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THE SA ATTORNEYS' JOURNAL

AUGUST 2023

GENDER CONUNDRUM REGARDING S 7(3) OF THE DIVORCE ACT

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12 Gender conundrum regarding s 7(3) of the Divorce Act

In his article Associate Professor, **Clement Marumoagae**, expands on his previous article 'Is the divorce court's discretion to transfer assets as per the Divorce Act unconstitutional?' 2022 (Nov) *DR* 18, which discussed the joint report that was prepared and relied upon by the court in *G v Minister of Home Affairs and Others (Pretoria Attorneys Association as* Amicus Curiae*)* [2022] 3 All SA 58 (GP). Specifically, it deals with the court's reliance on the report without seriously engaging its methodology and grounds on which its assumptions were made. Courts should not shy away from seeking input from *amicus curiae* who can provide proven research on present-day societal and marital realities. However, the reason for caution with a gender-based approach is the possibility of financially well-off spouses taking advantage of the law meant to protect the financially weaker spouse.

15 Exploring the necessity for clear guidelines in dealing with destruction of homes in sectional title schemes

In the event of the total or partial destruction of freestanding units in sectional title schemes, there is a lack of explicit guidance in both the Sectional Titles Schemes Management Act 8 of 2011 and the rules as to how aspects of the catastrophe should be dealt with. The course of action is largely dependent on the insurance. The Management Rules require that the insurance policy specify a replacement value for each unit excluding the member's interest in the land, which replacement values estimates the body corporate prepares for approval at a meeting of members. Legal practitioner, **Roger Green**, writes that because the insurance policy is taken out in the name of the body corporate and because the proceeds of a policy are paid to the body corporate, disputes can arise between trustees and affected owners. Furthermore, trustees need to appreciate the pain, loss and trauma arising from partial destruction of a building and the applicable legislation needs to be reviewed, amplified and amended.

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One-hundred-year progression of female legal practitioners

This year marks the centenary since the promulgation of the Women Legal Practitioners Act 7 of 1923. As at the end of January 2022 the demographics of attorneys in the country totalled 29 981. Of that number, female legal practitioners were 12 714, which means that female legal practitioners make up 42% of the attorney's profession ('Statistics for the attorneys' profession' (www.lssa.org.za)).

In August 2022, the Law Society of South Africa (LSSA) held a series of free webinars where female legal practitioners discussed issues that impacted on their growth in the profession. During the month of August 2023, the LSSA will again hold a series of free webinars on possible solutions for issues facing female legal practitioners, keep a lookout for an invite.

Female legal practitioners face an array of barriers throughout their legal careers, and these barriers differ during their course in the profession. Some of these barriers discussed at the LSSA Women's Month Webinar Series include:

- Candidate legal practitioners not being able to take maternity leave.
- No support and assistance platform for sole proprietors and newly admitted female attorneys.
- Few networking opportunities for candidate legal practitioners and young attorneys who cannot pay for attending conferences.
- Sole proprietor practices struggling to afford fees such as the annual subscription fee to the Legal Practice Council and audit fees.
- Female legal practitioners leaving the profession due to different forms of abuse.

Another aspect that was discussed at the LSSA Women's Month Webinar Series is that each year, the law graduates being produced by the universities become more representative of South African society, but many of these graduates are unable to gain access to the profession, or to their chosen branch of the profession. If they do gain access, many find themselves practising in circumstances which set them up for failure. The goal of transformation must be a legal profession, which represents the diversity of South African society in all branches and at all levels.

The Judiciary, in partnership with the South African Chapter of the International Association of Women Judges, held a ceremonial sitting in the different divisions of the High Court, across the country to commemorate the centenary of the Women Legal Practitioners Act. During her presentation at the ceremonial sitting at the Gauteng Local Division of the High Court in Johannesburg, President of the LSSA, Eunice Masipa, said that the current structure of the legal profession and the underrepresentation of women fail to accurately mirror the diversity of the country's population. '[Matilda Lasseko-Phooko and Safia Mahomed (2021)] argue that "the preferred approach to understanding gender equality is "substantive equality"". Substantive equality is described as an approach that looks at the overall effect of policies that are meant to achieve gender equality. This understanding is rooted in the recognition that inequality within the profession arises from deeply entrenched political, social, and economic disparities between men and women'.

Ms Masipa pointed out that this calls for the understanding that gender equality requires more than simply enacting policies, it requires a nuanced understanding of how those policies will impact different groups of people. Ms Masipa said that it is crucial that women actively work towards combating stereotypes and prejudices that target women. As these can create a lack of opportunities for women. 'To truly promote gender equality, we must ensure every woman is given a voice and the opportunity to fully participate,' Ms Masipa said (Kgomotso Ramotsho 'Celebration of 100 years of women in the practice of law' (www.derebus.org.za))

I have worked at the LSSA, in different capacities, for the past 14 years and my observation into the profession from the outside looking in, is that: For there

Mapula Oliphant – Editor

to be meaningful change in the progression of women in the legal profession, legal practitioners need to be intentional about transformation. Female legal practitioners must actively assist one another to grow in the profession, otherwise it will take another 100 years before we see any meaningful change. I have attended countless webinars, conference and events where female legal practitioners speak about the issues they face in the profession; however, no practical solutions are advanced. These events end up being a talk shop exercise that bring up the same issues over and over without leading anywhere. Perhaps the time has arrived for female legal practitioners to start discussing solutions instead of issues?

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- Please note that the word limit is 2 000 words.
- Upcoming deadlines for article submissions: 21 August; 18 September; 23 October and 20 November 2023.

Normalising and embedding good corporate governance in law firms

By Simthandile Kholelwa Myemane

Good corporate governance is an important element of good corporate citizenship. No entity, including law firms, operate in a vacuum, but within and with the society that it serves. All organisations, irrespective of their objectives, serve society by providing goods and/or services. Legal practitioners also serve society by providing legal services in a variety of areas; ranging from representation in respect of litigation matters, criminal matters, civil matters, deceased estate matters, Road Accident Fund matters, matrimonial matters, commercial matters, etcetera. All legal services provided by legal practitioners in law firms are either provided to an individual, a group of individuals, or businesses or entities.

Various scholars provide definitions or explanations of good corporate governance, but at the centre of good corporate governance is 'transparency'. Transparency is not an easy notion to be understood and/or implemented as some entities claiming transparency still do not disclose certain elements of their operations that they believe may impact them negatively. Transparency requires that everything is put out there and not hidden from stakeholders as it may backfire once it unfolds. Stakeholders require to have a full view of the entity that they are vested in, good or bad, so that they can make informed decisions around the entity.

King IV (the current King Code on Corporate Governance) is applicable to all entities within South Africa, irrespective of size or form, although not compulsory, sets out guidelines by providing principles and recommended practices to be followed; and requires that the entity 'apply *and* explain' its application of the Code. The previous version of the King Code, King III, was based on the premise of 'apply *or* explain'. King IV, therefore, enforces transparency and not just a tick-box exercise to say something was done, but requires that organisations also explain how it was done. While the Legal Practitioners Fidelity Fund (LPFF) encourages legal practitioners to apply the King Code in running their law firms, the King Code is not legislation and does not supersede legislation, but there is a lot of benefits for the law firms that apply the principles and recommended practices, especially in the long run. Several principles that are in King IV are incorporated in the Companies Act 71 of 2008. However, should a conflict exist between the provisions of the Act and the King Code, the law prevails.

The King Code introduced concepts such as ethical and effective leadership, an organisation being an integral part of society, sustainable development, corporate citizenship, and stakeholder inclusivity assists in the day-to-day running of entities and ensure long-term sustainability and viability of the entity (PwC 'A summary of the King IV Report on Corporate Governance for South Africa, 2016' (www.pwc.co.za, accessed 26-6-2023)). King IV defines 'corporate governance' as the 'exercise of ethical and effective leadership by the governing body towards the achievement of the following governance outcomes:

- ethical culture;
- good performance;
- effective control; [and]
- legitimacy.'

Considering these governance outcomes, one may immediately identify that the presence of those outcomes is more likely to bring about transparency and long-term sustainability of the entity. This article does not seek to discuss the principles and/or recommended practices of the King Code, nor does it seek to discuss the concepts of corporate governance, but rather seeks to unpack the governance outcomes as may be applicable to law firms. The ensuing discussion of the governance outcomes is not limited to what is discussed in this article, but provides guidance.

Ethical culture

An ethical culture that is rotten with fraud and corruption cannot lead to long-term sustainability of an entity, irrespective of its offerings and current market share. When talking about corporate governance, one is often reminded of the saying 'tone at the top'. The tone at the top is crucial for an organisation's long-term sustainability. For law firms, that tone at the top requires that the directors/partners/sole practitioners leading the law firm should set a tone that ensures that there is a good ethical culture within their firm. A desirable ethical culture cannot be set in an environment where the directors/partners/sole practitioners ignore the law and the rules governing the law firm, and do not move beyond compliance to act ethically in all respects. Good corporate governance exists in an environment where the ethical culture forces people to put their own selfish interests aside and act ethically in the best interests of the entity. The best interests of a law firm, includes the interests of the users of the legal services of that firm, the society that it serves.

Sections 86 and 87 of Legal Practice Act 28 of 2014 outline the types of trust accounts that the law firm may operate for purposes of depositing money held on behalf of another person, the clients of the firm, and the requirement to keep proper accounting records. More often than not, the absence of proper accounting records in a law practice is as a result of a poor ethical culture or leads to a poor ethical culture. This is because when employees of the law firm realise that the leadership does not concern itself with regulatory requirements and, therefore, does not regard the keeping of proper accounting records as important, they use that gap to act unethically and may misrepresent the accounting records.

While the LPFF recognises and acknowledges that not all legal practitioners are necessarily conversant with accounting principles and practices, they can still try to at least understand what is contained in the accounting records, as they remain responsible and accountable for what happens within the law firm, irrespective of who acted unethically. Leadership in the practice should, therefore, not reduce corporate governance to just talking about it, but should act it, and embed it in the law firm. Every staff member should be conversant with the code of ethics within the law firm, and the penalties imposed, or actions taken should they act against that code. For example, they should call for accounting records, including their supporting documents, on an ad hoc

basis and interrogate them, requiring explanations where necessary. This will ensure that the ethical culture, especially around entrusted clients' money, remains intact and above board as staff will fear being caught acting unethically. However, leadership that has a tendency of asking staff to make unlawful payments using entrusted money and covering up for that, open a gap for staff to emulate that practice without the leadership knowing, for their own benefit. This is because staff can get used to preparing accounting records that are flawed with fraud and develop a skill to also hide their own fraud. When this practice becomes the culture in the law firm, it becomes difficult, if not impossible, for leadership to identify fraud perpetrated by staff against the law firm.

Good performance

A law firm that ensures a good ethical culture is rewarded with good overall performance. Good performance can be seen in the ability of the legal practitioners of the law firm to attract and retain its clients, and in its financial performance. Word of mouth will go a long way in marketing the capabilities of a law firm that acts ethically. However, the opposite is also true, word of mouth will destroy a law firm that acts unethically even if the legal practitioner and staff can provide the required standard of legal services. It does not require all clients of a law firm to have a bad experience with the firm, but it takes just one client to spread the news about their bad experience, which can lead to existing and potential clients holding a negative view about the law firm and taking their business elsewhere. Every client of the law firm should, therefore, be treated with honesty and respect, in order for the performance of the law firm to yield good results over the long term. For good performance to be achieved by a law firm requires that leadership and staff at the firm maintain integrity, doing right even when the client does not know what is happening.

Effective control

While law firms employ people based on their skills and capabilities, there should be effective controls in place because some capable and skilled persons may not necessarily possess the required ethical qualities. Controls are only effective if they address an identified risk that threatens the achievement of objectives. This, therefore, requires of legal practitioners leading the law firm, to ensure that they perform risk assessments in their practices. A risk assessment involves understanding the objectives of the law firm, identifying risks that may threaten their achievement, prioritising the risks, and putting controls in place. For controls to be effective, they should consistently address the identified risk by either curtailing the likelihood of the risk occurring or the impact of the risk on the objectives should the risk materialise, or both. For law firms, one of the risks that they may face is theft or the misappropriation of trust funds. This risk calls for controls around the –

- receipting of trust funds;
- recording of trust funds;
- maintenance of accounting records to determine the trust position at any given point;
- review of trust accounting records to ensure that they are proper and accurate in all respects; and
- ultimately presenting the records for auditing or inspection.

Leadership at a law firm should, therefore, ensure that they control adherence to policies and procedures, and be consistent in dealing with non-adherence thereto for effective control to have meaning.

Legitimacy

Legitimacy speaks to authenticity, and the quality of being believable or trustworthy. If the LPFF continues to consider the law firm and the accounting records produced by it, as an example, the test by the auditors will be on their legitimacy. Once the auditors discover that the accounting records are fabricated in anyway, this observation gets reported to the regulatory authorities, the Legal Practice Council (LPC). Such reporting may lead to investigation of the law firm by the LPC, which if found to have produced illegitimate accounting records will have dire consequences for the law firm as the legal practitioners will be subjected to disciplinary action, which may result in suspension and/or strike off for the legal practitioner concerned. These outcomes will require the appointment of a *curator bonis* who will oversee the trust account of the law firm and inform the clients of the firm what transpired, which will negatively impact the law firm further, as potential clients of the firm will not want to be associated with the law firm and will take their business elsewhere. Accounting records that cannot be trusted lead to the law firm, as a whole, not being trusted by its stakeholders, and therefore, it is seen as acting illegitimately. No client wants to be associated with an illegitimate law firm, whether in fact or by perception. Legal practitioners should, therefore, protect not only their actual performance, but also how they are perceived by the society that they serve and their stakeholders.

Conclusion

In conclusion, applying the principles and recommended practices of King IV, though not legislation, will benefit law firms and contribute positively to its long-term sustainability and viability. Legal practitioners should not be in pursuit of immediate self-gratification when running law firms but should rather focus on the society that they serve and they will be rewarded with long term sustainability of their practices. A law firm that carefully applies the principles and recommended practices stands a better chance of withstanding tough economic times. Transparency is easily achieved in an environment where the ethical culture is good, performance is good, there is effective control, and records produced are legitimate and can be trusted and relied upon by stakeholders.

As a legal practitioner, one should always see themselves as part of the corporate citizenship and be responsible towards the society that one serves, and the reward will be fulfilling. Short-cuts will lead to shortened existence, avoid the temptation and do it right.

Simthandile Kholelwa Myemane *BCom Dip Advanced Business Management (UJ) Cert Forensic and Investigative Auditing (Unisa) Certified Control Self Assessor (Institute of Internal Auditors) Cert in Management and Investigation of Cyber and Electronic Crimes Cert in Fraud Risk Management Cert in Law for Commercial Forensic Practitioners Cert in Investigation of Financial Crimes Cert in Investigation and Detection of Money Laundering Cert in Economic Crime Schemes (Enterprises University of Pretoria) Post Graduate Diploma in Risk Management (MANCOSA)* is the Practitioner Support Manager at the Legal Practitioners' Fidelity Fund in Centurion.

Online litigation – preparing for the new normal

By Dr Bronwyn Batchelor

Access to justice and the courts are constitutionally entrenched rights. Rights that the legal profession assists in protecting and upholding. The COVID-19 pandemic and lockdown restrictions accelerated the technological innovation process and required the legal system to adjust in order to protect these entrenched rights. The COVID-19 pandemic forced the South African judicial system to embrace the digital era, in making justice more accessible.

The COVID-19 pandemic, and the consequent lockdown levels, affected every aspect of life as we knew it – and the legal fraternity was by no means an exception. Despite courts being considered an essential service from the beginning of 2020, court processes had to quickly evolve and adapt to what is commonly now referred to as the 'new normal'. There was no choice. Adapt or be left behind. This adaption was made possible through digital platforms. Fortunately, substantial changes had already taken place in the shift towards digitalisation, enabling a swift transition of our judicial system to the online environment (B Scriba and S Nel 'COVID-19 silver lining? The dawn of a new digital era for South African dispute resolution' (www.cliffedekkerhofmeyr.com, accessed 1-6-2023)).

In 2012, r 4A of the Uniform Rules of Court already introduced the option of serving court processes via e-mail. This mode of service then became the norm since the COVID-19 mandatory lockdown laws. Long before any COVID-19 lockdowns, the Gauteng Division of the High Court had actively been preparing to implement an electronic case management system, called CaseLines.

By virtue of a practice directive issued by the Judge President on 10 January 2020, the Gauteng Division of the High Court became the pioneering court in South Africa (SA) to successfully adopt CaseLines. This innovative platform equips legal practitioners with the capability to electronically register new civil cases, submit documents, and present evidence within the jurisdiction of the Gauteng Division. Designed to facilitate seamless digital court bundles, CaseLines also offers opportunities to engage and cooperate in pre-trial preparations and procedures.

According to Scriba and Nel (*op cit*), CaseLines has been effectively incorporated in various global jurisdictions, including the United Kingdom and the United Arab Emirates – and while encountering some initial hurdles inherent to any new system, CaseLines offers numerous remedies to the issues typically encountered in traditional systems. Judges benefit from convenient access to comprehensive electronic court files before hearings, and the system enables the establishment of virtual hearings, even in challenging circumstances such as a pandemic with its accompanying limitations.

In courts where CaseLines had not been implemented yet, alternative strategies have had to be devised to navigate the restrictions to accessing courts as a result of lockdown restrictions. Electronic mail technology allowed these courts to adapt by filing by e-mail. This method, however, brought its own issues.

Given the successful implementation of CaseLines in the Gauteng High Court, it is likely to be implemented in more jurisdictions and levels of the judicial system. CaseLines will increase the efficiency, and sustainability of the legal profession, with improved access to justice, thereby promoting these constitutionally entrenched rights.

Due to the lockdown measures imposed during the pandemic, SA's High Courts have incorporated virtual hearings and the issuance of electronic judgments into their practice guidelines. This includes, in some instance, the utilisation of CaseLines, while others have adopted different methods. The Supreme Court of Appeal and the Constitutional Court have implemented video conferencing facilities to conduct hearings. Various platforms, such as Microsoft Teams and Zoom are available to facilitate these virtual proceedings. As physical office access was restricted for an extended period, legal practitioners began resorting to electronic means to consult with colleagues and clients. This trend has now continued due to ease of use, saving on travel time and costs and increasing productivity.

Although digitisation has been 'forced' on many legal practitioners and the

South African courts due to the pandemic, it is seen as our legal system aligning more with how other jurisdictions approach this situation.

The digitisation of dispute resolution procedures offers several advantages, including cost reduction and the ability for parties to participate in hearings without the need to travel or any physical attendance. Additionally, expenses related to printing, copying, and transporting physical files are eliminated. The potential benefits and advancements provided by digital systems appear to outweigh the drawbacks associated with traditional paper-based methods. As a cloud-based system, CaseLines, effectively addresses logistical challenges faced by judges when reviewing documents filed in different courts. This eliminates additional infrastructural barriers and enhances the efficiency of civil litigation (Scriba and Nel (*op cit*)).

Legal practitioners are generally receiving positive responses to the elimination of challenges, such as misplaced court files or incorrect file delivery to presiding officers. The advent of virtual interpersonal access and live streaming has brought about a transformative change in dispute resolution procedures. The use of digital platforms enables the preservation of the fundamental principles of open justice and transparency, which form the basis of our democracy and legal system.

With any developments, there are always opportunities and challenges. Technology introduces some distinct challenges, such as technical errors and connectivity issues, along with the potential lack of individual practitioners' familiarity with specific digital platforms. Nevertheless, the integration of digital tools within the legal domain holds the potential to overcome numerous practical and financial barriers to justice commonly found in SA. Therefore, the potential advantages outweigh the challenges.

These challenges in any event are not insurmountable. Training is always available. This development also reminds us that legal practitioners need to be lifelong learners as the law and methods of application and implementation are not static. We, therefore, need to grow with the changes to serve the public as best as possible. It is, therefore, imperative that the legal practitioners of the future study and train with institutions of higher learning that are forward and future focused. Covering the latest legal developments as well as developing an enquiring mind in the learner to ensure that they are work ready and able to adapt to the evolving landscape easily. Adaptability and the ability to learn new skills easily are imperative in the new normal. These skills are becoming even more important than the traditional skills of learning theory which is now largely available at one's fingertips.

Undoubtedly, the COVID-19 pandemic has served as the driving force behind the adoption of paperless digital courtrooms (LexisNexis 'COVID-19 pushes courts to new era' (www.lexisnexis.co.za, accessed 1-6-2023)). This transition enables presiding officers and legal practitioners to operate more efficiently within a secure online and virtual setting. Embracing technology can only enhance the courts' function as custodians of SA's rule of law.

Dr Bronwyn Batchelor *BCom Law (UFH and Rhodes) LLB LLM LLD (UFH)* is the Head of the Faculty of Law at the Independent Institute of Education. ❑

Will the right to repair guidelines affect the second-hand car market?

By Zikhona Mphongoshe

The right to repair guidelines came into effect on 1 July 2021 and the legal basis for these guidelines is s 79(1) of the Competition Act 89 of 1998, as amended.

Background

The Competition Commission over the past decade received complaints regarding allegations of anti-competitive conduct in the aftermarket value chain (Guidelines for Competition in the South African Automotive Aftermarkets, December 2020 (the guidelines)). The allegations include exclusionary agreements and/or arrangements between an original equipment manufacturer (OEM) and an approved motor-body repairer. This has resulted in the exclusion of independent service providers (ISPs) for the servicing and repairs of vehicles that are still within their original warranty period.

With the new guidelines, consumers now have the right to use independent service providers. Your warranty with the motor manufacturers will not be affected should you choose to use an ISP. This directly deals with issues of high barriers to entry that exclude small and medium enterprises (SMEs) and historically disadvantaged individuals (HDIs) from becoming Approved Motor-body Repairers and Approved Dealers.

At the heart of these guidelines lies the right for consumers to have a choice in how their motor vehicles are serviced. However, this choice is still limited should you use an ISP. Another argument is whether these guidelines really do have a real effect if they only apply to motor vehicles that are in-warranty. Before we engage with these arguments, let us look at the advantages.

The first advantage is that you now have a choice to service your motor vehicle with an ISP and your warranty will not be affected should you opt for an ISP as opposed to servicing your car with an OEM. This gives the consumer an opportunity to use an ISP that offers the best price. The second advantage is that car dealerships are now obligated to separate the sale price of the vehicle and the service or maintenance plan costs. Consumers now have the option of purchasing motor vehicles without buying the plans. Prior to the guidelines, these two costs were bundled together and presented as a package deal. Lastly, consumers have the option of using parts that are not manufactured by the OEMs during the in-warranty period. Parts that are normally referred to as 'aftermarket/generic parts'.

From a consumer's perspective, this new legal framework is very progressive. However, it also poses many issues. Firstly, dealers do have the discretion

and are well within their rights to refuse to repair a faulty component that was replaced by a third party. The warranty will not be completely voided; however, the dealer can refuse to cover the affected component. Therefore, it is important to use an ISP that is accredited and has insurance.

There have been a lot of advancements to car technology and most cars that are being launched are high in technology and OEMs invest a great deal into equipping their technicians with the necessary skills to repair these models. You may put yourself at a disadvantage if you approach an ISP that is not skilled in repairing your vehicle. The technical information pertaining to new models will be accessible to ISPs. However, there is no legal obligation for OEMs to train technicians from ISPs. It is very important that you approach a Motor Industry Workshop Association accredited service centre for guidance.

The biggest contention with these new guidelines is whether the second-hand car market will not be negatively affected by them. Is there any guarantee that the second hand car buyer is purchasing a quality used vehicle? If consumers are given so much discretion like using non-OEM parts and using ISPs that may or may not be accredited, what effect would this have on a second-hand car buyer? Will car dealers volunteer this information to second hand car buyers? People approach OEMs under the assumption that the product they are buying is authentic. It becomes a problem when a consumer purchases a second-hand car from an OEM only to find out that it was not serviced by the OEM, and it also has aftermarket/generic parts. The solution would obviously be to declare this to the consumer and allow them to choose whether they would like to proceed with the purchase. This, however, could potentially pose a problem to OEMs should consumers elect to reject motor vehicles that were not serviced by the OEMs. This will in turn affect the trade-in market because if OEMs struggle to sell the traded vehicles, consumers will have limited trade in options. So now we are back to square one, where consumers will lean towards using the OEMs as opposed to ISPs.

There is no doubt that the new guidelines are progressive and will give consumers more options, but I would still recommend that consumers purchase service and maintenance plans and use reputable service providers.

Zikhona Mphongoshe *BA (Law) LLB (Wits)* is an automotive legal practitioner at Ford Motor Company in Johannesburg.

Balancing freedom of expression and cyberbullying: Exploring the boundaries

By Muraicho Kelly

Freedom of expression is a fundamental right enshrined in many constitutions worldwide, including South Africa's (SA's) Constitution. It is the cornerstone of democratic societies, allowing individuals to express their opinions, share information and engage in public discourse.

In the digital age, the concept of freedom of expression has become deeply intertwined with the issue of cyberbullying. While freedom of expression is a fundamental right that should be protected, the question which arises is: Can it sometimes cross the line and amount to cyberbullying? This article examines the fine line between freedom of speech and cyberbullying, evaluating the limits and considering the implications for people and society.

Defining freedom of expression

To understand the potential overlap between freedom of expression and cyberbullying, an in-depth understanding of freedom of expression as a legal and moral concept is required. Exploring how freedom of expression is protected by laws, international conventions and constitutional rights sets the foundation for ensuing discussion.

International treaties emphasise the significance of freedom of speech, while also recognising the need to combat cyberbullying and protect persons from online abuse. Here are some of the key international conventions that address these issues:

- ### Universal Declaration of Human Rights (UDHR), 1948

The UDHR adopted by the United Nations General Assembly in 1948 proclaims the right to freedom of expression in Article 19. It states that everyone has the right to hold opinions without interference and to 'seek, receive and impart information and ideas through any media'. However, this right may be subject to certain restrictions necessary to respect the rights or reputation of others and protect national security, public order, or public health.

- ### International Covenant on Civil and Political Rights (ICCPR)

The ICCPR, also adopted by the United Nations, provides further protection for freedom of expression in Article 19. Like the UDHR it recognises 'the right to hold opinions without interference' including 'freedom to seek, receive and impart information and ideas through any media' but also subject to limitations in respect for other people's rights.

The South African Constitution upholds the right to freedom of expression, while also recognising the need to balance it with other rights and responsibilities. Specifically, the Constitution protects the freedom of expression under s 16 which states:

'Freedom of expression -

(1) Everyone has the right to freedom of expression, which includes –

(*a*) freedom of the press and other media;

(*b*) freedom to receive or impart information or ideas;

(*c*) freedom of artistic creativity; and

(*d*) academic freedom and freedom of scientific research.'

However, it is important to note that this right is not absolute. The Constitution also outlines limitations and considerations in relation to freedom of expression including:

'(2) The right in subsection (1) does not extend to –

…

(*c*) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.'

In terms of cyberbullying, the Constitution does not specifically address it as a separate concept. However, the Constitution provides protection against harassment and the invasion of privacy, which can be applicable to cyberbullying cases. To give an example, s 14 states the right to privacy, which includes protection against invasion of personal information, while s 12 protects individuals from violence, threats, and harassment.

While the Constitution provides a foundation for protecting individual rights, other legislation and legal frameworks in SA, such as the Protection from Harassment Act 17 of 2011, Electronic Communications and Transactions Act 25 of 2002, Cybercrimes Act 19 of 2020 and the Films and Publications Act 65 of 1996 offer several avenues for addressing cyberbullying.

Identifying cyberbullying

The authors of StopBullying.gov identified cyberbullying as an act of bullying that occurs through digital devices such as mobile phones, computers, and tablets. They describe how it can manifest through various channels, including SMS text messages, messaging apps, social media platforms, online forums and even gaming environments where people can view, participate in or share content. Cyberbullying encompasses behaviours such as 'sending, posting, or sharing negative, harmful, false, or mean content about someone else' (StopBullying.gov 'What Is Cyberbullying' (www.stopbullying.gov, accessed 1-7-2023)). It can also involve the dissemination of personal or private information with the intention of causing embarrassment or humiliation to the targeted individual (StopBullying.gov (*op cit*)).

Navigating the boundaries

To strike the correct balance between these two challenges, it is imperative to ensure that freedom of expression does not become a cover for harmful behaviours, while anti-cyberbullying measures do not unreasonably restrict freedom of expression. This often requires a case-by-case analysis.

In the landmark case *Heroldt v Wills* 2013 (2) SA 530 (GSJ) at para 6, an interdict was obtained against the defendant for posting insulting words about the plaintiff, implying that he was an unfit parent to the daughters due to 'drugs and alcohol'. The defendant first refused to remove the posts, citing her right to free expression, which the court had to balance against the plaintiff's right to privacy and dignity. The defendant was ordered by the court to delete the defamatory posts and pay the plaintiff's legal fees.

In *Le Roux and Others v Dey* 2010 (4) SA 210 (SCA) the applicants were found responsible for defamation because of the circulation of a manipulated image that portrayed the respondent alongside another man in a sexually suggestive position. The liability of the applicants stemmed from the fact that a reasonable person could have made a connection between the respondent and the sexually explicit scenario depicted, potentially causing harm to the respondent's reputation.

In a case of defamation, the court examines two factors when assessing the conduct of the accused. Firstly, the court considers the ordinary meaning, whether express or implied that the publication would have to a reasonable person of ordinary intelligence. The intent of the accused defamer is irrelevant. Rather, the court considers how a reasonable person would have interpreted the statement or publication in question. Secondly, the court must determine whether the established meaning is defamatory. A statement or publication will be defamatory if it is reasonably expected to harm the reputation of a person in the eyes of an average or reasonable individual. In this case, the court concluded that an average person would link the respondent with the offensive image, thereby subjecting the respondent to mockery and disrespect. Additionally, the court determined that the picture itself was defamatory because its explicit purpose was to damage the respondent's reputation (Global Freedom of Expression '*Le Roux v Dey*' (https://globalfreedomofexpression.columbia.edu, accessed 22-5-2023)).

Conclusion

The relationship between freedom of expression and cyberbullying is a complex and multifaceted one. While freedom of expression should be protected, it is crucial to acknowledge that it can sometimes be abused and transformed into cyberbullying. Striking a balance requires thoughtful deliberation, legal frameworks, ethical considerations, and a collective effort to foster responsible online behaviour. However, it is evident that the sheer volume of content makes it difficult to respond to every case promptly placing an obligation on society to navigate its own legal landscape by fostering responsible online behaviour.

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Unveiling the taxation of attorney and client costs in the absence of a fee agreement

By Cora van der Merwe

In *JB Scott Attorneys v Tetani* (GP) (unreported case no 36381/2019, 26-5-2023) (Francis-Subbiah J), Francis-Subbiah J of the Gauteng Division of the High Court in Pretoria was seized with a taxation review brought by JB Scott Attorneys in Gqeberha, which was formulated by it as follows, 'whether the Plaintiffs (*sic*) attorneys were entitled to tax a bill in accordance with a fee mandate entered into by and between the Plaintiff and her attorneys was argued on 28.07.2022.'

The review revolved around two questions, namely:

- Whether the plaintiff's attorneys were justified in taxing a bill using a fee mandate between the plaintiff and her legal representatives, despite the court having been informed that no agreement existed.
- Whether a taxing master has the authority to endorse a surcharge on an attorney-client bill of costs.

The review respondent, Wendy Tetani, had entered into a settlement agreement with the Road Accident Fund (RAF) in her loss of support claim. Potterill J was informed that 'no contingency fee agreement exists between the plaintiff and the plaintiff's attorneys.' The court order reflected it. There are cogent reasons why a judge needs to be satisfied concerning the nature of the fee agreement between an attorney and client in contingency matters, as was explained by Boruchowitz J in *Tjatji v Road Accident Fund and Two Similar Cases* 2013 (2) SA 632 (GSJ):

'Section 4 of the Contingency Fees Act 66 of 1997 (the Act) provides that any offer of settlement made to any party who has entered into a contingency fee agreement may be accepted after the legal practitioner has filed an affidavit in which disclosure is made of the matters set out in ss 4(1)(*a*) - (*g*). This affidavit must be accompanied by an affidavit by the client deposing to the matters set out in s 4(2).'

Mrs Tetani had signed three agreements with JB Scott Attorneys, two of which were signed on the same day at the same time and were mutually destructive. The third agreement was signed over five years later and more than four months after the summons had been issued and was, on that basis alone, invalid.

The Full Bench in *Law Society of the Northern Provinces v Bobroff and Others* [2017] 4 All SA 85 (GP) at para 49 grappled with the issue where two or more simultaneously executed fee agreements were concluded. It noted: 'The firm gained an unfair advantage over its clients by concluding multiple fee agreements, on the basis that it may elect which agreement should be applicable on finalisation of a claim. In smaller claims, a percentage may be less than the fee calculated on an hourly basis. In big claims, it may be considerably more.'

In the context of RAF claims, it is a regrettable feature of RAF settlements that it has become in vogue for plaintiff legal representatives to mislead judges regarding the existence or nature of the fee agreement entered between attorneys and their clients. What Potterill J should have been told was that three fee agreements existed and that all of them were invalid. This would then have been included in the court order.

In *TM obo MM v MEC for Health, Mpumalanga* 2023 (3) SA 173 (MM), Legodi JP was alive to this course of conduct: 'The majority of the legal practitioners in RAF and medical-negligence matters seem to take the view that they can do without the provisions of the [Contingency Fees] Act by stating, "no contingency fees agreement has been concluded". That has to be rooted out. It is also the duty of the Legal Practice Council to do so. Our courts must also be vigilant. Otherwise, the courts may find themselves unintentionally facilitating promotion of wrong things in the form of court orders.'

In her review judgment, Francis-Subbiah J held that the taxing master's approach was unimpeachable in that he, 'accepted that his duty is not to ignore or vary the order made by the Judge, but to quantify the costs in accordance with the court order. He further accepted that where a fee agreement does not exist, an attorney can only be entitled to party and party fees in accordance with the court tariff.' It followed that there could also be no surcharge. It is not within a taxing master's power to add a surcharge, only to quantify what is in the bill of costs and which accords with the court order.

Citing long standing case law, the judge noted that: 'Before a court will interfere with the decision of a taxing master it must be *clearly satisfied* that the taxing master's ruling was *clearly wrong*.'

The judge further pointed out that a fee agreement was denied and that it, therefore, did not exist when the court made the order, and pertinently noted that: 'The sudden and subsequent reliance on a contingency fee agreement at taxation was viewed with concern and disquiet.'

The judgment departed from the general position where there is no costs order in taxation reviews and ordered JB Scott Attorneys to pay Ms Tetani's costs of the review on an attorney and client scale.

Cora van der Merwe BA *(UJ) BA (Hons) (cum laude) (UP) LLB (Unisa)* is a candidate legal practitioner at John Walker Attorneys in Pretoria. She is a legal costs expert. John Walker Attorneys represented MSs Tetani in the review. ❑

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Gender conundrum regarding s 7(3) of the Divorce Act

By Clement Marumoagae

I read Alick Costa's (the author's) article titled 'Are women still disadvantaged when it comes to s 7(3)(*a*) of the Divorce Act?' (2023) May *DR* 26, where he responded to my earlier article titled 'Is the divorce court's discretion to transfer assets as per the Divorce Act unconstitutional?' (2022) Nov *DR* 18. The author appears to take issue with what he regards as my criticism of the joint report that was prepared and relied on by the court in *G v Minister of Home Affairs and Others (Pretoria Attorneys Association as* Amicus Curiae*)* [2022] 3 All SA 58 (GP). The author argues that '[t]he criticism of the joint report of the experts and acceptance thereof by the court is unjustified and the reasons advanced are unconvincing'. It appears that the author misconstrued my argument in respect of the expert report that the court relied on. In this article, I respond to the author's article with a view to clarify the argument I advanced in my earlier article.

Contrary to the author's contention, I did not criticise the expert report, but the court's reliance on the report without seriously engaging its methodology and grounds on which its assumptions were made. I argued that '[w]hether academic experts are right or wrong in their assumptions is immaterial. When faced with academic opinion, the court must critically assess the basis on which the opinion is founded'. I further argued that '[p]erhaps extensive research regarding the position of women in marriages and reasons that motivate them to get married needs

Picture source: Gallo Images/Getty

to be conducted. Academic assumptions, which are not empirically tested may not adequately reflect the reality of these women'.

Most importantly, I submitted that '[i]t is important that when the CC [Constitutional Court] considers this matter, it adequately evaluates available research and expert opinion to reach a just decision'. To achieve this, I argued that '[s]hould the CC wish to entertain this matter, various interest groups should be allowed to participate as *amicus* to ensure that a well-considered judgment is delivered having regard to the policy and legislative implications of this matter'. In this regard, the basis of the author's disagreement with my approach is not entirely clear.

The author argues that '[s]adly, the inequality and its negative financial consequences particularly for women who are married excluding the accrual system still exists'. Further that notwithstanding the slow progress in the emancipation of women, exploitative patriarchy is still dominant and will not change until there is a change in social attitudes. Most importantly, he submits that 'generally speaking, wives are still the victims of domestic enshacklement, disempowerment and financial bondage'. The financial disparity on gender grounds in marriages is a historical fact that cannot be questioned. '[E]conomic inequality is not gender neutral' (Daria Tisch and Philipp M Lersch 'Distributive Justice in Marriage: Experimental Evidence on Beliefs about Fair Savings Arrangements' (2021) 83 *Journal of Marriage and Family* 516 at 521).

Notwithstanding this, to avoid persons who are not currently disadvantaged from taking advantage of well-known previous disadvantages experienced by women, courts should encourage parties to furnish them with extensive research on current challenges experienced by parties in different kinds of marriages. Courts should not hesitate to invite *amicus curiae* with proven research capabilities to make submissions on current societal and marital realities. While the High Court had the benefit of largely the doctrinal research conducted by two experts, there is no reason for the CC not to request further or alternative research. As highlighted in my earlier article, the High Court failed to heed the *amicus* request not '… to consider a complex and multi-layered legal aspect without the benefit and availability of statistics and broad-based or other empirical research such as research by the [South African Law Reform Commission]'. The CC is duty bound to engage this request to fully understand the current position in South Africa (SA).

South African courts have begun to adjudicate divorces where women are financially stronger spouses, which is a clear demonstration of some progress that has been made (see *BR v DR* (WCC) (unreported case no 14189/2022, 17-3-2023) (Kusevitsky J)). The danger with the general gendered approach is the potential

of financially well-off women taking advantage of the law meant to protect currently financially weaker spouses, most of whom are women in practice. A better approach is to create sustainable laws and jurisprudence that will protect financially weaker spouses, irrespective of their gender. Vulnerable women will automatically benefit without excluding financially weaker men in marriages. There is no debate that generally women are still financially vulnerable within marriages, but we cannot pretend that this is the reality of all women within marriages. Courts cannot be expected to generally view women in divorces as automatically deserving of protection without assessing their actual personal economic conditions. Available research demonstrates that '[t]he country introduced nearly 20 reforms increasing women's economic inclusion between 1990 and 2020' (Nisha Arekapudi and Natália Mazoni Silva Martins 'Challenging entrenched marital power in South Africa' (https://documents1.worldbank.org, accessed 1-7-2023).

According to the author, I did not advance reasons for my contention '… why a universal partnership in which financial relief is granted to the economically disadvantaged party, usually the *de facto* wife, should be the remedy as opposed to the remedy of the severance of the cut-off date in s 7(3)(*a*)'. This also appears to be a clear misunderstanding of my approach and reasoning. In my article, I argued generally, and not in line with what the CC is required to determine when assessing whether to confirm the High Court order, that there may be a need to assess remedies, such as universal partnership, which can be used to protect financially weaker spouses in marriages without extending the reach of s 7(3) of the Divorce Act 70 of 1979. I stated that '[i]n examining whether the Matrimonial Property Act continues to fail women who were married after 1 November 1984, it is also important to assess whether remedies such as universal partnerships have failed to achieve that which s 7(3) of the Divorce Act would have achieved had it continued to apply'.

The author further states that '[t]he universal partnership argument is not an issue before the CC, and it is not a reason for the CC not to confirm the court's order'. Nowhere in my article do I state that the CC must consider the universal partnership argument. This, however, does not mean that this court cannot evaluate whether this remedy can be used to achieve that which is sought to be achieved with the extended reach of s 7(3) of the Divorce Act. I stated that '… there is no reason why universal partnerships should not be applicable to marriages out of community of property where the accrual system is not applicable'. I then concluded that '[p]erhaps the argument should be the codification of this remedy as opposed to the extension of the application of s 7(3) of the Divorce Act beyond 1 November 1984'. The author correctly pointed out that the universal partnership argument was not an issue before the CC. However, this does not mean that this court should not assess whether this remedy cannot be used to assist vulnerable financially weaker spouses in marriages out of community of property where the accrual system is inapplicable, even in passing. Such an engagement would enrich the debate and spark further commentary and research on the matter.

Most worryingly, the author incorrectly states that I recognise '… the need for legislative intervention to grant financial relief on the termination of a marriage excluding accrual, to the economically disadvantaged party, irrespective of the gender of the party and without the need for any further research or "various interest groups should be allowed to participate as *amicus*"'. This is a mischaracterisation of my argument. It is important to note that nowhere in my article did I make this submission. First, I am of the view that s 7(3) of the Divorce Act in its entirety is constitutional and there is no need for the CC to interfere with it. I am of the view that there are other remedies that can be used to achieve that which the High Court sought to achieve, one of which is the universal partnership remedy.

Secondly, I argued that this is an issue that must be dealt with by the legislature, starting with a thorough investigation of the actual realities of divorced and divorcing persons. Society has advanced and we now have economically advanced women who are insisting on marriages in community of property without the accrual system. The current challenge is to protect a financially weaker spouse, irrespective of that spouse's gender. This approach will automatically benefit vulnerable women. Thirdly, I explicitly stated that there is a need for further research. Reports that are provided to courts must be scrutinised. Researchers reports based on the review of the available literature, some of which is not from SA, may not adequately assist courts to understand the true realities of women both in urban and rural areas in SA. Empirical reports where the views of these women have been sought and analysed would be more helpful as I argued in my earlier article in relation to child relocation cases in the State of California in the United States of America.

The author appears to be convinced that women cannot be allowed to contract themselves and their children into poverty. That women who conclude antenuptial contracts that exclude the accrual system are seldom making an informed choice given the demonstrable power imbalance between the parties. Further that because our law recognises imbalances between contracting parties in the case of employers and employees where there is legislation in place to protect the weaker party, the 'same' protection should be afforded to women in marriages. While this argument is generally understandable, it is often made in a very condescending manner towards women where their autonomy at the time of entering into these marriages is totally disregarded. Most importantly, they are often treated as people who had no idea what they were entering into at the time of their marriage. The impression created through this argument is that women generally would do anything to get married, including not protecting their financial interests when doing so. The true general position can be established through adequate empirical research.

In conclusion, the power imbalance is a reality, which makes universal partnership, particularly against men who tried to be clever by forcing women into financially prejudicial marriages, attractive. In my practice, I have successfully used this remedy to ensure that financially weaker spouses benefit from their marriages where the accrual system is not applicable. I maintain that there is no reason for the CC to confirm the order of the High Court. I vehemently disagree with the author that the judgment of the High Court is '… enlightened, sound, and well-reasoned' for the reasons advanced in my earlier article on this debate. Given the complexity of the matter, the CC will certainly benefit from the participation of various interest groups as *amicus* on this matter.

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Picture source: Gallo Images/Getty

By Roger Green

Exploring the necessity for clear guidelines in dealing with destruction of homes in sectional title schemes

There can be no more shattering and calamitous event than for one's home to collapse or be swept away with the loss of all personal belongings. This occurred to some homeowners during the floods in 2022.

The total or partial destruction of free-standing units in sectional title schemes revealed inadequacies in the sectional titles legislation. Neither the Acts nor the rules provide clear guidelines on how aspects of the catastrophe should be dealt with.

Section 17 of the Sectional Titles Schemes Management Act 8 of 2011 (the Act) deals with the destruction of a multi-unit building. Section 17(8) provides that if only one building is destroyed then the provisions of s 17 apply with necessary changes. The members are left to decide what changes.

Much hinges around insurance. Section 3(1)(*h*) of the Act requires a body corporate to insure the buildings for their replacement value. Rule 23(1)(b) of the Management Rules requires that the insurance policy specifies a replacement value for each unit excluding the member's interest in the land; provided that any member may require the replacement value specified to be increased.

The body corporate prepares estimates of the replacement values for approval at a meeting of members. By virtue of r 23(2) a member is responsible for the payment of additional premiums should the member wish to increase the replacement value. Rule 23(1)(d) makes a policy enforceable by any holder of a registered mortgage bond. Typically, an insurance policy will insure 'the body corporate and all individual unit owners and all mortgagees'.

Because the insurance policy is taken out in the name of the body corporate and because the proceeds of a policy are paid to the body corporate, disputes can arise between trustees and affected owners. Trustees tend to overlook s 3(6) of the Act, which provides that 'the body

corporate is, for the purposes of effecting insurance … , *considered to have an insurable interest for the replacement value*' (my italics). If the body corporate is considered to have an interest, then it is manifest that the underlying insurable interest vests in the owner of the unit.

If an owner decides to remove the rubble, restore, or compact the ground and rebuild the unit then it is clear that the full proceeds of the policy for that particular unit must be paid to the owner. Section 3(1)(*j*) of the Act requires the body corporate to apply insurance money received to the rebuilding and reinstating of the buildings. However, differing views arise when a unit is not rebuilt or where there is partial destruction.

Section 17(3)(*b*) of the Act requires the owners to pass a resolution to authorise the application of the insurance money received, the payment of money to owners and the subsequent amendment of the sectional plan. Regrettably the section does not stipulate when payment must be made. Accordingly, an owner can be left without a home and without receipt of the insurance funds, which have been paid to the body corporate. That enables the trustees to argue that the full proceeds should not be payable to an owner to reimburse that owner for the destroyed home. It can be contended that the affected owner should be paid only the market value of the building and that the balance should be used to remove rubble from the site and restore the ground to its prior level. What happens to the balance of the proceeds once the restoration of the land has taken place? Some argue that the balance belongs to the body corporate. That could not be correct.

Once it is clear that an owner does not wish to rebuild a destroyed home and the insurance money has been paid out, certain steps should be taken immediately. The insurance company should be told to cancel the premiums payable on the destroyed buildings. The rates department must be told to cancel rates. The trustees should pass a resolution in terms of s 3(2) of the Act to exempt the owner from liability for further contributions, including special contributions in terms of s 3(3). It can be argued that the obligations of the owner continue until the sectional plans have been amended in the deeds office and the title deeds cancelled. That process could take many months and would be highly prejudicial to the traumatised owner. Legally an owner may still be a member of the body corporate until the title deed is cancelled but such owner should not have any further financial obligations.

After a decision not to rebuild has been taken, s 17(9) of the Act requires the body corporate to give notice to the registrar of deeds of the destruction of the buildings so that the plans can be amended and the title deeds cancelled. The section incorrectly refers to a unanimous resolution not to rebuild. That conflicts with s 17(1)(*a*) where the building is deemed to be destroyed 'upon the physical destruction of the building'. The existing wording would require the members in terms of s 17(1)(*b*) by unanimous resolution so to determine. However, that section would require the consent of all bondholders.

Effect is given to s 17(9) by means of reg 31 to the Sectional Titles Act 95 of 1986, which provides for notification to be given in Form X of Annexure 1 to the Regulations. The regulation correctly refers to s 17(3)(*a*) and not to s 17(1)(*b*). Accordingly, the unanimous resolution required by Form X would be pursuant to s 17(3)(*a*), which deals only with the transfer of the interest of owners of sections, which have been destroyed.

Section 17(3)(*b*) of the Act stipulates that 'the owners *may* pass *such* resolution as they may consider fit' (my italics). Accordingly, the resolution to pay out affected owners is not a unanimous resolution in terms of s 17(3)(*a*). This is logical because one or two owners could block the resolution authorising payment of the insurance proceeds. However, the section should be amended to enable the trustees to pay affected owners without delay.

In terms of s 6(8) of the Act if an owner is adversely affected by a unanimous resolution, then that owner must consent to the passing of the unanimous resolution to make it effective. That could be a further hindrance. Professor CG van der Merwe in *Sectional Titles* (Durban: LexisNexis 2023) vol 1 at 14 – 205 lists resolutions, which must be passed unanimously. The payout of insurance proceeds is not included. Furthermore, s 39 of the Community Schemes Ombud Service Act 9 of 2011 (CSOS Act) does not provide for the ombud to make a ruling on an insurance payout. Accordingly, if a dispute were unresolved, a request could be made to the ombud to inquire whether the ombud was satisfied that the question could be dealt with. Or would the ombud decline an application for a ruling in terms of s 42(*d*) of the CSOS Act? The latter applies where the ombud was 'satisfied that the dispute should be dealt with in a court of law'.

If there is a dispute concerning the amount to be paid, then as an interim measure the body corporate should be obliged to pay the owner the market value of the unit. Failure to do so renders the affected owner helpless with no home and no insurance money.

A further difficulty to be avoided is that the unanimous resolution should record that the buildings were physically destroyed in accordance with s 17(1)(*a*) read with s 17(3)(*a*)(ii) and not that the buildings are 'deemed to be destroyed' as that wording in terms of s 17(1)(*b*) would require the consent of all bondholders in the scheme. An unnecessary, time-consuming, and expensive exercise.

When a unit is not rebuilt the removal of the bricks, tiles and mortar comprising the destroyed home could be an expensive task. Access to the site might be difficult. It may be necessary to construct a roadway to enable a front-end loader and trucks to get to the site. Portion of the proceeds of the insurance policy will be applied towards such costs including professional and other fees. Contracts for restoration of the land should be concluded by the trustees only after consultation and agreement with the affected owner. Pragmatism and compassion need to be exercised by the trustees. The work contracted for should be limited to the restoration of the site of the demolished home and not include other work for which the body corporate is responsible. A factor to be considered is whether a garden area adjoining the destroyed unit was common property and not an exclusive use area.

The proposition that an affected owner is entitled to payment only of the market value of the unit cannot be supported. The disparity between market value and replacement value is indicative only of the current depressed property market. If a body corporate lays claim to portion of the proceeds of the insurance policy, then why should an owner pay insurance premiums based on the replacement value? An affected owner nonetheless must consider the costs of removing the rubble, restoring the land and all other associated costs, including the likelihood of special levies being raised to repair and restore common property in the scheme. A careful assessment may result in the owner accepting payment of a lower value.

Where there is partial destruction of a building, problems of a similar nature can arise, particularly if the roof requires repair or external walls need to be rebuilt. These, by definition, form part of the common property and trustees assert a right to supervise construction and require the use of materials to their satisfaction before agreeing to release funds to the owner or contractors. Trustees need to appreciate the pain, loss and trauma arising from partial destruction of a building. Discussions should be sensitive and reasonable.

In short, the applicable legislation needs to be reviewed, amplified, and amended.

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Picture source: Gallo Images/Getty

What are the consequences of withdrawing a pre-trial admission during cross-examination at a trial?

By Leslie Kobrin

It has been well-established that admissions of allegations made in pleadings and at a pre-trial conference can only be withdrawn by the party who made such an admission if it obtains the leave of the court to do so. Such an application to withdraw the admission must be properly motivated and justified and it requires a full explanation by the defendant to be made to the court of the *bona fides* thereof. Thus, such party must bring a substantive application to court seeking leave to withdraw it and must provide a full explanation for its wish to withdraw the admission and must show complete *bona fides* in the application. The authority for this proposition can be found in the judgments of *JR Janisch (Pty) Ltd v WM Spilhaus & Co (WP) (Pty) Ltd* 1992 (1) SA 167 (C) at 170 and *President-Versekeringsmaatskappy Bpk v Moodley* 1964 (4) SA 109 (T) at 110H – 111A.

In *Aguma v South African Broadcasting Corporation SOC Limited and Another In re: South African Broadcasting Corporation SOC Limited and Another v Lornavision (Pty) Ltd and Another* (GJ) (unreported case no 17/49514, 4-2-2022) (Modiba J), Modiba J reiterated that the principles governing the withdrawal of admissions are trite. It is not completely impermissible to withdraw admissions, such permission must not be granted lightly given that an admission is an unequivocal agreement by one party with a statement of fact made by another party making it unnecessary for such other party to prove the factual statement. It is almost always prejudicial to the other party who would now become saddled with having to prove the averment it no longer has to prove by virtue of the admission.

For this very reason the applicant seeking to withdraw the admission must submit a full explanation as to the reason for having made the admission in the first place and what now necessitates its withdrawal. The application for the withdrawal of an admission must be made in good faith, which must be evident from the contents of the application to enable the court to exercise its discretion appropriately.

In *Aguma*, the court found that the application seeking the withdrawal of the admission did not meet these requirements with the result that the application was refused.

This issue was again the subject of discussion in the recent decision of Daniso J in *Nkoane v Minister of Police* (FB) (unreported case no 3920/2020, 30-1-2023) (Daniso J).

In this matter, the plaintiff claimed damages from the defendant resulting out of injuries she sustained in an incident in which she was shot in her left eye with a rubber bullet on 15 August 2019. By agreement the issues of merits and quantum were separated, and it was common cause that immediately prior to the shooting, a violent protest had erupted in the vicinity of the plaintiff's residence and in order to disperse the riotous crowd, the police who were deployed to the area discharged stun grenades and rubber bullets at the crowd. The plaintiff who was wearing school uniform on the day in question and while walking in the street after she had left home to buy bread at the tuckshop situated in the same street as her home, saw a group of community members running towards her when she heard the sound of a gunshot and she fell down. Her eyes burned and blood was streaming down her face when it occurred to her that she had been shot.

Police officers in uniform came and stood next to her for about ten minutes and she cried and asked for help, but they simply ignored her, walked away, got into a police vehicle and drove away. She was taken to the hospital after some civilians came to her assistance and took her home. Her left eye was removed at the hospital.

The trial in this action on the issue of merits proceeded and endured for three days with several police officers giving evidence on behalf of the defendant. Evidence was presented to the court in support of the plea to the effect that the wounds inflicted by the plaintiff were not caused by the firing of the bullets by the police.

It appears that on the second day of the trial the judge enquired of the defendant's counsel whether the defendant was denying that the rubber bullet, which struck the plaintiff was fired by the police. Counsel informed the judge that the defendant was denying that its officers fired the shot and that if it was found that the shot did strike the plain-

tiff, the defendant could not be held liable as the rubber bullets were fired to disperse the disorderly crowd.

What is worthy of comment, aside from the impropriety of the argument of the defendant's counsel, is, that this matter proceeded for three days with cross-examination of the plaintiff on the basis that it was not the police who fired the shots.

The judge, in her judgment took issue with the fact that the defendant's counsel who at the trial and during cross-examination of the plaintiff, reintroduced the defence that the defendant denied that the police were responsible for the shooting when at the pre-trial conference it was recorded that the police conceded that the plaintiff was shot by the police. It was argued on behalf of the defendant that it was entitled to have the matter decided on the pleadings. This, despite the concession made at the pre-trial conference. The judge held that a deviation from what was recorded in the pre-trial minutes would defeat the whole purpose of the provisions of r 37 of the Uniform Rules of Court, which are included therein to facilitate and expedite the conduct of the trial and eliminate issues, which may delay the trial. Moreover, the judge found that the cross-examination of the plaintiff to the effect that it was not the police who shot the plaintiff was contrary to the concession recorded in the pre-trial minutes and such cross-examination ought to have been confined to correlate with what was recorded in the pre-trial minutes.

The pre-trial minutes specifically recorded that the issues to be determined by the court on trial were, whether the defendant's actions were lawful, whether the defendant was liable for payment of damages, and whether the plaintiff suffered damages and if so, the nature and extent thereof.

It follows that judgment was granted in favour of the plaintiff on the issue of merits with costs.

I venture the notion that had there been objection to the leading of this evidence by the plaintiff's counsel, the judge would have upheld the objection and curtailed the seeming spending of unnecessary time traversing all this evidence.

I wish to conclude by observing the vital importance of accurate pleading and recording of what transpires at a pre-trial conference as withdrawal of admissions made in pleadings and at pre-trial conferences cannot be unilaterally withdrawn. Of equal importance is the notion that an admission recorded in the minutes of a pre-trial conference cannot be withdrawn without the leave of the court applying the same principles as set out above.

In the instance, when the party seeks to withdraw admissions in pleadings, he will almost invariably seek to do so, by bringing an application to amend the pleading. It has been held in many instances that provided the element of prejudice to the other party is overcome, (which should not be overlooked) the amendment is likely to be granted. Thus, the main issue for the court to decide in the application to amend by withdrawing the admission, is whether the applicant is acting *bona fide* and his explanation is thus crucially important for the court to determine the issue of *bona fides*.

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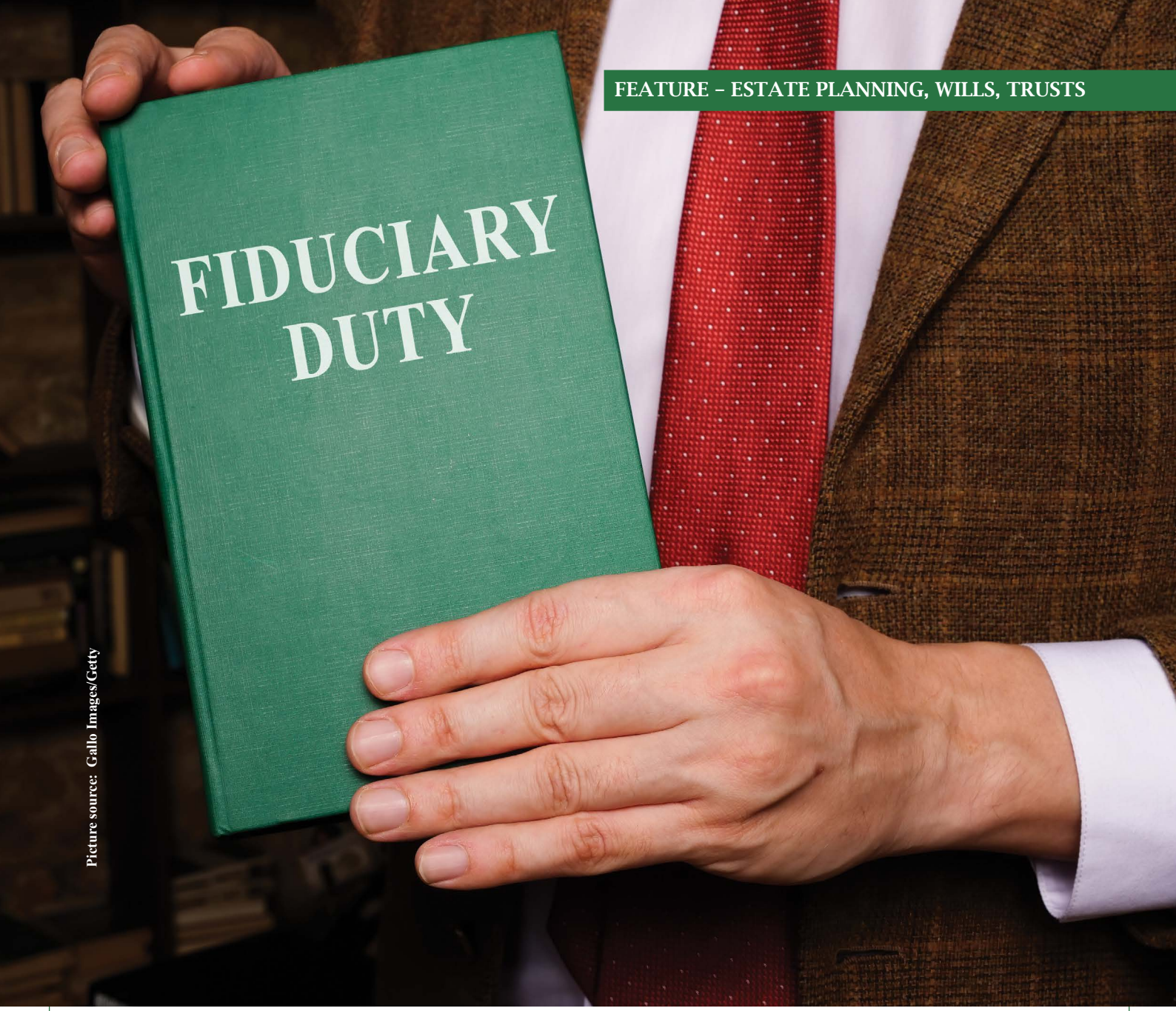

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Can you trust the trustees? Exploring the regulations required to prevent breaches in fiduciary duties

By Marietjie Du Toit

According to s 1 of the Trust Property Control Act 57 of 1988, a 'trust' means 'the arrangement through which the ownership in property of one person is by virtue of a trust instrument made over or bequeathed' to another person, the trustee, or to the beneficiaries of the trust, 'to be administered or disposed of according to the provisions' in the trust deed. The trust deed is a legal document and must, therefore, comply with common law principles, the Constitution and public policy.

The fiduciary office is one of the distinct characteristics of the trust as a legal institution. The trustee, (the administrators of the legal institution), derives their authority from s 9 of the Trust Property Control Act, the trust deed, and the common law. Trustees are fiduciaries, and their duty includes the legal obligation to act exclusively in the best interests of the beneficiaries. 'Fiduciary' alludes to 'trust' and a breach of that trust, is considered by most, to be exceptionally treacherous.

Alex Eliott 'Who guards the trustees?' (2007) December *Without Prejudice* 55 confirms the fact, that a trust cannot exist separately from its trustees and claims further, that beneficiaries of large trusts, suffer financially because of trustees making poor decisions, including committing fraud in their representative capacities. According to Eliott, the trust as a legal in-

stitution in South Africa – in the current era of 'hyper-regulation' – is in desperate need of proper regulation. As things now stand, the vulnerable beneficiary has only the legislature and the courts to depend on.

Administrative obligations of trustees

Walter Geach and Jeremy Yeats *Trusts: Law and Practice* (Cape Town: Juta 2008) at 204 states that the importance of keeping a minute register from the inception of a trust, 'cannot be overemphasised'. It is alleged that the minute register – as a record of all the resolutions discussed and decided on by the trustee, represent *prima facie* evidence before a court in any dispute against the trustees. The minutes reflect the attendance at each meeting, as well as the content of and the reasons for each resolution decided on. As set out in s 17 of the Trust Property Control Act, all records must be kept for at least five years, post the termination of a trust. A beneficiary has the right to request the legal reason/s taken in a resolution and the proof of the consequential administration thereof.

A breach in the fiduciary duty is viewed as an extremely serious violation of the law. The power of the fiduciary is not 'unbridled', as stated by Eben Nel ('Unfettered, but not unbridled: the fiduciary duty of the trustee *Wiid v Wiid* NCHC (unreported) 13-01-2012 case no 1571/2006' (2016) 37 *Obiter* 436) due to the demanding requirements, which are intrinsic to the relationship. These regulations strictly prohibit profit-making (usually financial) and a conflict of interest, both of which go beyond the fiduciaries' power in the meeting of their obligations. Strictly prohibited actions, include *inter alia,* secret personal gain, in the form of undisclosed commissions, discounts, bribes and allocations, as well as any other advantages, which may benefit a trustee personally.

Eliott ((*op cit*) at 55) states, that the topic of trustees, who fail their fiduciary duties is a popular one, because the prejudiced beneficiary is the one who must seek justice and hence directly pay for the misuse and abuse by trustees. In *Tijmstra NO v Blunt-MacKenzie NO and Others* 2002 (1) SA 459 (T) at 460, the court's finding was: 'Whenever trust assets are endangered a trustee should be removed'. According to Kirk-Cohen J, the grounds for the removal of a trustee, include some of the following reasons, *viz* –

- the transfer of funds from a safe investment to a personal account;
- disregard of obligations associated with the fiduciary office; and
- a 'puppet' or 'sleeping' trustee, who approves of the dominant founder/ trustee's wrongful conduct and permits misconduct on the part of a fellow trustee.

Walter Geach *Trust Law in South Africa* (Cape Town: Juta 2017) at 42-44 discusses the rights regarding loan accounts in detail. An allocation to a beneficiary does not automatically amount to a payment of the benefit in cash. Such an allocation could be to a loan account or not. In the latter instance, Geach suggests that a loan agreement should be drawn up. The agreement must indicate repayment and interest terms. If the funds or investment is held on behalf of the beneficiary, there should not be a loan account and any accruing income or benefit should be paid directly to the beneficiary. If this is not done, it could amount to a form of theft, as stated by CR Snyman *Criminal Law* (Durban: LexisNexis 2014) at 490-502. Snyman then discusses embezzlement, also termed 'theft by conversion' as a form of theft, which occurs where X appropriates or takes over the money of Y. Phia van der Spuy *Demystifying Trusts in South Africa* (Createspace 2017) at 34 confirms that the beneficiary who receives an allocation, must pay the tax on such benefit, consequently thereby vesting a right of absolute ownership.

Theft of credit, the unlawful and unofficial appropriation of trust funds, occurs where money belonging to the beneficiary is used for a purpose, not authorised by the trust deed, or intentionally misused by the trustee. To burden loan accounts by increasing the liability for one of the spouses in a divorce, is an attempt to defraud and to financially prejudice the other spouse. A forensic audit is advisable for the protection of prejudiced spouses in these circumstances.

The doctrine of mutual, common, material, and fundamental mistakes, regarding the constitution of a contract

Considering the fact, that there is no legal certainty regarding the creation of a trust, when transferring either or both joint and family assets, the possibility of a mistake, resulting in an invalid contract is a conceivable reality. Richard Christie and Victoria McFarlane *The Law of Contract in South Africa* (Durban: LexisNexis 2006) at 322-325 states that if the purported acceptance (by the trustee) does not correspond with the offer, no contract comes into being because the parties are not *ad idem.*

In *Williams v Evans* 1978 (1) SA 1170 (C) at 1174H, Broeksma J accepts the proposition that if parties entered into a contract with a common belief as to the future state of affairs the contract may fail if the belief fails, which constitutes a material fact, namely, that the parties would not have entered into a contract, if they had known, that their expectations would not materialise. Christie and McFarlane ((*op cit*) at 329) declare that the time has come to reconsider the significance of the common mistake of law. They state that if *Mouton v Hanekom* 1959 (3) SA 35 (A) permits the rectification of a common mistake of law, it would be inconsistent to not permit recission, as well. If then, there is no certainty in law, in respect of the rights and interests of parties in the founding of a trust, by the transfer of joint assets (*WT and Others v KT* 2015 (3) SA 574 (SCA); *Du Toit v Du Toit* (GP) (unreported case no 59114/16, 21-11-2017) (Rabie J) decided as a *stare decisis* of *WT and Others v KT*), courts are in serious jeopardy by ignoring and eliminating the development of the basic principles of common and trust law, under the rule of law.

A material mistake is a matter of fact and a fundamental mistake, concerns the law. Christie and McFarlane ((*op cit*) at 319-320) state that if the mistake is caused by X, Y is entitled to rescind the contract, if the mistake is sufficiently material, providing that Y can show, that he or she would not have entered the contract if they had in fact known the truth. This *lacuna* and uncertainty in trust law should be viewed as unconstitutional prejudice in terms of human rights, as well as substantive gender-inequality, which requires an urgent amendment and rectification by the legislator and the courts, accordingly.

The contract induced by misrepresentation

'Misrepresentation' was employed in argument in the case of *WT and Others v KT*, reflecting the present *stare decisis* on the division of joint-trust assets in a divorce. Misrepresentation is a concept, which indicates an untrue or misleading statement of fact made by one party to another during negotiations. Christie and McFarlane ((*op cit*) at 271) state that if misrepresentation is committed by a third party, who acts in collusion with or as the agent of one of the contracting parties, the innocent party can rescind the contract. Such a third party could be the drafter of the trust deed, a legal adviser, or the auditor of the founder. In *Musgrove & Watson (Rhod) (Pvt) Ltd v Rotta* 1978 (2) SA 918 (R) at 925, Goldin J held that where a person signs a contract because of being fraudulently deceived by a colluding third party, regarding the contents and character of that contract, 'no valid contract comes into effect'.

Silence may also amount to a misrep-

resentation. In *S v Heller and Another (2)* 1964 (1) SA 524 (W) at 537, the court examined the circumstances in which concealment can constitute fraud. Trollip J held in this regard that there must be 'a duty to disclose' (founder and auditor) and that the breach:

'[M]ust have been wilfully committed by the accused: (a) in circumstances as to equate the non-disclosure with a representation of the non-existence of that fact (this constitutes "the perversion of the truth"), (b) with knowledge of its falsity … , (c) with intent to deceive, and (d) resulting in actual or potential prejudice to the representee.'

Suspected theft and fraud of jointly owned property

According to EM Burchell and PMA Hunt *South African Criminal Law and Procedure* (Cape Town: Juta 1976) at 593, a co-owner is guilty of theft, when joint-property is dealt with the intention to permanently deprive the other co-owner of the full benefit of their ownership. Burchell and Hunt define two categories of co-owners namely, partners and couples married in community of property. The motive for hiding joint-assets in a trust can be proved by the beneficial consequences for only one of the spouses after the transfer or by the unlawful legalising of arbitrary power-control clauses, in favour of the founder. The significance of conscious consent for the proven validity of the transaction, was ruled by the SCA in *Marais and Another NNO v Maposa and Others* 2020 (5) SA 111 (SCA) at para 17-18; 25-31 and 45. If there was no written consent, the transaction is void. Where a claim alleges 'lawful' possession in Y, it designates 'lawful' as against the alleged thief, concerning a possession, that the alleged thief had no right to disturb.

Parties to theft

South African law records the following propositions, *viz*: If Z aids and abets the thief X, assisting him before the initial *contrectatio*, Z is a *socius* and guilty of theft, if he agrees before stealing the property, to assist in some other way after the theft and then does so without doing anything, that could be called a *contrectatio*. The person, who receives stolen property on the other hand, is deemed in almost every case to have committed theft. The person (trustee), who innocently receives stolen property and later learns the truth and brings about the *contrectatio* of it, is a thief by virtue of taking it, but not a party to the original theft nor a receiver of stolen property.

However, the continuing crime doctrine cannot make him a thief because he lacks possession. If Z, for example the trust expert, the 'architect' or drafter of the contract, the lawyer or the auditor assists the thief X (founder), after the *contrectatio*, he is a thief and not just an accessory to the theft because the crime continues. If the crime continues in future, Z by his continuing control of the theft commits a present *contrectatio* and will in future commit further *contrectationis* by the providing of advice, relating to the stolen property or money laundering or how to dispose of the stolen property. In order for Z to be accused of assisting the thief, after the original *contrectatio*, not only must the thief's conduct not be reported, but there must also be other features, which show that Z abused his duty in office or neglected his duty, by concealing the theft, thus assisting the thief X. Even if Z no longer provides help to the thief and X disposes of the property to another receiver, Z is still regarded as having protected X or having helped him to escape. Trust experts, auditors and lawyers should think long and hard about this legal principle and the criminal cause of action, in respect of assistance.

In conclusion, both misrepresentation and the fabrication of truth in constituting an agreement, during the transfer of ownership in joint property, is a matter of major concern, since it does not exclude mass conduct of lawlessness and anarchy in trust law, as is confirmed by the observation of trust authorities. It is relatively easy to uncover criminal conduct. The trust deed and the minutes of the administration by the trustees would provide substantiated evidence in black on white.

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Picture source: Gallo Images/Getty

By
Karabo
Sekailwe
Orekeng

Rescuing the director – can the business judgment rule be at your rescue?

The business judgment rule (the rule) is a defence mechanism found in s 76 of the Companies Act 71 of 2008 (the Act). The rule can be used by directors who face potential liability owing to a breach of their fiduciary duties. However, there are three crucial requirements that must be met in order for the defense to be available to a director.

Section 76(4)(*a*) of the Act, encapsulates the following requirements:

- 'The director took reasonably diligent steps to become informed about the matter at hand;
- The director had no material personal financial interest or conflict of interest in the matter, or had dealt with those personal financial interests as required by law; and
- The director rationally believed that the decision made or supported was in the best interest of the company and had acted in good faith in the best interest of the company' (see Keira-lea Sandilands 'What is the Director's Protective Mechanism as per the Companies Act' (https://serr.co.za, accessed 19-5-2023)).

Section 76(4)(*b*) of the Act states that directors can rely on the performance, information, recommendations, and opinions of professional advisors. However, when doing so, the director must have reasonable belief that the recommendations can be relied on and must reasonably rely on the advisor's competence. Therefore, in order for this section to apply, the director must not baselessly rely on the information but should scrutinise the information even if it comes from professional advisors (see Sandilands (*op cit*)).

'In *Aronson v Lewis* [473 A.2d 805 (Del. 1984)], the Delaware Supreme Court interpreted the business judgment rule as a presumption that when directors make business decisions for the company,' these decisions taken by the directors must be made 'in good faith, and in the honest belief that the decision was in the best interest of the company' (see Sandilands (*op cit*)).

The extent of a director's duty of care and skill depends on the nature of the business the company is partaking in, and South African law does not require a director to have absolute business acumen (see Deshara Pillay and Parmi Natesan 'The business judgment rule' (www.financialmarketsjournal.co.za, accessed 31-3-2023)).

Business is about taking risks for rewards and directors, when exercising their judgment and making decisions for a company, need to do so with the goal of furthering the companies' interests. However, even the best-orchestrated plans fail. In those instances, what needs to be assessed is the relevance of the decisions taken by the directors and this is not only based on results of the decision but is also based on the procedure/s the directors followed when the decision was taken (see Pillay and Natesan (*op cit*)).

Van Tonder states that the business judgment rule does not apply to the situation where the directors have failed to exercise their duties of oversight and monitoring this is due to the rule only applying in instances where the directors have made a business decision (see Jan-Louis van Tonder 'An analysis of the directors' decision-making function through the lens of the business-judgment rule' (2016) 37 *Obiter* 562). Failing to exercise oversight and monitoring duties amounts to a failure to act and does not translate to making a business decision. The author states that there must be evidence of an informed, deliberate, and good faith process of decision-making taken by the directors for the rule to apply. This situation is different to directors having a positive obligation and failing to act, the directors' decision not to act does not constitute a business decision.

Requirements of s 76(4)(*a*) of the Act

The first requirement states that the director must have 'taken reasonably diligent steps to become informed about the matter.' The assessment of steps taken to become informed is objective. The directors are required to take initiative to be informed of a matter prior to taking a decision. If presented with a report, they should read the report with a curious mind and interrogate the contents with the lens of protecting and acting in the company's best interests.

A director must be able to demonstrate that when they received the information, they critically considered the information prior to making their business decision. Whether or not a director made an informed decision a court would have to grapple with the surrounding circumstances. In terms of the second requirement, 'the director must not have a material personal financial interest in the subject matter of the decision' (see Linda Muswaka 'Shielding directors against liability imputations: The business judgment rule and good corporate governance' (2013) *SPECJU* 25).

The third requirement indicates that the director must have a rational basis to believe that the decision was taken in the best interest of the company. The test for rationality is objective. In order to satisfy a rational belief, 'directors must be independent with respect to the action' taken. 'A director is independent when he or she is in a position to base his or her decision on the merits of the issue rather than being governed by extraneous considerations'. Ultimately, directors must believe that the decision they have taken was in the best interest of the company and such belief must have a rational basis. Therefore, whether the rule will apply falls heavily on factual evidence provided and surrounding the conduct or decision-making process at issue (see Muswaka (*op cit*)).

The rule applied in United States (US)

In the US case of *Smith v Van Gorkom* 488 A.2d 858: 'The Delaware Supreme Court had to decide about a derivative suit against the members of the board of directors. These members had decided to sell the company by issuing the share for a price of 55 $ each. The shareholders … alleged that this purchase price had been too low and the board [failed] to obtain a higher price. The Supreme Court examined the information basis for the purchase decision in detail. In order to prepare the purchase decision, the board got an expert opinion … . Based on these findings, the CEO negotiated with the subsequent buyer on his own without informing the other board members or the shareholders of the company.' The Delaware Supreme Court found that the process leading up to the decision taken was not adequate to prepare an important decision for the given sale of the company. Therefore, the court found that the board failed to fulfil its obligation to be properly informed of what real value of the company was. According to the Delaware Supreme Court the duty to be informed also requires directors to be critical of the information it receives (see Dr Stefan Eisele *Codification of the business judgment rule in section 76(4) Companies Act 2008: Comparing the South African with the German approach* (LLM thesis, University of Cape Town, 2017)).
In the case of *Percy v Millaudon* 8 Mart (ns) 68 (La 1829), the shareholders of a bank sued its directors. The shareholders alleged that due to the misappropriation of funds by the bank's president and cashier, the directors of the bank were liable for the losses suffered by the company. The Louisiana Supreme Court held that: 'When the person who was appointed attorney-in-fact, has the qualifications necessary for the discharge of the ordinary duties of the trust imposed, we are of the opinion that on the occurrence of difficulties, in the exercise of it, which offer only a choice of measures, the adoption of a course from which loss ensues cannot make the agent responsible, if the error was one into which a prudent man might have fallen' (see Friedrich Hamadziripi and Patrick C Osode 'The nature and evolution of the business judgment rule and its transportation to South Africa under the Companies Act of 2008' (2019) 3 *Speculum Juris*). The effect of the court's *ratio decidendi* encouraged people to take up office of director allowing room for mistakes, which is at the core of the rule.

The rule applied in Canada

In *Maple Leaf Foods Inc v Schneider Corporation* 42 OR (3d) 177 (1998) OJ No 4142, the appellant, was a bidder for Schneider's shares. 'The appellant had declared its intention to make an unsolicited take-over bid for Schneider at $19 a share. After the establishment of a special committee by the respondent and some consultations between the former and the latter's board of directors, Schneider ended up accepting Smithfield Foods' offer of $25 a share. The appellants alleged that the agreement between the Schneider family and Smithfield Foods unfairly disregarded the interests of non-family shareholders and prejudiced them. It was held that: "the court looks to see that the directors made a reasonable decision not a perfect decision. Provided the decision taken is within a range of reasonableness, the court ought not to substitute its opinion for that of the board … . As long as the directors have selected one of the several reasonable alternatives, deference is … accorded to the board's decision"' (see Hamadziripi and Osode (*op cit*)).

Conclusion

The rule is a form of protection for directors and allows them to make informed decisions even if they face the threat of liability to the company and shareholders because of the desired outcome not being reached. What can be gleaned from the above is, directors should take informed decisions, such decisions should be taken in good faith and said director should not have an interest in the business transaction to rely on the rule. If the director acts contrary to this, by acting in bad faith and taking a decision that personally benefits them, the rule will not protect them and thus be inapplicable. It is also evident that the rule allows room for 'honest mistakes' and appreciates that there is no perfection in company decision-making (Hamadziripi and Osode (*op cit*)). Directors should thus be encouraged to act honestly and 'with integrity in board decisions and activities' (Muswaka (*op cit*)). This is done when a director does not accept information at face value and rather makes a thorough analyses of the information first. It is, therefore, prudent for directors to familiarise themselves with the business, finances and long-term or short-term objectives of the company.

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Promoting gender equality in the legal profession is essential

By Kgomotso Ramotsho

Legal administrator, Busisiwe Beverly Zwane.

Legal administrator Busisiwe Beverly Zwane, was born in Pretoria, and grew up in Dennilton and Witbank. Ms Zwane attended Hoërskool Patriot and after completing matric, she proceeded to the University of South Africa (Unisa) to study law. She has five siblings, whom she is very close to. Ms Zwane spoke highly of her parents who were both school principals, who she describes as very supportive towards their children's dreams.

Kgomotso Ramotsho (KG): Why did you choose to study law?
Busisiwe Zwane (BZ): I was drawn to the study of law because I have a strong sense of justice and a desire to make a positive impact in society. I see the law as a means to advocate for individuals or groups who may not have a voice and to bring about legal and social change.

Furthermore, law is a complex and dynamic field that requires analytical thinking, problem-solving skills, and a deep understanding of legal principles. I am attracted to the intellectual rigor and the challenge of mastering the intricate legal framework.

A law degree offers a wide range of career opportunities. Beyond traditional practice as a lawyer, law graduates can work in fields such as corporate law, government, academia, non-profit organisations, consulting, or even start their own legal firm. The versatility of a law degree attracts individuals who are interested in exploring different paths within the legal profession.

Studying law equips individuals with a set of transferable skills that are highly valued in various professions. These skills include critical thinking, research abilities, effective communication, negotiation, and problem-solving, which can be applied to roles outside the legal field as well.

KR: You are in your last year of tertiary studies and working at a law firm, how do you balance, studying and working?
BZ: Balancing work and school is demanding, as both require significant time and effort. Managing my time effectively is crucial. Creating a schedule that allows for dedicated study time while accommodating my work responsibilities. I prioritise tasks, set realistic goals, and adhere to deadlines to ensure I stay on track.

Juggling a demanding academic curriculum with professional obligations can lead to a heavy workload. It is important that I am organised and develop effective study habits. I focus on one task at a time. Additionally, I communicate with my employer about my academic commitments to ensure a reasonable workload distribution.

The combination of work and school is mentally and physically exhausting. It is crucial to take care of my well-being. I try and get sufficient rest and set aside time for leisure activities and socialising to prevent burnout.

Work and school might have conflicting schedules, such as exams or work assignments that require significant attention simultaneously. I therefore plan and communicate with my employer and professors to find solutions. I also seek flexibility in my work schedule when necessary. Balancing work, school, and personal life is essential for overall well-being. I dedicate time for relaxation, hobbies, church and spending time with fam-

ily and friends. I also communicate my boundaries and limitations to my employer and colleagues, ensuring they understand my need for personal time. It is also important to remember to prioritise self-care to avoid feeling overwhelmed. The demands of work and school can lead to increased stress levels. Developing effective stress management techniques, such as exercise, mindfulness, or seeking support from friends, family, or counsellors is important. I also identify and address sources of stress proactively and seek help when needed. While working in a law firm during your final year can provide valuable practical experience, it is crucial not to neglect networking and professional development opportunities. So, I attend legal seminars, join relevant professional associations such as the National Association of Democratic Lawyers (NADEL), and build connections within the legal community. One must also take advantage of your workplace to gain exposure to different areas of law and seek guidance from experienced lawyers. Remember, effective communication and time management are key to balancing work and school successfully and proactively seeking support from your employer, professors, and peers when needed. By prioritising tasks, maintaining a healthy work-life balance, and managing stress effectively, you can navigate the challenges and succeed both academically and professionally.

KR: As the chairperson of the student chapter of NADEL at Unisa, what are some of the challenges your organisation looks to address, especially at university level?

BZ: As the chairperson of the student chapter of NADEL at Unisa, our organisation seeks to focus on addressing several challenges at the university level by focusing on the following:

- **Access to justice:** We work towards promoting equal access to justice for all students, particularly those from marginalised backgrounds.
- **Human rights education:** Raising awareness about human rights issues among students, encouraging dialogue, and organising educational programmes.
- **Social justice advocacy:** Engaging in advocacy and activism on issues related to social justice, such as gender equality, racial justice, disability rights, and economic inequality.
- **Legal empowerment:** Empowering students by providing them with legal knowledge and skills that can help them navigate legal challenges. This involves conducting workshops on legal literacy, offering internships or mentorship programmes, and facilitating networking opportunities with legal professionals.
- **Collaboration and networking:** Fostering collaboration and networking opportunities with other student chapters of NADEL or similar organisations at different universities. This helps to facilitate knowledge sharing, joint initiatives, and the exchange of best practices to address common challenges.

KR: As a young person who is vocal about issues that are affecting other young people in the legal profession, how important it is for you to be a part of the engagements that talk to the transformation of the legal profession. What makes you want to be involved, vocal and advocate for transformation?

BZ: The legal profession, like any other field, should be reflective of the diverse population it serves. By being involved in transformation discussions, I contribute so that I can ensure that historically disadvantaged groups, including young people, have a voice and are adequately represented in the legal profession. This inclusivity fosters a more equitable and just system.

Transformation efforts aim to enhance access to justice for all individuals in society. By advocating for change, we can contribute to the development of policies and practices that address the barriers faced by young people and marginalised groups. This can help make the legal profession more accessible, affordable, and responsive to the needs of the broader population.

Transformation seeks to eliminate discriminatory practices and promote equal opportunities within the legal profession. Being involved allows us to push for reforms that address biases, prejudices, and systemic barriers that may prevent young people from entering or progressing in the legal field. This creates a level playing field and promotes diversity in legal workplaces.

Engaging in transformation discussions provides an opportunity for personal and professional growth. By actively participating, we as young people can expand our knowledge, network with like-minded individuals, and gain a deeper understanding of the challenges and opportunities within the legal profession. This involvement can enhance our advocacy skills, broaden our perspectives, and contribute to our development as young professionals.

As a young person, my involvement in transformation efforts today can have a lasting impact on the legal profession in South Africa (SA). By being vocal and advocating for change, I can help shape policies, practices, and cultural shifts that will benefit future generations of legal professionals. My active participation can contribute to a more inclusive, diverse, and socially conscious legal system. Ultimately, being involved, vocal, and advocating for transformation in the legal profession demonstrates our commitment to positive change and our desire to create a more inclusive and equitable society. By actively participating in these discussions, we can help shape the future of the legal profession in SA and contribute to a fairer justice system for all.

KR: Reading about the history of how women fought to be in the legal profession, now that they are in the legal profession, do you feel like they are treated equally as their male counterparts in this profession, are they being given fair and equal opportunities?

BZ: Historically, women faced significant challenges and barriers to entering the legal profession in SA. However, over time, concerted efforts were made to address gender inequality, promote inclusivity, and provide equal opportunities for women in law.

While progress has been made, it is worth noting that gender equality remains a work in progress in the legal profession, as it does in many other industries. Women still face some barriers and disparities, including unequal pay, fewer opportunities for career advancement, and challenges in balancing work and family responsibilities.

However, it is important to emphasise that there are numerous successful and respected women in the legal profession in SA, and many law firms and organisations are actively working towards creating more inclusive environments. Women are taking on prominent roles as judges, advocates, attorneys, and legal academics, and contributing significantly to the field.

Organisations such as NADEL and the South African Women Lawyers Association play important roles in advocating for gender equality in the legal profession and addressing issues faced by women in the field. It is crucial to recognise that the experiences of women in the legal profession can vary depending on factors such as location, practice area, seniority, and individual circumstances. While progress has been made, ongoing efforts are necessary to ensure that women are treated equally and provided with fair opportunities in the legal profession.

KR: Who are some of the women you look up to in the legal profession and why?

BZ: There are several notable women in the legal profession in South Africa who have made significant contributions. Thuli Madonsela is a prominent South African advocate and former Public Protector. She gained widespread acclaim

for her fearless approach to tackling corruption and maladministration during her tenure. Ms Madonsela is known for her integrity, dedication to justice, and commitment to upholding the rule of law.

Dr Navi Pillay is a renowned South African jurist who served as a judge of the International Criminal Court and later as the United Nations High Commissioner for Human Rights. She has been a strong advocate for human rights and has played a significant role in promoting justice and equality globally. Pansy Tlakula is a prominent human rights lawyer and former Chairperson of the Electoral Commission of South Africa. She has been actively involved in constitutional and electoral law matters and has made important contributions to the promotion of free and fair elections in SA.

Judge Mabaeng Denise Lenyai is an accomplished lawyer and the first female President of the Law Society of South Africa. She has been a strong advocate for the advancement of women in the legal profession and has worked towards fostering diversity and inclusivity within the profession. These women have demonstrated exceptional leadership, integrity, and a commitment to justice and human rights. They serve as role models not only for women in the legal profession but for all individuals aspiring to make a positive impact through the law.

Justice Dikgang Moseneke served as the Deputy Chief Justice of South Africa from 2005 to 2016. While not a woman, he played a vital role in promoting gender equality in the legal profession. He has been a champion of women's rights and has actively advocated for gender diversity in the judiciary.

KR: What does an equal legal profession look like to you?

BZ: An equal legal profession would strive for equitable representation of all racial and ethnic groups in the legal profession, including the judiciary, law firms, legal academia, and government legal entities. This would involve actively promoting diversity and inclusivity through recruitment, retention, and advancement policies.

Equal access to legal education would be crucial. This would involve addressing financial barriers, providing scholarships or financial aid to students from disadvantaged backgrounds, and promoting outreach programs to encourage students from underrepresented groups to pursue legal studies. Law firms would need to embrace transformation by adopting inclusive hiring practices, providing mentorship and support for aspiring lawyers from underrepresented groups, and actively promoting diversity within their ranks.

Measures should be implemented to reduce bias and discrimination within the legal profession. This includes implementing policies to prevent discriminatory practices in recruitment, promotions, and work assignments. Training programs on unconscious bias and cultural sensitivity could be introduced to educate legal professionals.

Establishing mentorship and sponsorship programs that connect aspiring lawyers from underrepresented groups with experienced professionals can be instrumental in providing guidance, support, and opportunities for career advancement.

Equal access to professional development opportunities, such as continuing legal education programmes, leadership training, and networking events, would be crucial in levelling the playing field and ensuring equal career advancement prospects for all legal professionals.

Promoting gender equality within the legal profession is also essential. This would involve addressing issues such as the gender pay gap, ensuring equitable representation of women in leadership positions, and implementing policies to prevent gender-based discrimination and harassment.

It is important to note that achieving an equal legal profession is an ongoing process that requires commitment, collaboration, and sustained efforts from all stakeholders, including legal professionals, educational institutions, government bodies, and professional organisations.

KR: What is your daily motivation?

BZ: My daily motivation is that I know I am a child of God and God's got me so the world is my playground, and I can go for anything I want.

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

THE LAW REPORTS

By Merilyn Rowena Kader

June [2023] 2 All South African Law Reports (pp 587 – 869); May – June 2023 Judgments Online

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
KZP: KwaZulu-Natal Division, Pietermaritzburg
NWM: North West Division, Mahikeng
SCA: Supreme Court of Appeal
WCC: Western Cape Division, Cape Town

Administrative law

Judicial review – s 7(1) of Promotion of Administrative Justice Act 3 of 2000 (PAJA): In *Supaluck Investments (Pty) Ltd v Valuations Appeals Board: City of Johannesburg and Another* [2023] 2 All SA 546 (GJ), the applicant sought the review of a decision by the Valuation Appeal Board for the City of Johannesburg to increase the property value of the applicant's property. The issue of condonation was central to the matter as the applicant was given the decision and reasons on 13 July 2016 and the application to review was only served on the second respondent on 19 October 2019. That was three years and two months since the applicant became aware of the reasons of the decision.

The first question was whether the delay in prosecuting the review application was unreasonable. If found to be so, the second question was whether the delay should be overlooked and condoned. If the answers were in the negative, it would be the end of the application, and it would be unnecessary to deal with the merits.

Section 7(1) of PAJA provides that any proceedings for judicial review in terms of s 6(1) must be instituted without unreasonable delay and not later than 180 days after the date on which any proceedings instituted in terms of internal remedies as contemplated in subs (2)(*a*) have been concluded; or 'where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons'. The delay in this case was held to be unreasonable, and the prospects of success on merits were non-existent. The application was dismissed.

Civil procedure

Approach to application of the Uniform Rules of Court: In *Sasol South Africa t/a Sasol Chemicals v Penkin* [2023] JOL 58591 (GJ), on 26 May 2020, personal service of the applicant's summons was affected on the respondent. The respondent gave notice on 1 June 2020 of his intention to defend the action but failed to deliver a plea. After delivery of a notice of bar on 22 June 2020, the respondent delivered his plea. On 21 October 2021, the respondent delivered a notice of intention to amend the plea. The applicant contended that the notice offended against the provisions of r 28 because it did not comply with two subrules, being that a notice of intention to amend as contemplated in the rule must contain a provision notifying the recipient thereof of its intention to object and that it must contain a tender for the costs occasioned thereby. The applicant brought the present interlocutory application contending that the notice to amend the plea was an irregular step as contemplated in r 30.

When dealing with less than perfect procedural steps, the correct approach is to evaluate them based on prejudice and the interests of justice. The applicant could not point to any prejudice caused by the respondent's notice to amend. There was also no obligation on a party giving notice of intention to amend in terms of r 28(1) to make a tender for the costs occasioned by the amendment. The court could find no authority for the proposition that the absence of a tender for costs renders the notice defective or irregular. The application was dismissed.

Court's power to inquire into merits or validity of compromise: In *Road Accident Fund v Taylor and related matters* [2023] JOL 58945 (SCA), after two actions brought against the Road Accident Fund (RAF) were settled between the parties, the court refused to make the orders requested by the parties, taking the view that the claims amounted to exploitation of the RAF. Postponing the matters *sine die*, the court directed that its judgment be brought to the attention of any court called on to enforce the purported settlement agreements; and that the conduct of the legal practitioners, medical practitioner and actuary be referred to their respective professional bodies. The plaintiffs, the RAF, and the other parties affected by the order applied for leave to appeal. The SCA granted leave. Van der Merwe JA addressed the issue of appealability and the requirements for the present court to have jurisdiction to entertain an appeal. The postponements were found to be appealable decisions. The orders made by the judge in the court below constituted judicial overreach. The court pointed out that the settlement agreements in both matters were final and unconditional compromises, in respect of which the court had no power or jurisdiction to embark on an inquiry as to whether the compromise was justified on the merits of the matter or was validly concluded. The appeals were upheld.

***Rule nisi* and interim order – nature of order in respect of which non-compliance was alleged:** On 18 December 2020, an order was issued declaring the municipality and municipal manager in breach of their constitutional obligations and granting consequential relief. A subsequent application to hold the municipality in contempt was dismissed. Central to the appeal by the Kgetlengrivier Concerned Citizens (KCC), was the interpretation of the 18 December order as amended and amplified on 12 January 2021 (the 'Gura J orders').

The issues were: The right to water and a healthy environment free from the harmful effects of sewerage spills, and

the breach by the Kgetlengrivier Municipality and its municipal manager of duties in that regard. The first appellant in *Kgetlengrivier Concerned Citizens and Another v Kgetlengrivier Local Municipality and related matters* [2023] 2 All SA 452 (NWM) approached the court to assert rights to water and a clean unpolluted environment.

Petersen J (Hendricks JP and Mongale AJ concurring) held that the right to potable water is a basic human right entrenched in s 27(1)(*b*) read with s 27(2) of the Constitution. The right to a healthy environment is inextricably linked to the right to basic sanitation services. While striving to deal decisively with those who do not honour their constitutional mandate in serving the people, the court must ensure that due process which accords with the letter of the law is followed.

In examining the nature and implication of the Gura J orders it was held that once the return day of a *rule nisi* coupled with an interim order passed without being extended, both the *rule nisi* and the interim order lapse. Application must be made for the revival of *rule nisi* for allegation of contempt of court to be adjudicated.

The order granted impacted on the constitutional right to liberty of the municipal manager in circumstances where he was 'convicted and sentenced' without trial. The appeal by the KCC in respect of the relevant contempt application accordingly stood to be dismissed.

All the appeals before the court were dismissed.

Constitutional and administrative law

Access to information: The appellant in *Ericsson South Africa (Pty) Ltd v City of Johannesburg Metropolitan Municipality and Others* [2023] 2 All SA 378 (GJ) sought an order compelling the respondents to provide copies of a draft and final forensic report on the City of Johannesburg's Broadband Network Project under the Promotion of Access to Information Act 2 of 2000, but the request was refused by the City on the basis that it was exempt from providing the applicant with the requested information under ss 37, 39, 40, 44 and 46 of the Act. Ericsson submitted that they should be bound by the grounds advanced in response to the request and internal appeal.

The application was dismissed based on non-joinder of the entity (Nexus), which compiled the forensic report.

Keightley J (Matojane J and Van Aswegen AJ concurring) held that s 82 of the Act deals with the court's powers regarding s 78 applications.

The Act gives content and effect to the constitutional right of access to information contained in s 32 of the Constitution. Section 11(1) of the Act provides that a requester must be given access to a record of a public body if he complies with all the procedural requirements; and access to that record is not refused in terms of any ground for refusal contemplated in the relevant provisions. When access is sought to information in the possession of the state, it must be readily availed. Refusal constitutes a limitation of the right of access to information. As such, a case must be made out that the refusal of access to the requested records is justified. Chapter 4 sets out a range of exemptions. Section 81 of the Act expressly places the burden on the state to prove that a refusal of a request for information was justified. The evidentiary burden must be discharged on a balance of probabilities. The state is required to put forward sufficient evidence for a court to conclude that, on the probabilities, the information withheld falls within the exemption claimed.

The respondents failed to justify their refusal of Ericsson's request. The court directed that the request be complied with, subject to measures being taken to protect third parties involved.

Corporate and commercial

Application by shareholder to bring derivative action on behalf of company in terms of s 165(5)(*b*) of Companies Act 71 of 2008: In *Nebavest 1 (Pty) Ltd t/a Minster Consulting v Central Plaza Investments 202 (Pty) Ltd and Others* [2023] 2 All SA 795 (WCC), the applicant (Nebavest) owned 50% of the shares in the first respondent (Central Plaza). The second respondent (Strydom) was the sole director of Central Plaza and a director of its other 50% shareholder (Salt).

Having served a demand on Central Plaza in terms of s 165(2)(*a*) of the Companies Act, Nebavest now sought to bring a derivative action on behalf of Central Plaza, for the repayment of all benefits paid by an insurer (African Unity) to persons other than Central Plaza arising from medical aid cover and other business conducted with the National Road Freight Industry Fund since 2010.

In terms of s 165(5)(*b*), a person who has made such demand may apply to a court for leave to bring proceedings in the name and on behalf of the company, and the court may grant leave if satisfied of three requirements, *viz* that the applicant is acting in good faith; the proposed proceedings involve the trial of a serious question of material consequence to the company; and it is in the best interests of the company that the applicant be granted leave to commence the proceedings.

In its demand in terms of s 165(2), Nebavest relied on the alleged breach of two agreements. The basis for the complaint was said to be the non-payment by African Unity of the full amount of the commission due to Central Plaza. The two agreements were an undated 'Non-Circumvention/Non-Disclosure Agreement' (the NCNDA) concluded between Central Plaza and African Unity, and an alleged oral agreement concluded in 2009 between Nebavest, Salt and African Unity. Against that background, it had to be determined whether the three requirements in s 165(5)(*b*) had been met. The good faith requirement in s 165(5)(*b*)(i) is not satisfied if it is apparent that the applicant does not honestly believe that a good cause of action exists and that it has a reasonable prospect of success. The court was unable to accept that Nebavest had a *bona fide* belief that Central Plaza enjoyed a viable claim against any of the persons identified as potential defendants in the contemplated derivative proceedings. The result was that the first requirement had not been met, and the application was dismissed with costs.

Effect of establishment of *concursus creditorium*: An application for credit facilities form that was presented to the first respondent (Voltex 2), in *Prevance Bonds (Pty) Ltd v Voltex (Pty) Ltd and Others* [2023] 2 All SA 587 (SCA), by the second respondent (First Strut) incorrectly recorded Voltex 2's registration number. After the liquidation of First Strut, Voltex 2 submitted its claims to the liquidators, with a security cession contained in the credit facilities form securing such claims. The appellant (Prevance) objected to the recognition of Voltex 2 as a secured creditor and Voltex 2 applied for rectification of the recordal of its registration number on the credit facilities application form and the security cession. Despite Prevance's objection, the High Court granted rectification. Prevance appealed.

Two issues arose for determination on appeal –

- whether Voltex 2 had provided sufficient evidence to sustain a claim for rectification of the security cession in motion proceedings; and
- whether it was competent to order rectification of a document after the institution of a *concursus creditorum*.

Rectification of a written agreement is a remedy available to parties in instances where an agreement reduced to writing, through a common mistake, does not reflect the true intention of the contracting parties. The onus is on a party seeking rectification to show, on a balance of probabilities, that the written agreement does not correctly express what the parties had intended to set out in the agreement. Prevance's defences were premised on the allegations that the purpose of the rectification application was to substitute a secured creditor in circumstances where the unsecured

creditor's claim should not have been admitted. But there was no factual foundation for the defences. The first issue was thus decided in Voltex 2's favour.

On the second question, the court agreed with the High Court that a case for rectification had been established by Vortex 2. The court emphasised the principle that a creditor, who at the date of winding-up was only a concurrent creditor, cannot by rectification of an agreement alter its position to become a preferent or secured creditor, as this would disturb the *concursus creditorum*. As the document in which the security cession was embodied was the recordal of the agreement and cession, rather than agreement and cession itself, it was capable of being rectified without offending the *concursus creditorum*. The rectification of the document would not result in any prejudice to the third-party creditors and, in any event, none had been established.

The appeal was dismissed with costs.

Damages

***Actio de pauperie* – past and future medical costs – general damages:** The plaintiff in *Marshall v Pillay* [2023] JOL 58851 (WCC) was attacked by the defendant's dog and instituted action under the *actio de pauperie*, for past and future medical expenses and general damages. She sustained physical and psychological damage.

Kusevitsky J held that an owner of a dog that attacks a person at the place he or she was injured, and who neither provoked the attack nor by his or her negligence contributed to their own injury, is liable, as owner, to make good the resulting damage. For liability to attach to a defendant, the only proof required under this action is that the defendant was at the time the owner of a domesticated animal, that the animal injured the plaintiff without provocation, and that in so inflicting injury, the animal acted *contra naturam sui generis*.

In assessing the claim for future damages, the court held that it was not bound by the recommendations of an expert who had deposed to evidence of her medical report via an affidavit in terms of r 38(2) of the Uniform Rules of Court.

An assessment of an appropriate award of general damages, is a discretionary matter and has as its objective to compensate an injured party fairly and adequately. General damages are awarded for bodily injury, which includes injury to personality. Its object is to compensate loss, not to punish the wrongdoer.

Plaintiff was entitled to the amount of R 37 567,61 in respect of past medical expenses, and R 4 620 for future medical treatment in the form of six physiotherapy sessions.

Family law and persons

Customary law marriage – validity of marriage certificate: In *Mgenge v Mokoena and Another* [2023] 2 All SA 513 (GJ), the applicant sought an order cancelling the marriage certificate recording that her son (the deceased) and the first respondent had entered a customary marriage. She stated that as mother of the deceased, she had not consented to his marriage, and was unaware of the existence thereof. She averred that in terms of customary law, she, as the mother of the deceased, was required to have participated in any pre-marriage negotiations between the families of the first respondent and the deceased.

The requirements for the conclusion of a valid customary marriage are contained in s 3 of the Recognition of Customary Marriages Act 120 of 1998. The prospective spouses must both be older than 18; must both consent to be married to each other under customary law; and the marriage must be negotiated and entered into in accordance with customary law.

In countering the applicant's assertions that no marriage had come about, the first respondent referred to the cus-

tomary negotiations between the two families and produced a copy of the resultant *lobola* agreement. The applicant's contention that the *lobola* document did not indicate the successful negotiation of a customary marriage was negated both by the wording of the agreement and the part-payment of the agreed *lobola*.

The court addressed the matter of the integration of the bride into the groom's family (the 'handing over' of the bride). Instead of deciding the issue based on which particular customary traditions applied, the court decided the question of whether the requirement of handing over was met on the basis of more general considerations.

A marriage certificate stands as *prima facie* proof of the marriage. The applicant's contentions did not suffice to cast any doubt on the validity of the marriage certificate. The court confirmed that the marriage certificate correctly recognised the existence of a marriage between the first respondent and the deceased during the lifetime of the deceased. The application was dismissed with costs.

Duties of support in permanent opposite-sex life-partnership: The eight- to nine-year-long relationship between the parties in *EW v VH (Women's Legal Centre Trust as* Amicus Curiae*)* [2023] 2 All SA 404 (WCC) ended, leading to the applicant instituting an action seeking a declaration that they had been in a permanent life-partnership and an order of maintenance in her favour. The respondent disputed the allegation that the relationship was a permanent life-partnership in terms of which they had undertaken reciprocal duties of support towards each other.

While the action remained pending, applicant launched the present urgent application. She ultimately sought development of the common law to recognise the existence of a duty of support between partners in unmarried opposite-sex permanent life-partnerships, entitling such parties to claim maintenance from one another.

The three central issues were whether the applicant was entitled to final relief (development of the common law) to ground a claim for interim maintenance when substantially the same final relief was sought in the pending action between the parties; whether development of the common law was required and appropriate; and whether the applicant should succeed in her claim for interim maintenance and a contribution towards her costs.

The applicant stated that the lack of legal recourse for life partners to claim maintenance from one another following the termination of their partnership was constitutionally unacceptable since it discriminated based on marital status and gender and constituted unequal protection before the law. Contrary to her assertion that nothing was being done to protect individuals in her position, there has been clear recognition by the legislature of the need to protect vulnerable life partners on termination of their partnerships.

The claim for interim maintenance and a contribution towards costs was based on a finding in applicant's favour for final declaratory relief. The application was dismissed.

In a dissenting judgment, it was held that where constitutional issues are raised in a matter, application of the law should be more generously approached. The issue of prejudice to the applicant was emphasised and the dissenting judgment favoured provision of a limited right in specified circumstances to allow for the applicant and those in similar situations to claim interim financial relief from their permanent life partners.

Legal practice

Striking of advocate from roll: First respondent in *Legal Practice Council (KwaZulu-Natal Provincial Office) v Manana and Another* [2023] JOL 58956 (KZP) was a trust account advocate who allegedly unlawfully misappropriated money from his clients trust account and failed to repay him.

The applicant sought and obtained a rule *nisi* against the first respondent, with interim relief, which, in essence, suspended the first respondent from his practice as an advocate and installed a curator to administer his practice. The applicant sought confirmation from the rule which, *inter alia*, will result in the name of the first respondent being removed from the roll of advocates, the basis being that the first respondent is not a fit and proper person to continue acting as an advocate.

In considering the first respondents conduct Mossop J referred to *General Council of the Bar of South Africa v Jiba and Others* [2016] 4 All SA 443 (GP) in which the court listed qualities a lawyer should possess namely –

- integrity;
- objectivity;
- dignity;
- the possession of knowledge and technical skills;
- a capacity for hard work;
- respect for legal order; and
- a sense of equality or fairness.

The first respondent had failed to demonstrate these qualities.

The rule *nisi* was confirmed and first respondents name was ordered to be removed from the roll.

Property

Eviction application: Appellants in *Skog NO and Others v Agullus and Others* [2023] 2 All SA 631 (SCA) appealed against the dismissal by the Land Claims Court (LCC) of their application for eviction of the first to 26th respondents (the occupiers) from a farm owned by the third respondent. The latter was a trust with the first two appellants its trustees. The occupiers resided in nine cottages on the farm, with the trust's consent, each cottage being occupied by a former employee and his or her family.

Despite being ordered to vacate after the employment relationship ended, none of them left the farm leading to the trust bringing an application for eviction, based on the Extension of Security of Tenure Act 62 of 1997. The trust asserted that the lease agreements concluded with the occupiers clearly stipulated that their tenure as residents was subject to the employment relationship continuing to exist. In approaching the LCC for the respondents' eviction, the trust relied on the unacceptable way the occupiers had allegedly conducted themselves on the farm, which the trust said had led to the breakdown of the relationship between it and the occupiers. The court declined to order the mass eviction of all the occupiers where it was not shown who exactly had been responsible for the conduct complained of.

An applicant who seeks final relief in motion proceedings must, in the event of a dispute of fact, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or *bona fide* dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers.

Section 8 of the Extension of Security of Tenure Act prescribes a two-stage procedure before an eviction order may be granted.

There must be termination of the right of residence of an occupier, which must be on lawful grounds and just and equitable. The decision to terminate the right of residence must then be communicated to the occupier. As the trust had sent separate notices to all the occupiers, terminating their rights of residence, and giving them notice of its intention to evict them, the only question was whether the termination of their right to reside on the farm was lawful and whether it was, given all the circumstances, just and equitable.

The court was satisfied that the termination of the right of residence was just and equitable in this case. Once an occupier's right to reside has been duly terminated, his refusal to vacate the property is unlawful. The relevant considerations in considering whether an eviction order is warranted include the availability of suitable alternative accommodation, the effect of an eviction on the constitutional rights of affected

persons, and any hardship that an eviction may cause the occupiers. Another relevant consideration was the comparative hardship to the occupiers and the owner of the property.

An eviction order was granted, and the local municipality ordered to provide suitable emergency housing for occupiers.

Other cases

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

- application for remission of interest;
- application to be declared a citizen;
- assault with intent to do grievous bodily harm;
- consideration of mootness on appeal;
- discharge at close of state's case
- disciplinary procedure – hearings in *absentia*;
- divorce litigation – r 43 application;
- lawfulness of acknowledgment of debt and power of attorney concluded on consumer's breach of credit agreement;
- possession of fraudulent visa leading to declaration as prohibited person;
- receiver and liquidator of joint estate; and
- special plea of prescription.

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By Kgomotso Ramotsho

Forfeiture counterclaim unsuccessful as husband fails to establish specific benefits

PMM v TNM and Others (FB) (unreported case no 282/2021, 22-6-2023) (Loubser J)

The Free State Division of the High Court in Bloemfontein in the *PMM v TNM* case had to look at the question of whether the first defendant in the matter had managed to establish the specific benefits of the marriage in community of property, in order to enable the court to decide whether the plaintiff will be unduly benefited if a forfeiture order is not made. Section 9(1) of the Divorce Act 70 of 1979 provides that:

'When a decree of divorce is granted on the ground of the irretrievable breakdown of a marriage the court may make an order that the patrimonial benefits of the marriage be forfeited by one party in favour of the other, either wholly or in part, if the court, having regard to the duration of the marriage, the circumstances which gave rise to the break-down thereof and any substantial misconduct on the part of either of the parties, is satisfied that, if the order for forfeiture is not made, the one party will in relation to the other be unduly benefited.'

The plaintiff, Mrs PMM, claimed a decree of divorce and division of the joint estate, including the pension funds held with the South African Local Authorities Pension Fund (fourth defendant), from her husband, the first defendant. The second defendant is the purported new wife of the first defendant. The High Court said that the matter initially seemed to be quite straight-forward, but it soon appeared to be more complicated when the first defendant filed a counterclaim to the plaintiff's summons, claiming an order for forfeiture of patrimonial benefits against the plaintiff. During the course of the trial, four witnesses testified under oath, including the plaintiff and the first defendant.

The first defendant had to leave the plaintiff and their three daughters at his parental home in Sterkspruit while he went to work on the mines at Orkney. In 1995, he left the mines to return to Sterkspruit. Around 1998, the plaintiff made her way to Bloemfontein to find employment, leaving the children and the first defendant behind in Sterkspruit with her mother-in-law. Not long thereafter the first defendant also moved to Bloemfontein, where he eventually found employment. The High Court pointed out that the marriage relationship was not destined to survive such adverse circumstances, and for the next 22 years the plaintiff and the first defendant lived in Bloemfontein, but not under the same roof. They lived completely separated, as the children grew up, they one by one also came to Bloemfontein, where they lived with their father.

The High Court said that since the first defendant carried the onus to prove that a forfeiture order should be made, he was the first witness to testify. He testified that he and the plaintiff became husband and wife in a traditional marriage ceremony in 1980. He added that when they came back from the mines in 1995, he bought a vehicle to transport people. The plaintiff was unemployed. And when he returned home in 1998, he found that the plaintiff had left. He did not know where she had gone. She left the children behind with his mother. They were in school. The next year he moved to Bloemfontein, where he found employment as a driver with the municipality. According to him, he saw the plaintiff again for the first time at court after all the years. The first defendant went on retirement at the municipality in 2021.

The High Court pointed out that in cross-examination the first defendant testified that his assets consist of his home. He obtained his pension money in 2021. That the plaintiff never contributed to the upbringing of the children. The first defendant also denied that the plaintiff helped him to find employment in Bloemfontein, or that she had visited the children from time to time. However, in her testimony, the plaintiff testified that she never deserted the first defendant and the children. According to the

plaintiff, she came to Bloemfontein to find employment because the first defendant failed to provide adequately for her and the children. She added that in Bloemfontein she found employment as a domestic worker with Mr S, who is a Chief Executive Officer at the 'Glaspaleis', meaning the municipality. The plaintiff has her own quarters on the premises of Mr S, where she lives. She denied that she had ever deserted the children. The plaintiff said she had contributed funds and clothes for the children and for the first defendant's mother through the years. She earns R 3 500 per month and through the assistance of Mr S, she obtained employment for the first defendant at the municipal library as a driver.

The High Court added that the plaintiff said the first defendant a number of years ago acquired a house in JB Mafora outside Bloemfontein, where he later lived with the children. Where the plaintiff regularly went to visit the children. Since 2018, there was no longer any relationship between her and the first defendant, and he married again in 2020. However, the plaintiff still visited the children at JB Mafora, and always took groceries for the children, and even contributed to the building of the house in JB Mafora by cooking food for the builders and providing them water.

The two other witnesses where the plaintiff and first defendant's two daughters who testified that their mother was present in their lives and who left for Bloemfontein to seek employment and when they moved to JB Mafora to live with the first defendant, the plaintiff came to visit them every holiday and even bought them school uniforms, clothes, and food.

The High Court said that through the years, the court has pronounced itself in clear terms how the provisions of s 9(1) should be approached and applied. The High Court added that as early as 1989 the Cape Provincial Division of the High Court pointed out in *Engelbrecht v Engelbrecht* 1989 (1) SA 597 (C) that joint ownership of another party's property is a right, which each of the spouses acquires on concluding a marriage in community of property. Unless the parties make precisely equal contributions, the one that contributed less shall on dissolution of the marriage be benefited above the other if forfeiture is ordered. The Cape Provisional Division of the High Court went on and stated that s 9 does not give the greater contributor the opportunity to complain about this. He can only complain if the benefit was undue. In that judgment the court went on to stated that, unless it is proved what the nature and extent of the benefit was, the court cannot decide if the benefit was undue or not. The High Court said this approach was endorsed by the Supreme Court of Appeal and followed by the courts of the Free State Division of the High Courts on several occasions.

The High Court said that the first defendant failed to establish the specific benefits. That all that he could say, was that his home represented an asset in the marriage in community of property, but he did not give any evidence as to the value of that home. He also did not provide any information regarding the value of his pension fund, the amount that was paid out to him from the fund in 2021, if any, and the amount of the funds that were still available in the pension fund. The High Court pointed out that it was completely in the dark as far as the specifics of the benefits in the marriage in community of property is concerned. The High Court added that it was not able to establish whether the plaintiff will be unduly benefited if an order of forfeiture is not granted against her. The High Court said the counterclaim for forfeiture, therefore, cannot succeed.

The High Court further said on the other hand, there can be no doubt that a decree of divorce should be granted, as prayed by the plaintiff. The first defendant did not take issue with this aspect of the plaintiff's claim. The High Court said it found no reason why the remaining prayers contained in the summons should not be granted.

The High Court made the following orders:

'1. The plaintiff's customary marriage to the 1st defendant on or about 6 December 1980, is declared a valid marriage in terms of the Recognition of Customary Marriages Act 120 of 1998.

2. The 3rd defendant [Department of Home Affairs] is ordered to register the marriage between the plaintiff and the 1st defendant as such.

3. The marriage entered into between the 1st and 2nd defendants on 12 March 2020 is declared null and void *ab initio*, and the 3rd defendant is ordered to remove the registration of such marriage from its records.

4. A decree of divorce in the marriage between the plaintiff and the 1st defendant is hereby granted.

5. A division of the joint estate of the plaintiff and the 1st defendant is hereby ordered, which joint estate includes the 1st defendant's pension funds held with the 4th defendant.

6. The 1st defendant is ordered to pay the plaintiff's costs in the main action.

7. The 1st defendant's counterclaim is dismissed with costs.'

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

Business rescue aimed at facilitating the rehabilitation of financially ailing companies

By Mdumseni Gambushe

Rey NO and Another v Adowa Student Accommodation Co-Ownership and Others (GJ) (unreported case no 2022/26787, 3-4-2023) (Dosio J)

Chapter 6 of the Companies Act 71 of 2008 (the Act) introduced the concept of business rescue aimed at facilitating the rehabilitation of financially ailing companies. Notwithstanding business rescue's commendable intent it inevitable contrasts with other legal principles in its operation and application, things were no different in the case of *Rey NO*.

Factual background

On 13 September 2019, Adowa Infrastructure Managers (the second respondent) contracted TSK Bartlett (the second applicant) for the construction of student accommodation (the contract). As per the contract, the second applicant furnished a construction guarantee (the guarantee), which was issued by Lombard Insurance (the sixth respondent).

By 11 February 2022, the contract had progressed past the stage of practical completion. On 9 September 2022, the second applicant commenced voluntary business rescue proceedings. Thereafter, Christopher Raymond Rey (the first applicant) was appointed as the business rescue practitioner.

On 22 September 2022, the second respondent cancelled the contract alleging that by commencing business rescue the second applicant had breached the contract, particularly clause 36.1.4 and 36.1.6 (the impugned clauses). Thereafter, the second respondent called up the guarantee.

As consequence thereof, the first and second applicants (collectively 'the applicants') approached the Gauteng Local Division of the High Court (the court) for an interim order on an urgent basis to interdict the sixth respondent from honouring the guarantee.

Legal issues

The applicants argued that the respondents had unlawfully called up the guarantee and that the impugned clauses were void and unenforceable.

Concerning the former the applicants argued that the guarantee could only be called up in terms of clause 5.1 and 5.2 thereof, which only entitled the respondents to call up the guarantee in the event of the second respondent's liquidation or default. They argued that the contract was only a month away from completion with little remedial work to be performed and that the commencement of business rescue would not affect their ability to complete the contract, therefore, they were not in default.

On their text, the impugned clauses does entitle the respondents to cancel the contract for breach at the instance of the applicants' commencement of business rescue. The applicants argued that the Act provides that at the commencement of business rescue, all contracts remain in place subject to the business rescue practitioner's election to suspend them.

It was further argued that the purpose of the business rescue is to allow the company in rescue to continue trading to facilitate its rescue, therefore, the impugned clauses by enabling the cancellation of the contract because the company has commenced business rescue, flies in the face of the Act in a way that is so unfair that its contrary to public policy, which renders them void and unenforceable and, the respondent's reliance on them to cancel the contract and call up the guarantee is likewise void.

The applicants argued that they were, in the circumstances, entitled to the interim order pending the outcome of an order declaring the impugned clauses as void and unenforceable, in which event, the demand would be unlawful, therefore, the sixth respondent was prohibited from honouring the guarantee.

The respondent argued that the second applicant's commencement of business rescue, was in breach of the contract, specifically the impugned clauses. That breach entitled them to cancel the contract at their election, which election they exercised. After the cancellation, they were entitled to call up the guarantee and the sixth respondent was likewise obliged to honour the guarantee.

They further argued that any dispute between the applicants and the respondent is independent of the contractual obligation between the second and sixth respondents arising out of the guarantee. Therefore, any such dispute cannot be a bar on the sixth respondent to honouring its contractual obligation to pay in terms of the guarantee.

The respondent argued that the applicants' argument, which contends that the respondents can be restrained, from presenting the construction guarantee because the cancellation clause is unenforceable is bad in law as a lawful cancellation is not a prerequisite for the sixth respondent to honour the guarantee.

Judgment

The court held that the prerequisites for granting an interim interdict are the following –

- *prima facie* right;
- an apprehension of irreparable harm if the interim interdict is not granted;
- the balance of convenience must favour the granting thereof; and
- there must be no satisfactory remedy available.

Thereafter, the court considered the nature and character of the guarantee through case law and held that the guarantee –

- establishes the contractual obligation on the bank to pay the beneficiary, and such responsibility is independent of the underlying contract or any disputes in relation thereto. The only basis that the bank can escape liability is proof of fraud on the part of the beneficiary (*Lombard Insurance Co Ltd v Landmark Holdings (Pty) Ltd and Others* 2010 (2) SA 86 (SCA));
- an interdict restraining a bank from paying will only be granted in the most exceptional cases (*State Bank of India and Another v Denel SOC Limited and Others* [2015] 2 All SA 152 (SCA)); and
- must be honoured after a proper claim

against the occurrence of a specified event (*Dormell Properties 282 CC v Renasa Insurance Co Ltd and Others NNO* 2011 (1) SA 70 (SCA)).

The court relying on the judgment of *Cloete Murray and Another NNO v FirstRand Bank Ltd t/a Wesbank* 2015 (3) SA 438 (SCA) held that the business rescue moratorium does not extend to the cancellation of contracts entered before the commencement of business rescue. Therefore, the respondents were entitled to cancel the contract, and the court was not convinced that such cancellation contradicted the spirit of the Act or that it precipitated an unlawful demand. However, even if the cancellation was unlawful, the courts have been clear that a lawful cancellation is not a prerequisite for calling up the guarantee.

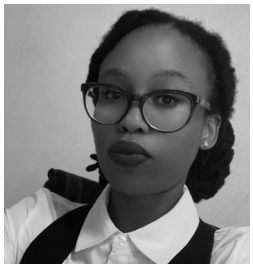
The court held that even if at the declaratory stage the court finds that the impugned clauses are void and unlawful as alleged, this would not provide a defence to the calling of the guarantee because the guarantee is independent of the contract and any dispute relating to the contract is no bar for the honouring of the guarantee unless the applicants can prove the respondents non-compliance with the terms of the guarantee or fraud.

Considering the absence of proof of fraud and non-compliance, the court held that the applicant's prospects of success for the declaratory order are weak, and the balance of convenience does not favour them. The court also found no evidence to support the proposition that the impugned provision was contrary to public policy. Consequently, the court dismissed the application.

Conclusion

It appears that the parties had different perspectives on the matter. The applicants seem to have viewed it from the lens of a business rescue matter while the respondents seemed to have looked at it through construction law lenses. This case underpins the view that as noble as the business rescue regime is, it is not to be afforded supremacy over other laws or legal principles without proper consideration of the circumstances.

Mdumseni Gambushe *LLB (UKZN)* is a legal practitioner at Venns Attorneys in Pietermaritzburg. ❑



By Phumzile Penelope Ziqubu

Can an employer dismiss an employee based on a breathalyser test result?

Samancor Chrome Ltd (Western Chrome Mines) v Willemse and Others (GJ) (unreported case no JR312/2020, 29-5-2023) (Van Niekerk J)

Mr Willemse (employee) was employed by Samancor Chrome (employer) in September 2000. The employee was charged and dismissed for having tested positive for alcohol on the 22 February 2019 at the workplace. The chairperson dismissed the employee on 25 March 2019.

The employee allegedly contravened the employer's policy on alcohol and drugs procedure. The policy statement states:

'This procedure applies to all employees at all levels. Western Chrome Mines subscribe to a policy of zero tolerance alcohol and drugs.

A person shall be deemed unfit to enter the premises in the event that their breath alcohol level exceeds 0.000 percent and if the drug test indicates any illegal substances.

The company shall take disciplinary action in all cases where an employee have (sic) tested positive for alcohol and/or drugs, this offense is viewed as gross misconduct and may lead to summary dismissal on the first offence.'

Clause 6.11 of the employer's disciplinary code provides the following:

'Employees are implored to refrain from influence of drugs including alcohol. The company has a zero-tolerance approach towards drug/alcohol use in its workplace and will not hesitate to dismiss any employee who:

- has a positive drug (including alcohol) tested reading; or
- refuses to undergo a drug (including alcohol) test.'

Arbitration

The arbitrator was required to decide whether the employee had committed any act of misconduct, and whether the dismissal was the appropriate sanction.

The employer led the evidence of three witnesses.

Phumla Ngemntu, a security officer for the company, stated that when the employee arrived at work on 22 February 2019, she performed a breathalyser test on him using an Alcoblow Rapid machine. The outcome was positive. The employee was dissatisfied, so Lonia Mabesele conducted another test using the Lion Alcometer breathalyser. The result was once again positive, with an alcohol concentration of 0.013%.

According to Ms Ngemntu's testimony, the applicant maintained a zero-tolerance policy for the use of drugs and alcohol at work, and any employee who tested positive for alcohol during a required test was subject to a dismissal.

Ms Mabesele in her testimony corroborated what Ms Ngemntu said.

Further evidence was from a chemical pathologist, Dr Jaco Broodryk. In his testimony, he said that Ampath Laboratories tested a sample of blood taken from the employee to see if there was any alcohol in it. A plasma ethanol test, which cannot measure alcohol below 0.010g/dl, was the procedure used to calculate the sample's blood alcohol content. The laboratory's report was negative, meaning that the blood sample of the employee contained less than 0.010 g/dl of alcohol.

Dr Broodryk testified that a blood test is more accurate than a breathalyser and that breathalysers can be wrong under certain circumstances. According to him,

the test results performed do not mean that the employee is completely free of alcohol in his blood, but simply does not have a blood alcohol concentration above 0.010 g/dl.

The employee testified that he was aware of the employer's policy and did not consume alcohol. He consulted Dr Koekemoer on the day who drew blood for determination. Dr Koekemoer corroborated the employee's evidence and added that the blood sample was sent to Ampath Laboratories of which the results were negative.

The arbitrator centred his award around the expert's evidence, namely Dr Broodryk. He stated that reliance should be put on the laboratory results as they are more accurate demonstrating a negative result. He said, 'there was no breach of the rule by the employee as the laboratory results, coupled with the expert testimony, confirmed that the employee did not have alcohol in his blood.'

Unhappy with the award the employer launched a review application based on the arbitrator's misconception of the nature of the enquiry.

Labour Court

The employer argues that because there is zero tolerance, there was a violation of the workplace policy and code even if the employee was not intoxicated. The employee was dismissed for breaking the zero-tolerance policy, not for intoxication.

The employer argued further that the arbitrator misconceived the nature of the enquiry since the report had a negative outcome, which Dr Broodyk made clear did not mean that there was no alcohol in the blood content but rather that the alcohol in the blood content was less than 0.10. Put differently, the employee's blood alcohol content may have been anywhere between 0.000 g/dl and 0.009 g/dl.

This court held the arbitrator did not misunderstand the nature of the inquiry. Only the absence of alcohol in the employee's blood was determined by the arbitrator; intoxication was not determined.

The burden of proving that the employee's blood contained alcohol fell on the employer. The employee did not dispute that the expert evidence did not demonstrate whether alcohol was present in his blood or not, or even if it was.

The employee did not claim that Dr Broodryk's evidence firmly proved that there was no alcohol in his blood, but likewise he did not state that there was any alcohol in the employee's blood.

According to the court, where a blood alcohol test result is negative, an employer cannot rely on a breathalyser test result that shows a positive reading for alcohol. Furthermore, a breathalyser test frequently produces a positive result even when the person has not had any alcohol. The expert's testimony that consuming something containing yeast can produce a positive outcome was relied upon by the court in this case. For this reason, the court found it is crucial to use the outcomes of a blood test.

Conclusion

It is clear from this case that employers should not be quick to charge employees based on the results of a breathalyser test. The result from a breathalyser test is not conclusive and needs to be corroborated. Employers cannot solely rely on a breathalyser test to dismiss an employee.

Phumzile Penelope Ziqubu *LLB (UKZN)* is a legal official in Johannesburg. She writes in her own capacity.

By Shanay Sewbalas and Keagan Smith

New legislation

Legislation published from 26 May – 15 June 2023

Acts

Division of Revenue Act 5 of 2023
Date of commencement: 15 June 2023. GN3295 *GG*48792/15-6-2023.

Bills and White Papers

Correctional Services Amendment Bill B14 of 2023
Publication of explanatory summary of the Correctional Services Amendment Bill, 2023. GN3474 *GG*48670/26-5-2023.

Independent Police Investigative Directorate Amendment Bill, 2023
Notice to introduce the Independent Police Investigative Directorate Amendment Bill, 2023 and publication of explanatory summary of the Bill. GN3507 *GG*48756/7-6-2023.
Publication of the explanatory summary of the Independent Police Investigative Directorate Amendment Bill, 2023. GN3508 *GG*48756/7-6-2023.

National Small Enterprise Amendment Bill, 2023
Notification to introduce the Bill into Parliament and publication of explanatory summary of the Bill. GN3534 *GG*48776/12-6-2023.

Performing Animals Protection Amendment Bill, 2023
Notice of intention to introduce a Private Member's Bill into Parliament and invitation comment. GenN1868 *GG*48790/15-6-2023.

Public Service Commission Bill, 2023
Publication of the Public Service Commission Bill, 2023. GN3511 *GG*48758/9-6-2023.

South Africa's Biodiversity, 2023
Publication of the White Paper on Conservation and Sustainable Use of South Africa's Biodiversity. GN3537 *GG*48785/14-6-2023.

Government, General and Board Notices

Auditing Profession Act 26 of 2005
Appointment of Members to the Board of the Independent Regulatory Board for Auditors (IRBA). BN445 *GG*48696/2-6-2023.

Compensation for Occupational Injuries and Diseases Act 130 of 1993
Notice issued by the Director-General under the Act. GenN1843 *GG*48673/30-5-2023.

Diplomatic Immunities and Privileges Act 37 of 2001
Ministerial Meeting to be held in Cape Town from 1 to 2 June 2023, and the 15th BRICS Summit to be held in Johan-

nesburg from 22 to 24 August 2023. GN3472 *GG*48668/29-5-2023.

Electoral Act 73 of 1998

Publication of reviewed lists of candidates. GenN1854 *GG*48752/6-6-2023.

Electronic Communications Act 36 of 2005

Broadcasting Digital Migration Policy: Announcement of date for final switch-off of the analogue signal and the end of dual illumination. GN3554 *GG*48793/15-6-2023.

Higher Education Act 101 of 1997

Report of the Independent Assessor into the Affairs of the Central University of Technology, Professor Norman Duncan to the Minister of Higher Education, Science and Innovation, Dr BE Nzimande. GN3490 GG48696/2-6-2023.

Immigration Act 13 of 2002

Extension of Zimbabwean Nationals Exemption granted in terms of s 31(2)(*b*), read with s 31(2)(*d*). GN3532 *GG*48764/8-6-2023.

Extension of Zimbabwean Nationals Exemption granted in terms of s 31(2)(*b*), read with s 31(2)(*d*) of the Act. GN3533 *GG*48772/8-6-2023.

Labour Relations Act 66 of 1995

Variation of scope of the National Bargaining Council for the Road Freight and Logistics Industry. GN3487 *GG*48696/2-6-2023.

Local Government: Municipal Electoral Act 27 of 2000

Municipal By-Election – 14 June 2023: Official list of voting stations: Eastern Cape – EC109 – Kou-Kamma – Ward 21009005; Eastern Cape – EC154 – Port St Johns – Ward 21504002; and KwaZulu-Natal – KZN245 – uMvoti – Ward 52405002. GenN1855 *GG*48757/7-6-2023.

Municipal By-Elections – 28 June 2023: Official list of voting stations: Various wards. GenN1863 *GG*48773/9-6-2023.

National Environmental Management Act 107 of 1998 and National Environmental Management: Biodiversity Act 10 of 2004

Extension of the period for establishment of the Ministerial Task Team to identify and recommend voluntary exit options and pathways for the captive lion industry by a further period of six months from 1 July – 31 December 2023. GN3536 *GG*48783/13-6-2023.

Quantity Surveying Profession Act 49 of 2000

Appointed the new sixth term council for the South African Council for the Quantity Surveying Profession. BN446 *GG*48696/2-6-2023.

Special Investigating Units and Special Tribunals Act 74 of 1996

Referral of matters to existing Special Investigating Unit and Special Tribunal: Umgeni Water Board. Proc R122 *GG*48693/2-6-2023.

Referral of matters to existing Special Investigating Unit: Free State Office of the Premier. Proc R123 *GG*48754/9-6-2023.

Tax Administration Act 28 of 2011

Returns to be submitted by a person in terms of s 25 of the Act. GN3540 *GG*48788/14-6-2023.

Tourism Act 3 of 2014

Appointment of a representative of the Department of Tourism to the South African Tourism Board. GenN1851 *GG*48744/5-6-2023.

Designation of the Tourism Complaints Officer. GenN1852 *GG*48745/5-6-2023.

Rules, regulations, fees and amounts

Agricultural Product Standards Act 119 of 1990

Regulations regarding control of the export of fresh vegetables. GN R3478 *GG*48693/2-6-2023.

Regulations regarding control of the export of grains. GN R3479 *GG*48693/2-6-2023.

Regulations regarding control of the export of animal products. GN R3481 *GG*48693/2-6-2023.

Regulations regarding control of the export of fresh fruits. GN R3482 *GG*48693/2-6-2023.

Regulations regarding control of the export of processed products. GN R3483 *GG*48693/2-6-2023.

Regulations regarding control of the tree nuts. GN R3484 *GG*48693/2-6-2023.

Regulations regarding control of the export of feed products. GN R3506 *GG*48754/9-6-2023.

Allied Health Professions Act 63 of 1982

Annual fees, deregistration, new registration and restoration of Allied Health Professions Council of South Africa practitioners/therapists. BN447 *GG*48758/9-6-2023.

Audit Professions Act 26 of 2005

Fees on assurance engagements payable to the IRBA with effect from 1 June 2023. BN448 *GG*48758/9-6-2023.

Maximum monetary fines in terms of the Act. GN3549 *GG*48790/15-6-2023.

Customs and Excise Act 91 of 1964

Amendment of rules (DAR 246). GN R3473 *GG*48669/29-5-2023.

Financial Markets Act 19 of 2012

Approved amendments to the Johannesburg Stock Exchange (JSE) debt listing requirements: Annual Improvement Project. BN449 *GG*48790/15-6-2023.

Approved amendments to the JSE listing requirements: Financial reporting disclosures; weighted voting shares; free float assessment and special purpose acquisition companies. BN450 *GG*48790/15-6-2023.

Genetically Modified Organisms Act 15 of 1997

Regulations: Amendments. GN3486 *GG*48696/2-6-2023.

Health Professions Act 56 of 1974

Regulations defining the scope of the processions of clinical technology. GN3510 *GG*48758/9-6-2023.

International Trade Administration Act 71 of 2002

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. GN R3552 *GG*48791/15-6-2023.

International Trade Administration Commission of South Africa: Anti-Dumping Regulations GenN1847 *GG*48696/2-6-2023.

Liquor Products Act 60 of 1989

Repeal of Amendments to the Wine of Origin Scheme Regulations published in terms of s 27 of the Act on 8 and 15 July 2022 in GN R2247 *GG*46681/8-7-2022 and GN R2277 *GG*47015/15-7-2022. GN3542 *GG*48790/15-6-2023.

Local Government: Municipal Structures Act 117 of 1998

Code of Conduct for Councillors Regulations. GN3538 *GG*48786/14-6-2023.

Local Government: Municipal Systems Act 32 of 2000

Upper limits of total remuneration packages payable to municipal managers and managers directly accountable to municipal managers. GN3541 *GG*48789/14-6-2023.

Merchant Shipping (International Oil Pollution Compensation Fund) Contributions Act 36 of 2013

Determination of rate of levy for 2019, 2020 and 2021 tax period and payment date in terms of s 3 of the Act. GN3530 *GG*48761/7-6-2023.

National Environmental Management Act 107 of 1998

Extension of the commencement date of the regulations to domesticate the requirements of the Rotterdam Convention on the prior informed consent procedure for certain hazardous chemicals and pesticides in international trade, 2023. GN3505 *GG*48751/6-6-2023.

Petroleum Products Act 120 of 1977

Maximum retail price for liquefied petroleum gas. GN R3502 *GG*48749/6-6-2023.

Amendment of the regulations in respect of petroleum products. GN R3503 *GG*48749/6-6-2023.

Regulations in respect of the single maximum national retail price for illuminating paraffin. GN R3504 *GG*48749/6-6-2023.

Public Finance Management Act 1 of 1999

Statement of the national government revenue and expenditure as at 30 April 2023 issued by the Director-General of National Treasury. GenN1844 *GG*48675/30-5-2023.

Social Service Professions Act 110 of 1978

Fees payable by social workers, child and youth care workers, social auxiliary workers, auxiliary child and youth care workers, student social workers, student social auxiliary workers, student child and youth care workers and student auxiliary child and youth care workers amendment regulations. GN R3485 *GG*48693/2-6-2023.

South African Citizenship Act 88 of 1995
Amendment Regulations on the Act. GN3535 *GG*48777/12-6-2023.
Statistics South Africa
Consumer Price Index: April 2023. GenN1857 *GG*48758/9-6-2023.

Legislation for comment

Agricultural Product Standards Act 119 of 1990
Draft regulations relating to the grading, packing and marking of dried fruit intended for sale in South Africa. GN R3480 *GG*48693/2-6-2023.
Compensation for Occupational Injuries and Diseases Act 130 of 1993
Publication of the Draft Rehabilitation, Reintegration and Return-to-Work Regulations for comment. GN R3539 *GG*48787/15-6-2023.
Competition Act 89 of 1998
South African Petroleum Industry Association granted conditional exemption. GN3529 *GG*48758/9-6-2023.
Draft Policy on Women in Sport
Public notice for making submissions in relation to the Draft Policy on Women and Sport. GenN1856 *GG*48758/9-6-2023.
Electronic Communications Act 36 of 2005
Application for the Transfer of Ownership of the Individual Commercial Sound Broadcasting Service and Radio Frequency Spectrum Licences by Extriserve (Pty) Ltd to Mediadynamix (Pty) Ltd. GenN1864 *GG*48774/9-6-2023.
Firearms Control Act 60 of 2000
Notice in terms of s 136(1) of the Act. GN3477 *GG*48682/1-6-2023.
Health Professions Act 56 of 1974
Rules relating to fees payable to the Council: Amendment. BN444 *GG*48696/2-6-2023.
Independent Communications Authority of South Africa
Notice to extend the closing date in respect of the discussion document on the review of the regulations on the Conveyance of Mail, 2009. GN3531 *GG*48762/8-6-2023.
Local Government: Municipal Property Rates Amendment Act 29 of 2014
Appointment of members of the Valuation Appeal Boards for City of Johannesburg, Mogale City, Midvaal and Lesedi Local Municipalities. GenN1845 *GG*48678/31-5-2023.
Marketing of Agricultural Products Act 47 of 1996
Invitation to directly affected groups in the pecan nut industry to comment on the request from the South African Pecan Nut Producers' Association. GenN1846 *GG*48696/2-6-2023.
Mineral and Petroleum Resources Development Act 28 of 2002
Notification regarding the opportunity to participate in the Environmental Authorisation Application process for the proposed Africa Oil SA Corp Block 3B/4B Offshore Exploration. GenN1867 *GG*48790/15-6-2023.
National Environmental Management: Biodiversity Act 10 of 2004
Draft Shark Biodiversity Management Plan. GN3488 *GG*48696/2-6-2023.
National Qualifications Framework Act 67 of 2008
Call for comments on the proposed occupational qualifications for registration on the Occupational Qualifications Sub-Framework for Trades and Occupations. GN3475 *GG*48674/30-5-2023.
National Water Act 36 of 1998
Proposal for establishment of the Lower Mfolozi Water User Association. GN3476 *GG*48676/30-5-2023.
Nursing Act 33 of 2005
Regulations relating to the conditions under which a registered person may practice as a private practitioner. GN3489 *GG*48696/2-6-2023.
Tourism Act 3 of 2014
Invitation to nominate candidates to serve as members of South African Tourism Board. GenN1859 *GG*48759/7-6-2023.

Shanay Sewbalas and Keagan Smith are Editors: National Legislation at LexisNexis South Africa. ❑

Employment law update

By Monique Jefferson

Resignation in the face of disciplinary action

In *South African Medical Association Trade Union obo Rikhotso v MEC: Department of Health, Limpopo Province and Others* [2023] 6 BLLR 575 (LC) an employee who was employed as a medical doctor resigned in the midst of facing disciplinary action. A disciplinary inquiry had been convened, which related to a charge that he had incited other employees to participate in an unprotected strike. The disciplinary inquiry commenced on 28 June 2022 and was concluded on 30 August 2022. While awaiting the outcome of the disciplinary inquiry the employee resigned and accepted a position at another hospital. On 1 November 2022, he resigned subject to his 30-day notice period. His employment would accordingly terminate at the end of the notice period on 30 November 2022. On 18 November 2022, the employee was advised that he had been found guilty of the charge against him and that the sanction was dismissal. On 25 November 2022, the employee appealed this decision. He was advised that the record of dismissal on the PERSAL system would be reversed pending the outcome of the appeal process. He was also informed that his removal from payroll would be revoked, and his notice period would be extended pending the outcome of the appeal. He was then instructed to continue rendering his services until the outcome of the appeal.

The appeal was unsuccessful, and the dismissal was upheld. The employee then approached the Labour Court (LC) on an urgent basis seeking an order that the extension of the notice period was unlawful. He also sought an order that the employer be directed to remove his name from its PERSAL system and to have the dismissal record expunged from his personnel file and for the records to instead reflect that the termination of his employment was by virtue of his resignation.

The LC found that it had jurisdiction to determine this dispute by virtue of s 77(3) of the Basic Conditions of Employment Act 75 of 1997 as the dispute concerned a contract of employment.

As regards the unilateral extension of the notice period by the employer, it was held that a resignation is a unilateral act that does not require acceptance by the employer. It is, therefore, not possible for an employer to unilaterally extend the notice period as the notice period is determined by the contract or statute and the employment relationship terminates at the end of the notice period. It was accordingly held that the extension of the notice period was unlawful as there was no legal basis for the employer to extend the notice period.

The LC then also considered whether there was any basis to grant an order that the employer must expunge the record of dismissal from its records and found that there was no basis in law for this. The basis of the employee's argument in this regard was that although he was issued with the sanction of dismissal during his notice period this sanction did not stand at the time of the termination of his employment as he had appealed the sanction. It was held by the LC that it is a well-established principle that an employer may still summarily dismiss employees during their notice period. It was found that the employee had confused the existence of the dismissal with the implementation of the sanction. In this regard, the appeal against the sanction simply delayed the implementation of the sanction but it did not have the effect of expunging the sanction from the personnel records. It was found that during an appeal process the sanction remains on record, but the implementation is suspended until the outcome of the appeal and the sanction would only be expunged from the employee's record if the appeal is in fact upheld. It was held that the employee was dismissed during the notice period and, therefore, the dismissal terminated the employment contract. It was found that the order that the employee was seeking was an attempt to conceal the dismissal. While the employer had unlawfully extended the contract until the appeal was concluded this did not change the fact that the employer had summarily dismissed the employee during the notice period.

The application was dismissed with costs on the basis that costs should follow the result, save for in exceptional circumstances.

Double jeopardy in disciplinary proceedings

In *South African Municipal Workers Union obo Malatsi v South African Local Government Bargaining Council* [2023] 6 BLLR 581 (LC) the employee alleged that the double jeopardy rule applied to a second hearing that was based on the same facts but for which he was charged with a different charge.

In this case, the employee was employed as an accountant and was dismissed following a forensic investigation where it had been discovered that his computer had been used to access the employer municipality's bank account. This was not permissible and had exposed the employer to a loss of approximately R 10 million. The employee was charged with failure to conduct himself with honesty and integrity in that he attempted to access the employer's bank account on 11 occasions on eight different dates. The alternative charge was fraud. The employee was found guilty of misconduct and dismissed.

At the arbitration the employee argued that there was a culture of teamwork in which computers and passwords were generally shared and known. The arbitrator found that although the employee had acted irresponsibly it was possible that somebody else had used the computer and password and, therefore, reinstatement was ordered with backpay on the basis that dismissal had been too harsh in the circumstances. The municipality took the arbitrator's decision on review to the Labour Court (LC) but the review application was dismissed. The employee was then reinstated, and the municipality convened another disciplinary hearing in respect of the employee. This second hearing related to the same incidents but this time the employee was charged with different charges. In this regard, there were two charges of misconduct. The first charge was gross dishonesty in that the employee acted dishonestly with the intention to deceive the municipality by sharing his own computer-created password with other employees, whereby his computer was used for fraudulent activities. The second charge was breach of the IT policy by sharing

passwords with other employees, which resulted in the employee's computer being used to do fraudulent activities. The employee was found guilty of the latter charge and was dismissed.

The employee referred an unfair dismissal dispute and argued that he was subject to double jeopardy. The arbitrator did not agree with this and found that the dismissal was fair on the basis that the conduct had caused a breakdown in the trust relationship.

On review the LC considered the principle of double jeopardy, which derived from criminal law. In essence it prevents a person from being tried twice for the same offence. This principle has also been adopted in the employment context whereby the general principle is that if the employer has imposed a sanction, the matter may not be re-opened to allow the employer to revisit the sanction and impose a harsher sanction. The LC, however, noted that this principle is subject to certain qualifications and reservations. In this regard, the courts have adopted an approach that if an employee has already been disciplined for an offence, it does not automatically mean that the employer is prohibited from holding another disciplinary hearing and imposing a harsher sanction. This depends on the circumstances and a second hearing may be permissible if it is in the interests of fairness or if new information has come to light that was not known during the first hearing. Therefore, each case must be determined on its own merits after considering the surrounding circumstances and determining what would be fair to both parties in the circumstances.

It was held that the double jeopardy rule did not apply to this case because in the first hearing there was no issue of sharing passwords. The second hearing had different charges, which related to the sharing of the passwords, which only came to light after the first hearing. Therefore, the first hearing did not relate to password-related misconduct. It was also found that there was no basis for the employee's argument that his dismissal was unfair because the dismissal had been found to be unfair during the first arbitration as the second arbitration was a new hearing. Therefore, the application was dismissed.

As regards costs, it was held that the union should pay the costs as the claim had been opportunistic and the claim was based on a meritless interpretation of the double jeopardy rule.

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By Moksha Naidoo

The Minister 'lifts' her obligation to hold a disciplinary inquiry against a senior employee

Letsholonyane v Minister of Human Settlements and Another (LC) (unreported case no J616/23, 15-5-2023) (Makhura AJ)

By virtue of her position as a Deputy Director General: Corporate Services, the Senior Management Service Handbook (SMS Handbook), which sets out the disciplinary procedure the employer must follow should it decide to institute disciplinary proceedings against a senior employee; applied to the applicant employee.

The Minister of Human Settlements was stuck in a lift for just over an hour in a government building. The Minister, thereafter, afforded the employee an opportunity to offer reasons why she should not be summarily dismissed for five counts of related gross negligence and/or misconduct, all emanating from the Minister's ordeal in the lift. In her response the employee denied the allegations and took the view that her response would be better served at an internal disciplinary inquiry.

A month later, the Minister placed the employee on precautionary suspension, pending 'the finalisation of the matter'.

A few days thereafter, the Minister issued the employee a letter of dismissal. This in turn prompted the employee to approach the Labour Court on an urgent basis seeking an order that the Minister unlawfully breached her contract of employment and to restore the employment relationship pending the employer complying with the SMS Handbook should it wish to discipline her.

The employee's application was a contractual claim brought under s 77(3) read with s 77A(*e*) of the Basic Conditions of Employment Act 75 of 1997.

The Minister raised two preliminary points, first that the court did not have jurisdiction to hear the matter and second was that the matter was not urgent.

The Minister relied on three judgments to argue the court lacked jurisdiction (*Singhala v Ernst & Young Inc and Another* (2019) 40 ILJ 1083 (LC), *Steenkamp and Others v Edcon Ltd (National Union of Metalworkers of SA Intervening)* (2016) 37 ILJ 564 (CC) and *Mohlala-Mulaudzi v Property Practitioners Regulatory Authority and Another* (LC) (unreported case no J68/23, 13-2-2023) (Moshoana J)).

The court, however, found that the first two authorities cited, were materially different from the facts before it in that both matters referred to, did not deal with a contractual claim but rather a claim that the employer breached the provisions of the Labour Relations Act 66 of 1995 (LRA).

In respect of the third judgment, and while acknowledging the applicant in that matter referred a contractual dispute alleging a breach of contract – the court found that the applicant's true claim was based on an unfair dismissal under the regime of the LRA and dismissed the application. Thus, the judgment was no authority that the court lacked jurisdiction, as alleged by the Minister.

Turning to the issue of urgency, the court found that the facts relied on by the applicant, satisfied the test for urgency.

In dispensing with the preliminary points, the question before the court, thereafter, was whether the dismissal complied to the binding procedure set out in the SMS Handbook.

The court examined the following clauses in the SMS Handbook.

Clause 1.1 states:

'The chapter contains the procedures that must be applied in cases of misconduct … of members of the SMS … . As regard misconduct, PSCBC Resolution 1 of 2003 envisages the issuing of a directive … to cover the disciplinary matters of the SMS. The procedures for misconduct in paragraph 2 below incorporates (*sic*) those provisions of the PSCBC Resolution 1 of 2003, which were considered appropriate and practicable in respect of members of the SMS.'

Going further, the court referred to:

'Clause 2 of Chapter 7 of the SMS Handbook deals with the disciplinary code and procedures. If the alleged misconduct warrants a more serious disciplinary action than counselling or warning (ie, for serious misconduct that may lead to dismissal), clause 2.6(1) provides that the Department "may initiate a disciplinary hearing", and must appoint an initiator. Clause 2.7(a) obligates the Department to issue a notice of disciplinary hearing at least 5 days before the hearing.

Clause 2.7(2)(c) provides as follows:

"If a member is suspended or transferred as a precautionary measure, the employer must hold a disciplinary hearing within 60 days … ."'

Referring to binding authority, the court reiterated the fact that the SMS Handbook was considered subordinate legislation and, therefore, binding on both employer and employee.

Having assessed the facts, the court held:

'Did the Minister apply the procedure set out in Chapter 7? The answer is in the negative. The Minister considered the allegations against the applicant to be serious. She was obliged to institute a disciplinary hearing as provided for in clause 2.7 of the SMS Handbook. Considered with the other provisions, including clause 1.1 referred to above and clause 2.1(g), which sets out the purpose to be prevention of arbitrary actions from supervisors, clause 2.6(1) of the SMS Handbook does not, in my view, make the institution of a formal disciplinary hearing optional or discretionary. Further, clause 2.7(5) provides that for less serious forms of misconduct, no formal inquiry shall be held, which clearly suggests that for serious misconduct, a formal inquiry is necessary. There is no alternative procedure for misconduct cases in the Handbook, such as the one followed by the Minister.'

Moreover, the court noted that in terms of clause 2.7(4)(a) of the SMS Handbook, it is only a chairperson who has the authority to hand down a sanction having found an employee guilty of an offence. In this case, the Minister unduly usurped such power and took the decision by herself to dismiss the employee.

The court granted the orders with costs.

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By Kathleen Kriel

Abbreviation	Title	Publisher	Volume/issue
LitNet	LitNet Akademies (Regte)	Trust vir Afrikaanse Onderwys	(2023) 20(1)
Obiter	Obiter	Nelson Mandela University	(2023) 44.1
PER	Potchefstroom Electronic Law Journal	North West University, Faculty of Law	(2022) 25 (2023) 26
PLD	Property Law Digest	LexisNexis	(2022) 26.3 (2022) 26.4 (2023) 27.1

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By
Phindile
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What must a guilty plea entail?

A guilty plea is meant to obviate the need for the state to adduce evidence to prove the guilt of the accused. The accused accepts that their conduct complies with the definitional elements of the charge(s) preferred against them. In terms of s 112(2) of the Criminal Procedure Act 51 of 1977, the accused who pleads guilty to the charge(s) is required to set-out the 'facts which he admits and on which he has pleaded guilty.' The accused need not set-out the conclusions of the law but facts from which the court would come to a legal conclusion of guilty. It is, therefore, not necessary for the accused to recite the definitional elements of the offence with which they are charged in their plea statement.

In *Mkhize v S* (KZP) (unreported case no AR365/21, 3-2-2023) (Chetty J (Ploos van Amstel J concurring)) the High Court failed to appreciate this trite proposition. The accused was charged with murder in terms of s 51(1) read with part 1 of schedule 2 of the Criminal Law Amendment Act 105 of 1997. At his trial, the accused pleaded guilty and the court *a quo* found him guilty as charged based on his plea. Events leading to the commission of the offence were that the accused and the deceased were involved in a romantic relationship. On 4 August 2019, the deceased informed the accused that she was visiting her mother and that she would be spending the weekend with her. The appellant discovered that this was not the case (para 4). On her return home the following morning the appellant confronted the deceased about her lies. The deceased confirmed that she had visited another man. On hearing this, the appellant's plea of guilty states he:

'… became enraged at the deceased's admission that she was seeing another man under the pretext of visiting her mother. He grabbed hold of a knife in the house and stabbed the deceased repeatedly. She attempted to flee without success' (para 5).

The appellant appealed his conviction on the basis that in his plea explanation he had not admitted that he had the necessary intention to kill the deceased and that his conduct was unlawful. In upholding his appeal, the court said:

'Although the appellant admitted to having stabbed the deceased repeatedly and that she died as a result of the wounds inflicted, these do not constitute facts from which the court *a quo* could have justifiably drawn the conclusion that the appellant had the necessary intention to kill the deceased' (para 6).

This conclusion is mindboggling. It is trite that the accused who pleads guilty to the charge of murder need not expressly state that they had the intention to kill. Intention as understood in law is a term of art, it encompasses more than the so-called 'colourless intention'. Intention entails the cognitive and the conative elements (CR Snyman *Criminal Law* (Durban: LexisNexis 2014) at 176). From the plea statement, there is nothing to suggest that the two elements were not satisfied. For example, on learning of the deceased's infidelity the appellant became angry and took the knife and repeatedly stabbed the deceased. It is clear from this statement that the conduct of the appellant was voluntary and goal oriented. The appellant did not claim the presence of any ground of justification. It is inconceivable that the usage of the word 'grabbed' in the plea explanation could have meant anything other than that when the appellant took a knife, he intended to stab the accused, an act that is unlawful. There is nothing in the judgment that suggests that the appellant did not fully admit the definitional elements of the crime of murder (perhaps the shortcoming of the plea statement is that it does not admit to premeditation, something, which was not the court's concern).

The court held that it is improper for the court to draw inferences from the admitted facts (para 8). If by the drawing of inferences, the court meant that the court convicting on the plea of guilty should not rely on circumstantial evidence then the court was correct. However, if the court meant that the court could not draw legal conclusions from the facts as presented in the plea of guilty then the court is wrong. The court must be satisfied that the facts contained in the plea of guilty establishes the offence with which the accused is charged. Conclusions whether the accused had intention or not are for the court to determine from the stated facts. For the accused to say he had intention is a conclusion of law, which is reserved for the court, and in fact is superfluous. The reasoning of the court seems to suggest that the elements of the offence such as unlawful conduct and intention must be expressly stated in the plea of guilty (para 8). However, this is not the position in our law. At the risk of repetition, the question whether the accused who pleads guilty has intention or not is the question that the court and the court alone must decide based on the state facts. Whether the word's intention is included in the plea of guilty or not is immaterial. As Snyman puts it '[t]here is no rule to the effect that a court may find that X acted with intention only if he (X) admitted that he had intention' (Snyman (*op cit*) at 185). There is nothing in the portion of the plea of guilty statement that points to a conduct that indicates that the appellant might not have acted with intention, at the very least *dolus eventualis*. To conclude otherwise would compel courts dealing with guilty pleas to put legal questions to accused persons, something not envisaged by the Act. That the accused states that they had intention in his plea of guilty does not absolve the court from scrutinising the alleged facts to satisfy itself that indeed the accused had the requisite intention. Therefore, the court was wrong in concluding that the accused plea of guilty statement was deficient.

Phindile Raymond Msaule *LLB LLM (NWU)* is a lecturer at the University of Limpopo.

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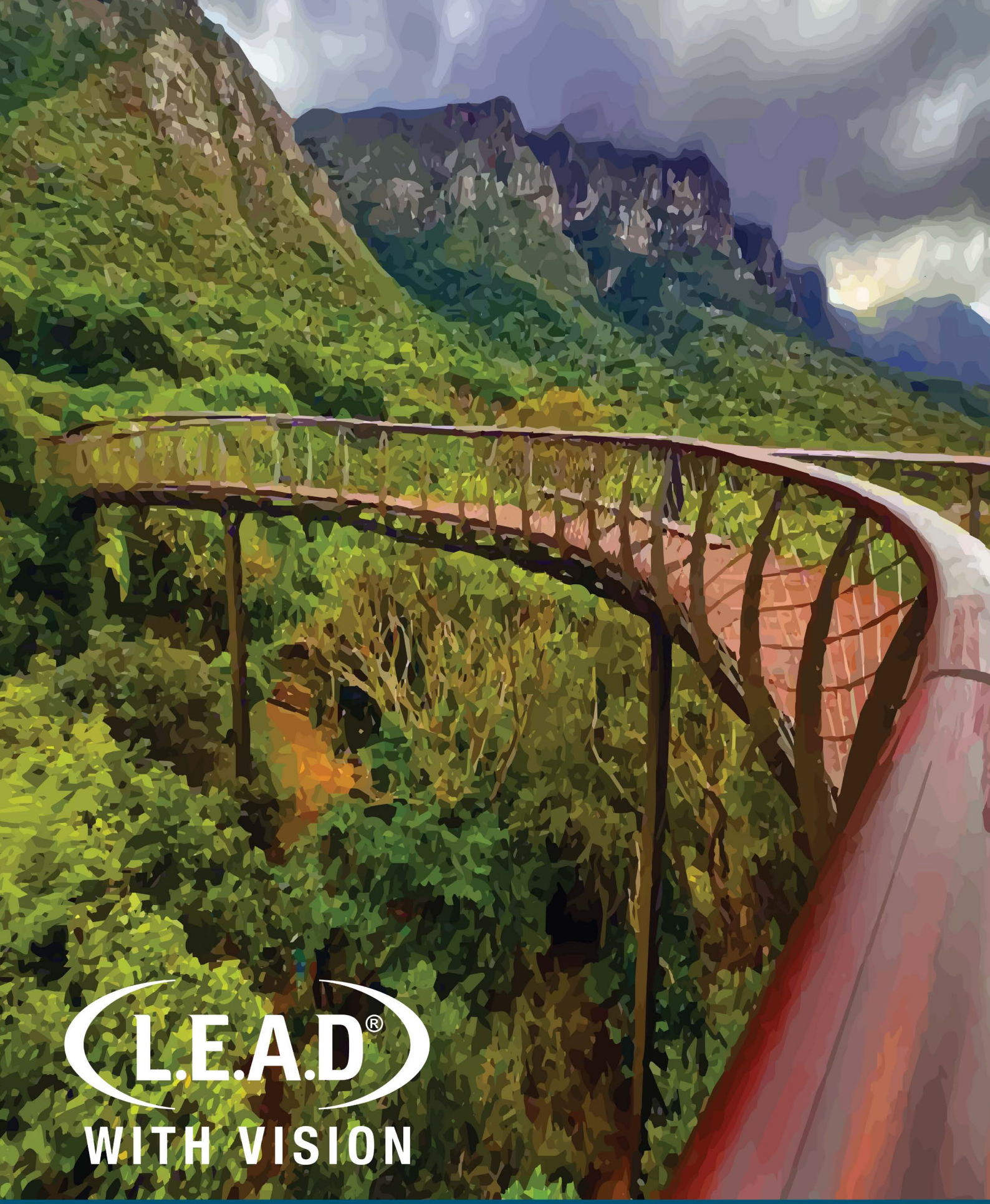

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