LAW SOCIETY OF SOUTH AFRICA
L.E.A.D® PROFESSIONAL AFFAIRS

DE REBUS
THE SA ATTORNEYS' JOURNAL

NOVEMBER 2023

DUTY TO SUSTAIN THE DIGNITY OF OUR COURTS

Checks and balances: Monitoring the separation of power and judicial independence

A discussion on the legal position of adult dependent children

Is the metaverse a far-fetched reality to access justice?

Doctrine of common purpose: Can the actions of one accomplice be attribute to others?

Becoming a legal practitioner is the best way to fight for vulnerable people

Requirements for readmission as a legal practitioner

The scourge of misrepresenting qualifications

***Pacta sunt servanda* is not a holy cow that can never be slaughtered**

A husband repeatedly in contempt on his obligation on Rule 43 Order

The inherent power of the High Court, the Supreme Court of Appeal and the Constitutional Court is limited

EXPERIENCE A NEW VISION IN HIGHER EDUCATION

Conquer the world of work with STADIO, one of Africa's leading distance learning providers.

With undergraduate and postgraduate qualifications available via contact- or distance learning, you can study while you work.

Visit STADIO.AC.ZA now to apply for an affordable distance learning qualification in the STADIO School Law:

- Bachelor of Laws (LLB)
- Bachelor of Commerce in Law
- Bachelor of Arts in Law
- Higher Certificate in Paralegal Studies

Study with us from as little as R1800 per month

APPLY NOW

087 158 5000 | hello@stadio.ac.za

STADIO
HIGHER EDUCATION

WWW.STADIO.AC.ZA

DE REBUS
THE SA ATTORNEYS' JOURNAL

CONTENTS

NOVEMBER 2023 | Issue 646
ISSN 0250-0329

10 Duty to sustain the dignity of our courts

Legal practitioners have a duty to uphold the dignity of the courts by advancing the interests of justice, observing legal principles, and adhering to ethical standards in the course of litigation. These principles are codified in the Legal Practice Act 28 of 2014, in conjunction with the Code of Conduct for all Legal Practitioners, Candidate Legal Practitioners and Juristic Entities. Although adhering to these standards may appear straightforward, recent occurrences have demonstrated instances where legal practitioners have breached these standards. Candidate legal practitioner, **Sipho Maphumulo**, writes that notable instances of this can be seen in two recent Labour Court judgments, namely, *Mlondo and Others v Electrowave (Pty) Ltd* [2023] 8 BLLR 813 (LC), and *University of South Africa v Socikwa and Others and a related matter* [2023] 8 BLLR 836 (LC). In these judgments, the courts issued orders with the intention of discouraging legal practitioners from misusing or disregarding court procedures.

14 Is the metaverse a far-fetched reality to access justice?

Technology is changing at a rapid pace, which in time may necessitate a corresponding evolution in access to justice and the practice of law. One particular technological progression involves the development of the metaverse, representing a move forward into the realm of virtual reality. Legal practitioners are currently faced with the challenge of bridging the gap between the practice of law and the use of technology, and the metaverse could be one of the many tools that could be used to bridge this divide. The technology holds the potential to facilitate legal proceedings and removes the physical barrier to court access by eliminating the necessity for in-person attendance. Legal Counsel, **Marcus Zulu**, writes that the remaining question is whether this innovation would be readily accessible to those who genuinely need it.

Regular columns

FEATURES

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

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

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

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

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

EDITORIAL SECRETARY:
Shireen Mahomed

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

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

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

CONTENTS: Acceptance of material for publication is not a guarantee that it will in fact be included in a particular issue since this depends on the space available. Views and opinions of this journal are, unless otherwise stated, those of the authors. Editorial opinion or comment is, unless otherwise stated, that of the editor and publication thereof does not indicate the agreement of the Law Society, unless so stated. Contributions may be edited for clarity, space and/or language. The appearance of an advertisement in this publication does not necessarily indicate approval by the Law Society for the product or service advertised.

For fact checking, the *De Rebus* editorial staff use online products from:
- **LexisNexis** online product: MyLexisNexis. Go to: www.lexisnexis.co.za; and
- **Juta**. Go to: www.jutalaw.co.za.

PRINTER: Ince (Pty) Ltd, PO Box 38200, Booysens 2016.

AUDIO VERSION: The audio version of this journal is available free of charge to all blind and print-handicapped members of Tape Aids for the Blind.

ADVERTISEMENTS:
Main magazine: Ince Custom Publishing
Contact: Dean Cumberlege • Tel (011) 305 7334
Cell: 082 805 1257 • E-mail: DeanC@ince.co.za
Classifieds supplement: Contact: Isabel Joubert
Tel (012) 366 8800 • Fax (012) 362 0969
PO Box 36626, Menlo Park 0102 • E-mail: classifieds@derebus.org.za

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

CIRCULATION: *De Rebus*, the South African Attorneys' Journal, is published monthly, 11 times a year, by the Law Society of South Africa, 304 Brooks Street, Menlo Park, Pretoria. *De Rebus* is circulated digitally to all practising legal practitioners and candidate legal practitioners free of charge and is also available on general subscription.

NEW SUBSCRIPTIONS AND ORDERS: David Madonsela
Tel: (012) 366 8800 • E-mail: david@lssa.org.za

SUBSCRIPTIONS:
Postage within South Africa: R 2 800 (including VAT).
Postage outside South Africa: R 3 000.

Problems at the Master's office

On 20 October 2023, the Law Society of South Africa (LSSA) appeared before the justice and parliamentary committee to voice legal practitioners' concerns over the issues experienced at the Master's office. In its problem statement and recommendations, the LSSA noted with appreciation the Portfolio Committee's engagements with the Chief Master on the state of affairs at the Masters' offices and its oversight visits to some of the Masters' offices. However, the Masters' offices across the country have continued to have service delivery issues.

In its capacity as a representative organisation, the LSSA has previously attempted to engage with the Minister of Justice and Correctional Service, the Deputy Minister of Justice, and the Chief Master with a view of finding meaningful solutions, with little or no success.

The LSSA notes that the Masters' offices have not been functioning as they should for several years and the COVID-19 pandemic, including loadshedding, have exacerbated the situation. The Masters' offices are, among others, responsible for the registration and supervision of the administration of deceased estates. According to its website: 'The purpose is to ensure an orderly winding up of the financial affairs of the deceased, and the protection of the financial interests of the heirs.'

In its problem statement, the LSSA added that: 'The continuous loadshedding adds to the Masters' offices' woes. During this pivotal juncture, the Masters' offices have exhibited a deeply concerning failure in meeting the needs of the South African public. Regrettably, they have been unable to establish a substantial level of trust among both the legal community and the public. Their embedded culture and malfunctioning operations not only hinder progress, but also display a distinct lack of proactive planning and a dearth of urgency. Immediate attention and corrective measures are imperative to address these critical shortcomings and gain the confidence of stakeholders.'

The LSSA also commented on the performance targets of the Masters' offices, captured on pages 52 and 53 of the Annual Report for 2021-22 of the Department of Justice and Constitutional Development. Noting that 'the statistics are in stark contrast to the realities experienced by legal practitioners in their quest to assist members of the public.

On multiple occasions, the LSSA has pointed out that legal practitioners have previously contributed to alleviating administrative backlogs and processing delays within state departments, thereby enhancing the administration of justice. Considering this, the LSSA expressed the view that a similar intervention could be pursued within a defined timeframe to alleviate the current backlog. This option has unfortunately not been pursued.

The LSSA made the following recommendations to assist in resolving some of the issues experienced at the Masters' office:

- All Masters' offices must be directed to embrace communication by electronic mail. This would be a meaningful intervention and significantly improve turnaround times for the administration of estates. Legislative changes should be made as soon as possible to facilitate this, where required. The proposed amendments in the Judicial Matters Amendment Bill B7 of 2023 relating to the Administration of Estates Act 66 of 1965 should be reconsidered.
- The amendments to the Trust Property Control Act 57 of 1988, pursuant to the provisions of the General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Act 22 of 2022, have created additional responsibilities for the Masters' offices, which will require additional capacity. The new provisions will also create hardship for members of the public. The LSSA intends to make representations for an amendment of the Act.
- All vacant posts need to be filled urgently, including the appointment of a permanent Chief Master.
- All officials should receive training to enhance efficiency and customer focus.
- The Portfolio Committee could perhaps prescribe further requirements for annual reporting regarding the performance of targets by the Master's office, as the Annual Report in this regard does not appear to depict the reality experienced by practitioners.

Mapula Oliphant – Editor

Would you like to write for *De Rebus*?

De Rebus welcomes article contributions from legal practitioners.

Practitioners and others who wish to submit feature articles, practice notes, case notes, opinion pieces and letters can e-mail their contributions to derebus@derebus.org.za.

The decision on whether to publish a particular submission is that of the *De Rebus* Editorial Committee, whose decision is final. In general, contributions should be useful or of interest to practising attorneys and must be original and not published elsewhere. For more information, see the 'Guidelines for articles in *De Rebus*' on our website (www.derebus.org.za).

- Please note that the word limit is 2 000 words.
- Upcoming deadlines for article submissions: 20 November 2023; 22 January, and 19 February 2024 .

LETTERS TO THE EDITOR

PO Box 36626, Menlo Park 0102 ● Docex 82, Pretoria ● E-mail: derebus@derebus.org.za ● Fax (012) 362 0969

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.

Unconstitutional loss of citizenship

I refer to the recent Supreme Court of Appeal judgment, *Democratic Alliance v Minister of Home Affairs and Another* (SCA) (unreported case no 67/2022, 13-6-2023) (Zondi JA (Schippers and Matojane JJA and Kathree-Setiloane and Unterhalter AJJA concurring)), wherein it was held that it is indeed unconstitutional should South Africans without first obtaining prior permission from the Minister of Home Affairs be stripped of their citizenship.

The year 1994 heralded a new beginning for South Africa and thankfully we thereafter obtained an exceedingly progressive Constitution. In fact, to counter past imbalances various measures were enacted.

It is truly amazing how it took so long for the requisite section of the South African Citizenship Act 88 of 1995 to be challenged. Logically, just because I decide tomorrow to acquire Japanese citizenship does not mean I have decided to renounce my South African citizenship.

Furthermore, there is no clear criterion as to how exactly citizens who acquire foreign citizenship should lose their South African citizenship. For example, does it apply only to citizens who acquire foreign citizenship by naturalisation only?

What happens in the case of citizens who are deemed citizens of foreign countries automatically by the laws of the said foreign country?

In addition, there is unfair differentiation between South African citizens by birth and South African citizens by naturalisation. The former, even if they lose their citizenship still maintain the right to remain in the country. Does this mean a South African citizen by naturalisation who has lived here for over 30 years must be deported after acquiring foreign citizenship without the requisite permission of the Minister?

This is an old Apartheid relic law whose purpose was to deprive freedom fighters of their nationality. So, it begs the question why would a government, which believes in human rights, and many of its members who suffered for freedom oppose the move to declare the said law unconstitutional?

I sincerely believe, we, members of the legal profession should not keep silent about blatantly unreasonable legislation.

Siyabonga Mkhize *LLB (Unisa)* is a legal practitioner in Johannesburg.

People and practices

Compiled by Kevin O'Reilly

DSC Attorneys in Cape Town has appointed Aphelele Mabanga as a Legal Practitioner.

Aphelele Mabanga

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

By Kevin O'Reilly

Deceased Estates, Trusts and Planning Committee meeting summary

The Law Society of South Africa's (LSSA) Deceased Estates, Trusts and Planning Committee (the Committee) met on 19 September 2023 to discuss various matters within its field of expertise. Some of the topics considered were the following:

Letter addressed to the Minister of Justice and Correctional Services

The LSSA addressed a letter to the Minister, requesting a meeting to discuss, *inter alia*, the following issues –

- the LSSA Electricity Task Team, which seeks to find sustainable solutions to address the negative effects of load-shedding on access to justice;
- the state of affairs at the Masters' offices, including substantial backlogs, unanswered correspondence and phone calls, and misplaced files; and
- legislation regulating enduring powers of attorneys.

The LSSA received an acknowledgement of receipt from the Minister but was unable to secure a meeting. The LSSA has several matters it wishes to discuss with the Minister and periodically sends follow-up letters. The LSSA will continue to follow up on these matters.

Performance Plan Statistics and Reports

The Committee acknowledged the importance of obtaining these statistics and reports consistently from the Office of the Chief Master. It was suggested that as soon as these reports are received by the Chief Master's Office, they should be shared with the LSSA as well. While recognising that these reports may not be entirely accurate, they do provide some insight into the turnaround times at the Masters' offices. The Committee will request these reports on a continuous basis.

Appointment of independent trustees

The Committee noted the former Chief Master's undertaking to revise Chief Master's Directive 2 of 2017, specifically regarding the exclusion of the provision that an independent trustee has no family relation or connection, blood or other, to any of the existing or proposed trustees, beneficiaries or founder of the trust. The Committee recalled that this issue originated from the *Land and Agricultural Development Bank of SA v Parker and Others* 2005 (2) SA 77 (SCA) judgment and subsequent developments. However, it was noted that if one interprets Chief Master's Directive 2 of 2017 (Trusts: Dealing with Various Trust Matters) correctly, there might not be a requirement for an independent trustee, especially in the case of a family trust not engaging in business activities, or if the trust was established before February 2017. Therefore, the 'independent trustee' is a fiction created by the industry and is not necessary in each and every family trust. The Committee resolved to follow up on this issue with the Chief Master's Office.

Enduring powers of attorney

The Committee noted that the South African Law Reform Commission (SALRC) published Project 122 Assisted Decision-Making Report, 2015, which also deals with enduring powers of attorney. However, nothing further had transpired. Upon follow up, the SALRC informed the LSSA that it had completed its mandate and the responsibility now lies with the Minister. The Committee is of the view that legislation should urgently be introduced to provide for enduring powers of attorney and included this issue on the agenda of the meeting with the Minister.

Relationship with deposit taking institutions

The Committee noted a letter had been sent to the Banking Association of South Africa (BASA) expressing dissatisfaction with the quality-of-service levels of the banks.

The issues raised included the following:

- The lack of response when dealing with deceased estates matters. The response provided is that the bank is conducting the necessary due diligence. Practitioners may sometimes have to wait up to a year and a half for a response.
- Another concern raised was that of special powers of attorney to act on behalf of an executor. Some banks are now unwilling to accept the special power of attorney and insist that the executor must personally handle the matter, which may not always be feasible.
- A further issue raised was that of closing out an account, which may take six to eight months. The only option left available to practitioners is to initiate legal proceedings.

Noting that BASA is not the regulatory body for the banks, the LSSA requested BASA to bring the concerns to their attention.

The Committee resolved to schedule another meeting with BASA to address these issues and engage in discussion with them.

Tax compliance for administering deceased estates

The Committee discussed the significant challenges practitioners face when submitting tax returns for deceased estates. The submission of income tax returns for deceased estates and post-death registration on e-filing was complex and problematic. This is exacerbated by the fact that practitioners cannot go directly to the South African Revenue Service (Sars) offices anymore to try resolve the deceased's tax issues.

The Committee intends to hold a joint meeting with the LSSA Tax and Exchange Control Committee (Tax Committee) to discuss these issues and subsequently arrange a joint meeting with Sars to seek resolutions for these problems. The Committee noted that there appears to be a system problem and an expertise problem concerning deceased estates, and these two aspects should be addressed during the meeting with Sars.

- Practitioners who encounter similar problems are invited to send an e-mail to Lizette@lssa.org.za.

Mandamus applications for the issue of letters of executorship/letters of authority

It was noted that one Master's office warned that any attorney that brings a *mandamus* application will be reported to the Legal Practice Council for unprofessional conduct. Attorneys in that area are afraid to take any steps for fear of victimisation. A proposal was made to advocate for the establishment of a dedicated court within the Master's office, specifically for handling matters related to the Master's office. This court would handle matters related to wills and disputed claims against estates etcetera, eliminating the need to go through the High Court for the processes.

Access to files stored at the Veritas off-site storage facility

Veritas has now become the new storage facility, replacing Metrofile. The project was piloted in March 2023, during which the files were moved to the new storage facility. Six months later, practitioners are still encountering difficulties in accessing the files stored there. It is claimed that the issue is resolved, however, when attempting to retrieve copies, amend letters of authority or to access older estate files, the response is that the files cannot be accessed because they are being processed by Veritas. It appears that there is breakdown in communication between the Master, the office manager and Veritas. This is also having an impact on registration of beneficial ownership.

It was suggested that the LSSA, in collaboration with the provincial associations and other affected stakeholders, address a letter to the Chief Master requesting an official response. The Committee decided to request one of the provincial associations to draft such a letter. If the LSSA is satisfied with the terms, it will support the letter.

Judicial Matters Amendment Bill – for comment

On 13 June 2023, the LSSA had the opportunity to meet with the Parliamentary Portfolio Committee on Justice and Correctional Services to make verbal representation on the Judicial Matters Amendment Bill B7 of 2023. One of the issues that came up during the hearing, was the state of affairs at the Masters' offices throughout the country. The LSSA was requested to submit a memorandum to the Portfolio Committee, including the problem statement and recommendations, whereafter the LSSA was invited to address the Committee on the issue. The memorandum was submitted, and on 20 October 2023, the LSSA appeared before Parliament to present on a number of concerning issues relating to the Master's Office. The LSSA put forth recommendations which were well received, and the Portfolio Committee undertook to engage with the LSSA again. See Mapula Oliphant 'Problems at the Master's office' 2023 (Nov) *DR* 3.

General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Act 22 of 2022

The Committee's attention was drawn to a *TSAR* article (Francois du Toit, Bradley Smith and Louis Janse van Vuren '"Beneficial owner" and "beneficial ownership" in South African trust law: troublesome aspects of the General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Act 22 of 2022' (2023) 3 *TSAR* 387), dealing with the Financial Action Task Force's (FATF's) Recommendation 25 in the Act. In relation to ownership, this introduced terminology foreign to South African trust law. The Committee was of the view that the FATF Recommendation 25 is primarily intended for *inter vivos* trusts and not testamentary trusts. As a way forward, it was suggested that the Committee members familiarise themselves with the *TSAR* article before coming to a resolution.

The Committee discussed the importance of addressing the broader compliance issues concerning the General Laws Amendment Act. The Financial Intelligence Centre (FIC) recently advised that attorneys who are also providing advice and assistance on the setting up and management of trusts and companies must register as Trust and Company Service Providers, notwithstanding that they are already registered as legal practitioners rendering such services.

The lack of proper implementation of Risk Management and Compliance Programmes (RMCP) within the legal profession is a growing concern.

- The LSSA has drafted guidelines aimed at assisting practitioners to prepare their own RMCPs. Click here to view the guidelines: www.LSSA.org.za

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

Requirements for readmission as a legal practitioner

By John Ndlovu

A person who has previously been removed from or struck off the roll of legal practitioners on the grounds that he or she was not a fit and proper person to continue practicing may apply to the High Court to be reinstated. The person who applies for readmission must, apart from satisfying all the other requirements set out in the Legal Practice Act 28 of 2014 (the LPA), demonstrate and convince the court that they are a fit and proper person to be readmitted and enrolled as a legal practitioner. This article will focus mainly on the requirement of being a fit and proper person.

Legislation

The LPA regulates all matters relating to legal practitioners, including admissions and readmissions as legal practitioners. Section 15(3) of the Attorneys Act 53 of 1979, the precursor to the current LPA, had specific provisions dealing with readmissions. The LPA only refers to admissions and does not have express provisions regulating the readmission of persons who have previously been removed from or struck off the roll. Section 24(2)(*c*) of this Act provides that the High Court must admit to practice and authorise to be enrolled as a legal practitioner any person who, on application, satisfies the court that he or she is a fit and proper person to be so admitted. It is, however, accepted that the provisions of s 24 should be construed as also regulating applications for readmission. The court has a discretion to decide whether an applicant is a fit and proper person to be readmitted as a legal practitioner.

The 'fit and proper' requirement

As discussed in the preceding paragraph, a person who applies for readmission either as an attorney or advocate must satisfy the court that they are a fit and proper person to be so readmitted. This requirement is in addition to the requirements set out in ss 24 and 26 of the LPA and applies both to persons who apply to be admitted for the first time as legal practitioners and to those who apply for readmission. The onus is on the applicant to convince the court, on a balance of probabilities, that they are a fit and proper person to be readmitted. In *Kudo v Cape Law Society* 1972 (4) SA 342 (C) at 345 the court stated that in considering whether the applicant has discharged the onus of convincing the court that he or she is a fit and proper person, 'the court will have regard to the nature and degree of the conduct which occasioned applicant's removal from the roll, to the explanation, if any, afforded by him for such conduct which might, *inter alia*, mitigate or even perhaps aggravate the heinousness of his offence, … to the lapse of time between his removal and his application for reinstatement; … to the expression of contrition by him and its genuineness, and to his efforts at repairing the harm which his conduct may have occasioned to others'. It follows, therefore, that where the applicant was removed from the roll of legal practitioners as a result of theft of trust funds, failure by him or her to repay the stolen funds prior to launching the application for readmission would limit his or her chances of successfully applying for readmission. Where the Legal Practitioners' Fidelity Fund (the LPFF) pays claims in terms of s 55 of the LPA to the applicant's erstwhile clients, the LPFF is subrogated in terms of s 80 to all the rights and legal remedies of the claimant against any practitioner or person in relation to whom the claim arose, or in the event of their death or insolvency or other disability, against any person having authority to administer their estate. The LPFF steps into the shoes of the claimants and exercises all the rights and remedies, which are normally accorded to the claimants. Failure by the applicant to pay the LPFF will certainly have an adverse effect on the applicant's application for readmission. Where the applicant has failed to repay the stolen funds, it would be difficult to see how they can be considered to be a fit and proper person as they would have failed to repair the harm, which their conduct may have occasioned to the LPFF or their erstwhile clients. In *Lethlaka v Law Society of the Northern Provinces* (GP) (unreported case no 54065/2012, 11-11-2014) (Rabie J and Mojuto AJ) the court dismissed the applicant's application for readmission with costs on the grounds, *inter alia*, that the applicant failed to pay the Law Society's taxed costs relating to the application for his striking off. The court also stated that: 'The applicant's laconic remark that he would pay the Law Society's costs once he is readmitted as an attorney, falls far short of what is expected of an attorney' (*Lethlaka* at para 34).

In *Law Society, Transvaal v Behrman* 1981 (4) SA 538 (A) at 557B-D, Corbett JA emphasised that the person seeking readmission must show that: 'There has been a genuine, complete and permanent reformation on his part'. The applicant must demonstrate that: 'The defect of character or attitude which led to his being adjudged not fit and proper no longer exists; and that, if he is readmitted, he will in future conduct himself as an honourable member of the profession' (*Behrman* at para 26). There is, however, no guarantee that a person who has been certified to be fit and proper to be readmitted as a legal practitioner will in future conduct themselves as an honourable member of the profession. Slabbert bemoans the fact that legal practitioners 'who have been described as "fit and proper" do not always act in such manner' (M Slabbert 'The requirement of being a "fit and proper" person for the legal profession' (2011) 14 *PER* 209). She argues that: 'the "fit and proper" person test does not succeed in keeping unwanted elements out of the legal profession. It is also no guarantee of moral goodness' (Slabbert (*op cit*) at 225). Slabbert's argument is tenable in view of the fact that there are known cases of legal practitioners who were previously struck off the roll on two or more occasions. In *South African Legal Practice Council v Mangolela and Another* (GP) (unreported case no 91612/2021, 23-11-2022) (Mogale AJ and Jansen Van Niewenhuizen J), the LPC brought an application to have Mr Mangolela struck off the roll of legal practitioners for the second time. He was initially admitted as an attorney on 30 January 2001. He was struck off on 13 February 2006 and was subsequently readmitted as an attorney on 4 December 2015. In this case it was found

that he overreached his clients, had substantial trust deficits in his bookkeeping, delayed the payment of trust funds, failed to respond to correspondence and that he placed his trust creditors and the LPFF at risk. The court found that the respondent had been dishonest, that he had shown a lack of integrity and openness and had shown no insight into the extent of his transgressions. The court remarked that these are character traits which an attorney should not have. He was struck off the roll for the second time on 23 November 2022.

An applicant who has a previous conviction or a pending criminal case against him or her, whether in relation to the theft of trust funds or any other serious criminal offence, should not be considered to be a fit and proper person to be admitted or readmitted as a legal practitioner. In *Thukwane v Law Society, Northern Provinces* 2014 (5) SA 513 (GP), the applicant sought to review the Law Society's decision not to register his articles of clerkship on the grounds that he was not a fit and proper person because he had been convicted of murder, robbery and the illegal possession of a firearm and was still on parole. The court held that since the purpose of the registration of articles was to allow an applicant to enter the attorneys' profession, the expression 'fit and proper' had to be given the meaning attributed to it in cases dealing with the admission, striking off and readmission of attorneys. In view of the aforegoing, the Law Society had to be convinced that the applicant possessed the characteristics of integrity, reliability and honesty required of attorneys. In this case the serious nature of the applicant's crimes militated against such a conclusion. Furthermore, the applicant had failed to show genuine and permanent reformation. The Law Society's decision not to register the applicant's articles was upheld by the court.

Conclusion

The expression 'fit and proper person' although not defined in the legislation, constitutes an important criterion for the admission, readmission and removal from the roll of legal practitioners. The onus is on the applicant to convince the court on a balance of probabilities, that he or she is a fit and proper person to be readmitted. There is, however, no guarantee that a person who has been declared fit and proper will in future conduct himself or herself as an honourable member of the profession. Since there is a real possibility that a person who has been readmitted on the grounds that they are fit and proper can again conduct themselves in a dishonourable manner as in *Mangolela* it is important that the requirements for readmission as legal practitioners should be made more stringent.

John Ndlovu *BIur (UniZulu) LLB (UP) Masters Cert (Labour Relations Management) (UJ)* is a Senior Legal Adviser at the Prosecutions Unit of the Legal Practitioners' Fidelity Fund in Centurion. ❑

The inherent power of the High Court, the Supreme Court of Appeal and the Constitutional Court is limited

By Unathi Floyd Xokiso

The Constitution in terms of s 173 confers inherent powers on the High Court, the Supreme Court of Appeal (SCA) and the Constitutional Court (CC) to protect and regulate their own process if it is in the interest of justice to do so. However, those powers do not exist without limitations regarding the instances in which they may be exercised. This article will critically examine the CC's interpretation of s 173 of the Constitution and accentuate the fact that the s 173 inherent power is not unlimited.

Section 173 of the Constitution

The meaning and application of s 173 of the Constitution was briefly dealt with by the CC more than a decade ago in the matter of *Children's Institute v Presiding Officer, Children's Court, Krugersdorp, and Others* 2013 (2) SA 620 (CC). In this case, the CC considered the question of whether the High Court could have been well within its rights to invoke its inherent power in terms of s 173 of the Constitution to allow an *amicus curiae* (the friend of the court) to adduce evidence. In reaching its decision the CC gave regard to the High Court's decision that 'allowing an *amicus* to adduce evidence would constitute the creation of a new substantive right, which goes beyond the scope envisioned by section 173'.

In direct contrast to what the High Court had found, the CC found that even if r 16A of the Uniform Rules of Court could have been found to be lacking in respect of allowing an *amicus* to adduce evidence, it still would have been appropriate to invoke s 173 of the Constitution. In other words, it would have been possible for the High Court to exercise its inherent power in terms of s 173 of the Constitution to allow an *amicus* to produce evidence. This ruling was welcomed by many and hailed as a landmark judgment in that it 'broke the silence' by allowing an *amicus* to adduce evidence (see Darren Subramanien 'Breaking the silence – friends of the court can adduce evidence *Children's Institute v Presiding Officer of the Children's Court District of Krugersdorp* Case CCT 69/12 [2012] ZACC 25' (2013) 34 *Obiter* 333 at 345).

However, quite recently, the matter of *Social Justice Coalition and Others v Minister of Police and Others* 2022 (10) BCLR 1267 (CC) came before the CC. In this case, the CC grappled with the question pertaining to the scope of the inherent power in terms of s 173 of the Constitution. As strikingly different from what the CC itself had found in *Children's Institute* in relation to the s 173 inherent powers, the same court found that s 173 does not give the court unfettered powers to do as it pleases. In reaching this conclusion, the CC referred to its earlier decision in the case of *S v Molaudzi* 2015

(2) SACR 341 (CC) wherein it held that the inherent power to regulate its own process applies to procedural rights rather than substantive rights. Furthermore, that a court may exercise inherent power to protect and regulate its own process when confronted by 'inadequate procedures and rules in the sense that they do not provide a mechanism to deal with a particular scenario'.

The same sentiment had been echoed by the SCA in *Oosthuizen v Road Accident Fund* 2011 (6) SA 31 (SCA), a judgment that was handed down prior to the handing down of both the *Children's Institute* and *Molaudzi*. In the *Oosthuizen* judgment, the SCA had found that the use of the court's inherent power could be achieved in instances wherein the court otherwise has jurisdiction but is presented with court rules and procedures, which do not provide viable mechanisms to address the problem at hand.

The decision that was made by the CC in respect of the s 173 inherent powers, in the matter of *Children's Institute,* was overturned by the same court in two judgments, namely *Molaudzi* as well as *Social Justice Coalition*. In this way, these two judgments reaffirmed what was ruled by the SCA in the *Oosthuizen* matter. As a result, it is safe to conclude that the exercise of the s 173 inherent power is strictly limited to instances in which the court, be it the High Court, the SCA, or the CC, is faced with court rules and procedures which do not address the problematic scenario facing the court at a particular time.

Conclusion

In conclusion, the s 173 inherent power is there to allow the High Court, the SCA, and the CC to protect and regulate their own process. However, as has already been highlighted above, such powers do not exist without limits, and this has been illustrated through case law mentioned above. What can be taken away from this article is that the s 173 inherent powers can aptly be exercised only in instances whereby the courts are faced with court rules and procedures which fail to address the procedural problem before the court.

Unathi Floyd Xokiso is a final year LLB student at the University of Johannesburg.

Duty to sustain the dignity of our courts

By Sipho Maphumulo

Legal practitioners have a duty to protect the dignity of the courts by advancing the interests of justice, observing the law, and maintaining the ethical standards of the profession whenever they litigate.

These standards are enshrined in s 36(2) of the Legal Practice Act 28 of 2014 read in conjunction with the Code of Conduct for all Legal Practitioners, Candidate Legal Practitioners and Juristic Entities. This might sound easy to adhere to, however, there have recently been instances in which legal practitioners have found themselves in breach of these standards and have subsequently faced repercussions. Prime examples of this, are recent judgments of the Labour Court (LC) in Durban and Johannesburg in *Mlondo and Others v Electrowave (Pty) Ltd* [2023] 8 BLLR 813 (LC), and *University of South Africa v Socikwa and Others and a related matter* [2023] 8 BLLR 836 (LC). In these judgments, the courts made orders aimed at deterring legal practitioners from abusing and disregarding court processes. As it will be apparent below, the conduct of the legal practitioners in these cases played a huge role in triggering the courts to make such orders.

Picture source: Gallo Images/Getty

Mlondo

The applicants were employed by the respondent prior to their dismissal in February 2021. During the period of their employment, the respondent had recognised the National Union of Metalworkers of South Africa (NUMSA) as a bargaining agent. Mr Maduna was a union official while Mr Mlondo and Mr Mbewe were shop stewards. On 19 January 2021, the applicants engaged in strike action and the respondent issued ultimatums, but the applicants persisted, nevertheless. The respondent subsequently resorted to suspending the applicants pending the outcome of an investigation and a disciplinary hearing.

Among the applicants' grievances, was a job grading system and short-time that was introduced by the respondent.

On 26 January 2021, the applicants were dismissed following a disciplinary hearing outcome by an independent chairperson who found them guilty of serious misconduct for participating in unprotected strike action. Following this dismissal, the two shop stewards' disciplinary hearing was held separately from the rest of the applicants. Mr Mbewe and Mr Mlondo's hearing was held on 4 February 2021 wherein the chairperson also found them guilty of serious misconduct for participating in an unprotected strike and ordered that their dismissal would be an appropriate sanction.

The court was then tasked to determine whether the applicants' dismissal was substantively and procedurally fair.

In terms of the Labour Relations Act 66 of 1995 (LRA), protected strike action carries immunity against dismissal and civil liability; while unprotected strike action does not. Considering this, participation in strike action that does not comply with the LRA (Schedule 8: Code of Good Practice: Dismissal) amounts to dismissible misconduct. The court must, however, look at all relevant circumstances of each case when determining the fairness of a dismissal.

On the issue of whether there was strike action on 19 January 2021, the applicants' legal representative submitted that the applicants did not participate in strike action on the date in question. In support of this submission, the applicants' legal representative argued that they had in fact held a meeting outside office hours on the said date, and they had no duty to report to work on that day.

The court dismissed this argument and found it to be disingenuous on the basis that the applicants themselves had initially pleaded that unjustified conduct by the respondent had provoked them to participate in unprotected strike action more than three times in a space of seven months, including the one in question (19 January 2021).

The court provided clarity that, for employees to successfully raise provocation as a reason for participation in strike action, the employer's conduct must be extremely appalling and there must be a proper justification why the employees failed to comply with recommended dispute resolution procedures instead of strike action. It was held that there was no evidence to show that the respondent had acted in an unjustifiable manner to provoke the applicants to participate in strike action.

Regarding the applicants' conduct to resort to strike action, the court referred to the *Modibedi and Others v Medupi Fabrication (Pty) Ltd* (2014) 35 ILJ 3171 (LC) and found that the applicants had disregarded statutory dispute resolution processes and the respondent's attempts to resolve the disputes in an amicable manner.

In summation, the court found that the applicants' contravention of the LRA was serious. The applicants had been informed and warned that an unprotected strike was a serious act of misconduct for which they may be disciplined; and were given an opportunity to be heard prior to their dismissal, but they had disregarded all these options.

When it came to the issue of costs, the court exercised its discretion as enshrined in s 162 of the LRA and ordered the applicant's legal representative to pay 50% of the respondents' legal costs, to be paid *de bonis propriis* on a punitive scale. This decision was triggered by the applicants' legal representative's conduct during trial, who, when he realised that their case had no merits, resorted to deviate from their pleadings. The court showed strong demur to deal with his inconsistency, but he persisted, nonetheless. The judge raised concerns that making up a case as the proceedings continued disturbed court processes and would not be tolerated.

The court referred to an article by Seegobin J titled 'Restoring dignity to our courts: The duties of legal practitioners' (www.groundup.org.za, accessed 30-9-2023). In this article, Seegobin J emphasised the role that legal practitioners must play in maintaining and restoring the dignity of our courts. Furthermore, the judge reminded legal practitioners that their role is not just to push their clients' interests, but they have a duty to assist the court in administering justice according to law.

Accordingly, the dismissal of the applicants was found to have been both procedurally and substantively fair.

Socikwa

Dr Marcia Socikwa was employed by UNISA on a five-year fixed-term contract as the Vice-Principal: Operations and Facilities. UNISA did not renew the contract and discharged Dr Socikwa from her duties effective from 28 February 2021. On 28 July 2022, the Commission for Conciliation Mediation and Arbitration (CCMA) found that Dr Socikwa's dismissal by UNISA was both procedurally and substantively unfair and ordered UNISA to compensate her R 1 271 964,72, equivalent to six months' salary.

Aggrieved by the award, UNISA filed a review application in the Johannesburg LC. However, they failed to comply with the stipulated time frame for launching of review applications. In their failure, they did not bother to seek an indulgence from Dr Socikwa, nor did they furnish the court with valid reasons for such failure as contemplated in clauses 11.2.2 and 11.2.3 of the Practice Manual of the LC.

When the sheriff attended to UNISA's premises to attach movable assets for the purposes of sale in execution on 9 May 2023, UNISA filed an urgent application for the stay of execution on 12 May 2023, which was strongly opposed.

The deponent to UNISA's 'urgent application' founding affidavit (Professor Vuyo Peach) tried to convince the court that they had complied with the stipulated time frames, but the court found Prof Peach to have 'deliberately meandered into amnesia as a tactic to deceive the court'.

Dr Socikwa pleaded for the dismissal of UNISA's application with punitive costs.

Department of Justice and Constitutional Development

The Department of Justice and Constitutional Development, Limpopo Province (the Justice Department) employed Ms Elelwane Mavhunga as a Chief Administrative Clerk at the Polokwane Magistrate Court. The Justice Department dismissed Ms Mavhunga for refusing to comply with the internal rotation policy and for allegedly making derogatory statements about the Department on social media. Aggrieved by the dismissal, Ms Mavhunga approached the General Public Service Sector Bargaining Council. The commissioner found her dismissal to be both substantively and procedurally unfair and ordered her reinstatement.

The Justice Department sought to review the award to the LC, however, they failed to comply with the stipulated time in terms of which a review application may be brought to the LC.

On 28 March 2022, Ms Mavhunga attached the Justice Department's movable property, being four vehicles. On 10 May 2023, the sheriff attended to the premises of the Justice Department and allegedly stated that he would be removing the vehicles by no later than 15 May 2023. An urgent application for stay of execution was opposed by the National Education, Health and Allied Workers' Union (NEHAWU).

The Justice Department persisted with the application despite failing to prove that they complied with the stipulated timeframe or reasonably justifying their lateness. Ms Mavhunga (represented by NEHAWU) invited the court to dismiss the Justice Department's urgent application with costs on the basis that it did not comply with the Rules for the Conduct of Proceedings in the Labour Court.

Both of these applications disregarded timeframes prescribed by both s 145(1)(*a*) of Labour Relations Act and the Practice Manual of the LC. Sethene AJ decided to write a consolidated judgment on these two urgent applications on the basis that 'both urgent applications were hopeless in law and facts', and 'urgency was self-created for reasons that are inexplicable, devoid of rationality and candour'.

The court borrowed the words of Duncan Webb where he stated that: 'Where a hopeless case is brought with the assistance of the advocate, the advocate must either be bringing it in the knowledge that it is hopeless (and therefore assisting in an abuse), or believing that it is not hopeless (and therefore incompetent), or not caring whether it is hopeless (and therefore guilty of recklessness or gross negligence). In any of these cases the conduct of the advocate warrants action being taken by the court' (D Webb 'Hopeless Cases: In defence of compensating litigants at the advocate's expense' (1999) 30 *VUWLR* 295 at 299).

The court was displeased with the conduct of both applicants' legal representatives for bringing 'absolutely hopeless' cases and they were reminded that: 'Legal practitioners, as officers of the court, have the fiduciary responsibility to the court. Once legal practitioners accept either the instructions and/or briefs, their appointment by their clients connotes that they become fiduciary in relation to the litigant. In the words of Innes CJ, fiduciary duty also involves "… a solicitor to his client … "'.

The court further held: 'Once appointment is confirmed and accepted, the forensic skills of legal practitioners must be ignited to ensure that they protect the court from the burden of entertaining and adjudicating absolutely hopeless cases. It remains the duty of a legal practitioner to act in the best interests of his or her client. Acting in the best interest of the clients also denotes that a legal practitioner has an obligation to disclose to the client that the case sought to be pursued is either absolutely hopeless or has prospects of success.'

Considering the above reasons, both these applications were dismissed.

In deciding whether cost orders were appropriate, the court took into account the conduct of the parties and their representatives in the proceedings. In light of this, the court exercised its discretion as enshrined in s 162(3) of the LRA. Both legal practitioners were ordered not to charge any legal fees for bringing these 'hopeless urgent applications', or if they had already been paid to repay them within 60 days.

In closing the court agreed with Van Niekerk J in *Mashishi v Mdladla and Others* [2018] 7 BLLR 693 (LC) where he warned that those who appear before the courts to be aware that in future, the pursuit of hopeless cases will attract consequences.

The significance of these cases is that they remind legal practitioners to 'act with honesty, candour and competence', and to 'exercise independent judgment in the conduct of the case', and not attempt to abuse court processes or mislead the court (Seegobin J (*op cit*)). Legal practitioners should be aware that LCs are on a mission of building a clear and consistent list of case law, which supports the granting of cost orders against those legal practitioners who disregard court rules and processes. Judges grant these orders to protect the dignity of the law and the courts. Accordingly, legal practitioners should be honest with their client when their cases are hopeless to avoid having cost orders granted against them.

Sipho Maphumulo *LLB (UKZN)* is a candidate legal practitioner at Garlicke & Bousfield Inc in Umhlanga.

Master SaaS Contracts – Part 2

By Martin Kotze

The first article discussed the difference between software licensing and the software as a service (SaaS) model.

In this article, we will dive deeper into the intricacies of SaaS contracts by looking at access and suspension rights, restrictions relating to the use of the SaaS and the provider's right to make changes to the SaaS.

Access and suspension rights

When it comes to access to the SaaS, it is important to be clear on who will regarded as an 'Authorised User'. Will, for example, the customer's affiliates also be able to access the SaaS? Will only named users be able to access the SaaS, or is it a concurrent user model?

Next, it is important to be clear when access to the SaaS can be suspended.

Generally, the provider would want the right to suspend access if there is non-payment or the customer does not comply with the Agreement or the Acceptable Use Policy (AUP) without any prior notice.

From the customer's perspective, especially where their reliance on the SaaS goes beyond mere utility, and the SaaS is deeply integrated into their operations, the customer would want the suspension of access to the SaaS to be the last resort.

Considering the above, it is important to find a balance when it comes to suspension rights with due regard to the customer's reliance on the SaaS for its operations.

Changes to the SaaS

The right to change the SaaS is often a topic of negotiation.

This right affects both the provider's ability to innovate and evolve its services and the customer's ability to rely on and integrate with those services.

From the provider's perspective, it wants to be able to update and enhance its services, ensuring that they remain competitive, functional, and secure. This could involve adding new features, enhancing user interfaces, or improving backend processing.

From the customer's perspective, frequent changes, even if they are improvements, can disrupt its workflow, necessitate unexpected adjustments, or require additional training and onboarding. Also, many businesses integrate SaaS offerings with other systems. Changes to the SaaS can break these integrations, leading to operational issues and additional costs.

As a compromise, the parties generally agree that any changes to the SaaS may not materially reduce the functionality of the SaaS and that changes may only be made to maintain or enhance the quality or delivery of the SaaS to its customers, the competitive strength of or market for the SaaS, or the SaaS' cost efficiency or performance.

If you are the customer, ensure you are provided advanced notice of any changes. In extreme cases, you may also consider negotiating a termination right if the changes to the SaaS have a material impact on your business.

Restrictions/acceptable use

The provider usually includes various restrictions relating to the use of the SaaS. These restrictions can be included in the SaaS agreement or in a policy (often referred to as the AUP).

An AUP is generally the way to go from the provider's perspective. This is because a policy can generally be updated unilaterally by the provider. Customers are generally hesitant to agree to anything which can be updated without their consent.

A compromise may be to provide that notice of any updates to the AUP must be given to the customer, and if the customer does not object within a provided timeframe, the AUP will be regarded as updated.

These restrictions (whether contained in the SaaS agreement or the AUP) generally address illegal or harmful activities such as intellectual property (IP) theft, copying, behaviours that violate laws, and similar acts. As always, the devil may be in the details, and these provisions require careful consideration from the customer's side.

There may be usage limits to prevent any user from overloading the system, which could affect other users. Now, this may seem like a reasonable restriction, but from the customer's perspective, you do not want a situation where the provider fails to commission sufficient resources on its side and then says it is a single user causing the slowdown of the SaaS.

Beyond the standard restrictions, there may also be specific restrictions on how the SaaS can be used. For example, there may be restrictions relating to integrations. Businesses these days use multiple SaaS offerings, and often, one of the main reasons a SaaS offering is chosen above another is its ability to integrate with another system. From the customer's perspective, it is therefore important to carefully scrutinise the restrictions relating to using the SaaS.

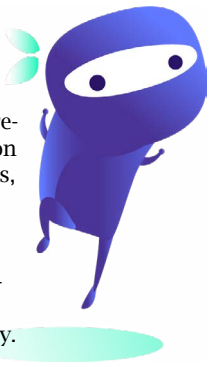
Some providers may also prohibit using the SaaS to create a competitive product or service. This makes sense. However, if there is even a remote possibility that the customer will be using the SaaS to create a product or offer which may be regarded as competitive to that of the provider, agree to an exclusion to the provision before signing up for the SaaS.

Conclusion

When negotiating access to the SaaS, changes to the SaaS and restrictions placed on the use of the SaaS, it is important to understand for which purpose the customer will be using the SaaS and how dependent the customer's operations will be on the SaaS.

Up next

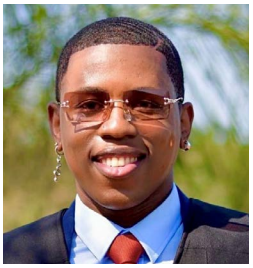
The next article will focus on important negotiation aspects relating to the limitation of liability, warranties, indemnification and intellectual property. Stay tuned for these crucial aspects to address legal risks and allocate responsibility.



ContractNinja is a proudly South African technology company which has developed powerful online contract builders which use the latest technology to help legal practitioners create bespoke contracts in less time and more accurately. It does this by guiding a user through an easy-to-use dynamic and interactive process using advanced decision trees and conditional logic to ensure the result (the contract) is tailored to your needs. ❑

Picture source: Gallo Images/Getty

Is the metaverse a far-fetched reality to access justice?



By Marcus Zulu

The metaverse is not a concept that is new within the technology space, despite many of us only having heard of it in recent years. Following the announcement made by Mark Zuckerberg in 2021 to rebrand Facebook to what is now known as Meta (the holding company of Facebook, WhatsApp and Instagram) the term 'metaverse' has become more prominent. It can further be argued that this rebrand has had somewhat of an impact in respect of igniting our curiosity with regards to what exactly the metaverse is. The term metaverse was first used in the novel *Snow Crash* (Bantam Books 1992) by Neal Stephenson. Between the publication of *Snow Crash* and 2023, there have been significant technological advancements such as artificial intelligence (AI), blockchain and 5G, which are some of the pillars that have changed the metaverse from an idea that was impossible to create into a futuristic 'successor of the mobile Internet' where 'we'll be able to feel present – like we're right there with people no matter how far apart we actually are' (Kari Paul 'Facebook announces name change to Meta in rebranding effort' (www.theguardian.com, accessed 1-10-2023)). In a nutshell, this platform can be described as 'a massively scaled and interoperable network of real-time 3D virtual worlds in which users can experience synchronously and persistently with unlimited numbers of other users, and with continuity of data such as identity, entitlements, objects, communications, and payments' (Davy Tsz Kit Ng 'What is the metaverse? Definitions, technologies and the community of inquiry' (2022) 38 (4) *Australasian Journal of Educational Technology* 190). The platform utilises augmented and virtual reality in order to 'enhance user experience, through engaging in social activities such as having meetings, collaborating on projects, playing games and learning in virtual environments' (Ng (*op cit*)). With the use of technology in our everyday lives becoming an increasing norm, one must ask, how can we use such technology in order to facilitate and access justice in South Africa?

The metaverse and the law

The world that we live in is changing at a rapid pace, therefore, the way in which we access justice and practice the law should be no different. As legal practitioners, we are currently faced with the challenge of bridging the gap between legal practice and the use of technology, and the metaverse could be one of the many tools, which could be used to narrow down this divide. Although the metaverse is in its early stages of development, the technology has had its first test run in a Colombian court, where it was used to facilitate legal proceedings. The technology enabled faster and easier access to the justice system, whereby users were represented by digital versions of themselves to take part in litigation

proceedings for the purpose of meeting the needs of a fair justice system and providing a neutral space for parties to exchange information and resolve disputes. In doing so, it removes the need for physical interaction. In order to explain key terms to participants and find the best way to verify their identities, the presiding magistrate made use of ChatGPT – an AI chatbot that provides human like responses to text based language, which is trained using data derived from an array of sources (see Maria Lorena Flórez Rojas 'Colombian judge holds a court hearing in the metaverse' (www.linkedin.com, accessed 1-10-2023))). Without considering the legal risks and challenges that may be associated with the use of the metaverse and ChatGPT as a means to access justice, it seems like the ultimate solution to resolving the issue of the law being inaccessible to those who might need it the most. The entire philosophy of attending a court hearing virtually is a new and unconventional one, since attending court hearings in person is the traditional norm. However, the question to ask is whether this is a marvel that could easily be accessed by those who desperately need it?

Legal practice in the digital age

The digitalisation of legal practice in South Africa (SA) is a journey that has been almost impossible to avoid and has affected lawyers around the country in one way or another. The legislature's commitment to digital transformation can be dated back to the early 2000s when the Electronic Communications and Transactions Act 25 of 2002 (the Act) was introduced. The intention of the Act was to regulate electronic communication, promote universal access to such electronic communication and encourage the use of e-government services (see long title of the Act). It is without doubt that the purpose of the legislature was to bring about digital transformation to various sectors of society within the Republic, including legal practitioners and the clients that they serve. In 2012, the Uniform Rules of Court were amended by introducing r 4A, which deals with the electronic transmission of documents and notices. In the same year, a landmark judgment was handed down by Steyn J of the KwaZulu-Natal Local Division of the High Court, granting an order for substituted service via Facebook. The court acknowledged that there have been significant changes in respect of using technology for the purpose of communication and it would not be unreasonable to expect the law to recognise and accommodate such changes (see *CMC Woodworking Machinery (Pty) Ltd v Pieter Odendaal Kitchens* [2012] 4 All SA 195 (KZD) at para 2). It is important to note that despite the progressive nature of the judgment handed down by the court, it was tacitly acknowledged that there may be instances where certain individuals may not have access to electronic communication and alternative means ought to be explored in order for justice to be served (see *CMC Woodworking Machinery* at para 14). Two decades after the introduction of the Act, OpenAI launched ChatGPT. Inevitably, it has also been a topic of discussion within the legal fraternity due to its ability (or attempts thereof, rather) to answer legal questions. The accuracy of the information provided by the platform has been somewhat questionable, as was the case in *Parker v Forsyth NO and Other* (Johannesburg Regional Court) (unreported case no 1585/20, 29-6-2023) (Magistrate Chaitram). The plaintiff's attorneys had relied on ChatGPT to conduct legal research, where the platform had provided feedback as requested and in the process, the platform created bogus judgments, which citations were provided to the defendants' attorneys. During the proceedings, it was admitted by the plaintiff's counsel that the source of these bogus judgments was ChatGPT. The court reiterated that the use of technology for the purpose of conducting legal research ought to be done with independent reading and frowned on the carelessness of repeating 'in parrot-fashion, the unverified research of a chatbot' (see paras 85 – 91). Considering these events, it is worth wondering whether the use of such technology may do more harm than good, in an attempt to provide access to justice for those who need it the most.

Is the metaverse a far-fetched reality for the ordinary South African?

The high costs of living in SA are depriving the majority of its citizens the opportunity to actively take part in the digital economy. To avoid a state where the fourth industrial revolution (4IR) only benefits the wealthy minority in SA, all homes in the country would need to be connected to the Internet within the next decade. When taking a glimpse at the reality of the digital divide in SA, 7,5 million people who are lower income earners are paying 80 times more than their wealthier counterparts. To put these numbers into perspective, only 10% of South Africans have affordable, fixed Internet available at their homes (see SABC News 'Digital divide will isolate poor South Africans from 4th Industrial Revolution' (www.sabcnews.com, accessed 1-10-2023)). This unfortunate reality can be traced to the growing level of socio-economic inequality in SA, which is due to a record 35,3% unemployment rate in the fourth quarter of 2021, post COVID-19. In addition to this, SA was projected to have reached a 60% level of a population living below the upper-middle-income country poverty line (see World Bank 'The World Bank's strategy in South Africa reflects the country's development priorities and its unique leadership position at sub-regional and continental levels' (www.worldbank.org, accessed 1-10-2023)). Taking the above into consideration, it is clear to see that only a select few in our society are afforded the opportunity to take full advantage of the digital community ushered into our new way of living via the 4IR. As a result of this, the idea of your average South African reaping the benefits of access to justice via the metaverse would only be reserved for the select few, who most likely are not facing any challenges of accessing justice in any event.

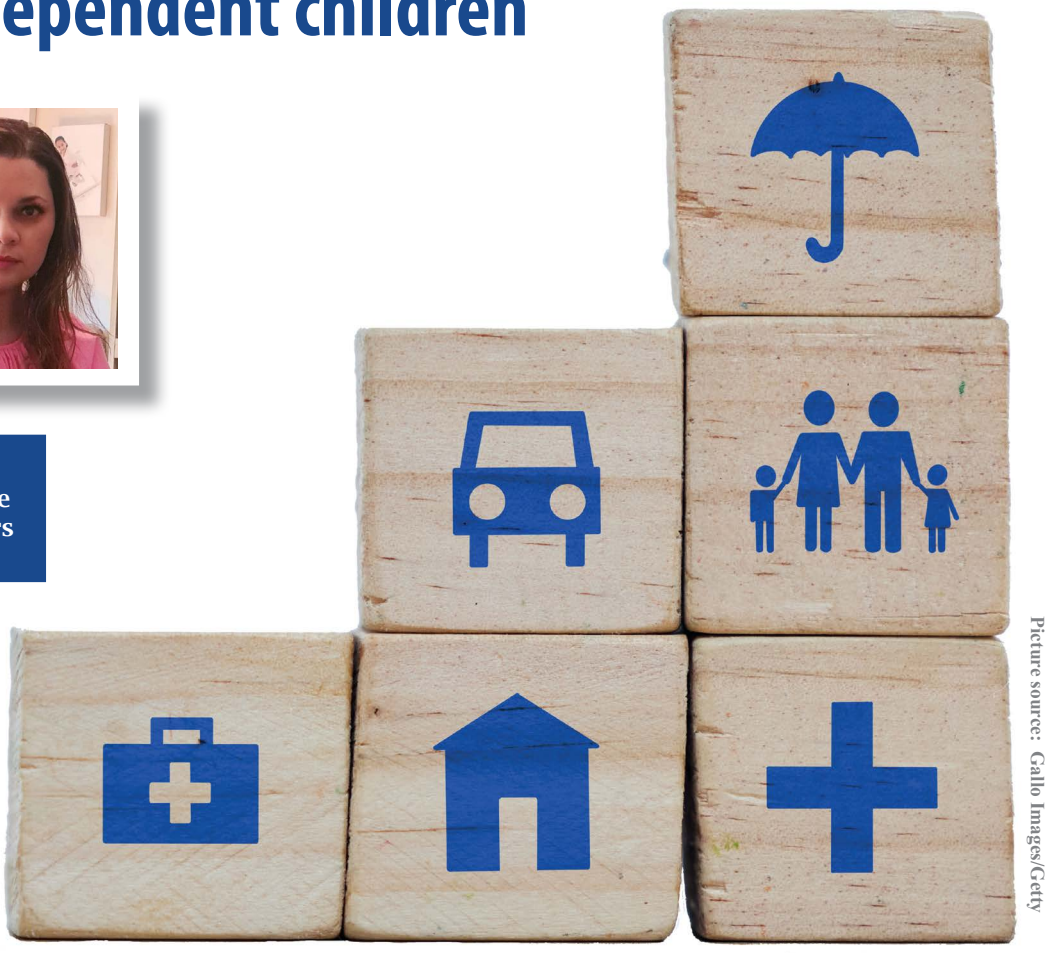
South Africa, we have work to do

Before considering the possibility of using the metaverse as a means to access justice to those who need it the most, there are other conditions that need to be met. As a starting point, the inequality gap would have to be narrowed down and various stakeholders would have to make a commitment towards including ordinary South Africans in the 4IR. To achieve this goal, the Department of Communications and Digital Technologies published a Summary Report and Recommendations (the Report), which was prepared by the Presidential Commission on the Fourth Industrial Revolution (the Commission) in 2020. The Commission, which is chaired by the President of the Republic, was tasked with developing a strategy and making recommendations regarding institutional frameworks and roles of various sectors of society, for the advancement of the 4IR. Some of the recommendations made by the Commission include investing in human capital, the establishment of an AI institute, the building of 4IR infrastructure, the review, amendment and creation of policy and legislation along with the establishment of a 4IR Strategy Implementation Coordination Council in the Presidency (see GenN591 *GG*43834/23-10-2020). It is important to understand that, at this stage, these are merely recommendations, and the onus would lie with the various government departments and other stakeholder in society to convert these into an existing reality. As it stands, it seems that the use of the metaverse to access justice in SA is a dream that remains beyond the parameters of our foreseeable future.

Marcus Zulu *LLB (UKZN)* is Legal Counsel at Absa Group in Johannesburg. ❑

A discussion on the legal position of adult dependent children

By Natalie Ruiters



Picture source: Gallo Images/Getty

The Supreme Court of Appeal (SCA) on 21 July 2022 in a unanimous decision of *Z v Z* 2022 (5) SA 451 (SCA) dispelled the notion that mothers cannot apply for maintenance on behalf of their young adult children. A few months after the *Z v Z* decision in October 2022, a mother in the George circuit court had a similar fight on her hands fending for the rights of her adult dependent children to maintenance. Saldanha J set the record straight for divorce matters in the SCA, or maintenance matters in the High Courts or lower courts, as to whether mothers have the *locus standi* or right to defend their adult dependent children's maintenance claims until such children becomes self-sufficient. In *DWT v MT and Another* (WCC) (unreported case no A222/2021, 19-10-2022) (Saldanha J) and *Z v Z*, the ages of the dependent children ranged between 19, 23 and 25, giving maintenance courts an idea that between the ages of 18 to 25 young adult dependent children can still rely on the safety net of their parents while venturing into the adult world of financial independence.

Despite the *Z v Z* judgment, the *DWT v MT* attorneys still advised their clients that the non-custodial parent can stop maintenance payments *ipso jure/ex lege* the interpretation of a divorce clause in a divorce settlement without investigating if such children are self-sufficient and financially independent.

It became evident from social media and public discourse that the South African public and some members of the legal fraternity are still under the misguided notion that custodial mothers do not have *locus standi* to pursue maintenance claims on behalf of their adult dependent children. It is obvious that the *Z v Z* case created a *lacuna* for legal representatives to advise their clients that the *Z v Z* case is only applicable to divorce matters in the High Court.

Applicability to other adult children

The question is whether the *Z v Z* case is applicable to other maintenance cases where no divorce proceedings were instituted. The short answer is affirmative since it is a SCA matter.

Unfortunately, some legal representatives including attorneys and advocates interpret the law to suit the needs of their clients and not the rights and needs of adult dependent children. For this reason, it is so important that a uniform approach is crafted by the Department of Justice (DOJ), which in turn will filter down to DOJ justice officials in maintenance courts, public prosecutors deemed maintenance officers in courts, the legal fraternity, magistrates, and judges.

Maintenance courts and maintenance officers (public prosecutors deemed maintenance officers in terms of s 4(1) of the Maintenance Act 99 of 1998, as well as maintenance officers appointed in terms of s 4(2) of the Maintenance Act) should take note of the case law pertaining to adult dependent children including *Z v Z* and *DWT v MT* and apply it in s 6 applications for discharge based on the young adult children reaching the age of majority as per s 17 of the Children's Act 38 of 2005. The criteria should be

that these young adults either still live with the custodial parent, studying at residence but still return over weekends and holidays to their family homes and still in need of financial support from both parents.

Psychological position of young adult children and social impact

I feel compelled to elaborate on the dire status of young adults who have just turned 18 and reiterate that they do not automatically become independent adults by attaining the s 17 (Children's Act) age of majority. Within the South African context, many 18-year-olds are still completing their final year of secondary schooling, taking a gap year for various reasons. It is imperative that these facts are understood by those working in the space of maintenance and its impact on young adults and be cognisant of where young adult children find themselves. To elaborate on some of these facts, one is that the economic climate does not allow for young adults to forge a way to gain experience and earn an income. We see this with young graduates too. They struggle to land a job even after graduating from tertiary education. As a result, this remains a bone of contention in the light of what is the acceptable age for parents to stop financially supporting young adult children, but until we understand pragmatically what young adults are facing, we will continue to miss the mark of the best interests of the child and integrating them to becoming self-sufficient citizens, who will contribute to the economy and not be dependent on the state when they fall pregnant or become depressed from low job satisfaction, as a result of taking whatever job they can to earn an income and not pursue better prospects due to lack of financial support from the parent/s.

In many of the cases I have mediated between a parent and young adult child, these young adults experience great amounts of anxiety having to face their parent (usually fathers) in court and plead that their basic needs be met. These young adults are in academic institutions, showing great propensity to finish their studies to truly become self-sufficient. This anxiety affects them enormously, causing insomnia, eating disorders, and having to consult with doctors as a result of the emotional turmoil experienced. Some young adult children end up seeking unhealthy relationships with men and women that can fund their studies. As an advocate fighting against human trafficking, I have interviewed many survivors who saw the red flags but were in desperate need of financial support to complete their studies or help support their households.

These students often have to miss lectures and compulsory practical training to attend court dates, where their fathers do not appear repeatedly and are intimidated by their father's legal representative, causing undue stress in having to get permission to miss practical training, which adversely affects their overall semester marks. In the wake of the SCA acknowledging most children are not financially independent by the time they attain majority at the age 18, it is imperative to realise that they do not have the emotional maturity to defend their contribution to the food bill and electricity while living with the custodian parent and younger siblings. I have witnessed that it causes tension between siblings within the household and strains the relationship between the young adult child and parents. Children do not have the maturity to explain expenses incurred during the course of a month in the household that a custodial parent can easily explain and verify in bank statements and expenditure receipts and, therefore, I accede to the ch 5 recommendations of the South African Law Review Commission Discussion Paper 157 – Project 100B: Review of the Maintenance Act 99 of 1998 (see N Ruiters 'Applying for maintenance on behalf of adult children' 2023 (Jan/Feb) *DR* 17). Chapter 5 deals with the *locus standi* of mothers in the maintenance courts.

Status quo in South African maintenance courts

It has become common practice for maintenance courts to take maintenance files to magistrates to discharge maintenance orders without calling maintenance dependent mothers and their adult dependent children into maintenance courts to confirm if such maintenance contributions are still needed. This amounts to a practice of unilateral discharging orders without applying the *audi alteram partem* principle and consulting the custodial parent and the adult dependent child in the process.

Proposed way forward

The DOJ can assist by issuing a circular to the 454 maintenance courts in South Africa with 186 maintenance officers and 229 maintenance investigators. Maintenance clerks at the helm of maintenance courts should also be included in the circular to inform the frontline staff to advise non-custodial parents on 'good cause' and the s 6 criteria before such discharge orders are heard in maintenance courts.

The Legal Practice Council should be encouraging their registered legal practitioners to advise their clients to approach the maintenance courts on a J107 to apply on 'good cause' for a discharge of the maintenance order of adult dependent children and not unilaterally interpret divorce court orders to the benefit of their client but taking the best interests of the adult dependent children to heart. If legal practitioners are encouraged in a circular to advise non-custodial parents to approach maintenance courts for s 6 discharge orders by proving 'good cause', the South African communities might have less estranged relationships between parent and child, and to furthermore preserve these relationships, as family is the fibre of community and will reduce the social ills we are experiencing.

The National Prosecuting Authority (NPA) as s 4(1) deemed maintenance officers, should follow suit and issue a circular and train their prosecutors in the rights of adult dependent children. Maintenance inquiries are included in ch 26 of the NPA Policy on Maintenance and, therefore, place a duty on prosecutors to assist in maintenance inquiries including adult dependent children discharge applications.

Furthermore, it is proposed that maintenance officers and clerks be conversant in mediation as a form of alternative dispute resolution and the tool it can be used to restore relationships while addressing maintenance issues, allowing all parties to be fully heard in a non-threatening environment. This is extremely useful for instances where young adult children are already applicants in the maintenance courts. This would heed to the Supreme Court of Appeal recommending that 'dependent children should also remain removed from the conflict between their divorcing parents for as long as possible, unless they elect to themselves assert their rights to the duty of support' (*Z v Z* at para 17).

Conclusion

The judgment of *DWT v MT* will hopefully dispel the notion that mothers in the local maintenance courts do have *locus standi* in maintenance matters pertaining to their adult children. Hopefully maintenance officers will be able to use the *Z v Z* and *DWT v MT* decisions to reject non-custodial parent's applications for discharge of maintenance orders solely based on the minor child turning 18 and deemed an adult in terms of s 17 of the Children's Act.

Natalie Ruiters *BA Psychology (UWC)* is a member of the Social Justice Association of Mediators, accredited by NABFAM and the founder of La Poppie Mediations in Cape Town. ❑

Picture source: Gallo Images/Getty

Doctrine of common purpose: Can the actions of one accomplice be attribute to others?

By Andrew Jeffrey Swarts

The common purpose principle is used by our courts in order to establish whether the actions of one of the perpetrators can be imputed on the others in order to hold all liable. The Constitutional Court (CC) in *S v Thebus and Another* 2003 (6) SA 505 (CC) at para 18 held that: 'The doctrine of common purpose is a set of rules of the common law that regulates the attribution of criminal liability to a person who undertakes jointly with another person or persons the commission of a crime.' *Namane and Another v S* (FB) (unreported case no A196/2014, 15-12-2016) (Ebrahim J, Murray AJ *et* Chesiwe AJ) at para 15 held that: '"Common purpose" is defined as a situation in which two or more people … agree … to commit a crime or actively associate in a joint unlawful enterprise.' It is clear that to apply the doctrine of common purpose, two or more people must be involved and the actions of one can be attributed to the other because of their shared intention to commit an unlawful act.

The different forms common purpose can take

The CC in *Thebus* at para 19 identified two different forms of common purpose. The one where a prior agreement, whether expressed or implied, between the parties arose or by way of active association and participation to commit a common offence. The two different forms have different requirements, and it is worthwhile to take a look at how the courts have applied both in different scenarios.

Prior agreement will be established where the perpetrators previously agreed to commit an offence. The court in *S v Molimi and Another* 2006 (2) SACR 8 (SCA) at para 34 found that: 'The evidence shows that the first appellant initiated and then planned the robbery in collaboration with the second appellant and accused 1.' This is a clear indication that an agreement between the parties was reached that they want to commit robbery and that they acted in concert to commit this crime as founded by the court after evidence was led. The court in *S v Mzwempi* 2011 (2) SACR 237 (ECM) held at para 21 that 'prior agreement may not necessarily be express[ed] but may be inferred from surrounding circumstances.'

The second form is active association. In *Namane* the court held that each of them is responsible for the acts committed by the others, either foreseeing

the possibility that the others might perform an act in order to further their common purpose, and 'was indifferent to such acts and their consequences'.

The court indicated that the other party foresaw the possibility that the one party might commit a crime and he who did not do the actual offence, reconciled himself with that possibility, making him as liable as the one who committed the offence. Counsel for the appellant in *S v Govender* 2023 (2) SACR 137 (SCA) submitted that the appellant and the accused did not agree to commit murder and thus the appellant should be found not guilty because of lack of evidence showing prior agreement. The court in *Govender* at para 15 applied the common purpose principle to the party that did not shoot the deceased and reasoned that: 'The appellant thus knew, or foresaw the possibility, that accused 1 was going to use the firearm in the club, which could result in the death of a person, but nonetheless reconciled himself with that possibility.' Stating that one did not have a prior agreement, while actively associating oneself with the unlawful act will make one just as liable as the one that caused the unlawful result.

Case study involving common purpose

In the case of *Tilayi v S* [2021] 3 All SA 261 (ECM), a group of men planned to intercept and rob a cash-in-transit vehicle. The vehicle belonging to Cash Paymaster Services was on its way to deliver the money to a pension pay-out point in a village in Tsolo on 15 September 2005. The robbers waited along the planned route of the cash-in-transit vehicle in two vehicles of their own, a bakkie and a stolen sedan. They were armed with firearms. Their plans were foiled when a manager reported two suspicious looking vehicles along the route of the cash-in-transit vehicle. The assistance of the police was called in to accompany the vehicle along the planned route in order to safely deliver the money to its intended destination. A spotter of the robbers alerted the robbers of the police's presence, and they took off. As the robbers drove off, they passed the police. The police recognised the vehicles by the description given to them, turned around and gave chase. The occupants in the bakkie shot at the police while being chased. The bakkie was later abandoned and the robbers fled on foot, while continuing to shoot at the police. The occupants of the stolen sedan later also abandoned their vehicle and fled on foot. The robbers tried to flee in any and every direction. The police gave chase in the forest. The police later called in the assistance of a police helicopter while waiting at the abandoned bakkie. Shots were fired from the forest and a police officer was fatally wounded.

It is evident that the principle of common purpose is not just a tool, but an effective mechanism created to serve justice.

The appellant was found not guilty of robbery because the court found that the robbery was only at the stage of planning and did not commence and was not executed. The appellant was, however, convicted of murder. The reasons advanced for this was, the trial court cannot prove the identity of the co-conspirators that fired the shots at the officers. It was submitted by the counsel of the appellant that once the appellant withdrew from the planned or agreed robbery, the appellant cannot to be found guilty of murder because he cannot be held liable for the actions of his co-conspirators after he withdrew from the agreed robbery. The court at para 23 applied the requirements as laid down by *S v Mgedezi and Others* 1989 (1) SA 687 (A) at 705I – 706C, where it states that –

- the person must be present at the scene of the unlawful act;
- he must have been aware of the unlawful act;
- his intention was to form common cause with the unlawful act;
- he committed some act in furtherance of the common unlawful act; and
- he had the guilty mind towards the unlawful act.

Counsel for the appellant submitted that the only agreement the appellant had was to commit the robbery and not murder. The court in finding the appellant guilty of murder by his active association, thus determined common purpose which in turn imputed the liability of the others on him. The court reasoned that he was actively planning with the others to commit the robbery and the execution of it. He was present in the bakkie when the police gave chase and the occupants of the bakkie shot at the police and he himself was armed. The court at para 33 held that the conduct of the appellant was consistent with the 'plan to use violence'. They were armed with heavy calibre assault weapons in order to overcome any resistance, including shooting their way out of a difficult situation, if needs be. The court stated that the appellant 'did foresee the possibility of a shooting affray'. He had the 'necessary *mens rea*' in respect of murder.

Dissociating, abandoning or withdrawing from the common purpose agreement

In the *Tilayi* case the counsel for the appellant argued that the appellant withdrew from the agreement when the planned robbery was not executed. In order to effectively dissociate from a previous agreement to commit an unlawful act the courts had laid certain requirements in order to indicate that the one co-conspirator withdrew from the agreement. In *Nube v S* (SCA) (unreported case no 091/15, 30-9-2015) (Bosielo JA (Pillay and Dambuza JJA, Van der Merwe and Govern AJJA concurring)) the court at para 23 dismissed the appellant contention that he dissociated himself from the planned robbery. In dismissing the contention, the court held that 'the day of the heist; and his unexplained failure to disclose sufficient information pertaining to the planned heist which would have allowed Grootboom [the police officer] to foil it.' The Supreme Court of Appeal indicated that to effectively withdraw it might require one to divulge information to the police in order to stop the planned unlawful act. In *Namane* at para 44 the court referred to *S v Musingadi and Others* 2005 (1) SACR 395 (SCA) where the court held that a sufficient dissociation would depend –

- on the circumstances;
- manner and extent of involvement;
- how far the crime had progressed;
- the timing and manner of disengagement; and
- in some instances, the preventative measures the person took to prevent the completion of the crime.

Conclusion

In *Mawala v S* (KZP) (unreported case no AR267/16, 12-10-2018) (Pillay J) at para 19 the court held that common purpose is a 'legal construct' to assist the State in prosecution where evidence is insufficient to link offenders to one another and to the crime. It is evident that the principle of common purpose is not just a tool, but an effective mechanism created to serve justice. Without it the State would have been in many instances clueless as to the true identity of the one who committed the act. The common purpose principle makes it easier to not just punish the true actor but also his co-conspirators who had the intention to commit such crimes that caused the unlawful result.

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

Picture source: Gallo Images/Getty Q

Checks and balances: Monitoring the separation of power and judicial independence

By Ganasen Narayansamy

'[T]he Constitution, at least *per se* matter, does not forbid judges to wear two hats; it merely forbids them to wear both hats at the same time' (Ronald J Krotoszynski Jr 'On the danger of wearing two hats: Mistretta and Morrison Revisited' (1997) 38 *William and Mary Law Review* 417).

As a prefatory remark, it is appropriate to state the following: 'The independence of the judiciary is a "distinctive feature of a constitutional democracy" and is an important feature of the doctrine of the separation of powers' (Scott Roberts 'Chapter 5: The Judiciary' (https://openbooks.uct.ac.za, accessed 10-10-2023).

In this brief analysis, I seek to venture and reflect on the elegant legal prowess of our Constitutional Court (CC) that gives meaning to the rarest of legal gifts, *elegantia juris*. In short, to bring some understanding of constitutional refinement, and in particular how the court analyses matters, putting together the final fabric for us all to 'wear' with pride, as it reflects a well-tuned constitutional democracy with checks and balances.

I will preface my analyses with the Constitution, where it provides for the separate functioning of the different branches. In terms of s 41(1), it is provided that:

'All spheres of government and all organs of state within each sphere must –

…

(*f*) not assume any power or function except those conferred on them in terms of the Constitution;

(*g*) exercise their powers and perform their functions in a manner that does not encroach on the … functional or institutional integrity of government in another sphere.'

However, experience and jurisprudence on the subject of a complete separation of powers doctrine has not been developed to the extent that there may never be one branch of government not reaching out to the other in the execution of the day-to-day operations of government. In other words, no independent judiciary exists in a separate isolated capsule from the other branches of the state.

Although Montesquieu eventually propounded the idea of the separation of powers, the doctrine developed into a norm comprising of four principles, as follows:

'(a) The principle of *trias politica*, which simply requires a formal distinction to be made between the legislative, executive and judicial components of state.

(b) The principle of the separation of personnel, which requires that the power of legislation, administration and adjudication be vested in three distinct organs of state authority and that each one of those organs be staffed with different officials and employees; that is to say, a person serving in the one organ of state authority is disqualified from serving in any of the others.

(c) The principle of the separation of functions, which demands that every organ of state authority be entrusted with its appropriate function only; that is to say, the legislature ought only to legislate, the executive to confine its activities to administering the affairs of state, and the judiciary to restrict itself to the function of adjudication.

(d) The principle of checks and balances, which represents the special contribution of the United States to the notion of separation of powers, and which requires that each organ of state authority be entrusted with special powers designed to keep a check on the exercise of functions by the others in order that the equilibrium in the distribution of powers may be upheld' (JD van der Vyver 'The separation of powers' (1993) 8 *SAPL* 177 at 178).

In the American Constitution, Article 1 provides that: 'All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.' There is, however, no express injunction in the American Constitution to 'preserve the boundaries of the three broad powers it grants, nor does it expressly enjoin maintenance of a system of checks and balances. Yet, it does grant to three separate branches the powers to legislate, to execute, and to adjudicate, and it provides throughout the document the means by which each of the branches could resist the blandishments and incursions of the others' (Johnny H Killian, George A Costello and Kenneth R Thomas *The Constitution of the United States of America: Analysis and interpretation: Analysis of cases decided by the Supreme Court of the United States to June 28, 2002* (US Government Printing Office 2004)).

In my view, as shall be evinced, the apex court toilfully visits every avenue of interpretation so as to ensure clarity

in giving meaning to the famous expression, 'everything that is visible hides something else that is invisible' (ME Ross *Salvador Dali and the Surrealists: Their Lives and Ideas* (Chicago Review Press 2003) at 53).

Put in another way, the apex court ensures that any concealed layers beneath which the proper interpretation exists is traced and sketched out in the very articulate judgment, which follows.

In *Speaker of the National Assembly v Public Protector and Others* 2022 (3) SA 1 (CC), the apex court explicitly sheds light on the proper interpretation of the role of a judge appointed to the panel and whether or not such appointment undermines judicial independence, and of course the doctrine of separation of powers.

The case finding its way into the corridors of the CC is to be located in *Public Protector v Speaker of the National Assembly* (WCC) (unreported case no 2107/21, 28-7-2021) (Baartman J (Dolamo and Nuku JJ concurring)).

The Public Protector raised issues concerning the removal of Chapter 9 Heads. The crux of the application was that the new rules, *inter alia*, regarding the panel were unconstitutional.

In terms of r 129V of the Rules of the National Assembly:

'(1) The panel must consist of three fit and proper South African citizens, which may include a judge, and who collectively possess the necessary legal and other competencies and experience to conduct such an assessment.

(2) The Speaker must appoint the panel after giving political parties represented in the Assembly a reasonable opportunity to put forward nominees for consideration for the panel, and after the Speaker has given due consideration to all persons so nominated.

(3) If a judge is appointed to the panel, the Speaker must do so in consultation with the Chief Justice.'

The court *a quo* acknowledged that the separation of powers doctrine model in South Africa is not one that requires a complete or total separation. In support of this argument, the court set out the test as pronounced by Zondo J in the *NSPCA v Minister of Agriculture, Forestry and Fisheries, and Others* 2013 (5) SA 571 (CC) at para 38, where Zondo J laid down the test by stating 'an appropriate approach to the determination of whether the performance of a function by a member of the judiciary offends the separation of powers would involve the following questions:

(a) Whether the function complained of is a non-judicial function. If it is a judicial function, that is the end of the inquiry as there can be no concern. If it is a non-judicial function, the inquiry proceeds to (b) below.

(b) Whether the performance of the non-judicial function by a member of the judiciary is expressly provided for in the Constitution. If it is, that is the end of the inquiry as there can be no infringement of the separation of powers. If it is not, the inquiry proceeds to (c) below.

(c) Whether the non-judicial function is closely connected with the core function of the judiciary. If it is, then the doctrine of the separation of powers is not offended. If it is not, the inquiry proceeds to (d) below.

(d) Whether there is any compelling reason why a non-judicial function which is not closely connected with the core function of the judiciary should be performed by a member of the judiciary, and not by the executive or a person appointed by the executive for that purpose. If there is, the separation of powers is not offended. If there is not, the separation of powers is offended and the relevant statutory provision, or the performance of such a function by a member of the judiciary, is inconsistent with the Constitution and must be declared unconstitutional.'

The High Court held further that it was 'persuaded that the reference to a judge in the relevant section can be severed with no adverse effect to the new Rules.' The court also placed reliance in *Coetzee v Government of the Republic of South Africa; Matiso and Others v Commanding Officer, Port Elizabeth Prison, and Others* 1995 (4) SA 631 (CC) at para 16, where it was held that: 'Although severability in the context of constitutional law may often require special treatment, in the present case the trite test can properly be applied: If the good is not dependent on the bad and can be separated from it, one gives effect to the good that remains after the separation if it still gives effect to the main objective of the statute. The test has two parts: First, is it possible to sever the invalid provisions and, second, if so, is what remains giving effect to the purpose of the legislative scheme?'

As opposed to the 'desirability' stance taken by the High Court, the CC positioned the argument, *inter alia*, from the lens of 'permissibility'.

The apex court reasoned that such a rule pertains to the role of a judge in non-judicial function and did not relate to the appointment of a judge by the President or the Judicial Service Commission. The court clarified the issue of a judge in non-judicial roles, making reference to *South African Association of Personal Injury Lawyers v Heath and Others* 2001 (1) SA 883 (CC) in which Chaskalson P held that 'it is permissible for a judge to fulfil a non-judicial role, with the caveat "that the performance of functions incompatible with judicial office would not be permissible"'.

Accordingly, the challenges did not withstand constitutional scrutiny, dismissing the application of the Public Protector concerning the unconstitutionality of r 129V. The appointment of the judge to the panel, therefore, the CC held, did not offend against the separation of powers doctrine and such appointment did not in any manner violate the domain of judicial independence.

Conclusion

It is deducible that the craftsmanship of the CC, reflects or demonstrates robustness and the courage of conviction exhibiting profoundness of well thought out arguments. Undoubtedly, in expounding the principles of constitutional imperatives it invariably indicates that the text of our Constitution is not a seasonal script, to be applied arbitrarily, according to personal desires, but that which constantly requires a careful, well-reasoned, engineering approach of interpretation where legislations or constitutional issues are in dispute. The need to keep in place judicial independence through the wisdom of its magnifying lens serves to reaffirm the importance of the Constitution as the lodestar to ensure checks and balances. As we embark on our journey as judicial officers, we are enjoined to induct these noble and notable ideas forming the core of the apex court philosophy in our judgments so that we do not lose sight of such accomplishments by the apex court.

In essence, the lesson to be gained from the Constitutional Court's methodology of reasoning invokes in us as judicial officers to consider what was described in Lon Fuller's article 'The Case of the Speluncean Explorers' (1949) 62 *Harvard Law Review* 616 to some extent and worthy of concluding with such analyses. When making decisions, 'within the ethic of care, reasoning draws on interconnections between people and seeks to minimise harms to others; for example, statutes should be interpreted in the light of their effect on people's interactions and mutual interdependence. Within the ethic of justice, reasoning is based on hierarchies of values, seeking to do what is morally (or legally) right'; such as the people's interactions should be interpreted in the light of whether they comply with the laws as written (Naomi R Cahn, John O Calmore, Mary I Coombs, Dwight L Greene, Geoffrey C Miller, Jeremy Paul and Laura W Stein 'The Case of the Speluncean Explorers: Contemporary Proceedings' (1993) 61 *The George Washington Law Review* 1754 at 1761). It is with such interpretation of statutes that we would find appropriate statutory application.

Ganasen Narayansamy *JP.ED SP.ED BCom BProc LLB Conveyancing and Notarial Practice (NDP) LLM* is an additional magistrate in Queenstown.

Becoming a legal practitioner is the best way to fight for vulnerable people

By Kgomotso Ramotsho

Legal practitioner, Wian Spies.

For the November Young Thought Leader feature column, *De Rebus* spoke to Wian Spies who was born in Pretoria. He is the eldest of four children. In 2012, he started high school at the Afrikaanse Hoër Seunskool (Affies) in Pretoria. Mr Spies said that during his school days he enjoyed playing soccer (for the Hollandia Football Club), indoor soccer, cricket and hockey. 'I particularly loved History as a school subject. History is also to this day the subject that has shaped my way of thinking the most and assisted me in my career to a very large extent. In this regard I will forever have much appreciation for Ms Schoeman who was our high school History teacher,' Mr Spies said.

After matric he enrolled as an LLB student at the University of Pretoria and stayed in Sonop, a privately owned student residence, during his studies. He completed his LLB degree in 2020 and was also elected as the *Primarius* of Sonop. In the same year he also commenced his LLM.

Mr Spies said that his mother and father always encouraged him and his siblings to attempt new things, to be independent and to finish what they have started. 'I believe that after studying for six years and completing my articles this year would not have been possible if I was not taught the way I was taught,' Mr Spies said.

Kgomotso Ramotsho (KR): Why did you choose to study law? Have you completed your LLM degree? What made you choose Procedural Law?

Wian Spies (WS): From a young age I have always questioned the way of doing things. In primary school I would often argue with my teachers on why things are regarded a certain way. The arguing would, understandably, frustrate the teachers and I would often lead to some form of punishment. Punishment generally involved having to go to detention with other kids who broke the rules. These kids are often referred to today as 'clients'.

I have always had a strong sense of justice. I hated to see vulnerable people being treated unfairly. I have always felt the urge to fight for these people and becoming a legal practitioner was the best way I could do so.

I have recently also graduated with my LLM degree in Procedural Law. My dissertation topic was 'Private prosecutions in South Africa', for the readers of this article who are interested, the dissertation can be accessed at: https://repository.up.ac.za. In the dissertation, I *inter alia* discussed the development of the principles of private prosecutions globally, as well as in South Africa and investigated the impact thereof on the criminal justice system in the post-Apartheid era and explored ways for the transformation of the criminal justice system by promoting private prosecutions.

I believe that I chose this topic as it forms part of my humanity and identity. I enjoyed writing the dissertation and experienced reading for and writing a dissertation to be a very enriching experience.

KR: What field of law do you specialise in?

WS: I specialise in General Litigation. I would not necessarily regard myself as an expert in the field yet as I have only been working in the field as a candidate attorney for 20 months and as an admit-

ted legal practitioner since 15 August 2023. I obtained experience in personal injury matters, third-party claims, civil litigation, criminal law, debt collection, firearms law, professional negligence matters, homeowners associations and rental housing matters, mining law and evictions.

KR: What is it that you enjoy about being a legal practitioner?
WS: I enjoy being able to stand up for people who are being bullied and/or treated unfairly.

KR: What are some challenges you have encountered being a legal practitioner?
WS: As a young legal practitioner, I often get the idea that opposing senior/more senior legal practitioners underestimates my knowledge and skill. I do, however, believe that I prefer it that way.

KR: What are the two qualities that a legal practitioner should have?
WS: I believe that a legal practitioner should always have very good people skills. Interaction with people is one of the main attributes to our profession and being able to communicate with people is in my opinion the most important quality a legal practitioner should have.

A legal practitioner should have a moral compass. For me my moral compass is the Bible.

KR: If you could change anything about the state of the legal profession in South Africa, what would you change?
WS: To revert to the *status quo ante* before the Legal Practice Act 28 of 2014 came into operation, with the two professions (attorneys and advocates) regulating themselves independently and without interference.

KR: Tell us about your role in the Pretoria Attorneys Association (PAA).
WS: I am part of the High Court subcommittee at the PAA. The idea of the subcommittee is to *inter alia* assist the court with difficulties to ensure smooth court proceedings and more efficient administration. I am of the view that being part of an association, such as the PAA is essential to ensure that the profession develops and improves on all levels. Given the fact that I work in general litigation especially in High Court matters, I thought that assisting under this portfolio made the most sense and is the place where I can add some value.

KR: Is your father a legal practitioner? Did this influence you to become an attorney?
WS: My father is also a legal practitioner practicing as an attorney. It most certainly did. My father introduced me to the profession by taking me to some of his hearings and sharing some of his interesting stories.

KR: Why did you choose to practice at VZLR Attorneys and not Hurter Spies Inc?
WS: I decided not to apply for articles at Hurter Spies Inc as I felt that it will benefit me more to do my articles at another firm, especially a well-established firm such as VZLR Attorneys. I am very privileged to be able to practice and learn from some of the best attorneys in Pretoria practicing at VZLR Attorneys. I am forever grateful for the opportunity that VZLR Attorneys has provided me to learn and get exposure to some of the most interesting parts of law.

I do, however, intend to join the team at Hurter Spies Inc in future.

KR: Did you suffer a sports injury playing hockey in High School? How did that effect you?
WS: I suffered a sports injury during one of South Africa's biggest school rivalries; Affies versus Grey College in Bloemfontein in May 2015 when I was in Grade 11. I was hit by a hockey ball just above my right temple and sustained a depressed skull fracture, for which I had to receive emergency neurosurgery. I missed three weeks of school as a result of the surgery. I am, however, very grateful for the fact that I to have no serious long-term effects as a result of the sports injury.

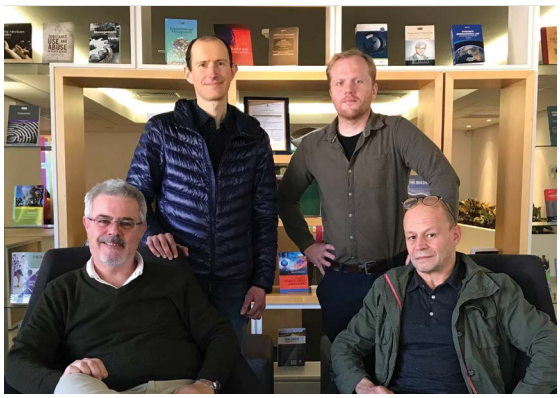
KR: What are some of your future goals in the legal profession?
WS: Future goals in the legal profession for me would be –

- to become an expert in certain fields of law, especially constitutional law and the law of delict;
- to serve people;
- to serve my community; and
- to be successful in helping the 'little guy' with their legal battles.

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

THE LAW REPORTS

September 2023 (5) South African Law Reports (pp 1 – 318); September 2023 (2) South African Criminal Law Reports (pp 221 – 321)



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

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

Abbreviations

ECB: Eastern Cape Division, Bhisho
GJ: Gauteng Local Division, Johannesburg
GP: Gauteng Division, Pretoria
ML: Mpumalanga Local Seat, Middelburg
SCA: Supreme Court of Appeal
WCC: Western Cape Division, Cape Town

Appeals

The test for appeals to the SCA: This appealability test was the topic in *TWK Agriculture Holdings (Pty) Ltd v Hoogveld Boerderybeleggings (Pty) Ltd and Others* 2023 (5) SA 163 (SCA), in which the SCA dealt with the test to be used to determine whether a lower court's decision could be taken on appeal specifically to the SCA. The facts were that the respondents were shareholders in the appellant, TWK Agri. The respondents, having dissented in respect of the adoption by TWK Agri of a resolution to amend its memorandum of incorporation, sought to exercise their appraisal rights under s 164 of the Companies Act 71 of 2008. To this end, they requested TWK Agri to pay them the fair value of the shares. Unhappy with TWK Agri's fair-value offer, the appellants approached the ML for an order directing TWK Agri to revise it. But TWK Agri raised various exceptions to the effect that the respondents' particulars of claim lacked the averments necessary to sustain a cause of action, that is, to secure an appraisal remedy. The single judge first hearing the matter upheld the exceptions but, on appeal, they were dismissed by a Full Court of the ML. TWK Agri was then granted special leave to appeal to the SCA. The SCA raised with the parties the appealability of the Full Court's order dismissing the exceptions: It had long been the rule, affirmed in recent SCA authority, that a dismissal of an exception (save an exception to a court's jurisdiction) was not appealable because it did not finally dispose of the issue raised by the exception. TWK Agri argued that this rule was not immutable and that, ultimately, appealability was determined by the general standard of the interests of justice, which would hold the dismissal of the exception to be appealable.

In its judgment, the SCA referred to the traditional test for appealability set out in *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A), according to which judgments and orders were appealable only if their effect was final, defined the parties' rights, and disposed of a substantial portion of the relief claimed. The SCA rejected TWK Agri's argument that the appealability test had been 'subsumed' under the remit of the interests of justice. It ruled that the doctrine of finality was still the central principle to be considered when deciding whether a matter was appealable to the SCA. While it acknowledged that there might well be some matters that went beyond *Zweni* or required an exception to its precepts, it the SCA nevertheless stressed that any deviation had to be clearly defined and justified to provide ascertainable standards consistent with the rule of law. The SCA accordingly held that the doctrine of finality meant that the dismissal of an exception was still not an appealable order.

The SCA, therefore, concluded that the order of the Full Court of the ML dismissing the exceptions raised by the appellant was not appealable, that the appeal was, therefore, not properly before it, and would be struck from the roll.

What constitutes 'exceptional circumstances' for the uplifting suspension of orders under appeal: *Road Accident Fund v Newnet Properties (Pty) Ltd t/a Sunshine Hospital and Another* 2023 (5) SA 289 (GP) concerned an automatic appeal, under s 18(4) Superior Courts Act 10 of 2013, to a Full Bench of the GP (Moshoana J, Malungana AJ and Skosana AJ). The appeal was against the court *a quo*'s s 18(1) order. That section provides that 'unless the court under exceptional circumstances orders otherwise', the operation and execution of a decision 'which is the subject of an application for leave to appeal or an appeal, is suspended pending the decision of the application or appeal'. Section 18(4) then provides for an automatic right of appeal when the court orders 'otherwise' and uplifts suspension under a 18(1).

The respondent (Newnet) had obtained a money judgment against the Road Accident Fund (RAF) in the GP relating to non-payment for service rendered. With the RAF's application for leave to appeal (to the Constitutional Court) still pending, Newnet applied under s 18(1) to execute the judgment. The court accepted that exceptional circumstances existed to order the enforcement of the order, such as the RAF's statutory obligation to pay for services and the physical well-being of patients in Newnet's care affected by the RAF's non-payment. The court also considered that the RAF had an emaciated prospects of success on appeal, and that this served as an exceptional circumstance to justify ordering 'otherwise'.

The Full Bench of the GP held the presence of exceptional circumstances was fact dependent. The exceptional circumstances had to specifically relate to the applicant itself, and the applicant had to produce evidence demonstrating that it was facing difficulties because of

the suspension of the decision. The fact that an appellant had poor prospects of success on appeal was not, by itself, constituted an exceptional circumstance that would allow deviation from the default position and the upliftment of the suspension. Even in the absence of prospects of success, a court was entitled to consider a s 18(3) application and/or 18(4) appeal.

Applying the law to the facts, the Full Bench of the GP concluded that Newnet had failed to show exceptional circumstances to justify dislodging the default position. Its claim was purely contractual and did not implicate RAF's statutory obligation to pay compensation, nor did the 'physical well-being of the patients' play any pivotal role. Financial problems were not rare, different or out of the ordinary. Newnet also failed to prove on a balance of probabilities that the RAF would not suffer any irreparable harm. The appeal was accordingly upheld, and the impugned order replaced with an order that the application to uplift the suspension was dismissed with costs.

Companies

An application for business rescue of a company that had already been finally wound up: In *Forty Squares (Pty) Ltd and Another v Noris Fresh Produce (Pty) Ltd t/a Golden Harvest (in Liq) and Others* 2023 (5) SA 249 (WCC), the WCC (per Gamble J) heard an application by the first applicant, Forty Squares, for an order under s 131 of the Companies Act 71 of 2008 placing the first respondent, Noris, which traded as Golden Harvest, in business rescue. Forty Squares was Golden Harvest's shareholder. Crucially, Golden Harvest was at the time of the application already in liquidation, a final winding-up order having already been obtained in the WCC.

Golden Harvest had operated a large wholesale fruit distribution business at its premises in Cape Town and Johannesburg, but had run into financial difficulties, which led to a cash-flow crisis and a default on payments to its suppliers. One such supplier was the seventh respondent, Capespan, which was owed some R 1,4 million and which had launched the winding-up proceedings against Golden Harvest. Golden Harvest's liabilities purportedly exceeded R 136 million.

In the subsequent business rescue application, the business rescue plan proposed the introduction of post-commencement finance (PCF) of R 20 million, to be contributed by Forty Squares, which it, in turn, intended to borrow. The proposed plan was to be of three years' duration and would purportedly give creditors a dividend of 30 cents in the Rand. The application was opposed by the liquidators of Golden Harvest (the second and eighth respondents), as well Capespan and another intervening creditor.

The WCC confirmed previous authority to the effect that a company that had been finally wound up could be the subject of a business rescue application. The WCC stressed, however, that a court must in such a scenario first be satisfied that there was a realistic prospect of the company being returned to profitability before it would grant the order. This would avoid sending a hopelessly insolvent company with little prospect of commercial rehabilitation through a process of business rescue, only for its winding-up to be later resumed, after an unnecessary waste of time and resources to the prejudice of the waiting creditors.

The WCC held that the facts did not indicate that the prospects of Golden Harvest being returned to solvency and commercial viability would radically improve by placing it in business rescue. These facts included that Golden Harvest's major creditors had indicated that they would not vote in favour of the business rescue plan; that Golden Harvest had ceased trading; that it had suffered severe reputational damage in the marketplace due to its inability to pay suppliers; that the PCF was unlikely to be sufficient to put Golden Harvest back into solvency; and that the three-year duration of the proposed plan defeated the 'quick-fix solution' of business rescue.

The WCC accordingly ruled that the application for business rescue had to be dismissed.

Criminal law

Compensation order may only be made by a trial court, not by a court on appeal: In *S v De Villiers* 2023 (2) SACR 221 (SCA) the appellant, an accountant, pleaded guilty in the regional court to stealing from an elderly long-standing client of his practice. The court imposed a sentence of seven years' imprisonment, of which three years were suspended. Despite the complainant having expressed the wish during sentencing proceedings to be repaid the stolen money, no such order was made.

In an appeal to the full court of the FB some nine years after his conviction, the appellant was granted leave to present further evidence of his changed circumstances. He testified that he was now 60 years old, had been economically active and a law-abiding citizen, had assisted the community in positive ways and had saved sufficient money to repay his erstwhile client. His appeal against sentence was dismissed, but a compensation order under s 300(1) of the Criminal Procedure Act 51 of 1977 for repayment of the stolen money was added by the court.

In a further appeal to the SCA on the narrow aspect of the additional order, Mothle JA (Zondi JA, Nhlangelula AJA and Siwendu AJA concurring), examined s 300(1) and found that, properly interpreted, only the court that convicted the person could make such an award. The one made by the FB, therefore, had to be set aside. This nevertheless left the evidence admitted by the full court still intact but not available to the trial court. The SCA, therefore, remitted the matter to the regional court for sentencing afresh, with the proviso that it also consider the further evidence admitted by the full court.

Section 93ter(1) of the Magistrates' Courts Act 32 of 1944 – duty of magistrate where accused legally represented: In *Director of Public Prosecutions, KwaZulu-Natal v Pillay* 2023 (2) SACR 254 (SCA) the KZP set aside a conviction and sentence for murder by the regional court on grounds that the peremptory provisions of s 93ter(1) of the Magistrates' Courts Act had not been satisfied. The regional court had proceeded without assessors. Before the trial commenced, the request to do so was brought by the accused's legal representatives. The KZP was of the view that this was insufficient.

In an appeal by the Director of Public Prosecutions to the SCA, Goosen JA (Dambuza ADP, Mothle JA and Matojane JA concurring) found that the KZP had erred in accepting as principle that the presiding officer was obliged to address an accused person directly, and explain the ambit and effect of the section, without reference to their legal representative. The magistrate was only required to bring the provisions to the attention of an accused person and establish whether such person wished to proceed without assessors. Where he or she was legally represented, the obligation was of a different character, and carried out in the light of the accused having exercised his or her right to such. This encompassed the right to have any plea tendered vicariously by the legal representative. The appeal was ultimately upheld, and the conviction and sentence reinstated.

Other criminal cases

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

- conduct of presiding officer;
- damages for unlawful arrest and detention;
- DNA evidence;
- harassment; and
- leave to appeal from magistrates' court to High Court.

Immigration

Detention of refugees under s 34 of the Immigration Act 13 of 2002: In *Abraham v Minister of Home Affairs and Another*

2023 (5) SA 178 (GJ) three illegal foreigners had been arrested and detained by the authorities pending deportation under s 34 of the Immigration Act. While in detention they stated that they wanted to apply for asylum, but they were not released to enable them to do so. They then unsuccessfully applied to the GJ for an order for their release. In a successful appeal to a Full Bench (Sutherland DJP, Wilson J and Dodson AJ), the court ruled that the lawfulness of detention under s 34 was extinguished when the detainee expressed a desire to apply for asylum – at which point the Refugees Act 130 of 1998, not the Immigration Act, governed the situation and the detainee was entitled to be immediately released. The Full Bench accordingly substituted the earlier order with an order for the release of the three foreigners.

Judges

Extent of oversight by the Judicial Service Commission – are retired judges covered? In *Seriti and Another v Judicial Service Commission and Others* 2023 (5) SA 304 (GJ), Sutherland DJP (Wepener J and Molahlehi J concurring) dealt with the question whether the Judicial Service Commission could institute proceedings against certain now-retired judges for their conduct during service as commissioners of the Arms Procurement Commission for the period 1997 – 1999, when they were still active judges. Section 7(1)(*g*) of the Judicial Service Commission Act 9 of 1994 (JSC Act) apparently extended the JSC's jurisdiction to judges who had been 'discharged from active service', but the applicants (two of the implicated judges) argued that this was unconstitutional because under s 176(2) of the Constitution a 'discharged' judge ceased to be one. Sutherland DJP disagreed with the applicants, ruling that the Constitution was not the sole source of regulation of the judiciary, it being clear from s 180 of the Constitution that national legislation like the JSC Act could also do so. Sutherland DJP found that s 7(1)(*g*) constituted a permissible extrapolation of the applicable provisions of the Constitution, in particular s 176(2), which did not exhaustively define the concept 'judge'. Sutherland DJP accordingly dismissed the applicants' request for an order declaring s 7(1)(*g*) unconstitutional.

Medical negligence claims

Payment in kind and the 'public healthcare defence': This defence was the subject of *Mashinini v MEC for Health, Gauteng* 2023 (5) SA 137 (SCA). In May 2014, Mashinini (the appellant) was the victim of botched surgery at the Tambo Memorial Hospital, a public hospital under the aegis of the Gauteng Member of the Executive Council (MEC) for Health (the respondent). During the operation she sustained an arterial injury that required further surgery and treatment to fix. In January 2017, she sued the MEC for negligence out of the GJ, claiming, among other things, future medical expenses of R 880 000. In response, the MEC raised the so-called 'public healthcare defence', under which claims against the state for future medical expenses could be satisfied by an undertaking by the government to provide medical treatment in public hospitals instead of financial compensation. Such an order, the MEC claimed would be in the interests of justice because the savings would make more resources available for the government to fulfil its healthcare obligations.

While the public healthcare defence was contrary to the common-law principle that compensation in delictual damages be paid in money, the GJ (per Adams J) nevertheless allowed it in the light of its reading of the decision in *MSM obo KBM v MEC for Health, Gauteng* 2020 (2) SA 567 (GJ), in which the GJ – according to the GJ – had developed the common law to make way for the defence. The GJ accordingly granted the MEC's petition for an order directing her (the MEC) to ensure that Mashinini received the medical services she required at a public hospital 'at the same or better level of service than in the healthcare sector'.

Mashinini, contending that public healthcare services were unsuited to her purposes and that Adams J had erred in holding that *MSM* had developed the common law to allow compensation in kind, appealed to the SCA. Mashinini's main objection to public hospitals was that, except in emergency situations, there were long waiting periods at the casualty sections, where patients were attended to on a first-come, first-served basis.

The SCA (per Zondi JA in a unanimous judgment) ruled that Adams J had indeed misconstrued *MSM*, which did not develop the common law to provide for the implementation of the public healthcare defence, the issue before that court having been only whether the state had discharged its evidential burden to show that the costs of private healthcare were not reasonable because a specific state hospital was as able as any private hospital to provide the required care. By tendering the services in question, the state had consented to the order, thereby reducing the monetary award in line with existing delictual principles.

The SCA went on to point out that because Mashinini had discharged the onus of proving her future medical expenses of R 880 000, the MEC, having pleaded the public healthcare defence, was saddled with an evidentiary burden to show that state hospitals could indeed render the required services. But since the MEC was unable to provide any evidence that medical services of the same or of an acceptably high standard would be available at no cost or for less than that claimed by Mashinini, the MEC's public healthcare defence had to be dismissed. The SCA accordingly upheld Mashinini's appeal, ruling that the R 880 000 for future medical expenses should have been awarded and amending Adams J's order to reflect this.

Mining

A mine-owner's obligation to keep on pumping out water from mine after cessation of operations: In *Ezulwini Mining Co (Pty) Ltd v Minister of Mineral Resources and Energy and Others* 2023 (5) SA 112 (SCA) the facts were that Ezulwini had ceased its operations at its mine and wanted to stop pumping groundwater out of it. When the government refused permission, it asked the GJ for a declarator that it could stop without government permission. The application was opposed by the respondent minister and the owner of an adjacent mine, which feared that water from the Ezulwini mine would flood its mine and endanger its workers. Other respondents were the Minister of Environment, Forestry and Fisheries, the Minister of Water and Sanitation, and an official of the provincial Department of Mineral Resources.

The GJ took the respondents' side, declaring that Ezulwini had to keep on pumping until the first respondent minister issued it a closure certificate or sufficient time had elapsed according to environmental legislation. Ezulwini appealed unsuccessfully to the SCA, which agreed with the GJ that Ezulwini was obliged to keep on pumping until authorised to stop or until the required time had elapsed.

In coming to its conclusion, the SCA emphasised the obvious impact the sudden cessation of water extraction would have on the mine's immediate and adjacent underground environment, including the voids above the mine, the extent of which would require time to be adequately assessed. The SCA, therefore, dismissed the appeal.

Prescription

Knowledge of debt in a delictual claim for wrongful arrest and detention: *Minister of Police v Zamani* 2023 (5) SA 263 (ECB) concerned an appeal to a Full Bench of the Eastern Cape Local Division, Bhisho (Van Zyl DJP, Majiki J and Stretch J), against the trial court's dismissal of a special plea of prescription placed before it for separate adjudication. This was in an action in delict for damages that had been instituted by Mr Zamani arising out of his alleged unlawful arrest and detention.

Section 12(3) of the Prescription Act 68 of 1969 provides that '[a] debt shall not be deemed to be due until the creditor *has knowledge of the identity of the debtor and of the facts from which the debt arises*: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care'. Mr Zamani, relying on this section, claimed that he did not know that he might have a claim for compensation against the defendant, or that his arrest was unlawful, until he had heard about such claims on a radio programme and thereafter consulted an attorney. It was not disputed that Mr Zamani knew the identity of the arresting officer, or that a period of more than three years had elapsed between his arrest and release from custody, and the time when he instituted his claim. The trial court found that the defendant had failed to prove that the plaintiff's claim had prescribed by not placing any evidence before it as to why this was the case.

The ECB Full Bench held that s 12(3) did not envisage that a plaintiff must have had knowledge that the conduct of the police was unlawful or that he had a legal right to bring a claim against the defendant. The nature of 'the facts from which the debt arises' in s 12(3) were facts that were material to the debt, that is, necessary for a plaintiff to prove to support a claim. Knowledge that the conduct of the debtor was wrongful or negligent – a legal conclusion and not a fact – was not required before prescription commenced to run, nor was knowledge of the full extent of his or her legal remedies and what the full legal implications of the known facts were.

The information Mr Zamani obtained from the radio program was no more than a realisation that he may have a claim against the policeman who arrested him, as opposed to the material facts relating to his arrest and detention that he would need to prove to establish the liability of the defendant.

The full extent of the plaintiff's cause of action was, therefore, complete and the debt became due when he was released from detention. There was nothing that prevented him from giving instructions to an attorney to institute proceedings. That the plaintiff may not have known what his legal rights were, did not delay the running of prescription. Section 12(3) did not require the creditor to have knowledge of any right to sue the debtor. In the result, the plaintiff's claim had become prescribed, and the appeal was upheld.

Other civil cases

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

- access to information held by public bodies;
- court overreach in road accident claims;
- financial assistance by companies in a group context;
- remission of rental due to *vis major*;
- striking-out applications; and
- winding-up of a close corporation.

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

A husband repeatedly in contempt on his obligation on Rule 43 Order

By Kgomotso Ramotsho

SFS v AJS (GJ) (unreported case no 11676/2018, 11-10-2023) (Nkutha-Nkontwana J)

The Gauteng Local Division of the High Court authorised and issued a warrant of arrest of the respondent in a case where the husband has been in repeated contempt. The respondent was held in contempt of the order granted on 29 June 2018 by Mokose AJ on 15 October 2021 by Windell J, under case number 11676/2018. This was as a result of an urgent court application seeking an order in terms of r 6(12) of the Uniform Rules of Court.

The applicant who is totally dependent on the respondent for maintenance, contended that the respondent is in contempt of the order granted by Makose AJ, as amended by the order granted by Windell J (r 43 order). The High Court said that this was the second contempt application against the respondent. The High Court added that the first application was served before Tshombe AJ on 20 June 2023. The respondent was accused of contemptuous refusal to make payment of the utility charges in respect of the former matrimonial home in which the applicant resides. The respondent was found to be in contempt and ordered to make payment of the arrear amounts owed to the City of Ekurhuleni Metropolitan Municipality with a punitive costs order. It was noted that it seemed the applicant had subsequently purged the above contempt.

The High Court pointed out that the applicant contended that the arrears amount the respondent is obliged to pay in terms of a r 43 order was equal to R 264 639 for the period between December 2022 to September 2023, which compromised –

- R 110 997 in respect of the cash maintenance and grocery allowance;
- R 25 891 in respect of swimming pool and home maintenance expenses;
- R 20 700 in respect of the gardener's wages;
- R 11 140 in respect of cell phone accounts;
- R 47 143 in respect of medical expenses for the children; and
- R 48 768 in respect of the applicant's medical costs.

The High Court said that it was common cause that C[…] is an independent adult and married but still lives with the applicant in the matrimonial residence. While A[…] is a student at Stellenbosch University. The High Court pointed out that the respondent was blatantly refusing to pay for A[…]'s university fees because they are not part of the r 43 order, so he contended. The High Court pointed out that the applicant contended that she has to use whatever maintenance and loans from family members to pay for A[…]'s rental of R 8 300 and allowance of R 6 000. And often cannot do so. A[…]'s university fees are outstanding by a sum of R 60 951,20 and if not paid, she was not going to graduate this year.

The High Court said that the applicant's ABSA bank account statement of 7 September 2023 showed a balance of R 106,74. That she also has health issues, which include auto-immune diseases, namely Rheumatoid arthritis and Hashimoto disease; she recently had a full knee replacement on 16 February 2023, being the second knee replacement operation in ten months; and compressed spine fractures due to osteoporosis and osteopenia of the bones, which cause her constant chronic pain. The High Court pointed out that at the time the r 43 order was granted, the applicant suffered aggressive HER2-positive breast cancer for which she had chemotherapy and radiation treatments as well as undergoing a double mastectomy in 2018. Yet, the respondent refused to pay her medical expenses per the r 43 order.

The High Court also added that the applicant had demonstrated that she does not have the means to litigate and as such tried to obviate same by sending e-mails with schedules of the arrears that were due and payable per the r 43 order to the respondent through his attorney of record, Mr Vardakos. Mr Vardakos has been on record since 2020 and conceded having received the communication from the applicant but either did not attend to it because he was travelling abroad or was busy with other matters, so he submitted. The court pointed out that the respondent was not a man of straw but a hardworking businessman with many assets including some which are abroad, as contended by the applicant. Yet he is a repeated contemnor who had deliberately frustrated the ordinary enforcement of the r 43 order. As a result, there is an accumulation of significant arrears, which include monies payable for medical care.

The High Court said that in contempt proceeding, the applicant bears the onus to prove, beyond reasonable doubt, the rudiments of contempt which are –

- existence of an order;
- service or notice of the order; and
- wilfulness and *mala fides*.

However, the respondent bears an evidential burden in relation to wilfulness and *mala fides*. The High Court added that the respondent conceded the existence of the order and in terms of the first contempt order was suspended on the condition that he purges the contempt, which he did. Even so, the respondent persists with his blatant disdain for the r 43 order.

The High Court pointed out that despite his allegation that he is employed by his businesses, the respondent failed to open up to the court about the details of his employment, proof of his earning, tax deduction, etcetera. The High Court added that the respondent expected the court to accept his mere say so that he previously used loans from his companies to meet his obligations per r 43 order as he failed to provide proof in a form of loan agreements or loan account or bank statement.

The High Court said that it is accepted that all court orders, whether correctly or incorrectly granted, have to be obeyed unless they are properly set aside. That it is a constitutional imperative for effectiveness and legitimacy of the judicial system. The High Court pointed out that in all the circumstances, the respondent has failed to discharge the evidentiary burden in showing that his default was not wilful and *mala fide*. The High Court added that the wilfulness and *male fides* have been shown to be beyond reason-

able doubt. Since the respondent is a repeated contemnor, there is no reason why he should not be committed to imprisonment.

The High Court made the following order:

'1. The application is heard as a matter of urgency and that the Rules relating to time periods be dispensed with in terms of rule 6(12) of the Rules of the above Honourable Court.

2. The respondent, A[…] J[…] S[…] is declared in contempt of the court orders granted on 29 June 2018 by Mokose AJ and on 15 October 2021 by Windell J, under case number 11676/2018.

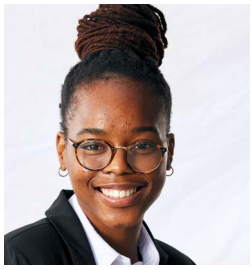
3. The respondent is hereby committed to imprisonment for a period of 6 months, which shall be suspended for a period of one … year on the following conditions:

3.1. The respondent pays to the applicant arrear maintenance and related expenses totalling the sum of R 274 639.

3.2 The respondent complies with his obligations set out in the Court Orders granted by Mokose AJ and on 25 October 2021 by Windell J, under case number 11676/2018.

4. The respondent is ordered to pay the costs of the application on the attorney and client scale.'

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



Pacta sunt servanda is not a holy cow that can never be slaughtered

By Senamile Sishi and Nosiphiwo Nzimande

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

In the recent judgment of *Ndebele and Another v Industrial Development Corporation of South Africa and Others* (GJ) (unreported case no 21687/2021, 25-7-2023) (Strydom J), the High Court decided not to slaughter the holy cow (*pacta sunt servanda*) (see PJ Sutherland 'Ensuring contractual fairness in consumer contracts after *Barkhuizen v Napier* 2007 (5) SA 323 (CC) – Part 2' (2009) *Stellenbosch Law Review* 50 at 52). The matter arose from a commercial lending transaction between the first respondent, Industrial Development Corporation of South Africa (IDC) and the third respondent Odiweb (Pty) Ltd (Odiweb), where IDC loaned R 57 million to Odiweb. Of interest in this matter is that Emvelo (Pty) Ltd (the second applicant) held 100% of Odiweb's issued share capital, and Mr Phathisani Ndebele (the first applicant) held 100% of Emvelo's issued share capital (para 1).

Facts

The High Court was tasked with determining the validity and legality of the call option exercised by the IDC, stipulated in the shareholder's agreement entered into by the IDC, Emvelo, and Odiweb. The call option would be eligible for exercise if Odiweb failed to repay the loan advanced by IDC by the repayment date.

Emvelo exercised its option in March 2015 to buy 49,17% of the IDC's interest in Odiweb and the loan account against it, which did not materialise. For this reason, the IDC proceeded to exercise its option to buy 50,83% of Emvelo's shares in Odiweb and elected Ms Buyelwa Patience Sonjica (the second respondent) as the director of Odiweb.

Consequently, an arbitration ensued between Emvelo and the IDC, eventually leading to the IDC abandoning its exercise of the option on 19 September 2018. However, during the arbitration, the IDC exercised a second call option on 6 March 2017, the validity and legality of which was being challenged by the applicants on various grounds. The most pertinent for this article are that the terms of the IDC call option and the IDC call price are contrary to public policy and against *ubuntu*.

Brief outline of the current legal position on contractual agreements that are against public policy

When confronted with contractual disputes, the courts generally respect the doctrine of *pacta sunt servanda*. However, in certain instances, the courts can refuse to enforce a valid contractual term if the term is against public policy (*Beadica 231 CC and Others v Trustees, Oregon Trust and Others* 2020 (5) SA 247 (CC)). It has been a longstanding principle in South African law that commercial agreements must further public policy. In *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd and Others* 1981 (2) SA 173 (T), the court adopted the stance that public policy cannot exist in a vacuum. In determining and applying public policy, the courts must consider the interests of the competing parties, the interests of society, the morals of the marketplace, business ethics, *inter alia,* that section of the community where the norm is to be applied. Hence, public policy must be flexible enough to be applied to different sections of the community. Of significance is that what one section of the community may find reprehensible may be the applicable norm when determining what is against public policy in that section of the community.

In *Barkhuizen v Napier* 2007 (5) SA 323 (CC), the court determined that a proper approach to addressing a challenge to contractual terms and their adherence to public policy must consider

constitutional values, particularly those entrenched in the Bill of Rights (para 30).

The court's application of the current legal position and its finding

Strydom J found that for the applicants to be successful, they must show that the founding terms of the call option are *contra bonos mores,* and they fall far from the grace of commercial ethics and marketplace standards. In showing this, the two-stage test laid down in *Barkhuizen*, which questions first whether the clause is unreasonable, and secondly if it is reasonable, whether it should be enforced in light of the events, which prevented compliance with the clause, must be applied. Further, the notion of *ubuntu*, which was described as harnessing 'the communal nature of society' by the court in *Beadica,* must be evident from the terms. In refusing to enforce a contractual term, the decision must not be based on judicial interference; that is, the subjective views of judges on reasonableness and fairness are immaterial. Instead, the decision must be based on whether the provisions/terms are averse to public policy. However, although the enforceability of contractual provisions must now meet the public policy test, *pacta sunt servanda* is still the cornerstone of our law of contract. Therefore, the terms of an agreement freely and voluntarily entered into by parties must be honoured, unless they are *contra bonos mores.*

After evaluating the terms of the contractual arrangement, Strydom J found that the 'structure made good commercial sense' and, further, the implementation thereof did not give rise to any unfairness. Emvelo must have been aware of the financial delays when it signed the agreement on 22 May 2014, and the second call option (which was only exercised on 6 March 2017) was still an option when the agreement was signed. Further, when the IDC exercised its call option (approximately three years after the agreement was signed), Emvelo still had not attained any financial assistance to enable it to exercise its call option. The court further noted that the applicants were given to acquire alternative finance to supersede the IDC loan but were not able to do so. Since IDC was able to pay for the immovable properties, it was only fair that they buy the shares from Odiweb (para 58). Therefore, based on the applicant's failure to discharge the onus of proving that the agreement was *contra bonos mores* and rendered the transaction unfair, the applicant's defence failed.

In relation to the principle of *ubuntu*, Strydom J found that the principle was not applicable, as this transaction had nothing to do with the communal nature of society or group solidarity. The court was 'dealing with an individual businessman who wants to make money for himself or his entity'; thus, *ubuntu* finds no application (para 61). Therefore, the applicant's defence on both *ubuntu* and public policy failed.

Senamile Sishi *LLB (UKZN)* and Nosiphiwo Nzimande *LLB LLM (UKZN)* are candidate legal practitioners at Livingston Leandy in Durban.

Three things whistleblowers want legal practitioners to know

'Corruption threatens to fell at the knees virtually everything we hold dear and precious in our hard-won constitutional order' (*Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC)).

In the battle against endemic corruption, whistleblowers are vital. Whistleblowers have helped to uncover gross corruption and maladministration, from the height of state capture to the present. Unfortunately, there are myriad reports detailing the suffering whistleblowers have experienced: Shunned by their peers; losing their jobs; and as in several tragic cases, losing their lives.

Those that choose to take on anti-corruption roles in the public, non-governmental and private sectors do so with a level of understanding of the risks involved. In contrast, whistleblowers are made not by election but by circumstance, finding themselves with the knowledge that they wish to report for the good of the public. In doing so, they make themselves extremely vulnerable. The law purports to protect them against harm – but such protection is only as good as the lawyers who advise and represent whistleblowers.

Whistleblowers want lawyers to know that:

- **More legal practitioners need to specialise in whistleblower law.** The whistleblower legislative framework goes beyond the Protected Disclosures Act 26 of 2000 (PDA) to include the Witness Protection Act 112 of 1998; Companies Act 71 of 2008; Protection from Harassment Act 17 of 2011 and more. More than the legal framework, it is important that legal practitioners understand the insidious nature of retaliation against whistleblowers. In some cases, rather than arguing the issue of victimisation, legal practitioners focus on arguing labour law issues such as suspension, diminishing the protected nature of the client's disclosure.

In practice, whistleblower cases often intersect with other areas of law, such as criminal law. They also often involve complex disputes of fact. There are few legal practitioners who engage with whistleblower protection provisions regularly in practice which has an impact on the quality of service that whistleblowers receive and the development of this area of law in the courts.

- **Legal practitioners should adjust the way they deal with whistleblower clients.** During consultations and other interactions with whistleblowers, it is important to understand that their clients may be going through a time of crisis. They could be facing issues such as occupational detriments, threats against themselves and their families and ostracization within their communities, all of which takes a significant emotional toll. Whistleblowers could, therefore, be highly emotional when narrating their story. This situation can be difficult for legal practitioners looking for salient legal facts to navigate, sometimes causing important information to be missed.

This could be addressed by devising a template with relevant questions before the consultation that guides the whistleblower to narrate their story chronologically and with pertinent information. More importantly, legal practitioners should approach this exercise with patience and empathy for the whistleblower. Whistleblowers have said that they suffered further trauma from the legal processes following their disclosures in addition to the trauma of occupational and other detriments. Their legal representatives should exercise care and compassion when interacting with their clients to help minimise this.

- **Legal practitioners can assist in opening access to legal representation for whistleblowers.** Legal advice and representation are a costly necessity for whistleblowers. Retaliation against whistleblowers often hits their pockets first, such as when they are suspended or dismissed. They may have to take steps to protect their safety, which may include relocating or enhancing home security. This can put a strain on their finances that puts legal representation out of reach – when this is precisely what is needed most to restore them to their position prior to the disclosure.

Legal practitioners can help. *Pro bono*, low fee and other fee arrangements have a great impact on the whistleblower's ability to access legal services. Unfortunately, the *pro bono* criteria used by most organisations eliminates management and unionised workers from *pro bono* representation – which can exclude whistleblowers in these groups.

In supporting whistleblowers *pro bono*, legal practitioners can multiply the social good effects: Not only do they support the individual whistleblower, they strengthen the culture of whistleblowing as a whole. This is because the perceived lack of support for whistleblowers has been cited as a reason that many people are afraid to blow the whistle. By dedicating *pro bono* hours to whistleblower matters, legal practitioners are potential change-makers in the futures of whistleblowers and by extension, the greater anti-corruption fight.

Even just the provision of *pro bono* or low fee pre-disclosure legal advice can be immensely impactful. Whistleblowers often make the decision to disclose in the dark, unaware of how to do so in a legally compliant manner, the protections available to them, and the limits of such protection. Legal advice before disclosure can aid whistleblowers to make informed choices about how to blow the whistle or whether to blow the whistle at all.

Not all whistleblower clients will require *pro bono* or low fee legal advice, however, it is important for legal representatives to have upfront and ongoing conversations about fees to manage expectations.

Legal practitioners can also help to manage legal costs by, for instance, requesting employers to hold pre-arbitration conferences before Commission for Conciliation, Mediation and Arbitration hearings so that parties can agree on certain issues, reducing the length of the arbitration and the associated costs.

This article is brought to you by the Whistleblower Support Platform for Reform (WSPR), in recognition of Whistleblower Protection Week. WSPR is a multi-stakeholder partnership dedicated to strengthening the protection and support for whistleblowers in South Africa. Its core institutions include Corruption Watch, Platform to Protect Whistleblowers in Africa (PPLAAF), Whistleblower House, Public Interest SA, the Southern African Institute for Responsive and Accountable Governance, and the Transparency, Integrity and Accountability Programme of the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH (contact: cherese.thakur@giz.de).

PPLAAF is hosting its second annual Whistleblower Protection Week from 13 – 17 November 2023, in collaboration with GIBS Business School and the Friedrich Naumann Foundation. This year, the week will focus on whistleblowing as a legal process, what legal practitioners need to know, and the proposed amendments to the PDA. Join us at GIBS Business School in Johannesburg for a week of discussions, workshops, and awareness raising.

❑

By Shanay Sewbalas and Keagan Smith

New legislation

Legislation published from 1 – 29 September 2023

Acts

Customs and Excise Act 91 of 1964
Amendment of part 1 to sch 5 (no 5/1/125). GN R3885 *GG*49313/15-9-2023.
Amendment of part 2 to sch 5 (no 5/2/126). GN R3886 *GG*49313/15-9-2023.
Amendment to part 1 of sch 1 (no 1/1/1899). GN R3916 *GG*49378/29-9-2023.
Amendment to part 1 of sch 3 (no 3/1/750). GN R3917 *GG*49378/29-9-2023.
Amendment to part 2 of sch 4. GN R3918 *GG*49378/29-9-2023.
Amendment to part 2 of sch 5, part 4 of sch 5, part 1 of sch 2, part 2 of sch 4, sch 5, part 2 of sch 4 and part 1 of sch 1. GN R3903 – GN R3909 *GG*49328/22-9-2023.
Land Court Act 6 of 2023
Date of commencement to be proclaimed. GN3744 *GG*49372/27-9-2023.
Repeal of the Transkeian Penal Code Act 4 of 2023
Date of commencement to be proclaimed. GN3743 *GG*49371/27-9-2023.
South African Post Bank Limited Amendment Act 10 of 2023
Date of commencement to be proclaimed. GN3746 *GG*49374/27-9-2023.
Traditional Courts Act 9 of 2022
Date of commencement to be proclaimed. GN3745 *GG*49373/27-9-2023.

Bills and White Papers

Department of Communications and Digital Technologies
Draft White Paper on Audio and Audiovisual Media Services and Online Content Safety: A new vision of South Africa 2023. GN3856 *GG*49245/4-9-2023.
Department of Women, Youth and Persons with Disabilities
White Paper on the Rights of Persons with Disabilities: Fifth Annual Progress Report on Implementation of the White Paper: April 2020 – March 2021. GN3901 *GG*49325/22-9-2023.
National State Enterprises Bill, 2023
Draft National State Enterprises Bill, 2023 for comment. GN3882 *GG*49312/15-9-2023.
Road Accident Fund Act 56 of 1996
Draft Road Accident Fund Amendment Bill, 2023 for comment. GN3868 *GG*49283/8-9-2023.
South African Airways Act 5 of 2007
South African Airways (SAA) publication for comment on the Draft SAA Repeal Bill, 2023. GN3883 *GG*49312/15-9-2023.

Government, General and Board Notices

Competition Act 89 of 1998
Notice in terms of s 10(7) of the Act: South African Petroleum Industry Association granted conditional exemption. GN3879 *GG*49309/15-9-2023.
Media and Digital Platforms Market Inquiry Final Terms of Reference 15 September 2023. GN3880 *GG*49309/15-9-2023.
Competition Tribunal: Notification of decision to approve merger: Various mergers. GenN2028 *GG*49309/15-9-2023.
Competition Tribunal: Notification of complaint referral. GenN2029 *GG*49309/15-9-2023.
Customary Initiation Act 2 of 2021
National Initiation Oversight Committee: Designation of Member: Mr M Matshingwane. GenN2031 *GG*49309/15-9-2023.
Electoral Commission Act 51 of 1996
Registration of political parties (registered between 29 June 2023 to 18 September 2023). GenN2041 *GG*49345/22-9-2023.
Electronic Communications Act 36 of 2005
Application for the transfer of ownership of the Individual Electronic Communications Network Service Licence from Ubuntel (Pty) Ltd to Net4 Telecoms (Pty) Ltd. GenN2017 and GenN2018 *GG*49297/11-9-2023.
International Trade Administration Act 71 of 2002
International Trade Administration Commission of South Africa: Initiation Notice: Sunset review of the anti-dumping duty on unframed glass mirrors. GenN2036 *GG*49325/22-9-2023.
Justices of the Peace and Commissioners of Oaths Act 16 of 1963
Designation of Commissioners of Oaths under s 6 of the Act. GN3873 *GG*49307/14-9-2023.
Labour Relations Act 66 of 1995
Bargaining Council for the Meat Trade, Gauteng: Extension of amendment of main collective agreement to non-parties. GN R3910 *GG*49346/22-9-2023.
Local Government: Municipal Electoral Act 27 of 2000
Municipal By-elections – 27 September 2023: Official list of voting stations. GenN2016 *GG*49282/8-9-2023.
Local Government: Municipal Electoral Act 27 of 2000
Municipal By-Elections – 11 October 2023: Official List of Voting Stations. GenN2040 *GG*49344/22-9-2023.
National Environmental Management: Biodiversity Act 10 of 2004
Biodiversity Management Plan for the Southern Ground-Hornbill (*Bucorvus Leadbeateri*). GN3921 *GG*49379/29-9-2023.
National Prosecuting Authority Act 32 of 1998
Determination of powers, duties and functions of a Special Director of Public Prosecutions. GN3878 *GG*49309/15-9-2023.
National Water Act 36 of 1998
Establishment of Limpopo-Olifants Catchment Management Agency. GN3898 *GG*49325/22-9-2023.
Establishment of Lower Mfolozi Water User Association, KwaZulu-Natal Province. GN3899 *GG*49325/22-9-2023.
Pharmacy Act 53 of 1974
Section 5 of the Act: Notice of election of Members of the South African Pharmacy Council. BN 476 *GG*49311/15-9-2023.
Social Housing Act 16 of 2008
Social Housing Policy, the Guidelines and the Act: Consolidated List of Restructuring Zones for the City of Cape Town. GN3902 *GG*49325/22-9-2023.
South African Geographical Names Council Act 118 of 1998
Publication of Official Geographical Names. GN3869 *GG*49298/12-9-2023.
Spatial Planning and Land Use Management Act 16 of 2013
Notice of the Approved Karoo Regional Spatial Development Framework in terms of s 18(1) of the Act. GenN2042 *GG*49370/27-9-2023.
Special Investigating Units and Special Tribunals Act 74 of 1996
Referral of matters to existing Special Investigating Unit: Amajuba District Municipality. Proc R137 *GG*49296/11-9-2023.
Special Investigating Units and Special Tribunals Act 74 of 1996
Referral of matters to existing Special Investigating Unit and Special Tribunal: Tshwane Metropolitan Municipality. Proc NR138 *GG*49328/22-9-2023.

Rules, regulations, fees and amounts

Auditing Profession Act 26 of 2005
The Independent Regulatory Board for Auditors Rule on Enhanced Auditor Reporting for the Audit of Financial Statements of Public Interest Entities. BN 475 *GG*49309/15-9-2023.

Customs and Excise Act 91 of 1964
Amendment to Rules (DAR 250). GN R3871 *GG*49304/15-9-2023.
Amendment of Rules (DAR 251). GN R3884 *GG*49313/15-9-2023.
Electronic Communications Act 36 of 2005
Amendment of the Numbering Plan Regulations, 2016 in terms of s 68 read with s 4 of the Act. GenN2033 *GG*49314/15-9-2023 and GenN2039 *GG*49329/21-9-2023.
Financial Markets Act 19 of 2012
Section 71(3)(*c*)(ii) of the Act: Amendments to JSE Clear (Pty) Ltd Rules – inclusion of Securities Collateral. BN 473 *GG*49272/1-9-2023.
Judges' Remuneration and Conditions of Employment Act 47 of 2001
Determination of Remuneration of Constitutional Court Judges and Judges: 2022/2023. GN3911 *GG*49369/26-9-2023.
Local Government: Municipal Property Rates Act 6 of 2004
Municipal Notice 5 of 2023: Assessment of Rates: Resolution Levying Property Rates for the Financial Year 1 July 2023 to 30 June 2024. GN3924 *GG*49381/26-9-2023.
Ulundi Local Municipality (KZN266): The City of Heritage: Resolution Levying Property Rates for the Financial Year 1 July 2023 to 30 June 2024. GN3872 *GG*49306/14-9-2023.
Magistrates Act 90 of 1993
Determination of salaries and allowances of magistrates: 2022/2023. GN3912 *GG*49369/26-9-2023.
Medicines and Related Substances Act 101 of 1965
Dispensing fee to be charged by persons licensed in terms of s 22C(1)(*a*). GN3875 *GG*49309/15-9-2023.
Petroleum Products Act 120 of 1977
Regulations in respect of the single maximum national retail price for illuminating paraffin. Maximum retail price for liquefied petroleum gas. Amendment of the regulations in respect of petroleum products. GN R3857 – GN R3859 *GG*49273/5-9-2023.
Pharmacy Act 53 of 1974
Rules relating to Good Pharmacy Practice: Amendments for implementation to minimum standards as contained in Annexure A. BN 479 *GG*49379/29-9-2023.
Project and Construction Management Professions Act 48 of 2000
Amended South African Council for the Project and Construction Management Professions fees and charges for the Project Management Institute and the Association of Schools of Construction of Southern Africa. BN 478 *GG*49347/22-9-2023.
Public Protector Act 23 of 1994
Determination of the salaries and allowances of the Public Protector and Deputy Public Protector. GN3914 *GG*49369/26-9-2023.
South African Human Rights Commission Act 40 of 2013
Determination of Remuneration of the Commissioners of the South African Human Rights Commission: 2022/23. GN3913 *GG*49369/26-9-2023.
Statistics South Africa
Statistics South Africa: Consumer Price Index: July 2023. GenN2035 *GG*49325/22-9-2023.

Legislation for comment

Accounting Standards Board
Invitation to comment on exposure Draft 205 issued by the Board. BN 474 *GG*49280/8-9-2023.
Administration of Estates Act 66 of 1965
Guardian's Fund: Master of the High Court: Free State Division – Bloemfontein, Eastern Cape – Makhanda, Northern Cape – Kimberley, KwaZulu-Natal – Pietermaritzburg and North Gauteng – Pretoria and Mmabatho. GenN2046 – Gen N2051 *GG*49380/29-9-2023.
Children's Act 38 of 2005
Draft Regulations Regarding Children. GN3881 *GG*49310/11-9-2023.
Civil Aviation Act 13 of 2009
Civil Aviation Regulations, 2011. GN3927 *GG*49386/29-9-2023.
Department of Forestry, Fisheries and the Environment
Draft Policy Position on the Conservation and Sustainable Use of Elephant, Lion, Leopard and Rhinoceros: Comments invited on the Draft: Withdraws GN3887 *GG*49319/19-9-2023. GN3889 *GG*49322/19-9-2023.

Electronic Communications Act 36 of 2005
Draft Amendment Plan Regulations, 2016 under ch 11 of the Act. GenN2038 *GG*49329/21-9-2023.
Financial Intelligence Centre Act 38 of 2001
Invitation of submissions on draft amendments to Money Laundering and Terrorist Financing Control Regulations. GN3922 *GG*49379/29-9-2023.
Independent Communications Authority of South Africa (ICASA)
ICASA workshop invitation on the Designated Certification Bodies Programme. GenN2014 *GG*49279/6-9-2023.
International Trade Administration Act 71 of 2002
Introduction of an import permit condition in terms of s 27(2)(*g*) of the Act. GenN2044 *GG*49379/29-9-2023.
Labour Relations Act 66 of 1995
Bargaining Council for the Furniture Manufacturing Industry KwaZulu-Natal: Extension to Non-Parties of the Agency Shop Fee Collective Agreement. GN3915 *GG*49378/29-9-2023.
Extension of period of Operation to Non-Parties of the Main Collective Agreement to Non-Parties: Bargaining Council for the Fishing Industry. GN R3925 *GG*49382/29-9-2023.
Marketing of Agricultural Products Act 47 of 1996
Invitation to directly affected groups in the grains and oilseeds industries to forward comments to the National Agricultural Marketing Council. GenN2027 *GG*49309/15-9-2023.
Merchant Shipping Act 57 of 1951
Draft Merchant Shipping (Dangerous Goods) Amendment Regulations, 2023. GenN2037 *GG*49325/22-9-2023.
National Environmental Management: Biodiversity Act 10 of 2004
Publication of the Draft Notice Prohibiting Certain Activities Involving African Lion (*Panthera Leo*) for comment. GN3926 *GG*49383/29-9-2023.
National Environmental Management: Waste Act 59 of 2008
Consultation on the draft Strategy for Reducing Food Losses and Waste in terms of ss 72 and 73 of the Act. GN3888 *GG*49321/19-9-2023.
National Water Act 36 of 1998
Invitation to submit written comments in terms of s 110 of the Act on the construction of the Mokolo and Crocodile (West) River Water Augmentation Project and the Environmental Impact Assessments relating thereto. GN3900 *GG*49325/22-9-2023.
Pharmacy Act 53 of 1974
Guidelines for Work-Based Learning. BN 477 *GG*49325/22-9-2023.
Rules relating to Good Pharmacy Practice: Amendments to Annexure A. BN 480 *GG*49379/29-9-2023.
Competency Standards for Industrial Pharmacists, Clinical Pharmacists and Radiopharmacists. BN 481 *GG*49379/29-9-2023.
Plant Improvement Act 53 of 1976
South African Citrus Improvement Scheme. GN R3860 *GG*49275/8-9-2023.
Protection of Personal Information Act 4 of 2013
Code of Conduct: Notice in terms of s 61(2) of the Act: The Residential Communities Council. GN3867 *GG*49280/8-9-2023.
Exemption: Bidvest Protea Coin (Pty) Ltd; IRS Forensic and Investigations (Pty) Ltd; Road Traffic Infringement Agency and SSG Security Solutions (Pty) Ltd. GN3923 *GG*49379/29-9-2023.
Spatial Planning and Land Use Management Act 16 of 2013
Notice of the Draft Norms and Standards in terms of s 8 of the Act. GenN2019 *GG*49303/13-9-2023.

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

Employment law update

By Nadine Mather

The scourge of misrepresenting qualifications

In *Lesedi Local Municipality v Mphele and Others* [2023] 9 BLLR 939 (LC), the Labour Court (LC) held as follows: 'We live in a world; where inauthenticity and fake credentials have become the norm, where quick wealth and instant gratification is valued more than integrity, where the disgusting trend of augmenting one's qualifications and achievements have become fashionable. This rot must be resisted and exposed at all costs.' The review application in this matter ultimately turned on this very issue.

The Lesedi Local Municipality (the Municipality) sought to appoint a chief financial officer (CFO). The requirements for the position were, among other things, compliance with the minimum competency levels prescribed in the Treasury Regulations and preferably a degree in accounting or finance. The employee completed an application, submitted his curriculum vitae, was interviewed, and was subsequently appointed as CFO of the Municipality.

Several years later, the Municipality conducted an investigation in which it was found that the employee had falsely claimed that he was an accountant and had misrepresented his qualifications and professional memberships in his application. Consequently, the Municipality instituted disciplinary action against the employee on the grounds of dishonesty, and the employee was found guilty and summarily dismissed. Disgruntled with his dismissal, the employee referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA).

The material evidence led at the arbitration proceedings at the CCMA included as follows:

- The employee had factually misrepresented –
  - having a BCom accounting degree (when in fact he had only obtained a BCom degree);
  - having an honours degree in Generally Recognised Accounting Practice (rather he had completed an accounting executive short course with an NQF 8 recognition level); and
  - being registered as an accounting officer with the Institute of Administration and Commerce.
- After being unnecessarily evasive, the employee conceded that he had not obtained an accounting degree and that the information reflected in his application was not correct. The employee, however, claimed that the overstating of his qualifications was an error on his part and denied that it was dishonest as alleged by the Municipality.

- While the Municipality conceded that the employee met the general requirements for the position of CFO, the employee was favourably considered, to the exclusion of other candidates, on the basis that he presented himself to be a BCom accounting graduate.

Against this background, the arbitrator found that the employee's dismissal was substantively unfair as the employee had in fact met the general requirements for the position of CFO. The arbitrator ordered that the employee be reinstated with back pay of around R 2 million. Unhappy with the finding, the Municipality instituted a review application against the arbitrator's award on the basis that the arbitrator's decision was one a reasonable decision maker could not reach.

The LC noted that the test in review applications entails ensuring that the arbitrator identified the true issue in dispute and reached a reasonable conclusion based on the evidence presented. Despite overwhelming evidence to the contrary, the arbitrator had found that the employee satisfied the requirements of the position and was, therefore, eligible for appointment as CFO. There was no compelling evidence, on a balance of probabilities, that he had committed misconduct.

The court found that the conclusion arrived at by the arbitrator did not align with the evidence placed before him. The issue before the arbitrator was not whether the employee had satisfied the advertised requirements for the position but whether he had represented that he had certain degrees and professional memberships, which he did not have. This evidence remained largely uncontested and proved that the employee had been grossly dishonest.

The court was not persuaded that the employee had merely made an error when reflecting his qualifications and professional memberships. If this was so, as he had claimed, he would have admitted it at the earliest possible opportunity. He failed to do so and only admitted that he lacked the qualifications when trapped in cross-examination. He nevertheless retained the view that he had done nothing wrong.

Accordingly, the court found that the arbitrator had evidently failed to properly assess the evidence placed before him. Had he done so, he would have found that the employee misrepresented his qualifications and his professional standing. The arbitrator's decision to reinstate the employee in these circumstances was unreasonable and constituted a decision a reasonable decision maker could not reach. The court further noted that the misrepresentation of qualifications has become a scourge in the employment landscape and can never be condoned. In this regard, the court held that:

'The misrepresentation of qualifications is a pervasive and menacing evil that greedily devours and indelibly taints our employment landscape. It trivialises our institutions of learning, devalues the sanctity of honest educational pursuits and cheapens legitimate and hard-earned achievements. It can never be excused, rationalised, or condoned. It is sickening to the core and detestable in every possible respect. It is not only morally offensive, it is also vocationally revolting. Every attempt to uproot it must be applauded and rigorously pursued.'

Having had the benefit of a complete record, the court held that it would serve little purpose to have the matter remitted to the CCMA for a hearing afresh when the court was in a position to determine the matter finally. The court ordered that the arbitrator's award be reviewed and set aside and substituted it with an order that the employee's dismissal was both procedurally and substantively fair. There was no order as to costs.

Bad advice not a basis to set aside an agreement

In *Ephraim Mogale Local Municipality v Hlongwane NO and Another* [2023] 9 BLLR 898 (LC), the employee was employed by Ephraim Mogale Local Municipality (the Municipality) as municipal manager. The Local Government: Municipal Finance Management Act 56 of 2003 (the MFMA) imposes several responsibilities on municipal managers to ensure that effective and transparent systems of financial risk are maintained. In particular, the MFMA prohibits the Municipality from opening a bank account with a bank that is not registered in terms of the Banks Act 94 of 1990 and imposes a duty on the municipal manager to enforce compliance with this obligation.

During her employment, the employee had requested and approved the transfer of R 80 million in municipal funds from FNB to VBS Mutual Bank, a bank which was not registered in terms of the Banks Act. This resulted in the loss of the entire amount when VBS folded. As a result, the Municipality charged the employee with several counts of gross misconduct. The employee pleaded guilty to all charges and accepted that the misconduct was serious and warranted dismissal. Notwithstanding this, the presiding officer of the disciplinary hearing imposed a sanction of three months' suspension without pay after finding that the Municipality had failed to prove that she was grossly negligent.

The Municipality filed an application to review and set aside the disciplinary outcome, but before the review application came before the court, the Municipality elected to enter into a settlement agreement with the employee. In terms of the settlement agreement, the employee would resign on signature of the agreement, and the Municipality would pay her a year's salary (nearly R 1,3 million) in full and final settlement within 30 days of conclusion of the agreement. The Municipality, however, subsequently declined to pay the employee.

As a result, the employee approached the Labour Court (LC) to have the settlement agreement made an order of court. A month later, the Municipality filed an application to have the settlement agreement declared unlawful and set aside and, if so, for the court to determine the review application.

The LC noted that this was one of the many cases that had produced litigation over what had become known as 'the Great Bank Heist' resulting from the spectacular collapse of VBS. This was also a case where the applications before the court displayed unimaginable levels of incompetence and disregard of what is expected of municipal officers, who now approached the court to fix the consequences.

The court noted that the proper approach was to first consider the application to set aside the settlement agreement, which agreement had been approved by the Municipality's Council. The purpose of settlement agreements is to put an end to litigation. The parties were bound by the signed agreement. The Municipality sought to resile from the agreement on the grounds that it was based on poor legal advice, which had resulted in a waste of taxpayers' money. While this was true, the Municipality had displayed utter incompetence by not only accepting the poor advice, but also by acting on it. The fact that the Municipality realised late that it was ill-advised by its legal representatives or that after signing the agreement, experienced some sense of 'buyer's remorse', did not render the agreement unlawful.

The Municipality further submitted that the settlement agreement was unlawful on the basis that it was contrary to good governance and accountability and argued in its heads of argument that it was contrary to public policy. The fact that the agreement was contrary to good governance again did not render the agreement unlawful.

In the court's view, the proper course would have been to approach the court to set aside the Council resolution in terms of which the settlement agreement was approved. The court, accordingly, held that the agreement could not be set aside in the circumstances.

Turning to the employee's application to have the agreement made an order of court, the court noted that the Municipality had opposed the application on the basis that the payments to VBS were unlawful, that to pay the employee an exorbitant amount of money would reward her at the expense of the public purse

and that the enforcement of the agreement would perpetuate the unlawfulness.

The court noted that it had a discretion to make any settlement agreement an order of court, and in exercising that discretion, the relevant facts and circumstances must be considered, such as are necessary to satisfy the demands of law and fairness. The court is not merely a rubber stamp. The court has a duty to ensure that enforcement is equitable and in the public interest, especially where the legitimacy of the agreement is challenged.

In the court's view, it would have been contrary to public policy to make the agreement an order of court as the payment of one year's salary to the employee, in circumstances where she acted unlawfully, would offend public policy. Enforcing the settlement agreement would constitute wasteful and irregular expenditure on the part of the Municipality and would certainly send the wrong message. Accordingly, the court declined to make the settlement agreement an order of court.

As to the Municipality's application to review the disciplinary proceedings, the court held that because of the settlement agreement, which agreement could not be set aside, the dispute had been fully and finally settled. Both the Municipality's and the employee's applications were accordingly dismissed.

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

By Kathleen Kriel

Recent articles and research

Abbreviation	Title	Publisher	Volume/issue
EL	Employment Law Journal	LexisNexis	(2023) 39.4 (2023) 39.5
ILJ	Industrial Law Journal	Juta	(2023) 44
JCLA	Journal of Comparative Law in Africa	Juta	(2023) 10.1

Bargaining units

Godfrey, S and Le Roux, R 'Workplaces and bargaining units: They co-exist in practice, but can they co-exist in law?' (2023) 44 *ILJ* 2110.

Enforcing judgments in Nigeria

Eyongndi, DTA and Odeyinde, O 'Examining the propriety of section 84(1) of the Sheriffs and Civil Process Act of Nigeria from the lens of the Supreme Court's Decision in *Central Bank of Nigeria v Insterstella Com Ltd*' (2023) 10.1 *JCLA* 169.

Labour law

Gorgan, J 'Lockouts blocked – when employers may (not) use replacement labour' (2023) 39.4 *EL*.
Gorgan, J 'Mad ministers – but not above the law' (2023) 39.5 *EL*.
Gorgan, J 'Playing for time – when delay doesn't pay' (2023) 39.5 *EL*.

Misconduct

De Villiers, C and Garbers, C 'The regulation of educator misconduct in public schools' (2023) 44 *ILJ* 2079.

Occupational diseases and injuries

Kahn, GIB 'Workers' social security in South Africa: COIDA amended' (2023) 44 *ILJ* 1395.

Operational requirement dismissals

Le Roux, R 'Compliance with a fair procedure? Rescued from another dimension to the LRA: Reflecting on *Solidarity on behalf of Members v Barloworld Equipment Southern Africa and Others* (2002) 43 ILJ 1757 (CC)' (2023) 44 *ILJ* 1444.

Plastic waste in Nigeria

Egeruoh-Adindu, I 'Towards an appropriate legal framework for sustainable management and disposal of plastic waste in Nigeria: Lessons from other jurisdictions' (2023) 10.1 *JCLA* 103.

Private investment

Ezirigwe, J 'From subsistence to commercialisation: Legal implications of "Ecowas Regulations on Transhumance" on livestock investment options' (2023) 10.1 *JCLA* 83.

Tortious liability

Quartey, MK and Coleman, TE 'The law applicable to tortious liability: A comparative analysis of article 4 of The Rome II Regulation and Private International Law in Ghana' (2023) 10.1 *JCLA* 1.

Unfair dismissal

Rycroft, A 'Adjudicating layoffs and short time' (2023) 44 *ILJ* 1432.

Unfair labour practices

Makhura, M; Phillips, J and Gwebityala, A 'Recurring problem of interpretation: Determining the date of an "ongoing" act or omission' (2023) 44 *ILJ* 1416.

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

YOUR LEGACY CAN CHANGE LIVES...

Many people would love to support a worthy cause, but may not have the disposable income to do so at this time in their lives.

When you are drafting your will, first take care of your loved ones, then please consider leaving a gift to SA Guide-Dogs Association for the Blind. A charitable legacy is exempt from Estate Duty.

Your legacy will give the gift of Mobility, Companionship and Independence.

For more information, please contact
Pieter van Niekerk
PieterV@guidedog.org.za or
011 705 3512

SOUTH AFRICAN GUIDE-DOGS PHOENIX CLUB

GUIDE-DOGS ASSOCIATION South Africa

To find out more about the exclusive benefits of our Phoenix Club available to 55+ year olds, contact **Pieter**

@SAGuide_Dogs **SA Guide-Dogs** **@sa_guide_dogs**

Johannesburg - Tel: 011 705 3512 **Western Cape** -Tel: 021 674 7395 **Kwa-Zulu Natal** - Tel: 082 875 6244
E-mail: info@guidedog.org.za

Standard Bank

UNLEASH THE **POWER OF RENEWABLE ENERGY FOR YOUR BUSINESS.**

Join us in building a sustainable business empire that's powered by innovation and fueled by the sun. Embrace a brighter, greener future with Standard Bank's cutting-edge renewable energy solutions.

By tapping into clean and sustainable energy sources, you'll not only reduce your environmental footprint but also unlock cost savings and enhance your business reputation.

Ready to unlock renewable energy for your business?

Email us at **legalsector@standardbank.co.za** and join us in building a sustainable business empire that's powered by innovation.

We are more than just a financial institution, we're Africa's most admired financial services brand.

Classified advertisements and professional notices

Index Page

• Vist the *De Rebus* website to view the legal careers CV portal.

Rates for classified advertisements:
A special tariff rate applies to practising attorneys and candidate attorneys.

2023 rates (including VAT):

Size	*Special tariff*	*All other SA advertisers*
1p	R 9 633	R 13 827
1/2 p	R 4 819	R 6 911
1/4 p	R 2 420	R 3 437
1/8 p	R 1 208	R 1 732

Small advertisements (including VAT):

	Attorneys	Other
1–30 words	R 487	R 710
every 10 words thereafter	R 163	R 245

Service charge for code numbers is R 163.

DE REBUS

Closing date for online classified PDF advertisements is the second last Friday of the month preceding the month of publication.

Advertisements and replies to code numbers should be addressed to: The Production Editor, De Rebus, PO Box 36626, Menlo Park 0102.
Tel: (012) 366 8800 • Fax: (012) 362 0969.
Docex 82, Pretoria.
E-mail: classifieds@derebus.org.za
Account inquiries: David Madonsela
E-mail: david@lssa.org.za

Services offered

PAGEL SCHULENBURG
Attorneys | Notaries | Conveyancers

LABOUR COURT Correspondent

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

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

Avril Pagel:
Cell: +27 (0)82 606 0441
E-mail: Avril@pagelinc.co.za

Pretoria Correspondent

RAMA ANNANDALE & MUNONDE
Prokureurs/Attorneys

High Court and Magistrate's Court litigation.
Negotiable tariff structure.
Reliable and efficient service and assistance.
Jurisdiction in Pretoria Central, Pretoria North, Temba, Soshanguve, Atteridgeville, Mamelodi and Ga-Rankuwa.

Tel: (012) 548 9582 • Fax: (012) 548 1538
E-mail: carin@rainc.co.za • **Docex 2, Menlyn**

PILLAY THESIGAN INC

WE OFFER A 24 HOUR NATION WIDE FULL SERVICE AS CORRESPONDENTS

24 HOUR HOTLINE - 084 764 9374

OUR SERVICES INCLUDE:
DOCUMENT RECEIPT AND RETRIEVAL, COURT APPEARANCES, BAIL APPLICATIONS DOCUMENT DRAFTING, SETTLING, CONSULTATIONS AND LODGEMENTS

GAUTENG PROVINCE (TSHWANE PRETORIA)

-THE HIGH COURT PRETORIA
-THE MAGISTRATE COURT TSHWANE
-AND SUB DISTRICT ATTERIDGEVIILE
-MASTER OF THE HIGH COURT
-THE DEEDS OFFICE
-THE CCMA
-ALL NATIONAL GOVERNMENT OFFICES

WESTERN CAPE PROVINCE (CAPE TOWN)

-THE HIGH COURT CAPE TOWN
-THE MAGISTRATE COURT CAPE TOWN
-AND SUB DISTRICTS
-MASTER OF THE HIGH COURT
-THE DEEDS OFFICE
-THE CCMA
-THE WESTERN CAPE PROVINCIAL OFFICES

GAUTENG PROVINCE (JOHANNESBURG)

-THE CONSTITUTIONAL COURT
-LABOUR COURT
-THE HIGH COURT JOHANNESBURG
-THE MAGISTRATES COURT JOHANNESBURG
-AND SUB DISTRICTS
-THE CCMA
-THE GAUTENG PROVINCIAL OFFICES

OUR PRACTICE ADDRESSES

742 WF NKOMO STREET
PROCLAMATION-HILL PRETORIA
SOUTH AFRICA
PHONE: (012) 387 6047
CELL NO: (081) 489 7662
FAX: (086) 218 7143
EMAIL: cot@pillayinc.com

24 HANS STRIJDOM AVENUE
THE ICON BUILDING
3 RD FLOOR FORESHORE
CAPE TOWN SOUTH AFRICA
PHONE: (021) 427 9000
CELL NO: (061) 515 9561
EMAIL: coct@pillayinc.com

2 MAUDE STREET
THE FORUM BUILDING
3RD FLOOR
JOHANNESBURG
SOUTH AFRICA
PHONE : (010) 226 9858
CELL NO: (061) 501 5491
EMAIL : coj@pillayinc.com

OUR SERVICES ARE GARANTEED BY MR THESIGAN PILLAY OUR SENIOR ATTORNEY IN THE PROFESSION AND SUCESSFUL MANAGING DIRECTOR WHO IS A FORMER JUDICIAL OFFICER AND PUBLIC PROSECUTOR .
WEBSITE - piillayinc.com

As qualified migration lawyers in Australia, PML is here to provide you with a professional and personalised solution to assist you with your needs.
We can prepare, lodge, and manage your application with the Department of Home Affairs until your visa application is finalised and an outcome has been determined. We can even assist you when you've already lodged your application!

- Immigration Lawyers, not only migration agents
- Member of the Migration Institute of Australia (MIA)
- Personal experience migrating from RSA to Australia
- Efficient systems to manage case-flow
- Value for money – fees through disclosure and agreement
- Located in Australia
- Communicate in either English or Afrikaans

Maritime Crew Visa (MCV): You can stay in Australia as long as you are a crew member of a non-military ship in Australia and enter (by sea) as often as you want. At the same time, the visa lasts for three years unless ended prematurely. You must be outside Australia when you apply, and you must not arrive in Australia without a valid visa.

CONTACT US: Riaan Norval
www.pacificmaritimelawyers.com.au
info@pacificmaritimelawyers.com.au

PAGEL SCHULENBURG
Attorneys | Notaries | Conveyancers

FAMILY LAW
Attorney

We are based in Bryanston, Johannesburg and offer expert advice and services in all family related legal issues.

Kelly van der Berg:
Telephone: (011) 463 1214
Cell: 071 682 1029
E-mail: kelly@pagelinc.co.za

LAND CLAIMS COURT
Correspondent

We are based in Bryanston, Johannesburg only 2,7 km from the LCC with over ten years' experience in LCC related matters.

Kim Reid: (011) 463 1214 • Cell: 066 210 9364
• E-mail: kim@pagelinc.co.za
Avril Pagel: Cell: 082 606 0441
• E-mail: Avril@pagelinc.co.za

ITALIAN LAWYERS

For assistance on Italian law (litigation, commercial, company, deceased estates, citizenship and non-contentious matters), contact

Anthony V. Elisio

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

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

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

Mobile/WhatsApp: 0039 348 5142 937
Skype: Anthony V. Elisio
E-mail: avelisio@tin.it | anthonyvictor.elisio@gmail.com
www.studiolegaleelisio.it

M&R Moodie & Robertson
Attorneys Notaries & Conveyancers

CONSTITUTIONAL COURT CORRESPONDENT ATTORNEYS

– BRAAMFONTEIN, JOHANNESBURG –

We offer assistance with preparation of all court papers to ensure compliance with Rules and Practice Directives of the Constitutional Court.

Our offices are located within walking distance of the Constitutional Court.

We have considerable experience in Constitutional Court matters over a number of years.

Contact: Donald Arthur
(011) 628 8600 / (011) 720 0342
darthur@moodierobertson.co.za

12th Floor Libridge Building (East Wing)
25 Ameshoff Street Braamfontein
Johannesburg

Smalls

POSITION WANTED: Admitted Attorney, over 10 years' experience, seeks a position as attorney/associate or professional assistant in the Gauteng area. I have wide experience in commercial law, evictions, civil litigation, magistrate's and High Court and Motion Court appearances, debt recovery, divorces. Good Standing. Available Immediately. **Contact, me, Mr A du Plessis at 073 366 0528.**

OFFICES AVAILABLE: Rosebank, stand alone 700m^2 offices. Fully furnished, including extensive law library, walk-in safe, bathrooms with showers, kitchens and parking. Prime position, close to Gautrain. Available immediately. **Contact 074 942 7734.**

***De Rebus* has launched a CV portal for prospective candidate legal practitioners** who are seeking or ceding articles. Advertisements and CVs may be e-mailed to: **Classifieds@derebus.org.za**