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DE REBUS

THE SA ATTORNEYS' JOURNAL

SEPTEMBER 2023

DO LEGAL PRACTITIONERS TRULY UNDERSTAND THE DANGER OF CHATGPT?

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The law is a tool to change society in one way or the other

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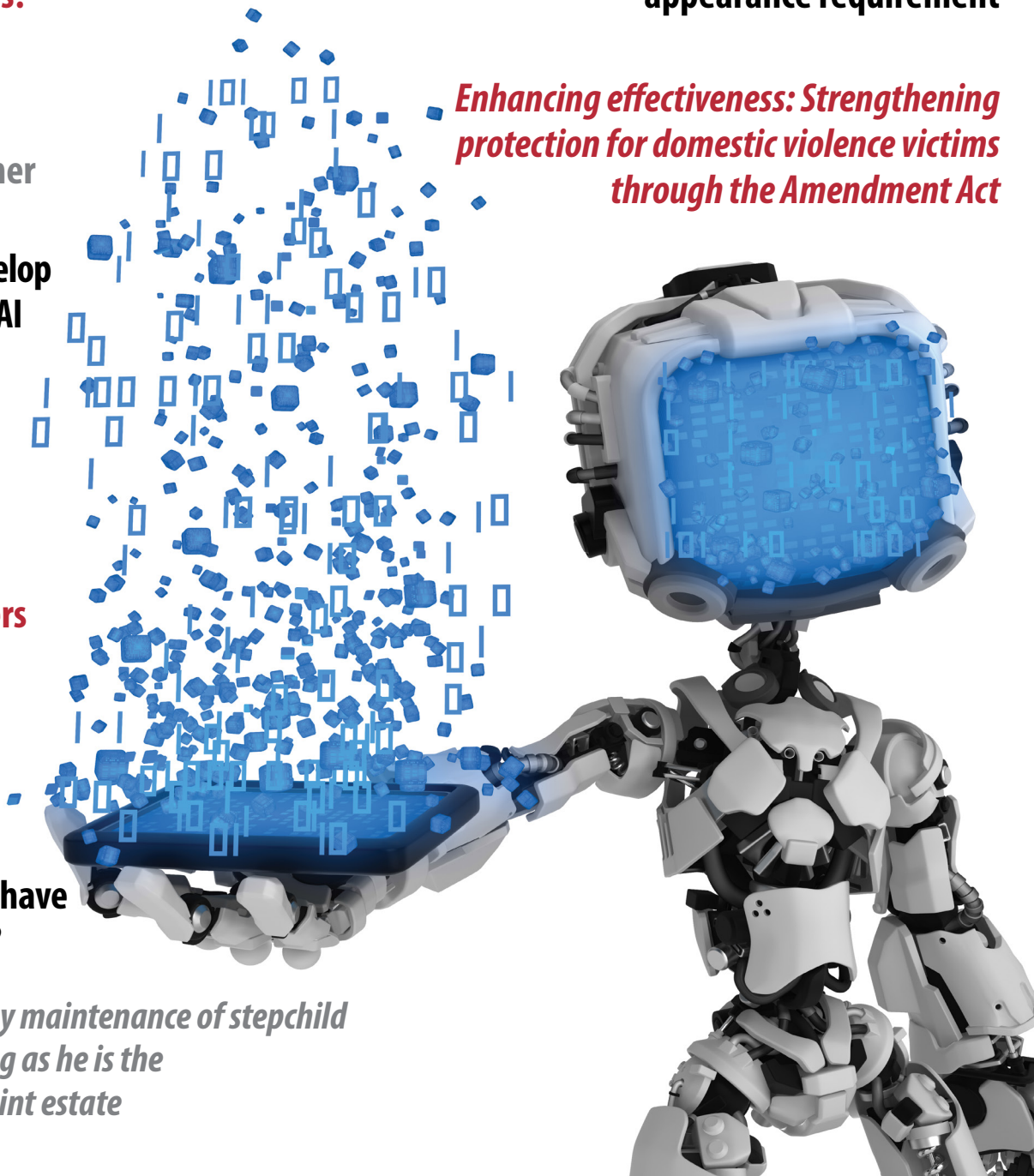
Law firms should develop policies on the use of AI



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14 Do legal practitioners truly understand the danger of ChatGPT?

ChatGPT stands as a notable innovation created by OpenAI, and OpenAI foresees the use of ChatGPT by legal professionals. Legal advisor, **Marciano Van Der Merwe**, writes that when the user is in the legal profession, they need to utilise a disclaimer. This disclaimer should communicate the use of artificial intelligence (AI) and its associated constraints. Mr Van Der Merwe also notes that the tool may pose a danger to the learning and development of junior legal practitioners. Practitioners who solely depend on AI may also hinder their learning and growth by only knowing what the final content looks like without comprehending the underlying reasons. Some additional potential risks include, among others, OpenAI does not guarantee the precision of the generated information and a privacy concern if confidential information is revealed while using ChatGPT.

Regular columns

FEATURES

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

PRODUCTION EDITOR:
Kathleen Kriel
BTech (Journ) (TUT)

SUB-EDITOR:
Kevin O' Reilly
MA (NMU)

SUB-EDITOR:
Isabel Joubert
BIS Publishing (Hons) (UP)

NEWS REPORTER:
Kgomotso Ramotsho
Cert Journ (Boston)
Cert Photography (Vega)

EDITORIAL SECRETARY:
Shireen Mahomed

EDITORIAL COMMITTEE:
Michelle Beatson, Peter Horn,
Mohamed Randera, Wenzile Zama

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

***DE REBUS* ONLINE:** www.derebus.org.za

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

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

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Rendering of community service by candidate legal practitioners and practising legal practitioners

On 11 August 2023, the Minister of Justice and Correctional Services, Ronald Lamola, published the amendment of Regulations made under s 94(1) concerning the rendering of community service by practising legal practitioners and candidate legal practitioners in GN R3788 *GG*49104/11-8-2023. The Regulations came into operation on 11 August 2023 and the following questions , among other, have been addressed:

What is regarded as community service?

The Legal Practice Act 28 of 2014 (the LPA) does not offer a definition for community service. However, s 29(2) contains a non-exhaustive list of services that may include community service, including –

- service in the state;
- service at the South African Human Rights Commission (SAHRC); and
- the provision of legal education and training on behalf of the Legal Practice Council (LPC), or on behalf of an academic institution or non-governmental organisation (NGO).

Services, without remuneration, by legal practitioners as judicial officers and small claims court commissioners also qualify as community service. Provision is also made for any other service, which the candidate legal practitioner or the legal practitioner may want to perform, with the approval of the Minister.

Community service as defined under the Regulations

The Regulations define community service, in relation to candidate legal practitioners, as free legal services rendered through structures referred to under s 29(2) of the LPA, for example: The state, the SAHRC, LPC, academic institutions and NGOs.

Community service, for purposes of the Regulations, includes the provision of legal services at no fee or at a reduced fee to –

- individuals, groups, or organisations seeking to secure or protect civil rights, civil liberties, or public rights; or
- charitable, religious, civic, community and educational organisations in matters, in furtherance of the organisational purposes, where the payment of standard legal fees would cause hardship.

Pro bono services, for purposes of the Regulations, are legal services 'at no fee or expectation of compensation from the client, and principally to benefit poor, underprivileged or marginalised persons or communities or the organisations that assist them.'

The definition of community service for practising legal practitioner mirrors the above definition applicable to candidate legal practitioners.

Does community service include *pro bono* legal services?

Yes, although the LPA makes no reference to *pro bono* legal services. The Law Society of South Africa has advocated that community service should include *pro bono* legal services.

The Regulations now define '*pro bono* services' and specifically states that any *pro bono* services rendered by a candidate and practising legal practitioner 'will be recognised as community service'.

Is community service compulsory?

Section 29(1) empowers the Minister to prescribe the 'requirements for community service' which may include, with reference to a candidate legal practitioner, 'community service as a component of practical vocational training' and, with reference to a practising legal practitioner, a minimum period of community service as a prerequisite for continued enrolment.

The Regulations make it compulsory to render community service. Candidate legal practitioners must render at least eight hours of community service per annum and practising legal practitioners, at least 40 hours.

Supervision of candidate legal practitioners

Candidate attorneys must be supervised by their principal while pupils must be supervised by the engaging advocate. The principal and engaging advocate are allowed to direct someone to do the supervision.

The legal practitioner's time spent on –

- providing supervision to a candidate legal practitioner who is rendering community service is attributable to community service; and
- presenting lectures or training to candidate legal practitioners at no charge and with no remuneration is regarded as community service.

Important aspects to keep in mind:

- **Practitioner versus practice:** The regulations compel a practising legal practitioner to render community service for at least 40 hours per annum. This obligation is not imposed on the legal practice as a collective. This means that the legal practitioner cannot, in our understanding, shift this responsibility to another legal practitioner or candidate legal practitioner within the firm.
- **Allocation of community service:** It is imperative for legal practitioners to initiate the rendering of such community service to allow enough time to complete the required minimum hours before the annual date of submission of certificates, which will be determined by the LPC. The obligation to render community service is not subject to a legal practitioner obtaining an instruction from the LPC or any other institution to render such community service to an individual, organisation or community.
- **Recipients of community service:** The legal practitioner must ensure that the recipients of the community service sign a certificate that substantially correspond with the form published under the Regulations.
- **Means test:** The Regulations do not require the implementation of a means test. The ostensible benchmark with reference to –
  - community service is where the 'payment of standard legal fees would cause hardship'; and
  - *pro bono* services is that it must principally benefit poor, underprivileged or marginalised persons or communities or the organisations that assist them.
- **Reduced fees:** Legal services rendered at a reduced fee to recipients of community service will also qualify for community service.

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

By Kevin O'Reilly

LSSA Legal Aid, *Pro Bono* and Small Claims Court Committee meeting

The Law Society of South Africa's (LSSA) Legal Aid, *Pro Bono* and Small Claims Court Committee (the Committee) met on 18 July 2023 to consider a range of issues related to its area of expertise. Some of the issues considered were:

South African Law Reform Commission Discussion Paper

The South African Law Reform Commission Discussion Paper: Project 142: Investigation into Legal Fees – Including Access to Justice and Other Interventions was released in March 2022. Although the report was not published for comment, the LSSA submitted comments to the Minister of Justice and Correctional Services. On 1 April 2023, the LSSA sent a follow-up letter to the minister, but no response has been received. The Committee decided to conduct an additional follow-up.

Legal Practice Council – *pro bono* legal assistance

While the responsibility for regulating *pro bono* services lies with the Legal Practice Council, the LSSA is invested in monitoring grassroots activities and deems it crucial to encourage the promotion of *pro bono* services. The Committee, therefore, considered the possibility of incentivising legal practitioners to engage in *pro bono* work and to give back to their communities.

The Committee considered a recognition award at the end of the year that acknowledges various categories of *pro bono* work performed by individuals. This could include awards for those who surpass their *pro bono* obligations or a certificate of recognition for individuals who engage in *pro bono* work, which serves as a testament to their dedication to serving the poor. Alternatively, a ceremony akin to the Deputy Minister's Small Claims Court Commissioners' Long Service Awards could be held.

The Committee observed that many clients face financial constraints due to the country's economic situation and are unable to afford private legal assistance, especially in the High Court, thus impacting their access to justice. As a result, many practitioners already engage in matters that end up as *pro bono* work but lack a proper recording system to track these efforts. Therefore, a significant amount of *pro bono* work remains unrecorded. To address the issue, the Committee considered the possibility of a programme in which practitioners could register cases explicitly designated as *pro bono* matters.

The Committee also proposed the idea of logging *pro bono* hours and being able to use those hours to attend Legal Education and Development (LEAD) courses.

Sheriffs

The Committee noted with concern the lack of Sheriffs in certain jurisdictions and, therefore, proposed broadening the scope of engagement between the LSSA and the Board for Sheriffs beyond the discussion of fees. It was noted that some of these issues fall outside the jurisdiction of the Board of Sheriffs and are under the purview of the Department of Justice, such as the appointment of Sheriffs, therefore, the Committee suggested inviting a representative from the Department of Justice to attend the next meeting. This would enable any concerns about the appointment of Sheriffs to be raised and noted during the meeting, and the representative could relay these concerns to the Department of Justice. A proposal was made to gather all Sheriff related concerns from the provincial associations for discussion at the next meeting.

Juristic persons in small claims courts

The Committee explored the possibility of advocating for the extension of the jurisdiction of the small claims courts to include small, medium, and micro enterprises. The Committee identified this matter as a priority for further attention at their next meeting.

Community service

The regulations regarding legal practitioners rendering community service received approval from both houses of Parliament. The Committee noted that the minister has not yet publish them in the *Gazette*.

Seminars and workshops

The Committee identified local government law and by-laws as potential subjects for training that LEAD could provide. It also identified potential seminars for individuals interested in becoming commissioners of the small claims courts, along with a workshop focused on potential amendments of the Small Claims Courts Act 61 of 1984 to improve the functioning of small claims courts.

Kevin O'Reilly *MA (NMU)* is a sub-editor at *De Rebus*. ❑

Social justice discussed at BLA NGM

By Kathleen Kriel

The Black Lawyers Association (BLA) held its National General Meeting (NGM) on 26 and 27 May 2023 in Bloemfontein. A closed session was held on 26 May and guests and delegates were invited to attend the open session on 27 May 2023. At the NGM, the former Deputy President of the BLA, Judge Mabaeng Denise Lenyai welcomed guests to the NGM, which was held under the theme: 'The past, the present and future: Law as a tool for social justice in a developmental state'.

Judge Lenyai said the theme was relevant as legal practitioners continue to confront the full range of human rights challenges, which are facing South Africa's (SA's) developmental democracy. Judge Lenyai gave examples of basic human rights, that are challenges, such as the cholera outbreak in Hammanskraal.

Judge Lenyai added that legal practitioners need to use their positions to campaign for social justice and create impactful solutions for the future. She said that the BLA, as the transforming voice of the voiceless, must use its knowledge capital and networks of business and civic organisations to forge collaborations for the advancement of equality, equity, and justice.

Judge Lenyai also thanked the delegates for their hard work to promote access to justice. 'Your contributions and participation will further grow the BLA into a formidable organisation that represents the legal sector and communities at large,' she said.

Judge Lenyai also used the opportunity to thank everyone for their support, guidance, and lessons over the years, as well as the nomination to the Judicial Service Commission. She noted that it would be her last NGM as the Deputy President of the BLA as she had been appointed to the Bench. 'I am worthy because of your belief in my capability. … The BLA will hold a special place in my heart. I know it will grow from strength to strength in advancing the interest of black lawyers and transforming the legal sector,' Judge Lenyai concluded.

Former Deputy President of the Black Lawyers Association (BLA), Judge Mabaeng Denise Lenyai welcomed guests to the BLA's national general meeting, which was held under the theme: 'The past, the present and future: Law as a tool for social justice in a developmental state'.

What is the duty of legal practitioners in a developmental state?

One of the invited speakers to the NGM, was the Judge President of the Free State Division in Bloemfontein, Cagney John Musi. Judge President Musi said that when looking at the theme of the day, two terms stood out for him, namely, 'social justice' and 'developmental state'. He said that in SA, many people live on the margin where the socio-economic rights referred to in the Constitution are not 'up-there', and to see that one need only look at the number of matters being referred to the Constitutional Court (CC) to enforce those socio-economic rights. He added that budget constraints hamper the development of the state and that is why many cases referred to the CC will be progressively realised. 'I say progressively in the sense that all the rights cannot be realised immediately, taking the state's constraints into consideration,' he said.

Judge President Musi said many legal practitioners go to university, study, and enter practice with a jaded view of what a legal practitioner's job is, namely, to make money and look after their family. He said that in a country like SA, legal practitioners should put such thoughts on the backburner. 'To be a [legal practitioner] one's duty is to the betterment of society and the community and to make sure that every person enjoys their rights,' he said. Judge President Musi said it is a privilege to study and it is a privilege that should be harnessed to make sure South African's have a better life and that the developmental state will grow rapidly and adequately to make sure the people have the means to make a better living.

Judge President Musi referred to the cholera outbreak in Hammanskraal, adding that such incidents should not happen in a country like ours. He asked how aware legal practitioners are of the social ills and what do they do as a profession, whether collectively or individually, to make sure the government performs and does what it ought to do? He added that

Judge President of the Free State Division in Bloemfontein, Cagney John Musi said that in South Africa, many people live on the margin where the socio-economic rights referred to in the Constitution are not 'up-there'.

Judge at the Land Claims Court, Luleka Flatela was the keynote speaker at the Black Lawyers Association's national general meeting. She referred to the 63-year anniversary of the Ingquza Hill massacre during her address.

basic human rights are entrenched in the Constitution, and it is only the legal profession that can make sure that the members of the community enjoy these rights.

Judge President Musi said that in this day and age, after we have struggled to make sure SA is a better place for all those who live in it, sitting and folding our arms is not the order of the day. He added when bad things happen around us, legal practitioners should make sure that they stop the situation, adding that the theme of the NGM was a relevant topic in SA as the country is going into an election year.

Keynote address

Judge at the Land Claims Court, Luleka Flatela was the keynote speaker at the NGM. Judge Flatela said it was a humbling experience speaking to the BLA on the topic, and started off with a quote from the book, *I Write What I Like: Selected Writings* (1978) by Steve Biko where it reads: 'Merely by describing yourself as black you have started on a road towards emancipation, you have committed yourself to fight against all forces that seek to use your blackness as a stamp that marks you out as a subservient being.'

Judge Flatela referred to the 63-year anniversary of the Ingquza Hill massacre, which took place in Lusikisiki, in the Eastern Cape. She said that the rural AmaMpondo fought against the regime who was using the law to control the people and to take their land. The government of the time open fired on the 'rural peasants' and 11 people were killed and many others were injured.

'The history of how the law, in the past, was used to enslave people is a reminder that we come from that history,' Judge Flatela said, adding that this story was told to her by her father, and at the time of hearing the story she felt that there should be justice for such people. It was then that she applied for a learnership, enrolled for her a BProc degree, and joined the student movement, and she also established the BLA's Student Chapter at Walter Sisulu University.

Judge Flatela said that the BLA encourages its members to enrol in commercial law courses and the like, but 'the BLA did not inform us on how to establish a non-profit organisation (NPO), to advance the struggles and put the rights of the people before the court,' she said. She noted that NPOs advance the socio-economic rights of the people on behalf of the people. Black legal practitioners are nowhere to be found in this arena. 'All the matters that black legal practitioners should be handling are handled by the NPOs and it keeps government on their toes and keeps government aware of people's rights', Judge Flatela added.

Judge Flatela explained that a developmental state, such as SA, is a state that was recently formed and includes everyone in the state. The government is intimately involved and uses its resources to advance the people's rights by creating a better life for the people, by using the resources at its disposal. She added that legal practitioners should not be deterred from advocating people's rights. 'I wish to encourage you, not to only look at the 25% of fees that you can make in a matter, but look at human rights matters, at the people who are likely to die of cholera, or lack of healthcare, children who are likely to die due to pit toilets. Do not ignore the call, you need to look at issues to advance the people' she concluded.

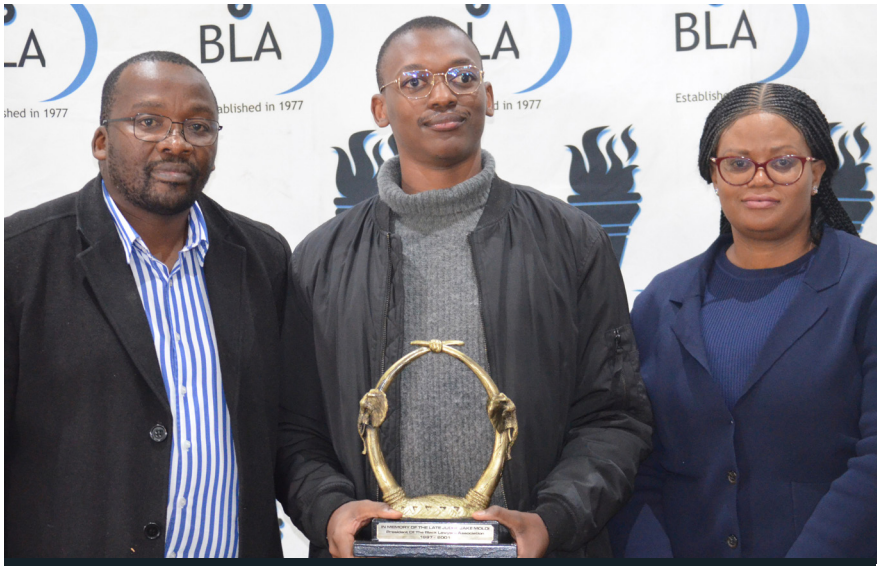
Chairperson of the Legal Practice Council, Janine Myburgh, said that as South Africans look in the past, we know that the law has not always been used as a tool for achieving social justice.

Messages of support

Various organisations gave their messages of support to the BLA. The Chairperson of the Legal Practice Council (LPC), Janine Myburgh, said that as South Africans look in the past, we know that the law has not always been used as a tool for achieving social justice. She said that the country has come a long way, but when we consider the present, there is still much to be done. She said that it is imperative that the legal system continues to evolve and adapt to the needs of society.

Ms Myburgh said she was concerned with the lack of decorum in courts by practitioners. Adding that legal practitioners should hold themselves and their

Members of the Black Lawyers Association's Student Chapter in Bloemfontein. Back row from left: Brendon Ncube; Tshegofatso Kraalshoek and Rhulani Ndlovu. Front row from left: Nkosazana Mrwetyana; Nthati Olifant and Naledi Matutle.



Black Lawyers Association (BLA) President, Bayethe Maswazi handing over a token of appreciation to family representative, Lumkile Moloi, whose father Judge Khalipi Jacob Moloi passed away in 2017. Pictured with them is the Secretary General of the BLA, Mamathung Charlotte Mahlatji.

fellow practitioners accountable when dealing with the judiciary, the magistracy, stakeholders, and the public. She said that a lack of decorum is a danger to the standards and dignity of the profession and the rule of law.

Ms Myburgh noted that the LPC is concerned about the outcome of the examinations. She said that the LPC was holding regular meetings and forums with stakeholders and is continuously addressing the situation.

In her message of support to the BLA, Law Society of South Africa's (LSSA's) President, Eunice Masipa said that the LSSA will continue to work with the BLA and will continue with their commitment to work on transformation, gender, and youth issues. Ms Masipa said as the organisations come together, they need to ponder on the current position of the legal profession. Increased regulatory fees, compliance costs and personal indemnity costs must be looked at and resolutions must be taken.

Ms Masipa said that as we celebrate 100 years of women in the profession, we cannot ignore the fact that current structures do not accurately reflect the current population of the country, adding that we must actively work to give every woman a voice and promote gender transformation.

Other messages of support were given by the Vice-President of Organised Business in the Black Business Council, Gregory Mofokeng, Deputy President of the South African Women Lawyers Association, Lily Malatsi-Teffo and Legal Practitioners' Fidelity Fund Chief Executive Officer, Motlatsi Molefe.

After the morning's session, an award of appreciation was given to the family of Judge Khalipi Jacob Moloi who passed away in 2017. Judge Moloi was a former President of the BLA and served two terms.

BLA President, Bayethe Maswazi, thanked the family for sharing Judge Moloi with the legal fraternity. He said he would like the family to remember that the token of appreciation means that the Moloi family has a special place in the BLA's heart.

Law Society of South Africa's (LSSA) President, Eunice Masipa said that the LSSA will continue to work with the Black Lawyers Association and will continue with their commitment to work on transformation, gender, and youth issues.

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

Are legal practitioners obliged to blow the whistle on unethical conduct of their peers?

By Thomas Harban

We live in an age where technology has made the accessing and sharing of information relatively instantaneous. This includes information on the unfortunate instances where legal practitioners have engaged in dishonest or irregular conduct. There may be instances where the unprofessional conduct is known to other members of the legal profession for some time before action is taken by the Legal Practice Council (the LPC), in the event of a violation of a rule falling within its statutory mandate. Losses to clients and other third parties could be mitigated if impugned conduct is reported early, as would the risk of the offending conduct bringing the profession into disrepute. The question raised in this article is whether there is an obligation on a legal practitioner who is aware of unethical conduct of another legal practitioner to report such conduct to the LPC.

The current compliance requirements applicable to legal practitioners, include an alertness to, and a reporting of, suspicious financial transactions in terms of the Financial Intelligence Centre Act 38 of 2001. These changes have come into effect many decades after the sanctity of the attorney-client confidentiality principles have been in place. If suspected criminal actions by clients must now be reported, should there not be a similar obligation to report the unethical conduct of our peers?

The attitude of being one's 'brother's keeper' or one's 'sister's keeper' to the detriment of the public and the profession is misplaced in the modern operating environment. The independence of the legal profession and self-regulation are some of the principles that are constantly emphasised, as is the protection of the image of the profession. An obligation to report the unethical conduct of other legal practitioners will enhance the observation of these principles. I refer to reports of unethical conduct that are substantiated by evidence and made in good faith. A common example is where a legal practitioner is unable or unwilling to properly account for funds held in trust, breaches obligations to pay over funds when they are due or fails to answer correspondence or to take calls from a party to whom funds are due to be paid. These are all significant red flags, yet some legal practitioners may be reluctant to tell on their peers or not be aware what their obligations are in this regard.

The risks

The risk of unsubstantiated, retaliatory reporting exists as is the ever-present danger of reports made in bad faith. Warning that circumspection is required in making allegations of misconduct against other lawyers, Professor Gino Dal Pont notes that '[the] more serious the allegation, the more circumspect its maker should be' and '[because] allegations of misconduct against a fellow legal practitioner are serious – if proven, they can potentially threaten his or her livelihood and, at the least, his or her reputation – there are good reasons for prospective lawyer-reporters to exercise the said circumspection. It stands to reason that allegations made without proper cause and unsubstantiated by the evidence can turn the disciplinary tables the other way. On more than one occasion in recent times, lawyers shown to have made unjustified allegations of misconduct against other lawyers have themselves been subjected to professional discipline' (Professor Gino Dal Pont 'Pointing the finger' (2011) November *Brief* 18).

Writing on the Australian experience, Professor Dal Pont opines that:

'[it] has been observed that "it is essential to the maintenance of professional standards and the confidence of the public in the (largely) self-regulated legal profession, that where professional standards are not met, and the matter cannot be resolved, the issue be referred to the appropriate authority", and that "[p]ractitioners have a professional obligation to do so". There is limited recognition of this obligation in the legal profession legislation, which requires lawyers to report other lawyers' dishonesty or irregularity in accounting for trust money, and to self-report, *inter alia*, their conviction for serious offences or tax offences and their insolvency. Fulfilling these obligations presents a means, beyond client complaint and judicial referral, whereby regulatory authorities are apprised of matters going to lawyers' professional conduct. The South Australian and Victorian professional rules contain an ostensibly more encompassing obligation in this regard, but it remains unclear whether it extends beyond reporting of a lawyer's own misconduct.

Be that as it may, it is hardly unprofessional to report another lawyer's misconduct to the appropriate body. Leaving aside the difficult ethical issues arising out of any prescriptive general obligation to report others' misconduct – in particular, how any such duty is to be enforced and the consequences of its breach – lawyers are, after all, well positioned to identify and report misconduct, which can, in turn, perform a valuable quality assurance role for the profession' (footnotes omitted).

The corollary of a duty to report unprofessional behaviour is the risk of sanction for those legal practitioners who do not comply with their obligations to report. Unsubstantiated report and those made in bad faith will have consequences for the purported whistleblowers concerned.

The risks of a rapid slide into mudslinging can be gleaned from the allegations made in some of the claims (and counterclaims) in defamation cases between legal practitioners. Complaints and counter-complaints between the parties may have been lodged with the LPC. In those cases, there is often mudslinging between the parties that does not enhance the principles of self-regulation or the promotion of the high ethical standards of conduct demanded of members of the profession. There may

be another motive at play rather than observance of an obligation to alert the LPC of supposedly offending conduct. This may be one of the reasons that professional indemnity insurance companies either exclude defamation claims or only offer cover for such claims as an extension to their policies. Defamation claims are excluded from the Legal Practitioners Indemnity Insurance Fund NPC's Master Policy (see clause 16(o)).

The Legal Practice Act, Rules and the Code

The Rules made under the authority of ss 95(1), 95(3) and 109(2) (the rules) of the Legal Practice Act 28 of 2014 (LPA) stipulate that:

'**Report of dishonest or irregular conduct**

54.36 Unless prevented by law from doing so *every legal practitioner is required to report* to the Council [the LPC] any dishonest or irregular conduct on the part of a trust account [legal] practitioner in relation to the handling of or accounting for trust money on the part of that trust account practitioner' (my italics).

'Trust account practitioner' is not defined in the LPA or the Rules, but 'trust account practice' is defined in r 1.35 as meaning –

'a practice conducted by –

1.35.1 one or more attorneys who are; or

1.35.2 an advocate referred to in section 34(2)(*b*) … who is in terms of the Act, required to hold a Fidelity Fund certificate.'

There is a similar definition in s 1 of the LPA and para 1.28 of the Code of Conduct for all Legal Practitioners, Candidate Legal Practitioners and Juristic Entities (the Code). It follows that a trust account practitioner will practice in a 'trust account practice.'

Paragraph 5 of the Code provides that:

'5. Legal practitioners, candidate legal practitioners … *are encouraged to report* unprofessional conduct by other legal practitioners, candidate legal practitioners or juristic entities to the Council in the manner prescribed in the rules prescribing the disciplinary procedure' (my italics).

While r 54.36 imposes a *requirement* on legal practitioners to report offending conduct in respect of the handling of, or accounting for trust money, on the part of their peers, para 5 of the Code only uses less coercive language in *encouraging* the reporting of unprofessional conduct. It is trite that the misconduct referred to in r 54.36 will also be a form of professional misconduct falling within para 5 of the Code. Consistent use of the same term (whether adjective or verb) in the Rules and the Code would, with respect, have better articulated the intention of the drafters and conveyed the compulsory nature of the reporting obligation, if that was their intention.

Regard may be had to the obligations to report in foreign jurisdictions as we seek to crystallise the obligations for South African legal practitioners and define them. How the information supplied to the LPC is actioned will also affect the rate at which reports are provided by members of the legal profession, and the confidence that the whistleblowers will have in the process.

The Model Rules of Professional Conduct adopted by the American Bar Association, for example, create such an obligation.

'**Rule 8.3 Reporting Professional Misconduct**

Maintaining the integrity of the profession

a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, *shall inform* the appropriate professional authority' (my italics).

The Federation of Law Societies of Canada's Model Code of Professional Conduct lists a wider range of circumstances where the duty to report exists, covering integrity, client protection and professional competence. It stipulates that:

'**Duty to report**

7.1-3 Unless to do so would be unlawful or would involve a breach of solicitor-client privilege, a lawyer *must report* to the Society:

a) the misappropriation or misapplication of trust monies;
b) the abandonment of a law practice;
c) participation in criminal activity related to a lawyer's practice;
d) conduct that raises a substantial question as to another lawyer's honesty, trustworthiness, or competency as a lawyer;
e) conduct that raises a substantial question about the lawyer's capacity to provide professional services; and
f) any situation in which a lawyer's clients are likely to be materially prejudiced' (my italics).

Conclusion

It is hoped that the LPC will clarify what the obligations of legal practitioners are in respect of the reporting of unethical conduct by other legal practitioners. Legal practitioners, together with the LPC and the courts, have an essential role to play in maintaining the *boni mores* of the profession. Pursuing that role with vigour will go a long way in enhancing the public perception of the profession and dispelling the myth that the legal profession is a closed circle that vigorously guards its territory and is slow to act against those who violate their ethical duties.

The members of the profession have an important role to play in ensuring compliance by their peers with the principles of independence, self-regulation, meeting the high standards of professional conduct and the enhancement of the image of the legal profession are to be maintained. I am, however, not espousing a view that legal practitioners become ubiquitous whistleblowers seeking out every misdemeanour to report to the LPC. A carefully considered professional decision will have to be made in each case on the evidence available to the potential whistleblower. The whistleblower jurisprudence developed in respect of the Protected Disclosures Act 26 of 2000 may provide some guidance.

Related reading:

- Jerome Doraisamy 'Obligation to report on fellow practitioners would be "draconian"' (www.lawyersweekly.com.au, accessed 28-7-2023).
- Ronald D Rotunda 'The lawyer's duty to report another lawyer's unethical violations in the wake of Himmel' (1988) *University of Illinois Law Review* 977.
- Hinshaw 'California's new "Snitch" rule means attorneys must report other attorneys' misconduct to the State Bar or Tribunal' (www.hinshawlaw.com, accessed 28-7-2023).
- Megan Zavieh 'Attorney misconduct – time to tattle?' (www.attorneyatwork.com, accessed 28-7-2023).

Thomas Harban *BA LLB (Wits)* is the General Manager of the Legal Practitioners Indemnity Insurance Fund NPC in Centurion.

Law firms should develop policies on the use of AI

By Kgomotso Ramotsho

De Rebus news reporter, Kgomotso Ramotsho spoke to legal practitioner Azhar Aziz-Ismail on what legal practitioners should and should not do when using ChatGPT (and similar forms of generative artificial intelligence (AI)). This comes after a South African legal practitioner was caught in the magistrate's court using ChatGPT, referencing what was described as 'fictitious' citations, facts, and decisions.

Mr Aziz-Ismail is a Knowledge Manager who is developing and managing the Knowledge Department at Clyde & Co. He is also the youngest executive member of the Gauteng Attorneys Association (GAA) and Johannesburg Attorneys Association (JAA), and heads the Knowledge, Legal Technology, and Innovation portfolio of the JAA. Mr Aziz-Ismail explained to *De Rebus* that ChatGPT is a generative AI chatbot that uses natural language processing and is not connected to the Internet. He said that ChatGPT has a free version and a premium version, which is a lot more accurate.

Mr Aziz-Ismail pointed out that ChatGPT should be used as a basic starting point when one is doing internal research, because it is not connected to the Internet, therefore, it is not going to pull information live from the Internet. He added that when correctly instructed to give certain information and it does not have that information, it typically responds by stating that it does not possess that particular information. Mr Aziz-Ismail pointed out that the free version of ChatGPT, which is in the testing stage, is available to the public so that people can train it. He added that a lot of people make the mistake of thinking that ChatGPT is a search engine. In reality, it is a large language model that does not have access to real time information. The last update that ChatGPT had was in September 2021.

Mr Aziz-Ismail said that the most important thing that legal practitioners should know is that what you type in, is what you are going to get out. The more specific one is, the more tailored the response will be. He added that ChatGPT makes life easier by helping users write things eloquently, but to get what you want, one cannot copy and paste, one must review what they type.

Mr Aziz-Ismail pointed out that ChatGPT is generative AI and generative AI can be manipulated, however, he mentioned that there are safeguards OpenAI have put in place warning users of some of the risks of using ChatGPT. Mr Aziz-Ismail spoke about AI 'hallucination' and said that this is where the risk comes in with ChatGPT. He noted AI hallucination came to be known in the legal profession in March 2023. He explained that AI hallucination is when AI creates information out of thin air, that does not exist. He said that it is risky for legal practitioners to use ChatGPT for research. He pointed out that this started in New Zealand, where a legal practitioner used generative AI to find relevant case notes, which did not go well.

Mr Aziz-Ismail pointed out that a legal practitioner in New Zealand found a case through ChatGPT, however, on researching the case reached out to the Law Society in New Zealand, where the law librarians found that the case did not exist. 'This gave us as lawyers the first [instance] of artificial intelligence hallucination'. He added that as great as AI is at helping legal practitioners with writing, it can generate both real cases and non-existent cases. He pointed out that legal practitioners need to be responsible when using ChatGPT. He added that law firms must have policies around generative AI. That law firms must also develop standards on the dos and don'ts of using generative AI. Some of the tips he shared on what and what not to do, when using generative IA, include the following:

- Legal practitioners using AI technology should only use it as a starting basis of internal research, however, it should not be the end all of the legal practitioner's research.
- Legal practitioners must apply their own legal expertise when critically assessing the AI content for accuracy.
- Legal practitioners need to check cited case law, articles, sources, and anything that ChatGPT refers to, to make sure it is not AI hallucination.
- If used for research, legal practitioners must only use AI for internal research and verify the information generated.
- Another risk that legal practitioners should be aware of when using AI is intellectual property copyright. Do not infringe on copyright.

Legal practitioner, Azhar Aziz-Ismail, cautions the responsible use of artificial intelligence chatbots.

- Legal practitioners need to examine publicly available information when using ChatGPT, they must fact check.
- Legal practitioners should not input individual client information or any commercially sensitive information belonging to the firm or clients, which can identify a matter, legal practitioner, client, or other employees at the law firm.
- Do not enter special or sensitive information on a chatbot.
- Junior legal practitioners using generative AI need to notify the person reviewing their work, so that they can apply extra scrutiny to it.

Mr Aziz-Ismail said: 'While these tools are amazing, we need to be responsible lawyers, we need to do our due diligence. We need to make sure that we are applying our minds and legal expertise. What is also important to emphasise is that artificial intelligence does not mean the end of lawyers. It is not going to replace you as a lawyer. What it is going to do, is that lawyers who use artificial intelligence smartly, correctly and take advantage of it, will replace those who don't, who refuses to move with the time. It is not that you should not use it, play around with it, explore it, but don't blindly use it in your work. You have the legal expertise and be careful of your prompts.' He added that if legal practitioners are not careful with prompts when using AI, they might pull up things that are not applicable in the South African jurisdiction. Mr Aziz-Ismail stressed that legal practitioners have a greater duty of confidentiality and a greater duty of privilege.

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

By
Prof Michele
van Eck

Pitfalls and traps for legal practitioners when using ChatGPT

The use of technology is fast changing not only the law but also the practice of law. ChatGPT is a good example of a technological tool used to increase the efficiency and speed of completing tasks. Irrespective of these potential benefits, there are significant risks in the use of such tools in the legal profession, which are also closely linked to the ethical and professional duties of legal practitioners. These risks and related pitfalls include, for example, maintaining the privilege and confidentiality of a client's information when legal practitioners use ChatGPT, the ethics of charging fees for tasks completed by ChatGPT and ensuring the quality and correctness of any work product produced by ChatGPT.

Maintaining privilege and confidentiality

Section 3.6 of the Code of Conduct for all Legal Practitioners, Candidate Legal Practitioners and Juristic Entities requires legal practitioners to 'maintain legal professional privilege and confidentiality regarding the affairs of present or former clients or employers, according to law' (the Code). However, when using chatbots, like ChatGPT, privileged and confidential information is at risk. Take, for instance, OpenAI may save and use any information that is submitted to ChatGPT to improve OpenAI's services (Michael Schade 'How your data is used to improve model performance' (https://help.openai.com, accessed 28-7-2023)). In addition, OpenAI notes that 'conversations may be reviewed by [their] AI trainers to improve [their] systems' (Natalie Staudacher 'What is ChatGPT?' (https://help.openai.com, accessed 28-7-2023)). This means that the information that is provided to ChatGPT would be stored and is reviewable by OpenAI. In instances where legal practitioners use ChatGPT in their legal practice, then any information provided to the chatbot may pose a significant risk to privileged, confidential and proprietary information of clients. In fact, OpenAI specifically warns users against providing sensitive information when using ChatGPT (Staudacher (*op cit*) at para 8).

To avoid and mitigate such risks, legal practitioners should refrain from disclosing any personal, sensitive, confidential, privileged, or proprietary information of clients or their employer when using ChatGPT. Failure to do so will not only be a potential breach of a legal practitioner's professional and ethical duties but may also be a breach of their confidentiality obligations towards their clients and employer.

Charging of fees

ChatGPT has the capability of completing tasks much faster than the average legal practitioner would ever hope to achieve. A legal practitioner may, under these circumstances, be tempted to leverage such efficiencies and charge the same fee for the work produced by ChatGPT as what they would have charged for having completed the task themselves in an ordinary manner. Such conduct may be ethically and professionally questionable. Take for instance, similar conduct (in the context of standardised documents) which was strongly criticised by our courts when legal practitioners embarked on the mass production and use of court applications (effectively recycling standard documents, like affidavits) in the matters of *Cele v the South African Social Security Agency and 22 Related Cases* 2008 (7) BCLR 734 (D), *Sibiya v Director-General: Home Affairs and Others* [2009] 3 All SA 68 (KNP), *Absa Bank Ltd v Havenga and Similar Cases* 2010 (5) SA 533 (GNP), and *Tekalign v Minister of Home Affairs and Others and Two Similar Cases* [2018] 3 All SA 291 (ECP).

Legal practitioners should avoid the temptation of charging the same fees when less time is spent on the work produced for clients (especially when the only work done is of an administrative nature). This notwithstanding, a legal practitioner is entitled to a reasonable fee for the work produced but are not to overreach or charge fees that are unreasonably high (see paras 3.12 and 18.7 of the Code). Determining what is reasonable would relate to the actual amount of time spent, the type of work done, as well as the complexity of the matter. Put differently, ethical and professional duties prevent a legal practitioner from charging the same fee for drafting or amending a document as opposed to completing standard form documents purely from an administrative perspective, and such a principle may also apply to producing work through technologies like ChatGPT where little or no work is done by the legal practitioner (see, for example, M Van Eck 'Ethical and professional duties in the use of recycled legal instruments: A trio of cases' (2020) 2 *TSAR* 354).

Integrity of the work product

The risk with any technology, including ChatGPT, is that the information provided is not always accurate and correct. In fact, OpenAI admits this by stating that 'ChatGPT will occasionally make up facts or "hallucinate" outputs' (Staudacher (*op cit*) at para 13). In addition to this, OpenAI warns that 'ChatGPT is not connected to the internet, and it can occasionally produce incorrect answers. It has limited knowledge of world and events after 2021 and may also occasionally produce harmful instructions or biased content' (Staudacher (*op cit*) at para 4).

In this regard, a legal practitioner should be cautious in accepting the work produced and answers received by ChatGPT and should scrutinise all feedback from ChatGPT to ensure accuracy, correctness and appropriateness of the information and feedback received from the chatbot. Ultimately, a legal practitioner remains responsible for their work product and cannot blame ChatGPT (or any other technologies that may have been used) for mistakes or inaccuracies. This principle is found in para 18.14 of the Code, which notes that any work produced by a legal practitioner must be of a 'degree of skill, care or attention, or of such a quality or standard, as may reasonably be expected of [a legal practitioner]'.

Concluding remarks

Although ChatGPT may be a valuable tool, especially in the increased efficiencies and the optimisation of time, the use of such technologies is not without risk. Legal practitioners should remain vigilant and use such technological tools with caution. After all, ChatGPT is not a 'shortcut' for legal practice.

Ultimately, regardless of the mode of producing work (whether manually or through technology), a legal practitioner's ethical and professional duties remain intact and must be observed. In fact, one may say that a legal practitioner must be more vigilant in preserving professional integrity and honesty with the use of such technologies, like ChatGPT (see, for example, para 3.1 of the Code).

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

Do company policies have to be complied with?

By Michael Kabai

Employers must make sure that when new policies are put into effect, they consult employees. To consult with employees is to say to them, for example, 'I have intentions of doing this; what do you wish to say about that?' as compared with 'this is what is going to be done'.

If the policy materially alters the employees' employment terms and circumstances, both parties must endeavour to reach an agreement that benefits both parties, as this might be an issue of dispute. Where there is a union that represents employees, consult with it, and explain what the purpose of the policy is, allowing them to provide input. A typical consultation would involve the following –

- presenting the employees or the union with the necessary details concerning the change that is planned;
- allowing the employees or the union to communicate their or its opinions in reaction to the information presented; and
- a genuine review of the employees' or the union's viewpoints prior to reaching a final decision and implementing the policy.

Policies matter because they promote consistency and the achievement of a given objectives. They are important in establishing rules that regulate an organisation's behaviour and are an important element of an organisation's culture.

The issue of compliance with the company's policy was recently brought into focus in the Labour Court (LC) in *Taguzu v Commission for Conciliation, Mediation and Arbitration and Others* (unreported case no JR1785/18, 27-6-2023) (Tlhotlhalemaje J). In this case, the Chefs Warehouse, a restaurant, introduced a policy after consulting with all its staff, requiring all front waiters to declare all cash gratuities received from customers. The policy's purpose was for the restaurant to ensure that at least 25% of all gratuities were divided with all back-of-house staff members, who also contributed to patrons' services and diners' experience.

With the exception of the applicant, all staff members supported the policy. All staff members signed the policy, and the applicant refused to sign it; yet, while refusing to sign it, the applicant verbally agreed to abide by it. The applicant also demonstrated adherence to the policy by declaring her gratuities on the same day the policy became effective.

However, it was determined that on 10 and 11 February 2018, the applicant failed to declare the gratuities she received in accordance with the policy thereby breaching the policy. In the end, the applicant was dismissed for failing to adhere to the restaurant policy, and the matter was referred to the Commission for Conciliation, Mediation and Arbitration (CCMA). In the CCMA, the applicant claimed she never agreed to the policy since she never signed it, that there was no proper consultation, and that she had not failed to disclose her gratuities. The commissioner, on the other hand, stated that proper consultations were made and that her refusal to sign the policy did not render it unlawful or invalid. The commissioner determined that if the applicant had concerns about the policy's implementation, she should have filed a complaint with the CCMA, which she did not do. The commissioner further determined that the applicant had violated the policy by failing to declare the customer gratuities she had received.

The applicant brought this matter to the LC for review, contending, among other things, that the commissioner failed to apply his mind to the facts and thereby reached an unfair and irrational conclusion.

After reviewing the matter, the LC agreed with the commissioner that the policy was not invalid. The LC also contended that the fact that the applicant did not agree to the policy did not imply that she was not consulted. The judge commented that the applicant seemed to have endeavoured to comply with the policy as and when it suited her.

The LC was also of the view that the policy did not in any material respects alter the applicant's terms and conditions of employment. Finally, the LC decided to dismiss the applicant's application to review and set aside the arbitration award.

A takeaway here is that if an employee or union is dissatisfied with the company's policy that is being implemented, they should approach the CCMA.

The policy could be invalid if it materially alters the terms and conditions of employment. However, the LC in this matter pointed out that if indeed the applicant's terms and conditions were altered, she ought to have approached the CCMA with a dispute in that regard under the provisions of s 64(4) or s 186(2)(*a*) of the Labour Relations Act 66 of 1995.

A further finding is that not signing a policy does not automatically render it invalid.

The last point is that before policies are implemented, the employer must ensure that employees or the union are properly consulted.

Michael Kabai *LLB (UL) LLM (Unisa) LLM (NWU) MBA (Regent)* is a legal practitioner, adviser, and legal and compliance manager at the South African National Space Agency (SANSA). The views expressed in Mr Kabai's article are his own and do not reflect the views of SANSA. ❑

By the Financial Intelligence Centre

Identifying beneficial ownership: A crucial step in combating financial crime

Understanding who ultimately benefits from business relationships or a single transaction is key to combating crime in South Africa's financial system. Businesses listed as accountable institutions in terms of the Financial Intelligence Centre Act 38 of 2001 (FIC Act) are, therefore, required to determine the ownership and control structure of their clients.

Money laundering, terrorist financing and proliferation financing trends have shown that criminals often misuse legal persons to obscure the true ownership or control of funds, which are derived from illegal activities or intended for illegal activities.

The amendments to the FIC Act in December 2022, further aligned domestic legislation to the international anti-money laundering, counter-terrorist financing and counter-proliferation financing standards set by the Financial Action Task Force.

A 'beneficial owner' is a '*natural person* who directly or indirectly – *ultimately owns or exercise's effective control* of – a client of an accountable institution; or a legal person, partnership, or trust … ' (our italics). Section 21B of the FIC Act sets out the obligations for accountable institutions to identify and take reasonable steps to verify the beneficial owner.

Natural person

The definition of 'beneficial owner' includes the scenario where a natural person 'exercises control of a client [that is also a natural person] of an accountable institution on whose behalf a transaction is being conducted'.

Legal person

Where the client is a legal person, the accountable institution must follow a process of elimination to identify the beneficial owners. An accountable institution must first identify the natural person who has a controlling ownership interest in the legal person. If the ownership interests do not indicate a beneficial owner, or if there is doubt as to whether there is a person with the controlling ownership interest, then the accountable institution must establish the natural person who exercises control over

the legal person 'through other means'. This may include through voting rights attaching to different classes of shares or through shareholders agreements or nominee shareholders.

'If no natural person can be identified who exercises control through other means, the accountable institution must determine who the natural person is who exercises control over the management of the legal person' (see FIC Guidance Note 7).

Trusts

When establishing a business relationship or conducting a single transaction for a trust, the accountable institution must identify all the natural persons linked to the trust. This principle applies as beneficiaries are often not the only person(s) who benefit from the trust. The trustees and founders also have the capacity to gain from a trust dependent on the way the trust is set up and its purpose. In addition, the trustees, founders, and beneficiaries all can exercise influence over the decisions or operations of a trust.

Where either one of the trustees, founders, and beneficiaries are a legal person, then the accountable institution must follow the process of elimination that applies for legal persons to identify the natural person who is the beneficial owner.

Partnerships

The accountable institution must identify each natural person that is a partner to a partnership. Where a partner is a legal person, then the accountable institution must follow the process of elimination to identify the natural person that is the beneficial owner of that legal person who is a partner.

Reasonable steps to verify a beneficial owner's information

Once the accountable institution has identified the beneficial owners, it must then take reasonable steps to verify the beneficial owner's information. This entails applying measures that are commensurate with the assessed money laundering, terrorist financing and proliferation financing risk the business relationship or single transaction poses.

The accountable institution could use information obtained by reasonably practical means while striking a balance between the accuracy of the verification required and the level of effort invested to obtain such verification. The underlying element of this requirement is that the accountable institution must be satisfied that it knows the identity of the beneficial owner.

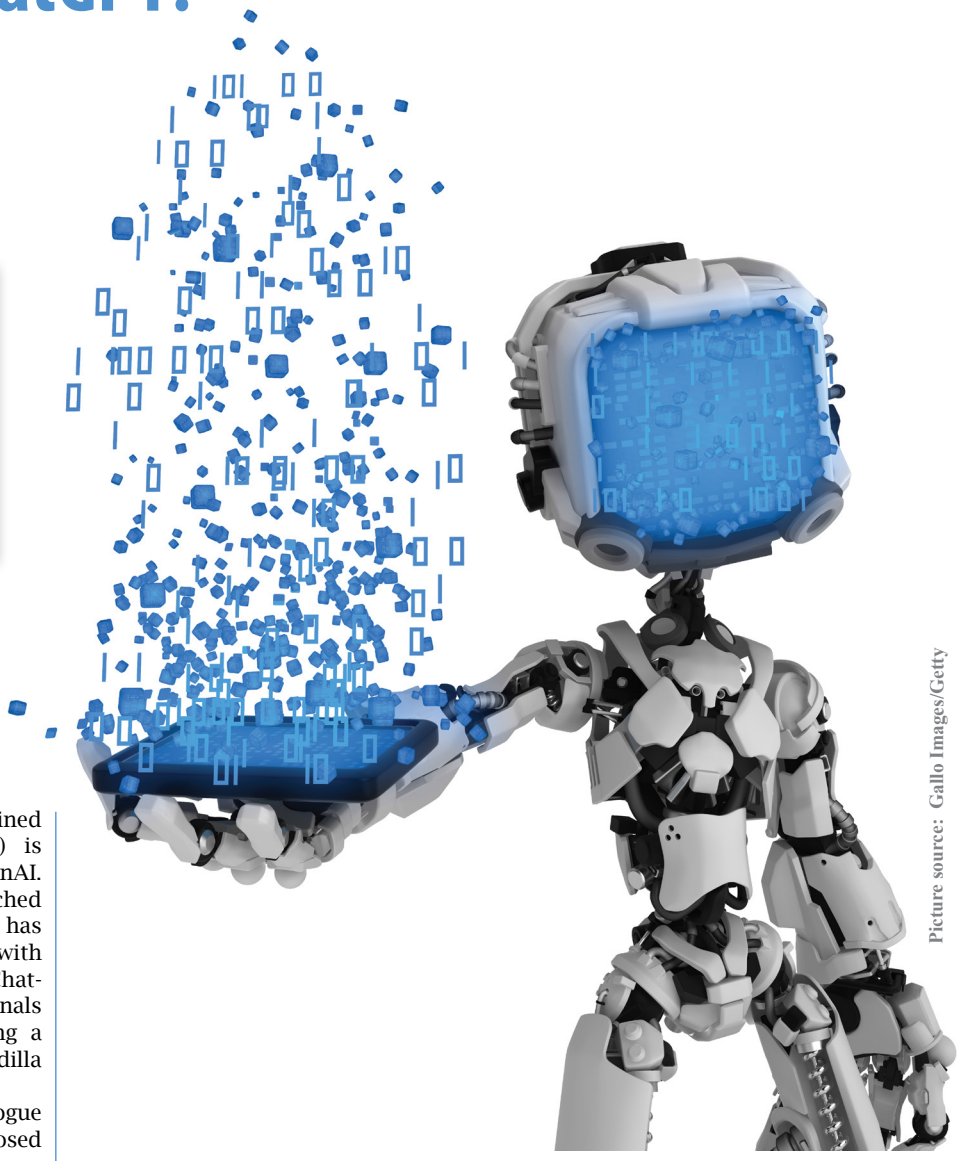
Call to register as an accountable institution and submit the risk and compliance return

Attorneys and advocates required to have a Fidelity Fund Certificate (FFC), as stated in the sch 1 of the FIC Act are reminded of their obligation to register as accountable institutions with the FIC on the registration and reporting portal, goAML (see FIC Draft Public Compliance Communication 47A). All attorneys and obliged advocates are required to submit a risk and compliance return (see Directive 6 (www.fic.gov.za)).

For more compliance information and guidance offered to accountable institutions, refer to the FIC website (www.fic.gov.za). The FIC's compliance contact centre can be reached at +27 (0) 12 641 6000 or log an online compliance query by clicking on: www.fic.gov.za.

Do legal practitioners truly understand the danger of ChatGPT?

By Marciano Van Der Merwe



Picture source: Gallo Images/Getty

Chat Generative Pre-trained Transformer (ChatGPT) is a phenomenon by OpenAI. The chatbot was launched in November 2022 and has over 100 million users with 13 million unique visitors per day. ChatGPT is said to make some professionals redundant and was used in passing a judgment by Judge Juan Manuel Padilla Garcia in Cartagena, Columbia.

ChatGPT uses a conversational dialogue to generate responses to questions posed by the user. As a Pre-trained Transformer, it uses deep learning techniques to generate natural language text. It can generate code, write a thesis, do reports, and pass a law examination from the University of Minnesota course (PM Parikh, DM Shah, KP Parikh 'Judge Juan Manuel Padilla Garcia, ChatGPT, and a controversial medicolegal milestone' (https://ijmsweb.com, accessed 29-7-2023)). In consideration of this widespread use and attention the following identifies and discusses the limitations followed by the dangers of using ChatGPT within the South African legal profession.

For tailored legal advice, OpenAI notes that it does not allow the use of their models without a qualified person to review the output. ChatGPT is not fine-tuned to give legal advice. Users should not rely on ChatGPT as their only source of legal advice (OpenAI 'Terms of use' (https://openai.com, accessed 29-7-2023), 'Disallowed usage of our models' under 'Usage policies' (https://openai.com, accessed 29-7-2023)).

OpenAI does envision legal practitioners use of ChatGPT. Its usage policies under 'We have further requirements for certain uses of our models' (OpenAI 'Usage policies' (*op cit*)), is of the view that further requirements are needed for certain uses of ChatGPT. Where the user is a consumer in the legal industry, the user must make use of a disclaimer. The disclaimer must inform the user's clients that AI is being used and the potential limitations thereto.

Additionally, the tool is sensitive to input phrasing or attempting the same prompt multiple times. Opposed to clarifying what users asked, the tool might guess what the user's intended query is. However, to circumvent this, ChatGPT Plus allows users to constantly challenge such assumptions. OpenAI acknowledges that ChatGPT can write 'plausible-sounding but incorrect or nonsensical answers' (Ian Sample 'ChatGPT: what can the extraordinary artificial intelligence chatbot do?' (www.theguardian.com, accessed 29-7-2023)).

ChatGPT may limit the unique way in which legal practitioners service their clients. Output generated by ChatGPT is similar among the various ChatGPT users, in that a user can provide an input and the output received will be the same or similar to the output received by other users (OpenAI 'Terms of use' (*op cit*) at provision 3(b)), therefore, resulting in standardisation of output among users and how legal practitioners may service their clients.

The tool may pose a danger to the learning and development of early legal career professionals. It relies on feedback to help OpenAI improve its limitations. In Michelle Mohney's article mention is made that the approach to developing ChatGPT, includes reinforcement learning (Michelle Mohney 'How ChatGPT could impact law and legal services delivery' (www.mccormick.northwestern.edu, accessed 29-7-2023)). This includes human input to better align the dialogue to human expectations and intentions.

However, as contemplated Paul W Glimcher, reinforcement learning entails a process whereby a conditioned response is brought about from a conditioned stimulus (Paul W Glimcher 'Understanding dopamine and reinforcement learning: The dopamine reward prediction error hypothesis' (www.pnas.org, accessed 29-7-2023)). In other words, the more often content produced by ChatGPT is rated as accurate, by users and ChatGPT trainers, the more reinforcement ChatGPT obtains that the content is accurate.

Similarly, early legal career professionals gain experience through a similar learning process. Professionals who solely rely on ChatGPT may be doing their learning and development an injustice by only knowing what the end content looks like and not understanding why. This will hamper their ability to perform professional work with a degree of skill, care, or attention as may reasonably be expected from an attorney, in accordance with para 18.14 of the Code of Conduct for all Legal Practitioners, Candidate Legal Practitioners and Juristic Entities (the Code).

Furthermore, OpenAI does not warrant the accuracy of the information produced. The company further notes, in provision 7(b) of the 'Terms of use' (OpenAI 'Terms of use' (*op cit*)), the services provided by ChatGPT are on an 'as is' basis. There is no warranty that the services provided are accurate or error free.

At a privacy level, the use of ChatGPT may pose a privacy threat to organisations. In terms of s 1 of the OpenAI's Privacy Policy (OpenAI 'Privacy policy' (https://openai.com, accessed 29-7-2023)), information is collected about the user's browsing activities over time and across different websites. The site does not respond to 'Do Not Track' signals. Furthermore, in terms of s 2 ('How we use personal information') of the Privacy Policy, personal information is used to provide, administer, maintain, improve and/or analyse the services. How personal information is used may present a danger to the duty legal practitioners have to their clients.

The Law Society of South Africa (LSSA) places duties on legal practitioners when using Internet-based technologies like ChatGPT. In accordance with the LSSA Guidelines on the Use of Internet-Based Technologies in Legal Practice (www.lssa.org.za), legal practitioners are required to take reasonable steps or reasonable protective measures. This is pursuant to ensuring that information provided by clients remain confidential. Thus, the way information is used by ChatGPT may pose a danger to the privacy of client information.

However, OpenAI holds that the content provided by the user (API content) is not used to develop or improve the service. It is only used to provide and maintain the API services (Open AI 'Terms of use' (*op cit*) at provision 3). Notably, there is no further elaboration on what is meant by 'provide and maintain' nor how 'provide and maintain' differs from 'develop or improve' under these circumstances.

There is a clear indication that non-API content can be used to improve ChatGPT's performance. Should there be a copyright complaint, OpenAI makes provision on how the user should go about initiating such complaint (Open AI 'Privacy Policy' (*op cit*) at provision 9).

OpenAI further limits its liability in its terms of use. More specifically, provision 3(a) of the OpenAI's 'Terms of use' (*op cit*), states the user owns all 'Input'. OpenAI assigns to the user the right, title, and interest in the 'Output'. Output and input amounts to content and content may be used by OpenAI but the user is responsible for the content, including ensuring that it does not violate any law or terms of use.

I submit that this is a way for OpenAI to avoid potential liability. The user is responsible for the content whereas OpenAI has the right of use. In the event the content is inaccurate legal professionals will ultimately be held liable.

Liability for legal practitioners is further evident in legislation and legal practitioners are under legislative obligations when servicing their clients. Paragraph 3.6 of the Code holds that legal practitioners are to 'maintain legal professional privilege and confidentiality regarding the affairs of present or former clients'. Any use of ChatGPT must comply with relevant legislation such as the Electronic Communications and Transactions Act 25 of 2002 (ECTA) and Protection of Personal Information Act 4 of 2013 (POPIA).

In terms of the ECTA, liability for legal practitioners may ensure if the chatbot is used contrary to ECTA. The ECTA facilitates and regulates electronic communications. Electronic communication is defined as the originator sending data messages on the originators behalf and where the information system did not execute the said programming. Furthermore, where a person acts as an intermediary they are expressly excluded under the definition of an originator.

An intermediary may provide a service in respect of the data message and, therefore, ChatGPT may be defined as an intermediary. Although legal practitioners may make use of ChatGPT as an intermediary, legal practitioners will still be considered the originators of any data message. Thus, in this instance, legal practitioners will be liable for the use of artificial intelligence generated information in terms of the ECTA.

Similarly, legal practitioners may encounter liability in terms of POPIA. POPIA introduces conditions to 'establish minimum requirements for the processing of personal information'. Subsection 19(1) states 'a responsible party must secure the integrity and confidentiality of personal information in its possession or under its control'. In accordance with subs 19(1)(*b*) responsible parties are to take reasonable measures to prevent 'unlawful access to or processing of personal information'.

As abovementioned ChatGPT makes use of non-API content to improve its performance. If personal information of clients is used to improve the performance of ChatGPT services, this will breach POPIA. Pursuant to a conviction thereof, the legal practitioner is liable to imprisonment or a fine.

The Code states in para 3.3 that legal practitioners shall 'treat the interests of their clients as paramount'. This is subject to their duty to the court, interests of justice, observance of the law and ethical standards. Should any legal practitioner seek to use ChatGPT their client must be informed.

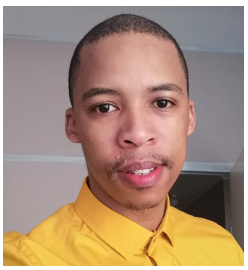
However, OpenAI allows users to opt-out of having their data used to improve their non-API services. OpenAI further notes that it removes any personally identifiable information from data intended to improve the model's performance (Michael Schade 'How your data is used to improve model performance' (https://help.openai.com, accessed 29-7-2023)).

In conclusion, the tool has received widespread attention and use. Legal practitioners are to use the tool to their benefit in accordance with legislation and the Code. Practitioners can use it to implement new efficiencies in servicing clients. However, practitioners must be aware of the dangers and limitations of using ChatGPT.

Marciano Van Der Merwe *BA (Industrial Psychology and History) LLB (Wits)* is Corporate Counsel in Johannesburg. Mr Van Der Merwe writes in his personal capacity. ❑

Picture source: Gallo Images/Getty

Alter ego trusts: How do courts determine the concealment of assets through trusts in divorce cases?



By
Dintoe
Daniel Kgole

This article discusses the approach adopted by South African courts when deciding whether it is legally permissible to consider the value of trust assets when determining the value of the spouses' estates for purposes of calculating accrual claims when divorcing parties are married out of community of property subject to the accrual system or the division of the divorcing parties' joint estate when they are married in community of property. Spouses who are married out of community of property with the accrual system, conclude an antenuptial contract, which may expressly exclude assets they wish not to form part of the growth of their respective estates should the parties divorce. Excluded assets in terms of the antenuptial contract will not form part of the accrual claims during divorce. When trust assets and other matrimonial property lie at the heart of judicial determination of the division of the divorcing parties' joint estates or the determination of the value of the divorcing parties' accrued assets during divorce have always been a difficult issue in regard to on which basis the value of trust assets may be considered when determining the values of the spouses' estates. This article demonstrates that financially stronger spouses tend to create trusts on the eve or during divorce proceedings to prejudice financially weaker spouses. On the one hand, trust property is intended to be separate from the founder and/or trustee's personal estate in terms of s 12 of the Trust Property Control Act 57 of 1988 (TPCA). On the other hand, ss 3 and 4 of the Matrimonial Property Act 88 of 1984 (MPA) provides a formula to be adopted when calculating the accrual of divorcing parties. This statutory guideline is adopted to ascertain what needs to be considered when determining the value of the spouses' estates. Recently, the Supreme Court of Appeal (SCA) was approached to provide much-needed clarity on the issue in *Paf v Scf* 2022 (6) SA 162 (SCA).

Prior to or during the commencement of divorce procedures, financially stronger spouses tend to create trusts with a view of protecting their assets from creditors. Such spouses transfer their assets into trusts either on the eve of divorce, or during divorce proceedings to render their respective assets unreachable. One of the reasons for doing this is to protect their assets from forming part of the matrimonial assets. Normally, once a trust deed is created and assets are transferred thereto, such assets are separate from the founder's and trustee's personal estates. Under such circumstances the other spouse would find it difficult to extend their matrimonial claim to trust assets or portion of

the value of the trust assets simply because such assets are separate from the personal estate of either the founder or trustee. To prevent the abuse of the provisions of the trust deed, a founder who creates a trust needs to appoint a trustee who will manage and control trust assets for the benefit of the beneficiaries (see *MJK and Others v IiK* 2023 (2) SA 158 (SCA) at paras 32-33). This position gives the impression that the founder or trustee cannot enjoy the ownership of or absolute control thereof and to personally benefit in trust assets unless such a trustee or founder is also a beneficiary.

Financially stronger spouses, in most cases, create these trusts with the intention of defeating the claims of creditors or with the fraudulent intention of depriving financially weaker spouses of their rightful matrimonial claims when a joint estate is divided, or accrual is calculated (see *Paf* at para 5). Put differently, such spouses use trusts as vehicles to accumulate and protect their personal estates. Under such circumstances, when a court can determine that such a trust was abused and used to achieve fraudulent results, a court will find that such a trust is an 'alter ego trust'. In the persuasive authority of *RP v DP and Others* 2014 (6) SA 243 (ECP) at para 22, the court held that where a trust has been created to hide personal assets, the courts should, on sufficient evidence, pierce the trust veil and consider the value of trust assets as part of the personal estate assets. This is an illustration that the party who claims accrual, which also includes the value of trust assets, bears the burden of proof to show that the other party –

- transferred assets to a trust;
- was a trustee and beneficiary of trust assets;
- they enjoyed control and management of trust assets; and
- they were a beneficial owner of trust assets (see also *MJK* at para 32 and *Paf* at para 46).

Where parties consider creating trusts with the intention of hiding their assets, a court, during divorce, should exercise its common law discretion to pierce the trust veil and consider the value of such trust assets when determining the division of joint estates and/or the difference in value of the divorcing parties' estates for accrual calculations (see *Paf* at para 37). This position paves the way to allow spouses, whose estates show smaller accruals, to claim accrual against the difference that the estate of the other spouse shows in terms of ss 3 and 4(1)(*a*) of the MPA and through the court's common law discretion thus giving effect to the inclusion of the value of trust assets. The purpose of this exercise is to strike a balance between affected matrimonial rights of financially weaker spouses against the rights of spouses

Prior to or during the commencement of divorce procedures, financially stronger spouses tend to create trusts with a view of protecting their assets from creditors.

who are financially strong. In practice, mostly these events occur in instances where divorcing parties are married out of community of property subject to the accrual system. It must be noted that, previously, it was difficult for financially weaker spouses to establish an available legal tool that they could rely on for the purposes of fair and equitable division of the spouses' joint estates or accrual claims that would include the value of trust assets (see *MM and Others v JM* 2014 (4) SA 384 (KZP) at para 18-19). Such spouses suffered serious financial prejudice as they were unable to extend their accrual claims to include the value of the defaulting spouses' trust assets.

Furthermore, a spouse with a smaller accrual is required to prove that the trust assets have ostensibly been held in a trust while the other spouse has enjoyed control and management of trust assets or at all material times such spouse has been the beneficial owner of such trust assets. These circumstances encourage the courts to exercise their common law powers to declare the value of trust assets as part of defaulting spouses' personal estate. Such trusts are mostly regarded as a sham or simulated or alter ego when it is found that there has been abuse of such trusts (see *Paf* at para 26). Importantly, in a persuasive authority of *Van Zyl and Another NNO v Kaye NO and Others* 2014 (4) SA 452 (WCC) at para 16, the court held that when a trust is deemed a sham, such a trust will be regarded as if it has not existed, and its assets shall remain the assets of the defaulting spouse and will accordingly be deemed to form part of their personal estate. In such instances, a court entertaining a divorce action will consider including the value of the assets in a trust when determining patrimonial assets to which divorcing parties are entitled.

Further, although these trust assets, from the strict principles of trust law, are believed to be separate from the founder or the trustee's personal estate. Should the alleging spouse produce sufficient evidence, which requires a court to conduct an in-depth inquiry into the facts of the case, the court should proceed to assess any possible dishonesty on the part of the financially stronger spouse regarding the true intention of having created such a trust in the first place. Should the court be satisfied that neither of the spouses will suffer any prejudice because of considering the value of the assets for the purposes of the patrimonial consequences of the divorcing parties' marriage, the court will consider the value of such trust assets. After evaluating all the relevant evidence and satisfying itself that indeed a trust was created to preclude and/or frustrate a financially weaker spouse's right to matrimonial property claim, a court is empowered to decide whether the trust deed was created to hide assets not to benefit trust beneficiaries. The SCA in *Paf* at para 39 stated that 'where the trust form is abused to prejudice an aggrieved spouse's accrual claim, a court should exercise its wider power in terms of the common law to prevent such prejudice'. The introduction of this common law power principle comes to the rescue of financially weaker spouses. This is the case because the majority of these spouses will have suffered financial prejudice due to the lack of available legal avenues to enable them to extend their matrimonial claims to the value of their financially stronger spouses assets that they hid in trusts because the MPA and the Divorce Act 70 of 1979 are silent with regard to whether or not the value of trust assets qualifies to form part of the matrimonial assets in a case where such trusts were created for a wrong purpose.

In conclusion, to enable the courts to be consistent when pronouncing on this issue and to also achieve certainty in judgments, it is submitted that the legislature should consider including the necessary provisions in s 3 of the MPA that cater for the inclusion of the value of trust assets when it is established that a financially stronger spouse created a trust with an intention of defrauding, firstly, by abusing such trust deed with a view of hiding assets for their own benefit and to also frustrate the other spouse's matrimonial claim. The proposed provisions should also allow a court to exercise its statutory power as opposed to a common law power. This should be the case when a court is required to divide the divorcing spouse's joint estates when married in community of property or determining the value of the spouses' estates for calculating accrual claims from the estate that show great value when divorcing spouses are married subject to the accrual system.

Dintoe Daniel Kgole *LLB LLM (Estate Law) LLM (Divorce and Pension law) (NWU)* is a candidate legal practitioner at Marumoagae Attorneys Inc in Johannesburg and Mahikeng. ❑

Enhancing effectiveness: Strengthening protection for domestic violence victims through the Amendment Act

By Mohammed Moolla

'In 2020, President Cyril Ramaphosa declared [gender-based violence (GBV)] South Africa's second pandemic and noted that it needed to be taken as seriously as the coronavirus. Already named the "rape capital of the world" by Interpol, South Africa continues to grapple with increasing rates of domestic abuse, sexual violence and femicide. During the pandemic, incidents of GBV increased exponentially due to many women having been confined to spaces with their perpetrators as a result of lockdowns and measures to restrict movement and curb the spread of the virus.

Police Minister Bheki Cele recently announced that more than 9 500 cases of GBV and 13 000 cases of domestic violence were reported just between July and September 2021. Over the same period, 897 women were murdered (an increase of 7.7% compared to the same period in 2020), while sexual offence cases increased by 4.7% and incidents of rape rose by 7.1% compared to the second quarter of 2020.

These troubling statistics highlight our failures as a nation in protecting South African women, especially black and disabled women, and calls for an urgent and consolidated response to the crisis we are facing from all sectors of our society including government, corporates, communities, schools and universities.

This year, [President] Ramaphosa signed into law legislation aimed at strengthening efforts to end GBV in the country including the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Bill, the Criminal and Related Matters Amendment Bill, and the Domestic Violence Amendment Bill' (Deepa Vallabh 'Criminalising gender-based violence is not enough' (https://mg.co.za, accessed 31-7-2023)).

A presiding officer in the domestic violence court is responsible for overseeing cases related to domestic violence. This includes presiding over hearings, making legal rulings, and ensuring that court proceedings are conducted fairly and impartially.

The role of a presiding officer in domestic violence court is particularly important because domestic violence cases can be complex and emotionally charged. The presiding officer must be knowledgeable about relevant laws and regulations, as well as the specific issues that arise in domestic violence cases, such as the dynamics of power and control between abusers and victims.

In addition to overseeing court proceedings, a presiding officer in the domestic violence court may also be responsible for coordinating with other agencies and organisations, such as law enforcement, social services, and victim advocacy groups, to ensure that victims receive appropriate support and services.

Overall, serving as a presiding officer in domestic violence courts can be a challenging but rewarding experience, as it involves working to protect the safety and well-being of victims of domestic violence while upholding the principles of justice and fairness in the legal system.

The Domestic Violence Amendment Act 14 of 2021 came into effect on 14 April 2023 as per Proc R117 *GG*48419/14-4-2023.

The original Act had a section called definitions. The new Act now calls it definitions and interpretations. There were no subsections in the old Act. There are now subss 1 and 2. Section 1(1) is the definitions and s 1(2) is the interpretation. The old Act had 24 definitions and the new Act has 52 definitions.

There are new definitions for words such as 'capture', 'coercive behaviour', 'caregiver', 'child' and 'Director-General'.

There are also new definitions contained in the regulations regarding electronic communication.

The Act now prescribes that the court manager will prepare a roster for clerks who will attend to applications and provide contact details that can be outside normal court hours, including weekends and public holidays. The roster will be sent to Station Commanders at local police stations and displayed on the Department of Justice website.

The supervisor on duty or court manager is responsible for contacting the magistrate designated to consider urgent applications, which are brought after hours.

'The new Act aims to aid the country in its endemic of widespread gender-based violence as well as the harm done against children within a household' (BusinessTech 'New domestic violence laws in South Africa – what you need to know' (https://businesstech.co.za, accessed 31-7-2023)).

The Act also provides that a new document called a domestic violence safety monitoring notice may now also be applied for with application for protection order or before a final protection order is granted. This is applied for where a complainant shares a joint residence with the respondent. The application is made with a supporting affidavit to the clerk of the court or via electronic submission to the electronic address of the court. The court may consider any other additional evidence (oral or written), but such evidence must form part of proceedings.

The service by the clerk now may be effected by hand, e-mail, SMS, mms or any social media, such as WhatsApp, Facebook or Twitter.

If a clerk foresees any delay, then the clerk is required to approach the magistrate for directions.

The Act also makes provision that all courts now have jurisdiction where either the complainant or respondent resides, studies, carries on business permanently or temporarily within its area. This includes the area where the cause of action arose.

Provision has been made for the clerk of the court to receive applications electronically via online portal or in person.

A minor child without assistance or consent of an adult may also bring an application.

An application may be considered by the court outside of ordinary hours if a court is satisfied that a reasonable belief exists that the complainant is suffering or may suffer harm if the matter is not dealt with immediately.

The clerk of the court must capture all applications, supporting affidavits and other information in the integrated electronic repository. The clerk must immediately submit the application and supporting affidavits to court.

A magistrate must consider the application and if an application for a domestic violence safety monitoring notice is made, then both applications are considered together.

A court must satisfy itself that reasonable grounds for believing that the complainant and respondent share joint residence, and reasonable grounds exist to suspect that the respondent poses a threat to complainant's safety. The court may then issue a domestic violence safety monitoring notice.

The domestic violence safety monitoring notice directs the Station Commander where the complainant resides to direct a South African Police Service (SAPS) member to contact the complainant at regular intervals to inquire about the complainant's well-being via electronic service at an electronic address and visit the joint residence at regular intervals and see and communicate privately with the complainant. Where a SAPS member is prevented from seeing the complainant or unable to enter the joint residence to see and communicate with the complainant in private, the SAPS may, to overcome resistance against entry, use such force as may reasonably be required.

The words 'undue hardship may be suffered' are deleted and replaced with 'complainant is suffering or may suffer harm' because of domestic violence.

There is now also provision for an investigation by the Family Advocate or designated social worker to determine if a child needs care and protection.

The Act now provides that a warrant of arrest is issued by the magistrate the moment the interim protection order has been issued. The warrant of arrest remains on the file, until the interim protection order has been served on the respondent. The clerk serves the interim protection order and warrant of arrest on the complainant only after receiving the return of service.

If a notice to show cause is issued, the clerk must inform parties in the prescribed manner and captures written notice in the integrated electronic repository.

All service of any documents in terms of this Act are to take place not later than 12-hours if served electronically and no later than 24-hours if served in person.

The Act also makes provision for seizure of weapons. Any weapon seized must be kept by SAPS. A court must direct the clerk of the court to refer a copy of the record of evidence to the relevant Station Commander for consideration in terms s 102 of the Firearms Control Act 60 of 2000 and a copy of the record must be submitted to the National Commissioner of SAPS.

Any documents subpoenaed (book, document, or object) must be produced by 12pm on the day before proceedings.

Provision has also been made for the hearing of evidence by audio visual link.

In issuing a final order, where a notice to show cause is issued, a court must proceed to hear the matter to consider all evidence received in terms of the application and further affidavits or oral evidence as the court may direct which will form part of the record of the proceedings. Where a court finds on a balance of probabilities, that the respondent has or is committing an act of domestic violence then the court must issue a final protection order.

For variation applications, the court must be satisfied that circumstances have materially changed since the original order was made; good cause must be shown for the variation or setting aside; and proper service has to be effected on the respondent.

The court has several applicants constantly looking for their final orders, which they have lost or misplaced, and have difficulty in tracking the file. People move homes and change jobs over time and lose documents. The court will now be able to secure all documents electronically and be able to retrieve orders at a press of a few buttons.

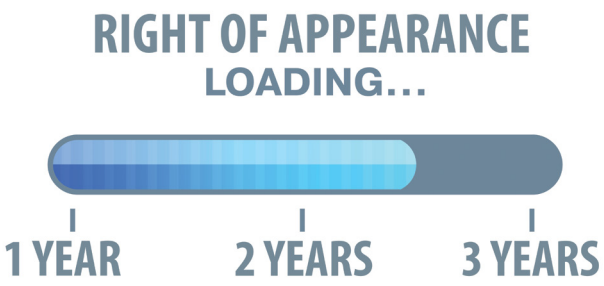
The changes to the Act are welcomed as they will help improve its effectiveness in addressing domestic violence. An added advantage is that the process for obtaining a protection order has been simplified and made more accessible to all victims, including children.

Overall, the changes to the Domestic Violence Act help to improve protection and support to victims of domestic violence in South Africa and have strengthened the legal and social framework for addressing this pervasive problem in the country.

Mohammed Moolla *BProc (UKZN) LLM (UWC)* is a senior magistrate at the Wynberg Magistrate's Court in Cape Town. ❑

Why the wait? Challenging the constitutionality of the right of appearance requirement

By Blessing Sicelo Makhathini



It is an undisputed norm that any law that is inconsistent with the Constitution is invalid (s 2 of the Constitution). This is so because the Constitution is, according to the preamble, the supreme law of South Africa. Against this background, s 25(3)(*a*)(i) of the Legal Practice Act 28 of 2014 (LPA), in my opinion, is impugned on constitutional grounds. The purpose herein is to establish the extent to which the impugned provision does not fulfil the constitutional obligations.

Understanding s 25(3)(*a*)(i) of the LPA

The impugned provision provides a High Court registrar with authority to issue a right of appearance (ROA) certificate to attorneys who wish to appear in the High Court, Supreme Court of Appeal, or the Constitutional Court (CC). The authority herein is not faulted. However, the gist of the constitutional threat is the requirement that an attorney must have been practicing as such for a continuous period of not less than three years.

Background

It is understood that the impugned provision is the replacement of s 3(2) read with s 4(1)(*b*) and (2) of the now repealed Right of Appearance in Courts Act 62 of 1995. The repealed provision had also provided the registrar with the authority to issue the right of appearance subject to a certificate confirming that the attorney had been in practice for a continuous period of not less than three years.

Notwithstanding the aforementioned similarities, the impugned provision is distinguishable in material respects. This is so on the basis that the same requirement existed as an 'alternative' under the repealed provision. As a result, attorneys who satisfied other requirements in s 4(1) were still issued with the right of appearance despite not satisfying the three-year requirement.

Freedom of trade, occupation, and profession

The contended constitutional concern originates from s 22 of the Constitution (infringed provision). It is common cause that the infringed provision provides every citizen with a right to freely choose their trade, occupation, or profession. The provision further includes a special limitation clause (I Currie and J De Waal *The Bill of Rights Handbook* 6ed (Cape Town: Juta 2013) at 174). In this regard the legislature is vested with power to enact regulatory provisions to oversee the chosen practice. The right under discussion is not absolute (Currie and De Waal (*op cit*) at 150). This is so because ss 7(3) and 36(1) of the Constitution authorise the limitation of rights in the Bill of Rights. Hence the infringed provision is generally not exempted from the limitation analysis.

Application of s 36(1) of the Constitution

The difficulty with applying the s 36(1) analysis in the instance of rights, which have their own limitation clauses, had been acknowledged (Currie and De Waal (*op cit*) at 152). This is because these rights are generally armed with their own limitation criteria. However, the present enquiry is distinguishable. The CC, through Ngcobo J, has provided notable guidelines in this regard (*Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC)).

The court was called on to rule on the constitutionality of s 22C(1)(*a*) of the Medicines and Related Substances Act 101 of 1965. The test to resolve the difficulty was held to be whether the impugned law, viewed objectively, would negatively affect the 'choice' of a trade, occupation or profession (para 68). It is an affirmative outcome that will drive the enquiry to s 36(1) of the Constitution. Although the court unanimously found in the negative, the facts warranted such conclusion. This is so because s 22C(1)(*a*) merely provided permissible regulations for the practice (para 72). As a result, the court applied the rationality test as opposed to the reasonableness test in s 36(1) of the Constitution.

On the contrary, the present scenario constitutes, on objective grounds, an impairment on the 'choice' to enter and to continue with the attorneys' profession. Therefore, it is fitting to invoke s 36(1) of the Constitution.

Whether s 25(3)(*a*)(i) of the LPA is a law of general application?

It is common cause that the impugned provision is a legislative provision. This is deemed to be 'law' for the purposes of the s 36(1) analysis (Currie and De Waal (*op cit*) at 156). The second part of the inquiry deals with the character of the impugned law. In this part, the focal question is whether the law applies impersonally, equally and is not arbitrary (Currie and De Waal (*op cit*)). Henceforth, s 25(3)(*a*)(i) would be of general application if this question is answered in the affirmative.

It is noted that the LPA recognises both attorneys and advocates as legal practitioners (s 1). This was seemingly done in pursuit of an integrated legal profession. One notable sign of integration permits advocates to source instructions directly from the public (s 34(2)(*a*)(ii)). However, the import of the impugned provision does not extend to newly admitted advocates who are able to immediately acquire the ROA on admission. Against this background, the impugned provision does not apply equally to legal practitioners.

The differentiation emanates from the fact that the character of the impugned provision singles out newly admitted attorneys. An example of this was the subject of adjudication in *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC). Albeit in dissent, Mokgoro J found that the law, which targets specific individuals, cannot be of general application (para 102). The dissent is nonetheless significant because Mokgoro J merely used a different vehicle to arrive at the same destination as Goldstone J who penned the majority judgment. The majority also did not reject this reasoning, thus making it a crucial dictum. Therefore, the differentiation suffers from the undesired form of arbitrariness (Currie and De Waal (*op cit*) at 159 – 160).

The arbitrariness arises from the fact that similarly placed persons (or supposedly) are treated in a substantially different manner. Treatment of this nature was accordingly rejected in *S v Makwanyane and Another* 1995 (3) SA 391 (CC). The rejection is premised on the basis that an arbitrary action is incapable of providing rational reasons for unequal treatment of similarly placed persons (para 156). The same is true with the application of s 25(3)(*a*)(i) of the LPA. Consequently, the impugned provision is not of general application.

From the foregoing, the bus ought to have been parked already. Be that as it may, and for academic purposes, the inquiry will nonetheless proceed to apply the s 36(1) analysis. This is also necessary because the courts may, notwithstanding the reasons, proceed to the same destination.

Reasonableness and justifiability

The limitation of constitutional rights cannot be based on flimsy reasons. The reasons must conform to a democratic society based on human dignity, equality, and freedom (s 36(1) of the Constitution). The analysis was first adopted in *Makwanyane* under s 33(1) of the interim Constitution and was subsequently included in s 36(1) of the final Constitution. The absence of persuasive reasons will ultimately be the collapse of reasonableness and justifiability of the limitation.

The nature of the right (s 36(1)(*a*)): The focus turns to the heart of s 22 of the Constitution and its importance within the overall Constitutional scheme, because rights do not weigh equally. The nature of the right under discussion is, for present purposes, informed by the significance of human dignity. This view was confirmed in *Affordable Medicines* (para 59). The effect is that s 22 of the Constitution is elevated to a higher degree (see *Makwanyane*).

The importance of the purpose of the limitation (s 36(1)(*b*)): The contravention caused by the impugned provision to the Constitutional right(s) must serve a legitimate purpose. The legitimacy is based on whether a purpose can be located within constitutional aspirations of democracy, human dignity, equality, and freedom. The impugned provision has been in operation for more than four years. However, in the absence of evidence to the contrary, the purpose remains vague. There have, however, been suggestions, albeit with doubt, that purport to link the limitation to the protection of society from possibly 'incompetent attorneys' (Prof Fareed Moosa 'Challenges faced by attorneys – rights to appear in superior courts' 2022 (Dec) *De Rebus* 11). It is submitted that public interests are of paramount importance in any profession. Therefore, subject to reservations hereunder, the limitation is presumed to conform to a legitimate legislative purpose (see *Rafoneke and Another v Minister of Justice and Correctional Services and Others* 2022 (6) SA 27 (CC) at para 82).

The nature and extent of the limitation (s 36(1)(*c*)): The magnitude of the limitation becomes the subject of scrutiny. The court in *S v Manamela and Another (Director-General of Justice Intervening)* 2000 (3) SA 1 (CC) has warned against the use of a 'sledgehammer to be used to crack a nut' (para 34). The essence herein is that the effect of the limitation should not exceed what is reasonably necessary in pursuit of a purpose.

To the extent that human dignity is also compromised, the encroachment is severe in nature. The impairment further borders on the clients' right to choose a legal representative of their choice (s 35(2)(*b*) of the Constitution). This is so because clients who prefer newly admitted attorneys may be inclined to engage advocates who are immediately issued with the right of appearance. Hence the impugned provision becomes a *prima facie* hindrance to access to justice. The right to equality is also not spared from the sledgehammer. This is due to the unfair differentiation among newly admitted legal practitioners.

Furthermore, the encroachment has the effect of placing the enjoyment of the 'choice' in abeyance pending the conclusion of three years. This is despite absence of evidence justifying the extent of limitation. Hence the extensive nature of the limitation on s 22 of the Constitution is disproportionate to any presumed benefit.

The relation between the limitation and its purpose (s 36(1)(*d*)): The test aims to establish the nexus or the absence thereof between the infringing law and its purpose. For present purposes, the nexus is affected by the following factors: There is no evidence that newly admitted attorneys, but not advocates, are unable to represent their clients accordingly in superior courts nor can it be reasonably said that putting the ROA in abeyance for three years will equip these attorneys. This is so, Prof Moosa submitted, because there is no mandatory training or requirement(s) to be undertaken during the three years (Moosa (*op cit*) at 12). For all possibilities, it could be three wasted years. Therefore, the

s 25(3)(*a*)(i) requirement is misplaced in relation to its supposed purpose.

Less restrictive means to achieve the purpose (s 36(1)(*e*)): This aspect is undertaken on the assumption that the purpose is worthwhile in which case the infringing law should be replaced with less limiting measures. Despite an unfounded assumption that newly admitted attorneys are unskilled to appear in superior courts, it is submitted that a more extensive Practical Vocational Training (PVT) would have been warranted as opposed to three, possibly empty, years. This is so because the three-year period is unregulated. As a cure, in addition to board examinations and Practical Legal Training, a structured advocacy training could have been included within the period of PVT. It is also not a mitigating factor that s 25(3)(*a*)(i) further provides for the possibility of three years being reduced. The impairment on access to justice, 'choice' to enter and to continue as an attorney would have prevailed already and the inroads would have been far reaching, thus rendering the possible reduction ineffective.

Conclusion

From the foregoing, s 25(3)(*a*)(i) cannot be located within the constitutional scheme based on human dignity, equality, and freedom. This is unfortunate in the light of the LPA's objectives to promote transformation, access to legal services, equality and to remove unnecessary barriers (s 3 of the LPA). It is noted that the infringed provision was meant to eliminate the restriction on employment caused by past laws. There is, however, *prima facie* evidence that the impugned provision is directly opposite to these objectives. It is inconceivable that the legislature would have intended such a catastrophe to prevail in a constitutional democracy. Given the impact on an integral part of the attorneys' profession, it is rather surprising that the issue has not been the subject of adjudication, nor has it generated enough academic scrutiny.

Blessing Sicelo Makhathini *LLB LLM (UKZN)* is a legal practitioner in Ermelo. He writes in his personal capacity. ❑

The law is a tool to change society in one way or the other

By Kgomotso Ramotsho

Candidate legal practitioner, Masai Buthane.

In this month's Young Thought Leader feature, *De* Rebus news reporter, Kgomotso Ramotsho spoke to Masai Buthane from Limpopo. Mr Buthane was born in Mokopane and grew up in Lephalale. After completing high school at Northern Academy, he pursued tertiary studies at the University of Johannesburg (UJ). Mr Buthane graduated with a BCom Law degree, specialising in accounting and economics in 2016, followed by a Bachelor of Law degree in 2018, and a master's degree in law focussing on human rights and a thesis on the expropriation of land without compensation with an analysis of the history of acquisition of property as a factor in determining just and equitable compensation.

During his student days, Mr Buthane was elected in 2017 as the secretary general of the Black Lawyers Association Student Chapter (BLASC) National Executive Committee and served on various executive committees of student activist organisations at UJ. Mr Buthane said that his upbringing instilled a sense of independence in him, and his parents' engagement as active citizens, striving to impact change wherever possible, inspired his commitment to bring about societal change. Mr Buthane is currently a candidate legal practitioner at Webber Wentzel, specialising in the formation of investment funds and general corporate law. 'I am also active in the National Association of Democratic Lawyers and the Association of Black Securities and Investment Professionals. I have also been recently appointed as a UJ Alumni Gauteng Chapter Convener', Mr Buthane added.

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

Masai Buthane (MB): I chose to study law because I always believed that the law is a tool to effect change in society in one way or another. At first, I was confused as to whether I should study and become a chartered accountant, an econometrist or a lawyer. Thus, I first studied BCom Law specialising in accounting and economics later specialising in law and studied an LLB (after loving the legal aspects more). However, from my days in high school I was quite interested in entrepreneurship and how to run a successful business. I always had great business ideas and sometimes I invested in growing small businesses in high school with the aim of enjoying profits later on and enhancing the business to create more cash flow in the business. Funny enough, all this is private equity (the space that I am now in). Ultimately, I chose to study law in order to impact society. Also, it is important to say that I chose to study law in order to liberate myself and my family from socio-economic and related challenges.

KR: In the firm, what field of law do you specialise in and what are some of the challenges you face in your profession? What aspects of your job are you passionate about?

MB: I work at Webber Wenzel and I am an investment funds lawyer specialising in the formation of private equity funds and general corporate aspects. My work entails specialising in establishing, managing, and ensuring legal compliance for various investment funds, which pool money from multiple investors to be professionally managed and invested in diverse assets. We draft fund documentation and handle negotiations, ensuring

transparent operations and facilitating successful transactions within a complex financial and legal landscape. I am passionate about the field of work that I do because I am able to be part of the private equity teams that impact change in society and enterprises in which they invest in. I am mostly interested in environmental, social and governance investing (more so the social aspect) and the wider spectrum of impact investing because this speaks to the problems of socio-economic challenges in South Africa, such as unemployment, poverty, black and women discrimination. What makes me passionate about it is helping and advising teams that invest in enterprises and who ultimately positively impact society in a social economic sense, which was something I always wanted to do but was only able to purse in the political spectrum.

Some of the challenges that we face in our profession is that you find that there are certain legal practitioners who are not being paid according to what they put in or who are not paid at all. This is exploitation in my view. In addition, we still see today that when writing our Board Examinations in only two languages (English and Afrikaans). This goes against the principles of diversity and our South African values as it still is uncertain why Afrikaans and people that speak the language are advantaged over the other (majority) students who speak various other official languages. Certainly, this is discrimination on its own, in the legal profession. In addition, the inequality of women employment in the whole profession and various other discriminations against women namely, not being paid while on maternity leave; being looked down on for being pregnant; not being entitled to bonuses because they are pregnant and not receiving promotions like their male counterparts.

KR: What is the most important quality you think a legal practitioner should have?

MB: A legal practitioner should be non-judgmental and unbiased and embody integrity and honesty. These qualities are essential to upholding justice and maintaining the dignity of the judiciary.

KR: Has it always been your dream to work at one of the big law firms?

MB: While not an initial dream, exposure to big law firms during my active student years made me recognise the opportunities they offer. I appreciate how my current role aligns with my interests and offers room for personal and professional growth.

KR: There is a misconception that the quality of legal practitioners in the private space and that of those in the public space is not the same. Do you have any thoughts on this?

MB: The quality of a legal practitioner is based on the experience that they have, which speaks to the training that they get and the amount of time, hard work and attitude that the individual puts into their growth. They are very good lawyers in the public space, and they are very good lawyers in the private space. I think it is incorrect that there is a level of quality simply because of the sector one is in. There is an intentional misconception that black professionals are incompetent because the face of the public sector is black while white professionals are competent because the face or the private sector is white. This cannot be accepted. Unless there is lack of resources, training provided to a legal practitioner in the public sector, I do not see why there cannot be quality in their respective speciality.

KR: What advice would you give to candidate legal practitioners who might want to get articles of clerkship at a big law firm?

MB: Go for it but do your research. Go for a firm that you think will align with your values and you will be able to meet its expectation namely, the expectation of long working hours. So, one must do quite a lot of research. There is also more in the legal profession that just a big law firm. Depending on what your values are and interest in law, you choose the course you want to run. And I am always happy to advise people should they wish to contact me via LinkedIn.

KR: What does access to justice mean to you?

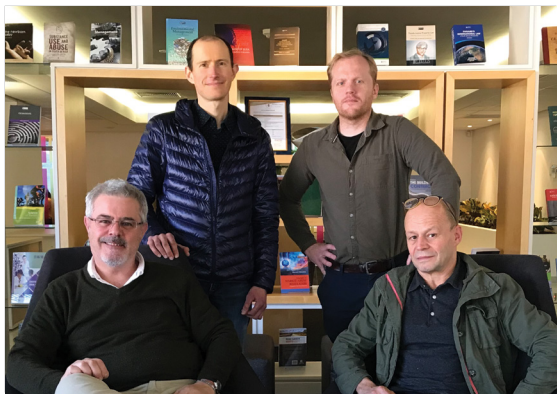
MB: Access to justice means someone in Lephalale being able to cry to the law and find resolution in the law. This means someone in Ga-Rammobola in Moletji being able to be assisted by the law and through competent legal practitioners. This is at times, for free (*pro bono*) and at times at low costs and still being exposed to quality legal assistance. This is legal assistance in the most efficient manner for the people. So, it ultimately means the most ordinary person being able to access dispute resolution, and general legal assistance in the most time efficient and cost-effective way regardless of being in the village or township, or being old or young, male or female, black or white, rich or poor.

KR: What is your everyday motto that you live by and why?

MB: My motto is time, space and patience is important in life: You must give yourself time, you must give yourself space, and you must be patient in your craft. Life is not easy. You fall, you dust yourself off, you come back, you run, sometimes you fly, sometimes you crawl, as long as you keep moving and pushing, with time and space all will make sense. And yes, God is King!

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

THE LAW REPORTS



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

July 2023 (4) South African Law Reports (pp 1–323); May 2023 (2) South African Criminal Law Reports (pp 1–112)

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

Abbreviations

CC: Constitutional Court
GJ: Gauteng Local Division, Johannesburg
MM: Mpumalanga Division, Mbombela
NCK: Northen Cape Division, Kimberley
SCA: Supreme Court of Appeal
WCC: Western Cape Division, Cape Town

Appeals

When an application (petition) for leave to appeal to the SCA is 'lodged': In *Varnardo Investments (Pty) Ltd and Another v K2012150042 (Pty) Ltd* 2023 (4) SA 314 (WCC) the WCC had to determine whether a judgment had been suspended pending its appeal to the SCA and when exactly an application for leave to appeal was 'lodged' under the SCA Rules. Grobbelaar AJ for the WCC found that an application was 'lodged' when it was presented to the registrar of the SCA, thereby simultaneously suspending the judgment appealed against even where the registrar had at the time declined to stamp the application. The WCC ruled that even an application that was 'incomplete' in the sense that the judgment of the court *a quo* refusing leave to appeal was not attached to it could be lodged in this manner. In the premises the WCC made an order for the restoration of the *status quo ante* where the respondent had, by the time the application for leave to appeal was handed to the recalcitrant registrar, already executed on the judgment appealed against.

Arbitration

Arbitrators' powers: Can arbitrators decide only on the issues set out in the parties' pleadings? In *Close-Up Mining and Others v Boruchowitz NO and Another* 2023 (4) SA 38 (SCA) the second respondent (the Lutzkie Group) brought a dispute with first to third appellants (Close-Up Mining) before an arbitrator (the first respondent). During the proceedings Close-Up raised a defence that it had not pleaded. The arbitrator's response declined to hear it based on his understanding that arbitrators lacked competence to consider unpleaded matters. Close-Up sought review in the GP, arguing that the arbitrator failed to appreciate that he had a discretion to consider unpleaded matters.

The GP, however, agreed with the arbitrator and dismissed Close-Up's application. It did, however, grant leave to appeal to the SCA, which (per Unterhalter AJA) found that there was no fixed rule that an arbitrator may decide only issues delineated in the parties' pleadings, and that its admissibility depended on what the parties had agreed. They could either confer a discretion like the one contended for by Close-Up or, instead, confine the arbitrator's competence to the issues pleaded. Unterhalter AJA then considered whether the arbitration agreement in question gave the arbitrator the power to decide matters that had not been pleaded. He pointed out that the agreement stipulated that disputes would be determined under the rules of the Arbitration Foundation of Southern Africa (AFSA), therefore, narrowing the issue to whether those rules granted an arbitrator the discretion concerned. In the event Unterhalter AJA found that the AFSA rules did not do so and dismissed the appeal.

Companies

The court's discretion to convert a member's voluntary winding-up into a compulsory winding-up: In *Van den Heever NO and Others v World Marine Energy (Pty) Ltd (in Liq) and Another and a Related Matter* 2023 (4) SA 296 (WCC) the court had to decide whether to convert the respondent's members' voluntary winding-up into a compulsory winding-up on application by the liquidators of one of the respondent's former creditors. (According to precedent the existence of a voluntary members' winding-up was no bar to the granting of a compulsory creditors' winding-up under s 354(1) of the Companies Act 61 of 1973). The liquidators argued that the respondent was unable to repay the R 16 million it owed them. The WCC, per Sher J, pointed out that 'commercial morality' and the 'public interest' were important considerations in the exercise of its discretion to order the conversion applied for. Bearing this in mind, Sher J held that the respondent's conduct militated in favour of a conversion. It had, among other things, implemented the voluntary winding-up to avoid management exposure at a potential insolvency inquiry in circumstances where its management had been guilty of the commission of numerous material irregularities. In addition, conversion would allow the liquidators to challenge several voidable dispositions made by the respondent after its voluntary winding-up. Sher J, having refused an application for direct liquidation, made an order for the provisional winding-up of the respondent.

Business rescue: The validity of a sale by liquidators after liquidation proceedings have been 'suspended' by business rescue proceedings: In *Southern Sky Hotel and Leisure (Pty) Ltd t/a Hans Merensky Hotel and Spa (in Liq) and Others v Southern Sky Food Enterprises*

(Pty) Ltd 2023 (4) SA 99 (SCA) creditors obtained a final liquidation order against the first appellant company in liquidation. The second to fifth applicants were appointed as liquidators. A third party then applied for an order placing the company in business rescue. While the business rescue application was still pending, the liquidators put the company's property up for sale on auction. A sale agreement was subsequently concluded with the respondent. The agreement presumed that liquidation proceedings were interrupted by the business rescue application and made the sale conditional on its dismissal.

The respondent (the buyer) applied for an order invalidating the sale on the basis that it was concluded while liquidation was 'suspended' under s 131(6) of the Companies Act 71 of 2008, which provides that 'if liquidation proceedings have already been commenced by or against the company at the time [a business rescue] is made in terms of subsection (1), the application will suspend those liquidation proceedings until [*inter alia*] the court has adjudicated upon the application'. The GJ granted the order but granted leave to appeal to the SCA.

The SCA (per Basson AJA), having duly interpreted s 131(6), ruled that it did not invalidate the agreement because it did not suspend the liquidators' powers and that the agreement was, therefore, valid. The SCA, therefore, upheld the appeal against the GJ's order and replaced it with an order dismissing respondent's application.

Business rescue: Who gets to vote on a business rescue plan? If company A is a creditor of company B and both are in business rescue, do company A's business rescue practitioners or its directors have the right to vote on company B's business rescue plan? The issue arose in *Ragavan and Others v Optimum Coal Terminal (Pty) Ltd (in Business Rescue) and Others* 2023 (4) SA 78 (SCA). The fifth respondent (Tegeta) was in business rescue. The sixth and seventh respondents were its business rescue practitioners, and the appellants its directors. Tegeta was a creditor of the first respondent (Optimum), also a company in business rescue. Optimum's business rescue practitioners published a rescue plan and notified the affected parties of a meeting to vote on it. Tegeta's directors argued that it was their right to vote on the plan, while the business rescue practitioners argued that it was theirs. The GJ found for the business rescue practitioners, and the directors appealed to the SCA. The SCA (per Mabindla-Boqwana JA) ruled, on an interpretation s 140(1)(*a*) of the Companies Act 71 of 2008, that the right to vote on a debtor company's business rescue plan vested in the business rescue practitioners of the creditor company, not the creditor company's directors, and dismissed the appeal.

Conveyancers

The liability of a conveyancer for failing to warn a buyer that e-mail is not a secure way of transferring information: In *Hawarden v Edward Nathan Sonnenbergs Inc* 2023 (4) SA 152 (GJ) the plaintiff was the buyer in a property sale transaction and the defendant the conveyancer appointed by the seller. The defendant e-mailed the plaintiff its bank details for the plaintiff to pay the purchase price to the defendant; the plaintiff's e-mail account was hacked by a third party and the third party intercepted the defendant's e-mail and altered the bank details. After the plaintiff paid the purchase price into the nominated account, the money was misappropriated. The plaintiff instituted proceedings against the defendant, claiming damages equal to the purchase price based on what the plaintiff agued was the defendant's negligent failure to warn it of the danger of 'business e-mail compromise' of the kind that had occurred. The first issue was whether the omission was wrongful, that is, whether it would be reasonable to impose liability for the failure to warn. The GP, per Mudau J, held that it would be. This was because of the determinacy of liability (confined as it was to the plaintiff and the quantum of the purchase price) and the plaintiff's vulnerability (because of her commercial inexperience, ignorance of the risk of e-mail compromise and inability to contractually protect herself against the defendant, with whom she had no contractual link). Mudau J then had to decide whether the defendant's omission had been negligent. He found that the defendant had been aware of the danger and had indeed created the risk by the means it employed to convey its banking details despite the simple steps it could have been taken to mitigate the danger. Since the omission was a necessary precondition for the loss, which was in turn foreseeable, the defendant was liable to the plaintiff for damages equal to the purchase price.

Criminal law

Common purpose and premeditation in murder cases: In the murder case of *S v Ratau* 2023 (2) SACR 40 (MM), one Ratau and the deceased had been detained by the police and were being transported in a police bus when the prisoners simultaneously attempted to rob their police guards of their service pistols. The deceased's intended victim managed to resist the attack and, in so doing, shot and killed the deceased. Relying on the doctrine of common purpose, the state charged Ratau with attempted robbery and the premeditated murder of the deceased. The MM (per Roelofse AJ), having found that Ratau and the deceased had persisted in their attack while subjectively foreseeing that their attempt to rob the police officers of their weapons might lead to their discharge and the death of one or more of the occupants of the bus, convicted Ratau of premeditated murder based on common purpose and *dolus eventualis*.

Execution

Compliance with r 46A of the Uniform Rules of Court and the right to housing: *Bestbier and Others NNO v Nedbank Ltd* 2023 (4) SA 25 (SCA) concerned an appeal to the SCA, against a High Court judgment in favour of the respondent, Nedbank Ltd. The judgment was against the first to fourth appellants, in their official capacities as trustees of Goede Hoop Trust (the trust) for payment of an undisputed debt, settled by agreement, *inter alia*, consenting to judgment.

The High Court also declared Goede Hoop Wine Estate (the property) executable and entered judgment directly against the first appellant, Mr Bestbier, in his personal capacity based on a suretyship agreement. In declaring the property executable, it held that the appellants' rights to adequate housing were not engaged or compromised, so that r 46A – which requires judicial oversight and consideration by a court of various factors when a creditor seeks to execute against 'the residential immovable property of a judgment debtor' – was not applicable.

The main issue before the SCA was the applicability of r 46A (and Practice Directive 33A of the High Court), in circumstances where the property sought to be declared executable was owned by a trust and was a primary residence of the trust beneficiaries, as well as the trust employees and their families (the farmworkers).

The SCA (per Molefe AJA) held that s 26(1) of the Constitution was not compromised in every case where execution was levied against immovable property. The sole purpose of judicial oversight in all cases of execution against immovable property was to ensure that the orders being granted did not violate s 26(1) of the Constitution, that the judgment debtor was not likely to be left homeless because of the execution.

The only way to determine whether the right to adequate housing had been compromised was to require judicial oversight in all cases of execution against the immovable property on a case-by-case basis. Due regard must be had to the impact that the sale in execution is likely to have on vulnerable and poor beneficiaries who were occupying the immovable

property owned by the judgment debtor, who were at risk of losing their only homes. Where that has been established, r 46A was applicable, despite the judgment debtor being a trust, and would have to be followed (and, therefore, also rule 33 of the Practice Directive).

Molefe AJA concluded that the appellants had failed to show how their constitutional rights to adequate housing might be impacted: They did not show that as a result of indigence, the beneficiaries would be left vulnerable to homelessness if the farm in question was sold in execution. There was nothing to show that if r 46A was applied, default judgment and an order declaring the immovable property especially executable would not have been granted. The appeal was accordingly dismissed.

Hate speech

Displaying the old South African flag: In a demonstration organised by civil rights group AfriForum, participants had waved the old South African flag around, prompting another rights group, the Nelson Mandela Foundation, to seek an order from the Equality Court (the GJ sitting as such) declaring the gratuitous display of the old flag to be prohibited hate speech, unfair discrimination and harassment as intended in the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Act). The GJ granted the order and AfriForum appealed to the SCA, which in *AfriForum NPC v Nelson Mandela Foundation Trust and Others* 2023 (4) SA 1 (SCA) found, per Schippers JA, that the GJ's order was unassailable. Schippers JA pointed out that such a display was not only calculated to be harmful but actively propagated hatred. The SCA, however, excluded display for artistic, academic, or journalistic purposes from the prohibition.

Insolvency

What happens when the trustees of an insolvent estate abandon a right of action obtained before insolvency? In *Thomas and Another v Thomas* 2023 (4) SA 107 (SCA) the facts were that the trustees of the respondent insolvent estate had abandoned a right of action the respondent had obtained before his sequestration. When the respondent was rehabilitated some years later, he approached the NCK for an order declaring that, while the right did not form part of the insolvent estate due to its abandonment, it remained alive and could be employed by him. The NCK agreed with the respondent's argument and granted the order prayed for. In an appeal, the SCA, per Mocumie JA, found that the respondent's right of action had on the granting of the insolvency order vested in the trustees, and that the effect of the subsequent abandonment had been to extinguish it, leaving nothing to revive. The SCA accordingly upheld the appeal and replaced the NCK's order with one dismissing the respondent's application.

Intellectual property

Shape mark – trademark in a plastic bottle? *Dart Industries Inc and Another v Botle Buhle Brands (Pty) Ltd and Another* 2023 (4) SA 48 (SCA) dealt with a trademark and passing-off dispute between Tupperware and Buhle over the similarity of their hourglass-shaped plastic water bottles. Tupperware Brands Corporation, a United States of America (Tupperware USA) entity, was the registered owner of the Eco Bottle shape/container mark in South Africa. The GJ, having concluded that the Eco Bottle mark was neither inherently distinctive nor had acquired distinctiveness from prior use, dismissed Tupperware's application and granted Buhle's counterapplication for cancellation. Tupperware USA and its South African affiliate appealed to the SCA, which held, per Makgoka JA in a unanimous judgment, that the two bottles were too similar for Tupperware's Eco Bottle to fulfil a trademark function. In particular, the Eco Bottle lacked an inherently distinctive character: The average consumer would see it as nothing more than a fancy water bottle and would not distinguish it from other water bottles in the trademark sense. The

SCA pointed out that the acquisition of distinctiveness through prior use involved an investigation into whether an inherently non-distinctive shape mark had acquired sufficient distinctiveness to function as a trademark. In the case of the Eco Bottle, its apparent popularity was likely more due to its being part of the well-known Tupperware range of goods than its shape. The SCA concluded, in the light of these findings, that the GJ had correctly cancelled the Eco Bottle mark.

Refugees

An application of the constitutional principle of non-refoulement: Under s 22(12) and (13) of the Refugees Act 130 of 1998 (read with reg 9 and Form 3 of the Refugee Regulations), asylum seekers who failed to renew their visas within one month of expiry were considered to have 'abandoned' their visa applications, thereby exposing them to deportation (the so-called 'abandonment rule'). In *Scalabrini Centre and Another v Minister of Home Affairs and Others* 2023 (4) SA 249 (WCC) the applicants contended that the provisions in question were unlawful because they offended the principle of non-refoulement (the practice of not forcing refugees *or* asylum *seekers to return to a country in which they are liable to be subjected to* persecution), which had been incorporated into the Constitution by virtue of various international treaties to which South Africa was party. The state, represented by the respondents, argued that the provisions served the legitimate government purpose of addressing the backlog of inactive asylum applications by incentivising to complete their applications. The WCC, per Goliath DJP, pointed out that the Refugees Act was aimed specifically at giving effect to the country's international obligations to refugees, in particular the right to non-refoulement, which was given exceptionally strong protection. The WCC emphasised that it was evident that, in violation of this, the impugned provisions severely limited asylum seekers' right to non-refoulement and completely deprived them of the protections of the asylum system. The WCC concluded that the impugned provisions were, therefore, unconstitutional, and invalid, and directed the state to amend them without delay. The declaration of invalidity was referred to the CC for confirmation.

Revenue

Forfeiture orders: The consequences where one was made after a winding-up: In *South African Reserve Bank and Another v Maddocks NO and Another* 2023 (4) SA 85 (SCA), the issue before the SCA was validity of three forfeiture orders, issued by the appellant (the Reserve Bank) under reg 22B of the Exchange Control Regulations, against two companies in liquidation, pursuant to obtaining blocking orders against them before they were wound up. The two respondents were the joint liquidators of the companies. The subject-matter of the appeal was a High Court order obtained by the respondents, declaring the forfeiture orders null and void and directing the National Revenue Fund to pay the forfeited moneys into the liquidators' bank account.

The thrust of the liquidators' case was that the Reserve Bank, after issuing the blocking orders in respect of the moneys standing to the credit of the companies, became their creditor and was required to participate in the *concursus creditorum*. It could, therefore, not validly deal with the assets of the companies in liquidation by the issue of forfeiture orders, which prejudiced other creditors.

Dismissing this argument, the SCA, per Zondi JA, held that, having regard to the context and purpose of the Currency and Exchanges Act 9 of 1933 and the Exchange Control Regulations, the operation of the blocking orders did not result in the creation of a debtor-creditor relationship between the companies and the Reserve Bank. The liquidation of the two companies did not nullify the blocking order, which was in existence at the time. It followed that the forfeiture orders issued after the liquidation of the companies were not affected by the liquidation; the money which was declared as forfeited to the state did not fall into the estates of the insolvent companies. The SCA concluded that the liquidators were, therefore, not entitled to demand that the funds be paid out to them for distribution, and that the appeal would succeed.

Telecommunications

Whether service providers may release customer information to third parties who want to institute legal proceedings against the customer in question: In *Giftwrap Trading (Pty) Ltd v Vodacom (Pty) Ltd and Others* 2023 (4) SA 68 (SCA), the applicant (Giftwrap), an online retailer, marketed its products through advertisements on online platforms provided by a third party, this for a fee calculated on the basis of the number of visits – or 'clicks' – the advertisement received. Giftwrap had for some years been the victim of click fraud, a species of fraud in which a wrongdoer repeatedly clicks on an advertisement with the intention of driving up the costs of the advertisement for the advertiser. Giftwrap had come into possession of Internet protocol (IP) addresses of devices used by the wrongdoer, as well as the identity of the Internet service provider used by each device. The service providers were the respondents. Giftwrap had then requested the customer information associated with each IP address to enable it to take legal action against the customers concerned. But the respondents refused to provide it. In view of this, Giftwrap applied to the GP for the disclosure of the information's disclosure based on s 42(1)(*c*) of the Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002, which prohibited the disclosure of 'information … obtained in the … performance of … duties in terms of the Act, except … information which is required … as evidence in any court of law'. Service providers such as the respondents are obliged under the Act to obtain and store prescribed customer information.

The GP dismissed the application, reasoning that the Act did not permit disclosure of customer information to requesting parties, in order for those parties to identify wrongdoers. Giftwrap appealed to the SCA. The question the court had to answer, ruled Van der Merwe JA in a unanimous judgment, was whether s 42(1)(*c*) of the Act permitted service providers to disclose to third parties information they required in order to identify wrongdoers in order to instituted legal proceedings against them (as opposed to providing information which was required as evidence in pending legal proceedings). Van der Merwe JA found that, properly interpreted, the provision did not permit the disclosure of such information and dismissed the appeal.

The Public Protector

Whether a decision declaring conduct of the President to be constitutionally invalid was immediately executable: Section 18(1) and (3) of the Superior Courts Act 10 of 2013 provides that a party may apply to have a decision by a High Court put into immediate operation pending appeal. In *Public Protector of South Africa v Speaker, National Assembly and Others* 2023 (4) SA 205 (WCC) the decision in question, granted at the instance of the Public Protector, ordered that 'the decision of the President to suspend the [Public Protector be] declared invalid', and that '[t]he suspension … [be] set aside … from the date of this order'. The respondents immediately filed notice to appeal directly to the CC, which prompted the Public Protector to seek the immediate putting into operation of the WCC's above-quoted order in her favour. A full bench of the WCC (Nuku J, Francis J and Lekhuleni J) ruled that the order was not capable of being immediately executed under the Act because it dealt with unconstitutional conduct and hence had no force until it was con-

firmed by the CC. Before this, there was nothing on which execution could be levied. The WCC added that it made no difference that appeals to the CC had in fact been lodged: They could not render final and binding a decision that, by operation of law, was not. The WCC accordingly dismissed the Public Protector's application.

Other cases

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

- appeals against decisions of the Community Schemes Ombud Service;
- registration of births; and
- effect of divorce on a provision in a will.

Gideon Pienaar *BA LLB (Stell)* is a Senior Editor, Joshua Mendelsohn *BA LLB (UCT) LLM (Cornell)*, Johan Botha *BA LLB (Stell)* and Simon Pietersen *BBusSc LLB (UCT)* are editors at Juta and Company in Cape Town.

❑

Compiled by Kevin O'Reilly

People and practices

Garlicke & Bousfield Inc in La Lucia has appointed Karen Slade as a Senior Associate in the Property and Conveyancing Department.

Malan Scholes Attorneys in Johannesburg has appointed Megan Jacobs as an Associate in the Mining and Environmental Department. Ms Jacobs specialises in mining law.

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

❑

By Mapakiso Pita

Substantial misconduct as a factor to grant forfeiture of patrimonial benefits of a marriage

M v M (SCA) (unreported case no 022/2022, 26-5-2023) (Mbatha JA (Molemela, Meyer and Matojane JJA and Siwendu AJA concurring))

In terms of s 9 of the Divorce Act 70 of 1979, a court granting a decree of divorce on the ground of irretrievable breakdown of the marriage, 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 with due regard to a variety of factors, one being substantial misconduct on the part of either of the parties.

It is against this section of the Divorce Act that this article will analyse the case of *M v M* and the legal principles emphasised therein.

Background

The applicant and respondent were married to each other in community of property and profit and loss. In October 2016, the respondent instituted an action for divorce against the applicant and ancillary relief thereto in the Limpopo Division of the High Court, Polokwane (para 1). The High Court dismissed the applicant's counterclaim for a partial forfeiture order in respect of the applicant's pension benefits and ordered that the applicant's pension fund pay out the respondent 50% of the applicant's pension interest/benefit to the respondent (para 1).

As a result of the High Court's order, the applicant turned to the Supreme Court of Appeal to appeal the judgment and order, except the order dissolving the marriage (para 2). The issues in dispute were as follows:

- Firstly, whether the applicant was entitled to a partial forfeiture order in respect of her pension interest/benefit held in the Government Employees Pension Fund (para 24).
- Secondly, whether the respondent's prolonged extramarital affairs and the abuse and misappropriation of the funds from the various family businesses for the benefit of his girlfriend and the respondent's failure to contribute meaningfully to the joint estate translated into substantial misconduct on his part (para 24).
- Thirdly, whether the respondent would be unduly benefitted if the order for partial forfeiture was not granted (para 24).

The evidence of the trial court can briefly be set out as follows. It transpired from the applicant's testimony that the respondent's prolonged extramarital affair led to the irretrievable breakdown of the marriage relationship despite her attempts to save her marriage through professional counselling (para 7-8). In addition, the respondent had a child with his mistress during the subsistence of his marriage with the applicant, which incident was described to have brought her pain and humiliation (para 7). Further, in favour for her claim for a partial forfeiture of benefits, the applicant testified that respondent misappropriated their joint estate by giving money to his mistress to start a cash loan business (para 10). Also, the respondent built a double-storey house for his mistress and sold cattle forming part of their estate and deposited the proceeds of the sale into his mistress's business banking account (para 11). The applicant further testified that the respondent gave his mistress access to their motor vehicles without her consent (para 11).

The respondent's evidence was said to be riddled with inconsistencies and discrepancies, which he struggled to justify and substantiate. Despite this, the full court dismissed the appeal by the applicant for an order for partial forfeiture of benefits, by reasoning that both parties had committed substantial misconduct and undue benefits should not accrue to one party in relation to the other if an order for forfeiture was not granted (para 23).

Legislative provisions on the concept of forfeiture

It is trite law that entitlement by one spouse to share in the pension interest of the other spouse is regulated by the provisions of s 7(7) and 7(8) of the Divorce Act. On the contrary, s 9 of the same legislation holds that the court may make an order that the patrimonial benefits of the marriage be forfeited by one party in favour of the other, having regard to certain factors, and if satisfied that if the order for forfeiture is not made the one party will in relation to the other party be unduly benefitted. The factors contained in s 9(1) that the court had to consider for a claim of forfeiture are: The duration of the marriage, the circumstances which gave rise to the breakdown of the marriage and any substantial misconduct on the part of either of the parties.

Wijker v Wijker 1993 (4) SA 720 (A) outlined certain legal principles in relation to s 9(1) of the Divorce Act. It held that a party seeking an order for forfeiture of benefits does not have to prove the existence of all three factors in s 9(1) cumulatively. The question to be asked by the court is whether one party will be unduly benefited if an order of forfeiture was not made. Furthermore, in *Wijker* the court held that substantial misconduct is one that is found to be so 'obvious and gross that it would be repugnant to justice to let the "guilty" spouse get away with the spoils of the marriage' (para 28).

In *Botha v Botha* 2006 (4) SA 144 (SCA) the principles emanating from the *Wijker* judgment were endorsed and the court held that only the factors in s 9(1) should be accorded consideration and the application of this section should be within the context of the evidence tendered in court.

Analysis and evaluation

The appeal court found that the trial court and the full court failed to apply the principles advocated in the *Wijker* judgment by coming to factually incorrect conclusions (para 34). A full bench in the High Court concluded, among others, that both the applicant and respondent have 'committed substantial misconduct, [and] an undue benefit will not accrue to one party in relation to the other if an order for forfeiture is not granted' (para 34). Further, it found that the full court failed to consider the evidence of the applicant that she could not accord the respondent his conjugal rights, as she feared contracting HIV/AIDS virus

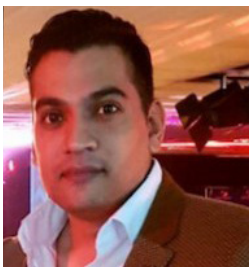
(para 35). This is a clear indication that she did not give the respondent permission to continue with his extramarital affairs (para 35). The court further failed to consider the evidence of the applicant that when she sought counselling for their marital problems, the respondent told the therapist that he would never stop having extramarital relationships (para 35).

Based on the lack of appreciation of the facts in the trial court, the appeal court is empowered to reconsider the facts. The appeal court found that the respondent's prolonged relationship with his mistress existed for a long period of time while he was still married to the applicant (para 37). Also, this relationship of the respondent to the mistress was gross and humiliating as it was flaunted in the public domain to the prejudice of the applicant (para 37). The respondent only filed for divorce at the time there was nothing left in the joint estate except for the applicant's pension interest and a few assets (para 37). Further, the respondent made little contributions for the benefit of the joint estate, while the applicant struggled to make ends meet (para 37). In addition, the respondent channelled assets of the joint estate to benefit his mistress and such constitutes misconduct as he deprived the joint estate from benefiting (para 39). Considering the above, the appeal court found that the evidence presented before it proved that the respondent's actions amounted to substantial misconduct and his claim 'of 50% of the pension benefit which has accrued to the applicant is not sustainable' (para 41).

Conclusion

In conclusion, the court held that the above cited authorities and the evidence presented before it justifies the granting of order of forfeiture of the half share of pension benefits against the respondent. It is clear from the above that courts are called on to decide on matters decisively and appreciate the facts presented before it. One party should not be unduly benefitted to the prejudice of the other especially if one party's actions amounted to substantial misconduct and abuse of the joint estate.

Mapakiso Pita *LLB (UFS) LLM (Business Entities) (UFS)* is a candidate legal practitioner at Legal Aid South Africa in Welkom. ❑



By Professor Ciresh Singh

A battle between patent owners and pharmacies

Bayer Intellectual Property GMBH and Others v New Clicks South Africa (Pty) Ltd and Others (CCP) (unreported case no 2022/8099; 06238/2007, 7-7-2023) (Collis J)

On 7 June 2023, more than a year after reserving judgment in an urgent application, Collis J delivered judgment in the case of *Bayer v Clicks*. In this matter, Bayer approached the Court of the Commissioner of Patents to prevent Clicks from selling a cheaper generic blood thinning tablet called Rivaxored, that was in direct competition with its patented tablet – Rivaroxaban: Patent no 2007/06238.

Bayer was granted a patent for the tablet Rivaroxaban in 2000. Bayer accordingly obtained exclusive control over the product for a period of 20 years. The patent was due to expire in December 2020. In 2007, Bayer changed the dosage of the medication from a twice daily dosage to 'once a day' dosage. They claimed that this change in dosage was an 'inventive step', and they were successful in obtaining a new patent for the tablet. This consequently extended the expiry of the patent, for another 20 years (from December 2007 to January 2026). This extension was widely criticised by the health fraternity.

After expiry of the initial patent (in December 2020), Dr Reddy's Laboratories (Pty) Ltd launched generic versions of Rivaroxaban. Dr Reddy's was a rival company to Bayer and imported generic tablets – Rivaxored into South Africa (SA) and sold it to pharmaceutical wholesalers and retailers, like Clicks, Dis-Chem and Alpha Pharm.

Background and facts of the case

In 2021, Bayer brought a claim against Dr Reddy's seeking to prevent the distribution and sale of the generic tablets and were successful in obtaining an interim interdict against Dr Reddy's (*Bayer Intellectual Property GMBH and Others v Dr Reddy's Laboratories* (CP) (unreported case no 2007/06238-5, 15-12-2021) (Keightley J)). In terms of the interdict, the court found that Bayer's patent was *prima facie* valid, and that the sale of generic Rivaxored in SA constituted a *prima facie* infringement of the patent. The court held that the continued sale of Rivaxored in SA gave rise to irreparable harm to Bayer.

Despite the interdict granted against Dr Reddy's, Clicks continued to sell Rivaxored. Bayer accordingly brought the current application before court to prevent Clicks from selling Rivaxored.

Arguments by the parties

Clicks contended that they were not bound by the initial order against Dr Reddy's and was, therefore, not in contempt. They argued that the (extended) patent granted to Bayer was invalid as it failed to constitute an inventive step, as 'there [was] nothing exceptional about the new [one] dosage claim' (para 44).

Moreover, Clicks claimed that Bayer stood to lose only R 3 million in sales based on its current stock levels, and this prejudice was outweighed by the public interest in having access to a cheaper alternative to the patented product (para 65). In other words, they claimed that 'public interest based on the availability of cheaper generic medicines should outweigh the interests of the patentee' (para 66).

Bayer conceded that while Clicks was not bound by the order, their conduct undermined the authority of the court, as they showed 'scant regard for the find-

ings' of the court by continuing to sell a product, the sale of which was found to be '*prima facie* unlawful' (para 13).

The court order

Regarding the inventiveness of the patent, Collis J held that this issue was comprehensively dealt with in the Keightley J judgment, and 'any findings made on the inventiveness of the patent stands until set aside on appeal' (para 46). In *Bayer v Dr Reddy's*, Keightley J found the patent to be *prima facie* valid.

It is undisputed that Bayer would lose sales as a result of the conduct of Clicks by its continued sale of Rivaxored, and that Bayer would find it difficult to prove the full extent of its losses to successfully launch a damages claim. Clicks argued that Bayer had a statutory right to claim a reasonable royalty *in lieu* of damages. This same argument was raised and rejected in the Dr Reddy's application by Keightley J. In terms of prevailing case law: 'The statutory provision that a royalty may be imposed *in lieu* of damages is an option available to a plaintiff. It is not an invitation to infringers to become *de facto* licensees' (*Pfizer Ltd and Another v Cipla Medpro (Pty) Ltd and Others* 2005 BIP 1 (CP)). 'Nor is it an answer to its claim for an interdict that an [IP holder] might be awarded a reasonable royalty as an alternative to damages. That is a remedy available at the option of a patentee and it cannot be compelled in effect to licence the use of its patent' (*Cipla Medpro (Pty) Ltd v Aventis Pharma SA and Related Appeal* 2013 (4) SA 579 (SCA)).

The court also rejected the argument that public interest in obtaining availability to a cheaper alternative, outweighed the interest of the patentee. Collis J found 'that the protection of a patent will also serve the public interest' (para 67). 'The marginal harm to a small percentage of patients in the private sector (who don't have medical aid or who have to make a small co-payment) was not considered to be sufficient to outweigh the negative public interest effect of failing to enforce valid patents' (para 70).

Accordingly, the balance of convenience favoured Bayer and that they were granted an interim interdict.

Comments

There were some key points for discussion from the *Bayer v Clicks* case.

Licences

In both the *Dr Reddy's* and *Clicks* cases, it was contended that a licence or royalty could be offered as a remedy to Bayer, *in lieu* of damages. The court in both cases confirmed that this was an option electable by the patent holder, and not the infringer. Such an option could not be imposed on the patent holder and this remedy was not an invitation for infringers to become licensees. In other words, the courts confirmed that a licence cannot be forced on the patent owner as a remedy for infringement.

Evergreening and constitutionalism

In part of their argument, Clicks appeared to contend that s 25 of the Patents Act 57 of 1978, was unconstitutional. They, however, failed to take this argument any further to support this with any evidence (paras 48-49). Section 25 essentially permits 'evergreening'. Evergreening is a technique used by some patent owners, in particular pharmaceutical companies, to extend the lifetime of a patent. Dr Reddy's and Clicks both argued that the (extended) patent granted to Bayer was invalid as the change in dosage lacked any inventiveness (indirectly implying that this was *contra bonos mores* and unconstitutional as it unfairly extended the monopoly of a patent). In the Dr Reddy's case, the court, however, confirmed that the (extended) patent was *prima facie* valid and worthy of protection. It is unfortunate that Clicks did not take their argument, in respect of evergreening, further as it would have given clarity to the issue of evergreening, and the balancing of public health and welfare rights against patent rights.

Nevertheless, the court unequivocally confirmed the rights of a patentee, and found that any minor prejudice suffered by public health would not be enough to outweigh the rights of a patent holder. The monopoly given to the patentee of medication ensures that the 'public interest is served by ongoing research and development. This principle underpins the protection of patents … law' (*Bayer v Dr Reddy's Laboratories* at para 98).

The question, however, must be asked – how does one balance the rights of public health and the patent owner, and under what circumstance, if any, will public healthcare outweigh patent rights?

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

By Kgomotso Ramotsho

Husband ordered to pay maintenance of stepchild while divorce is pending as he is the administrator of the joint estate

GR v RR (GP) (unreported case no 38304/21, 21-2-2023) (Noko AJ)

In *GR v RR* the Gauteng Division of the High Court ordered that pending a divorce, the respondent continue paying maintenance for his stepson. The applicant brought an application in terms of r 43 of the Uniform Rules of Court for interim orders of maintenance for the applicant and the two children, contribution of legal costs and that the primary residence of the parties' minor child be awarded to the applicant subject to the respondent's right of reasonable contact with the minor child.

The parties were married to each other in terms of customary rites in 2008 and subsequently entered a civil marriage, which marriages still subsists. In the High Court the applicant's counsel submitted that the applicant is no longer persisting with the prayer for primary

residence and reasonable contact for the minor child since the parties still reside together. The maintenance for the children, includes the major child who was born of a relationship between the applicant and a third party.

In the prayers set out in the notice of motion, the second prayer states:

That the respondent be ordered to contribute to the maintenance as follows:

By making payment of maintenance to the applicant for herself, the minor child, and the major child in the amount of R 50 000 per month on or before the first day of every month.

By retaining the applicant, the minor and the major child on the current medical aid and membership of the respondent and by making payment and by bearing all medical expenses incurred in private healthcare in excess of the cover provided by any medical aid scheme or hospital plan of which the major child is a member, such costs include all medical, dental, pharmaceutical (including levies), surgical, hospital, orthodontic and ophthalmic (including spectacles and/or contact lenses), physiotherapeutic, psychotherapeutic, occupational therapeutic, homeopathic, chiropractic and similar medical expenses, which are not covered by the medical aid scheme. The respondent shall reimburse the applicant for all expenses so incurred in respect of which she has made payment, or all expense so incurred in respect of which she has made payment, or shall make payment directly to the service providers, as the case may be, within five days of the applicant providing the respondent with proof of payment and/or the relevant invoice.

For as long as the major child, applies himself with due diligence and continues to make satisfactory progress, by making payment of all reasonable expenses incurred in respect of the major child's tertiary education, such costs to include, without limiting the generality of the foregoing, all university fees and/or fees due to an institution for higher learning attended by major child, tuition fees, as well as the costs of, but not limited to, the costs of all books, stationery, equipment (including computer hardware and software, printer hardware and software and electronic devices reasonably required by him). The respondent shall reimburse the applicant for all expenses so incurred in respect of which she has made payment, or all expense so incurred in respect of which she has made payment, or shall make payment directly to the service providers, as the case may be, within five days of the applicant providing the respondent with proof of payment and/or the relevant invoice.

The counsel for the applicant submitted that the applicant had been unemployed since 2017. She had tried to start various businesses but was unsuccessful. There was never pressure for her to look for employment as the respondent had always been gainfully employed and able to maintain the applicant and the children. The respondent has been paying for all household related expenses and paid the applicant an amount between R 28 000 and R 32 000 per month for her personal needs. In addition, the respondent gave the applicant an Absa credit card for her unrestricted use. The respondent has also paid for the expenses related to the schooling of the major child. Even though the respondent is gainfully employed, he has decided not to continue with his responsibilities associated with maintenance hence the application in terms of r 43 was launched.

The counsel for the applicant further submitted that in an exchange between the parties the respondent sent a WhatsApp message to the applicant where he stated that he will no longer be making financial resources available to the applicant until the divorce is finalised. The counsel for the applicant added that the respondent has sufficient means available to provide for the needs of the applicant. The counsel pointed out that the respondent's business is to provide services to government departments mostly in respect of tenders secured by his company. The parties have purchased a matrimonial home worth R 4 million in cash. He has improved the said property to the value of R 100 000 and purchased furniture to the value of more than R 1 million. This information was not objected to by the respondent in his answering affidavit.

The applicant's counsel further contended that the argument by the respondent that there is no legal obligation to maintain the major child as he has, *inter alia*, not adopted him is unsustainable. The respondent has been maintaining the child without any qualm since 2018 after the biological father stopped contributing to his maintenance. The applicant's counsels added that in fact there is a legal obligation on the applicant to maintain the child and as she is married in community of property to the respondent the latter is indirectly contributing to the maintenance for the said major child. The counsel for the applicant further submitted that the respondent has been less than candid with the court claiming that he is only receiving a monthly salary of R 40 000 and at the same time stating that he has monthly expenses to the tune of R 68 584,40.

The High Court pointed out that the respondent on the other hand contended that the applicant's list of expenses appears to be too luxurious and unnecessary. The High Court said that the order, which may be granted in terms of r 43 applications is predicated on the determination whether there is a need for payment of maintenance and further as whether the respondent can afford it. The High Court added that it is not in dispute that the parties though involved in a divorce proceeding are still residing together. Further that the applicant is unemployed, and the respondent has always been the breadwinner. In fact, the respondent conceded that he has been paying for all household expenses and is still prepared to proceed with payments.

The High Court said that the respondent is a civil engineer and chief executive officer of a private company and that his stated income is R 40 000 per month and his expenses are well over R 68 584 per month. The High Court pointed out that it appears that the respondent was indeed less candid with the court in this respect but failed to take the court into his confidence and explain how he pays for the excess. The High Court referred to another matter where Spilg J in *SC v SC* (GJ) (unreported case no 20976/2017, 28-2-2018) (Spilg J) held that:

'The mere fact that a party claims to earn a salary and produce a payslip or even an IRP5 form tells a court very little unless it is self-evident that he or she is strictly a wage earner with no personal connection to the employer.'

The High Court said that the respondent in this case has a personal connection with the employer. The High Court further added that by the glance on the bank statement of the records of transactions in the business account of the respondent, it appears astounding for the respondent to contend that the applicant should look to her parents for maintenance. The High Court said that this confident but ill-informed suggestion was being made despite evidence, which demonstrates that the respondent appears to be a philanthropist who occasionally pay his parents, siblings, and girlfriend some thousand rands. The High Court added that the applicant is likely to start looking for employment as the parties would be divorced and the respondent would also have a new household to maintain. However, the respondent in the meantime has an obligation to provide maintenance and this may change once the applicant is employed during the operation of the interim order. The High Court also pointed out that the respondent should also keep the applicant and the children on the medical aid.

The High Court pointed out that under the common law a stepparent has no legal duty of support in respect to the stepchildren. The High Court said that reference was made to two judgments in *Heystek v Heystek* 2002 (2) SA 754 (T) where a stepfather who was married in community of property had an obligation

to maintain the stepchild in his capacity as administrator of the joint estate and his control of the common purse. The High Court added that the emphasis on these two judgments was the fact that the parties are married in community of property, and it follows that such an obligation to pay maintenance may not follow when such parties are divorced.

The High Court said that it is understood that the stepchild's upbringing and maintenance is the responsibility of the applicant and the child's biological father. The High Court added that it was quite curious why the applicant in this case or even the respondent were both content that the biological father was not discharging his responsibilities and paying maintenance for his child. The High Court said if anything they have themselves to blame. The High Court added that the applicant's failure to provide any explanation to allow the major child's father not to pay is unfathomable except to say that the applicant is taking advantage of the respondent and at the same time the respondent indirectly is liable on the basis that he is the administrator of the joint estate.

The High Court pointed out that in the end the respondent should be ordered to also contribute towards maintenance of the stepchild for a period of six months, during which the applicant should ensure that the biological father carrys out his obligations to pay for maintenance of his child.

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

By Shanay Sewbalas and Keagan Smith

New legislation

Legislation published from 3 – 28 July 2023

Acts

Appropriation Act 8 of 2023
Date of commencement: 7 July 2023. GN3650 *GG*48916/7-7-2023.

Constitution Eighteenth Amendment Act 3 of 2023
Amends s 6 of the Constitution. Date of commencement: 27 July 2023. GN3730 GG49041/27-7-2023.

Customs and Excise Act 91 of 1964
Amendment to part 1 of sch 2 (no 2/1/72). GN R3735 *GG*49047/28-7-2023.
Amendment to part 3 of sch 6 (no 6/3/63). GN R3669 *GG*48959/14-7-2023.
Amendment to part 3 of sch 2 (no 2/3/69). GN R3696 *GG*49013/21-7-2023.
Amendment to part 3 of sch 2 (no 2/3/70). GN R3697 *GG*49013/21-7-2023.
Amendment to part 3 of sch 2 (no 2/3/71). GN R3698 *GG*49013/21-7-2023.

Eskom Debt Relief Act 7 of 2023
Date of commencement: 7 July 2023. GN3649 *GG*48915/7-7-2023.

Financial Matters Amendment Act 9 of 2023
Amends s 1, s 2, s 3*bis*, s 4 and s 21 of the Associated Institutions Pension Fund Act 41 of 1963. Substitution of s 6A of the Associated Institutions Pension Fund Act. Amends s 21 of the Military Pensions Act 84 of 1976.
Amends s 1, s 5, s 7 and s 8 of the Temporary Employees Pension Fund Act 75 of 1979.
Amends ss 1, 4, 5, 15, 20 and 30 of the Government Employees Pension Law Proclamation 21 of 1996.
Substitution of s 16 of the Government Employees Pension Law.
Amends s 1 of the Land and Agricultural Development Bank Act 15 of 2002. Substitution of s 45 of the Land and Agricultural Development Bank Act.
Amends s 49 of the Auditing Profession Act 26 of 2005. Date of commencement: 7 July 2023. GN3651 *GG*48917/7-7-2023.

Financial Matters Amendment Act 9 of 2023
Date of commencement: 14 July 2023. GN3683 *GG*48962/14-7-2023.

Bills and White Papers

Intergovernmental Monitoring, Support and Interventions Bill, 2023
Draft Intergovernmental Monitoring, Support and Interventions Bill, 2023 for comment. GenN1915 *GG*48932/10-7-2023.

National Environmental Management: Integrated Coastal Management Act 24 of 2008
Coastal Management Line for Garden Route National Park in terms of s 25(1) read with s 25(5)(*a*). GN R3668 *GG*48959/14-7-2023.

National Nuclear Regulator Act 47 of 1999
Publication of explanatory summary National Nuclear Regulator Amendment Bill, 2021. GN3705 *GG*49026/26-7-2023.

Marriage Bill, 2022
Draft Marriage Bill for comment. GenN3648 *GG*48914/7-7-2023.

Government, General and Board Notices

Banks Act 94 of 1990
Consent granted in terms of s 34 of the Banks Act for a foreign institution to establish a representative office within South Africa: Capital International Bank Ltd. GenN1918 *GG*48960/14-7-2023.
Withdrawal of consent granted in terms of s 34 of the Act to maintain a representative office of a Foreign Institution in South Africa: Swedbank AB (publ). GenN1908 *GG*48923/7-7-2023.

Broad-Based Black Economic Empowerment Act 46 of 2013
Withdrawal of GN R102 *GG*44172/19-2-2021. GN R3702 *GG*49018/25-7-2023.

Compensation for Occupational Injuries and Diseases Act 130 of 1993
Notice of withdrawal of items (b) and (c) of the GenN189 *GG*44422/7-4-2021. GenN1924 *GG*49020/25-7-2023.

Co-Operative Banks Act 40 of 2007
Registration – GIG Co-operative Bank. GenN1909 *GG*48923/7-7-2023.

Electoral Commission Act 51 of 1996
Registration of political parties (registered between 20 March to 29 June 2023). GenN1887 *GG*48898/6-7-2023.

Electricity Regulation Act 4 of 2006
Amendment of sch 2 to remove the threshold for generation facilities. GN3656 *GG*48923/7 July 2023.

Health Professions Act 56 of 1974
List of classified and certified psychological tests. BN457 *GG*48960/14-7-2023.

Higher Education Act 101 of 1997
Amendment of the definition on the language policy framework for public higher education institutions, determined in terms of s 27(2) of the Act. GN3654 *GG*48923/7-7-2023.

Labour Relations Act 66 of 1995
Cancellation of Government Notices: Building Industry Bargaining Council (Cape of Good Hope). GN R3665 *GG*48959/14-7-2023.
Bargaining Council for the Furniture Manufacturing Industry KwaZulu-Natal: Extension to Non-Parties of the Main Collective Amending Agreement. GN R3666 *GG*48959/14-7-2023.
Building Industry Bargaining Council (Cape of Good Hope): Extension to Non-Parties of the Main Consolidated Agreement. GN R3667 *GG*48959/14-7-2023.

Labour Relations Act 66 of 1995
Cancellation of registration of a bargaining council: Bargaining Council for the Laundry, Cleaning and Dyeing Industry (Cape) (LR2/6/6/43). GN3637 *GG*48883/4-7-2023.

Merchandise Marks Act 17 of 1941
Declaration of the 2023 Netball World Cup as a protected event. GenN1924 *GG*49015/24-7-2023.
Final notice on the prohibition on the use of certain words and emblems associated with the 2023 Netball World Cup to be hosted in South Africa. GenN1925 *GG*49015/24-7-2023.

National Environment Management Act 107 of 1998
Extension of the period for establishment of the National Environmental Consultative and Advisory Forum period of 12 months from 18 August to 17 August 2024. Proc N126 *GG*48921/7-7-2023.

Pan South African Language Board Act 59 of 1995
Recommendation to sign the Los Pinos Declaration for International Decade of Indigenous Languages. BN461 *GG*49011/21-7-2023.

Promotion of Access to Information Act 2 of 2000
Publication of the manual in terms of s 14 of the Act. BN453 *GG*48923/7-7-2023.

School Governing Bodies Elections 2024
Announcing the period for the 2024 School Governing Bodies (SGB) elections and the time for the assumption of duties for the newly elected SGB. GenN1914 *GG*48952/13-7-2023.

South African Citizenship Act 88 of 1995
Withdrawal of GN3535 *GG*48777/12-6-2023 amendment regulations on the South African Citizenship Act. GN R3657 *GG*48924/7-7-2023.

South African Council for the Quantity Surveying Profession Act 49 of 2000
Erratum to address errors in the GN443 of 2023 in respect of the term of the council and the titles of some of the appointed council members. BN455 *GG*48923/7-7-2023.

Special Investigating Units and Special Tribunals Act 74 of 1996
Referral of matters to existing Special Investigating Unit. Proc R130 *GG*49029/28-7-2023.
Use of Official Languages Act 12 of 2012
Compliance with the use of the Official Languages Act. BN460 *GG*49011/21-7-2023.
Water Services Act 108 of 1997
Name change of Bloem Water to Vaal Central Water Board. GN3664 *GG*48954/13-7-2023.

Legislation for comment

Astronomy Geographic Advantage Act 21 of 2007
Notice of intention to amend the regulations on the Protection of the Karoo Central Astronomy Advantage Areas in terms of the Act. GN3688 *GG*49006/18-7-2023.
Civil Aviation Act 13 of 2009
Civil Aviation Regulations, 2011. GN3652 *GG*48920/7-7-2023 and GN3736 *GG*49048/28-7-2023.
Critical Infrastructure Protection Act 8 of 2019
Critical Infrastructure Protection Regulations, 2023. GN3732 *GG*49045/28-7-2023.
Electoral Act 73 of 1998
Invitation to make representations. GenN1933 *GG*49050/28-7-2023.
Proposed amendments to the regulations published under the Act. GenN1934 *GG*49051/28-7-2023.
Financial Markets Act 19 of 2012
Proposed amendments to the Johannesburg Stock Exchange (JSE) listing requirements and the JSE debt listing requirements – accreditation of auditors. BN465 *GG*49028/28-7-2023.
Financial Sector Regulation Act 9 of 2017
Draft Deposit Insurance Regulations for comment. GN3645 and GN1782 *GG*48888/4-7-2023.
Health Professions Act 56 of 1974
Health Professions Council of South Africa: Rules relating to the registration by medical practitioners and dentists of additional qualifications: Amendment. BN458 *GG*48960/14-7-2023.
Higher Education Act 101 of 1997
Notice of intent to cancel the registration of CityVarsity (Pty) Ltd, Damelin (Pty) Ltd, ICESA City Campus (Pty) Ltd and Lyceum College (Pty) Ltd as registered private higher education institutions. GN3718 *GG*49028/28-7-2023.
Independent Communications Authority of South Africa Act 13 of 2000
Request of further information from stakeholders with respect to the signal distribution services market inquiry. GenN1932 *GG*49049/28-7-2023.
International Trade Administration Act 71 of 2002
Proposal to further restrict the export of copper semi-finished products, temporarily prohibit the export of used or second-hand rails, and subject rails to export control for comment. GN R3703 *GG*49019/25-7-2023 and GN3706 *GG*49027/26-7-2023.
Labour Relations Act 66 of 1995
Cancellation of Government Notice: Bargaining Council for the Civil Engineering Industry (BCCEI): GN R581 of 22 May 2020. GN R3724 *GG*49029/28-7-2023.
Cancellation of Government Notice: BCCEI: GN R1106 of 19 October 2018 and GN R1482 of 15 November 2019. GN R3725 *GG*49029/28-7-2023.
BCCEI: Extension of dispute resolution collective agreement to non-parties. GN R3726 *GG*49029/28-7-2023.
National Bargaining Council for the Road Freight and Logistics Industry: Extension of period of operation of the main collective agreement. GN R3727 *GG*49029/28-7-2023.
BCCEI: Extension of registration and administration expenses collective agreement to non-parties. GN R3729 *GG*49029/28-7-2023.
Marine Living Resources Act 18 of 1998
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Consultation on the intention to amend certain requirements for an application for environmental authorisation for renewable energy. GN3716 *GG*49028/28-7-2023.
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Mine Health and Safety Act 29 of 1996
Guideline for a mandatory code of practice for: the management of medical incapacity due to ill-health and injury; selection and provision of personal protective equipment for women in the South African mining industry. GN3733 and GN3734 *GG*49046/28-7-2023 and GN3739 and GN3740 *GG*49059/28-7-2023.

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Determination of salaries and allowances of the Deputy President, ministers and deputy ministers for 2022/2023. Proc N127 *GG*48929/10-7-2023.
Determination of salaries and allowances of members of the National Assembly and permanent delegates to the National Council of Provinces. Proc N128 *GG*48929/10-7-2023.
Determination of the upper limit of salaries and allowances of premiers, Members of the Executive Councils and Members of the Provincial Legislatures: 2022/2023. Proc N129 *GG*48929/10-7-2023.

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

Employment law update

By Nadine Mather

Employee claiming damages for infringement of constitutional rights

In *Letimile v Cape Town International Convention Centre Company SOC Ltd* [2023] 7 BLLR 670 (LC), a disabled employee instituted a claim in the Labour Court (LC) under the Employment Equity Act 55 of 1998 for general damages from her employer, the Cape Town International Convention Centre Company SOC (CTICC). The employee claimed damages based on CTICC allegedly violating her constitutional rights to –

- freedom of expression and association by prohibiting her from continuing to publish views on the sexual health of disabled women;
- bodily integrity and privacy by demanding disclosure of her medical records; and
- human dignity by intimidating, insulting, and humiliating her in its response to the publication of her views.

The CTICC raised an exception to the employee's statement of claim on the basis that the employee had breached the principle of subsidiarity by relying directly on the Constitution rather than specific employment legislation put in place to give effect to constitutional rights (ie, the Labour Relations Act 66 of 1995 (LRA), the Employment Equity Act and applicable codes of good practice). The CTICC argued that the employee's claim in the LC had to be confined to the relief afforded by applicable employment legislation and, accordingly, the employee's statement of claim failed to disclose a valid cause of action.

The employee contended that the LC had jurisdiction to entertain her claim by virtue of s 157(2) of the LRA. Section 157(2) of the LRA provides that the LC has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in the Bill of Rights and arising from, *inter alia*, employment and labour relations. The employee accordingly argued that the subsidiarity principle was of no relevance as she relied on s 157(2) of the LRA to establish her cause of action for damages.

The LC noted that the principle of subsidiarity means that where legislation gives effect to constitutional rights, the Constitution cannot be relied on directly. However, the application of the subsidiarity principle in relation to labour legislation is complex and the outer contours of the principle of subsidiarity have not yet been fully defined by our courts. Further, our courts are anxious to not close the door on potential, novel claims in circumstances where all the facts have not yet been placed before the court, such as in the present matter.

Nevertheless, the employee had not based her claim on the concept of subsidiarity. Rather the employee had tied her claim to s 157(2) of the LRA, which she contends allows her to seek general damages relying directly on fundamental rights contained in the Constitution. Considering the interpretation of s 157(2), the LC held that this section was enacted to extend the jurisdiction of the LC to disputes concerning the alleged violation of constitutional rights arising from employment and labour relations, rather than to restrict or extend the jurisdiction of the High Court.

The LC noted that the constitutional rights to privacy, bodily integrity and freedom of expression are not unknown quantities in the LC. Their infringement arises in cases under the umbrellas of sexual harassment, discrimination, and dismissal claims. The real issue at the heart of this exception was the question as to whether the reliance on constitutional rights, apart from that to equality and fair labour practices, can give rise to a discreet damages claim, over and above the damages claim allowed for under the Employment Equity Act.

In other words, the court will have to determine whether the employee's rights were infringed as pleaded and if so, whether this would impact on the damages awarded under the Employment Equity Act or give rise to a separate and additional award of general damages as sought by the employee. How the court may determine the appropriate remedy should it find for the employee was not, however, the subject of the exception.

The LC accordingly found that the principle of subsidiarity did not apply in this case as the employee had relied on s 157(2) of the LRA to raise alleged violations of her fundamental rights.

The exception was dismissed.

Pension fund claiming arrear contributions for dismissed employees who were re-employed

In *South African Municipal Workers' Union National Provident Fund (Pty) Ltd v Dihlabeng Local Municipality and Others* [2023] 7 BLLR 626 (SCA), several employees of Dihlabeng Local Municipality (the Municipality) engaged in an unprotected strike resulting in their subsequent dismissal on 31 July 2009. The affected employees challenged their dismissal and before the matter was heard, the Municipality and the affected employees entered into a settlement agreement in terms of which it was agreed, *inter alia*, that:

- The dismissed employees were to be employed by the Municipality with effect from 8 October 2009, on condition that the employees received a final written warning for participating in an unprotected strike.
- No salary, benefits, or compensation will be paid for the period that the employees were unemployed. Put differently, no retrospective salaries or benefits will be paid by the Municipality.
- The employees' previous years of service would be recognised by the Municipality as if the employees were employed continuously.

Thereafter, the employees were allocated new employee numbers and their leave cycles and increases commenced from 8 October 2009. They were also allowed to choose the pension fund to which the Municipality would pay their pension fund contributions. Eighteen of the employees, who were formerly members of the South African Municipal Workers' Union National Provident Fund (SAMWU Fund), elected to become members of the Municipal Employees Pension Fund (MEPF) with effect from 8 October 2009.

Two years after the settlement agreement, these 18 employees approached the SAMWU Fund and requested payment of their withdrawal benefits arising from their dismissal on 31 July 2009. The SAMWU Fund refused to pay their

benefits. Consequently, the affected employees referred a complaint to the Pension Funds Adjudicator (the Adjudicator), which complaint was dismissed on the basis that the employees had been reinstated by the Municipality and there had been no break in their service, as well as their membership with the SAMWU Fund.

Thereafter, the SAMWU Fund instituted a claim in the High Court in terms of s 13A of the Pension Funds Act 24 of 1956 for payment of alleged arrear pension fund contributions, as well as interest thereon, from the Municipality. The application was dismissed and leave to appeal was granted.

On appeal, the SAMWU Fund argued that on a proper interpretation of the settlement agreement, the affected employees had been reinstated and not re-employed. Further, that the matter was *res judicata* as the issue of re-employment or reinstatement had already been determined by the Adjudicator in a binding determination, and that the Municipality was estopped from contending otherwise. The Municipality, on the other hand, argued that the affected employees concerned had ceased to be members of the SAMWU Fund and had validly elected to change their retirement fund and to become members of the MEPF because of them being re-employed as opposed to being reinstated.

On the issue of *res judicata*, the Supreme Court of Appeal held that while the determination by the Adjudicator is deemed to be equivalent to a civil judgment, the dispute determined by the Adjudicator was not between the same parties. The Municipality was not party to the proceedings and was not given an opportunity to be heard. Further, the complaint before the Adjudicator was about the SAMWU Fund's refusal to pay the employees their withdrawal benefits following their dismissal. In the High Court, however, the SAMWU Fund sought to enforce payment of arrear contributions by the Municipality. The Adjudicator did not decide this issue.

Turning to the issue of whether the Municipality was obliged to pay any arrear pension fund contributions to the SAMWU Fund, the court held that this was dependent on whether the employees had been reinstated or re-employed in terms of the settlement agreement. The SAMWU Fund contended that reinstatement restores the employment relationship, as if the employee was never dismissed. The employee need not be reinstated on identical terms and can be reinstated on different terms. Thus, the High Court erred in finding that the employees were re-employed and not reinstated.

The court held that reinstatement and re-employment have different legal consequences. Where employees are reinstated, they resume employment, and the original employment contract simply revives. Re-employment, on the other hand, entails new contracts of employment and the benefits arising from the past employment relationship are not extended to the new employment relationship.

When considering the text of the settlement agreement, the court noted that it was agreed between the parties that no salary, benefits or compensation, and no retrospective salaries/benefits, would be paid to the employees. When sensibly interpreted, it is understood to mean that the parties intended for re-employment instead of reinstatement. The acknowledgement of the employees' previous years of service was simply a concession made by the Municipality for the purpose of calculating the employees' leave and notch increases with respect to remuneration.

Thus, when considering the terms of the agreement, the context in which the agreement was concluded, and the conduct of the parties after its conclusion, it was clear that the intention of the parties was for the affected employees to be re-employed and not reinstated. Further, on the basis that no salaries nor benefits were paid for the period during which the employees were unemployed meant that no contributions would have been deducted for payment to the SAMWU Fund for that period. Accordingly, the SAMWU Fund was not entitled to enforce payment of such contributions against the Municipality.

In the circumstances, the court held that the High Court's finding that the employees were re-employed and not reinstated was correct.

The appeal was dismissed with costs.

Nadine Mather *BA LLB (cum laude) (Rhodes)* is a legal practitioner at Bowmans in Johannesburg. ❑

By Moksha Naidoo

Is a referral to conciliation always a prerequisite to adjudication?

***National Union of Metal Workers of South Africa obo members v SAA Technical (Pty) Ltd* (LC) (unreported case no JS30/2022, 31-5-2023) (Prinsloo J).**

Sections 189A(7) and 191(11) of the Labour Relations Act 66 of 1995 (LRA) were before the court in this interlocutory application.

Section 189A(7) which reads:

'If a facilitator is appointed in terms of subsection (3) or (4), and 60 days have elapsed from the date on which notice was given in terms of section 189(3) –

(*a*) the employer may give notice to terminate the contracts of employment in accordance with section 37(1) of the Basic Conditions of Employment Act [75 of 1997]; and

(*b*) a registered *trade union* or the *employees* who have received notice of termination may … –

(i) …

(ii) refer a *dispute* concerning whether there is a fair reason for the *dismissal* to the Labour Court in terms of section 191(11).'

Section 191(11), which states:

'The referral, in terms of subsection (5)(*b*), of a *dispute* to the Labour Court for adjudication, must be made within 90 days after the *council* or (as the case may be) the commissioner has certified that the *dispute* remains unresolved.'

The respondent employer, embarked on an s 189A process on 28 April 2021 and engaged a facilitator appointed by the Commission for Conciliation, Mediation and Arbitration (CCMA). The process ended on 1 October 2021, whereafter, on 18 October 2021, the employer handed out notices of dismissal to 1 193 of the applicant union's members.

On 16 January 2022, the union filed a statement of claim at the Labour Court (LC) challenging the substantive fairness of its members dismissals.

The employer raised the point that the court did not have jurisdiction to hear the claim, absent the union first referring the dispute to the CCMA for conciliation and after a certificate of non-resolution was issued. It was common cause that the union did not first refer a dispute to the CCMA for conciliation before filing its statement of claim.

In support of its argument, the respondent referred the court to the authorities, which stated that in general, conciliation was a jurisdictional pre-requisite for the LC to have jurisdiction to adjudicate a claim.

More on point with the argument raised, the respondent referred the court to *South African Equity Union obo Van Wyk and 100 members v Lodestone Confectionary (Pty) Ltd t/a Candy Tops* (unreported case no S19/16, 26-5-2017) and *Catering Pleasure and Food Workers Union v National Brands Ltd* (2007) 28 ILJ 1064 (LC).

In both these judgments, the employees were dismissed pursuant to an s 189A process, facilitated by a CCMA commissioner. The respective employees, like the union *in casu,* filed a statement of claim at the LC without first referring a dispute to the CCMA for conciliation. The court on both instances upheld the employer's argument that it lacked jurisdiction to hear the claim, as the jurisdictional pre-requisite (that being a referral first to the CCMA and a certificate being issued), had not been met.

On the other hand, the union firstly drew a distinction between s 189A(7) and (8).

When a facilitator is appointed, then in terms of s 189A(7), there is no requirement to refer a dispute for conciliation. However, when a facilitator is not appointed, then s 189A(8) does require a referral to the CCMA for conciliation. In addition, the union argued that there was no benefit in conciliation as the facilitation process and conciliation process aims to achieves similar objectives.

The union relied extensively on the decision in *National Union of Metalworkers of SA on behalf of Members and Others v Bell Equipment Co SA (Pty) Ltd* (2011) 32 ILJ 382 (LC), where the LC on that occasion interpreted s 189A(7)(*b*)(ii) to mean that employees do not have to refer a dispute for conciliation post facilitation and can instead refer the matter directly to the LC for adjudication. On this point the court in *Bell Equipment* held:

'In arriving at this conclusion I take into account two important factors. The first is that in the event of the appointment of a facilitator, the parties benefit from the facilitation process which is not identical to but not dissimilar from the conciliation process. What is more, a period of 60 days must elapse from the date on which the s 189(3) notice is given before an employer may give notice to terminate. Secondly, subsection (7)(*b*)(i) does not require a trade union or the employees who have received notice of termination to refer a dispute to the CCMA or the bargaining council for conciliation and for a certificate of non-resolution to be issued should the employees wish to give notice of a proposed strike in terms of s 64(1)(*b*) of the LRA. I can see no reason why the legislature in drafting subsection (7)(*b*)(ii) would require employees to refer disputes to the CCMA or a bargaining council if they wish to refer such disputes to the Labour Court.

It must be accepted, however, that the reference to s 191(11) in subsection (7)(*b*)(ii) serves a purpose. … It appears to me that what the legislature intended was to provide that the referral of the dispute to the Labour Court for adjudication must take place within 90 days, that being the time referred to in s 191(11)(*a*). I do, however, realise that the section provides for the referral to be made within 90 days after the CCMA or bargaining council has certified that the dispute remains unresolved. When then should the 90-day period be calculated from in terms of s 189A(7)(*b*)(ii)? The only logical answer is that it must be calculated from the date of the notice of termination.'

Having noted the conflicting judgments and interpreted the relevant sections of the LRA, the court followed the authorities which held that conciliation is a jurisdictional pre-requisite for a referral, in terms of s 189A(7), to the LC. In doing so, the court reasoning was as follows:

Firstly, in accordance with the general scheme of s 191, a dispute challenging the substantive fairness of a dismissal due to the employer's operational requirements; must first be referred to the CCMA or bargaining council within 30 days of dismissal and thereafter to the LC within 90 days of the certificate being issued.

Secondly, the Constitutional Court in *National Union of Metalworkers of SA v Intervalve (Pty) Ltd and Others* (2015) 36 ILJ 363 (CC) found that all dismissal disputes must be first conciliated before the CCMA or LC has jurisdiction to adjudicate the dispute.

Thirdly, the section itself dictates that a referral to the LC, must be made in terms of s 191(11), which states that the referral must be made within 90 days of the CCMA or bargaining council issuing the certificate of non-resolution. On this point, the court, on application of the principles of interpretation, rejected the union's argument that reference to s 191(11) in s 189A(7), was due to a 'lack of drafting elegance'.

Fourthly, on the argument that facilitation and conciliation serve similar objectives, the court held:

'In my view there is no merit in this argument. The facilitation process during a section 189A retrenchment process is a pre-dismissal process and it is focussed on compliance with and serving the requirements of section 189(3). The facilitation process does not concern itself with an unfair dismissal dispute, as the process happens prior to dismissal. Conciliation on the other hand happens post dismissal, when the fairness of a dismissal is challenged with a view to resolve the dismissal dispute.

When employees who were dismissed, after a section 189A process was followed, seek to challenge the fairness of their dismissal, a fresh cause of action arises. The dispute arose post dismissal and was certainly not considered or conciliated during the pre-dismissal facilitation process. It is a fresh dispute that must be conciliated.'

The respondent's jurisdictional point was upheld with no order as to costs.

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

Recent articles and research

By Kathleen Kriel

Abbreviation	Title	Publisher	Volume/issue
SAJBL	South African Journal of Bioethics and Law	South African Medical Association NPC	(2022) 15.2 (2022) 15.3 (2023) 16.1
SAJHR	South African Journal on Human Rights	Taylor & Francis	(2021) 37.4 (2022) 38.1/2 (2022) 38.3/4
SAJS	Southern African Journal of Security	University of South Africa Press	(2023)
SAPL	Southern African Public Law	University of South Africa Press	(2022) 37.1 (2022) 37.2

Access to genetic resources

Knight, J; Flack-Davison, E; Engelbrecht, S; Visagie, RG; Beukes, W; Coetzee, T; Mwale, M and Ralefala, D 'A literature review analysis of engagement with the Nagoya Protocol, with specific application to Africa' (2022) 15.2 *SAJBL* 69.

Administrative decisions

Cachalia, R 'Resuscitating the PAJA in state self-review? *Compcare Wellness Medical Scheme v Registrar of Medical Schemes*' (2022) 38.1/2 *SAJHR* 70.

Best interests of the child

Fawole, CE 'Making the best of the best interests: A commentary of *AB v Pridwin Preparatory School*' (2022) 38.1/2 *SAJHR* 128.

Births and deaths

Soma-Pillay, P; Nkosi-Thomas, L and Pillay, Y 'Rights of the fetus: Voice of the unborn baby and Constitutional Court decision' (2022) 15.2 *SAJBL* 40.

Clinical research

Rägo, L and Zweygarth, M 'The CIOMS consensus report on clinical research in resource-limited settings' (2022) 15.3 *SAJBL* 70.

Communal land

Mukwevho, N 'The evolution and development of the principle of free, prior and informed consent in South Africa' (2022) 38.1/2 *SAJHR* 144.

Consent in clinical trials

Kovane, GP; Nikoderm, VC and Khondowe, O 'Informed consent in clinical trials' (2022) 15.2 *SAJBL* 48.

Constitutional Court statistics

Kamolane-Kgadima, B; Kathi, T; Moloko, T; Malindi, Z; Mhiribidi, RT; Skosana, T and Chagopa, AR 'Constitutional Court statistics for the 2020 term' (2021) 37.4 *SAJHR* 566.

Constitutional injunctions

Mudau, P and 'Nyane, H 'A critical analysis of Zimbabwe's non-implementation of constitutional injunctions on devolution' (2022) 37.2 *SAPL*.

COVID-19

Abioye, F 'COVID-19, Women's rights, and the rule of law in Africa: Muddying the waters' (2022) 37.1 *SAPL*.

Albertyn, C and Adams, R 'Introduction: Special issue on "The Covid-19 Pandemic, Inequalities and Human Rights in South Africa", part 2' (2021) 37.4 *SAJHR* 437.

Dube, F 'Testing the right to vote in free, fair, and regular local government elections in South Africa: Challenges from the COVID-19 pandemic' (2022) 37.1 *SAPL*.

Fagbayibo, B; Mulaudzi, M; Mooki, M; Chembe, K 'Editorial: Another day, another COVID-19 special issue: A vital "bandwagon"' (2022) 37.1 *SAPL*.

Kavuro, C 'The COVID-19 pandemic and socio-economic protection for refugees in South Africa' (2021) 37.4 *SAJHR* 466.

Klaaren, J and Ray, B 'South Africa's technologies enhancing contact tracing for Covid-19: A human rights and techno-politics assessment' (2021) 37.4 *SAJHR* 535.

Mahhumane, D 'Dismissal of an employee for failing to follow COVID-19 regulations: *Eskort Limited v Mogotsi* [2021] JR1644-20 (LC) (2022) 37.1 *SAPL*.

Mushariwa, M 'Transformation agenda during COVID-19: Do the means justify the ends?' (2022) 37.2 *SAPL*.

Neluvhalani, VSJ 'Statelessness and COVID-19 in South Africa' (2022) 37.1 *SAPL*.

Olayinka, OF 'The COVID-19 pandemic and education during a state of emergency: Re-assessing the right to education of children with disabilities in Nigeria' (2022) 37.1 *SAPL*.

Olivier, M and Govindjee, A 'Asylum seekers in South Africa and COVID-19: A catalyst for social security law reform?' (2021) 37.4 *SAJHR* 442.

Owie, UN 'Multilateralism and management of public health emergencies: A case study of the Africa Joint Continental Strategy for COVID-19 Outbreak' (2022) 37.1 *SAPL*.

Pillay, K 'Impact of the Covid-19 pandemic on the occupational roles of private security officers in South Africa' (2023) *SAJS*.

Cultural practices

Bande, L 'Criminalising harmful cultural practices: Lessons from Malawi' (2022) 37.2 *SAPL*.

Delictual liability

Boonzaaier, L 'Delictual liability for injuries suffered at childcare centres' (2022) 38.3/4 *SAJHR* 309.

Early childhood development

Ally, N; Ozah, K and Peacock, TN 'Renewal and Reform: Special Issue on "Realising the Rights of Children to Quality Early Childhood Development in South Africa"' (2022) 38.3/4 *SAJHR* 163.

Bekink, M 'The right of children with disabilities to early childhood development:

Is South Africa complying with international law?' (2022) 38.3/4 *SAJHR* 192.
Biersteker, L; Berry, L and Gwele, M 'In whose best interests? The ECD regulatory framework, understandings of the best interests of the young child and access to quality early education' (2022) 38.3/4 *SAJHR* 215.
Brooks, LE; Kotzé, J; Almeleh, C; and Senona, E 'Assessing the policy options for the public provisioning of early childhood development programmes' (2022) 38.3/4 *SAJHR* 240.
Bryer, MR and van Leeve, Y 'Early childhood development and decent jobs for women: Planting two trees from one seed?' (2022) 38.3/4 *SAJHR* 261.
Fredman, S; Donati, G and Naicker, S 'New beginnings: The right to equality and early childhood care and education' (2022) 38.3/4 *SAJHR* 167.
Peacock, TN 'Advancing early childhood development: The role of local government' (2022) 38.3/4 *SAJHR* 285.

Ethics

Furtak, AM 'Developing ethical research behaviour in doctoral students' (2022) 15.2 *SAJBL* 65.
Omutoko, K; Amugune, B; Nyawira, T; Inwani, I; Muchoki, C; Masika, M; Omosa-Manyonyi, G; Kamau, C; K'Apiyo, L and Jaoko, W 'Strengthening research ethics oversight in Africa: The Kenyan example' (2023) 16.1 *SAJBL* 19.
Van Staden, W; Nienaber, A; Rossouw, T; Turner, A; Flimalter, C; Mervier, AE; Nel, JG; Bapela, B; Beetge, MM; Blumenthal, R; Castelyn, CDV; de Witt, TW; Dlagnekova, AG; Kotze, C; Mangwane, JS; Napoles, L; Sommers, R; Sykes, L; Van Zyl, WB; Venter, M; Uys, A and Warren, N 'Race in health research: Considerations for researchers and research ethics committees' (2023) 16.1 *SAJBL* 9.

Healthcare practitioners

Kwinda, M; Labuschaigne, M and Slabbert, M 'Disciplinary proceedings against healthcare practitioners facing criminal charges: The role of the Health Professions Council of South Africa' (2022) 15.2 *SAJBL* 44.

Healthcare services

Mahomed, S; Labuschaigne, M and Slabbert, M 'Justice in the provision of healthcare services – A stifled right in the private sector' (2022) 15.3 *SAJBL* 92.

Insurance and COVID-19

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

Possible alternative legislative provisions that might assist during the enforcement of maintenance orders

By Andrew Jeffrey Swarts

Section 26(1)(*a*) of the Maintenance Act 99 of 1998 provides that whenever any person against whom any maintenance order has been made has failed to make any particular payment in accordance with that maintenance order, the maintenance order can be enforced by execution against their property, by attachment of their emoluments or by attachment of debt. The provision is well formed, and it seemingly provides the platform for any applicant to enforce any maintenance order. It gives the applicant the assurance that when you have a maintenance order that has not been complied with, that the Maintenance Act provides the remedy to enforce payment of the arrear maintenance. The Constitutional Court (CC) in *Bannatyne v Bannatyne and Another* 2003 (2) BCLR 111 (CC) at para 25 held that: 'The [Maintenance Act] is a comprehensive piece of legislation designed to provide speedy and effective remedies.' This statement by the CC was put to the test in a recent Supreme Court of Appeal (SCA) case, *S v SH* (SCA) (unreported case no 771/21, 13-4-2023) (Nicholls JA (Molemela, Mothle and Meyer JJA and Olsen AJA concurring)). In order to understand the recent case in the SCA, one has to see how it developed.

The SCA case of *S v SH*

The appellant, the father of the children, in this case is an advocate in the Western Cape. The respondent, the mother of the children, is a judge in the Western Cape. The main question the court had to answer was whether the appellant should be committed to prison for contempt of court due to his failure to comply with a maintenance order. The respondent obtained a maintenance order against the appellant on 29 July 2013. The appellant did not appeal the July 2013 order. The appellant subsequently did not comply with the July 2013 order and the respondent applied to enforce the maintenance order. The respondent re-issued a writ of execution against the appellant. The sheriff approached the home of the appellant on 10 and 14 December 2020 and observed a Range Rover SUV parked at the home of the appellant and marked it for attachment. On 17 December 2020, the appellant informed the sheriff via an affidavit that he is no longer the owner of the Range Rover SUV. On 10 December 2020, the appellant unilaterally informed the children's school that due to his 'precarious financial position', he is unable to pay the fees any longer and that the children will be attending another school. The respondent applied for the appellant to be committed to prison for his failure to comply with the order of 29 July 2013. On 4 December 2020, the High Court ordered the appellant to comply with the July 2013 order. At that time the appellant was in arrear in the amount of R 138 413,90. The December 2020 order was endorsed to the effect that, if the appellant failed to comply, the respondent could apply to have the appellant committed to prison. A warrant of arrest would be issued and a court would determine the period of imprisonment for his non-compliance based on the December 2020 High Court order. The application for the appellant's committal was set down for 2 March 2021, giving the appellant an opportunity to address the court. On the day of the committal hearing the appellant informed the court that he had not secured a lawyer for that hearing. On the day of the committal hearing the appellant brought an application for postponement of the hearing and submitted that he should not be held in contempt of court. The application for postponement indicated the grounds on which the appellant relied. The appellant averred that his sister is terminally ill, and that the quantum of the arrears was not correct were advanced as some of the reasons. This matter was referred to the SCA in order for

that court to determine if the High Court order, to commit the appellant to prison for non-compliance, was valid. The SCA found that the appellant was not given an opportunity to state his case and that he should be given an opportunity first before he could be committed to prison. The matter was referred back to the High Court in order to give the appellant an opportunity to state his case.

A little over seven years and four months went by before the respondent, mother of the children, finally came before the High Court for the court to issue yet another order in December 2020. The December 2020 High Court order was in essence a confirmation of the High court order obtained in 2013. The 2020 order was a confirmation of the fact that the appellant was in arrears and that he had the means to comply with the maintenance order obtained against him in 2013. The above difficulties existed from the moment the respondent obtained the maintenance order against the applicant. She on numerous occasions tried to enforce it, but with no success. The SCA case was to commit the appellant to prison for his non-compliance over many years of not abiding by the original maintenance order. This frustration and humiliation befalls many applicants, usually mothers, when they approach the maintenance courts with valid enforceable maintenance orders. These orders are at times not complied with for years. The ordinary applicant who approaches the maintenance court does not have the stomach to approach the High Court twice, the SCA and back to the High Court. An alternative remedy must be available to the ordinary person. An alternative provision that is effective and less time consuming.

Alternative provisions to aid an applicant during the enforcement of a maintenance order

A closer look at the Domestic Violence Act 116 of 1998 (DVA) defines a complainant that can apply for a protection order under the DVA as a person who has been in a domestic relationship with the respondent. The DVA further defines a domestic relationship as a relationship between two people who are parents of a child or children. The DVA also acknowledges economic abuse as an act of domestic violence. Economic abuse is defined as 'the deprivation of economic or financial resources to which a complainant is entitled under law'. Under any law includes the law applicable to the Maintenance Act 99 of 1998. The DVA allows an applicant to approach the court for a protection order against a respondent, not to unreasonably withhold payment of the maintenance. In terms of s 6(4) of the DVA a court must issue a protection order against the respondent if the court finds on a balance of probabilities that the respondent has or is committing an act of domestic violence. Section 7(7)(*a*) of the DVA prohibits the court to refuse a protection order to the applicant merely because other remedies are available or at the complainant's disposal. The DVA specifically addresses the maintenance at s 7(7)(*b*) where it states that: 'If the court is of the opinion that any provision of a protection order deals with a matter that should … be dealt with further in terms of any other relevant law, including the Maintenance Act, 1998, the court must order that such a provision must be in force for such limited period as the court determines, in order to afford the party concerned the opportunity to seek appropriate relief in terms of such law.'

Many of the enforcement applications brought in the maintenance court have their postponements and the parties do understand that the matter had to be postponed due to unforeseen circumstances. There is, however, the select few that have unreasonably tried to frustrate the process and cause postponements due to the fact that the respondent would rather deplete every legal avenue than to comply with the maintenance order. In such select cases the provisions of the DVA would greatly assist an applicant to obtain a protection order, interdicting the respondent from frustrating the payment of maintenance while the enforcement application is ongoing in the maintenance court. Section 8(1) of the DVA states that the court when issuing a protection order must issue a warrant of arrest which will be suspended, the suspension will only be valid while the protection order is not being breached. Section 17 of the DVA provides that if a person commits a breach of the provisions in the protection order a fine or a prison sentence, up to five years, can be imposed or both.

Conclusion

The SCA case above would have been a prime example of where the protection order process could have been employed. Many times, when applicants approach the maintenance court to enforce a maintenance order due to non-compliance, the respondent will still not pay. The failure continues even after they learned that an enforcement application had been brought against them. The protection order obtained in terms of the DVA will add that extra layer of protection while the enforcement application is not yet finalised. The provisions of the DVA contain an element of arrest and incarceration that would indicate to an unwilling respondent that the law is serious when the well-being of a child is at stake. In the rare event that a respondent's action indicates an unwillingness to fairly participate in the maintenance process, the provisions of the DVA should be employed to protect the best interests of the minor child concerned. The DVA was not written in isolation or only for cases of physical abuse as it is currently being employed in the courts.

Andrew Jeffrey Swarts *LLB (Unisa)* is an aspirant prosecutor at the National Prosecuting Authority in Upington. ❑

Book announcement

Copyright Reform or Reframe?

By André Myburgh; Herman Blignaut; Werina Griffiths; Stephen Hollis; Salomé le Roux; Tammi Lea Pretorius; Tracy Rengecas; Owen Salmon and Christiaan Steyn
Cape Town: Juta
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165 pages (flipbook)

The Copyright Act 98 of 1978 and the Performers' Protection Act 11 of 1967 need updates and long-awaited changes. This monograph aims to provide a thorough analysis of the provisions that will be introduced by the Copyright Amendment Bill B13D of 2017 and the Performers' Protection Amendment Bill B24D of 2016. The reasons for the flaws in the Copyright Amendment Bill can be attributed to extension of new rights and exceptions, originally intended for a specific category of works, to all works in a one-size-fits-all manner. Additionally, most of these provisions lack supporting studies or impact assessments. Consequently, it can be concluded that these Bills fail to achieve their stated goals of benefiting authors and performers and adapting the law to the demands of the digital age. ❑

By
Sabelo
Bongani
Ndlovu

Academic record and certificate retention for outstanding fees: A national shame

The practice of withholding certificates as an inducement to settle student debt is a thorny topic. We are all aware of the crisis; let us not waste space on scene-setting, anecdotes, and statistics. To keep the discussion brief and focused, indulge me and let us hone in on the withholding action taken by public institutions, looking exclusively at domestic experience and practice.

Is there a legal basis for the practice?

The Higher Education Act 101 of 1997 (HEA) grants the Minister of Higher Education, Science and Technology the authority to determine higher education policy. An institution also has the capacity – subject to ministerial approval pursuant to ss 33 and 34 of HEA – to set policies and rules that regulate its internal affairs, especially as pertaining to the relationship with its students. Those policies and rules are, however, not exempt from compliance with the Constitution or with any other laws flowing from constitutional imperatives.

Usage reveals that institutions assume the existence of an institutional right to withhold certificates, but does such a right exist in fact and, if so, do any parameters apply to the exercise thereof?

Section 65B of HEA, which deals with the awarding of diplomas, certificates, and degrees is silent on the supposed right to withhold. Nor does s 65BA, entitled 'Withdrawal and revocation of degree, diploma, certificate or other qualification', expressly provide for the withholding of qualifications once earned.

One possible origin of such a right is a notional contract between the institution and the student in terms of which the institution provides an education to the student in exchange for and on condition of, among others, the student's timely payment of fees and conformity with the institution's code of conduct. A student is made to sign a raft of documents from various administrative departments. These may include agreements in acceptance of a placement offer, enrolment and registration agreements, agreements in respect of occupation of a residence, and fee payment structure undertakings. This last category is the obvious refuge for institutions: Most now explicitly list the prevention of a student from receiving their certificates among the harsh consequences a student may face should they have an outstanding balance upon exit. Still, there is scope to argue against the existence and validity of a coherent education contract (lack of a single document or oral agreement or demarcation of the totality of documents that constitute it, the essential elements of such a contract have not been described, students endorse fee policies by force of coercion). Its enforceability is a matter apart.

Assuming the basis of the disputed right lies in the contract, recall that *Beadica 231 CC and Others v Trustees, Oregon Trust and Others* 2020 (5) SA 247 (CC) and related jurisprudence direct us to scrutinise a contract incorporating the right in the light of public policy. A contract must be infused with the spirit of *ubuntu* – an incident of public policy as embodied by the Constitution. This simply means that contracting parties must deal fairly with one another, paying attention to the personal circumstances of a counterparty with a view to performing compassion and maintaining a peaceful symbiosis in the community. This legal imperative thus circumscribes the once near-absolute principles of freedom of contract and contractual sanctity. At the interface of these principles and *ubuntu*, we – and particularly the courts – must assess factors such as whether there is equality of arms between the parties, any history of socio-economic exclusion and systemic disadvantage, and whether the action of one party is likely to exacerbate the hardships faced by an indigent party. Now turning to the contract of education, the power and prowess asymmetries are self-evident. It often happens that a prospective student receives a single remotely feasible offer from the family of public institutions. Moreover, these institutions essentially stipulate the terms of study and award (unilaterally on a take-it-or-leave-it basis) to students the majority of whom come from backgrounds of modest means. It should not escape our notice either that fee policies routinely resemble the dreaded standard form contract. *Ubuntu* demands that a withholding right must be exercised sparingly, judiciously, and empathetically. At the very least, the enforcement thereof should not be a mechanical exercise but one that considers the peculiarities of each case, however burdensome that may prove to be.

A second proposition is that institutions hold a sort of quasi-lien (a right of retention in intangible property) over the certificates they hopefully eventually grant, which certificates are a product of the pedagogical services rendered to socialise and develop the student intellectually and professionally. But it is conceptually and morally questionable that an institution should be able to 'possess' a person's education or to detain evidence thereof.

Yet another possibility is that institutions are empowered to withhold certificates by virtue of the wide discretion they enjoy in respect of conferring qualifications. However, unfettered discretion occupies a shaky position in a social order founded on justification. If a discretionary decision to withhold a qualification is reached despite, as is true in many cases, a student having substantially satisfied the bulk of – if not all – graduation requirements, that decision is patently unfair.

Whatever the source of such a right might be, it is highly problematic that institutions enforce the right so dispassionately, frustrate the s 29(1)(*b*) constitutional right to further education by barring entry to continuing education, and call up student debts in a manner that effectively stunts a former student's capacity to gather the fruits of their years of toil.

Is the withholding policy and practice defensible in our society?

Arguably, the action of withholding a qualification restricts the s 22 constitutional right to freedom to choose and pursue a career and negatively impacts on dignity (by limiting choice, inhibiting – even if only temporarily – the realisation of a person's full potential, and – in many instances – by perpetuating indigence and consequential deprivations).

It stands to reason that the ability to invade these rights cannot be implied or tacitly read into either the HEA or any fee policy.

Assuming that the right to retain a qualification exists, would the limitation that this right visits on the countervailing rights identified above, pass constitutional muster under s 36? The limitation fails at the first step of that inquiry. As already mentioned, there is no law that explicitly imbues institutions with the right to withhold qualifications once earned. The policy of an institution is not law, let alone one of general application. Even if it were such a law, the grounds that would justify the practice – the financial integrity of an institution, deterrence of widespread default and the principle of contractual sanctity – are far outweighed by the reasons against it when the constitutional balancing mechanism is applied.

First, consider the unequal historical and contemporary distribution of resources in our society. The implications of qualification retention are many and grave:

- Denying a former student access to the tool they need to shatter the cycle of poverty by obtaining employment damns them to continuing poverty and dependence.
- A graduate who is unable to enter the workforce is a burden on their family, community and the fiscus.
- By the time an institution adopts a softer stance, permitting graduates access to their transcripts, the recruitment window for the relevant year has often practically closed.
- Withholding a qualification inflicts immeasurable harm on a graduate's psychological well-being, both owing to emotional stress linked to the two preceding points and to moments of triumph (which milestones may be few and far between) being sapped of their joy.
- A graduate in that position is overcome with a sense of stagnation.

Second, the practice may be in tension with a crucial public objective, one that is a staple of South African political rhetoric: the value and transformative potential of education.

Third, the arguments challenging the existence of a right to withhold a qualification outlined above all militate against upholding the reasonableness of the limitation, particularly because they show how the practice may derogate from the dictates of the Constitution.

The foregoing line of reasoning coheres with the decision of the Mpumalanga Division of the High Court in *Ex Parte Lindumusa Hopewell Makamu* (MM) (unreported case no 304/2021, 7-10-2021) (Mashile J *et* Roelofse) (see Lindumusa Makamu 'Rule 17.6.3 of the Rules of the Legal Practice Act declared unconstitutional' 2022 (July) *DR* 39). Here, r 17.6.3 of the Rules made under the authority of ss 95(1), 95(3) and 109(2) of the Legal Practice Act 28 of 2014 requiring an applicant for admission as an attorney to furnish a certified copy of their degree certificate was declared unconstitutional (see Makamu (*op cit*)). The court's decision was based on findings that the rule is essentially underinclusive in relation to its underlying rationale being an applicant's obligation to demonstrate they have satisfied the LLB requirements (does not necessitate the production of a degree certificate), that the rule violates the rights of an applicant with a credit fees balance to equality, human dignity, and occupational freedom. On reflection, this does not rubberstamp a debtor student's frustration of a creditor institution's right to debt enforcement. It is an acknowledgement that the failure to obtain a degree certificate should not necessarily be an insurmountable hindrance in the path of a person who has completed their studies. The subtext of this acknowledgement is recognition of the fact that certificate withholding practices are unfair and harmful. A certificate is not constitutive of qualification; it is merely evidence thereof and ought not to be used to hold a former student to ransom and likely stunt their development.

What should happen?

The view that institutions should be run like a business is not without merit, but it belies two unassailable truths: education is not a commodity, but a right and educational institutions carry responsibilities beyond securing purely commercial interests. We understand these truths. That much is reflected in our approach to exclusionary fee practices in the context of basic education: paragraph 25(12) of the National Protocol for Assessment Grades R – 12, 2011 prohibits the withholding of a school report card.

I will venture a guess that loads of aspirant students prematurely throw in the towel even when they read and hear the stories of students who have been deprived of their qualifications. Furthermore, arrear and interest fees sometimes accrue to a student's account through no fault on the student's part, but because the National Student Financial Aid Scheme has paid late, protest action has disrupted enrolment procedures and timelines, or an institution's financial administration is in shambles. Why this burden should be shifted onto a student is beyond comprehension.

We have seen that there is no statutory right to withhold a certificate. How is it that our legislature makes pronouncements on issues as banal as changes in the names of institutions, but omits to regulate a matter with such far-reaching consequences?

The pressures on institutions to recover debts and to maintain healthy balance sheets are immense. But the common manner of debt enforcement makes a mockery of Nelson Mandela's assertion that education is the most powerful weapon which one can use to change the world, the state's obligation to progressively make further education available and the country's commitments in the international sphere, including goal 4 of the United Nations Sustainable Development Goals which stipulates that states should endeavour to ensure inclusive and equitable education and to promote lifelong learning. It is a travesty that this withholding practice – which surely feels punitive to those individuals who suffer its lashes – is allowed to persist. This hope-dashing scourge deserves vigorous public debate, ministerial intervention, and judicial treatment. We must interrogate not only its legality, but also whether it is just. For my part, I think it is cruel to hold our youth to ransom. The recognition of educational achievement ought to be decoupled from financial status. Our institutions must stop conducting themselves like loan sharks contrary to our *boni mores*; they must find other ways to recoup debt.

Sabelo Bongani Ndlovu *BA (Hons) (Law and French) (Amherst College, USA) LLB (UCT)* is a candidate legal practitioner at Webber Wentzel in Johannesburg. ❑

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Fast Low-Cost Arbitration

By Judge Ezra Goldstein

The arbitration agreement reads: 'The parties appoint A as arbitrator to decide the dispute arising out of the sale of X's property in Waverley, Johannesburg to Y applying the law as far as practicably possible, tempered by fairness, and as informally as he chooses, and with a view to limit costs in his sole discretion and without being bound at all by any pleadings the parties may have exchanged.'

The arbitrator interviews claimant and defendant together, with or without representation, questions them, looks at the documents and other evidence, researches the law and makes a decision. If the arbitrator can mediate a settlement along the way, he or she tries to do that. Litigants pay for time actually spent on a matter and there is no day fee. The meeting sessions are mostly limited to two hours and so can occur flexibly, including before or after office hours to suit the convenience of the parties.

The procedure can be tweaked in various ways. For example, the arbitrator can hear both sides informally, research the law, if necessary, and then supply the parties with an oral or written *prima facie* view giving the 'loser' the opportunity to convert the proceedings to a formal arbitration with pleadings and evidence, etcetera. Good arbitrators are prepared to change their minds. I, myself, sitting as a judge concurred without qualification in the Full Court decision of *South African Druggists Ltd v Beecham Group PLC* 1987 (4) SA 876 (T). That decision included a significant passage at 880A-B. Later in *Government Mining Engineer and Others v National Union of Mineworkers and Others* 1990 (4) SA 692 (W) at 705E, I stated that my view was now at variance with the correctness of that passage, and every judge who grants leave to appeal acknowledges that they may have erred. (I must confess that often when counsel asked me for leave to appeal against one of my judgments, I used to ask them if they hoped to persuade the court of appeal to go wrong.)

To overcome the problem of getting a prospective defendant to agree to fast inexpensive arbitration say to him or her: If you refuse to agree to this inexpensive route my client will sue you in the High Court/magistrate's court and the case will cost you a lot more. This is a unique feature of fast arbitration, which incidentally is particularly suited to smallish claims, which make litigating in the ordinary way prohibitively expensive.

Of course, the problem of getting agreement to fast arbitration can be resolved when the contract between the parties contains a clause along the following lines: 'Any dispute arising from this agreement will be referred to arbitration by arbitrator X or, failing him for any reason, by an arbitrator agreed to between the parties and in the absence of agreement, by an arbitrator appointed by the Chairperson of the Johannesburg Bar Council and the appointed arbitrator will apply the law as far as practicably possible, tempered by fairness, and as informally as he chooses, and with a view to limit costs in his sole discretion and without being bound at all by any pleadings the parties may have exchanged.' The clause can also be amplified by providing that it will only apply to claims of, say, R 500 000 or R 1 million, or less. Of course, provision must then be made for exactly how claims for more are to be dealt with by arbitration or court, if appropriate.

To reduce arbitration time and to increase the expeditious effectiveness of the procedure, attorneys, and counsel ought to ensure that their clients are fully prepared and focused on the relevant issues, and also that a bundle of the relevant documents is prepared and paginated for both sides and for the arbitrator. Usually, an index is unnecessary and unhelpful and just results in extra costs. I proceed to discuss terms of the arbitration agreement above.

- '[A]pplying the law as far as practicably possible … .'
  If a particularly difficult law or factual point arises the arbitrator can try to get agreement between the parties as to how it can be resolved at the least cost, for example, if it is difficult to assess the quantum of damages the arbitrator can try to get the parties to agree to such a quantum or he or she can make an educated guess, after discussion with the parties, at what it is without getting into the difficulty of having to have all the evidence investigated. Another example, on a difficult legal point, which might require many hours of research the arbitrator can make an educated guess, after discussion with the parties, on what the law ought to be. Another example, where the difference between a party and party costs order and an attorney and client costs order depends on investigating complicated facts the arbitrator can refuse to do so and just order party and party costs.
- '[T]empered by fairness.'
  Gives the arbitrator the power to rule fairly despite uncertainties or technical difficulties. For example, the arbitrator would have the power to order apportionment of damages in contract, as was done in *Thoroughbred Breeders Association of South Africa v Price Waterhouse* 1999 (4) SA 968 (W) – overruled on appeal by the Supreme Court of Appeal (SCA), *Thoroughbred Breeders' Association v Price Waterhouse* 2001 (4) SA 551 (SCA), by a majority of four to one, while acknowledging at 590E that the court's sympathies were with the minority, which favoured apportionment and that there was 'a pressing need for legislative intervention.' See further *McCarthy Ltd v ABSA Bank Ltd* 2009 (2) SA 398 (W) at 400F–I. The arbitrator would also be able to avoid following the majority decision in *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (A), and instead be able to follow the minority and the court *a quo* – *Pilkington Brothers (SA) (Pty) Ltd v Lillicrap, Wassenaar and Partners* 1983 (2) SA 157 (W) – where fairness required this. Why, one may ask, should there not be an action in delict where a contractual obligation is negligently discharged and why should the quantum of damages not in fairness be the difference between the value of the performance actually rendered and what it would have been had the contractual obligation been performed with the care a reasonable man would have taken?
- '[W]ith a view to limit costs … .'
  This is the constant focus.
- '[I]n his sole discretion … .'
  This gives the arbitrator the power to make effective decisions along the way without being hidebound by formalistic restrictions.
- '[W]ithout being bound at all by any pleadings the parties may have exchanged … .'
  This is an attempt to avoid the unfortunate apparently absolute rule that arbitrators are bound by the pleadings incorrectly stated by the SCA in *Gutsche Family Investments (Pty) Ltd and Others v Mettle Equity Group (Pty)*

Ltd and Others (SCA) (unreported case no 115/2011, 8-3-2012) (Brand JA)) at para 18(c). *Gutsche* deviates from *Hos+Med Medical Aid Scheme v Thebe Ya Bophelo Healthcare Marketing & Consulting (Pty) Ltd and Others* 2008 (2) SA 608 (SCA) and *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA).

In *Hos+Med* the arbitration agreement expressly stated that the issues for determination were those defined in the pleadings – 611F, and the court at 616 – 617 para 30 footnote 5 distinguished *Telcordia* and seems to indicate that if the arbitration agreement were as wide as that in *Telcordia* the arbitrator and the arbitral appeal tribunal in *Hos+Med* would have been entitled to deviate from the pleadings. In *Telcordia* at 280 para 7 the agreement 'provided that "all disputes between the parties that may arise" had to be determined by an arbitrator'.

In *Close-Up Mining and Others v Boruchowitz NO and Another* 2023 (4) SA 38 (SCA) the SCA in paras 8 – 15 without mentioning *Gutsche* in effect overrules it and follows *Hos+Med*, stating that it cannot be said '[a]s an invariable statement of the competence of an arbitrator' that he is bound by the pleadings. The court states correctly that the arbitration agreement is the source of the arbitrator's powers, and the agreement must determine whether the arbitrator is bound by pleadings or not. The judgment is marked 'Reportable', correctly so. Unterhalter AJA at para 14 states that he is 'fortified in my opinion by the unreported decision in this court in [*Holford v Carleo Enterprises (Pty) Ltd and Others* (SCA) (unreported case no 977/2013, 28-11-2014) (Gorven AJA))].'

In *Holford* the SCA in a judgment marked 'Not Reportable' and without mentioning *Gutsche* in effect overrules it too, stating in para 8 that '[t]he powers of an arbitrator … derive from the arbitration agreement', and stating in para 9 that the agreement in *Holford* gave the arbitrator 'such powers as are allowed by law to a High Court of the Republic of South Africa to ensure the just, expeditious, economical and final determination of the dispute and shall have all of the powers afforded to a judge of the High Court of South Africa …' and that since a court would be entitled to decide an unpleaded issue properly ventilated, where no prejudice to either party occurred, an arbitrator could do so too.

An interesting footnote, which indicates how unpredictable and vagarious litigation can be (even if it not fast arbitration and even if it occurs in the highest of courts) is that *Hos+Med* says otherwise about this very point. In paras 29 and 30 the SCA appears to have accepted the submission that where the arbitrator and the arbitral appeal tribunal were vested with 'the powers of a High Court and of the Supreme Court of Appeal, respectively' these were 'procedural powers and do not confer jurisdiction to determine matters on which the parties have not agreed.'

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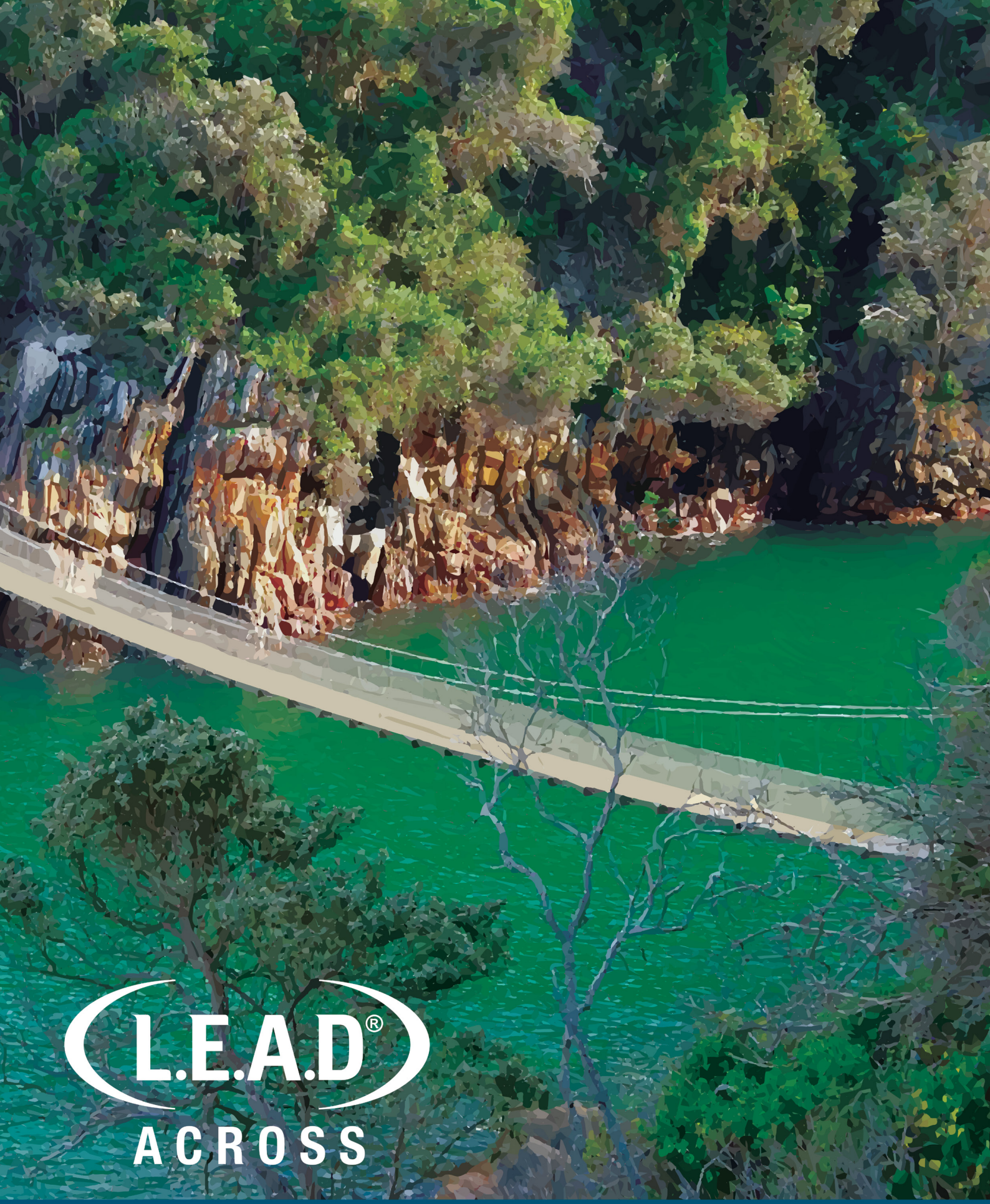
Judge Ezra Goldstein *BA (UKZN) LLB (UP)* is an arbitrator and retired judge in Johannesburg. ❑



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We are based in Bryanston, Johannesburg and fall within the Labour Court's jurisdiction.

Odete Da Silva:
Telephone: +27 (0) 11 463 1214
Cell: +27 (0)82 553 7824
E-mail: Odasilva@pagelinc.co.za

Avril Pagel:
Cell: +27 (0)82 606 0441
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Anthony V. Elisio

South African attorney and member of the Italian Bar,
who is in regular contact with colleagues and clients in South Africa.

Rome office
Largo Trionfale 7
00195 Rome, Italy
Tel: 0039 06 3973 2421

Milan office
Galleria del Corso 1
20122 Milan, Italy
Tel: 0039 02 7642 1200

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Skype: Anthony V. Elisio
E-mail: avelisio@tin.it | anthonyvictor.elisio@gmail.com
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PAGEL SCHULENBURG
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Kim Reid: (011) 463 1214 • Cell: 066 210 9364
• E-mail: kim@pagelinc.co.za
Avril Pagel: Cell: 082 606 0441
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