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DE REBUS
THE SA ATTORNEYS' JOURNAL

OCTOBER 2023

EXPLORING THE AVAILABILITY OF S 7(3) REDISTRIBUTION TO SPOUSES IN FOREIGN MARRIAGES

Arrest without a warrant – what requirements must be observed by peace officers?

Are the proposed Community Schemes Ombud Service Practice Directive orders within the Ombud's jurisdiction?

Is mediation an option in sexual violence cases?

Unfair discrimination of 'older person' definition found in the Older Persons Act

The 15 rules for writing letters

Everyone is protected by the law, and everyone should protect the law

***Ubuntu* and commercial contracts**

The need for effective training programs in law firms

The Barbie doll has shaped the importance of intellectual property ownership: The famous Barbie doll case

Court withdraws a previous order after application proves the court was misled

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CONTENTS

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News articles on the *De Rebus* website:

- RAF matters still ongoing
- The legal profession is best placed to ensure that disputes are resolved via arbitration, with rules applicable across all BRICS countries
- Social justice discussed at BLA NGM

20 Exploring the availability of s 7(3) redistribution to spouses in foreign marriages

Office manager, **Kobus Brits**, explores the availability of s 7(3) of the Divorce Act 70 of 1979 as it pertains to spouses in foreign marriages. Section 7(3) grants the court in divorce matters the power to redistribute assets of spouses in marriages out of community of property entered into before 1984. As held in *Beaumont v Beaumont* 1987 (1) SA 967 (A), s 7(3) introduced a completely new concept in this area of law: the authority of a court, under specific conditions, to mandate the transfer of one spouse's assets to the other. Mr Brits discusses *Esterhuizen v Esterhuizen* 1999 (1) SA 492 (C) in which the couple, who were residing in Namibia when they got married, had concluded an antenuptial contract. On their divorce in South Africa, the wife sought a redistribution order and a claim for maintenance. The defendant claimed that s 7(3) did not apply because the marriage took place in Namibia. The court held that the complexity and partial inadequacy of the law in this regard was not something the courts could rectify by means of interpretation.

Regular columns

FEATURES

22 Arrest without a warrant – what requirements must be observed by peace officers?

Aspirant prosecutor, **Andrew Jeffrey Swarts**, discusses s 40(1)(*b*) of the Criminal Procedure Act 51 of 1977 and the requirements peace officers (police officers) must observe, follow and adhere to for an arrest to be lawful, specifically when effecting an arrest without a warrant. Section 40(1)(*b*) states that a police officer may arrest, without a warrant, a person whom they have reasonable suspicion of having committed a sch 1 offence. Mr Swarts writes that police officers are given the power to make arrests without a warrant. However, it should be noted that this authority is not absolute. There are four elements that must exist in order for the arrestor to effect an arrest without a warrant, namely: the arrestor must be a peace officer, they must entertain a suspicion, the suspicion must be that they, the suspect, committed a sch 1 offence and that the suspicion is reasonable. Of all the elements, the fourth one requires an in-depth look at the court's interpretation.

24 Are the proposed Community Schemes Ombud Service Practice Directive orders within the Ombud's jurisdiction?

On 14 March 2023, the Community Schemes Ombud Service (CSOS) promulgated a draft Practice Directive on s 39(7)(*b*) of the Community Schemes Ombud Service Act 9 of 2011 (CSOS Act). Legal practitioners, **Jennifer** and **Graham Paddock** write that the pivotal question is whether the Chief Ombud can legally institute 12 novel adjudication orders via this directive. Specifically, they ask if the Chief Ombud can legitimately extend the scope of the orders in s 39 of the CSOS Act by way of a practice directive and if the proposed additional orders are appropriate outcomes for the CSOS adjudications? Although arguments may endorse the idea of broadening the reach of orders via practice directives, the Paddocks believe that according to the principle of separation of powers, the Chief Ombud does not possess the necessary legal authority to do this. The CSOS, being a state-owned entity, cannot wield legislative or interpretive authority, as these powers are reserved for Parliament and the High Court.

27 Is mediation an option in sexual violence cases?

In some magistrate offices, the practice of mediating sexual assault cases has become the norm rather than the exception. Unfortunately, the formal prerequisites for conducting informal mediation, as outlined in the directives, are not being adhered to. Numerous articles extol the benefits of mediation. However, Magistrate, **Desmond Francke**, maintains that mediation should not be considered in the context of sexual assault cases for a number of reasons. Sexual assault is a crime, which leads to a severe imbalance of power between the perpetrator and the victim. This imbalance is so serious that any agreement reached through mediation would inherently be unjust. Mediation becomes impracticable in cases of power-based crimes because the victim, typically a woman, is placed in a grossly unequal negotiation position with her assailant. Furthermore, they are negotiating matters that should not be subject to negotiation, such a matters of privacy, dignity and the infringement on numerous rights.

30 Everyone is protected by the law, and everyone should protect the law

In this month's young thought leader column, *De Rebus* features legal practitioner **Hilde Eksteen**. Ms Eksteen received an LLB from the University of Johannesburg, she is a general litigation practitioner and specialises in family law. Ms Eksteen helps oversee events at the Johannesburg Attorneys Association and likes engaging on social media and sharing court tips with aspiring and junior legal practitioners.

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Road Accident Fund Amendment Bill, 2023

On 8 September 2023 the Department of Transport published a draft Road Accident Fund Amendment Bill, 2023 in GN3868 *GG*49283/8-9-2023 for public comment. The deadline for comment is 8 October 2023.

It is of extreme importance that all legal practitioners, as well as the public and the relevant civic associations, are made aware of the dire consequences that will follow the enactment of this Bill and that they voice their objections so that this Bill can be stopped in its tracks, or at least proceed to a full public participation process.

If the draft Bill is signed into law, the rights of all drivers, passengers and pedestrians to claim compensation for injuries they suffer in a motor vehicle accident will be taken away. In its place will be significantly reduced 'social benefits'.

Despite the fact that only very limited social benefits will be paid –

- the innocent injured party is still denied a common law claim against the guilty party for the balance of his or her loss;
- all claimants will still have to prove that their injuries were suffered as a result of the negligence of the driver or owner of a motor vehicle; and
- all those using the roads will nevertheless, either directly or indirectly, still have to contribute to the Road Accident Fund (the Fund) by way of the fuel levy, which is currently R 2,18 per litre.

The Fund receives more than R 45 billion per year via the fuel levy.

The poor and disempowered who make up the vast majority of claimants and who are compelled to use public transport, will bear the brunt of the consequences of these amendments. They will be forced into the public health system, as the prescribed tariffs will not cover the actual costs incurred at a private hospital. Under the present system many receive treatment at dedicated private healthcare facilities. They will not receive any lumpsum payments and it is very likely that, if they are not able to produce a salary slip, they will receive no compensation for loss of earnings. In other words, they will receive no benefit at all, even though they may suffer devastating injuries and are the very people that the Fund should protect.

The proposed legislation also unfairly discriminates against the working classes who are dependent on public transport to get to work or who are conveyed in motor vehicles during the course of their employment.

Those that can afford it will be compelled to take out private accident cover for medical and other expenses, as well as accident benefits. This is likely to be very costly, as there will be no reimbursement of expenses covered from the Fund. Medical aids will more than likely exclude cover, or the cost thereof will have to materially increase to preserve the funds in the pool for all members.

Current compensation versus proposed changes

1 Current

The Fund is a state backed insurer which steps into the shoes of the wrongdoer and compensates the innocent injured party subject to some caps in respect of loss of income.

Proposed

The object of the Fund has been changed from the payment of compensation (as a statutory insurer) to the provision of social benefits (welfare) – this despite the fact that road users continue to pay a significant premium by way of the fuel levy.

2 Current

Injuries sustained in a motor vehicle accident anywhere in the Republic of South Africa by any person are covered.

Proposed

Only persons injured on a public road may claim – injuries suffered in motor vehicle accidents in parking areas, sports fields, farm roads, driveways, private estates, game reserves or any other private road are not covered. Persons who are not citizens or direct permanent residents are not covered. Persons crossing a highway are not covered. Persons injured in a hit-and-run are not covered. Pedestrians, drivers and cyclist who may test over the legal limit for alcohol and their dependants are not covered.

3 Current

Uncapped compensation for general damages for pain and suffering, loss of amenities of life, disfigurement and shock paid to those who have suffered serious injuries.

Proposed

No payment for pain and suffering, loss of amenities of life, disability, disfigurement, or shock regardless of how catastrophic the injuries might be.

4 Current

Loss of earnings and support, past and future, are paid by way of a lumpsum, affording the injured claimant or dependants the freedom and dignity to take charge of their own future.

Proposed

No lumpsum payments for future loss of earnings or support. Future earnings or loss of support will be paid as an annuity (monthly payments). The Fund has the right to continually reassess its liability to continue to pay. If the injured claimant is a breadwinner and dies, the pension will cease, leaving dependants destitute.

5 Current

All medical and other expenses reasonably incurred that arise directly from the accident are covered.

Proposed

Medical and other expenses will be subject to a prescribed tariff, which will not cover the actual costs incurred. All future expenses to be pre-authorised in terms of a procedure to be prescribed and subject to restrictions and exclusions.

6 Current

In terms of the common law, expenses covered by medical aids must be paid by the Fund and in terms of the rules of the medical scheme, reimbursed to the medical aid to go back into the pool of funds available for the benefit of all members.

Proposed

No cover for expenses covered by medical aid/insurance. This will have dire consequences for all medical aid members, not just road accident victims. Medical aids may be forced to exclude cover for motor vehicle accident expenses.

7 Current

Costs incurred to inter the deceased in a grave are covered.

Proposed

Fixed capped benefits for funeral expense.

8 Current

Any person injured as a result of the negligence of a driver or owner may claim.

Proposed

No compensation if there is a claim in terms of the Consumer Protection Act 68 of 2008.

No compensation if injured while filming a movie or advertisement.

Claims for passengers who may be covered by the operator's passenger liability insurance to be reduced by the extent of the cover.

9 Current

Once a claimant has lodged a substantially compliant claim on the Fund and a period of 120 days has lapsed, the claimant is free to prosecute his or her claim in a court of law.

Proposed

Jurisdiction of the courts are largely ousted by the establishment of alternative dispute resolution procedures followed by referral to the Office of the Road Accident Fund Adjudicator (yet to be established).

10 Current

Once a valid claim has been lodged, the period to institute proceedings before the claim will prescribe and become unenforceable is extended from three years to five years from date of accident, allowing a claimant sufficient time for injuries to stabilise and to prepare a claim.

Proposed

Lodgement of a claim no longer extends prescription from three to five years, meaning that many claims could prescribe while trapped in the internal resolution process.

11 Current

An injured party can claim personally or be represented by a practising attorney or an employee of the state.

Proposed

Claimant can be represented by any person or functionary as prescribed in the regulations.

Funds are needed urgently in order to launch and maintain an effective awareness campaign and to rally opposition to the legislation, including litigation, if necessary. The Law Society of South Africa calls on all practitioners to contribute whatever they can to a dedicated fund for this purpose. Any contributions can be transferred into the following bank account:

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The Road Accident Fund Committee of the Law Society of South Africa ❑

LETTERS TO THE EDITOR

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

Reaction to claim by RAF CEO regarding RAF performance

I have noted the reaction of the Chief Executive Officer (CEO) of the Road Accident Fund (RAF), Collins Letsoalo, to the criticism of the state of the RAF. He was reported to have said that: 'Over the past three years, my performance has been brilliant based on an assessment by the independent board.' The assessment criterion referred to creates a false picture of the state of the RAF.

Since 2002, the RAF has been judicially criticised in 34 cases with costs orders being made against the RAF and members of its staff. In January 2023, the CEO and the Board of the RAF were mulcted in a personal cost order based on the unacceptable administration of two claims in the Mpumalanga Division, Mbombela. The CEO in a Moneyweb interview on RSG of 26 July 2023 referred to a 2019 *De Rebus* article I wrote pointing out the folly of the RAF's litigation, which was the result of decisions taken by the RAF during 2000/2002 to litigate all claims irrespective of the merits (see Prof Hennie Klopper 'Is the Road Accident Fund's litigation in urgent need of review?' 2019 (March) *DR* 10).

In that article I never suggested that the RAF should rid itself of its panel of attorneys without any contingency to deal with cases dealt with by its panel of attorneys. This was entirely a decision made by the RAF. This decision has proven to have been unwise with far reaching detrimental consequences for some 300 claimants and the RAF. Claimants were now faced with even further delays. The result of this decision was highlighted on 10 July 2023 by the Gauteng Local Division High Court in *Gwizi v Road Accident Fund* (GJ) (unreported case no 2020/2948, 10-7-2023) (Cajee AJ): 'Before concluding, I highlight once again the unsatisfactory supine attitude to litigation adopted by the RAF that led in this case to the striking out of what was clearly a meritorious defence, at least as far as the issue of liability is concerned. In the recent case of *LN and Another v Road Accident Fund* [(GP) (unreported case no 43687/2020, 20-4-2023) (Davis J)] in the Pretoria High Court Davis J described the RAF as being a "perpetually recalcitrant or delinquent litigant". It is clearly not fulfilling its mandate of properly investigating and defending unmeritorious claims, like the present one.

This is in no way meant to be a criticism of what I am told are the seventeen odd legal practitioners belonging to the RAF unit of the State Attorney in Johannesburg. Most appear to be very conscientious and hard working. Unfortunately, they appear to be totally overwhelmed by the sheer volume of matters in court that they have to deal with, and are only seeking to intervene in matters at the proverbial twelfth hour, without an adequate opportunity to investigate and prepare long after the defendant's defences are struck out for failure to comply with court orders aimed at ensuring matters before court are trial ready by the time that they are heard. These legal practitioners are doing the work of a much larger number of RAF panel attorneys and their employees and advocates who previously dealt with these matters. The unit appears to be severely under resourced and understaffed.'

The decision of the RAF to fire its panel attorneys without any credible measures to deal with affected cases was its own and it should take responsibility for its consequences which, as highlighted by the above judgment, were far less than brilliant. The dismissal of the panel attorneys has also exposed the RAF to the potential of increasing costs and damages awards because claims are not properly investigated, available information is too old, and the RAF is in many instances unrepresented. The RAF has apparently realised the folly of this action and has on 5 July 2023 called for bids for panel attorneys.

Finally, the blaming of the state of the RAF on the legal profession is disingenuous. The current situation is the result of RAF management decisions and practices of the past two decades (see my article 'Is the Road Accident Fund an *inheritas damnosa?*' 2023 (July) *DR* 14).

Blaming the legal profession is akin to a child who has murdered his parents and then pleads in mitigation that he is now an orphan.

Professor Hennie Klopper *BA LLD (UFS)* is an Emeritus Professor at the University of Pretoria and legal practitioner at HB Klopper in Pretoria.

By
Kevin
O'Reilly

Family law committee meeting summary

The Law Society of South Africa's (LSSA) Family Law Committee (the Committee) met on 25 August 2023 to discuss a number of issues related to its area of expertise. Some of the key issues considered were the following.

International Bar Association (IBA)

The IBA Family Law Committee (the IBA Committee) is interested in connecting with family lawyers globally and invites them to join the organisation. They are interested in receiving contributions from family law lawyer organisations, particularly in regard to comparative law family issues. The IBA Committee recently promoted a webinar on child abductions, the various organisations to be contacted in various countries regarding these abductions and the mechanisms that could be used for the return of these children including the Hague Convention provisions.

Surrogacy

The Committee noted that there are significant discrepancies among countries as to the permissibility of and the financial considerations around surrogacy. The Hague Conference is in the process of considering either a convention or a guide in regard to the practice of surrogacy globally. The Committee agreed it would be beneficial to provide input and participate in the questionnaires in this regard.

The Hague Convention on the Civil Aspects of International Child Abduction

The Committee noted that the LSSA had previously written to the Minister of Justice and Correctional Services, Ronald Lamola, in this regard on problems experienced in practice. Another attempt would need to be made to target specific persons within the Department in this regard.

There is a training session in Kenya in September/October 2023. The Committee's chairperson will attend (but not in her capacity as representative of the LSSA) and will attempt to establish connections with other organisations and countries to exchange information and build relationships.

South African Law Reform Commission (SALRC) Project 142: Discussion Paper 150 – Investigation into Legal Fees

The Report by the SALRC was released in March 2022. Although the Report was not published for comment, the LSSA submitted comments on the Report to the Minister of Justice and Correctional Services. The LSSA has also requested a meeting with the Minister, which requires follow-up.

Children's Amendment Bill, 2021

The Children's Amendment Bill was an annexure to the SALRC Discussion Paper 155: Relocation of Families with Reference to Minor Children. The Committee expressed concerns with the Bill in its current form. The Committee resolved to conduct a webinar focusing on the Bill to debate the concerns. An invitation would be extended to the SALRC to present and engage in a brief discussion on the proposed Bill including a question-and-answer session.

Divorce Amendment Bill B22 of 2023

The Committee agreed to submit comment on the Bill. The Committee regretted the lack of an omnibus approach to divorces, marriages, and the consequences of marriages and relationships. The Department of Home Affairs and the Department of Justice and Constitutional Development are submitting separate Bills. There should be comprehensive form, taking into account also the patrimonial consequences of marriages and relationships. Life relationships should also be considered as the majority of South Africans live in life relationships and not marriages.

Marriage Amendment Bill 2023

The Committee notes that the purpose of the Bill is to align all marriages in South Africa (SA) with the Constitution. However, there are serious concerns with the Bill and also its consequences, particularly in view of the lack of the omnibus approach.

- The Bill does not refer to Hindu marriages.
- Although the Bill permits polygamous marriages, it does not include polyandry.
- Life relationships should be addressed.
- The patrimonial consequences of marriages and relationships should be addressed, and the lack of this simultaneous reform will only include litigation and prevent access to justice and to equitable outcomes. The lack of resources and access to facilities, education, information and the sophisticated registration of agreements, as well as drafting agreements may impede the delivery of justice and will cause the same imbalances and inequitable outcomes as has been addressed in the *Greyling v Minister of Home Affairs and Others; Booysen v Richardson NO and Others* (CC) (unreported case no CCT 158/22, 10-5-2023) case before the Constitutional Court (CC) may remain.
- The requirement for registration of the marriages as defined in the Bill is problematic. Court approval has to be obtained before a polygamous marriage is solemnised. The CC has already found this is not necessary.
- The schedules referred to in the Bill are not published, which makes the submission of the Bill problematic.
- The requirement of the registration of antenuptial contracts prior to marriage is not viable.
- There are differences in the various legislation regarding the age of marriage.
- Proof, such as birth certificates and identity documents, passports, required are not necessarily practically obtainable and problems are already experienced in practice, particularly in regard to refugees and migrants.
- The Bill should be gender and sex sensitive in regard to the identification of individuals who are gender diverse, non-binary, transgender and so on.
- The provision for applications to court in certain circumstances are onerous and against the constitutional case law.
- Marriages officers will have no choice but to conduct marriages.
- There appears to be provision for amendment of marriage regimes contrary to s 21 of the Matrimonial Property Act 88 of 1984. If the Bill requires customary marriages to be registered, again contrary to the current case law.

- The piecemeal approach can only lead to disputes and litigation, which most in SA can ill afford.

SALRC Project 100E: Discussion Paper 160 – Review of Aspects of Matrimonial Property Law

The SALRC published a discussion paper for comment, highlighting the fact that the Matrimonial Property Act is nearly four decades old, and acknowledging the substantial societal transformations SA has experienced. In response, the discussion paper makes a variety of proposals.

The Committee resolved to arrange a workshop on this issue and to extend an invitation to all provincial family law sectors to participate.

The Committee noted a choice needed to be made between retaining the existing framework within the Matrimonial Property Act or adopting a broader approach and introducing an s 7(3) redistribution accompanied by a carefully considered opt out provision. The Committee chose to postpone further discussion on the matter to a later meeting, to allow time to prepare and engage in debate on the topic. The Committee also determined to extend an invitation to the SADC Lawyers Association to provide insights and feedback in future workshops, similar to their involvement in providing input for the gender-based violence legislation.

Family courts

The Committee acknowledge the need to take practical steps to address challenges in the family court. Smaller regions where specialisation is scarce, requires assistance. The Committee proposed assisting in providing basic family law training for attorneys and to reach out to the Family Advocate offices to explore ways in which they could offer support in regard to further education in family law and practical assistance.

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

Strengthening the legal profession: The North Free State Attorneys' Association's Annual Report

By Martus de Wet

The year in review has been marked by significant growth for the North Free State Attorneys' Association (NFA), a regional legal organisation that emerged in the midst of the challenges posed by the COVID-19 pandemic in Parys in 2021. Since its inception, the NFA has been dedicated to serving as the voice of legal professionals in the Northern Free State, addressing practice-related challenges encountered by attorneys. Over the past two years, we have witnessed substantial expansion, both in terms of our membership and the scope of our activities.

Amid our achievements, we also take a moment to remember esteemed colleagues who are no longer with us. The passing of our colleagues including John Andrew, Buks Oberholzer, Marius van Lingen, and others has left a void not only in our hearts but also in the legal community. We pay tribute to their contributions to the legal profession.

Commitment and dedication

The NFA's success over the past year can largely be attributed to the unwavering commitment and dedication of our management committee. Additionally, we extend our congratulations to Thabo Molete and Matt Willemse on their election to the management committee.

We also honour the following practitioners who achieved 40 years of practice: TV Matsepe, NPJ Steyn, A Podbielski, PJ Haasbroek, JF Smith, and Dr JP Coetzee.

Collaboration and partnerships

Collaboration has been a cornerstone of our work, and we acknowledge the invaluable partnership we share with the Goldfields branch of the National Association of Democratic Lawyers (NADEL). Gift Morolong and his team have played a pivotal role in our collaborative endeavours, and we express our gratitude for their dedicated contributions.

Committees serving the profession

The NFA operates through various committees that cater to our members and the legal profession at large. Under the leadership of Liesl Louw-Van Wijk, our Courts Committee has been diligently addressing challenges and developments within the judicial system. We have effectively tackled issues such as courtroom facilities, consultation spaces, and document processing, thanks to our strong relationships with court management and the judiciary. The Property Law Committee has been actively engaging with municipalities to tackle challenges in the field of conveyancing, acknowledging the difficulties faced by practitioners such as obtaining clearance figures and certificates.

Looking ahead

The geographical reach of our committees has also expanded to encompass the entire Free State region, reflecting the growing demand for our services. We encourage active participation from all NFA members, including candidate attorneys, as we collaborate to address the profession's challenges.

Challenges and realities

Despite our growth, the challenges confronting attorneys remain substantial, and the work of the NFA has only just begun. We are acutely aware of the increasing difficulties faced by practitioners in sustaining their legal practices. Despite the perceived prestige associated with being an attorney, the reality of managing a practice presents a less glamorous picture. In the Free State, a staggering 74% of attorneys in private practice with one to five years of experience earn less than candidate attorneys in the public sector. Similarly, 70% of attorneys with six to ten years of post-admission expe-

rience in private practice earn less than candidate attorneys in the public sector or entry-level government employees. A mere 28% of attorneys practicing for more than ten years earn more than R 25 000, with 48% charging no more than R 330 per hour in reality.

A few years ago, it was reported that only four out of ten applicants for candidate attorney positions were fortunate enough to commence their practical vocational training within one year after obtaining their law degree. Contrary to one of the primary objectives of the Legal Practice Act 28 of 2014, access to the legal profession has become increasingly restricted over the past decade, presenting us with these harsh realities daily.

We have witnessed a decline in the legal profession's presence in rural areas and access to justice appears to be diminishing for the average citizen. The NFA acknowledges these challenges, particularly as they manifest in the Northern Free State.

The NFA's response: The Young Lawyers Training and Mentorship Initiative

In response to these circumstances, the NFA has launched the Young Lawyers Training and Mentorship Initiative. This program aims to provide free training, guidance, and mentorship to young practitioners, leveraging the knowledge and experience of our senior members. We are grateful for the support received from the corporate sector to facilitate this initiative.

Preserving the legal profession

A strong and independent legal profession is essential for upholding justice, safeguarding individual rights, and maintaining the rule of law. We must stand united as colleagues to ensure the preservation of the legal profession for future generations.

Conclusion

In conclusion, we eagerly anticipate strengthening our relationships with key stakeholders, including the judiciary, government departments, and sister organisations. Let us unite in upholding the highest standards of our profession, ensuring a legacy that confidently passes the baton to future generations.

As Judge Michael Kirby wisely observed, 'where there is no independent legal profession there can be no independent judiciary, no rule of law, no justice, no democracy, and no freedom.' It is our collective responsibility to uphold these principles and secure the future of the legal profession in the Northern Free State and beyond.

Martus de Wet is the Chairperson of the Northern Free State Attorneys' Association.

❑

People and practices

Compiled by Kevin O'Reilly

Garlicke & Bousfield Inc in La Lucia Ridge has four new appointments.

Gerard Vadivalu has been appointed as a Senior Associate in the Litigation Department.

Andrew Naidoo has been appointed as a Senior Associate in the Litigation Department.

Emma Sorour has been appointed as an Associate in the Litigation Department.

Sakhile Mbele has been appointed as an Associate in the Litigation Department.

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

❑

The legal profession is best placed to ensure that disputes are resolved via arbitration, with rules applicable across all BRICS countries

By Kgomotso Ramotsho

The BRICS Legal Forum will be held in Johannesburg, South Africa (SA), on 8 and 9 December 2023, and will be hosted by the Law Society of South Africa (LSSA). *De Rebus*, News Reporter, Kgomotso Ramotsho, spoke to the Executive Director of the LSSA, Anthony Pillay about the importance of legal practitioners attending the upcoming BRICS Legal Forum.

Kgomotso Ramotsho (KR): What is the significance of legal professionals participating in the BRICS Legal Forum?

Anthony Pillay (AP): The objectives include, among others, seeking to provide for a fair, just, and equitable economic partnership that benefits the countries' societies, especially in the developing world. The legal profession is best placed to ensure that disputes are resolved via arbitration, with rules applicable across all BRICS countries so that international companies have certainty on the rules applicable, financial structure, and taxation implications and that awards are implementable.

KR: As the host country, will the BRICS Legal Forum have an impact on the landscape of the legal profession of SA, and what might some of those impacts be, or put differently, is there a benefit for the legal profession as a whole?

AP: The legal profession understands that for our country's national interest, professional services must be rendered to international companies that might have commercial arbitration requirements. This allows the expertise of large commercial transactions to be arbitrated in SA, covered by a South African arbitration centre with registered and qualified South African arbiters. The same applies to South African companies implementing and working on international projects in SA who can readily bring their disputes for arbitration.

This benefits the legal firms regarding access to arbitration work and the various commercial entities involved, both locally and internationally.

KR: What can legal practitioners attending the BRICS Legal Forum for the first time expect?

AP: They will see the myriad opportunities and skills necessary to deal with intellectual property rights, taxation, financial company structures, company law and commercial arbitration.

The BRICS Legal Forum serves as an open, permanent platform for legal cooperation and professional exchange of ideas between lawyers of BRICS countries, as well as the promotion of legal diplomacy using law as an instrument for economic cooperation and social development. The Forum provides legal support for political, economic, and cultural development of its member countries and BRICS cooperation mechanism. Its focus is on improving the discourse and decision-making powers of the establishment of a more justified international order and system.

To attend the BRICS Legal Forum, legal practitioners can register on the website at: https://bricslegalforum.org.

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The need for effective training programs in law firms

By Thomas Harban

It goes without saying that legal practice is constantly evolving and that legal practitioners must keep up with these changes. On the one hand, there is a need to have up-to-date knowledge of the law and, on the other, insight into the broader environment in which the legal practice is conducted. After all, it is the legal expertise that clients purchase from the firm and the legal practice does not operate in a vacuum. This raises the question regarding the level of training conducted by practices. Even experts in various fields of practice attain and maintain their expertise by constantly upskilling themselves, staying abreast of legal developments and ensuring that they are ahead of the curve, to use modern parlance. The growth in the number of practitioners has resulted in increased competition in the legal services market and this is compounded by other professions (most notably property practitioners and auditors) and even financial institutions offering services that were traditionally regarded as the exclusive domain of legal practitioners.

The need for training

The points raised in the previous paragraph demonstrate the need for regular training of legal practitioners to remain relevant, impart specialist advice and to compete in the increasingly competitive legal services market. Legal practitioners with outdated legal knowledge and skills run the risk of becoming a proverbial legal dinosaurs, placing the long-term sustainability and relevance of their practices at risk.

Paragraph 3.13 of the Code of Conduct for all Legal Practitioners, Candidate Legal Practitioners and Juristic Entities (the Code) prescribes that legal practitioners, candidate legal practitioners and juristic entities shall 'remain reasonably abreast of legal developments, applicable laws and regulations, legal theory and the common law, and legal practice in the fields in which they practice.' Regular training is one of the most effective activities for law firms to ensure that they comply with their professional standards of ethics. That will significantly mitigate the risk of regulatory action by the Legal Practice Council (LPC) or errors that may result in professional indemnity (PI) liability for the firm. The Legal Practice Act 28 of 2014 (LPA) and the Code are recent introductions to the regulatory framework and only time will tell whether an enterprising and astute plaintiff will rely on a breach of the LPA and the Code in framing a claim for damages against a legal practice. A failure to exercise 'the skill, knowledge and diligence expected of an average attorney' is often raised in PI claims against legal practitioners (see, for example, *Mlenzana v Goodrick and Franklin Inc* 2012 (2) SA 433 (FB) at para 92). A lack of adequate knowledge of the law and the incorrect application of the law are some of the underlying errors that ultimately result in professional indemnity claims against legal practices. A complaint to the LPC based on a lack of knowledge of the law has the potential for significant consequences and embarrassment for a legal practice.

The adequacy of the current academic qualifications to prepare candidate legal practitioners for practice is a matter that has been debated in many circles. The adequacy of the training received by some candidate legal practitioners is also a matter that has received significant focus. Without sufficient knowledge of substantial and procedural law, one cannot successfully pursue legal practice. Successful pursuit of legal practice requires several skills over and above the knowledge of the law. Lawyers in private practice must also be entrepreneurial. Computer and financial literacy, respectively, are other areas that are often cited. All of the matters raised can be a source of a wide-ranging debate.

For current purposes, I restrict my comments to the fact that legal practitioners must constantly evaluate the gaps in training between universities and practice when they take on candidate legal practitioners. Areas where there are gaps in the training of candidate legal practitioners must be identified and adequate training programs developed to address the identified gaps to properly upskill candidate legal practitioners. A gap analysis will also assist experienced legal practitioners to identify areas where they, themselves, need to be upskilled. By agreeing to take on candidate legal practitioners the firm has, after all, undertaken to properly train those candidates in preparation for admission. The young practitioners have put their professional futures in the hands of their principals. Investing in adequate training for candidate legal practitioners will go a long way in enhancing the quality of future legal practitioners, the image of the profession and well-trained candidate legal practitioners, who can make a significant contribution to the firm. The future of the firm in an increasingly competitive market will be secured as it has internally developed high calibre candidates who can be promoted through the ranks. The organic growth of skills can be extended from candidate legal practitioners to administrative and support staff as well. Firms with a good training program will be employers of choice for potential candidate legal practitioners. Only a well-trained legal practitioner will recognise the value of an effective training programme.

Many other professions have a prescribed system of minimum compulsory post-qualification education and training programmes to be completed within defined time periods (usually a year). In various other jurisdictions members of the legal profession are also required to undergo such training. Compliance with the requirements is monitored by the respective regulators and proof of compliance must be submitted within prescribed periods and is subject to audits or other verifications. Some PI insurance companies in certain jurisdictions and professions also insist on a minimum level of post-qualification education as this is an effective risk mitigation measure. There are various names for such programs, the most common being continuous professional development (CPD) or continuing legal education (CLE). The purpose of the LPA includes the creation of a framework for the 'development of adequate training programmes for legal practitioners and candidate legal practitioners' (s 3(*g*)(iii)) and the objects of the LPC include the promotion of 'high standards of legal education and training, and compulsory post-qualification professional development' (s 5(*h*)). A system of com-

pulsory post-qualification professional development has not been developed and implemented yet. When that system is implemented, it will go a long way in addressing some of the risks resulting from inadequate training of legal practitioners and ensuring that high standards are maintained in the profession.

Mlenzana is an often-cited case where a firm of attorneys was found liable to the plaintiff for damages suffered after the latter's claim against the Road Accident Fund prescribed in the hands of the former. The lack of adequate knowledge on the part of the attorney dealing with that matter was lamented by the court and phrases such as '[the] law was lamentably misconceived' (para 52), '[the] defendant's understanding of the legal position … was materially wrong' (para 70) and '… a clear misconception of the law' (para 72) were used. The following paragraph of Rampai J's judgment in that case should serve as a warning of the consequences of a failure to implement adequate training programmes in law firms:

'I have to say, and it is not pleasant saying it at all, that the plain truth about this whole problem was not of [the attorney who handled the matter] Ms Smith's own making. She was admitted as an attorney in 2003 and on 2 October 2003 she was given a huge responsibility to run not only the MVA department of the defendant but also the conveyancing department, she was a virtual novice in the legal profession at the time. She was put in the deep end and left by herself to navigate the stormy waters of the deep ocean. She was not at all equipped to do such intricate work. Her legal knowledge was still very limited. Since then, she had hardly ever attended a MVA seminar. Yet she regarded herself as an expert in the field. Her evidence was that a two-day practical training course she was compelled to attend as a candidate attorney was the only meaningful training she ever received. That, in brief, explained why the plaintiff's claim prescribed' (para 93).

Available training

Some legal practitioners lament the purported expense of training programs. My retort is the adage that 'if you think education is expensive, try ignorance'. In the depressed economy, funds earmarked for training may be diverted to other areas perceived as more pressing for law firms. This increases the risks faced by the firms concerned as a lack of adequate training will increase the likelihood of errors or omissions occurring. There are several institutions that provide training to legal practitioners on a cost-effective basis. Some training is provided at no cost. Legal practitioners are urged to have regard to the training calendar of the Legal Education and Development (LEAD) division of the Law Society of South Africa (LSSA). LEAD provides training by experts and the topics are targeted at the legal profession. The Legal Practitioners Indemnity Insurance Fund NPC (LPIIF) provides risk and practice management training to legal practitioners at no cost. There is thus no excuse for a lack of proper training in law firms.

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The 15 rules for writing letters

By Marius van Staden

As legal practitioners we pour our energy into practising law and acquiring knowledge of the law. However, that is not the only skill required to practise our profession.

We also require the skill of language. Without language the law is not possible. To practise law is to practise language.

In South Africa we are in the fortunate position of being exposed to and acquiring skills in a variety of languages. We can hone our skills over the course of more than one language. This alone should improve our ability to communicate and be creative.

How does a legal practitioner communicate their client's case (other than through pleadings) – by writing letters to their opponents. What do you do when you write a letter to a colleague – you express your legal knowledge, to convey and advance your client's case.

The importance of letter writing cannot be underestimated. Pleadings occur at a given stage of a case, while correspondence occurs throughout the course of the case. Many a case is lost through an ill-conceived letter. Many a case is won by an appropriate letter at the right time.

This article contains the mainstay of what I have learnt over the course of the last 32 years to effectively communicate with colleagues.

I have compiled the following 15 rules for writing a letter to an opponent.

The 15 rules

1 The first rule is to ensure your letter is accurate – accurate in portraying your client's instructions and in using grammar and spelling.

It is a mortal sin to incorrectly convey your client's instructions. If in doubt, phone your client and make sure of their instructions.

In being accurate, honesty is non-negotiable.

2 A legal practitioner's tool of trade is the language they use. If you are unable to master this tool, you may have difficulty in advancing your client's case. Become a student not only of law, but also of language.

Language reflects who you are and your level of education. Your opponent forms their impression of you based on your language. You owe it to yourself not to disappoint yourself by using poor language.

As a legal practitioner you have the privilege of exercising, and improving your language skills, daily. You are remunerated for mastering language. Do not squander this opportunity.

3 A legal practitioner cannot practise without access to a good dictionary. If you do, you prejudice yourself. The choice of the right word does make a difference.

4 If you are uncertain about the facts, or the law, make sure. If you are unable to make sure, do

not say it. Your chances of being wrong when not saying something are less, than saying the wrong thing.

Your opponent will furthermore be emboldened by your incorrectly reflecting the facts or the law.

5 Structure and planning are important. Your letter should be well constructed and not consist of disparate thoughts. You can only achieve good structure if you plan and ask yourself what you want to say, before you say it.

A well-constructed letter should also look neat, including justifying the margins.

Depending on its length, your letter should have an introduction, body, and conclusion. The introduction should indicate the purpose of the letter, and the conclusion should ideally refer to your demand or request for information, the reason you are writing the letter.

Your letter should make sense holistically when read. Reread, and change the contents of your letter, if necessary, to ensure your letter correctly conveys what you want to say.

Then reread again. If you fail at proofreading, your opponent will do so at your expense, and point out your mistakes.

It takes a split second to push the send button for a letter that remains on record for a lifetime.

6 Communication is two-way traffic. It is not only what you say, but also how it is understood. Before sending your letter, ensure your colleague will likely understand what you intend conveying. Read it from your colleague's perspective. If you know your colleague, bear in mind their specific characteristics.

7 Do not hide your strong point. Ensure your strongest point features at an early stage, and that it will be understood. Show your strength!

8 If, and depending on circumstances, you have the choice of using a less offensive (softer) word, do so. You are likely to better convey what you want to say and may achieve greater co-operation from your colleague.

You will then also have the luxury of choice, the option of later adopting a harder approach, if required. If you use the more offensive (harder) word from the inception, you will have lost the luxury of choice.

9 You are communicating with a fellow-professional, who, like you, is advancing their client's case. Over the course of a matter, you have more interaction with a colleague through correspondence, than other modes of communication. If you do not treat your colleague with the amount of respect you wish to be treated, you invite them to reciprocate. In the end both of your clients lose, by two legal practitioners not focusing on their clients' cases, but instead stoking their own egos.

You also want to make life easier for yourself. The consequences of your disrespect will reverberate in later cases. If your communication with a colleague is more strained because of past interaction, you may only have yourself to blame.

It is in your own interest to enjoy a good relationship with colleagues. You cannot practise law if you are not prepared to be respectful towards colleagues. If you are disrespectful towards colleagues, you are also disrespectful towards the profession.

I am often amazed at how colleagues profess to be professionals, but do not act professionally. They fail to understand they do not show strength by being rude, but weakness and lack of intellectual prowess.

10 Never resort to personal comments – play the ball and not the man! You display a lack of faith in your client's case if you play the man. You are then not communicating your client's case and may end-up becoming involved in personal vendettas, or ping-pong matches.

11 Often legal practitioners' correspondence devolves into a ping-pong match that does not advance their clients' cases, with each legal practitioner wanting to have the last word. Do not incite the match. You do not lose if you do not have the last word – there never should have been a ping-pong match in the first instance.

The converse is true – the first person withdrawing from the ping-pong match is actually the winner.

12 Do not write a letter when emotions cloud your judgment. If your letter is written when you are emotional:

- You detract from your ability to advance your client's case and undermine what you need to say. Instead, you vent your emotions. Remember your client is not paying you to vent emotions.
- Inevitably you will find yourself confronted by stronger negative emotions the next day, when you read your letter and are amazed at how poorly what you have written reflects on you.
- If you cannot stop yourself from writing the letter when you

are fuelled by emotion, at least do not send the letter. Wait till the next day. If you did not realise it when you wrote the letter, you will realise it the next day why you should not have written the letter in the first instance. You can then congratulate yourself for not having sent the letter and being the wiser for learning from your mistakes – without any accompanying negative consequence.

- It is almost like learning from a failed test, without having undertaken the test.

13 Often your client carries an emotional investment in the matter. The last thing you should do is to not portray emotional maturity. You add to your client's emotional burden if you do.

Always assume your letter is going to become an annexure in court papers, that a judge will read your letter. (Sportsmen are prone to say you also play for the pavilion, for the onlookers who are not participating in the match). Ask yourself what a judge will think of you and your client's case, when they read your letter.

It is surprising how you will then tone down what you are saying.

14 Foster a relationship with senior colleagues whose judgment you trust, and whom you can call for advice on the law and ethical conduct. You may save yourself a lot of heartache later.

However, colleagues will only help you if you are prepared to help yourself. Before approaching a senior colleague, do your research and then ask him whether he agrees with your approach. Do not display intellectual laziness by expecting your senior colleague to save you from research. They may just be less inclined to help you the next time.

15 Use plain language:

- Omit unnecessary words (such as 'on account of the fact that' or 'as a consequence of' (instead of 'because') or 'I confirm that' (Is that not why are you writing the letter?)) and avoid nominalisations ('making a decision' instead of 'decide'). Every word must contribute to what you want to communicate.
- Use short sentences and paragraphs. Aim to convey one statement per sentence and one theme per paragraph. Because of their crispness short sentences and short paragraphs convey better what you want to say. They also force you to consider what you want to say, and not be lazy in saying it.
- However, at the same time ensure your letter has good flow. This may require reconstructing sentences, which you will only know once you reread your letter.
- Use the active and not the passive tense. The passive tense tends to mask meaning. It uses more words and curtails your ability to use short sentences.
- Use the first person for yourself and the second person for your colleague. This helps with shorter sentences and more direct and understandable content.
- Be consequential with the choice of words. When using a word to convey a specific meaning, do not use a different word to convey the same meaning, or use the same word to convey a different meaning.
- Use headings in the different sections of a longer letter. It will cause you to consider your letter construction and contribute to your better assembling the contents of your letter.

Conclusion

Each practitioner has their own experience of what works for them. The application of these rules depends on context. They reflect my experience and what I have in turn learnt from others.

Hopefully these rules will assist especially junior colleagues to avoid minefields, and better serve their clients' interests, when writing a letter.

Law and language should be a life-long learning process.

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Default awards in arbitration proceedings

By Ignatius Bredenkamp

The provision for a default award in arbitration proceedings, is contained in s 15(2) of the Arbitration Act 42 of 1965. This section provides for the arbitration tribunal to proceed if a party fails, after having received reasonable notice of the time and place where the arbitration will be held, to attend such proceedings. The other proviso is that the tribunal may proceed if the defaulting party has previously not shown good and sufficient reason for its failure to attend.

Absence of proper notice results in a default award, issued in the absence of a party, to be fatally flawed (see *Vidavsky v Body Corporate of Sunhill Villas* 2005 (5) SA 200 (SCA) at para 14). Such an award is a nullity for all practical purposes. In the *Vidavsky* matter, notice of the arbitration proceedings, commencing on the 27 March 2003, was sent by registered post to the chairperson of the body corporate. His wife collected it on the afternoon of 27 March 2003 and then handed it to him. The arbitration proceedings proceeded on the morning of the 27 March 2003 in the absence of the chairperson and a default award was issued. The High Court held that insufficient notice was given to the defaulting party.

Presently parties to an arbitration invariably agreed to communicate and serve statements and documents by means of e-mail. The agreement in this regard is either contained in the written agreement to arbitrate, or in the absence of such an agreement, in the minutes of the initial pre-arbitration meeting. The

status of an e-mail (being a data message) is that acknowledgment of receipt thereof is not necessary to give legal effect thereto (see s 26(2) of the Electronic Communications and Transactions Act 25 of 2002). An acknowledgment of receipt may be given by any communication by the addressee, whether automated or otherwise, or any conduct of the addressee, sufficient to indicate to the originator that the data message has been received. A read receipt of the e-mail would probably be sufficient.

The question that comes to mind is whether it is necessary to lead evidence to obtain a default award, as s 15(2) of the Arbitration Act does not contain such a requirement. In the matter of *Wilton v Gatonby and Another* 1994 (4) SA 160 (W), the court held that the onus of proof rests on the claimant, which does not shift because of defendant's default. He or she must put sufficient evidence before the arbitrator for a conclusion on the merits in order to obtain a default award. In the absence of such evidence, the award is a nullity (see *Wilton* at 167).

South Africa's International Arbitration Act 15 of 2017, contains provisions for default awards, that differ from those contained in the domestic Arbitration Act of 1965. The purpose of the International Arbitration Act is of course to 'facilitate the use of arbitration as a method of resolving international commercial disputes' (s 3(*a*)). Article 25 of the UNCITRAL Model Law on International Commercial Arbitration, which is incorporated in International Arbitration Act, by means of s 6 of the latter, provides as follows:

'Unless otherwise agreed by the parties, if, without showing sufficient cause:

…

(b) the respondent fails to communicate his [or her] statement of defence … , the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations;

(c) any party [failing] to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it.'

In view of the above provisions, it would be interesting to see whether the domestic courts would specifically regard the absence of a statement of defence and/or failure to produce documentary evidence (despite attendance at the proceedings), as sufficient grounds to issue a default award. To put it in practical terms, will a court exclude a respondent from the proceedings and proceed to a default award, even if the respondent attends these proceedings, but fails to produce a statement of defence and/or documentary evidence at the hearing?

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By Martin Kotze

Master SaaS Contracts – Part 1

So, you have been asked to draft a mission-critical Software-as-a-Service (SaaS) contract. How complex can it be? It is basically software being licenced.

As it turns out, there are important differences between a software licence and a SaaS contract.

A SaaS contract falls under a category of contracts called a cloud services agreement.

Software license versus cloud services subscription

To understand the difference between a software licence and a cloud service subscription, you need to understand the access method.

With a software licence, you receive a copy of the software and install the software on your computer. Once installed, you can access and use the software offline (often called 'on-premises' software).

Think about Microsoft Word that you must install on your computer or McAfee antivirus software.

With a cloud service subscription, you generally require an Internet connection, and you access the software through a web browser. There is nothing to install, and you do not need a copy of the software.

Think about Xero accounting software or Salesforce customer relationship management (CRM) software. There is nothing to install. You open your browser, you log in with your credentials, and there you go.

Important considerations

• Hosting

With a SaaS solution, the software is hosted off-premises (often called 'cloud hosted'), and the service provider takes responsibility for commissioning the servers and ensuring that everything runs smoothly.

Therefore, when you go with cloud services, you rely on someone else's information technology (IT) infrastructure, which is an important consideration, especially if the software is mission-critical.

Conversely, using someone else's IT infrastructure has several benefits, including scalability, less maintenance and flexible pricing.

• Copyrights and access rights

Due to the delivery models being different, with a software licence, you need to address various copyright-related aspects. For example, how many copies can the customer make of the software? Are there any restrictions as far as the scope of the license is concerned? For example, may the software only be used for internal purposes?

On the other hand, with a SaaS solution, you need to address various aspects related to access rights and use of the SaaS solution.

• Confidentiality

When using cloud services, users may be required to upload confidential documentation to a cloud server. A cloud server you have little control over. For this reason, you must address various aspects dealing with confidentiality and data breaches in the cloud subscription agreement.

• Data privacy

Cloud services can be provided from anywhere in the world, which is convenient, but this, in turn, may result in compliance headaches, especially when it comes to cloud service providers' processing of personal information in other countries.

• Business continuity

Another scenario that requires consideration is what happens if the cloud service provider goes out of business.

If you use 'on-premise' software, you will still be able to use the software.

With a SaaS system, you will not be able to continue using the software because the servers hosting the software will most likely be suspended.

• Commercial models

A SaaS solution often uses different commercial models compared to on-premises software licensing. The pricing of a SaaS solution is generally more flexible. For example, SaaS providers can also charge 'usage fees' as 'usage' of the software is easier to monitor as everything happens on the servers controlled by the SaaS provider.

• Service provider benefits

The above considerations are mainly concerned with the customer's perspective.

From a service provider's perspective, providing a cloud service may hold several benefits.

One of the benefits is including suspension rights in the agreement. Generally, the subscription fees are payable in advance, and if the customer fails to pay, the service provider can suspend the service and restrict access to the system.

The cloud service provider is also in control of all released updates. With on-premises software, an issue that may arise is that customers fail to update the software to the latest version. This, in turn, places an additional support burden on the software provider to support outdated software.

Stay tuned

Considering the above, several additional considerations must be considered when drafting your SaaS contract. Over the next few months, we will unpack all these aspects and help you master technology contracts.

Martin Kotze, a seasoned corporate and commercial lawyer with a keen interest in technology.

By
Dr Yash
Naidoo

Changes to the HPCSA's professional conduct inquiry process may improve efficiency and practitioner well-being

In June 2023, the Minister of Health, Dr Joe Phaahla, published new regulations (GN R3564 *GG*48838/23-6-2023), which amended the Health Professions Council of South Africa's (HPCSA) professional conduct inquiry process.

Many of the amendments are designed to streamline the professional conduct inquiry process by removing formal legalistic mechanisms, which can lead to delays.

The majority of these changes are timely and welcome when you consider the results of a recent Medical Protection survey of '204 health professionals in South Africa who had been investigated by the HPCSA between 2018 and 2022' (Dr Yash Naidoo 'HPCSA amendments offer hope' (www.medicalbrief.co.za, accessed 27-9-2023)). In the survey, 71% of practitioners said, 'the length of the investigation [impacted on] their mental well-being most', with some lasting many years (Dr Naidoo (*op cit*)).

Here I will detail each amendment in the new regulations and how they may reform the HPCSA's professional conduct inquiry process.

The first and second amendments simply change the name of the 'ombudsman', to the 'chief mediator'. The chief mediator is a person appointed by the council to mediate in the case of minor transgressions. The process of mediation remains the same.

The third amendment is far more significant than a mere name change. This amendment inserts reg 4A into the picture. Regulation 4A allows for a complainant who is aggrieved by the decision of the HPCSA's Preliminary Committee of Inquiry (the PCI), to appeal the decision. 'In other words, if a patient complains and the PCI accepts the practitioner's explanation, the patient can now appeal that ... decision' (Dr Naidoo (*op cit*)).

This option did not exist in the past; the matter would have been regarded as finalised and the complaint closed. Now, if an appeal is lodged by the complainant (which must be done within 30 days from the date on which the complainant becomes aware of the decision), the practitioner will be notified of the appeal and given at least 14 working days to provide a further written response, failing which the appeal will be submitted to the HPCSA's Appeals Committee without the practitioner's written response.

'The significant implications of this amendment ought to be self-evident. Of all the eight amendments, it is the only one [which has] the potential to delay the process as opposed to curtailing it' (Dr Naidoo (*op cit*)).

Contrary to the third amendment, the fourth amendment is aimed squarely at streamlining the inquiry process. The amendment shortens the period for notifying a practitioner that they have been referred to a formal inquiry, from 60 days to 30 days. The notification contains details of the date, time, and place of an inquiry, as well as the charge sheet formulated by the pro forma complainant. The charge sheet sets out the charges against the practitioner and is informed by the PCI's points of inquiry.

The amendment expressly provides that the pro forma complainant may formulate and at any time effect immaterial changes to the charge sheet without the approval of the PCI or the chairperson of the PCI, provided that the charge sheet must be consistent with the PCI's points of inquiry.

The fifth amendment seeks to introduce one main provision, namely that the pro forma complainant and the practitioner or their legal representative must exchange all documents they intend using during the inquiry, 15 days before the inquiry.

However, while the amendment appears to deal solely with the exchange of documents prior to an inquiry, what it also does is to remove an important regulation, which had existed in the previous version of the regulations. That is the mechanism for the request for further particulars.

The amendment removes the provision that 'allowed a practitioner or their legal representative to ask for further information regarding the charges formulated by the pro forma complainant' (Dr Naidoo (*op cit*)). In the past, a practitioner or their legal representative could request further particulars 'up to 30 days before the inquiry, and the pro forma complainant would have to respond in writing within 14 days' (Dr Naidoo (*op cit*)).

It seems that this amendment is another attempt at streamlining the inquiry process and removing more formalistic and legal mechanisms, which could delay matters, although it remains to be seen whether this may have a detrimental impact on the practitioner's right to a fair hearing.

The pre-inquiry conference is the meeting between the pro forma complainant and the practitioner, or their legal representative, and is held at least seven days before the inquiry, to discuss formal and legal matters.

The sixth amendment makes one significant change to the existing regulations governing the conduct of a pre-inquiry conference. It removes the previous regulation, which required the parties to exchange summaries of the opinions of experts that they intended to call at the inquiry.

Again, presumably the objective of this amendment is in keeping with the underlying theme of the other amendments, which is to excise the formalities involved in the inquiry process. The same question regarding a practitioner's right to a fair hearing, however, applies.

The seventh amendment deals with an appeal against the decision of a professional conduct committee.

The practitioner or the pro forma complainant may appeal against the findings or penalty of the professional conduct committee (or both the findings and the penalty). The amendment makes it clear that this may only be done after the penalty has been imposed on the practitioner, or after the practitioner has been discharged.

The eighth amendment is another one 'aimed at saving time and costs. It provides that the default medium for the holding of pre-inquiries and professional conduct inquiries is virtual – such as via Microsoft Teams or Skype. The registrar can direct otherwise and presumably will accommodate reasonable requests to hold the inquiry in person. This amendment will not only help to save time and costs for practitioners and their indemnifiers but hopefully also save costs for the HPCSA and indirectly all registrants who pay yearly registration fees' (Dr Naidoo (*op cit*)).

Discussion

Medical Protection, which protects the professional interests of over 300 000 healthcare professionals around the world, including more than 30 000 in South Africa, supports healthcare practitioners from the moment a HPCSA complaint is received, through to its conclusion. 'The HPCSA's preliminary inquiry processes have recently become more efficient, with a number of cases being resolved in less than a year from the date of submission of the complaint – towards the latter part of 2022 and beginning of 2023' (Dr Naidoo (*op cit*)).

This is a positive development and will no doubt benefit both the professions and public perception of the professions, alike. 'Justice delayed is justice denied. As the Medical Protection survey indicates, delays also have a significant impact on the well-being of practitioners whose main professional concern is to care for and uphold the well-being of others. ... Time will no doubt tell whether these latest changes will have the intended effect, however, the desire for improved efficiency from the HPCSA is welcome' (Dr Naidoo (*op cit*)).

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Cinderella and the 'will' for change: Some suggestions

By Sujata Balaram

We all know the fairy tale of Cinderella, who had to submit to the ill-treatment of her stepmother who had usurped her deceased father's estate. What we do not know is how the story could have changed had Cinderella received bequeathment. Forgery of wills is a very common occurrence but like many fraud cases it is not reported, nor does it make it to court, rather it is just swept under the carpet.

In countries like South Africa (SA), the majority of cases go unreported due to the lack of knowledge by the affected, extremely high legal costs involved in litigation, and fear of a retaliation from the forger.

Currently, there is no legal requirement in SA that calls for wills to be digitised and registered with a relevant authority in order for the will to be valid, but such can be introduced. Requiring a will to be registered in order to be valid can reduce will-forgery and will create a clear record of the testator's/testatrix's wishes that can be easily verified. Should there be a death without a will, the register would be able to verify that such is the case, and no wills can be fraudulently produced after the death.

While this idea may be a move forward, there are some loopholes that can allow fraud to still occur, for example, wills can still be forged and then registered unless there are verification requirements in place. To tighten the loopholes, secure record keeping, background checks on notaries and legal practitioners, and the use of technology need to be implemented. Below, are some suggestions that can create faith in the system:

- **Legislation requiring notarising of wills:** In addition to the current requirements for a valid will, calling for wills to be notarised in order to be valid, is a step forward. However, with this requirement comes the need to ensure that notaries are not involved with the process of fraud by certifying a forged will.
- **Legislation requiring stringent record keeping:** To overcome the above, the law should call for stringent record keeping procedures that will need to be followed by the relevant authority with which the wills will need to be registered, namely, notaries and legal practitioners, so that it can be easy to spot invalid wills. Maintaining detailed documents and using technology can help with this process.
- **Legislation requiring the use of technology:** Blockchain, encryption, and meta-data technologies can be used to secure electronic records of wills and related documents, as well as verifying signatures and other requirements for a valid will. Technology will be the driving force behind this system since it will provide the necessary verification and security that is close to that of a bank. Recommended spot checks and shortcomings can be identified by developers and lawmakers.
- **Provide training and education:** Providing training and education to notaries, legal practitioners, and the public can help prevent acts of fraud by highlighting the importance of registering a will to ensure the security of families who are left behind.

To date, this idea has not been fully explored by countries. Making legislation, which states that wills have to be digitised and registered in order to be valid does come with its cons – when you think about countries lacking finance, technology and the general anti-fraud ethos – but that does not mean that such an idea needs to be shelved forever. We are living in the digital era, and it can provide us with so many opportunities to prevent an age-old issue of wills being forged.

If Cinderella's world had these laws implemented, maybe her fate would have been different. Maybe she would have not married a prince but instead started her own queendom with more advanced laws that keep up with the rapid pace of technology.

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Unfair discrimination of 'older person' definition found in the Older Persons Act

By Thabo Elias Lekoko

The Constitution is the supreme law, and it provides protection to all those lives within the Republic (s 7 of the Constitution). Chapter 2 of the Constitution contains the Bill of Rights, which is applicable to everyone and is in line with international standards, which promotes the protection of human rights around the world (Universal Declaration of Human Rights). Section 9(3) of the Constitution, provides that no one is allowed to unfairly discriminate on grounds such as age, sex, religion, race and others. This indicates that in South Africa everyone is equal before the law, and they will receive the same treatment if they are in need of protection from the existing law in this country. The country has a long history of inequality and violence. The people who are most vulnerable to these issues are children, women, and older persons. For the purpose of this article, I am going to only focus on older persons who need protection and care. South Africa acknowledged the need to introduce legislation to protect these vulnerable members of our society. For example, the Older Persons Act 13 of 2006 was introduced. The objects of the Act are the following:

'(*a*) maintain and promote the status, well-being, safety and security of older persons;

(*b*) maintain and protect the rights of older persons;

(*c*) shift the emphasis from institutional care to community-based care in order to ensure that an older person remains in his or her home within the community for as long as possible;

(*d*) regulate the registration, establishment and management of services and the establishment and management of residential facilities for older persons; and

(*e*) combat the abuse of older persons.'

The rights found in the Bill of Rights supplement the rights of older persons found in the Older Persons Act. Moreover, this Act dictates that in all matters concerning older persons their rights must be protected, respected and their best interests must be held in consideration. The aim and purpose of this Act are subjected to s 9(3) of the Constitution, namely that older persons must be protected from unfair discrimination on any grounds including their age and sex. Section 39(2) of the Constitution provides that when interpreting legislation, the Bill of Rights must be promoted and protected in terms of the law.

In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) the court held the following at paras 72 and 90:

'The Constitution is … the starting point in interpreting any legislation. … First, the interpretation that is placed upon a statute must, where possible, be one that would advance at least an identifiable value enshrined in the Bill of Rights; and, second, the statute must be reasonably capable of such interpretation.'

'The emerging trend in statutory construction is to have regard to the context in which the words occur, even where the words to be construed are clear and unambiguous.'

In *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC) the court held the following at para 21:

'Section 39(2) of the Constitution provides … that all statutes must be interpreted through the prism of the Bill of Rights. All law-making authority must be exercised in accordance with the Constitution. The Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens, and includes all in the process of governance. As such, the process of interpreting the Constitution must recognise the context in which we find ourselves and the Constitution's goal of a society based on democratic values, social justice and fundamental human rights. This spirit of transition and transformation characterises the constitutional enterprise as a whole.'

However, s 1 of the Act defines 'older person' as a person who in the case of a male to be 65 years or older and for a female to be 60 years or older. The interpretation of this section can show that the Act is unfairly discriminating against males in terms of their sex and age. I find this section to be in contrast with s 9(3) of the Constitution due to its unfair discrimination.

Scenario

A is a 61-year-old woman exposed to acts of domestic violence in her home and B is a 64-year-old man who is exposed to the same circumstance. Both approached the court respectively seeking intervention. On A's matter the court applied the Domestic Violence Act 116 of 1998, supplemented by the Older Persons Act, and protection was rendered to her. However, on B's matter only the Domestic Violence Act was applied and the Older Persons Act was not considered as B is not yet 65 years or older.

If we were to interpret the age difference between A and B we would all agree that B is the older person. However, this Act does not see this because it shows preference to one gender and neglects the other. This begs the question why women are a declared older persons from 60 years of age and men have to be 65 years of age? Clearly there is a need to ensure equality between older persons in this Act.

In conclusion, the definition of 'older person' found in s 1 of the Older Persons Act is unfairly discriminating against males in terms of age and sex. To regulate this issue the definition of older person found in s 1 of the Older Persons Act should be amended. Moreover, empowering older people by informing them about their rights can help protect them against abuse. Furthermore, I believe that the South African government must account for their actions towards the protection of the rights of older people and to bring all genders to a similar level and standard of protection for older persons.

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May the real shareholder please stand up!

By Sive Mqikela and Matodzi Ramashia

On 1 April 2023, amendments to the Companies Act 71 of 2008 (the Companies Act) came into effect.

One of the key amendments is in respect of s 56, which deals with beneficial interest and ownership in shares.

Previously, s 56 of the Companies Act allowed for a company's shares to be held by and registered in the name of one person (registered holder) for the beneficial interest of another (beneficial holder) without the identity of the latter having to be disclosed to the company or made accessible to the public.

Through an arrangement with the registered holder, a beneficial holder was able to enjoy all shareholder rights and benefits without their identity being disclosed to the company and without being obliged to appear on the publicly accessible securities register (s 26(2) of the Companies Act, grants the right to inspect or make a copy of the securities register of a company to any member of the public) of the company (except in terms of s 56(5), which entitles a company to require the registered holder to disclose the identity of the beneficial holder if the company knows or has reasonable cause to believe that shares are held for the beneficial interest of another).

In practice, the arrangements between a beneficial holder and a registered holder would be regulated by a nominee agreement in terms of which the beneficial holder would nominate the registered holder to hold the shares on behalf of the beneficial holder, vote in the company as directed by the beneficial holder and receive distributions on behalf of the beneficial holder. The ultimate beneficiary to all rights and entitlements relating to the shares would be the beneficial holder, and the registered holder would merely be a proxy.

It should, however, be noted that public companies, state-owned companies, and private companies in respect of whom there has been a transfer (other than by transfer between or among related or inter-related parties (as defined in s 2)) of 10% or more of the issued shares in the company within the preceding 24 months (collectively 'regulated companies' (see s 117(1)(*i*) for a definition of regulated companies (as amended)) were (and are still) required to disclose the identity of certain beneficial holders in their audited financial statements.

The absence of specific disclosure requirements has been viewed by the legislature as potentially enabling corruption, money laundering, fraud and the like. Consequently, the Companies Act has been amended such that the true and ultimate beneficiaries in respect of all companies must be known to the company, the regulatory authorities, and the public.

In terms of the amendment, all regulated companies as well as private companies that are controlled by or are subsidiaries of the regulated companies (collectively the 'affected companies'), are now also (among other things) required to establish and maintain a register of persons who hold beneficial interests that are equal to or in excess of 5% of the total number of the issued shares in the company (the beneficial interest register), and file such register with the Companies and Intellectual Property Commission (the Commission) (see s 56(7)(*a*A) read with reg 121A of the Companies Regulations, 2011 (as amended)).

Further, all companies that do not fall within the meaning of affected companies are now required to –

- file a record containing all the information regarding natural persons who, directly or indirectly, ultimately own a company or exercise effective control of that company (the 'beneficial owner') to the Commission (see s 56(12)); and
- include in their securities registers the name and identity/registration number of the registered holders, as well the full details (ie, names, registration numbers, addresses, and extent of ownership) of the beneficial holders and the beneficial owners, and keep the Commission informed of any changes to the beneficial owners by furnishing the Commission with a copy of its updated securities register within ten business days after a change has occurred (see reg 32 and 32B of the Companies Regulation, 2011 (as amended)).

In terms of Guidance Note 2 of 2023: Beneficial Owner Filing Requirements issued by the Commission on 29 May 2023, companies incorporated before 24 May 2023 should file the above information with the Commission on the date on which the next annual returns become due for filing. Any company incorporated on and after 24 May 2023 will be required to file the above information with the Commission within ten business days after it has been incorporated.

A failure by a company to comply with the new requirements of the Companies Act, in relation to its beneficial interests and ownership, constitutes a contravention of the Companies Act, and may result in the Commission issuing a compliance notice. Moreover, a non-complaint company may incur administrative fines.

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Exploring the availability of s 7(3) redistribution to spouses in foreign marriages

By Kobus Brits

Section 7(3) of the Divorce Act 70 of 1979 states as follows:

'A court granting a decree of divorce in respect of a marriage out of community of property –

(*a*) entered into before the commencement of the Matrimonial Property Act, 1984, in terms of an antenuptial contract by which community of property, community of profit and loss and accrual sharing in any form are excluded; [or]

(*b*) entered into before the commencement of the Marriage and Matrimonial Property Law Amendment Act, 1988, in terms of section 22(6) of the Black Administration Act, 1927 (Act No 38 of 1927), as it existed immediately prior to its repeal by the said Marriage and Matrimonial Property Law Amendment Act, 1988; … may, subject to the provisions of subsections (4), (5) and (6), on application by one of the parties to that marriage, in the absence of any agreement between them regarding the division of their assets, order that such assets, or such part of the assets, of the other party as the court may deem just, be transferred to the first-mentioned party.'

This was inserted into the Divorce Act post-1984, as a remedy to address the inequality. In *Beaumont v Beaumont* 1987 (1) SA 967 (A) at 987H – I, the court held that 'the inequity which could flow from the failure of the law to recognise a right of a spouse upon divorce to claim an adjustment of a disparity between the respective assets of the spouses which is incommensurate with their respective contributions during the subsistence of the marriage to the maintenance or increase of the estate of the one or the other.' Section 7(3) 'seems to only be beneficial to marriages concluded in terms of South African law and meeting the requirements as set out in section 7(3) of the Divorce Act' and persons married in terms of the Black Administration Act 38 of 1927 (Thulelo Mmakola Makola 'A comparative legal analysis of the effects of divorce on marital property' (LLM thesis, Unisa, 2018) at 34).

Christopher Forsyth is of the view that 'the legislature, not having the private international implications in mind, had failed to make provision for the case of a marriage out of community but without an antenuptial contract' (Christopher Forsyth *Private International Law* 5ed (Cape Town: Juta 2012) at 308). Our courts delivered conflicting judgments on the availability of s 7(3) to spouses in foreign marriages.

Picture source: Gallo Images/Getty

Case law

'In *Esterhuizen v Esterhuizen* [1999 (1) SA 492 (C)] the parties had married in terms of Namibian law. The parties entered into an antenuptial contract in Namibia excluding community of property, community of profit and loss and accrual sharing. Upon their divorce in South Africa, the wife sought a redistribution order in terms of section 7(3) of the Divorce Act and a claim for maintenance' (Makola (*op cit*) at 39). The court held that s 7(3) of the Divorce Act was not available to the plaintiff to achieve a redistribution of assets and further held that the court was not entitled to make a maintenance order. Relying on the decision of *Frankel's Estate and Another v the Master and Another* 1950 (1) SA 220 (A) the court held that 'in the absence of an antenuptial contract, the matrimonial property regime of spouses not domiciled in the same country at the time of marriage would be governed by the domicile of the husband at the time of entering into the marriage' (Makola (*op cit*) at 39).

The court referred to *Milbourn v Milbourn* 1987 (3) SA 62 (W) in which the parties were married and domiciled in England without having entered into any form of an antenuptial contract. 'The marriage, in terms of the English law, was automatically out of community of property and without accrual sharing' (Makola (*op cit*) at 38). The plaintiff claimed a redistribution order in terms of s 7(3) of the Divorce Act. The court held that in the absence of an antenuptial contract, 'the proprietary [consequences] of a marriage are irrelevant and a plaintiff claiming an order for the redistribution of the parties' assets cannot rely on section 7(3) for redistribution of their assets' (Makola (*op cit*) at 38).

Josman AJ considered *Bell v Bell* 1991 (4) SA 195 (W), which indirectly dealt with s 7(3). The couple had married in England, while the defendant was domiciled there. The parties subsequently acquired a domicile in South Africa and the plaintiff now sought a divorce and claimed the transfer of certain property to her in terms of ss 23 and 24 of the Matrimonial Causes Act 1973 (United Kingdom). As in the *Milbourn*, there was no antenuptial contract and the marriage was in terms of English law out of community of property. The court 'granted such an order arguing that since the proprietary consequences of the marriage were clearly governed by English law, the wife was entitled to "the benefits available under the law of the husband's domicile at the time of the marriage"' (Christopher Forsyth *Private International Law* 4ed (Cape Town: Juta 2003)).

In the *Bell* case, Josman J disagreed with Kuper AJ that 'in the absence of an antenuptial contract the proprietary consequences of a foreign marriage must be determined in accordance with the law of the matrimonial domicile'. Josman J applied the decision of the *Frankel's Estate* case 'that in the absence of an antenuptial contract, the matrimonial property regime of spouses not domiciled in the same country at the time of marriage would be governed by the domicile of the husband at the time of entering into the marriage' (Makola (*op cit*) at 40).

In *Lagesse v Lagesse* 1992 (1) SA 173 (D), 'the parties were married in Mauritius while the defendant was domiciled there and the proprietary consequences of their marriage would, therefore, be governed by the law of Mauritius' (Makola (*op cit*) at 39). The parties had not concluded a formal antenuptial contract but made a declaration to the marriage officer to the effect that they wished their marriage to be governed by the provisions of the Status of Married Women Ordinance of 1949 (Mauritius).

The court held that the parties had been married out of community of property, the note to be interpreted as an express term of the agreement. Kriek J held: 'It seems to me that a term incorporated into a contract by reference is as effectively a term of the agreement as one expressly included in the contract.'

The *Esterhuizen* case is not without criticism. Josman J referred to an article by Jan L Neels and Marlene Wethmar-Lemmer 'Constitutional values and the proprietary consequences of marriage in private international law – introducing the *lex causae proprietatis matrimonii*' (2008) *TSAR* 587, in which 'Neels argued that section 7(3) may be utilised to effect redistribution of assets based on past contributions. This is a proprietary matter and, therefore, the use of section 7(3) is only available to marriages with South Africa as the matrimonial domicile' (Makola (*op cit*) at 40). The *Esterhuizen* case is a divorce matter and governed by the *lex fori*.

'The conclusion that the court came to was that the plaintiff was not entitled to invoke section 7(3) of the Divorce Act to effect a redistribution of assets based on past contributions. The court was, however, able to make an order in terms of section 7(2) of the Divorce Act for maintenance' (Makola (*op cit*) at 41). 'Redistribution of assets based on past contributions is indeed, therefore, classified by the court as a proprietary consequence of marriage' (Makola (*op cit*) at 41).

'Heaton and Schoeman do not support the decision in the *Esterhuizen* case. The authors' argument is that the section 7(3) of the Divorce Act cannot be applicable to foreign marriages. The decision of the *Esterhuizen* – that one can claim for a redistribution order in the guise of a maintenance order – is flawed' (see Makola (*op cit*) at 41).

In *Hassan v Hassan* 1998 (2) SA 589 (D) the parties were married and domiciled in Scotland at the time of the marriage and later emigrated to South Africa and established a domicile here. The central issues to be decided were the division of the proprietary rights and payment of maintenance to the plaintiff. The applicable application of the law 'for the proprietary consequences of marriage was the law of Scotland' (Makola (*op cit*) at 42). The court 'held that redistribution orders formed part of proprietary consequences of marriage and that matrimonial domicile should govern patrimonial and maintenance aspects of divorce regulated by Scottish laws' (Makola (*op cit*) at 42).

In the unreported matter of *Lenferna v Lenferna* (SCA) (unreported case no 120/13, 2-12-2013) (Zondi AJA), 'Neels and Fredericks state that whether the parties … could be able to apply for redistribution would depend on whether redistribution is qualified as a proprietary issue or as a divorce issue or a hybrid proprietary/divorce issue. A hybrid proprietary/divorce issue is governed partially by the proper law of the proprietary consequences of marriage and by the *lex fori*. When considering reasonableness and fairness for classification of section 7(3), in some instances it would indicate proprietary classification and in other instances a divorce issue' (Makola (*op cit*) at 45).

Conclusion

'Redistribution orders based on the South African Divorce Act may only be relied on by parties whose marriage is governed by a foreign law if such redistribution orders are classified as divorce matters. If redistribution orders are classified as proprietary consequence of marriage, the lex domicilii matrimonii will govern redistribution, if redistribution is applicable in that foreign matrimonial domicile' (Makola (*op cit*) at 48).

'The current connecting factor for proprietary consequences of marriage is unconstitutional. …The rule is discriminatory as it is against the right to equality. … It is proposed that a suitable alternative connecting factor be found through conducting relevant comparative research in this field. … Authors have criticised the rule on various grounds' (Makola (*op cit*) at 46 – 47).

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Picture source: Gallo Images/Getty

Arrest without a warrant – *what requirements must be observed by peace officers?*

By Andrew Jeffrey Swarts

This article will focus on the s 40(1)(*b*) of the Criminal Procedure Act 51 of 1977 and the requirements the peace officers must observe, follow, and adhere to for the arrest to be lawful. The definition clause of the Criminal Procedure Act defines a 'peace officer' as including 'any magistrate, justice, police official … .' It also includes any power that has been issued under s 334 (1) to peace officers in a notice. Any reference to a peace officer in this article will be a reference to a police officer.

Where does the power originate for a police officer to act?

Section 13(1) of the South African Police Service Act 68 of 1995 (Police Service Act), states that: 'Subject to the Constitution and with due regard to the fundamental rights of every person, a member may exercise such powers and shall perform such duties and functions as are by law conferred on or assigned to a police official.' It is clear from this provision that police action can only be legitimate if there are laws governing such action and that such action should be in line with the Constitution. The Police Service Act states that in exercising any function and when performing their duties, the police must pay 'due regard' to the rights of the person affected by such action. The preamble of the Police Service Act states that one of the functions that must be performed by police officers is to combat crime. To effectively discharge this duty, they must be equipped with the necessary powers to do so. Some of the powers include, but are not limited to are arrest, interrogation of suspects, questioning of witnesses, entering of premises to name but a few. Arresting of a suspect is one of the more drastic steps that may be taken in order to secure the attendance of the suspect at court. The ideal situation is when a police officer obtained a warrant of arrest and effected the arrest to secure the attendance of a suspect at court. Some instances do not allow a police officer to obtain a warrant of arrest. The obtaining of a warrant of arrest at that time might defeat the purpose because the suspect might evade capture or destroy valuable evidence. In such instances the law allows for an arrest of a suspect without a warrant of arrest.

The law applicable to arrest without a warrant

Section 40(1)(*b*) of the Criminal Procedure Act states that: 'A peace officer may without warrant arrest any person –

…

(*b*) whom he reasonably suspects of having committed an offence referred to in schedule 1'. The authority to effect an arrest without a warrant is granted to peace officers. The right to effect an arrest without a warrant is not unqualified. It does not authorise the arrestor to be a law unto himself when faced with a situation where the obtaining of a warrant will defeat the purpose. The court in *S v Mabena and Another* [2007] 2 All SA 137 (SCA) at para 2 held that: 'The Constitution … proclaims the existence of a state that is founded on the rule of law. Under such a regime legitimate state authority exists only within the confines of the law, as it is embodied in the Constitution that created it, and the purported exercise of such authority other than in accordance with law is a nullity.' The powers as indicated by *Mabena* have no force if those powers are exercised contrary to what the law envisaged. The law empowering the police to effect an arrest without a warrant must also comply with the Constitution. Considering s 13(1) of the Police Service Act, there can be no question that the power to arrest without a warrant is given to the peace officer to properly discharge their mandate. The court in *Mabena*, however, indicates how legislative power should be exercised. The laws governing police

action also indicates the parameters and requirements within which these actions must be performed.

The parameters and requirements that contains the power to arrest without a warrant

Section 40(1)(*b*) of the Criminal Procedure Act allows a police officer to arrest a suspect without a warrant when they reasonably suspect the suspect of committing a sch 1 offence. There are jurisdictional facts that must exist in order for the arrestor to effect an arrest without a warrant as indicated by *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 818G-H. The jurisdictional facts are the arrestor must be a peace officer, they must entertain a suspicion, the suspicion must be that they, the suspect, committed a sch 1 offence and that the suspicion is reasonable. The court in *Duncan* indicated the four elements that must be present for the arrest to comply with the lawful requirements for the police officer to effect the arrest. The first three elements are easy to ascertain, but the fourth element is the one that requires an in-depth look for a police officer to be clothed with the necessary authority to effect the arrest.

How the courts interpreted the fourth element as held by *Duncan*

In *Manala v Minister of Police and Others* (GP) (unreported case no 13342, 12-8-2020) (Sardiwalla J) at para 22, the court held that: 'The arrestor's grounds must be reasonable from an objective point of view. When the peace officer has an initial suspicion, steps have to be taken to have it confirmed in order to make it a "reasonable" suspicion before the arrest is made.' The court in *Manala* refers to steps that must be taken. What steps is the court referring to? To answer this, we must look at *Ramakulukusha v Commander, Venda National Force* 1989 (2) SA 813 (V) at 836I – 837B where it was held that 'there must be an investigation into the essentials relevant to the particular offence before it can be said that there is a reasonable suspicion that it has been committed.' There are 'steps' that need to be taken and an investigation into 'essentials' but that does not indicate what both aspects mean. The court in *Manala* also refers to the need 'to have it confirmed'. The 'it' the court refers to, is the reasonable suspicion, which must be confirmed. The reasonable suspicion must be present in order to conclude that a sch 1 offence has been committed. The court in *Manala* clarifies it, by indicating that the steps that must be taken are the investigation into the essentials, meaning the merits of what the police officer is confronted with at that time. For the arrestor to confirm their suspicion, they need to validate their suspicion by investigating their suspicion in order to conclude that their suspicion has merit based on the available information.

Evaluation by the police officer of the available information

The 'steps' that must be taken are that the officer must take the available information and test it against the circumstances that confronts him at the time of the incident. The possible witnesses, the evidence, the rebuttal explanation of the suspect against the evidence at their disposal. The suspect at the time might give a reasonable explanation as to their whereabouts at the time of the commission of the offence. The 'steps' that needed to be taken also imply that the police officer must do a follow up on the possible alibi provide by the suspect. The possible witness that was indicated by the suspect that could corroborate the version of the suspect as to the suspects involvement in the commission of the offence. The circumstances of each case will be unique but the starting point for a police officer will be that they need to confirm the suspicion they have. The suspicion must be tested by doing an investigation into the available facts at their disposal. The *Manala* case also refers to 'before the arrest is made'. This is very important because that indicates that the 'steps' that the policer must take must precede the arrest. The investigation into the available facts must be made before the arrest is effected. The suspicion will only be regarded as reasonable once the police officer has confirmed the suspicion. If the available information stands untested the arrest will be inconsistent with the law. The Supreme Court of Appeal in *Minister of Safety and Security and Another v Swart* 2012 (2) SACR 226 (SCA) at para 20 held that: 'The question is whether any reasonable person, confronted with the same set of facts', would draw the same conclusion. The requirement that the police officer acted reasonably will not suffice if their action does not objectively conform to that of a reasonable person. The reasonable person test is to ensure that the actions of the police officer would equate to the actions of a police official that was in his or her position. If it can be said that the police officer's actions align with that of an officer in their position armed with the same information and that another police officer would have acted the same while being armed with the same information, it could be said that the police officer acted reasonably.

In *Minister of Safety and Security and Another v Zulu* (KZP) (unreported case no AR238/08, 14-5-2010) (Steyn J), a police informer reported to the police that the respondent, Mr Zulu, and two others were seen in possession of suspected stolen property. The police office went to the house of the respondent later in the evening in order to follow up on the information he received. The respondent took the police to another person's house where certain items that were suspected of being stolen, were found. The police arrested the respondent on a charge of housebreaking with the intent to steal and theft. The police officer in this case did not find the respondent in possession of the suspected stolen goods when he visited the respondent's house. He did not request the respondent to search his residence when he was at the respondent's home. The High Court in dismissing the application brought by the Minister of Safety and Security concluded that: 'It is clear that Lambrechts [the police officer] relied on a suspicion made by someone else, [and] he failed to verify and test the suspicion'. The 'verification' the court refers to, is the investigation the police had to do in order to verify if the suspicion that the police had was reasonable. After the investigation the police would have been able to determine on the available facts if the respondent has committed a sch 1 offence. The arresting officer must form a suspicion based on evidence that can objectively sustained as indicated by the court in *Ralekwa v Minister of Safety and Security* 2004 (1) SACR 131 (T). For the arresting officer to gather evidence, they must do an investigation of the facts at their disposal. The facts will indicate to the police officer if the suspicion they have is reasonable and if the suspicion is reasonable in order for it to comply with the law before they decide to arrest the suspect or not.

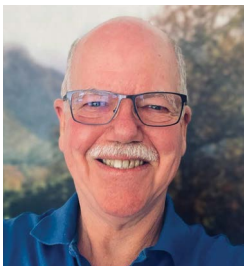
Conclusion

For the suspicion to be regarded as reasonable in terms of s 40(1)(*b*), it must be tested. The investigation is a requirement in order for the police officer to comply with s 13(1) of the Police Service Act in general and s 40(1)(*b*) of the Criminal Procedure Act in particular. The police officer need only have a suspicion that a sch 1 offence has been committed. In *Mabona and Another v Minister of Law and Order and Others* 1988 (2) SA 654 (SE), it was held the test is not certainty of the commission of an offence, but the suspicion that a suspect committed a sch 1 offence.

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

Picture source: Gallo Images/Getty

Are the proposed Community Schemes Ombud Service Practice Directive orders within the Ombud's jurisdiction?



By Jennifer and Graham Paddock

On 14 March 2023, the Community Schemes Ombud Service (CSOS) promulgated a draft Practice Directive on s 39(7)(*b*) of the Community Schemes Ombud Service Act 9 of 2011 (CSOS Act). The pivotal question is whether the Chief Ombud can legally institute 12 novel adjudication orders via this directive.

The executive summary of the provisional Practice Directive clarifies the Chief Ombud's authority to issue practice directives on any matter pertinent to the operation of the service. Moreover, the Practice Directive aims to interpret 'any other order proposed by the Chief Ombud' within the ambit of s 39(7)(*b*) of the CSOS Act, which covers relief measures and additional orders related or consequential to orders under s 39 of the CSOS Act.

This Practice Directive introduces 12 new relief proposals and orders under s 39(7)(*b*) of the CSOS Act, with an aim to expand the existing adjudication orders in s 39. This article focuses on two legal questions arising from the Practice Directive.

Can the Chief Ombud legitimately extend the scope of the orders in s 39 of the CSOS Act by way of a practice directive?

In support of the Practice Directive, one could argue that the Chief Ombud should possess the flexibility to broaden the spectrum of orders through practice directives. This adaptability would enable the CSOS to address unanticipated issues within community schemes not envisaged by the legislature when draft-

ing the CSOS Act. Additionally, it could enhance the dispute resolution process by offering supplementary relief options beyond s 39 of the CSOS Act, promoting better resolution of disputes and more effective governance within the community scheme landscape.

The introduction of new orders could fill gaps in existing legislation and regulations. The Chief Ombud's proposed expansion could provide better protection and coverage for parties in disputes within community schemes.

The primary counterargument is that including 12 new orders beyond those listed in s 39 of the CSOS Act exceeds the CSOS' and the Chief Ombud's jurisdiction. This action appears to modify and expand s 39 of the CSOS Act, which necessitates an amendment to the CSOS Act, achievable solely through the legislative process. This perceived transgression could be construed as encroaching on the legislative function, thereby violating the principle of separation of powers.

The doctrine of the separation of powers, fundamental to democracy, is enshrined in the Constitution. It divides government into three branches, namely, the –

- legislative (the National Assembly and the National Council of Provinces, addressed in ch 4);
- executive (the organs of state government, including the CSOS, addressed in ch 5); and
- judicial (the courts that interpret and apply the law, addressed in ch 8).

This principle prevents power abuses and upholds democracy by ensuring that no single entity possesses excessively extensive or absolute authority.

A secondary counterargument is that s 39 constitutes a *numerus clausus* (a closed list) of orders demarcated by statute, limiting the CSOS's jurisdiction to the orders encapsulated therein. The purpose of s 39(7)(*b*) is to allow the Chief Ombud to address unique or unexpected issues that may arise in specific cases. However, s 39(7)(*b*) does not grant the Chief Ombud the power to issue a practice directive with 12 new routine orders, as if they were orders specified in s 39.

Are the proposed additional orders appropriate outcomes for CSOS adjudications?

- **Contractual matters**

  In this regard, the Chief Ombud proposes three new orders –

  '(i) an order declaring a contract term and/or condition to be contrary to the CSOS legislation and/or its regulations relating to community schemes;

  (ii) an order declaring an enforcement and/or recognition of a contract term and/or condition relating to community schemes to be contrary to the CSOS legislation and/or its regulations; or

  (iii) an order requiring an association to pay overpayments and/or refund deposits to a former member of the scheme.'

  The first two proposed orders incorrectly assume that the CSOS Act and its regulations can and will impose restrictions on the terms and conditions that can be incorporated in community scheme contracts. In our view, any such restriction could only be contained in the various laws and regulations governing the administration and management of community schemes, not in the CSOS Act. If these proposed orders were amended to address this issue, it could be argued that they would allow for the more effective management and regulation of contracts within community schemes. They could prevent the enforcement of contract terms that contravene relevant laws and ensure the return of overpayments or deposits, thereby protecting community scheme members from unfair contractual conditions.

  The third of these orders seems unnecessary as s 39(1)(*e*) already grants adjudicators a widely phrased power to give 'an order for the payment or re-payment of a contribution or any other amount'. The proposal addresses the issue of whether an ex-member of a community scheme is a person who has a material interest in the scheme. In our view, if a CSOS application involves payment arising from the scheme's administration, the ex-member would have a material interest.

- **Adjudication orders**

  In this regard, the Chief Ombud proposes two new orders –

  '(i) an order setting aside an adjudication order where adjudication proceedings did not follow the approved CSOS procedure; or

  (ii) an order setting aside an adjudication order where objective facts and/or evidence indicates that an adjudicator failed to properly apply his/her mind to issues which were material to the determination of the dispute and/or misconceived the nature and/or purpose of the inquiry.'

  Supporters of these proposed orders might suggest that they could ensure that the adjudication process is transparent, fair, and follows due process and that they would allow the CSOS to correct instances where required procedures were not correctly followed, thus increasing the public confidence in the CSOS's adjudications.

  The counterargument is that these proposed orders give the CSOS the authority to review its own adjudicator's orders. In our view, a practice directive could allow a peer review process before finalising an order, but only an amendment to the CSOS Act can provide for a CSOS review process thereafter.

- **Trustees**

  In this regard, the Chief Ombud proposes two new orders –

  '(i) an order settling the question of who the lawful trustees of a Body Corporate are; or

  (ii) an order declaring that a trustee of a body corporate has acted in breach of his or her fiduciary duty, and to:

  (a) pay, in his or her personal capacity, for any loss suffered as a result thereof by the body corporate; or

  (b) pay back, in his or her personal capacity, any economic benefit received by the trustee by reason thereof.'

  These proposed orders inaccurately assume that all community schemes are sectional title schemes. To be potentially appropriate, the wording of these orders would have to be amended to refer to scheme executives and associations, not trustees and bodies corporate. With these amendments, it could be argued that the proposed orders would enhance accountability and ensure fiduciary responsibilities are upheld. If trustees or scheme executives are found in breach of their duties, the personal financial liability would serve as a strong deterrent against misconduct.

  The counterarguments in this case are that these proposed orders would grant CSOS adjudicators the right to make intricate findings of personal culpability and liability which, in our view, are issues better adjudicated by the High Court, particularly because the consequent penalties and possible criminal actions could make members of community schemes reluctant to serve as volunteer executives.

- **Administrators**

  In this regard, the Chief Ombud proposes one new order –

  '(i) an order requiring an administrator to cite the CSOS as an interested party in their papers for:

  (a) any extensions to their term of appointment; or

  (c) any amendment to their terms of appointment.'

  This proposed order also inaccurately assumes that all community schemes are sectional title schemes and requires amendment to apply to all persons to whom CSOS, a court, or any other competent authority gives partial or total executive control of a community scheme.

  With these alterations, it could be argued that by imposing a legal obligation on the compulsory scheme executive to involve the CSOS as an

interested party in any administrative matters relevant to their mandate, transparency and oversight could be increased, thereby promoting the effective functioning of the community schemes.

The principal counterargument is that this proposed order deals with an issue that would be more suitably addressed either in the regulations under legislation governing the appointment and conditions applicable to such scheme executives, as the CSOS Act and regulations contain no provisions that give it the power to deal with this issue.

- **Managing agents**

In this regard, the Chief Ombud proposes two new orders –

'(i) an order barring a managing agent from managing finances within community schemes; or

(ii) an order requiring the Property Practitioners Regulatory Authority to make a determination regarding the conduct of a managing agent as a property practitioner.'

The first of these orders would allow a CSOS adjudicator to prohibit a specific managing agent or agency from undertaking any engagement or employment that involves the management of community scheme finances. The second proposes that an adjudicator be entitled to require the Property Practitioners Regulatory Authority to initiate disciplinary action against a managing agent.

It could be argued that these proposed orders could increase the accountability of managing agents and protect community schemes from potential misconduct and that giving a CSOS adjudicator the power to direct the Property Practitioners Regulatory Authority might also enhance the professional standards of managing agents.

The first counterargument is that these orders deal with issues that should be determined by the High Court because of the negative effects for the managing agent. A second counterargument is that in terms of s 4(1) of the CSOS Act, which sets out the CSOS' functions, there is no provision that can be seen as a foundation for either of these proposed orders.

Conclusion

While arguments may support expanding the scope of orders through practice directives, in our opinion, the principle of separation of powers suggests that the Chief Ombud lacks the legal authority to do so. The CSOS, a state-owned entity, cannot exercise legislative or interpretive powers, which are reserved for Parliament and the High Court respectively. CSOS adjudicators have limited quasi-judicial powers under s 39 of the CSOS Act, while the role of the Chief Ombud and other CSOS officials is to implement the CSOS Act and its regulations. It is only within this context that the Chief Ombud may issue practice directives that 'direct the performance of any act in the operation of the Service'.

If new types of orders are necessary, the legislature should implement such amendments. If the Chief Ombud believes the CSOS needs jurisdiction to allow its adjudicators to routinely issue orders not provided for in s 39 of the CSOS Act, to conduct reviews of completed adjudications or to perform other acts not provided for in the CSOS Act, the CSOS Act requires the Minister of Human Settlements to initiate an amendment to that Act. In our view, these outcomes cannot be achieved by way of an internal Chief Ombud's practice directive.

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Picture source: Gallo Images/Getty

Is mediation an option in sexual violence cases?

By Desmond Francke

'Sexual [assault] cases are similar in power structure to domestic violence or criminal assault matters. In those cases there is more than a simple dispute over money or property. Instead, there is a dynamic present that involves power, fear, and coercion. These elements underlie the "dispute" being mediated, which may be a "simple" divorce or the resolution of a criminal charge such as "simple" assault. But like an iceberg, only the tip is visible, and the most dangerous part remains unseen. In those situations, there is an imbalance of power between the aggressor and the victim that cannot be reconciled in mediation' (Mori Irvine 'Mediation: Is it Appropriate for Sexual Harassment Grievances?' (1993) 9 *Ohio State Journal on Dispute Resolution* 27). In a country such as South Africa (SA) where between October and December 2022, 5 935 rape incidents were recorded, and only one in nine sexual assault matters are reported, the emphasis should be on prevention, deterrence, and denunciation. Parliament through the legislature is playing its role to curb the epidemic through enacting Acts, such as the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 and its subsequent amendments and the Criminal and Related Matters Amendment Act 12 of 2021.

The judiciary to a large extent has expressed its concern and dismay about these crimes as stated in *Maila v S* (SCA) (unreported case no 429/2022, 23-1-2023) (Mocumie JA (Carelse and Mothle JJA and Mjali and Salie AJJA)) where Mocumie JA held: 'Rape remains underreported nationally, but there may be no rapes more hidden than those committed within families. Sexual violence victims "often experience a profound sense of shame, stigma and violation". These factors are compounded by attempts from family members of the victim or the perpetrator to influence the victims not to file charges or, if charges have been filed, to withdraw the case so that the families can resolve the problem amicably. Often the perpetrator offers to pay the medical costs for the victim's medical treatment, including psychological treatment, and even maintenance of the family in cases of indigent families.' The National Prosecuting Authority in its Strategic Plan 2020 – 2025 as one of its goals, attempts to eradicate gender-based violence. In the Prosecution Policy Directives with effect from 1 May 2019, it states informal mediation should not be considered in the following cases: 'Offences such as murder, rape, robbery with aggravating circumstances and any other offences that fall within the ambit of [the Criminal Law Amendment Act 105 of 1997] (minimum sentences)'.

At some magistrate offices, it has become the norm rather than the exception to mediate, specifically when dealing with rape cases. Regrettably, the formal prerequisites to an informal mediation are not complied with as envisaged in the directives. Many articles have been written about the advantages of mediation in criminal matters and rape matters. In its simplest form, mediation is a process through which two or more disputing parties negotiate a voluntary settlement of their difference with the help of a 'third party' (the mediator) who typically has no stake in the outcome. I hold the view it should not even be considered in sexual assault matters for many reasons.

Sexual assault is a power-based crime (that is, a crime where there is an imbalance of power, or an abuse of power by the perpetrator, and the victim/survivor feels powerless to stop it. 'Power-based personal violence is a form of violence that has as a primary motivator the assertion of power, control and/or intimidation in order to harm another' (Rowan University 'Facts about Power-Based Personal Violence and Sexual Violence' (https://sites.rowan.edu, accessed 24-8-2023)). Many victims of sexual violence, 'particularly women who are assaulted by their intimate partners, suffer ongoing abuse through what is known as "coercive control", or a pattern of intimidation, humiliation, deprivation, and force that is typically less visible than forms of physical injury' (Daniel Del Gobbo and Vathsala Illesinghe 'Restorative justice for survivors of sexual violence' (https://policyoptions.irpp.org, accessed 24-9-2023)). The power imbalance between the aggressor and the victim is so serious and so unchangeable that any agreement would be unfair. Power can be based on a variety of factors including personality, strategic positions, tactical positions, or gender. Power based on gender is not merely a difference in physical strength. It can be grounded in the emotional, psychological, or financial hold one person has over another. The power imbalance is mostly present in the realm of domestic relationships and abusive relationships. When a power relationship exists and is partially based on gender, it may have its roots in the societal differences between men and women. In a perfect world, men and women should share equivalent power. '[A] society characterised by gender inequality, one that is differentiated and stratified by gender, and that has an institutionalised ideology justifying male domination in all socially significant contexts … is a society that routinely provides [men] with greater resources than [women]' (Irvine (*op cit*)). A power-based crime makes mediation impossible because the woman is not in an equal bargaining position with her assailant, and they are bargaining over matters that are not negotiable such as privacy, dignity, and an infringement of so many rights. The victim has no chance of exoneration as the person telling the truth is largely irrelevant to the outcome of mediation.

Mediation causes inequality and the concept of equality is ignored or even reflected in the kind of reparation an offender may be required to make. Mediation presupposes that the parties (the assailant and the victim) are on an equal footing and asks them to negotiate an agreement for future behaviour. The assailant is not punished for the crime(s) he has committed. The mediation process seems to imply that victims share responsibility for the unlawful conduct and requires them to modify their own behaviour in exchange for the assailant's promise not to commit further crimes. Victims are made to feel responsible for impeding the man's recovery, and causing harm to the community are beliefs that some men require physical force to enjoy sex with women and indeed feel entitled to physically forced sex as a matter of privilege. There may be pressure for the victim to accept at least partial responsibility in mediation which causes victim blaming. Instead of focusing on the wrongdoing of the assailant, victims during mediation processes very often ask themselves questions, such as: What if I did this or that? Would the consequences have been different?

Sexually abused women repeatedly forgive their partners, accept the blame, and believe, if they just try harder, their relationship will work. Mediation in sexual assault crimes is a process that effectively trades justice for harmony. Sexual assault crimes are the one area of criminality where we judge the offence not by the perpetrator but by the victim. Mediation does not favour a victim-centred approach as required by South Africa's jurisprudence. Mediation places the assailant on an equal footing with the victim which enhances victim-blaming and a lack of reporting by potential victims.

Mediation in sexual assault cases provides credence to the term 'reasonable woman'. 'This may minimise the subjective impact on the victims who mostly are women who may be stereotyped as emotional, prone to exaggeration and overreaction, unlike men who are stereotyped as "rational"' (Dr Angela du Plesiss 'Using mediation to deal with sexual harassment cases at the workplace' (www.esap.online, accessed 24-8-2023)). We live in a society where there is a depiction of complainants in sexual assault crimes as over dramatic, disregarding the propensity of women to understate the amount and severity of the violence they have been subjected to. '"[M]ediation can be destructive to many women and some men because it requires them to speak in a setting they have not chosen and often imposes a rigid orthodoxy as to how they should speak, make decisions, and be." Societal norms and expectations of gender do not disappear inside the mediation room because none of the parties themselves can be completely immune to social norms. For example, there is an expectation that women will approach problems and disputes from an ethic of care, or a "relational" standpoint, which can skew the outcome of mediation. This means, that rather than protecting their own interests, women will try to solve disputes in a way that maximises the happiness for all parties involved, having difficulty even recognising that they have self-interests. Furthermore, the more personal the setting, the more women tend to "doubt their positions,"' and behave like reasonable women instead of 'recognising and advocating for their own interests' (Sarah Rogers 'Online Dispute Resolution: An option for mediation in the midst of gendered violence' (2009) 24 *Ohio State Journal on Dispute Resolution* 349). Victims will be 'compelled to hide emotions that are stereotypically "unfeminine" as … they are physically present at a mediation session. The physical meeting of parties can heighten the need to suppress anger in expression and tone' (Rogers (*op cit*)). Due to the meditation setting, victims will not be free to express themselves nor have their true feelings understood by the mediator. Mediation in sexual assault cases normalises it when drastic action has to be taken by the National Prosecuting Authority (NPA) as envisaged by their Strategic Plan. It begs the question as to what standards and tests representatives of the NPA employ to determine what conduct of the victim falls within the threshold of 'reasonable' to consider mediation. It must be remembered, prosecutors as representatives of the NPA have not received any training in mediation – a field that requires specialised skill and knowledge, specifically in sexual assault crimes.

Mediation in sexual assault crimes, no matter how well intended, risks trivialising the seriousness of these crimes. 'In light of the goal of restoration of the relationship, in the context of … sexual assault cases, these processes may seem too much like the admonishment to "go home and sort things out" which until recently was too often the response to charges of sexual assault crimes' ('Re-Thinking Access to Criminal Justice in Canada: A Critical Review of Needs, Responses and Restorative Justice Initiatives' (www.justice.gc.ca, 25-8-2023)). 'The prime interests that the legislative scheme of sexual offences against [victims] protect are the personal autonomy, bodily integrity, sexual integrity, dignity, and equality of children' (*R v Friesen* [2020] 1 SCR 424). 'The unique psychological characteristics of the victim-offender relationship may make a face-to-face, intimate meeting between the two parties more damaging

than healing' (Rogers (*op cit*)). The courts' understanding of the profound physical and psychological harm that all victims of sexual assault experience have deepened. 'While face-to-face encounters are probably the richest experiences of human interaction … there are some situations in which such a meeting is not feasible' (Rogers (*op cit*)). Mediation may allow the assailant the first contact with the victim, which may lead to secondary trauma. 'It is not only the actual threat of physical violence that might interfere with [mediation] during a face-to-face encounter, but the perceived violence by the victims of gendered violence' (Rogers (*op cit*)). Pursuing mediation could or 'would jeopardise a victim's future safety, because the offender will not be incarcerated' (Rogers (*op cit*)). 'The unique power dynamics between a victim and an offender [may result in] some "victims [being] unable to hold their own in a face-to-face meeting"' (Rogers (*op cit*)). 'Some rape victims experience a feeling of continued, forced connection with their rapists' (Rogers (*op cit*)). See *S v C* 1996 (2) SACR 181 (C) where it was held: 'A rapist does not murder his victim – he murders her self-respect and destroys her feeling of physical and mental integrity and security. His monstrous deed often haunts his victim and subjects her to mental torment for the rest of her life – a fate often worse than loss of life.' 'There may be many situations when the mediator [normally the representative of the state] is unaware that an [offender] is attempting to coerce or intimidate the victim, thereby controlling the mediation, through their "use of words or movements known only to the victim as being threatening"'. With 'the constant pressure to appear cooperative, women may be discouraged to assert their own interests and also to feel free to confront their [concern] … about losing their composure in the public eye' (Rogers (*op cit*)).

The hope expressed in this article 'pushes the envelope in the realm of current criminal justice, … the process presents promising possibilities for reaffirming victim autonomy, increasing victim safety, and reducing the effect of harmful gender … norms in the judicial process' (Rogers (*op cit*)).

Desmond Francke *BIuris (UWC)* is a magistrate in Khayelitsha. ❑

Everyone is protected by the law, and everyone should protect the law

By Kgomotso Ramotsho

Legal practitioner, Hilde Eksteen.

In this month's issue we feature Hilde Eksteen, a young legal practitioner based in Gauteng. Ms Eksteen was born in 1990 in Roodepoort. Her mother is an educator and father a union representative. She matriculated in 2008 from Noordheuwel High School and thereafter studied for her LLB at the University of Johannesburg where she met her husband on the very first day.

De Rebus news reporter, Kgomotso Ramotsho, spoke to Ms Eksteen who pointed out that she was raised to take note of the fact that everyone has rights. She said that both her parents, being public servants, always helped people and the community by forming part of various civil minded organisations and committees.

'I would say that this shaped the individual I am today, especially looking at all the committees that I am serving on, and the fact that I want to help everyone,' Ms Eksteen added.

Kgomotso Ramotsho (KR): Why did you choose to study law?
Hilde Eksteen (HE): A passion for the law has always been embedded in my soul along with the drive to always stand up for the underdog.

KR: In your own words, what is access to justice?
HE: Access to justice means everyone is protected by law, and everyone protects the law.

This view is inspired by the Constitutional Court's logo and its theme 'justice under a tree'. Looking closely, you will note that the logo depicts a tree and beneath it a crowd of people. Meaning that the Constitution protects us all ('us' meaning the crowd of people) and gives us access to justice, but we need to take care of the tree.

This is the theoretical position but in practice the most vulnerable members of society often battle to access justice, due to the lack of funds, long queues and disinterested officials etcetera. We should all work together to ensure access to justice for all.

KR: What field of law do you specialise in?
HE: I am a general litigation practitioner, but I specialise in Family Law.

KR: In the past the legal fraternity was a profession only for men. The first woman to be admitted as an attorney, was only admitted 100 years ago. In your day-to-day experience in the profession, do you feel that men are still dominating the profession?
HE: During 2023, I attended a colleague's admittance at the Gauteng Local Division, Johannesburg. During which it was evident that female legal practitioners are paving the way, as more or less 23 legal practitioners were admitted on that day, of which only one was male.

KR: I have heard that most female legal practitioners prefer a male opponent as they are more collegial.
HE: In my view it is, and it is important to always remember to respect one another regardless of your gender.

KR: What is your role at the Johannesburg Attorneys Association (JAA)?
HE: I oversee the events and co-chair

with my mentor and very good friend Chantelle Gladwin-Wood.

KR: Do you feel like it is important for one to belong to an organisation such as the JAA and others? If so, why?
HE: Yes, it is important. Being part of an organisation such as the JAA, the West Rand Legal Practitioners Association, the Pretoria Attorneys Association and the Gauteng Attorneys' Association has assisted me enormously. I have had the opportunity to build my network through organisations from whom I have received so much support whether it being mentally, emotionally, or professionally.

It is also essential to my mind, that practitioners give back to the profession and help one another.

KR: What is it that you enjoy about being a legal practitioner?
HE: I love helping people and having the opportunity to change their lives for the better. Besides that, appearing in court is the best.

KR: Besides law, what else are you passionate about?
HE: I have an extreme passion for education. A lot of us in the profession take for granted the fact that we had the opportunity to study, or even forget that we had the opportunity to access education. We also tend to forget to educate those around us.

KR: What is your favourite quote and why?
HE: My favourite quote is *carpe diem*. It is also embroidered on the inside of my robe.

I believe that it depends on you to make your own day great and not to wait on others to do it for you.

KR: You engage on social media, sharing court tips for aspiring and junior lawyers. Additionally, you address inquiries related to the legal profession through your own experience. What inspired you to use social media as a platform to support and mentor candidate attorneys and young lawyers?
HE: I sit in court every day and see how candidate attorneys and/or young newly admitted attorneys struggle in court, and I could not take it anymore.

I was fortunate enough to have an amazing principal, Leon Loock, under whom I served my articles, but not all of us had a principal practicing in litigation who can assist in court appearances.

It was for this reason that I took to TikTok and Instagram to reach the masses and help where I can.

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

THE LAW REPORTS

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

By Merilyn Rowena Kader

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

Arbitration

Whether arbitrator and appeal tribunal had committed a gross irregularity in the conduct of the arbitration proceedings: In *Roux v University of Stellenbosch and Others and a related matter* [2023] 3 All SA 248 (WCC), the University of Stellenbosch sued Mr Roux for damages arising from breaches of his employment contract. The parties agreed to have the matter referred to arbitration. In terms of the arbitration award, Mr Roux was found to have unlawfully transferred in excess of R 35 million from the unrestricted reserves of the university, into four accounts under his control over a period of ten years. Mr Roux was ordered to repay a total amount of R 37 116 402 as damages to the university. His appeal was dismissed.

The university applied to court for an order that the final arbitration award and arbitration appeal award granted in its favour be made orders of court. In response, Mr Roux sought the review and setting aside of the arbitration awards in terms of s 33 of the Arbitration Act 42 of 1965, alleging that the arbitrators had committed gross irregularities. Mr Roux mainly relied on s 33(1)(*b*) of the Act, which led to a consideration of whether the arbitrator and the appeal tribunal had committed a gross irregularity in the conduct of the proceedings. The court found that Mr Roux was given a fair trial and the application by the arbitrators of the common law on either the onus or the special damages challenge did not detract from that. Mr Roux's application failed and the university's application to make the awards an order of court succeeded. Mr Roux was ordered to pay the university the amount of R 37 116 402 plus interest.

Civil procedure

Application of *in duplum* rule: In *MEC: Police, Roads and Transport, Free State Provincial Government v Bovicon Consulting Engineers CC and Another* [2023] JOL 59563 (SCA), the question in this appeal was whether the operation of the *in duplum* rule disentitled the first respondent (Bovicon) to post-judgment interest on the amount owed to it. The High Court granted an order in Bovicon's favour against the appellant (the MEC) for payment of post-judgment interest accruing to the amount owed to Bovicon by the MEC – in effect, holding that Bovicon was entitled to *mora* interest on the judgment amount for as long as it remained unpaid. Apart from claiming to have fully satisfied the judgment debt, the MEC contended that the rate of interest applied by Bovicon exceeded that prescribed in terms of the Prescribed Rate of Interest Act 55 of 1975. Petse AP and Masipa AJA acknowledge that Bovicon's counsel conceded that the High Court had erred in awarding interest at the rate of 15,5% in respect of the judgment amount. The appropriate rate of interest would be that prevailing at the time when judgment was granted in the High Court. Save for correcting the amount of interest payable, the court dismissed the appeal.

Consumer – s 43(2) of the Consumer Protection Act 68 of 2008 prohibits pyramid schemes: In *Bester NO and Others v Mirror Trading International (Pty) Ltd (in liquidation) t/a MTI and Others* [2023] 3 All SA 101 (WCC), as joint final liquidators of MTI, the applicants sought declaratory relief that, *inter alia*, the business model of MTI was an illegal scheme; that all agreements concluded between MTI and its investors in respect of the trading and investment of Bitcoin for the purported benefit of the investors were unlawful and void *ab initio*.

The ground on which the respondents opposed the relief sought by the applicants raised the question of whether Bitcoin (cryptocurrency) fell within the definition of property in the Insolvency Act 24 of 1936. The court found that cryptocurrency, like money, is movable property (s 2 of the Insolvency Act). The court found that the business of MTI was shown to be fraudulent. Section 43(2) of the Consumer Protection Act prohibits pyramid schemes. Even persons who unknowingly join, enter or participate in a pyramid scheme, will not be entitled to enforce an agreement between themselves and the illegal scheme. The agreements were declared void *ab initio*.

Discovery in terms of r 35 of the Uniform Rules of Court: In *Pentagon Financial Solutions (Pretoria) (Pty) Ltd and Others v Basson and Others* [2023] 3 All SA 560 (WCC). An annexure to the notice of motion comprised the list of documentation, which respondent stated was necessary for the conduct of a forensic audit. The main application in this matter, was brought by the applicants seeking declaratory relief. The respondents launched an application in terms of r 35(13) of the Uniform Rules of Court, for an order allowing the discovery of certain documentation, which the applicant failed to respond to timeously. An application was brought in terms of r 30A to compel a response.

Rule 35(12) provides that any party to a proceeding may at any time before the hearing, deliver a notice to any other party in whose pleadings reference is made to any document or tape recording, to produce such document or recording for inspection and to permit the making of a copy or transcription thereof. Alternatively, the receiving party must state within ten days whether it objects to such production and the grounds therefor. In the event of non-compliance,

r 30A provides for the giving of notice to the defaulting party, of intention to apply for an order compelling compliance or for the claim or defence to be struck out. In terms of r 30A(1), the court must first determine whether there has been non-compliance with the r 35(12) notice. While there did not appear to be any onus on a party in the context of an r 30A application seeking documents in terms of r 35(12), a party who seeks such documentation has the burden of adducing evidence as to the relevance of the document, and to show that the document is not privileged and can be produced. The r 30A application thus succeeded.

Leave to amend – r 28 of the Uniform Rules of Court: The plaintiff in *Essence Lading CC v Infiniti Insurance Limited and Another* [2023] 3 All SA 410 (GJ) sought leave to effect an amendment to the citation of the name of the second defendant. The plaintiff had cited Mediterranean Shipping Company (Mediterranean) as the second defendant, instead of MSC. MSC did not react to the summons and did not enter an appearance to defend. Instead, the named defendant, Mediterranean, entered an appearance to defend and raised an exception that the particulars of claim did not disclose a cause of action against it. The essential question was how the mistake could be corrected in a manner, which complied with the constitutional imperative of a fair and just judicial process.

Rule 28 of the Uniform Rules of Court may only be used to affect a substitution when no prejudice or injustice would result from such procedure. That would generally be the case where through some form of agency, the party to be introduced is already represented in the action and service of the process on the agent is deemed to be service on the party to be introduced; and the correct defendant, despite the mistake in the citation, entered an appearance to defend or intervene in the action. Therefore, subject to certain exceptions, the appropriate process to substitute a defendant, which would prevent an incurable injustice, was for the plaintiff to bring an application for joinder or substitution on proper notice to the proposed new party. Once the new defendant was properly joined or substituted, and became a party to the action, it would then be open to the plaintiff to appropriately amend the summons either based on the order granted by the court, or in terms of r 28.

Summary judgment application – r 30 of the Uniform Rules of Court: The defendant in *Ingenuity Property Investments (Pty) Ltd v Ignite Fitness (Pty) Ltd* [2023] 3 All SA 458 (WCC) had delivered a special plea and a plea on the merits, the plaintiff replicated, and simultaneously applied for summary judgment against the defendant. In response, the defendant applied in terms of r 30 for an order that the plaintiff's summary judgment application be set aside as an irregular step, averring that the Uniform Rules of Court do not permit a plaintiff to simultaneously replicate in terms of r 25(1) and apply for summary judgment in terms of r 30(2). The defendant submitted that the rules only permit the plaintiff to do one or the other as its next procedural step and concluded that, for those reasons, the summary judgment application fell to be set aside as an irregular step.

Rule 30(2), does contain an express prohibition, precluding an application in terms of r 30(1) when a further step has been taken. Litigants are prohibited from bringing an application to set aside an irregular step if the applicant has itself taken a further step in the cause with knowledge of the irregularity. Rule 30(2)(*a*) is intended to deal with the situation where a party has taken a further step in the cause and thereafter seeks to make application to set aside an irregular or improper step. Confirming the purpose of r 30, the court concluded that on the particular facts of this matter, the r 30 application fell to be dismissed.

Constitutional law

Whether ban on public displays of old South African flag constituted an unconstitutional infringement of the right to freedom of expression guaranteed in s 16(1) of Constitution: In *Afriforum NPC v Nelson Mandela Foundation Trust and Others* (*Johannesburg Pride NPC and Another as* Amici Curiae) [2023] 3 All SA 1 (SCA), a complaint was lodged in the High Court against Afriforum by the Nelson Mandela Foundation Trust, that public displays of the old South African flag at certain protests was a contravention of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. The court determined that the display of the old flag at the protests constituted hate speech, unfair discrimination, and harassment, within the meaning of ss 10(1), 7 and 11 of the Act. Afriforum appealed.

Schippers JA undertook an analysis of the meaning and effect of s 10(1) of the Act, which is linked to the rights to freedom of expression, equality, and dignity. The prohibition of hate speech in s 10(1) when read with the proviso in s 12 proscribes certain types of expression. The old flag is an icon of Apartheid, and represents hate and trauma for most people, particularly black South Africans. The gratuitous public displays of the old flag conveys affinity for Apartheid and satisfies the requirement of promoting and propagating hatred and unfair discrimination. The court set aside the order prohibiting 'any' display of the old flag and replaced it with an order prohibiting 'gratuitous public displays' thereof, subject to the proviso in s 12 of the Act.

Corporate and commercial

Commercial lease – claim for remission of rent: Having leased premises from a trust, the appellant (the Butcher Shop) in *The Butcher Shop and Grill CC v Trustees for the Time Being of the Bymyam Trust* [2023] 3 All SA 40 (SCA) sub-leased the premises to a related company (Apoldo). The imposition of restrictions during the national state of disaster caused by the COVID-19 pandemic led to the appellant withholding payment of rent due claiming that it was denied beneficial use of the premises because of the restrictions and was thus not obliged to make payment of the full amount of rent due in terms of the lease. With regard to the entitlement to remission of rent when property is not placed at the disposal of the lessee, either by the lessor or because of an intervening circumstance, Goosen JA; Carelse, Van der Merwe, Mbatha and Weiner JJA concurring, confirmed that parties may limit or exclude the right to claim remission of rent in circumstances of *vis major*. The lease agreement was found not to have precluded a claim for remission of rent arising from a *vis major* event in this case. However, the Butcher Shop did not have a claim, in law, for the loss of use and enjoyment of the premises suffered by Apoldo as the sub-lessee.

Criminal procedure

Appeal against refusal of bail: In *Kula v S* [2023] 3 All SA 218 (NWM), the appellant, who was charged with murder appealed against the refusal of his application for release on bail. The grounds of appeal were that the magistrate had misconstrued the schedule to the Criminal Procedure Act 51 of 1977 wrongly placing the onus on the appellant, in terms of s 60(11)(*a*) and sch 6 to the Act, to prove exceptional circumstances warranting his release on bail.

Section 59 of the Criminal Procedure Act as amended by s 2 of the Criminal and Related Matters Amendment Act 12 of 2021 provides that an accused in custody may be released on bail before his first appearance in a lower court, unless the offence he is facing is one referred to in s 59(1)(*a*)(*ii*) and (*iii*). In terms of the newly introduced s 60(11)(*c*), where an accused is charged with one of the said offences, the court must order that he be detained in custody unless, having been given a reasonable opportunity to do so, he adduces evidence which satisfies the court that the interests of justice permit his release.

The court highlighted the procedural irregularities in the conduct of the bail application by the magistrate. It was found that whether sch 5 or 6 applied,

the appellant still bore the onus of adducing evidence, either that exceptional circumstances exist, which in the interest of justice permitted his release on bail. None of the allegations against the appellant brought the bail application within the ambit of s 60(11)(*a*). Instead, s 60(11)(*c*) applied. The court went on to conclude that the interests of justice justified the release of the appellant on bail with strict conditions.

Application for setting aside of summons issued for purpose of instituting a private prosecution: In two separate applications, the respective applicants (Ms Maughan and Mr Downer) in *Maughan v Zuma (Campaign for Free Expression and Others as* Amici Curiae*) and a related matter* [2023] 3 All SA 484 (KZP) sought the setting aside of summons issued for the purpose of instituting a private prosecution against them by the respondent (Mr Zuma).

The applicants averred that the respondent had not obtained a *nolle prosequi* certificate from the Director of Public Prosecutions entitling him to institute the private prosecution against Ms Maughan and that he did not satisfy the requirements for standing in terms of s 7(1)(*a*) of the Criminal Procedure Act 51 of 1977; and the private prosecution was an abuse of process.

Section 7(1)(*a*) provides for private prosecution where the Director of Public Prosecutions declines to prosecute for an alleged offence committed against a 'private person who proves some substantial and peculiar interest in the issue of the trial arising out of some injury which he individually suffered in consequence of the commission of the said offence'. Where a private prosecution, such as alleged in the current matter has been initiated for an ulterior purpose, it constitutes a breach of the principle of legality and amounts to an abuse of the process of the court. A prosecution which is unsustainable also constitutes an abuse of the process of court. A court is then obliged to intervene and end the abuse of process. The applicants were thus entitled to the relief sought in the respective notices of motion.

Delict

Wrongfulness inquiry in delictual action: In *MEC for Education, KwaZulu-Natal v Singh* [2023] JOL 59566 (SCA), the respondent, an educator, took early retirement seven years before the usual compulsory retirement age, claiming that she suffered from clinical depression due to her employer's failure to take reasonable steps to prevent the principal of her school from victimising her. She sued for damages representing the income she lost as a result of being unable to work for what would have been the last seven years of her working life. Olsen AJA confirmed that the respondent bore the onus to establish wrongfulness, causation, and negligence. Evidence regarding the respondent's medical condition and applicable legislative framework was considered by the court. The court discussed the respondent's failure to engage with the remedies available to her in the case of victimisation and acknowledged the appellant's contention that allowing a delictual claim along the lines of that advanced by the respondent posed a significant threat to the capacity of a department to perform its functions. Wrongfulness was found not to have been established. The appeal was upheld.

Family law

Divorce constitutional invalidity of s 4 of the Mediation in Certain Divorce Matters Act 24 of 1987: The High Court's declaration of constitutional invalidity in respect of s 4 of the Mediation in Certain Divorce Matters Act 24 of 1987 was referred to the Constitutional Court for confirmation in *Centre for Child Law v TS and Others* [2023] JOL 59835 (CC).
The section was declared unconstitutional in that it placed an obstacle in the way of never-married parents and their

children, to access the services of the Office of the Family Advocate in the same way that married parents going through a divorce and parents who were married to each other were able to access those services when there was a dispute regarding the care and contact of their children.

Section 9(3) of the Constitution prohibits direct and indirect discrimination by the state against anyone on any of the grounds listed therein. The first question was whether there was differentiation between people or categories of people. Tshiqi J referred to the test for assessing whether differentiation amounts to discrimination and whether the discrimination is unfair. As the provision treated divorced or divorcing parents differently from never married and married parents who were separating but not divorcing, differentiation was established.

The next question was whether the differentiation bore a rational connection to a legitimate government purpose. The third respondent (the Minister) conceded that there was no purpose behind the differentiation. Section 4 clearly discriminated on the basis of marital status, albeit indirectly. The next question was whether the limitation was reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, in view of all relevant factors, including those mentioned in s 36(1) of the Constitution. The limitation was not justifiable in terms of s 36. The High Court order was confirmed, and the declaration of invalidity was suspended for 24 months to enable Parliament to cure the defect.

Intellectual property

Trademarks – s 10 of the Trade Marks Act 194 of 1993: In *National Brands Limited v Cape Cookies CC and Another* [2023] 3 All SA 363 (SCA) application was made by the first respondent (Cape Cookies) for registration of the trademark SnackCrax under class 30, in a specification covering savoury biscuits. The application was opposed by the appellant (National Brands), who was the proprietor in South Africa of the trademarks Salticrax, Snacktime and VitaSnack in class 30. Cape Cookies' SnackCrax savoury biscuits had been on the market since August 2014 and were sold in competition with National Brands' Salticrax savoury biscuits. Cape Cookies also used the VitaCrax mark, registered in 2009, in relation to a crisp bread snack.

National Brands opposition to trademark registration was based on several provisions of s 10 of the Trade Marks Act 194 of 1993, specifying which marks may not be registered as trademarks. Registration is not permissible where the mark sought to be registered was likely to take unfair advantage of the distinctive character or repute of an existing trademark. The registration stage of trademarks is aimed at ensuring the sanctity of the Register of Trade Marks, which should contain only distinctive marks. Only one ground of opposition needs to succeed for registration to be prohibited. There is an overall onus on the applicant for registration to satisfy the court that there is no bar to registration under the Act.

Local government

Interdictory relief against municipality for nuisance emanating from property: In *Body Corporate of the Six Sectional Title Scheme No SS 433/09 v City of Cape Town* [2023] 3 All SA 136 (WCC), the applicant was the body corporate of a sectional title scheme, and the respondent (the City) was the registered owner of seven neighbouring undeveloped erven forming a large open field as well as a parking lot. Although the erven had been awarded to claimants in land restitution claims, in 22 years, transfer of the properties had still not taken place. According to the applicant, the site in its current state, and the activities being conducted thereon by various persons, including the homeless, constituted a societal health, environmental and safety risk. It sought a final interdict against the City directing it to take all steps reasonably necessary to clear the site of the illegal occupants. It was contended that the nuisance generated from the site would continue until the land was redistributed as planned, but that such redistribution could not occur while the nuisance continued. The applicant, therefore, sought to compel the City to take more permanent steps to deal with the issue.

The court agreed with the applicant that the City had contravened its municipal planning by-law as the activities on the site did not comply with the permitted zoning uses. The City further failed to comply with its community fire safety by-law, its street, public places and prevention of noise nuisances' by-law, and its integrated waste management by-law. The activities complained of gave rise to a nuisance that the applicants could not reasonably be expected to tolerate. The applicant acknowledged that the most appropriate remedy would be a structural interdict. That would afford a reasonable opportunity for the City to take appropriate remedial steps in line with the order issued by the court.

Tax

Review of South African Revenue Services (Sars) decision on prescription of tax assessment: In *I-Cat International Consulting (Pty) Ltd v Commissioner for the South African Revenue Services* [2023] 3 All SA 154 (GP), the applicant's request for a reduced assessment in terms of s 93 of the Tax Administration Act 28 of 2011 in respect of its 2015 tax assessment was declined by the respondent (Sars) on the ground that the 2015 assessment had become prescribed in terms of s 99 of the Act. The applicant applied for the review of the decision. The court called for submissions on whether the provisions of ss 99(2)(*d*)(*i*) and 150 were applicable; and whether the court was entitled to *mero motu* raise the aforementioned as questions of law that emerged from the evidence. Vermeulen AJ confirms the parties' agreement that the court could raise the issues in question. Regarding the review application being out of time, the court refers to s 9 of the Promotion of Administrative Justice Act 3 of 2000; standard to be applied in assessing delay; and factors to be considered when granting condonation. Condonation was granted. On the merits, the court found that provisions of s 99(2)(*d*)(*i*) were applicable to the present matter with consequence that the prescription period of three years as provided for in s 99(1) was not applicable. Sars' finding that the 2015 assessment had prescribed was reviewed and set aside.

Wills and estates

Interpretation of will: The dispute between the appellants and respondents in *Spangenberg and Others v Engelbrecht NO and Another* [2023] JOL 59562 (SCA) centred around the interpretation of a clause in the appellants' father's will. The appellants challenged the executor's interpretation that it was the deceased's intention to grant the second respondent a *habitatio* over a plot of land. The appellants alleged that they and the testator had informally agreed to divide the plot into three portions with each sibling being allocated a specific portion. They appealed against the High Court's granting of declaratory relief to the executor.
Weiner JA held that the testators have the freedom to dispose of their assets in a manner they deem fit, except insofar as the law places restrictions on that freedom. The principle of freedom of testation is constitutionally endorsed.

The approach to interpretation required the court to ascertain the wishes of the testator from the language used. In endeavouring to ascertain those wishes, the will had to be read in light of the circumstances prevailing at the time of its execution. Relying on the contextual interpretation of the words in the will, there was no place for the introduction of the surrounding circumstances relied on by the appellants. The appeal was dismissed.

Other cases

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

- appeal against refusal of bail;
- appeal by state against sentences imposed for murder and rape on grounds of leniency;
- appointment of managers and acting managers directly accountable to municipal managers;
- determination;
- exceptions to particulars of claim;
- extradition;
- interpretation of a lease agreement;
- interpretation of tariff headings for customs duty;
- lawfulness of detention of illegal foreigner intending to apply for asylum;
- refusal of interim interdict;
- refusal of request for reduced assessment in terms of s 93 of the Tax Administration Act 28 of 2011;
- review and setting aside of a taxation award;
- striking of advocate from roll; and
- voting on motion tabled in National Assembly.

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Court withdraws a previous order after application proves the court was misled

By Kgomotso Ramotsho

Rasakanya v Mbuyane and Another (MM) (unreported case no 2702/2021, 8-8-2023) (Mashile J)

The High Court in *Rasakanya* looked at an application that was aimed at rescinding the order of Roelofse AJ dated 21 December 2021. The application was brought in terms of r 42(1) alternatively, r 31(2)(b) of the Uniform Rules of Court and/or the common law. The High Court said that the applicant sought an order for deregistration of the purported marriage between the first respondent and the deceased and cancellation of the marriage certificate by the Department of Home Affairs pending the outcome of the referral of the matter for oral evidence. The High Court pointed out that during the hearing of this matter, it was advised that the applicant was no longer persisting with its relief that the customary marriage existing between the first respondent and the deceased be declared legally invalid.

On 7 December 2021, the court per Mashile J refused to grant an order declaring the first respondent to have been legally married to the deceased by customary law. The court directed the first respondent to present affidavits of emissaries from both families who were present at the time when *lobola* negotiations took place. On 21 December 2021 and ostensibly following compliance with the order of the High Court dated 7 December 2021, Roelofse AJ granted an order declaring the customary marriage to be legal and directed the Department of Home Affairs to register it.

The court said that the factual background was succinctly captured in the heads of arguments of the applicant and to avoid reinventing the wheel and since it is not contested in large part, the court proceeded to borrow extensively therefrom. The court pointed out that on 5 May 2020 when the deceased died, he was survived by six of his sisters, among which is the applicant. In terms of clause 3 of his will executed on 2 February 2017, he nominated his sisters and children as beneficiaries of his late estate. The court added that subsequent to the burial of the deceased, in 2020 the applicant visited the Office of the Master of the High Court in Mahikeng (the Master) to inquire whether one of her family members had, in line with a resolution adopted by family, opened a late estate file.

The court said that the applicant was staggered when informed that the first respondent had, after identifying herself as the wife of the deceased, opened a late estate file. The applicant was further advised that the Master refused to issue letters of executorship to the first respondent in the absence of a marriage certificate at the office of Jague Venter Attorneys for reading of the deceased's last will and testament. The court said that in February 2021, the applicant was informed by her siblings during a conference call that the first respondent sought a court order declaring her to be the lawful wife of the deceased, which order was subsequently granted.

The court added that notwithstanding the first respondent's knowledge that when she launched her application on 22 September 2020, she was mindful of the existence of the last will and testament of the deceased because she was at the reading of the will in July 2020.

The first respondent was aware of the identity of the deceased's six sisters, as well as their respective places of residence before the order was granted on 21 December 2020. The court said that the applicant alleged that the first respondent's full knowledge of the existence of the last will and testament of the deceased aside, she failed to alert the court in her founding affidavit of the existence of beneficiaries of the estate of the deceased.

The court added that in fact, at para 7.9 of her founding affidavit to which she deposed on 11 September 2020, she expressly and unambiguously advised the court to the contrary – the deceased died without leaving a valid will and testament known to her. The court said that as such, the first respondent, concluded, that it was for that reason that until then no executor or executrix had been appointed to administer his estate. The court pointed out that the applicant contended that the court order of 21 December 2020 was erroneously granted insofar as the court would not have granted it had it been appraised of all the facts surrounding the matter. Such information, argued the applicant, pertains to

the first respondent stating under oath that the deceased died intestate when in fact the first respondent knew that the opposite was true. Mashile J said that the court would have insisted in the joinder of the beneficiaries because they had a substantial and direct interest in who would be appointed as executor and executrix. That the failure to join the beneficiaries would have been rendered the application fatal.

The court said that to the extent that the first respondent deliberately misled the court by informing it that the deceased died without leaving a valid will and therefore intestate, the order of the 21 December 2021 was fraudulently obtained. Mashile J added that the first respondent intentionally furnished the court with incorrect information and the information benefited her as she obtained an order declaring the customary marriage between the deceased and her valid. Mashile J pointed out that the court acted thereon to the detriment of the applicant and her siblings who were beneficiaries under the will.

The court had to determine whether or not –

- the court would have granted the order of 2 December 2021, had it been mindful of the existence and provisions of the will of the deceased;
- the order of 21 December 2021 was fraudulently obtained;
- the surviving siblings of the deceased have any substantial interest in the deceased's late estate; and
- the fact that the applicant is not persisting in an order declaring the customary marriage between the first respondent and the deceased illegal renders the relief sought, rescission of judgment, in vain.

In the analysis the court said that three issues arise and those are –

- firstly, whether or not the judgment was granted in the absence of the people who had direct and substantial interest in that matter;
- secondly, in their absence; and
- thirdly, they affected the outcome.

Mashile J added that it is unquestionable that the applicant and her sisters are people who have substantial and direct interest in the matter because they stand to benefit financially under the will of the deceased and as such, they were supposed to have been joined. Mashile J pointed out that assuming that the customary marriage was legally incontestable, advising the court that the deceased had a will and such will mention other heirs or heiress, she would stand to inherit part of the deceased's late estate instead of all of it.

Mashile J said that regarding the absence of the siblings in court at the time when the order was granted, it is clear that the first respondent deliberately omitted to mention the siblings of the deceased so that the court could labour under the impression that she was the only person who stood to inherit under the will. Mashile J added that it is remarkable that at the time the matter came before the court, the respondent already knew that the siblings were heiresses under the will and yet she told the court that she was not aware of a valid will and testament left by the deceased. The court said this is dishonest because she was at the reading of the will in July 2020. The court pointed out that while she refers to her lack of knowledge of the existence of a 'valid will', it is important to point out that she never raised any concerns about invalidity of the will at any juncture.

The court said that it was satisfied that all the requirements of the r 42(1)(a) have been met. That the order was granted in error and in the absence of the applicant and her siblings. Mashile J pointed out that the court would not have granted the order had it been appraised of all the facts that pertained at the time. Mashile J added that the application is in good faith because all that the applicant and her siblings are doing is to vindicate their right to benefit under the will of the deceased. Mashile J said that the applicant would no doubt have a *bona fide* defense, which on the face of it, would have some prospect of success. Mashile J pointed out that the intention of the first respondent was unmistakable. Her objective was to mislead and induce the court to provide her with the relief that she was seeking.

Mashile J added that fraud featured prominently in the matter. Mashile J said that the legal position insofar as a transaction tainted by fraud is concerned is that it 'unravels everything'. The court noted that in this regard, it may be useful to refer to English law and how it has since become infused into the South African legal system. The court said that beginning with the case of *Lazarus Estates Ltd v Beasley* [1956] 1 All ER 341, where Denning LJ had to answer the question whether or not a declaration could be challenged on the ground that it was false and fraudulent.

Mashile J further referred to another English case, *United City Merchants (Investments) Ltd and Others v Royal Bank of Canada and Others* [1982] 2 All ER 720 in which Lord Diplock stated that: '"fraud unravels all". The courts will not allow their process to be used by a dishonest person to carry out a fraud.' Mashile said that the fraud perpetrated by the first respondent cannot be countenanced to benefit her. That her failure to disclose information that could have led to the joinder of the applicant and her siblings is adequate for the application to succeed.

The court added that it was satisfied that the applicant made a case for the rescission of the judgment and order of 21 December 2021. The court in view of the rescission of the 21 December 2021 order, held there was no need for the court to specifically refer the matter for oral evidence but this does not stop the first respondent from approaching the court to declare the customary marriage legally valid. The court made the following order:

- The judgment and order of the court dated 21 December 2021 was set aside and rescinded.
- The first respondent was directed to pay the costs of the applicant.

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By Lusapho Yaso

The Barbie doll has shaped the importance of intellectual property ownership: The famous Barbie doll case

Mattel Inc v Greiner and Hausser GMBH 354 F3d 857 (9th Cir 2003)

There is little doubt that since 1959, when Ruth Handler and her husband Elliot launched the Barbie doll through their company Mattel Inc, they have shaped not only the game in the toy market, but they have mastered the importance of intellectual property ownership. Since the Barbie doll is a brand, it incorporates components of intellectual property, one of which is intellectual property ownership, which stems from an intellectual property infringement dispute between the Barbie doll and Bild Lilli, a well-known German toy doll. This is significant because it demonstrates acquired intellectual property ownership through a settlement agreement between the parties in which Mattel Inc purchased the Bild Lilli doll's copyright and patent rights, making Mattel Inc the exclusive right owners of the revamped and redesigned Bild Lilli doll, which we now call the Barbie doll today. This article demonstrates the shift in intellectual property rights ownership through a dispute over doll similarity and how Mattel Inc has acquired exclusive intellectual property rights of Bild Lilli and making use of its intellectual property rights in this day and age since the settlement agreement between these entities to make a success of their Barbie doll.

Background

Greiner & Hausser GmbH (G&H), a prominent German company, launched a doll named Bild Lilli in 1955, based on a cartoon character that appeared in the German newspaper Bild-Zeitung. However, shortly after its debut, Bild Lilli became embroiled in an intellectual property dispute, with G&H alleging that Ruth Handler, co-founder of Mattel Inc, stole the idea and concept of Bild Lilli and created a comparable doll called Barbie. As you may already know, the Barbie doll stands out as one of the most iconic toys in the history of the toy industry, having debuted in 1959 and generating billions in revenue through different Barbie doll versions by the year 2023.

Concerning intellectual property, the Bild Lilli doll is considered to have used the 'doll hip joint' function, which is the technical functionality used in dolls to make movements on its limbs. In this regard, G&H obtained a United States (US) patent on its Bild Lilli doll hip joint and later sold its exclusive rights in and around the Bild Lilli doll in the US, Canada, Hong Kong, and the United Kingdom to Louis Marx and Co (Marx), a New York-based toy manufacturer, for a period of ten years.

The dispute between these parties appeared to have escalated in 1961, when G&H filed an application in the US against Mattel Inc, alleging that Mattel's Barbie doll was an infringement of the G&H doll due to the use of the 'hip joint' functionality, which appeared to be a technical feature in Mattel's Barbie doll. However, Mattel Inc flatly denied this infringement application, claiming that G&H's patent was invalid and/or that Mattel Inc did not infringe on G&H's patent. G&H and Marx also claimed that the Barbie doll was 'a direct take-off and copy' of G&H's Bild Lilli, and that Mattel Inc 'falsely and misleadingly represented itself as having originated the design' of the doll.

The settlement agreement between the parties

After several years of back and forth in this issue, the parties ultimately decided to settle in 1964, when they entered into multiple agreements about the intellectual property rights of the Barbie and Bild Lilli dolls. Mattel Inc purchased G&H and Marx's Bild Lilli doll copyright, as well as all of its German and US patent rights, for three lump-sum payments of 85 000 Deutschemarks (equivalent to R 1 703 044,48 today). Furthermore, the parties' settlement agreement called for Marx's licence to be handed to Mattel in 1970. Further parts of the settlement agreement between the parties suggested that Mattel would not utilise the name Bild Lilli in any form, and G&H promised not to develop or sell dolls with names similar to Barbie or Bild Lilli.

Intellectual property rights ownership over the barbie doll

Since intellectual property rights can be understood to protect mental creations such as inventions, Mattel's purchase, and ownership of G&H's copyright in and around the Bild Lilli doll clearly demonstrates that Mattel Inc had acquired these rights to produce the Barbie doll and control its mass production. Furthermore, the acquisition of these intellectual property rights implied that Mattel Inc could make and produce derivatives of the Barbie doll, implying that Mattel Inc could produce similar doll characters in different shapes, sizes, colours, and outfits, as well as different versions of songs and any Barbie movies (such as *Barbie* (2023)). This also meant that Mattel Inc could distribute the Barbie doll in any way they saw fit for their business.

Following the parties' settlement agreement in the 1970s, it is clear that Mattel Inc has leveraged the acquired intellectual property rights ownership to its advantage, as seen by the renowned Barbie movies, the colour pink, Barbie doll television show and cartoons. The Barbie doll has made a fortune from the acquisition of the Bild Lilli intellectual property rights throughout the years. This demonstrates that had Mattel Inc not obtained these intellectual property rights, the Barbie doll may have been said to continue infringing on Bild Lilli's intellectual property.

Conclusion

In this case, we can learn that proper acquisition of intellectual property rights license agreement, which stipulates the terms of the use of the license grants the owner of the rights the right to use these acquired rights to reproduce, control, and make derivatives of the work in any manner they deem fit, as is the case with the Barbie doll. Furthermore, because ownership is so important in the world of technology, Mattel Inc is free to commercialise its Barbie intellectual property rights with any new technology. And lastly, since Mattel Inc has a licence over the Barbie doll, Mattel Inc can actively monitor any use of its copyright license, as well as monitor and prevent other companies and third parties from infringing on its copyright, trademarks, and any other intellectual property rights it has over the Barbie doll.

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By Phumzile Penelope Ziqubu

A commissioner has power to dismiss a matter when a referring party fails to appear

Mohube v Commission for Conciliation, Mediation and Arbitration and Others (LC) (unreported case no JA18/2022, 18-5-2023) (Coppin JA)

Mr Mohube (the employee) worked as a company secretary of the Passenger Rail Agency of South Africa (the employer). The employee was allegedly involved in financial/tender irregularities and fraud. He was subsequently charged, faced a disciplinary hearing, and found guilty. On 26 April 2019, he was sanctioned to a dismissal. Aggrieved by the outcome he referred an unfair dismissal dispute to the Commission of Conciliation Mediation and Arbitration (CCMA).

CCMA

On the 12 June 2019, the matter was set down for a conciliation/arbitration (con-arb). Present was the commissioner together with the employee. The employer representative was absent. The commissioner issued a non-resolution certificate and directed the matter to be set down for arbitration.

At the arbitration sitting held by Commissioner Botha, the employee did not attend. Commissioner Botha issued a dismissal ruling in terms of s 138(5)(*a*) of the Labour Relations Act 66 of 1995 (LRA).

The employee applied for recission under s 144 of the LRA claiming he did not receive the notice of set down of which the employer opposed. Commissioner Byrne refused recission and said Commissioner Botha's dismissal ruling stood. Unhappy, the employee launched a review application in the Labour Court (LC).

Labour Court

The employee's application sought to review and set aside Commissioner Bryne's recission ruling. In the application he also sought a review of Commissioner Botha's dismissal ruling. This court found that strange as that was the precise ruling he wanted to rescind.

This court dismissed the employee's review application of Commissioner Byrne's recission ruling.

Labour Appeal Court

This court set out clearly that commissioners have discretion to dismiss a matter in terms of s 138(5)(*a*) of the LRA due to non-attendance of the referring party. However, a commissioner must apply their mind and issue a dismissal ruling as a last resort.

This court held that a dismissal ruling will not be regarded as a violation of the LRA or the Constitution as the employee would have been afforded an opportunity to appear but failed to do so. In the same token the employee will still have a remedy available namely, to apply for recission in terms of s 144 of the LRA.

Directive by the CCMA

This case introduced changes in the way s 138(5)(*a*) of the LRA and r 30 of the Rules for the Conduct of Proceedings before the Commission for Conciliation, Mediation and Arbitration should be applied. This led to the Director of the CCMA repealing the Directive on the Determination of Dismissals under s 138(5)(*a*) of the LRA, 2021 and issuing a new directive with immediate effect. This directive (Directive on s 138(5)(*a*) of the LRA 66 of 1995, read with CCMA rule 30 on the power of a commissioner to dismiss a matter for non-attendance at arbitration) encompasses guidelines and/or factors that a commissioner may take into account when using their discretion to dismiss a matter.

The directive is set out as follows:

'The CCMA Directive on the Determination of Dismissals under section 138(5)(*a*) of the LRA of 5 October 2021 is repealed with immediate [effect].

That commissioners have the power to dismiss matters in terms of section 138(5)(*a*) of the LRA. However, as per the LAC, commissioners are directed to utilise this power as a last [resort].

In cases where a dismissal has been ruled, parties have a right to apply to have the ruling rescinded in terms of section 144 of the LRA read with CCMA Rule.

A ruling issued in terms of rule 30 is a ruling contemplated in terms of section 144 of the [LRA].

The CCMA will issue guidelines within seven (7) working days of the date of this Directive on what factors may be considered when exercising the power to dismiss and on how to deal with matters that are pending in terms of the CCMA Directive on the Determination of Dismissals under section 138(5)(*a*) of the LRA of 5 October 2021 and Rules 30(1)(a) and (b)' (CCMA 'Directive on section 138(5)(*a*) of the Labour Relations Act 66 of 1995, read with CCMA Rule 30 on the power of a commissioner to dismiss a matter for non-attendance at arbitration' (www.ccma.org.za, accessed 2-9-2023)).

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Ubuntu and commercial contracts

Ndebele and Another v Industrial Development Corporation of South Africa and Others (GJ) (unreported case no 21687/2021, 25-7-2023) (Strydom J)

By Mongezi Mpahlwa and Kgabi Moeng

It is trite that the old Latin phrase – *pacta sunt servanda*, which means 'agreements must be kept' – was and still is the cornerstone of the law of contract. In the case of *Ndebele*, which was handed down on 25 July 2023, the Johannesburg Local Division of the High Court had to determine whether the provisions of a call option in terms of a shareholders' agreement were contrary to public policy and *ubuntu*, alternatively, impossible to perform and, therefore, unenforceable. In this article we deal with how the High Court specifically dealt with the issue pertaining to *ubuntu*.

Background

The Industrial Development Corporation of South Africa (IDC) loaned and advanced the sum of R 57 million to Odiweb (Pty) Ltd (Odiweb) for the acquisition of immovable properties to be used in the establishment of a solar power electricity generating plant in the Northern Cape. Odiweb was established as a special purpose vehicle for purposes of the project whose issued share capital was 100% held by Emvelo Holdings (Pty) Ltd (Emvelo). Mr Ndebele held 100% of Emvelo's issued share capital, 49,17% of which was sold to the IDC for a nominal amount of R 59. As security for the shareholder loan, Emvelo pledged 50,83% of its shares in Odiweb to the IDC in terms of a cession and pledge agreement.

In broad context, the contractual arrangement between the parties and Odiweb provided that the IDC shareholder's loan to Odiweb had to be repaid by 1 April 2015, otherwise, the IDC could exercise the IDC call option for a call option price of R 51. Upon the exercise of the IDC call option, the IDC would become 100% shareholder of Odiweb.

On 2 April 2015, the IDC exercised its first call option to acquire Emvelo's 50,83% shares in Odiweb the latter having failed to repay the shareholder loan. However, following the initiation of arbitration proceedings between the IDC and Emvelo, the first exercise of the IDC call option was subsequently abandoned by the IDC. This was done in order to give Odiweb more time to pay back the shareholder loan.

On 6 March 2017, the IDC exercised its second call option, with the shareholder loan remaining unpaid. Ndebele and Emvelo challenged the validity and legality of the IDC's exercise of the second call option in which they sought various declaratory orders, including a declaration that the terms of the IDC call option and the IDC call option price were contrary to public policy and against *ubuntu*; alternatively, impossible to perform and, therefore, unenforceable.

Analysis on the concept of *ubuntu*

On the concept of *ubuntu*, the court relied on what was explained in the judgment handed down by the Constitutional Court (CC) in the case of *Beadica 231 CC and Others v Trustees, Oregon Trust and Others* 2020 (5) SA 247 (CC) in which it was said:

'[*Ubuntu*] emphasises the communal nature of society and "carries in it the ideas of humaneness, social justice and fairness" and envelopes "the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity."'

The CC went on to hold that: '(i) the law of contract dictates that agreements concluded by parties should be upheld and that this is necessary in order to ensure that the law of contract is predictable, so that parties may regulate their conduct accordingly; (ii) it is only where a contract is so unreasonable and so unfair so as to be against public policy that a contract can be overturned; and (iii) the subjective view of judges on the unfairness or unreasonableness of a contractual term is irrelevant; it is only whether a contract (or a term of a contract) goes against public policy (the general norms of society) that a court should refuse to enforce it.'

In *casu*, it was stated that where the court is dealing with an individual businessman, such as Mr Ndebele seeking to make money for himself or his entity, does not require that the concept of *ubuntu* should come to their assistance.

Furthermore, the court emphasised the implementation of commercial contractual terms had nothing to do with the communal nature of society, which carries in it the ideas of humanness, social justice, and fairness. It stated that group solidarity does not enter the fray and as a result, compassion cannot be called on where a party's sole aim is to make money. In order to achieve this goal, the court stated that one must freely and voluntarily enter into commercial contracts.

By not accommodating Mr Ndebele and Emvelo, either by allowing Emvelo to remain a shareholder in Odiweb or paying fair value for its shares in Odiweb, the court held that the concept of respect, human dignity, conformity to norms, and collective unity were not compromised. The court found that the use of *ubuntu* as a line of defence to avoid the consequences of the shareholder's agreement should fail. The application was dismissed with costs, including the costs of two counsel.

Mongezi Mpahlwa *BCom (Law) LLB (UWC)* is a legal practitioner and Kgabi Moeng *BA LLB (Wits)* is a candidate legal practitioner. Both legal practitioners work at Cliffe Dekker Hofmeyr in Johannesburg. Mr Mpahlwa was involved in the above matter. ❑

The application of s 11 of the Mineral and Petroleum Resources Development Act 28 of 2002: Is the Minister's prior consent needed?

By
Meshack
Netshithuthuni

Vantage Goldfields SA (Pty) Ltd and Another v Arqomanzi (Pty) Ltd and Others (SCA) (unreported case no 733/2022, 27-6-2023) (Ponnan and Matojane JJA (Mocumie and Mbatha JJA and Mali AJA concurring))

The recent decision by the Supreme Court of Appeal (SCA) in *Vantage Goldfields SA* has put an end to the argument regarding the application of s 11 of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA).

Section 11(1) of the MPRDA provides that:

'A prospecting right or mining right or an interest in any such right, or a controlling interest in a company or close corporation, may not be ceded, transferred, let, sublet, assigned, alienated or otherwise disposed of without the written consent of the Minister, except in the case of change of controlling interest in listed companies.'

Facts

The matter involved the issue of shares in the holding company, Vantage to Macquarie. Barbrook Mines (Pty) Ltd (Barbrook) and Makonjwaan Imperial Mining Company (Pty) Ltd (MIMCO) were the holders of new order mining rights. 'The shares in Barbrook and MIMCO were ultimately 100% held by Vantage' (Jones Antunes and Mmatshepo Papo 'Does section 11(1) of the MPRDA apply to an indirect change in control?' (www.werksmans.com, accessed 2-9-2023)). 'Vantage initially had 34 shareholders until Macquarie … acquired 98% of the shares in Vantage' (Antunes and Papo (*op cit*)).

'The court *a quo* held that a controlling interest is not limited to a direct controlling interest. It includes an indirect controlling interest' (Giada Masina and Francois Sieberhagen 'Mining rights and indirect change of control – judge settles old debate' (www.africanmining.co.za, accessed 2-9-2023)). The Minister of Mineral Resources and Energy argued that s 11 did not restrict a direct controlling interest in a company that holds a right. The court held that s 11 is a provision, which seeks to protect and ensure that the objects of the MPRDA are achieved.

The High Court judgment was taken on appeal. The SCA had to consider whether s 11 of the MPRDA applies in instances where there is a change in the controlling interest of the ultimate mining right holder. Put differently, whether the change in control of Vantage triggered the need for ministerial consent and/or approval in terms of s 11(1) of the MPRDA in relation to the new order mining rights held by Barbrook and MIMCO.

In answering the aforesaid question, the SCA had regard to the *Mogale Alloys (Pty) Ltd v Nuco Chrome Bophuthatswana (Pty) Ltd and Others* 2011 (6) SA 96 (GSJ) judgment. 'The defendant (who initially held 52% of the shares in a company) sold 33% of his shares to the plaintiff. The other three shareholders held 10%, 12% and 26% shares respectively' (Samantha Joshua 'Losing control' (www.hoganlovells.com, accessed 2-9-2023)). 'The plaintiff contested that ministerial consent was not required in the circumstances because a "controlling interest" was not transferred from the defendant to the plaintiff' (Joshua (*op cit*)). 'The court was asked to determine whether ministerial consent was required in terms of section 11 in order for the sale of the 33% shareholding to the plaintiff' (Joshua (*op cit*)). The facts of *Mogale* overlaps with the facts in Vantage. In *Mogale*, the court was faced 'with the situation where there had been a change in control of the direct holder of the mining right' while in Vantage the court was faced 'with the situation where the controlling interest in the mining right holder had changed ie, an indirect change of control' (Antunes and Papo (*op cit*)). The court adopted a wide and purposive interpretation of s 11(1) and stated, 'that the reference to change of control … should be given a very broad interpretation' (Masina and Sieberhagen (*op cit*)). It held 'that the minister's consent is required before any transaction that results in a loss of control, even if another party is not gaining control' (Masina and Sieberhagen (*op cit*)).

'In interpreting section 11(1) of the MPRDA the SCA had regard to the objects of the MPRDA, section 2(*a*) and (*b*)' (Antunes and Papo (*op cit*)). The SCA held that it would be absurd to confine the objects of the MPRDA when interpreting 's 11(1) of the MPRDA to direct changes in control of the mining right holder because such an interpretation would undermine … the … objects of the MPRDA' (Antunes and Papo (*op cit*)). 'The court therefore held that section 11(1) of the MPRDA must be interpreted to include both direct and indirect changes in control' and can be triggered by issuing of new shares in a company (Antunes and Papo (*op cit*)). The SCA confirmed the court *a quo*'s finding by stating that the Minister's prior consent is required in indirect change of control of the holders of mining rights. Thus, 'the shareholders, by consent, alienated or disposed of their controlling interest in Vantage, and indirectly in the holders of the mining rights' (Masina and Sieberhagen (*op cit*)).

Conclusion

The SCA held 'that ministerial consent under section 11(1) of the [MPRDA] is needed for both direct and indirect changes of control of a company that holds mining rights' (Masina and Sieberhagen (*op cit*)). Therefore, in terms of s 11 of the MPRDA, 'a prospecting or mining right cannot be transferred from one company to another without the Minister of Mineral Resources and Energy's consent' (Masina and Sieberhagen (*op cit*)). 'The SCA thus found that the change in control in Vantage triggered section 11(1) of the MPRDA in respect of the new order mining rights held by Barbrook and MIMCO' (Antunes and Papo (*op cit*)). The court found that 'it would be inconsistent with the MPRDA and its objects to exclude a change of an indirect controlling interest, especially considering the state's responsibility to act as custodian of South Africa's mineral resources and the objects relating to equitable access to the nation's mineral resources and transformation' (Masina and Sieberhagen (*op cit*)).

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By Shanay Sewbalas and Keagan Smith

New legislation

Legislation published from 28 July –25 August 2023

Acts

Customs and Excise Act 91 of 1964
Amendment of part 1 of sch 2. GN R3747 *GG*49072/3-8-2023.
Amendment of part 1 of sch 1. GN R3749 *GG*49068/4-8-2023.
Financial Intelligence Centre Amendment Act 1 of 2017
Commencement of certain provisions of the Act. GN3803 *GG*49140/18-8-2023.
Liquor Products Amendment Act 8 of 2021
Date of commencement: 1 August 2023. Proc 132 *GG*49064/1-8-2023.

Bills and White Papers

African Renaissance and International Cooperation Fund Amendment Bill, 2022
Draft publication of the Amendment Bill for public comment. GN3819 *GG*49189/25-8-2023.
Companies Act 71 of 2008
Notice to introduce the Companies First Amendment Bill, 2023 and the Companies Second Amendment Bill, 2023 to Parliament. GenN1965 *GG*49116/14-8-2023.
National Prosecuting Authority Act 32 of 1998
Publication of explanatory summary of the National Prosecuting Authority Amendment Bill, 2023. GenN1943 *GG*49079/4-8-2023.
National Prosecuting Authority Amendment Bill, 2023
Publication of explanatory summary of the National Prosecuting Authority Amendment Bill, 2023. GenN1989 *GG*49189/25-8-2023.
Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002
Publication of explanatory summary of the regulation of Interception of Communications and Provision of Communication-Related Information Amendment Bill, 2023. GenN1942 *GG*49079/4-8-2023.
Regulation of Interception of Communications and Provision of Communication-Related Information Amendment Bill, 2023
Publication of an explanatory summary of the Regulation of Interception of Communications and Provision of Communication-Related Information Amendment Bill, 2023. GenN1990 *GG*49189/25-8-2023.

Government, General and Board Notices

Agrément South Africa Act 11 of 2015
Call for applications for members to serve on the Board of Agrément South Africa (ASA). GN3806 *GG*49141/18-8-2023.
Audit Profession Act 26 of 2005
Registration of registered auditors and registered candidate auditors. BN 467 *GG*49079/4-8-2023.
BRICS summit
The 2023 BRICS summit: Announcement of the dedicated courts for the hearing of alleged offences associated with the summit. GN3808 *GG*49186/22-8-2023.
Competition Act 89 of 1998
Notice of designation in terms of s 10(3)(*b*)(iv) of the Act. GenN1179 *GG*47132/29-7-2022.
Notice of designation in terms of s 10(3)(*b*)(iv) of the Act. GenN1985 *GG*49181/21-8-2023.
Notice in terms of s 10(7) of the Act: Marang Africa Healthcare (Pty) Ltd granted conditional exemption: Previous conditional exemption 1 June 2021 – 1 December 2022. GN3821 *GG*49189/25-8-2023.
Electoral Act 73 of 1998
Publication of reviewed list of candidates. GenN1968 *GG*49122/16-8-2023.
Electronic Communications Act 36 of 2005
Applications for the transfer of ownership of the Individual Electronic Communications Network Service (I-ECNS) and Individual Electronic Communications Service (I-ECS) Licences from Q-Kon South Africa (Pty) Ltd to Q-Kon Service Provider (Pty) Ltd. GenN1980 *GG*49139/18-8-2023.
Final Radio Frequency Spectrum Assignment Plan for the frequency band 138 MHz to 144 MHz and 156.8375 to 174MHz for public consultation. GN3761 and GN3762 *GG*49079/4-8-2023.
Final Radio Frequency Spectrum Assignment Plan for the frequency band 335.4 MHz to 380 MHz. GN3763 *GG*49079/4-8-2023.
Final Radio Frequency Spectrum Assignment Plan for the frequency band 380 MHz to 399.9 MHz, 406.1 MHz to 410 MHz, 410 MHz to 430 MHz, 440 MHz to 450 MHz, and 1518 MHz to 1525 MHz. GN3764, GN3765, GN3766, GN3767 and GN3768 *GG*49079/4-8-2023.
Employment Services Act 4 of 2014
Notice of the Productivity SA: Annual General Meeting. GenN1988 *GG*49189/25-8-2023.
Higher Education Act 101 of 1997
Publication of cancellation of the registration of Stellenbosch Graduate Institute (Pty) Ltd as a private higher education institution. GN3818 *GG*49189/25-8-2023.
Independent Communications Authority of South Africa Act 13 of 2000
General notice to non-responsive electronic communications service/electronic communications network service licensees to submit their outstanding compliance documents and information. GenN1938 *GG*49076/3-8-2023.
International Trade Administration Commission of South Africa
Investigation into the alleged dumping of frozen bone-in portions of fowls of the species *gallus domesticus* originating in or imported from Brazil, Denmark, Ireland, Poland and Spain: Imposition of the final anti-dumping duties. GenN1925 *GG*49065/2-8-2023.
Notice of initiation of an investigation into the alleged dumping of active yeasts (Baker's Compressed Yeast) originating in or imported from the Zimbabwe. GenN1983 *GG*49140/18-8-2023.
Correction Notice: List 04/2023. GenN1945 *GG*49079/4-8-2023.
Labour Relations Act 66 of 1996
List of bargaining councils that have been accredited by the Commission for Conciliation, Mediation and Arbitration in terms of the provisions of the Act. GenN1987 *GG*49189/25-8-2023.
Liquor Products Act 60 of 1989
Correction Notice: The 'repeal notice' published in GN3542 *GG*48790/15-6-2023 is corrected and replaced. GN R3737 *GG*49053/31-7-2023.
Local Government: Municipal Electoral Act 27 of 2000
Municipal By-elections – 23 August 2023: Official list of voting stations. GenN1950 *GG*49080/4-8-2023.
Municipal By-elections – 13 September 2023: Official list of voting stations: Eastern Cape – EC121 – Mbhashe – Wards 21201001 and 21201002. GenN1994 *GG*49194/25-8-2023.
Local Government: Municipal Property Rates Act 6 of 2004
Appointment of Members of Valuation

Appeal Board for City of Johannesburg Metropolitan Municipality, Mogale City, Midvaal and Lesedi Local Municipalities. GenN1966 *GG*49120/15-8-2023.

Magistrates' Courts Act 32 of 1944
Annexure of certain districts to other districts for the duration of the BRICS summit. GN3809 *GG*49186/22-8-2023.

Medicines and Related Substances Act 101 of 1965
Exclusion of Schedule Zero medicines from the operations of ss 22G and 18A of the Act. GN3800 *GG*49140/18-8-2023.

South African Language Practitioners' Council Act 8 of 2014
Notice of appointed Board Members of the South African Language Practitioners' Council. GN3804 *GG*49140/18-8-2023.

South African Weather Service Act 8 of 2001
Transfer of aviation meteorological oversight function under the Act to the Minister responsible for transport. Proc 135 *GG*49185/22-8-2023.

Tourism Act 3 of 2014
Appointment of Uveshnee Pillay to serve as the departmental representative to the South African Tourism Interim Board. GenN1986 *GG*49183/22-8-2023.

Use of Official Languages Act 12 of 2012
Minister's notice to exempt the National Gambling Board from establishing a language unit. GN3771 *GG*49079/4-8-2023.

Legislation for comment

Competition Act 89 of 1998
Notice in terms of s 10(6) of the Act: The South African Guild of Actors and the Personal Managers Association. GN3820 *GG*49189/25-8-2023.

Constitution
Invitation for public comments: The Draft White Paper on Audio and Audiovisual Media Services and Online Content Safety: A New Vision for South Africa (July 2023). GenN1934 GG49052/31-7-2023.

Electronic Communications Act 36 of 2005
Applications for the transfer of ownership of the Individual Electronic Communications Service (I-ECS) and Individual Electronic Communications Network Service (I-ECNS) Licences from Sevenstone Investments 108 (PTY) Ltd t/a Ntelecom to K2022433426 (South Africa) (Pty) Ltd. GenN1967 *GG*49121/15-8-2023.

Application for the renewal of an Individual Commercial Television Broadcasting Service Licence and Radio Frequency Spectrum Licence by eTV (Pty) Ltd. GenN1974 *GG*49139/18-8-2023.

Application submitted by the South African Broadcasting Corporation (SABC) in respect of the renewal of its Individual Television Broadcasting Service and Radio Frequency Spectrum Licences for SABC 1, SABC 2 and SABC 3. GenN1975 *GG*49139/18-8-2023.

Applications for the transfer of control of the I-ECS and I-ECNS Licences from Zazu Internet (Pty) Ltd (the applicant) to the proposed new Shareholders (the transferee). GenN1976 *GG*49139/18-8-2023.

Application for the renewal of an Individual Subscription Broadcasting Service Licence and a Radio Frequency Spectrum Licence by Electronic Media Network (Pty) Ltd. GenN1977 *GG*49139/18-8-2023.

Application for amendment of Individual Commercial Television Broadcasting Service Licence by eTV (Pty) Ltd. GenN1978 *GG*49139/18-8-2023.

Applications for the transfer of ownership of the I-ECS and I-ECNS Licences from Myvoip Communications (Pty) Ltd (the applicant) to Fibre FI (Pty) Ltd (the transferee). GenN1979 *GG*49139/18-8-2023.

Electronic Communications Amendment Bill, 2022
Extension of due date for written comments on proposed Bill. GN3748 *GG*49073/3-8-2023.

Films and Publications Act 65 of 1996
Draft Regulatory Instruments of the Film and Publication Board. GN3798 *GG*49140/18-8-2023.

Health Professions Act 56 of 1974
Regulations relating to the evaluation and accreditation of training in educational and training institutions. GN3799 *GG*49140/18-8-2023.

Intergovernmental Relations Framework Act 13 of 2005
Regulations framing the institutionalisation of the District Development Model in terms of s 47(1)(*b*) of the Act. GenN1941 *GG*49079/4-8-2023.

International Trade Administration Act 71 of 2002
Extension of public comment period on the 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. GN3789 *GG*49115/14-8-2023.

Medicines and Related Substances Act 101 of 1965
General regulations made in terms of the Medicines and Related Substances Act: Amendment. GN3817 *GG*49189/25-8-2023.

Regulations regarding fees payable in terms of the provisions of the Act. GN3759 *GG*49079/4-8-2023.

Merchant Shipping Act 57 of 1951
Draft Merchant Shipping (Crew Accommodation) Regulations, 2023. GenN1992 *GG*49189/25-8-2023.

National Environmental Management Act 107 of 1998
Consultation on the intention to amend the Environmental Impact Assessment Regulations, listing notice 1, listing notice 2 and listing notice 3 of the Environmental Impact Assessment Regulations, 2014 for activities identified in terms of ss 24(2) and 24D of the Act. GN3773 *GG*49081/4-8-2023.

Draft National Appeal Regulations, 2023. GN3815 *GG*49189/25-8-2023.

National Minimum Wage Act 9 of 2018
Investigation into the National Minimum Wage: Invitation for written representations. GN R3746 *GG*49062/1-8-2023.

National Nuclear Regulator Act 47 of 1999
Notice in terms of s 28 of the Act, on the proposed fees increase for the National Nuclear Regulator. GenN1982 *GG*49140/18-8-2023.

National Water Resource Infrastructure Agency Bill, 2023
Notification to introduce the Bill, into Parliament and publication of explanatory summary of the Bill. GN3746 *GG*49063/1-8-2023.

Pharmacy Act 53 of 1974
Regulations relating to the election of members of the South African Pharmacy Council: Amendment. GN3758 *GG*49079/4-8-2023.

Plant Breeders' Rights Act 15 of 1976
Correction of plant breeders' rights application fee. GN3810 *GG*49189/25-8-2023.

Various sections. GN3751 *GG*49079/4-8-2023.

Skills Development Act 97 of 1998
Call for nominations of suitable candidates to serve as the Chairperson of the National Skills Authority. GN3802 *GG*49140/18-8-2023.

Rules, regulations, fees and amounts

Fertilizer, Farm Feeds, Agricultural Remedies and Stock Remedies Act 36 of 1947
Regulations relating to Agricultural Remedy. GN3812 *GG*49189/25-8-2023.

Financial and Fiscal Commission Act 99 of 1997
Determination of the salaries and allowances of the members of the Financial and Fiscal Commission: 2021/2022. GenN1969 *GG*49123/16-8-2023.

Financial Markets Act 19 of 2012
Approved Amendments to the Johannesburg Stock Exchange (JSE) Equities Rules, JSE Derivatives Rules and JSE Interest Rate and Currency Derivatives Rules: Recognition of the JSE Ombud Scheme. BN 468 *GG*49079/4-8-2023.

Health Professions Act 56 of 1974
Regulations defining the scope of the professions of nutritionists. GN3760 *GG*49079/4-8-2023.

International Trade Administration Act 71 of 2002
Export control: Extension of the price preference system on the exportation of ferrous and non-ferrous waste and scrap: Price Preference System. GN1935 *GG*49056/31-7-2023.

Extension of the Policy Directive on the exportation of ferrous and non-ferrous waste and scrap metal. GN3738 *GG*49057/31-7-2023.

Legal Practice Act 28 of 2014
Amendment of regulations made under s 94(1). GN R3882 *GG*49193/25-8-2023.

Local Government: Municipal Property Rates Act 6 of 2004
Makana Local Municipality: Resolution on levying property rates in terms of s 14 of the Act. GN R3790 *GG*49136/18-8-2023.
Magistrates Act 90 of 1993
Section 12(5)(*a*) read with s 12(5)(b) of the Act: Determination of additional remuneration payable to permanent magistrates acting in any other judicial office in terms of the Act. GN3775 *GG*49082/4-8-2023.
Magistrates' Court Act 32 of 1944
Section 9(7)(*a*) and (*d*) of the Act: Determination of benefits of magistrates who have to dispose of cases after vacating the office of magistrate. GN3774 *GG*49082/4-8-2023.
Marketing of Agricultural Products Act 47 of 1996
Establishment of statutory measure and determination of guideline prices: Levies relating to lupins. GN R3744 *GG*49068/4-8-2023.
Continuation of statutory measure and determination of guideline prices: Levies relating to wheat, barley and oats. GN R3745 *GG*49068/4-8-2023.
Medicines and Related Substances Act 101 of 1965
Regulations relating to a transparent pricing system for medicines and scheduled substances: Dispensing fee for pharmacists. GN3816 *GG*49189/25-8-2023.
Second single exit price increase of medicines and schedule substances for the year 2023. GN3801 *GG*49140/18-8-2023.
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. Correction Notice: GN3739 and GN3740 *GG*49059/28-7-2023 replaces GN3733 and GN3734 *GG*49046/28-7-2023. GN3739 *GG*49059/28-7-2023.
Guideline for a Mandatory Code of Practice for the Selection and Provision of Personal Protective Equipment for Women in the South African Mining Industry. Correction Notice: GN3739 and GN3740 *GG*49059/28-7-2023 replaces GN3733 and GN3734 *GG*49046/28-7-2023. GN3740 *GG*49059/28-7-2023.
National Energy Act 34 of 2008
Amendment Regulations for the Mandatory Display and Submission of Energy Performance Certificates for Buildings, 2008. GenN1937 *GG*49075/3-8-2023.
Petroleum Products Act 120 of 1977
Amendment of the regulations in respect of petroleum products. GN R3742 *GG*49060/1-8-2023.
Maximum retail price for liquefied petroleum gas. GN R3743 *GG*49060/1-8-2023.
Regulations in respect of the single maximum national retail price for illuminating paraffin. GN R3741 *GG*49060/1-8-2023.
Political Party Funding Act 6 of 2018
Regulations on Political Party Funding, 2018: Multi-Party Democracy Fund. GenN1936 *GG*49074/3-8-2023.
Remuneration of Public Office Bearers Act 20 of 1998
Determination of salaries and allowances of Traditional Leaders, Members of National House and Provincial Houses of Traditional Leaders: 2022/2023. Proc 134 *GG*49124/16-8-2023.
Determination of upper limits of salaries, allowances and benefits of different members of Municipal Councils. GN3807 *GG*49142/18-8-2023.
Statistics South Africa
Statistics South Africa: Consumer Price Index: June 2023. GenN1944 *GG*49079/4-8-2023.

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

Employment law update

By Monique Jefferson

Constructive dismissal

In *Mkhutshulwa v Department of Health, Eastern Cape and Others* [2023] 8 BLLR 809 (LC), a senior employee who was employed as an assistant director resigned and stated in her resignation letter that the reason for her resignation was that her employer had rendered her continued employment intolerable. She then referred a constructive dismissal dispute alleging that when she had to report to a new person in an acting role, she was marginalised and was not given any work by that person over a number of months. She alleged that this affected her psychologically and resulted in her being admitted to a psychiatric facility. The matter was arbitrated, and the arbitrator dismissed the claim.

The employee then took that arbitrator's decision on review on the basis that the arbitrator committed gross irregularities and reached an unreasonable decision. The employee alleged that she had led evidence to prove her case, but the arbitrator had misconstrued and disregarded the evidence.

The employer conceded before the Labour Court (LC) that the arbitrator's decision did not pass muster. It was accordingly held that the decision should be reviewed, and the LC had to determine the appropriate relief after considering the papers. The employee sought an order that the arbitration award be substituted with an order for compensation. On the other hand, the employer argued that the matter should instead be remitted for an arbitration *de novo* before a different arbitrator.

The LC held the view that justice would be served by resolving the dispute before the LC and not remitting it for arbitration to be resolved at a later stage. The LC referred to the test for constructive dismissal as per the case law. In this regard, the test is an objective one and the conduct of the employer toward the employee and the cumulative impact must be such that objectively the employee could not reasonably be expected to cope in that situation and resignation must have been a reasonable step in the circumstances. The complaints, therefore, need to be considered as a whole. In this case the employee was the only one who led evidence at the arbitration as the employer had elected not to call witnesses notwithstanding its right to do so. Therefore, the employee's evidence was unchallenged. It was found by the LC that based on the evidence led, the employee's employment was rendered intolerable as the evidence demonstrated that the employee did not receive work for months. There was also evidence that she had escalated this to her employer and there was initially a solution of reassigning her to the Extended Public Works Programme. After this came to an end there were no further solutions and again, she found herself in a situation where she was not given work. She made further complaints and raised grievances about her working conditions, but this was not resolved. The employee also did not sit idle during this period but tried to improve herself by furthering her studies.

It was held that the employer was under an obligation to ensure that the employee received work so that she could further develop her expertise, and simply providing her with a monthly salary was accordingly not sufficient. It was also not a defence that she had been afforded an opportunity to study because she had no work. It was found that it would be just and equitable in the circumstances to order compensation equal to ten months' remuneration. There was no order as to costs.

Application for payment of severance pay

In *National Union of Metalworkers of South Africa and Others v Scaw South Africa (Pty) Ltd* [2023] 8 BLLR 852 (GJ), it was held that the High Court does not have jurisdiction to determine disputes about entitlement to severance pay and such disputes must be determined by statutory arbitration even if the amount claimed exceeds the minimum prescribed by the Basic Conditions of Employment Act 75 of 1997 (BCEA) and even if the claim is based on a breach of contract regarding severance pay.

In this case the employer informed a number of employees who were retrenched that they would not be paid severance pay because they had unreasonably refused offers of alternative employment. The employees' employment contracts referred to severance pay of two weeks' salary per year of service and an *ex gratia* amount. National Union of Metalworkers of South Africa (NUMSA) on behalf of its members accordingly argued that the employer breached the employment contracts by refusing to pay the employees severance pay and sought an order directing the employer to pay severance pay in accordance with the contracts.

The employer argued that the High Court did not have jurisdiction to determine the dispute because the dispute resolution procedure in the BCEA was required to be followed. NUMSA on behalf of the employees argued that the High Court did have jurisdiction as the pleadings were based on a breach of contract and not an entitlement under the BCEA.

The employer argued that the employees were not entitled to severance pay on the basis of s 41(4) of the BCEA as they had unreasonably refused an offer of alternative employment. The High Court found that when a contract provides for more favourable severance pay this is still subject to s 41(4) of the BCEA and the employer accordingly could still rely on the provisions in the BCEA, which permitted an employer not to pay severance pay in certain circumstances.

The High Court held that it lacked jurisdiction to determine whether severance pay could be forfeited as per the BCEA as s 41(6) confers exclusive jurisdiction on councils or the Commission for Conciliation, Mediation and Arbitration to deal with severance pay disputes regardless of whether or not the severance pay dispute is based on the statutory minimum severance pay. It was found that it would defeat the purposes of the BCEA if the High Court were to take over the functions of a specialised tribunal that in terms of the law has been tasked to determine such disputes. The application was accordingly dismissed with costs.

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

By Kathleen Kriel

Recent articles and research

Abbreviation	Title	Publisher	Volume/issue
Advocate	Advocate	General Council of the Bar	(2023) 36.2
AHRLJ	African Human Rights Law Journal	Centre for Human Rights, Department of Law, University of Pretoria	(2023) 23.1
BTCLQ	Business Tax and Company Law Quarterly	Juta	(2023) 14.2
DJ	De Jure	University of Pretoria	(2023) 56

African human rights system

Coleman, TE; Ako, EY and Kyerematenng, JG 'A human rights critique of Ghana's Anti-LGBTIQ+ Bill of 2021' (2023) 23.1 *AHRLJ* 96.

Zouapet, AK 'From "puzzling" to comprehensible and efficient: Reform proposals to the African human rights framework through a "system" lens' (2023) 23.1 *AHRLJ* 1.

AI in the financial sector

Kgoale, TJ and Odeku, K 'An analysis of legal accountability for artificial intelligence systems in the South African financial sector' (2023) 56 *DJ* 191.

Centenary of women in law

Cele, N 'The New African Woman' (2023) 36.2 *Advocate* 48.

Rabkin, F 'Cissie Gool, the advocate' (2023) 36.2 *Advocate* 39.

Rabkin, F and Meiring, J 'A battle finally won: How women became lawyers in South Africa' (2023) 36.2 *Advocate* 26.

Tabata, C and Nyembe, N 'Thina Abalandelayo: We, the generations who followed' (2023) 36.2 *Advocate* 44.

Zikalala, L and Ntloko, YS 'Kgomotso Moroka SC: Representivity, longevity and the burden of being first' (2023) 36.2 *Advocate* 41.

Ceremonial court sittings – centenary of women in law

Dumbuza, N 'In celebration of 100 years of women in the legal profession in South Africa' (2023) 36.2 *Advocate* 50.

Engelbrecht SC, MJ '100 years of women in law: Ceremonial court sittings' (2023) 36.2 *Advocate* 53.

Manganye, S 'Reflecting on the journey of women in the legal profession' (2023) 36.2 *Advocate* 57.

Mukome, L 'I know a woman' (2023) 36.2 *Advocate* 56.

Nicholls, C 'The history of women at the Supreme Court of Appeal' (2023) 36.2 *Advocate* 51.

Child labour

Bernard, RB 'The regional regulation of child labour laws through harmonisation within COMESA, the EAC and SADC' (2023) 23.1 *AHRLJ* 48.

Company law

Blumberg SC, M 'Can directors in a private company have weighted voting rights at board meetings?' (2023) 14.2 *BTCLQ* 8.

Chitimira, H 'Editorial: Special Edition on Rethinking Global Economies, Financial Markets, Corporate Practices and Business Activities Post-COVID-19 Pandemic' (2023) 56 *DJ* 133.

Oppenheim, J 'Unlocking the beneficial interest and beneficial ownership quagmire' (2023) 14.2 *BTCLQ* 13.

Conflict of interest – fiduciary duties

Mudzamiri, J 'Reflecting on the corporate opportunity rule in company law through a jurisprudential review of Modise v Tladi Holdings (Pty) Ltd 2020 (4) All SA 670 (SCA)' (2023) 56 *DJ* 206.

Consumer law

Magau, P 'The regulatory nexus between the promotion of financial education and financial inclusion in enhancing consumer protection in South Africa' (2023) 56 *DJ* 220.

Mupangavanhu, Y and Kerchhoff, D 'Online deceptive advertising and consumer protection in South Africa – the law and its shortcomings?' (2023) 56 *DJ* 86.

Controlled foreign company

Clegg, D 'How foreign is your business establishment?' (2023) 14.2 *BTCLQ* 1.

Corporate social investment tax levy

Preston, MJ and Peeroo, S 'An analysis of the possibility to implement a CSI tax levy in South Africa: Lessons from Mauritius' (2023) 56 *DJ* 280.

Cryptocurrencies

Ncube, PT and Kabwe, R 'The regulation of cryptocurrencies to combat money laundering crimes in South African banking institutions' (2023) 56 *DJ* 354.

Customary law

Osman, F 'Mshengu v Estate Late Mshengu 9223/2016P: Considering the ownership of house property in customary law' (2023) 56 *DJ* 13.

Digital financial services

Chitimira, H and Torerai, E 'Policy implications and mobile money regulatory approaches to promote financial inclusion of the poor in Zimbabwe after the COVID-19 pandemic' (2023) 56 *DJ* 241.

Employment law

Sengwane, K and van Eck, S '*Monareng v Dr JS Moroka Municipality* 2022 43 ILJ 1855 (LC) – Affirmation that resignation by an employee constitutes a point of no return: Or does it?' (2023) 56 *DJ* 376.

Family law

Uys, AM 'South African courts' differing approaches to determining children's views in family law matters' (2023) 56 *DJ* 309.

Fidicuary duties

Mudzamiri, J 'Revisiting the no reflective loss principle under the South African company law regulation: A reflective assessment through the lens of Hlumisa Investment Holdings (RF) Ltd v Kirkinis 2020 (3) All SA 650 (SCA)' (2023) 56 *DJ* 157.

Harmful practices

Kachika, T 'Juxtaposing emerging community laws and international human rights jurisprudence on the protection of women and girls from harmful practices in Malawi' (2023) 23.1 *AHRLJ* 126.

Human rights

Shawa, R; Coomans, F; Cox, H and London, L 'A promising potential: Using the right to enjoy the benefits of scientific progress to advance public health in Africa' (2023) 23.1 *AHRLJ* 30.

Insolvency law

Mabe, Z 'The constitutional disqualification for unrehabilitated insolvents from being members of Parliament' (2023) 56 *DJ* 25.

Marumoagae, MC 'What amounts to "dispositions without value" in the context of section 26 of the Insolvency Act 24 of 1936?' (2023) 56 *DJ* 174.

Smith, A 'The extraordinary in the ordinary: The devil is in the (sometimes unexpected) details of section 34 of the Insolvency Act 24 of 1936 and the actio Pauliana' (2023) 56 *DJ* 43.

International commercial arbitration

Warikandwa, TV and Usebiu, L 'A proposal for international arbitration law in Namibia based on the UNCITRAL Model Law on International Commercial Arbitration' (2023) 56 *DJ* 259.

Islamic legal system

Essop, F 'Understanding the Islamic legal system for South African legal practitioners' (2023) 36.2 *Advocate* 60.

Legal behaviour

Seegobin, R 'Restoring dignity to our courts: The duties of legal practitioners – Insulting, inappropriate, vulgar, and disparaging language have no place in litigation' (2023) 36.2 *Advocate* 63.

Legal practice

Rabkin, F 'Law matters' (2023) 36.2 *Advocate* 68.

Maintenance claims

Thutse, L 'Does the treatment of arrear maintenance claims of children under the Insolvency Act 24 of 1936 constitute a violation of their constitutionally protected rights to social welfare and human dignity? An exposition' (2023) 56 *DJ* 340.

Matrimonial law

Monareng, KN '*LH v ZH* 2022 (1) SA 384 (SCA): Should section 18(a) of Matrimonial Property Act 88 of 1984 apply to all spouses in a marriage in community of property, irrespective of when the non-patrimonial damages were received?' (2023) 56 *DJ* 77.

Police brutality

Ecoma, BE 'A post-mortem assessment of the #EndSARS protest and police brutality in Nigeria' (2023) 23.1 *AHRLJ* 156.

Principle of complementarity

Ncame, NP 'Justice in conflict: Principle of complementarity or principle of competition?' (2023) 23.1 *AHRLJ* 75.

Right to basic education

Mutu, P 'Leveraging technology to deliver basic education to children in conflict areas of Northern Nigeria' (2023) 23.1 *AHRLJ* 182.

Tax evasion

Animashaun, O and Chitimira, H 'An analysis of the statutory measures adopted to curb tax evasion in Nigeria after the COVID-19 pandemic' (2023) 56 *DJ* 1363.

Tribute

Masuku, T 'Tribute to Thulani Rudolf Maseko' (2023) 36.2 *Advocate* 66.

United States Supreme Court

Barrie, G '"Three generations of imbeciles are enough" Justice Oliver Wendell Holmes JR in *Buck v Bell*' (2023) 36.2 *Advocate* 58.

Vicarious liability

Knobel, JC 'The use of vicarious liability in environmental law to enhance the legal conservation status of birds of prey' (2023) 56 *DJ* 66.

Winding-up orders

Boraine, A and Swart, WJC '*NCA Plant Hire CC v Blackfield Group Holdings (Pty) Limited* [2021] JOL 51810 (GJ): Some critical observations on the legal effect of a provisional winding-up order' (2023) 56 *DJ* 125.

Women's rights

Vengesai, P '*Mangwende v Machodo*: Bride price refund and the violation of women's rights in contemporary Zimbabwe' (2023) 23.1 *AHRLJ* 205.

Zambian company law

Phiri, C 'Small companies and regulatory tiering: A legal and economic analysis of Zambia's new regime' (2023) 56 *DJ 107*.

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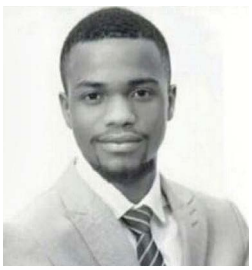

The questionable justifiability in the utility of statutory suspension of third-party claims during business rescue proceedings in South Africa

By Bongani Memani

A company is temporarily exempt from legal proceedings (civil proceedings) during business rescue proceedings (s 133(1) of the Companies Act 71 of 2008 (the Act)). That is so because if a company is not temporarily protected against legal proceedings, costly litigation may ensue, which may diminish the company's prospects of being potentially rescued from its financially distressed position. However, that being the case, it is important to note that this protection has loopholes in that the Act does not provide for the interim suspension of instituting litigation against a distressed company while the company awaits approval of the business rescue proceedings (Anneli Loubser 'The business rescue proceedings in the Companies Act of 2008: Concerns and questions (part 2)' (2010) 4 *TSAR* 689). What this means, for example, is that, without the interim suspension of

instituting legal proceedings against a distressed company while that company awaits approval to commence with business rescue proceedings, a creditor may, for example, get a notification of the company's intention to apply for business rescue proceedings and then opportunistically attach all the company's assets before they are affected by the suspension order, which may potentially leave the company in a position that is beyond rescue.

The suspension of litigation against a company under distress is, as such, a moratorium. The question, therefore, is whether the effect of a moratorium when it comes to time bar clauses, is viable and does not contradict, which is to say it is consistent with the purposes of business rescue in s 7(*k*) of the Act, which is mainly to cater for all stakeholders.

Time bar clauses are clauses whereby a person in a contract is only allowed to sue another party to the contract within a certain limited time. The question, however, is whether the measurement of a time bar clause is justifiable to be suspended in the moratorium. In other words, if you are the other party suing a company under business rescue, you are deprived of approaching the courts for a certain period of time. Does that not then infringe on ones right to access the courts within the period stipulated in the contract, which is an important right found in the Constitution (s 34 of the Constitution states that: 'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum') and if more time is given to the other party in terms of business rescue proceedings, does that not outshine the relevance of time bar clauses in terms of contract law and provide the other party more advantage to prepare for a case?

Floodgates tend to open from s 133(3) of the Act, in that minority creditors who disagreed with business rescue proceedings commencing, generally consider money owed to them as a current asset. Such money is a form of property, and if the creditors' payment is suspended it is a deprivation of their property rights to use it and enjoy it at that moment. That being said, it is still yet to be clarified by the legislature when it comes to s 36 of the Constitution, which embodies the limitation clause, whether the business rescue provision provided by the Act outweighs the property rights in the Constitution in this regard.

It is worth noting further that this moratorium may also make other financially stable businesses become financially distressed. That is so because the company under business rescue's payments which may be due, are also suspended, which in turn means that it does not have to pay any interest, legal costs and other costs, further meaning that with that relaxation, the company accesses the market more cheaply, which could ordinarily affect their solvent competitors who have to access the market by spending fortunes (Eberhard Braun and Wilhelm Uhlebruck *Unternehmensinsolvenz* (IDW-Verlag GMBH: Düsseldorf 1997) at 423 in Anneli Loubser 'Tilting at windmills? The quest for an effective corporate rescue procedure in South African law' (2013) 25 *SA Mercantile Law Journal* 437). A good example of how the suspension of rights could have a negative effect towards smaller businesses, is the question of whether small property rental companies would survive if their property were leased to a financially distressed company which is under business rescue, of which their rental income would be paid after an extended period because of the suspension of rights. Would those companies also not be in financial distress due to lack of liquidity, which should be balanced by the rental income?

A person who is in lawful possession of the business property is allowed to continue to use the property even during the proceedings, and the first economical argument for this is that if the business rents out its premises before the supervision process, the rental income will continue to be generated of which it could be of much assistance in rescuing the company. The argument against this relates to corporate giving – if a corporation lets its premises for free as part of a social responsibility programme, would the continuation of free possession not put the business in a worse situation on their financially distressed status, instead of getting income over that property? It is my argument that this is a certain loophole to the procedure, but moreover, the Act also fails to address the issue of the effects to social responsibility programmes that a company may currently be pumping money into. Should we interpret that by this provision they also continue to be in force? A grey area remains, which is also another criticism of the business rescue procedure.

The business rescue practitioner, in exercising his powers of allowing or disallowing disposal of the company property, must act reasonably not to withhold consent to those transactions where it is not necessary to do so, but must look at whether it is allowed to do so by ch 6 of the Act, the state of the company at that period of time and the nature of the property and rights claimed in respect of it. This is important in the sense that the practitioner must not allow the disposal of property which forms a greater part of the business, which, if sold, could lead to the demise of the company as a whole. For example, the property which generates the greater part of the income in a company must be the last to be put on the disposal list. Suppose a financially distressed company which is under business rescue wishes to dispose of some of the property in which a person has a particular interest or security. In that case, it may do so by getting consent from such a person or the company may dispose of that property and pay the amount owed to that person or provide other alternative security for the amount owed to that person.

However, s 134(3)(*b*)(ii) might raise an issue because what if the alternative security which is given, which amounts to the amount owed at that time to the other party, is not a viable asset to form security – for example a vehicle which depreciates in value? A form of a complete codification would have assisted in s 134(3)(*b*)(ii) because the facts raise a problem of unjustified enrichment to the debtor company if the form of security is an asset which depreciates in value.

Great scrutiny needs to be done as the South African business rescue regime seems to be good on paper rather than practically.

Bongani Memani *LLB LLM (Corporate Law) (Wits)* is a legal practitioner at WMN Attorneys Inc in Johannesburg.

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RISKALERT

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RISK MANAGEMENT COLUMN

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RISK MANAGEMENT COLUMN

Short risk notes

LPIIF application in respect of Board Notice 271 of 2022

Following on our previous updates, we can now report the Legal Practitioners Indemnity Insurance Funds NPC's (LPIIF's) application has been set down for hearing in the Gauteng Division of the High Court, Pretoria at 09:30 on 26, 27 and 28 February 2024. The application will be heard by a full bench. Several parties have joined as applicants and others have applied to participate as *amici*. We will provide a further update on the application after the matter has been heard.

We, once again, thank those parties that have provided us with information regarding claims rejected b≠y the Road Accident (RAF) purportedly relying on the impugned Board Notice. We now have sufficient information and request that firms refrain from sending us every rejection received from the RAF. We do not have the capacity to deal with every claim that has been rejected by the RAF. The LPIIF is not a law firm and thus cannot dispense legal advice. Firms are urged to have regard to our previous updates where our position was explained.

The related matter (*Mautla and Others v RAF and Others*) regarding Board Notice 58 of 2021 was argued on 9 May 2023, also before a full bench, and judgment in that matter was reserved.

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When the judgment in that matter is handed down, we will also share it with the profession. We are also aware of the litigation culminating in the judgment in *Road Accident Fund v Sogoni and Another* (EL660/2023) [2023] ZAECELLC 18 (21 July 2023).

Draft Road Accident Fund Amendment Bill

On 8 September 2023 the draft Road Accident Fund Amendment Bill was published for comments. A copy of the draft Bill can be accessed at https://www.gov.za/sites/default/files/gcis_document/202309/49283gon3868.pdf

RISK MANAGEMENT COLUMN continued...

Interested parties are invited to submit written comments on the draft bill within 30 days from the date of publication. The parties to whom the comments are to be submitted and their respective email addresses are set out in the publication containing the draft Bill. Please access the link above for information.

Punitive costs orders against legal practitioners

There have been several judgments where legal practitioners have been saddled with punitive costs orders. Two recent judgments are summarised below with the intention of warning legal practitioners of the risks flowing from impugned conduct. The cases can be used by firms for their internal training programs.

The LPIIF policy does not indemnify legal practitioners for punitive costs orders (clause 16 (g)). Practitioners are also advised to read chapter 8 (Personal costs orders against legal practitioners) of Dr Bernard Wessels' book *The Legal Profession in South Africa: History, Liability and Regulation* (Juta, 2021).

Manamela v Maite (2023/055949) [2023] ZAGPJHC 1011 (6 September 2023)

The applicant launched an urgent spoliation application over a weekend and an order was granted on 10 June 2023 (the spoliation order). The applicant's attorney allegedly acted on a *pro bono* basis and had funded the litigation out of his own pocket. An urgent contempt application was launched on 15 June 2023 as a result of the respondent's alleged failure to comply with the spoliation order (the first contempt application). An attempt to enrol the first contempt application on the urgent roll for 20 June 2023 was unsuccessful, presumably because the applicant did not meet the requisite deadlines. The application was removed from the urgent roll on 27 June 2023 as the presiding judge was not satisfied that proper service had been effected by the Sheriff on the respondent.

The applicant again enrolled the first contempt application on the urgent roll for 11 July 2023. The spoliation application and the contempt application were only properly served on the respondent on 5 July 2023, that is after the launching of the first contempt application. The respondent opposed the application and launched a counter application seeking, firstly, the stay of execution on an urgent basis and, secondly, in the normal course, a rescission of the spoliation order. The respondent, in her answering affidavit, comprehensively set out the grounds on which she opposed the allegations of contempt and the grounds for the rescission order sought. She also raised the lack of proper service in the various legal proceedings. The matter was argued on 13 July 2023 and both the first contempt application and the respondent's counter application were struck from the roll, with costs to be costs in the cause. Both the first contempt application and the respondent's counter application thus remain pending to be heard in the normal course on the opposed roll. This was recorded in correspondence sent by the respondent's attorney to the applicant's attorney on 20 July 2023 and it was also recorded that the respondent could not restore possession of the property, was not responsible for the alleged dispossession and that portions of the order were unenforceable as the respondent was not resident on the property. The correspondence from the respondent's attorney further recorded that the applicant was unsuccessful in three attempts to approach the court on an urgent basis and cautioned him "against approaching the court for a further urgent application as, clearly, the matter is not urgent and [the applicant] is not entitled to urgent relief".

A second urgent contempt application was launched on 20 July 2023 and enrolled for hearing on 1 August 2023. On the eve of the hearing, the applicant's attorney addressed a letter to the presiding judge requesting a postponement due to his illness and thus his inability to represent the applicant at the hearing. Instead of briefing counsel to appear, the applicant's attorney sent his candidate attorney to appear at the hearing on 1 August 2023 (though the candidate attorney did not have a right of appearance in the High Court). The candidate attorney sought a postponement of the matter to 8 August 2023. The matter was removed from the roll and costs were reserved. During the proceedings, the applicant was cautioned by the presiding judge against enrolling the application again on an urgent basis and warned that it could result in an adverse costs order. The applicant was also warned about the proper processes and advised that the rescission application could be determined in time. The court instructed the respondent's counsel to convey the caution to the applicant's attorney by way of correspondence and this was acknowledged by the candidate attorney.

Ignoring the caution, the applicant's attorney, however, re-enrolled the application on the urgent roll on 8 August 2023 without notifying the respondent's attorneys and without service of the notice of set down on them, though he was aware of that respondent intended opposing the application. The respondent's counsel only became aware of the re-enrolment of the matter after being contacted by the applicant's counsel on the instruction of the court. The respondent opposed the application and contended that no proper service of the spoliation application had been effected on her, challenging the urgency of the first contempt application, that the first application had been removed from the roll by the court, accusing the applicant and her legal representatives of *mala fides* and seeking the dismissal of the application with a *de bonis propriis* costs order against the

RISK MANAGEMENT COLUMN continued...

applicant's attorney. The applicant's attorney, in an affidavit filed, did not deal at all with why the notice of set down for 8 August 2023 was not served on the respondent's attorneys.

The second contempt application was described in the judgment as an abuse of process (at paragraph 52), "exacerbated by the lack of service of the notice of set down for 8 August 2023 on the respondent. This failure is egregious and flaunts a fundamental norm of our law" (at paragraph 56) and smacking of *mala fides* (paragraph 57).

Dippenaar J noted that:

"[1] The pernicious effect of legal representatives simply disregarding the rules of court is that the very fabric of the Rule of Law is being eroded.

[2] There appears to be an alarming trend that legal practitioners through apparent hubris or feigned ignorance directly ignore or flaunt their indifference towards the rules of Court and worse yet, merely do not comply with Court orders.

….

[6] This urgent contempt application sharply brings this relationship and the duties on a legal practitioner into focus.

….

[62] Seen cumulatively, the conduct of the applicant's attorney was entirely unbecoming of a legal practitioner and displays a disturbing disrespect for the Court, its rules and judicial authority.

[63] As illustrated by the history of the litigation, [the applicant's attorney] flouted important and fundamental tenets pertaining to service and urgent applications and ignored decisions made by the Judges who heard the matter in the urgent court."

The court dismissed the second urgent contempt application, ordered that the costs of that application, including the costs reserved on 1 August 2023, be borne by the applicant's attorney of record *de bonis propriis* on the scale as between attorney and client and directed that the applicant's attorney not present a bill, nor recover any fees or disbursements from the applicant in respect of the second contempt application.

Harker and Another v MGM Family Trust (Number: TM50521/1) and Others (2994/2022) [2023] ZAECQBHC 49 (5 September 2023)

Mr Harker was appointed executor of a deceased estate and also acted as the attorney of the applicant (the deceased estate). Simultaneously wearing the hats as executor and attorney for the deceased estate, Mr Harker gave himself instructions to act on behalf of the deceased estate. It is also worth noting that Mr Harker then appeared in person in this matter.

In the underlying matter (not explained in the judgment), an application by the applicants had been dismissed with attorney and client costs, "inappropriate and untenable relief" having been pursued "in circumstances where the Uniform Rules clearly provide for the correct procedure" (paragraph 4). The court found that an affidavit by Mr Harker, meant to set out reasons why he should not be ordered to pay the costs of the application *de bonis propriis*, "was of no assistance to determine whether he acted in appreciation of his fiduciary duty and with due regard to the interest of the estate or whether he was incorrectly advised in pursuing the application" and that the "affidavit ought to have focussed on the reasons why he should not pay the costs *de bonis propriis*. This was his obligation as executor, but moreso as an officer of this Court, which he has a duty to assist in arriving at a just decision." (paragraph 5)

There was no record that Mr Harker had been issued with a Fidelity Fund Certificate and thus entitled to practice. He acknowledged that "he is currently in trouble with the Legal Practice Council and accepted that he must bear the consequences flowing therefrom." (paragraph 17)

Mr Harker did not explain how he considered the interests of the estate before he embarked on unmeritorious litigation which was not in the best interests of the estate which was entrusted to him.

The court considered the authorities for punitive costs orders.

Ellis AJ wrote that:

"[1] The executor in a deceased estate occupies a fiduciary position and must therefore not engage in a transaction by which he will personally acquire an interest adverse to his duty.

….

[15] An executor must act [reasonably], meaning his conduct in connection with the litigation must be reasonable and with due regard to the resources in the estate. An attorney must act diligently, with due regard to the court rules and established principles, and never in a manner which can be considered to be improper.

[16] In this matter not only is Mr Harker as the executor the litigant in a fiduciary position, but he is also giving instructions in that capacity to himself as the attorney of record. The affidavit filed by Mr Harker does not clarify which hat he wore when embarking on this application, which application I have already found to be convoluted and without reasonable prospects of success. The costs of the application were therefore unnecessarily incurred and without heeding established principles." (footnotes omitted)

The court ordered that Mr Harker pay the costs in his personal capacity and that a copy of the judgment be brought to the attention of the Legal Practice Council and the Master of the High Court.

How professional complacency or a tick-box approach make your firm jaded

Introduction

Have you ever had the unpleasant experience of interacting with a professional service provider who comes across as being disengaged, disinterested or even nonchalant to what you are trying to convey or the question on which you seek professional advice? If so, imagine a client left with that impression after a consultation with a legal practitioner. Equally, a professional service provider who appears to be doing the bare minimum and is simply going through the motions does not make for a pleasant and engaged client experience. These experiences rapidly diminish a client's confidence in the legal practitioner.

The legal profession is a service industry that clients engage when seeking professional legal advice for an issue that they are faced with. Legal services are, in many instances, grudge purchases that clients would have avoided if they could. Where a client has taken the steps to entrust a legal practitioner with a legal problem, that practitioner owes the client several duties including the duty to deal with the matter meaningfully. How meaningfully you deal with the matter will be determined by several factors, including your attitude to the client and how diligently you execute your work. People in the firm often follow the tone set at the top by partners/ directors on how they engage with clients. Some unfortunate habits easily creep in and become difficult to shake off.

This article aims to highlight some of the risks that flow from the manner some legal practitioners approach their instructions. As stated above, the tone for, and approach to the execution of client mandates is set by the legal practitioners in a law firm. Junior professionals and other support staff will adopt a similar attitude to engaging with clients' matters as that set by their seniors. Some of the errors and omissions that ultimately result in professional indemnity claims against legal practitioners can be traced back to the attitude and approach of the firm to the execution of mandates. On the other hand, a positive approach to a matter will result in a positive experience and satisfied clients.

Professional complacency

By professional complacency I refer to situations where a legal practitioner has become so secure in the work that they do that they put minimum effort into the execution of clients' instructions. The standard of the output by such legal practitioners may not be the same as it once was, but they are oblivious to the consequences.

You may, on good grounds, consider yourself to be an expert or even an authority in the area or areas of law in which you practice. Your reputation may be what you are trading on. When clients instruct your firm, they expect your professed professional expertise to be applied to all areas of the execution of the mandate. The experience and expertise that you have gained over the years is your stock-in-trade and the commodity that clients seek when mandating you. The moment a client feels that you are not providing the required expertise will be the beginning of a breakdown of the professional confidence that had been placed in you.

Do not allow professional complacency to creep in and thus negatively affect how you execute client mandates. Your perception of your own expertise is never more important than the service expected by clients. Should you ever feel that a matter does not warrant your (real or perceived) status, politely decline the instruction and suggest that the client approach another legal practitioner.

Going through the motions and assuming that you can simply ride on your professional reputation is risky. The mandate you are expected to carry out for one client is hardly likely to be the same as another that you had previously carried out. The nuances in each matter must be carefully considered. Resist the temptation of believing that, based on your expertise, all you need to do is give a cursory consideration to a matter where you have accepted a mandate. I do not know of

RISK MANAGEMENT COLUMN continued...

any lawyer who has attained the status of being the exclusive sage in any area of law. The fact that there are competing opinions on any legal point should be reason enough to know that there is always a risk that your opinion will not always prevail in every situation and that real effort on your part is required to ensure that considered advice is provided to the client. You must put in the work to earn your fee. Your concerted effort in the execution of every aspect of the mandate is what clients expect.

A dissatisfied client may refer to your purported expertise in the cause of action in a professional indemnity claim against your firm (as transpired in *Steyn NO v Ronald Bobroff & Partners* 2013 (2) SA 311 (SCA)). An attorney who, after accepting a mandate, is unavailable to consult with a client or to provide updates in a matter is equally at risk. One of the plaintiff's complaints in *Mlenzana v Goodrick & Franklin Inc* 2012 (2) SA 433 (FB) was that her attorney "was difficult to reach. [The plaintiff] received no regular progress reports. Every time she went to see her attorney about the matter she was merely told that the matter was receiving attention or that her attorney was not available." (at 443 I-J).

Tick box approach

The tick box approach I refer to is where the execution of the tasks, whether it be running the law firm or executing client mandates, is about merely following a set of rules or procedures in a bureaucratic manner. The aim is simply to tick the box that the task has been executed. Minimal meaningful effort is put into the execution of the task.

In this age of information overload, chasing multiple deadlines simultaneously and executing repetitive tasks, there is an ever-present risk of not properly engaging with information before you. There is the danger when attending to a matter that is like numerous others that have been attended to in the past, a legal practitioner falls into the trap of doing a cursory assessment of the information before them or merely ticks the proverbial boxes in the hope that prior experience will get them through. Examples of legal practitioners "going through the motions" or simply "winging it" are, unfortunately, very common. Your professional experience in the area in which you practice may get your through most situations with relative ease, but do not bank on sailing through all situations with little or no effort.

A common occurrence in the financial services industry serves as a good demonstration of the dangers of the tick box mentality. Since 1 July 2016, the Legal Practitioners Indemnity Insurance Fund NPC (LPIIF) has excluded claims arising from cybercrime (the current LPIIF policy and previous policies can be accessed on the website www.lpiif.co.za). This exclusion has been widely communicated to the legal profession and the insurance industry on various platforms since 2015 (a year before it came into effect). Notwithstanding the repeated and extensive communication, the LPIIF receives numerous cybercrime notifications from insurance brokers acting for legal practitioners (and many from the legal practitioners themselves). Letters sent to the brokers concerned reiterating the cybercrime exclusion do not deter them from repeatedly sending such claims to the LPIIF though they are, ostensibly, experts in the

RISK MANAGEMENT COLUMN continued...

insurance structure for legal practitioners in South Africa and aware that this type of claim is not covered by the LPIIF. Some of the brokers concerned even place cyber insurance cover for law firms and, when selling such policies, inform law firms that this risk is not covered by the LPIIF and thus there is a need to procure that cover in the commercial market. How meaningfully are the brokers engaging with the information from their law firm clients when notifying a claim or potential claim to an insurer that they, purportedly, are aware does not cover the claim concerned? Are the brokers concerned just going though the proverbial motions or doing a tick box exercise when sending the claim to the LPIIF? Is this just a shotgun approach to notify the insurance market widely hoping that it will stick somewhere? What are the risks to the law firms concerned that the cybercrime related claims will not be notified (timeously or at all) by the brokers to the correct insurance company that is on risk? Lastly, when receiving communication from their brokers that the claim has been notified to an insurer, how many law firms enquire from the brokers which insurance company the cybercrime claim has been notified to and whether that insurance company is actually on risk for that claim? A law firm that is the broker's client in this example is an analogous position to the client who is placed at risk because that firm did not properly engage with the information provided and went through a tick box exercise in executing the mandate. The risk of a loss is ever present while the client is under the impression that the matter is being properly attended to, similarly to the law firm that suffered a cybercrime related loss and is under the impression that its expert broker is dealing with the matter prudently.

Do not use the tick box approach to compliance, whether that be compliance with the Legal Practice Act 28 of 2014, the Financial Intelligence Act 38 of 2001, the Contingency Fees Act 66 of 1997 (CFA) or any other legislation. A prudent approach is to aspire to comply with the spirit and the letter of the law.

There may be repetitive tasks involved in the execution of the mandates in the areas that you practice. You may have developed systems, processes, and internal procedures on how the mandate is to be executed. These should not lure you into a false sense of security. Executing a legal services mandate cannot be treated like a mathematical formula or even an exercise on an excel spreadsheet where there is a simple input of data, and a result is arrived at. A tick box methodology will also hinder the effectiveness of your oversight and supervision of staff in your firm as you will not meaningfully engage with information placed before you.

Using precedents blindly is another characteristic of the tick box approach and presents potential risks to law firms. *Hendry v Road Accident Fund* 2023 JDR 0373 (MN) is a demonstration of the risks of using precedents in the settlement of matters where contingency fees agreements have been entered into but there has not been meaningful compliance with the CFA requirements when entering into the settlement agreement. *Wheelwright v CP De Leeuw Johannesburg (Pty) Ltd* (JA 81/2022) [2023] ZALAC 6 (21 February 2023) illustrates the challenges that can arise from a commonly used clause in contracts. The judgments in *Mlenzana v Goodrick & Franklin Inc* and *Margalit v Standard Bank of South Africa Ltd and Another* 2013 (2) SA 466 (SCA), respectively, provide good training material for firms on the risks of failing to meaningfully consider information before them, resulting in liability for the firms concerned.

Conclusion

Negative client experiences posted on the internet or social media can do untold damage to your reputation. Do an honest self-assessment on how mandates are carried out in your firm. If there are any symptoms of professional complacency or a tick-box approach, take steps to remedy that and reinvigorate your practice. Prolonged periods of professional complacency and undertaking tick box exercises will lead to you and your staff becoming jaded. Clients will soon notice that and choose other legal practitioners who approach their work with enthusiasm. Professional complacency and a tick-box approach will hamper a law firm's ability to compete in the increasingly competitive legal services market.

RISK MANAGEMENT COLUMN continued...

The 1,2, 3 of balancing the trust account

By Carl Holliday

Legal practitioners' trust accounts must be managed in compliance with s 86 of the Legal Practice Act 14 of 2014 and the Rules issued in terms of that Act. Rules 54, 55 and 56 also set out requirements that must be met in the management and administration of trust accounts. Compliance is recorded and reported by the appointed auditor, and monitored by the Legal Practitioners Fidelity Fund (LPFF) and the Legal Practice Council (LPC), respectively.

Compliance requires that, *inter alia*, the accounting records be written up not later than the end of the following month. Trust compliance is observed and confirmed through a three-step process which will be discussed below. For sake of brevity it is assumed that no investments exist in the books. These steps are:

1. Trust liabilities must not exceed equal trust assets (r 54.14.8).
2. Trust cash book must reconcile with trust bank statement.
3. Trust ledgers must balance.

1. Trust liabilities must equal trust assets

This is the first and final test. In its most basic form, this test requires a comparison of the trust assets to the trust liabilities.

The balance of the trust cash book (a debit is expected) represents the available trust assets, and the sum of client trust ledger balances represents trust liabilities (a credit is expected). The balance of the trust cash book must be at least equal to the balance of the trust ledger. It is important to note that the trust bank statement balance should generally not be directly compared to the trust ledger balance.

It is critical to be able to determine the trust position readily and accurately.

2. Trust cash book reconciles with trust bank statement

The second step requires the trust bank statement to be completely and accurately recorded in the trust cash book, with transactions clearly allocated. It is imperative that each receipt and payment be accurately and clearly recorded against a corresponding trust creditor.

A typical risk presents itself where a business creditor, such as an advocate,

RISK MANAGEMENT COLUMN continued...

is paid directly from the trust account. The business creditor is not a trust creditor, and no trust funds stand to the credit of such a creditor. Funds allocated to a trust creditor may only be disbursed based on a properly executed mandate that authorises such disbursement, or by way of refund to the attorney where the payment is made from the business account.

Trust bank charges and interest present a unique situation. Net interest should be transfered to the LPFF by the bank, automatically, monthly. This implies that at the end of the financial year, it is unlikely that any trust interest will remain in the current account. Likewise, bank charges are generally transfered to the business account for payment. Note that where charges exceed interest, the attorney will be out of pocket for this expense. Also, Value Added Tax (VAT) on bank charges are refunded regardless of the VAT status of the account holder.

Commissions earned by the account holder should be received directly on the business account, and stands to the credit of the firm, not a client.

Care should be taken to ensure all bank transactions are allocated accurately every month, and that duplicate transactions or omissions do not occur. Where a time lapse occurs between a cash book entry and the corresponding bank statement entry, the difference will appear on the bank reconciliation.

In the final instance, a bank reconciliation is a document which contains details of the bank balance, and the corresponding cash book balance and an explanation of any differences. The successful reconciliation always ends on a nil balance. Outstanding transactions are expected to resolve by next month end. A non-nil balance indicates an incomplete or inaccurate, and failed reconciliation.

Outdated or non-nil balance bank reconciliations constitute a red flag instance which deserves immediate investigation.

3. Trust Ledgers are balanced

A client ledger account simultaneously represents a business asset, in the form of accounts receivable, and a trust liability, for the funds held in trust.

It is shortsighted to merely inspect client ledgers for apparent trust debit balances.

Risk: A client ledger should not reflect a trust debit balance. This situation most commonly obtains due to duplicate or inaccurate transaction processing. Where trust debit balances are discovered, these need to remedied forthwith.

Risk: A client ledger may also reflect a business credit balance. By defintion, the attorney is only entitled to receive such money in the business account, which does not retain a trust character. A client business credit balance indicates that funds, not due to the attorney, have been received in business. This situation needs to be remedied forthwith.

Only in the final instance, where simultaneously a business balance and trust balance exists, may the smaller of the two be transfered from trust to business. This constitutes a transfer from the trust ledgers. To expect a one-to-one match of invoices to transfers is simplistic, the net business and trust balances for each client must be considered.

Unfortunately excessive attention is paid to the last instance, and trust debit and business credit balances often ignored.

The Trust Position

Finally, once an accurate trust cash book balance is available, and an accurate sum of client trust ledgers has been determined, can a comparison be made.

The trust cash book balance acts as a benchmark. This amount is fixed and cannot be altered. Ledger balances must be compared to this amount.

Once the variation has been determined, the amount available as *surplus*, that is the amount by which the cash book balance exceeds the ledger balances, may be transfered from the trust banking account to the business banking account.

In the event where the variation amount indicates a *deficit*, that is the cash book balance is less than the ledger balances, this amount must be transfered from the business bank to the trust banking account.

Once these transactions are accounted for, the first test in the next cycle demostrates a a perfect trust position.