

THE EVOLUTION OF DIGITAL SIGNATURES: DOES WET INK STILL HOLD WATER IN THE SALE OF IMMOVABLE PROPERTY?

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Young leader envisages a legal profession that will account to its members

Former President of LSSA calls on youth to be active within the organisation

Liability for refunds of legal fees, disbursements, or personal costs orders

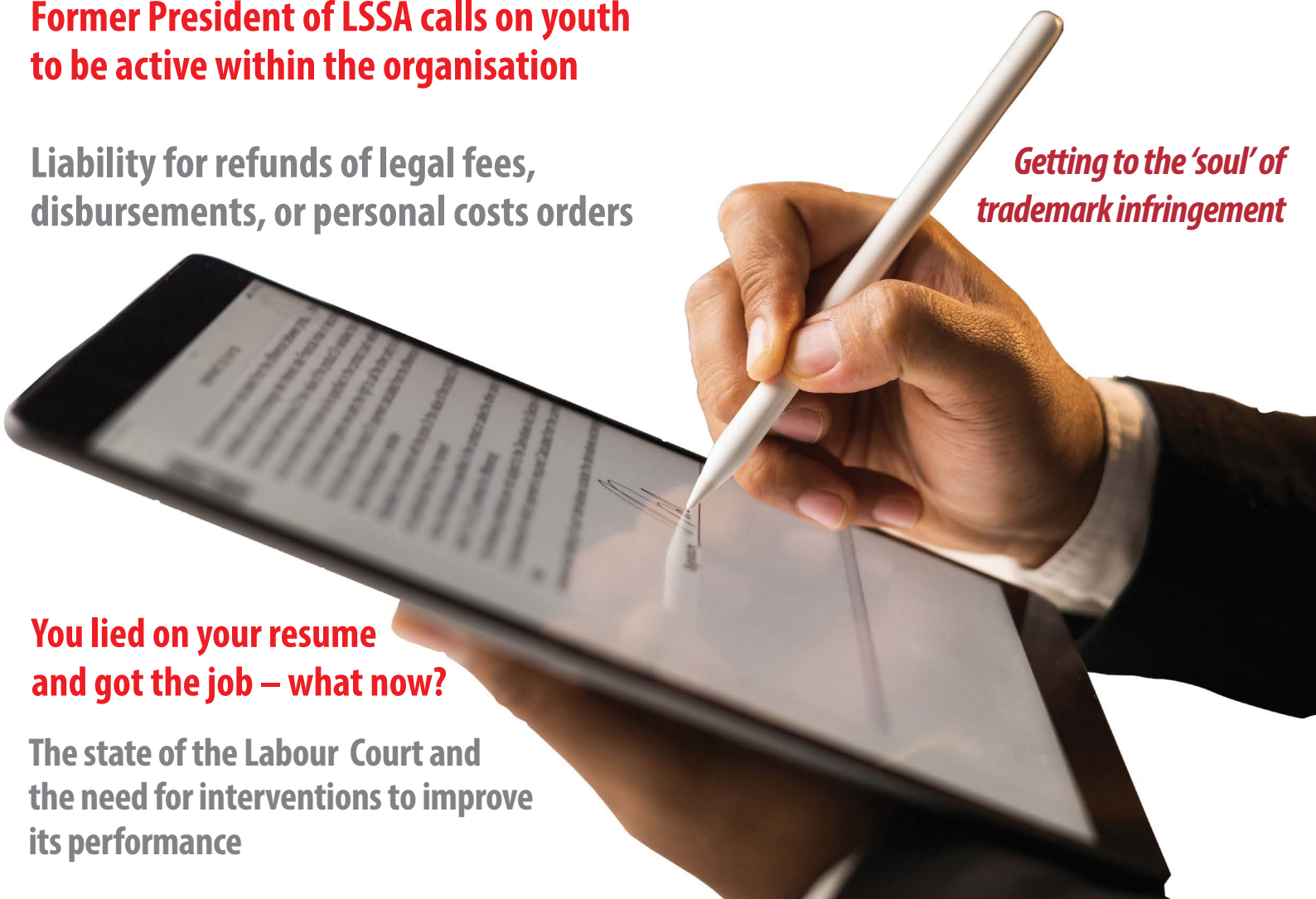
Calibrations and concentrations: Misconceptions of breath alcohol testing in the workplace

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20 The evolution of digital signatures: Does wet ink still hold water in the sale of immovable property?

Legal practitioner, **Stefan Le Roux** and candidate legal practitioner, **Celine Bakker** discuss the issue of using advanced electronic signatures for legally binding documents, specifically in the sale of immovable property. The Alienation of Land Act 68 of 1981, which was drawn up in 1981, required a physical signature using wet ink. However, with the rise of technology, the use of advanced electronic signatures for contracting has become more common. The Electronic Communications and Transactions Act 25 of 2002 has enabled electronic communications and transactions online for the past two decades, but it does not grant advanced electronic signatures legal status for the sale of immovable property. This creates a hurdle for modern-day business practices, as sellers and buyers still need to use pen and paper to sign documents. Mr Le Roux and Ms Bakker suggest that it is time for the law to adapt and adopt the use of advanced electronic signatures for the sale of immovable property.

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FEATURES

23 Young leader envisages a legal profession that will account to its members

In this new series of articles highlighting young thought leaders in the legal profession, we are featuring **Zincedile Monde Tiya**, a passionate legal practitioner based in Mthatha who is currently pursuing a Master of Laws degree at Walter Sisulu University. Mr Tiya is deeply committed to promoting transformation within the legal profession and plays an active role in it, which include serving on the National Executive Committee of the National Association of Democratic Lawyers, being a council member of the Southern African Development Community Lawyers Association, and acting as an alternate member of the House of Constituents for the Law Society of South Africa (LSSA). Additionally, Mr Tiya is involved in various Specialist Committees of the LSSA and holds positions on the Investigations and Disciplinary Committees of the Legal Practice Council in the Eastern Cape. Furthermore, he is an examiner for the Competency-Based Examination for Admission as an Attorney.

26 Are women still disadvantaged when it comes to s 7(3)(a) of the Divorce Act?

The High Court in *G v Minister of Home Affairs and Others (Pretoria Attorneys Association as Amicus Curiae)* [2022] 3 All SA 58 (GP) ruled that the Divorce Act 70 of 1979's cut-off date of 1 November 1984 was constitutionally invalid. The Constitutional Court (CC) has not yet reviewed the decision and retired legal practitioner, **Alick Costa**, discusses whether the CC should uphold the High Court's ruling. Mr Costa writes that women in many societies, including our own, continue to experience social and financial disadvantage solely because of their gender. Gender discrimination and unequal treatment persist in every aspect of women's lives, such as the workplace, land reform, and marriage. Taking that into account, Mr Costa writes that the universal partnership argument is not relevant to this case and should not be a reason for the CC to deny the court's order. Furthermore, the Divorce Act allows the courts to use their discretion when transferring assets, which is constitutional.

29 Calibrations and concentrations: Misconceptions of breath alcohol testing in the workplace

Alcohol is a substance that is widely accepted in society and is known to have negative effects on our physical and cognitive abilities. In South Africa, the levels of alcohol in one's blood or breath are regulated in the public domain, on public roads, and in workplaces where employees are responsible for tasks that require a high level of safety. In their article, legal practitioner, **JB Laurens**, and forensic toxicologist, **Dr Johannes B Laurens**, focus on the use of breath alcohol tests in the workplace. Mr Laurens and Dr Laurens write that one interesting issue that arises when dealing with alcohol-related cases is the difference in the standards of proof between civil disputes and criminal courts. The balance of probabilities standard used in civil disputes, which is generally considered to be a lower standard of proof, unfortunately results in alcohol test results of inferior quality being accepted in labour courts compared to the approach taken in criminal courts, which requires proof beyond a reasonable doubt.

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Technological advances in the legal profession

During the COVID-19 pandemic the world was reminded of the importance of leveraging technology as a tool to reach professional goals and objectives. The legal profession was no exception, as the profession had to figure out means to use alternative methods of practicing law when human contact was a risk. Technology has continued to develop in a post-pandemic world, with advancements that have the potential to improve or pose risks in the work conducted by legal practitioners.

Virtual courts have continued to be held, which proves that some technological lessons learned during the pandemic will continue in a post-pandemic world. Virtual courts assist with access to justice as the court rolls are lessened daily by virtual courts. Not to mention the fact that virtual meetings have also cut travel time for live meetings, however, some find these intrusive and have the potential of participants concentrating elsewhere during the meeting.

Artificial intelligence (AI) is a reality, which the legal profession cannot ignore. An article published in *De Rebus* on ChatGPT by Professor Michele van Eck (*Chatting with ChatGPT: Will attorneys be able to use AI to draft contracts?* 2023 (April) *DR* 12) details the fact that ChatGPT and similar chatbots have the potential of changing drafting practices. However, the fear that such technology will replace

legal practitioners as contract drafters is premature. In this current issue, Diana Mabasa writes '[Artificial intelligence (AI)] is pervasive. It is penetrating every area of our lives daily, almost minute by minute and, without being alarmist, conspiratorial, or fearmongering, the dangers of such explosive technology are real. That should not, however, deter the enormous potential it has as a revolutionary tool' (Diana Mabasa 'ChatGPT: Exploring the risks of unregulated AI in South Africa' (2023 (May) *DR* 17)).

In her article, Ms Mabasa makes an urgent call for a dedicated national AI strategy to address the ethical and social challenges that come with AI usage. She goes on to state: 'We need a legislative framework in [South Africa] that will put the necessary guardrails in place, educate the public and develop expertise in government to manage this technological avalanche. Without a legal regulatory framework, we will have to play catch-up with the rest of the world as technological advances race along at breakneck speed. The time for legislatures and policymakers to step in is now.'

There are various technology trends legal practitioners can use, these include:

- **Automation:** Automation can be done to reduce time-consuming administrative tasks by using tools such as e-mail templating for



Mapula Oliphant - Editor

example. Other areas, which can be automated, include data collection, reporting, daily tasks, and billing.

- **AI:** While this area is still unexplored in the legal industry, as mentioned in the above articles, it can be used to carry out repetitive tasks such as checking contracts for missing clauses.
- **Internet of things:** This developing technology allows objects used in our daily lives to be plugged into the Internet to provide real-time data. In other words, this is a network of interconnected devices that communicate with one another via a network, which can be used as evidence in legal cases.
- **Voice technology:** People usually speak faster than they can type, voice dictation and other voice assistants increase productivity because they type as a person speaks (Essential Tech 'Technology is changing the legal profession' (www.essentialtech.com.au, accessed 24-4-2023)).

New practice areas are directly derived from changes in the world, technology being one of them. Legal practitioners can look forward to new areas of work as technology continues to advance. The pitfalls are, however, that as much as technology advances, there will be opportunists who will find ways to breach any secure network. Legal practitioners are reminded to always be alert and read the following judgments: *Hawarden v Edward Nathan Sonnenbergs Incorporated* [2023] 1 All SA 675 (GJ) and *Hartog v Daly and Others* (GJ) (unreported case no A5012/2022, 24-1-2023) (Stroud J).

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: 22 May; 19 June; 17 July; and 21 August 2023.



By
Kgomotso
Ramotsho

Former President of LSSA calls on youth to be active within the organisation

The former President of the Law Society of South Africa (LSSA), Mabaeng Denise Lenyai, called on the legal profession's youth to join the LSSA Youth Forum. Ms Lenyai was addressing members of the LSSA at the Annual Conference and Annual General Meeting (AGM) that was held in Johannesburg on 24 and 25 March 2023, under the theme 'Committed to building a better legal profession for all'. She said that the youth should be vocal about how they want things to be done and should raise up their hands to lead this forum. Ms Lenyai challenged the youth to take the baton. She pointed out that many senior legal practitioners are ready to step down from their leading roles, however, she added that senior legal practitioners cannot step down if there is no one to handover to.

Ms Lenyai said they do not want to pick and point fingers at anyone, adding that that creates a problem, because there is no commitment and passion for those serving the LSSA and the legal profession. 'We need people with passion to serve, people who are going to have the commitment, because at the LSSA we work, we do not play,' Ms Lenyai said. She added that the senior practitioners are ready to groom younger legal practitioners, to assist with the management of the LSSA with corporate governance.

Ms Lenyai spoke about the South African Law Reform Commission Discussion Paper: Project 142: Investigation into Le-



Former President of the Law Society of South Africa (LSSA), Mabaeng Denise Lenyai called on the youth to join the LSSA's Youth Forum and to be active in the forum.

gal Fees – Including Access to Justice and other Interventions (Section 35 of the Legal Practice Act) and the draft Broad-Based Black Economic Empowerment Legal Sector Code of Good Practice (the Legal Sector Code). She pointed out that the Legal Sector Code submissions have been made and that the legal profession was waiting on the Minister of Justice to address them on when the implementation will take place, adding that the profession should join forces with the LSSA and the Legal Practice Council (LPC) to get further answers regarding the Legal

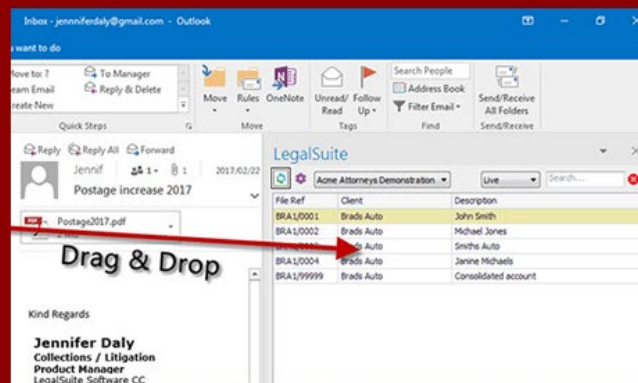
Sector Code. Ms Lenyai added that the LSSA has also engaged with the LPC, the Legal Practitioners' Fidelity Fund (LPFF) and the Legal Practitioners Indemnity Insurance Fund NPC (LPIIF), regarding the ways the legal profession can still deliver access to justice to the public, but also making sure that legal practitioners are able to put bread on the table for their families.

Ms Lenyai said that the LPC has increased its members fees, and the LPFF, LPIIF are intending to start levying legal practitioners before the end of 2023 for professional indemnity (PI) cover. Ms Lenyai added that the LSSA is engaging with those organisations to discuss the levy. Ms Lenyai said that members should engage with the LPFF and LPIIF to plead that the amount is not too high as this would cause some legal practitioners to close their law firms.

Ms Lenyai also touched on the work that is done by the LSSA Women's Task Team, dealing with issues that female legal practitioners deal with, such as among others, skewed briefing patterns. She said that the LSSA has distributed a survey for female legal practitioners to answer, however, she pointed out that they are not getting feedback from female practitioners. She urged them to participate in the survey so that the LSSA Women's Task Team will know on which issues to assist female practitioners. She added that the Institute for African Women in Law would like to partner with the LSSA in their efforts in trying to find

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Minister of Justice and Correctional Services, Ronald Lamola was the keynote speaker at the Law Society of South Africa's Annual Conference and Annual General Meeting, which was held on 24 and 25 March 2023.

ways to make it easier for female legal practitioners to stay in the legal profession and rise to the top.

Ms Lenyai spoke about the sustainability issues within the LSSA and said the House of Constituents (HoC) has decided that the LSSA will start collecting a member's fee from its members. She announced that the National Association of Democratic Lawyers (NADEL) and the independent structures have agreed, and they are willing to be levied by the LSSA at the proposed amount of R 300 per person per annum. She pointed out that the Black Lawyers Association (BLA) is still engaging with the proposal.

To download the LSSA's annual report, visit www.LSSA.org.za.



Chairperson of the Legal Practice Council, Janine Myburgh, discussed the future of the legal profession.

Keynote address

Minister of Justice and Correctional Services, Ronald Lamola, delivered the keynote address at the AGM. He told members that he was aware of the challenges that the legal profession is facing, one of which, is loadshedding. Mr Lamola said loadshedding is not only affecting legal practitioners, but also the operations of the courts, livelihoods, and social lives of the country. He added that it is an existential challenge that the president has identified as an existential crisis. He said he was aware of the impact it has on small law firms and operations of the courts. He pointed out that the Department of Justice is engaging with the new Minister of Electricity, to see whether they can exempt courts from loadshedding. He added that the Department of Justice is also engaging with the Department of Public Works and Infrastructure on alternative sources of energy for the operations of some courts. He said the reality is that they cannot do it for every court in the country.

Mr Lamola said that he is aware of the challenges at the Master's Office, which the legal profession has been raising. He added that they are looking into those challenges. He pointed out that they have come to the conclusion that they can help to provide efficiency in the Master's Office through modernisation, digitisation, and the filling of vacancies in that office. Mr Lamola pointed out that there has been a back and forth on some regulations regarding the Legal Practice Act 28 of 2014 (LPA). He mentioned that the Legal Sector Code also had to be promulgated in terms of the Broad-Based Black Economic Empowerment Act 53 of 2003. He said the Legal Sector Code is with the Department of Trade, Industry and Competition, ready to be gazetted. He pointed out that he has seen the letters from the LSSA, BLA and NADEL regarding the Legal Sector Code and he has forwarded the letters to the relevant people. He added that he also has written a letter of support for the Legal Sector Code to be promulgated.

During the question-and-answer session with Mr Lamola, LPC Council Member, Busani Mabunda, said that Mr Lamola should use any other means to influence the promulgation of the Legal Sector Code because nothing has been done with the document currently. Legal Practitioner, Zuko Tshutshane, asked Mr Lamola about a regulation in the LPA that deals with practical vocational training (PVT), which he said is silent in providing an extension once the two years end like it was in the Attorneys Act 53 of 1979. He added that he was of a view that there was a proposal for an amendment to have a six-month grace period once PVT ends for a candidate legal attorney



Legal Ombudsman, Judge Siraj Desai attending the Law Society of South Africa's Annual Conference and Annual General Meeting.

that has not yet finished writing their examinations. He said that it is important to amend that regulation.

The future of the legal profession

During her speech, the Chairperson of the LPC, Janine Myburgh, said that when the LPA was introduced many people were asking how the future of the legal profession was going to be affected and regulated. She said that a few years down the line, many would agree that there has been a significant change of direction in the workings of the LPC. She added that she was encouraged that the profession has been engaging the LPC, raising issues and taking up invitations to play roles in advancing the legal profession.



Legal practitioner, Athi Jara, gave her view on climate change and how it is the biggest humanitarian crisis currently.

Ms Myburgh said while the change brought by the LPA may still be difficult, time has given the profession the opportunity to adjust to these changes. She added that COVID-19, among many other challenges, has given the profession the opportunity to reflect. She said the legal profession is forced to review and come up with ways of practicing and doing business. She added that legal practitioners continue to learn the important lessons of the need for good relationships and positive engagements within the profession, key stakeholders, including the public they service.

Climate change is the biggest humanitarian crisis

In a panel discussion on environmental and climate issues, legal practitioner, Athi Jara, said that SA's Climate Change Bill B9 of 2002, recognises that any policy must be integrated with economic development, which will be done in an environmental and socially conscious manner. She pointed out that the Bill is divided into categories. The first category being policy alignment for climate change litigation by government institutions. It then looks at the response by provinces and municipalities, as well as the strategic national adaptations strategies. She noted that the Bill obliges the Minister to set out a greenhouse gas emission trajectory for SA and to provide for national emission reduction targets. She said this is binding on organs of states and private persons as representatives of legal entities.

In his presentation, panellist and legal practitioner, Ilan Lax said there are talks around climate justice that the developing nations have been the main drivers of climate emissions and it is those developing nations that have produced the carbon base that is changing the climate rapidly. He pointed out that when there are extreme weather impacts, those impacts happen and affect vulnerable nations, particularly in poor areas, and that is why it is called injustice. He added that climate justice is the way to see legal practitioners deliver litigation, adaptation and so on to the poorest of the poor.

Panellist and legal practitioner, Ugeshnee Naicker said climate change is the biggest humanitarian crisis and a threat to humanity. She added that there is overwhelming scientific evidence that supports the position that climate change is a result of human activities and the burning of fossil fuels. She pointed out that the climate crisis has already begun, and low-income countries are already facing the extreme effects of it. She said climate justice links human rights, human development, and climate action. She added that achieving climate justice means understanding the contribution to



Legal practitioners, Diana Mabasa and Azhar Aziz Ismail, discussing technological disruption in legal practice at the Law Society of South Africa's Annual Conference and Annual General Meeting.

carbon emissions by developed nations versus the developing countries.

- Visit www.LSSA.org.za to view Ms Jara and Mr Lax's presentations.

Technological disruption in legal practice

In a panel discussion on technological disruption in the legal practice, legal practitioner, Krish Govender, said it is important for South Africa (SA) to be on guard and to be careful because the Constitution, the values and ethos that SA has embodied, are driven with the purpose of growing a caring society and one hopes that artificial intelligence (AI) would be rooted in promoting a just society. He added that the idea of speaking about AI might be very technical and informative, however, he said it is not in SA's control but coming from elsewhere. He asked if these creations will work for the continent of Africa, will they serve the constitutional values and the ethos

that SA want, such as *ubuntu* and gender equality. 'We are facing the world that is a pretty bad place. Where we know, South Africa, in itself, has the highest level of inequality and that is a serious issue to be taken in the context of the whole world,' Mr Govender said.

Mr Govender noted that society is living in dangerous time, that the smart thinkers of the world are among smart criminals, that they can hack into any system, he said that if there is a firewall there is a, smarter, more creative, clever thinker who can break that firewall.

The second presenter, legal practitioner, Diana Mabasa said that it is not about disruption and automation, but it is about innovation. She asked legal practitioners at the AGM how are they going to innovate going into the future, what is it that they going to do different? She said they must look at how technology is going to change their lives.

The third presenter, legal practitioner, Azhar Aziz Ismail said McKinsey did a survey and that 22% of a legal practitioner's job and 35% of a paralegal's job can be automated. He pointed out that legal practitioners do not need to be scared and worried, but only need to look at regulations on how this can impact legal practitioners.

- See Ms Mabasa's article 'ChatGPT: Exploring the risks of unregulated AI in South Africa' on p 18.

Looking at legal education through a transformed lens

In a panel discussion on 'Legal education: The winds of change - a new paradigm for legal education', Mr Mabunda said the LPC is statutorily empowered to deal with issues of legal education in this country, dealing with training of both attorneys and advocates. He added that the LSSA is one of the stakeholders the LPC takes seriously due to its history. He said it is the mandate of the LPC to ensure the



Panellist and legal practitioner, Professor Sizwe Snail ka Mtuze; Judge Mokgere Masipa; and legal practitioner, Etienne Barnard, presented on the topic 'Preparing legal practitioners for change'.

objectives of the LPA through the LPC are fulfilled.

Legal practitioner, Prof Clement Marumoagae, said that there have not been engagements on what legal education in the context of South Africa is. He added that currently there are two groupings who have a stake in the legal education, namely law teachers and legal practitioners. He pointed out that there are people saying that the duty to teach people the law and to make them practice are law teachers, and the law teachers say they cannot teach people law and preserve them to the profession. He added that the discussion that must be held is who must play a role to make sure that candidate legal practitioners are ready and are able to enter the legal profession.

Prof Marumoagae said that there should be a day where there will be a serious debate as to the respective roles in the legal education system and looking at it from a transformed lens, to see what can be done collectively, to ensure that at the end of the day, competent legal practitioners are produced, who can be fit for purpose. He pointed out that the debate is not happening. He challenged the LPC to engage that question and realise as to what can be done to ensure that justice is done to legal education.

Professor Michele van Eck made a presentation on the Legal Education Ecosystem, which focussed on –

- influences in the legal education ecosystem;
 - purpose of the legal education ecosystem; and
 - changing landscape of legal education.
- Read the full presentations at www.LSSA.org.za.

Preparing legal practitioners for change

In a panel discussion on preparing legal practitioners for change, panellist and legal practitioner, Professor Sizwe Snail ka Mtuzi asked where exactly the legal profession is with cyber law. He said that ten years down the line as a practicing legal practitioner if one does not know what cyber law is, one should not be practicing



The Law Society of South Africa's newly elected office bearers, Vice President Mabaeng Denise Lenyai, President Eunice Masipa, and Vice President Joanne Anthony-Gooden.

law, because there are so many aspects related to the law that intersects with cyber law. He added that cyber law can deal with telecommunications and can even deal with risk at one's practice. He pointed out that cyber law or ICT law is here and now in the practice of law.

Judge Mokgere Masipa said because of the continuous changes in cyber law, it is essential that there is continuous training and education offered to legal practitioners and some form of compulsory education, because of the risks associated with technology.

Legal practitioner, Ettienne Barnard, said that there should be extra provisions made for energy and how to deal with power outages. He said legal practitioners must build trust, as courts have to rely on them. He said practitioners need to go back to basics.

Question and answer session

During the question-and-answer session regarding the president's report, legal practitioner, Noxolo Maduba-Silevu, commented on the composition of the LSSA's constituent members and the representa-

tion of women within its structures. She said that she applauds NADEL for having 50/50 male and female representatives, whereas other constituent members of the LSSA do not have such representations from the structures. Ms Maduba-Silevu said the LSSA must put systems in place and insist on making sure that the representation is 50/50. In her response, Ms Lenyai said that most female legal practitioners do not raise their hands when invitations are open. She added that the legal profession should create a safe space for them to be able to raise their hands.

Legal practitioner, Kathleen Dlepu asked Ms Lenyai whether the LSSA will be joining other stakeholders in taking the matter of Legal Sector Code to court should they not be promulgated. Ms Lenyai said she will take the question back to the LSSA's HoC, but she is positive that the LSSA will support the matter.

Legal practitioner, Nkosana Mvundlela noted that not much had been said on the budgeting of the services that the LSSA wanted to render to the members of the profession as noted in the LSSA's Member Benefits Handbook and its pos-



Delegates who attended the Law Society of South Africa's Annual Conference and Annual General Meeting.



Manager of Library Services at the LPC law library, Thembinkosi Ngcobo said the law library was given the mandate to facilitate easy access to up-to-date legal information for legal practitioners.

sible costing. He asked if that would extend to the LSSA assisting members, especially up and coming law firms of junior legal practitioners, in relation to their audits and so forth. Ms Lenyai responded that the LSSA will intensify and improve on the roadshows that members can be engaged in the services the LSSA offers. She added that in the handbook there is more information with regards to members' benefits.

- To download the LSSA's Member Benefits Handbook, visit www.LSSA.org.za.

A word from the incoming President

During the elections of office-bearers, the independent constituency nominated Joanne Anthony-Gooden as the first Vice President of the LSSA. Ms Anthony-Gooden accepted the nomination.

The BLA nominated Ms Lenyai for the second Vice President seat. Ms Lenyai accepted the nomination.

NADEL nominated Eunice Masipa, as the President of the LSSA. Ms Masipa accepted the nomination. In her speech the newly elected President of the LSSA, Ms Masipa thanked Ms Lenyai. She added that the attendance of the AGM was outstanding, and a clear indication of the hard work Ms Lenyai has done together with committee and management at the LSSA. She pointed out that the numbers show that the members are interested in what the LSSA does, and they can see what the LSSA can do for them. Ms Masipa expressed her gratitude to NADEL. She vowed to lead by example and work tirelessly to foster a united organisation that prioritises the advancement of the legal profession and the sustainability of

the LSSA.

Ms Masipa added that she is committed to leveraging her experience and skills to steer the LSSA towards success and growth. She pointed out that since the LPA was enacted, the LSSA has repositioned itself as a member's interest organisation with the aim of representing the legal profession, ensuring the rule of law through fair and efficient administration of justice. She added that the LSSA's vision is to empower legal practitioners to deliver exceptional legal services to the community in a professional, ethical, and competent manner. She said that the LSSA will continue to maintain communication with stakeholders to address any challenges that legal practitioners may encounter.

Happenings on day two of the AGM

On the second day of the annual conference and AGM, Manager of Library Services at the LPC law library, Thembinkosi Ngcobo said the law library was given the mandate to facilitate easy access to up-to-date legal information for legal practitioners and candidate legal practitioners. He shared some of the services that the library offers and announced that the library now holds webinars for information sharing sessions, which are in partnership with organisations such as the LPFF.

- To view the presentation by Mr Ngcobo, visit www.LSSA.org.za.

A word from the LPFF

LPFF Chief Executive Officer, Motlatsi Molefe said that when he first started out as a young legal practitioner, he understood that to be a legal practitioner, meant that he was not just in a career, but in a career that is supposed to make



Legal Practitioners' Fidelity Fund Chief Executive Officer, Motlatsi Molefe, said the Fund exists to support confidence in the legal profession by users of legal services.



Incoming President of the Law Society of South Africa (LSSA), Eunice Masipa, thanked Ms Lenyai for the work she did as outgoing President of the LSSA.

one wealthy. He added that like many others, he unfortunately discovered that being a legal practitioner does not necessarily translate into wealth, and sometimes it takes one through the path of difficulty. Mr Molefe said that it is in that moment that one needed to decide whether it was worth being a legal practitioner or not. He pointed out that if one stands the test of time, that is when they become a legal practitioner, because it is a calling.

Mr Molefe said that the Fund exists to ensure that legal practitioners' clients get assurance that if legal practitioners do things to reach wealth in a manner that is not acceptable, clients should know that they would not be left without recourse. He added that the Fund exists to support confidence in the legal profession by users of legal services.

Mr Molefe pointed out that the Fund exists to support the notion that this is a profession that simply does not seek to take away only from the public, but also seeks to invest in the public through the investment of whatever loses the public suffers. But also, through initiatives such as offering bursaries, he said this is necessary in a country like SA where there is so much inequality in access to resources.

The services that the LPIIF offer

LPIIF Managing Director, Sipho Mbelle, told attendees that the LPIIF does not exist for profit. He said that they are an insurance that provides PI for legal practitioners practicing with a Fidelity Fund Certificate (FFC). He pointed out that SA has two layers of PI cover, and the LPIIF runs one that is called the base layer, which covers a firm up to R 3,125 million.

He said that the base layer is compulsory.

Mr Mbelle pointed out that when the LPFF pays for the premium, it pays for every legal practitioner that has an FFC. He said that the LPIIF exists so that if a legal practitioner makes a mistake, clients will be able to be compensated, adding that it continues to generate confidence in the legal profession. He detailed the services that the LPIIF offers. He said that

the LPFF has been paying for the premium of the LPIIF, however, he pointed out that, that will change as legal practitioners will pay in future. Mr Mbelle added that they are still engaging with legal stakeholders regarding the matter and to discuss ways the change will not threaten the sustainability of law firms.

Services that the LPIIF offer are –

- PI insurance;
- executor bonds;

- prescription alerts;
- risk management; and
- practice support.

After formal proceedings members had a swift networking session, to engage with the young legal practitioners.

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

Photos from the AGM



By
Haroon
Aziz

The struggle for transformative constitutionalism continues

The Department of Justice and Constitutional Development (DOJCD) held the National Conference on the Constitution: Reflections and the Road Ahead on 22 – 24 March 2023 in Johannesburg. It aimed to advance transformative constitutionalism, the rule of law, economic transformation, and respect for human rights and freedom.

Its foci were on the –

- transformation and building of an independent and resilient judiciary;
- transformation and growing the economy as a constitutional imperative;
- progress on land reform, restitution, and distribution;
- governance and electoral reform; and
- effectiveness of constitutional and independent statutory bodies in strengthening constitutional democracy.

It invited the widest possible segments of society to participate in-person or online. Its inclusiveness showed that law and justice matter to all citizens.

President Cyril Ramaphosa in his opening address referred to the ‘transformational promise’ of the prescriptive and purposeful constitution and its historical context.

The promise interweaves –

- social and economic justices;
- societal and economic transformation;
- termination of human suffering and injustice;
- poverty alleviation;
- land restitution and agrarian reform;
- delivery of socio-economic services;
- healing of psychological wounds;
- enforcement of popular will;
- law and morality, ethical leadership;
- building of national unity through diversity; and
- the promotion of languages, cultures, and religions.

As the Constitution is more than the supreme law it simultaneously rejects the past and envisions a just future. Its promise places historical responsibility on all citizens and their respective leaderships to participate in the transition from the traumatic past into the future through the eye of the painful present.

Because the Constitution is the supreme law, we ask what constitutes the core of judicial transformation from Apartheid injustice to constitutional justice?

The Judge President of the Gauteng Di-

visions of the High Court, Judge Dunstan Mlambo attempted to answer this question. On 24 March 2022, he delivered the 16th Annual Human Rights Law Lecture at the Stellenbosch University Law Faculty. The topic was ‘Transformative Social Change and the Role of the Judge in Post-Apartheid South Africa’.

Against the background of factionalised political attacks on the judiciary he highlighted policy deficiencies. ‘One searches in vain for policies and other transformative problems that have been stymied by the courts. All that the courts have done is to point to deficiencies in policies that have come before and referred these back for improvement in line with constitutional dictates,’ he said.

He pointed out that the failings of the transformative agenda are located in the constitutional governance framework. He said, ‘currently, there are themes that seek to suggest that our Constitution has been a failure in that it has not resulted in better living conditions for the poor masses; there are themes that suggest that judges and courts have become a “Juristocracy” that impedes the socio-economic development of the poor masses; there are yet other themes that suggest that courts and judges, unelected as they are, have become too powerful and must be reined in and that South Africa could do better under a parliamentary supremacy framework.’

He pointed out that predominantly party-political members, MPs, and their like propagate such themes and ‘openly decry the power of judges and courts.’

The state is the duty-bearer for the translation of transformation into ‘social and economic parity and development’. As such it ‘must adopt rights-informed legislation and social justice policies that follow a distributional pattern of focusing on the poor and ensure the availability of financial and human resources for the implementation of such policies.’

The solution to developmental problems requires a return to constitutional principles and deliverables. He said that the Constitution is human rights-based and future-focused with provision of developmental tools to advance the constitutional project. He warned that political hostility towards the courts and judges would delegitimise the courts and ‘sound the death knell to our constitutional transformative project as a nation.’

He said that it was not the judiciary’s

fault that South Africa’s constitutional transformative agenda has failed.

Like politicians, judges, and magistrates, too, need to have their performance measured, held accountable, and judged whether they should continue to hold judicial office. The days of Apartheid when they appeared to embody the cult of angelic icons, aloof from society are over. But for this to happen the judiciary, magistracy, and legal community, must create a new legal culture and mind-set, inductively, from within the profession, with civil society participation. A grey area of legal justice is the application of the law of inferential evidence, which involves human subjectivity. Ethical mode of thinking and acting requires the dropping of perceptual bias that favours the dominant faction in government. It is an area where judges and magistrates can assert the true independence of the judicial mind, fearlessly. It is where the cultivation of a new legal culture, immersed in the wider culture of democracy can be cultivated and public trust in the justice system can be optimised. Public participation is the necessary condition for the ongoing development of transformative constitutionalism.

Small firms of attorneys are naturally doing community work on the ground, which is spread far and wide thinly. While retaining their decentralised nature such work should be institutionalised as corporate social investment (CSI) to broaden the new legal culture and its democratic values. The DOJCD should consider accelerating this CSI in motion incrementally and nationally as a follow-through on its National Conference – beyond a once-of event as a process of societal change. Change owned by the community cannot be defeated.

Judge President Mlambo referred to Karl Klare’s article titled ‘Legal culture and transformative constitutionalism’ (1998) 14 *South African Journal on Human Rights* 146 that invites a new imagination, self-reflection, and the need to revise judicial methodology and judicial mind-set to promote the culture of democracy. Otherwise, the traditional legal methods with its inbred formalism of legal culture would slow down social and legal transformation. This requires reworking the common law and the legal infrastructure to which the constitution is alive and prevents the rigging of the ‘constitutional superstructure onto a

common and customary law base inherited from the past and indelibly stained by Apartheid' (DM Davis and K Klare 'Transformative constitutionalism and the common and customary law' (2010) 26 *South African Journal on Human Rights* 403). It becomes the legal duty of judges, magistrates, attorneys, and advocates to promote constitutional values through which human dignity, equality, and freedom inhere as democratic values.

Judge President Mlambo refers to s 39(2) of the Constitution and points out that the courts are obliged to promote the spirit and objects of the Bill of Rights and to s 8(3)(a) that obliges judges to 'develop the common law and fill gaps in the legislation to give effect to the rights enshrined in our Constitution.'

He says, 'judges under a transformative constitutionalism must not shy away from developing the common law, given that they are both authorised and bound by a constitutional injunction to fulfil the constitutional vision.' He also refers to s 172 of the Constitution and said: 'That section mandates and authorises judges to strike down any law or conduct that does not comply with the Constitution.' This is necessary to bring about a socially and economically transformed society. Judges are obliged 'to develop new methods for approaching adjudication and new criteria for resolving common law questions.'

There was an economic context to the adoption of the Constitution. The African National Congress (ANC) had come into power based on its Reconstruction and Development Programme (RDP), which was its mandate from its poverty-stricken constituency in 1994. In government it developed the White Paper on Reconstruction and Development in 1994. It reneged on this mandate and, as the all-powerful executive it unilaterally adopted the International Monetary Fund (IMF) and World Bank (WB) structural adjustment programme known as Growth, Employment and Redistribution (GEAR) in 1996. The RSA Constitution was also adopted in 1996.

This reneging is the source of the alienation that set in between the ANC and its constituency. While GEAR aimed theoretically to create macroeconomic stability it created social instability by arbitrarily cutting down on social spending.

Within a decade GEAR proved to be an economic and social failure. The ANC in government, again, without a mandate from its poverty-stricken constituency adopted a new economic policy called Accelerated and Shared Growth Initiative for South Africa (AsgiSA) in 2005. Within five years AsgiSA proved a failure. The ANC prematurely replaced President Thabo Mbeki with President Jacob Zuma as the State President. Zuma replaced

AsgiSA with his New Growth Path (NGP) in 2010. Within three years NGP proved a failure. The ANC Mangaung Conference adopted a new economic policy known as National Development Plan (NDP) in 2012. The ANC in government introduced NDP in 2013.

All four plans – GEAR, AsgiSA, NGP, NDP – failed because they were implemented according to IMF and WB prescription that compelled the ANC government to cut down on social spending as arbitrary percentages of the gross domestic product. This is the source of government failure to deliver on its constitutional mandate as enshrined in s 27 of the Bill of Rights. The government is pre-armed with a legal defence in terms of s 36(1) on the 'limitation of rights'. This means that the poor must provide for their social needs by themselves. Otherwise, the government provides minimally for education, health, housing, social grants, security, electricity, water, and sanitation. Its failure to deliver the socio-economic benefits of the 'national democratic revolution' (NDR) has resulted in rapid decline in its electoral support. Also, it had failed to mobilise expertise to manage a modern industrialised nation-state with the capacity for socio-economic delivery. NDR degenerated from a 'revolution' into a weak reform that favoured those who could afford human rights to provide for themselves.

These plans failed to attract foreign direct investment for productive investment in the real economy with sustainable long-term job creation. They attracted portfolio investment for short-term profits on the under-taxed JSE casino.

Unbearable levels of Eskom blackouts since 2007 have beset the country with unnecessary problems because the ANC came into power without an energy policy. In power it hired different consultants to develop a few policies, all of which could not be implemented because they were based on false assumptions. The blackouts, aside from damaging the economy violate human rights because they cause deaths in hospitals, labour pains of women giving birth are compounded, patients on oxygen support suffocate, lessons at public schools are stopped, police stations fail to provide safety and security, and justice is delayed at law courts.

The governance framework shows systemic failures or deficiencies in government policies.

The national government at the pinnacle of power must take basic and ultimate responsibility for failure in delivering socio-economic benefits to the people as part of its constitutional mandate. Thereafter, pro-rata shares of irresponsibility may be cascaded to provincial and local governments, state owned

enterprises, and judiciary. National government means Parliament, National Council of Provinces, Executive, and all coercive organs of state power.

It should stop wasting time and money in finding loopholes in the constitution to rationalise its multiple failures.

It must educate its servants on liberation values as a precondition for their employment as its 'public representatives' who should also be trained in the design of new policies, which include social justice as the central axis of transition from the past to the future. They should be trained, firstly, in preventing threats to democracy and political and social stability. This means that they should not themselves pose such threats through dereliction of constitutional duty. The policies should prioritise the interests of women, youth, workers, peasants, unemployed, and the environment.

Civil society is highly aware that the constitution by itself cannot fail. It fails only if an apathetic electorate allows its lazy 'public representatives' to make it fail.

While politicians speak of a 'developmental state' they have failed to define it and set out its terms of reference, for which they should be held accountable and as an objective measure against which their performance should be evaluated and as a determinant whether they should continue to hold political office. The political failure to define obstructs the definition of transformative constitutionalism. This makes it difficult to meet the objective standard of interpretive fidelity.

Government should realise that 'foresight prevents blindness'.

Haroon Aziz is a retired physicist, author, and researcher and is part of the leadership collective of the Apartheid Victims' Families Group.



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By
Thomas
Harban

Liability for refunds of legal fees, disbursements, or personal costs orders

There are many instances where a legal practice will be called on to make payment to a former client or other third party in circumstances that will not be covered by a professional indemnity (PI) insurance or other policy. This article highlights two such instances, namely –

- claims for refunds of fees or disbursements (trading losses); and
- punitive costs orders made against the practice when acting as a legal representative in litigation.

I highlight these two instances as they are very commonly notified to the Legal Practitioners Indemnity Insurance Fund NPC (the LPIIF).

Trading debts

The LPIIF receives numerous claim notifications from legal practitioners where a former client or another third party seeks to recover legal fees or disbursements that had been paid to the practice. Claims for refunds or recoveries of fees or disbursements are trading debts and excluded from the indemnity provided under the LPIIF policy. The LPIIF have been notified of claims where, for example, the entity that had paid the fees or disbursements to the practice is in liquidation and a recovery of the money paid to the firm is sought on the basis that it is a voidable disposition. In other instances, the relationship between the firm and the erstwhile client has broken irretrievably and the latter seeks a refund of money that had been paid to the former. Whatever the trigger is for the claim for the refund of fees or disbursements, the LPIIF policy, like many other PI insurance policies, will not respond to such claims as they are regarded as the trading debts of the practice and thus excluded. PI insurance policies primarily cover the liability of the insured legal practices in respect of claims for damages suffered by the claimant in course of the practice conducting legal services where a cause of action is made out against the practice for contractual or delictual liability. In other instances, the claim against the legal practice is framed as a breach of a fiduciary duty it had to the claimant. PI insurance policies are

aimed at covering claims for compensation for the losses suffered by the claimant and not at indemnifying a legal practice for its own business losses.

Trading debts in the context of a PI insurance policy do not have the same meaning as that ascribed to the term in an accounting or other business sense.

The LPIIF Master Policy is available online at www.lpiif.co.za. The policy defines a trading debt as follows:

‘XXVII Trading Debt: A debt incurred as a result of the undertaking of the **Insured’s** business or trade. (Trading debts are not compensatory in nature and this policy deals only with claims for compensation). This exclusion includes (but is not limited to) the following:

- a) refund of any fee or disbursement charged by the **Insured** to a client;
- b) damages or compensation or payment calculated by reference to any fee or disbursement charged by the **Insured** to a client;
- c) payment of costs relating to a dispute about fees or disbursements charged by the **Insured** to a client; and/or
- d) any labour dispute or act of an administrative nature in the **Insured’s** practice’ (emphasis in the original).

The trading debt exclusion in the LPIIF policy is framed as follows:

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

- a) arising out of or in connection with the **Insured’s Trading Debts** or those of any **Legal Practice** or business managed by or carried on by the **Insured**.’

Many of the PI insurance policies available in the commercial market have framed their exclusions of trading losses in a similar manner to LPIIF policy.

Punitive costs orders

The LPIIF policy also excludes liability for punitive costs orders made against legal practices. Clause 16(g) of the policy excludes any liability ‘arising from or in connection with any fine, penalty, punitive or exemplary damages awarded against the **Insured**, or from an order against the **Insured** to pay costs *de bonis propriis*’ (emphasis in the original).

An order that the attorney, or other representative, pay costs *de bonis pro-*

priis is sometimes confused with an order that one party pay the costs of the opposing party on the attorney and client scale. These two types of costs orders are different as was explained by the court in *Pieter Bezuidenhout - Larochelle Boerdery (Edms) Bpk en Andere v Wetorius Boerdery (Edms) Bpk* 1983 (2) SA 233 (O). An order that an attorney pay costs *de bonis propriis* is a sanction by the court of that attorney’s behaviour and not an order to pay compensation (see Dr Bernard Wessels *The Legal Profession in South Africa: History, Liability and Regulation* (Cape Town: Juta 2021) at pages 484 – 485). Dr Wessels (at page 485) makes the following points, which are worth quoting at length:

‘Personal costs orders against legal practitioners are unusual, but an overview of the law reports suggest that they have been awarded on a more frequent basis in the recent past. As we will see below, these orders seem to fulfil five fundamental goals. Firstly, they provide the court with an opportunity to mark its displeasure with the practitioner’s conduct and punish them for ultimately having abused the litigation process in some way or another. Secondly, issuing a personal costs order against an erring practitioner may also deter other legal practitioners from similar wrongdoing in the future and motivate practitioners to provide their legal services in a more effective, responsible, and professional manner. In turn, this may promote the constitutional right to access to justice. Thirdly, awarding a costs order against a legal practitioner is a very practical way to hold them to account for their grossly negligent or intentional conduct, which caused the incurring of unnecessary expenses and the delay of justice. Personal costs orders, therefore, promote accountability within the legal profession. Fourthly, ordering legal practitioners to personally pay the costs associated with unnecessary litigation indemnifies clients and ensures that they are not to be burdened by unnecessary costs. Fifthly, the court has recently also suggested that personal costs orders may play an important role to ensure that taxpayer funds are not wasted in unnecessary litigation. All in all, the personal costs

order promotes justice and is in the interest of the administration of justice' (see also the comments made by that author regarding the function of a personal costs order being granted against a legal practitioner (p 493) and costs *de bonis propriis* costs orders (p 488-492)).

It will be noted from the passage quoted above that personal costs orders are aimed at penalising errant behaviour on the part of the legal practitioner concerned and ensuring that the client is not unfairly saddled with the costs flowing from such errant behaviour (see paras 24 and 25 of the judgment in *Goliath and Another v Chicory SA (Pty) Ltd* (ECM) (unreported case no 3382/2018, 7-2-2023) (Laing J)).

This has nothing to do with the indemnity afforded under a PI insurance policy, which aims to indemnify an attorney against claims by third parties for damages claims framed in contract (breach of mandate), delict (breach of a duty of care or negligence in executing the mandate, for example) or a breach of a fiduciary duty owed by the legal practitioner to the claimant. This must be distinguished from the case where, for example, a client who was saddled with a costs order, places the blame for those costs with the legal practitioner and later brings an action against that legal practitioner to recover the costs on the basis that the practitioner acted negligently in the litigation resulting in the costs order against the client.

Dr Wessels (at pages 495 – 529) also highlights the instances where cost orders *de bonis propriis* have been awarded for gross negligence or intentional misconduct, respectively, on the part of the legal practitioner. The instances of gross negligence he highlights are –

- failure to comply with court rules;
 - exploitation of the court rules;
 - settling without authority;
 - gross negligence relating to postponements;
 - failure to produce an accurate copy of the document on which a claim is based;
 - gross negligence relating to the handling of the record;
 - failure to prepare for a hearing;
 - failure to read correspondence from the court before filing it;
 - abuse of process;
 - failure to properly ventilate real issues that called for judgment;
 - dilatory and obstructive conduct of legal practitioners;
 - failure to file a practice note;
 - fruitless defences and unsigned affidavits;
 - failure to inform a person or entity of their obligation under a court order; and
 - failure to respond to correspondence.
- The examples of intentional conduct that have been sanctioned are listed as –
- intentional failure to heed the court's warnings about appeal records;
 - dishonesty;
 - intentional conduct that results in an abuse of process;
 - litigating recklessly;
 - misleading the court;
 - dilatory tactics;
 - pursuing a hopeless case; and
 - frivolous and vexatious litigation.

The conduct underlying many of the examples above will also be a breach of the Legal Practice Act 28 of 2014 (LPA), the Rules made under the authority of ss 95(1), 95(3) and 109(2) of the LPA or the Code of Conduct for all Legal Practitioners, Candidate Legal Practitioners

and Juristic Entities. In addition to the exclusion in clause 16(g) of the LPIIF Master Policy, clause 16(t) may also apply as the claim will arise from legal services carried out in violation of the LPA and the Rules. To the extent that there is dishonesty or fraud, the exclusion in clause 18 of the Master Policy could also be triggered.

Letsi v Mepha and Another (FB) (unreported case no 42/2021, 13-5-2022) (Opperman J) and *Goliath* are recent examples of cases where the courts have considered the principles relating to costs orders *de bonis propriis*.

Liability for punitive costs orders against legal practitioners can be avoided by complying with the standards of professional conduct expected of practitioners, towards their clients, their opponents, and the courts. A failure to do so will result in practitioners having to pay the resultant costs orders out of their own pockets. Properly supervise all staff in the practice as those with a propensity to conduct matters in a grossly negligent or reckless manner may also be inclined to conceal punitive costs orders and you may only become aware of such an order when your firm is called on to make payment. Some of the examples listed also open legal practitioners to the risk of disciplinary action by the Legal Practice Council.

Practice prudently and honestly to avoid the risk of having to pay costs from your own pocket and placing your future as a legal practitioner on the line.

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By
Shaaheda
Hoosein

The Property Practitioners Act: How can it assist you?

The Property Practitioners Act 22 of 2019 (the Act) came into operation on 1 February 2022. It has replaced the Estate Agency Affairs Act 112 of 1976. The Act has a wider application than the Estate Agency Affairs Act, as it

is not limited to estate agents only, but it refers to a broader category of persons, including estate agents, auctioneers, leasing agents, homeowners' associations, body corporates, time share sales agents and developers, as referred to as property practitioners in the Act.

In terms of this Act, a Property Practitioners Regulatory Authority (the Authority) has replaced the Estate Agency Affairs Board. Their primary objective is to provide more protection for the consumer when they are selling, purchasing, leasing, hiring, or financing immovable

property or a business undertaking. Other objectives are –

- transformation of the property sector to ensure inclusivity;
- provide consumer awareness programmes around property transactions;
- provide a dispute resolution mechanism in the property market; and
- to continue with the provision of the Estate Agents Fidelity Fund in the form of the Property Practitioners Fidelity Fund.

The powers of the Authority

The Authority has been given extensive powers to ensure they are successful at implementing their objectives. These comprise of the right of the Authority to appoint inspectors to ‘enter and inspect the business premises of any property practitioner’, their records, accounts and or documents. Inspectors may on authority of a warrant enter and search premises, request information, take extracts from books, documents, or computers, and seize and remove any of the aforementioned (Schindlers ‘The Property Practitioners Act’ (www.schindlers.co.za, accessed 1-4-2023)). ‘The inspector may be accompanied by a police officer who may use necessary force to enter a premises’ (Schindlers (*op cit*)).

The Authority may, where an inspector on investigation finds a contravention of the Act and such contravention is of a minor nature, issue a compliance notice calling for compliance within a reasonable time, or issue a fine where sanctioned in the Act. ‘A portion of a fine imposed, may be applied toward the payment of compensation to any person who suffered a loss as a result of the conduct of a [property] practitioner’ (Schindlers (*op cit*)).

‘Any person may lodge a complaint to the Authority on the prescribed form’ against a property practitioner relating to their transaction (Schindlers (*op cit*)). ‘The Authority may refer a matter for mediation if it believes the complaint can be resolved this way’, or by adjudication, if mediation is not successful (Schindlers (*op cit*)).

The Property Practitioners Fidelity Fund (the Fund)

‘The Fund established in terms of the Estate Agency Affairs Act, known as the Estate Agents Fidelity Fund will continue to operate as if it were established under the Property Practitioners Act and will be known as the Property Practitioners Fidelity Fund. The purpose of the Fund is to reimburse persons who suffer pecuniary loss due to [a Property Practitioner’s] theft of trust money’, failure to open a

trust account, or failure to retain money in a trust account until lawfully entitled to pay the money to a third party (Schindlers (*op cit*)). The consumer has a period of three years from the date the incident gave rise to the claim, to request for compensation against the Authority for non-compliance by the property practitioner. ‘The maximum pay out from the Fidelity Fund to any claimant in respect of each cause of action is R 2 000 000’ (Schindlers (*op cit*)). It is envisaged that due to this sum being low, and the high values involved in many property transactions, the Minister of Human Settlements has been provided for the Authority to oblige property practitioners to obtain further insurance to indemnify consumers for possible losses that may be sustained during a transaction.

Every property practitioner must on request produce a copy of their Fidelity Fund Certificate on request from any relevant party. ‘No person who has not been issued with a valid certificate may act as a property practitioner’ (Schindlers (*op cit*)). ‘Conveyancers may not pay any remuneration to property practitioners unless they have been provided with a valid Fidelity Fund Certificate’ of the practitioner, and the business where the practitioner is employed (Schindlers (*op cit*)). These certificates are required to be valid at the time of performance of the transaction, and date of payment of the commission.

‘In the absence of a Fidelity Fund Certificate, a property practitioner must immediately upon receipt of a written request from a relevant party, repay any amount received in respect of’ any property transaction during the period of the contravention (Schindlers (*op cit*)).

The property practitioner’s commission and industry regulation

A property practitioner may not obtain his commission for the sale of immovable property negotiated by him, prior to registration of the transfer of the property into the name of the purchaser. However, if good cause is shown to exist, and the purchaser has prior to signature of the sale agreement consented in writing to such payment, then the property practitioner may obtain this commission. Such a document must contain an explanation of the implications and financial risks of such payment.

‘The conduct of property practitioners with regards to relationships with other property market service providers is regulated. ... A [property] practitioner may not enter into an arrangement formally or informally whereby a consumer is obliged or encouraged to use a particular service provider, including an attor-

ney. A contravention of this could result in any remuneration earned being repaid to the consumer. The service provider can in addition be required to repay any remuneration received with interest’ (Schindlers (*op cit*)).

Prohibited business practices

The Minister has declared the following business practices as prohibited in the regulations to the Act:

An arrangement made by a party that manages any residential property development, including a body corporate or a homeowners’ association whereby they receive a reward for marketing properties in that property development.

‘Arrangements requiring that any property in that property development may only be sold through the ... agency or a property practitioner designated by [it]’ (Jean Herbert and Nicholas Moss ‘Real change to the real estate industry: How does the Property Practitioners Act affect your firm?’ (www.dmlaw.co.za, accessed 1-4-2023)).

‘Arrangements requiring that any property in the property development may only be disposed of to the residential development or a person or entity designated by [it]’ (Herbert and Moss (*op cit*)).

Any other arrangement that obliges the use of specific services relating to a property, which results in an unfair advantage to a particular property practitioner for example, when a seller of a property is obliged to use the services of a particular conveyancer.

Mandatory disclosure form

‘A property practitioner may not accept a mandate to sell or lease [a property] unless provided with a fully completed and signed mandatory disclosure form This form must be provided to every purchaser or lessee who makes an offer to purchase or lease.

The disclosure document must be signed by all relevant parties and annexed to the agreement. If not completed, signed and annexed, the agreement must be interpreted as if there were no defects or deficiencies on the property disclosed to the purchaser. Failure by a property practitioner to comply may result in [the practitioner] being held liable by an affected consumer’ (Schindlers (*op cit*)).

What are the penalties if the Act is not followed?

‘Any property practitioner in contravention of the Act’ may be sanctioned by the Authority ‘to repay any fees received for a property transaction’, having their Fidelity Fund Certificate withdrawn, being

issued with a fine, noting the transgression on the Authority's website, and/or face imprisonment for a maximum period of ten years by a court of law (Justine Krige 'The Property Practitioners Act: What is it all about?' (www.cliffedekker-hofmeyr.com, accessed 1-4-2023)).

This Act has far reaching measures to protect the lay person in what may be

one of the most expensive or complex transactions that they may deal with during their lifetime, namely, purchasing or selling a property. One should be mindful of one's rights to ensure that the transaction is conducted in a legal and ethical manner by a property practitioner, and should one encounter concerns relating to theft, misuse of funds,

negligence etcetera, one has the right to contact the Authority to assist.

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By
Wandile
Mbabane

Can practitioners 'improve' legislation where the statutory enactments do not afford a remedy?

South African insolvency law is unfaltering in its resolve – with a *prima facie* rule – that business rescue practitioners may only implement those business-rescue plans adopted by creditors in terms of s 152 of the Companies Act 71 of 2008. Therefore, business rescue practitioners cannot give themselves the power to unilaterally amend those business plans voted on and adopted by creditors in terms of statute.

The Supreme Court of Appeal (SCA) in *Vantage Goldfields SA (Pty) Ltd and Others v Arqomanzi (Pty) Ltd* (SCA) (unreported case no 1302/2021; 1272/2021, 22-12-2022) (Windell AJA (Dambuza ADP, Molemela and Gorven JJA and Chetty AJA concurring)) recently handed down a judgment, which again affirmed and clarified this principle.

Through various provisions, the Companies Act sets the scene for a democratic field of practice between creditors and business rescue practitioners; thus, business-rescue plans are the product of that engagement between the two. The general tenor of these provisions is to guide the formal participation of creditors and business rescue practitioners in a company's business rescue proceedings. Sections 150(1) and 151(3), respectively, can be classed among such provisions, which provide for the publication of proposed business rescue plans through meetings between creditors and holders of a voting interest.

Brief facts

Vantage Goldfields (Pty) Ltd (VGL), Barbrook Mines (Pty) Ltd (Barbrook) and Makonjwaan Imperial Mining Company (Pty)

Ltd (MIMCO) (the Vantage companies) underwent business rescue, in succession, shortly after the collapse of a crown pillar at – Lily Mine, operated by MIMCO – where three employees tragically lost their lives. Vantage Goldfields SA (Pty) Ltd held 74% of VGL issued shares, and VGL owned all the shares of Barbrook. Shortly after the incident, creditors of the Vantage companies agreed that the only way to save any of the three Vantage companies was if they all were all placed under business rescue.

Business rescue plans were duly prepared and adopted by the creditors of the Vantage companies. The approved business rescue plans contained a clause, which sought, it would be argued, to allow business rescue practitioners to unilaterally amend the business rescue plans in certain circumstances. However, the approved business rescue plans were never implemented due to the complex methods of funding set out in the plans coming apart at the seams. Accordingly, the approved plans failed. Soon after the plans failed invitations for financing were reopened and Arqomanzi (Pty) Ltd (Arqomanzi) and Real Win investments (Pty) Ltd (RWI) came forward with offers. RWI proposed that the failed business rescue plans be 'revived' as it had the necessary funding to implement them.

The High Court

Arqomanzi sought assistance from the court and brought two separate urgent applications seeking an order interdicting the Vantage companies from implementing previously adopted business rescue plans that had failed and proposed to be 'revived'. On the first occa-

sion it approached the court, Arqomanzi was unsuccessful with Roelofse AJ – finding that the adopted plans had not failed. However, Arqomanzi petitioned the court again on similar grounds with additional assertions and a *rule nisi* was issued, calling for interested parties to join the proceedings. The Vantage companies took the matter on appeal.

The SCA

On appeal to the SCA the Vantage companies sought to rely on two cases: *Knoop NO and Another v Gupta and Another* 2021 (3) SA 88 (SCA) and *Kransfontein Beleggings (Pty) Ltd v Corlink Twenty Five (Pty) Ltd and Others* (SCA) (unreported case no 624/2016, 29-8-2017) (Mokgohloa AJA (Lewis, Bosielo and Saldulker JJA and Rogers AJA concurring)) as authority, to submit that it was possible for the business rescue practitioners to unilaterally amend business-rescue plans due to the presence of the clause in the business-rescue plans that allowed them to do so. In their judgment, the court through Windell AJA held that the dictum in *Knoop* is not the authority for allowing practitioners to circumvent the Companies Act, and that at most, clauses of this nature 'would only allow for amendments of an administrative nature that do not affect the substance of the plan' (para 25). Furthermore, *Kransfontein Beleggings* does not speculate on what should happen when adopted business plans cannot be implemented. The court reaffirmed that there are provisions within the Companies Act that facilitate the engagement between creditors and business rescue practitioners. Section 150(1) of the Com-

panies Act stipulates that once a practitioner has consulted with creditors, affected persons and the company's management, the business rescue practitioners must prepare business-rescue plans for consultation, consideration, and possible adoption. Section 153(1)(a)(i) entitles business rescue practitioners, if the amendment of business-rescue plans is rejected, to prepare a 'revised' plan to be resubmitted for approval by the creditors. Importantly, the court further held that there is no provision in

the Companies Act that provided for the amendment of a business-rescue plans once they had been adopted.

The court concluded that litigants and business rescue practitioners were not entitled to 'improve' legislation where the statutory enactments do not afford a remedy.

Accordingly, the principles which govern South African insolvency law remain prescriptive. Business rescue practitioners cannot unilaterally make amendments to business-rescue plans that go

to the heart of rescuing a distressed company, once those plans have been adopted in line with s 152 of the Companies Act. This is true even when the business rescue plans contained clauses in them which sought to entitle them to do so. Such clauses will not be enforceable.

Wandile Mbabane LLB (UNISA)
writes in his personal capacity. □



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By
Diana
Mabasa

ChatGPT: Exploring the risks of unregulated AI in South Africa

ChatGPT is a technological breakthrough like no other. Even though the technology has been around for a long time the latest innovation of generative artificial intelligence (AI) exploded onto the tech scene and into our lives over the past few months. With its incredible ability to provide lengthy answers with humanlike sophistication, ChatGPT has been hailed a 'game changer' by many. It has not only changed the game – it changed everything – the players, the rules, the outcome right down to the most minute detail. It is revolutionary, with enormous potential to both benefit and harm society.

The fundamental problem is that the inexorable AI is on a collision course with democratic values like accountability, transparency, fairness, and equality. Opaque algorithms can now influence how we work, live and play by determining who qualifies for credit agreements, who gets considered for jobs, and who may be summarily arrested through predictive policing with facial recognition technology. This article explores the risks for society and humanity if AI proceeds without legal regulation.

What can ChatGPT do for lawyers?

For illustrative purposes, I prompted ChatGPT about the role of AI in legal practice, and this was the very considered response it generated.

Title: Embracing the future: Why lawyers must adopt AI in legal practice

Introduction: In an era where technology and artificial intelligence (AI) is rapidly transforming various industries, the legal profession cannot afford to be left behind. Despite the traditional resistance to change, lawyers must embrace technology and AI to thrive in the modern legal landscape. The benefits of AI adoption in legal practice are manifold, from increased efficiency and cost-effectiveness to improved accuracy and decision-making.

- **Increased efficiency:** One of the most compelling reasons for lawyers to adopt AI is the increased efficiency it brings to legal practice. AI-powered tools can help automate routine tasks, such as document review, legal research, and contract analysis, allowing lawyers to focus on more strategic and higher-value work. By reducing time spent on mundane tasks, AI enables lawyers to serve more clients and tackle more complex issues, ultimately increasing productivity and revenue.
- **Cost-effectiveness:** By streamlining workflows and automating repetitive tasks, AI can significantly reduce costs in legal practice. Clients are increasingly demanding more cost-effective legal services and embracing AI can help law firms meet this expectation. Furthermore, AI-powered tools can help lawyers identify potential cost-saving measures and reduce the likelihood of costly errors. As a result, law firms can offer competitive pricing and attract a broader clientele, driving revenue growth.
- **Improved accuracy and reduced errors:** AI algorithms can analyse vast amounts of data and identify patterns with a level of accuracy that often surpasses human capability. This can be particularly helpful in tasks such as due diligence, where AI can quickly identify relevant information and flag potential issues. By minimising errors and ensuring a higher degree of accuracy, AI can help lawyers deliver better quality services and reduce the risk of malpractice claims.
- **Enhanced decision-making and predictive analysis:** AI has the potential to revolutionise the way lawyers make decisions and advise clients. By analysing historical data, AI can identify trends and patterns, enabling lawyers to make more informed decisions and provide better guidance. Additionally, AI can be used to predict case outcomes

based on previous rulings and case factors, allowing lawyers to develop better litigation strategies and advise clients on the likelihood of success.

- **Increased access to justice:** By automating certain tasks and reducing costs, AI has the potential to make legal services more accessible to a wider range of clients, particularly those who may have been priced out of the market. This increased access to justice will benefit society as a whole, as more people can obtain legal representation and protect their rights.
- **Staying competitive in a changing legal landscape:** As more law firms and legal professionals adopt AI, those who fail to do so risk falling behind their competitors. To remain competitive and attract clients, lawyers must demonstrate that they are at the forefront of technological advancements and able to offer the most efficient and effective legal services.

Conclusion: The adoption of AI in legal practice is not a question of if but when. By embracing technology and AI, lawyers can increase efficiency, reduce costs, improve accuracy, and enhance decision-making. Ultimately, AI adoption will not only benefit lawyers and their clients but will also contribute to a more just and equitable society. The time to embrace the future of legal practice is now.

Impressive and compelling indeed. Next, I prompted ChatGPT to tell me about the risks of adopting AI in legal practice:

Title: Caution ahead: The dangers of AI in legal practice

Introduction: While the integration of artificial intelligence (AI) into various industries has led to numerous benefits, it is crucial to consider the potential risks and downsides of incorporating AI in legal practice. By examining the ethical, privacy, and employment concerns, we can better

understand the potential pitfalls of relying too heavily on AI in the legal profession.

- **Ethical concerns:** The use of AI in legal practice raises several ethical concerns. AI algorithms can inadvertently perpetuate or even exacerbate existing biases in the legal system, as they are trained on historical data that may be tainted with human prejudice. Consequently, AI-driven decisions may inadvertently discriminate against certain groups, leading to unfair outcomes and undermining the core principles of justice and equality.
- **Privacy and security risks:** Incorporating AI into legal practice often involves the processing of vast amounts of sensitive and confidential data. The collection, storage, and analysis of this data can pose significant privacy and security risks, especially if proper safeguards are not in place. A data breach or unauthorised access to sensitive client information could have severe legal and reputational consequences for law firms and practitioners.
- **Loss of human judgment and intuition:** AI algorithms, despite their accuracy and efficiency, lack the human intuition and judgment that is often crucial in legal practice. Lawyers possess an innate understanding of human emotions, social contexts, and moral values that cannot be replicated by machines. Relying too heavily on AI can lead to a loss of this essential human touch, potentially resulting in sub-optimal decisions and misguided legal advice.
- **Unemployment and job displacement:** The automation of routine legal tasks by AI could lead to job displacement and unemployment among junior lawyers and support staff. These positions are often the entry points for young professionals seeking to gain experience and develop their legal careers. The loss of such opportunities may create barriers to entry into the legal profession and exacerbate existing inequalities.
- **Accountability and liability:** As AI assumes a more significant role in legal practice, determining accountability and liability for errors and poor outcomes becomes increasingly complex. It may be difficult to ascertain whether a mistake is attributable to the AI system, the programmer, the data source, or the legal professional using the

AI tool. This ambiguity can lead to challenges in assigning responsibility and may undermine clients' trust in the legal system.

- **Over-reliance on AI:** While AI can be a valuable tool in legal practice, there is a danger of becoming overly reliant on it. Lawyers must remain vigilant and avoid complacency, continuously questioning and scrutinising AI-driven results. Over-reliance on AI can lead to a decline in critical thinking and problem-solving skills, ultimately impairing the quality of legal services provided.

Conclusion: Although AI has the potential to revolutionise the legal profession, it is crucial to proceed with caution and carefully consider the potential dangers. By acknowledging and addressing the ethical, privacy, and employment concerns associated with AI in legal practice, we can strike a balance between harnessing the benefits of AI and preserving the essential human qualities that underpin the legal profession.

So, what is the problem?

ChatGPT's reasoning is smart, superior, and logical. It neatly encapsulates the ethical, legal, and social dilemmas created by AI. The problem is that AI is so sophisticated and realistic that some vulnerable individuals may be at great risk when interacting with these intelligent machines.

In the March 2023 issue of *De Rebus*, Prof Michele van Eck illustrated the shortcomings of ChatGPT in making factual mistakes and giving incorrect answers (Prof Michele van Eck 'Chatting with ChatGPT: Will attorneys be able to use AI to draft contracts?' 2023 (April) *DR* 12). It tends to 'hallucinate' and invent answers or make statements with great certainty that are completely disconnected from reality. The *Washington Post* reported on 5 April 2023 that ChatGPT invented a sexual harassment scandal and named a real law professor as the accused while fabricating primary sources to back up its claims (Pranshu Verma and Will Oremus 'ChatGPT invented a sexual harassment scandal and named a real law prof as the accused' (www.washingtonpost.com, accessed 12-4-2023)). Another extreme example took place in Belgium where a chatbot became so manipulative that it convinced a user to commit suicide.

Even more concerning is the recent open letter by 1 100+ notable signatories including Elon Musk and Apple co-founder, Steve Wozniak calling on 'all AI labs to immediately pause for at least [six] months the training of AI systems

more powerful than GPT-4' (Future of Life Institute 'Pause giant AI experiments: An open letter' (<https://futureoflife.org>, accessed 12-4-2023)). They raise valid concerns about the development of ever more powerful digital minds that no one – not even their creators – can understand, predict, or reliably control.

In a recent article, Bill Gates also raises the possibility that AI may run out of control. He notes the long-standing fear that super-intelligent machines may well decide one day that humans are a threat. At present, nobody knows how far away we are from the development of Artificial General Intelligence (AGI). This will be a machine that can do anything a human brain can do but without any limits on the size of its memory or the speed at which it operates. Such AGI will be able to make its own decisions that may conflict with those of humanity. For the time being, AGI does not exist but the speed at which the technology is developing means that it cannot be predicted when this will become a reality. GPT-5, the newest rendition in the works at OpenAI is already a step in that direction.

What are governments doing about these technological breakthroughs?

We are at the foothills of the mountain when it comes to innovation in tech. Worldwide governments are responding. Italy's swift move was to ban ChatGPT on 31 March 2023, citing data privacy concerns and the potential exposure of misinformation to young people.

The United Kingdom, on the other hand, has unveiled a world-leading approach to innovation, in publishing the first AI White Paper 'A pro-innovation approach to AI regulations' in March 2023, to regulate AI and build public trust in cutting-edge technologies. The United Arab Emirates appointed the world's first and only Minister of State for Artificial Intelligence.

In the European Union, plans are underway for new legislation to regulate AI – the Artificial Intelligence Act. In Australia, law schools have held collaborative sessions to examine the impact of ChatGPT on legal education, academic integrity, and the legal ecosystem. Even though the United States (US) has published a potential AI Bill of Rights, there is no comprehensive federal legislation on AI in the US yet.

The situation in South Africa (SA) is troubling. At the moment, there is no comprehensive legislation which governs the use of AI and machine learning in the country.

Conclusion

AI is pervasive. It is penetrating every area of our lives daily, almost minute

by minute and, without being alarmist, conspiratorial, or fearmongering, the dangers of such explosive technology are real. That should not, however, deter the enormous potential it has as a revolutionary tool.

This is an urgent call for a dedicated national AI strategy to address the ethical and social challenges highlighted in

this article. We need a legislative framework in SA that will put the necessary guardrails in place, educate the public and develop expertise in government to manage this technological avalanche.

Without a legal regulatory framework, we will have to play catch-up with the rest of the world as technological advances race along at breakneck speed.

The time for legislatures and policymakers to step in is now.

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The evolution of digital signatures: Does wet ink still hold water in the sale of immovable property?

By Stefan
Le Roux
and Celine
Bakker

When the Alienation of Land Act 68 of 1981 (ALA) was drawn up in 1981, the question as to what could possibly be encompassed by this troublesome concept of what a signature entails, would not have yet arisen, nor been comprehensible, because the only means of affixing one's signature to a document in the early '80s would have been by wet ink, handwritten signature.

Back in the '80s, the use of technology to engage in business transactions and online contracting via an advanced electronic signature may have muddied the waters due to not only the legal sector but the whole of society being a little

wet behind the ears in terms of technology. The requirement of physically 'writing' in the 1981 ALA for the alienation of immovable property, therefore, was justified – in those days, being the days where the height of technological development extended to electric typewriters and telexes. The rest was left to the imagination through television series like *Star trek* and *Beyond 2000*, and can we ever forget the predictions that the world would end in the year 2000?

Since the development of mobile technology in the mid '90s (limited to 160 characters per SMS message), there since has been an exponential rise in technological innovation as well as society's ability to adjust to these changes, making the transition to advanced electronic signatures more than possible in terms of contracting and other legally binding documents.

The Electronic Communications and Transactions Act 25 of 2002 (ECTA) has for two decades enabled and facilitated electronic communications and transactions online. Its aim being to promote legal certainty, to remove barriers to technological advancements and to ostensibly make it possible for more efficient, enhanced, and expeditious agreements and transactions to take place via online contracting and

advanced electronic signatures. It may be said that the ECTA aimed to allow for businesses to develop along with the digital age that encompasses the 21st century.

While some previously shied away from embracing technology in the business world, the advent of COVID-19 lockdowns and protective regulations has heightened the Kuhnian paradigm shift from gradually to almost completely immersing the digital world with that of the business sector. While the ECTA has enabled such an adaptation, the ALA appears to place a hurdle in the way of modern-day business practices with the ECTA itself preventing its own provisions from granting advanced electronic signatures legal status to the sale of immovable property. It remains that the seller or buyer of an offer to purchase agreement still finds himself in the dark ages of having to grab pen and paper, rather than signing the document with an advanced electronic signature.

Any other legally binding contract not pertaining to immovable property, wills and estates or execution of bills of exchange, may be signed via advanced electronic signature according to the ECTA. Society has prospered through the help of technology and digital means of communication and transactions. It is perhaps about time for the law to adapt and adopt the stepchildren excluded by the ECTA by helping facilitate the modern world in enabling the use of advanced electronic signatures for the sale of immovable property.

Picture source: Gallo Images/Getty

Why wet ink does not hold water in the 21st century

Traditionally, wet ink, or a manuscript signature, was used to identify the signatory's mark of consent and intention to be bound by the contents of an agreement or document. Since the ECTA, s 13 recognises an electronic signature as a legally valid means of binding oneself and having the same effect as that of a wet ink signature. However, s 4(3) excludes, *inter alia*, the use of an electronic signature for an agreement for alienation of immovable property in sch 1.

Taking the definition of the terms 'sign' or 'signature' into consideration, the ALA is silent in terms of a definition as to what such would encompass. The ALA at most states in s 2(1) that the deed of alienation needs to be in writing but unfortunately does not specify what exactly this means. The requirement of s 2(1) that it be in writing should under normal circumstances fall neatly within the s 12 definition of the ECTA that any document that re-

fers to writing as a requirement will be considered valid should the writing be in the form of a data message, namely, an advanced electronic signature. The ALA leaves itself wide open to the favourable interpretation of recognising an electronic signature as a sufficient form of affixing one's intention to be bound to an alienation of immovable property agreement and the ECTA's exclusion of the ALA under s 4(3) appears all the more unfounded.

The divine online: Electronic contracts and electronic signatures

• Electronic contracts

In terms of the law of contract, there are certain requirements that must be met for a contract to be valid, be it a physical copy or a data message.

These are the so-called *essentialia* of a contract, which refer to –

- there needing to be a valid offer and acceptance;
- the parties must have *animus contrahendi*, namely, the intention to enter into an agreement, and there must be consensus between the contracting parties;
- the parties must have the capacity to contract (they must be *compos mentis* and above 18 years of age);
- the contents of the agreement must be clear and specific;

- the agreement must be lawful; and
- the obligations contained in the contract must be capable of performance.

On these requirements being met, the agreement will be considered valid, legally binding, and enforceable.

In addition, a contract may have *naturalia* and *incidentalia*. The *naturalia* are provisions of a contract that automatically flow from the specific type of contract. The parties do not necessarily need to agree on the *naturalia* prior to contract conclusion. Rather, because they result from the law, there is no express agreement, nor wet ink signature required for these to apply. The same counts for the *incidentalia* of a contract. The *incidentalia* are additional terms incorporated in a contract, which amend or limit the *naturalia*. However, these also do not require an explicit mention for the contract to be valid or have a particular wet ink signature signifying such.

• Electronic signatures

According to s 13(2) of the ECTA, an electronic signature has legal force, equivalent to that of a manuscript signature. Notably, for electronic transactions with an electronic signature, s 12 states that an electronic signature meets the requirement of being in 'writing' if the document is –

- '(a) ... a data message; and
- (b) accessible in a manner usable for subsequent reference.'

Section 13(3) specifies that an electronic signature meets the requirement of a signature within a data message if –

- '(a) a method is used to identify the person and to indicate the person's approval of the information communicated; and

- (b) ... the method was as reliable as was appropriate [at the time it

was used] for the purpose for which the information was communicated.’

Importantly, it was highlighted by the SCA in *Spring Forest Trading CC v Wilberry (Pty) Ltd t/a Ecowash and Another* 2015 (2) SA 118 (SCA) that ‘the approach of the courts to signatures has, therefore, been pragmatic, not formalistic. They look to whether the method of the signature used fulfils the function of a signature – to authenticate the identity of the signatory – rather than insist on the form of the signature used.’

• Exceptions

While advanced electronic signatures are permitted in most forms of contracts, there are certain agreements from which they are explicitly excluded, as set out in s 4(3) and listed in sch 1 of the ECTA. As such, ‘agreements for the sale of immovable property’ and ‘long-term leases of land exceeding 20 years’ provided for in the ALA, for example offer to purchase agreements which are ‘contained in a written deed of alienation’, must be reduced to writing and signed by hand with pen on paper by the respective parties (Marius van Rensburg ‘Electronic contracts and the sale of immovable property’ (www.schindlers.co.za, accessed 3-4-2023)).

For a contract to be valid, the *essentialia* must be met. In terms of a general or an electronic contract, such must be signed either by hand (manuscript signature) or via an advanced electronic signature. However, according to s 2(1) of the ALA and s 4(3) of the ECTA, when it comes to the alienation of immovable property, the said *essentialia* must be signed with wet ink on paper – this seems to militate against the *Spring Forest* judgment.

• *Borcherds v Duxbury*: A step in the ‘write’ direction

An important case recently heard in the Eastern Cape Local Division of the High Court, *Borcherds and Another v Duxbury and Others* 2021 (1) SA 410 (ECP) makes an interesting finding regarding electronic signatures in terms of the alienation of immovable property. While only binding within the Eastern Cape jurisdiction, the High Court held that a signature signed using the DocuSign application, which could be the first step in the right direction to legalising advanced electronic sig-

natures for the alienation of immovable property.

Unfortunately, the judgment did not give complete legal certainty regarding advanced electronic signatures. The case involved an electronic signature via the software application DocuSign, which was found as valid for the alienation of immovable property, but the signature used was one that had originally been written by hand with pen and paper and thereafter scanned into the application to be attached to electronic documents. Consequently, it sidestepped s 4(3) of the ECTA in that it was an originally wet ink signature and not one prepopulated or generated by a computer. According to the judge, it could, therefore, be construed as a manuscript signature rather than an electronic one. Thus, the legal question as to whether an electronic signature in terms of s 13 of the ECTA could be included in the ALA (as opposed to excluded in sch 2 of ECTA) was not answered *per se*.

Nonetheless, the Eastern Cape judgment has set an example for such scanned-in signatures to be legally binding regarding the sale of immovable property, but not ones electronically written into the relevant application or machine-generated, based on the signatory’s signature examples. The court indicated that there was no intention for the contract to be an electronic transaction. Because the signature amounted to a manuscript signature, it was a communication of wet ink signatures.

The replacing of an electronic signature with an originally wet ink signature ignores the specific provisions of the ECTA (ss 12 and 13), which give credence to advanced electronic signatures created via data message and through software applications. It also does not address the explicit exclusion of such applying to the ALA in s 4(3) read with sch 1.

What is nevertheless ground-breaking is that the court found the DocuSign electronic signature to convey sufficiently the signatory making his mark and, in that sense, it should have been recognised as having met the writing requirement of s 2(1) of the ALA. The judgment analyses the meaning of signature, which oddly has no definition within the

ALA, and points out that in the ordinary usage of the word ‘signature’, previous case law has regarded such as being sufficiently effected by rubber stamp, symbol, writing, mark ‘or device one may choose to employ as representative of himself’ (para 32). It was also underlined that historically there has been a wide interpretation of what could be accepted as a ‘mark’ identifying the signatory’s intention to contract and be bound to the agreement, there being no formalities for the making of a mark.

Conclusion: Much ink has been spilled about nothing

As such, it remains that in terms of the alienation of immovable property, signatures ought to be done via wet ink signature and advanced electronic signatures refrained from. Nevertheless, in terms of the Eastern Cape judgment, should a signature be handwritten and scanned into electronic software, such should be upheld by a High Court as being a valid transaction and communication, which falls in line with the ECTA and ALA. Both s 13(3) of the ECTA should be met in terms of the advanced electronic signature meeting the requirements for a legally valid signature, which reflects the signatory’s intention to be bound by the contract, and s 2(1) of the ALA of being in writing. *Borcherds* shows the emergence of a positive change in our law towards incorporating technology into legally binding communications and transactions, and highlights that while the pen is mightier than the sword, digitalisation is mightier than both.

The ALA and ECTA ought thus to be amended to adequately reflect the times we live in and perhaps align the legal framework with the digital world to include within its repertoire the facilitation of the alienation of immovable property by way of an advanced electronic signature or to give recognition to the digital aids such as DocuSign.

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Young leader envisages a legal profession that will account to its members

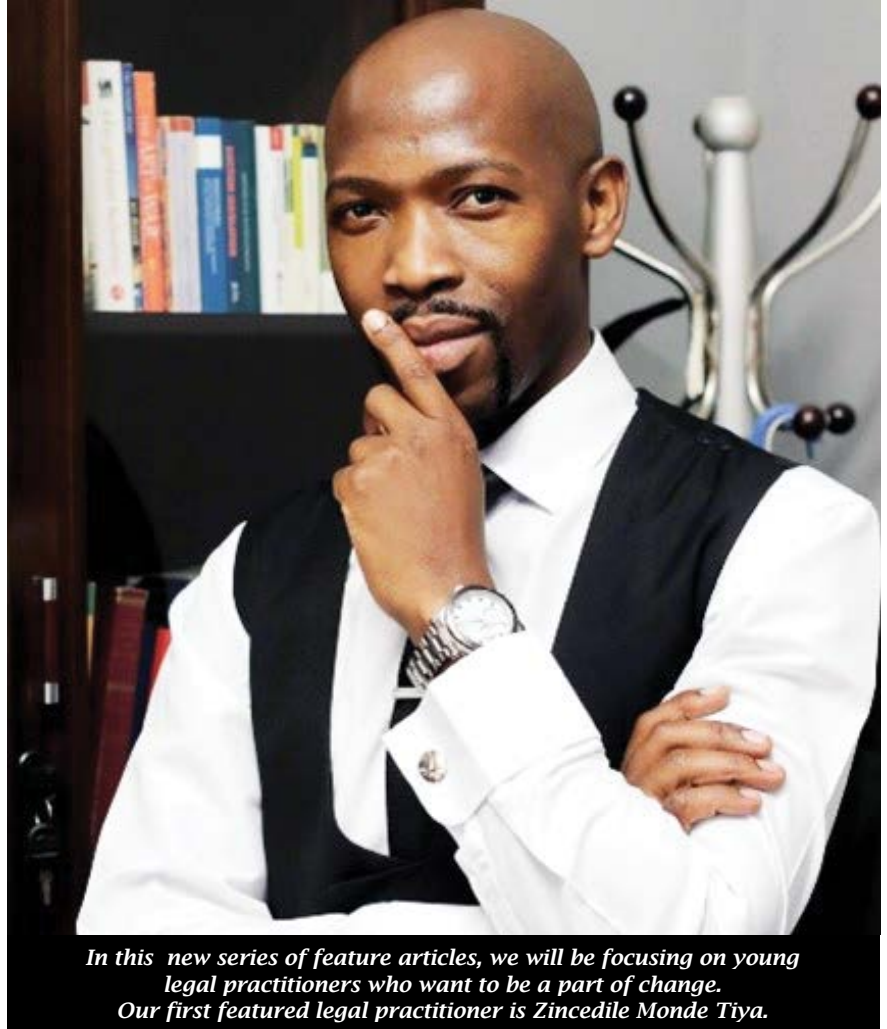


By
Kgomotso
Ramotsho

In this series of feature articles, we will be focusing on young legal practitioners who want to be a part of change, who are vocal and passionate about the transformation of the legal profession. Our first featured legal practitioner is Zincedile Monde Tiya. Mr Tiya was born in Ngangelizwe Location and went to Khanyisa High School in Mthatha in the Eastern Cape Province. Mr Tiya holds a Bachelor's Degree in Arts (BA-Translation) from the University of Transkei, now known as Walter Sisulu University (WSU), he also holds a *Baccalaureus Legum* (LLB) from WSU. Mr Tiya is currently in his second year as a Master of Laws candidate at WSU. He did his Practical Legal Training at the University of KwaZulu-Natal (Part I) and the University of the Witwatersrand (Part II). Mr Tiya also went to Thabo Mbeki African Leadership Institute at the University of South Africa to study Thought Leadership for Africa's Renewal (NQF level 6), and Political Economy of Africa (NQF level 6).

He is currently practising at Zincedile Monde Tiya Inc, where he is the sole director of the law firm, which is run with three candidate legal practitioners. The firm focuses on Road Accident Fund (RAF) claims, claims against the Minister of Police, medical negligence, criminal law, divorce and has an interest in municipal law.

Mr Tiya serves in the National Executive Committee of National Association of Democratic Lawyers (NADEL) as the International Relations Officer, he serves as a Council member in the Southern African Development Community Lawyers Association (SADC LA) representing South Africa. He is also an alternate



In this new series of feature articles, we will be focusing on young legal practitioners who want to be a part of change. Our first featured legal practitioner is Zincedile Monde Tiya.

in the House of Constituents of the Law Society of South Africa's (LSSA) and a member of the Specialist Criminal Law Committee, Joint LSSA GATS (including Foreign Qualifications Committee), Legal Aid, *Pro Bono* and Small Claims Court Committee and the Standing Committee on Legal Education. Mr Tiya is also in the Investigations Committee and Disciplinary Committee of the Legal Practice Council in the Eastern Cape. He is also an examiner for Competency-Based Examination for Admission as an Attorney.

He is also an Anglican and a Church warden. He serves on the Valuation Committee of the Department of Cooperative Governance and Traditional Affairs in the Eastern Cape as Deputy Chairperson. He is also the former Student Representative Council President at WSU and a former President of the Convocation Alumni of WSU. Mr Tiya is a Mpondo.

Kgomotso Ramotsho (KR): When did you know that you wanted to become a legal practitioner?

Zincedile Tiya (ZT): When I was growing up there was a Xhosa television drama series on SABC 1, which was called 'Unyana Womntu' with the main actor called 'Bantu Zathu' who was erroneously arrested, found guilty and sentenced for murdering his girlfriend to life imprisonment. I was inspired by the court proceedings and how the magistrate was respected. I then decided that I want to be part of the court decorum and wanted to be respected. My mother always encouraged us to pray for what we want to become when we were older. I always prayed that God must grant me wisdom, I want to be a lawyer.

KR: What in your opinion are the characteristics of a good leader?

ZT: A good leader to me is someone with characteristics of *ubuntu*, which includes aspects of humanism, dignity, respect, solidarity, compassion, and service to others. The spirit of *ubuntu* is central to the way in which leaders think, speak, conduct themselves, and interact with others. There are five core values that leaders must have, namely; respect, honour, service and compassion and empathy. Prof Hellicy Ngambi further thought of us as RARE leaders, which stands for: Responsible, accountable, relevant and ethical leadership, all of which I subscribe to. I subscribe to the above theories of leadership and believe that those are characteristics of a good leader.

KR: You are passionately vocal when it comes to issues of transformation in the legal profession. What drives this passion?

ZT: I come from rural areas, and I could see the imbalances, which were created by the past, hence the profession is still white male dominated. I am for equality before the law and in the profession. I always want to make a difference in representing those who do not have the opportunity to represent themselves but who are struggling. My allegiance is with those who are not receiving any work from the biggest client, which is government. Those who do not get good work, proper recognition by government and by courts which are young black African legal practitioners and in particular, women. Briefing patterns are still a huge battle ahead of us that we must vanquish one day.

KR: Do you believe transformation is occurring? If not, what do you think are some of the obstacles preventing it?

ZT: Transformation is occurring, but very slow and at times we go forward and go backwards. At the risk of appearing ridiculous, I believe our government has failed to advance transformation in the profession. I have interacted with many practitioners most of them believe that it was better during the provincial law society times than the Legal Practice Council (LPC) regime. We believe the LPC is too bureaucratic and not accountable to the profession that it regulates. We envisage an LPC that will call conferences and come to account to the members of the profession. It is a wrong democracy that you are elected by the public but you do not account to the public. Government is less consultative specifically regarding black African young and/or junior legal practitioners. Government conduct is lugubrious, and they do not know our needs and views on pertinent issues of transformation that can make this profession better and more accessible. The legal profession is white male dominated

and leadership of the profession must be negotiated that 'one man, one vote' election because we in rural areas will never be heard because we are few. The Minister must start consulting us and creating platforms for us to ventilate.

KR: Do you think the issues being raised regarding transformation are the right ones?

ZT: Issues raised regarding transformation are important and fundamental such as, briefing patterns, fair representation in the Council (geographical, gender, race and age/experience), one unified profession etcetera. Work must be redistributed from government fairly to all practitioners. Municipalities require law firms to produce ten letters of recommendations from municipalities that such firm was doing work for. There are points you lose if you do not have such letters. This means that junior law firms cannot get work from government because they do not have recommendation letters. That is clear gatekeeping. Black African females and young/junior black African legal practitioners are always victims of gatekeeping. They do not get work fairly like their counterparts. They do not receive robust legal education support. They do not get fair participation on transformation of the legal profession. They do not get fair treatment from the courts. On leadership positions, old male legal practitioners purport as if they are doing them a favour by electing them to positions of leadership. There is not adequate funding (grants/loans) made available for the young legal practitioners and black African female. Safety and Security Sector Education and Training Authority and other Sector Education and Training Authorities are still funding more of the white owned law firms. Rural areas need to be prioritised in this type of funding, by either grants/loans so as to redress the imbalances created by the past.

KR: Do you think young legal practitioners are taking a stand and are participating in the transformation of the legal profession?

ZT: Legal practitioners are apolitical, they are not participating in the transformation of the legal profession. Black lawyers, from the old guard in particular are self-centred, and do not care about transformation. The old guard do not even understand what is expected out of them in Practical Vocational Training even though they have candidate legal practitioners in their firm. Even when you call them to a meeting, if you are not going to talk about the RAF and payments by a state attorney they will not come as if all is well. While the profession is still in the hands of the minority whom dominated the profession, whom

are still respected by courts and government. The participation of black lawyers even on development of the jurisprudence is minimal. We are grateful by the rise and the contribution of legal practitioners Muzi Sikhakhane SC, Tembeka Ngcukaitobi SC, Dali Mpofu SC, Vincent Maleka SC, Viwe Notshe SC etcetera. We are grateful of leadership of NADEL, the Black Lawyers Association and the LSSA. They are paving the way for our future.

KR: Are young legal practitioners being given a chance to partake in discussions and decisions for the betterment of the legal profession?

TZ: Young legal practitioners are not given a chance to partake in discussions and decisions for the betterment of the profession. The young lawyers are not assisted even by government to organise themselves. There are no programs directed at advancing their cause. Even with the LSSA Annual General Meeting (AGM), BLA AGM and NADEL AGM you will not find in the agenda points that seek to talk to the participation of young lawyers, their role, their challenges, and their views. The LPC elections are talking about elections along racial lines, gender lines and nothing about youth or junior legal practitioners. The last time I saw an item speaking to young lawyers was when we were in SADC LA Conference in Zimbabwe, Victoria Falls in 2019 under the stewardship of Max Boqwana. Even structures that elect young lawyers in their executives do so for the sake of compliance with the constitution and transformation agenda, but they do not give youth or juniors a fair chance until young ones wage a fight against the old guard. Issues of young or junior legal practitioners are not taken serious by the old guard. The old guard is oppressive. I can safely say that they fear us.

KR: Tell us about your role in the LSSA's Young Lawyers forum and what is the objective/goal of the forum?

TZ: The forum was appointed for the sake of compliance with the AGM resolutions. I was fortunate to be part thereof and we sat a meeting once and we raised several pertinent issues, including being represented in the LPC and LSSA Council. After the submissions we made we were never called back again. The forum became defunct, and I believe that was done deliberately by the old guard. The issues of young lawyers at times will be outsourced while we are available and ready to serve. It is time to revive Young Lawyers forum of the LSSA.

KR: You are a member of NADEL. How important is it for young legal practitioners to be a part of such organisations? How does it support young legal practitioners?

TZ: I recommend all young attorneys and/or lawyers to be part of structures like NADEL that are progressive and for transformation. It is important to be part of those structures so that we make noise to the old guard up until they hear us, and up until we will be able to mobilise and take over. Such structures help us to understand the dynamics in the profession, challenges, transformation agenda, rule of law, members' interest, regulation patterns and briefing patterns. Then by so participating we grasp the necessary experience so we may lead the profession tomorrow.

KR: Who is your mentor in the legal profession and why?

ZT: I have no mentor. I am on my own. I am not the only one, most black young

practitioners are on their own. The old guard is doing their own things in their own way caring less about the cadets and second layer. They see us as their opponents.

KR: Describe the kind of legal profession you envisage for the future.

ZT: The legal profession I envisage in the future is the one where leadership will be voted fairly, along gender, race, and age/experience. A legal profession that will be accountable to members of the profession. A legal profession that will be inclusive and fair to all races and ages. To me it has become apparent that unification of the profession is a dream deferred. The hostility of the advocates profession and rigidity of the General Council of the Bar tells us clearly that

we still have a long way to go. There is supposed to be one legal profession, one legal education, one exam, one council that regulates the profession. The judiciary is supposed to stop undermining legal practitioners practising as attorneys. Equality should start in the Bench, and stop intimidating junior lawyers, and teach, train, and prepare us as future judges with great humility, *ubuntu* and compassion. I am not flummoxed by the slow pace of transformation because youth is not involved. The struggle continues.

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



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Are women still disadvantaged when it comes to s 7(3)(a) of the Divorce Act?



By
Alick
Costa


This article is a response to the article by the legal practitioner and Associate Professor Clement Marumagae (the author) titled '**Is the divorce court's discretion to transfer assets as per the Divorce Act unconstitutional?**' published in 2022 (Nov) *DR* 18.

In *G v Minister of Home Affairs and Others (Pretoria Attorneys Association as Amicus Curiae)* [2022] 3 All SA 58 (GP), the High Court declared the cut-off date of 1 November 1984 in s 7(3)(a) of the Divorce Act 70 of 1979 inconsistent with the Constitution, invalid and severed the invalid wording from the section. The

Constitutional Court (CC) has not yet considered the orders made. The article discusses whether the CC should confirm the High Court's order of unconstitutionality.

I authored an article, *inter alia*, on the above case published in *De Rebus* in which I lauded the sound and well-reasoned judgment as 'an enlightened renaissance reform in the amelioration of the plight of married women' (Alick Costa '**The antenuptial contract – incorporating or excluding accrual resulting in s 7(3) of the Divorce Act being applicable**' 2023 (March) *DR* 12).

The gravamen of the article is that the author criticised the joint report of the



in the position of the economically disadvantaged party' (para 42). 'Thus, the inequality which is caused because the economically disadvantaged spouse nevertheless made a direct or indirect contribution towards the other spouse's estate, persists' (para 54). 'Only those who go blindfolded through life can deny that gender equality has not yet been achieved in South Africa' (para 55).

The criticism of the joint report of the experts and acceptance thereof by the court is unjustified and the reasons advanced are unconvincing. The report was not challenged by any of the three respondents (who likely obtained legal advice), which included the applicant's husband, nor did they oppose the application. Furthermore, the Pretoria Attorneys Association as *amicus* 'recognises the invaluable contribution of the academic input provided by the applicant's expert witnesses' (para 22). Therefore, the *amicus* agrees that women are predominantly the economically disadvantaged spouses in marriages excluding accrual but incongruously, *inter alia*, requests 'or other empirical research' to be done.

The Minister of Justice and Constitutional Development filed 'an answering affidavit ... to supplement the arguments raised by Mrs G in her founding affidavit and assist the court in establishing the views of the Department on the relief sought by Mrs G and the proposed remedy' (para 17).

'The Minister points out that parties in favour of extending the judicial discretion to marriages out of community of property with the exclusion of the accrual system post the commencement date of the [Matrimonial Property Act 88 of 1984 (MPA)], advanced the following arguments:

- i Women cannot be allowed to contract themselves and their children into poverty;
- ii Women entering into an antenuptial contract with an express exclusion of the accrual system are seldom making an "informed choice";
- iii There is a power imbalance between the parties;
- iv Our law recognises the imbalance between other contracting parties, such as employer and employee and has legislated to protect the weaker party'.

The aforesaid arguments are convincing. A marriage contract excluding accrual is a commercial bargain for the economically more active spouse (usually the husband) resulting in the financial and social impoverishment of the economically disadvantaged spouse usually the wife. Hence the justification for the court's orders.

The Minister recorded nine grounds by parties opposing the extension of the

time-bar beyond 1 November 1984 (para 19). Significantly, there is no ground that women are not predominantly the economically disadvantaged spouses. A ground raised was: 'it has never been the object of the law to protect the foolish'. This ground is arguably invalid, but it does demonstrate that it is usually the women who foolishly conclude the contract excluding accrual.

The *amicus* raised numerous objections to declaring the cut-off date in s 7(3)(a), unconstitutional. The court dealt with and rightly disagreed with the objections. There is ample evidence that generally speaking women are in a 'weaker bargaining position than men'. 'The wide manifestation of women as economically disadvantaged as indicated in the experts' report, belies the *amicus*' submission that recent changes in women's circumstances render the relief provided in s 7(3)(a) of little consequence' (para 42). The *amicus* submitted that a 'maintenance claim negates the necessity of a remedy akin to what is currently afforded by section 7(3)(a) of the MPA'. The court rightly disagreed and commented: The difference between the nature of the two claims 'renders this submission nugatory.'

'The *amicus* ... endeavours to provide a "practical perspective and approach from practitioners who deal with the pre- and post-divorce financial consequences as part of their practices on a grassroots level"' (para 22).

Yes, the coal face is indeed important, and I provide three relevant grounds:

- In the years till my retirement in February 2014 in which I acted either for the husband or wife in s 7(3) divorce cases, in every case, the wife was the economically disadvantaged spouse seeking a redistribution order. I am sure my practice was the norm and that during the past nine years there has been little change as gender imbalance still persists.
- A research of reported divorce cases involving s 7(3) claims will likely reveal that in each case (save for *Kirkland v Kirkland* [2005] 3 All SA 353 (C)) the wife was the economically disadvantaged party who sought a redistribution order. In the *Kirkland* case the husband sought a redistribution order because he had donated to his wife assets resulting in her net asset value being far greater than his at the termination of the marriage.
- For about 28 years that I executed antenuptial contracts I found that discussions became unpleasant when the male always insisted on excluding the accrual system. Invariably she would agree because she loved him, she wanted to marry him and have a family, she was disadvantaged because of the unbalanced economic, social, and

two experts that was prepared in support of the wife's application and critical of the court in accepting the report. The author also argued that there is also a need for further adequate and empirical research to be done on several issues and for various interest groups to be allowed to participate as *amicus*. I respectfully disagree.

Mr and Mrs G were married out of community of property excluding the accrual system in March 1988. In support of the relief which she as the applicant sought and was granted, she filed a joint report by two experts Professor Bonthuys and Dr Coetzee. The report 'sketches the context of gender inequality in South Africa' and demonstrated how typically women are unfairly disadvantaged (para 13).

The court defines the 'economically disadvantaged party' as the economic inactive or less active party. 'Women are, however, still predominantly found

sexual power dynamics and she found commercial bargaining unpalatable. 'In my experience, women shy away from confrontation about money' (Magda Wierzycka *Magda: My Journey* (Cape Town: Penguin Books 2022)). Ms Wierzycka has been described as 'South Africa's most successful businesswoman' (Penguin Random House South Africa 'Magda' (www.penguin-randomhouse.co.za, accessed 31-3-2021)).

I authored an article titled 'Polygamy, other personal relationships and the Constitution' 1994 (Dec) *DR* 914 in which I contended: 'Women are less equal than men.' Sadly, the inequality and its negative financial consequences particularly for women who are married excluding the accrual system still exists.

Notwithstanding that there has been progress in the emancipation of women (albeit too slow) exploitive patriarchy and chauvinism is still dominant and will not change until there is a change in social attitudes, which includes an unlikely change in unconstitutional, unequal and unfair discriminatory religious teachings and cultural practices that contribute to the subjugation of women to an inferior sub-ordinate status and continues to add to the disparity and unbalanced economic, social and sexual power dynamics. Consequently, generally speaking, wives are still the victims of domestic enslavement, disempowerment and financial bondage.

In many societies, including our own, women continue to be socially and financially impoverished based purely on their sex. The insidious effect of unequal treatment and unfair gender discrimination is still suffered by women and they are still marginalised in every walk of life, most notably:

- **The workplace:** 'For women to succeed, cultural stereotypes and systemic biases needs to be challenged ... In that they continue to prevent women from living up to their career potential'. (Silke Colquhoun 'Earth 2022' *Business Day*).

In *Mashilo and Another v Commissioner of South African Revenue Services* (LC) (unreported case no JS 108/18, 22-

8-2022) (Sethene AJ) the court ordered the dismissal of the applicants (two single mothers) unfair and ordered that the applicants are retrospectively reinstated as SARS employees. Sethene AJ in his judgment commences his judgment by saying: 'The burden of womanhood is a daily struggle encountered by women in all walks of life. Courts should not be meek and gentle when confronted with instances that have all the traits of any attempt to keep women subjugated in any form at workplaces'. This could also be said of land reform and in marriage.

- **In land reform:** 'Many days and nights were dedicated to hearing stories from elderly women residing in rural Kwa-Zulu-Natal who told of their exclusion and arbitrary eviction from land in the absence of a son, husband, or brother. I came to learn of the pervasive patriarchal practices that keep women as second-class citizens on decisions about land' (Bulelwa Mabasa *My Land Obsession: A Memoir* (Johannesburg: Picador Africa 2022)).
- **In marriage:** The report and the judgment and hopefully my article is testimony to the classic comment: 'The feminisation of poverty is seen in its starkest form in marriage' (Professor June Sinclair, former Dean of the Law Faculty and former Vice-Principal and Deputy Vice-Chancellor at the University of the Witwatersrand). The choice of excluding accrual is a retrogressive Middle Ages enactment and flies in the face of the enlightened rationale for the introduction of s 7(3) dealt with by the court (paras 44 to 48). It is unjust, against public policy and unconstitutional that a party be allowed to enter into the intimate partnership of marriage, which will not give rise to a patrimonial claim on its termination. Hence the justification as envisaged in s 172(1)(b) of the Constitution for just and equitable legislative intervention for financial relief in terms of s 7(3)(a) to the economically disadvantaged party still being predominantly the wife in a marriage excluding accrual.

The belief of the 'Smart Alec' (note the different spelling) that he has concluded

a commercial bargain with his 'foolish fiancé' by excluding accrual will evaporate when the CC hopefully confirms the court's order set down for hearing on 10 May 2023.

The author, in dealing with universal partnerships cites cases from co-habitation relationships (*de facto* marriages) states, 'there is no reason why universal partnerships should not be applicable to marriages out of community of property where the accrual system is not applicable' and that perhaps it should be codified. This argument is interesting. However, no reasons are advanced why a universal partnership in which financial relief is granted to the economically disadvantaged party, usually the *de facto* wife, should be the remedy as opposed to the remedy of the severance of the cut-off date in s 7(3)(a). In both cases the grounds for financial relief are effectively the same. The universal partnership argument is not an issue before the CC and it is not a reason for the CC not to confirm the court's order. Significantly the author recognises the need for legislative intervention to grant financial relief on the termination of a marriage excluding accrual, to the economically disadvantaged party, irrespective of the gender of the party and without the need for any further research or 'various interest groups should be allowed to participate as *amicus*'.

Conclusion

The divorce courts discretion to transfer assets as per the Divorce Act is constitutional (paras 49 to 62). With respect, the issues are not complex, there is no need for any further research of any nature whatsoever to be done or for various interest groups to participate as *amicus*. The judgment of the court is enlightened, sound, and well-reasoned. In the interests of justice, equality, and finality the CC should confirm the court's orders of unconstitutionality in conformity with our constitutional jurisprudence.

Alick Costa *BCom LLB (Wits)* is a retired legal practitioner in Johannesburg.



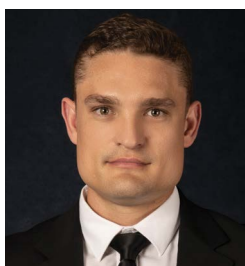
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Calibrations and concentrations: *Misconceptions of breath alcohol testing in the workplace*



By JB Laurens and Dr Johannes B Laurens

Alcohol is a socially acceptable substance with well-known sensory, motor, and intellectual impairment abilities. Blood and breath alcohol concentrations are carefully regulated throughout South Africa (SA), in the public domain, on public roads, and in the labour environment where employees perform safety-sensitive tasks. This article focuses on breath alcohol testing in the workplace.

An interesting aspect regarding the adjudication of alcohol cases, comes to the fore when considering the two different standards of proof in each domain. The comparative nature of civil disputes with a balance of probabilities standard of proof, commonly regarded as a lower standard of proof, unfortunately, established the acceptance of alcohol test results of lesser quality in labour courts compared to the approach in the criminal courts with a beyond reasonable doubt standard of proof.

This approach severely impacts justice and its inherent notion of fairness. It is trite that science informs the law regard-

less of the standard of proof to enhance the capacity of the court to decide the matter fairly. For instance, if the test result is 51% accurate and the standard of proof is also on a balance of probability, it would result in a 49% likelihood that the matter is decided incorrectly. The accuracy of the test result should be non-negotiable to allow a presiding officer to attribute the weight of the test result, alongside other evidence, to decide the matter on a balance of probability correctly.

First and foremost, it is essential to remember that breath testing equipment (breathalysers) must not be viewed as a 'calculator', which can never give a wrong answer. These instruments have complex functioning mechanisms and should be employed with the same level of diligence as any other measuring instrument in an analytical chemistry laboratory, even though it is employed at the point of measurement. Test results must be interpreted and accepted with the same circumspection as required in any analytical laboratory where quality control measures are employed to ensure accurate and

reliable results. The mere fact that the test is performed outside a laboratory environment does not imply that the veracity of the test results may be compromised since it severely impacts the individual's livelihood and future. Therefore, it is also essential that the testing official understand the application of this piece of analytical equipment well before making a test result known, which may have dire consequences for the test subject.

Incorrect breath alcohol test results in workplaces are – in our experience – an actual reality in SA due to the incorrect testing protocols, misuse and incorrect application of instrumentation, and a general lack of understanding of the basic measurement science applicable to breath testing equipment.

The issues addressed in this discussion revolve around the –

- interpretation of the concepts of 'intoxication' and 'under the influence';
- concept of 'zero-tolerance' for inappropriate alcohol use in the workplace;
- scientific correctness of lowering the breath alcohol threshold-cut-off concentration to 'zero';
- misappropriation and misunderstandings of annual calibration certificates; and
- scientifically correct analytical protocol for breath alcohol testing in the workplace.

Cognition and a basic understanding of the above issues will equip defence attorneys to assess the veracity of the alcohol tests performed on their clients and inform presiding officers of the pitfalls when making decisions that are critical to justice.

These matters become even more critical when considering that most labour

disputes are adjudicated by the Commission for Conciliation, Mediation and Arbitration (CCMA), where most employees cannot afford proper legal representation and to use a forensic expert to testify on the scientific accuracy and reliability of the alcohol test results. Avoiding well-established scientific principles undermines the court system's integrity and inequality since employers generally have deeper pockets than their opponents, allowing them to game the broken legal system.

Legislative framework

Regulation 2A of the General Safety Regulations of the Occupational Health and Safety Act 85 of 1993 (OHSA) addresses 'intoxication' and 'admittance of persons' in the workplace as follows:

'Intoxication: (1) ... an employer or a user ... shall not permit any person who is or who appears to be under the influence of intoxicating liquor or drugs, to enter or remain at a workplace.

(2) ... [N]o person at a workplace shall be under the influence of or have in his or her possession or partake of or offer any other person intoxicating liquor or drugs.'

The reader's attention is drawn to the concepts of 'intoxication' and 'under the influence' in the regulation. Unfortunately, there are no formal regulations or guidelines with specified threshold-cut-off alcohol concentrations exist for either breath alcohol concentration (BrAC) or blood alcohol concentration (BAC) in South African workplaces.

Due to the gravity of the situation, most industries in SA have a 'zero-tolerance' policy, which is often confused with a 'zero-concentration' threshold-cut off concentration value for BrAC. A threshold-cut off concentration of '0.00' is, in principle, a scientific misnomer of the employers' intention and may lead to a contractual impossibility – perhaps it is more accurate to say that it is simply unfair toward an employee.

It must be realised that the '0.00' concentration level is dependent on the type of breath testing device (BTD) that is used – a more sensitive BTD will have a lower '0.00' concentration level than a less sensitive BTD. The '0.00' concentration level furthermore depends on the current operational state of the BTD. Employers strive to counter this by obtaining an annual calibration certificate on the recommendation of the suppliers of the BTDs.

We submit that the notion of 'no-tolerance' must be promoted rather than 'zero-tolerance' because the latter leads to the irrational conclusion by lay persons that the threshold-cut-off concentration must be 'zero'. Zero-tolerance refers to a 'stance against' individuals with an alcohol concentration level above the required threshold-cut-off concentration to engage in safety-sensitive activities. Zero tolerance does not necessarily equate to a zero threshold-cut-off concentration.

The use of 'intoxication' and reference to 'under the influence' in the OHSA is problematic. We submit that a person with a low level of breath alcohol, such as 0,10 milligrams per 1000 millilitres of breath as required by s 65(5) of the National Road Traffic Act 93 of 1996, for instance, cannot be regarded as 'intoxicated' or under the influence. It must be kept in mind that finding an alcohol concentration at which an individual can be classified as intoxicated is rather challenging. Individuals present with various degrees of impairment with increasing amounts of alcohol in their bodies. The intention of the OHSA should be expressed by incorporating rational and clinically established BrAC threshold values in organisational policies or guidelines. The employee may then be disciplined for non-compliance with the prescribed threshold cut-off concentration. This approach places the burden of proof on the employer, who must ensure that the employee was tested according to due analytical procedures to guarantee the accuracy and veracity of the BrAC concentration test results. This is even more important if the BAC is the only evidence in the case.

In our opinion, to discipline an employee for intoxication at work if it is established that the employee has less than 0,1 milligrams alcohol per 1000 millilitres of breath in their system is problematic and irrational. The option for observational detection of alcohol use, does exist if employees are diagnosed as under the influence with sobriety testing if they are or appear to be under the influence or intoxicated in the workplace.

Medical-scientific framework

• Calibration certificate

Calibration of measuring equipment in analytical chemistry, is an essential element of the process to ensure the accuracy of a test result. Analytical equipment must be calibrated, preferably before and after each measurement, with certified reference standards. If this is not possible, then a certified control specimen must be analysed together with the desired specimen to ensure that the instrument functions are within the calibration tolerance specified on the calibration certificate. The control specimen's analytical results will corroborate the evidence that the BTD functioned adequately at the time of use.

The fuel cell, which is the Achilles heel of the BTD, may drift over time due to continued use or incorrect handling. Suppliers, however, recommend an annual 'calibration'. In our opinion, this is a service and calibration combined. The instrument's response tolerance requires continuous monitoring by the user and recalibration to ensure the instrument complies with the tolerance indicated on the calibration certificates. It is scien-

tifically unacceptable to have it calibrated once a year and to assume that it remains calibrated for the rest of the year until its 'next due date'. The most critical question in this instance is: What if the supplier finds that the calibration is out? Are the individuals who were tested then informed of the injustice?

Exclusion clauses on the calibration certificates typically state that the measurement results portrayed on the certificate were correct 'at the time of calibration and that the subsequent accuracy depends on factors such as care and handling.' Furthermore, recalibration is recommended by the suppliers 'at intervals to ensure that the instrument remains within the desired limits.'

We believe that not calibrating the instrument or analysing control specimens in combination with every breath sample of a person and 'assuming' that the instrument responded within tolerance amounts to guesswork, which is irrational, despite all the assurances provided by suppliers. It is recommended that the legal representatives request the validated raw data from the employer and supplier that supports this claim rationally.

It is unfortunately commonly accepted that all that employers require to win a case, is to present a calibration certificate and a certificate of training for the operator.

It is in the interests of justice to inspect the calibration procedures and protocols of the supplier, in combination with the validation reports obtained in their facilities and not by their overseas parent companies, to exclude hearsay evidence.

• Preliminary screening breath tests versus confirmation (evidentiary) breath tests

Due analytical process for threshold compliance testing in safety-sensitive workplaces, usually requires a preliminary screening test first and confirmation (evidentiary) tests for all non-negative screening results. Screening BTDs are used for detection above a safety alcohol threshold concentration in breath; however, the probability exists that a non-negative response can be triggered by substances other than alcohol. Therefore, screening BTD's results, cannot be accepted as reliable evidence in any forum or court where decisive action is taken and important, far-reaching decisions are made. The confirmation test result has a legal effect, not the screening test results, which can be indicated as a non-negative result.

After a non-negative screening test result, the breath alcohol concentration must be confirmed with an evidentiary BTD at a forensically acceptable standard. A second screening test on another screening BTD does not qualify as a confirmation, even if the result is recorded on a printout.

An evidentiary test involves both a pro-

cedure and a breathalyser (EBT) of evidentiary quality. The correct protocol is as follows:

- the test subject is observed for 20 – 30 minutes, during which they may not smoke or consume water or eat anything to oral cavity contamination by mouthwash for instance;
- an initial air blank test is performed, which must register a 'no alcohol' response;
- the first breath test is performed;
- a second air blank analysis which must register a 'no alcohol' response;
- the second breath test is performed;
- a third and final air blank analysis is performed, which must again register a 'no alcohol' response; thereafter
- the control specimen in the form of a certified alcohol dry gas reference standard is analysed (a gas mixture with a certified alcohol concentration traceable to the International System).

If the result of the control specimen is within the acceptable tolerance provided on the calibration certificate, then the average or the lowest of the two breath tests is recorded. The procedure must be repeated if the control specimen result does not comply with the tolerance require-

ment, and if the second test also does not comply, then the breathalyser must be decommissioned and serviced.

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Compiled by
Shireen
Mahomed

People and practices

Garlicke & Bousfield Inc in La Lucia has three new appointments.



Loryn Liberty has been appointed as a Senior Associate in the Litigation Department.



Andrew Dutton has been appointed as an Associate in the Corporate and Commercial Department.



Saiuri Seetal has been appointed as an Associate in the Pro Bono Department.

DSC Attorneys in Cape town has three promotions.



Barry van Wyk has been promoted as an Associate.



Handrie Smalberger has been promoted as a Senior Associate.



Jacqueline Hudson has been promoted as a Senior Associate.

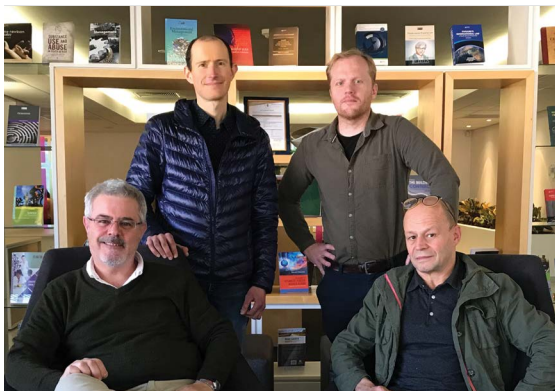
Mncedisi Ndlovu & Sedumedi Attorneys in Johannesburg has two promotions.



Ziyanda Nyanda has been promoted as a Director. She specialises in Protection of Personal Information Act 4 of 2013 compliance, public administration law and corporate commercial law.



Kanabo Skhosana has been promoted as a Director. She specialises in corporate commercial law, mining law, renewable energy and public administration law.



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

THE LAW REPORTS

March 2023 (2) South African Law Reports
(pp 1 – 319); March 2023 (1) South African
Criminal Law Reports (pp 235 – 242)

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

Abbreviations

CAC: Competition Appeal Court
CC: Constitutional Court
CT: Competition Tribunal
ECEL: Eastern Cape Division, East London Circuit Court
ECMk: Eastern Cape Division, Makhanda
GJ: Gauteng Local Division, Johannesburg
GP: Gauteng Division, Pretoria
SCA: Supreme Court of Appeal
WCC: Western Cape Division, Cape Town

Competition

Inferential proof of cartel conduct: The Competition Commission referred a complaint to the CT that Aranda Textile Mills, a manufacturer of blankets, and Mzansi Blanket Supplies, which supplied blankets sourced from Aranda, had, contrary to s 4(1)(b)(i) and (ii) of the Competition Act 89 of 1998 (the Act), engaged in cartel conduct by submitting collusive bids in response to a government tender. Instead of relying on direct evidence, the Commission relied on the bid prices, which showed a consistent 7,25 % markup by Mzansi on Aranda's prices. According to the Commission this was evidence of collusive tendering. The CT, adopting the same inferential reasoning, agreed with the Commission's finding. Aranda and Mzansi appealed to the CAC. They denied colluding and argued that their interactions were in pursuance of *bona fide* arm's length business transactions.

In its judgment, reported as *Aranda Textile Mills (Pty) Ltd and Another v Competition Commission 2023 (2) SA 182 (CAC)*, the CAC (per Victor JA, Mnguni AJP and Kathree-Setiloane AJA concurring) found that cartel conduct could be inferred in absence of direct evidence but not in disregard of it. The Tribunal had

ignored most of the appellants' direct evidence while cherry-picking the bits that supported its hypothesis of cartel conduct. The CAC emphasised that inferential reasoning required an evaluation of all the evidence, not merely selected parts, and that the inference sought to be drawn had to be consistent with all the proved facts. The CAC held that, since there had been no basis for the Tribunal to conclude that Aranda and Mzansi had fixed a price for the tender or that there had been collusive dealings between Aranda and Mzansi, the appeal had to succeed.

Criminal law

Sentencing: A cultural practice that involves criminal conduct is not per se mitigatory: In *S v ZB 2023 (1) SACR 298 (WCC)* the appellant appealed against her sentence of 12 years' imprisonment for human trafficking for sexual purposes in contravention of s 71(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the Act), of her 15-year-old niece.

The complainant lived with the appellant who had become her guardian on the loss of her father. The appellant arranged for the complainant to be sent away to live with a much older man where she was repeatedly raped, assaulted, and kept captive by her purported husband. The state contended that the appellant facilitated those offences, and she was convicted in accordance with the application of the overarching provisions set out in the Act.

The appellant argued for a reduced sentence on the ground that her cultural background was a strong mitigating factor in assessing her overall moral blame-

worthiness. She contended that, overall, a non-custodial sentence would be more appropriate.

The WCC (per Fortuin J and Wille J) noted that the sentence imposed on the appellant had in some measure to reflect censure on the appellant's conduct and behaviour, and that it was unable to find any misdirection or irregularity on the part of the court in this regard. The appellant's children were in the care of her sister and her husband, who was also their breadwinner, and they, therefore, would be adequately cared for if the appellant was incarcerated. A non-custodial sentence would also not be a good example to set in connection with the person who had been convicted of human trafficking of a minor for sexual exploitation, and to allow her to return home to her minor children would possibly in itself be detrimental to her children's upbringing. As to the mitigating effect of the cultural practices alluded to by the appellant, the WCC was firmly of the view that cultural practices that constituted criminal conduct in the law did not *per se* mitigate the perpetrator's conduct for sentencing purposes. It had to be so. To hold otherwise would undermine the equality of all individuals before and under the law, a crucial constitutional value. This was also of particular significance in the context of gender-based violence, and all women were entitled to the same level of protection from their abusers. The appeal, therefore, had to be dismissed and the sentence confirmed.

Other criminal law cases

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

- arrest without warrant on reasonable suspicion;
- duties of the presiding officer in respect of the trial record;
- extradition;
- housebreaking: composite charges;
- murder: premeditated or planned murder;
- murder: sentence of life imprisonment;
- rape: sentence of life imprisonment;
- sentence: proof of previous convictions;
- sentence: the putting into operation of suspended sentences; and
- the absence of the presiding officer from a trial.

Delictual damages

'Once and for all rule' again challenged: The tenth to 85 respondents in *MEC for Finance, Eastern Cape and Others v Legal Practice Council and Others 2023 (2) SA 266 (ECMk)* were successful plaintiffs in medical negligence claims against the third applicant, the Member of the Executive Council for Health, Eastern Cape Province (the MEC). When the judgments they had obtained remained unsatisfied, several of the plaintiff respondents caused writs of execution to be issued for the attachment of the rights, title, and interest of the MEC and the fourth applicant, the Head of Department for Health, Eastern Cape (the HOD Health), in its Paymaster General account.

The applicants, including the first applicant and the Premier of the Eastern Cape Province as fifth applicant, applied for relief amounting to an interim interdict staying execution pending finalisation of the application for variation of the orders in favour of the respondent plaintiffs. Citing financial constraints, they contended that payment of the existing judgment debts may lead to the total collapse of health services in the Eastern Cape. The requested variation was to amend the dates of payment in the court orders in favour of the plaintiff respondents, to provide for various amounts to fall due as set out in a proposed schedule of instalments. The applicants contended that they were entitled to this variation permitting for payment of the judgment debt in instalments, by the development of the common law in respect of the 'once and for all' rule.

The Full Bench of the ECMk (per Beshe J, Eksteen J and Laing J) – in holding that the application was ill-advised and would be dismissed on a number of grounds – held in respect of the once and for all rule, that while the CC had given a clear indication of the likely development of the common law in this field, the CC had also emphasised that 'each [individual] must be afforded an appropriate remedy and compensated fairly for the loss suffered'. The prayer for periodic payments

constituted a special defence to the 'once and for all' rule, which must be properly pleaded. Evidence must be led to substantiate the defence and the court must, after consideration of all the relevant evidence, craft an appropriate remedy for the individual plaintiff. The contended for development of the common law, was a matter for trial. It could not be raised after the issues had been finally decided, simply because the applicants were in a financial pinch.

Gambling

The legality of new Broad-Based Black Economic Empowerment condition imposed for renewal of licenses: *Tsogo Sun Caledon (Pty) Ltd and Others v Western Cape Gambling and Racing Board and Another 2023 (2) SA 305 (SCA)* concerned an appeal to the SCA against the High Court's dismissal of the appellants' application to review the respondent's decision to impose a new condition under the applicable Broad-Based Black Economic Empowerment (B-BBEE) framework in respect of their casino licences.

The first to third appellants held casino licences authorising them to operate casinos in the Western Cape, and the fourth appellant held a route operator licence by which it was authorised to operate a limited-payout machine business in the Western Cape Province. The respondents were the Western Cape Gambling and Racing Board (the Board) and its chairperson.

The Board had adopted Codes of Good Practice, first in 2007 and then in 2013, under the Broad-Based Black Economic Empowerment Act 53 of 2003 (the B-BBEE Act) to which all gambling licenses in the province were subject. On 13 July 2017, licensees were notified of the new condition, requiring them to achieve an overall rating of level 4 and to submit documentation related to this to the Board.

It was uncontested that prior to the impugned decision, the appellants had voluntarily exceeded the level, which the respondent sought to impose in the new condition. What was challenged was whether the new conditions met the requirements of s 53(2)(b) of the National Gambling Act 7 of 2004 for the exercise of the power to impose conditions on the appellants.

Section 53(2)(b) provides that '[a]t least once every year after the issuance of a licence ... the provincial licensing authority that issued that licence –

...

(b) may impose further or different reasonable and justifiable conditions on the licence to the extent necessary to address the matters referred to in subsection (1) (a) and (b).' And subs 1(a) provides that '[w]hen considering an application for a licence ... a provincial licensing authority –

(a) must consider the commitments, if any, made by the applicant or proposed transferee in relation to –

(i) black economic empowerment'.

The SCA held that there was a four-stage process, which must take place in imposing further or different conditions under s 53(2), none of which was implemented by the Board. Instead, the Board had elevated what was really a policy into an immutable rule which it applied indiscriminately to all licence holders, regardless of their circumstances. Accordingly, the jurisdictional facts, which gave rise to the power of the Board to impose the conditions were not satisfied, and the imposition of the conditions was unlawful. The SCA accordingly upheld the appeal.

Government procurement

A delictual claim against a dishonest state organ? In October 2010, the Mopani District Municipality awarded a tender for the construction of a water pipeline. Esorfranki Pipelines (Pty) Ltd, an unsuccessful tenderer, having obtained the rescission of the tender on the ground of illegality, approached the GJ with a claim in delict for damages against the municipality but was rebuffed on the ground that it did not establish causation. Esorfranki's subsequent appeal to the SCA was dismissed on the grounds, *inter alia*, that it did not establish factual causation or wrongfulness. It then applied to the CC for leave to appeal. In its judgment, reported as *Esorfranki Pipelines (Pty) Ltd v Mopani District Municipality 2023 (2) SA 31 (CC)*, the CC delineated the issue before it as whether economic loss caused by intentional breach of s 217 of the Constitution – which requires fair, open, and cost-effective tendering processes – was recoverable in delict. The CC focused on the element of wrongfulness, pointing out that while some factors, such as the dishonesty of the municipality, went in its favour, another, namely that the Promotion of Administrative Justice Act 3 of 2000 (PAJA) provided for compensation as a species of just and equitable relief in such cases, went strongly against it. The CC emphasised that PAJA was constitutionally mandated legislation designed to give effect to the administrative justice requirement of s 33 of the Constitution in both substantive and remedial terms. A tenderer in the position of Esorfranki was, therefore, entitled, in appropriate circumstances, to recover its lost profits under PAJA. The CC concluded that the principle of subsidiarity – which provides that where legislation is enacted in order to comprehensively give effect to a constitutional right, a litigant cannot bypass the relevant legislation and rely directly on the Constitution or the common law – therefore, precluded it from allowing Esorfranki's delictual claim.

Labour law

The legality of an ex post facto implementation of the 'no work, no pay' rule:

Between 9 November and 15 December 2020, workers of the Amathole Municipality in the Eastern Cape went on an illegal (unprotected) strike. The municipality, under the mistaken impression that some of its workers had not joined the strike, paid them their full salaries despite the hiatus in services rendered. Having realised its mistake, the municipality belatedly (more than five months after the end of the strike) notified the workers in question that it would implement the 'no work, no pay' rule by deducting the mistakenly paid money from their future salaries. The affected workers (the applicants), complaining that they were afforded no hearing on the matter by the municipality, applied to the ECEL for an interim interdict prohibiting the municipality from making the deductions. The ECEL granted the interdict and the municipality paid back the sums it had already deducted. The applicants, however, insisted on final relief, which the municipality resisted on the ground that the payments were, in the light of the unlawfulness of the strike and the court-sanctioned implementation of the 'no work, no pay' rule, made in error and hence susceptible, without more, to set-off or deduction under s 34(5) of the Basic Conditions of Employment Act 75 of 1997 (BCEA). Section 34(5) states that: 'An employer may not require or permit an employee to –

(a) repay any remuneration *except* for overpayments ... resulting from an *error in calculating the employee's remuneration*'.

In its judgment on the application for final relief, reported as *Gqithekhaya and Others v Amathole District Municipality* 2023 (2) SA 227 (ECEL) (Hartle J) ruled that the invocation of the 'no work, no pay' principle did not elevate a wage deduction for work not done to one 'permitted in terms of a law' as envisaged in s 34(1)(b) of the BCEA. The ECEL went to point out that the municipality should during the interim relief stage have asked the court for leave to deduct the remuneration it was entitled to withhold if the court found in its favour that the strike was unlawful. But mistaken payment would not entitle the municipality to recover the overpayment, five months after the fact, against present remuneration. Section 34 of the BCEA prohibited arbitrary deductions and s 34(5) could not be invoked without the employee's consent or an order of court. The ECEL accordingly made an order declaring that the deductions effected against the applicants' salaries amounted to unlawful self-help.

Motor vehicle accident claims

The legality of a Road Accident Fund (RAF) decision to cease paying medical claims if they were paid by a medical scheme:

On 12 August 2022, the RAF issued an internal directive instructing its managers to reject all medical claims if a medical aid scheme had paid for them. The rationale behind the directive was that in such cases the claimants did not suffer any losses. Discovery Health, South Africa's largest medical aid scheme, urgently approached the GP for an order rescinding the directive as unlawful. The directive was immediately implemented, resulting in a sudden and immediate cessation in settlements of all medical claims submitted by attorneys on behalf of member of medical schemes for the reimbursement of accident-related medical expenses. This was done without consulting or notifying medical schemes, their members, or attorneys.

In its judgment, reported as *Discovery Health (Pty) Ltd v Road Accident Fund and Another* 2023 (2) SA 212 (GP), the GP (per Mbongwe J) interdicted and restrained the RAF from implementing the directive. He pointed out that Discovery's approach could not be more justified and that it was, in fact, coerced into litigation by the RAF, which had chosen to 'go rogue'.

During his judgment Mbongwe J pointed out that the RAF functioned within the confines of the Road Accident Fund Act 56 of 1996, which obliged it to compensate, in full, the victims of vehicle accidents. Mbongwe J pointed out that the implementation of the directive would have driven medical schemes into bankruptcy forced claimants to abandon medical claims to avoid prescription and to settle their hospital bills out of funds received under other heads of damages.

Neighbour law

A nuisance claim concerning calls to prayer by an 'extraordinarily sensitive complainant':

Madrasah Taleemuddeen Islamic Institute v Ellaurie and Another 2023 (2) SA 143 (SCA) concerned a nuisance claim pertaining to the issuing of five daily calls to prayer, the first at 3:30, by the appellant, the Madrasah Taleemuddeen Islamic Institute, a school for Islamic studies (the Madrasah) located in Isipingo Beach, south of eThekweni in the KwaZulu-Natal Province. The first respondent, Mr Ellaurie, resided approximately 20 metres away from the Madrasah and experienced the sounds as a detestable nuisance. He applied to the KZD for an interdict directing the Madrasah to stop issuing calls to prayer that were audible to him, alternatively that it ceases its operations altogether.

He argued that the calls to prayer 'invaded his personal space' and robbed of the 'quiet enjoyment of [his] property' at an 'unearthly time'. Other grounds he relied on reflected a detestation of the Islamic faith. He claimed that the sounds gave a 'distinctly Muslim atmosphere to the area' which many non-Muslim people allegedly found repugnant. The KZD (per Mngadi J) granted an order directing the Madrasah to ensure that the calls to prayer would not be heard in Ellaurie's property. The Madrasah appealed to SCA.

The SCA, in a judgment penned by Dambuzza ADP (Gorven JA, Hughes JA, Musi AJA and Daffue AJA concurring) held that under neighbour law only unreasonable interferences with the use and enjoyment of one's property were prohibited. One factor in assessing the reasonableness of an interference would be the complainant's sensitivity thereto: An interference would not be considered to be unreasonable when the harm or complaint about it arose from a special or extraordinary sensitivity on the part of a complainant: The first respondent's profound dislike of Islam, the SCA held, made him an 'extraordinarily sensitive complainant', and accordingly the question of the reasonableness of the calls to prayer could not be judged by his standards. The SCA emphasised that he had placed scant evidence before the court to support a finding of unreasonableness according to the standards of the ordinary person living in Isipingo Beach.

The SCA deemed it necessary to address remarks made by the KZD to the effect that the freedom of religion guaranteed in the Constitution was no guarantee of the 'practice or manifestations of religion', and that, therefore, the Madrasah had to show that the calls to prayer were essential to its religion, and that all Ellaurie had to show was an interference with the enjoyment of his private space. The SCA disagreed, pointing out that the Constitution not only provided protection for different religious beliefs, but also guaranteed the freedom to observe and manifest those different religious beliefs. The rights of the appellant in this regard were relevant in an assessment of the interference of which the first respondent complained.

The SCA concluded that the appeal had to be upheld, and the judgment of the KZD set aside and replaced with an order dismissing the first respondent's application.

SLAPP suits

Abuse of process? SLAPP, an acronym for Strategic Litigation Against Public Participation, was successfully raised as a defence in the WCC in *Mineral Sands Resources (Pty) Ltd and Another v Redell*

and Others and Two Related Cases 2021 (4) SA 268 (WCC). There, defendants were environmental attorneys and community activists opposed to the mining activities of Australian mining company Mineral Sands Resources, which had sued the defendants for defamation. In their SLAPP defence the defendants successfully argued that the suit was aimed at intimidating them into silence and constituted an abuse of process. In an application for leave to appeal to the CC, now reported as *Mineral Sands Resources (Pty) Ltd and Others v Reddell and Others 2023 (2) SA 68 (CC)*, the issue was whether such a species of abuse should be recognised in South Africa. Mineral Sands argued that motive should play no role in the inquiry whether the SLAPP defence could be accommodated in the abuse-of-process doctrine. Conversely, the respondents (the defendants in the WCC) submitted that the only criterion should be motive, and merits should play no role at all.

The CC held that both motive and merits played a role in the inquiry, and that ulterior purpose and a SLAPP defence ought not to be conflated. The CC pointed out that there were various kinds of abuse of process and that the characteristics of the SLAPP defence, which merited a place in our law, were more nuanced than that of ulterior purpose and also did not fall into the category of frivolous

and vexatious proceedings, where the focus was on the nature of the case rather than the procedure employed. The CC held that the doctrine of abuse of process as it stood could accommodate the SLAPP defence. The respondents would have to prove at trial that the defamation suit brought by Mineral Sands –

- was an abuse of process;
- was not brought to vindicate a right;
- amounted to the use of court process to achieve an improper end and to use litigation to cause the defendants financial and/or other prejudice in order to silence them; and
- violated, or was likely to violate, the right to freedom of expression.

The CC emphasised that since a SLAPP defence required a consideration of both merits and motive, the respondent's defence, based as it was on motive alone, lacked the averments necessary to satisfy the requirements of a successful SLAPP defence. The CC pointed out that while its finding that the SLAPP defence could be accommodated in the doctrine of abuse of process rendered it unnecessary to consider whether the common law ought to be developed, it was nevertheless up to Parliament to decide whether a more comprehensive, specific SLAPP-suit defence of the kind developed in Canada and the United States ought to be legislated for here. In its order the CC

gave the respondents 30 days to amend their special plea to include the required averments.

Special execution

An application for the reconsideration of a reserve price: Can a court revisit the original order declaring residential property to be specially executable? In the matter of *Nedbank Ltd v Mabaso and Another 2023 (2) SA 298 (GJ)* the GJ (per Moultrie AJ) dealt with an application in terms of Uniform Rule 46A(9) for the reconsideration of a reserve price set in respect of immovable property declared to be specially executable. The applicant was Nedbank Ltd. It had obtained orders against the first respondent and the second respondent declaring their undivided shares in certain immovable property constituting their primary residence to be specially executable, and authorising execution thereon at a reserve price of R 596 305,99. A sale of the property by public auction was subsequently conducted by the Roodepoort South Sheriff. However, because the highest bid received was only R 300 000, namely below the reserve price, no sale took place. This fact prompted the applicant to approach the GJ in terms of r 46A(9)(c) for the variation of the previous orders to allow the property to be sold in execution without a reserve price. The second respondent

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opposed the application and sought to persuade the GJ to set aside the orders of special executability, being in a position since obtaining employment to make monthly payments of R 3 000 per month towards satisfying his debts to the applicant. In terms of the certificate of balance furnished by the applicant, the full (accelerated) amount of the respondents' joint and several indebtedness to the applicant stood at R 681 543,18, including arrears amounting to R 212 614,49.

Importantly, the GJ confirmed that it was indeed open to a court hearing an application in terms of r 46A(9)(c) to revisit the underlying order of special executability against the respondents' primary residence, should it come to light that the circumstances of the matter had changed to such an extent that such an order was no longer warranted. Such might be the case where there were other satisfactory means of satisfying the judgment debt. The GJ, however, declined to exercise its discretion in this case in favour of setting aside the order

of special executability. There was no real prospect that the considerable arrears would be paid off in the absence of a sale of the property in execution.

The GJ held further that –

- it was not appropriate that the sale in execution of the property should take place without a reserve price;
- the applicant's claims that such a course of action was necessary for a sale to take place was unfounded; and
- the sheriff's report showed that there had indeed been significant interest in the property at the unsuccessful auction.

The solution the GJ arrived at was to set the reserve price at the amount of the highest bid submitted at that auction, that is, R 300 000, which according to the GJ was the best indication of the property's value.

Other civil cases

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

- appeals against decisions of the Community Schemes Ombud Service;
- capital gains tax on trusts;
- curatorship for insurance companies;
- determination of accrual in divorce cases;
- execution pending appeal;
- internal appeals in environmental law cases;
- irregularities in government procurement;
- pre-emption in land sales;
- right of way;
- summary judgment in magistrates' courts; and
- the constitutionality of the Executive Ethics Code.

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By
Lusapho
Yaso

Getting to the 'soul' of trademark infringement

Golden Fried Chicken (Pty) Ltd v Vlachos and Another (SCA) (unreported case no 497/2021, 3-11-2022) (Gorven JA (Petse AP, Makgoka and Mabindla-Boqwana JJA and Basson AJA concurring))

The mark/phrase 'soul' finds itself, yet again, in another trademark litigation. On the 3 November 2022, the Supreme Court of Appeal (SCA) passed down the most interesting judgment considering the trademark questions as it relates to the mark 'soul', which happens to be controversial and catches fire all the time when it is talked about under trademark subjects. Does this judgment set precedent for all upcoming and/or underway trademark applications with the trademark trading name 'soul' and does this mean that the trademark applications on this trademark name 'soul' is bound to fail subsequent to this judgment? This is definitely not the easiest judgment to follow but it is worth taking note especially if you are trading using the trademark 'soul' or plan to incorpo-

rate the mark 'soul' in your trading business name. This judgment will guide you accordingly.

The issue before the SCA

On 3 November 2022, the SCA was tasked to deliver a judgment on appeal on whether the 'notional customers would associate restaurant services called "Soul Souvlaki" with those of the Appellant if the latter was trading in the same market and selling Greek cuisine under the name "Soul". Or put differently, 'would the use of the mark "Soul Souvlaki" be likely to lead to deception or confusion in the minds of a substantial number of customers?'

Background

In this case, Golden Fried Chicken (Pty) Ltd (the appellant) trading as 'Chicken

Licken' brought an interdict application against Dino Vlachos and Soul Souvlaki (Pty) Ltd (the respondents) for 'infringing' its trademark by trading as 'Soul Souvlaki' in the food and restaurant sectors. The appellant had registered the words 'Soul' and 'Soul Food' under classes 29, 30, 35 and 43, as evidenced by the number of years it has been trading. The second respondent (Soul Souvlaki) trading since 2012, conversely had applied to register its trading name under classes 35 and 43. This is where most of the disagreement and dispute arose, under class 43, on which the majority judgment solely ruled on.

The appellant argued and contended in the SCA that the use of the second respondent's trading name 'Soul Souvlaki' is infringing and will continue to infringe the appellant's mark ('Soul').

This is where the court had to decide whether the mark ‘Soul’ as used by the respondents is likely to create confusion on the part of the consumers. The appellant further abandoned all other classes in which it had registered its trademark but sought relief under class 43 of the Act wherein the appellant did not intend to seek relief on the mark ‘Soul Food’ but limited its infringement on ‘Soul’.

Judgment

Since both the appellant’s and respondent’s trademarks are registered in relation to food services in the same class, the question before the court was whether the respondent’s registered trademark causes or is likely to cause deception in the eyes of the public. The court relying on several cases thus determined that the names ‘Soul’ and ‘Soul Souvlaki’ were not identical marks in that, while the mark ‘Soul’ existed in the respondent’s mark, ‘Souvlaki’ was not common to it. The judge further held that ‘the word “Souvlaki” is at least as significant as the word “Soul”. ... When the marks

are compared side by side, the word “Souvlaki” clearly distinguishes the respondents’ mark from Soul.’ The judge continued to hold that ‘in my estimation, the likelihood of deception or confusion is far more remote than in the case of “Pepsi Twist” as compared to “Lemon Twist” or “Diet Twist”.’ The judge went on to conclude that ‘it is unlikely that the notional restaurant customer would confuse it with a restaurant called “Soul”.’ As a result, a direct comparison of the marks reveals no possibility of deception or confusion. In light of the foregoing, the judge did not believe the respondent’s mark is sufficiently similar to the appellants to deceive or confuse. As a result, in the restaurant and food sectors, the mark ‘Soul Souvlaki’ sufficiently distinguishes the respondent’s services from those of the appellant. Having said that, ‘the appellant failed to establish infringement under the provisions of s 34(1)(a) of the Act.’

Conclusion

In this case, the SCA opined that the ap-

pellant did not establish a case of trademark infringement under s 34(1)(a) of the Trade Marks Act 194 of 1993 in that the appellant failed to prove beyond a reasonable doubt how the mark ‘Soul’ in its trading name would confuse or was likely to cause deception in the eyes of the public when used or compared against ‘Soul Souvlaki’. This case emphasises the critical importance of trademark names used by companies in their trading names, as well as the fact that the likelihood of deception in the eyes of the public is not always the case ‘when the marks are compared side by side’, as highlighted and held in both this case and *Century City Apartments Property Services CC and Another v Century City Property Owners’ Association* [2010] 2 All SA 409 (SCA).

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By
Phumzile
Penelope
Ziqubu

You lied on your resume and got the job – what now?

Umgeni Water v Naidoo and Another [2023] 1 All SA 857 (KZP)

Many job requirements require a specific qualification to ensure that candidates meet the profession’s or industry standards. The requirements are always set out in the job advertisement and candidates must meet these requirements to be shortlisted and later appointed. The requirements usually relate to work experience, skills, a specific degree or professional designations, specific knowledge, and physical abilities. This list is not exhaustive.

This brings us to the big question: ‘What action may an employer take if an employee has misrepresented their qualifications?’ (Ivan Israelstam ‘What action may an employer take if an employee has misrepresented their qualifications or experience?’ (www.skillsportal.co.za, accessed 3-4-2023)). This question was answered in the case of *Umgeni Water*.

Background facts

Sheldon Naidoo (employee) applied for a graduate programme offered by Umgeni Water. One of the requirements to be admitted to the programme was that the candidate must possess a degree

in Bachelor of Science in Engineering (chemical engineering).

In his application form the employee attached a degree certificate in chemical engineering from the University of KwaZulu-Natal (UKZN). This degree certificate resulted in him being admitted to the graduate programme.

The employee remained in the employ of Umgeni Water for several years. A new opportunity presented itself at Umgeni Water, a position of Process Technician was advertised. The employee applied and had to attach his qualification certificate to the application form.

This time Umgeni Water conducted a qualification check. The employee’s qualification was checked and sent to UKZN for verification.

UKZN stated it had no record of the said degree being conferred on the employee. Umgeni Water approached the employee seeking answers, which proved to be a fruitless exercise.

Soon after the employee resigned, which was rejected by Umgeni Water as there was disciplinary proceeding underway, the employee tendered a second resignation letter this time resigning with immediate effect due to ill health.

Unhappy with the outcome of the verification, Umgeni Water sued the employee for all money paid to him during his employment. The basis being he submitted a fraudulent qualification certificate, which meant from the onset there was no employment contract in existence.

The matter escalated to the KwaZulu-Natal Division of the High Court in Pietermaritzburg and relief was sought in terms of s 37D(1)(b) of the Pension Funds Act 24 of 1956 (the Act).

Graduated from UKZN

The court considered the facts of the matter and went on to state the employee was untruthful. The degree certificate produced by the employee was a forgery. The employee falsely represented the true nature of his qualifications with an intention of securing employment from Umgeni Water.

It was clear from the evidence that the employee once registered at UKZN but was excluded at some stage, which meant he never graduated. The false utterance and presentation of a falsified certificate from UKZN misled Umgeni Water to think the employee possessed a chemical engineering degree.

Employment relationship

The court held that this act can be regarded as fraud as it induced Umgeni Water to offer him employment of which had it known about the fraudulent degree/certificate it would not have.

The 'employment relationship' was under false pretence and cannot be regarded as true. The graduate programme requirements specified a candidate with a chemical engineering degree.

It was clear that there was no employment contract as most of the terms were broken by the employee.

Monetary claim

Umgeni Water stated it was entitled to compensation from the employee's provident fund for the unjust enrichment. Umgeni Water referred the court to s 37D(1)(b)(ii) of the Act. This section protects 'the employer's right to pursue the recovery of money due to it arising, *inter alia*, out of any fraud perpetrated against it by its employee' (para 46).

The court found that the conduct of the employee falls in the ambit of this section of the Act and warrants Umgeni Water to have a valid claim against his pension fund money.

The court ordered the employee to pay Umgeni Water an amount of R 2 203 565,04 with 'interest from date of demand to the date of final payment' (para 54). Furthermore, Umgeni Water was entitled to execute the judgment against the employee's provident fund.

Conclusion

Employers have a right to complete and correct information of a candidate pertinent to the job to decide to employ that candidate.

It is important for employers before appointing a candidate to verify the qualifications through South African Qualifications Authority (SAQA). On the other hand, candidates must not mislead the prospective employer as the National Qualifications Framework Amendment

Act 12 of 2019 stipulates this 'it is a criminal offence to misrepresent qualifications' (Labour Guide 'The case of the employee who misrepresented his qualifications' (<https://labourguide.co.za>, accessed 3-4-2023)).

It is further important to note that the misrepresentation of a qualification also has a huge impact on other potential candidates who were not shortlisted and/or appointed because of the forged qualification presented by the successful candidate.

It is clear from the above that there is legal recourse for an 'employer who subsequently finds that it has employed someone who deceived it prior to employment' (EOHCB 'Disclosure of information at interviews' (www.eohcb.co.za, accessed 3-4-2023)).

Phumzile Penelope Ziqubu LLB (UKZN)
writes in her personal capacity.



By
Kgomotso
Ramotsho

Husband forfeits the patrimonial benefits of the accrual system after showing no regard for his role as a husband

M v M (GP) (unreported case no 56859/2021; 26859/2021, 21-2-2023) (Swanepoel J)

In a case of *M v M*, the Gauteng Division of the High Court in Pretoria looked at the whether the defendant should forfeit the benefits arising from the application of accrual system to the marriage. On 11 November 2021, the plaintiff issued summons in which she sought a decree of divorce and other ancillary relief. However, due to delays on the part of the defendant, the matter was dealt with only in 2023. The hearing was on 25 January 2023 and delivered on 21 February 2023.

In the evidence that was placed before the court by affidavit, the court said that the parties were married to one another on 24 April 2011. The accrual system was made applicable to their marriage by virtue of an antenuptial contract in which their respective estates were valued at nil rand. The court pointed out that the

defendant's immovable property situated in Randpark Ridge was excluded from the accrual, as was plaintiff's immovable property at Cosmo City. Both parties' retirement annuities, pension and provident and provident schemes were also excluded.

The court said that the plaintiff is evidently a successful businesswoman. She has been operating a close corporation since 2008 (the corporation), to which she is a sole member of the corporation, and it is her most valuable assets. The court said the defendant held some positions but has also worked for the corporation for a brief period from 2019 to December 2021, when he was dismissed subsequent to a disciplinary hearing.

The court said that in 2011 to 2015 the defendant was employed in Ermelo. The parties had the understanding that the defendant would return to their Johan-

nesburg home on weekends. However, the court added that those weekends became less frequent as time went on. The defendant on times that he did not go home spent time with his biker friends, leaving the entire burden of maintaining the household financially to the plaintiff.

The court added that during a period in 2013 to 2014 the defendant was involved in an extramarital relationship with a family friend, who was also married, while involved with two other women. And from 2016 to 2017, with a fourth person, who was a family friend, engaged to be married to another family friend. The court also discussed the fact that the defendant had no interest in the corporation and refused to assist the plaintiff financially, until he lost his employment in 2019. The defendant received a settlement payment of R 275 000 from his previous employer

but refused to divulge to the plaintiff what he had done with the money. The court said the money certainly did not go towards maintenance of the home.

The court pointed out that the defendant was unemployed, and the plaintiff appointed the defendant as Chief Operating Officer of the corporation at a salary of R 35 000 per month. However, the defendant was not satisfied with the salary, and demanded an increase. The court said that the defendant salary was increased to R 44 100 and then to R 90 000 per month, simply to assuage his demands, and even with that salary none of his income was used to support his family but spend on girlfriends and weekend getaways and towards maintaining a girlfriend in an apartment in Durban.

On 25 February 2021, the defendant reported to the plaintiff that one of the corporation's vehicles had been stolen in Durban while visiting a supplier. The court said that the vehicle was allegedly 'recovered' by persons only known to the defendant, and the plaintiff had to pay money to those persons for recovery of the vehicle. The court pointed out that essentially the defendant extorted money from the plaintiff in exchange for the return of her vehicle. The court added that the defendant not being satisfied with merely being unfaithful and dishonest, he also set up his own company to compete with the corporation, while he was still in the corporation's employee. As a result he was dismissed in December, which outcome the defendant is still disputing in litigation.

The court pointed out that s 9(1) of the Divorce Act 70 of 1979 reads:

'(1) When a decree of divorce is granted on the ground of the irretrievable breakdown of a marriage the court may make an order that the patrimonial benefits of the marriage be forfeited by one party in favour of the other, either

wholly or in part, if the court, having regard to the duration of the marriage, the circumstances which gave rise to the breakdown thereof and any substantial misconduct on the part of either of the parties, is satisfied that, if the order for forfeiture is not made, the one party will in relation to the other be unduly benefitted.'

The court referred to *Wijker v Wijker* 1993 (4) SA 720 (A) where the court had occasion to consider the correct approach to forfeiture orders. The court in *Wijker* said:

'It is obvious from the wording of the section that the first step is to determine whether or not the party against whom the order is sought will in fact be benefitted. That will be purely a factual issue. Once that has been established the trial court must determine, having regard to the factors mentioned in the section, whether or not that party will in relation to the other be unduly benefitted if a forfeiture order is not made. Although the second determination is a value judgment, it is made by the trial court after having considered the facts falling within the compass of the three factors mentioned in the section.'

The court said that once it has been determined that a party will be benefitted if an order is not made, the next question is thus how the three factors of duration, substantial misconduct, and the case breakdown are to be weighed. In summary the court added that when the determination is made that the defendant would benefit by sharing in plaintiff's estate, the three factors have to be considered individually to be determine whether the benefit what would accrue to defendant would be 'undue'. The court pointed out that the Divorce Act intended to move away from the fault-factor in divorces, but rather to provide for a fair determination of the parties' patrimonial affairs.

The court said, nevertheless, the requirement that the benefit must be 'undue' requires one to exercise a value judgment. The court added that although there is no evidence of the value of defendant's estate, and what its accrual may be, there is no doubt that the plaintiff's estate has shown growth. The court added that it was aware of the fact that the marriage (on the face of it) lasted some 12 years. However, in truth, the marriage relationship lasted for but a short while. The court said the defendant was soon living as if he were a bachelor. He only came home for brief intermittent periods and did not contribute to the common home financially, emotionally, or in any other manner.

Swanepoel J said that it strikes him to be exceedingly unfair that the defendant, having shown no regard for his role as husband and father, and having made no contribution of any kind to the common home, neither financially nor emotionally, should benefit from plaintiff's work. The court added that it was of a view that the claim for forfeiture should succeed. The plaintiff provided the court a draft order, which the court incorporated in the judgment.

The court after considering the matter, granted the plaintiff a decree of divorce. The defendant forfeits the patrimonial benefits of the accrual system in total, including the plaintiff's members' interest in the corporation.

The parties shall retain full parental rights and responsibilities in respect of a girl born on 5 January 2015 including the parental responsibilities and rights.

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 3 March - 24 March 2023

Acts

Customs and Excise Act 91 of 1964

Imposition of Provisional Payment (PP/168). GN R3155 GG48211/17-3-2023.

Financial Sector and Deposit Insurance Levies (Administration) and Deposit Insurance Premiums Act 12 of 2022

Commencement of the Act. Except the provisions referred to in paras (b) and (d) that will take effect on 1 April 2023.

Sections 2(2)(b) and (c) and s 3 will take effect on 1 April 2024. Commencement of certain amendments in s 4. GN3188 GG48291/24-3-2023.

Financial Sector and Deposit Insurance Levies Act 11 of 2022

Commencement of the Act. Except the provisions referred to in para (b) that will take effect on 1 April 2023. Section 9 and sch 6 will take effect on 1 April 2024. GN3186 GG48291/24-3-2023.

Financial Sector Laws Amendment Act 23 of 2021

Commencement of certain provisions. GN3202 GG48294/24-3-2023.

Financial Sector Regulation Act 9 of 2017

Commencement of certain provisions. GN3187 GG48291/24-3-2023.

Bills and White Papers

Judicial Matters Amendment Bill, 2023

Publication of explanatory summary of the Bill. GenN1678 GG48217/16-3-2023.

Government, General and Board Notices

Compensation for Occupational Injuries and Diseases Act 130 of 1993

Confirmation of life for all foreign pensioners and beneficiaries in the Compensation Fund. GN3200 GG48294/24-3-2023.

Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007

Revised National Instruction on Sexual Offences issued in terms of s 66(1)(a) of the Act. GN3124 GG48183/8-3-2023.

Electoral Act 73 of 1998

Publication of reviewed lists of candidates. GenN1651 GG48175/3-3-2023.

Publication of supplemented lists of candidates. GenN1677 GG48215/16-3-2023.

International Trade Administration Commission

Notice of initiation of the investigation into the extension of safeguard measure on imports of threaded fasteners of iron or steel: Bolts ends and screw studs, screw studding and other hexagon nuts (excluding those of stainless steel and those identifiable for aircraft). GenN1695 GG48294/24-3-2023.

Labour Relations Act 66 of 1995

Furniture Bargaining Council: Extension of period of operation of the Collective Bargaining Fee Collective Agreement. GenN1686 GG48221/17-3-2023.

National Bargaining Council for the Road Freight and Logistics Industry: Extension to non-parties of the Main Collective Amending Agreement. GenN1692 GG48279/23-3-2023.

Local Government: Municipal Electoral Act 27 of 2000

Municipal By-elections - 5 April 2023: Official List of Voting Stations. GenN1689 GG48222/17-3-2023.

National Nuclear Regulator Act 47 of 1999

Notice in terms of s 8(4)(a)(i) of the Act to invite nominations to the Board of the National Nuclear Regulator. BN406 GG48221/17-3-2023.

National Radioactive Waste Disposal Institute Act 53 of 2008

Notice in terms of s 7(8)(a) of the Act to invite nominations to the Board of the National Radioactive Waste Disposal Institute. BN407 GG48221/17-3-2023.

National Water Act 36 of 1998

Disestablishment of Schweizer-Reneke Irrigation Board. GN3205 GG48294/24-3-2023.

National Water Act 36 of 1998

Notice to update water use information in terms of the Act. GN3137 GG48187/10-3-2023.

Notice to register water use in terms of the Act. GN3138 GG48187/10-3-2023.

Establishment of the Mzimvubu-Tsitsi-

kamma Catchment Management Agency in terms of s 78(1) of the Act. GN3140 GG48187/10-3-2023.

Water Resources classes and resource quality objectives for Thukela Catchments in the Pongola-Mtamvuna Water Management Area. GN3141 GG48187/10-3-2023.

Nursing Act 33 of 2005

South African Nursing Council: Section 4(h) of the Act. GN3164 GG48221/17-3-2023.

South African Geographical Names Council Act 118 of 1998

Publication of Official Geographical Names. GN3148 GG48191/10-3-2023.

Publication of Official Geographical Names. GN3150 GG48207/10-3-2023.

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

Declaration of Existing Provincial Road P3 Section 3 through the Town of Wolmaransstad as Part of National Road N12 Section 14. GN3156 GG48216/16-3-2023.

N2 North Coast, oThongathi and Mvoti Toll Collection Resumption. GN3168 GG48226/17-3-2023.

Spatial Data Infrastructure Act 54 of 2003

Spatial information standards in terms of s 11 of the Act. GN3128 GG48187/10-3-2023.

Tax Administration Act 28 of 2011

Notice of addresses at which a document, notice or request is to be delivered or made for purposes of r 2(1)(c)(ii) and r 3(1) read together with r 2(1)(c)(iii) of the rules promulgated in terms of s 103 of the Act. GN3135 GG48187/10-3-2023.

Notice of address of service specified by the Commissioner in terms of s 11(5) of the Act, with regard to any notice or process by which legal proceedings are instituted. GN3136 GG48187/10-3-2023.

Rules, regulations, fees and amounts

Audit Profession Act 26 of 2005

Fees payable to the Independent Regulatory Board for Auditors with effect from 1 April 2023. BN405 GG48221/17-3-2023.

Civil Aviation Act 13 of 2009

25th Amendment of the Civil Aviation Regulations, 2023. GN R3169 GG48228/17-3-2023.

26th Amendment of the Civil Aviation Regulations, 2023. GN R3170 GG48228/17-3-2023.

Customs and Excise Act 91 of 1964

Amendment of Rules (DAR242). GN R3194 GG48293/24-3-2023.

Dental Technicians Act 19 of 1979

Regulations relating to scope of profession of dental technicians and dental technologists. GN R3193 GG48293/24-3-2023.

Dental Technicians Act 19 of 1979

Amendment to regulations relating to

unmounted artificial teeth. GN R3153 GG48211/17-3-2023.

Amendment to regulations relating to the registration of dental laboratories and related matters. GN R3154 GG48211/17-3-2023.

Films and Publications Act 65 of 1996

Notice of the publication of the Enforcement Committee Rules and complaints handling procedures of the Film and Publication Board. GN3199 GG48294/24-3-2023.

Gas Regulator Levies Act 75 of 2002

Levy and interest payable on piped-gas industry. GN3175 GG48275/20-3-2023.

Higher Education Act 101 of 1997

Amended Institutional Statute of the University of the Free State. GN3133 GG48187/10-3-2023.

Marketing of Agricultural Products Act 47 of 1996

Establishment of levy and determination of guideline prices: Levies relating to imported meat and poultry. GN R3191 GG48293/24-3-2023.

Establishment of statutory measure: Records and returns by importers of meat, poultry meat and mechanically deboned meat. GN R3192 GG48293/24-3-2023.

Establishment of statutory measure: Registration by importers of meat, poultry and mechanically deboned meat. GN3198 GG48294/24-3-2023.

Medicines and Related Substances Act 101 of 1965

Notification of retention fee payment. GN R3182 GG48287/24-3-2023.

National Council of Societies for the Prevention of Cruelty to Animals

Rules. BN403 GG48187/10-3-2023.

National Environmental Management: Waste Act 59 of 2008

Extended Producer Responsibility Scheme for the pesticide sector. GN3177 GG48281/23-3-2023.

Extended Producer Responsibility Scheme for the lubricant oil sector. GN3178 GG48282/23-3-2023.

Extended Producer Responsibility Scheme for the portable battery sector. GN3179 GG48283/23-3-2023.

National Prosecuting Authority Act 32 of 1998

Salary level for Deputy Directors of Public Prosecutions and Chief Public Prosecutors appointed in terms of the Act. GN3167 GG48225/17-3-2023.

Nuclear Energy Act 46 of 1999

Nuclear non-proliferation regulations. GN R3145 GG48188/10-3-2023.

Petroleum Pipelines Levies Act 28 of 2004

Levy and interest payable on petroleum pipelines industry. GN3174 GG48275/20-3-2023.

Plant Improvement Act 53 of 1976

Publication of Plant Improvement Act Tariffs for 2023/2024. GN R3190 GG48293/24-3-2023.

Private Security Industry Regulation Act 56 of 2001

General notice annual fee increase. GenN1674 GG48206/15-3-2023.

Railway Safety Regulator Act 16 of 2002

Notification of publication of the Regulator Verbal Safety-Critical Communication Standard for implementation and compliance by the railway operators. GN3203 GG48294/24-3-2023.

Tax Administration Act 28 of 2011

New dispute resolution rules. GN R3146 GG48188/10-3-2023.

Legislation for comment

Companies Act 71 of 2008 and General Laws Amendment Act 22 of 2022

Invitation for comment on the Draft Companies Amendment Regulations, 2023. GN3151 GG48210/15-3-2023.

Compensation for Occupational Injuries and Diseases Act 130 of 1993

Increase in monthly pensions. GenN1668 GG48187/10-3-2023.

Competition Act 89 of 1998

Invitation for the public comment on the draft regulations relating to appeals arising from market inquiries before the Competition Tribunal in terms of s 43F and the draft regulations relating to a divestiture recommendation by the Commission in terms of the Act. GN3125 GG48184/8-3-2023.

Draft rules relating to appeals arising

from market inquiries before the Competition Tribunal. GN3126 GG48184/8-3-2023.

Draft rules relating to a divestiture recommendation by the Commission in terms of s 43D(2) of the Act. GN3127 GG48184/8-3-2023.

Invitation for the public to comment on the draft Block Exemption Regulations for Energy Suppliers, 2023. GN3122 GG48182/8-3-2023.

Invitation for the public to comment on the draft Block Exemption Regulations for Energy Users, 2023. GN3123 GG48182/8-3-2023.

Media and digital platforms market inquiry draft for March 2023. GN3171 GG48252/20-3-2023.

Constitution

Notice of intention to introduce a Private Member's Bill into Parliament and invitation for comment: Local Government: Municipal Structures Amendment Bill, 2023. GenN1712 GG48311/24-3-2023.

Electronic Communications Act 36 of 2005

Application for the transfer of ownership of the Individual Electronic Communications Service Licence from Yabroo (Pty) Ltd to NET4 Telecoms (Pty) Ltd. GenN1675 GG48213/15-3-2023.

Application for the transfer of ownership of an Individual Electronic Commu-

nications Network Service Licence from Ubuntel (Pty) Ltd to NET4 Telecoms (Pty) Ltd. GenN1676 GG48214/15-3-2023.

Application for the renewal of an Individual Commercial Subscription Television and Sound Broadcasting Service Licence by MultiChoice (Pty) Ltd. GenN1680 GG48219/16-3-2023.

Financial Markets Act 19 of 2012

Proposed amendments to the Johannesburg Stock Exchange (JSE) Debt Listing Requirements: Annual Improvement Project. BN402 GG48187/10-3-2023.

Proposed amendments to the JSE Listing Requirements: Financial reporting disclosures, weighted voting shares, free float assessment and special purposes acquisition companies. BN404 GG48187/10-3-2023.

Independent Communications Authority of South Africa Act 13 of 2000

Discussion document on the review of the Regulations on Mail Conveyance, 2009. GN3172 GG48254/17-3-2023.

Legal Practice Act 28 of 2014

Proposed amendment to r 17.6.3. GN3201 GG48294/24-3-2023.

Constitution Nineteenth Amendment Bill, 2023: Notice of intention to introduce a Private Member's Bill into Parliament and invitation for comment. GenN1693 GG48294/24-3-2023.

Marine Spatial Planning Act 16 of 2018

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Publication of draft Marine Sector Plans for comment. GN3132 GG48187/10-3-2023.

National Environmental Management Act 107 of 1998

Proposed amendments to the regulations to phaseout the use, production, distribution, sale, import and export of persistent organic pollutants. GN3180 GG48284/23-3-2023.

Consultation on the draft National Regulations for the Management of Mercury in South Africa. GN3189 GG48292/24-3-2023.

National Environmental Management: Air Quality Act 39 of 2004

Consultation on proposed regulations for implementing and enforcing priority area air quality management plans. GN R3152 GG48211/17-3-2023.

National Environmental Management: Waste Act 59 of 2008

Proposed amendments to the Regulations to Prohibit the Production, Distribution, Import, Export, Sale and Use of Persistent Organic Pollutants that are listed by the Stockholm Convention on persistent organic pollutants. GN3181 GG48285/23-3-2023.

Proposed amendments to the National Norms and Standards for the Assessment of Waste for Landfill Disposal, 2013. GN3183 GG48288/24-3-2023.

Proposed amendments to the Nation-

al Norms and Standards for Disposal of Waste to Landfill, 2013. GN3184 GG48289/24-3-2023.

Proposed amendments to the Waste Classification and Management Regulations, 2013. GN3185 GG48290/24-3-2023.

National Forests Act 84 of 1998

Amendments to the regulations of the Act. GN3121 GG48181/8-3-2023.

National Land Transport Act 5 of 2009
Regulations in terms of ch 7 of s 91 of the Act. GN3149 GG48203/14-3-2023.

National Qualifications Framework Act 67 of 2008

Call for comment on the proposed Occupational Qualifications for Registration on the Occupational Qualifications Sub-Framework for Trades and Occupations. GN3173 GG48255/20-3-2023.

Call for comment on the proposed Occupational Qualifications for registration on the Occupational Qualifications Sub-Framework for Trades and Occupations. GN3176 GG48280/23-3-2023.

National Railway Safety Regulator Act 16 of 2002

New safety permit fee model. GenN1688 GG48221/17-3-2023.

National Water Act 36 of 1998

Regulations relating to access and use of government waterworks and surrounding state-owned land for recreational purposes in terms of the Act. GN3204 GG48294/24-3-2023.

Revision of general authorisations in terms of s 39 of the Act, for water uses as defined in s 21(c) or s 21(i). GN3139 GG48187/10-3-2023.

Draft Integrated Water Quality Management Policy. GN3142 GG48187/10-3-2023.

South African Weather Service Act 8 of 2001

Proposed Regulations Regarding Fees for the Provision of Aviation Meteorological Services. GN3147 GG48190/10-3-2023.

Veterinary and Para-Veterinary Professions Act 19 of 1982

Draft rules relating to the disciplinary processes against the veterinary and para-veterinary professions for comment. GN3196 GG48294/24-3-2023.

World Heritage Convention Act 49 of 1999

Notice of the intention to change the name of uKhahlamba-Drakensberg Park World Heritage Site to Maloti-Drakensberg Park World Heritage Site in line with Decision 37 Com 8B.18 of the World Heritage Committee. GN3159 GG48221/17-3-2023.

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



By
Nadine
Mather

Employment law update

Employee seeking to 'dodge' retirement by taking leave that extended beyond her retirement age

In *Mocwaledi v Premier of the Northern Cape Province* [2023] 3 BLLR 254 (LC), the employee, after 32 years of service with the Department, attained the age of 65 years in January 2019. The Department granted the employee annual leave until early February 2019. Four days after the employee had returned to work, she was advised that her salary had been stopped and she had been removed from the Department's Persal system because she had passed the retirement age.

Disgruntled by the Department's conduct, the employee referred an auto-

matically unfair dismissal dispute to the Labour Court (LC) claiming that she had been dismissed because of her age. In doing so, the employee alleged that she had not received a retirement letter advising her that her retirement was imminent nor had the Department consulted with her in this regard. Moreover, two of her fellow employees had continued working for the Department after the age of 65 years, which she contended amounted to inconsistent treatment.

The Department denied that the termination of the employee's employment amounted to an automatically unfair dismissal. The Department alleged that the employee was aware that the retirement age in place was 65 years and that she had tried to 'dodge' her retirement by taking annual leave. Further, she had evaded

employees who had attempted to deliver her retirement letter to her residential address.

The LC noted that s 187(1)(f) of the Labour Relations Act 66 of 1995 (LRA) provides that a dismissal is automatically unfair if the reason for the dismissal is that the employer unfairly discriminated against an employee on, *inter alia*, the basis of age. However, in terms of s 187(2)(b) of the LRA, a dismissal based on age is fair if the employee has reached the normal or agreed retirement age for persons in that capacity. In this regard, the Public Service Act 103 of 1994 provides that the retirement age for public service members is 65 years. On the evidence before the court, there was no question that the employee had reached the statutory, normal retirement age on her 65 birthday.

The court held that when applying for leave when she did, and it being granted, the employee may have believed that her services were needed beyond her retirement age. However, this was no more than wishful thinking on the employee's part. While the Department was at fault for delivering her retirement letter late and not at least thanking the employee for her lengthy service and contribution, this treatment did not render the employee's retirement an automatically unfair dismissal.

The Labour Appeal Court (LAC) has recently held that even where an employee is kept on after the agreed or normal retirement age, an employer may nevertheless fairly terminate the employment relationship at a later stage. In this regard, the LAC found that while a dismissal of an employee on the grounds of age prior to reaching retirement age may have the effect of impairing the right to dignity of that employee, the dismissal of an employee who has passed their retirement age would not. This is because employees with agreed or normal retirement dates anticipate that they will work until they reach retirement age and are expected to prepare financially for their retirement.

Having regard to the facts of the matter, and to the LAC judgment by which the court was bound, the LC held that the termination of the employee's employment did not amount to an automatically unfair dismissal. While the circumstances around the termination may have reflected a lack of professional work practice by the Department in that annual leave was granted for a period after the employee's retirement date, the fact that the employee worked after her retirement date could not assist her claim.

The application was dismissed.

Ignoring workplace discrimination can be costly for employers

In *Solidarity obo Oosthuizen v South African Police Service and Others* [2023] 3 BLLR 258 (LC), the employee, Lieutenant Colonel Oosthuizen (Oosthuizen), was employed by the South African Police Service (SAPS) as a Human Resources officer situated at the Klerksdorp Police Station. Oosthuizen took corrective action against two of her subordinates, each warrant officers. Thereafter, an altercation occurred in which both warrant officers accused Oosthuizen of calling them the 'k-word'. Oosthuizen reported the incident to SAPS and two officers were appointed to investigate her complaint.

The parties lodged criminal cases against each other and shortly there-

after, Oosthuizen was transferred to another station at the request of the warrant officers pending the outcome of the internal investigations. On the conclusion of the investigations, both officers independently recommended that disciplinary action be taken against the warrant officers. As a result, Oosthuizen filed a grievance requesting that disciplinary action be taken against the warrant officers for falsely accusing her of calling them the 'k-word'.

Instead of proceeding with the disciplinary action, SAPS decided to suspend the disciplinary action pending finalisation of a grievance that was lodged by the warrant officers against Oosthuizen. Oosthuizen then referred a further grievance due to SAPS failure to proceed with the disciplinary action. After Oosthuizen referred the dispute to the Commission for Conciliation, Mediation and Arbitration, she received a notice to attend a disciplinary hearing for using the 'k-word'. She was, however, acquitted of all charges and the presiding officer found that the warrant officers had colluded to falsely accuse Oosthuizen.

As a result, SAPS then proceeded to discipline the warrant officers, with one of them being acquitted and the other pleading guilty and receiving a written warning coupled with one day's leave without pay. However, the warrant officers were subsequently found guilty of *crimen injuria* by a Regional Court in respect of the charge laid by Oosthuizen and, consequently, they were subject to a second disciplinary hearing and dismissed.

Solidarity, on behalf of Oosthuizen, challenged the conduct of SAPS in failing to deal with her grievances pertaining to the unfair discrimination. The issue before the Labour Court (LC) was accordingly whether SAPS was vicariously liable in terms of s 60 of the Employment Equity Act 55 of 1998 (EEA) for the racial harassment and bullying perpetrated by the warrant officers against Oosthuizen.

Broadly speaking, s 60 of the EEA provides that where an employer contravenes a provision of the EEA, the alleged conduct must immediately be brought to the attention of the employer and the employer is required to consult all parties and take necessary steps to eliminate the alleged conduct. If the employer fails to take the necessary steps and it is proved that the employee had contravened the EEA, the employer will be deemed to also have contravened the EEA. However, an employer will not be liable for the conduct of the employee if the employer is able to demonstrate that it did all that was reasonably practicable to ensure that the employee would not contravene the EEA.

The EEA prohibits unfair discrimination on a number of grounds, including

race, or on any arbitrary ground. Moreover, harassment is identified as a specific form of unfair discrimination, which is prohibited on any one or a combination of the grounds of unfair discrimination. Where unfair discrimination is alleged on a listed ground, the employer has the onus of proving, on a balance of probabilities, that such discrimination did not take place as alleged or it was rational and fair, or otherwise justifiable. In the present matter, the application involved an allegation of discrimination based on race and, accordingly, SAPS bore the onus of disproving the allegation.

The issues for determination before the LC were as follows –

- whether the conduct of the warrant officers in harassing and falsely accusing Oosthuizen of racism constituted unfair discrimination;
- whether SAPS failed to act in accordance with s 60 of the EEA and as such was vicariously liable for contravening the provisions of the EEA; and
- the relief in the event that SAPS was found to have contravened the EEA.

The court held that although the use of racial slurs stubbornly persists in South African workplaces, there is a growing and disturbing trend of false claims of racial and sexual harassment by subordinates to escape being disciplined. Oosthuizen's version of what had occurred when she had tried to discipline the warrant officers had gone unchallenged and one of them had admitted that he had behaved offensively. Yet SAPS did nothing. It was abundantly clear to the court that Oosthuizen had been harassed by her two subordinates.

The court noted that an employer's duty to take steps to eliminate harassment when an allegation is made within a reasonable time period is now codified in the Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace, which renders employers vicariously liable for harassment in terms of s 60 of the EEA if they fail to take appropriate steps to address the harassment. In the present case, it was common cause that SAPS was made aware of the harassment as soon as it took place and had initially taken immediate action to investigate the conduct. However, the investigation reports that had recommended disciplinary action against the warrant officers were not implemented and, instead of taking appropriate steps to prevent the harassment, SAPS had done everything in its power to protect the perpetrators while they engaged in racial harassment.

After an analysis of the evidence, it was apparent that SAPS had failed to consult all relevant parties and to take the necessary steps to eliminate the racial harassment within SAPS. There was no evidence to demonstrate that SAPS

did all that was reasonably practicable to ensure that the warrant officers would not racially harass Oosthuizen or act in contravention of the EEA. In the circumstances, the court was satisfied that for a period of about a year, Oosthuizen was disparaged and humiliated by the conduct perpetrated by the warrant officers.

SAPS was, therefore, vicariously liable for the racial harassment.

In seeking compensation for the humiliation and insult that Oosthuizen had suffered, the court found that Oosthuizen was entitled to payment of compensation in the amount of R 300 000. Further, SAPS was directed to provide

Oosthuizen with a written apology and to pay her costs.

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By
Moksha
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Reinstatement – not an option

Toyota SA Motors (Pty) Ltd v CCMA and Others (LAC) (unreported case no DA6/2021, 14-2-2023) (Waglay JP, Kathree-Setiloane and Savage AJJA concurring)

The third respondent's member, Mr Thwala, commenced his employment with the appellant, Toyota SA Motors as a crane driver, beginning March 2010 on a three-month fixed term contract. His contract had been continuously renewed until his dismissal on 14 August 2015.

It was common cause that on the date of his dismissal, the employee's fixed term contract would have expired on 31 October 2015.

Unhappy with the dismissal, National Union of Metal Workers (NUMSA) on behalf of Thwala, referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration, seeking retrospective reinstatement.

The arbitrator, in her award dated 24 May 2018, found Thwala's dismissal substantively unfair. In respect of remedy, the arbitrator rejected Thwala's version

that he was to be made a permanent employee and instead considered the fact that at the time of his dismissal, Thwala was on a fixed term contract, which had expired on 31 October 2015. On this score the arbitrator held:

'Reinstatement as a permanent employee is thus not an option and, his fixed term contract has long since expired, I cannot order his return to work on that basis (ie, on a fixed term contract)'.

Regarding the quantum to compensate Thwala, the arbitrator relied on *Jorgensen v I Kat Computing (Pty) Ltd and Others* (2018) 39 ILJ 785 (LAC), to limit the compensation to two and a half months, that being from date of dismissal to the date the fixed term contract would have expired, but for his dismissal.

On review, NUMSA sought to set aside the remedy of compensation and replace it with reinstatement.

Section 193(2) of the Labour Relations Act 66 of 1995 provides:

'The Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee unless –

(a) the employee does not wish to be reinstated or re-employed;

(b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;

(c) it is not reasonably practicable for the employer to reinstate or re-employ the employee; or

(d) the dismissal is unfair only because the employer did not follow a fair procedure.'

In granting an order in favour of the union, the Labour Court (LC) held that in terms of s193(2)(c), it behoves an employer to establish that it was not practical to grant reinstatement. In this case, Toyota failed to adduce any evidence to discharge such an onus. The court found that the arbitrator misdirected herself in placing the onus on Thwala to prove that reinstatement was practical.

On appeal the Labour Appeal Court (LAC) acknowledged the fact that when awarding a remedy, an arbitrator exercises a discretion. However, in this case, and on the basis that the fixed term contract had expired prior to Thwala's dismissal being found unfair; the arbitrator's discretion was removed. The LAC held:

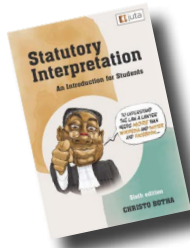
'Integral to the exercise of the arbitrator's discretion in terms of section 193(1) of the LRA in deciding whether to reinstate, re-employ or compensate the employee, is the nature of the employment contract and whether it is extant when an employee's dismissal is found to be unfair. The remedy of reinstatement is confined to the situation where, at the date of the finding that the dismissal is unfair, the original employment contract is still in existence. However, where the employee is employed on a fixed-term contract, the expiry of which precedes the unfair dismissal finding, as in this dispute, then reinstatement or re-employment are not legally permissible remedies. In the circumstances, the arbitrator no longer has a discretion to choose between the three remedies contemplated in section 193(1) of the LRA but is obliged in law to order the employer to pay the employee compensation in terms of section 193(1)(c) of the LRA.'

Thus, the arbitrator, in accordance with the above, was legally precluded from awarding reinstatement – following which, the LC erred in finding that under these circumstances, Toyota bore the onus to prove reinstatement was not practical.

The appeal was upheld with no order as to costs.

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

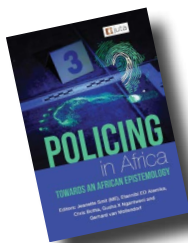
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Statutory Interpretation: An Introduction for Students

By Christo Botha
Cape Town: Juta
(2022) 6th edition
Price: R 450 (including VAT)
257 pages (soft cover)

This edition is a user-friendly introduction to the basic principles of statutory interpretation and is about understanding enacted law-texts, in other words, making sense of the total relevant legislative scheme applicable to the situation at hand. Apart from poor reading and writing skills, one of the more striking current interpretation problems is the inability of law students (as well as the latest generation of legal practitioners) to interpret and apply legislation within the total legal environment.

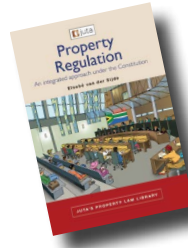


Policing in Africa: Towards an African Epistemology

By J Smit (Managing Editor)
Cape Town: Juta
(2022) 1st edition
Price: R 725 (including VAT)
473 pages (soft cover))

Policing in Africa is often portrayed as being practised by incompetent and corrupt apologists for governing regimes. Professional policing, on the other hand, is the opposite of populist, incompetent, corrupt and regime-partisan policing.

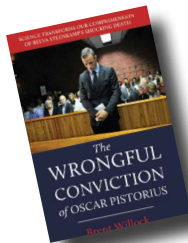
This book is designed for studying and reflection. Learning outcomes guide, new terms enlighten, and critical thinking activities and case studies support reflection.



Property Regulation: An Integrated Approach under the Constitution

By Elsabé van der Sijde
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Price: R 950 (including VAT)
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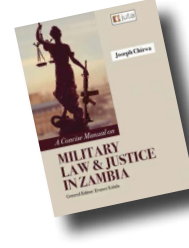
This book is intended for subject specialists in constitutional property law. The regulation of property is undeniably a social justice issue: It profoundly affects how we live and expresses many of society's social, cultural and economic value choices. It determines what can be owned, by whom and how, and the conditions for access to these resources by others. In an increasingly complex society, finding the appropriate balance between competing interests in relation to resources becomes both more important and more challenging.



The Wrongful Conviction of Oscar Pistorius: Science Transforms our Comprehension of Reeva Steenkamp's Shocking Death

By Dr Brent Willock, PhD C.Psych
Durham: Torchflame Books
(2018) 1st edition
Price: R 459 (including VAT)
228 pages (soft cover)

Clinical psychologist, Dr Brent Willock, brings a new perspective to bear on these horrific events: That Oscar Pistorius' horrific actions occurred while he was in a deep sleep, known as a parasomnia state. Dr Willock uses scientific scrutiny and legal precedence to resolve many of the crucial anomalies surrounding the trial and also discusses how mental health experts, and the defense team could have overlooked this hypothesis that could have exonerated Oscar Pistorius.



A Concise Manual on Military Law and Justice in Zambia

By Joseph Chirwa
Cape Town: Juta
(2022) 1st edition
Price: R 305 (including VAT)
142 pages (soft cover)

This manual deals with military law and military justice in Zambia. It is an attempt to stir interest in research and scholarship in one of the most secretive public service institutions in the country. It deals with the core issues at the heart of military law and military justice in this jurisdiction. It is concise and succinct yet comprehensive in nature and user-friendly for the men and women in uniform and can be carried anywhere for use with utmost ease. It is also a valuable resource for instructors and lecturers of military law.



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By
Kathleen
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<i>AMTJ</i>	African Multidisciplinary Tax Journal	Juta	(2022)
<i>JACL</i>	Journal of Anti-Corruption Law	University of the Western Cape, Faculty of Law	(2023) 6.1 (2023) 6.2
<i>LitNet</i>	LitNet Akademies (Regte)	Trust vir Afrikaanse Onderwys	(2023) 20(1) (2022) 19(3) (2022) 19(2)

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

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By
Mbekezeli
Benjamin

The state of the Labour Court and the need for interventions to improve its performance

With 1 May being workers' day, it is important to assess the health of the Labour Court (LC), an institution that sits at the nerve centre of South Africa's labour dispute resolution system.

According to the 2021/22 Judiciary Annual Report (JAR), the LC performed well. It finalised 60% of its 4 307 cases against a target of 58% per year (2021/22 JAR pg 31). It also handed down 87% (1 122 of 1 294) reserved judgments (2021/22 JAR at 39). However, the court's rolls are so clogged that as from October 2022, the LC has not been able to enrol any new trials until 2024. This is a crisis! But how did it come to be so, and what are the solutions?

The LC was created by the Labour Relations Act 66 of 1995 (the LRA) as a specialist court – with a similar status to the High Court – to adjudicate labour disputes. It deals with reviews from the Commission for Conciliation, Mediation and Arbitration (CCMA) and industry bargaining councils. It also deals with trials and applications that are initiated at the court itself. Appeals against its decisions lie with the Labour Appeal Court (LAC).

As a specialist court, the LC was meant to deal with a narrower scope of cases than the High Court. The expectation at its founding was that it would also have a smaller caseload, only restricted to labour law, and thus needing only a few judges. But the experiences of the last 25 years have dashed those expectations.

According to the JAR 2021/2022 (at 31) the LC dealt with a total of 4 307 matters in 2021/2022. By comparison, in 2020/2021 the LC dealt with a total 4 168 matters (JAR 2020/2021 at pg 28), while 4 980 matters were handled by the generalist Free State High Court (JAR 2021/2022 at 37) that also had a similar number of judges (15, compared to the LC's 13) – but only in Bloemfontein.

Unique among all courts is that the LC permanently operates across four major cities: Cape Town, Durban, Gqeberha and Johannesburg. Each city is effectively its own court, which also serves multiple provinces. For example, the Johannesburg court serves Gauteng, Free State, Limpopo, Mpumalanga and North West; and the Cape Town court serves Northern and Western Cape.

The LC operates with a strained judicial capacity. There is no doubt that its 13

judges are overworked. Judge President Basheer Waglay – who also doubles up as the judge president of the LAC – commutes weekly between his home in Cape Town and the LC's Johannesburg seat.

In addition, he has had no permanent deputy judge president since 2017. This is partly due to a statutory stipulation in s 153(2)(a) of the LRA that only High Court judges may be deputy judge president but also due to the Judicial Service Commission not attracting suitable candidates when the position was advertised in late 2022. Most worrying is that several of the LC's most senior, most industrious judges are close to retirement.

In the JAR 2020/21, the LC was the worst performer among all superior courts, with a 52% case finalisation rate (against a 58% target). To have improved this rate by 8% in the space of a year (JAR 2021/2022) required its judges to pull those efforts from their deepest storage wells. Such a feat is unlikely to be repeated – and this is precisely the problem – the wells are running dry.

The LC needs more judges. But even if it received a dozen judges today, where will it house them? It also needs more courtrooms and office and chamber space. In the current fiscal climate, government is unlikely to build new courtrooms or hire more judges or secretaries, even though it is ultimately government's responsibility. So, what are the alternatives?

Some have suggested as a short-term measure to deal with the case backlog that senior legal practitioners make their *pro bono* hours available to the court. These cases could be heard at private arbitration centres or even virtually, away from the inundated courts.

While daily loadshedding is now a new obstacle, the COVID-19 pandemic has proved that digital technologies may provide a faster, cheaper, and more secure method of court document management and virtual hearings. According to the 2023 Office of the Chief Justice budget vote (2023 Estimates of National Expenditure at 2) released by National Treasury, budgeted R 174,1 million has been budgeted to rollout the Court Online system to the rest of the provincial High Courts other than Gauteng. It is not clear if any money has been set aside for the LC in the 2023 budget, and a call should be made to rectify this situation in subsequent years.

A longer-term intervention, which Waglay JP mentioned in an address to the CCMA's Annual Labour Conference in 2022, is the need for a comprehensive review of the LC's rules to make its processes more informal and flexible, and not subject to the straight jacket like rules applicable in the High Courts.

Another intervention is to delink the LC from the LAC. Each court should have its own leadership and complement of judges and registrars who would be able to deal with appeals much faster. This was an intervention proposed more than 20 years ago by then Judge President and now Chief Justice Raymond Zondo in a dicta in *Langeveldt v Vryburg Transitional Local Council and Others* [2001] 5 BLLR 501 (LAC). It would require minor amendments to the LRA.

Although judges matter, the bulk of the work in our labour dispute resolution system is done at the CCMA and industry bargaining councils. Severe budget cuts to the CCMA and a generally more litigious, less conciliatory society have also meant that many more cases that should have ended up elsewhere are now going to the LC. A more systemic intervention would, therefore, be to channel those cases back to the CCMA.

Another systemic intervention is for employers and trade unions to come to the party. Many cases drag on for years because the parties (and their lawyers) are simply unwilling to see them to finality. Delay-causing technical points are raised not to protect rights or interests, but simply used as leverage to strengthen bargaining power. A change in attitude is needed, and so too are strict case managers.

We need to salute our LC judges for performing above their target. A 60% finalisation rate is not nearly enough but seen in the context of strained resources and a deluge of cases, it is an incredible feat. However, the LC needs support to be a top performer and achieve its mission of cheap, efficient, and effective dispute resolution and labour peace.

Mbekezeli Benjamin LLB (Wits) is a research and advocacy officer at Judges Matter. □

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RISKALERT

MAY 2023 NO 2/2023

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RISK MANAGEMENT COLUMN

Update on the LPIIF's review application against the RAF and Others

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DISCLAIMER
Please note that the Risk Alert Bulletin is intended to provide general information to legal practitioners and its contents are not intended as legal advice.

In November 2022 the LPIIF launched an application to review and set aside Board Notice 271 of 2022 introduced by the Road Accident Fund (RAF) for the acceptance and administration of claims. The respondents have indicated that they intend opposing the application. We have not received the respondents' answering affidavits yet. Only part of the record for the decision by the RAF and the Minister of Transport, respectively, has been received. The LPIIF has thus launched an application to compel the production of the full record.

Various interested parties have brought applications to intervene. At the time of writing, we have also recently received an urgent application from a firm of attorneys seeking an order –



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- (i) interdicting the RAF from rejecting claims based on the Board Notice; and
 - (iii) seeking to intervene in the review application.
- To date, we have been notified of over 150 claims that have been rejected by the



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RISK MANAGEMENT COLUMN continued...

RAF, purportedly relying on the impugned Board Notice. In some cases, the risk of prescription is imminent. We have sent updates on the status of the review application to those firms who have notified us of claims affected by the Board Notice. It will be appreciated that we do not have the capacity to receive, analyse and capture the thousands of affected claims lodged with the RAF or to provide guidance in respect of each individual claim. The LPIIF is not a firm of legal practitioners and thus cannot provide legal advice on every affected claim.

We have also been made aware of a practice adopted by some RAF offices where lodgements of claims are effectively “door stopped” and not accepted purportedly for non-compliance with the Board Notice. No rejection letters are issued in those instances.

Legal practitioners are urged to read the LPIIF’s application, and all the annexures attached thereto. The grounds relied on in the review application will be gleaned from the documents. Unfortunately, some of the practitioners enquiring about the grounds of review refuse to read the papers, or the updates provided, and then repeatedly send the same queries even though the application and updates have been sent to them. This puts additional strain on our limited resources and does not assist in

the important challenge we have taken on.

Over and above communicating directly with those firms who have notified us of affected claims, we have communicated with various structures in the profession giving updates on the review application. In addition, our communication has been sent to 8 639 email recipients in the profession. The LPIIF does not have the email addresses of every affected firm and individual legal practitioner in the country, but we have tried our best to communicate with a sizeable portion of the profession. The application was also distributed by the Legal Practice Council and is available on its website.

The Board Notice has been applied since 4 July 2022, yet some practitioners pursuing RAF claims on behalf of plaintiffs appear to be oblivious to it. That is a huge risk for those practitioners and their clients. Another area of concern is those practices who, in spite of the Board Notice, do not make any effort to meet the new requirements. We understand that the requirements are onerous and subject to various grounds of attack but practitioners must still act prudently in the interests of their clients. Unless or until the Board Notice is set aside (or the unlikely event that it is withdrawn), practitioners are urged to comply with it. Practitioners who have identified additional grounds to chal-

lenge the impugned Board Notice can either participate in one of the current tranches of litigation or launch challenges of their own.

Though the Supreme Court of Appeal was considering two different questions (see below) in *Road Accident Fund v MKM obo KM and Another; Road Accident Fund v NM obo CM and Another* (1102/2021) [2023] ZASCA 50 (13 April 2023), what is stated about contingency fees agreements in paragraphs 27 to 31 of its judgment makes for interesting reading in the context of what the Board Notice prescribes regarding such agreements between attorneys and their clients. The LPIIF raised similar questions in paragraph 25 of its comments on Board Notice 58 of 2021 (the LPIIF’s comments are annexed to its founding affidavit).

The related matter (*Mautla and Others v RAF and Others*) has been set down for hearing in the Gauteng Provincial Division on 9 May 2023.

Looking at how similar matters have played out, we anticipate that the LPIIF’s review application will probably be heard late this year or even next year.

We will keep the profession apprised of developments in the various tranches of litigation relating to the Board Notice.

RISK MANAGEMENT COLUMN continued...

Short notes on some recent cases

Several decisions handed down in recent months will be of interest to legal practitioners from a risk and practice management perspective. The decisions have been grouped according to the risk and practice management topics we have identified in each. These cases also make for good training material for firms and provide guidance on the measures that firms must implement in order to mitigate the relevant risks.

Cyber risks

The judgments in *Hawarden v Edward Nathan Sonnenbergs Inc* (13849/2020) [2023] ZAGPJHC 14; [2023] 1 All SA 675 (GJ) (16 January 2023) and *Hartog v Daly and Others* (A5012/2022) [2023] ZAGPJHC 40 (24 January 2023) have received a lot of attention in the profession and the general media since they were handed down in January 2023. The two cases relate to litigation against law firms by parties who had suffered losses following on cyber breaches. In the *Hawarden* case the cause of action against the law firm was framed in delict, whereas the plaintiffs in *Hartog* framed their claims in contract. The perpetrators of the

business email compromise (BEC) crime impersonated the law firm in *Hawarden*, while the sellers of the immovable property were impersonated in *Hartog*. A payment the law firm intended making to the sellers was thus targeted in *Hartog*, whereas a payment intended to be made to the law firm was targeted in *Hawarden*. We are informed that an appeal has been launched in the *Hawarden* matter.

Attorneys are not the only targets of cybercrime. In *Gerber v PSG Wealth Financial Planning (Pty) Ltd* (36447/2021) [2023] ZAGPJHC 270 (23 March 2023) the perpetrators of the BEC impersonated a financial service provider's (FSP's) clients. An investment managed by the FSP was thus the target. In *Mosselbaai Boeredienste (Pty) Ltd t/a Mosselbaai Toyota v OKB Motors CC t/a Bultfontein Toyota* (A43/2021) [2021] ZAFSHC 286 (18 November 2021) a transaction between two motor vehicle dealers was successfully targeted by the BEC scammers.

Cybercrime is universal. Attorneys and all parties that they transact with must thus be acutely aware of the ever-present risks and implement appropriate measures to mitigate the risks.

Contingency Fees Agreements

In *Road Accident Fund v MKM obo KM and Another; Road Accident Fund v NM obo CM and Another* (1102/2021) [2023] ZASCA 50 (13 April 2023) the Supreme Court of Appeal (SCA) was called upon to adjudicate two questions:

- (i) whether s 4 of the Contingency Fees Act 66 of 1997 imposes an obligation on the Road Accident Fund (RAF) to ensure that a legal practitioner obtains judicial approval before it enters into a settlement agreement with such a practitioner; and
- (i) whether a settlement agreement concluded without such judicial approval is unlawful.

The background facts, in brief, were that a firm of attorneys was instructed to prosecute claims against the RAF in two separate matters. In the first matter, a curator *ad litem* had been appointed to represent the interests of the plaintiffs who were minors. The court order appointing the curator *ad litem* in the first matter stipulated that he was to obtain the court's approval before settling the matter. Such approval was not obtained when the settlement agreement was concluded. In the second matter, the minor children were represented by their mother. In both matters contingency fees agreements were entered into with the firm concerned. Summons was

RISK MANAGEMENT COLUMN continued...

issued in January 2019 and offers of settlement were made in November 2020 in the two matters. Section 4(3) of the Contingency Fees Act provides that: “(3) Any settlement made where a contingency fees agreement has been entered into, shall be made an order of court, if the matter was before the court.” Applications were brought before the High Court to make the settlement agreements orders of court and draft orders were prepared. The High Court answered the two questions paraphrased above in the affirmative and, accordingly, declared the settlement agreements to be unlawful as they were concluded without judicial approval.

The SCA considered the first question and concluded (at paragraph 31) that “there is no obligation on the RAF to ensure that the legal practitioner complies with s 4 before it concludes a settlement with him or her. It may well be salutary, where a contingency fees agreement is in place, for the RAF to enquire whether there has been compliance with s 4 of the Contingency Fees Act before it concludes a settlement agreement with a legal practitioner. But that does not equate to a statutory or legal obligation.” The SCA also reached a different conclusion (at paragraph 41) to that of the High Court on both questions.

The SCA ordered that a copy of the judgment be brought to the at-

tention of the Legal Practice Council regarding certain aspects of the conduct of the legal practitioners involved in the matter, including the curator *ad litem* in the first matter. The following finding by the SCA (at paragraph 65) should serve as a warning to legal practitioners:

“In seeking approval to have the draft orders made orders of court, the legal representatives gave the court the impression that the payments to the attorneys would be made once the orders were made. They failed to disclose to the court that in both matters: (a) [payment of the] capital had already been made; (b) the attorneys had already taken their fees without any taxation of such fees. Thus, the court was effectively misled. This conduct on the part of the legal practitioners should be brought to the attention of the Legal Practice Council. So should the conduct of the curator *ad litem* in failing to seek judicial [approval] conduct before accepting the offer of settlement.”

Contingency fees agreements were also central in another matter decided in recent months. On 26 January 2023 Roelofse AJ, sitting in the Mpumalanga Provincial Division of the High Court (Mbombela) delivered a judgment in *Hendry v The Road Accident Fund and Eight Similar matters* (case no 856/2020). This judgment was handed down before the SCA

judgment in *Road Accident Fund v MKM obo KM and Another; Road Accident Fund v NM obo CM and Another* and the references by Roelofse AJ to that case are thus to the judgment of the court *a quo* (Fisher J sitting in the Gauteng Division of the High Court, Johannesburg).

The matters in the Mpumalanga Provincial Division all concerned applications to make settlement agreements orders of court and the plaintiffs’ attorneys had concluded contingency fees agreements with their respective clients. Written settlement agreements had been entered into between the plaintiffs and the RAF and the plaintiffs’ attorneys thus applied to have the settlement agreements be made orders of court. Draft orders had been prepared. The court raised concerns with the legal representative of the plaintiffs that the material placed before it was inadequate to consider making the settlement agreements orders of court. The court noted (at 22) that it appeared (and was conceded by the plaintiffs’ legal representative) “that the affidavits were in the form of a template that was used in all the matters. It is clear that the only variables such as the plaintiffs’ details, the settlement amounts were changed in accordance with the particulars of each matter and the settlement that was reached.” The court found that:

- The information provided in

RISK MANAGEMENT COLUMN continued...

the affidavits deposed to by the plaintiffs' attorney did not adequately address the substance of what was required by s 4(1) and s 4(2) of the Contingency Fees Act and was a mere repetition (paragraph 24).

- It was unable, "in the mandatory exercise of [its] oversight function, ... to consider the probity of the settlement agreements with the information that [was before it]" (paragraph 25).
- There was insufficient information to assess what amount the plaintiffs would have ultimately claimed at trial and what they were abandoning or compromising by settling rather than going to trial (paragraph 26).
- The plaintiffs' legal representatives had not provided information to enable an assessment the chances of success at trial (paragraph 27).
- The statement by the plaintiffs' attorney of an inability to give the chances of success at trial, in the face of what s 2 of the Contingency Fees Act prescribes before a legal practitioner enters into a contingency fees agreement, "perplexing". The court also considered the obligation placed on legal practitioners by paragraph 3.10 of the Code for Legal Practitioners, Candidate Legal Practitioners and Juristic Entities (paragraph 28).

The attorney's fees at the stage of the settlement were not disclosed. The court pointed out that a costs consultant could have been engaged earlier in the process so that the plaintiffs could become aware of the costs upon settlement. The belief by the attorney that the plaintiffs would not be able to obtain better relief if the matters proceeded to trial was inadequate (paragraph 30) and there was nothing said about the language used in explaining the settlements to the plaintiffs, whether an interpreter had been utilised or whether the plaintiffs understood the implications of settling or not settling (paragraph 33). The affidavits did not disclose what had been reduced to writing when the plaintiffs were informed of the offers and amounts of settlement. "The client must fully understand the financial implications too" (paragraph 32).

The plaintiffs' attorneys were ordered to file and deliver supplementary affidavits dealing in full with each of the requirements in terms of sub-sections 4(1)(a) to (e) of the Contingency Fees Act.

Conduct of legal practitioners

In *Goliath and Another v Chicory SA (Pty) Ltd* (3382/2018) [2023] ZAECMKHC 38 (7 February 2023) the inappropriate language used by the legal practitioners and the depth of the attack on the court and its findings were highlighted.

The applicant in *Gaone Jack Siamisang Montshiwa (Ex Parte Application)* (Case no 672/2021) [2023] ZASCA 19 (3 March 2023) was found to have made disparaging allegations about judges.

The applicant's attorneys and counsel in *SASOL South Africa t/a SASOL Chemicals v Gavin J Penkin* (Case No: 06609/2020) [2023] ZAGPJHC 329 (14 April 2023) narrowly escaped a sanction of being precluded from recovering any costs from the applicant.

Egregious handling of a trial

In *T.B.M v Road Accident Fund* (21/50117) [2023] ZAGPJHC 299 (5 April 2023) the plaintiff's minor child suffered injuries in an accident involving multiple vehicles. The minor child, NSM, had been a passenger in one of the vehicles involved. The injuries sustained included a diffuse axonal injury. The court described a diffuse axonal injury as serious. Though the plaintiff, TBM, sued in her capacity as a representative of her minor child, the latter was erroneously described in the particulars of claim as an adult with full legal capacity. Counsel for the plaintiff filed his written submissions before any evidence was led, and thus prematurely. The court believed that the amount of more than R10 million in compensation sought had been inappropriately inflated. No justification was made on the papers for an award of gen-

RISK MANAGEMENT COLUMN continued...

eral damages or any award for future medical expenses. No evidence was placed before the court that the minor child had actually suffered a head injury, the experts called on her behalf assuming such an injury but none actually able to say that with certainty. The hospital records showed no indication of a head injury. None of the people who had treated the minor child were called to testify and no witnesses were called to explain how the accident occurred. No evidence was led of a decline in NSM's scholastic performance after the accident.

An order absolving the defendant, the RAF, from the instance was granted. The following extract from the judgment should serve as a warning to practitioners to act prudently in litigation of this nature:

"10. This outcome is in no small part due to inadequate preparation for trial on the part of both parties' legal representatives. At the outset of the trial, I was informed by counsel that the parties had settled what counsel described as 'the merits' of TBM's claim. But it emerged during the trial that this could not have been true. The RAF had clearly not conceded the nature and extent of NSM's injury, because the RAF had not accepted that NSM had suffered a head injury. Mr. Ngobeni cross-examined

extensively on the absence of any evidence of a head injury. He argued at the close of the trial that a head injury had not been proved.

11. It ought to have occurred to the parties' legal representatives that this meant that the 'merits' of the trial – in the sense of the RAF's liability to compensate MSM for her proven losses – could not have been settled. A separation of issues between liability and quantum of damages is only possible if the nature of the injuries is conceded, but the amount to be awarded to compensate for the consequences of those injuries is not agreed. Here, a critical part of the 'merits' of the claim – the nature of the damage suffered – had not been conceded, and so it could not be said that the 'merits' had been settled.

12. For these reasons, I do not think any costs order is justified. The trial proceeded on a wholly mistaken shared assumption. Nor do I think that the plaintiff's legal representatives ought to be permitted recover their fees and disbursements from the plaintiff. TBM was entitled to expect a higher standard of representation than she received."

Termination of mandates

In *Chabeli Molatoli Attorneys Incorporated v Pitso N.O and Others* (25412/22) [2022] ZAGPPHC 744 (6 October 2022) the applicant (a

firm of attorneys) sought an order removing the first respondent, the executrix of a deceased estate, from office. The executrix had entered into an agreement with the applicant appointing the latter as her agent but later terminated the applicant's mandate and appointed another firm of attorneys to act as her agents. The applicant also sought to have the termination of the mandate of agency declared invalid. The first respondent contended that, as principal, she was entitled to revoke the mandate of agency granted to the applicant. She also argued that it would be against public policy to force a principal to continue in a relationship with an agent where the latter no longer wished to continue in that relationship. The first respondent expressed dissatisfaction with, among other things, the legal fees which the applicant had charged. She alleged that the respondent's legal fees amounted to 60% of the value of the estate.

The court found that:

"[19] Bad relations between an executor and an heir cannot lead to the removal of the executor unless it is probable that the administration of the estate would be prevented as a result. But, ..., even in such event, the respective actions of the heir and the executor must be considered, for an heir cannot be allowed to frustrate, through un-

RISK MANAGEMENT COLUMN continued...

reasonable and wrong conduct, the actions of an executor which is beyond reproach. A disgruntled heir cannot be allowed to circumvent the administration process by improperly pressurising the executor to accede to his demands. To remove an executor in such circumstances would not serve any purpose for the same lot would befall the next executor as well. It is not necessary to discuss this issue any further since in the present matter I hold the view that the relationship between the second to fourth respondents and the applicant is not such that it would prevent the administration of the estate.”

The termination of the applicant’s mandate was found to be unlawful.

Dissatisfied with the outcome, the unsuccessful respondents brought an application for leave to appeal. The applicant launched an application to cross appeal. Leave to appeal to the Supreme Court of Appeal was granted on 11 April 2023 and the application to cross appeal to the SCA was also granted (*Chabeli Molatoli Attorneys Incorporated v Pitso and Others* (25412/22) [2023] ZAGPPHC 223 (11 April 2023)).

It will be interesting to see how the various matters are ventilated in the SCA and how that court rules in respect thereof.

Macherth Attorneys Incorporated v South African Forestry Company

SOC, Ltd and Others (29177/2020) [2022] ZAGPPHC 150 (2 March 2022) is another matter relating to the termination of the mandate of a firm of attorneys. The applicant served on the panel of attorneys of the first and second respondents, having been appointed after a tender process. The applicant was appointed to the panel of attorneys for a period of three years commencing from 2 May 2017, renewable for a further two years subject to an annual review of the services provided. During the term of the appointment, disputes arose between the first and second respondent, on the one hand, and the applicant, on the other. The disputes concerned allegations by the first and second respondents that the applicant overcharged for fees, concealed a settlement offer in order to generate more fees and charged for matters where it had not been mandated to act. Attempts to resolve the disputes between the parties were unsuccessful and the applicant’s bills were referred to the Legal Practice Council for assessment. The first and second respondents wrote to the applicant on 5 January 2020 terminating its mandate. The court found that the decision to terminate the applicant’s mandate was based on contract, was not administrative action taken pursuant to any legislative instrument and thus not subject to review in terms of the Promotion of Administrative Justice Act 3 of 2020. The application was

thus dismissed. The court also stated that the application was moot as it had been launched in July 2020, two months after the contract ended. The applicant launched an application for leave to appeal which was dismissed on 22 March 2023 (*Macherth Attorneys Incorporated v South African Forestry Company SOC, Ltd and Others* (29177/2020) [2023] ZAGPPHC 187 (22 March 2023)) for failure to prosecute the appeal timeously (an application for condonation was unsuccessful) and because the appeal would have no practical effect.

Claims against the Legal Practitioners’ Fidelity Fund

Smith v Legal Practitioners’ Fidelity Fund Board (26539/2016) [2023] ZAGPPHC 66 (1 February 2023) arose out of an interesting set of facts. The plaintiff’s four claims arose out of four transactions he had entered into with a Mr Stephens, described as the Financial Officer of a law firm. In all four transactions the plaintiff paid the required funds into the law firm’s trust account. The owner of the firm had emigrated to Australia. Each transaction involved a scheme that Mr Stephens convinced the plaintiff to invest in and attractive returns were promised. Mr Stephens later disappeared, only to be traced to the USA, and the plaintiff lost his money. It subsequently emerged that he (Mr Stephens) had used a fictitious name. The plaintiff’s ac-

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tion against the Legal Practitioners' Fidelity Fund (Fidelity Fund) was unsuccessful. The claims were found to fall within the statutory exception in s 47(1)(g) read with s 47(5)(b) of the Attorneys Act 53 of 1979. (The Legal Practice Act 28 of 2014 repealed the Attorneys Act. See ss 56 (1)(e), (5) and (6) for the corresponding investment exclusions in the current statute.)

In *Rabalao v Trustees for the time being of the Legal Practitioner's Fidelity Fund: South Africa and Another* (63838/2021) [2023] ZAGPPHC 218 (3 April 2023) the applicant intended purchasing immovable property and paid the purchase price, transfer and registration fees into the trust account of an advocate practising in terms of s 34(2) (b) of the Legal Practice Act (a "trust account advocate"). A person who identified herself as a lawyer working with the trust account advocate informed the applicant that the transfer of the property into the applicant's name would be made after the applicant paid the purchase price, transfer fees and registration costs. The transfer and registration of the property into the name of the applicant never took place and she lost her money. The question before the court was whether the legal practitioner, in receiving the funds into his trust account, acted in the course of his practice as a trust account advocate. The applicant had lodged a claim with the Fidelity Fund, which rejected it on the basis that the money was not "given in trust to a trust account practice in

the course of the practice of the ... advocate referred to in section 34(2) (b)." The court, after considering the provisions of the Legal Practice Act and previous cases on the test for entrustment, reviewed and set the Fidelity Fund's decision to reject the applicant's claim and ordered that the decision be reconsidered.

Delictual claims for medical malpractice

- *Mashinini v The Member of the Executive Council for Health and Social Development, Gauteng Provincial Government* (335/2021) [2023] ZASCA 53 (18 April 2023)
- *NSS obo AS v MEC for Health, Eastern Cape Province* (Case no 017/22) [2023] ZASCA 41 (31 March 2023)
- *TN obo BN v Member of the Executive Council for Health, Eastern Cape* (36/2017) [2023] ZAE-CBHC 3 (7 February 2023)

Prescription

- *Minister of Justice and Constitutional Development and Others v Pennington and Another* (162/2022) [2023] ZASCA 51 (14 April 2023)
- *Shoprite Checkers (Pty) Ltd v Mafate* (903/2021) [2023] ZASCA 14 (17 February 2023)

Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002 (RICA)

- *Giftwrap Trading (Pty) Ltd v*

Vodacom (Pty) Ltd and Others (1009/2020) [2023] ZASCA 47 (4 April 2023)

Road Accident Fund

- *Hlatshwayo and Another v Road Accident Fund* (3242/2019) [2023] ZAMPMBHC 2 (24 January 2023)
- *Discovery Health (Pty) Limited v Road Accident Fund and Another* (2022/016179) [2022] ZAGP-PHC 768 (26 October 2022)

Other interesting cases

Legal practitioners should also read *Ruth Eunice Sechoaro v Patientie Kgwadi* (896/2021) [2023] ZASCA 46 (4 April 2023) and *Krügel Heinsen Incorporated v Thompson and Another* (Case no 41/2022) [2023] ZASCA 38 (31 March 2023) which have a direct bearing on their execution of their duties in matrimonial matters post-divorce and conveyancing, respectively. The judgment in *Krügel Heinsen Incorporated* and that in *Cutlers Holdings Ltd & Anor v Shepherd and Wedderburn LLP* [2023] EWHC 720 (Ch) demonstrate that courts will not hold legal practitioners liable where there is no legal basis for liability.