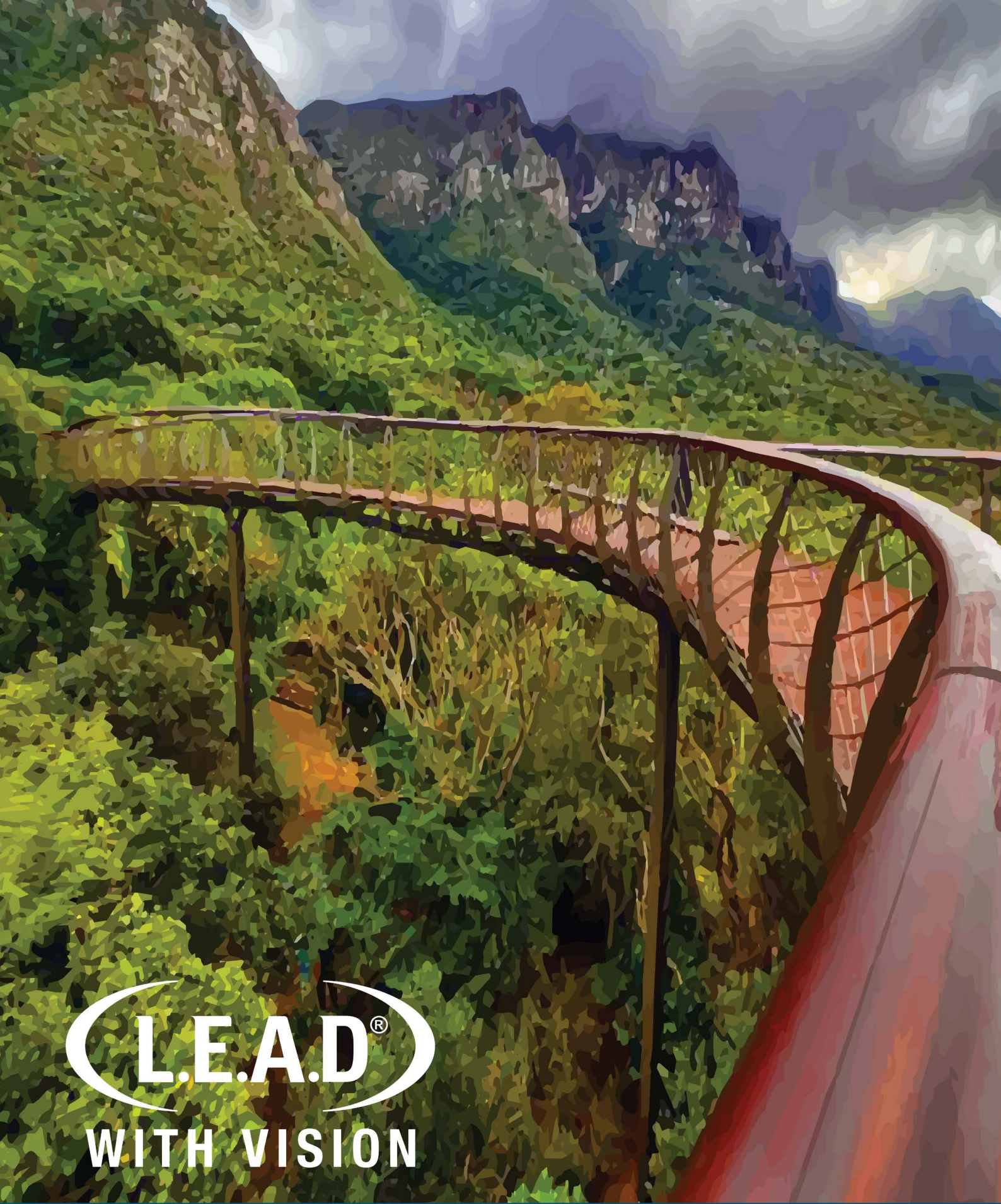
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Skype: Anthony V. Elisio

E-mail: avelisio@tin.it | anthonyvictor.elisio@gmail.com
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