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DE REBUS

THE SA ATTORNEYS' JOURNAL

JULY 2023

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LSSA National Wills Week 2023 registration now open

The Law Society of South Africa (LSSA) National Wills Week is a public outreach programme that has been successfully running since 2008. This year, the LSSA National Wills Week campaign will take place during the week of 11 to 15 September 2023. During this week, members of the public will be able to have a basic will drafted free of charge. Attorneys' firms throughout the country register with the LSSA to become participants in this initiative. The LSSA National Wills Week is advertised to the public during the month of August, alerting the public of participating law firms. Members of the public are then directed to the LSSA website where they can see the list of participating law firms per province and are able to contact the law firm directly and book an appointment.

The LSSA National Wills Week is now an established highlight among the profession's social outreach and access to justice initiatives. This is thanks to the thousands of attorneys who participate by giving generously of their time and skills. The LSSA National Wills Week has also attracted increasing coverage in the media, as well as support from major stakeholders.

The aim of the LSSA National Wills Week campaign is twofold, namely to –

- position attorneys as the premier providers of wills and estates services to the public, and to improve the image of the profession generally; and
- encourage members of the public who would not normally make use of the services of an attorney, or who may hesitate to consult an attorney to have a basic will drafted.

How does the LSSA National Wills Week work?

Your firm will be provided with free posters in the language combination of your choice to publicise your participation. Provision is made on the posters for your firm's contact details.

Your firm will be listed as a participating firm on the database of participating firms on the LSSA's website.

A national media campaign will be launched early in August. All media and publicity material will invite members of the public to consult the LSSA website for the contact details of participating firms.

What is expected from you as a participating firm?

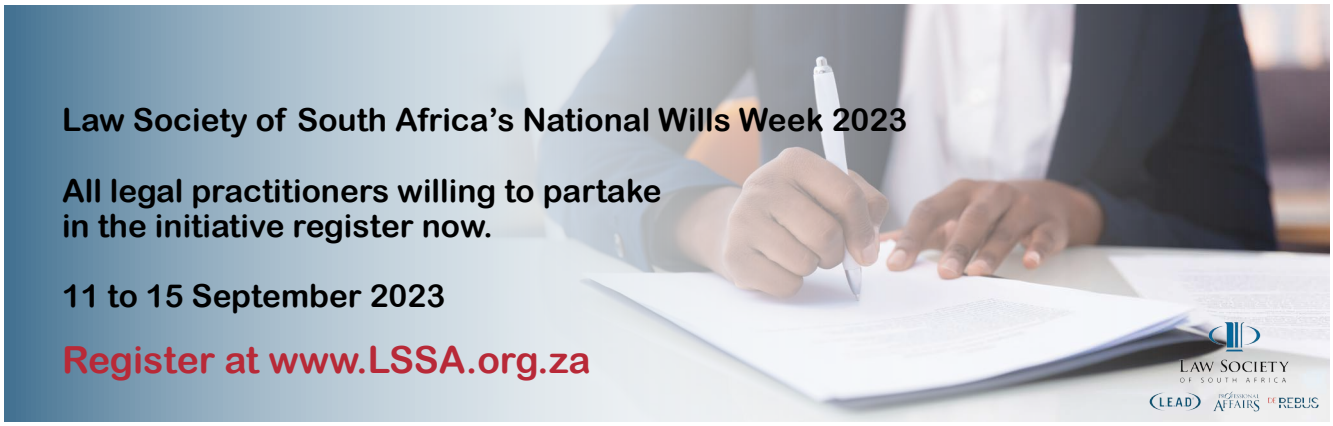
- The firm will draw up basic wills free of charge.
- The firm will provide an explanation of the importance of having a properly and professionally drafted will to the client.
- You may not insist that you are appointed as the executor of the estate.
- You must give the client a copy of their will.
- You will not be expected to redraft or amend existing wills for free, nor will you be expected to draft complex wills involving trusts, etcetera.

Register your law firm for the LSSA National Wills Week here: www.lssa.org.za.

Mapula Oliphant – Editor

Would you like to write for *De Rebus*?

Upcoming deadlines for article submissions: 17 July; and 21 August 2023.



By Karabo Sekailwe Orekeng

The dangers of business e-mail compromise

There has been a global challenge of cybercrime, hence the importance of cyber security, which guards against hackers and online criminality. 'South Africa has the third highest number of cybercrime victims in the world' (see Nathan Craig 'Cybercrimes on the up, with SA annually losing about R 2,2 billion' (www.iol.co.za, accessed 1-6-2023)). Annually, cybercrime costs the country R 2,2 billion. In addition to this, South Africa (SA) had the highest incidents of targeted ransomware and business e-mail compromise (BEC) attacks of any African country (see Craig (*op cit*)).

What is BEC?

E-mail account compromise is one of the most financially damaging online crimes. This cybercrime exposes the fact that people rely on e-mails to conduct business. This occurs when electronic communications are accessed and replaced with e-mails that are similar to e-mails that may be expected by the recipient.

How it takes place

Criminals implement a BEC scam in the following ways:

- 'Spoof an e-mail account or website.' This is done by the scammer slightly varying the legitimate e-mail address and tricking victims into thinking fake accounts are authentic.
- 'Send spearphishing e-mails. These messages look like they are from a trusted sender to trick victims into revealing confidential information. That information lets criminals access company accounts … and data that gives them the details they need to carry out a BEC schemes.'
- 'Use malware. Malicious software can infiltrate company networks and gain access to legitimate e-mail threads about billing and invoices. That information is used to time requests or send messages, so accountants or financial officers don't question payment requests. Malware also lets criminals gain undetected access to a victim's data, including passwords and financial account information' (see FBI 'Business e-mail compromise' (www.fbi.gov, accessed 1-6-2023)).

Recent BEC in SA

In *Hawarden v Edward Nathan Sonnenbergs Incorporated* [2023] 1 All SA 675 (GJ), the Gauteng Local Division High Court ordered the defendant, ENS Africa (ENS), to pay R 5,5 million plus punitive costs to Judith Hawarden (the plaintiff) after she fell victim to a scammer spoofing an e-mail account.

Facts and legal issue

The plaintiff purchased an immovable property from a third-party seller who subsequently appointed ENS as the conveyancer in the sale transaction. The plaintiff proceeded to pay the deposit due, and thereafter, paid the balance by way of electronic transfer directly to the defendant's trust account. The plaintiff was under the impression that she was paying the balance into what she had believed was an ENS account. Unbeknown to the plaintiff, her e-mail account was hacked and the e-mail containing the ENS account details was intercepted and changed to reflect the fraudster's bank account details. This ultimately resulted in the money electronically transferred by the plaintiff being deposited in the fraudsters bank account.

The question the court dealt with was 'whether or not to impose liability for pure economic loss sustained by the plaintiff who fell victim to cybercrime through [BEC] as a result of the defendant's negligent omission to forewarn the plaintiff of the known risks of BEC and to take the necessary safety precautions that are designed to safeguard against the risk of harm occasioned by BEC from eventuating'.

The plaintiff argued that the law firm owed her the duty to exercise reasonable care. In addition to this argument, she stated that ENS had the legal duty to warn her of the danger of BEC, because this was already on the rise and had become prevalent.

The plaintiff argued that the firm should have warned her, before making any payment, that there should have been a verification process wherein she would have been asked to verify her account details, and the defendant should have loaded its trust account details on online banking systems so that the account number would not have to be sent out on unprotected and unsafe emails (see Tania Broughton 'Leading law firm ordered to pay victim of cybercrime' (www.groundup.org.za, accessed 1-6-2023)).

The judge stated that the defendant should have used secure means when communicating with her to ensure that she was protected. The defendant argued that if the court held the firm liable, 'it would expose all conveyancers … to claims of the same kind by third parties, with whom they have no relationship, for losses they suffered at the hands of fraudsters who hacked their own e-mail accounts' (para 112). The defendant also made the argument 'that it is the responsibility of the debtor, who chooses to make an electronic payment, to ensure that it is paid into the right account' (para 113).

Ultimately the court found that the firm's 'banking details were financially sensitive information … and needed to be treated as such. … [C]oncluding that the risk of BEC was foreseen by ENS' (para 126). Moreover, that 'sending bank details by e-mail is inherently dangerous' (para 127). 'The risk of loss to Hawarden was highly foreseeable by ENS' (see Broughton (*op cit*)).

This is not the first time a law firm has been a victim of cybercrime. In the case of *Fourie v Van Der Spuy and De Jongh Inc and Others* 2020 (1) SA 560 (GP) the main question asked by the court was who bore the responsibility for payments lost due to cybercrime?

In this matter the applicant claimed payment of R 1 744 599,45 from the respondents, jointly and severally, the one paying the other to be absolved. The case concerned a property transaction where the seller of the property was prejudiced due to the transfer attorney effecting payment of the proceeds of the purchase price of the property erroneously to an unknown third party, thereby falling victim to cybercrime.

'The court held that the transfer attorney was negligent and failed to exercise the requisite skill, knowledge and diligence expected of an average practicing attorney and thus failed to discharge the fiduciary duty [owed] to [the] client by transacting via e-mail whilst being fully aware that fraud is prevalent in the attorneys profession and despite that being so, not employing any measures to ensure that neither do they nor the client fall victim to the plague of fraud and cybercrime' (Ade Nyongo 'What happens when your attorney pays your money to the wrong person?' (www.golegal.co.za, accessed 1-6-2023)).

Tips to avoid cybercrime

In 2019, the Law Society of South Africa (LSSA) released an advisory note to attor-

neys concerning BECs. The advisory was aimed at ensuring that attorneys' clients are made aware of the risk of potential fraud with the intention of preventing firms from falling victim to fraud and/or cybercrime while ensuring attorneys fulfil their duty of care to clients by making them aware of the cybercrime risk.

Due to the pervasiveness of cybercrime, the LSSA recommended that the below wording should appear on all communications to clients, where banking transactions of high value may be performed alerting the client to BECs:

'Criminal syndicates may attempt to induce you to make payments due to [firm's name] into bank accounts which do not belong to the firm and are controlled by criminals. These frauds are typically perpetrated using e-mails or letters that appear materially identical to letters or e-mails that may be sent to you by [firm's name]. Please take proper care in checking that these e-mails do emanate from [firm's name]. Before making any payment to [firm's name] please ensure that you verify that the account into which payment will be made is a legitimate bank account of [firm's name]. If you are not certain of the correctness of the bank account, you may contact [firm's name] and request to speak to the person attending to your matter. They will assist you in confirming the correct bank details. [Firm's name] will not advise of any change in bank details by way of an e-mail or other electronic communication. If you should receive any communication of this nature, please report it to the person attending to your matter' (see LSSA advisory 'Cybercrime: Business e-mail compromises' (www.lssa.org.za)). This paragraph can also serve as a notice on the company's website – preferably on the home page – as well any other avenues or mechanisms a company uses to communicate to clients.

In addition to this, in 2020 the Legal Practice Council (LPC) in the same breath advised legal practitioners to be careful when sending out correspondences with bank account details, and when making payments into bank accounts for which details are provided by e-mail. In the notice the LPC created an ethical duty, which placed on legal practitioners the duty to ensure that appropriate systems are put in place to ensure payments, particularly from trust accounts, are paid to correct accounts (see LPC notice 'Fraud alert' (www.derebus.org.za)).

Conclusion

It is paramount for firms to use dedicated verification process systems when transacting via e-mail. This can be done by phoning or sending another confirmation e-mail before paying money over. From the above cases, it is clear that the courts will not be in favour of a party that was deemed to be negligent.

What is further clear from the aforementioned cases is, firms or companies should be extra vigilant when conducting business via e-mail. There is no blueprint on the steps a firm should take in order to avoid liability. Surrounding circumstances will be of importance in determining whether a firm or company is responsible by looking at the steps taken to prevent the occurrence of loss through cybercrimes. It is suggested that if a firm implements the tips above to prevent the occurrence of falling victim to a cybercrime, such as having various notices alerting clients of the potential risk of fraud and following a strict verification process it would have taken reasonable steps on its side to uphold its duty to exercise reasonable care toward its clients.

Karabo Sekailwe Orekeng *BA (Law) BA (Hons) (Economics) LLB (Rhodes)* is a candidate legal practitioner at DMS Attorneys.

By Muano Mudzanani

The common law 'public healthcare defence' remains a viable defence despite the SCA ruling in *Mashinini*

The *Mashinini v Member of the Executive Council for Health and Social Development Gauteng Provincial Government* (SCA) (unreported case no 335/2021, 18-4-2023) (Zondi JA (Schippers and Gorven JJA and Mali and Siwendu AJJA concurring)) case raises questions. Before the common law development of the 'public healthcare defence' the Department of Health used to settle claims of medical negligence in monetary compensation. Sometimes these compensations would be in the millions per case as in *MEC for Health and Social Development, Gauteng v DZ obo WZ* 2018 (1) SA 335 (CC). This reality affected the fiscal responsibilities of the department and would mean that with each payment honoured, the citizens of South Africa who cannot afford private healthcare and rely on public sector healthcare were left with fewer resources in their health care system. To solve this problem, the government has been pleading 'public healthcare defence' in most of its disputes. Court judgments show that when pleaded, this defence has the capacity of reducing monetary penalties significantly.

The common law 'public healthcare defence' has been an effective legal plea for the Department of Health since it was first successfully raised in the case of *MSM obo KBM v Member of the Executive Council for Health, Gauteng Provincial Government* [2020] 2 All SA 177 (GJ). This remained the case until it was raised and was unsuccessful in the case of *Mashinini*. The objective of this article is to assess whether the 'public healthcare defence' remains a viable defence for the Department of Health on medical negligence matters wherein the department has been found liable.

Background

The applicant in the *Mashinini* case was a 39-year-old professional nurse who underwent a surgical procedure at Tambo Memorial Hospital. During the procedure the appellant sustained a bile duct and hepatic artery injury. This meant that emergency management, endoscopic management and a bile duct reconstruction was required, and same was performed at Greys Hospital. However, because of the injuries sustained during the failed operation the appellant had to undergo various corrective surgical procedures aimed at correcting the damage done to her. It was on these facts that the appellant brought a case against the Gauteng Department of Health and its organs on 18 January 2017 for the failed surgical procedure. The appellant claimed for general damages, loss of future earnings, past medical expenses, and future medical expenses. The Department of Health did not dispute the claims and raised the common law 'public healthcare defence'.

Common law public healthcare defence

The 'public healthcare defence' was first

raised as a theory in the case of *DZ obo WZ*. In this case the Gauteng Department of Health was found to be liable for R 23 272 303 of which R 19 970 631 was in respect of future medical expenses. They raised a defence to pay directly for each future medical expense each time it was required. However, the court found this defence to be contrary to the 'once and for all' rule and, therefore, was unsuccessful. However, the Member of the Executive Council for the Department of Health in the Eastern Cape who was *amici curiae* raised two defences, one, 'public healthcare defence' in terms of which the delict claims for future medical expenses against the Department of Health may be satisfied by providing healthcare services in the public sector. Second, the 'undertaking to pay defence' to pay for those medical services that public healthcare sector could not provide. Though the Gauteng Department of Health was unsuccessful in this case, the Constitutional Court was more willing to hear the later defence brought by the Eastern Cape Department of Health.

The same defence ('public healthcare defence') was properly brought in the Gauteng Local Division High Court, and the court had an opportunity to rule on 'public healthcare defence' in the matter of *MSM obo KBM v Member of the Executive Council for Health, Gauteng Provincial Government* [2020] 2 All SA 177 (GJ). When the 'public healthcare defence' was raised, the court held the wider interest of justice provides a requirement for common law to be developed where it permitted compensation in kind. This meant that the Department of Health need not offer monetary compensation in cases were the plaintiff claimed money for private future medical expenses that may also be offered in the public healthcare sector to the same standard. The common law 'public healthcare defence' was further developed in case of *TN obo BN v MEC for Health, Eastern Cape* 2023 (3) SA 270 (ECB) from the Eastern Cape Local Division High Court, and the court held that the standard of health provided in the public sector need not be the same as that of the private sector, it only needed to be of a reasonable standard. This meant that before the *Mashinini* case, the Department of Health need not pay compensation in monetary form where they can provide medical services required, in the public sector, and the medical services provided need only to be of a reasonable standard. So, if the standard has become easier to meet; then why was the department unsuccessful in pleading the 'public healthcare defence' in the *Mashinini* case?

In the *Mashinini* case the SCA held that the Department of Health had failed to provide evidence to counter that offered by a medical expert, Professor Damon Bizos, who stated that the way government institutions were operated meant they were not capable of providing medical services to an appellant with complicated medical conditions, which would require immediate access to specialist surgeons. The SCA then ruled that the lack of evidence led by the defence, and available evidence led by the appellant, which remained unchallenged meant that the medical treatment in the future and the cost of providing such treatment would be paid in monetary form amounting to R 879 314. The lack of evidence challenging Prof Bizos testimony was imperative in this case and the decision of the court appeared to have been driven by his submission. This judgment has raised a lot of questions with some suggesting that the court might revert to the standard where compensation for medical expenses was paid in monetary form and not in kind.

Conclusion

The *Mashinini* case does not overrule the established common law 'public healthcare defence'. It simply places the burden of proof on the Department of Health to fully challenge testimony submitted by the plaintiff. For now, the *Mashinini* case and future similar cases like it, are best viewed as an exception to the common law rule, where the Department of Health has failed to prove that it will fully undertake the duty to provide future medical services to a reasonable standard to that in the private sector. Therefore, the *Mashinini* case is the exception and not the rule. Litigants should be aware that the common law 'public healthcare defence' remains a defence accepted by the court. Litigants should also expect the Department of Health and other state organs to raise some form of the common law 'public healthcare defence' as it has been effective when raised. Common law has been set, but it is not without a requirement to meet its burden of proof. Each time a state organ raises this kind of defence, they would be expected to reasonably prove that they can offer the services the plaintiff needs to a reasonable standard.

Mudzanani Muano *LLB (Northwest University)* is a Legal Intern at the Department of Health.

By Anton Sean Myburgh

Must compliance with management reg 25(1) and (2) of the Sectional Titles Schemes Management Act be pleaded in claims for payment of overdue levies?

In an appeal against a decision of a magistrate's court in *Body Corporate of Kleber v Sehube and Another* (GJ) (unreported case no 2021/A3094, 9-11-2021) (Sutherland DJP), the Gauteng Local Division High Court decided that no reference to reg 25(1) or (2) of the Management Rules as per the Sectional Titles Schemes Management Act 8 of 2011 needs to be pleaded to sustain a cause of action to recover levies due and payable by owners.

The High Court held that these specific regulations are for administrative purposes and good order and are not part of the cause of action. The High Court held that the liability to pay levies arises when the resolution to pay is passed. The liability to pay such levies is not dependent on the giving of the notices set out in reg 25(1) and (2).

No doubt it is correct that the liability to pay levies arises when such a resolution is passed by the body corporate. The question that ought to arise is that if there are any procedural steps that a body corporate must take before it may institute legal proceedings to recover overdue levies and interest.

The High Court devoted three paragraphs to the relevance of these two regulations. Respectfully, the judgment in my mind does not really deal comprehensively with the purpose of these two regulations.

By way of s 3 of the Act all the owners are liable to pay levies to a body corporate. The amount and nature of such levies are determined by the body corporate when they pass a resolution to that effect. This resolution also determines, *inter alia*, when the levies are payable (due date) and the interest rate that will be charged on all overdue amounts.

Logic dictates that the owners should be informed of such a resolution. This is the first purpose of reg 25(1) namely to publish the resolution to the owners so that all the owners know what amounts they are to pay and by when and what interest will be charged on any overdue amounts. As such, I believe that compliance with reg 25(1) is a crucial step before action can be taken to recover overdue levies and also because it is peremptory by the use of the word 'must'.

There is nothing in reg 25(1), which is at odds with s 3 of the Act and in fact it confirms the liability for levies and provides a mechanism by which the body corporate must publish the resolution to the owners. This regulation is essential to enforce the resolution and the liability that arises therefrom. In the absence of compliance with reg 25(1) the resolution would be nothing more than a secret decision made by the body corporate.

There is a further reason why the resolution must be published to the owners and that is so that any owner may challenge the levies raised by way of the dispute mechanisms set out in the Act and regulations and which must be informed of in the reg 25(1) notice.

Regulation 25(2) is triggered if an owner does not pay the levy by the due date. If the levy is overdue a body corporate must comply with reg 25(2). It is the next compulsory step that the body corporate must take in the process to recover overdue levies. When the levy is overdue this also triggers interest on the overdue amounts at the rate that was passed by the resolution. The daily amount of interest must be set out in this notice, and this is so that the owner can determine the exact amount to be paid, inclusive of interest on any given day.

Importantly, the notice must inform the owner that if the overdue amount and interest is not paid within 14 days from giving of the notice, the body corporate intends to act for the recovery thereof.

Taking action to recover overdue amounts, in my mind and in the context, can only mean legal action or proceedings.

Because the word 'must' is used, it follows that the body corporate must afford 14 days to the owner before it may take action to recover the amounts. In my opinion, the only reasonable interpretation that can be attributed to this regulation is that a body corporate may not sue until the notice has been given and until the 14 days have lapsed. The purpose of the notice and its content is to afford the owner a period of 14 days before legal proceedings are instituted against the owner to make payment so that legal proceedings can be prevented with the associated costs.

The purpose of reg 25(1) and (2) is, therefore, to confirm the liability for levies, to publish the amounts and due dates to the owners and to afford 14 days to the owner to pay overdue amounts and the interest thereon before legal proceedings are instituted.

As such, these regulations respectfully are not only administrative and for good order but serve to prescribe compulsory steps by the body corporate with a view to the institution of legal proceedings. They are procedural requirements to be able to institute legal proceedings.

There are many regulations and statutes that prescribe compulsory steps before legal proceedings may be instituted and averments that these steps were complied with are, therefore, essential to establish the right to institute the legal proceedings. These issues are, therefore, to be distinguished from the issue of liability for that purpose.

While it can be argued that the wording of these regulations does not specifically say that legal proceedings may not be instituted unless the regulations are complied with and the 14-day period has run out, I believe that in the context, that is what the regulator had in mind. It would be at odds with reg 25(2) to reason that action may be taken by way of legal proceedings before the 14-day period has run out.

An owner who receives such a notice will, therefore, know that he has 14 days to pay in order to prevent the institution of legal proceedings and that no such proceedings will be instituted until the 14-day period has run out.

No doubt body corporates, by this decision of the High Court, will contend that pleading compliance with these two regulations is not required for purposes of legal proceedings to recover overdue levies and interest. However, I would suggest that this may not be aligned to the aim and purpose of these regulations and would advise to rather comply with the regulations and to only institute action after the 14 days have lapsed and to plead compliance therewith to be on the safe side.

Anton Sean Myburgh *BLC (UP) LLB (Unisa)* is a legal practitioner at Anton Myburgh Attorneys. ❑

By Bonginkosi Ngubeni

Navigating multilingualism in the South African justice system: Challenges and solutions for accurate interpretation in South African courts

The importance of accurate interpretation in criminal proceedings cannot be overstated. The ability of defendants to fully understand the charges against them and participate in their own defence is a fundamental aspect of a fair trial. However, in South Africa (SA), the lack of legal terminology in many languages poses a significant challenge to accurate interpretation, particularly in cases where an accused's freedom, rights or even their good name is at stake.

Section 35 of the Constitution guarantees the right to a fair trial, including the right to an interpreter if the accused does not understand the language used in court. However, this right is not always realised in practice, particularly for speakers of less common languages or dialects. This can result in inaccurate interpretation, which in turn can lead to wrongful convictions or acquittals.

The issue of inaccurate interpretation has been brought to light in several cases, such as the *Thandi Maqubela* trial (*S v Maqubela* 2017 (2) SACR 690 (SCA)), where an interpreter's errors resulted in a retrial and ultimately an acquittal. This case underscores the potential consequences of inaccurate interpretation and the importance of addressing this challenge.

One potential solution is to provide more comprehensive training to interpreters in the relevant legal terminology, particularly in the official languages of SA. The National Qualifications Framework Act 67 of 2008 provides for the development of national standards and qualifications for education and training, including for interpreters. Investing in interpreter training and supervision, in line with these standards, could ultimately improve the accuracy of interpretation in criminal cases.

Another potential solution is to explore the use of technology, such as real-time translation software or remote interpreting services, to supplement or replace human interpreters in certain situations. The Electronic Communications and Transactions Act 25 of 2002 provides a framework for the use of electronic communications and transactions in SA, including the use of electronic signatures and data messages. This Act could be used to explore the use of technology in court proceedings, with careful consideration of the potential limitations and risks.

In addition to interpreter training and technology, courts could consider using a combination of interpreters and expert witnesses who are fluent in the relevant languages and can provide additional context and clarification in cases where interpretation is particularly challenging. This approach would require the involvement of professionals with specialised skills, such as linguists or cultural experts, and could be supported by the Legal Practice Act 28 of 2014, which provides for the regulation of legal practitioners in SA.

The challenge of accurate interpretation in South African courts, requires a multifaceted approach that involves investing in interpreter training and supervision, exploring the use of technology, and utilising a range of resources and expertise to ensure that the accused receives a fair trial. By doing so, we can uphold the principles of justice and ensure that all parties involved in court proceedings are able to fully understand and participate in the process, regardless of the language they speak.

Although strides are being made to ensure that the justices system works for the benefit of all parties, I believe that improvements can be made especially in the lower courts.

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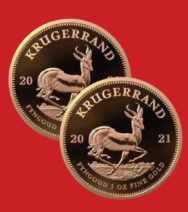

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Bail application: Are there exceptional circumstances?

By Andrew Jeffrey Swarts

Picture source: Gallo Images/Getty

When a person has been arrested with or without a warrant in terms of s 50(1)(*a*) of the Criminal Procedure Act 51 of 1977, they shall be informed of their right to apply and be released on bail or be informed their further detention in terms of s 50(1)(*b*) and s 50(6)(*a*) respectively. In the event that somebody has been arrested and the case brought against them is of a more serious nature, they might fall under s 60(11)(*a*) of the Criminal Procedures Act, which provides that: 'Notwithstanding any provision of this Act, where an accused is charged with an offence –

(*a*) referred to in schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permits his or her release.'

How the courts have dealt with the 'exceptional circumstances' requirement

In *S v Jonas and Others* 1998 (2) SACR 677 (SE) it was held that the term 'exceptional circumstances' in a schedule 6 bail application are not defined. No direct causes were attached to what constitutes 'exceptional circumstances'. In *Mvambi v S* (GJ) (unreported case no A113/2021, 4-2-2022) (Malangeni AJ) at paras 19, 20 and 22, the court held that the burden is on the appellant in a bail application to provide 'that exceptional circumstances exist which in the interest of justice permit his [or her] release'. The court held that normal or ordinary circumstances do not amount to exceptional circumstances. The court in *Mvambi* referred to *Jonas* that an urgent serious medical condition and a cast-iron alibi can be considered exceptional circumstances. In *Nhlapo v S* (GP) (unreported case no A07/2023, 17-2-2023) (Ally AJ) at para 5, the court referred to exceptional circumstances as, 'more than what can be described as the run-of-the-mill bail applications.' The court in *Nhlapo* held that the appellant 'must present cogent evidence' that will be able to 'stand up to scrutiny' in order to convince the court on a 'preponderance of probabilities' that the appellant is a candidate for bail.

Result of not challenging the exceptional circumstances advanced by the appellant

In *Fourie v S* (GP) (unreported case no A107/2020, 8-6-2020) (Rabie J), the appellant was charged with nine counts, among others – robbery with aggravating circumstances; attempted murder; and malicious injury to property to name but a few. The charges against the appellant fell under s 60(11)(*a*). The burden was on the appellant to advance exceptional circumstances in order to discharge the burden placed on him in terms s 60(11)(*a*). The charges emanated from a cash in transit heist where the armoured vehicle was physically forced off the road. Shots were fired at the armoured vehicle while being at the side of the road. The occupants inside the armoured vehicle were forced to open it under threat that the robbers would use explosives to gain entry if they did not comply. It was submitted by the defence that the matter should be dealt with as a matter falling under schedule 5. They argued that the appellant was not physically involved

in the robbery. The court rejected the defence's contention and stated that if the allegations are true, the appellant acted in concert with the perpetrators and his intention was to the accomplish the desired outcome and as such he should face the same consequences. The court proceeded with the bail application as a schedule 6 offence. It was submitted by the state that the appellant was an employee of SBV as the Head of Logistics. The state alleged that the appellant manipulated the route taken by the occupants of the vehicle the day of the robbery in order to execute the robbery. It was found that the appellant did not have the mandate to change routes. The appellant submitted that he would stand his trial and that he had no relatives abroad. The state did not place anything before court in opposing the application. The state did not do anything to rebut the appellant's denial that he did not commit or was involved in this crime. The court held that: 'It would appear that the state had adopted this line of approach on the assumption that the appellant had all to do in order to succeed with his application for bail.' The court in this matter found in favour of the appellant after proving exceptional circumstances, the court found that the version of the appellant stood unchallenged by the state.

When is the state required to challenge and rebut the exceptional circumstances advanced by the defence?

In *Maponyane v S* (NWM) (unreported case no CAB 07/2022, 2-9-2022) (Petersen J), the accused were charged with attempted murder, kidnapping, robbery, pointing of firearm, possession of a firearm and possession of ammunition. The court at para 8 concluded that the appellant relied predominantly on his personal circumstances and that he believed the state's case was weak. In his affidavit the appellant stating that: 'The learned magistrate erred in failing to attach the necessary weight to the personal circumstances of the appellant.' The appellant adduced evidence by way of affidavit, that he is a father of three. His continued incarceration makes it difficult to support his children financially. He stated that he is employed at his father's place of business and that his father is a sick elderly man. His continued incarceration placed a strain on the family business. The investigator in this matter testified that one of the mothers confirmed that she had two children by the appellant, but that she had not received maintenance money for more than a year from the appellant. It was also pointed out that the appellant's father was in the court the day the bail application was heard and that he was present at every postponement prior to that day. The court dismissed the version of the appellant on the bases that every assertion made by the appellant was rebutted by the state. The court in dismissing the appellant's application stated that: 'The appellant against the presumption of innocence regularly finds himself in conflict with the law, being released on bail on very serious charges and being arrested while on bail. That, in itself, undermines the proper functioning of the bail system and contributes to bringing the administration of justice into disrepute in the eyes of society.'

In *S v Mathebula* 2010 (1) SACR 55 (SCA) at para 12, the court held that: 'Thus it has been held that until an applicant has set up a *prima facie* case of the prosecution failing there is no call on the state to rebut his evidence to that effect.' The difference in how the state opted to apply itself in the *Maponyane* case as opposed to the *Fourie* case is evident in the outcome of both cases. The proactive approach by the investigator in the *Maponyane* case, by bringing the relevant information to the attention of the court, to place the court in a position to determine that exceptional circumstance did not exist.

Unintentional consequences of a schedule 6 bail application

In many schedule 6 offences, one finds that the investigation has been dragged on for too long and the state requests a remand for the investigations to be completed. It is in the defence's discretion to request that the matter be struck from the roll to 'give the state ample time to conclude the investigation'. Should the matter be struck from the roll, how do you secure the attendance of the accused before court when the investigation is completed? Does the state opt for a summons? Section 60(11)(*a*) states that 'the court shall order that the accused be detained in custody.' This is a mandatory provision, and the detention of the accused is the subject of this provision, until he is dealt with in terms of the law. The provision indicates that his detention is to be secured first and his detention shall be by way of a court order. This indicates that his detention shall be by way of warrant of arrest. In order to properly understand the provision, the case of *S v Hewu and Others* 2017 (2) SACR 67 (ECG), might be of assistance. In the *Hewu* case, the postponements were numerous and because of that the magistrate struck the matter from the roll. The appellant was arrested with a J50 warrant of arrest that same day and was brought before a different magistrate the next day. The matter was struck of the roll for a second time in as many days. On appeal, the judge requested submissions form the offices of the National Director of Public Prosecutions (NDPP) in Port Elizabeth and Grahamstown. The Port Elizabeth offices of the NDPP submitted that s 60(11)(*a*) 'makes no distinction between accused persons who appear for the first time' and those released on bail, there attendance should be secured by warrant of arrest. By issuing a summons, it is contrary to the intention of the provision. The Grahamstown offices of the NDPP submitted that the magistrate should have held a s 342A inquiry in order to determine what caused the delay in the finalisation of the investigations and then should have applied its mind based on the outcome of the inquiry. The court in *Hewu* stated that each case should be dealt with on its own merits but concluded that in the present case the court should have held a s 342A inquiry in order to ascertain what caused the delays. The court held at para 23 that: 'Section 60(11) of the Act does not constitute an absolute bar to a court's refusal to postponement and a decision to strike it from the roll in terms of s 342A(3)(*a*).' The court also held that: 'If it later transpires that the trial can be proceeded with and be completed soon, the re-arrest of the accused could be justified.' The court in *Hewu* was willing to accept both submissions made by the different NDPP's offices, but the method to be followed will be indicative of the case before court.

Conclusion

In *S v Mabena and Another* [2007] 2 All SA 137 (SCA) at para 6, the Supreme Court of Appeal confirmed that the 'potential factors for and against the grant of bail', listed in the Act, s 60(4), are no less relevant than what they are in a schedule 6 bail application. In almost every bail hearing the appellant recites the provisions of s 60(4) and assert that the state's case against them is weak. On the former assertion the court in *Mathebula* at para 15 held that: 'Parroting the terms of ss (4) of s 60 … does not establish any of those grounds, without the addition of facts that add weight to his *ipse dixit*.' On the latter assertion the court in *Mathebula* at para 12 stated that, 'he [the appellant] must prove on a balance of probability that he will be acquitted of the charge.'

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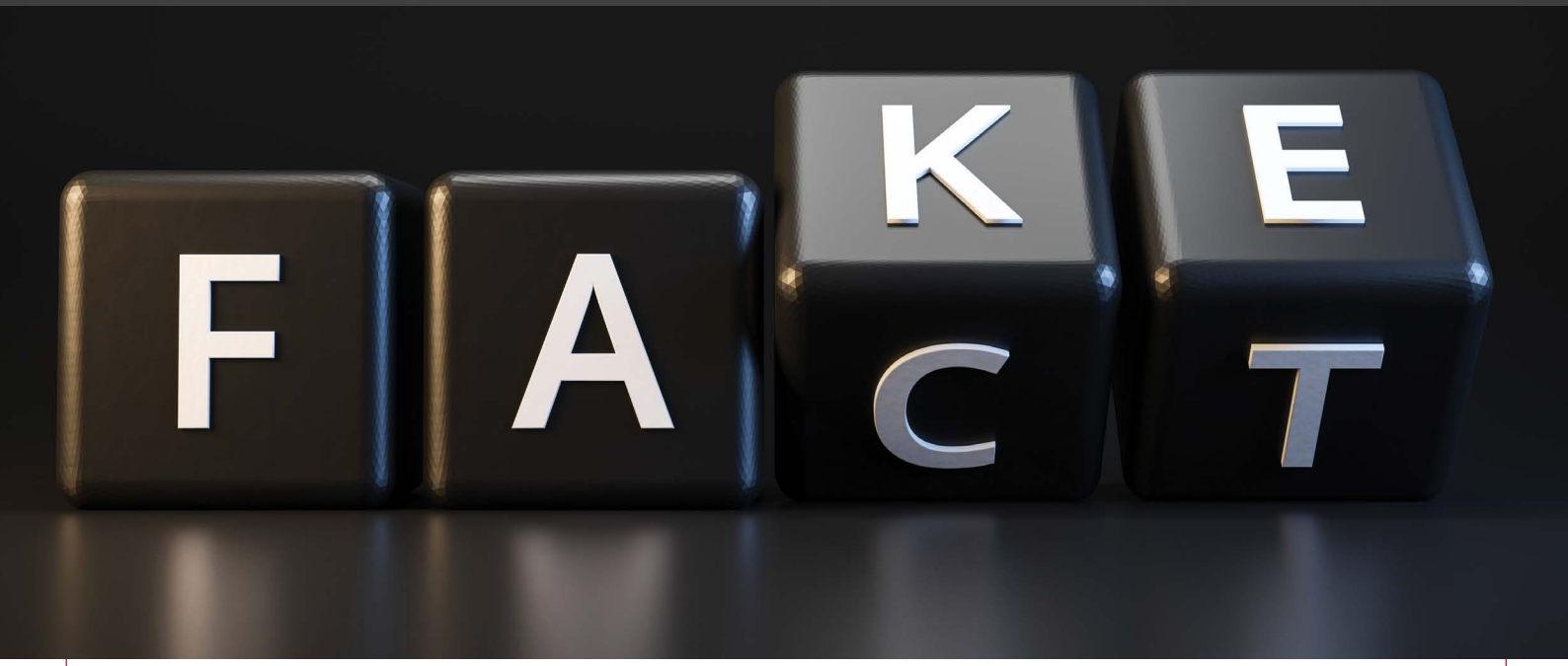
The *Kapa* case: A landmark ruling redefining the admissibility of hearsay evidence in criminal trials



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By Thembeka Ratshibvumo

The Constitutional Court (CC) judgment in *Kapa v S* 2023 (4) BCLR 370 (CC) handed down on 24 January 2023 marked a ground-breaking departure from the approach and treatment of hearsay evidence that has so far been standard practice. To unpack the gist of the judgment, it is necessary to revisit what hearsay evidence is, what the law provides and how this has been treated by the courts over the years.

Section 3(4) of the Law of Evidence Amendment Act 45 of 1988 (the Hearsay Act) defines 'hearsay evidence' as 'evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence'. As a general principle, hearsay evidence is inadmissible. As Mbatha AJ who wrote for the minority in this judgment puts it, the reason for its inadmissibility is that 'the statutory interests of justice test for the admission of hearsay evidence has a constitutional dimension, and the admission of hearsay might be so unfair as to infringe the [accused's] fair trial rights' (see para 4 of the judgment where the judge referred to *Savoi and Others v National Director of Public Prosecutions and Another* 2014 (5) SA 317 (CC); and *S v Ndhlovu and Others* 2002 (6) SA 305 (SCA) at para 16). The Hearsay Act, however, provides for the exceptions to the rule under which hearsay evidence may be admitted. It is apposite to detail the nature of hearsay evidence led in *Kapa* before considering the exceptions to the rule against hearsay.

Mr Kapa was one of the seven accused who stood trial in the Western Cape Division High Court facing several charges forming part of vigilantism in Khayelitsha, including two of murder. Mr Kapa was convicted on one of the murder charges and was sentenced to 15 years' imprisonment. He was acquitted on the rest of the charges. One of the reasons that led to his acquittal is that one of the state witnesses, Mr May, who happened to be the only eyewitness, repudiated his statement, and his evidence was expunged, meaning, no weight was attached to it.

Mr Kapa was thus convicted on a charge of murder of Mr Bungane (the deceased), who was accused of stealing his items including a car radio. His conviction was based on a statement made by Ms Dasi, the deceased's girlfriend. Ms Dasi, however, did not live to give evidence, for she died shortly before the commencement of the trial. Mr Kapa opposed the state's application to have Ms Dasi's statement admitted as an exception against hearsay evidence. After applying the provisions in the Hearsay Act, the High Court admitted the statement as evidence. Ms Dasi's statement was the only evidence that directly implicated Mr Kapa in the commission of murder against the deceased. Without this statement, there could not have been any conviction as none of the state witnesses incriminated Mr Kapa.

Mr Kapa's applications for leave to appeal against conviction and sentence were dismissed by both the High Court and the Supreme Court of Appeal. The CC had to decide whether the admission of hearsay evidence tendered in the form of a statement made by Ms Dasi, infringed against his constitutional right to a fair trial. Three of the CC justices held that it did and they based their reasoning on

the judgments of *Ndhlovu* and *S v Ramavhale* 1996 (1) SACR 639 (A). However, six justices who decided for the majority, took a different approach saying: 'But where the interests of justice, constitutionally measured, require that hearsay evidence be admitted, no constitutional right is infringed' (para 101). Interestingly, by referring to the interests of justice, the CC (through the majority judgment) was referring to the provisions of the Hearsay Act, which happened to be the basis on which *Ramavhale*, *Ndhlovu* and the minority judgment were centred. This necessitates the visitation of the Hearsay Act itself.

Section 3 of the Hearsay Act provides – 'Hearsay evidence –

(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless –
(*a*) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;
(*b*) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or
(*c*) the court, having regard to –
(i) the nature of the proceedings;
(ii) the nature of the evidence;
(iii) the purpose for which the evidence is tendered;
(iv) the probative value of the evidence;
(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
(vi) any prejudice to a party which the admission of such evidence might entail; and
(vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice.
(2) The provisions of subsection (1) shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence.'

The courts' interpretation of the above provisions over the years, was summarised in the minority judgment when it held: 'Courts are generally hesitant to admit hearsay evidence that is decisive in convicting an accused. The Supreme Court of Appeal in *Ndhlovu* stated that "admitting or relying on hearsay evidence which plays a decisive or even significant part in convicting an accused" should only be done "if there is compelling justification for doing so."'

In holding that the interests of justice demand the admission of the hearsay evidence, Majiedt J who wrote for the majority held that the minority judgment 'impermissibly evaluates the probative value of the statement in a piecemeal fashion. It should instead apply a holistic approach, assessing whether on the whole the statement was of adequate probative value in light of all of the other circumstantial evidence taken together. Approached in this way, the outcome must be different' (para 98).

The CC was alive to the prejudice suffered by Mr Kapa in admitting the hearsay evidence, when it held: 'The prejudice occasioned to the applicant as an accused person by the admission of the hearsay evidence is significant. The accused was deprived of an opportunity to cross-examine the witness, which could have shed light on the credibility and reliability of the witness, her powers of observation, and so forth.' It, however, quoted from *Ndhlovu* (at para 24) with approval, where the following was held: 'The Bill of Rights does not guarantee an entitlement to subject all evidence to cross-examination. What it contains is the right (subject to limitation in terms of section 36) to "challenge evidence". Where that evidence is hearsay, the right entails that the accused is entitled to resist its admission and to scrutinise its probative value, including its reliability. The provisions enshrine these entitlements. But where the interests of justice, constitutionally measured, require that hearsay evidence be admitted, no constitutional right is infringed' (para 101).

The court concluded that, 'it bears emphasis that the fact that the evidence in question evidently strengthens the prosecution's case does not render the evidence prejudicial to an accused' (para 102). It also concluded that, 'there can hardly be any doubt that the applicant is being substantially prejudiced by the admission of the statement as he is deprived of the opportunity to cross-examine the deponent. But that is not the only consideration – the court must also consider the fact that the witness is deceased, and the overriding consideration of the interests of justice. Ultimately, the question is whether there are adequate pointers of truthfulness, reliability, and probative value for the statement to be admitted as evidence' (see para 103).

There can be no doubt that *Kapa* ushers in a new era in the treatment of hearsay evidence in criminal trials. The admissibility of hearsay evidence has been made easier even when it is decisive in convicting an accused. The prejudice to be suffered by the accused persons was rightly acknowledged by the CC. One needs not look very far to see the consequences of this decision. It is common in cases involving vigilantism for witnesses to recant their statements during trial for reasons such as fearing for their lives. This is exactly what Mr May did in this case and it worked in favour of the accused. As the minority judgment correctly hinted, a possibility that Ms Dasi could have disavow her statement too, had she lived to give evidence cannot be excluded.

With this judgment, the question that begs to be asked is what impact it would have on all the cases in which witnesses are killed before giving evidence. Mr May lived to give evidence and through cross-examination, no weight could be attached to the statement he gave to the police. Ms Dasi died shortly before the trial started, and her statement was admitted without any question to the author as she was no more, resulting in the conviction of the accused. It does not look like the death (or even killing) of state witnesses would serve any benefit to the accused persons as it may even worsen their situation.

Whether the new dispensation adds value to the jurisprudence of criminal law, will depend on where one stands. Mr Bungane and Ms Dasi's family was elated that justice could still be done even in death. Mr Kapa, however, felt prejudiced having been deprived of a right to cross-examine anyone implicating him in wrongdoing, especially that which led to his incarceration. Whatever the position, hearsay evidence as it is treated by the courts, would never be the same. The impact thereof in cases that up to now would have been withdrawn by the state due to unavailability of state witnesses, remains to be seen.

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Picture source: Gallo Images/Getty

Is the Road Accident Fund an *inheritas damnosa*?

By Professor Hennie Klopper

The Report of the Road Accident Fund Commission, 2002 commented on the Road Accident Fund (RAF) as follows: '39.1.1.7 … The RAF continues to experience difficulty with its restructuring as a modern corporate entity, its restyling as a service-oriented provider of benefits, the remoulding of attitudes to employees within the organisation and to consumers outside the organisation and its embrace of diversity.

39.1.1.8 These challenges have been compounded by a dearth of appropriate skills … at all levels of the RAF organisation. The result has been that the organisation has floundered in the quicksand of its own inertia or has succumbed to an epidemic of consultants'.

Damning judicial criticism of the RAF since 2002 was frequent and commonplace. To date the RAF's delinquency featured in 34 cases. In some instances, the protection of s 15(3) of the Road Accident Fund Act 56 of 1996 (RAF Act), protecting officials against personal liability, was forfeited – recently in *Hlatshwayo and Another v Road Accident Fund* (MM) (unreported case no 3242/2019, 24-1-2023) (Legodi JP (Mphahlele DJP and Mashile J concurring). Bertelsmann J in *Ketsekele v Road Accident Fund* 2015 (4) SA 178 (GP) remarked that whomsoever should manage the RAF is: 'Saddled with an *inheritas damnosa*, a cursed inheritance that would doom it to fail virtually immediately. The compensation of road accident victims requires a radical change that should be free of the shackles of an institution that complies with neither its duty to uphold the fundamental rights enshrined in the Constitution nor the duties imposed upon it by its statute.' The question may be asked whether and why this assessment may be true.

On reflection the following aspects influence the fortunes of the RAF –

- external environment in which the RAF functions and funding; and
- past management decisions and legislation.

External environment: Sources of RAF liability

• *RAF Act*

The RAF exists as a road crash victim (RCV) social security compensation fund for the personal consequences of road traffic crashes (RTCs). The mechanism employed, is the suspension of delictual liability of the wrongdoing driver of a motor vehicle and the transferral thereof to the RAF. Motor vehicle drivers/owners contribute to the RAF through the payment of a fuel levy. The sole beneficiary of the system is the third party (RCV) (see *Smith v Road Accident Fund* 2006 (4) SA 590 (SCA)) who is afforded the

Fatalities	South Africa	/100 000	WHO /100 00 middle income countries average
Annual average	14 000	42*	19.2
2015 Labuschagne	13 591	41*	
2015 Lancet	20 180	70*	
* Based on 2022 SA population of 60 million.			

Table 1

Injuries	Number	Non-serious	Serious
2015 Labuschagne	265 029	202 509	62 520
Based on 2006 hospital admissions	363 446	290 757*	72 689*
*** Using the ratio in the Labuschagne report.**			

Table 2

greatest possible protection against the possibility that he would, in the absence of the RAF Act, be unable to recover his damages personally from the wrongdoing driver (see ss 19(*a*), 21 and 22 of the RAF Act and *Aetna Insurance Co v Minister of Justice* 1960 (3) SA 273 (A) at 285).

- *RTCs, fatalities, injuries and resulting claims*

RTCs and their frequency and consequences for RCVs are indisputably pivotal to the RAF's fortunes. Internationally road fatalities are used to indicate road safety. Table 1 is a comparative road fatality table comparing South Africa (SA) to international World Health Organisation (WHO) statistics (WHO 'Road safety' (www.who.int, accessed 10-5-2023); Lee Rondganger 'South Africa's roads deaths are a "national crisis"' (www.iol.co.za, accessed 10-5-2023); F Labuschagne, E de Beer, D Roux and K Venter 'The cost of crashes in South Africa 2016' (www.satc.org.za, accessed 10-5-2023); *Lancet* Global Burden of Disease Study (chief contributors Christopher JL Murray, Alan D Lopez, Mohsen Naghavi, and Haidong Wang) (www.thelancet.com, accessed 10-5-2023); Worldometer (www.worldometers.info, accessed 22-3-2023)).

Besides fatalities, RTC injuries impact road users. Table 2 shows the number of serious and non-serious RTC injuries both established and probable (based on public hospital trauma admissions) (see Labuschagne (*op cit*) report table 6 at p 32; RG Matzopoulos, M Prinsloo, A Butchart, MM Peden and CJ Lombard 'Estimating the South African trauma caseload' (2006) 13 *International Journal of Injury Control and Safety Promotion* 49; Amy Williams *Investigation into the factors contributing to malpractice litigation in nursing practice within the private healthcare sector of Gauteng* (MNurs, Stellenbosch University, 2018).

The current probable RTC trauma count could be considerably more (SA population has grown by 24% in 2006 to 60 million in 2022 (see Worldometer (*op cit*)).

The primary source of RAF liability is death and injury caused by unlawful and negligent driving of a motor vehicle. The state of SA road safety for the past ten years and resultant RAF personal claims, is reflected in Table 3 (see Road Traffic Management Corporation (RTMC) Road Traffic Reports 2010 – 2020 and RAF Annual Reports 2010 – 2020).

- *Governance*

Over the past 13 years, there have been seven Ministers of Transport. The RAF's chief executive officer (CEO) is appointed for five years. During this period, there were three and two acting RAF CEOs.

- *Funding*

The RAF is currently funded by a fuel levy of R 2,18 per litre. Table 4 shows 2010-2020 funding, claims payments and administration costs of the RAF (see RAF Annual Reports 2010-2020).

Management and legislation

Faced with the RAF problem, successive RAF managements made and instigated some decisions, legislation and measures thought to be solutions and/or RAF service delivery enhancements. From own experience and discussions with RAF staff, examples since 2002 are:

- Adjustment of the staff structure by the introduction of more claims handlers and fewer claims' assistants, having a negative effect on productivity and resulting in increased in litigation.
- Acceptance and payment of suppliers claims without corresponding personal claims being lodged (see HB Klopper 'Supplier's claims in terms of section 17(5) of the Road Accident Fund Act 56 of 1996' 2007 (70) *THRHR* 469). Apart from the possible unlawful expenditure, this policy exposes the RAF to liability where the supplier claim is admitted but, when a personal claim is subsequently lodged, it is established that admission of the suppliers claim was erroneous (see *Daniels and Others v Road Accident Fund and Others* (WCC) (unreported case no 8853/2010, 28-4-2011) (Binns-Ward J)).
- The withdrawal and suspension during 2004 of all existing settlement offers resulting in a flood of summonses.
- The unilateral implementation of payment in instalments of compensation for loss of income and maintenance without the RAF Act authorising such instalments and without the RAF having the administrative capacity to properly administer deferred payments, resulting in unnecessary legal costs.
- Unofficial capping of claims for non-patrimonial loss by introducing an arbitrary internal injury quantum list not based on legal principle or precedent, and informing staff that deviation will result in disciplinary steps.
- Exclusively issuing only undertakings for future medical expenses without adequate administrative resources.
- In order to manage cash-flow, an instruction to enter an appearance to defend all summonses, whether defence is justified or not (see *Daniels*) ending in a R 10 billion legal bill in 2020 (see Hennie Klopper 'Is the Road Accident Fund's litigation in urgent need of review?' 2019 (March) *DR* 10). It also resulted in the loss of efficacy of the anti-litigation measure contained in s 17(3)(*b*).
- Amendment of s 17(1) in 2008 introducing a serious injury threshold for non-patrimonial loss substantially increasing administrative and legal costs and causing further delays. Also

	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
Fatalities	13 967	13 954	10 977	10 170	10 367	10 613	14 071	14 050	12 921	12 503	9 969
Claims	85 369	74 162	52 445	47 159	53 230	62 436	71 664	73 860	92 101	103 423	102 086
Note: Average overall staff count = 2 363											

Table 3

	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
Funding Rmil	12 683	14 526	17 104	18 143	20 156	20 680	33 206	33 342	37 341	43 239	41 241
Claims + Admin Rmil	13 555	28 798	45 807	31 580	25 934	29 703	34 222	31 965	36 941	44 578	45 766
Surplus/ (Deficit) Rmil	(872)	(14 272)	(28 703)	(13 437)	(5 778)	(7 023)	(1 016)	1 377	400	(1 338)	(4 525)

Table 4

abolishing the right to recover pre-summons costs by repealing s 17(2).

- Proposing and expending considerable resources on the formulation and promotion of the Road Accident Benefit Scheme (RABS), which was rejected by Parliament.
- An attempt to side-line attorneys (in the belief that attorneys were the source of the RAF's problems) by the introduction of a direct payments scheme (see *Law Society of SA and Others v Road Accident Fund and Another* 2009 (1) SA 206 (C)).
- To save costs, the attempted exclusion of attorneys by the introduction and active propagation of 'direct claims' where the RAF acts on behalf of a claimant. Many direct claimants have been prejudiced by the RAF either allowing their claims to prescribe or be under settled (see Gert Nel 'Road Accident Fund "direct claims" versus public interest' 2018 (Aug) *DR* 26. Also see *Tosholo v Road Accident Fund* (WCC) (unreported case no 449/2018, 4-5-2023) (Wathen-Falken AJ)) causing more litigation. Ostensibly direct claims, 'serious injury' assessments/ disputes and the promotion of RABS may have contributed to a virtual doubling of administrative costs for 2011 – 2014 (RAF Annual Report 2015/16).
- Termination of RAF panel attorney contracts in 2019/2020 (ostensibly in response to Klopper 'Is the Road Accident Fund's litigation in urgent need of review?' (*op cit*)) and *cf Road Accident Fund and Others v Mabunda Incorporated and Others and a related matter* [2023] 1 All SA 595 (SCA)) affecting some 300 High Court defended cases without any effective strategy to deal with claims of affected plaintiffs after termination (see *Hlatshwayo*). The current stopgap of appointing the State Attorney seems to be unsatisfactory (see eg, *Tshabalala v Road Accident Fund* (GJ) (unreported case no 12133/2018, 23-3-2023) (Gilbert AJ); *Zulu v Road Accident Fund* (GP) (unreported case no 89670/18, 1-3-2023) (Mogotsi AJ).
- Recent attempts to amend the RAF claims regulations by internal decree (see *Nel v Road Accident Fund* (GP) (unreported case 22142/2021, 7-5-2021) (Neukircher J) and *Mautla and Others v Road Accident* (GP) (unreported case no 29459/2021)). Also, efforts to amend the RAF Act and common law by rejecting and litigating claims by foreigners and claims for medical expenses paid by a medical aid (see *Mudawo v Minister of Transport and Road Accident Fund* (GP) (unreported case no 11795/2022); *Discovery Health (Pty) Limited v Road Accident Fund and Another* (GP) (unreported case no 2022/016179, 26-10-2022) (Mbongwe J); *Van Heerden v Road Accident Fund* (ECGq) (unreported case no 845/2021, 4-10-202) (Rugunanan J); *Mawila v Road Accident Fund* (15105/2022, 28-11-2022); *Malgas v Road Accident Fund* (ECGq) (unreported case no 126/2020, 1-12-2022) (Van Zyl DJP); *SJJW v Road Accident Fund* (WCC) (unreported case no 19574/2017, 8-2-2023) (Van Zyl AJ)).

Discussion and conclusion

Much of the RAF malaise is attributable to mainly four factors –

- abnormally high incidence of RTCs and resultant flood of claims;
- lack of adequate funding;
- no political and managerial continuity; and
- exacerbation by futile and costly managerial decisions and/or legislative attempts to solve a misidentified RAF problem.

Despite the perceived delinquency of the RAF, an analysis of 13 years of RAF claims completion performance shows that it completes an average of 94% of the number of claims annually lodged and spends an average of 106% of income on settlement of claims (RAF Annual Reports 2006 – 2020). The high claims volumes resulting from abnormally high RTC incidence and underfunding over decades has caused a current accumulated backlog of 359 190 claims. This represents a contingent RAF liability of some R 50 billion (calculated using the 2020 average personal claim payment of R 279 950).

The government has a constitutional duty to ensure road safety (see Klopper Hennie 'The right to road safety' 2018 (June) *DR* 20). The government's failure to effectively comply with this duty (as expressed by SA's unacceptably high road fatality rate) is the main, real, and actual basic root cause of the RAF problem.

All of the above considerations, make the RAF an *inheritas damnosa.* Ultimately, it is the unfortunate third party as sole beneficiary of RAF social security, who is the only and hapless victim of such a damned inheritance.

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Picture source: Gallo Images/Getty

By Prof Fareed Moosa

Rule 43 and Muslim divorces: Can relief be granted if the marriage was dissolved by Sharia law?

Rule 43 of the Uniform Rules of Court was promulgated in GN R48 *GG*999/12-1-1965 and has largely remained untouched. In *S v S and Another* 2019 (6) SA 1 (CC) at para 53, the court held that r 43 requires revision. In *MD v MD* (GJ) (unreported case no 2021/43212, 2-2-2023) (Bezuidenhout AJ) at para 11, Bezuidenhout AJ labelled the truncated procedures stipulated in r 43 to be 'discriminatory and … inconsistent with the constitution'. Undoubtedly, this rule serves a useful purpose.

Rule 43 permits a plaintiff wife at the wrong end of the economic wrung to obtain maintenance *pendente lite* and a cost contribution from her more affluent spouse. Rule 43 does not permit a spouse, as of right and without more, to be maintained in a way 'sufficient to keep him or her in the same lifestyle as that enjoyed during the marriage' (*BR v DR* (WCC) (unreported case no 14189/2022, 17-3-2023) (Kusevitsky J) at para 4). Relief granted under r 43 is predicated on the existence of a reciprocal duty of support (see *EW v VH (Women's Legal Centre Trust as* Amicus Curiae*)* [2023] 2 All SA 404 (WCC) at para 43). On divorce, that duty ceases, except as otherwise provided in legislation (see *EH v SH* 2012 (4) SA 164 (SCA) at para 12).

Rule 43 is geared to facilitating inexpensive and expeditious relief. These goals are achieved, first, by our courts adopting a robust adjudicative process (see *CT v MT and Others* 2020 (3) SA 409 (WCC) at para 25(g)). Secondly, while an applicant must deliver a sworn statement in the form of a declaration, a respondent must, within ten days, deliver a sworn reply in the form of a plea. Neither may adduce additional affidavits, save with leave from the court. An applicant who discloses only information favourable to her case acts dishonourably and may be denied relief (see *SK v JLK* (WCC) (unreported case no 3198/23, 24-3-2023) (Thulare J) at para 17).

Object of article

This article challenges the correctness of the view that a blanket bar exists against appeals to all orders granted in r 43 proceedings. This article demonstrates that a limited right of appeal exists. Furthermore, it is argued that this right is useful in litigation undertaken within the framework crafted in *Women's Legal Centre Trust v President of the Republic of South Africa and Others* 2022 (5) SA 323 (CC) at para 86 for the benefit of persons in Sharia (Muslim) marriages.

Ambit of appeals bar

The starting point is s 16(3) of the Superior Courts Act 10 of 2013. In *S v S*, s 16(3) was declared constitutional. Section 16(3) is an ouster clause constraining judicial review. It reads: 'Notwithstanding any other law, no appeal lies from any judgment or order in proceedings in connection with an application –

(*a*) by one spouse against the other for maintenance *pendente lite*;
(*b*) for contribution towards the costs of a pending matrimonial action'.

The power of judicial review is crucial to a democratic order and the maintenance of the rule of law, both foundational values engrained in s 1 of the Constitution. That power must be protected against undue erosion through legislative means. For this reason, as an ouster, s 16(3) must be interpreted strictly through the lens of its wording, context, purpose, and s 39(2) of the Constitution (see *Chisuse and Others v Director-General, Department of Home Affairs and Another* 2020 (6) SA 14 (CC) at para 47).

Section 16(3)(*a*) and (*b*) envisage proceedings between spouses. Therefore, it does not bar an appeal against a ruling, such as, in *EW v VH*, which refuses relief under r 43 on the basis that the protagonists are not spouses owing one another a duty of support. *In casu*, the majority (per Cloete *et* Slingers JJ) dismissed an r 43 petition on the basis that the applicant failed to prove the existence of a permanent life partnership in a familial setting arising from her cohabitation with respondent. Section 16(3) does not oust appellate jurisdiction on the issue whether a High Court was correct in finding that an applicant fell beyond r 43's net. If this ruling is overturned on appeal, then the case would be remitted back for adjudication on the merits of the relief sought under r 43, un-

less the appeal court deems it expedient to decide same in the interests of the parties' rights to speedy, cost-effective justice.

A proper interpretation of the word 'law' in s 16(3)'s context for purposes of the phrase '[n]otwithstanding any other law' necessitates that it be understood through the prism of constitutional supremacy entrenched in s 2 of the Constitution, and as a foundational value in s 1(*c*). As a result, the Constitution, as law, falls beyond the ambit of 'law' for s 16(3)'s purpose. Put differently, the Constitution's status as 'the supreme law' means that s 16(3) cannot override the Constitution or its provisions. The decision in *S v S* at para 58 must be understood against this backdrop.

In casu, the court recognised that cases may arise 'where strict adherence to the rules [of court] is at variance with the interests of justice' because, on the one hand, a litigant who bears the brunt of an r 43 order is unable to seek variation under r 43(6) owing to the absence of a 'material change' in circumstances while, on the other hand, 'there is a need to remedy a patently unjust and erroneous order' (para 58). In such 'exceptional cases' an appeal would be an appropriate remedy to avert grave injustice that would flow from the r 43 order. The appellate power in these circumstances was sourced in s 173 of the Constitution. It contains a reservoir of inherent judicial powers to administer justice.

Rule 43 and Muslim divorces

No fixed rules can be laid down as to when an appeal ought to be allowed to remedy a patently unjust and erroneous r 43 order. Each application for leave to appeal would have to be decided on its own merits. A real danger exists for substantial injustice to arise from an r 43 order granted erroneously in litigation occurring within the judicially created mechanism in *Women's Legal Centre Trust*.

In casu, the apex court declared the common law, the Marriage Act 25 of 1961, and the Divorce Act 70 of 1979 unconstitutional to the extent that they each fail to recognise as valid marriages those solemnised according to Sharia law but not registered as civil marriages. The declarations of invalidity were suspended for 24 months to enable the state to enact appropriate legislation. Pending its enactment, the court formulated the following stopgap measures: First, Muslim marriages subsisting at 15 December 2014 'may be dissolved in accordance with the Divorce Act' (para 86(1.7)). For this purpose, the entire Divorce Act was declared applicable, 'save that all Muslim marriages shall be treated as if they are out of community of property; except where there are agreements to the contrary' (para 86(1.7)(a)).

Although the court order indicates that the election to terminate a Muslim marriage under the Divorce Act is conferred on a finite group, the judgment's spirit supports the view contended for here that the election applies equally to prospective spouses in Muslim marriages generally. The restrictive language used in the order is regrettable.

Secondly, s 7(3) of the Divorce Act will apply to Muslim marriages 'regardless of when it was concluded' (para 86(1.7)(b)). Section 7(3) empowers '[a] court granting a decree of divorce' to grant a redistribution of assets 'on application' by any spouse. Thirdly, s 12(2) of the Children's Act 38 of 2005 will apply to 'a prospective spouse in a Muslim marriage concluded after the date of this order' (para 86(1.8)). Fourthly, ss 3(1)(*a*), 3(3), 3(4)(*a*), (*b*), and 3(5) of the Recognition of Customary Marriages Act 120 of 1998 apply to prospective Muslim marriages. Fifthly, '[i]f administrative or practical problems arise in the implementation of this order', then 'any interested person may approach this court for a variation of this order' (para 86(1.10)).

In *Women's Legal Centre Trust*, the court emphasised that the true problem requiring redress is the absence of a dispute resolution mechanism that deals with 'the consequences of the dissolution of a Muslim marriage, particularly as regards the equitable distribution of assets and the protection of children' (para 58). Hence, the court fashioned interim relief that addressed these concerns, while at the same time recognising the validity of Sharia marital law. At para 60, it affirmed that the constitutionality of that law was not at issue *in casu*.

Consequently, the judgment and order in *Women's Legal Centre Trust* makes it plain that Muslims can continue to practice Sharia law by, *inter alia*, solemnising and terminating marriages according to its tenets. Subsequently, Meer J went a step further. In *Benjamin and Another v FNB Trust Services (Pty) Ltd NO and Others* [2022] 4 All SA 687 (WCC) at para 77, she held that 'given the practice of Islamic law by South African Muslims since at least the 1790s', Sharia law is part of South African customary law. Whether the judge's view will receive widespread judicial endorsement remains to be seen.

The preceding discussion shows that Muslim marriages (*nikah*) may validly be terminated through a Shariah compliant *Talaq* or *Faskh*, or by court order under the Divorce Act. The requirements to lawfully terminate marriage under Sharia law is usefully discussed in *Benjamin*. No spouse in a Muslim marriage has the right to demand that its dissolution occur pursuant to the civil law in the Divorce Act. South African law embraces freedom of religion and the right of different communities to practice their culture and customs. As a result, there is no impediment to the lawful termination of a marriage by Sharia law, even while civil divorce proceedings are underway. The right to invoke a Sharia divorce is firmly recognised in *Women's Legal Centre Trust*.

Irrespective of the process followed to terminate a Muslim marriage and its timing, spouses or former spouses may now claim post-divorce maintenance and asset redistribution under ss 7(2) and (3) of the Divorce Act respectively. This begs the question: Pending such litigation, can relief be granted under r 43 after the marriage was dissolved by Sharia law? I submit 'no' – the duty of support underpinning this rule falls away on divorce, including by Sharia law (save for a husband's duty to maintain his wife during *Iddah*). If relief is granted under r 43 despite evidence of a lawful dissolution by Sharia law, then that ought, it is submitted, to constitute grounds for an appeal envisaged in *S v S*. An order under r 43 can be financially crippling and personally devastating. The obligations created must be complied with 'in form and spirit' (*SS v VV-S* 2018 (6) BCLR 671 (CC) at para 23), failing which contempt proceedings may ensue and a contemnor's imprisonment ordered (see *Bannatyne v Bannatyne (Commission for Gender Equality, as* Amicus Curiae*)* 2003 (2) SA 363 (CC) at paras 27-28).

Finally, the declarations of unconstitutionality in *Women's Legal Centre Trust* and the relief crafted by the court changed the landscape of our law of marriage. *Women's Legal Centre Trust* brought a decisive break from our disgraceful past in the treatment of Muslim marriages and the consequences flowing from their termination. As a result of this ground-breaking judgment, the basis for the approach followed in *AM v RM* 2010 (2) SA 223 (ECP) and *SJ v SE* 2021 (1) SA 563 (GJ) in relation to the application of r 43 as compared to that contended for above in this article has fallen away – with respect, they no longer hold as good precedent.

In both cases, relief was granted under r 43 despite a *Talaq* occurring. However, in both, the court justified its decision on the basis that a constitutional challenge was raised in the main action, which potentially impacted the *Talaq*. In *AM v RM*, Revelas J held that r 43 applied because the constitutional challenge raised would, if upheld, affect 'the status and effect of the *talaq*' (para 10). In *SJ v SE*, Modiba J held: 'Treating the Islamic marriage … as dissolved by the issuing of the *Talaq* … will result in a grave injustice … pending the determination of the divorce action where she seeks to raise constitutional issues' (para 45).

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A legal profession where rules are not only read in books, but are practised and adhered to

By Kgomotso Ramotsho

Candidate legal practitioner, Shandukani Mudau.

Shandukani Mudau is a 28-year-old candidate legal practitioner and former President of the Black Lawyers Association Student Chapter National Executive Committee (BLA-SC NEC). Ms Mudau was born in Vyeboom village near Vuwani. She completed her matric at Tshipakoni Secondary School where she completed grade ten to matric. After passing matric she enrolled to study an LLB at the University of Venda.

She graduated in 2022 and attended the School for Legal Practice at the University of Venda campus, which was launched in 2021. After completing law school, she was afforded an opportunity to work as a candidate legal practitioner at Mashabela Attorneys Inc and was the first candidate legal practitioner to be registered under legal practitioner Sikhanyiso Moyo.

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

Shandukani Mudau (SM): Growing up we did not have career options and the only fields, which seemed respectable within the community was teacher, police officer or lawyer. At that time, I just wanted to be a magistrate, not knowing I had to be an admitted legal practitioner and work my way up. Lucky enough my father was a police officer and I would try on his clothes during plays at church or at school and I got the nickname 'Sergeant Mudau,' which I low key loved and I always said 'law chose me'. During my matric year my half-brother was stabbed to death and the way in which it affected my father and siblings was very bad. Following the tragic death of my late brother, no arrest was made even after witnesses came forth to say who had stabbed him, nothing was done. It was only the community that took matters into their own hands, which was not enough to me. I had questions as to why the police did not do anything? Why were those accused of killing my brother not brought to justice and why were they still alive and he was not? Why is our legal system not assisting the marginalised? I felt that we had a legal system, which was not for us since we could not access it at the time.

I then decided to study law to bring awareness to previously disadvantaged members of the community who are facing different kinds of crimes on a day-to-day basis and to be able to solve disputes within communities.

KR: As a candidate legal practitioner, what are some of the lessons you are learning about the legal profession?

SM: The legal profession is what Theodore Roosevelt described in his speech titled 'Citizenship in a Republic' popularly known as 'Man in the arena'. It is a profession that is very jealous and requires you to prepare extensively for it to yield a positive outcome, it requires patience, persistence, passion, and self-discipline. You must be in the arena to win and make it in this profession. It is a profession that is not too friendly and does not have room for making mistakes, as that one simple mistake can cost you millions or a client's freedom.

I am learning that the legal system is not immune to change, however, it is moving at a slow pace. Women are being embraced within the legal profession even though we are still overlooked and undermined by our male counterparts especially in law firms. We still have women that are expected to give sexual favours in order to be within the system and have their articles registered.

The legal profession is not so friendly to candidate legal practitioners, in a sense that most of our fellow candidate legal practitioners are being exploited by their principals and ill-treated, whereas some are not even compensated for the work that they do and they are scared to even do anything or to leave the firms where they are being ill-treated.

KR: You were the President of the BLA-SC NEC. What are some challenges that law students and candidate legal practitioners have brought to your organisation for you to address?

SM: During my term as the President of the BLA-SC NEC, my office used to address issues surrounding articles and vocational work programmes. What I have realised is that we have a lot of students who after completion of their degrees, get stuck without finding articles because no one is willing to employ a graduate that does not have Practical Legal Training. The programme is expensive for those students who used the National Student Financial Aid Scheme while still doing their degrees. As a result after completion of their degrees, these students go and work as cashiers or petrol attendants just to survive, in the hopes of raising funds to pay for the fees for school for legal practice, which increases every year. In an attempt to assist such graduates and to raise those funds for them, the BLA-SC looked at bursaries that used to assist associations, such as the Black Lawyers Association (BLA), that fund such students and pay for their fees. In our attempt we approached the Treasurer and Education offices on reviving the programme, which I hope the current president together with his collective finalise on and bring back that funding programme through the BLA.

During my term as president, we received a lot of letters challenging us to address some of the requirements of being a candidate legal practitioner, which some firms were requiring, such as a graduate must have their own car and a valid driver's licence. We found these requirements to be absurd and discriminatory because most of our graduates especially those who are from disadvantaged backgrounds were automatically disqualified from being candidate legal practitioners. We addressed these issues together with the BLA and such requirements were scraped and any firm that still requires a graduate to have such can be reported to the Legal Practice Council (LPC).

Most of our female members would complain of harassment from their seniors in the profession while doing vocational work and articles. When we offered assistance, they would opt to remain anonymous for fear of having no one believing them or wanting to associate with them in future, which led them to abandon their complains.

We provided legal assistance to our leaders across the country who would get arrested and suspended during strikes or while advocating for students. We further partnered with the South African Union of Students in order to assist Student Representative Council members with legal services when they require it. This is done through the BLA Provincial Executive Committee (PEC) across the country, when a need for such services arises, we would communicate with PEC members, and they would assist.

The Safety and Security Sector Education and Training Authority was one of the programmes that had and still has issues when it came to disbursement of candidate's stipends. Candidates would go for more than four months without getting paid. We addressed these issues through our Treasurer office and further escalated the matter to the BLA as it was also in charge of the programme.

KR: Are young legal practitioners being heard and given platforms?

SM: Young legal practitioners are being given a platform through organisations, such as the BLA and others. The BLA has established young professionals, which will be formally launched in November during the AGM. Such platforms will give candidates a platform to voice the problems that they go through on a day-to-day basis. Some of the aims and objectives of the BLA as per s 3.1 of the BLA constitution is to 'promote, protect and uphold the rights and interests of its members', it also strives 'for the empowerment of all disadvantaged people especially women and young legal practitioners' as per s 3.6.

We also have organisations such as the Law Society of South Africa, which is now focusing on empowering young legal practitioners and giving them a space to grow and deal with issues that affect young people, most especially candidate legal practitioners.

KR: This year South Africa is celebrating the centenary of the Women Legal Practitioners Act 7 of 1923. Do you have any thoughts on this?

SM: 'The first woman to appear in the law reports seeking to be admitted as an attorney was Sonya Schlesin (*Schlesin v Incorporated Law Society* 1909 TS 363)' (Patrick Bracher 'The slow rise of women in the legal profession' 2020 (Sept) *DR* 14). After having her application to be admitted as an attorney turned away Ms Schlesin never gave up nor neglected the fight for her admission. Back then women were not recognised to have the same benefits or recognition as men, women were inferior to men and the courts decorum did not cater for women attorneys. 'The Transvaal Supreme Court held that because the word "attorney" had always referred to people "of that class who have always been capable of being attorneys, namely men, Bristowe J went on to say that admitting women as attorneys could also lead to them being admitted as advocates "a change which would mean an enormous difference in the practice of the courts in this country" and he clearly did not mean a positive change' (Bracher (*op cit*)).

Ms Schlesin failed and was turned away, she also had to pay costs of the application for the Law Society. Madeline Wookey resorted to compelling the Incorporated law society to register her articles with an attorney and notary practising. 'Maasdorp JP found that because there was no positive law in existence disqualifying women from being enrolled as attorneys, her application succeeded. Maasdorp JP came to the conclusion that women were equally entitled with men to be enrolled as attorneys on giving proof of the necessary qualifications. The laws, he held, made enrolment compulsory except for good cause shown. As no good cause had been shown why women should not be entitled to sign articles and to become attorneys once they attained the required qualifications, the application was granted' (Bracher (*op cit*)).

It is because of this victory that today we have the Women Legal Practitioners Act, which was promulgated by publication in the *Government Gazette*. On the 10 April 1923 women were officially and constitutionally recognised to be admitted as attorneys of the High Court as well as a notary or conveyancer. Today women are flourishing in these departments and doing exceptionally well.

The Women Legal Practitioners Act states as follows: 'Women shall be entitled to be admitted to practise and to be enrolled as advocates, attorneys, notaries public or conveyancers in any province of the Union, subject to the same terms and conditions as apply to men, and any law in force in any province of the Union regulating the admission or enrolment of persons as advocates, attorneys, notaries public or conveyancers shall henceforth be interpreted accordingly' (Bracher (*op cit*)).

The gap from the 10 April 1923 and 2023 is very big, however, we are not yet at a point where we can say women are equal to men. The legal profession is not so friendly to women. 'We are still not anywhere near where we should be', women are now taking space and 'leading in sufficient numbers in all branches of the profession' (Bracher (*op cit*)) and have to bring ten times the hard work than their male counterparts.

The former Chief Justice of the Orange Free State, Melius de Villiers wrote

an article 'Women and the legal profession' (1918) 35 *SALJ* 289 (see Bracher (*op cit*)). He states in his article that 'intellectually the average woman will be at least as capable as the average man to be an attorney or advocate and that "the administration of justice will be greatly benefited by women" being admitted he went on to say, relying on the "interest of the community at large", that the "point is that of motherhood". He justified this by saying: "For the sake of perpetuation of the race, … women are by nature what they are; if in the part assigned to women by nature an injustice is done to them or a hardship is inflicted upon them, these are none of man's doings, nor can he with the best wishes in the world do anything to make things otherwise. A revolt against nature by women may be successful, but it is the community at large that would have to suffer for it. And a revolt against nature is involved in any proposal to allow women to enter the legal profession' (Bracher (*op cit*)).

KR: What kind of legal profession do you envisage, as a young black woman?
SM: I envisage a legal profession that is free from discrimination, and everyone is treated equal regardless of their skin colour, a legal profession where the LPC will have Board Exams Question papers in one language and not in Afrikaans and English. While Afrikaners are being given preference by being examined in their own mother language, a profession where we all write one paper in one language, which is English.

A profession that is accessible to everyone and not only the privileged, a profession where rules are not only read in books, but are practised and adhered to, a profession free from corruption within the court officials wherein you must pay a certain registrar to get a date, which is recent and not far.

A profession whereby women are not afraid to hold high office ranks because they are always undermined and talked down by their male and female colleagues. A profession whereby we as women do not have to work ten times harder and sacrifice to be accepted within the profession.

A profession whereby a woman is not expected to perform on the same ladder as men because men and women will never be the same. Women must take care of their families whereas men do not, and such gives men an advantage to be ahead as they have more time to prepare than women.

KR: Who are some of the women you look up to in the legal profession and why?
SM: The woman that I look up to is Mabaeng Denise Lenyai who has just been appointed to be a Judge of the Gauteng Division of the High Court. She is a former Deputy President of the BLA and also former President of the LSSA to name a few of her achievements. I look up to Ms Lenyai because of the way in which she carries herself within the legal profession, she is the epitome of dignity, calmness, determination, hard work and a God fearing woman.

We all know that the legal profession is not friendly to women, especially those who thrive to make a change and be visible even with all the odds stacked against her she still made it and prospered from having her firm closed down to becoming a judge of the Gauteng Division, that has to be dedication, self-discipline, hard work and God's grace.

The reason why I chose Ms Lenyai is because I have had the opportunity to work and interact with her when she was still the General Secretary of the BLA. I have learned to remain calm when faced with challenges and to also be a solution to other people's problems without expecting a reward in the end, but most importantly to always give back to the community.

KR: Besides the BLA, which other organisation are you a part of and what is your role there?
SM: I am a member in good standing of the Black Management Forum (BMF) SC University of Venda branch. I was elected the first female chairperson of the branch in 2020. Shortly after that I was elected as the Academic Transformation Officer to serve at the NEC, which I excelled in, until the end of office. I was then elected to serve as the National Deputy Chairperson of the BMF-SC wherein I was elected in December 2022, and term of office will end in December 2023. The BMF-SC stands for 'the development and empowerment of student leadership, primarily among black students at tertiary institutions, and the creation of leadership structures and processes, which will enhance the abilities and capabilities' of students on entering the labour market or corporate world (https://wcbmf.wordpress.com, accessed 20-6-2023).

My role within the BMF-SF is to ensure that the organisation runs smoothly, and that the memorandum of incorporation is adhered to by our branches across the country, most of all addressing issues that are affecting our general memberships such as financial exclusions whereby the organisation offers bursaries and short-term lessons from ALX Africa programmes whereby in the end participants gets certificate.

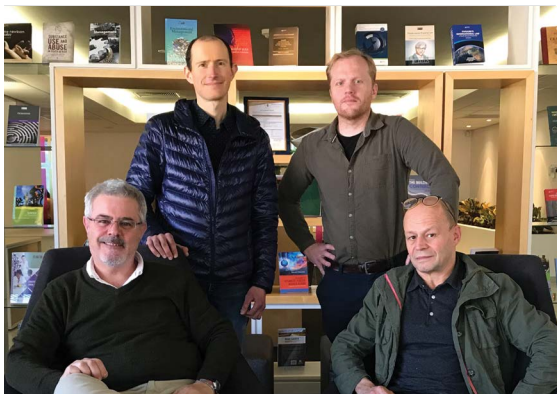
I am a member of South African Women Lawyers Association in good standing and looking forward to joining other organisations such as the LSSA and partaking in the activities that they have.

KR: Where do you see yourself in the next five years in the legal profession?
SM: I see myself being a director of my own law firm and studying towards an agriculture related degree since I have interest in farming and horticulture.

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

THE LAW REPORTS

May 2023 (3) South African Law Reports (pp 1 – 326); May 2023 (1) South African Criminal Law Reports (pp 447 – 564)



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

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

GJ: Gauteng Local Division, Johannesburg
GP: Gauteng Division, Pretoria
LCC: Land Claims Court
MM: Mpumalanga Division, Mbombela
SCA: Supreme Court of Appeal
WCC: Western Cape Division, Cape Town

Children

An opposed overseas relocation of a minor child: MH, a Dutch mother living in South Africa (SA), wanted to return to her homeland permanently with her five-year-old son, K, who was born in SA in May 2013. The boy, over whom MH had in 2015 been granted full parental rights and responsibilities, had a Dutch passport, and spoke that language. But his biological father, OT, also Dutch, with whom MH had been involved in an acrimonious relationship while they were both living in SA, opposed the relocation on the ground that it would destroy his relationship with K.

The discord between MH and OT was the primary reason why MH wanted to leave SA for the Netherlands. It was in her view detrimental to both her and K's wellbeing to live here under such stressful circumstances. She also cited better employment prospects and an improved lifestyle for her and K in the Netherlands, where they would have the support of her nuclear family. OT argued that none of this was a sufficient reason for relocation and that, given the level of distrust between the parents, the odds were that his close and burgeoning relationship with K would be ruined if MH and K left SA. OT had by this time acquired permanent residence in SA and was involved in a stable relationship with a South African woman. An agreement, which was made an order of court provided that OT had contact rights with K and that his consent was required for MH and K to relocate permanently from SA.

This was the situation that the WCC was confronted with in *MH v OT* 2023 (3) SA 159 (WCC), an opposed application by MH for an order that would allow her to relocate to the Netherlands permanently with K.

In its judgment the WCC (per Cloete J) pointed out that when a court sat as upper guardian of a minor child, there was no 'onus' in the conventional sense, so that in relocation matters the courts had to take an overall view of the situation to determine whether the parent's decision to relocate was a reasonable one. Not every relocation should be approached only from the child's perspective, nor would the child's best interests always trump all other rights.

While there was little doubt in the WCC's mind that K wished to maintain frequent contact with his father, it had to weigh this against K's rights to –

- develop in an environment free of strife between his parents; and
- have his primary attachment figure, MH, free from the anxiety that had permeated her life since at least his birth.

The WCC emphasised that MH's reasons for wishing to relocate were clearly *bona fide* and reasonable, that there were no compelling reasons to override her decision, and that the bond between K and the OT was such that it could withstand separation. In the light of these considerations, the WCC on 4 July 2018 authorised WH to remove K permanently to the Netherlands.

Consumer protection

The legality of the 'on the road fees' charged in car sales: In *National Credit Regulator v National Consumer Tribunal and Another* 2023 (3) SA 225 (GP) the GP in four interrelated appeals dealt with the legality of the 'on the road fees' (OTR fees) customarily added to the financed prices of cars sold through dealerships. In issue was not the legality of the fees themselves, but rather whether they were legal under the National Credit Act 34 of 2005 (the Act).

The National Credit Regulator (NCR) had in 2017 issued compliance notices against three vehicle finance houses – Volkswagen Financial Services SA (Pty) Ltd (VWFS), Mercedes-Benz Financial Services SA (Pty) Ltd (MBFS) and BMW Financial Services SA (Pty) Ltd (BMWFS) – containing findings that they had charged consumers OTR fees disguised as service and delivery fees in contravention of various stipulations of the Act. The NCR ordered the finance houses to reimburse the affected consumers. The finance houses then successfully approached the National Consumer Tribunal to have the compliance notices set aside and the OTRs refunded (back) to them.

The NCR appealed to the GP, which proceeded to hear four consolidated statutory appeals involving the Tribunal, the finance houses, and the NCR, which appealed the Tribunal's order for the refunding of the OTRs. The parties provided the GP with a joint practice notice in which they asked the GP to determine whether the charging of the OTR fees was contrary to ss 100, 101 and 102 of the Act, which between them prescribe the types and nature of fees, or services that credit providers may charge consumers under instalment sale agreements. Section 100 deals with prohibited charges and provides that a credit provider may not charge a consumer fees, charges or

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commissions prohibited by the NCA. Section 101 deals with the cost of credit and prohibits a credit agreement from requiring from the consumer payment for anything but the principal debt, interest and certain specified fees and charges, '*plus* the value of any item contemplated in section 102' (our italics). Section 102, which contains a list of these items (fees or charges that may form part of the transaction: initiation fees, connection fees, delivery fees etcetera). It provides that the credit provider may not charge for them unless the consumer appoints the credit provider as his or her agent in arranging for the service concerned. OTR fees are never mentioned.

In a split judgment, the majority of the GP (per Malungana AJ, Millar J concurring) pointed out s 100 prohibits the credit provider from charging or imposing monetary liability on the consumer in respect of prohibited fees or charges, and that the credit provider imposes no obligation or financial liability when it finances the principal debt predetermined by the dealer. And s 101 is triggered only if the credit provider charges for the goods or services prohibited in s 100 as that would increase the cost of credit. Dealers and credit providers thus perform separate, complimentary roles during the 'pre-agreement' stage that culminates in the conclusion of the credit agreement. Therefore, the finance houses do not charge OTR fees when they include them in credit agreements: they are added to the purchase price during the initial negotiations between consumers and dealers, that is, during the pre-agreement stage. The finance houses then financed the principal debt, consisting of the purchase price and the other extras, including the OTR fees. There was, therefore, no merit in the NCR's argument that in VWFS and the other finance houses had charged the consumers OTR fees in contravention of the Act. The dealers had imposed them at the initial stage of the sale process. In the premises, the GP ruled in favour of the finance houses that they did not contravene ss 100, 101 or 102 of the Act, upheld their appeals and dismissed the NCR's appeal.

In a firm dissent Moshoana J argued that the view that the value of items contemplated in s 102 is not part of the principal debt because it is 'charged' by the dealer, is absurd and contrary to aims of the NCA. Logically, if a sum including an OTR is charged by the dealer and then imposed on the consumer as part of the deferred amount, then the credit provider effectively 'charged' or 'imposed a monetary liability' on the consumer, thereby violating ss 100(1)(*a*) and 102 of the Act. Moshoana J would, therefore, have ruled against the financiers, dismissing their appeals, and upholding the NCR's appeal.

Contingency fee agreements (CFAs)

What do they look like? In *TM obo MM v MEC for Health, Mpumalanga* 2023 (3) SA 173 (MM), an action against the Member of the Executive Council (MEC) for Health on behalf of a child who was diagnosed with cerebral palsy arising from alleged medical negligence at childbirth, Legodi JP was presented with a draft order of settlement, submitted to be made an order of court by agreement between the parties. Accompanying the draft order was an affidavit from the plaintiff's attorneys, which stated that 'neither the plaintiff nor plaintiff's legal representatives entered into a [CFA] as is contemplated in terms of section 4(1) of the Contingency Fees Act No 66 of 1997' (the Act).

Concerned that the fee agreement amounted to a CFA without complying with s 4 of the Act, the MM issued several directives to the plaintiff's attorneys requiring more information on the exact nature of the fee agreement. They replied that there was no success fee involved, but that, having ascertained that it was a prosecutable claim, they agreed to recover reasonable attorney and own client fees, as well as all disbursements not recovered in the party and party bill of costs. It was common cause that the plaintiff was indigent and unable to pay fees upfront.

The MM disagreed with their reply, holding that it was common cause that payment of legal fees was dependent on the success of the litigation and was to be paid from the capital amount that may be recovered in the litigation. All was, therefore, dependent on a 'no win, no fee' model or on the so-called 'success fee'. An agreement where fees and disbursements were paid out of the capital amount on favourable finalisation of the matter could be nothing else but a CFA.

The MM further held that agreements –

- without upfront or immediate payment of fees for legal services rendered; or
- for payment of fees from the capital amount arising from successful litigation were meant to be controlled by the Act subject to oversight by the courts as per s 4 of the Act.

Any entitlement to fees for services in respect of proceedings payable in the event of the success would be unlawful at common law unless there was compliance with the Act. Accordingly, one may not enter into a fee agreement based on a specific or implied agreement that fees would only be paid in the event of the success of the litigation, without complying with the Act. Neither can one dodge the Act by specifically or impliedly providing that a legal practitioner would only be entitled to charge their normal fees, or less, if the litigation was successful. The agreement in question clearly constituted a CFA and was illegal for non-compliance with the Act.

Criminal law

Inquests – magistrate holding informal instead of formal inquest constituting irregularity but not vitiating findings: *Todd v Magistrate, Clanwilliam and Others* 2023 (1) SACR 481 (WCC) concerns an application for the review of the findings of an inquest arising from an incident in which the deceased died in a fall from a cliff. When she fell, the deceased was in the presence of her husband, the applicant and only witness. The magistrate found in terms of s 16(2)(*d*) of the Inquests Act 58 of 1959 (the Act) that, although there were no direct witnesses to the incident, the available circumstantial evidence strongly indicated foul play on the applicant's part. The magistrate, therefore, ruled that her death was brought about by an act or omission that *prima facie* involved or amounted to an offence on the applicant's part. Aside from challenging these findings, the applicant contended that the magistrate had erred in holding a non-public inquest into the deceased's death based solely on affidavits and without recourse to oral evidence, and despite the recommendations of the Director of Public Prosecutions and the request by the daughter of the deceased.

The WCC (per Lekhuleni J, Allie J concurring), agreed that the magistrate's decision to hold an informal inquest was wrong and that inquest magistrates were ordinarily under an obligation to call for oral evidence. The WCC was nevertheless of the view that this did not mean that the magistrate's decision had to be reviewed. More was required. The applicant had to satisfy the court that the exercise of the magistrate's discretion was so unreasonable and capricious that it infringed his fundamental rights. But the applicant did not show that he had suffered any prejudice pursuant because of the magistrate's decision to hold an informal inquest.

As to the findings on the facts, the WCC was not persuaded that the applicant had given a plausible explanation of what really caused the deceased, an accomplished sportswoman, to fall. She was an accomplished cyclist and was medically sound and physically fit. The circumstances were such that they demanded an answer, which only the applicant could provide and which he had failed to do. Since there were no grounds for setting-aside of the magistrates' decision, the WCC dismissed the application.

Murder – a finding of premeditation does not require that death was premeditated or planned: In *S v Dube* 2023

(1) SACR 513 (MM) the accused was convicted of housebreaking with the intent to assault and murder. Intention in the form of *dolus eventualis* was found to be present. The only remaining issue to be considered was whether the murder could be considered premeditated in circumstances where the accused had only intended to inflict bodily harm on the deceased. If so, the matter fell within the ambit of s 51(1) of the Criminal Law Amendment Act 105 of 1997 and the accused faced the prospects of a prescribed sentence of life imprisonment.

The facts were that the accused had been celebrating his birthday at a tavern when he was phoned by his brother who asked him where he was. On being informed, his brother said that he would join him there, but failed to do so. After leaving the tavern the accused passed his girlfriend's home. He stopped there and discovered his brother and girlfriend engaging in sexual activities. He broke down the door, entered the house and stabbed his girlfriend at least five times, one of which severed her carotid artery, causing her death.

The MM took the view (per Roelofse AJ) that it was not the death that had to be premeditated or planned, but rather the aim of the criminal act. The judge illustrated the principle as follows: If A had premeditated an assault on B, and carried out the assault, while foreseeing that the assault might cause B's death, B's murder was premeditated despite that the original plan was only an assault. Applying the principle to the facts, the accused was guilty of murder as contemplated by s 51(1).

Other criminal law cases

Apart from the cases discussed above, the material under review also contained criminal cases dealing with –

- committal to regional court;
- medical parole;
- parole for life imprisonment;
- questioning on guilty pleas;
- sentencing for fraud;
- the conduct of a prosecutor; and
- the conduct of the presiding officer.

Review

Does the path to review for an organ of state wishing to review the decision of another organ of state fall under PAJA, or the principle of legality? *Mapholisa NO v Phetoe NO and Others* 2023 (3) SA 149 (SCA) was an application against an order of the GP dismissing an application to review a decision of the Professional Conduct Committee (the PCC) of the Health Professions Council of South Africa (the HPCSA). After the GP refused leave to appeal, Mr Mapholisa, a pro forma complainant appointed by the HPCSA, petitioned the SCA. The SCA referred his application for oral argument and directed that the parties should prepare to argue the merits if called on to do so.

The facts were that a doctor, Dr Miller, had treated a patient, and a third party had complained to the HPCSA that Dr Miller had conducted himself unprofessionally. The Council conveyed the complaint to one of its constituent boards, the Medical and Dental Professions Board, which appointed a Committee of Preliminary Inquiry to investigate the allegations. The Committee's finding (and resultant resolution) was that Dr Miller was guilty. The Registrar of the HPCSA then appointed Mr Mapholisa as a pro forma complainant. Mr Mapholisa prepared charges and conveyed these to Dr Miller, who declined an admission of guilt fine.

Thereafter, the inquiry proceeded before the PCC. Dr Miller raised a preliminary point that the third party who had lodged the complaint lacked *locus standi* because he was not his patient and was, therefore, unable to give evidence as to what had transpired. This PCC upheld the point.

Mr Mapholisa then brought proceedings in the GP to review the PCC's decision. Dr Miller met them with a point *in limine* that the Promotion of Administrative Justice Act 3 of 2000 (PAJA) required Mr Mapholisa, as the pro forma complainant, to first exhaust his right of appeal to an appeal committee of the PCC before approaching a court.

The GP upheld the point and dismissed the application. It also found that the PCC had been correct in finding that Mr Mapholisa lacked standing. The GP refused leave to appeal, and on Mr Mapholisa's petition, the SCA referred the dispute to oral argument.

The issue before the SCA was whether Mr Mapholisa ought to have exhausted its internal remedy as PAJA required. This raised the further issue of whether PAJA applied, which narrowed down to whether PAJA applied where one organ of state reviewed the decision of another organ of state as in this case.

The SCA (per Mali AJA in a unanimous judgment), adopting the reasoning in *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC), ruled that it did not. (In *Gijima* the CC held that PAJA availed only private persons because it gave effect to the constitutional right to just administrative action, which was enjoyed only by private persons).

Consequently, the principle of legality enabled the review, and the common law, not PAJA, regulated the procedure. Under the common law there was no duty to exhaust internal remedies.

This raised the question whether the Health Professions Act 56 of 1974 or the regulations governing misconduct inquiries created such an obligation. The SCA ruled that they did not, with the result that there had been no obligation on Mr Mapholisa to approach the appeal committee before proceeding in the GP. Accordingly, the GP had erred in finding such a duty and in dismissing the review on that basis.

As to the merits, the question was whether the PCC (and the GP) had been correct in their findings that the third party who had lodged the complaint with the HPCSA had lacked standing to do so. This turned on the breadth of the term 'complainant' in the regulations, and whether it accommodated a person in the third party's position. The SCA ruled that it did because the term was very broadly defined and reading it broadly would allow the PCC to attain its objective of exercising its powers in the public's best interests. Such wide reading would also best promote the protection of the public.

The SCA accordingly granted leave to appeal and granted and upheld the appeal, setting aside the GP's order and replacing it with an order that the PCC's decision on the absence of *locus standi* be set aside and substituted with an order dismissing the doctor's preliminary point that the third-party complainant lacked standing.

International law

Application of the 'foreign act of state doctrine' and principle of state immunity by a South African court: In *East Asian Consortium BV v MTN Group Ltd And Others* 2023 (3) SA 77 (GJ), the GJ (per Wepener J) had to consider a number of issues separated in terms of r 33(4) of the Uniform Rules of Court from an action that the plaintiff, East Asian Consortium BV (EAC) – a company incorporated in the Netherlands – had instituted against the MTN Group Ltd (the first defendant) and associated entities (second to fourth defendants). In the particulars of claim to that action, EAC claimed that after responding to an international tender invitation issued by the Iranian government, it was granted a private licence for the purposes of implementing and operating a GSM-type cellular phone system public network in Iran. EAC claimed that MTN, through the bribery of Iranian officials, persuaded Iran to break its agreement with EAC and replace it with MTN. EAC claimed delictual damages flowing from MTN's wrongful interference in its contractual rights, alternatively competition with EAC for those rights. Various preliminary issues relating to jurisdiction had to be decided first, including the question of the choice of law applicable in determining whether a claim for damages flowed from the particulars of claim and whether MTN

should succeed in special pleas claiming lack of jurisdiction because –

- the tender agreement granted Iranian courts exclusive jurisdiction; and
- the application of the foreign act of state doctrine and the principle of state immunity.

The GJ held that the choice of law should be guided by the *lex loci delicti commissi* principle, which stated that the applicable law is that of the place where the delict was committed. This would point to Iran since the pleaded facts suggested that that was where the delictual conduct took place.

On the question of jurisdiction, the GJ proceeded and agreed with MTN that the reference in the tender documents to 'any dispute relative to these present regulations or the call for competitive bids to which they relate' – in respect of which it was provided that Iranian courts had exclusive jurisdiction – encompassed the present litigation.

The GJ confirmed the endorsement by South African courts of the foreign act of state doctrine, which demanded that courts should decline to exercise jurisdiction over acts done by foreign states 'in the exercise of sovereign authority'. The GJ held that since it was being asked to sit in judgment of the implementation of Iranian government policy, it would decline to exercise jurisdiction.

The GJ further held that Iran in any event had immunity from the court's jurisdiction by virtue of s 2 of the Foreign States Immunities Act 87 of 1981. The GJ accordingly upheld the special pleas raised by MTN.

Land reform

The right of ESTA occupiers to graze cattle: In the matter of *Moladora Trust v Mereki and Others* 2023 (3) SA 209 (LCC) the applicant, the Moladora Trust, approached the LCC for an order against the first to third respondents, who occupied, in terms of the Extension of Security of Tenure Act 62 of 1997 (ESTA), part of the Trust's farm situated in Dr Kenneth Kaunda district, North West Province, to remove all the grazing animals (presently nine cattle) under their control. The respondents, Magalone Mereki, Topies Mereki and Dikhotso Mereki, were the children of a former employee of the Trust, Mrs Meriam Mereki, who died, according to the applicant, sometime 'before 2017'. The applicant acknowledged that Mrs Mereki had permission to graze cattle. It insisted, however, that the respondents (who had continued living on the farm since their mother's death) did not and that their right of occupation was for residential or housing purposes only. The applicant alleged that the trustee, Mr Marius Nel, had sought to engage the respondents on the absence of consent, but was met by verbal abuse. The applicant served formal notice on the respondents in January 2018, calling on them to remove their cattle within one month, to no avail. In October 2020, it served similar notices, once again with no response. That prompted the present application to the LCC (heard before Cowen J).

A key question for consideration by the LCC was whether the security of tenure protected by s 25(6) of the Constitution and ESTA included rights of ESTA occupiers to graze cattle. The LCC held that it did not. An ESTA occupier derived any right to graze cattle on the land they occupied by consent, and not as an adjunct to any occupational rights conferred by s 6(2) of ESTA. However, the LCC added, once consent to graze cattle was obtained, that right formed part of an ESTA occupier's right of tenure protected by s 25(6) of the Constitution and ESTA and was subject to the various protections provided by the latter, including those set out in ss 8 and 9, which imposed particular requirements for the termination of rights of residence, as well as eviction.

The LCC went on to hold on the facts that the respondents had tacit consent to graze cattle. This was because of the failure of the applicant to contest the re-

spondents' right to keep and graze cattle for more than a year after the respondents' mother's death and the significant delays that followed their response in January 2018 to send a formal notice. The LCC accordingly dismissed the application.

Road Accident Fund (RAF) claims

Undefended claims: Default judgment for order that future medical and hospital expenses be paid by s 17(4)(1)(a) undertaking: In *K obo M and Another v Road Accident Fund* 2023 (3) SA 125 (GP), a full Bench of the GP answered two questions referred to it by way of a directive issued under s 14(1)(*a*) of the Superior Courts Act 10 of 2013 by the Acting Judge President of that division, both arising from the RAF's failure to defend or participate in the finalisation of actions against it.

The first question was whether it was competent for a court granting default judgment to order that a plaintiff's claim for future medical and hospital expenses be compensated by the RAF by way of an undertaking issued in terms of s 17(4)(1)(*a*) of the Road Accident Fund Act 56 of 1996 (the Act) in the absence of a tender to that effect by the RAF. Section 17(4)(1) entitles the RAF to furnish an undertaking – as opposed to a once-off payment – to compensate a third party for costs of future medical expenses after the costs have been incurred and on proof thereof. Relevant to this question was that, in response to the directive, the RAF's chief executive officer stated on affidavit that the RAF had, since the issuance of the directive, made a 'blanket election' to furnish undertakings in all matters where plaintiffs claimed future medical expenses under s 17(4)(*a*).

The GP held that the right to furnish the undertaking was specifically given to the Fund. A court had no jurisdiction to direct the Fund to furnish an undertaking where the Fund had made no such election. However, as result of the RAF's blanket election, once a plaintiff proved its claim as contemplated in s 17(4)(*a*), it was entitled to claim an order catering for a direction to the Fund to furnish such an undertaking, and a court was entitled to grant such an order. This applied also where orders by default were sought.

Other civil cases

Apart from the cases discussed above, the material under review also contained criminal cases dealing with –

- slip and fall at a shopping mall;
- the allocation of television broadcasting licenses;
- the High Court's jurisdiction where a magistrates' court had jurisdiction; and
- unlawful alienations and preferences in company liquidations.

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By Kgomotso Ramotsho

Employer to reinstate and pay employee after dismissal was procedurally and substantively unfair

Sibanyoni v Seriti Power [2023] 6 BALR 701 (CCMA)

The Commission for Conciliation, Mediation and Arbitration (CCMA) was required to determine whether the respondent acted fairly by conducting a second disciplinary hearing, and whether the disciplinary hearing amounted to double jeopardy. The CCMA had to decide whether the dismissal of Themba Sibanyoni (the applicant) was substantively fair and depending on the Commissioner's findings to also determine the appropriate relief. This was after the applicant was charged with sexually harassing a woman in a park outside working hours and was found guilty after a disciplinary hearing. Seriti Power (the respondent) formulated new charges of assault and bullying, convened a second disciplinary hearing, and dismissed the applicant. The applicant claimed that the second hearing contravened the double jeopardy rule and that he had merely tried to defend himself when assaulted with pepper spray and bottles by the alleged victim.

The applicant was employed since 1 May 2009 and was working as a Process Supervisor in a coal mining industry. He was paid a salary of R 40 000 per month and was dismissed on 2 September 2022, after a disciplinary hearing. He was charged and dismissed for the following:

Acts of violence: It was alleged that on or about 20 December 2021 at or near Klipfontein Dam in Emalahleni, he engaged in acts of violence against his subordinate, Thandeka Kekae. It is alleged that he kicked, strangled, and punched Ms Kekae on the body and face.

His conduct as described above was contrary to his duty to act in the best interest of the company and was contrary to clause 8 of the Procedure for Handling Complaints of Sexual Harassment, Harassment, Violence and Bullying. It was a serious act of misconduct, which was not expected from an employee of the company, particularly and employee at his level status.

The applicant was charged with sexual harassment at the first hearing. Based on videotaped evidence, the presiding officer had found that the woman attacked the applicant with pepper spray and bottles. The respondent during the disciplinary hearing relied on documentary evidence and called five witnesses. One of the witnesses who is employed as a security guard at Klipfontein Dam, said he witnessed the assault of the applicant by Ms Kekae. He added that applicant did not kick her. That he did not retaliate

when he was attacked. Another witness, Tom Mashifane, testified that he was just an ordinary civilian visiting the park on the day in question. He was asked by bystanders to assist as Ms Kekae was assaulting the applicant. When he spoke to her to calm down, she took pepper spray and sprayed the applicant. The applicant was blinded and fell, and Mr Mashifane wrestled pepper spray from her.

The commissioner was told that the applicant did not act violently and did not push Ms Kekae. Mr Mashifane said he witnessed the event, and the applicant was trying to defend himself.

The applicant challenged the procedural and substantive fairness of his dismissal and sought reinstatement as relief. The applicant raised two preliminary points for the CCMA to consider. The applicant alleged that the issue occurred in his private time, away from the operations of the respondents and had no impact on the business of the respondent. The applicant also alleged that the same issue was dealt with and concluded at a previous hearing where he was exonerated. The second hearing amounted to double jeopardy.

The applicant claimed double jeopardy in that the issue of acts of violence was dealt with substantively at the sexual harassment hearing and he was exonerated by the chairperson of that hearing. Commissioner Baloyi said that he would investigate the double jeopardy claims first. However, in order for him to make a finding he would need to determine whether the acts of violence charge was substantively dealt with in the sexual harassment case. And if so, whether the two hearings dealt substantively with the same matter, same parties, and the same merits, whether the respondent was justified to do so and whether the outcome amounted to double jeopardy.

Commissioner Baloyi said that it was his view that the issue of violence (acts of violence) in the video were dealt with at the sexual harassment dispute. He added that the description of the charge alone did not mean that evidence was not led on violence in the video. He pointed out that the issue was dealt with substantively and the chairperson made a finding. His finding was not challenged nor overruled by the respondent. Commissioner Baloyi said that despite the charge at the second hearing being identified as 'acts of violence', the merits of the case are the same as were led at the sexual harassment dispute in terms of the video. The commissioner pointed out that the charge under the 'acts of violence' clearly refers to violence in contradiction with the procedure on 'handling complaints of sexual harassment, harassment, violence and bullying'.

Commissioner Baloyi said that without analysing the substantive fairness of the dispute, it was clear that the respondent had relied on the same facts as were presented at the sexual harassment case. Commissioner Baloyi said the applicant was dismissed solely on the same video presented at the sexual harassment disciplinary hearing with no new evidence presented. Commissioner Baloyi concluded that the two hearings dealt substantively with the same matter, same parties, and the same merits. He pointed out that the applicant was not found guilty of any 'acts of violence', that the respondent was not justified in convening the second hearing and this amounted to double jeopardy.

Commissioner Baloyi re-emphasised that the applicant was dismissed for a charge that emanates from the respondent's policy on handling complaints of sexual harassment, harassment, violence, and bullying. The Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace (the Code of Good Practice) at para 2.3, which was gazetted in GN R1890 *GG*46056/18-3-2022, states that the Code of Good Practice finds application in a situation where the employee is working, or which is related to work.

Commissioner Baloyi said that it was established from the applicant's first hearing that he has not committed any violation against the code, nor was he found guilty of committing any violence. He added that it follows that there is no impact or reputational damage on the respondent. The applicant's suitability to work was given impetus by findings at his sexual harassment case. Commissioner Baloyi pointed out that the incident on the video of 20 December 2021 happened outside the application in terms of the Code of Good Practice, as well as the respondents' own disciplinary code. 'Acts of violence' (violence) under the respondent's sexual harassment policy was found not to have occurred by the chairperson of the applicant's first disciplinary hearing. Commissioner Baloyi said that the applicant's two preliminary points succeed and his inquiry on the disputes stopped there. He added that the applicant's dismissal was procedurally and substantively unfair.

In deciding the remedy, Commissioner Baloyi said he considered the arbitration guidelines and s 193(1)(*a*) of the Labour Relations Act 66 of 1995. He added that he considered the severity of unfairness of the applicant's dismissal. The commissioner ordered reinstatement and six months back pay was just and equitable, calculated as follows: R 40 000 x 6 months = R 240 000.

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Pension interest in divorce: is it time to reform s 7 of the Divorce Act?

By Mapakiso Pita

CNN v NN [2023] 2 All SA 365 (GJ)

Usually when parties divorce, a decree of divorce will indicate that the divorcing parties have agreed or been ordered to divide their estates equally, and as a result the pension fund will be bound to honour the court order by paying the other spouse as agreed by the parties or ordered by the court.

In *CNN v NN*, the parties had entered into a settlement agreement, which was then made an order of court on 14 October 2022 (para 1.1). The same settlement agreement was varied and the term 'pension interest' was removed and replaced with 'accrued pension benefit' (para 1.1). The latter amendment was made an order of court (para 1.2). The legal issue

that this court had to determine was whether it can vary and enforce a settlement agreement by replacing a statutorily defined phrase 'pension interest' with 'accrued pension benefit', a term not statutorily defined in the Divorce Act 70 of 1979 (para 2).

The facts of the case are briefly explained: The respondent resigned from his employment and left his pension fund on 7 May 2021, two months after being served with divorce summons (para 3). Later, the party's marriage was dissolved on 14 October 2022 and the decree of divorce incorporated a settlement agreement (para 3). At the time the decree of divorce was granted the respondent was not a member of a pension fund, thus did not have a pension interest which could be allocated to the applicant (para 3).

'At the time the divorce order was granted, the respondent's pension benefits were still held by the fund' (para 4). After the divorce order was granted, the applicant then approached the respondent's pension fund to claim payment of what she believed belonged to her (para 4). It was then that the respondent's pension fund informed her that the respondent was no longer a member of the pension fund (para 5). The applicant was informed that the divorce order could not be enforced as it fell short of the legislative requirements necessary for its enforcement (para 5). Of interest to the court, was that the respondent's fund advised the applicant to furnish a divorce order, which would direct the fund to pay a pension benefit instead of a pension interest (para 5). The applicant was advised that the respondent's pension interest had accrued, and his pension interest was nil (para 5).

As a result of the contents of the letter from the respondent's pension fund, the applicant was encouraged to bring an application to amend the phrase 'pension interest' and replace it with 'accrued pension benefit' as contained in the divorce order (see para 6). Further, the court enquired from the applicant's counsel whether such a statutorily recognised phrase 'pension interest' could be replaced with the phrase 'accrued pension benefit' and if such an amendment could be enforced in terms of the Divorce Act (para 7).

Counsel for the applicant submitted that 'the phrase "pension interest" made it difficult for the applicant to claim her entitled portion of the respondent's pension benefit' (para 10). Hence, the need to replace the phrase 'pension interest' with 'accrued pension benefit' as the pension benefit had accrued to the respondent due to his resignation from his employment (para 10). The applicant was not aware that the respondent had exited his fund as he had not bothered to inform the applicant of his resignation (para 13).

The applicant was 'incorrectly advised … to approach this court to vary the divorce order to allow her to claim … the respondent's accrued pension benefit' and such an amendment would be unenforceable (para 13). The applicant sought to amend the court order that was made by the court, unaware of the respondent's pension status (para 17). The respondent was not a member of a pension fund, at the time the divorce order was granted therefore the order 'could not be enforced in terms of sections 7(1) and 7(8) of the Divorce Act' (para 17).

The court held that this case highlighted 'an important gap in the law regulating pension interests in South Africa'. As the law stands, there is not sufficient legal framework that allows a non-member spouse to claim pension benefits of the member spouse, directly from the fund if the spouse exits the fund before divorce (para 20). As a result, this gap opens the door for member spouses to resign from the pension fund after being served with summons thus keeping their pension benefits from their non-member spouses (para 20). Section 7(7) of the Divorce Act has created a legislative framework that makes it possible for a non-member spouse to claim a portion of the member's pension interest as at the date of divorce (para 26).

Section 7(8) facilitates the practicality of s 7(7) in that it, among others, allows the divorce court a discretion to make a portion of the member's pension interest to accrue to the non-member spouse (para 28). However, in this case the applicant was claiming a portion of the respondent's pension interest that accrued before their divorce was granted (para 31). As such 'the applicant [has relied] on section 7(8) of the Divorce Act to claim a pension benefit that [had] already accrued to the respondent through resignation' (para 31).

This case highlights a significant social issue regarding fund members who exit their funds when they are involved in divorce proceedings. When members cash in their benefits, it 'makes it difficult for non-member spouses to claim their entitled share of such benefits on divorce' (para 33).

In this case, the law was against the applicant as she could not claim benefits that accrued to the respondent before a divorce order was granted as such was outside the confines of s 7(8) of the Divorce Act (para 35). The variation of the divorce order sought by the applicant could not stand in the face of s 7(8) of the Divorce Act (para 35).

In conclusion, 'as the law stands, the court can only order [a pension] fund to pay a pension interest as defined in section 1 of the Divorce Act in terms of section 7(8) of the Divorce Act, and not an "accrued pension benefit"' (para 35). Unfortunately, the current legal framework makes provision for member spouses to intentionally disadvantage their non-member spouses' claims to their retirement benefits by resigning after being served with a divorce summons (para 35). Non-member spouses' access to the member spouses pension benefits is dependent on divorce and if they are active in their membership. At the time a divorce order was granted the respondent was not a member of a pension fund and the applicant could not be allocated a pension interest (para 36). This case calls for a legislative reform of s 7 of the Divorce Act to ensure that there is adequate legislative framework to protect non-member spouses from member spouses who resign from employment once served with a divorce summons.

- See also Mukwevho Donald 'An exploration of s 7(7) and 7(8) of the Divorce Act 70 of 1979: Towards a legislative reform' in 2023 (June) *DR* 27 and Law Reports – 'Family law' in 2023 (June) *DR* 25.

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By Shanay Sewbalas and Johara Ally

New legislation

Legislation published from 24 March – 19 May 2023

Acts

Customs and Excise Act 91 of 1964
Amendment to part 2 of sch 4. GN R3372 *GG*48518/5-5-2023.
Amendment to part 1 of sch 2. GN R3413 *GG*48605/17-5-2023.
South African Reserve Bank Act 90 of 1989
Substitution of sch 2 to the Act. GN3357 *GG*48490/2-5-2023.

Bills and White Papers

Constitution Twentieth Amendment Bill, 2023
Notice of intention to introduce a Private Member's Bill into Parliament and invitation for comment. GN3410 *GG*48589/12-5-2023.

Government, General and Board Notices

Banks Act 94 of 1990
Withdrawal of consent granted in terms of s 34 of the Banks Act to maintain a representative office of a foreign institution in the Republic of South Africa: Banco Santander Totta, SA. GenN1813 *GG*48630/19-5-2023.
Notice by the Prudential Authority in terms of s 69(7) of the Act. GenN1814 *GG*48630/19-5-2023.
Withdrawal of consent granted in terms of s 34 of the Banks Act to maintain a representative office of a foreign institution in the Republic of South Africa: Millennium BCP. GenN1815 *GG*48630/19-5-2023.
Competition Act 89 of 1998
Notice in terms of s 43B(4)(*b*) of the Act (as amended): Notice of extension granted: Online Intermediation Platforms Market Inquiry. GN3437 *GG*48634/19-5-2023.
Constitution
Transfer of administration and powers and functions entrusted by legislation to certain cabinet members in terms of s 97 of the Constitution. Proc N119 *GG*48524/5-5-2023.
Construction Industry Development Board Act 38 of 2000
Findings and sanctions of the investigating committee published in terms of the Construction Industry Development Regulations, 2004 (as amended): Juvansu Trading CC. BN436 *GG*48630/19-5-2023.
Continuing Education and Training Act 16 of 2006
Amendment to notice relating to the change of seat of the Mpumalanga Community Education and Training College. GN3408 *GG*48589/12-5-2023.
Electoral Act 73 of 1998
Publication of reviewed lists of candidates. GenN1793 *GG*48572/10-5-2023.
Employment Equity Act 55 of 1998
Public Register Notice. GN3348 *GG*48483/28-4-2023.
Immigration Act 13 of 2002
Notice of designation of a place as port of entry and exit: Bulembu Airport (Bhisho). GN3384 *GG*48524/5-5-2023.
Income Tax Act 58 of 1962
Notice in terms of para 2D of the Second Schedule to the Act. GN3356 *GG*48487/3-5-2023.
Labour Relations Act 66 of 1995
Bargaining Council for the Furniture Manufacturing Industry KwaZulu-Natal: Extension of period of operation of the Main Collective Agreement. GenN1778 *GG*48489/2-5-2023.
Cancellation of Government Notice: Motor Industry Bargaining Council (MIBCO): Autoworkers Provident Fund Collective Agreement. GN R3366 *GG*48518/5-5-2023.
Cancellation of Government Notice: MIBCO: Provident Fund Collective Agreement. GN R3367 *GG*48518/5-5-2023.
MIBCO: Extension to Non-Parties of the Autoworkers Provident Fund Collective Agreement. GN R3368 *GG*48518/5-5-2023.
National Bargaining Council for the Electrical Industry (NBCEI): Cancellation of Government Notice. GN R3369 *GG*48518/5-5-2023.
NBCEI: Extension of National Pension and Provident Funds Collective Agreement to Non-Parties. GN R3370 *GG*48518/5-5-2023.
Bargaining Council for the Furniture Manufacturing Industry of the Western Cape: Extension to Non-Parties of the Main Collective Agreement. GenN1790 *GG*48541/8-5-2023.
Bargaining Council for the Furniture Manufacturing Industry KwaZulu-Natal: Extension of period of operation of the Provident Fund and Mortality Benefit Association Collective Agreement. GenN1795 *GG*48589/12-5-2023.
Cancellation of Government Notice: Bargaining Council for the Civil Engineering Industry (BCCEI): Exemptions Collective Agreement. GN R3415 *GG*48627/19-5-2023.
Bargaining Council for the Meat Trade, Gauteng: Extension of amendment of Main Collective Agreement to Non-parties. GN R3416 *GG*48627/19-5-2023.
BCCEI: Extension of Consolidated Exemptions Collective Agreement to Non-Parties. GN R3417 *GG*48627/19-5-2023.
Variation of Scope of the Bargaining Council for the Fishing Industry. GN R3418 *GG*48627/19-5-2023.
NBCEI: Cancellation of Government Notices. GN R3419 *GG*48627/19-5-2023.
NBCEI: Cancellation of Government notices. GN R3421 *GG*48627/19-5-2023.
NBCEI: Extension to Non-parties of the Collective Bargaining levy agreement. GN R3422 *GG*48627/19-5-2023.
National Bargaining Council for the Electrical Industry of South Africa: Extension to Non-parties of the Main Collective Agreement. GN R3423 *GG*48627/19-52023.
Local Government: Municipal Electoral Act 27 of 2000
Municipal By-elections – 24 May 2023: Official list of voting stations. GenN1792 *GG*48533/5-5-2023.
Municipal By-Elections – 24 May 2023: Official list of voting stations: KwaZulu-Natal – KZN291 – Mandeni – Ward 52901015. GenN1821 *GG*48636/19-5-2023.
Medicines and Related Substances Act 101 of 1965
Exclusion of certain alcohol-based handrubs from the operation of specified provisions of the Act. GN3382 *GG*48524/5-5-2023.
Notification of registration of medicines in terms of s 17 of the Act, as amended. GN R3396 *GG*48571/12-5-2023.
National Environmental Management: Air Quality Act 39 of 2004
Publication of the eighth National Greenhouse Gas Inventory Report for the Republic of South Africa. GN3393 *GG*48568/9-5-2023.
National Water Act 36 of 1998
Intention to Transform Irrigation Boards into Water User Association. GN3355 *GG*48483/28-4-2023.
Disestablishment of the Umfunda Yophongolo Water User Association. GN3361 *GG*48513/3-5-2023.

Establishment of Makhathini Lower Pongola Water User Association. GN3362 *GG*48514/3-5-2023.
Disestablishment of the Uphongolo Dam Water User Association. GN3390 *GG*48535/3-5-2023.

Pharmacy Act 53 of 1974
Correction Notice: Election/Appointment of Council Members (Board Notice 184/2018). BN433 *GG*48588/12-5-2023.

Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002
Certificate of exemption in terms of s 46(3) of the Act. GN R3424 *GG*48627/19-5-2023.

Tourism Act 3 of 2014
Members of the South African Tourism Board: Erratum. GenN1780 *GG*48508/2-5-2023.

Traditional and Khoi-San Leadership Act 3 of 2019
Formula for determination of number of members of a Kingship, Queenship and Principal Traditional Council. GN3433 *GG*48630/19-5-2023.

World Heritage Convention Act 49 of 1999
Declaration of Management Authority for Robben Island Museum World Heritage Site. GN3380 *GG*48524/5-5-2023.
Declaration of Management Authority for Ukhahlamba-Drakensberg Park World Heritage Site, a South African Component of Maloti-Drakensberg Park World Heritage Site. GN3381 *GG*48524/5-5-2023.

Legislation for comment

Accounting Standards Board
Invitation to comment on Exposure Draft 204 issued by the Accounting Standards Board. BN431 *GG*48483/28-4-2023.

Children's Amendment Bill, 2023
Notice of intention to introduce a Private Member's Bill into Parliament and invitation for comment. GN3432 *GG*48630/19-5-2023.

Civil Aviation Act 13 of 2009
Civil Aviation Regulations, 2011. GN3389 *GG*48529/5-5-2023.

Council for Medical Schemes Levies Act 58 of 2000
Proposed levies on medical schemes issued in terms of s 3 of the Act. GenN1797 *GG*48589/12-5-2023.

Employment Equity Act 55 of 1998
Draft Employment Equity Regulations, 2023 for comment. GN3407 *GG*48589/12-5-2023.

Health Professions Act 56 of 1974
Regulations relating to the Registration of Orientation and Mobility Practitioners, 2023. GenN1806 *GG*48628/18-5-2023.

International Trade Administration Act 71 of 2002
Request for comments from interested parties on the proposal to prohibit the export of certain ferrous and non-ferrous waste and scrap metal and the temporary suspension of the price preference system insofar as it relates to certain ferrous and non-ferrous waste and scrap metal for a further period of nine months. GenN1799 *GG*48598/15-5-2023.
Draft notice for public comment: Trade policy directive issued in terms of s 5 and notice in terms of s 6 of the Act, on the exportation of ferrous and non-ferrous waste and scrap metal: International Trade Administration Commission of South Africa Export Control. GenN1800 *GG*48598/15-5-2023.

Labour Relations Act 66 of 1995
MIBCO: Extension to non-parties of the Motor Industry Provident Fund: Collective Agreement. GN R 3395 *GG*48571/12-5-2023.

Marketing of Agricultural Products Act 47 of 1996
Deciduous fruit industry: Application to benefit from a statutory levy in the deciduous fruit industry. GenN1811 *GG*48630/19-5-2023.

National Education Policy Act 27 of 1996
Proposed amendment to the National Policy for Determining School Calendars for Public Schools in South Africa.

National Environmental Management Act 107 of 1998
Consultation on the Intention to Amend the Transitional Arrangements in the Financial Provisioning Regulations, 2015. GN3436 GG48633/19-5-2023.
South Africa for comment. GN3373 *GG*48520/4-5-2023.
National Environmental Management: Waste Act 59 of 2008
Proposed amendments to the regulations and notices regarding extended producer responsibility, 2020. GN3388 *GG*48527/5-5-2023.
National Water Act 36 of 1998
Proposal for establishment of Mhlathuze Water User Association. GN3386 *GG*48524/5-5-2023.
The revision of Regulations regarding the Procedural Requirements for Water Use Licence Applications and Amendments. GN3434 *GG*48630/19-5-2023.
Promotion of Administrative Justice Act 3 of 2000
Invitation for comments on the Draft Broad-Based Black Economic Empowerment Policy 'B-BBEE Policy' applicable to the gambling industry. BN435 *GG*48630/19-5-2023.
Protection of Personal Information Act 4 of 2013
Notice in terms of s 61(2) of the Act of a proposed Code of Conduct for the Academy of Science of South Africa. GN3409 *GG*48589/12-5-2023.
Skills Development Act 97 of 1998
Draft Regulations for National Skills Authority to conduct investigations. GN3431 *GG*48630/19-5-2023.
Spatial Planning and Land Use Management Act 16 of 2013
Notice of the Draft Norms and Standards in terms of s 8 of the Act. GenN1812 *GG*48630/19-5-2023.
Water Services Act 108 of 1997
Intention to change the name of Umgeni Water to the proposed uMngeni-uThukela Water. GN3373 *GG*48519/3-5-2023.
Intention to change the name of Bloem Water to the proposed Vaal Central Water Board. GN3363 *GG*48515/3-5-2023.

Rules, regulations, fees and amounts

Compensation for Occupational Injuries and Diseases Act 130 of 1993
Regulations on pulmonary tuberculosis associated with silica dust exposure for the compensation fund made by the Minister under the Act. GN R3365 *GG*48518/5-5-2023.
Construction Industry Development Board Act 38 of 2000
Standard for Developing Skills through Infrastructure Contracts: 31 March 2023. GenN1769 *GG*48483/28-4-2023.
Standard for Developing Skills through Infrastructure Contracts: 31 March 2023. GenN1779 *GG*48491/28-4-2023.
Council for Medical Schemes Levies Act 58 of 2000
Imposition of levies on medical schemes issued in terms of s 2 of the Act. GenN1796 *GG*48589/12-5-2023.
Critical Infrastructure Protection Act 8 of 2019
Interim Critical Infrastructure Protection Regulations, 2022: Making regulations contained in the schedule. GN3387 *GG*48526/5-5-2023.
Domestic Violence Act 116 of 1998
Revision of National Instruction 7 of 1999 in terms of s 18(3) of the Act. GN3364 *GG*48517/4-5-2023.
Electricity Act 41 of 1987
License fees payable to licensed generators of electricity. GN3385 *GG*48524/5-5-2023.
Firearms Control Act 60 of 2000
Firearms Control Fees Amendment Regulations, 2020. GN R3412 *GG*48604/17-5-2023.
Liquor Products Act 60 of 1989
Regulations: Amendment. GN3275 *GG*48411/24-3-2023.
Local Government: Municipal Property Rates Act 6 of 2004
Assessment of rates. GN3400 *GG*48584/11-5-2023.
National Minimum Wage Act 9 of 2018
Medium-term targets for the national minimum wage report. GN3392 *GG*48556/8-5-2023.
Medium-term targets for the national minimum wage report. GN R3394 *GG*48570/8-5-2023.
Non-Profit Organisations Act 71 of 1997
Regulations in respect of Amendments to the Act as contained in the General Laws (Anti-Money Laundering and Combating terrorism Financing) Amendment Act 22 of 2022. GN3391 *GG*48542/8-5-2023.
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Correction of publication on Major Hazard Installation Regulations. GN R3420 *GG*48627/19-5-2023.
Petroleum Products Act 120 of 1977
Regulations in respect of the single maximum national retail price for illuminating paraffin. GN R3358 *GG*48503/2-5-2023.
Maximum retail price for liquefied petroleum gas. GN R3359 *GG*48503/2-5-2023.
Amendment of the regulations in respect of petroleum products. GN R3360 *GG*48503/2-5-2023.
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Rules Board for Courts of Law Act 107 of 1985
Amendment of Rules Regulating the Conduct of the Proceedings of the Magistrate's Courts of South Africa. GN R3371 *GG*48518/5-5-2023.
Amendment of the Rules Regulating the Conduct of the Proceedings of the Provincial and Local Divisions of the High Court of South Africa. GN R3397 *GG*48571/12-5-2023.
Amendment of the Rules Regulating the Conduct of the Proceedings of the Supreme Court of Appeal of South Africa. GN R3398 *GG*48571/12-5-2023.
Amendment of Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa. GN R3399 *GG*48571/12-5-2023.
Skills Development Act 97 of 1998
Regulations for the establishment of the National Apprenticeship and Artisan Development Advisory Body as a legal body for apprenticeship and artisan development consultation. GN3383 *GG*48524/5-5-2023.
South African Weather Service Act 8 of 2001
Regulations regarding fees for the provision of aviation meteorological services. GN3411 *GG*48602/16-5-2023.
Statistics South Africa
Consumer Price Index, February 2023. GenN1788 *GG*48524/5-5-2023.
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Subdivision of Agricultural Land Act 70 of 1970 and Conservation of Agricultural Resources Act 43 of 1983
Revised tariffs, rates and scales for the goods and services provided by the Department in terms of the Acts. GenN1786 *GG*48524/5-5-2023.
Revised tariffs, rates and scales for the goods and services provided by the Department in terms of the Acts. GenN1787 *GG*48524/5-5-2023.

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Employment law update

By Nadine Mather

Does a refusal to work overtime constitute insubordination?

In *Association of Mineworkers and Construction Workers Union obo Mkhonto and Others v Commission for Conciliation, Mediation and Arbitration and Others* [2023] 5 BLLR 403 (LC), four employees, employed by Andru Mining (the Company), were dismissed for gross insubordination for refusing to obey an instruction from their site manager to work two hours' overtime. The employees' normal working hours were from 6am to 4pm, and they were instructed to work overtime from 4pm to 6pm on a particular day to meet production targets. The employees did not agree to work overtime.

Disgruntled with the dismissal of the employees, the Association of Mineworkers and Construction Union (AMCU) referred a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). The CCMA arbitrator found that as the employees did not object to working overtime when informed of the instruction, this amounted to an implied or tacit agreement. Further, the employees had already agreed in their employment contracts to work overtime as and when required. Accordingly, the arbitrator ruled the dismissals fair.

On review to the Labour Court, AMCU contended that the employees did not agree to work overtime due to safety issues and thus could not have been guilty of gross insubordination as the instruction to work overtime was unlawful. The Company, on the other hand, contended that the employees were bound by their employment contracts to work overtime on request, and none of the employees had objected when the request was made.

The issue before the court was whether the Company had proved the charge of insubordination. Section 10 of the Basic Conditions of Employment Act 75 of 1997 (BCEA) provides, among other things, that employees may not be required or permitted to work overtime except in accordance with an agreement. Further, an agreement to work overtime, which is concluded at the commencement of the employee's employment, or during the first three months of employment, lapses after one year. The Company was thus required to prove that there was an agreement to work overtime to validate the instruction.

In respect of the four employees, it was noted as follows:

- The employment contract of one of the employees contained an agreement to work overtime, which employment contract was only a few months old.
- The employment contract of another employee did not, however, contain an agreement to work overtime.
- While the employment contracts of the remaining two employees did contain an agreement to work overtime, such agreement was entered into at the commencement of their employment and had since lapsed prior to the instruction being issued.

In the absence of an agreement to work overtime on the day in question, the court found that the instruction from the site manager in respect of three of the four employees was unlawful as it was in breach of the BCEA.

The court noted that whether a refusal to obey an instruction amounts to insubordination depends on various factors, including whether the instruction was reasonable. In this regard, an unlawful instruction cannot be considered reasonable. There was no evidence that supported the arbitrator's finding that were was a tacit or implied agreement to work overtime. In the court's view, an agreement as contemplated in s 10 of the BCEA could only be inferred when an employee had worked overtime without prior consent. Otherwise, an employee would be under no obligation to work overtime. Accordingly, the finding that three of the employees were guilty of gross insubordination was unreasonable.

While the instruction was lawful in respect of the one employee who had agreed to work overtime in his contract of employment, which agreement was still valid, the court was required to consider the reasonableness of the finding that the employee was guilty as charged and the appropriateness of the sanction of dismissal.

It was common cause that the employee was aware that he had to work overtime but failed to comply with the instruction. As regards the appropriateness of the sanction, it was conceded that the employee had never refused to work overtime prior to this particular incident, and it was only two hours of overtime that was lost. Although the Company sought to use the loss of production to justify the sanction of dismissal, there were no details provided of the production lost nor the costs thereof.

The court held that an inquiry into the appropriateness of the sanction entails an evaluation of the totality of the circumstances. Acts of insubordination do not justify dismissal unless they are serious and wilful. Further, the Code of Good Practice: Dismissal deems it inappropriate for an employer to dismiss an employee for a first offence, except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable.

In the present case, the arbitrator failed to apply his mind to the fact that the insubordination was the employee's first offence and there was no evidence that the employee acted wilfully and repeatedly. A progressive disciplinary sanction in a form of a warning would have been sufficient. It followed that the sanction of dismissal in respect of the one employee concerned was unfair.

The arbitrator's award was thus reviewed and set aside. The court substituted the award with an order that the dismissal of the employees was substantively unfair and that the Company reinstate the employees with retrospective effect.

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By Moksha Naidoo

Lock-out in response to a strike: Distinction between a terminated and suspended strike

National Union of Metalworkers of SA v Trenstar (Pty) Ltd (2023) 44 ILJ 1189 (CC)

Section 76(1)(*b*) of the Labour Relations Act 66 of 1995 (LRA) reads:

'An employer may not take into employment any person –

(*a*) …

(*b*) for the purpose of performing the work of any employee who is locked out, unless the lock-out is in response to a strike.'

An offensive lock-out is when an employer, in the absence of the employees going on strike; prevents employees from entering its premises in an attempt to force them into accepting a demand concerning a matter of mutual interest. Under these circumstances, the employer, in keeping with s 76(1)(*b*), is not allowed to employ replacement staff.

A defensive lock-out is when an employer locks out employees, in response to the employees engaging in strike action – in which case and as per the above section, the employer is allowed to employ replacement staff.

The question before the apex court was whether an employer, who embarks on a defensive lock-out, can continue to employ replacement staff once the striking employees decide to suspend their strike and wish to return to work. Put differently does a defensive lock-out change to an offensive lock-out, when striking employees decide to suspend their strike action and under which circumstances, replacing labour is not permitted.

Background

The National Union of Metalworkers of South Africa (NUMSA), on behalf of its members, demanded the respondent employer, Trenstar, give its members a once off gratuitous payment of R 7 500. Once Trenstar refused, NUMSA referred a mutual interest dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). Conciliation failed after which NUMSA, on 23 October 2020, gave the employer notice of its intention to strike beginning 26 October 2020.

The strike continued for a month whereafter the union's attorney, at 1:25pm on Friday, 26 November 2020, wrote to the employer and advised that the union had decided to suspend its strike with effect from end of business that day and that its members would be returning to work on Monday, 23 November. In the same correspondence, it was clearly stated that decision to suspend the strike should not be construed as a withdrawal of the demand.

In reply, sent shortly after receiving the above letter, the employer wrote to the union and informed it that the employer gives 48 hours' notice of a lock-out to begin at 7am on Monday, 23 November, the purpose of which being a demand that the union and its members drop or waive the demand of R 7 500 gratuitous payment. The employer went further to record that the lock-out was in response to the union's strike action and, therefore, s 76(1)(*b*) was applicable.

NUMSA approached the Labour Court (LC) on an urgent basis seeking an interdict preventing Trenstar from employing replacement labour for the duration of the lock-out. NUMSA argued that when the lock-out commenced, the strike had ended and, therefore, the lock-out was an offensive lock-out, following which, replacement labour was not allowed.

Trenstar argued that NUMSA had not withdrawn the strike or the demand but merely suspended it after which it could reinstate the strike at any time.

The LC dismissed the application on the approach that the lock-out was called for in response to the ongoing strike and hence s 76(1)(*b*) found application. The LC held further that the fact that the lock-out began when the strike was suspended was not a determining factor in the dispute.

Pursuant to the court's judgment, NUMSA abandoned its demand and the lock-out ended.

NUMSA nevertheless appealed the decision of the LC. The Labour Appeal Court declined to entertain the appeal on the basis that the dispute was moot.

NUMSA, thereafter, approached the Constitutional Court (CC).

The CC found that it would be in the interest of justice to grant leave to appeal, more so, considering the conflicting judgments handed down by the LC regarding s 76(1)(*b*).

Before the CC, NUMSA argued that an employer's right to employ replacement labour, should end when a strike ends. This interpretation of s 76(1)(*b*), according to NUMSA, would have the least impact on the constitutionally guaranteed right to strike. Such an interpretation accords with the literal and common sense meaning of the phase 'in response to a strike' as set out in the section. Once a strike ends an employer may continue a lock-out, but this would be an offensive lock-out, following which the prohibition of replacement labour must apply.

Trenstar persisted with the distinction it drew between a suspended strike and a strike that has terminated. It argued that its notice calling for a lock-out was issued while the strike was ongoing, despite the announcement of the suspension of the strike being already made at the time. Therefore, factually, the lock-out was in response to a strike. Trenstar continued to argue that the union only suspended the strike and could, at any time, reinstitute their strike action. If the union was correct on its interpretation, then each time an employee issued a 48-hour notice for a lock-out in response to a strike, all the union had to do was to issue a notice suspending the strike immediately prior to the expiry of the 48-hour notice period. This according to the employer would frustrate the purpose of a defensive lock-out.

The court began first to address the distinction made by the employer that the strike was suspended and had not terminated. On this issue the court held:

'If employees are not refusing to work and are not retarding or obstructing work, they are not on strike, and no strike exists. This is the ordinary meaning of the words used in the definition of "strike". If the employees were previously refusing to work for a prescribed purpose, but are no longer refusing to work, there is not a strike. The fact that the grievance or dispute underlying the prescribed purpose remains in existence does not mean that the strike has not come to an end; a demand unaccompanied by a concerted withdrawal of labour is not a "strike"'.

The court went further to find that the employer conflated an unconditional right to strike with a strike. Once a dispute has been conciliated and at the expiry of the statutory notice period, a union acquires the right to strike. However, it is only when the employees stop work, that the strike begins. During the period of suspending the strike, there is no strike, rather an unconditional right to strike at any time.

The court summarised its finding on this score as follows:

'The position in this case, therefore, is that the strike ended at 17h00 on Friday 20 November 2020. A few hours earlier, but after being notified that the strike would so end, Trenstar gave notice that it would commence a lock-out at 07h00 on Monday 23 November 2020. Trenstar in fact implemented the lock-out as notified. As from the Monday morning, the employees' absence from work was due to a lock-out, not a strike. Trenstar did not reject the tender of services as unacceptable or incomplete. Instead, it excluded the employees from the workplace in terms of a lock-out despite their tender of services.'

In further support of its findings, the court turned to the wording of the section under discussion. Section 76(1)(*b*) allows for replacement labour when the lock-out 'is' in response to a strike. The word 'is' denotes present tense and not past tense. Stated otherwise, replacement labour is permitted because of an ongoing strike and not because of a strike that ended.

The CC set aside the order of the LC and replaced it with an order, which would have prevented the employer from employing replacement labour as from 23 November 2020. No order as to costs was made.

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By Kathleen Kriel

Abbreviation	Title	Publisher	Volume/issue
Advocate	Advocate	General Council of the Bar	(2023) 36.1
AMTJ	African Multidisciplinary Tax Journal	Juta	(2023) 3
DJ	De Jure	University of Pretoria	(2023) 56
EL	Employment Law Journal	LexisNexis	(2023) 39.1 (2023) 39.2 (2023) 39.3
ITJ	Insurance and Tax Journal	LexisNexis	(2023) 38.1 (2023) 38.2
JACL	Journal of Anti-Corruption Law	University of the Western Cape, Faculty of Law	(2023) 7.1
JCCLP	Journal of Corporate and Commercial Law and Practice	Juta	(2022) 8.2
JJS	Journal for Juridical Science	University of the Free State, Faculty of Law	(2023) 48.1
JLSD	Journal of Law, Society and Development	University of South Africa Press	(2022) 9
LDD	Law, Democracy and Development	University of the Western Cape, Faculty of Law	(2023) 27

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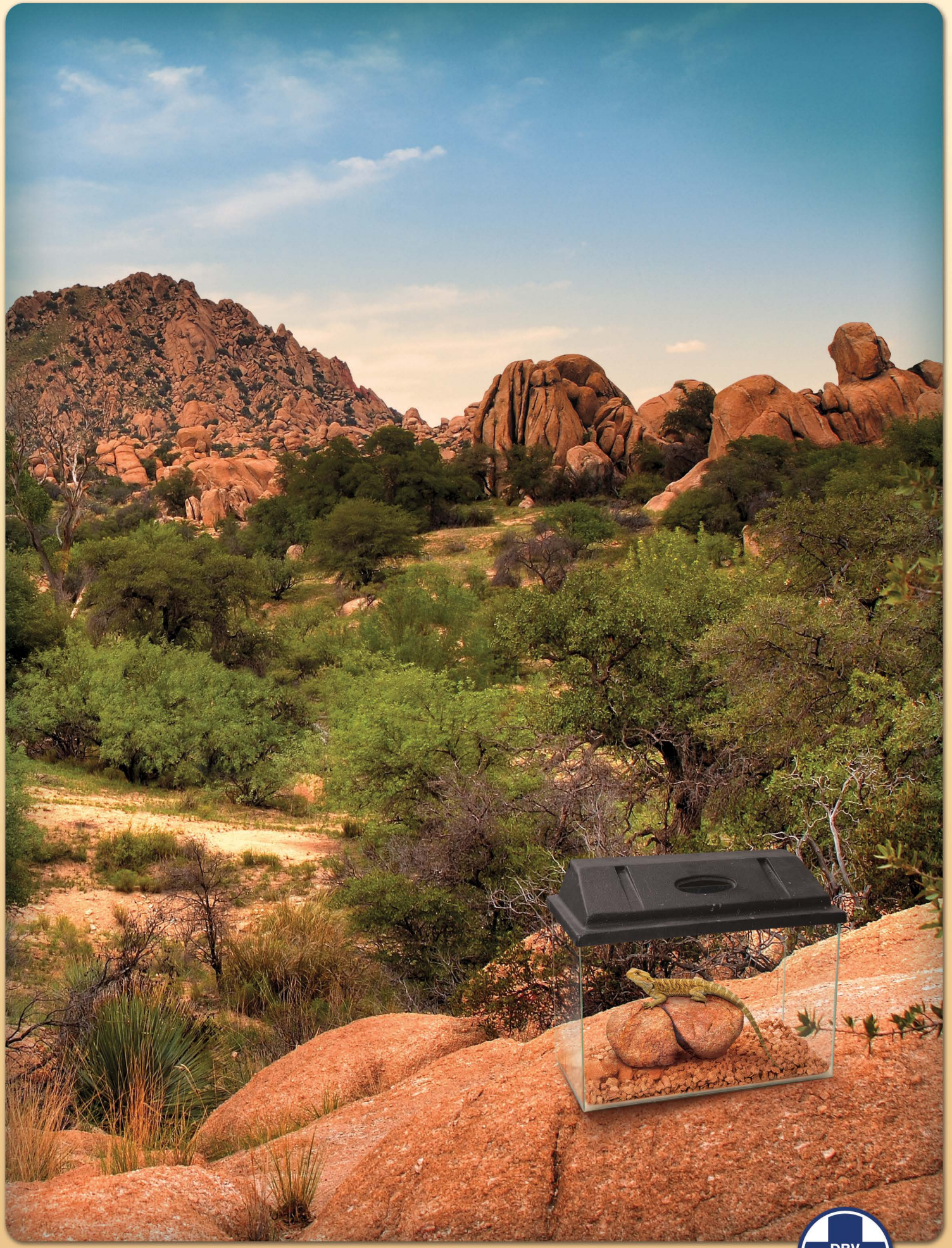

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