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DE REBUS

THE SA ATTORNEYS' JOURNAL

DECEMBER 2023

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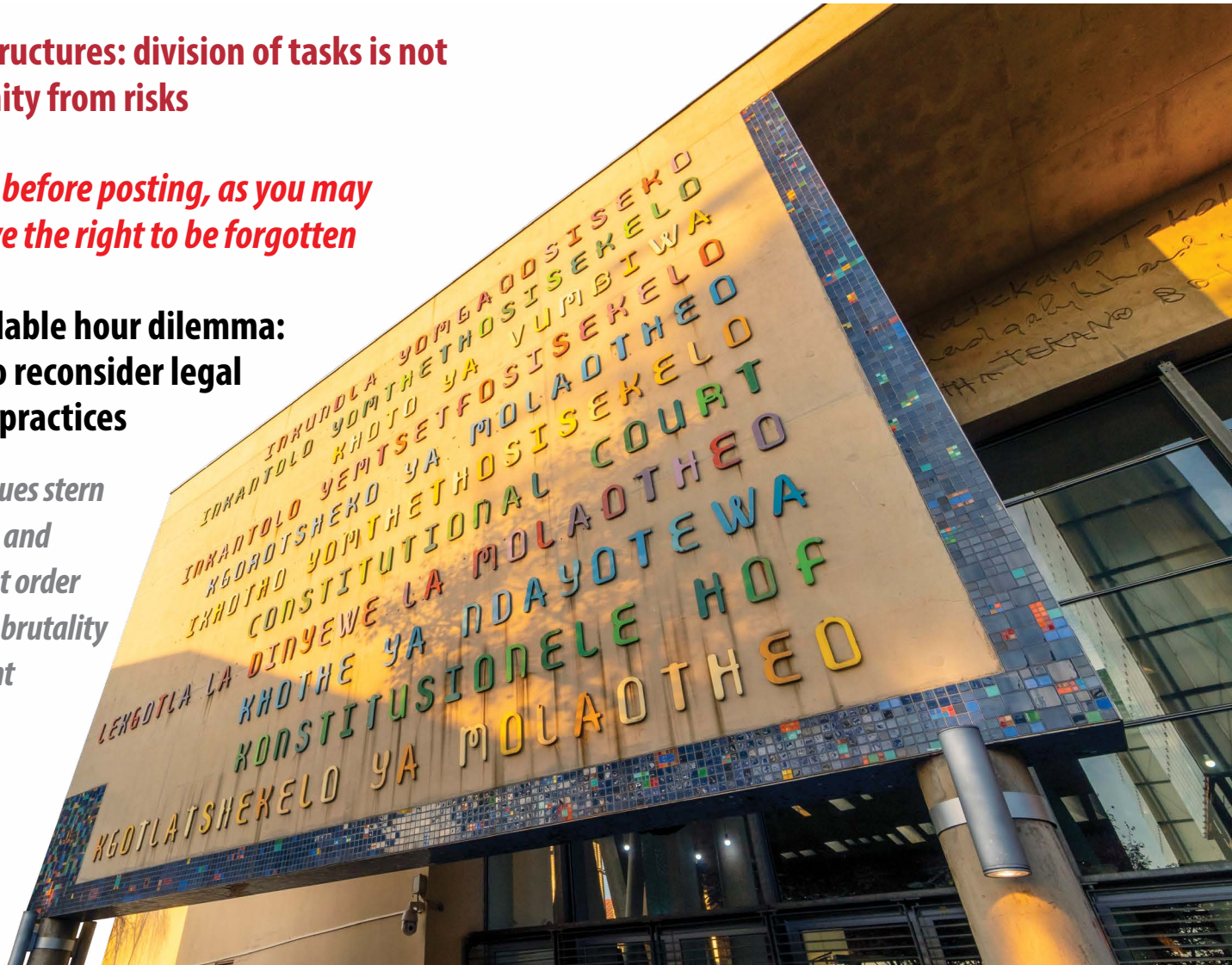

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24 Decoding statutory interpretation: An in-depth analysis of the South African Constitutional Court

Additional Magistrate, **Ganasen Narayansamy**, discusses the Constitutional Court's (CC'S) embrace of interpretive skills, emphasising their persuasive nature in revealing the hidden meaning, purpose, or intention of a statute. Furthermore, he examines the challenge presented in *Amabhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Correctional Services and Others* 2021 (3) SA 246 (CC), where the court declared s 1 of the Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002 (RICA) as unconstitutional. The majority judgment delved into the core of s 1 to determine whether it grants the power to designate a judge. It concluded that the section indeed provides for the power to designate a judge as provided in s 1 of RICA and was considered an implied primary power as the only viable interpretation. After considering the in-depth analysis of the structure and purpose of RICA, the court concluded that RICA was unconstitutional to the extent that it lacked adequate safeguards for independent judicial authorisation of interception. The CC illustrates in this case the power of harmonising the need for authoritative decisions with a much broader reminder that such decisions taken must align itself more accurately within the meaning of constitutional imperatives.

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There is a difference between the Law Society of South Africa and the Legal Practice Council

The Legal Practice Council (LPC) has been in existence for the past five years, yet there are still legal practitioners who do not know its function or the difference between the LPC and the Law Society of South Africa (LSSA). There is widespread confusion in the profession about the difference between the LPC and the LSSA. This stems from the fact that many legal practitioners do not know that the functions performed by the LPC are vastly different from those performed by the LSSA.

For a simpler explanation, the LPC has taken over the regulatory functions of the former four provincial societies, namely the Cape Law Society, the Law Society of the Free State, the KwaZulu-Natal Law Society, and the Law Society of the Northern Provinces. On the other hand, functions of the LSSA are:

- To provide legal education through its Legal Education and Development (LEAD) division. LEAD provides access to quality learning, which is relevant and affordable through its extensive range of learning activities (seminars, courses, etcetera).
- To publish the *De Rebus* journal, which is an educational tool used by the profession for research purposes.
- Through its Professional Affairs Department, to coordinate and support the activities and representations of the LSSA's specialist committees. The department comments on issues and legislation that affects the legal profession and the public. The department also liaises with Parliament and LSSA stakeholders and coordinates special projects.

Since the enactment of the Legal Practice Act 28 of 2014 (LPA), the LSSA has been positioning itself as a member interest organisation with a new mandate of serving attorneys and candidate attorneys. Since 29 October 2018, the mission of the LSSA has been to represent the attorneys' profession, safeguard the rule of law via the efficient and fair administration of justice, while the LSSA's vision has been to empower attorneys so that they can provide excellent legal services to the community in an ethical, professional, considerate, and competent manner. The LSSA brings together the Black Lawyers Association, the National Association of Democratic Lawyers and independent attorneys, in representing the attorneys' profession in South Africa.

The LSSA conducts several behind the scenes activities that the profession does not see but would have felt their impact had the LSSA not intervened. The LSSA intervenes on behalf of the profession to influence legislation and other issues that affect the profession. The LSSA has made numerous submissions on behalf of the profession on issues that affect the profession, justice administration, and the rule of law. The LSSA also participates in various professional interest and public interest cases, either as a party or as *amicus*.

The website of the LPC states that: 'The Legal Practice Council is a national, statutory body established in terms of section 4 of the Legal Practice Act, No 28 of 2014. The Legal Practice Council and its Provincial Councils regulate the affairs of and exercise jurisdiction over all legal practitioners (attorneys and advocates) and candidate legal practitioners'. 'The Legal Practice Council is mandated to set norms and standards, to provide for the admission and enrolment of legal practitioners and to regulate the professional conduct of legal practitioners to ensure accountability'.

In a broader sense, the objectives of the LPC are to represent the public's interest, while regulating and disciplining legal practitioners and candidate legal practitioners. Section

Mapula Oliphant – Editor

5 of the LPA sets out the objectives of the LPC, which are to:

'(*a*) facilitate the realisation of the goal of a transformed and restructured legal profession that is accountable, efficient and independent;

(*b*) ensure that fees charged by legal practitioners for legal services rendered are reasonable and promote access to legal services, thereby enhancing access to justice;

(*c*) promote and protect the public interest;

(*d*) regulate all legal practitioners and all candidate legal practitioners;

(*e*) preserve and uphold the independence of the legal profession;

(*f*) enhance and maintain the integrity and status of the legal profession;

(*g*) determine, enhance and maintain appropriate standards of professional practice and ethical conduct of all legal practitioners and all candidate legal practitioners;

(*h*) promote high standards of legal education and training, and com-

pulsory post-qualification professional development;

(*i*) promote access to the legal profession, in pursuit of a legal profession that broadly reflects the demographics of the Republic;

(*j*) ensure accessible and sustainable training of law graduates aspiring to be admitted and enrolled as legal practitioners;

(*k*) uphold and advance the rule of law, the administration of justice, and the Constitution of the Republic; and

(*l*) give effect to the provisions of this Act in order to achieve the purpose of this Act, as set out in section 3.'

The difference in functions between the LSSA and the LPC

As can be seen from the below, there are fundamental differences between the LSSA and the LPC. Legal practitioners are advised to regularly read notices or newsletters issued by the LSSA in order to keep informed.

Legal Practice Council (LPC)	Law Society of South Africa (LSSA)
Represent public interests – representative function is exercised primarily in the interests of the members of the profession.	Voice of the profession.
Regulation.	Assessments for entry to the profession as per our objectives to uphold and encourage the practice of law and to promote and facilitate access to the profession.
Discipline.	Legal Education Training (mandatory and post-qualification professional development (PPD)) in terms of the objectives to uphold, safeguard and advance the rule of law and the administration of justice.
Transformation.	Transformation of the profession. Policies and codes of conduct that represent practitioners' interests, both local and international.
Accreditation and monitoring.	A forum for practitioners to gather and deliberate.
Data and records.	Practice management resources.
Examinations/assessments.	Lobby government on crucial issues.
Regulatory and not a representative body.	Comment on proposals affecting the profession and society.
Preserve and uphold the independence of the legal profession; to enhance and maintain the integrity and status of the legal profession; and most directly, to establish and administer insurance schemes, medical aid schemes or medical benefit schemes, pension funds, provident funds, pension schemes or benevolent schemes for practitioners, former practitioners, and their employees.	Publishes a digital legal journal for all legal practitioners.

LETTERS TO THE EDITOR

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

The arbitration of matrimonial disputes – a suggested amendment of the Arbitration Act

It is a truism that matrimonial disputes are among the most stressful and destructive of disputes, affecting not only the parties but also their children, and often, also their close relatives and friends. Sometimes matrimonial disputes can affect those in contractual relationships with both, or one or other of the parties. All of this makes obvious that matrimonial disputes especially require expeditious resolution. It is a truism too that our very busy courts cannot comply with that requirement. Section 38 of the Superior Courts Act 10 of 2013 can be invoked by the court to expedite matters by appointing a referee with wide flexible powers to determine many matrimonial issues and report to the court, which can then adopt the report. The difficulty, of course, is that that procedure entails the costs and delays attendant upon applying to a court for the required direction, and then those entailed in moving a court to adopt the report.

An alternative solution is to amend the Arbitration Act 42 of 1965 in order to provide for the arbitration of matrimonial matters. Section 2(*a*) of the Act prohibits arbitration of 'any matrimonial cause or any matter incidental to any such cause … .' The laudable intention of this provision is to elevate the importance of matrimonial disputes above those of other disputes given the centrality of the family and its importance. And so, the legislation is intended to place the control of matrimonial disputes firmly in the hands of the court. This objective can be achieved by amending the Act to provide for arbitration and, at the same time, for the ultimate control of the court, should either of the parties require it, the suggested amendment would repeal subs (*a*) of s 2 and add s 2 *bis* which ought to read:

(1) Matrimonial causes and matters incidental thereto may be subject to arbitration, provided that the court consisting of one or more judges may, at the request of either of the parties, hear an appeal against any award based on any record, which may have been kept of the arbitration proceedings, supplemented, in the discretion of the court, by further evidence, and provided further, that no appeal will lie against interim awards in the absence of exceptional circumstances.

(2) An award of divorce, which shall contain the reasoning of the arbitrator may only take effect by order of court.

The words 'any record which may have been kept' would take account of the fact that the record may be scanty. The words 'exceptional circumstances' are borrowed from s 17(2)(*f*) of the Superior Courts Act. The amendment would enable the parties to fashion an arbitration agreement, which would cater with as little delay as possible for the requirements of the case, and so interlocutory applications including those which would be brought in terms of r 43 of the Uniform Rules of Court could be dealt with differently from those involving final relief. The parties would, of course, be at liberty to follow any procedure they deem practical and effective, including those of the Arbitration Foundation of Southern Africa, or those of the Association of Arbitrators (Southern Africa), or the 'Fast Low-Cost Arbitration' route, which I discussed in 2023 (Sep) *DR* 47.

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

Failing our children: The lower courts' disregard of the best interests of the child in maintenance matters

The importance of the best interests' principle in South Africa has long been settled. It is enshrined in the Bill of Rights and is further incorporated into the Children's Act 38 of 2005. In all matters involving children, their best interests take priority. In matters before the High Courts, this position is undisputed. However, the same cannot be said for the lower courts. The apparent reasons for the double standards are uncertain. What is, however, evident is that in the lower

courts and maintenance courts, the best interests' principle does not carry the weight that it deserves. In fact, whether it is even considered is questionable. The lower court system is currently so overburdened that greater attention is spent on settling disputes than on asking the important question, namely does the settlement protect/promote the child's best interests? This is the case whether one is dealing with seasoned magistrates or newbies to the Bench.

The situation mentioned above is even worse in the maintenance courts. With matters being postponed repeatedly for a number of reasons, with attempts for child maintenance being blocked at every turn by respondents wanting to avoid their maintenance obligations and with staff being overburdened with the number of complaints that they are required to deal with, the question of best interests does not even arise. Regrettably the current system, does not allow for this and children remain without any or adequate maintenance for years on end. Clearly, the current maintenance system is failing the very people that it is required to protect.

Is it not time that the current system is overhauled and that we stop paying lip-service to an ideal that we are clearly not protecting?

Carmel Jacobs *LLB (UWC) LLM (UP) PhD (Leiden)* is a Senior Lecturer in the Department of Private Law at the University of the Western Cape.

By Kevin O'Reilly

Environmental and Climate Justice Committee meeting summary

The Law Society of South Africa's (LSSA) Environmental and Climate Justice Committee (the Committee) met on 8 November 2023 to discuss a number of issues within its area of specialisation. The following were among those issues discussed.

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

The SALRC released its report in March 2022 and sent a final report with recommendations to the Minister. Although not being open for public comment, the LSSA provided feedback on the report to the Minister. The LSSA has repeatedly requested a meeting with the Minister to discuss the report, given that the report is not open for public comment. Although the recommendations that came out of the discussion paper do not directly impact on environmental issues it does impact all legal practitioners in a significant way.

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

The amendments of regulations concerning the rendering of community service by practising legal practitioners and candidate legal practitioners published on 11 August 2023 were also noted. The Committee noted that the profession is waiting for the Legal Practice Council (LPC) to provide guidance on it. The Committee observed that the regulations lack clarity and will likely be challenged. Additionally, it was noted that a simple proposal to address this issue by including an extra sub-section within s 29(2), stating that *pro bono* service in accordance with the LPC rules would qualify as community service was not accepted.

Cases considered

- *Minister of Water and Sanitation and Others v Lötter NO and Two Similar Cases* 2023 (4) SA 434 (CC)

The Committee took note of the transfer of water use rights judgment in *Lötter*. The judgment looked at whether one can transfer water use rights and if so if one can charge a fee. This is something the Department used to allow but in 2018 the Department issued a circular, which said that s 25 does not allow trading in water use entitlements. The Constitutional Court (CC) held that one can transfer water use rights and the fact that one paid only a nominal amount to obtain them in the first place is irrelevant to the question of what someone can charge, for example, when surrendering your water use license in favour of a third party.

The court noted that one of the purposes of the National Water Act 36 of 1998 is to transform historical inequalities in water allocation but that cannot be done as the National Water Act is currently framed. Therefore, it is possible that amendments will be made to the National Water Act to address that concern.

- *South African Iron and Steel Institute and Others v Speaker of the National Assembly and Others* 2023 (10) BCLR 1232 (CC)

The Committee also looked at *South African Iron and Steel Institute*, which challenged the enactment and coming into force of the National Environmental Management Laws Amendment Act 2 of 2022, which changed the definition of 'waste'. The CC found that the public participation process in which the definition of 'waste' was changed was inadequate.

- *Federation of South African Fly Fisheries v Minister of Environmental Affairs* (GP) (unreported case no 62486/2018, 10-9-2021) (Vorster AJ)

It was noted that leave to appeal to the Supreme Court of Appeal and the CC was refused in regard to the matter of *Federation of South African Fly Fisheries*, which determined the inadequacy of the sufficiency of information in a consultation process under s 100 of the National Environmental Management: Biodiversity Act 10 of 2004 (NEMBA). Furthermore, it was asked what considerations were applied in relation to the definition of 'invasive' in NEMBA.

Emergency cleanup and routine cleanup enactments

In light of the 2021 chemical spillage from a United Phosphorus Limited (UPL) chemical plant in Durban, the Committee considered emergency cleanup and routine cleanup enactments under ss 28 and 30 of National Environment Management Act 107 of 1998 (NEMA) and s 19 of the National Water Act and asked:

- What is an emergency incident?
- When does an emergency incident cease to be an emergency incident and become a long-term cleanup event?
- What are the overriding provisions?
- How do they work in practice within the different categories of emergencies?

In the event of such an occurrence, is our legislation explicit enough to give guidance to the authorities as to what legislation overrides the other legislation to the extent that it is needed for such an emergency, ensuring an appropriate response?

The Committee decided to have a future discussion in which they posit a simulated emergency scenario exercise, evaluating a reasonable response in accordance with overarching NEMA principles, to examine practically how municipal bylaws, provincial legislation, and national legislation intersect to handle disagreements over specific line functions or distinct competencies/jurisdictions, and to identify a swift method of resolving disputes to achieve effective mitigation/response/redress.

Legislative update and new law developments: Climate Change Bill B9 of 2022

On 24 October 2023, the Bill was passed by the National Assembly and sent to the National Council of Provinces (NCOP) for concurrence. Once it has been approved by the NCOP and signed by the President, South Africa will have its first Climate Change Act.

Media and communication

The Committee considered providing information to communities lacking proper consultation or a clear understanding of their environmental rights. This will involve delivering presentations and offering educational guidance on environmental law. This could take various forms, including brochures, webinars, or information sessions. The Committee will determine topics to provide broad and targeted environmental seminars. Participation will also be extended to other environmental practitioners interested in contributing. The initial presentation will focus on what is climate justice. The Committee noted that the most adverse impacts of climate change will disproportionately affect impoverished individuals who lack the means to alleviate those impacts.

Kevin O'Reilly *MA (NMU)* **is a subeditor at** *De Rebus.*

By Kgomotso Ramotsho

Legal practitioners have a duty to change the environment and prevent state collapse

The National Association of Democratic Lawyers (NADEL) held its Annual General Meeting (AGM) and Conference in October 2023. The AGM was kick started by the launch of NADEL's digital magazine *The Progressive Lawyer*.

Launch of the magazine and opening of the conference

In her welcoming remarks, the Deputy Chairperson of the NADEL Johannesburg Branch, Chantelle Gladwin-Wood, said that the theme of the conference 'The Regression of Democratic Gains is a Sign of a State Collapse' and 'Foregrounding Women in the Legal Sphere and likely Gains,' focusses on two components, namely of where they come from and where the organisation is headed in the future. She pointed out that looking at history, NADEL needs to know where they come from, what the organisation fought for in order to know where they are going, if they are going in the right direction and what way the organisation is going to take to get there.

Ms Gladwin-Wood said that the possible benefits of the theme of entrenching women in legal spheres and the gains that might be achieved by that, is never ending. She pointed out that she was not speaking at the function to give solutions to the challenges of the state's collapse, which society has faced. However, she added that in one way or the other everyone has been impacted by the effects of the state's collapse due to corruption. Whether personally or through a family member who has died due to a dysfunctional government hospital; or those who could not get their accident claims from the Road Accident Fund; or a failed pension fund payment, we all have experienced the state's collapse.

Deputy chairperson of the National Association of Democratic Lawyers (NADEL) Johannesburg branch, Chantelle Gladwin-Wood spoke at the opening of the NADEL Annual General Meeting.

President of the National Association of Democratic Lawyers (NADEL), Mvuzo Notyesi at the opening of the organisation's Annual General Meeting and Conference and launch of NADEL's Journal The Progressive Lawyer *that took place on 19 October 2023.*

Ms Gladwin-Wood, however, pointed out that those who feel the pinch of the state's collapse are the most vulnerable and marginalised in society. She said legal practitioners have a duty to do what they can to change the environment, prevent the state's collapse and move towards a fairer and just society for all. She asked delegates what NADEL is doing to prevent the state's collapse? She asked delegates to entrench the right of all persons in South Africa (SA), whether they are male, female, non-binary, or transgender.

During the evening of the launch of the magazine, legal practitioner, Tembeka Ngcukaitobi SC, was tasked to discuss the 'Coalition Government and the Rule of Law: Is Coalition Government a Good Model and what are the Implications for the Rule of Law'. Mr Ngcukaitobi said that the regular government and multi-party system of a democratic government are designed to ensure accountability, responsiveness, and openness. He added that it is a functional provision. 'We need a multi-party system so that there can be accountability, responsiveness, and openness. Those are the founding values of the South African constitutional order,' Mr Ngcukaitobi noted.

Mr Ngcukaitobi pointed out that s 2 of the Constitution is often forgotten about. He said that is the section that entrenches the supremacy of the Constitution. He said that there are two components to the supremacy of the Constitution. Mr

Legal practitioner Tembeka Ngcukaitobi SC, addressed delegates at the launch of the National Association of Democratic Lawyers Journal, The Progressive Lawyer. *The launch took place on 19 October 2023 in Gauteng.*

Ngcukaitobi pointed out that component one, is that conduct that is inconsistent with the Constitution is invalid. He added that, that is what he regards as the negative component of the rule of law. He said put differently it prohibits conduct outside of the Constitution. He pointed out that what people forget is that it also has a positive component, which says the obligations imposed by it must be fulfilled.

Mr Ngcukaitobi said that in the Bill of Rights the critical section for the topic he was discussing, is political rights in s 19, which has three functional provisions. The first being the right to make political choices, the second being the entitlement of every citizen to vote in a free, fair election in a legislative body that has been established in terms of the Constitution. He added that the law in SA has been that in the national and provincial sphere, only political parties as per the provision of the Electoral Act 73 of 1998, only political parties to field candidates to contest in those elections. He pointed out that the challenge that came from a group representing independent candidates stated that the provision is unconstitutional.

Mr Ngcukaitobi said the court said that it is an infringement of s 19(3), which confers a right on any other adult citizen, and any other citizen is distinct from any other political party which is referred to in s 19(1). Every adult citizen has a right to stand for public office and if elected to hold office. He said that will have implications in the future. He pointed out that the implication is decision making. That is how the decision is going to be made in provincial legislature and how decisions are to be made in Parliament. Mr Ngcukaitobi said that the Constitution does address this question. He pointed out that decision making is to be made on the basis of a majority rule, whenever there is a disputed issue, that issue will be dealt with by a majority vote.

The Deputy Judge President of the Gauteng Division of the High Court, Judge Aubrey Ledwaba at the launch of the National Association of Democratic Lawyers Journal **The Progressive Lawyer.**

The Deputy President of the Law Society of South Africa, Matshego Ramagaga gave a message of support at the National Association of Democratic Lawyers AGM.

Mr Ngcukaitobi said that majoritarianism has its own advantages and disadvantages. He added that the reason majoritarianism is adopted, people assume that it is legitimate, because it is supported by more people. He said that the one function that majoritarianism serves its legitimation, it gives the decision. He added that that is distinguishable from whether or not the decision is correct, but it is legitimate because it has been taken by the majority of the people.

Conference

On 20 October 2023, Deputy Judge President of the Gauteng Division of the High Court, Judge Aubrey Ledwaba delivered the welcome and opening remarks to the delegates who attended the NADEL conference, which included Legal Services Ombud, Judge Siraj Desai, President of the Supreme Court of Appeal, Judge Betty Molemela and Judge Mbuyiseli Madlanga.

During the messages of support session, a representative from the Pan African Bar Association of South Africa (PABASA), Salome Manganye, said NADEL has a very important and special part to play in the PABASA journey. She pointed out that when PABASA was formed, NADEL played a significant role with regard to funding the establishment of PABASA. She added that NADEL and PABASA stand for the same ideals and that NADEL has a seat on the board of the Pius Langa School of Advocacy at PABASA. She said that NADEL is still playing a role in shaping legal practitioners that will form part of the future and one day be seating judges and senior legal practitioners in the profession.

The LSSA supports the objectives of NADEL

The Vice President of the Law Society of South Africa (LSSA), Matshego Ramagaga said that the LSSA supports the objectives of NADEL and where necessary also collaborates with NADEL. She added that NADEL is privileged and honoured to have descended from great giants such as, the late Justice Dullah Omar, the late Chief Justice Pius Langa, Justice Dumisa Ntsebeza SC and many others. 'When you find yourself descending from such great giants, it becomes a duty and an obligation upon you to try and emulate those giants,' Ms Ramagaga said.

Ms Ramagaga pointed out that at the time the Minister of Justice and Constitutional Development was appointed in the democratic South Africa, 'we were not trained to take office in the political sphere. But what he did, upon taking office was to establish a team that would look to the transformation of the administration of justice'. She said that the late Mr Omar took office in 1994 and in 1995 the task team was in place. Ms Ramagaga added that the task team did not sleep on the job but produced the famous document known as Justice Vision 2000, which was launched in 1997. Ms Ramagaga pointed out that it was Mr Omar's dream that the document would have almost been implemented in full by 2002. 'Today we are still struggling to implement that document. It is a straightforward document that talks to transformation within the justice environment. His dream was to have one profession, which will have different branches of practice,' Ms Ramagaga said.

Ms Ramagaga pointed out that on paper there is one profession, which is regulated by the Legal Practice Act 28 of 2014 (LPA). However, she said that when one looks deeper to what is happening in the legal profession, there is no willingness and deliberateness to try to fuse the two branches of the legal profession. Ms Ramagaga challenged NADEL and the BLA, as well as other organisations in the legal profession to try and make sure Mr

The Black Lawyers Association's President Bayethe Maswazi gave a message of support at the National Association of Democratic Lawyers AGM and conference in Gauteng.

Council Member at the Legal Practice Council, Busani Mabunda, gave a message of support to the National Association of Democratic Lawyers delegates at their AGM and conference.

Omar's dream comes true. Ms Ramagaga pointed out that in the legal profession the word 'transformation' is loosely used to a point that the meaning of the word has cheapened. She said that when one talks about transformation, they should start by looking internally and say 'am I prepared to shift from my position of comfort?' She added that if one is not prepared to shift from the position of comfort, 'then what you are saying is that I am a proponent of transformation, I am an advocate of transformation, but I am not an agent of transformation'. She pointed out that if the profession is going to have proponents, the advocates, but not the agents of transformation who make sure that transformation happens, then it remains just but a word on paper. She said the profession should make sure that it gives true meaning to the word transformation through actions.

The BLA is with NADEL in the battle for transformation

The President of the Black Lawyers Association (BLA), Bayethe Maswazi in his message of support said that the BLA is with and has always been with NADEL in the battle for transformation in the legal profession and the judiciary. He said that the quality of democracy in any nation, will be reflected by the quality of the wisdom of the people of that nation in their preparedness to invest in that democracy. 'At this moment we ought to ask ourselves what level of quality of wisdom that has been invested in the South African democracy. And if we find that the wisdom is low, that will explain the extent to which we have degenerated as a country in every social illness,' Mr Maswazi noted.

Mr Maswazi added that legal practitioners are important for constitutional democracy and democracies in general. He said that legal practitioners are the ones who appear in court to petition various legal outcomes and judges determine the true meaning of the law. He added that for that reason the profession needs to invest its wisdom in producing legal practitioners that will answer the most important demands made by the Constitution. Mr Maswazi said that delegates should use the NADEL conference to renew the vows to the marriage, to the idea of a transformed legal profession and a transformed judiciary. 'In our experiences at the hand that we have held together as NADEL, we have no doubt as the BLA that you will continue what you have always done by holding our hands as we execute the important task of transforming our judiciary and our profession. As we say in the BLA, we want a better profession for a better judiciary, in order to achieve a better society,' Mr Maswazi added.

Messages of support from other stakeholders

A representative of the Legal Practitioners' Fidelity Fund (LPFF), CJ Ntsoane, said that at the LPFF they have experienced transformation through the President of NADEL, Mvuzo Notyesi, that when he talks of transformation, he includes women and affords opportunities to young and upcoming legal practitioners. He congratulated NADEL on their conference and added that after the robust discussion NADEL will come up with fruitful resolutions.

Legal Practice Council (LPC), Council Member Busani Mabunda, said that the process of getting to the LPA was a long journey, through various ministers, including the late NADEL founding member Dullah Omar. He pointed out that the process was vigorous, even to the extent of making presentations in Parliament. He said that it is very important and pivotal for people who have a clear understanding of where the country and the legal profession is headed to participate to protect structures of governance of the legal profession.

Board member of the Legal Practitioners' Fidelity Fund (LPFF), CJ Ntsoane spoke on behalf of the LPFF at the National Association of Democratic Lawyers AGM.

The Minister of Justice and Correctional Services, Ronald Lamola spoke about the 'Regression of Democratic Gains is a sign of a State Collapse', on 20 October 2023 at the National Association of Democratic Lawyers AGM and Conference.

Other messages of support were from the Ambassador of Venezuela, HE Mairin Moreno-Merida and HE Enrique Orta Gonzalez Ambassador of Cuba. Cuba's representative openly spoke about the growing concern of the violent attacks to Palestine people by Israel. The representatives called for the violence and killing to end on both ends.

NADEL played a key role in the struggle for democracy

In his address, Minister of Justice and Correctional Services, Ronald Lamola, said that NADEL has played a key role in the struggle for democracy in SA. He added that the organisation has also been a catalyst in the enactment of the LPA. He noted the theme of the conference 'The regression of democratic gains is a sign of a state collapse' should also gauge if the legal profession has lived up to the object of the LPA.

Mr Lamola said for him to answer the question posed by the theme, he will have to take stock of the road travelled in the prosecution of the National Democratic Revolution since the democratic breakthrough in 1994. He began by saying that he wants to acknowledge the challenges the country faces in the provision of water and electricity, the challenges of crime, a stagnant economy, and joblessness. The role played by COVID-19 in the devastation of the economy and the July 2021 unrest that took place in the country, loadshedding and the natural disasters that happened in KwaZulu-Natal and the Eastern Cape.

Mr Lamola shared some of the statistics by a census survey, and said that despite the challenges faced in the country, SA is a resilient nation. He pointed out that the latest population and housed

The Executive Officer of Legal Practice Council, Charity Nzuza and Chief Executive Officer of SADC LA, Stanley Nyamanhindi attended the National Association of Democratic Lawyers AGM and Conference.

count in SA since the end of Apartheid paints a picture of a remarkable progress over the past 29 years. He added that it is important to note that SA's development has been intentional and systemic, with well-designed developmental programs implemented since 1994. He added that the progress is impressive, particularly in areas related to education, clean water, electricity, sanitation, and refuse removal. He said that the Census 2022 shows that 82,4% of households now have access to piped water inside their dwelling or yard, and 70,8% of people have access to a flushing toilet.

Mr Lamola said that the impressive improvements also pose significant challenges to service delivery and essential infrastructure capacity. He added that the Census 2022 results make it clear that the future of SA is bright, but there is still a long way to go. Mr Lamola looked closer at the judiciary and the legal profession. He pointed out that in 1994 there were 165 judges, and of that 165, 160 were white males, three were black males and two were white females. Today there are 249 judges in active services, 93 are black males, 84 are black females and 45 are white males and 31 are white female judges. He added that there are also black females in the leadership of the judiciary, namely, the Deputy Chief Justice of the country, Mandisa Maya, the President of the Supreme Court of Appeal, Betty Molemela, the Judge President of the KwaZulu-Natal Division of the High Court, Thoba Poyo-Dlwati, the Judge President of Mpumalanga Division of the High Court, Sheila Mphahlele, to name a few. Turning to magistrates of the 1 652 magistrates in SA, 52% are female and 74% are black. He said that these are self-evident gains that must be advance even further to aspire to achieve the objectives of the Constitution.

Mr Lamola pointed out that the LPA established the LPC to become the country's sole and ultimate statutory body to regulate the affairs and the conduct of legal practitioners, and to set the relevant norms and standards. He added that today more and more young black aspirant legal practitioners continue to enter the legal profession. And this was part of Justice Vision 2000 published by the former minister Dullah Omar.

Mr Lamola pointed out that in September 2023 after consulting the LPC, he signed a draft Guidelines for consideration by the President as he exercises his powers and prerogative when considering the granting of Silk status. He said that the draft Guidelines are currently being considered by the legal services unit in the Presidency, and soon, the country will have certainty about the process of allocation of senior status for legal practitioners. He added that in brief, distinct from the past, 'we propose that even attorneys qualify for honours which if approved, will be conferred as 'Senior Legal Practitioner'. He said that this is also a product of consultation with the profession.

Mr Lamola spoke about the Office of the State Attorney. He said that government and the State Attorney have set targets for briefs given to women advocates. 'We have three targets when it comes to measuring briefing patterns. We set a target of 40% of briefs allocated to female legal practitioners and we achieved 42%.'

Mr Lamola touched on the Masters' office. He said that the department is on the course to digitise the Masters' services and they have started with the online services for deceased estates. He pointed out that the department has collaborated with First National Bank in this regard, and they provided *pro bono* services, this will be extended to all the Masters' services.

Mr Lamola said that the department will soon convene all stakeholders for the Masters' services, for the legal profession to provide suggestions on the challenges the Masters' office is facing. He added that the department will request the legal profession to extend *pro bono* services to the Masters' offices countrywide. The department will soon announce the mechanism for the profession to do it.

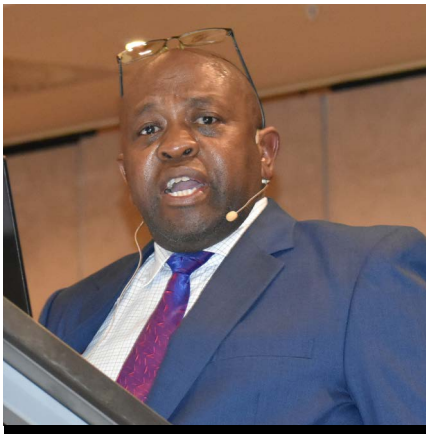
National Association of Democratic Lawyers National Executive Members Eunice Masipa and Zincedile Tiya at the organisation's AGM and conference held in Gauteng.

Mr Lamola said that he was certain that NADEL has taken note of the unspeakable atrocities, which are being meted out against the people of Palestine. He added that international law needs to be enforced in the Israel-Palestine conflict. He pointed out that it is essential to denounce any violent actions by either party. He added that the oppressive nature of Israel's occupation has created a divisive environment, depriving the Palestinian people of their right to self-determination. Mr Lamola said that to achieve peace and justice for all parties involved, human rights must be prioritised, including the inalienable right to self-determination. He said this requires a dismantling of Israel's settler-colonial occupation and an end to apartheid practices.

NADEL's President Report

In his president report, the President of NADEL, Mvuzo Notyesi, said the conference was timely and relevant because it will help the conference to contextualise the cause of the decline in service delivery within the local municipalities and consequently the regression of the democratic gains they have fought for,

Legal practitioner Dali Mpofu and the Legal Ombudsman, Judge Siraj Desai at the National Association of Democratic Lawyers AGM and Conference.



Constitutional Court Judge, Mbuyiseli Madlanga spoke about the importance of legal education, effective legal writing and advocacy skills at the National Association of Democratic Lawyers AGM and Conference.

to look at practical ways to minimise the effects, and to develop a plan which can easily and sustainably be implemented and foregrounding women as the country commemorate 100 years of women in law. Mr Notyesi added that NADEL recognises that building an Africa, the task will demand a collective tackle of societal socio-economic challenges.

Mr Ntoyesi said that this year's conference has chosen as its themes 'The Regression of Democratic Gains is a Sign of State Collapse;' and 'Foregrounding Women in the Legal Sphere and likely Gains'. It is a reflection on the absolute need to look to the future. It is immensely valuable to come together, to discuss the challenges we face, and to leave with answers to those challenges. Our identity as African leaders is deeply rooted in our connection and commitment to a better South Africa for all.'

Mr Notyesi added that NADEL is grateful to Mr Lamola, the judiciary, and the legal fraternity for the continued support of the aims and objectives of NADEL.

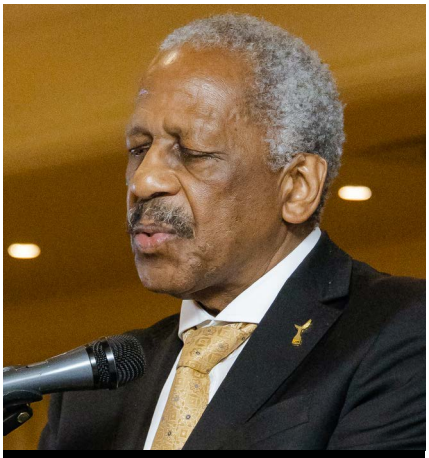
Mr Notyesi also publicly condemned the brutal retaliatory actions of the Israeli army upon the civilian population of Gaza. Mr Notyesi said that 'NADEL views the resistance by Hamas in Gaza in the context of a struggle for Palestinian freedom, equality, and justice against the violation of human rights of the Palestinian people. NADEL recognises the right of the Palestinian people to rise and resist the occupation and brutality of the Israeli government. The NADEL President reaffirmed NADEL's support for the struggle of the Palestinian people. In this regard, the NADEL Constitution commits NADEL members in building international relations and international solidarity in defence of human rights.'

Breakaway sessions at the conference

The conference also had breakaway sessions by various speakers including Justice Madlanga who spoke on the topic of legal education that is infused with a transformative constitution. He said that he chose the topic because of the *Vodacom (Pty) Ltd v Makate and Another* (GP) (unreported case no 57882/2019, 15-9-2023) (Ledwaba DJP) case. He pointed out that the matter started as an intellectual property (IP) matter, which related to the creation of the 'Please Call Me' platform. He said that because the matter started as an IP matter, it is unsurprising that one of the leading legal practitioners in IP, not only in SA but also internationally, Cedric Puckrin, ran the matter from the High Court, however, when it came to the Constitutional Court (CC), he had the wisdom of being led by a senior counsel who by far is junior to him. He added that it made sense, because even though he held the knowledge of IP law, litigating in the CC is something foreign to him.

Justice Madlanga said that the importance of legal education is essential to uphold the Constitution. He pointed out that SA has journeyed from Apartheid to democracy is a testament to the power of law as an instrument for social change. 'Our Constitution hailed as one of the most progressive in the world is a backdrop upon with our new nation stands,' Justice Madlanga said. He, however, added that a Constitution, no matter how visionary, is only as strong as those who understand, interpret and apply it. Justice Madlanga pointed out that this is where legal education comes in, by equipping individuals with an upskilled understanding of the law. 'We ensure

Deputy president of the National Association of Democratic Lawyers, (NADEL) Machini Motloung at the Pius Langa memorial lecture and dinner held by NADEL on 21 October 2023. (Picture supplied.)



Politician and legal practitioner, Dr Mathews Phosa, delivered the Pius Langa memorial lecture and dinner hosted by the National Association of Democratic Lawyers in Gauteng on 21 October 2023.

that our democratic foundations remain robust and resilient,' Justice Madlanga added.

Justice Madlanga said that legal education finds expression in and among two broad imperatives, the education of lay persons in the country's fundamental laws and the way law students are taught law and their preparedness to enter the legal profession. He added that education in general brings knowledge and knowledge brings access to different parts of life and the world that one would otherwise not be exposed to. He said that providing legal knowledge to lay people, creates access to the country's body of law for the public. He pointed out why this is important, as Professor James Boyd White put it, 'knowledge of the law is like knowledge of a language'. The more one understands it, the more likely they are to actually put it to use in order to 'speak coherently about what we call justice'.

Justice Madlanga referred to what the late Chief Justice Pius Langa's words that say, 'the way we teach law students and the values and philosophies we instil in them will define the legal landscape of the future.' He added that this necessitates constant change from a conservative culture of legal interpretation that so characterises legal education during Apartheid – which was based on formal legal reasoning and to open a culture of substantive legal reasoning – that directly peruses SA's Constitutions transformative values. He pointed out that the Constitution was adapted as a tool to transform SA from a segregated country to one where equality and dignity prevailed, he said by equality he means substantive equality not formal equality.

The Fourth Annual Pius Langa Memorial Lecture

Dr Mathews Phosa delivered the Fourth Annual Pius Langa Memorial Lecture at the NADEL dinner. In his address said that he was asked to speak about a man that he knew very well. He pointed out that the lecture is a celebration of a great man, a great mind. However, he unfortunately said that the celebration is happening when the world is witnessing a great war. He said that the war is tragic and there is nothing new in the war. He pointed out that innocent bystanders are becoming victims in a conflict where there can be no winners. He added that one of the lessons he was taught is that war brings out the worst in a person, one has to be brutal.

Dr Phosa said that the former Chief Justice Pius Langa became known for his measured approach to judgments. His approach to life and issues and his carefully worded views with a strong measure of *ubuntu*, and also encouraging his esteemed colleagues on the highest Bench to do the right thing. He pointed out that he made a measurable contribution towards a much more inclusive legal profession. He said that he was in his Convention for a Democratic South Africa team, and he would not be like others, instead he was the quiet measured voice all the time. He added that they had a team from the African National Congress, which was doing the final drafting. He pointed out that today as the country see the Constitution as it stands today, it was what Justice Langa, and the team drafted.

Dr Phosa said that today there are many global leaders who are quick to take harsh actions and judgment, and even quicker to choose sides and encourage those in war, to engage in battle. He said leaders could do much more reflecting like Justice Langa did and do the right things without rushing into positions and casting stones. He pointed out that what he did was leadership. He said that history has taught that in every conflict there are rights and wrongs and often, however, difficult it is to stomach on both sides there are right and wrongs. He pointed out that when reflecting on the global turbulence and as well as SA's own fragile democracy, he is reminded of the biblical truth 'blessed are the peacemakers'.

National Association of Democratic Lawyers delegates at the Pius Langa memorial lecture and dinner.

Dr Phosa said 'blessed' in his view are those who attempt to find win-win solutions, where others throw the stones of conflicts even higher. When the centre is struggling to hold as in the case with both international communities and here in SA, 'it is always the peacemakers who shape our destiny away from conflict, war, division and hatred'. He pointed out that Justice Langa is that peacemaker and his story reflected one of struggle, determination, a leader who will put the past behind him and dedicate his life to building a better more balanced society.

Dr Phosa added that Mr Langa rose above bitterness, from poverty and long hours of sweating at a factory, he studied for long hours, day and night to eventually become the second Chief Justice in the democratic SA. He added that the architects of the hard-fought democracy, including the late Chief Justice Langa would not be proud of the state of both the country and the legal fraternity. He pointed out that recent developments have shown that the ground between the legislative and executive branch on the one side and the judiciary on the other side have deepened and the constitutionally imbedded respect between them is slowly being wangled away.

Dr Phosa said for example the Zondo Commission depicted a framework on how to redesign and corrected the obvious flows on both executive branches, as well as the legislative branch. However, he pointed out that very little has come out of it and the reaction to it in the face of the corrective proposal has resulted in hardly anything more than a token action. He added not even one minister, or deputy minister who was mentioned in that commission is standing trial. He said that it is a shocking state of affairs that three arms of state are at serious fault with one another. He added that the people have lost confidence in politics and politicians, which is a sad thing because this democracy is too young. He pointed out that the cancer of public sector corruption is growing despite the many promises to clear up the shameful legacy of state capture. He said that the power of the judiciary to act as an independent arbiter in a decisive manner is being undermined by the fact that the current government is more than willing to look the other way, when they should in fact support judicial reports and findings.

Dr Phosa said that Justice Langa was a leader and a peacemaker. He added that he was a jurist who understood that justice and restitution should be tempered with mercy. He pointed out that Justice Langa understood SA's precious democracy should be viewed in the spirit of *ubuntu*, honesty, integrity, and leadership. He added that the legal fraternity should mobilise all members to shape the future of the country in such a way that it is a better future for all. He concluded that the responsibility of shaping a better future and rejecting what is not acceptable is in the hands of all people.

National Association of Democratic Lawyers delegates at the Pius Langa memorial lecture and dinner.

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

The BLA exists to change society

By Kgomotso Ramotsho

The Black Lawyers Association (BLA) held its gala dinner and Annual General Meeting (AGM), in Cape Town on 17 and 18 November 2023 under the theme, 'Reflections on the five years of the transformed legal profession. Pondering on the future.' The itinerary started on the morning of 17 November with an outreach programme by the BLA, where they visited the Atlantis School of Skills, to donate furniture and sewing material to the school. The BLA National Executive Committee (NEC) members together with the provincial NEC members and other members from different BLA branches, were met by the leadership of the school. The principal of the school expressed gratitude to the BLA for their generosity and kind gesture. While giving the BLA members a tour, he explained that the biggest challenge that they have as the school is buying material, as it is expensive. He explained that they use material, such as foam, for making ottomans, couches, and headboards.

The principal said that after making the products at school, the learners are able to take some of the items and sell them so that they can make some money. But the biggest win is the fact that after leaving the school, learners are equipped with skills that can help them start a business. He gave an example of an upholstery business and added that learners also learn how to spray paint cars, build wall units and learn how to use other recycled materials, such as cans, to make furniture. The learners are also trained to be beauticians, they get to work with hair, do makeup, nails and massages.

During the evening at the gala dinner the President of the BLA, Bayethe Maswazi, in his address, said that it is important to remember that a revolution is a moral act and yet requires clarity of thought, clarity of conscience and adeptness of character. He added that members must be pure in their conscience, so that they are pure in the actions they undertake as cadres that call themselves a detachment involved in the sacred responsibility of liberating themselves. He pointed out that the BLA exists to change society. 'We must all as the members of the BLA be catalyst of that change,' Mr Maswazi added.

Messages of support

In their message of support Secretary General of the South African Women Lawyers Association (SAWLA), Mpho Kgabi said that SAWLA would like to see BLA growing from strength to strength. 'We can see that BLA is building black lawyers. I can see that BLA is having more women. I am happy and sure that in future we will have more leadership of women in the BLA,' Ms Kgabi added.

The Secretary General of the National Association of Democratic Lawyers (NADEL), Nolitha Jali, quoted the Legal Practice Act 28 of 2014 (LPA). Ms Jali said that the Legal Practice Council (LPC) has been established: 'To provide a legislative framework for the transformation and restructuring of the legal profession in line with constitutional imperatives so as to facilitate and enhance an independent legal profession that broadly reflects the diversity and demographics of the Republic.'

President of the Black Lawyers Association, Bayethe Maswazi, giving is opening remarks at the organisation's AGM in Cape Town.

She described the LPA and the Council on Higher Education's Qualification Standard for Bachelor of Laws, 2015 as visions that emanate from consultative process of the Justice Vision 2000 in which legal practitioners directly or indirectly, contributed. 'They articulate the progressive views and aspiration of the profession, especially those who were previously denied access to the legal profession but were left out of the process of developing law and were treated as mere subjects which law was to govern and enslave.'

Ms Jali told delegates that they must take the lesson from the failures of the majority of African state leaders, who despite good intentions, failed to complete their respective liberation agendas because of greed, division, and selfish ambitions of those they called comrades. 'They failed because of third forces who operated within their respective cultures who benefited and continue to benefit from Africa's resources,' Ms Jali added. 'Comrades let us unite, urgently. Let us not give up on thinking and fighting or history will soon tire of us and condemn us, perhaps more harshly than those who had oppressed us. Do not tolerate division amongst yourselves, deal harshly with them who seek to plough discord. Remember the enemies of transformation are alive, they are powerful, well-

Members of the Black Lawyers Association (BLA) led by the BLA President Bayethe Maswazi, visited the Atlantis School of Skills, where the organisation donated furniture and sewing materials to the school.

Secretary General of the South African Women Lawyers Association, Mpho Kgabi spoke at the Black Lawyers Association's gala dinner.

resourced and are united in their goal of maintaining the status quo,' Ms Jali said.

The Chairperson of the LPC, Janine Myburgh, in her message of support said that South Africa (SA) has not yet reached a transformed legal profession. She pointed out that the enactment of the LPA has started the profession on the path of its transformation in line with the demographics of the country in order to respond properly to the needs of all the people of SA. She added that the main challenge the legal profession has, is to ensure that the profession is fully representative of the diversity of the South African society, and to make the legal profession more accessible to the public. Ms Myburgh pointed that the LPA has 12 objectives that the Council of the LPC have to adhere to. Among the 12 objectives, she said one is in s 5 of the LPA, which is to 'facilitate the realisation of the goal of a transformed and restructured legal profession that is accountable, efficient and independent.'

Ms Myburgh said that she can categorically confirm that the LPC is committed and continues to ensure the realisation of this objective. She added that the LPC is taking bold steps to transform the legal profession, she pointed out that currently the LPC is looking at the matter with regards to silk status for legal practitioners. 'We received much criticism from certain sectors in the legal profession regarding our stint in this and as the LPC we continue to ensure that we promote the access to the legal profession in pursuit of the legal profession that broadly represents the demographics of the Republic', Ms Myburgh said.

The President of the Law Society of South Africa (LSSA), Eunice Masipa, said the LSSA stands as a united force with the BLA, advocating for pursuit of a transformed legal profession. 'Our collective goal is to contribute to the realisation of a South Africa that fosters transformation, equity, and justice within the legal system. I am acutely aware that these aspirations are shared by progressive lawyers who recognise the noble objectives set forth by the BLA,' Ms Masipa added.

Ms Masipa pointed out that the theme of the BLA conference, 'Reflections on the five years of the transformed legal profession: Pondering on the future,' could not be timelier. She said it is incumbent on legal practitioners to introspect and inquire: Have we done enough to bring about the transformation we aspire to see in the legal profession? She pointed out that organisations such as the LSSA and the BLA bear the responsibility of actively contributing to and facilitating this change. 'To chart a course toward a more promising future, we must collectively reimagine the landscape of our profession', she added.

Ms Masipa noted: 'When we reconvene in five years to reflect on our progress, it is my hope that we can provide a resounding affirmative to the question of whether we have played our part in transforming the legal profession. Our actions today should be geared toward passing a baton of progress and inclusion to the legal practitioners of tomorrow, ensuring that they inherit a profession that is not only transformed but also genuinely inclusive.'

Ms Masipa added that the diversity within the LSSA is not a hindrance but a source of strength. Ms Masipa pointed out that the BLA serves as a beacon of inspiration, reminding legal practitioners of their ability to unite in the face of any challenge. 'Together, we share a common purpose that transcends our individual differences. Let us support one another in this collective endeavour to be better, stronger, and more unified. … I wish you well and stand in solidarity with the decisions that shape the trajectory of our shared pursuit for a transformed and just legal profession,' Ms Masipa added.

In his address to delegates attending the BLA dinner, Constitutional Court Judge, Mbuyiseli Madlanga said that he is bothered by the fact that some law graduates were going to sit at home and not become the legal practitioners that they have aspired to be. He pointed out that this is an issue that cuts deep within him. He added that at his previous engagement with NADEL members he mentioned that it pains him that he had no answers for this worrisome issue. He added that he did not want to claim that he has ready solutions but asked the delegates to engage with the subject.

Judge Madlanga challenged delegates to explore possibilities and said as practising legal practitioners they are solution driven, as they take on causes of the members of the public daily. He said in good conscious legal practitioners can only take on causes when they truly believe there is a possible solution. 'You may only pursue hopeless causes if your clients insist, but from your side you must make it clear to the client what the view of their cause is. And you must do the latter, exactly because yours is a solution driven enterprise. And your client must know when you think there is no solution,' Judge Madlanga added.

Secretary General of the National Association, of Democratic Lawyers, Nolitha Jali, delivered a message of support to the Black Lawyers Association.

Chairperson of the Legal Practice Council, Janine Myburgh, delivered a message of support to the Black Lawyers Association.

The President of the Law Society of South Africa, Eunice Masipa, gave a message of support at the Black Lawyers Association's gala dinner prior to the organisation's annual general meeting.

Judge Madlanga said that with regard to the high unemployment of law graduates, delegates will need to know how, if at all, it had anything to do with the LPA. Judge Madlanga said one of the main aims of the LPA is the transformation of the legal profession. As an example he referred to s 5(*a*) of the LPA, and said it seemed to him that as far as the law graduate is concerned, the relevance of the LPA is that once law graduates have somehow managed to bring themselves within the entry point of the legal practice, which is either articles or pupillage, it is only at that point that the law graduates truly become the LPA's problem. But before that the law graduate is as good as an entity somewhere in the dark recesses.

Judge Madlanga said that for decades it has always been difficult to find articles of clerkship. He added that being accommodated for pupillage used to be better. He added in recent times it has come to the point where it becomes more and more difficult to find pupillage. He pointed out that he did not need data to prove that it is black law graduates who do not get accepted at this entry level. He added that also within that category it is the most disadvantaged that are affected. 'I say so because largely, the poorest of the poor matriculants obtain their law degree from the historically disadvantaged universities, marginalisation starts right there,' he said.

Judge Madlanga said graduates of the University of Limpopo; Walter Sisulu University; and the University of Fort Hare, etcetera, are less likely to find articles of clerkship at the 'so called' big five law firms and other large firms. He added that the reality is that as a group, it is those law firms that have the largest capacity to take all the candidate attorneys. 'It guts me that the unfortunate painful happenstance of being born in poverty should be a determinant of the trajectory of your professional life. I must not be misunderstood. Many are born in poverty graduate from these historically disadvantage universities, make it into these large law firms and go on to be prominent legal practitioners. Others still get their articles from small, sometimes one practitioner's law firm and rise to become legal practitioners of whom we are proud today.'

The Black Lawyers Association's KwaZulu-Natal Branch was given an award at the organisation's gala dinner as the most promising branch for their concerted efforts to be better, steady but consistent growth, their diligence and contibution to the black legal profession at large.

Judge Madlanga said that the reality is that the vast majority of those who come from disadvantaged communities, are those likely not to find articles of clerkship or pupillage. He added there is talk about transformation, which he mentioned as one of the aims of the LPA. He said surely the target group should be those disadvantaged, marginalised, those who feel on a daily basis how painful it is to live on the periphery. He pointed out that for them there is no full realisation of the fruits of SA's constitutional democracy. Judge Madlanga said that if the LPA does not work to some distance towards alleviating the plight of this category of law graduates, then it has failed in its quest to transform the legal practice landscape.

Constitutional Court Justice, Mbuyiseli Madlanga spoke at the Black Lawyers Association's gala dinner on 17 November 2023.

Judge Madlanga noted that true transformation seeks to bring from the periphery those who are disadvantaged to the mainstream. He said it seeks to change the bleak lives of the disadvantaged and make a promise of freedom and equality a reality for them too. He added that it seeks to make them feel that they belong to the democratic SA. He pointed out that what has been achieved in this section has not been able to assist the majority of those in need. He challenged BLA and other organisations, such as NADEL, to come up with a solution that will address training needs under the LPA, but also to satisfy the needs of society.

The AGM

At the AGM the Legal Services Ombud, Judge Siraj Desai, passed his message of support to the BLA. He said that when the LPA was born, he was a part of the debate, and the debate was not simply, in the ordinary sense of the word, merging the attorneys and advocates profession. He pointed out that was one side of the coin. He noted that the other and the most important part of the coin was to break the strangle the grey suited men had on both professions, especially the advocates.

Judge Desai said the advent of the LPA has introduced a new legal order in this country. He pointed out that the Bar Council is equivalent to the BLA and NADEL, as they are all non-statutory bodies. He said in the sense the profession has begun to achieve what it intended to do, which is to begin the process of the new legal order for the country. 'We never broke the stranglehold of the economic power in this country and the legal profession falls within that category of power that one had to bring to dismantle. I must say as a tribute to my principal and

The Black Lawyers Association's Limpopo Branch was awarded with the most outstanding branch award at the organisation's gala dinner. This was for their consistent growth demonstrated by their participation at BLA activities and exceptional contribution to the legal profession at large.

Legal Ombudsman Judge Siraj Desai addressed delegates at Black Lawyers Association AGM.

old friend and comrade Dullah Omar, he had a vision when we debated the LPA to introduce the improvised position of the Act,' Judge Desai said.

Judge Desai pointed out that it is not simply the context of what the LPC is doing but the thriving of the people of this country that is important, signalling that the process of dismantling an old legal order has begun. He pointed out that it is still a long way to go but the process has begun, since the dawn of democracy in SA.

During the panel discussion, former President of the BLA Mashudu Kutama said that the Constitution of SA recognises the past injustice, however, the LPA does not do the same. He added that when the LPA was drafted it was drafted as if the legal profession does not have a past. He said that the LPA does not recognise that black legal practitioners were not allowed in court and were oppressed. He pointed out that the BLA advocated for fusion of the legal profession, however, this did not happen.

Mr Kutama said the LPC rules by directives and decrees, and that the fact that the LPC does not have an AGM is an issue. He asked what kind of organisation does not engage with its own members. He added that when he raised the issue, he was told that LPC will issue directives. 'We do not have a platform to engage the LPC,' Mr Kutama added.

Council member of the LPC, Kathleen Matolo-Dlepu said that the LPC is a negotiated settlement and acknowledges that it is not the result that the BLA wanted. She pointed out that when she says it is a negotiated settlement there was a time where, she, and the late Lutendo Sigogo and Mr Kutama had to walk out of a meeting, because it was a tough negotiation. She added that the National Forum ushered in the LPC. She said that one of the things they had to do was to restructure the legal profession and take the provincial law societies, and the GCB had to be on board with the changes. Ms Matolo-Dlepu said they had to start by establishing provincial offices of LPC, fund the LSSA, and appoint a CEO for the LPC.

Ms Matolo-Dlepu added that the LPC had to establish committees, and among others the committees are namely –

- Management Committee;
- Professional Affairs Committee;
- Transformation Committee;
- Risk Committee; and
- Legal Education Committee, etcetera.

Ms Matolo-Dlepu added that they then had to look at the LPA and the Code of Conduct as to what to remove and what to keep. 'It took us almost a year to try and negotiate. To revamp the education. To make sure that we have standardised the education even if we are not there. We wanted to make sure that we have an exam that will be an LPC exam,' Ms Matolo-Dlepu said. She pointed out that unfortunately the GBC still has its own exam. She said that if people want to be subjected to a second exam, that is their own problem, because the LPC exam is the only one that will get one to be enrolled as a legal practitioner. Ms Matolo-Dlepu pointed out that the frustrating part is that the LPC wanted one and the same exam for candidate legal practitioners and then after that exam, they would choose whether they want to be an advocate or attorney. She said the modules should have been the same, then towards the end one would have selective modules.

Ms Matolo-Dlepu pointed out that one of the issues worrying her is the issue of ethics. She said that the profession has lost the standard with regard to ethics. She added that although people worry about being struck off the roll, ethics have declined. 'We are being attacked every day because people think lawyers are thieves, which is not true, because only a pocket of those people are. But we can't be proud to say that. We are supposed to protect the public,' Ms Matolo-Dlepu added.

Former President of the Black Lawyers Association, Mashudu Kutama spoke at the organisation's AGM.

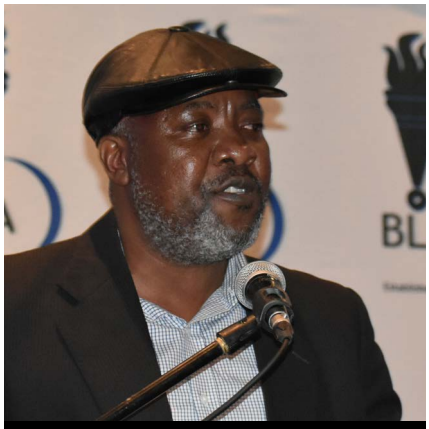
Member of the Legal Practice Council, Kathleen Matolo-Dlepu.

Ms Matolo-Dlepu further shared some of the other things that the LPC has done since its inception. She also encouraged the BLA that they are well represented in structures, such as the LPC.

Former BLA President and Council member and Chairperson of the LPC Legal Education, Standard and Accreditation Committee, Busani Mabunda for his presentation started by quoting the Dalai Lama: 'Share your knowledge. It is a way to achieve immortality,' and 'when educating the minds of our youth, we must not forget to educate their hearts.' Mr Mabunda said that there are definite strides that the LPC is making with the plethora of issues Mr Kutama raised.

Mr Mabunda said speaking as the chair of the Legal Education, Standard and Accreditation Committee, it is indeed true that there are inherent problems, which are afflicting candidates who sit for exams, with respect to ethics. He pointed out that he is giving his absolute assur-

Court Justice, Judge Mbuyiseli Madlanga and Legal Ombudsma Judge Siraj Desai at the Black Lawyers Association's annual general meeting.



Former Black Lawyers Association President and Council member and Chairperson of the Legal Practice Council's Legal Education, Standard and Accreditation Committee, Busani Mabunda was one of the speakers at the organisations annual general meeting.

ance that the LPC is seriously looking at those issues. Mr Mabunda encouraged the members of the BLA and members of the legal profession in general to go and read about the endeavour the LPC is taking to transform legal education. 'We are aligning ourselves with the new order.'

Mr Mabunda added that vocational training should be about vocational training of people who aspire to be legal practitioners, either as attorneys or as advocates. He shared some of the aspects that he said the LPC aligns to the objective of LPA relating to transformation and legal education, which are found in s 5 of the LPA. He said that engaging with any educational institution, which has the department, school, or faculty of law to discuss issues to the curriculum and how it responds to the needs of the legal profession. He pointed out that this is equally one of the important issues, which is extremely helpful. He said that to that end among the stakeholders that the LPC have been engaging with is the South African Law Deans' Association.

Mr Mabunda pointed out that there were some problems before, however, the LPC and the Law Deans are substantially finding common ground and bringing synergy with respect of what has been taught at university level and how it can be helpful for law graduates, so that the law graduates do not see things, such as a summons for the very first time when they are doing their articles of clerkship or pupillage.

The Solicitor-General, Fhedzisani Pandelani said the Office of the Solicitor-General is a creature of statute and can only do what it is intended to do according to legislation. He added that his office in the pecking order was the first piece of legislation, namely the State Attorney Amendment Act 13 of 2014. He said then it was followed by the LPC. And the last critical Act was the Legal Aid South Africa Act 39 of 2014. He pointed out that the State Attorney Amendment Act was deferred for seven years, because there were people with vested interests that did not want that piece of legislation to be proclaimed without being amended.

Mr Pandelani said that even the LPC was contested for two years and there is one common denominator which is the GCB. 'We had our own advocates internally; the GCB imploded them and said you cannot actually have advocates operating within the states we won't recognise them, and that project was in fact stopped because the GCB interfered with that project.' Mr Pandelani added that they have been imploded for seven years and for 66 years there have not been any transformative agenda that sought to empower legal practitioners. He said when the BLA was formed in 1977, it had been 21 years and black legal practitioners were never recognised.

Mr Pandelani said the State Attorney Act 56 of 1957 commenced in 1957. He pointed out that no black legal practitioner has ever been briefed to deal with that work for all those years. He added that then came the piece of legislation that formed the Office of the Solicitor-General. He said it had as its dominant intention, the change of the landscape. Section 3(4) essentially said 'we know no better on how we can in fact transform this landscape. Please come up with policies that will enable us to deal with the challenges that we have.' He said the section was instructive in nature and reached out to the legal profession.

The Solicitor-General, Fhedzisani Pandelani spoke at the Black Lawyers Association's Annual General Meeting.

Mr Pandelani said they have done 28 stakeholder consultations with the legal profession. He added that when the organised profession was resisting, the Solicitor-General went through the LPC, which sent out letters to members of the legal profession calling for stakeholder engagements. He pointed out that they developed policies, the first policy said management and coordination of all litigation in which the state is involved. The second one was state legal cover; the third was early settlement matters. He, however, pointed out that he does not have the resources to deal with early settlement matters. He said as it stands, he only has 306 legal practitioners with 370 000 active matters. He pointed out that it is an unhealthy state that such a small number of legal practitioners working on a huge number of matters, adding that the state could collapse. Mr Pandelani pointed out that he needs the assistance of legal practitioners. He told members of the BLA that he needed their help.

BLA elections

The BLA elections for the new NEC did not take place, a date for elections will be announced to members in due course.

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

BLA gala dinner

By Thomas Harban

Firm structures: Division of tasks is not immunity from risks

Law firms commonly implement internal structures aimed at meeting their peculiar requirements. The structures may include rules for the admission of partners (directors in the case of incorporated firms) and the assignment of responsibilities for the various areas of practice and the financial functions. While firms develop such measures in accordance with their business needs, operating structures and the internal financial relationships, it must always be borne in mind the internal structures will not lead to immunity for the practitioners in the event that risks materialise. This is particularly the case with the regulatory requirements that law firms must meet.

The firm's internal structures

In some firms the founding documents, the partnership agreement (in the case of a partnership) or the shareholders' agreement (in the case of an incorporated practice) may refer to those who share in the profits as 'equity partners/directors' and those who are remunerated on a salary basis as 'salaried partners/directors'. The Legal Practice Act 28 of 2014 (LPA), however, makes no distinction between profit sharing and salaried partners in firms. The responsibilities of all partners/directors in firms are identical no matter what the internal arrangements are regarding remuneration. Similarly, for incorporated practices, the Companies Act 71 of 2008 refers to 'directors' and there is no concept of a 'salaried director' in that legislation with different obligations to other directors (see *Limpopo Provincial Council of the South African Legal Practice Council v Chueu Incorporated Attorneys and Others* (SCA) (unreported case no 459/22, 26-7-2023) (Nicholls JA (Saldulker and Carelse JJA and Nhlangulela and Mali AJJA concurring)) at 28 quoted below). Section 34(7) of the LPA provides:

'A commercial juristic entity may be established to conduct a legal practice provided that, in terms of its founding documents –

…

(*c*) all present and past shareholders, partners or members, as the case may be, are liable jointly and severally together with the commercial juristic entity for –

(i) the debts and liabilities of the commercial juristic entity as are or were contracted during their period of office; and

(ii) in respect of any theft committed during their period of office.'

Internal arrangements cannot trounce the provisions of legislation and legal practitioners cannot contract out of the liability imposed by the LPA.

For purposes of the Legal Practitioners Indemnity Insurance Fund NPC (LPIIF) policy, the annual amount of cover is afforded to the firm as a whole and not to individual partners/directors (see clauses II, XXIII, 5, 6 and 7 of the policy). That policy also does not distinguish between salaried and equity partners and those held out to the public as partners/directors as considered as such for purposes of that policy.

It will be noted from the cases discussed below that all the partners/directors in the firm are liable even where the financial functions are the responsibility of the one partner/director. A partner/director appointed simply to improve the firm's Broad-Based Black Economic Empowerment score, for example, with no real involvement in the management and administration of the firm will have the same responsibilities and face the same consequences as one who is effectively controlling the firm. Such a person will also be considered a partner/director by the LPIIF.

Some decided cases

In *Incorporated Law Society, Transvaal v K and Others* 1959 (2) SA 386 (T), the three respondents had practiced in partnership as attorneys. The first respondent was primarily office based, responsible for the conveyancing and estate work and, since the inception of the partnership with the second respondent, had overseen the firm's books of account (at 387E-F). It was contended by the second respondent that his areas of concern in the firm were court work and that he (the second respondent) was not involved in the financial aspects of the practice, or the trust accounting tasks (at 387C-D). The second respondent had not concerned himself with the management of the trust account and whether there were sufficient funds retained in that account to meet the trust account creditors (387H). The third respondent was the first respondent's son, having served articles at the firm and admitted to the partnership after his admission. The third respondent's primary areas of concern were magistrate's court work, though he took it upon himself to supervise some of the trust account functions (at 387D-E). The first and third respondents admitted, *inter alia*, that they had contravened s 33 of the Attorneys, Notaries and Conveyancers Admission Act 23 of 1934, which prescribed the retention of money in the trust banking account until required to be paid to or on behalf of the trust creditors (at 387F-G). The first and third respondents oversaw the firm's trust account (387G). The court explained that the second respondent's 'guilt extends not from the direct default in making the necessary provisions or in contravening [s 33 of the Attorneys, Notaries and Conveyancers Act] but in the fact that he failed to ensure, as an attorney of this court, that the partnership firm was complying with the requirements of the section, and as a partner he was admittedly guilty of that charge' (387H-388A). The court stated the following in respect of the second respondent:

'It frequently happens in partnership firms that one or more of the partners is concerned with court work and that either another partner or an individual person is entrusted with the books of account and with seeing that trust accounts are properly kept, and that sufficient trust money are properly held at all times. In the instant case the court is accepting the ignorance of the second respondent in the circumstances disclosed as a very strong mitigation feature, but

in future no attorney should be heard to say that, because of the arrangement that he would be doing a particular type of work and therefore was not concerned with the manner in which the books of account had been kept, or the trust account, he should not be blamed. He will not be heard in that regard.

Every attorney must realise that it is a fundamental duty on his part, breach of which may easily lead to his being removed from the roll, to ensure that the books of the firm are properly kept, that there are sufficient funds at all times to meet the trust account claims, and that when he makes the declaration required for fidelity fund [certificate] purposes there is no doubt that that declaration is truly and honestly made' (391C-F).

The third respondent, on the other hand, was aware for a period of six months that the books of account were not properly kept, and during that period, the trust account did not have sufficient funds to meet the claims of trust creditors (392A).

The first respondent was removed from the roll of attorneys, the second respondent severely reprimanded and the third respondent was suspended from practice for a period of six months.

In *Hepple and Others v Law Society of The Northern Provinces* [2014] 3 All SA 408 (SCA), the first and second appellant, Hepple and Earle, respectively, practiced as co-directors in an incorporated practice with two other directors. The two other directors were not involved in the appeal as they had not been subject to the application for removal from the roll of attorneys. The then Law Society of the Northern Provinces commissioned an expert in the field of auditing the accounting records of attorneys to investigate the conduct of the firm. The accounting expert had noted that 'one would have expected that, given the size of the practice and, the nature of its activities, [directors] meetings would have been held and that the financial performance and the state of the trust account would have been placed on the agenda for discussion, more so if separate management functions had been allocated to each of the directors' (at para 16). The two directors who were not involved in the appeal had told the accounting expert that they had not been informed of some of the activities in the firm (at para 17). The first appellant pleaded for a lessor sanction maintaining that he was not involved in the financial shenanigans of the second appellant as –

- a resolution was taken by the board of which allegedly relieved him of financial management of the firm; and
- he claimed that when he discovered that the second appellant was conducting an investment practice, he asked the latter to desist (at para 20).

The court found that:

'As to the first point, there is the difficulty that he is unable to explain the trust deficits that occurred … whilst he was involved with the financial management of the firm. Moreover, that he was not involved with the financial management of the firm, is no defence at all. The duty to comply with the provisions of [the Attorneys Act 53 of 1979] and the Rules is imposed upon every practising attorney, whether practising in partnership or not, and no attorney can therefore be heard to say that under an arrangement between him and his partner, the latter was not responsible for the keeping of the books and control and administration of the trust account, and that he was therefore not negligent [in] his failure to ensure compliance with the provisions of the Act and the Rules. As to the second point – knowing that his co-director had engaged in serious misconduct, Hepple simply asked him to stop. One would have thought that such a discovery would have caused him to be more vigilant and not to simply continue with his unquestioning behaviour' (para 21) (footnotes omitted).

More recently, in *Limpopo Provincial Council of the South African Legal Practice Council v Chueu Incorporated Attorneys and Others* the question before the Supreme Court of Appeal was the liability of all directors of a law firm when the financial misconduct was allegedly committed by only one director (at para 3). The directors had operated at different locations of the firm, with the second respondent serving as its managing director and in charge of the finances of the firm (at para 6). The third to eighth respondent contended that their shareholding, if any, was minor and that they had nothing to do with the firm's finances, which fell within the exclusive domain of the second respondent, were not provided with financial statements, not consulted about major decisions, did not receive distributions of profit (at para 14), no shareholders agreement was entered into and they were treated as salaried employees (at para 15). The Supreme Court of Appeal found that:

'Every director has a fiduciary duty towards the company of which it is a director. To plead ignorance of financial matters, when faced with allegations of misappropriation, does not absolve a director. It has been emphasised over the years that legal practitioners cannot escape liability by contending that they had no responsibility for the keeping of the books of account or the control of the administration of the trust account. As this court stated in *Hepple v Law Society of the Northern Provinces*, for an attorney to explain trust deficits on the grounds that he or she had no involvement in the financial affairs of the firm "is no defence at all".

Abdication of responsibilities does not absolve legal practitioners of their duties. As far back as *Incorporated Law Society, Transvaal v K and Others*, the court cautioned attorneys who attempted to excuse their conduct on the basis that they were responsible for other work in the firm and did not concern themselves with the books of account. In that matter, as here, a particular individual in the firm was tasked with handling the books of account. …

In addition, the respondents were constrained to concede that the concept of "a salaried director" is not one found in the Companies Act of 2008 or the LPA. Once a legal practitioner is appointed as a director, whatever the factual terms of the arrangement may be, they bear full responsibility for the finances of the firm' (paras 26 – 28) (footnotes omitted).

Some lessons from the cases

Having regard to the cases, some of the lessons to be learnt are that:

- It is paramount that all practitioners educate themselves on their responsibilities.
- All partners/directors must take an active role in the management of the law firm's financial functions, especially the management of the trust account functions.
- The responsibility for compliance with the LPA and the Rules lies equally with all the partners/directors in the firm.
- Frank discussions must be held regularly regarding the firm's operations and finances even in circumstances where such discussions lead to discomfort. The discussions must be held formally and properly documented.
- Beware of narratives provided by one party without providing verifiable documentary proof thereof. Though this may be difficult when dealing with the founder of the firm (as happened in the three cases referred to above), confronting that discomfort may mitigate the risk of a strike-off later if any unethical conduct emerges.
- Irregularities in the handling of trust money must be reported to the Legal Practice Council (LPC) when they are detected (see the Rules made under the authority of ss 95(1), 95(3) and 109(2) of the Legal Practice Act 28 of 2014, which stipulate that:

'**Report of dishonest or irregular conduct**

54.36 Unless prevented by law from doing so every legal practitioner is required to report to the Council [the LPC] any dishonest or irregular con-

duct on the part of a trust account [legal] practitioner in relation to the handling of or accounting for trust money on the part of that trust account practitioner'.

Paragraph 5 of the Code of Conduct for all Legal Practitioners, Candidate Legal Practitioners and Juristic Entities provides that: 'Legal practitioners, candidate legal practitioners … are encouraged to report unprofessional conduct by other legal practitioners, candidate legal practitioners or juristic entities to the Council in the manner prescribed in the rules prescribing the disciplinary procedure.'

- A rotation of the responsibility in the financial role is essential.
- Beware of the overconcentration of financial responsibilities with one person.
- Address the regulatory requirements, liability and indemnity in the partnership agreement or shareholders agreement (as the case may be).

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By Nicholaas Smuts

The billable hour dilemma: Time to reconsider legal billing practices

The legal profession has long relied on the billable hour as the standard method for charging clients. Lawyers meticulously track their working hours, and clients are subsequently invoiced accordingly. However, this conventional billing model has increasingly faced criticism in recent times, prompting a re-evaluation of its suitability for the evolving legal landscape. In this article, I will examine the arguments both for and against the billable hour system and consider whether it is time for the legal profession to explore alternative billing methods.

Understanding the billable hour

The billable hour approach involves billing clients based on the time lawyers spend on their cases. While it offers certain advantages, such as transparency and accountability, it also raises several significant concerns.

Arguments against the billable hour

- **Encourages inefficiency:** Critics contend that the billable hour incentivises lawyers to prioritise the quantity of work over its quality. This may lead lawyers to bill more hours than necessary, resulting in inefficiency and inflated costs for clients.
- **Strains client-attorney relationships:** The billable hour model can create a conflict of interest between lawyers and clients. Clients may be reluctant to reach out to their attorneys for fear of accruing additional charges, potentially hampering effective communication and collaboration.
- **Client uncertainty:** Predicting the final cost of legal services under the billable hour model can be challenging for clients. This uncertainty can induce stress and financial strain, particularly in complex or protracted cases.
- **Stifles innovation:** Critics argue that the billable hour system discourages lawyers from embracing technology or seeking more efficient ways to deliver legal services. This resistance to change can impede innovation within the legal profession.

Exploring alternative billing models

Various alternative billing models have emerged as potential replacements for the billable hour:

- **Flat fees:** Lawyers charge clients a predetermined fixed fee for specific legal services, regardless of the time invested. Flat fees offer cost predictability for clients and incentivise lawyers to work efficiently.
- **Contingency fees:** In contingency fee arrangements, lawyers receive a percentage of the client's award or settlement if the case is successful. This model aligns the interests of lawyers and clients and can make legal services more accessible to those with limited resources.
- **Value-based pricing:** Value-based pricing focuses on the perceived value of legal services rather than the time spent. Lawyers and clients negotiate fees based on the outcome, complexity, and significance of the case.
- **Subscription-based services:** Some law firms are experimenting with subscription-based models, where clients pay a regular fee for ongoing legal advice and support. This model encourages ongoing collaboration and can strengthen client relationships.

Conclusion

While the billable hour has been the prevailing billing method in the legal profession for decades, it is not without its shortcomings. Critics argue that it may incentivise inefficiency, strain client-attorney relationships, create uncertainty for clients, and stifle innovation. Consequently, the legal profession is increasingly exploring alternative billing models that offer greater transparency, cost predictability, and alignment of interests between lawyers and clients.

Whether the legal profession should entirely discard the billable hour is a subject of ongoing discussion. It is evident that the traditional billing model may not be suitable for all cases or clients. Legal practitioners should carefully consider their clients' needs and the nature of the legal work involved when selecting the most appropriate billing method. Ultimately, adopting a flexible approach that combines traditional billable hours with alternative billing models may offer a balanced solution, ensuring that clients receive the value they deserve while lawyers are fairly compensated for their expertise and services.

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Ponder before posting, as you may not have the right to be forgotten

By Sekgoela Sekgoela

There are two approaches that continue to define the global and South African media landscapes, namely, social media and citizen journalism.

In its basic form, social media include platforms, such as Facebook, Twitter, Instagram and WhatsApp. Citizen journalism entails active participation by citizens, (not professional journalists) in the process of gathering, sharing and disseminating information, largely through free online media platforms. There is no doubt that social media platforms have deepened citizen journalism to the depth never imagined before and continue to provide alternative means of sharing information – something that was not possible with traditional media platforms. The intention of this article is to highlight why citizens should ponder before posting information on social media, and the rights one may or may not have to remove this information. There is generally no restriction as to ownership of accounts on social media, and as it is, anyone can register an account, including the so-called parody account – this is an account whose profile is of someone else and not that of the author posting the content.

Unlike professional journalists who are trained and governed by codes of discipline or various conventions, citizen journalists are neither trained nor regulated by any industry body or government. Therefore, this means that citizen journalists, including all those who disseminate information on social media platforms do not account to anyone – which calls for concern, as their actions could at times tarnish people's reputations.

The question is, what is the recourse to repairing reputational damage occasioned by posts on social media platforms? One of the options is that one could consider going to court – a route, however, that can be both lengthy and costly. Take, for an example the defamation case (*State v Phamotse* (unreported case no 3/2534/2019) (19-9-2023)) involving Mr Romeo Khumalo, Mrs Basetsana Khumalo and Ms Jackie Phamotse, which was brought to the Randburg Magistrate's Court. In this case, Ms Phamotse had published content on social media, which Mrs Khumalo regarded as defamatory. It approximately five years for the court to rule in the Khumalo's favour.

To bring this into perspective, a lengthy court process could mean that the content, which brought about the case in the first place, remains on social media platforms for an extended period, thus causing more harm to the victim, unless the court remedies the situation by granting interim relief by directing deletion of the offensive content from the social media platforms.

This, however, does not account for the fact that social media platforms tend to feed off each other. So, even after deleting offensive content from the account where it was originally posted, it is possible for the same content to find its way to other platforms. This then brings into sharp focus in law the concept aptly called the right to be forgotten.

The right to be forgotten is simply the right to have information detrimental to one's reputation removed from media search engines. This right was first confirmed by the Court of Justice of the European Union (Court of Justice) in the 2014 landmark case of *Google Spain SL, Google Inc v Agencia Española de Protección de Datos (AEPD), Mario Costeja González* (C-131/12, 13-5-2014). Without going into all the facts of the case, the Court of Justice ruled that under certain circumstances, individuals may request information related to them to be removed from media search engines. These circumstances include, but are not limited to, instances where the information has become irrelevant and excessive in relation to the purpose for which it was processed. However, in 2019, a French court ruled in *Google LLC, Successor in law to Google Inc v Commission Nationale de l'informatique et des Libertés (CNIL)* (C-507/17, 24-9-2019) that the right to be forgotten does not have universal application.

What does the law in South Africa (SA) say about the right to be forgotten?

Notwithstanding the ruling in *CNIL*, the first ruling in the *Google Spain* case bears relevance to SA and can be referenced and relied upon in an instance where one's reputation has been scandalised for no justifiable reason. There are two basic reasons for this. First, this is because s 10 of the Constitution provides that, 'everyone has inherent dignity and the right to have their dignity respected and protected' – and the right to be forgotten is the right to have one's dignity respected and protected. The second reason is that s 39(1) of the Bill of Rights of the Constitution provides that when interpreting the Bill of Rights, a court or tribunal –

'(*a*) must consider international law; and

(*b*) may consider foreign law'.

In this regard, South African courts may use the *Google Spain* case as a reference to motivate one's right to be forgotten on the various online platforms for the reason that the *Google Spain* ruling was delivered by an international court, dealing with international law.

There is, however, a caveat as was ruled in *Brooks v Minister of Safety and Security* [2009] 2 All SA 17 (SCA) that, 'it is a trite principle of our law, that a person should not be allowed to benefit from his/her own wrongful act.'

Simply put, if you exercise citizen journalism and/or post information that is damaging to your own reputation, the courts will not grant you the benefit of the right to be forgotten.

Therefore, use social media responsibly, practice just citizen journalism and most importantly, ponder before you post.

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Decoding statutory interpretation: An in-depth analysis of the South African Constitutional Court

By Ganasen Narayansamy

Pentimenti is a very interesting Italian term, often applied in the study of art where repented traces or sketches concealed by layers of paint soon reveal themselves (Douglas Oliveira Diniz Goncalves '*Pentimenti* reading: Unraveling hidden interests and values behind constitutional drafts' 2022 (Jan) *Academia Letters* (www.academia.edu, accessed 3-11-2023).

It helps artists to analyse their intentions, motives and impulses. It is used not only to produce the final product or result but also show the undesired parts of their work. The art of searching beneath the layers of paint to reveal what is hidden, is the idea behind this 'philosophy'.

The article posits the Constitutional Court's (CC's) embrace of interpretive skills that serves as persuasive, based on principles that are indicative of the most mature deliberations and adjudications to bring to the surface the hidden meaning, purpose or intention of a statute and adds constructive value to the René Magritte 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).

I shall restrict the discussion to the second challenge, arising from the *Amabhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Correctional Services and Others (The Right2know Campaign and Another as* Amici Curiae*)* [2019] 4 All SA 343 (GP); 2020 (1) SA 90 (GP); 2020 (1) SACR 139 (GP). The High Court declared s 1 of the Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002 (RICA) as unconstitutional.

The matter subsequently proceeded before the CC for a declaration of unconstitutionality. The second challenge relates to, *inter alia*, the issue of a 'designated judge' and the issue of 'judicial independence', in terms of s 1 of RICA (see para 55 and para 62, respectively, of the High Court declaration of invalidity of s 1 of RICA).

Accordingly, the CC in *Amabhungane Centre For Investigative Journalism NPC and Another v Minister of Justice and Correctional Services and Others* 2021 (3) SA 246 (CC), was faced with the interpretation of s 1 of RICA, to the extent that the said section was declared unconstitutional by the High Court, in so far as the issue of a 'designated judge' and 'independence of the designated judge' is concerned.

Section 1 of RICA provides that:

'(1) In this Act, unless the context otherwise indicates –

…

"designated judge" means any judge of a High Court discharged from active service under section 3(2) of the Judges' Remuneration and Conditions of Employment Act, 2001 (Act No. 47 of 2001), or any retired judge, who is designated by the Minister to perform the functions of a designated judge for purposes of this Act.'

The case before the apex court is for a confirmation of declaration of invalidity in terms of s 172(1) of the Constitution. The apex court went about in its interpretation by infusing its 'interpretative skills' stent into the very heart of the statute to bring alive the true or actual meaning as intended by the legislature.

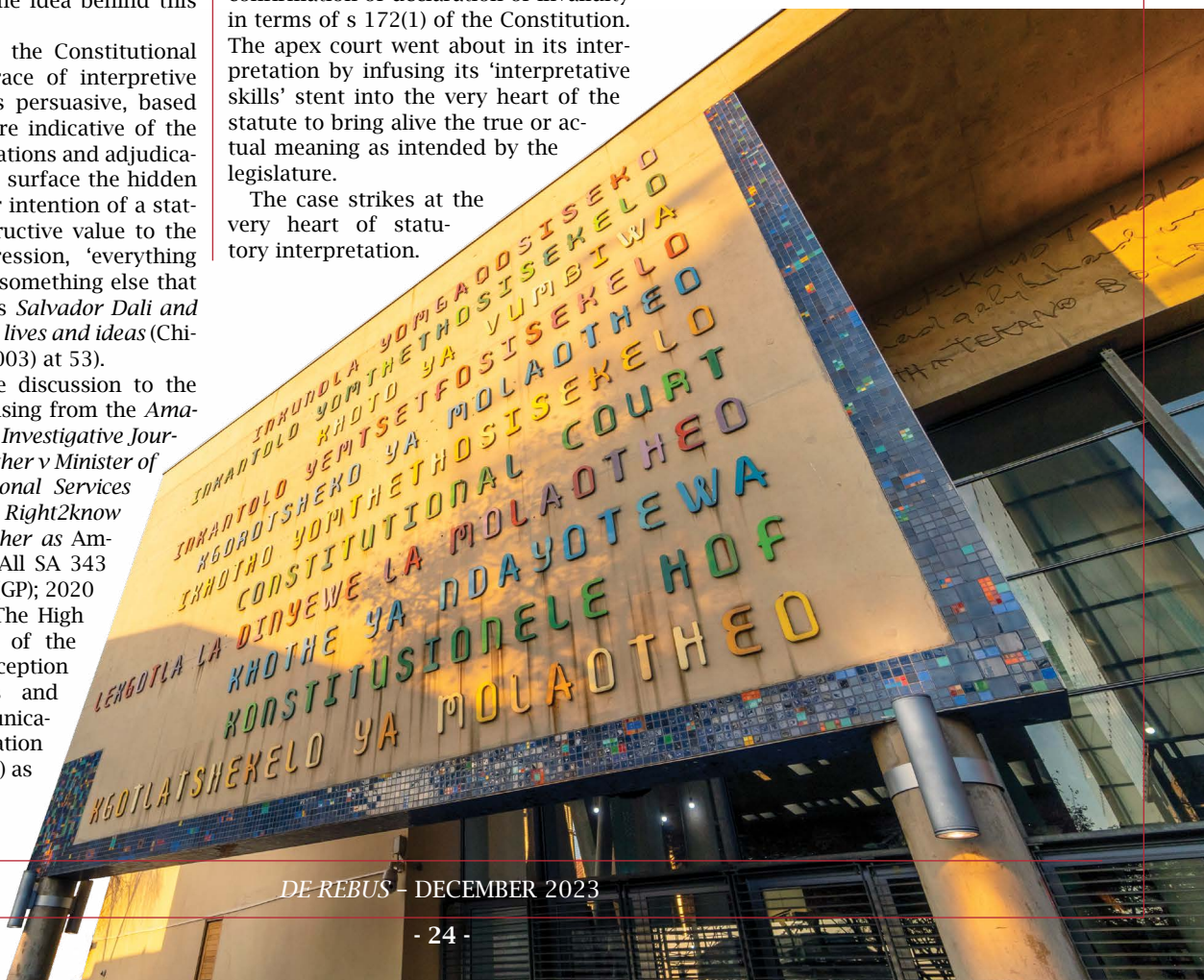
The case strikes at the very heart of statutory interpretation.

In crystallising the interpretation of a statute, one view is that it 'is not some normative judgment that could but does not underlie the law, but rather the normative judgment that in fact underlies the law' (Michael Perry 'A brief comment on motivation and impact' (1978) 15 *San Diego Law Review* 1173). Legislative intent is, therefore, indisputably relevant to constitutional adjudication. 'Definitions, "allow the identification of norms by elucidating the sense in which expressions are used"' (Jeanne Price 'Wagging, not barking: Statutory definitions' (2013) *Scholarly Works* 764).

The majority and minority judgments seemingly are delineated along the margin of the maxim, 'he who clings to the letter, sticks in the bark' (William C Anderson *A Dictionary of Law* (Chicago: TH Flood and Company, Law Publishers 1893) 634).

The CC thus had to flex its statutory interpretive muscles to unearth and bring to surface the intended meaning in RICA with reference to 'designated judge', primary, ancillary and implied powers.

The minority judgment took the view that s 1 of RICA concerns what the phrase "designated judge" means, and nothing else.' It is further held that the text does not even remotely contemplate the Minister's power to designate.



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The section basically sets out that such appointments are made from a pool of retired judges and 'is not concerned with the power to designate.'

It was further held that the expression, '[i]n this Act, unless the context otherwise indicates', was interpreted to mean that the defined meaning applies to the relevant Act only, as was stated in *Independent Institute of Education (Pty) Ltd v Kwazulu-Natal Law Society and Others* 2020 (2) SA 325 (CC); 2020 (4) BCLR 495 (CC) at para 16. The word 'university', the court held, in the Higher Education Act 101 of 1997, is confined to instances where the Higher Education Act applies.

In its reasoning, the minority judgment held that s 3 of the old Interception and Monitoring Prohibition Act 127 of 1992, provides for the interception direction to be issued by a judge designated by the Minister and such a provision is lacking in RICA. Accordingly, s 1 does not confer 'express power' and, therefore, the Minister's power to designate cannot constitute an 'implied power'.

The majority judgment on the other hand, delves into the core of s 1 of RICA to determine whether the said section provides for the power to designate a judge. The court considered, for example, the legal maxim or principle '*ut res magis valeat quam pereat*' (it may rather become operative than null).

As such, the court held, rather than to render RICA virtually inoperable as a result of a lack of power to designate, an interpretation that finds power to designate a judge in terms of s 1, read with the other provisions referred to, commend itself.

The court substantiated its argument by including the dictum of Kotze CJ in *Hess v The State* (1895) 2 ORC where it is held:

'Where the meaning of a section in a law is uncertain or ambiguous it is the duty of the court to consider the law as a whole, and compare the various sections with each other and with the preamble, and give such meaning to the particular section under consideration that it may, if possible, have force and effect.'

In applying the principles of ancillary powers as articulated by Hoexter, the court held that, '[t]here is a very strong argument in favour of implying a power if the main purpose of the statute cannot be achieved without it' (Cora Hoexter *Administrative Law in South Africa* (Cape Town: Juta 2012) at 45).

The majority concluded that the section indeed provides for the power to designate a judge as provided in s 1 of RICA, being an implied primary power, as the only viable interpretation. Such conclusion was arrived at by the majority after considering the in-depth analysis of the structure and purpose of RICA (at para 79).

On the issue of independence, the words of the well-known Justice Chase come to bear on us, when he stated:

'We are not at liberty … to inquire into the motives of the legislature. We can only examine into its power under the constitution' (Charles B Elliott 'The legislatures and the courts: The power to declare statutes unconstitutional' (1890) 5 *Political Science Quarterly* 224 at 257).

The court held that judges are appointed in terms of s 174(3) of the Constitution after consultation with the Judicial Services Commission (JSC), and there was, therefore, a need to scrutinise the 'structural or perceived' independence of the judiciary. Further, there are rigorous interview processes, judges' terms of office are strictly regulated, court hearings are conducted in open courts and these processes allow for public scrutiny.

Therefore, in light of such stringent and protective measures, it necessitated the apex court to examine and ascertain whether RICA provided for such measures. The court drew on the *ratio* (basis for the decision) for example in *Justice Alliance of South Africa v President of the Republic of South Africa and Others* 2011 (5) SA 388 (CC); 2011 (10) BCLR 1017 (CC):

'[T]he power to extend the term of a judge goes to the core of the tenure of the judicial office, judicial independence and the separation of powers … .' In *Thint (Pty) Ltd v National Director of Public Prosecutions and Others; Zuma v National Director of Public Prosecutions and Others* 2008 (2) SACR 421 (CC); 2009 (1) SA 1 (CC); 2008 (12) BCLR 1197 (CC) at para 83, the court analysed the task the judicial officer had to undertake and held that a judicial officer is an important part of the protection of fundamental rights. In *Minister of Safety and Security v Van Der Merwe and Others* 2011 (5) SA 61 (CC); 2011 (9) BCLR 961 (CC) at para 36-38, the court held that these safeguards ensure that the power to issue and execute warrants is exercised within the confines of the authorising legislation and the Constitution. There are safeguards and judicial requirements to be met by the judicial officers. Having considered such reasoning arising from the above cases, *inter alia*, the court held the view that the requirement of independence is a constitutional imperative.

Accordingly, the court held that RICA was unconstitutional 'to the extent that it fails to ensure adequate safeguards for an independent judicial authorisation of interception.' The 'protective processes and structures' are the 'missing links' for RICA to place a designated judge in the manner that is provided in the Act. Such lack of structural independence, the CC held, may lead to a reasonable lack of independence. The decision sends out a clear message of eschewing the 'proclivity' to become dictatorial to the legislature, but rather as an instrument or branch of the government, that ensures checks and balances.

Conclusion

The CC illustrates in this case the power of harmonising the need for authoritative decisions with a much broader reminder that such decisions taken must align itself more accurately within the meaning of constitutional imperatives. When considering the hierarchy of the CC and the various strands that come into play, the court in a rather articulate manner crystallised its reasoning and held that the *lacuna* in the statute must be rectified by Parliament in so far as empowering the Minister to designate a judge, guarding the principles of separation of powers doctrine. Such an 'abstention' by the apex court augurs well in a constitutional democracy, ensuring the progress of checks and balances.

Finally, it is not unusual within our legal system, when circumstances arise in respect of certain statutes, whether new or old, face constitutional challenges in our democracy. There are no better words to describe how indeterminacies in statutory interpretation are dealt with than that presented by James Madison in the Federalist Paper no 37 where he states:

'All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications.'

If judicial precedents are anything by which we measure and decide our matters as judicial officers, it is my view that the CC has created a very strong 'stock of judicial decisions', on which we may place reliance. Eschewing reliance on the principle of *stare decisis*, more specifically the standards set by the apex court and of course constitutional imperatives, may well result in being ill-founded and detrimental to a just, fair and equitable decision.

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Understanding the distinction: Unfair dismissal v unlawful termination in employment contracts

By
Judge James
D Lekhuleni

At common law, the measure of damages to which an employee is entitled is limited to the amount of wages or salary he or she would have earned but for the employer's premature termination of the contract. Suppose an employee is dismissed and is entitled to claim compensation in terms of the Labour Relations Act 66 of 1995 (LRA) and also believes that his employer committed a breach of contract in the way he was dismissed and the damages he could claim for this, are more than the compensation he could claim under the LRA. Should the employee be entitled to claim such damages in terms of the law of contract or compensation in terms of the LRA? This article revisits the approach the courts adopted to address the coexistence of common law and LRA remedies. This article also investigates how this dual system has created a fertile ground for forum shopping and delays the finalisation of labour law disputes.

The LRA remedies

Section 191 of the LRA sets out the procedure for the referral of a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) or bargaining council where an employee claims unfair dismissal. The LRA provides for two different routes for unfair dismissal disputes. First, the matter may be referred to the CCMA or to the accredited council with jurisdiction. If conciliation is unsuccessful, the employee may refer the dispute, depending on its nature, to the CCMA for arbitration or adjudication by the Labour Court. Section 193 of the LRA provides for remedies available to an employee who has been unfairly dismissed. The question of remedies only arises once it is found that the dismissal of the employee has taken place and that such dismissal is either procedurally or substantively unfair. The Act endeavours to protect employees. Once a dismissal is found to be unfair, the employee must be reinstated in his employment position or must be re-employed (*Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2011) 32 ILJ 590 (LC) at para 40). Reinstatement involves restoration of the original contract, and 'it contains all the ingredients of the original [contract], including the possibility of termination for misconduct or on retrenchment' (*Steel Engineering and Allied Workers Union of SA and Others v Trident Steel (Pty) Ltd* (1986) 7 ILJ 418 (IC) at 437F). Re-employment on the other hand, implies the termination of a previously existing employment relationship and the creation of a new employment relationship, possibly on different terms (*National Union of Mineworkers v Haggie Rand Ltd* (1991) 12 ILJ 1022 (LAC) at 1027E-J). Reinstatement or re-employment must be ordered in all cases where an employee has been unfairly dismissed, except where s 193(2) applies, for instance, where the employee does not want to be reinstated or that continued employment relationship would be intolerable.

On the other hand, compensation is one of the remedies that a court or the arbitrator can award should it be found that the employee was unfairly dismissed or that the employer's conduct amounted to an unfair labour practice. Section 194 of the LRA sets out a formula to be applied for compensation in circumstances where it is found that an employee was dismissed unfairly. For instance, the compensation awarded to an employee whose dismissal is found to be unfair either because the employer did not prove that the reason for the dismissal was a fair reason related to the employee's conduct or that the employer did not follow a fair procedure, or both, may not be more than the equivalent of 12 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal. While the compensation awarded to an employee whose dismissal is automatically unfair must be just and equitable in all the circumstances, but not more than the equivalent of 24 months' remuneration calculated at the employee's rate of remuneration on date of dismissal. Evidently, this section sets up a cap on compensation that may be awarded to a dismissed employee. A compensation award must comply with the formula set out in s 194. The LRA

provides that compensation must be just and equitable in all circumstances. This implies that the compensation must be fair to the employer and to the unfairly dismissed employee.

Contractual remedies existing parallel to the LRA remedies

The remedies of an employee whose employment contract has been terminated by an employer can be found either in the concept of breach of contract under the common law or unfair dismissal concept under the LRA (*Mangope v SA Football Association* [2011] JOL 26612 (LC)). In *Fedlife Assurance Ltd v Wolfaardt* (2001) 22 ILJ 2407 (SCA), the Supreme Court of Appeal (SCA) held that the unfair labour practice concept, developed over the years by the South African specialist tribunals, was seen as supplementing and not replacing the common law remedies. The court noted that chapter VIII of the LRA is not exhaustive of the rights and remedies that accrue to an employee on the termination of a contract of employment, and that a contract of employment for a fixed term is enforceable in accordance with its terms and an employer is liable for common law damages if it is breached on ordinary principles of common law. The SCA has endorsed this approach in several subsequent cases (see *Makhanya v University of Zululand* 2010 (1) SA 62 (SCA); *Lewarne v Fochem International (Pty) Ltd* 2019 JDR 1750 (SCA); *South African Maritime Safety Authority v McKenzie* 2010 (3) SA 601 (SCA)). A discussion of all these cases, goes beyond the scope of this article.

However, in *Fedlife,* the appellant employer and the respondent employee entered into a contract of employment, which was for a fixed term of five years commencing on 1 December 1996. The employer repudiated the contract by purporting to terminate it with effect from 31 December 1998, on the grounds that the employee's position had become redundant. The employee alleged that he had elected to accept the repudiation with the result that the contract came to an end. He then instituted an action in the Witwatersrand Local Division of the High Court, where he claimed damages for breach of contract. The employer filed a special plea that, in terms of s 157(1) of the LRA, the Labour Court had exclusive jurisdiction to adjudicate dismissals occasioned by occupational requirements in terms of s 191(5) and s 189 of the LRA. The employee excepted to the special plea on the grounds that it failed to disclose a defence. The exception was upheld and the special plea was set aside. On appeal, the SCA dealt in depth with the interplay of the common law, the LRA, and the Constitution. The court held that the LRA does not expressly, nor by necessary implications, abrogate an employee's common law entitlement to enforce contractual rights. The court noted that the common law right to enforce a term of an employment contract remained intact and that it was thus not necessary to declare a premature termination to be an unfair dismissal.

In effect, what the court said was that an employee whose contract of employment is prematurely terminated by an employer is entitled to sue the employer and claim damages for breach of contract under the common law. As a result, the employee's compensation for breach of a fixed-term contract was not limited to the provisions of s 193 read with s 194(1) of the LRA. The judgment also entails that the remedies envisaged in the LRA are not exhaustive of the rights and remedies that accrue to an employee on termination of a contract of employment. It, therefore, suggests that s 157 of the LRA does not confer a general jurisdiction on the Labour Court in labour matters, but rather an exclusive jurisdiction in matters which, in terms of the LRA or another law, must be referred to the Labour Court for adjudication.

The co-existence of the LRA remedies parallel to the common law remedies was recently confirmed by the Constitutional Court (CC) in *Baloyi v Public Protector and Others* 2022 (3) SA 321 (CC) at paras 40 and 46, where the court found that contractual rights of dismissed employees exist independently of the LRA. The court noted that the termination of a contract of employment has the potential to find a claim for relief for infringement of the LRA, and a claim for enforcement of a right that does not emanate from the LRA, for example, a contractual right. It is submitted that these judgments have far-reaching consequences. In *Fedlife,* the employee was allowed to rely on common law principles despite a remedy being available for unfair dismissal in terms of the LRA. The court endorsed the principle that a claim for dismissal in terms of the LRA could still be dealt with in terms of the common law as an unlawful dismissal and apply the general principles of the common law. While it is noted that the Labour Court and the High Court enjoy concurrent jurisdiction in matters involving breach of an employment contract, this case makes it clear that a claim for damages for breach of contract falls within the ordinary jurisdiction of the High Court, notwithstanding that the contract is one for employment. I submit that when the LRA was enacted this was not intended. The co-existence of common law remedies parallel to statutory remedies was rejected by the House of Lords in *Johnson v Unisys Ltd* [2001] 2 All ER 801, in which the court found that a common law right cannot satisfactorily co-exist with a statutory right not to be unfairly dismissed. Lest this would fly in the face of the limits Parliament has prescribed in statute. Importantly, s 210 of the LRA provides that if any conflict relating to matters dealt with in the LRA arises between the LRA and 'the provisions of any other law', the LRA will prevail. In *Fedlife,* the employee was allowed to claim damages for the unexpired period of his employment contract. It is submitted that it was possible for the employee to claim compensation in terms of the LRA for any procedural unfairness he might have suffered. As a result, the employee's claim was not limited to the provisions of s 194 of the LRA.

This anomaly is compounded by the fact that a claim in terms of the common law must be instituted within three years from the date on which the cause of action (dismissal) occurred (see s 10(1) of the Prescription Act 68 of 1969). The LRA provides for the speedy resolution of disputes, such that an employee has a period of 30 days within which to lodge a claim with the CCMA from the date of dismissal. In the case of fixed-term contracts, employees who can afford legal costs have an option to approach the High Court and claim enough damages, as opposed to the limited compensation entrenched in s 194 of the LRA. Employees who cannot afford the litigation costs are bound to follow the procedure laid down by the LRA.

Conclusion

The current system endorsed by the CC has the potential of creating a labour law system for the rich and the poor. Those who can afford costs of litigation would approach the High Court and claim more damages and the poor are bound to go to the CCMA. Significantly, the upshot of these decisions is that employees who fail to refer their claims in terms of s 191 of the LRA, have a period of three years within which to issue summons and claim for breach of contract. The employee's claim in terms of contract is not capped. In case of a termination of a fixed-term contract before its expiration, the damages may be extensive, especially where the unexpired term involves a long period, as was the case in *Fedlife.* From a careful reading of the LRA and its objectives, this was not intended. I submit that our labour law system should be developed to recognise that a remedy for dismissal in terms of the LRA should be the exclusive remedy of employees in such cases.

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Safeguarding rights in matrimonial regimes: *Addressing constitutional concerns in the Trust Property Control Act*

By Marietjie du Toit

The trust legal institution, as it is recognised today – was unknown in Roman-Dutch law, although the principle of fiduciary duties has been a universal phenomenon for many centuries. After the occupation of the Cape by the English in 1806, the legal institution of a trust, as it developed in England, was 'imported' into the South African Legal system (PA Olivier, S Strydom and GPJ van den Berg *Trust Law and Practice* (Durban: LexisNexis) 3-33 at para 3.4.2.1.10 – self-enrichment and the *bonus paterfamilias*). It mentions that in the United States of America, the trustee's primary obligations are identified as 'duty of loyalty'. This term is not known in South African legal terminology, although it may manifest in the spirit of public policy and *ubuntu*. This duty primarily excludes any element of 'self-dealing', and 'self-enrichment' is expressly prohibited.

Post the establishment of the Union of South Africa in 1910, various statutes gave recognition to the trust as a legal institution (JP Coetzee *'n Kritiese ondersoek na die aard en inhoud van trustbegunstigdes se regte ingevolge die Suid-Afrikaanse Reg* (LLD thesis, UNISA, 2006) at 75-76). In 1984, the Appellate Division recognised that a testamentary trust was in fact a legal phenomenon *sui generis*, confirming its unique nature in *Braun v Blann and Botha NNO and Another* 1984 (2) SA 850 (A), and rejected the comparison of the trust to a *fideicommissum*. Consequent to the ruling, a trust became recognised as a legal institution *sui generis*.

Walter Geach and Jeremy Yeats (*Trusts: Law and Practice* (Cape Town: Juta 2008) at 5) state that the former Law Commission, now known as the South African Law Reform Commission (SALRC) already recommended in 1987, that the law of trusts should not be codified but that only certain administrative aspects needed regulation. The result was the promulgation of the Trust Property Control Act 57 of 1988 with effect from 31 March 1989. The Act consists of 27 sections and it is clear from the provisions that the Act in practice aims to regulate certain administrative aspects in respect of a trust. These aspects include *inter alia*: the control of the office of the fiduciaries/trustees; the powers vested in a trustee; protection of the beneficiaries; the powers vested in the Master of the High Court as well as the powers of the court.

The Trust Property Control Act can be described as 'special law' (VG Hiemstra and HL Gonin *Trilingual Legal Dictionary* (Cape Town: Juta) 217; (Paul.: Dig. 1.3.16)). 'Special law is that which, contrary to the dictates of reason, has been introduced by the authority of the legislators in contemplation of some particular advantage.' It can be anticipated that the law incorporated in the Trust Property Control Act is subjective law, for the particular advantage of one person or spouse in the creation of a trust by the transfer of ownership in either a joint- or accrued property.

Currently, in South African trust law, there is no certainty in law, with regard the division of joint assets which are then transferred to a discretionary trust. In the event of a divorce action the negative financial consequences for a spouse, as an equal contributor to the family trust fund may be devastating. There is no legislation regulating the creation of the family trust, except the common-law principles which, it is argued, are more than often not applied clearly and consistently by South African courts. It further follows then that the protection of beneficiaries includes the constitutional validity and legality of trust deeds, any other agreement between trustees as well as deeds of settlement. It is commonly asserted that spouses and their partners all have a common intention even before the marriage, to provide for themselves and/or their family.

It is alleged that basic human rights and valid trust-law principles are not deemed applicable by the majority of South African courts in divorce disputes and the division of matrimonial property that include trusts. This contributes to an infringement on property rights, which may be a criminal course of action resulting in said invalid resolutions and actions being legalised by some South African court rulings. The dilemma is worsened by the deceptive definition of a 'trust' as regulated by the Trust Property Control Act. It is suggested that the wording in s 1, 'ownership in property of one person', in the definition of a 'trust,' could contribute to the prejudice of a spouse in a joint estate where jointly-owned assets are transferred to a family trust and the balance of power is reserved for only one trustee with even a testamentary prerogative. The same principle may apply to the accrual objective.

The uniqueness and flexibility of a trust as legal instrument, coupled with little legislative regulation, may allow the misuse and abuse of this legal institution as stated in *Land and Agricultural Bank of South Africa v Parker and Others* 2005 (2) SA 77 (SCA) at paras 22, 26 and 29. To endorse this statement, note must be taken of the important judgment in *Crookes, NO and Another v Watson and Others* [1956] 1 All SA 227 (A) at 242-244. At this early stage of the development of trust law, Schreiner JA, in a minority ruling, was already of the opinion that a trust is an independent legal entity with great potential. However, care had to be taken not to force it into a 'mould not properly shaped' for it. Such a mould may be in the form of a legal institution, where existing personal and property rights of one of the spouses are exterminated, without any legal basis or foundation and procured by the other spouse for the accumulation of personal wealth.

The trust as a legal institution has its critics. Van den Heever JA, in a separate minority judgment in *Crookes* at 242-244, found the trust entity, as it arose in those circumstances, unacceptable in South African law. He was further of the opinion that the trust as a legal institution, does not deserve independent existence within the South African legal system in the form that it was presented in that specific case. He held in this regard in *Crookes* at 243:

'Shorn of verbiage the trust deed amounts to no more than this: it is a contract between the settlor on the one side and himself and his by no means independent nominee on the other, pursuant to which he takes his money from one pocket, places it in the other and proceeds to dictate laws unto himself as to what the fate of that money shall be.'

In *WT and Others v KT* 2015 (3) SA 574 (SCA), the SCA overruled the decision of Lamont J in *TW v TK* (GJ) (unreported case no 02268/2010, 19-9-2013) in the South Gauteng High Court. The partners lived together before they were married in a community of property matrimonial regime. The trust was proposed, when they decided to purchase a family home. However, with its creation, the trust had no beneficiaries who could possibly benefit from this simulated 'trust' legal institution.

In fact, such a 'trust' is a sham and invalid. However, when the applicants discover this fact during the process of getting divorced, they immediately created an amendment to the trust deed, which is illegal and fallacious. This wrong decision in *WT v KT*, has become the *stare decisis* for the past nearly eight years. It follows that the consequences for one of the equal contributing spouses in the case of *Du Toit v Du Toit* (FB) (unreported case no 2792/2015, 22-1-2016) (Daffue J) a *stare decisis* ruling on *WT v KT*, may be recognised as unjustified enrichment of the founder to the value of approximately nearly R 25 million.

'The uniqueness and flexibility of a trust as legal instrument, coupled with little legislative regulation, may allow the misuse and abuse of this legal institution...'

As there is no current legislation to redress this unjust situation of the creating of a trust by alleged agreement and the subsequent transfer of equal ownership in property, the aggrieved spouse as a beneficiary is left without any remedy if the marriage is terminated by divorce. Indebted relief was, however, brought by the ruling in the out of community of property case of *LW v CW and Others* (WCC) (unreported case no 12866/2014, 26-8-2020) (Salie-Hlophe J) and the recent ruling in *PAF v SCF* 2022 (6) SA 162 (SCA) – subject to the accrual system.

It may be argued that the founder of a trust, created prior to the adoption of the Constitution into South African law, did not foresee that constitutional and Bill of Rights' values (both of which protect any individual against unfair discrimination on the grounds of race, sex, gender, association and/or religion), would become the rule of law, although the common-law principles have the same effect. Francois du Toit (*South Africa Trust Law: Principles and Practice* (Durban: LexisNexis 2007) at 60) claims that the 'ownership in property of one person', refers to the property of the founder. Consequently, the trust deed may be invalid and unenforceable, if the transfer of assets fails due to the common-law maxim, *nemo plus iuris* (see also IM Shipley 'Trust assets and the dissolution of a marriage: A practical look at invalid trusts, sham trusts and piercing the veneers of trusts/going behind the trust form' 2016 (28) *SA Merc LJ* 508 at 517 III: Argument one: failed transfers). The trust can be a simulation of a transaction, as well as the *de facto,* invalid control of trust assets because of the exploitation of the common-law maxim *nemo plus iuris.*

The ruling of the Supreme Court of Appeal in *Marais and Another NNO v Maposa and Others* 2020 (5) SA 111 (SCA), is of significance in respect of the protection of the property rights and interests of spouses married in community of property. A Full Bench ruled on s 15(3)(*c*) of the Matrimonial Property Act 88 of 1984 (MPA). The spouses in question were married in community of property. The matter in dispute was the validity of the alienation of joint assets without the consent of the other spouse as set out in s 15(9)(*a*) of the MPA. The stipulation in a will to transfer joint property to a third party was declared void. It is assumed that no spouse in any matrimonial regime, is likely to give consent to a transaction in which he or she could suffer a loss of assets which were accumulated over many years of hard work and financial prudence.

A concerning fact is, that the effects and consequences of the creation of a trust within the context of s 1 of the Trust Property Control Act are never mentioned, nor the fact that one of the spouses may enter into the transaction, not knowing of the fraudulent misrepresentation of said transaction. The creation of a trust from joint assets, or assets which will form part of the accrual remedy, could be done for no other reason than to hide those assets in the trust to escape the consequences that would ensue in the event of divorce or other dispute. This is an example of the 'substance over form' law principle or the 'shamming intention' of the founder as discussed by D Pavlich in *Trusts in Common-Law Canada* (Canada LexisNexis 2014) at 111. Pavlich, asserts that 'an Act of Parliament shall not be used as an instrument of fraud.' It can unfortunately not be construed that the Trust Property Control Act does not provide a loophole for fraudsters in any matrimonial regime.

It is thus proposed that the alleged unconstitutional and illegal Trust Property Control Act is in need of development in the sense of lawmakers becoming aware of potential prejudice to property and human rights as a result of the present definition of a 'trust'. A reasonable solution may be the reading into s 1 of the Trust Property Control Act, a few critical additional words for the protection of spouses' personal and property rights, in whichever matrimonial regime the spouses are married. The definition of a 'trust' could read: '[T]rust means the arrangement through which the ownership in property of one or more founders, equipped with notarial *pro rata* interest certificates (or shares) is made over or bequeathed by virtue of a trust instrument.' This procedure is already being followed in some business trusts, without any regulated trust legislation.

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Navigating trusts in South Africa – exploring the new compliance obligations

By
Mathys
Briers-Louw

A trust is a legal arrangement in which assets or property are held by one party (the trustee) for the benefit of another party or parties (the beneficiaries). Recent legislative changes have dire consequences for non-compliance. This article explores the new changes and distinguishes trust administration and the role of an independent trustee.

History

The history of trusts in South Africa (SA) dates back to the early 19th century when the Cape Colony became a British colony in 1806. With the establishment of British rules, the English trust concept was introduced to SA. This occurred as part of the peace treaty, which brought about the British influence in the Cape. The Roman-Dutch legal tradition, which already existed in SA, also played a role in shaping the development of trusts in the country. Over time, trusts in SA have evolved, and today there are different types of trusts, including *inter vivos* trusts (created during the founder's lifetime) and testamentary trusts (established through a will). The historical development of trusts in SA has been influenced by both English trust principles and the local legal framework.

New compliance obligations

The purpose of these legislative changes is to, in part, address shortcomings in SA's regulatory framework in addressing beneficial ownership transparency.

The Financial Intelligence Centre Act 38 of 2001 (FICA), as amended

'A person who carries on the business of creating a trust arrangement for a client', in terms of the FICA (item 2(c) of schedule 1) is required to register as an accountable institution and have the required policy (a Risk Management and Compliance Programme (RMCP)) and procedures for reporting such suspicious transactions in place to combat money laundering and terrorist financing. The same applies to persons who are involved in the management and administration of trusts, including independent trustees.

The Trust Property Control Act 57 of 1988 (TPCA)

The TPCA was recently amended to provide for, among others, the establishment and maintenance of registers of beneficial owners of trusts by trustees and the Master of the High Court and the recording of the details of accountable institutions by trustees. These changes came into effect on 1 April 2023.

Section 11A of the TPCA requires trustees to establish, record and keep an up-to-date record of information relating to beneficial owners of trusts. New subsection 11(1)(*e*) of the TPCA requires trustees to keep a record of accountable institutions the trustees engage with, as trustees.

According to recent amendments to the TPCA, the ultimate beneficial owner of a trust is always a natural person. In cases where the founder, beneficiary, or trustee of a trust is a legal entity, or a person acting on behalf of a partnership or in accordance with trust provisions, the ultimate beneficial owner of that trust is the natural person who ul-

timately owns or exercises effective control over the legal entity, partnership, or relevant trust property or arrangements. The details of all the beneficial owners must be recorded in the beneficial ownership register of the respective trusts. Additionally, individuals who directly or indirectly own the relevant trust property or exercise effective control over the trust's administration, but do not fall under the definitions of founder, trustee, or beneficiary, are also considered beneficial owners and must have their details recorded in the beneficial ownership register.

A trustee commits an offence if they fail to adhere to the new requirements. These obligations include –

- informing an accountable institution, with whom they engage as a trustee, that the transaction or business relationship pertains to trust property;
- documenting the details of the accountable institution as prescribed in regulation 3B;
- establishing and recording the beneficial ownership information of a trust, as outlined in regulation 3C;
- maintaining an updated record of the beneficial ownership information stipulated in regulation 3C; and
- submitting a register of the beneficial ownership information, as prescribed in regulation 3C, to the Master of the High Court.

If a trustee (not just an independent trustee) is found guilty of any of the aforementioned offences, they will face severe penalties. These penalties may include a fine of up to R 10 million, imprisonment for a maximum period of five years, or both the fine and imprisonment.

The South African Revenue Service (SARS): New requirements

All trusts are required to be registered with SARS (even those 'dormant' trusts if there is such a thing) and submit returns annually.

Even though beneficial ownership information also has to be provided to SARS on the trust income tax return, SARS is now one of the parties with access to the Master's beneficial ownership registers. Effective from 23 June 2023, Income Tax Returns for Trusts (ITR12T) now require many more details than in the past, including beneficial owner information which will likely be matched with the Master's information. 'Additional questions were added to the Income Tax Return Wizard to determine if any local or foreign amount(s) were vested in the trust as a beneficiary of another trust' (Phia van der Spuy 'Sars announces significant changes to the treatment of trusts' (www.iol.co.za, accessed 3-11-2023)). 'Additional questions were added to the Income Tax Return Wizard to determine if amounts were deemed to have accrued to a donor/funder in terms of section 7 during the relevant year of assessment' (Van der Spuy (*op cit*)). SARS also introduced a new requirement to upload mandatory supporting documents with the tax return, 'including the trust instrument, annual financial statements and resolutions/minutes of trustee meetings' (Van der Spuy (*op cit*)).

Trustees will also, similar to banks and others, become third-party data providers to SARS, as they will be required to inform SARS of all distributions made to beneficiaries, annually from May 2024, on an IT3(t).

Trust administration versus independent trustee

Trust administration refers to the management and handling of the assets within a trust. When an individual, known as a founder, establishes a trust, they transfer their assets into the trust to be managed for the benefit of one or more beneficiaries. Trust administration involves various responsibilities, such as record-keeping, asset management, tax filings, distributions to beneficiaries, and compliance with legal requirements.

It is important to note that trust administration can vary depending on the trust's specific terms and the applicable legislation. Professional assistance from attorneys, accountants, an independent trustee or financial advisors may be necessary to ensure proper trust administration.

There seems to be a general misconception in SA that a trust's attorney, accountant, or independent trustee automatically takes care of trust administration and compliance.

A trustee is an individual or entity appointed with a duty to guard, manage and administer a trust in the best interests of the beneficiaries. In terms of s 9(1) of the TPCA, trustees must 'act with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another'.

In *Land and Agricultural Development Bank of SA v Parker and Others* [2004] 4 All SA 261 (SCA), the Supreme Court of Appeal suggested that each family trust should appoint an independent trustee. Thereafter, in March 2017, the Chief Master of the High Court issued a Directive that makes the appointment of an independent trustee a requirement for all new family business trusts being registered.

An independent trustee plays a crucial role in the administration of a trust. No new trusts can be registered without a truly independent trustee (not a beneficiary and also with no family relation or connection, blood or other to any of the other trustees, beneficiaries or founder of the trust). The primary responsibility of an independent trustee is to act in the best interests of the beneficiaries and ensure that the trust's assets are managed and distributed according to the terms of the trust deed.

Several duties are to be fulfilled by an independent trustee. These duties include managing the trust's assets diligently and prudently following the objectives and instructions specified in the trust deed. They are also bound by a fiduciary duty to act in good faith, with utmost honesty, and avoid conflicts of interest that could compromise the interests of the beneficiaries. Furthermore, (independent) trustees must maintain accurate records of the trust's financial transactions, investments, and distributions. They are responsible for communicating with beneficiaries, providing them with relevant information about the trust's activities, and addressing any concerns they may have. In addition, (independent) trustees must ensure compliance with all applicable laws, regulations, and tax obligations related to trust administration.

Furthermore, an independent trustee affirms under oath to be qualified to act as such and to be competent to scrutinise and check the conduct of the other trustees. Surely, when appointing the required independent trustee and accountant regard is placed on them to take care of the legislative trust requirements as knowledgeable and qualified persons. 'This is hardly the reality in practice, we have found', says Phia van der Spuy CA(SA), a registered Fiduciary Practitioner, a Chartered Tax Adviser, and a Trust and Estate Practitioner.

Is there light at the end of the tunnel?

Certainly. Not only has SA stepped up to enter the international arena of trusts, after our legislation has been brought in line with the rest of the world, but now more than ever before the professional role to be fulfilled as an independent trustee, associated with the risks and increased compliance and trust administration obligations creates opportunities which have not been utilised by trust service providers in the past. The changes in legislation, the increased costs of compliance and the associated risks justify the charges for professional services which have often been done for free in the past. We see these services for which trust service providers can charge as fourfold. One is statutory proceedings such as the registration of new trusts or amendment of existing trusts. Two, independent trustee services. Three, trust administration. Four, accounting and taxation.

Luckily there are Client Relationship Management platforms, which simplify trust administration and save time. The required and onerous beneficial owner register is kept up to date as per the Master's requirements and can be populated by the push of a button and uploaded to the Master's portal, without breaking into a sweat. The required register of accountable institutions the trustees deal with, is also maintained in the system, together with proof of their interactions with them as required by law. Such platforms also pre-populate all the Master's forms, legislatively required asset register of a trust, required resolutions and real-time accounting records, and SARS submission capabilities to name but a few features.

Conclusion

Trusts in SA have a long history dating back to the early 19th century. They have been shaped by both English trust principles and the local legal framework. Recent legislative changes have introduced new compliance obligations for trusts in SA. These changes aim to address shortcomings in the country's regulatory framework regarding beneficial ownership transparency.

FICA requires individuals or companies who create trust arrangements for clients and who are involved in the management and administration thereof (including independent trustees), to register as accountable institutions and implement policies and procedures to combat money laundering and terrorist financing.

The TPCA has been amended to include establishing and maintaining registers of beneficial owners of trusts. Trustees are required to record and keep up-to-date information about beneficial owners and accountable institutions they engage with. Failure to adhere to these requirements can result in severe penalties.

SARS requires all trusts, including dormant trusts, to be registered and submit annual returns. Trustees must provide detailed information, including beneficial owner information, which will be cross-referenced with the Master's information.

Trust administration involves managing and handling the assets within a trust, including record-keeping, asset management, tax filings, distributions to beneficiaries, and compliance with legal requirements. Professional assistance from attorneys, accountants, independent trustee service providers, or financial advisors may be necessary for proper trust administration. One is not to assume that your trusted adviser fulfils this function.

An independent trustee, who is not a beneficiary or related to other trustees or beneficiaries, plays a crucial role in trust administration. They act in the best interests of the beneficiaries, manage and distribute trust assets according to the trust deed, fulfil fiduciary duties, maintain accurate records, communicate with beneficiaries, and ensure compliance with laws and regulations. Once again, make sure that your independent trustee fulfils the new compliance obligations.

Despite the increased compliance obligations and risks associated with trusts, there are opportunities for trust service providers in SA. These opportunities include statutory proceedings, independent trustee services, trust administration, and accounting and taxation services.

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Master SaaS Contracts – Part 3

By Martin Kotze

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

The second article discussed access and suspension rights, restrictions relating to the use of the SaaS and the provider's right to make changes to the SaaS.

This article will look at provisions often heavily negotiated by legal teams, which include limitation of liability, warranties, and indemnification.

Limitation of liability

According to the latest data provided by World Commerce and Contracting, limitation of liability provisions ranks as the most negotiated term in contracts.

Limitation of liability provisions are, in essence, risk apportionment provisions – if the SaaS provider's liability for certain events is excluded or limited in any way, the risks relating to that event become that of the customer.

For example, let us say the SaaS forms a core component of the customer's operations, and something goes horribly wrong with the SaaS, which causes the customer to lose millions. The customer would obviously want to hold the SaaS provider responsible. On the other hand, such a claim will likely put the SaaS provider out of business.

Limitations of liability provision are, therefore, a fine balancing act.

In practice, parties will generally agree that neither party may claim indirect or consequential damages from the other party. The SaaS provider would then also push for a limitation on claims relating to direct damages (often referred to as a 'cap', which is placed on claims relating to direct damages suffered by the customer).

Generally, customers will be open to agreeing to a cap to be placed on claims for direct damages. The cap amount and the calculation often come down to an arm wrestle (ie, the parties' bargaining power and the parties' risk profiles).

Importantly, customers would want to exclude certain claims from the cap placed on direct damages (in practice, these exclusions are often called 'carve-outs').

The usual suspects (ie, claims which will not be subject to the cap) include claims relating to gross negligence, wilful misconduct, and fraud. An alert customer may also push to exclude claims relating to breach of confidentiality, breach of data protection provisions or breach of applicable laws.

Then, there are also situations where a customer may require that the SaaS provider indemnify them against any third-party intellectual property infringement claims. If this is the case, claims under the indemnity are also generally excluded from the liability cap.

On the other hand, the customer may feel that the carve-outs, especially those related to claims for breach of confidentiality and data protection provisions, may expose them to significant risks they cannot take.

In the above situation, the customer may require that the claims relating to breach of the confidentiality and data protection provisions not be carved out but that these claims be made subject to a 'super cap'. In other words, there is still a cap on these types of claims, but the cap placed on these claims is much higher.

Warranties

Generally, a SaaS product is not specifically designed for a single customer. For this reason, the SaaS provider would not want to make any warranties relating to the SaaS's suitability for a specific use case or that the SaaS will work with the customer's current systems.

Additionally, a SaaS provider does not want to make any warranties that the SaaS will be 'error-free'. There are just too many moving parts. Instead, SaaS providers generally provide a service level agreement, which addresses the correction of any errors which may arise during the use of the SaaS product.

From the customer's perspective, you want to at least include warranties that provide that the SaaS will function in all material respects as stipulated in the SaaS documentation.

An aspect often overlooked related to warranty provisions in SaaS contracts is the remedies available to the customer if there is a breach of warranty. What if the SaaS provider cannot bring the functionality of the SaaS in line with the documentation? Will the customer be entitled to cancel and receive a full refund? These are important questions from a customer's perspective, and the contract must clearly provide what happens if there is a breach of warranty.

From the SaaS provider's perspective, you want to add exclusions where the customer cannot claim a breach of warranty. For example, think about the situation where the SaaS is used in a manner not provided for in the documentation; then, the customer must not be able to claim a breach of warranty.

Indemnification

The most common indemnity included in SaaS agreements is an indemnity against third-party intellectual property (IP) claims. As a customer, you do not want a situation where someone institutes an intellectual property infringement claim against you because of your use of a SaaS product.

Most of the time, the SaaS provider will be willing to indemnify the customer against IP claims. However, there will generally be a couple of carve-outs.

As a SaaS provider, you do not want to indemnify the customer if the customer uses the SaaS product in such a way that it violates the terms of the SaaS agreement or if the customer combines the SaaS product with any other product, resulting in an IP infringement claim.

The amount which can be claimed under the indemnity is also often a topic of negotiation. From the customer's perspective, you want to be indemnified for all possible expenses and losses you can possibly think of.

From the SaaS provider's perspective, you want to define the indemnified losses payable under the indemnity as narrowly as possible and limit these losses to foreseeable reasonable losses.

Additionally, the SaaS provider would want to have the right to control any legal proceedings related to the IP infringement claim brought against the customer.

Conclusion

Crafting a SaaS agreement involves achieving a fair balance of interests, where risk is appropriately shared, and both parties have clear, actionable paths in case of breaches. This balance fosters a positive, long-term relationship between the SaaS provider and the customer, ultimately leading to mutual success in their business endeavours.

The struggle for getting work as an emerging legal practitioner is real

By Kgomotso Ramotsho

Legal practitioner, Thandeka Mpanza.

In this month's Thought Leaders feature, we feature a young legal practitioner, Thandeka Mpanza who is an admitted attorney of the High Court. She practises of her own accord in Morningside, Sandton under the name and style of Thandeka Mpanza Attorneys, which is a boutique firm. Ms Mpanza said that she loves the law, particularly the administration of justice. 'Though I believe more strides still need to be put in place to effect access to justice so as to restore faith in our justice system,' Ms Mpanza said.

Ms Mpanza described herself as a light-hearted, dry humoured, allegedly intelligent, and outspoken young lady. 'I am a leader, I am an activist, and one day wish my activism to reflect in my judgments as a judge on the Bench', Ms Mpanza added. 'I have the privilege of serving as the youngest Executive Member of the Law Society of South Africa, and once I got over the intimidation of advising and engaging on issues affecting the profession alongside very seasoned and respected senior members of the profession, I now realise that perhaps I was appointed for such a time as this, to be the voice of the youth within spaces wherein issues are affecting legal practitioners,' Ms Mpanza added.

Ms Mpanza is a Branch Executive Committee Secretary of the Black Lawyers Association North West. She was born in Johannesburg and raised in a township in the East Rand called Vosloorus. However, she pointed out that she has very strong roots in the North West having studied at the North-West University. She said that her formative years were spent in Mahikeng with her maternal grandparents, after which, she returned home to Vosloorus and attended high school at Sunward Park High School in Boksburg.

Ms Mpanza added that the way her parents raised her largely shaped who she is. 'My parents were and to this day remain very strict, however, that taught me discipline from an early age. Discipline to know that I was not allowed to do what most of my peers were doing and I had to learn to be ok with it', said Ms Mpanza. She said her parents were not wealthy, but they persevered to ensure that she and her siblings had an advantage of an education, and everything else would determine by them and their choices.

Ms Mpanza said: 'My mom starting as a staff nurse to having retired as senior Matron at Charlotte Maxeke Johannesburg Academic Hospital and having obtained her Honours degree in nursing through distance learning while raising four children really inspired me to push beyond my circumstances and persevere no matter the curveballs life threw at me. Anyone who has met my father connotates my resilience and fighting spirit to him, apparently, I am his replica. My dad has taught me the importance of betting on yourself, not being afraid of failure because it is an inevitable part of life. He taught me to stand up for the voiceless, and I guess perhaps that is my advocacy journey started. Naturally, when I told him I am ready to start my own practise he didn't hesitate in supporting the thought, while my mom naturally leaned towards caution and insisted, I give it a bit more time.'

Kgomotso Ramotsho (KR): Why did you choose to study law?
Thandeka Mpanza (TM): My reasons for studying law are not noble nor the stuff great lawyers are made up of at all! The real answer is while I have always been a natural public speaker, and a fighter which was probably the universe preparing me to be a litigator, loved reading and drafting, my parents were trying to channel me towards the engineering field, only problem is that I was absolutely shocking at mathematics and numbers in general (my struggle with legal bookkeeping bears testimony to this).

While studying grade 11 I started at-

tending university open days and imagine my pleasant delight that you do not need mathematics to be a lawyer.

I excitedly made a deal with my parents that if they allowed me, I would be the best lawyer this country has seen. They were not opposed to the idea at all, in fact they remarked '*mara vele weitsi wena ka tsela u buang ka teng ulawyera*' (loosely translated 'the manner in which you are so talkative being a lawyer suits you').

However, I strongly believe that nothing happens by chance, and our destiny always finds us amidst confusion. Everything in my life prepared me for being an attorney, my love for people, my love for fairness and justice, my public speaking prepared me for court, my love for reading and drafting prepared me for pleadings and reading. Nothing ever happens in vain.

KR: You recently opened your own law firm. Have you always wanted to own your own law firm and why?

TM: I think the answer is yes and no. Yes, because it has indeed always been a dream of mine to establish a leading all female black owned and run law firm, however, fear of failure always deterred me. I wanted to run an impactful practice, one based on ethical behaviour and practice.

The no comes in here, the last time I checked a vast majority of newly opened practices fail within a very short time from inception, many of which are black owned. The idea and comfort of having a guaranteed salary seemed appealing to me, however, I decided to go with the former and bet on myself. The beauty of failure is that you get to try again.

KR: We often hear that it is challenging for emerging young legal practitioners who start their own firms. What are some of the challenges you have identified as a young legal practitioner who just started her own law firm?

TM: One hundred percent it is indeed challenging for emerging young legal practitioners starting their own practices. Firstly, the struggle for work is real! I do not subscribe to the school of thought that the pie is not big enough for all of us, I just believe that so many entities are not yet prepared to distribute work evenly among us. The biggest gripe for me is skewed or perhaps let me say procurement preferences that are designed in nature to exclude small firms, or young practitioners. An example is you will find yourself applying to be placed on a legal panel and one of mandatory requirement are that you ought to have five – ten years post-admission experience, and in some cases indemnity cover in excess of millions. While it can be understood why such requirements would be in place, automatically I would lose points for the panel bid. The principle to me is simple, give me work to gain the experience to generate more work. There are so many other difficulties, and while we are thankful that the Law Society of South Africa offers compulsory courses such as Practice Management Training to somewhat prepare us for efficiently running our practices, we need more support and guidance from seasoned practitioners as to avoid issues that emanate from lack of mentorship and support. Support in respect of running administrative function, correctly branding and running marketing, leadership etcetera.

KR: You do work in administration of deceased estates. How do you feel about challenges that legal practitioner face at the Masters office not being efficient or functional, the way it should be?

TM: The situation at the Master's office is disheartening, especially because while the COVID-19 pandemic might have exasperated the situation, these challenges were always there. I am of the view that the issues stem from a lack of leadership and service delivery. Once that aspect is resolved, all the other issues such as unanswered correspondences and telephone calls, allegations of bribery, directives being issued without consultation, etcetera become ancillary and can be resolved.

KR: What would you change at the Master's office to make it functional?

TM: I am of the view that the Master's office needs to fast track modernising their systems to streamline operations, automate processes, ensure transparency, and increase accountability.

I am of the view that they need to thoroughly train and re-train officials to enhance efficiency and customer focus, basic 'Batho Pele' principles. Additional capacity needs to be added and vacant posts need to be filled.

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

TM: I think the most important qualities a legal practitioner should have are diligence and meticulousness.

I think (and I concede that some might disagree) but empathy is also an important quality. Now, if you do not conflate issues and ethics by getting involved in your client's matter, empathy will make you realise that save for conveyancing and commercial transactions etcetera, attorneys are approached when clients have an issue/dispute, and regretfully that issue requires them to part with money prior to it being potentially resolved.

The work of an attorney is therefore very difficult besides the actual work itself, as you need to manage client expectations from the onset, a likely very frustrated client that is.

I think empathy will help you remember that as an attorney you need to be honest with a client from the onset on the prospects of success, be transparent on potential costs involved, offer constant communication, honesty, integrity, no overcharging or overreaching, offer an excellent service offering that you would want to be offered likewise. Basically, do unto clients as you want done to yourself.

KR: Who is your mentor, and do you think it is important for young legal practitioners to have mentors? What is the importance of mentorship?

TM: Again, contra to the norm, I have never confined myself to one specific mentor. I draw inspiration from all the people I meet en route this life journey, why would you want to confine yourself when this profession is filled with different yet exceedingly outstanding practitioners who some are unbeknown to the public?

If I were though to highlight some of the people who I have stolen snippets of life lessons from, and continue to use them in approaching practice it would be the following:

Now Judge Mabaeng Denise Lenyai and legal practitioner Mme Khanyisa Mogale – I met these women as attorneys practicing in the North West while I was a student and they embodied everything I wanted to become as an attorney. Run a successful practice, impart knowledge, remain an activist, and be beautiful. No surprise Mme Lenyai is now a judge seated at the Gauteng Division of the High Court.

Mr Edwin Tlou runs a successful practice in Mahikeng and Rustenburg that I would like to model my practise similar to one day.

I also draw inspiration from practitioners I have met and worked with along the way, some brilliant minds in the corporate law spaces, a space said not to be filled by black practitioners namely legal practitioner Arthur Maisela, Mr Ronny Mkhwanazi, and though I have only ever said to him 'it is a pleasure meeting you Sir', Mr Michael Bill Motsoeneng. These men are outstanding in the respective fields, and an inch of their knowledge would make me an outstanding practitioner.

Lastly, peers who have opened their own practices, who concede that the journey is not easy but month in month out they keep on pushing and doing so brilliantly: Ms Tshepo Masilela, Lemogang Ngunduza, Orefotse Modubu, Mr Letlhogonolo Nomadolo, Mr Gift Mncube, Mr Dobbie Mhlongo, legal prac-

titioner Rorisang Tsalong, and excellent drafter and researcher legal practitioner Regomoditswe Marakalla.

They are all young practitioners who I have drawn inspiration from, and I occasionally draw counsel from them outside of legal knowledge (like what to do when clients do not pay invoices). Their names may not be well known yet, but I do not doubt that the future judiciary will be made up of some of these names.

KR: What are your goals, where do you want to see yourself in the next five years?

TM: Honestly, I just want to practice the law in a manner that reminds me why we lawyers are there; to help people. I want to run an ethical practice that is founded on excellence. We have commercialised the law so much we have lost the basics.

We do, however, need to survive and commercialise the law to some extent, and to that end I would like to own and run one of the biggest boutique all-rounder firms in Gauteng and expanding into North West. Without prejudice, I would like to have an all-female team in respect of both professional and support staff (I trust that should one day employ a male colleague in future, this article will not be used against me). I want to be remembered and counted among the best, who served the people with pride and diligence.

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

Legal practitioners reminded to report suspicious and unusual transactions to the Financial Intelligence Centre

By the Financial Intelligence Centre

Legal practitioners are reminded of their obligation to file suspicious and unusual transaction reports (STRs) to the Financial Intelligence Centre (FIC) to assist in the fight against financial crime.

The information contained in regulatory reports, such as STRs, is central to the FIC's development of financial intelligence, which law enforcement, prosecutorial authorities and other competent authorities can use for their investigations, prosecutions, and applications for asset forfeiture.

Where a legal practitioner suspects that a transaction or an activity involves money laundering, terrorist financing or a contravention of financial sanctions, they must report this suspicion to the FIC as an STR. STRs assist the FIC with the building of financial intelligence on possible money laundering, terrorist financing and proliferation financing (ML, TF and PF) in the country.

A suspicion may involve several factors that, if seen in isolation may seem insignificant, but when viewed together, may arouse suspicion concerning that transaction or activity. The reporter should evaluate the transactions, as well as the client's financial history, background, and behaviour when determining whether a transaction or activity is suspicious or unusual.

Legal practitioners can refer to FIC issued Guidance Note 4B for a detailed discussion on filing STR reports in terms of s 29 of the Financial Intelligence Centre Act 38 of 2001 (FIC Act). In addition, the FIC's recently issued Public Compliance Communication 47A (PCC 47A) (www.fic.gov.za) includes potential ML, TF and PF risk indicators, which will aid legal practitioners in identifying reportable transactions or activities.

PCC 47A also clarifies the definition of legal practitioners as per item 1 to sch 1 of the FIC Act, which covers attorneys practising for their own account, legal firms, and advocates with a Fidelity Fund Certificate, namely, advocates that may deal directly with clients from the public.

Risk and compliance returns

Legal practitioners are also urged to file their risk and compliance returns (RCR), in terms of Directive 6 of 2023, with the FIC without further delay. Although the RCR submission date has passed, the FIC has kept the submission link open, and can be accessed on the FIC website (www.fic.gov.za) by clicking on the link on the home page titled: 'File your 2023 risk and compliance return today' (www.fic.gov.za).

The risk and compliance return covers the reporting period from 1 April 2022 to 31 March 2023, both dates are inclusive. The returns enable the FIC to better assess the inherent ML, TF and PF risks faced by an accountable institution. The FIC is in the processes of issuing administrative sanctions to those that have not complied with the RCR submissions.

It is important to note that:

- Only accountable institutions that have successfully registered with the FIC and who have received an organisation identity number (Org ID) may submit an RCR.
- Accountable institutions that have not yet registered with the FIC must do so immediately.
- All accountable institutions must submit separate RCRs for each Schedule item registered with the FIC. This means that a separate RCR must be submitted for each FIC Org ID held by an accountable institution. This requirement applies to entities with branch networks, and entities that offer multiple offerings across the Schedule items.
- Only one RCR submission is permitted per accountable institution for each Org ID held.
- Accountable institutions must accurately capture and state their Org ID number in their RCR returns. In the Org ID field, only the Org ID must be captured, not a personal ID number nor the company registration number.
- The RCR can only be submitted on the online form. No manual submissions will be accepted.
- Accountable institutions must ensure that the RCR information provided is accurate and complete.

As the FIC does not confirm receipt of RCRs, once you have submitted your RCR, a 'thank you' page will appear indicating a completed submission with a download option. Download and save the RCR responses submitted, as proof of having filed an RCR.

Risk management and compliance programme

Legal practitioners are also required to develop, document, maintain and implement a Risk Management and Compliance Programme (RMCP) in terms of s 42 of the FIC Act. Each institution's RMCP must include the way it identifies, assesses, monitors, mitigates, and manages ML, TF and PF risk. This also includes the way the institution rates the level of risk.

Public Compliance Communication 53, read together with the amendments as provided for the General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Act 22 of 2022, will guide legal practitioners when developing an RMCP.

For more information and guidance refer to the FIC website for various guidance notes and public compliance communications. Alternatively, contact the FIC's compliance contact centre on +27 12 641 6000 or log an online compliance query on the website.

❑

By
Merilyn
Rowena
Kader

THE LAW REPORTS

September [2023] 3 All South African Law Reports (pp 613 – 921); October [2023] 4 All South African Law Reports (pp 1 – 276); September – October 2023 Judgments Online

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

Abbreviations:

CC: Constitutional Court
ECB: Eastern Cape Division, Bhisho
ECM: Eastern Cape Division, Mthatha
FB: Free State Division, Bloemfontein
GJ: Gauteng Local Division, Johannesburg
GP: Gauteng Division, Pretoria
KZD: KwaZulu-Natal Division, Durban
LC: Labour Court
SCA: Supreme Court of Appeal
WCC: Western Cape Division, Cape Town

Administrative law

Judicial Service Commission (JSC) not justified in rejecting findings and conclusion of the Judicial Conduct Tribunal that judge's conduct constituted gross misconduct: Judge Nkola Motata was arrested after he drove into the boundary wall of a residential property and became involved in a verbal altercation with the property owner. He was subsequently charged and convicted of driving a motor vehicle while under the influence of intoxicating liquor. The incident led to three complaints being lodged against him with the first respondent, the JSC. All three complaints were considered by the Judicial Conduct Committee (the JCC) of the JSC, which decided in terms of s 16(4)(*b*) of the Judicial Service Commission Act 9 of 1994 that the complaint, if established, would *prima facie* indicate gross misconduct by Judge Motata and accordingly recommended that it be investigated by a Judicial Conduct Tribunal (the Tribunal). The Tribunal concluded that Judge Motata's conduct constituted gross misconduct and recommended to the JSC that the provisions of s 177(1)(*a*) of the Constitution be invoked. The majority of the JSC, however, rejected the Tribunal's recommendation. It found Judge Motata guilty of misconduct *simpliciter* and imposed a fine of R 1 152 650,40 to be paid to the South African Judicial Education Institute.

The appellant, Freedom Under Law (FUL) applied in the High Court, to review and set aside the JSC's decision and to substitute that decision with a finding that Judge Motata was guilty of gross misconduct as contemplated in s 177(1)(*a*) of the Constitution, alternatively, for the matter to be remitted to the JSC to be decided afresh taking into account the findings of the court. The court's dismissal of the review application relating to one of the complaints led to the appellant's appeal in *Freedom Under Law (RF) NPC v Judicial Service Commission and Another* [2023] 3 All SA 631 (SCA).

The majority decision of the JSC did not offer reasons for rejecting the factual findings of the Tribunal in respect of the relevant complaint, including the findings on the credibility of the witnesses. The evidence showed that Judge Motata had alleged that he had been provoked by the property owner whom he also alleged had used a racial slur against him. That was proven not to be true. The High Court should have inquired whether the JSC was entitled to simply disregard the Tribunal's factual findings in the manner that it had. It did not do so. Had the court undertaken that task, it would have realised that no justifiable warrant existed for the JSC to have rejected the Tribunal's findings. The court did not consider remittal of the decision to the JSC to be acceptable. It considered itself as well placed as the JSC to make a decision and decided, therefore, on substitution of the order.

The appeal was upheld, and the matter was remitted to the JSC – not for a finding to be made, but to be dealt with in terms of s 20(4) of the Judicial Service Commission Act.

Application for review of decision of Financial Services Tribunal: On finding the applicant to have contravened its Listings Requirements, the Johannesburg Stock Exchange (JSE) decided that the transgressions warranted a R 2 million fine and a 'public censure' as provided for in the Listing Requirements. The applicant applied for the reconsideration, by the Financial Services Tribunal, of the JSE's finding and the Tribunal decided to suspend the payment of the fine imposed but declined to suspend the publication of the censure. That led to the present application for the review and setting aside of the Tribunal's decision not to suspend the publication of the censure in *Abdulla v Johannesburg Stock Exchange Limited and Others* [2023] JOL 60716 (GJ).

The court confirmed that the grounds for review were that the Tribunal had failed to attach sufficient weight to particular considerations, and that it had attached too much weight to others. The two factors, which the Tribunal was said to have weighed inappropriately, in this case were the capacity of publication of the censure to cause the applicant harm, and the applicant's prospects of success in securing a more lenient sanction from the Tribunal than that imposed by the JSE. Neither was weighed in a manner that deprived the decision of its underlying rationality, or of a logical connection to the surrounding facts. The application was dismissed.

Civil procedure

Evaluation of expert opinion in determining its probative value and the considerations relevant thereto are determined by the nature of the conflict in the opinion: In *Jayiya v Member of Executive Council for Department of Health, Eastern Cape* [2023] 4 All SA 72 (ECB), the appellant had instituted a medical negligence claim against the respondent (MEC). The claim was brought in the appellant's own name and on behalf of her newborn child, who had suffered cerebral palsy as a consequence of a hypoxic-ischemic encephalopathy during the birth process. The appellant alleged that the employees of the respondent, including the medical practitioners who had treated her at the clinic, were negligent. The court *a quo* found against the appellant. On appeal, the appellant contended that the court had erred in not attaching enough weight to the joint minutes of

experts. It was submitted that the court had erred in not finding that, in view of the agreement reached by the experts in the joint minutes, it was not necessary for the appellant to call further witnesses on the agreed issues and that the court was bound to adjudicate the matter based on such agreement by experts because there was no valid repudiation or withdrawal of the agreement by any of the parties. The appellant also submitted that the court erred in its assessment of expert evidence and by substituting the direct uncontradicted expert evidence with its own logic and in that regard, it had committed a misdirection.

In a claim for delictual damages, the plaintiff must prove, on a balance of probabilities, that the acts or omissions of the defendant were wrongful and negligent, and caused loss. The appellant had to establish that the wrongful and negligent conduct of the respondent's nursing and medical staff, acting within the course and scope of their employment, had caused her harm. The correct approach for establishing the existence of negligence involves reasonable foreseeability and the reasonable preventability of damage.

The court was required to evaluate and resolve the conflict in the testimony of the expert witnesses called for the appellant and the respondent. The evaluation of expert opinion in determining its probative value and the considerations relevant thereto are determined by the nature of the conflict in the opinion, and the context provided by all the evidence and the issues which the court is asked to determine. An expert witness must not omit to consider the material facts that should detract from his concluded opinion. It is not expected of the court to simply accept the opinions of experts. The expert's evidence must be logical and his conclusions must be reached with knowledge of all the facts.

Having regard to the evidence, the court *a quo* erred in rejecting the evidence of the appellant solely based on contradictions in her evidence and where no version was put to her by the respondent. The present court upheld the appeal.

Access to information: In terms of the Promotion of Access to Information Act 2 of 2000, the applicant (HJI) sought access to copies of documents relating to the negotiation and conclusion of agreements by the respondents, the Minister of Health, and the National Department of Health (NDOH) for the supply of COVID-19 vaccines. The NDOH refused the request, and the present application in *Health Justice Initiative v Minister of Health and Another* [2023] JOL 60444 (GP), was for reconsideration of the request *de novo*.

The court refers to s 25(3)(*a*) of the Act, requiring adequate reasons for a refusal of access. The court stated that: 'It is not open to the respondents to conclude agreements which include a confidentiality clause and then seek to rely on the confidentiality clause to circumvent their obligations of accountability and transparency'. Disclosure in the public interest was discussed. Finding no merit in the respondents' arguments that the information and records sought should not be disclosed, the court ordered that the requested records be provided.

Constitutional law

Effect of misdirection by court in straying beyond separated issue: In *Koch & Kruger Brokers CC and Another v Financial Sector Conduct Authority and Others* [2023] JOL 60538 (CC), application was made to the CC for leave to appeal the judgment of the High Court on a separated issue. According to the applicants, the question of negligence did not form part of the separated issue and was not argued. They complained that the High Court decided the issue of negligence without considering any of the evidential material put up in their affidavits and without hearing the applicants' counsel on that issue.

The court found that the separated issue was never precisely defined. Although the complaint that the High Court had strayed beyond the separated issue and thereby violated the applicants' s 34 rights, the court still had to decide whether it was in the interests of justice to grant leave to appeal, the separation on which the parties and the High Court embarked was misconceived. The High Court's findings were ineffective for resolving any of the grounds of review. Consequently, it was not in the interests of justice to grant leave to appeal.

Criminal procedure

Constitution of trial court in terms of s 93*ter*(1) of the Magistrates' Courts Act 32 of 1944: In *Director of Public Prosecutions, KwaZulu-Natal v Pillay* [2023] 3 All SA 613 (SCA), the Director of Public Prosecutions, KwaZulu-Natal appealed against the High Court's setting aside of the respondent's conviction and sentence on a charge of murder. The appeal dealt with the proper interpretation of s 93*ter*(1) of the Magistrates' Courts Act. The High Court's judgment dealt only with the constitution of the trial court. It held that the peremptory requirements of s 93*ter*(1) had not been satisfied and it set aside the respondent's conviction.

Section 93*ter*(1) provides that in a trial involving a charge of murder, the magistrate shall be assisted by assessors unless the accused requests that the trial proceed without assessors. The court held that s 93*ter*(1) did not confer on an accused person a right to be tried by a properly constituted court. The language employed in the section confers only a right to request that the trial proceed without assessors. Once the request is made, the magistrate has a discretion to summon one or two assessors to assist, notwithstanding the request. The fact that the court has a discretion to summon assessors despite the request, effectively negates the notion of any kind of election by the accused. Where an accused is represented, it must be established that the representative and the accused were aware of the provisions of the section, and whether the accused, as represented, has made a request as envisaged. It is incumbent on the presiding officer to ensure that the court is constituted in accordance with s 93*ter*(1). The High Court erred in respect of the law relating to the section and in its application to the facts, with the result that the appeal had to succeed.

Employee benefits and retirement

Whether the Pension Funds Adjudicator has jurisdiction where a complainant lodges a complaint directly with the Adjudicator instead of a pension fund: On the death of a member of the appellant pension fund, a dispute arose concerning the allocation of the death benefits to his dependents. Ms Mutsila, the deceased's widow, was dissatisfied with the approach by the fund in allocating the death benefits to certain beneficiaries whom she considered not to qualify for the death benefits. She lodged a complaint with the Pension Funds Adjudicator, who set aside the fund's determination and ordered it to pay R 300 000 to Ms Mutsila. The fund was unsuccessful in setting aside the Adjudicator's determination in the High Court, and the present appeal was brought in *Municipal Gratuity Fund v Pension Funds Adjudicator and Another* [2023] 4 All SA 1 (SCA).

Section 30P of the Pension Funds Act 24 of 1956 states that any party who feels aggrieved by a determination of the Adjudicator may, within six weeks after the date of the determination, apply to the applicable division of the High Court for relief. The court is not limited to a decision on whether the Adjudicator's determination was right or wrong and is not confined to the evidence, or the grounds on which the Adjudicator's determination was based, as the court can consider the matter afresh and make any order it deems fit.

The first leg of the fund's challenge was that Ms Mutsila should have approached the fund before lodging a complaint with the Adjudicator, and therefore, the relevant jurisdictional requirement was absent. Second, the fund contended that when the Adjudicator informed it about the complaint, it was not granted an opportunity to deal with the merits of the complaint, and therefore, the *audi alter-*

am partem principle had not been complied with.

The jurisdictional objection was without merit, as Ms Mutsila had in fact complained to the fund about the proposed distribution of the deceased's death benefit. She was dissatisfied with the fund's response and was advised by the fund to refer a dispute to the Adjudicator. However, the second point raised by the fund was upheld, as it was clear that the *audi alteram partem* rule had not been complied with. The next question was whether the Adjudicator's ruling should stand. Setting out the applicable provisions of the Pension Funds Act regarding the distribution of death benefits, the court referred to the delay in finalising the matter. The parties and the beneficiaries in particular, were entitled to finality and would not achieve that if the Adjudicator's determination was allowed to stand. The court was satisfied that the fund's determination should prevail. The appeal was upheld.

Evidence

Assessment of evidence in claim for damages arising from assault: The plaintiff in *Tutshana v Kentucky Fried Chicken (Madeira Drive Thru – Mthatha) and Another* [2023] JOL 60635 (ECM) sued the defendants for damages arising from his alleged unlawful assault by the second defendant at the first defendant's premises. The second defendant (Mr Jola) was an employee of the first defendant (KFC), and was alleged to have been acting in the course and scope of his employment at the time, rendering KFC vicariously liable for his conduct.

Notyesi AJ states that a defendant who pleads self-defence in an action against him based on assault, has to prove that the force used in defending himself was in the circumstances reasonable and commensurate with the plaintiff's alleged aggression. The test for determining self-defence is objective.

The parties adduced conflicting versions regarding the circumstances leading to the assault of the plaintiff. The court found that the plaintiff and his companions were the main cause of the squabble at the KFC outlet and that Mr Jola, in his capacity as a supervisor, was obliged to intervene. Rejecting the plaintiff's evidence, the court dismissed his claim.

Insolvency

Final winding-up of commercially insolvent companies: Investec Bank in *Investec Bank Limited v Personify Investments (Pty) Ltd and related matters* [2023] JOL 60652 (KZD) applied for the final winding-up of three companies (referred to collectively as 'the respondents'). In terms of a provisional winding-up order granted against the respondents, the parties were called on to show cause, if any, as to why the provisional order should not be made final.

Nkosi J describes the onus and degree of proof required of an applicant when an application is made for a final winding-up order. The court can exercise its discretion not to grant a final winding-up order if it can discern from the evidence before it, on a balance of probabilities that the company concerned does not appear to be insolvent. Highlighting the respondents' inability to pay their debts, the court referred to the interest that was continuously accruing on the cumulative amount of their debts. Considering the prospects of financial recovery to be bleak, the court grants the final winding-up order.

Labour law

Application for consolidation of proceedings: In terms of rule 23(1) of the Labour Court Rules, the applicant sought the consolidation of the separate disputes referred by the respondents. The respondents had been employed by the applicant, and were both dismissed for the applicant's operational requirements. In *SAICA Enterprise Development (Pty) Ltd v Brown and Another* [2023] JOL 60649 (LC) the court referred to rule 23(1) which provides that a court may 'make an order consolidating any separate proceedings pending before it if it deems the order to be expedient and just'. The court accepted the applicant's argument that consolidating the trials would be expedient because it would lead to an expeditious finalisation of both trials. However, should the trials be consolidated, the first respondent's legal insurance would not cover the costs of her legal representation. Justice required that she enjoy the benefit of having her legal representation funded, and the benefit of the expedience of the consolidation did not justify a decision, which would see her lose her benefit. The application was dismissed.

Property

Nature and scope of *lien*: In *Springs Car Wholesalers (Pty) Ltd t/a No Finance Cars v F and H Motors* CC [2023] JOL 60665 (FB) the respondent was in possession of a vehicle owned by the applicant, and which the applicant had leased to a third party. On discovering that the vehicle had suffered a mechanical breakdown and that the lessee had the vehicle towed by the respondent for repairs, the applicant applied for an order directing the respondent to hand the vehicle over to the sheriff for delivery to the applicant, and for an amount of R 17 739,28 to be held by applicant's attorney as security for the respondent's alleged claim. The respondent opposed such relief, contending that it was entitled to retain possession of the vehicle because it had a *ius retentionis lien* arising from, what was referred to as a 'repair lien'.

Van Rhyn J explained that a right of retention (*ius retentionis*) or *lien* is the right to retain physical control of another's property as security for payment of a claim for money or labour expended on that property. Two main kinds of *lien* are described. The protection afforded by a *lien* is limited – namely, the retentor merely has a defence against the *rei vindicatio* of the owner. A debtor and creditor *lien*, on the other hand, can be enforced only against the other contracting party, in this case, the lessee.

As the applicant had been deprived of possession of its vehicle and, of rental income in terms of the lease agreement, return of the vehicle was ordered.

Suspension of running of acquisitive prescription against persons unable to assert their rights: The plaintiff in *Khatha v Pillay NO and Others* [2023] JOL 60570 (GJ) sought an order declaring that she had become the owner of immovable property through acquisitive prescription as contemplated in s 1 of the Prescription Act 68 of 1969. The defendants raised a special plea to the effect that, the required prescription period was not completed thirty years later at the end of May 2016 or on any date prior to the date pleaded in the particulars of claim. The special plea was based on the contention that the death of the deceased in August 2014 constituted 'superior force' as contemplated in s 3(1)(*a*) of the Act and prevented her from interrupting the running of prescription as contemplated in s 4, and that the earliest presumptive prescription date occurred before the day on which such impediment ceased to exist. The defendants' further contention was that the impediment only ceased to exist on the date when they were appointed as executrixes and in a position to serve legal process claiming ownership.

Moultrie AJ considered whether the death of the party against whom prescription was running constituted 'superior force'. Section 3(1)(*a*) concerns postponement of the completion of prescription in certain circumstances. Suspension of extinctive prescription is based on the principle that the person against whom prescription is running is not in a position to protect their rights. Proper interpretation of s 3(1)(*a*) favoured the defendant's interpretation.

The special plea was upheld.

Tax

Exhausting of internal remedies before seeking judicial review: After conducting an audit, the respondent (the Commissioner) decided that the tax avoidance provisions in ss 80A-80L of the Income Tax Act 58 of 1962 were applicable, and that the applicant had engaged in an impermissible tax avoidance scheme. The

applicant applied for review of the decision but the Commissioner raised a preliminary point that the application should not be entertained as the applicant had failed to exhaust his internal remedies. That led to the applicant seeking leave to amend his notice of motion, to include an order exempting him from exhausting his internal remedies prior to the hearing of the review in *Erasmus v Commissioner for the South African Revenue Service* [2023] JOL 60537 (WCC).

The court confirmed the duty to exhaust internal remedies before seeking review, contained in s 7(2)(*a*) of the Promotion of Administrative Justice Act 3 of 2000. Section 7(2)(*c*) allows a court to exempt a party from discharging that obligation in exceptional circumstances if deemed to be in the interests of justice. Adequate dispute resolution processes put in place by the Tax Administration Act 28 of 2011 meant that the applicant had an available alternative. The application for an order exempting the applicant from exhausting internal remedies was dismissed, and the application for review was struck from the roll.

Wills and estates

Exceptions to claim for recognition of document as will: The trustees of a trust in *Roux NO and Another v Stemmet NO and Others* [2023] JOL 60598 (WCC) instituted action against the defendants, seeking revocation of a will and recognition of a subsequent will. In 2018, the testator (the deceased) executed a will bequeathing his entire estate to his adult children, but while quarantined in hospital with the COVID-19 virus, he contacted a third party and indicated that he wished to revoke the 2018 will, and that his final instructions regarding the disposal of his estate were that his entire estate was be left to the trust. A will was drafted but the testator was unable to receive the document personally as he had been induced into a coma and died shortly after. The plaintiffs pleaded that it was thus impossible for the deceased to execute the will or to otherwise comply with the applicable formalities prescribed by the Wills Act 7 of 1953, but his intention was for that will to constitute his final instructions regarding the disposal of his estate.

Pangarker AJ addressed four exceptions raised by the defendants to the particulars of claim. The judgment outlines the court's approach to exceptions and the test on exception. The court upheld the exceptions relating to absence of jurisdictional facts required by s 2A(*c*) of the Act and to plaintiffs' failure to plead the basis on which they sought to have the 2021 document recognised as a valid will.

Other cases

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

- alleged unlawful arrest, detention and malicious prosecution;
- application for eviction of unlawful occupiers;
- application for stay of proceedings on ground that order referring claim to trial was obtained through fraud;
- aviation – lease of aircraft – breach of lease agreement;
- claim for damages – malicious prosecution;
- contempt of court application;
- decisions to cancel permanent residence permits; and
- release of accused on warning – cancellation of release.

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Court issues stern warning and deterrent order in police brutality judgment

By Senamile Sishi and Nosiphiwo Nzimande

Xaba and Another v Minister of Police (NWM) (unreported case no 788/2021; 789/2021, 31-8-2023) (Morgan AJ)

'Our strength will come not from the sharpness of our spears, but from our willingness to offer others the protection of our shields' (Simon Sinek *Leaders Eat Last* (Penguin Books 2017)).

'[T]he liberty of the individual is one of the fundamental rights of a man in a free society which should be jealously guarded at all times and there is a duty on our courts to preserve this right against infringement' (see para 31).

Our courts are inundated with matters involving unlawful arrest, detention, and assault, evidencing the prevalence of police brutality in our society today. In the recent judgment of *Xaba*, the North West Division of the High Court handed down judgment on a matter that arose from police brutality, where the plaintiffs brought a delictual damages claim consequent to their unlawful arrest, detention, and assault by members of the South African Police Service. The task at hand for the court was the determination of the quantum of damages suffered by the plaintiffs, as the defendant (Minister of Police) conceded to 100% liability. However, what was meant to be a clearcut determination of the quantum of damages was amplified with a stern warning and a deterrent order.

In its determination, the court emphasised the importance of the protection that the Constitution offers the right to freedom and security of person, which encompasses the right not to be deprived of freedom arbitrarily or without justification. Law enforcement officers have an obligation to guard this right, as they have a duty to serve and protect the public and to uphold and protect the law. Thus, the court expressed its great disappointment in law enforcement officers who fail to fulfil their duties and obligations, as this failure is contrary to their oath of office.

The court further issued a stern warning to law enforcement officers in South Africa who act contrary to their oath of office and do not respect and obey a person's right to freedom. A degree of the court's rationale derived from its aim to restore the integrity and dignity of law enforcement officers among the public. As noted by the court, brutality on the part of law enforcement officers results in the loss of public confidence in these authorities, which may cause restlessness and lawlessness among the public, leading to communities taking matters into their own hands instead of reporting incidents to relevant authorities. Thus, the court accentuated the importance of action to be taken to ensure that police brutality comes to an end and the dignity of law enforcement officers is restored.

The court further stressed the importance of the Independent Police Investigative Directorate (IPID), which is appointed to investigate crimes committed by law enforcement officers to ensure that policing protects the dignity of persons and protects and upholds the law. The court stressed the IPID's duty after stating that our court rolls are flooded by matters similar to the current one. The flooded court rolls cause widespread prejudice in our court system, as other parties who have proceedings in court consequently have to postpone or delay their proceedings due to the limited resources in our courts. In addition to the limited resources in our courts, after the court finds that the plaintiff has a successful claim, the monetary award derives from taxpayers' monies. This double-edged sword affects taxpayers and the South African markets, as it cripples our economy and impacts investor confidence, as investors become reluctant to invest in our country's economy.

As such, in para 7 of the order, the court found it necessary that the defendant (Minister of Police) and Executive Director of the IPID, investigate the matter within three months of the order and provide the court with a written report on action that has been taken against the police officers responsible for the plaintiffs' unlawful arrest, detention, and assault.

The court concluded by awarding the plaintiffs one composite amount in respect of the general damages they suffered in each claim, interest, and costs. The court further included para 7, as noted above, which reinforces the importance of law enforcement officers to serve the public, uphold and protect the law and the Constitution, and protect the public in line with the duties and responsibilities as encumbered by their oath of office.

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Minister fails to provide proof that additional benefits of leave have a negative effect on the economy

By Kgomotso Ramotsho

Van Wyk and Others v Minister of Employment and Labour (GJ) (unreported case no 2022-017842, 25-10-2023) (Sutherland DJP)

The High Court in Johannesburg declared that the provisions of ss 25, 25A, 25B and 25C of the Basic Conditions of Employment Act 75 of 1997 (BCEA), and the corresponding provisions of the Unemployment Insurance Act 63 of 2001 (the UI Act), ss 24, 26A, 27, 29A, are invalid. This was after the applicants had made an application to the Johannesburg High Court on allegations of unconstitutionality of s 25, 25A, 25B and 25C in the BCEA, which deals with maternity leave.

The High Court pointed out that there were six entities who joined as *amci curiae*. The court said that four of them, the Centre for Human Rights at the University of Pretoria, Solidarity Centre South Africa, International Lawyers Assisting Workers Network, and the Labour Research Service advanced a common argument in support of the applicants criticism of the BCEA. A fifth *amicus* is the National Employers Association of South Africa (NEASA), who made a common cause with the Minister of Labour opposing the criticism of the BCEA. The sixth *amicus* did not participate in the hearing.

The High Court pointed out that the contested sections are in ch 3 of the BCEA. The High Court added that this chapter regulates the minimum leave that an employer must grant to employees in respect of several circumstances. The policy norm informing the statutory regulation of leave is that employees should be entitled to time off work for a guaranteed minimum duration under specified circumstances, a right which does not exist in terms of common law. The High Court said that as such, this is a quality-of-life-policy choice.

The High Court added that, accordingly, the first basic benefit the BCEA creates is paid annual leave, stipulated in ss 20 and 22. The High Court said that the second basic benefit, stipulated in s 22, is a minimum duration of paid leave to recover from illness. And the third is in s 27, which makes provision for three days paid family responsibility leave in every leave cycle; plainly intended to cater for a response to a family emergency. The High Court pointed out that a fourth category of leave relates to the relationship of the employees *qua* parents to their children. The High Court said that this guaranteed period of leave does not compel an employer to pay to the employee. Sections 25, 25A, 25B, 25C and 26 regulate the granting of such leave.

The High Court said that the most recent amendments, namely, ss 25A – 25C were introduced by Labour Laws Amendment Act 10 of 2018 and came into effect on 1 January 2020. The cited provisions of the BCEA differentiate three categories of child, namely –

- a child born of a mother;
- a child born by surrogacy; and
- an adopted child.

The High Court pointed out that a birth-mother's circumstances are dealt with in ss 25 and 26. The High Court added that s 26 addresses explicitly the physiological dimension of pregnancy and of child nurture immediately post-birth. A mother shall not be permitted to perform work hazardous to her health or that of a child during pregnancy and six months after birth. The High Court pointed out that s 25(3) forbids a mother working for six weeks after the date of birth unless a doctor or midwife approves thereof.

The High Court said that s 25 goes on to provide for a total of four consecutive months' maternity leave for a birthmother, of which one month may be taken prior to the date of birth. The High Court pointed out that in terms of ss 25A(1) and 25A(2)(*a*) a father is entitled to ten days leave from date of birth of the child. The High Court pointed out that s 25B deals with an adopted child. The recognition of leave for a parent in this category is limited to a child who is not more than two years old. The section recognises both adoptive parents. The High Court said that is must be read with s 25A. One parent is entitled to ten consecutive weeks leave and the other to ten days leave alluded to in s 25A. The High Court added that no provision is made for physical recovery. The provisions are gender neutral and a pair of same sex is not distinguished from heterosexual pair.

The High Court said that the third party of child is born via surrogacy. The High Court added that the leave is guaranteed for the genetically linked parents, called the 'commissioning parents' in the statute. The High Court held that the section says nothing whatever about the surrogate herself. The High Court said that s 25C regulates this category of leave. The entitlement is identical to that provided for adoptive parents; ergo, ten weeks or ten days.

The High Court pointed out that the guaranteed leave in ss 25A, 25B and 25C which is compulsory for an employer to grant, as alluded to above, does not require an employer pay any remuneration. The High Court said that the effect of the BCEA is that the employee has the time off work and has job security upon return to work. The High Court added that in all three categories the employee on this type of leave may claim a financial benefit from the Unemployment Insurance Fund (UIF) in such sums as are determined by the Minister of Labour.

The High Court said that s 25(1) is unconstitutional because no valid grounds exist to distinguish one parent-employee from another. The High Court added that both parents should be entitled to parental leave in equal measure and the failure provide so is unfair discrimination and violates the dignity of all parents. The High Court said that suggestions as to how equality and dignity might be achieved varies: The Van Wyks' suggest that both parents share four months leave according to their election; the Commission for Gender Equality and the Sonke Gender Justice suggest both parents each have an equal and contemporaneous leave entitlement.

The High Court pointed out that the Minister argues that the present suite of benefits in the BCEA compares favour-

ably with other states' benefits more especially if appropriate jurisdictions are chosen to compare, that choice being directed by having regard to countries which have socio-economic profiles similar to that of South Africa. The High Court said the resistance by the Minister to the challenges to the BCEA is based on the proposition that what is in the statute does not violate any constitutional guarantees. The High Court pointed out that this is, in a limited sense, technically true, because the true location of the criticism is 'what is not' in the BCEA, but such distinction is unhelpful in conducting the analysis.

The High Court said, furthermore, the Minister contended that the controversy put before the court is not suitable for judicial adjudication because it is intrinsically a matter of social policy involving resource-allocation, which is a subject matter better left to Parliament to evaluate and make choices. The High Court added that NEASA also opposes the relief sought as supposedly bad for business and shares the Minister's view that the controversy should be left to Parliament to address. The High Court said that must be borne in mind that the BCEA is a statute, which addresses minimum benefits in relation to employment and is not an instrument to regulate family life or prescribe norms by which free people should organise their family life.

The High Court pointed out that the state does nevertheless intervene in that realm but does so in other statutes, of which the Children's Act 38 of 2005 is foremost importance in relation to controversy in this case. The High Court added that nonetheless, the BCEA must find application in a way that is in harmony with the Children's Act no less than with the Constitution. The High Court said that ch 15 of the Childrens' Act deals with adoption. The High Court pointed out that s 229 states that the purpose of adoption is to 'protect and nurture children by providing a safe, healthy environment with positive support; and promote the goals of permanency planning by connecting children to other safe and nurturing family relationships intended to last a lifetime'.

The High Court said that it must follow that s 25B of the BCEA was enacted to facilitate the achievement of these goals. The High Court added that the Children's Act does not address the practical conditions under which a child who is adopted must be 'received' by the adoptive parents and the process of establishing a bond between the child and both adoptive parents can be accomplished. The High Court said that ch 19 of the Children's Act regulates surrogate motherhood and ch 3 of the Children's Act deals with 'parental responsibilities and rights'. The High Court said these apply to all three categories of child as identified in the BCEA.

The High Court pointed out that the provisions of this chapter stipulate, as a norm, equal duties, and rights by each parent. The High Court added that married partners are addressed in ss 19 and 20 in those express terms. The court said that circumstances of unmarried parent give rise, in ss 20 and 21, to differential treatment of the father, to cater of potential fluid relationships between father and mother and the defector intimacy or remoteness of the fathers' involvement with the mother and with the child. The court said this variable does not intrude on the jurisprudential issue at stake.

The High Court added that upon the premise that the leave entitlement, and duration of the leave, are provided for the purpose of the nurture of a baby or toddler, not merely to allow a literal physiological recovery from giving birth, it seems plain that the distinctions made in the BCEA are at odds with the objectives of ss 9 and 10 of the Constitution and also odds with the norms inherent in the Children's Act. The High Court said that the first irrationality is the provision for a ten-week period of leave provided for a birth mother.

The High Court noted to accord a paltry ten days' leave to a father speaks to a mind-set that regards the father's involvement in early parenting as marginal. The court said that this is *per se* offensive to the norms of the Constitution in that it impairs a father's dignity. The court pointed out that long standing cultural norms exalting motherhood are not a legitimate platform for a cantilever to distinguish mothers' and fathers' roles.

The High Court said that there are many examples where other countries prescribe more generous periods of leave. The High Court added that, however, it is not part of this case that the court is called upon to address more than the question of an inequality of the duration of leave for each class of parent and for fathers and mothers or same-sex partners. The High Court said that the helpfulness of this literature is in the ubiquitous recognition of parents *qua* parents rather than a strict delineation between fathers and mothers, a norm wholly in line with the international instrument and with the South African Constitution.

With regards to the basis of opposition to the declaration of unconstitutionality. The court specifically dealt with the main perspective articulated by the Minister and by NEASA. The court said that the Minister and NEASA were unconvincing. The High Court pointed out that the first aspect of significance is the absence of any evidence produced by the Minister. The High Court said that it was a pity because the themes addressed in the Minster's affidavit are, in certain respects, premised on assumptions bereft of substantiation. The High Court pointed out that the absence of relevant evidence impoverished the argument.

The High Court said that it was contended that ultimately, the additional benefits of leave have a negative effect on the economy by diverting the resources of business. The High Court added that unhappily, the Minister has evaded sharing with the court what the effect might be. The High Court said that to run with this type of thesis it is necessary to know how many maternity beneficiaries there are in any year, how many employers have paid maternity benefits, how many employers grant paid paternity benefits, and what proportion of labour force is covered by these contracts as contributors to the UIF. The High Court noted that none of this data has been placed before the court.

The High Court concluded that the declaratory orders sought by the applicants are well founded. That the sections in the BCEA do offend ss 1 and 10 of the Constitution. The High Court said Parliament must get to work to eliminate the inequalities. The High Court added that Parliament shall make substantive changes and a range of options exist in how to eliminate inequality. The High Court said that the appropriate immediate means by which to remove inequality, in the interim period, is the proposal advanced on behalf of Van Wyks; namely, all parents of whatever stripe, enjoy four consecutive months' parental leave, collectively. The High Court pointed out that in other words, each pair of parents of qualifying child shall share the four months leave as they elect.

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By
Lesetsa
Teffo

Access to information held by the state

Health Justice Initiative v Minister of Health and Information Officer, National Department of Health (GP) (unreported case no 10009/22, 17-8-2023) (Millar J)

The Health Justice Initiative (HJI), the applicant, submitted a request on the 19 July 2021 in terms of s 18(1) of Promotion of Access to Information Act 2 of 2000 (PAIA) to the National Department of Health (NDoH), the respondent, for access to information delineated in Form A, being among others, copies of the memoranda of understanding and contracts concluded between the NDoH and pharmaceutical companies for the procurement of vaccines relating to the Coronavirus (COVID-19). The request was made subsequent to information that a budget of R 10 billion was allocated for the procurement of COVID-19 vaccines. Despite the promise to revert to the applicant on or before the 13 September 2021 the NDoH failed to meet the deadline. The HJI contacted Janssen Pharmaceuticals, Pfizer South Africa and other entities in December 2021 without success. Its appeal to the NDoH was never entertained as a result it brought an application for an order compelling the NDoH to disclose information concerning procurement of COVID-19 vaccines (paras 7 – 11).

Nature of dispute

The NDoH refused the HJI access to information requested on the ground of mandatory protection of confidentiality of third parties as contemplated in s 37 of PAIA. It based its reasons that procurement of contracts was negotiated in good faith and in the interests of the country that they are non-disclosure agreements signed by the NDoH and vaccine manufacturers. Therefore, the provision of such contracts would amount to breach of the terms of confidentiality that would prejudice both the NDoH and vaccine manufacturers (paras 11 – 12). The NDoH had invited all affected pharmaceutical companies to make presentations whether they consent to disclose such information in the public interest.

Judgment

The High Court had to deliberate on the reasons for blanket refusal given by the respondent if they are adequate in terms of s 25(3) of PAIA.

Interestingly it dealt with the following points –

- point *in limine* of non-joinder;
- whether the confidentiality clause incorporated into the agreement shielded the NDoH from disclosing requested information;
- prejudice to future procurement/commercial interests' consequent to disclosure of requested information; and
- whether public interest compelled the disclosure of requested information (paras 13,14 and 19).

The respondent's contention that the parties it had concluded agreements with had direct and substantial interest to the proceedings such that failure to join them rendered the application as stillborn was dismissed. The court held that s 47(1) of PAIA obliges NDoH to notify third parties of the request and invite them to make representations in terms of s 48(1) of the Act. Resultantly, the NDoH failed to discharge the burden of proof of representations from third parties (paras 21, 23 and 24).

It held further that since information was disclosed in confidence by the Minister of Finance to the Parliamentary Portfolio Committee on Health, the basis of refusal by the NDoH was found to be without merit (paras 30, 35 and 38). There was no probable prejudice to be suffered by the respondent in the event of disclosure. Even though the contracts were negotiated in response to an emergency plan, the public must know the terms of basis of negotiations by the state. Non-disclosure of information makes it impossible to ascertain if mandatory disclosure contemplated in s 46 of PAIA applies. If it does, it disregards the oversight function of the courts (paras 43, 48 and 49.3)

Comment

Section 32(1) of the Constitution guarantees everyone's right of access to information held by the state or another person when such information is required for the exercise or protection of any rights. PAIA was enacted in terms of s 32(2) of the Constitution to give effect to the right of access to information. It sets out the application of the Act, manner of access to information and the grounds that a party can rely on to refuse access to information or records.

The case addressed several crucial issues such as state's blanket refusal to provide requested information in terms of PAIA that gives effect to the constitutional right of access to information held by the state. It is the HJI's constitutional victory that was previously confirmed in *Brummer v Minister for Social Development and Others* 2009 (6) SA 323 (CC) that access to information is the crucial right to freedom of expression that includes the right of access to receive or impart information or ideas (paras 62 and 63).

The state's refusal to disclose requested information without adequate reasons in terms of s 25(3) of PAIA is indicative of the secretive and unresponsive culture in public and private bodies, and contrary to the purpose of PAIA. The court referred to ss 195(1) and 217(1) of the Constitution that 'public administration must be governed by the democratic values and principles enshrined in the Constitution', that is, maintain and promote a high standard of professional ethics. That is, every organ of state that contracts for goods and services is bound to 'do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective'.

The HJI presented a compelling argument that the state cannot use the confidentiality clause to circumvent the obligation to account and be transparent to the public. Non-disclosure of information or records by the state is mischievous to the spirit of the Constitution and what PAIA seeks to address (paras 33 and 49.2). The fact that NDoH reported to Parliament that the vaccine manufacturer insisted on far reaching indemnities and establishment of a vaccine injury fund, during negotiations was misleading considering that many lives were lost daily to the COVID-19 pandemic. In *De Lange and Another v Eskom Holdings Ltd and Others* 2012 (1) SA 280 (GSJ) the court remarked that a party that intends to rely on a confidentiality clause to withhold disclosure is expected to show the nature of the confidence, aspects of the agreement covered by the duty of confidence and whether the duty contains any exceptions under s 37(1)(*a*) of PAIA or pursuant to a court order (para 128). The NDoH failed to discharge the burden of proof that disclosure of confidential information would constitute an action of breach of duty of confidence owed to the third party.

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By Sydwell Sibongile Mketsu

Revolutionising refugee rights: The impact of the *Gavrić* ruling on s 4(1) of the Refugee Act

Gavrić v Refugee Status Determination Officer, Cape Town and Others (People against Suppression, Suffering, Oppression and Poverty as Amicus Curiae*)* 2019 (1) BCLR 1 (CC)

In a landmark decision, the case of *Gavrić* has brought about a pivotal transformation in the interpretation of s 4(1) of the Refugees Act 130 of 1998. This section, a crucial component of the Act, delineates the grounds on which applications for refugee status can be excluded, primarily focusing on individuals who have committed certain serious crimes. Until this groundbreaking ruling, decisions made under this clause were unassailable, leaving many asylum seekers without a legal recourse to appeal.

Background

South Africa (SA), with its robust constitution that champions human rights and constitutional values, has been a haven for numerous individuals seeking refuge from persecution and violence. The Refugees Act has been a foundational legislation, outlining the rights, obligations, and processes related to asylum seekers. However, the non-appealable nature of decisions under s 4(1) has been a contentious point, leaving many asylum seekers in a state of legal uncertainty and despair.

The historical context of refugee laws in SA and comparative analysis with international standards

• Historical Context of Refugee Laws in South Africa

South Africa's history with refugee laws is deeply intertwined with its tumultuous past marked by Apartheid and its transition to democracy. The post-apartheid era saw the country grappling with its legacy and striving to establish a legal framework that aligns with its newfound democratic values and human rights commitments.

The Refugees Act is a landmark piece of legislation that marked the country's commitment to protecting those fleeing persecution. It was enacted to affirm the country's adherence to international conventions and its resolve to uphold the rights of refugees and asylum seekers. The Act outlines the rights, obligations, and processes related to asylum seekers and is pivotal in determining who qualifies for refugee status in SA.

• International Refugee Law Standards

Internationally, the 1951 Convention relating to the Status of Refugees and its 1967 Protocol relating to the Status of Refugees are the cornerstone of refugee protection, outlining the rights of refugees and the obligations of states to protect them. The principles of non-refoulement, prohibiting the return of refugees to places where they face persecution, and the right to seek asylum are fundamental tenets of international refugee law.

• Comparative analysis

– **Adherence to international standards:** South Africa's Refugees Act is largely in conformity with international standards, particularly the 1951 Refugee Convention. It incorporates the definition of a refugee as per the Convention and adheres to the principle of non-refoulement.

– **Grounds for exclusion:** Both international standards and South African law provide grounds for excluding individuals from refugee status, particularly those who have committed serious crimes. Section 4(1) of the Refugees Act delineates these exclusion grounds, similar to Article 1F of the 1951 Refugee Convention.

– **Appeal rights:** The recent landmark rulings in South Africa, confirming the appealability of decisions under s 4(1) of the Refugees Act, have strengthened the alignment with international standards. The right to a fair trial and effective remedy are integral to international human rights law, and the enhancement of appeal rights in SA is a significant step in fortifying these rights for asylum seekers.

– **Detention and deportation:** South Africa, like many other countries, faces challenges related to the detention and deportation of asylum seekers. The international standards emphasise the importance of ensuring that detention is a measure of last resort and that the rights of detainees are respected. South Africa's approach to detention and deportation has been a subject of scrutiny and calls for reforms to ensure compliance with international norms.

– **Integration and resettlement:** South Africa has adopted a more integrative approach to refugees, allowing them to live in urban areas and access basic services. This contrasts with the encampment policies of some countries and aligns with international recommendations promoting the social and economic integration of refugees.

– **Xenophobia and social cohesion:** South Africa has experienced challenges related to xenophobia and social cohesion. The international community emphasises the importance of fostering mutual understanding and tolerance between refugees and host communities. South Africa's efforts to address xenophobia and promote social cohesion are crucial in creating an inclusive and harmonious society.

The historical context of refugee laws in SA is reflective of the country's journey from its Apartheid past to a democratic nation committed to human rights. The Refugees Act, while largely aligned with international refugee law standards, has undergone significant developments, particularly in enhancing appeal rights, to strengthen its compliance with international norms. The ongoing efforts to address challenges related to detention, deporta-

tion, xenophobia, and social cohesion are pivotal in shaping a more inclusive and equitable refugee protection framework in SA.

The comparative analysis with international standards reveals a dynamic interplay between national legislation and international norms, highlighting the continual evolution of refugee laws in response to emerging challenges and changing needs. The convergence of South African law with international standards underscores the universal commitment to protecting the rights and dignity of refugees and asylum seekers, fostering a global solidarity in upholding the principles of justice, equality, and human rights.

The *Gavrić* case

The case of Dobrosav Gavrić emerged as a beacon of hope amid this backdrop of legal complexities. Gavrić, the applicant, found himself entangled in the intricate web of legal procedures after his application for refugee status was excluded under s 4(1) of the Refugees Act. The absence of a legal avenue to challenge the decision meant that Gavrić, like many before him, was left facing the grim prospect of deportation.

The landmark ruling

The Constitutional Court, in a historic judgment, altered this scenario by confirming the appealability of decisions made under s 4(1) of the Refugees Act. This development is not just a procedural enhancement; it is a monumental stride towards reinforcing the principles of justice, equality, and human rights enshrined in the South African Constitution. It reaffirms SA's commitment to protecting the rights of the vulnerable and fortifies the nation's adherence to the rule of law and due process.

Implications on asylum seekers

This ruling has profound implications for countless asylum seekers, allowing them the opportunity to challenge and appeal decisions that could have life-altering consequences. It ensures a fairer and more equitable legal process, providing a platform for the voices of asylum seekers to be heard and their rights to be adequately considered. The ability to appeal decisions under s 4(1) means that each case will be examined meticulously, ensuring that justice is not compromised.

Reflection on constitutional values

The judgment in Gavrić's case is a reflection of SA's enduring constitutional values. It underscores the significance of upholding constitutional and human rights, shedding light on the intricate layers of legal and ethical considerations involved in refugee protection. It offers a platform for enriched dialogue and reflection on the foundational values that guide the nation's approach to asylum seekers and refugees, emphasising the importance of maintaining a balance between national security and individual rights.

International perspective

From an international perspective, this ruling aligns South Africa with global standards on refugee protection. It reinforces the principles of non-refoulement and the right to a fair trial, which are fundamental to international refugee law. It also reflects South Africa's commitment to its international obligations and its cooperation with international organisations and bodies working towards the protection of refugees.

Public sentiment and societal impact

The societal impact of this ruling is immense, influencing public sentiment and societal attitudes towards asylum seekers and refugees. It fosters a more inclusive and compassionate society, addressing underlying tensions and challenges related to migration, unemployment, and social inequality. It contributes to fostering social cohesion and mutual understanding between South African citizens and the asylum-seeking population.

Conclusion

The ruling in *Gavrić* is a watershed moment in the legal history of South Africa. It illuminates the path to justice for those seeking refuge and accentuates the enduring commitment to human rights and equitable legal processes in the country. This development is a beacon of hope for many, emphasising the resilience and evolution of justice in SA. It is a testament to the strength and adaptability of SA's legal system and its unwavering resolve to uphold the values of justice, equality, and human dignity.

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By Prof Arthur van Coller

Collective liability: Does the financial misconduct of one director of a law firm invoke liability of all directors?

Limpopo Provincial Council of the South African Legal Practice Council v Chueu Incorporated Attorneys and Others (SCA) (unreported case no 459/22, 26-7-2023) (Nicholls JA (Saldulker and Carelse JJA and Nhlangulela and Mali AJJA concurring))

Swift, in Gulliver's Travels, stated that a 'lawyer must proceed with great caution, or else he will be reprimanded by the judges, and abhorred by his brethren, as one that would lessen the practice of the law' (Jonathan Swift *Gulliver's Travels* (London: Jones and Company 1826) at 138). As predicted by Swift, the judiciary has consistently voiced its disapproval of the numerous instances of harmful and unethical conduct by legal practitioners. Another such instance wherein the Limpopo Provincial Council of the Legal Practice Council (LPC) referred to legal practitioners implicated in misconduct as 'thug-like practitioners, who continue to engage in subterfuge, whilst obfuscating and detracting everyone's attention from the fact that they have grossly brought the profession into disrepute through their unlawful thieving conduct' was recently reported in a judgment by the Supreme Court of Appeal (SCA) (*Limpopo Provincial Council of the South African Legal Practice Council v Chueu Incorporated Attorneys and Others*). The SCA was specifically requested to consider whether the financial misconduct allegedly committed by one director (the second respondent) of a law firm implicates the other directors (the directors) in their fiduciary duty towards the firm.

The Provincial Council of the LPC received and investigated several complaints against the firm and found evidence of non-payment of funds due to clients, dishonest and irregular conduct on the part of a trust practitioner concerning the handling of trust monies and the appropriation of an erroneous payment to the firm. The Investigating Committee of the LPC formulated 26 charges against all the firm's directors and duly scheduled a disciplinary hearing. However, the directors were absent from the hearing. As a result, the LPC launched an urgent application in terms of s 43 of the Legal Practice Act 28 of 2014 (LPA) in the Limpopo Division of the High Court, Polokwane, for the suspension of the directors pending the conclusion of a disciplinary inquiry by the LPC. The directors, many of whom had resigned at this stage, opposed the application because their shareholding, if any, was minor, and the second respondent managed the firm's finances. The directors further raised some points regarding the requirements of an interim interdict and the authority of the Limpopo LPC Chairperson to act.

The High Court, relying on *Griffiths and Inglis (Pty) Ltd v Southern Cape Blasters (Pty) Ltd* 1972 (4) SA 249 (C), found no evidence that the LPC Council authorised the institution of proceedings and upheld the point *in limine*. Nonetheless, the High Court proceeded to consider the merits of the matter as its finalisation was considered to be in the interests of justice. The High Court thus inquired whether the offending conduct was proven on a balance of probabilities, whether the directors were fit and proper persons and whether they should be suspended or struck from the roll. The High Court reasoned that the threshold of the factual inquiry had not been met as the suspension of the directors was basically sought just because they were directors at some point. Nonetheless, an order was granted by agreement, suspending the second director only. The LPC then sought leave to appeal the order as it related to the directors, and eventually, special leave to appeal was granted by the High Court.

The SCA referred to precedent on a challenge to the authority of a litigant to institute proceedings. A litigant who challenges a person's authority to act must use rule 7(1) of the Uniform Rules of Court (*Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA)). Any resolution or other document proving authority will thus suffice to prove the necessary authority to act. The SCA then considered the liability of the directors. Section 34(7)(*c*)(i)-(ii) of the LPA stipulates that directors are jointly and severally liable, together with the commercial juristic entity, for debts, liabilities and theft incurred or committed during their period of office. The SCA further commented that directors have a fiduciary duty towards the company, and ignorance of financial matters does not absolve a director. A legal practitioner who claims no involvement in the firm's financial affairs when accused of misconduct has 'no defence at all' (*Hepple and Others v Law Society of the Northern Provinces* [2014] 3 All SA 408 (SCA) at para 21). Legal practitioners have a fundamental duty 'to ensure that the books of the firm are properly kept, [and] that there are sufficient funds at all times to meet the trust account claims' (*Incorporated Law Society, Transvaal v K and Others* [1959] 2 All SA 24 (T) at 29).

The SCA further reasoned that the inquiry whether a legal practitioner is 'fit and proper' should be undertaken only when final relief is sought. The initial question was whether sufficient facts existed to justify an interim suspension. The SCA found that the offending conduct concerning the firm's financial affairs had been adequately established, and some directors were, on their own versions, in dereliction of their duties. The SCA thus, in a unanimous judgment, set aside the High Court order and suspended the directors from practicing for six months, pending the finalisation of investigations into their conduct. The SCA also ordered the appointment of a *curator bonis* to administer and control the trust accounts of the directors. The directors were held liable to, jointly and severally, pay the reasonable costs of the inspection of the accounting records, the reasonable fees and expenses of the auditor and curator engaged by the LPC and the expenses relating to the publication of the court order. In addition, the directors were ordered to pay the costs of the application, jointly and severally, the one paying the other to be absolved.

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By Shanay Sewbalas and Keagan Smith

New legislation

Legislation published from 2 October – 3 November 2023

Acts

Customs and Excise Act 91 of 1964
Amendment to part 1 of sch 1: GN R4008 *GG*49557/27-10-2023.
National Qualifications Framework Amendment Act 12 of 2019
Date commencement: 13 October 2023. Except ss 1(*h*), 3(3) and 32A(1). Proc 139 *GG*49501/13-10-2023.

Bills and White Papers

Division of Revenue Act 5 of 2023
Notice of introduction in the National Assembly of the Division of Revenue Amendment Bill for 2023/24 financial year and publication of the explanatory summary of the Bill. GN 3990 *GG*49550/24-10-2023.
National Ports Act Amendment Bill
Withdrawal of public participation process on the pre-draft National Ports Act Amendment Bill published in *GG*49220/1-9-2023. GenN2074 *GG*49450/9-10-2023.
Pension Funds Act 24 of 1956
Notice of introduction in the National Assembly of the Pension Funds Amendment Bill and publication of the explanatory summary of the Bill. GN4009 *GG*49558/26-10-2023.
South African Broadcasting Corporation (SABC) SOC Ltd Bill, 2023
Notice of introduction of the Bill into Parliament. GN3929 *GG*49391/2-10-2023.
South African Revenue Service
Tax Administration Laws Amendment Bill, 2023: Publication of the explanatory summary of the Bill. GN4011 *GG*49576/27-10-2023.
Statistics Act 6 of 1999
Statistics Amendment Bill B00-2023. GN3944 *GG*49407/6-10-2023.
The Local Government
Municipal Structures Amendment Bill, 2023 for public comment. GN3977 *GG*49518/20-10-2023.
The Local Government: Municipal Structures Second Amendment Bill, 2023
The publication of a draft Bill for comment. GN4030 *GG*49603/3-11-2023.
The Preferential Procurement Policy Framework Amendment Bill, 2023
Publication for comment. GN3978 *GG*49518/20-10-2023.

Government, General and Board Notices

2030 National Development Plan and the National Tourism Sector Strategy
Tourism Sector Masterplan. GenN2092 *GG*49503/13-10-2023.
Agricultural Product Standards Act 119 of 1990
Registration of Karoo Lamb/Karoo Lam as a South African Geographical Indication. GN3992 *GG*49556/27-10-2023.
Broad-Based Black Economic Empowerment Act 53 of 2003
The procedures for the application, administration and allocation of export quotas under the Economic Partnership Agreement between the European Union and Southern African Development Community for 2024. GN4020 *GG*49588/31-10-2023.
The procedures for the application, administration and allocation of export quotas under the Economic Partnership Agreement between the United Kingdom of Great Britain and Northern Ireland, of the One Part, and the Southern African Customs Union Member States and Mozambique, of the Other Part, for 2024. GN4023 *GG*49590/1-11-2023.
The application for market access permits for agricultural products in terms of the World Trade Organisation Agreement for 2024. GN4024 *GG*49591/2-11-2023.
Civil Aviation Act 13 of 2009
Ministerial order regarding administrative support to the Air Services Licensing Council and the International Air Services Council. GenN2078 GG49454/10-10-2023.
Companies Act 71 of 2008
Companies and Intellectual Property Commission. GN4002 *GG*49556/27-10-2023.
Companies and Intellectual Property Commission
Practice Note 4 of 2023: Filing of documents and the process of challenge. GN4032 *GG*49603/3-11-2023.
Compensation for Occupational Injuries and Diseases Act 130 of 1993
Confirmation of Life for All Foreign Pensioners and Beneficiaries in the Compensation Fund. GN3930 *GG*49398/2-10-2023.
Cybercrimes Act 19 of 2020
Notice of publication for general information: Standard operating procedures in terms of s 26 of the Act, for the investigation, search, access or seizure of articles. GN3950 *GG*49447/6-10-2023.
Declared Cultural Institutions Act 119 of 2001
Transfer of the Madiba House as an immovable asset of the Iziko Museums of South Africa in terms of s 9(2) and (3) of the Act. GN3948 *GG*49439/5-10-2023.
Electoral Act 73 of 1998
Publication of reviewed lists of candidates. GenN2097 *GG*49540/20-10-2023.
Publication of reviewed lists of candidates. GenN2098 *GG*49540/20-10-2023.
Electronic Communications Act 36 of 2005
Application for the transfer of ownership of the Individual Electronic Communications Network Service Licence and Individual Electronic Communications Service from Epilite 102 CC to Kyrascene (Pty) Ltd. GenN2083 *GG*49464/11-10-2023.
Notice regarding Final Radio Frequency Spectrum Assignment Plan for the IMT900 band in terms of regulation 3 of the Radio Frequency Spectrum Regulations, 2015. GN3999 *GG*49556/27-10-2023.
Notice to amend various radio frequency spectrum licences in the frequency bands 880 MHZ to 915 MHZ and 925 MHZ for the implementation of the final radio frequency spectrum assignment plan for the IMT 850 frequency band. GN4000 *GG*49556/27-10-2023.
Financial Markets Act 19 of 2012
Approved amendments to the Johannesburg Stock Exchange (JSE) Listing Requirements and the JSE Debt Listing Requirements: Accreditation of auditors. BN505 *GG*49603/3-11-2023.
Financial Surveillance Department of the South African Reserve Bank
Appointment of a restricted authorised dealer in foreign exchange. GenN2091 *GG*49502/13-10-2023.
Higher Education Act 101 of 1997
Appointment of an Administrator for the University of South Africa. GN4015 *GG*49582/27-10-2023.
Immigration Act 13 of 2002
Sections 19(4), read with regulations

18(1), (5) and (6): Critical Skills List. GN R3934 *GG*49402/3-10-2023.

Income Tax Act 58 of 1962

Section 12I Tax Allowance Programme: Air Liquide Large Industries (Pty) Ltd. GN4001 *GG*49556/27-10-2023.

Interim Protection of Informal Land Rights Act 31 of 1996

The extension of the application of the provisions of the Act. GN4026 *GG*49603/3-11-2023.

Labour Relations Act 66 of 1995

Furniture Bargaining Council: Extension to Non-Parties of the Main Collective Amending Agreement. GN R4026 *GG*49596/3-11-2023.

Local Government: Municipal Electoral Act 27 of 2000

Municipal By-elections – 22 November 2023: Official list of voting stations. GenN2117 *GG*49599/3-11-2023.

Municipal By-elections – 15 November 2023: Official list of voting stations. GenN2108 *GG*49580/27-10-2023.

Municipal By-elections – 8 November 2023: Official list of voting stations. GenN2096 *GG*49518/20-10-2023.

Municipal By-elections – 25 October 2023: Official list of voting stations. GenN2071 *GG*49446/6-10-2023.

Local Government: Municipal Property Rates Amendment Act 29 of 2014

Appointment of members of the Valuation Appeal Board for City of Johannesburg Metropolitan and Merafong City Local Municipalities. GenN2105 *GG*49555/25-10-2023.

Marketing of Agricultural Products Act 47 of 1996

Establishment of statutory measure: Records and returns relating to trees as well as production and marketing information of plums and prunes, nectarines and peaches, apricots, apples and pears. GN R3940 *GG*49405/6-10-2023.

Establishment of statutory measure: Registration of producers, exporters, municipal markets and traders of plums and prunes, peaches and nectarines, apricots, apples and pears and processors of apple concentrate and packers/processors of dried fruit. GN R3941 *GG*49405/6-10-2023.

National Environmental Management: Waste Act 59 of 2008

Determination of the licensing authority for the different classes of landfills. GN3968 *GG*49511/17-10-2023.

National Water Act 36 of 1998

Transformation of Gamtoos Irrigation Board into Gamtoos Water user Association in terms of s 92(1) of the Act. GN3947 *GG*49407/6-10-2023.

Transformation of Karkloof Irrigation Board into Karkloof Water User Association in terms of s 98(6) of the Act. GN3981 *GG*49518/20-10-2023.

Transformation of Ngwagwane Irrigation Board into Ngwagwane Water User Association in terms of s 98(6) of the Act. GN3982 *GG*49518/20-10-2023.

Disestablishment of Hoeko Irrigation Board in Western Cape Province. GN3983 *GG*49518/20-10-2023.

Political Party Funding Act 6 of 2018

Multi-Party Democracy Fund. GenN2089 *GG*49499/13-10-2023.

Statistics South Africa

Consumer Price Index Rate: September 2023. GenN2157 *GG*49603/3-11-2023.

Consumer Price Index: August 2023. GenN2062 *GG*49407/6-10-2023.

The South African Roads Agency Limited and National Roads Act 7 of 1998

Declaration of existing Provincial Roads P18 Section 5, P18 Section 6, P18 Section 7 and P18 Section 8 as National Road R26 – District of Thabo Mofutsanyane in the Province of the Free State. GN4014 *GG*49578/27-10-2023.

Use of Official Languages Act 12 of 2012

Section 12(1) of the Act: Minister's notice of exemption of iSimangaliso Wetland Park Authority. GN3980 *GG*49518/20-10-2023.

Wine and Spirit Board: Wine of Origin Scheme

Defining of production area Keeromsberg. BN 485 *GG*49556/27-10-2023.

Defining of production area North West. BN 486 *GG*49556/27-10-2023.

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Establishment of statutory measure and determination of levies on peaches and nectarines. GN R3937 *GG*49405/6-10-2023.

Establishment of statutory measure and determination of levies on pears. GN R3938 *GG*49405/6-10-2023.

Establishment of statutory measure and determination of levies on plums (including interspecific plums) and prunes. GN R3939 *GG*49405/6-10-2023.

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Amendment of the regulations in respect of petroleum products. GN R3933 *GG*49401/3-10-2023.

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The amendment of the regulations in respect of petroleum products. GN R4018 *GG*49587/31-10-2023.

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Proposed amendments to the A2X Listing Requirements: Structured products and special securities. BN504 *GG*49603/3-11-2023.

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Consultation on the Draft Amendments to the Waste Tyre Regulations, 2017. GN3952 *GG*49456/10-10-2023.

Consultation on the proposed amendments to the regulations regarding the control of the import or export of waste. GN3928 *GG*49390/2-10-2023.

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Western Cape Provincial Regulatory Entity: Notice of intention to review operating licence conditions. GenN2077 *GG*49453/10-10-2023.

Western Cape Provincial Regulatory Entity: Notice of intention to review operating licence conditions: Notice period 13-20 October 2023. GenN2085 *GG*49471/11-10-2023.

Western Cape Provincial Regulatory Entity: Notice of intention to review operating licence conditions. GenN288 *GG*49403/3-10-2023.

Western Cape Provincial Regulatory Entity: Notice of intention to review operating licence conditions. GenN2066 *GG*49440/4-10-2023.

Western Cape Provincial Regulatory Entity: Notice of intention to review operating licence conditions. GenN2067 *GG*49441/5-10-2023.

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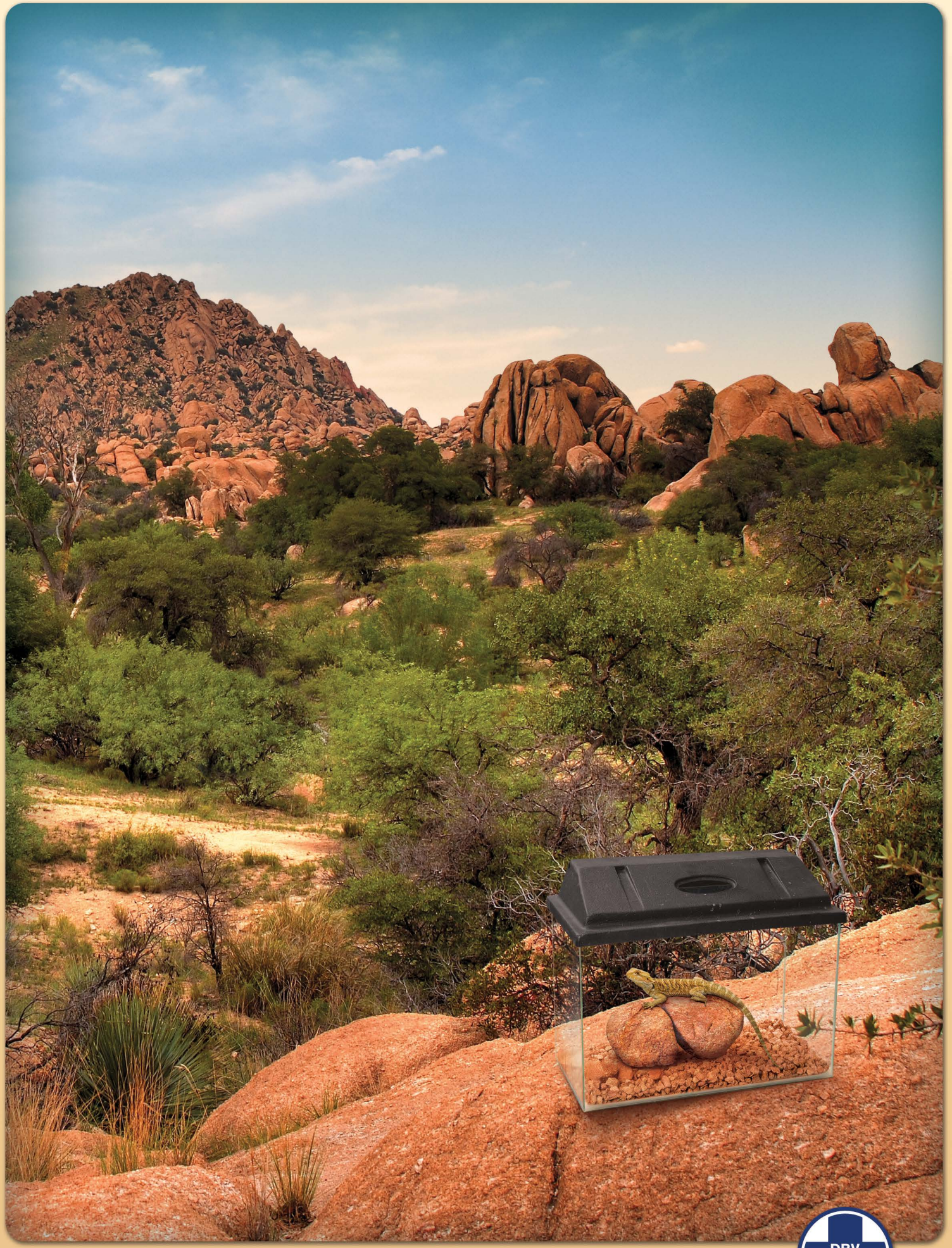
Shanay Sewbalas and Keagan Smith are Editors: National Legislation at LexisNexis South Africa.



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Employment law update

By Monique Jefferson

Testing positive for marijuana in the workplace

In *Marasi v Petroleum Oil and Gas Corporation of South Africa (SOC) Ltd* [2023] 10 BLLR 1043 (LC), the employee was denied entry to the workplace after he was tested for marijuana and his test was in excess of the tolerance level in the employer's substance abuse policy. The employee alleged that the marijuana was taken because he had attended a traditional healing course that involved using marijuana. He alleged that his denial of access to the workplace amounted to suspension and that this constituted unfair discrimination on the basis of culture. He also alleged that the substance abuse policy was outdated because it was implemented prior to the Constitutional Court decision in *Minister of Justice and Constitutional Development and Others v Prince and Others* 2018 (6) SA 393 (CC); 2018 (10) BCLR 1220 (CC) in terms of which the use, possession, and cultivation of cannabis by adults for private use was decriminalised. The employee went on paid annual leave and sick leave during the period that he was not permitted to attend the workplace and was eventually able to return to work after about three months. This was once he tested within the parameters of the substance abuse policy.

After returning to work he referred a dispute alleging that he had been suspended during this period and was unfairly discriminated against. The Commission for Conciliation, Mediation and Arbitration lacked jurisdiction as the employee earned above the prescribed annual earnings threshold and the matter was then referred to the Labour Court (LC). The employee claimed three months' remuneration as compensation, as well as damages of R 250 000 for impairment of dignity, distress, and past medical expenses. In addition, he sought an order that the employer's alcohol and substance abuse policy be reviewed.

The employer alleged that the employee was not on suspension and raised the defence that it is an inherent requirement of the job that the employee not be intoxicated by marijuana as the workplace is a chemical factory. According to the employer the employee had still been permitted to attend the traditional healer's course despite the fact that it involved cannabis. The employer, however, alleged that the right of the employee to practice his culture and use marijuana in private could not trump the employer's health and safety policies, particularly because it had an obligation as an employer to maintain a safe working environment. Given the fact that the employer's business involved the exploration and production of oil and gas there was a need for strict requirements that had to be adhered to in order to ensure the health and safety of all employees.

The LC had to consider whether testing below the limits set out in the employer's substance abuse policy was in fact an inherent requirement of the job for employees in a chemical plant and found that it was an inherent requirement of the job and, therefore, this was a complete defence to a discrimination claim. It was remarked that although the employee felt that his dignity had been impaired whether or not there was discrimination does not depend on the subjective feelings of the complainant. It was also held that the fact that the use of substance is legal does not detract from a test based on its effect.

The employee also alleged that there was an unfair labour practice, but it was held that excluding the employee from the workplace for testing positive for marijuana was not a suspension. It was found that the employee had simply been prevented from attending the workplace until his marijuana levels were at an acceptable level as per the policy. Furthermore, it was held that the employer had taken sufficient steps to reasonably accommodate the employee while he was attending his course as he had been allowed to move to Mossel Bay. His request to work from home was also considered but could not be accommodated because his role required him to be present to assist with boardrooms and meeting rooms and was also 50% client facing.

The application was dismissed.

Dismissal for testing positive for alcohol at the workplace

In *Pioneer Foods (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* [2023] 10 BLLR 1063 (LC) an employee was dismissed for misconduct after reporting for duty under the influence of alcohol. The employee had already received two final written warnings for testing positive in terms of a breathalyser test. The employee had pleaded guilty to the charge at the disciplinary hearing although he had alleged at the arbitration that he should have instead been charged for leaving work without permission. This was because he had tested positive after undergoing an initial screening test, but he then left work before a second test could be carried out.

The commissioner found that dismissal was too harsh in the circumstances and ordered reemployment.

The matter was then referred to the Labour Court (LC) for review by the employer and the LC had to determine whether the arbitrator had committed a material error that resulted in the award being unreasonable. There were a number of facts that were not in dispute such as the fact that there was a workplace rule regarding testing positive for alcohol in the workplace and the employee was well aware of this rule as demonstrated by the fact that the employee had received previous warnings for the same misconduct. The employee also did not dispute that he tested positive that day although he left the premises before the second part of the test was conducted, allegedly to attend to an emergency. Furthermore, the employee admitted to the charge of being under the influence of alcohol during the disciplinary inquiry.

The LC found that the commissioner had ignored the evidence that the employee had pleaded guilty to the charge and incorrectly found that the employer needed to lead evidence that the employee was unable to perform the work even though this was not the subject of the charge. The commissioner also did not consider the two final written warnings that the employee had on file.

It was accordingly held that the decision by the commissioner was not reasonable as critical evidence had not been considered. The award was accordingly set aside.

Test to be applied for s 197 transfer

In *Mobile Telephone Networks (Pty) Ltd and Others v CCI SA (Umhlanga) (Pty) Ltd*

and Others [2023] 10 BLLR 1006 (LAC) it had to be determined whether s 197 of the Labour Relations Act 66 of 1995 applied in circumstances where a contract came to an end with one service provider but the services of two subcontractors of that service provider continued to be used.

In this case an entity, CCI, was engaged by another entity, MTN, to provide call centre services. These services were provided for about five years and then the contract lapsed. CCI also subcontracted part of the service to two other companies during the term of the contract. When the contract lapsed some of the calls that had been allocated to CCI were redirected to these two subcontracting companies. Forty five employees of CCI resigned and joined one of the subcontractors. The other subcontractor recruited about 270 employees to manage the increase in workflow. CCI then instituted an urgent application alleging that all its employees who had worked on the MTN contract had transferred to MTN and the two subcontractors.

The Labour Court remarked that whether or not there is a transfer of a business as a going concern requires a factual analysis. What is critical is whether the business that is alleged to have transferred has retained its identity. Other critical factors are –

- whether the components of the old business remain discernible after the transfer;
- whether these assets of the old business changed hands;
- whether a significant number of the old employer's workforce transferred to the new business; and
- what influence the agreement between the principal and initial 'outsourcee' had on the circumstances of the alleged transfer.

It was held that s 197 does not guarantee protection of jobs as there needs to be a discrete business in the hands of the old employer that transfers as a going concern to the new employer and is recognisable in the hands of the new employer. The Labour Appeal Court held that the test to be applied to determine whether there has been a transfer of a business as a going concern is a factual test as opposed to a moral test and is not based on fairness to the employees.

On the facts it was found that there was a discrete MTN business in the hands of CCI but when the contract with MTN lapsed, CCI's relationship with MTN also ended. It was found that the significant asset of CCI was the contractual entitlement to perform the call centre services for MTN. When this contract came to an end the two subcontractors received more work from MTN and CCI became redundant. It was found that s 197 was potentially triggered because of this additional work taken up by the subcontractors and not the actual lapse of the CCI contract. It was found, however, that just because the same service was now being carried out was not sufficient to trigger s 197 and it ultimately depended on whether the CCI/MTN business unit transferred.

It was held that s 197 did not apply as the calls that were redirected to CCI were now being redirected to the two subcontractors that already performed this service. The subcontractors, therefore, did not require a transfer of equipment or assets to perform this service as they had already been carrying out the service before the lapse of the CCI contract. Therefore, CCI's return of certain equipment and historical call records to MTN was not necessary for the subcontractors to perform the service and was in fact not provided to the subcontractors. Section 197 accordingly did not apply.

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

By Moksha Naidoo

A 'record' breaking judgment

Van Straaten v Wehnke NO and Others (LC) (unreported case no JR1876/21, 12-9-2023) (Moshoana J).

In terms of r 7A(6) of the Rules for the conduct of proceedings in the Labour Court (Labour Court Rules), an applicant to a review application is obliged to furnish the registrar and any other party, a copy of the record or a portion of the record, which the applicant relies on in furthering his or her review application.

Rule 7A(7) states:

'The costs of transcription of the record, copying and delivery of the record and reasons, if any, must be paid by the applicant and then become costs in the cause.'

The question before the Labour Court (LC) was whether an applicant, who received the digital record from the registrar of the LC in terms of r 7A(5), could, without paying for a professional transcriber to transcribe the record; transcribe the record themselves, serve and file same for purposes of furthering their review application.

The applicant Mr van Straaten (van Straaten) sought to review an arbitration award, concluded under the auspices of the Commission for Conciliation, Mediation and Arbitration (CCMA), wherein it was found that his dismissal was both substantively and procedurally fair.

Having received the digital record from the registrar, van Straaten transcribed the record himself, served and filed the transcribed record and thereafter filed a supplementary affidavit in accordance with the rules.

Although the review application was not initially opposed, the employer entered a notice to oppose and thereafter brought a r 11 application seeking an order, among others, that:

- The applicant be directed to have the record transcribed by a professional transcriber, who attests to the veracity to the transcription and delivers a certificate of authenticity.
- The record remains incomplete until the applicant complies with the above and once the applicant does so, the respondent will have ten days in which to file its answering affidavit.

The interlocutory was set down for hearing.

The court noted that the question before it, had to be assessed within the prism of s 34 of the Constitution, the advancement of social justice, as outlined in the preamble of the Constitution and s 1 and s 3 of the Labour Relations Act 66 of 1995 (LRA), which states that the LRA must be interpreted so as to get effect to the right to fair labour practice.

The court observed that r 7A(7) is identical to r 53(3) of the Uniform Rules of Court, hence turned to DE van Loggerenberg *Erasmus: Superior Court Practice* (Cape Town: Juta), wherein it was stated that –

- the rule was developed for the benefit of an applicant under circumstances where he or she does not have all the evidence at their disposal; and

- secondly, there is nothing which prevents a respondent from placing the record or parts of the record before court simply because the applicant has not done so.

Turning to the advancement of social justice, the court found that on the employer's interpretation of r 7A(7), an applicant could lose its automatic right to review an unfavourable award, if he or she is not in a position to meet the high costs associated with professional transcribers.

In this case, van Straaten's offer to provide the employed with the digital disc to confirm the accuracy of his transcript, was rejected by the employer for 'unsatisfactory' reasons, according to the court.

In pursuing its argument, the employer relied on the judgment in *Osho Steel (Pty) Ltd v Ngobeni NO and Others* (2020) 41 ILJ 476 (LC), wherein that matter the court held:

'In the end however, it would lead to an untenable position for the court and the parties to a dispute, where unofficial transcribed records are simply filed and served, when there are clear rules governing that process.'

The court distinguished the facts before it, to that which served before the court in *Osho*. In the latter case, the applicant did not receive a digital copy of the record from the registrar – the applicant simply transcribed a digital recording which she had recorded. *In casu*, van Straaten transcribed a digital record given to him by the registrar of the LC. Thus, the dispute in *Osho* turned on an interpretation of the subrule dealing with the dispatching of the record, whereas on the facts before it, the parties *in casu* were addressing the subrule pertaining to the payment of the transcribed record.

As to van Straaten's right to a fair hearing as per s 34 of the Constitution; the court found that if the interpretation of r 7A(7) was to mean that a transcribed record can only be achieved through the expensive way of instructing a transcriber to transcribe the record; then such an interpretation would unduly limit van Straaten's right in terms of s 34.

On the correct interpretation of r 7A(7), the court found that as the LRA in an enabling legislation to the right of fair labour practice, a review contemplated in s 145 of the LRA, is effectively one exercising their right to fair labour practice. Therefore, the subrule must be afforded an interpretation, which is the least restrictive on the constitutional guaranteed right. In adopting the purposive interpretation, the court found that any transcribed record, irrespective of its creation, satisfied the record for purposes of r 7A(7). This, however, does not prevent the respondent from challenging the authenticity of the record, by transcribing the same digital record through a professional transcriber and placing that record before the court.

In conclusion the court held:

'In summary, a transcription produced from an electronic record provided to the registrar of the Labour Court by a body contemplated in r 7A(2)(b) of the Labour Court is sufficient irrespective of its manner of creation into a useable format. An applicant for review is the primary beneficiary of a record of review. A respondent is not barred from placing before court a record it believes to be authentic. It must be remembered that a respondent also has a duty to ensure that a proper record is placed before a court of review. The contention that because the transcript has not been generated by a professional transcriber, then an incomplete record has been availed is not only against the principles discussed in this judgment, it is preposterous to the extreme. A transcription, irrespective of its manner of creation, completes a record of the proceedings sought to be reviewed and set aside. Accordingly, the present motion is doomed to fail.'

The application was dismissed with no order as to costs.

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

By Kathleen Kriel

Recent articles and research

Abbreviation	Title	Publisher	Volume/issue
BTCLQ	Business Tax and Company Law Quarterly	Juta	(2023) 14.3
Fundamina	Fundamina	Juta	(2023) 29.1
ITJ	Insurance and Tax Journal	LexisNexis	(2023) 38.3
JJS	Journal for Juridical Science	University of the Free State, Faculty of Law	(2023) 48.1

Colonial boundaries

Peté, SA and Swanepoel, P 'In-between black and white: Defining racial boundaries in colonial Natal at the turn of the twentieth century – part two' (2023) 29.1 *Fundamina* 53.

Corruption

Nortje, W 'Professionalising the fight against police corruption in South Africa – towards a proactive anti-corruption regime' (2023) 48.1 *JJS* 72.

Criminal Procedure Act

Van der Linde, DC 'Does the state have to provide substantiating evidence when an accused pleads guilty to drug-related charges? A discussion of *S v Paulse* 2022 (2) SACR 451 (WCC)' (2023) 48.1 *JJS* 96.

Double jeopardy

Mujuzi, JD 'The right against double jeopardy (*Non Bis in Idem*) and the drafting history of article 14(7) of the International Covenant on Civil and Political Rights, 1966' (2023) 29.1 *Fundamina* 1.

Evidence

Ntontela, M 'A courtroom misdiagnosis: A historical overview of the South African approach to evidence of persons with communication disabilities before 1996' (2023) 29.1 *Fundamina* 29.

Exchange control

Berger, R and Geldenhuys, E 'South Africa's ambiguous exchange control climate' (2023) 14.3 *BTCLQ* 15.

Foreign pension schemes

Kruger, D 'Foreign pension schemes: There be dragons, and some confusion – Part 1' (2023) 14.3 *BTCLQ* 30.

Forfeiture

Sibisi, S 'The impact of the duration of the marriage in forfeiture of patrimonial benefits: *PP v PJ* [2020] ZAGPJHC 281 (2 November 2020)' (2023) 48.1 *JJS* 145.

General anti-avoidance

Liptak, E 'Purpose requirement of the GAAR: Rethinking the "subjective" vs "objective" debate' (2023) 14.3 *BTCLQ* 1.

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Maintenance claims

Miles, T 'Circumstances under which maintenance claims may be instituted' (2023) 38.3 *ITJ*.

Marital regimes

Botha, M 'Important practical rules applicable to accrual regime marriages and marriages in community of property' (2023) 38.3 *ITJ*.
Miles, T '"Till death do us part" – know the importance of your marital regime on your estate' (2023) 38.3 *ITJ*.

Matrimonial law

Botha, M 'Accrual claim: Calculating the inflation adjusted commencement value' (2023) 38.3 *ITJ*.

Reserve bank

Van Niekerk, G 'The nationalisation of the South African Reserve Bank: A legal-historical perspective of three central banks' (2023) 29.1 *Fundamina* 80.

Risk management

Emmett, R 'Counting on insuring first party risks: The case of *Abacus Insurance Limited v the Prudential Authority*' (2023) 38.3 *ITJ*.

School governing bodies

Alexander, N 'An overview of an ombud office to enhance co-operation between School Governing Bodies and the Department of Education' (2023) 48.1 *JJS* 40.

Tax administration

Moosa, F 'Protecting the public purse with moral tax administration' (2023) 14.3 *BTCLQ* 23.

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

Do the community service regulations go far enough or are poor people losing out?

By Erica Emdon

The Department of Justice and Constitutional Development published a notice on 11 August 2023 on the rendering of community service by candidate legal practitioners and legal practitioners (Legal Practice Act 28 of 2014: Amendment of Regulations made under Section 94(1), GN R3788 *GG*49104/11-8-2023).

In the notice, the meaning of 'community service' is the one that is set out in s 29(2) of the Legal Practice Act (LPA) as –

- being service in the state;
- service at the South African Human Rights Commission (SAHRC);
- service as commissioners or judicial officers without remuneration;
- providing legal education to the Legal Practice Council (LPC), academic institutions or non-governmental organisations; or
- any other service approved by the Minister.

In addition, 'community service' is defined to include the provision of legal services at no fee or a reduced fee to 'individuals, groups or organisations seeking to secure or protect civil rights, civil liberties or public rights' or 'to charitable, religious, civic, community and educational organisations' to further their organisational purposes, where payment of standard legal fees would cause them hardship.

The regulations provide that *pro bono* services, defined as free services principally to benefit poor, underprivileged or marginalised persons or communities, are now considered to be a form of community service (ss 4A(6) and 4B(6)).

Candidate legal practitioners must render such services for at least eight hours annually and be supervised by their principal, while qualified legal practitioners must perform 40 hours of community service per annum.

On the 18 September 2023, the LPC sent a notice to legal practitioners and candidate legal practitioners alerting them to the new requirements for community service. The notice states that the LPC is currently establishing guidelines to assist.

The problem with these community service requirements is they give legal practitioners such a wide range of options to perform their community service obligations that the real purpose of community service by legal professionals is lost. The Preamble of the LPA sets the framework for creating a legal system that addresses the fact that legal service provision is skewed toward the privileged and not a reality for most South Africans. It aims to 'ensure that

legal services are accessible' and recognises that access to legal services 'is not a reality for most South Africans'.

South Africa (SA) is one of the most unequal societies in the world, and this inequality is evidenced in the vast disparity of access to justice and legal services between the rich and the poor. We have a population of about 60 million, with around 30 000 practising attorneys nationwide. This equates to approximately one lawyer for every 2 000 people in South Africa, and because most lawyers operate for profit and only serve the more affluent community in urban areas, the ratio in poorer communities is much higher. There is an enormous unmet need and a solid imperative to increase the availability of legal services for the poor in South Africa.

The South African Law Reform Commission (SALRC) identified several reasons why people requiring legal services are not accessing them in its 2021 Project 142: Investigation into Legal Fees. These included the legacy of Apartheid, an emphasis on criminal justice over civil justice in state spending, and prohibitively high legal fees that make access to the courts a privilege of the wealthy. Various academics, including Jonathan Klaaren and Theo Broodryk, have indicated that hourly rates for legal services are exorbitant and way out of reach of the majority of the population. The high costs of legal services in South Africa create significant obstacles for most citizens to access justice, exposing the inequality within the country's legal system.

While it is to be commended that the community service regulations have now been published, filling the hiatus that has existed since the promulgation of the LPA on 22 September 2014, which effectively put the *pro bono* rules on hold, since reporting and monitoring came to a standstill, they do not impose on the legal profession sufficient obligations to meet the justice needs of the poor.

Now legal practitioners have various choices they can make, as to how they render their community service. These options enable legal practitioners to provide services that are far removed from the lives of the poor. Yes, many of the institutions listed in s 29(2) and in the new regulations may indirectly help poor people, but service in those institutions does not give poor people the direct access to legal practitioners that they require.

Many legal practitioners may choose the more convenient and easy options for complying with the regulations. It is far easier to sit in one's office taking instructions by e-mail from a non-governmental organization (NGO), the LPC, a staff member at the SAHRC or an educational institution than appears in a magistrate court or attend a legal clinic. It is challenging to assist a poor person about to be evicted from their home or a refugee about to lose their right to stay in the country. It is easier to draft the Memorandum of Incorporation for a newly established church than to spend two hours taking down a statement from a woman experiencing domestic violence and assisting her in obtaining a protection order.

In 2002, a conference was held attended by the profession, including judges, politicians and other stakeholders, entitled 'The Responsibility of Lawyers in South Africa to undertake *Pro Bono Publico* and Public Interest Work', at which the concept of *pro bono* giving by the legal profession was recognised as the central way to address the disparity in access.

Pro bono publico means 'for the public good' in Latin and sees this as professional work undertaken by legal practitioners without remuneration for the poor and needy. Following the 2002 conference, the Cape Law Society, followed by the other law societies, all published *pro bono* rules, consolidated into one rule, rule 25, in 2016 that required attorneys to undertake 24 *pro bono* hours per annum (rule 25.1 of the Rules for the Attorney's Profession in GenN2 *GG*39740/26-2-2016).

Rule 25 provided that *pro bono* is legal work that includes giving advice, opinions or aiding in matters falling within the professional competence of a legal practitioner to facilitate access to justice for those unable to pay for such services. *Pro bono* services had to be provided through recognised structures, be recorded and submitted to the law society. Recognised structures included advice offices, university law clinics, NGOs and small claims courts.

While rule 25 might have complicated the matter of provision of *pro bono* services by requiring them to be rendered through recognised structures, there is much value in the *pro bono* system that it regulated. Some of the elements that enhanced access to justice for the poor should be included in the guidelines the LPC will be producing. The rendering of *pro bono* was focused on the poor and aimed to enable them to access *pro bono* services. Some law societies, for example the Law Society of the Northern Provinces (LSNP) stipulated that *pro bono* work could only be provided to those with a gross monthly income below the regulated amount, which in 2016 was R 7 000 per month.

The LSNP provided that it was permissible to undertake *pro bono* work for non-governmental or non-profit or community-based or public benefit corporate or unincorporated bodies, trusts, foundations or charities 'working for the public interest or working to secure or to protect human rights, which are mainly funded by donations' (rule 79A.1.1.4). Provision of *pro bono* services to these organisations could only be done where payment of legal fees would deplete the organisation's resources and adversely affect their ability to carry out charitable or public interest work.

Other wording of the LSNP rule that indicated the focus was on the poor stated that the *pro bono* should be 'performed on a gratuitous basis with an altruistic or philanthropic intent' and should be 'primarily designed to address the needs of persons of limited means'. Section 4A(1)(*a*)(ii) and 4B(1)(*a*)(ii) of the regulations have reproduced this sentiment.

One reason why the rule 25 was widely accepted, was because it enabled firms to allocate all the *pro bono* work in a firm to one legal practitioner (or a few). This would cumulatively equal the number of legal practitioners multiplied by 24 hours per practitioner and enabled firms to allocate *pro bono* work to specific practitioners employed to do *pro bono* work, which many of the more prominent commercial law firms were doing. Some argue that this option allows some legal practitioners never to undertake their *pro bono* obligations since in their firms, others undertake them on their behalf. This is viewed as problematic because there is an assumption that doing *pro bono* for the poor is good for the legal practitioner. If *pro bono* work aims to ensure service to the poor, and if consolidating hours results in a more effective and comprehensive service for them, then it should be considered acceptable from a pragmatic standpoint. Doing *pro bono* work has been shown to increase the psychological well-being of lawyers who benefit from stepping away from their usual high-pressure commercial work to give back and make a difference in someone's life. But the rationale for *pro bono* should be kept in focus, which is to enhance delivery to those who cannot access legal assistance.

A list of the kinds of services legal practitioners could perform as part of their *pro bono* contribution was published, and included:

- prison visits;
- plea bargaining;
- in *forma pauperis* instructions;
- work for community advice officers and university clinics;
- work for the office of the Judicial Inspectorate for Correctional Services;
- civil litigation in either the High Court or magistrate's court and criminal litigation in either of these courts;
- family law including matrimonial matters, divorce, maintenance, primary care, residence and access;
- labour law matters including appearance in the Commission for Conciliation, Mediation and Arbitration, bargaining councils, Labour Court or Labour Appeal Court; deceased estates and matters relating to these;
- insolvency including debt counselling;
- property law matters;

- constitutional matters; and
- the law of contracts.

It would be useful, if the guidelines that the LPC issues on *pro bono*, set out what work is to be regarded as *pro bono* drawn from the list above, and includes a few additional areas. There may be many areas of law to add, but some are:

- Staffing of legal clinics. Legal practitioners who staff legal clinics either at courts, in townships, or other areas accessible to the poor, should be able to count those hours as *pro bono* hours. Work at clinics generally involves giving advice, writing letters, making phone calls, and referring clients to the correct place to go and have their problems solved. Here the legal practitioner assists clients to solve their individual/family difficulties. These arise from a range of circumstances, including work, family, and consumer-related issues; land and housing-related disputes; disputes and queries relating to deceased estates; and those relating to the government, including problems related to accessing services and unfair administrative and state practice.
- Foreign migrants. Asylum seekers, refugees, and people without their documentation in order are often members of very impoverished communities and live in circumstances of extreme legal vulnerability. *Pro bono* work that assists them to regularise their status is critical.
- Alternative dispute resolution (ADR). Many disputes lend themselves to ADR and legal practitioners could assist in providing *pro bono* ADR services to resolve them.

The focus should be on providing services to individuals experiencing conflicts and problems of a legal nature in their lives. While high-impact Constitutional Court cases are important, they are generally funded by donor organisations that promote rights-based litigation. Or litigants can apply for funding from Legal Aid South Africa, which has a unit that supports these types of cases. The gap that requires filling is for the ordinary person on the street, unable to afford to pay private legal fees, to be able to see a legal practitioner for assistance.

The guidelines that are prepared by the LPC should promote a focus on *pro bono* service provision rather than on service to the state, SAHRC, LPC, and other institutions. The council must be mindful that the unmet need for legal services is vast and should stress the importance of legal practitioners meeting it. The council and the profession should build and nurture an ethos to use our skills to benefit the broader social good. By taking this stance, we remain faithful to the Constitution and the LPA.

Erica Emdon *BA (Hons) Socio LLB MA (Wits)* **is a director at the Public Interest Practice, is the former director of ProBono.Org.** ❑

The need to integrate psychology literature into undergraduate law school curricula: Preparing law students for the psychological impact of legal practice

By Phathutshedzo C Ramaru

As a candidate legal practitioner, after hearing from several colleagues in the legal profession about the mental health challenges they encounter in practice, I was inspired to write this article, highlighting the causes and possible solutions.

This article argues for the integration of psychology literature into undergraduate law school curricula to equip law students with a better understanding of the psychological impact of legal practice. Psychology – the science of how people think, feel, and behave – has a great deal to teach about the well-being of legal practitioners, as well as a range of core competencies related to effective lawyering.

The mental demands of a lawyer are often high. Lawyers often work long hours, have heavy workloads, and deal with difficult clients, seniors, and traumatic matters. They also have to meet unrealistic expectations, prepare legal documents, and maintain communication with colleagues and clients – all while juggling multiple cases at once. While some thrive in such a demanding environment, others find it overwhelming, leading to stress, anxiety, or even burnout. This can have an immense toll on their psychological well-being.

'Given that lawyers deal so much with human behaviour in their daily work, you'd think law students would be required to have a strong grounding in psychology. Unfortunately, that's not the case' (Sara Martin 'Lessons for lawyers' (www.apa.org, 5-11-2023)).

A recent study conducted by the American Bar Association and Hazelden Betty Ford Foundation, published in the *Journal of Addiction Medicine* in 2016, found that 28% of legal practitioners reported experiencing depression, 19% reported experiencing anxiety, 23% reported experiencing stress, and 21% reported that their alcohol use has been a problem. Krill, PR; Johnson, R; Albert, L 'The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys' (2016) 10(1) *Journal of Addiction Medicine* p 46 (https://journals.lww.com, accessed 30-11-2023).

The following factors can contribute to the psychological impact of legal practice:

- **Long hours and high workload:** Lawyers often work long hours and have a high workload, which can lead to stress, fatigue, and burnout.
- **Dealing with difficult clients:** Lawyers often have to deal with difficult clients, which can be emotionally draining.
- **Exposure to traumatic material:** Lawyers are often exposed to traumatic material, such as crime scenes and victim statements, which can have a negative impact on their mental health.
- **'Lack of control:** Lawyers often feel like they have little control over their work', which can lead to feelings of helplessness and frustration (Talk-Counsel 'How to Decrease Lawyer Burnout and Attrition Rates: Legal Leaders' Tips' (www.linkedin.com, 5-11-2023)).
- **Unrealistic expectations:** Lawyers are

often expected to be perfect and to work tirelessly, which can lead to feelings of inadequacy and guilt.

Despite the psychological challenges of legal practice, there is little or no focus on psychology in undergraduate law school curricula. This is a significant oversight, as a better understanding of psychology could help law students to prepare for the challenges they will face in practice.

Integrating psychology literature into law school curricula could help law students to:

- Understand the psychological impact of legal practice on themselves and their clients.
- Develop coping mechanisms to manage stress and anxiety.
- Build resilience in the face of challenges.
- Communicate effectively with clients and other legal professionals.

Below are some of the ways to integrate psychology literature into undergraduate law school curricula:

- A stand-alone module in lawyering and psychology.
- Offering an elective module in lawyering and psychology.
- Integrating psychology literature and lawyering into existing modules.
- Introduction of the following psychology topics *inter alia*: Perception, memory, communication, individual and group decision-making, conflict, goal setting and planning, self-assessment, motivation and grit. According to research conducted by psychologists, these topics have much to contribute to an understanding of the work of legal practitioners and can be effectively integrated into undergraduate law school curricula (JR Sternlight and JK Robbennolt 'Psychology and effective lawyering: Insights for legal educators' (2015) *Scholarly Works* 921).

By integrating psychology literature into law school curricula would help law students understand the psychological challenges of the job and developing coping mechanisms, law students can be better equipped to succeed and thrive in legal practice.

By contrast, medical schools in the U.S have 'placed more focus than law schools on clinical education, and recently have begun to emphasize the importance of some aspects of psychology' (Sternlight, JR and Robbennolt, JK 'Psychology and Effective Lawyering: Insights for Legal Educators' (2015) *Scholarly Works* 921. (https://scholars.law.unlv.edu, accessed 30-11-2023). Similarly, according to Randall Kiser, the 'medical profession is years ahead of the legal profession in recognising the importance of emotional intelligence and incorporating psychology' into its medical school curricula (Kiser, R 'The Emotionally Attentive Lawyer: Balancing the Rule of Law with the Realities of Human Behaviour' (2015) 15.2 Nevada Law Journal 442 (https://scholars.law.unlv.edu, accessed 30-11-2023). For example:

- Many medical schools now require students to take courses in psychology, such as behavioural science, social science, and medical ethics.
- Medical schools are also increasingly offering students opportunities to learn about psychology through clinical rotations, such as psychiatry, neurology, and paediatrics.
- Medical schools are also supporting research on the intersection of medicine and psychology.

While it might be desirable for all future legal practitioners to engage in a substantial course of psychological study, this is unrealistic. Legal practitioners would benefit from engaging in a substantial course of psychological study, but time in law school is limited. Rather than learning psychology as future researchers or therapists, law students need to learn aspects of psychology that will help them function more effectively as legal practitioners (Sternlight and Robbennolt (*op cit*)).

I hope that this discussion will encourage more law school Deans and faculty members in South African universities and elsewhere to consider integrating psychology literature into their undergraduate law school curricula.

Phathutshedzo C Ramaru *LLB (Unisa)* is a candidate legal practitioner in Johannesburg. ❑

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RISKALERT

DECEMBER 2023 NO 5/2023

IN THIS EDITION

RISK MANAGEMENT COLUMN

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RISK MANAGEMENT COLUMN

Risk notes

As we approach the end of 2023, it is an opportune time to look back and assess how risk related events have played out in this year.

A substantial amount of risk management information was published by the LPIIF this year, both in the *Bulletin* and the practice management column of *De Rebus*. There was also an increased focus on risk management training and general interaction with stakeholders.

Risk management education was provided to firms who requested such training for practitioners and staff in their offices. Legal practitioners are reminded that this training is available at no cost to the firms. Please contact us and we will avail ourselves to provide the training to your practice. The training can either be provided in person at your office or by using one of the virtual platforms if that is your preference.

Working with the Legal Education and Development Division (LEAD) of the Law Society of South Africa (LSSA), we prepared the material for the Module 2 (Risk Management and Insurance) of the Practice Management and Training (PMT) program. There were three intakes for the PMT program in 2023 and a substantial number of newly appointed directors/partners in existing firms, and those commencing practice for their own accounts, benefitted from the training. The standard of some of the assignments submitted by PMT candidates is, however, a serious cause of concern. Many candidates did not read the manual, watch the videos or read the guidance posted on the eLEADer platform. Risk management and insurance is not a subject where candidates can get through by simply "winging it." Dishonesty in various forms, including plagiarism, sharing of answers or candidates colluding and submitting identical assignments, was discovered. Integrity and honesty are essential character-

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istics for legal practitioners. The conduct of the candidates concerned is a serious threat to their own futures in legal practice and the integrity of the profession. In one instance, a candidate submitted an assignment drafted by Artificial Intelligence (AI) which was a collection of words remotely relevant to the questions and the candidate's assignment referred to non-existent authorities. The importance of the PMT program must be recognised and, it is hoped, the affected practitioners' approach to the management of their practices and execution of client mandates is with more diligence and honesty than they approached the Risk Management and Insurance module. There were many candidates who approached the program industriously (some scoring 100% in the assignment) and their efforts are lauded.

An awareness session hosted by the Legal Practice Council (LPC) on 31 March 2023 was a success with an impressive number of practitioners joining. That event included several stakeholders in the profession, including the LPIIF, presenting on their respective mandates and the services they offer. We also provided risk management presentations when requested by the various voluntary associations in the profession.

The LPIIF team engaged with numerous practitioners in various towns and cities around the country as part of the stakeholder engagement sessions that were held with the Legal Practitioners' Fidelity Fund (Fidelity Fund). The LPC and the Legal Services Ombud also participated in the stakeholder engagements held in all nine provinces. The focus of the engagements was the decision by the Fidelity Fund's board to implement a change in the funding model for the professional indemnity insurance provided to practitioners with Fidelity Fund certificates. In future, practitioners will be required to pay a contribution as stipulated in section 74 of the Legal Practice Act 28 of 2014 and rule 51 of the rules issued in terms of that Act. Practitioners are urged to keep a look out for communication from the Fidelity Fund in respect of the date of implementation of the contribution and the amount that they will be required to pay. The amount to be paid and the implementation date are matters within the statutory authority of the Fidelity Fund.

Publications

We regularly publish risk management materials. The topics covered in the publications this year included the following:

March

Practising in an increasingly complex regulatory environment (De Rebus): www.derebus.org.za/practising-in-an-increasingly-complex-regulatory-environment/

The concerning risk picture emerging the available statics (Risk Alert Bulletin): https://lpiif.co.za/wp-content/uploads/2023/03/Risk-Alert-Bulletin-March-2023.pdf

May

Liability for refunds of legal fees, disbursements or personal costs orders (De Rebus): www.derebus.org.za/liability-for-refunds-of-legal-fees-disbursements-or-personal-costs-orders/

An update on the LPIIF's application to review and set aside RAF Board Notice 271 of 2022 and short notes on recent cases (Risk Alert Bulletin): https://lpiif.co.za/wp-content/uploads/2023/04/Risk-Alert-Bulletin-May-2023.pdf

June

Notes explaining the changes to be made to the LPIIF policies for the 2023/2024 insurance year (Risk Alert Bulletin): https://lpiif.co.za/wp-content/uploads/2023/05/RISK-ALERT-BULLETIN-JUNE-2023.pdf

The LPIIF's professional indemnity insurance Master Policy and Executor Bond Policy, respectively, were published (Risk Alert Bulletin): https://lpiif.co.za/wp-content/uploads/2023/05/RISK-ALERT-BULLETIN-JUNE-2023.pdf

September

Are legal practitioners obliged to blow the whistle in unethical conduct of their peers? (De Rebus): https://www.derebus.org.za/are-legal-practitioners-obliged-to-blow-the-whistle-on-unethical-conduct-of-their-peers/

October

The need for effective training programs in law firms (De Rebus): www.derebus.org.za/the-need-for-effective-training-programs-in-law-firms/

A further update on the LPIIF's application to review and set aside RAF Board Notice 271 of 2022 and short notes on recent cases, an update on proposed legislative changes, recent cases, a note on balancing the trust account and an article on the risks of professional complacency (Risk Alert Bulletin): https://lpiif.co.za/wp-content/uploads/2023/09/RISK-ALERT-BULLETIN-OCTOBER-2023.pdf

December

Firm structures: division of tasks is not immunity from risks (De Rebus)

Previous editions of the Bulletin can be accessed on the risk management page of the LPIIF website www.lpiif.co.za

The articles published in the practice management column of De Rebus will be found on the publication's website www.derebus.org.za

RISK MANAGEMENT COLUMN continued...

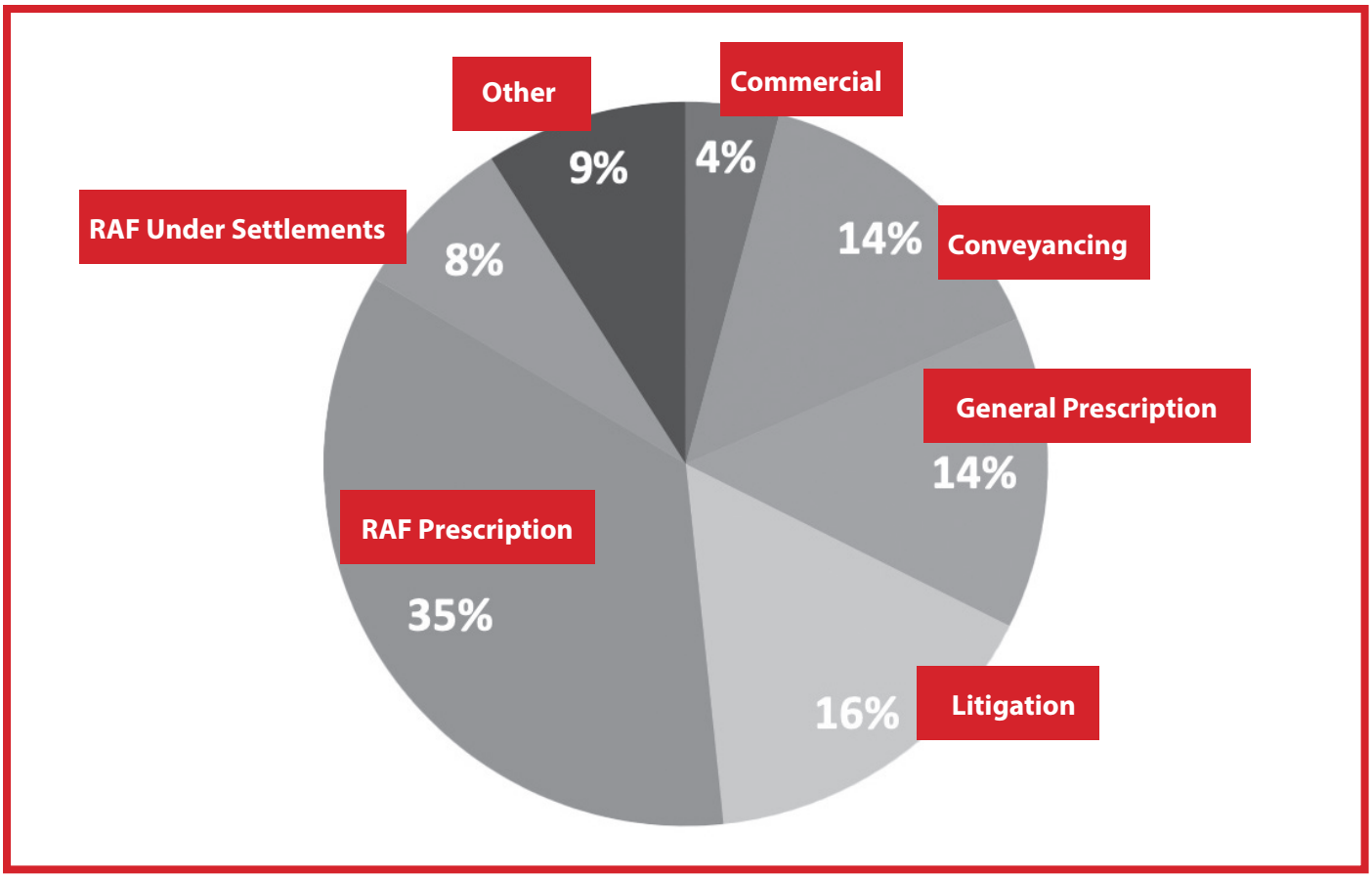
LPIIF claim statistics

The statistics are reported quarterly and figures and graphs below reflect the position as at 30 September 2023, the last completed quarter before this publication. The next reporting cycle will be on the figures as at 31 December 2023.

The reserve requirement for outstanding claims as at 30 September 2023 was actuarially calculated at R766,852,000, an increase from R751,627,800 at the corresponding point in 2022. This is a significant amount, taking the size and funding model of the LPIIF into account. Legal practitioners and other stakeholders must be concerned by the high value of the outstanding claims. The continued growth in claims will threaten the sustainability of the LPIIF. Many of the underlying errors and omissions that result in professional liability claims could have been avoided had risk management measures been applied by the firms concerned. Increases in claims will require an increase in the required premium to be paid to the LPIIF by the Fidelity Fund, placing additional strain on that institution's resources as well.

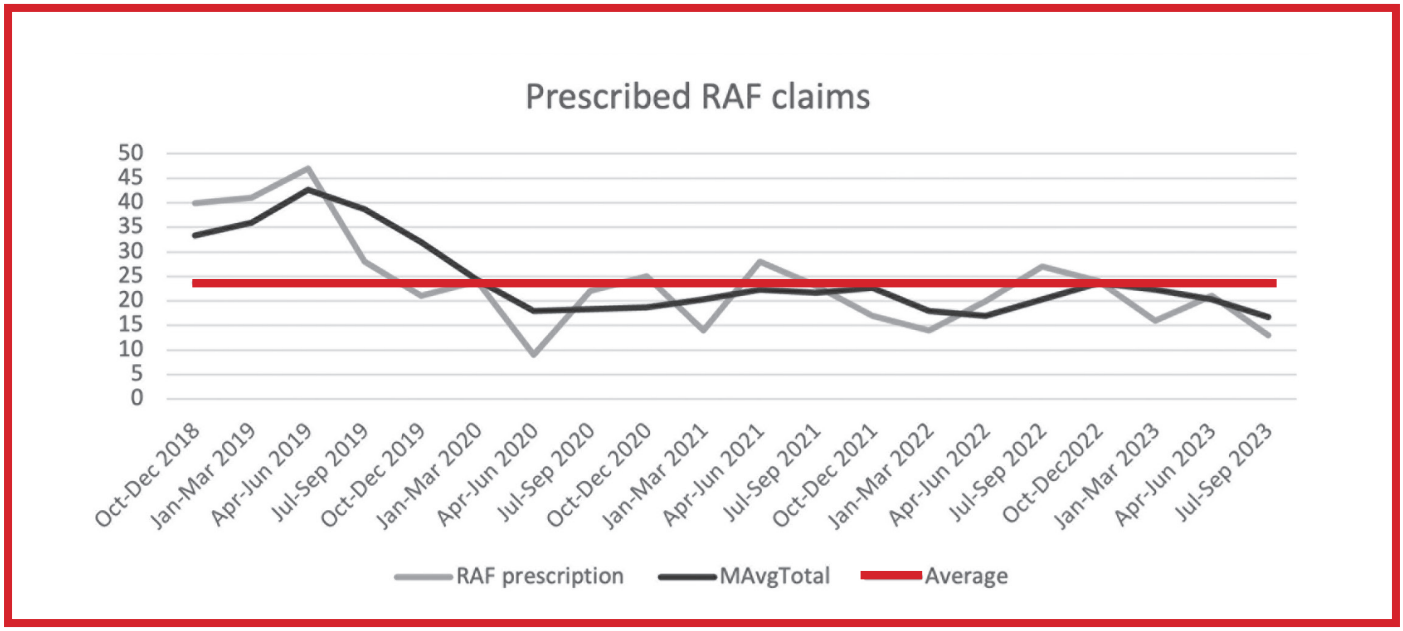
The LPIIF had 2371 outstanding claims in this reporting period. Prescribed Road Accident Fund (RAF) claims, conveyancing, general prescription, litigation and commercial claims make up the highest number and value of claims. These areas of practice have consistently provided the most risk. The graph below depicts the breakdown of the outstanding claims by claim type.

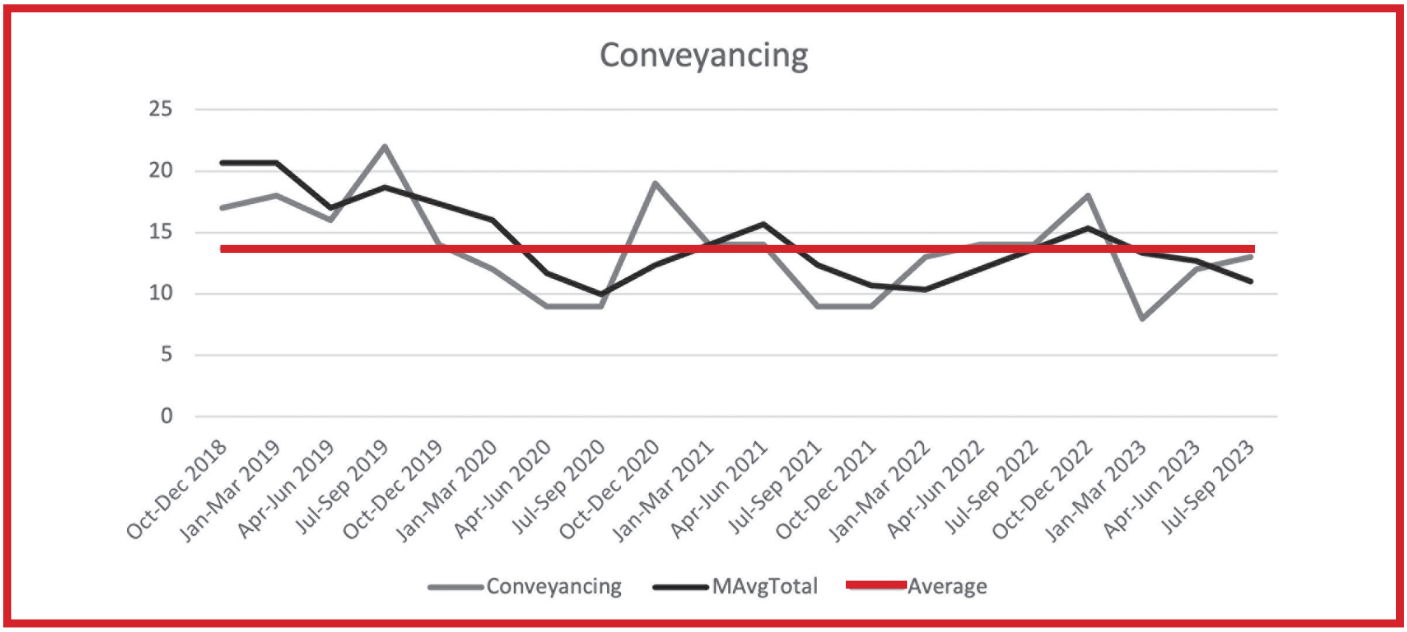
Outstanding claim types as at end September 2023



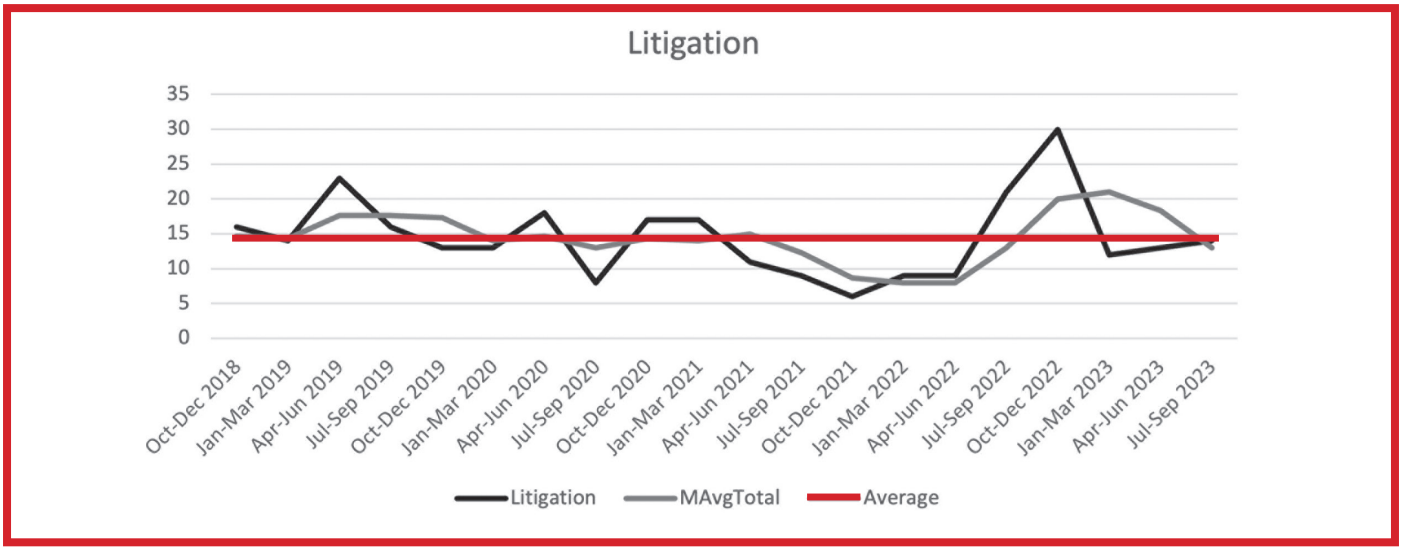
RISK MANAGEMENT COLUMN continued...

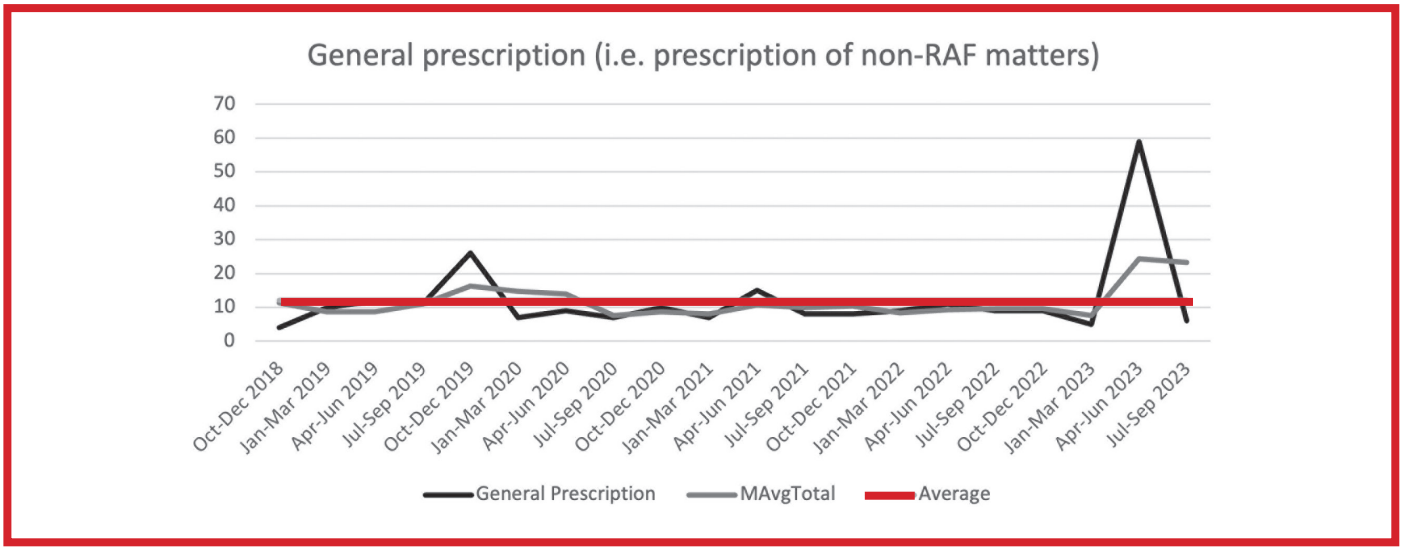
In the past five years, the trends for notifications of each of the high-risk claim areas has been as follows:





RISK MANAGEMENT COLUMN continued...





Substantial resources have been made available to assist the profession in mitigating the risk of prescription. The resources include the Prescription Alert service. There are numerous risk management materials available on the LPIIF website and the risk of prescription has received significant attention in our publications and educational materials over the years. We have a standing offer to law firms to conduct training on prescription as a risk. The LPIIF has also been involved in a lot of litigation in previous years aimed at addressing the risk of prescription. The company is currently engaged in a review application in respect of RAF Board Notice 271 of 2022 and has raised the increased risk of prescription in its challenge to the requirements the RAF seeks to introduce for the acceptance of claims.

RISK MANAGEMENT COLUMN continued...

Executor bonds

In recent years a substantial amount of work has gone into reducing the outstanding exposure in this line of business. At its peak, there were outstanding bonds valued at R14,6 billion. This exposure has now reduced to 5024 outstanding bonds with a total value of R4,781,365, 310 as at 30 September 2023. By comparison, at the end of September 2022 there were 5152 outstanding bonds with a total value of R4,830,288, 264. The significant reduction from the peak has been achieved through the deployment of additional resources, a clean-up of the available data, chasing up practitioners with long-outstanding bonds and deploying a team at the various offices of the Master of the High Court nationwide to inspect files and ascertain the status of the various matters where the LPIIF had issued bonds of security. The terms on which bonds are granted have also been reviewed and are set out in the executor bond policy. A copy of the executor bond policy, the terms and conditions under which the company issues bonds of security and the application forms are available on the LPIIF website.

Of considerable concern is those practitioners who, in breach of their policy obligations, do not provide the LPIIF with regular updates on the statuses of the matters where they have been appointed to administer deceased estates. Misappropriation of estate related funds and property is the main cause of claims in this area of the business. Practitioners who have faced claims involving an element of dishonesty or who have been suspended or struck off the roll of attorneys will not be issued with new bonds. Practices who employ such persons, discreetly in some instances, place themselves at huge risk.

It can be gleaned from the average value of bonds issued that this service is mainly utilised by people who need it most- those with estates valued at under R2 million. If the executors in those estates were to approach the commercial market for bonds, the estate would have to carry the costs for the bond, diminishing the value of the available distributions to beneficiaries.

We are monitoring the current challenges faced by the Masters office. We have also been made aware of several fraudulent practices that have been prevalent in the market. These include the fraudulent issuing of death certificates for people who are still alive, registration of estates in their names, and the fraudsters then trying to steal their investments and other assets. In one matter covered in the media, a firm of attorneys was named. We have also been made aware of an emerging practice where immovable property in a deceased estate is fraudulently transferred. Practitioners are urged to apply extreme caution when receiving instructions, even where those instructions purport to be on a letterhead of a firm of attorneys. Firms must also be careful of the fraudulent use of their letterheads. Added caution must be applied to all instructions related to deceased estates.

Recent judgments

There have been a number of significant judgments handed down since the last publication of the *Bulletin*. Due to space constraints, we cannot publish notes on all the judgments and have selected a few that will be of interest to legal practitioners.

Mautla and Others v Road Accident Fund and Others (29459/2021) [2023] ZAGPPHC 1843 (6 November 2023).

In 2021 the RAF sought to introduce new terms for the acceptance and management of claims. The changes were set out in a management directive and Board Notice 58 of 2021. An interim interdict was granted against the RAF on 15 June 2021 and the review application was argued before a full bench on 9 May 2023. The full bench handed down its judgment on 6 November 2023. This is a significant judgment and the order provides that:

1. Condonation was granted for the late institution of the review proceedings.
2. Regulation 7 (1) of the Road Accident Fund Regulations promulgated by the Minister of Transport in terms of section 26 of the Road Accident Fund Act 56 of 1996, is declared to be unconstitutional, unlawful and invalid and is reviewed and set aside to the extent that it confers upon the Road Accident Fund the right to amend or substitute the "RAF 1 Form" attached to Annexure A to the Regulations.
3. The following decisions and actions were reviewed and set aside

RISK MANAGEMENT COLUMN continued...

in terms of section 8(1) of the Promotion of Administrative Justice Act 3 of 2020. The decision:

3.1. to adopt and implement the Management Directive titled "*1/2021-Compulsory Information to be submitted when lodging a claim for compensation with the RAF*," dated 8 March 2021, and any directives or instructions issued or actions taken in terms thereof;

3.2. set out in the "*RAF Supplier Claims external Communication*" dated 19 May 2021 which requires the compulsory submission of certain supporting documents for the submission of supplier claims and any directives or instructions issued, or actions taken in terms thereof;

3.3. to publish, adopt and implement "*Board Notice 58 of 2021*", with description "*Road Accident Fund Stipulation of Terms and Conditions upon which Claims for Compensation shall be Administered*" published in the Government Gazette on 4 June 2021 and any directives or instructions issued, or actions taken in terms thereof; and

3.4. to publish, adopt and implement the "*SUBSTITUTION OF RAF 1 CLAIM FORM*" published in the Government Gazette on 4 June 2021, and any directives or instructions issued, or actions taken in terms thereof.

4. In consequence of the orders summarised above:

4.1. Any objection, or rejection by the RAF of a claim for compensation submitted between 8 March 2021 and 15 June 2021 due to non-compliance with the Management Directive, Board Notice or Substitution Notice is declared to be null and void; and

4.2. Claimants whose claims were rejected by the RAF between 8 March 2021 and 15 June 2021 due to non-compliance with the Management Directive, Board Notice or Substitution Notice are afforded a period of 6 months from 6 November 2023 to resubmit their claims in accordance with the provisions of the Road Accident Fund Act.

5. The RAF is to inform each and every person of whom it has a record, and in respect of whom a claim is submitted during the period 8 March 2021 to 15 June 2021 and whose claim was neither accepted or acknowledged, of the terms of the order.

6. The RAF is to inform each and every person of whom it does not have a record, and in respect of whom a claim was submitted during the period 8 March 2021 to 15 June 2021 and whose claim was neither accepted nor acknowledged, of the terms of the order by publication of the whole order in a newspaper circulated nationally on a Friday, commencing 10 November 2023, for 4 consecutive weeks and to prominently display a copy of the order on the homepage of its website for not less than 6 months, commencing within 7 days of the date on which the order was granted.

7. The RAF was ordered to pay the costs of each of the applicants as between attorney and client, including the costs of the employment of more than one counsel where applicable.

At the time of writing, the RAF has filed a notice of application for leave to appeal the whole judgment and order handed down on 6 November 2023. The application for leave to appeal with be argued on 30 November 2023. Practitioners will be kept apprised of developments in the matter. Practitioners are reminded that the LPIIF's application to review and set aside Board Notice 271 of 2022 will be argued before a full bench on 26, 27 and 28 February 2024.

Road Accident Fund v Zilwa Attorney Incorporated and Others (Eastern Cape Division, Mthatha Case no: 4112/2023) (6 November 2023)

I write this at a time when the judgment has not been uploaded onto SAFLII yet. When uploaded, the SAFLII citation will be provided. In that matter, the court declared paragraphs 2.4.1.3 and 2.4.1.5 of Board Notice 271 of 2022 unlawful and set them aside. The clauses purport to prescribe that claimants' attorneys submit a tax clearance certificate once a year (clause 2.4.1.3) and a copy of the contingency fee agreement concluded between the attorney and the claimant, proof of compliance with section 4 of the Contingency Fee Act 66 of 1997, or an affidavit by the attorney that there is no contingency fees agreement (clause 2.4.1.5) be provided to the RAF. The RAF had insisted on these documents being provided before a payment could be made in terms of a court order. The RAF was ordered not to enforce nor implement the impugned clauses of the Board Notice.

The litigation in *Road Accident Fund v Sogoni and Another* (EL660/2023) [2023] ZAECELLC 18 (21 July 2023) also relates to Board Notice 271 of 2022.

Ross and Another v Nedbank Limited (10029/2020) [2023] ZAGPJHC 949 (17 August 2023)

This is another judgment in the wake of a cybercrime incident where fraudsters had intercepted the payment of the purchase price of a property. Induced by the correspondence from the fraudsters, the plaintiffs paid the purchase price into the fraudster's account rather than to the conveyancers. The

RISK MANAGEMENT COLUMN continued...

fraud was discovered the day after payments totalling R2,940,000 were made into the fraudulent account. On the discovery of the fraud, the bank informed the plaintiffs that the fraudulent account would be frozen. However, the bank allowed the full amount to be withdrawn from the fraudulent account.

The plaintiffs brought a delictual claim against the bank for damages alleging a negligent breach of a duty of care owed to the plaintiffs not to allow the withdrawal of the funds from the fraudulent account. The bank alleged contributory negligence on the part of the conveyancers. The bank's special plea of non-joinder of the conveyancers was dismissed.

Legal Practice Council v Mkhize (13881/2021; 13204/2022) [2023] ZAGPPHC 1144 (8 September 2023)

This was an application to remove the name of an advocate from the roll. The complaints against him included accepting briefs and payments directly from members of the public when he did not practice as an advocate contemplated in s 34 (2) (b) of the Legal Practice Act. A contention by the respondent that the administrators in his office had accepted the money without his approval was not accepted by the court. The complaints by the members of the public included that, having accepted the the instructions, the respondent had not fulfilled the mandates that they had given him. Rather peculiarly, though the respondent had never taken silk and was thus not senior counsel, he robed as a silk when appearing in court. When questioned about his purported senior counsel status and why he had robed in that manner, the respondent gave unconvincing answers and conflicting versions of his dates of admission and his purported attainment of the non-existent attainment of senior counsel status. He also appeared not to know of letters patent. The court granted an order sticking the respondent's name from the roll.

South African Legal Practice Council v Steenkamp and Others (6176/2022) [2023] ZAFSHC 368 (26 September 2023)

The first and second respondents had practiced in partnership. An investigation was initiated by the regulator after it emerged that there was a deficit of at least R2 556 944.16 in their trust account. They then closed their practice, taking with them all the files that were not subject to the investigation. A *curator* had been appointed to administer their trust account. It emerged that their former bookkeeper had stolen a large amount of money, as had a professional assistant that they had employed. They did not institute criminal proceedings against the bookkeeper or the professional assistant.

The first and second respondent joined another firm of attorneys, the third respondent in the matter, moving the files not subject to investigation, their infrastructure and staff. The LPC alleged that 127 serious complaints had been received against the respondents, the majority of which related to the period after they joined the third respondent. The sole director (cited as the fourth respondent) of the third respondent had previously been employed by the first and second respondent in their erstwhile firm. The second respondent was not reflected in the correspondence of the third respondent, but the first respondent was reflected as an assistant to the director. The LPC's case was that the first respondent had deposed to affidavits in other matters where he described himself as a director of the third respondent.

It was common cause that the first and second respondents had closed their practice without informing the regulator as prescribed by the relevant rules and had allowed the bookkeeper and professional assistant access, and gave them authority, to make payments from the firm's trust account. This allowed those individuals to steal money from the trust account. The first and second respondents, in their affidavits, did not explain how their interactions with the professional assistant were conducted and what oversight, if any, was exercised to ensure that the payments authorised at the request of the professional assistant were properly requested and properly authorised. The court concluded that there was no oversight of the trust account, no supervision of employees in respect of that account and that they did not appear to have taken the necessary steps to protect the interests or property of their clients. It was also found that the first and second respondents appeared to be acting as directors of the third respondent, though not in possession of Fidelity Fund certificates.

The first and second respondents were suspended from practice pending the finalisation of the LPC's investigations against them, and any subsequent disciplinary proceedings that may be instituted in court. They were also ordered to pay the costs of the application, jointly and severally, the one paying the other to be absolved.