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DE REBUS

THE SA ATTORNEYS' JOURNAL

NOVEMBER 2022

CAN AN ARTIFICIAL INTELLIGENCE SYSTEM BE CLASSIFIED AS AN INVENTOR?

Child offenders and the rationale behind different sentencing considerations

Determining what 'in the presence' means for the virtual commissioning of oaths

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An attorney's dilemma

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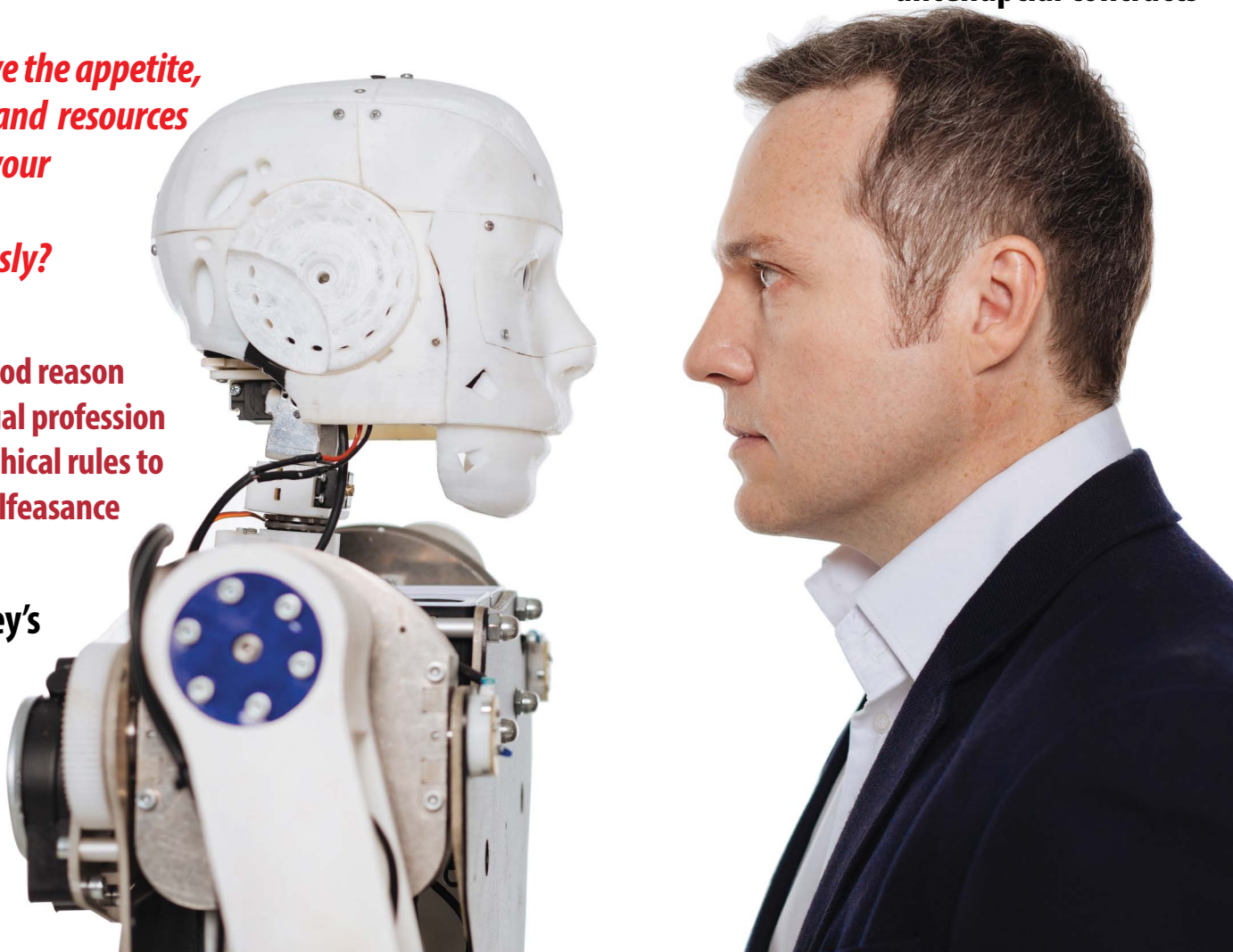
Enforceability of warranties and indemnification in sale of business contracts

Dual marriages: A guide to antenuptial contracts



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News articles on the *De Rebus* website:

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- Legal practitioner praised for her global award recognition
- Female legal practitioners must respect and support one another
- Male legal practitioners should engage on issues that affect female legal practitioners
- Female legal practitioners can have a successful career and build families

12 Can an Artificial Intelligence system be classified as an inventor?

In 2019, Dr Stephen Thaler filed a patent application in Australia for a food container and named the artificial intelligent (AI) system DABUS that he built as the inventor. Dr Thaler followed this up with patent applications in South Africa (SA), the United Kingdom and the United States. SA was the first to grant the patent. Candidate legal practitioner, **Ikechukwu Emmanuel Okeke**, writes that SA conducts only formal examinations of all patent applications as opposed to substantive examinations, which may account for SA's decision. However, the Companies and Intellectual Property Commission have initiated processes to begin substantive examinations. Mr Okeke writes that the DABUS patents may now open the floor for discussions on whether to modify the Patents Act to accommodate inventions made by AI systems.

Regular columns

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NDip Journ (DUT) BTech (Journ) (TUT)

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BTech (Journ) (TUT)

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MA (NMU)

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

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

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The future of court proceedings: The Court Online system

The Office of the Chief Justice has held two training workshops for legal practitioners on the Court Online system. The website of the South African Judiciary describes 'Court Online' as an e-filing, digital case, and evidence management system for the High Courts. The system will allow legal practitioners to file documents electronically without having to be physically present at court. The system also enables managing court appearance diaries and court evidence instantaneously online with ease.

The Court Online system will allow electronic documents to be automatically routed to the designated registrar clerk for processing. The website of the judiciary adds: 'The system will also allow further routing within the courts e.g. for approvals by the Registrar and a reply is then sent out by the registrar clerk which is routed back to the originating LF [Law Firm]/litigant. This shall enable realisations of improvements in efficiency by minimising paper flow to shorten case processing time. The process shall be fast, convenient and efficient' (www.judiciary.org.za).

The system will provide an electronic case file showing upcoming hearing dates and documents that have been filed or served or any other important notifications received from the courts. Added to that the system will be an electronic platform for the exchange and sharing of documents between parties. The fact that the system is online, should allow for faster responses, as well as accurate and real time information, which will lead to speedy inspection of documents electronically and the ability to request for and receive electronic extracts of documents. Litigating parties will attain details of hearing fixtures through SMS or e-mail. Judges will use the system to adjudicate disputes electronically.

The system will be limited to the civil court proceedings covering the following matters –

- judicial case management;
- civil and criminal appeals;
- Commercial Court;
- default judgments;
- divorce actions;
- leave to appeal;
- opposed motions;
- ordinary civil trials;
- r 43 applications;
- special civil trials;
- special motions/third court;
- summary judgment applications;
- trial interlocutory applications; and
- unopposed motions.

Court Online can be accessed on any laptop or tablet with Internet access and an Internet browser that is HTML5 compliant, since the system is web based, no programme needs to be loaded onto your device. To register for the Court Online system, follow the steps below:

1. Go to https://sajustice.caselines.com
2. Click on 'Register'.
3. Fill in the registration form and click on Register.
4. Look out for your 'verification e-mail' in your mailbox. When it arrives, click on the link in the e-mail to verify your account. (Please check your spam folder, as it may have diverted into this mailbox. If you have not received your verification link within 15 minutes, contact the Helpdesk for support).

- To view recordings of the workshops visit: www.judiciary.org.za
- For more information on how to use the Court Online system see: www.lssa.org.za

❑

Mapula Oliphant – Editor

Would you like to write for *De Rebus*?

De Rebus welcomes article contributions in all 11 official languages, especially from legal practitioners. Practitioners and others who wish to submit feature articles, practice notes, case notes, opinion pieces and letters can e-mail their contributions to derebus@derebus.org.za.

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

- Please note that the word limit is 2 000 words.
- Upcoming deadlines for article submissions: 21 November 2022; 23 January; and 20 February 2023.

An attorney's dilemma

By Leslie Kobrin

I recently came across the judgment in the matter of *Trollip v Phatshoane Henney Attorneys* (FB) (unreported case no 3683/2018, 23-6-2022) (Loubser J), which, *inter alia*, dealt with the failure of an attorney to inform his client that because of his negligence he recovered an amount for the client far less than the amount of the original claim.

Mrs Trollip was injured in a motor vehicle accident and, as a result, instructed her attorney to investigate, lodge and prosecute a claim for compensation from the Road Accident Fund (RAF). The attorney, on receiving these instructions, arranged for Mrs Trollip to undergo a medico legal assessment with a medical practitioner and on receipt of the report, lodged the claim and issued summons out of the Regional Court.

During the course of the litigation the attorney arranged for Mrs Trollip to be examined by other experts and on receipt of their reports he noted that the quantum of her claim could well exceed the monetary limit of the jurisdiction of the Regional Court and after consulting with counsel, he established that it was not possible to transfer the proceedings from the Regional Court to the High Court. As a result, he succeeded in recovering from the RAF the sum of R 400 000 being the limit of the Regional Court jurisdiction and paid over such amount to Mrs Trollip after deducting his irrecoverable costs and expenses. The attorney failed to inform his client that he had failed to claim appropriately in the High Court and that had he done so, he could well have recovered a higher quantum.

The attorney, in giving evidence at the trial in respect of which his firm was sued by Mrs Trollip for professional negligence, testified that he did not see it as his duty to inform his client that it was as a result of him having issued summons out of the Regional Court instead of the High Court, he was not able to recover any further amounts for her.

On this very issue Loubser J at paras 21 and 22 noted:

'The second defendant further testified that, on 9 July 2015, the plaintiff was not aware that she could claim from him or the first defendant. She was only aware of the fact that she had a bigger claim than the R 400 000,00. He testified that he did not inform her that her limited claim was the result of his negligence, and that she could seek the assistance of another attorney in the circumstances. He did not regard it as his duty to inform her as such, he testified.'

As for the duty to inform, I cannot agree with the second defendant. When there is a conflict between an attorney's own interest and the interest of a client, the interests of the client must certainly prevail. This is not the point, however. The point is that the second defendant did not inform the plaintiff, therefore wilfully preventing the plaintiff to know of the existence of the debt.'

At para 24 the judge stated:

'A feature that stands out in this respect, is that the defendants persisted in the special plea of prescription while the second defendant was well aware of the fact that he had withheld crucial information from the plaintiff on 9 July 2015, which caused her to lack the necessary knowledge on that day to realise that there had been negligence and that this had caused the claim to be limited. It speaks for itself that the plaintiff had to incur costs to resist the special pleas and, in the prevailing circumstances, I can find no reason why the plaintiff should be left out of pocket.'

Loubser J relied on the finding of Pretorius J in the case of *Ekman v Venter & Volschenk Attorneys and Another* (GP) (unreported case no 44655/2013, 1-7-2015) (Pretorius J) who at para 42 stated:

'In regards to the 2006 case, he conceded that he only told the plaintiff on 26 July 2010 that the 2006 claim had become prescribed and on that date he informed the plaintiff of the option of seeking another attorney to deal with the matter. The failure to disclose the prescription immediately, as well as the consequences thereof was a duty which the first defendant conceded he had had, but did not comply with. The defendants did not act in this matter in a manner that is expected from a diligent, hard-working attorney. A reasonable attorney would have seen to it that he pursued both claims diligently, whilst keeping the plaintiff up to date on the progress of

his claims. A reasonable attorney would immediately have informed the plaintiff of the prescription of his claims and would have advised the plaintiff how to deal with it. Due to the first defendant's concession in this regard the court finds that the first and/or second defendants are guilty of not acting as a reasonable attorney or firm of attorneys would have acted under these circumstances.'

Now, I respectfully submit that placing on an attorney a duty to inform his client that the client has a claim against him for professional negligence, causes the attorney to be in breach of clause 24 of the Master Policy of the Legal Practitioners' Indemnity Insurance Fund NPC, which reads as follows:

'24. The Insured:

24.1. shall not cede or assign any rights in terms of this policy;

24.2. *agrees not to,* without the Insurer's prior written consent:

a) admit or deny liability for a Claim;

b) settle a Claim;

c) incur any costs or expenses in connection with a Claim unless the sum of the Claim and Claimant's Costs falls within the Insured's Excess;

failing which, the Insurer will be entitled to reject the Claim, but will have sole discretion to agree to provide indemnity, wholly or partly' (my italics).

It follows that had the attorney(s) in the cases quoted above admitted to the client that it was his negligence, which caused the client to suffer the financial loss because he has a duty to make such a disclosure, the attorney's claim for professional indemnity cover for these claims would have been repudiated on account of such disclosure being in breach of clause 24 of the Master Policy.

This is surely a case of heaven help the attorney if he does and heaven help him if he does not.

On 1 September 2022, the court dismissed an application for leave to appeal the judgment on the basis that the judge did not believe there was a reasonable prospect that another court would come to a different conclusion.

Leslie Kobrin *Dip Iur (Wits) Dip Bus Man (Damelin)* is a Consultant Legal Practitioner at Bove Attorneys Inc in Johannesburg. ❑

By Bruce Andre Barkhuizen

Section 4(2) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act – why calendar days and not court days

It is trite that in order to evict unlawful occupiers from property used for residential purposes, the procedure as contemplated in the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (the PIE Act) must be followed.

Section 4(2) of the PIE Act requires that the property owner (or the person in charge of the property at the relevant time) seek the authorisation of a notice (a so-called 's 4(2) notice') advising the occupiers of the date on which the eviction will be heard by the court. In most courts, the courts also require that additional aspects be included in the s 4(2) notice (which is recommended) such as, that the occupiers –

- may be present at and participate in the hearing of the eviction matter;
- may obtain and make use of legal representation;
- are warned that the court may grant an eviction order even if the occupiers do not appear; and
- are requested to bring their respective circumstances to the attention of the court.

The PIE Act also requires that the s 4(2) notice be served 'at least 14 days before the hearing'. This requirement is pre-emptory, and non-compliance is fatal as the PIE Act does not provide for condonation in the event of short service, which the courts are very mindful of.

Given the drastic effect of non-compliance with timeous service, the courts have required strict adherence with s 4(2) of the PIE Act and this has raised an interesting question: Must service take place at least 14 'calendar days' before the hearing, or must service take place at least 14 'court days' before the hearing?

Considering the above question, it would be prudent to consider what are 'calendar' days and what are 'court' days. In brief: A 'calendar day' is any day of the week as it would appear on a calendar, inclusive of officially declared public holidays, Saturdays and Sundays; and, a 'court day' is any day of the week as it would appear on a calendar, exclusive of officially declared public holidays, Saturdays and Sundays.

The above only goes so far as to answer the question and hence we must turn to the Interpretation Act 33 of 1957, and in particular s 4, which provides the method as to how time periods (such as the 14-day time period) are to be calculated and which reads as follows:

'When any particular number of days is prescribed for the doing of any act, or for any other purpose, the same shall be reckoned exclusively of the first and inclusively of the last day, unless the last day happens to fall on a Sunday or on any public holiday, in which case the time shall be reckoned exclusively of the first day and exclusively also of every such Sunday or public holiday.'

On the basis of s 4 of the Interpretation Act, the time period in s 4(2) of the PIE Act should be calculated as follows:

- Exclusive of the first day.
- Inclusive of the last day.
- Inclusive of the days between the first day and the last day unless the last day falls on an officially declared public holiday or Sunday, in which case the last day shall be that day after the said officially declared public holiday or Sunday.

The above method of calculation does not exclude any officially declared public holiday, Saturday or Sunday from the calculation of the time period and hence it can be concluded that the reference in s 4(2) of the PIE Act to 'days' does not

mean 'court days' as this would have the effect of excluding any officially declared public holiday, Saturday or Sunday from the calculation. Accordingly, it would appear that 'calendar days' was intended.

The foregoing is supported by the *Nedcor Bank Ltd v Master of the High Court and Others* [2002] 2 All SA 281 (A) case in which the Appellant Division (as it then was) was called on to consider the Insolvency Act 24 of 1936, regarding the calculation of time periods in statue – more specifically s 40(2) of the Insolvency Act.

In the *Nedcor* case the court concluded that regard must be had to s 4 of the Interpretation Act and hence the court proceeded to calculate the time period of ten days in s 40(2) of the Insolvency Act as read with s 4 of the Interpretation Act.

The conclusion is clear, the time period in s 4(2) of the PIE Act is to be calculated with regard to s 4 of the Interpretation Act and hence 'calendar days' would be used instead of 'court days'.

Bruce Andre Barkhuizen *LLB (UJ)* is a legal practitioner and notary at Bruno Simão Attorneys in Johannesburg. This article was written in Mr Barkhuizen's private capacity. ❑

Arbitration and governing law clauses: An analysis of whether subsequent agreements replaced or rendered clauses inoperative

By Lufefe Zwelendba

In the recent Supreme Court of Appeal (SCA) case of *Tee Que Trading Services (Pty) Ltd v Oracle Corporation South Africa (Pty) Ltd and Another* (SCA) (unreported case no 065/2021, 17-5-2022) (Dambuza JA (Mocumie and Dlodlo JJA, Meyer and Smith AJJA concurring)), the SCA dealt with the question of whether subsequent agreements can supersede or render clauses inoperative in all previous entered into agreements. The SCA ordered that the arbitration and governing law clauses in the licence agreement and the sub-licence agreements remained valid and operative and the appellant contended that the subsequent agreements superseded the licence agreements.

Background

I-Flex, a company based in India entered into a licence agreement with Tee Que (TQ) a company based in South Africa (SA), which granted TQ the right to licence a software system to the South African Post Office (SAPO). Subsequent to that agreement, TQ entered into a sub-licence with SAPO. The licence agreement and the sub-licence agreement both contained arbitration and governing law clauses.

These clauses were in conflict. In the licence agreement, all disputes would be referred to the international arbitration in London and would be determined in terms of the laws of England and interestingly, the disputes pertaining to the sub-licence agreement would be dealt with in accordance with the South African laws and the rules of arbitration of the International Chamber of Commerce (ICC). It is worth noting that both of these agreements had a non-variation clause meaning that the agreement constituted the entire agreement, and that no variation either would be binding on the parties unless reduced in writing.

This was seemingly sound between the parties because each party knew that should a dispute arise in the licence agreement, the matter would be referred to London and that should a dispute arise in the sub-licence agreement, the dispute would clearly be dealt with in accordance with the South African laws.

However, the confusion began in 2005 when Oracle acquired I-Flex business, and Oracle became I-Flex's successor in title in respect of the licence agreement. Oracle came on board with its own requirements. Oracle required TQ to enter and accept membership of the Oracle Partner Network – the intentions were to ensure that the relationship that TQ had with I-Flex is further extended to Oracle as the successors in title and that TQ would be able to distribute Oracle's other programs. The two entered into an agreement, which was then termed the Oracle Partner Network Agreement. On the conclusion of the agreement, the parties entered into two further agreements which were termed the Oracle Licence and Services Agreement and the Oracle Partner Network Full Use Distribution Agreement. In terms of all these three further agreements, any disputes relating thereto would be determined according to South African laws and by the South African courts.

The dispute

A dispute arose, where TQ instituted a civil claim against Oracle and SAPO in the amount of R 61 603 515 for breach of the licence agreements. TQ claimed that Oracle and SAPO entered into agreements, which excluded TQ – and that the agreements were in breach of the licence agreement and the sub-licence agreement entered with TQ, respectively. In the enforcement of the dispute clauses of the agreements, TQ insisted that the dispute resolution mechanism specified in the Oracle network membership agreements that the arbitration and governing laws were strictly in terms of South African law and they insisted that referral of disputes to international arbitration would not be in the interest of any of the parties since all the parties are based in SA and the action arose within SA.

Oracle disputed the referral of the dispute to the South African court and in terms of South African laws, by bringing an application for stay of the action pending referral of the dispute to arbitration. It used the arbitration and governing laws in the licence agreements to its favour and stated that the dispute was bound to be referred to international arbitration under the supervision of the ICC and it further contended that the South African Arbitration Act 42 of 1965

was not applicable to the licence agreements.

The High Court's position

In light of the pleadings by both parties, the Gauteng Division of the High Court, Pretoria held that the clauses in the earlier licence agreement that TQ and I-Flex entered into on which Oracle later became a successor in title, remained valid and binding. The sub-licence agreement between TQ and SAPO also remained valid and binding. Therefore, both licence agreements remained valid despite the three later agreements. The High Court further ruled in favour of Oracle and ordered a stay of the action proceedings pending referral of the dispute to arbitration. TQ was dissatisfied with the judgment handed down by the High Court and proceeded to appeal the order.

Supreme Court of Appeal

Before the SCA the main argument made by TQ was that the dispute was not an international commercial dispute on the basis that I-Flex, which is the Indian company was no longer party to the licence agreements and the two entities which were now involved were based in SA.

Subsequent to the above argument, the SCA had to consider all the five agreements in question and had to decide whether the:

- 'The dispute was not an international commercial dispute because I-Flex was no longer party to the licence agreements and the entities involved were based in South Africa?'
- 'The arbitration and governing law clauses superseded by the dispute resolution clauses in the network membership agreements?'
- The International Arbitration Act 15 of 2017 and the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration of 1985 (Model Law) would apply to the dispute in terms of the licence agreements?

Whether the arbitration and governing law clauses were superseded by the dispute resolution clauses in the network membership agreements

The SCA held that 'the period of the licence agreements was "perpetual", subject to termination by either party as provided in the agreements' (para 17). It was further held that 'in terms of the licence agreements, the arbitration and governing law clauses would only terminate if the parties or one of them invoked the provisions of the termination clause' (para 25).

As a result, no variation of the licence agreement was ever affected and there was nothing in the Oracle network membership agreements, which directed that TQ and Oracle intended to terminate the licence agreements or any clauses therein.

Therefore, the SCA held that arbitration and governing laws remained valid and in force in terms of the licence agreements.

The applicability of the International Arbitration Act and Model Law in the dispute

The SCA stated first that the dispute is still an international commercial dispute as the agreements remained in force even though I-Flex is no longer party to the agreement.

It further stated that 'there is no bar to parties who conduct business in the Republic choosing a place of arbitration that is situated outside the Republic. Under Article 20 of the Model Law, parties are free to agree on the juridical seat of arbitration' (para 34).

The SCA substantiated with the case of *Polysius (Pty) Ltd v Transvaal Alloys (Pty) Ltd and Another; Transvaal Alloys (Pty) Ltd v Polysius (Pty) Ltd* 1983 (2) SA 630 (W) whereon the court held that:

'When the parties contracted, they were fully alive to the nature of the issues that would be likely to arise … . With this in mind, they stipulated for an arbitration in Switzerland and should be held to it'.

The SCA stated that the case was similar to the case at hand on the basis that when TQ and Oracle agreed to the terms of the original agreement between TQ and I-Flex they were alive to the location of their businesses and resorted to retain the arbitration and governing law clauses in the licence agreements.

Furthermore, the SCA stated that the International Arbitration Act and Model Law was still applicable in the agreement. It further stated that the submission made by TQ that the Model Law is excluded from the application was misguided.

Conclusion

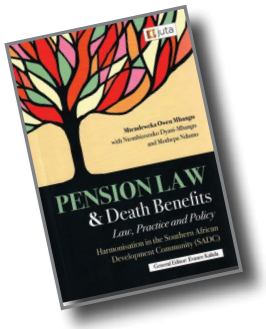
Thus, the SCA emphasised the applicability of a non-variation clause where there is more than one agreement concluded between the parties – in that an agreement cannot be superseded by another agreement – unless the parties who enter into the subsequent agreement(s) expressly make their interests clear from the onset and trigger the termination clause or any clause thereon, which shall give rise to superseding all prior agreements.

Furthermore, the applicability of the arbitration clause and governing laws is in terms of the express provisions as provided for in the agreement in question, namely where the breach and enforcement of the agreement is sought and cannot be interpreted and/or sought in other agreements entered into between the parties unless such terms are express to that effect.

This places a paramount importance to the parties when concluding commercial agreements that they pay particular attention to their dispute resolution and governing law clause – which are often referred to as standard clauses that can be easily missed.

Lufefe Zwelendba *LLB (UFH)* is a candidate legal practitioner at MRT Law Inc in Cape Town. ❑

Book announcement



Pension Law & Death Benefits: Law, Practice and Policy Harmonisation in the Southern African Development Community (SADC)
By Mtendeweka Owen Mhango, Ntombizozuko Dyani-Mhango and Mothepa Ndumo
Cape Town: Juta
(2022) 1st edition
Price: R 480 (including VAT)
238 pages (soft cover)

This book discusses the complex area of pension law relating to the distribution of death benefits in the Southern African Development Community region, with a focus on developments in South Africa, Botswana, Malawi, Eswatini and Lesotho. When a member of a pension fund dies in any of these five countries, there are specific provisions in the law that regulate how their death benefits should be distributed.

This book is aimed at pension members and their families, industry players and students and helps any beneficiary and families in these countries to understand their rights and responsibilities and to protect those rights.

By
Siyabonga
Sibisi

Dual marriages: A guide to antenuptial contracts

Due to the past non-recognition of customary marriages, South Africans resorted to the practice of entering into both a civil and a customary marriage. This is referred to as a dual marriage. In a monogamous dual marriage, the same couple is married to each other by both civil law and by customary law. Despite the full recognition of customary marriages by the Recognition of Customary Marriages Act 120 of 1998, dual marriages are still rife in South Africa. In fact, s 10(1) of the Recognition of Customary Marriages Act permits monogamous dual marriages. A dual marriage should not be confused with a polygynous marriage where a person has various spouses at the same time. If a person decides to enter into a polygynous marriage, s 10 of the Recognition of Customary Marriages Act is also apposite. This section provides that a civil marriage cannot co-exist with a customary marriage in a polygynous setting (s 10(1) and (4)). Only a customary marriage can withstand polygyny. In other words, a polygynous dual marriage is impermissible (s 10(4)). Be that as it may, people still enter into subsequent marriages during the subsistence of a civil marriage with another person. As already noted, this is legally impermissible in terms of s 10. The effect is that the second marriage will be invalid.

This article focuses on a situation when a couple enters into a monogamous dual marriage. It deals with the impact of monogamous dual marriages on antenuptial contracts. It will open by demonstrating how dual marriages are entered into. It will then discuss the legal implications of dual marriages on antenuptial contracts. Each dual marriage is unique on its facts and the applicable principles will change depending on the facts. This article will submit that, due to procedural reasons, some existing antenuptial contracts in dual marriages may be null and void. Case law will be used to support this assertion.

Dual marriages

As noted above, a dual marriage is when African people enter into both a customary marriage and a civil marriage with each other. They may start with a civil marriage and then conclude with a customary marriage. They may also adopt a blended approach whereby a civil marriage and a customary marriage are entered into at the same time. An example of a blended approach is when a couple says marriage vows and, thereafter, perform the gifting ceremony. This blended format is attractive as it is cost effective. African people usually open the subject of marriage by negotiating and delivering *ilobolo*. Contrary to popular belief, mere delivery of *ilobolo* does not conclude a customary marriage. This marriage is not just a once-off event; it is a culmination of various events that end in the bride being integrated into her new family.

Once an agreement is reached on *ilobolo*, with at least partial delivery thereof, the parties are usually permitted by their families to conclude a civil marriage. Once a civil marriage has been concluded, the parties usually finalise the customary marriage by integrating the bride into the new family. The integration of the bride usually involves the bride being welcomed into the family and introducing her to the ancestors. Nothing prevents the parties from starting with the customary marriage. After this customary marriage, they enter into a civil marriage. It is common to find that customary marriage is registered; instead, they will use the civil marriage certificate. For this reason, Professor Fatima Osman refers to a dual marriage as a marriage that is celebrated in terms of customary law and registered as a civil marriage (Fatima Osman 'The million Rand question: Does a civil marriage automatically dissolve the parties' customary marriage?' (2019) *PER* 1 at 8).

Matrimonial property in dual marriages

The general principles regarding marital property are applicable. Both a civil and a customary marriage are by default in community of property (see s 7 of the Recognition of Customary Marriages Act). Should a couple wish to exclude community of property, they must execute an antenuptial contract, in which case, their marriage will be out of community of property. The parties must decide whether they wish to include or exclude the accrual.

If the parties in a monogamous dual marriage wish to include community of property, this is the default system and problems do not arise. The problem arises if the parties in this monogamous dual marriage want to conclude an antenuptial contract. Section 87(1) of the Deeds Registries Act 47 of 1937 requires that antenuptial contracts must be registered within three months after execution. It must be entered into before the conclusion of the marriage. The problem arises where the parties start by complying with the cultural aspects of a marriage, thereby concluding a customary marriage. Often, they do not think about the impact that this has on their matrimonial property. By default, the customary marriage will be in community of property. When they agree that their civil marriage will be out of community of property, they simply execute the antenuptial contract without considering that they are already married in community of property. The question then turns on the validity of the said antenuptial contract.

The validity of antenuptial contracts in monogamous dual marriages

As stated above, when parties enter into a customary marriage, in compliance with culture, without an antenuptial contract such marriage will be in community of property. If the parties subsequently attempt to execute an antenuptial contract in view of an impending civil marriage, this antenuptial contract will be null and void because the parties are already married in terms of customary law and their marriage is in community of property. The correct procedure is to approach the High Court for an order allowing the parties to change the matrimonial property system applicable to their marriage. This procedure is set out in s 21 of the Matrimonial Property Act 88 of 1984.

In order to succeed with an application of this nature, a party must satisfy the court that 'there are sound reasons for the proposed change' (s 21(1)(*a*)), that 'sufficient notice of the proposed change has been given to all the creditors' (s 21(1)(*b*)) and that 'no other person will be prejudiced by the proposed change' (s 21(1)(*c*)).

In *LNM v MMM* (GJ) (unreported case no 2020/11024, 11-6-2021) (Siwendu J), the court dealt with a similar issue. In this case, the parties had agreed to enter into a civil marriage out of community of property. However, being Africans, they first complied with the cultural aspects of entering into a marriage. *Ilobolo* was successfully negotiated, and the bride was handed to her new family. The parties started cohabiting. The customary marriage was not registered as the parties had intended that the civil marriage would regulate their matrimonial property matters. In anticipation of a civil marriage, the parties duly executed and registered an antenuptial contract. Before they could enter into a civil marriage, their relationship became sour. In an action for divorce, the court had to determine the validity of the customary marriage and the antenuptial contract. The court held that the customary marriage was valid. Since the antenuptial contract was executed and registered after the parties had already entered into the customary marriage, it was null and void. The court held that the correct procedure was that in s 21 of the Matrimonial Property Act, set out above.

Conclusion

Depending on the time when the antenuptial contract is executed and registered, such antenuptial contract may be null and void. Although in *LNM v MMM* the parties did not finally conclude a dual marriage, however, one was anticipated and on the cards. Because of this, the case is very important. It is certainly a guide to practitioners who deal with antenuptial contracts involving parties who adhere to customary law. Practitioners who deal with monogamous dual marriages should heed the advice in this article and follow the correct procedure in s 21 antenuptial contracts.

Siyabonga Sibisi *LLB LLM (UKZN)* is a legal practitioner and lecturer at the University of KwaZulu-Natal in Durban. ❑

LAW SOCIETY OF SOUTH AFRICA
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THE SA ATTORNEYS' JOURNAL

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Do you have the appetite, expertise, and resources to pursue your mandates expeditiously?

By Thomas Harban

Many of the professional indemnity (PI) claims notified to the Legal Practitioners Indemnity Insurance Fund NPC (the LPIIF) arise from circumstances where the legal practitioners concerned did not attend to their mandates timeously or with the level of diligence, the degree of skill, care or attention reasonably expected of a legal practitioner.

Before accepting an instruction, consider whether you have the appetite, expertise, and resources to pursue the matter. If a matter will not receive your full attention, or is outside of your capabilities, it is best that you do not accept the mandate in the first place.

Matters lying unattended or dormant in a legal practice are a potential source of risk (including the risk of prescription or a complaint to the Legal Practice Council (the LPC)) for the firm.

I will use three decided cases to demonstrate my points. In so doing, I hope that readers will identify the underlying triggers that resulted in the negative consequences for the legal practitioners concerned and take steps to avoid similar actions, or errors in their own practices.

Attempting to lay blame with the client

The first case I consider is *Mlenzana v Goodrick and Franklin Inc* 2012 (2) SA 433 (FB).

The plaintiff's husband had died because of injuries he sustained in a motor vehicle accident that occurred on 22 June 2004. She instructed the defendant (a firm of attorneys) on 17 August 2004 to pursue a claim for loss of support against the Road Accident Fund (RAF) on her behalf. The plaintiff's cause of action against the defendant was based on an alleged breach of the mandate that she had given to the firm, in that the defendant had wrongfully neglected to lodge her claim with the RAF within the three-year prescription period in s 23 of the Road Accident Fund Act 56 of 1996. She alleged that prescription of her claim could have been prevented had the defendant exercised the care and diligence that could reasonably be expected of an average legal practitioner.

The defendant defended the action. The essence of the defence was that the failure to lodge the plaintiff's claim timeously was not caused by negligence on its part (at para 9). In its plea, the defendant laid the blame for its failure to lodge the claim timeously with the plaintiff. The defendant alleged that the plaintiff had failed to furnish it with certain information and to sign certain documents necessary to lodge her claim and that the defendant was unable to obtain necessary information from the deceased's employer.

For current purposes, I draw attention to the following points made in the judgment –

- the plaintiff's complaint that the attorney was difficult to reach, she (the plaintiff) did not receive progress reports and when she went to the defendant's office, she was either told that the matter was being attended too or that her attorney was not available (para 46);
- the concessions made in cross-examination by the attorney who dealt with the matter regarding the required information she had received from the defendant (para 50);
- the attorney's understanding of the legal position regarding the quantification of RAF claims. On this point, Rampai J unflatteringly commented – 'The law was lamentably misconceived' (at para 52) and that this 'was a clear misconception of the law' (para 72);
- the attorney's lack of file notes for the specific consultation to support her version that she only received the deceased's salary advice after prescription (para 57). No file notes were kept even of the second consultation she had with the defendant on 16 September 2005, which was more than a year after the first consultation (para 78);
- that the defendant had all the necessary information to meet the substantial compliance requirements for the submission of a RAF claim form approximately five months before the prescription date (para 70) but failed to submit the claim timeously;
- the numerous letters written by the attorney to the plaintiff requesting information that she either already had (para 77) or could readily obtain herself (paras 80 to 86);
- the failure of the attorney to note the obvious breakdown in communication between herself and her client (para 78); and
- the court's description of the attorney's actions as 'a chronicle of procrastination and neglect' (para 89).

The defendant was found liable to plaintiff for damages as may be proved or agreed (para 103).

An unexplained delay of more than a decade to get to trial

In *Nene v Road Accident Fund* (GJ) (unreported case no 2012/41577, 12-1-2022) (Weiner J) Weiner J had made an order requiring the plaintiff's attorney to depose to an affidavit explaining why –

- the matter took ten years to get to trial;
- an amendment of R 10 million in the quantum claimed was served on 13 June 2019;
- the attorney should be entitled to fees under the Contingency Fees Act 66 of 1997; and
- the attorney should not be reported to the Legal Practice Council (LPC).

The attorney's explanation was that he had been instructed by the plaintiff on 3 September 2009 to pursue a claim against the RAF to recover damages she had suffered because of injuries she sustained in a motor vehicle accident. His affidavit set out a chronology of events covering the period from the date that he was instructed until the matter was eventually placed on the trial roll on 16 August 2021. It was gleaned from the chronology provided by the attorney that there was a lapse of time between the time that the RAF's plea was served on 8 May 2013 and 20 March 2017 when the attorney contacted the RAF to ascertain who its new attorneys were as the RAF had changed its panel attorneys

sometime after the plea had been delivered. The plaintiff had been informed on 20 March 2017 that a trial date would be obtained when the RAF appointed new attorneys. The RAF's new attorneys came on record on 12 April 2017. The plaintiff was informed on 29 March 2017 that she was required to attend medical assessments, but the assessments only took place 18 months later and the RAF then also requested the plaintiff to attend its own medical assessments. A trial date was only applied for 18 months later (14 September 2018) and the date allocated was 23 October 2019. There were further delays occasioned by the fact that the RAF wished to still appoint its own medical experts to conduct medical assessments. The RAF's medical reports were ultimately served in September and October 2019, followed by the joint minutes also in October 2019. The plaintiff's attorney allowed another 15 months to lapse before applying for a case management meeting to be held. The matter was then placed on the trial roll for 16 August 2021.

The court found (at para 4) that there were large gaps where there were no explanations for the delay, the explanation was unacceptable, the attorney's conduct deserved censure and that '[a] plaintiff who has had to wait for 12 years for her matter to come to trial has not received professional, ethical, and proper treatment from her attorney. It amounts to negligence and ineptitude.'

The attorney's explanation for the amendment of the quantum from a total of R 350 000 to R 10 million, described by the court as 'astonishing' (para 5), was that:

'It is common practice in the firm, that amendments to the Particulars of Claim are done. The goal of the amendment is to ensure that the plaintiff receives the best possible recourse for the injuries suffered. It is common knowledge that in this particular matter, the Actuarial Calculation reflects an amount which is substantially less than what is being claimed on the Amended Pages. However, an Actuarial Calculation cannot be read in isolation as it is not exclusive evidence. An amendment can thus be made for a higher amount in the interest of the plaintiff. It is also common knowledge that an amendment does not necessarily mean that the outcome by way of trial or settlement will be exactly what is claimed on the Amended Pages. The amount which the plaintiff may receive at the finalisation of a matter may be the amount reflected on the Actuarial Calculation, an amount stated on the Particulars of Claim or an amount between what is claimed and what the calculation reflects.'

The claim was settled for an amount of R 139 209 (para 8) and the court found that '[the] amended claim was thus totally unrelated to the actual damages suffered by the plaintiff. This conduct is egregious, grossly unprofessional, deceitful, and worthy of censure.'

The explanation given by the attorney on why he should be entitled to fees in terms of the Contingency Fees Act was also found to be unsatisfactory (para 10) and he failed to explain the 12-year delay for the matter to be heard. The attorney's conduct was referred to the LPC for investigation (para 15) and the attorney was ordered to strictly abide with the compliance requirements set out in ss 4(1), (2) and (3) of the Contingency Fees Act (para 14).

An unexplained delay to interrupt prescription

In *Minister of Police v Masina* (SCA) (unreported case no 1082/17, 28-3-2019) (Matojane AJA (Tshiqi, Wallis, Zondi and Van der Merwe JJA concurring)) the respondent was injured on 16 May 2012 when he was allegedly shot by a member or members of the South African Police Service (SAPS) while participating in protest action. He claimed that he only became aware of his right to institute a claim against the Minister of Police (the minister) in February 2013 when an acquaintance – who had also been shot in the same protest action – requested him to consult with his (the acquaintance's) attorneys regarding the events on the date of the alleged shooting. On 10 September 2013 the plaintiff accompanied his acquaintance give a statement in support of a claim to the attorney's acting for the latter in a claim against the minister. He gave a statement to the attorney and enquired about the possibility of instituting his own claim against the minister and was informed that he would have to instruct the firm formally to act for him, which he did in approximately June 2014.

The minister defended the action and raised two grounds of prescription, being –

- the failure to timeously comply with s 3(1) and (2) of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 (the Act); and
- a special plea of prescription as contemplated by s 11(*d*) of the Prescription Act 68 of 1969.

The appellant's attorneys launched an application in terms of s 3(4)(*b*) of the Act for condonation of his non-compliance with the requirements to give notice. That application was granted by the court *a quo* and the minister appealed against that decision.

The Supreme Court of Appeal found (at para 13) that the appellant knew that his claim lay against the police and that he should have taken immediate steps to enforce his claim. Matojane AJA (as he was then) stated that:

'There was no explanation for his failure to try and pursue a claim after February 2013 until June 2014. *Furthermore, there was no explanation for the failure of his attorneys to pursue the matter expeditiously once he instructed them to do so in June 2014. The notice was only sent to the Minister of Police in September 2014. The particulars of claim were prepared in February 2015, and the summons was issued on 28 April 2015. It was only sent to the sheriff on 15 May and served on 19 May after the expiry of the three-year prescriptive period.* This delay was also unexplained' (para 17, my italics).

The appeal by the minister was upheld and the application for condonation was dismissed with costs.

Lessons learned

Legal practitioners must act on all instructions from clients promptly.

The Code of Conduct for all Legal Practitioners, Candidate Legal Practitioners and Juristic Entities prescribes that:

'3. Legal practitioners, candidate legal practitioners and juristic entities shall –

…

3.11. use their best efforts to carry out work in a competent and timely manner and not take on work which they do not reasonably believe they will be able to carry out in that manner;

…

3.13. remain reasonably abreast of legal developments, applicable laws and regulations, legal theory and the common law, and legal practice in the fields in which they practice;

…

18.3. exercise proper control and supervision over his or her staff and offices;

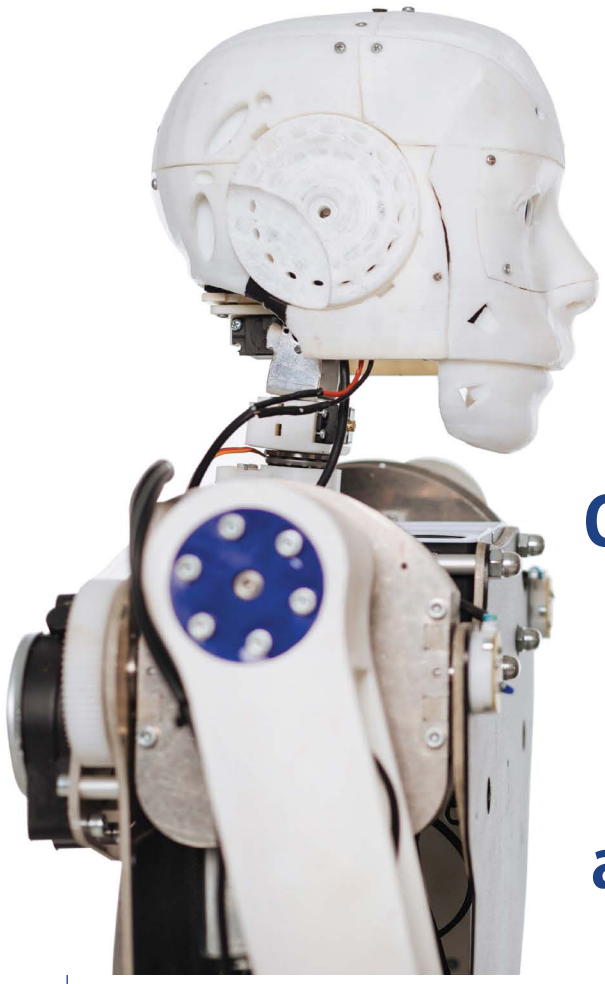
….

18.14. perform professional work or work of a kind commonly performed by an attorney with such a degree of skill, care and attention, or of such quality or standard, as may reasonably be expected of an attorney.'

Regular assessments and audits of all the files in the practice, proper supervision and oversight are some of the measures that can be implemented to mitigate the risks highlighted in the three cases referred to.

If you do not have the appetite, expertise, capacity, and resources to pursue the mandate timeously and adequately, it is prudent to decline the instruction and suggest that the client instruct another attorney instead.

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



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Can an artificial intelligence system be classified as an inventor?

By Ikechukwu Emmanuel Okeke

It is not uncommon to see a robotic cleaner mopping the floor when landing or transiting through Changi airport in Singapore. These robots have been programmed to actively look for spills to mop up. The artificial intelligence (AI) of these robotic cleaners enables them to perform the functions of a cleaner 24-hours a day without any need for human supervision and/or intervention. Another example is Henn-na Hotel in Japan that boasts of being the world-first hotel completely staffed by robots. From the check-in to check-out, everything is handled by robots.

In 2018, Dr Stephen Thaler announced that his AI system, Device for the Autonomous Bootstrapping of Unified Sentience (DABUS), invented new products on its own initiative, without any human intervention. The two new inventions that were created by DABUS are a food container suitable for liquid and solid products and a device for attracting enhanced attention.

Dr Thaler filed patent applications in various countries for the invention and named his AI system, DABUS, as the inventor. This sparked a debate in the intellectual property industry and the pertinent question was whether inventions made by AI qualifies for a patent.

South Africa

Section 25(1) of the South African Patents Act 57 of 1978 states that a patent will be granted for an invention that is 'new', has an 'inventive step' and has utility. Furthermore, s 27(1) stipulates that an application for an invention can only be made by the inventor or 'any other person' acquiring such right from the inventor or both the inventor and such other person. Does this imply that an AI system can be classified as an inventor?

A 'person' is defined as a 'human being regarded as an individual' (www.wikidoc.org, accessed 1-10-2022). It can be said that a person is a human being and AI systems are not classified as human beings. In addition, the drafters of the South African Patent Act most likely envisioned human beings and not robots as inventors. Thus, in that context, an AI system may not be regarded as an inventor according to the South African Patent Act.

Ironically, Dr Thaler filed a patent application in South Africa (SA), named DABUS as an inventor and was granted a patent. As surprising as it may sound, it is important to understand how patent officers examine patent applications that are received. When a patent application is made, the applications are examined based on the formalities and the substantive nature of the application. A formal examination process verifies that all necessary documents such as a power of attorney and patent specification were submitted, and that the required fees have been paid timeously. On the other hand, a substantive examination examines the patent specification to determine if the invention being claimed is novel, has an inventive step and can be used in SA. Other substantive aspects of the invention are also scrutinised at this stage to determine if it meets the requirements of the Patents Act, and a patent can be granted. Most patent office's offer both a formal and substantive examination of all patent applications received. However, SA conducts only formal examinations of all patent applications received. It is important to note that the South African Patent Office, the Companies and Intellectual Property Commission, have initiated processes to begin substantive examinations, but this is yet to be implemented. This would explain why Dr Thaler succeeded in obtaining a patent in SA for an invention in which the inventor is not a person.

United Kingdom

All patent applications designated to the United Kingdom (UK) are submitted to the UK Intellectual Property Office (UKIPO). The UKIPO conducts both a substantive and formal examination of all patent applications. Dr Thaler's patent applications that were submitted to the UKIPO for inventions created by DABUS were rejected. In rejecting the applications, the UKIPO noted that Dr Thaler had failed to comply with s 13(2) of the UK Patents Act 1977, which required that a person is identified as the inventor, as well as indicating how an applicant had derived his rights from the inventor. Dr Thaler argued that no persons was mentioned as the inventor as required by s 13(2) because his AI DABUS was the sole inventor. Dr Thaler's argument was rejected, and his patent application was deemed to be withdrawn. In an attempt to overturn the rejection, Dr Thaler launched a High Court proceeding arguing, *inter alia*, that the UKIPO had misinterpreted the UK Patents Act 1977.

In its ruling, the High Court rejected Dr Thaler's argument and dismissed his application. The judge held that only a natural person could be considered as an inventor and the UKIPO was correct in its interpretation of the Patents Act as applied to Dr Thaler's patent applications. Unperturbed by the High Court ruling, Dr Thaler launched an appeal. In his appeal application, Dr Thaler sought the Appeal Court to, *inter alia*, determine if the UK Patents Act 1977 require that an inventor be a person. In dismissing the appeal, the court held that the UKIPO and the High Court were correct in their interpretation of the Patents Act 1977.

United States of America

The United States (US) Patent and Trademark Office (USPTO) is responsible for receiving all patent applications in the US. Just like the UKIPO, the USPTO conducts a substantive and formal examination of all patent applications received. Dr Thaler's patent applications naming DABUS as the inventor that were filed in the US were rejected by USPTO. An appeal that was filed at the United States District Court for the Eastern District of Virginia was also dismissed. Similar to the court cases that were instituted in the UK, Dr Thaler had sought, *inter alia*, a declaration that inventions by AI should not be rejected on the basis that no natural person was identified as the inventor. In defending its decision to reject the patent applications, the USPTO noted that public comments obtained from a conference on AI rejected the notion that AI systems could be recognised as inventors because human interventions were still required. Furthermore, the court held that the US Patents Act (USC Title 35) refers to an inventor as an individual and an AI has never been considered as an individual.

Australia

The IP Australia (Australian Patent Office) conducts substantive and formal examinations of patent applications. A patent application naming DABUS as an inventor was filed in Australia. The Deputy Commissioner of Patents, in considering the patent applications, noted that the Australian Patents Act 1990 does not define an inventor and thus, he relied on the ordinary English meaning of an inventor which refers to a natural person. Furthermore, s 15 of the Australian Patents Act 1990 stipulates that a patent for an invention may be granted to a person who is an inventor or has acquired rights from the inventor. As a result, it was concluded that the ordinary meaning of inventor is inherently human. This led to the patent applications being rejected by the Australian Patent Office and the applications were deemed to have lapsed for failing to comply with patent requirements.

Not surprisingly, Dr Thaler launched a proceeding at the Federal Court of Australia challenging the decision of the Australian Patent Office. In considering the applications before the court, the judge noted that no specific provisions in the Australian Patent Act 1990 expressly rejects the proposition of an AI system being an inventor. Furthermore, copyright law, which requires a human author or existence of moral rights may be interpreted as excluding non-human inventors, but no aspect of patent law could be interpreted as excluding non-human inventors. The judge also noted that the Deputy Commissioner was correct in stating that the Patents Act does not define the word 'inventor'. Thus, the ordinary meaning of the word 'inventor' must be ascribed. In ascribing the ordinary meaning of the word 'inventor', the judge stated:

'… as the word "inventor" is not defined in the Act or the Regulations, it has its ordinary meaning. In this respect then, the word "inventor" is an agent noun. In agent nouns, the suffix "or" or "er" indicates that the noun describes the agent that does the act referred to by the verb to which the suffix is attached. "Computer", "controller", "regulator", "distributor", "collector", "lawnmower" and "dishwasher" are all agent nouns. As each example demonstrates, the agent can be a person or a thing. Accordingly, if an artificial intelligence system is the agent which invents, it can be described as an "inventor"' (*Thaler v Commissioner of Patents* [2021] FCA 879).

Furthermore, the judge stated the following in response to the commissioner's reliance on the dictionary meaning of the word 'inventor':

'The commissioner's reliance on dictionary definitions is problematic to say the least.

First, there are competing dictionary definitions of "inventor" that merely define the term as the noun corresponding to the verb "invent", without describing the agent which invents. So, which dictionary do you use? And what meaning, and in what context?'

In ruling in favour of Dr Thaler, the judge emphasised that the Patents Act should be interpreted in a way that promotes economic wellbeing and technological innovation regardless of whether the innovation was made by a natural person or an AI system. According to the judge, an inventor includes an AI system, such as DABUS. An appeal has been filed against the decision of the judge and the matter is still pending.

Dr Thaler submitted patent applications to patent offices including USPTO, the European Union, Germany, Australia, and UK that conduct both substantive and formal examinations. In his applications for invention made by DABUS, he listed DABUS as the inventors. Thus far, his patent applications have been rejected by all offices worldwide that conduct substantive examination of patent applications.

Conclusion

With the advancement of technology, especially AI, it is expected that more inventions by AI systems will become the norm. Furthermore, the Fourth Industrial Revolution (4IR) can be best described as a fusion of technologies such as AI, genetic engineering, robotics, Internet of Things, 3D printing and quantum computing. Nicky Verd, the renowned author of *Disrupt Yourself or be Disrupted* (Johannesburg: Porcupine Press 2019) captures the essence of the 4IR in her book by stating that: 'The Fourth Industrial Revolution is not about new Apps, or new technologies. It is about a new era, new ways of thinking and new ways of doing business.'

The current South African Patents Act, as it stands was not envisaged to deal with inventions made by AI systems. As technology rapidly advances in the 4IR, our Patents Act needs to be updated to meet the rigour of the 4IR. The floor is now open for discussions on whether to modify our Patents Act to accommodate inventions made by AI systems and bring the Act in line with advancing technology or resist AI being regarded as inventors and possibly stifle innovations. I vote for the former.

Ikechukwu Emmanuel Okeke *BSc (cum laude) (UNISA) BSc Hons MSc (UP) LLB (cum laude) (UNISA)* is a candidate legal practitioner at Natasha Mohunlal & Associates in Pretoria.

Picture source: Gallo Images/Getty

Has the court's jurisdiction in community scheme matters been ousted by the Community Schemes Ombud Service?

By Lisa Mills

The vexed question of concurrent jurisdiction frequently arises, whether it be concurrent jurisdiction of two different courts, or the jurisdiction of special bodies created by statute and the jurisdiction of the courts. In *Heathrow Property Holdings NO 3 CC and Others v Manhattan Place Body Corporate and Others* 2022 (1) SA 211 (WCC) the Western Cape Division of the High Court (WCC) held that the court's jurisdiction has been ousted in respect of all disputes that fall within the ambit of the Community Schemes Ombud Service Act 9 of 2011 (the CSOS Act). Sher J held that the courts are obliged to decline to hear such disputes, save where exceptional circumstances are shown to exist, which will depend on the facts of each particular case. This has been followed in *Wingate Body Corporate v Pamba and Another* (GP) (unreported case no 33185/2021, 21-1-2022) (Mbongwe J) and *Bila and Others v Monterey Body Corporate and Others* (GJ) (unreported case no 2021/5060, 18-2-2022) (Friedman AJ). Soon after the *Heathrow Property* judgment was handed down, the Supreme Court of Appeal (SCA) handed down its judgment in *Standard Bank of South Africa Ltd and Others v Mpongo and Others* 2021 (6) SA 403 (SCA), which clarified the law relating to the ouster of the courts' jurisdiction. This article considers whether the decision in *Heathrow Property* is consistent with the established legal principles articulated in *Mpongo*.

The CSOS Act

The CSOS Act came into effect on 7 October 2016. One of its stated purposes is to provide a dispute resolution mechanism in community schemes, which include, *inter alia*, sectional titles schemes, share blocks, homeowners' associations and housing schemes for retired persons. Disputes subject to the CSOS Act are defined as those regarding the administration of a community scheme between persons who have a material interest in the scheme, one of whom is the association, occupier or owner. After accepting an application, the ombud will consider whether there is a reasonable prospect of a negotiated settlement. If so, he will refer the matter to conciliation. If not, or 'if conciliation fails, the ombud must refer the application to an adjudicator' for determination (Banele Mhlongo 'Resolving disputes with communal living and communal ownership' (www.news24.com, accessed 2-10-2022)). The adjudication process is inquisitorial, rather than the adversarial, and the powers of the ombud go far beyond those of the courts. An adjudicator may grant equitable relief, unlike a court which is bound to apply established legal principles. 'The adjudicator must observe the principles of due process of law. The adjudicator is called upon to act quickly, and with as little formality and technicality as is consistent with a proper consideration of the application. The adjudicator must also consider the relevance of all evidence but is not obliged to apply the exclusionary rules of evidence as they are applied in civil courts' (s 50 of the CSOS Act; *Stenersen & Tulleken Administration CC v Linton Park Body Corporate and Another* 2020 (1) SA 651 (GJ)). Legal representation is only permitted where there are exceptional circumstances or where the parties all agree. Any person 'dissatisfied by an adjudicator's order, may appeal to the High Court, but only on a question of law' (s 57 of the CSOS Act).

The *Heathrow Property* judgment

In *Heathrow Property* the owner of three units in a sectional title scheme applied to court to declare that a conduct rule restricting short-term rentals was unreasonable and void. They also challenged a trustees' resolution to instal a biometric access system on the ground that this constituted a luxurious improvement which required unanimous consent of all owners. The court held that the issues in the application fell squarely within the jurisdiction of an adjudicator under the CSOS Act. The court distinguished this matter from the cases that deal with concurrent jurisdiction of different courts. Sher J pointed out that an adjudicator has an equitable power to decide what is reasonable in relation to the rules or resolutions of a community scheme and also to direct what should reasonably be done in place of any impugned rule or resolution. A court, on the other hand, 'is confined to reviewing the legality or rationality of the conduct of a decision-making body and not the fairness thereof, and … generally does not have the power to substitute its own decision' for that of the governing body (*Heathrow Property Holdings NO 3 CC* at para 53). Sher J held that, as the adjudicator has powers, which exceed those of the court, his jurisdiction is in substantial respects not concurrent with that of the courts. The judge concluded that, adopting a purposive and sensible interpretation of the Act, it is apparent that the legislature intended that the primary forum for adjudication of disputes in terms of the Act is CSOS and the High Court is intended to exercise review and appellate jurisdiction only.

Is there an ouster of the courts' jurisdiction in CSOS?

Although the Ombud has powers to grant relief, which the court cannot grant, the question is whether the court's jurisdiction is ousted in cases where the relief being sought by the litigants does fall within the powers that the court would have. The issue under consideration is the overlap of jurisdiction between the Ombud and the court. The SCA explained the concept of concurrent jurisdiction in the case of *Makhanya v University of Zululand* 2010 (1) SA 62 (SCA) at para 25. When a statute confers judicial power on a special court it may simultaneously exclude the ordinary power of the High Court (exclusive jurisdiction), or it may confer power on the special court without excluding the ordinary power of the High Court (concurrent jurisdiction). In the latter case the claimant may choose the court in which to pursue the claim.

In *Richards Bay Bulk Storage (Pty) Ltd v Minister of Public Enterprises* 1996 (4) SA 490 (A) the appellate division explained the correct approach to deciding whether an ouster of jurisdiction can be inferred. It held that if 'the Act does not do so in express terms, and the question then is whether it contains an implication to that effect. … [And] there is a strong presumption against such an implication' (para 5). In *Metcash Trading Ltd v Commissioner, South African Revenue Service, and Another* 2001 (1) SA 1109 (CC) at para 43, Kriegler J noted that, as there was no express ouster of the court's inherent jurisdiction in the statutory provision concerned, the question was whether such an ouster was 'necessarily implicit in its terms, while it is trite that there is a strong presumption against such an implication'. In *Mpongo*, Sutherland AJA, writing for a unanimous court, referred to all three of these decisions in support of the conclusion at para 68 that 'there is a strong presumption against the ouster of the High Court's jurisdiction, and the mere fact that a statute vests jurisdiction in one court is insufficient to create an implication that the jurisdiction of another court is thereby ousted.'

In the CSOS Act there is no express ouster of the High Court's jurisdiction, nor is an ouster necessarily implicit in its terms. The fact that the ombud has wider powers does not imply an ouster of the court's jurisdiction. There is simply an overlap in situations where a court can grant the same relief as an adjudicator.

Can a court refuse to exercise its jurisdiction?

In *Agri Wire (Pty) Ltd and Another v Commissioner, Competition Commission, and Others* 2013 (5) SA 484 (SCA) the SCA confirmed that 'save in admiralty matters, our law does not recognise the doctrine of *forum non conveniens*, and our courts are not entitled to decline to hear cases properly brought before them in the exercise of their jurisdiction'. In *Mpongo*, Sutherland AJA explained that there are various common law and statutory mechanisms in place to mitigate any adverse consequences to a defendant who may suffer prejudice due to a plaintiff's choice of forum where concurrent jurisdiction exists. One example is that 'a court may refuse to hear a matter over which it has jurisdiction if the plaintiff is guilty of an abuse of process' (*Mpongo* at para 59). In *Standard Credit Corporation Ltd v Bester and Others* 1987 (1) SA 812 (W) at 820A-B, Van der Walt J explained that an 'abuse of process could be said, in general terms, to occur when a court process "is used by a litigant for a purpose for which it was not intended or designed, to the prejudice or potential prejudice of the other party to the proceedings"' (*Mpongo* at para 46). This view was endorsed by the SCA in *Beinash v Wixley* 1997 (3) SA 721 (SCA) at 734G where the court said that, although there can be no all-encompassing definition of the concept of abuse of process, in general terms, 'an abuse of process takes place where the procedures permitted by the Rules of the Court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective'. Applying this approach to the facts in *Heathrow Property* it cannot be said that the owners were abusing the court's process by bringing their case to the court instead of the Ombud under the CSOS.

How can parties be encouraged to use the CSOS where appropriate?

In an earlier judgment of the WCC in *Coral Island Body Corporate v Hoge* 2019 (5) SA 158 (WCC), Binns-Ward J noted that the compelling constitutional and social policy considerations that informed the introduction of the CSOS Act, including cheap, expeditious and informal determination of disputes in community schemes, would be undermined if the courts indiscriminately entertained matters that should rather have been brought under the Act. He held that, although the courts do not have the power to refuse to hear such cases, they should use their judicial discretion in respect of costs to discourage the inappropriate resort to the courts in respect of matters that could, and more appropriately should, have been taken to the ombud. The judge referred to the judgment in *Goldberg v Goldberg* 1938 WLD 83 where the court pointed out that a successful applicant might be awarded costs on a lower scale, or deprived of his costs, or even ordered to pay any additional costs incurred by the respondent consequent upon the case being brought in the High Court. I submit that the approach of Binns-Ward J is undoubtedly the correct approach and one that has been endorsed in a long line of judgments preceding *Heathrow Property*.

Moreover, the finding in *Heathrow Property* that the court's jurisdiction is not ousted where exceptional circumstances are shown to exist falters on the basis that 'fish cannot sometimes be fowl', as observed by Sutherland AJA in *Mpongo* at para 84.

Lisa Mills *BA LLB LLM (Maritime) (UKZN)* is a legal practitioner and a member of Ubunye Chambers in Durban. ❑

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Determining what 'in the presence' means for the virtual commissioning of oaths

By Danielle Hugo

One of the challenges that had to be overcome within the legal arena – following the disruption caused by the COVID-19 pandemic – was that of the commissioning of affidavits. The checklist for the virtual commissioning of an affidavit is as follows:

- Utilise a virtual platform that will ensure the deponent and the commissioner can both see and hear each other, and that the affidavit is signed by the deponent while the commissioner witnesses the signing.
- Append a commissioner's certificate customised for virtual commissioning in the following format:

'I hereby certify, by way of appending an advanced electronic signature hereto, that the Deponent has electronically signed and sworn before me on this the __ day of _____ 20___, by way of visual video meeting held with the Deponent on an electronic platform and he/she has declared that; he/she knows and understands the contents of this affidavit; that it is the truth to the best of his/her belief; and that he/she has no objection to taking the prescribed oath, which the Deponent considers to be binding on their conscience, the Regulations Governing the Administering of an Oath or Affirmation in GN R1258 *GG*3619/21-7-1972, as amended, having been substantially complied with.'

- File an additional affidavit by the commissioner setting out the reasons why reg 3(1) cannot be complied with. This additional affidavit should also set out all the steps that were taken to ensure *substantial* compliance with reg 3(1).
- It is advisable that the additional affidavit should be commissioned strictly in compliance with the regulations.

According to reg 2(1) of the regulations published in terms of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963 (the Act) under GN R1258 *GG*3619/21-7-1972, a commissioner of oaths who administers the oath or affirmation to any person shall ask the deponent –

'(a) whether he knows and understands the contents of the declaration;

(b) whether he has any objection to taking the prescribed oath; and

(c) whether he considers the prescribed oath to be binding on this conscience'.

'If the deponent acknowledges that he knows and understands the contents of the [affidavit] and informs the commissioner of oaths that he does not have any objection to taking the oath and that he considers it to be binding on his conscience' (reg 2(2)).

'The deponent shall sign the declara-

tion in the presence of the commissioner of oaths' (reg 3(1)).

In a number of decisions it has been held that reg 3(1) does not require the commissioner of oaths to certify that the affidavit has been signed in their presence (see *Ladybrand Hotels (Pty) Ltd v Stellenbosch Farmers' Winery Ltd* 1974 (1) SA 490 (O) at 492G – 493A; *Nkondo v Minister of Police and Another* 1980 (2) SA 362 (O) at 365A; *Cape Sheet Metal Works (Pty) Ltd v JJ Calitz Builder (Pty) Ltd* 1981 (1) SA 697 (O) at 699B). If an objection is made to the validity of the affidavit as a result of the alleged non-compliance with the regulations, the onus rests on the person objecting to the affidavit to produce evidence to prove such a failure (see *Ladybrand Hotels* at 493C – D). In the case of *Q4 Fuel (Pty) Ltd v Ellisras Brandstof en Olie Verspreiders (Pty) Ltd* (LP) (unreported case no HCAA 08/2021, 11-11-2021) (Kganyago J), the Full Court held that although it was desirable that each and every page of the accompanying affidavits be initialled, it is not a requirement in terms of the regulations. It is advisable that the aforementioned finding be approached with caution and rather be complied with as it has become general practice to initial every page of the affidavit, as well as the annexures to prove that they form part of the affidavit. According to r 13v of the Rules Regulating the Conduct of the Proceedings of the Eastern Cape Division of the Supreme Court of South Africa published under GN R3289 *GG*2518/12-9-1969, it is a requirement that every page of the affidavit and annexures be initialled.

Recently in *Knuttel NO and Others v Bhana and Others* [2022] 2 All SA 201 (GJ), Katzew AJ was faced with, among others, 'the question whether the extraordinary steps taken for the commissioning of the oath of the deponent to the founding affidavit, who was infected with the COVID-19 virus at the time, constituted substantial compliance with the requirements for the commissioning of oaths'. In considering the question, Katzew AJ referred to the Full Court decision in *S v Munn* 1973 (3) SA 734 (NC) in which it was held that the purpose of the administration of the oath is twofold, namely to –

- add to the dignity of the occasion; and
- obtain irrefutable evidence that the relevant deposition was indeed sworn to.

In the *Munn* case it was further held that the regulations were directory only. Therefore, where there had not been strict compliance with the regulations, the affidavit would not necessarily be deemed null and void. The affidavit could still be valid, if there had been substantial compliance with the formalities in such a manner that it still gave effect to the purpose of the regulations. The purpose of administering the oath thus lies at the heart of the enquiry into whether there has been substantial compliance with the Regulations.

In the *Knuttel* case, the applicant's attorney explained in an additional affidavit that 'he e-mailed the unsigned draft founding affidavit to the deponent, … with instructions to read, initial and sign it before e-mailing it back to him. He then engaged the services of a commissioner of oaths who, … spoke to the … applicant in a video WhatsApp call. Having identified the … applicant as the person she professed to be, the commissioner then posed the usual questions, before she administered the oath in the conventional way, except that the deponent's initialling and signature had been appended before the link-up' (para 57). The court held that there was substantial compliance with the regulations and accepted the affidavit. The decision in the *Knuttel* case was, however, essentially *obiter*. This is because the averments contained in the founding affidavit that were being challenged, was also before the court in another affidavit which was commissioned strictly according to the regulations.

In *Firstrand Bank Ltd v Briedenhann* 2022 (5) SA 215 (ECGq) the issue of administering the oath via video conference, and whether there was compliance with reg 3(1) were also considered. The court raised a concern in regard 'to the fact that the affidavit filed … had been signed by the deponent utilising an electronic signature and had been commissioned by way of virtual conference' (para 6). The plaintiff in the case explained that it had set up a digital platform for the purposes of commissioning affidavits. The court held that 'the language of reg 3(1), when read in the context of the regulations as a whole, suggests that the deponent is required to append their signatures to the declaration in the physical presence or proximity of the commissioner' of oaths (para 25). The essential purpose of the regulations was held 'to provide assurance to a court receiving an affidavit that the deponent, properly identified as the signatory, has taken the oath. The signature to the declaration in the presence of the commissioner establishes a guarantee that the consequences of oath-taking are understood and accepted' (para 25). The essential features of the *Briedenhann* case are as follows:

It was argued that 'presence' could also be achieved through sight and sound. On that basis 'virtual presence' achieved by technology fell within the ambit of the meaning of the phrase. The court, however, did not agree. Goosen J stated that it came down to an exercise in interpretation; and that required meaning to be ascribed to the provision 'on the basis of the language used, of what was intended and what the purpose was of the provision' (para 27). The Justices of the Peace and Commissioners of Oaths Act 16 of 1963 dates back to 1963, so there could have been no intention of the legislature to include Zoom, Microsoft Teams or the like at the time. Goosen J held that the plain meaning of 'in the presence' meant within the physical proximity of the commissioner of oaths and did not extend to 'virtual presence'.

Goosen J held further that where the directory regulations had 'not been followed and adhered to, a court has a discretion whether or not to admit the affidavit' (para 48). In the exercise of its discretion, two factors had to be highlighted. First, the rule of law considerations; and secondly, 'the function of courts in dealing with novelty and innovation that fall outside of the ambit of an existing regulatory framework' (para 49). As regards the rule of law consideration, it was 'not open to a person to elect to follow a different mode of oath administration' (para 51). The mere fact that a regulation was directory, 'does not mean that a party can set out to achieve substantial compliance with such regulation rather than to comply with its requirements' (para 51). As regards the function of courts in dealing with new innovations, it was held that it was not the function of a court to legislate. However, on exercising his discretion judicially and within the interests of justice, Goosen J found that the evidence put before him undoubtedly proved that the purpose of reg 3(1) had been met, and therefore accepted the affidavits.

Until such a time as the regulations have been amended to cater for the virtual commissioning of affidavits (which is long overdue) the point of departure is not whether the meaning of the phrase 'in the presence' could or should be extended to include virtual presence. It is whether the specific virtual presence employed in that specific set of circumstances constitutes substantial compliance with the regulations or not.

- See Law Reports 2022 (Nov) *DR* 26.
- See Donald Msiza 'Virtual commissioning in South Africa – understanding *FirstRand Bank Ltd v Briedenhann*' 2022 (Oct) *DR* 6.

Danielle Hugo *LLB (UP)* is a legal practitioner and member of the Pretoria Society of Advocates at the Parc Nouveau Advocates' Chambers in Pretoria.

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Is the divorce court's discretion to transfer assets as per the Divorce Act unconstitutional?

By Clement Marumoagae

In *G v Minister of Home Affairs and Others (Pretoria Attorneys Association as* Amicus Curiae*)* [2022] 3 All SA 58 (GP), s 7(3) of the Divorce Act 70 of 1979 was declared unconstitutional. This order is yet to be considered by the Constitutional Court (CC) in terms of s 167(5) of the Constitution. This article discusses whether the CC should confirm the High Court's order of unconstitutionality.

The nature and character of s 7(3) of the Divorce Act

Section 7(3) of the Divorce Act generally provides the divorce court discretion when dissolving a marriage out of community of property concluded on or before 1 November 1984 to transfer assets or part thereof from the financially stronger spouse (hereafter FSS) to the financially weaker spouse (hereafter FWS). This section was inserted into the Divorce Act to protect vulnerable women who were married out of community of property and contributed towards the growth of their husbands' estates while their own was not growing due to the gender roles that they assumed during their marriages. It allows vulnerable women to be allocated a portion of their husbands' assets that were accumulated during the marriage, because they are ordinarily prevented from sharing on divorce due to being married out of community of property (*Holomisa v Holomisa and Another* 2019 (2) BCLR 247 (CC) at para 2). For this provision to be applicable, '[t]he marriage must have been entered into in terms of an antenuptial contract excluding community of property and of profit and loss and any form of accrual sharing' (*Beaumont v Beaumont* [1987] 2 All SA 1 (A) at 7).

The court's discretion to transfer assets from the FSS to the FWS, is a remedial exercise that recognises the contribution of the FWS on the accumulated assets that increased the FSS' estate. This is a redistribution remedy that seeks to protect the FWS. The exclusion of other vulnerable FWSs from the protection offered by the redistribution remedy had being held to be unconstitutional (see *Holomisa* and *President, RSA and Another v Women's Legal Centre Trust and Others* 2021 (2) SA 381 (SCA)). For redistribution to be ordered, s 7(4) of the Divorce Act requires the court to be satisfied that it is just and equitable to do so by assessing whether the FWS contributed directly or indirectly to the maintenance or increase of the estate of the FSS. The FWS must have maintained or increased the FSS' estate during the subsistence of the marriage by rendering services or saving expenses, which would otherwise have been incurred by the FSS (*Buttner v Buttner* [2006] 1 All SA 429 (SCA) at para 22).

The redistribution remedy can only be used by a FWS who was married before the legislation believed to empower spouses to choose their matrimonial property regimes and decide the applicable patrimonial consequences, such as the Matrimonial Property Act 88 of 1984, came into effect (*V v V* (GP) (unreported case no 19579/2013, 8-12-2017) (Petersen AJ) at para 14). However, in *Bezuidenhout v Bezuidenhout* [2004] 4 All SA 487 (SCA) at para 21, the court recognised that '[w]omen whose marriages were entered into later and with the exclusion of the accrual system may therefore be in the same disadvantaged position as before'. This is what the FWS attempted to demonstrate in *G v Minister of Home*

Affairs and Others, where among others, the court correctly observed that '[a]s the law currently stands, the court has no power to exercise the discretion provided in section 7(3), where marriages were concluded out of community of property with the exclusion of the accrual system after 1 November 1984' (para 1).

Restriction on the redistribution remedy

In *G v Minister of Home Affairs and Others* the parties were married out of community of property in 1988. The wife sought an order declaring the redistribution remedy unconstitutional to the extent that it does not apply to FWSs, mostly women, whose marriages are out of community of property with the exclusion of the accrual system, which were concluded after 1 November 1984 (para 2). Neither the husband nor the Minister of Justice and Constitutional Development who was joined to the proceedings opposed the application. The Pretoria Attorney's Association was admitted *amicus*. The wife argued that the restriction on the application of the redistributive remedy disproportionately impacts women. Further that the restriction amounts to unfair discrimination and operates to 'trap predominantly women in harmful, and toxic relationships when they lack the financial means to survive outside of the marriage' (para 11).

The court accepted an expert report that was prepared in support of the wife's application. This expert report referred to a 2016 study, which was not cited in the judgment, which allegedly found that South African women and women-headed households are significantly more likely to be multidimensionally poorer than males or male-headed households. It is also not clear whether the court assessed the study itself to evaluate the methodology and the adequacy of its sample to determine whether the conclusion reached by the expert who produced the report was factually justified. The court did not indicate whether this study dealt with married women and made findings about their socio-economic conditions during the marriage, reasons for getting married and economic position on divorce.

The expert report contended that '[b]lack women remain the poorest group in South Africa. As a result of their disproportionate poverty, women depend economically on male family members, husbands, and intimate partners for their survival and that of their children' (para 13). While this may be found to be true, it is not clear on what basis the statement was made. From the judgment, there appears to be no empirical research in South Africa, with an acceptable sample that includes urban and rural women who were divorced that was used to substantiate the expert's claims. The experts opined that '… given that women's ability to generate an income is reduced by marriage, as statistically proven, and that women bear more responsibility for housework and caring labour, a marriage out of community of property with the exclusion of the accrual system would generally favour men' (para 13). This may well be true but cannot be accepted without serious consideration of the continued emancipation of women in the economy, despite being slow.

It is important for courts to carefully assess and analyse reports prepared by academics as was demonstrated by the Supreme Court of California in two well-known child relocation cases, *In re Marriage of Burgess* 913 P.2d 473 (Cal. 1996) and *In re Marriage of LaMusga* 32 Cal. 4th 1072 (2004). These cases demonstrate how academics' research influenced the outcome of child relocation disputes. In the former case, Dr Judith Wallerstein provided a brief that led the court to adopt a presumption in favour of mothers in relocation disputes. In the latter case, Dr Richard Warshak demonstrated that Dr Wallerstein's brief discounted the value of children's frequent contact with non-custodian parents and ignored the important role fathers play in their children's lives. This led the court to assess academic research carefully and critically before pronouncing itself on relocation disputes. The court rejected presumptions and evaluated the role and importance of both parents in their children's lives in child relocation disputes (Clement Marumoagae *Adjudication of child relocation disputes in South Africa* (PhD Thesis, University of Cape Town, 2021) at 122-128).

Whether academic experts are right or wrong in their assumptions is immaterial. When faced with academic opinion, the court must critically assess the basis on which the opinion is founded. It is not enough to merely rely on historical grounds on which everyone may well agree relating to the participation (or lack thereof) of married women in the economy without carefully assessing the actual position of women in marriages and their respective attitudes. Perhaps extensive research regarding the position of women in marriages and reasons that motivate them to get married needs to be conducted. Academic assumptions, which are not empirically tested may not adequately reflect the reality of these women. It is important that when the CC considers this matter, it adequately evaluates available research and expert opinion to reach a just decision. The CC was correctly criticised for failing to reference research that it used to ban corporal punishment in South Africa and ignoring contrary research in *Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others (Global Initiative to End All Corporal Punishment of Children and Others as* Amici Curiae*)* 2019 (11) BCLR 1321 (CC) (Brigitte Clark 'Why can't I discipline my child properly? Banning corporal punishment and its consequences' (2020) 2 *SALJ* 335 at 356). This is a mistake that the CC should not make when considering *G v Minister of Home Affairs.* The *amicus* argued that '… the court is requested to consider a complex and multi-layered legal aspect without the benefit and availability of statistics and broad-based or other empirical research such as research by the [South African Law Reform Commission]' (para 22). The High Court failed to effectively engage this submission.

There are other equally important factors that must be considered before the High Court's decision can be confirmed. First, the argument that FSSs dictate the marital regime that will eventually govern a marriage is debatable. The view that there are men who are afraid to suggest marriages out of community of property to their partners is never considered. So is the extent to which men may be forced into these marriages. Second, when promulgating the Matrimonial Property Act, did the legislature consider the plight of women who were subjected to marital power? Third, an assessment of whether women have the same bargaining power to decide their preferred marital is important. This raises the choice argument which was rejected by the majority of the CC in *Bwanya v the Master of the High*

Court and Others 2022 (3) SA 250 (CC) at para 62, based on the 'alleged' women's lack of bargaining power. It is important to note that in reaching this conclusion, Madlanga J did not cite any authority or research that justifies his conclusion. The opinion was not unanimous and choice argument can still be considered by the CC. The CC must determine whether marital regimes are a matter of choice and the extent to which both parties can decide their preferred system. A determination of whether a party who voluntarily entered a marriage can be held to the natural consequences of the marriage is important. These are issues that need adequate research.

In examining whether the Matrimonial Property Act continues to fail women who were married after 1 November 1984, it is also important to assess whether remedies such as universal partnerships have failed to achieve that which s 7(3) of the Divorce Act would have achieved had it continued to apply. Just like this provision, which becomes important when the marriage ends, universal partnership can be established when the relationship terminates. A partnership will be established when parties brought something into the partnership such as money, labour or skill; when the object of the partnership was carried out for the joint benefit of both parties; the parties object was to make a profit; and the partnership was legitimate (*Pezzutto v Dreyer and Others* 1992 (3) SA 379 (A) at 390A-C). In *Khan v Shaik* 2020 (6) SA 375 (SCA) at para 8, it was held that '[p]lainly, the essence of the concept of a universal partnership is an agreement about joint effort and the pooling of risk and reward. Upon termination of the universal partnership, what follows is an accounting to one another; the poorer partner becomes the richer partner's creditor'.

In *Butters v Mncora* [2012] 2 All SA 485 (SCA) at para 18(b), the SCA held that '[a] universal partnership of all property does not require an express agreement. Like any other contract it can also come into existence by tacit agreement, that is by an agreement derived from the conduct of the parties'. The CC will then be in a position to determine whether the concept of universal partnership can be applied to marriages out of community of property, which excludes the accrual system, or this will lead to untenable amendment of the parties antenuptual contract (*DM v MM* (FB) (unreported case no 1226/2018, 26-10-2018) (Opperman J) at para 7-10). Based on *Fink v Fink and Another* 1945 WLD 226 at 228 and *Mühlmann v Mühlmann* 1984 (3) SA 102 (A), there is no reason why universal partnerships should not be applicable to marriages out of community of property where the accrual system is not applicable. The parties will still retain their contractual autonomy and where it is demonstrated that the financially weaker spouse contributed towards the accumulation of the financially stronger spouse, the former spouse's rights can be protected using the universal partnership remedy. Perhaps the argument should be the codification of this remedy as opposed to the extension of the application of s 7(3) of the Divorce Act beyond 1 November 1984.

Conclusion

Given the complexity of the issues and the research that is needed, courts are not better placed to deal with the extension of the application of the redistribution remedy. This requires legislative intervention, starting with a thorough balanced investigation of the lived realities of divorced spouses by the South African Law Reform Commission. Should the CC wish to entertain this matter, various interest groups should be allowed to participate as *amicus* to ensure that a well-considered judgment is delivered having regard to the policy and legislative implications of this matter.

Clement Marumoagae *LLB LLM (Wits) LLM (NWU) Dip Insolvency Practice (UP) PhD (UCT)* is a legal practitioner at Marumoagae Attorneys and an Associate Professor at the University of Witwatersrand in Johannesburg.

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Child offenders and the rationale behind different sentencing considerations

By Sherika Maharaj

The commission of serious violent crimes such as rape, robbery and murder seem to be the order of the day in South Africa. Quite distressingly, many of the perpetrators are children. Sentencing in general is said to be one of the most challenging and daunting tasks undertaken by a presiding judicial officer but arguably more so when it comes to children. One of the most important pieces of legislation regulating the criminal justice system for children in conflict with the law is the Child Justice Act 75 of 2008 (the Act). I endeavour to focus on the salient principles affecting the sentencing of children convicted of serious offences.

Who is a child in terms of the Act?

A child is defined as a person under the age of 18 years, and in certain circumstances, a person who is 18 years or older but under the age of 21 and whose matter is dealt with in terms of s 4(2).

The Constitutional prescripts

Section 28(1)(*g*) of the Constitution provides that a child may only be detained as a measure of last resort. Section 28(2) states that 'a child's best interests are of paramount importance in every matter concerning the child'. These provisions have impacted sentencing. In *Director of Public Prosecutions, KwaZulu-Natal v P* 2006 (1) SACR 243 (SCA). The court held that the traditional aims of punishment are affected. The ambit and scope of sentencing had to be widened to give effect to the provisions of s 28(1)(*g*) and, if detention of a child is unavoidable, it would be 'only for the shortest appropriate period of time.' The court held that neither the Constitution nor international conventions forbade the incarceration of children and that there may very well

be instances where incarceration of a child was required.

Applicability of the minimum sentencing legislation

Section 51(1) and (2) of the Criminal Law Amendment Act 105 of 1997 as amended, does not apply to children under the age of 18 years at the time of the commission of the offence (see *Centre for Child Law v Minister of Justice and Constitutional Development and Others (National Institute for Crime Prevention and the Re-Integration of Offenders, as* Amicus Curiae*)* 2009 (2) SACR 477 (CC)). However, Jansen J in *Mahlangu v S* (GP) (unreported case no A382/2014, 17-7-2015) (Jansen J) qualifies the above by elucidating that while these sentences are not applicable, the court has a discretion to impose them but must provide reasons.

Adults versus children – the rationale behind different sentencing considerations

In *Centre for Child Law* at paras 26 and 28, the court explained that: 'The Constitution draws this sharp distinction between children and adults not out of sentimental considerations, but for practical reasons relating to children's greater physical and psychological vulnerability. ... They are less able to protect themselves, more needful of protection, and less resourceful in self-maintenance than adults. … We distinguish them because we recognise that children's crimes may stem from immature judgment, from as yet unformed character, from youthful vulnerability to error, to impulse, and to influence. We recognise that exacting full moral accountability for a misdeed might be too harsh because they are not yet adults. Hence we afford children some leeway of hope and possibility.'

Guidelines to a 'discretionary' sentencing approach – *S v Nkosi* 2002 (1) SA 494 (W)

'(i) Wherever possible a sentence of imprisonment should be avoided, especially in the case of a first offender.

(ii) Imprisonment should be considered as a measure of last resort, where no other sentence can be considered appropriate. Serious violent crimes would fall into this category.

(iii) Where imprisonment is considered appropriate it should be for the shortest possible period of time, having regard to the nature and gravity of the offence and the needs of society as well as the particular needs and interests of the child offender.

(iv) If at all possible the judicial officer must structure the punishment in such a way as to promote the rehabilitation and reintegration of the child concerned into his/her family or community.

(v) The sentence of life imprisonment may only be considered in exceptional circumstances. Such circumstances would be present where the offender is a danger to society and there is no reasonable prospect of his or her rehabilitation' (*Centre for Child Law* at para 93).

What are the objectives of sentencing and what factors should the court consider?

One needs to look no further than the provisions of s 69(1) of the Act. Sentencing should:

'(*a*) encourage the child to understand the implications of and be accountable for the harm caused;

(*b*) promote an individualised response which strikes a balance between the circumstances of the child, nature of the offence and the interests of society;

(*c*) promote the reintegration of the child into the family and community;

(*d*) ensure that any necessary supervision, guidance, treatment or services which form part of the sentence assist the child in the process of reintegration; and

(*e*) use imprisonment only as a measure of last resort and only for the shortest appropriate period of time'.

Bearing this in mind, Bosielo J in *S v Phulwane and Others* 2003 (1) SACR 631 (T) stated that 'I venture to suggest that every judicial officer who has to sentence a youthful offender must ensure that whatsoever sentence he or she decides to impose will promote the rehabilitation of that particular youth and have, as its priority, the reintegration of the youthful offender back into his or her family and, of course, the community' (at para 9).

Sentencing considerations where both the child offender and victims are minors – competing interests

In *S v LR* (FB) (unreported case no A17/2020, 6-1-2021) (Mbhele ADJP, Naidoo J and Reinders J), Mbhele ADJP with Naidoo J and Reinders J concurring, dismissed an appeal application against the conviction on a charge of rape of a minor child (aged nine) and sentence of ten years' imprisonment imposed on a 16-year-old child offender. The facts revealed that the child offender and victim were living together at the time of the offence. The court held that 'the fact that the Constitution regards a child's best interests as of paramount importance must be emphasised. It is the single most important factor to be considered when balancing or weighing competing rights and interests concerning children. All competing rights must defer to the rights of children unless unjustifiable. Whilst children have a right to, *inter alia*, protection from maltreatment, neglect, abuse or degradation, there is a reciprocal duty to afford them such protection. Such a duty falls not only on law enforcement agencies but also on right thinking people and, ultimately the court, which is the upper guardian of all children.'

Sentences applicable in terms of ch 10 of the Act

Although the Act provides for a host of non-custodial sentences, such as community-based sentences; restorative justice sentences; fines or correctional supervision, the court may be inclined towards the imposition of a custodial sentence in serious offences. The Act provides for a sentence of compulsory residence in a child and youth care centre (s 76) and/or a sentence of imprisonment (s 77).

In terms of s 76(1), a child may be sentenced to compulsory residence in a child and youth care centre, which provides a programme referred to in s 191(2)(*j*) of the Children's Act 38 of 2005. A child and youth care centre are defined as a facility for the provision of residential care outside the child's family environment and which must offer a therapeutic programme designed for residential care outside the family environment. This sentence may 'be imposed for a period not exceeding five years or for a period which may not exceed the date on which the child in question turns 21 years of age, whichever date is the earliest' (s 76 of the Act). In terms of s 76(3), where the court convicts a child of an offence referred to in sch 3 (for example rape) and which, if committed by an adult, would have justified a term of imprisonment exceeding ten years, the court may only if substantial and compelling reasons exist, may in addition thereto sentence the offender to a period of imprisonment, which is to be served after completing the period of residence. After completion of the time at the child and youth care centre, the child must be brought before the child justice court and the manager of the child and youth care centre must submit a report to the court on the progress regarding whether the objectives of sentencing have been achieved and the possibility of the child's reintegration into society.

Pre-sentencing considerations: Pre-sentence reports and the victim impact statements

Section 71(1)(*a*) provides that the court must 'request a pre-sentence report prepared by a probation officer prior to

the imposition of sentence'. There are two exceptions, namely, 'where a child is convicted of an offence referred to in schedule 1 or where requiring the report would cause undue delay in the conclusion of the case, to the prejudice of the child'. However, no court may impose a sentence involving compulsory residence in a child and youth care centre without the report.

'A victim impact statement means a sworn statement by the victim or someone authorised by the victim to make a statement on behalf of the victim which reflects the physical, psychological, social, financial or any other consequences of the offence for the victim' (s 70). It is admissible as evidence on its mere production, unless disputed. SS Terblanche in 'The Child Justice Act: Procedural sentencing issues' (2013) 16(1) *PER/PELJ* 321 at 333 opines that obtaining and presenting a victim impact statement lies in the discretion of the state and that a child justice court may need 'convincing reasons' to order that one be obtained '*mero motu*'.

Post sentencing – appeals and automatic reviews

Section 85(1) provides for an automatic review of criminal proceedings in the lower court if the child was at the time of the commission of the offence under the age of 16 years, or 16 years or older but under the age of 18 years and has been sentenced to any form of imprisonment that was not wholly suspended, or any sentence of compulsory residence in a child and youth care centre. Subsection (1) does not apply if an appeal has been noted in terms of s 84.

In *A v S* (ECG) (unreported case no 20190063, 3-6-2019) (Malusi J), the child offender was convicted of murder and sentenced to eight years' imprisonment. On automatic review, Malusi J identified several procedural irregularities committed by the court *a quo*. The 16-year-old accused was not informed of the nature of the allegations, his rights nor the court procedure. On one instance, proceedings were conducted in the absence of his guardian and on another, there was no indication that the court was in camera.

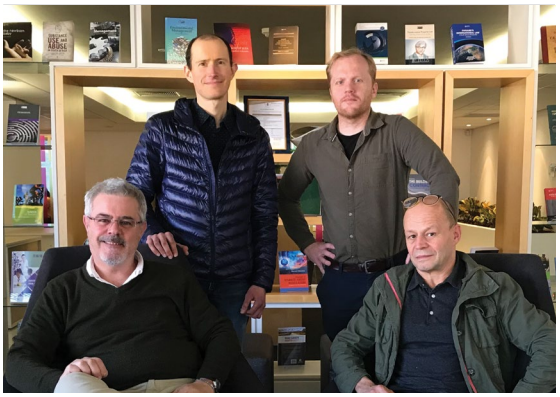
The most egregious misdirection related to the sentence proceedings. Firstly, it was the court's obligation to obtain a pre-sentence report and not to prompt the defence attorney to apply for one. Secondly, the pre-sentence report compiled by the probation officer was at odds with the 'aims and ethos' of the Act. The probation officer recommended that the accused be incarcerated and also failed to provide current and reliable information on programmes that are available for the rehabilitation of the accused. Thirdly, the magistrate accepted the recommendation of the probation officer for the accused to be imprisoned, without considering the objectives of sentencing in s 69 and imposed a shockingly inappropriate sentence of eight years' imprisonment. The magistrate did not provide any reasons to depart from the sentence provisions in terms of s 76(2) of the Act but simply ignored them and sentenced the accused to imprisonment.

Conclusion

Case law has shed light at the end of the tunnel and provides cogent sentencing guidelines that assist in the sentencing of child offenders. At the heart of sentencing lies the rehabilitation and reintegration of the child offender. It bears the hallmark to the lyrics of Whitney Houston's (1986) *Greatest Love of All* where she sang 'I believe the children are our future *teach them well* and let them lead the way.'

Sherika Maharaj *Nat Dip (diag) (DUT) LLB LLM (UNISA)* is a legal practitioner at Legal Aid South Africa in East London. ❑

THE LAW REPORTS



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

September 2022 (5) South African Law Reports (pp 1 – 321); September 2022 (2) South African Criminal Law Reports (pp 233 – 347)

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
ECGq: Eastern Cape High Court, Gqeberha
GJ: Gauteng Local Division, Johannesburg
GP: Gauteng Division, Pretoria
SCA: Supreme Court of Appeal
WCC: Western Cape Division, Cape Town

Children

The need for courts to have regard to interests of existing children of commissioning parents and surrogate in applications for confirmation of surrogate motherhood agreement: In *Ex parte JCR and Others* 2022 (5) SA 202 (GP) the court (per Neukircher J) dealt with an application for the confirmation of a surrogate motherhood agreement under s 295 of the Children's Act 38 of 2005.

The first and second applicants, a married couple, were the commissioning parents. The third and fourth applicants, also a married couple, were the surrogate parents. Both the commissioning parents and the surrogate parents already had children: A 10-month-old in the case of the commissioning parents and a 10-year-old and a 7-year-old in the case of the surrogate parents. This gave the GP cause for concern. From the perspective of the children of the commissioning parents, what impact would a new family member have on their life and their well-being? And how would the children of the surrogate parents be affected by observing their mother being pregnant for nine months, going to hospital to deliver the baby, and then to return home without it?

The GP held that a court, when confronted with deciding an application under s 295 in which the commissioning parents or surrogate parents already had children, was obliged by the best-interests-of-the-child principle encapsulated in s 28 of the Constitution, and as upper guardian of all children, to first consider whether there would be any harmful impact on such children. The GP requested information from the applicants to put itself in a position to answer such question. It ultimately held that there would be no harmful impact. The GP did, however, find it appropriate to set out guidelines to assist courts confronted with s 295 applications in similar circumstances, in particular, the GP held that applicants under s 295 should place before the court information to the effect that a clinical psychologist had consulted with any child(ren) of the commissioning parents and surrogate parents in order to –

- prepare them for the surrogacy and the outcome;
- make recommendations in their interest, including whether they might need further therapy; and
- report on the effect that any previous surrogacy had had on them.

What was also of concern to the GP was the fact that the surrogate in this case, the third applicant, had already acted as surrogate on several previous occasions and had undergone several pregnancies, one of which had resulted in a miscarriage, and some of which had resulted in caesarean sections. Were there health risks to the third applicant were she to act as surrogate again? The GP initially found the experts' reports inadequate for the purpose of determining this question. However, after seeking and obtaining further information from the applicants, the GP satisfied itself that there was no risk of harm. Once again, however, in this regard, the GP deemed it appropriate to add to the guidelines referred to above. The GP held that applicants in s 295 applications should present to court a full medical assessment of the surrogate, including information on her previous pregnancies, previous caesarean sections, whether any complications arose during any of her pregnancies, and, if so, what and whether any of her pregnancies resulted in the child not being born alive or whether she miscarried.

The GP concluded by confirming the surrogate motherhood agreement.

Company law

The ambit of company directors' duty of disclosure under s 75 of the Companies Act 71 of 2008: Our law has historically recognised the principle that a contract between a company and one of its directors, or with an entity in which that director has an interest, is voidable at the instance of the aggrieved company unless its shareholders approve it. This principle is currently codified by s 75 of the Companies Act 71 of 2008, which sets out the procedures and rules of disclosure that apply when company directors, or people or entities related to them, have personal financial interests that conflict with those of the company. Section 75(3) specifically prohibits directors from entering into agreements in which they or a related person has a 'personal financial interest' (a concept defined in s 1 of the Act), unless the agreement was

subsequently ratified by shareholders following disclosure or declared valid by a court under s 75(8).

The ambit of s 75 was recently discussed in *Atlas Park Holdings (Pty) Ltd v Tailifts South Africa (Pty) Ltd* 2022 (5) SA 127 (GJ).

The facts were that Atlas Park had applied for an order validating a lease concluded between itself and Tailifts despite the fact that one Van Breda, a director of both companies, had failed to make disclosures required by s 75.

Tailifts, seeking to escape from the lease, claimed that Van Breda had manufactured it for his own benefit while wearing two directors' hats, one for Atlas Park and one for Tailifts. Tailifts argued that Van Breda was conflicted because he had secretly secured mezzanine financing to purchase the leased property and that his failure to disclose this meant that Tailifts was prevented from using the financing to acquire the property for itself.

Atlas Park in turn argued that the lease was valid because, to the extent that Van Breda had failed to make any disclosures, this had been only in relation to indirect interest, which was excluded by s 75. Atlas Park, while conceding that there was some noncompliance with s 75, argued that it was a simple *de jure* failure and that, *de facto*, the disclosure requirements of the Act were complied with.

In its judgment the GJ pointed out that Atlas Park's view that s 75(1) involved asking the court for a simple indulgence to bring a so-called *de facto* situation into line with certain purely formal legislative requirements, was incorrect. However, attractive to Atlas Park, such an interpretation would minimise the mischief which the section was intended to address and reduce the purpose of the legislation to one requiring a simple ticking of boxes. Moreover, the Act's definition of 'personal financial interest' indicated that any shareholding (other than through a unit trust or collective investment scheme) by a director in another company which had an interest in the transaction under consideration would amount to a 'direct' personal financial interest requiring disclosure and recusal. Where a director engaged in a transaction by which he effectively usurped a corporate opportunity for personal financial advantage by extracting dividend income or other economic benefits via another company, the requirement of a direct 'personal financial interest' (as defined) was satisfied.

The GJ pointed out that the intention of s 75(3) was clear: A director was obliged to make disclosure if there were conflicted, and an offending transaction was *ipso facto* void unless a court declared it valid. Section 75(3) had to be interpreted as being composed of two parts: The imposition of the underlying common-law duty not to misappropriate a corporate opportunity, which determined when a disclosure had to be made, and the trigger that would void the transaction if disclosure was not made. It required an actual financial benefit which the director, or a related party to the director's knowledge, had obtained through his or her failure to disclose. Any other reading of the provision would result in the absurdity that a wilful act directed against a company's financial interests or well-being would not result in the nullity of the tainted transaction.

The GJ ruled that Atlas Park failed to show that Tailifts, had it been properly informed of the availability of the mezzanine finance, would not have taken up the corporate opportunity to acquire the property. Instead, Van Breda had usurped it for his own financial benefit.

The GJ, taking into account Van Breda's material and wilful non-disclosure, his abuse of his position as director *vis-à-vis* the clear interests of Tailifts, and the real and substantial direct economic benefit he had gained, dismissed Atlas Park's application to validate the lease under s 75(8) with costs.

Who may apply for the conversion of business rescue into liquidation? *Commissioner, South African Revenue Service v Louis Pasteur Investments (Pty) Ltd (in provisional liquidation) and Others* 2022 (5) SA 179 (GP) concerned an application by the Commissioner for the final liquidation of the respondent (LPI). The Commissioner had earlier obtained an order converting LPI's business rescue into liquidation proceedings under s 132(2)(*a*)(ii) of the Companies Act 71 of 2008 and placing it in provisional liquidation.

The application was opposed by, *inter alia*, LPI and the business rescue practitioner. They contended that s 132(2)*(a)*(ii), properly construed, could only be invoked if there were first an application by the practitioner in terms of s 141(2)*(a)*(ii) 'for an order discontinuing the business rescue proceedings and placing the company in liquidation'. This meant, so they argued, that only the business rescue practitioner – not a creditor like Sars – could apply for the conversion of business rescue into liquidation.

The GP (per Millar J), having considered the nature of a conversion application and its relationship with moratorium on legal proceedings, held that it was apparent from the plain meaning of the section that the enforcement of debt was separate and distinct from a conversion application; the latter was not a proceeding for the enforcement of any debt but offered a distinct way in which business rescue may be terminated. The court further held the argument that only practitioners and not creditors may apply for conversion, also ignored that the moratorium on legal proceedings against a company under business rescue (s 133(1)) may be lifted.

And there was no doubt that LPI was hopelessly insolvent and that the granting of a final winding-up order was apposite. In such circumstances, a court had a limited discretion to refuse such an order; it had the power to intervene where it was shown that business rescue practitioners had committed a material mistake in concluding that the continued implementation of the business rescue plan would result in a better return for the creditors of the company. LPI was accordingly placed in final winding-up.

Criminal law

Release on bail following arrest for cross-border cybercrimes: In *Otubu v Director of Public Prosecutions, Western Cape* 2022 (2) SACR 311 (WCC) the appellant was one of eight accused arrested in terms of art 13 of the Extradition Treaty between the United States (US) and South Africa (SA) governing extradition. They were to face charges relating to a criminal scheme to defraud romance victims via the Internet and mobile phones. One consolidated bail hearing was held in which the magistrate refused bail, and the appellant appealed the decision.

During the hearing the state alleged that the appellant was a member of the Neo Movement of Africa, also known as the 'Black Axe'. There was no evidence that the appellant was in fact a member of the movement or that he had committed any acts of violence as purportedly regularly undertaken by that organisation, and the state conceded this. It also conceded that the appellant might not have real ties within Nigeria anymore, from whence he had come, but alleged that he was still a flight risk because of his purported association with Black Axe in SA. It appeared that the state was more concerned with the fact that, if the appellant did flee SA, there was no extradition treaty between Nigeria and the US, but it gave little or scant consideration to the use of possible restrictive bail conditions being imposed. It laid much emphasis on the fact that the appellant had left the borders of SA on two occasions to go to Nigeria to attend burial services of his parents. However, on both occasions, he had returned lawfully, and had remained in SA. The evidence also showed that although the appellant did have a successful agricultural business in Nigeria, after fleeing Nigeria in 2012 he had not returned there. There were no previous cases against the appellant, who stated in his founding affidavit that he generated approximately R 30 000 – R 45 000 per month from his housing rental business and earned some money from the selling of Nigerian food items to his community. The appellant and his wife, to whom he was married in community of property, had purchased a piece of land for an amount of R 1,5 million in September 2020. They were also building a house on

another property. It was further common cause that the appellant had been arrested some six months earlier and there was no certainty as to how long it would take for the extradition inquiry and transfer of the appellant to the US.

Carter AJ found that both the investigating officer and the magistrate had based their views on the accused collectively and not individually, and that this was a misdirection. Further, that the court used a 'bail box' approach in denying the appellant bail, and should have considered proactive, practical, and inventive bail conditions, which would have served to balance the interests of society and those of the appellant. Earlier guidelines were restrictive and outdated as they had limited application to the cyber universe that the world had rapidly progressed into. The methods allegedly used by the appellant were, *inter alia*, via iCloud, cryptocurrency, Bitcoin payment, storage wallets, Google drive, block-chain devices, and mobile storage wallets. Many of the aforementioned were still being understood by the major financial institutions, and in the majority of countries not accepted as means for financial payment or transacting. Notwithstanding this, there was no excuse in the WCC's view to safeguard the unknown to the detriment of the appellant.

The decision to refuse the appellant's release on bail was, therefore, set aside and replaced with an order granting him bail in an amount of R 210 000, subject to various relevant conditions.

Other criminal law cases

Apart from the cases dealt with above, the September SACR also contained cases dealing with –

- applications for restraint orders under the Prevention of Organised Crime Act 121 of 1998;
- life imprisonment for rape;
- pretrial applications; and
- the nature of an act of domestic violence.

Labour law

Right to strike: Interdicting striking employees from engaging in actual or threatened unlawful conduct: In *Commercial Stevedoring Agricultural and Allied Workers Union and Others v Oak Valley Estates (Pty) Ltd and Another* 2022 (5) SA 18 (CC) the CC heard an unopposed appeal against a final interdict obtained in the Labour Court (LC) and upheld on appeal by the Labour Appeal Court (LAC). The interdict prohibited striking workers employed by the respondent, Oak Valley Estates, from unlawfully interfering with Oak Valley's operations. The workers were members of the first applicant, the Commercial Stevedoring Agricultural and Allied Workers' Union. The strike related to the alleged racist allocation of employee housing by Oak Valley and its refusal to recognise 'seasonal' workers as permanent employees. It was common cause that the strike triggered incidents of intimidation, damage to property, and unlawful interference with Oak Valley's business operations and that there were numerous breaches of the picketing rules issued prior to the commencement of the strike by the Commission for Conciliation, Mediation and Arbitration.

The applicants (the union and 173 workers) did not deny that unlawful conduct took place but maintained that Oak Valley failed to establish that it could be attributed to the second to 174th applicants. The LAC accepted the LC's rejection of 'the requirement of establishing a link between the individuals who were interdicted and the impugned conduct'. It upheld the final interdict on the basis that Oak Valley 'was able to name certain individuals who participated in what it considered to be unlawful acts together with a further group of unnamed but clearly identifiable individuals'.

The issue in the CC was whether an employer faced with unlawful conduct during a protected strike could interdict participating employees without linking each employee to the unlawful conduct. In upholding the appeal, the CC held that final interdictory relief against striking employees engaging in actual or threatened unlawful conduct was only competent if striking employees factually linked to reasonable apprehension of actual or threatened infringement of a clear right. Mere participation in a strike in which there was unlawful conduct did not suffice to establish a required link.

The CC reasoned that if this were not so, innocent participants in strike or protest action would inevitably get caught in the net of an interdict, and that being implicated in a contempt application (whether or not such application was likely to succeed) would be prejudicial to innocent bystanders and would have a chilling effect on the exercise of their constitutional rights to strike (s 23(2)(*c*)) and to protest (s 17). A person who lawfully exercised their right to protest, strike or assemble, but was nonetheless placed under interdict, would accordingly impermissibly be denuded of their constitutionally protected rights.

- See also Vuyokazi Yokwe 'The impact of the Oak Valley Estates ruling on strikes and protests' 2022 (June) *DR* 29.

Mortgage and foreclosure

Judicial execution against a debtor's primary residence – process if reserve price not achieved: Rule 46A of the Uniform Rules of Court, introduced in 2017, aims to protect, through a process of court oversight, indigent debtors who were in danger of losing their homes. It specified that the court had to set a reserve price before such a house could be sold in execution. Subrule 46A(9) sets out the process to be followed when the reserve price is not achieved, including reconsideration by the court in question. In *Changing Tides 17 (Pty) Ltd NO v Kubheka and Others* 2022 (5) SA 168 (GJ), the GJ had to decide what form this reconsideration process should take. The GJ ruled that it should be initiated by a formal interlocutory application supported by an affidavit deposed to by someone with knowledge of the relevant facts – a 'submission' in chambers by the creditor's attorney would not do. The application, which had to be personally served on the debtor, had to satisfy the court, *inter alia*, that the auction had been properly advertised and that there was no reason other than a too-high reserve price that caused the failure of the sale. The application also had to explain any failure to hold the sale within six months of the handing-down of the foreclosure order and inform the court of any additional reliable evidence of the true value of the property.

Practice

The admissibility of affidavits commissioned remotely/digitally: In *FirstRand Bank Ltd v Briedenhann* 2022 (5) SA 215 (ECGq) the applicant, FirstRand Bank Ltd, applied for default judgment for payment of R 928 138,42, together with interest on that amount and costs, against the respondent, Briedenhann, consequent to the breach by the latter of the terms of the mortgage loan agreement the parties had concluded. During the hearing of this matter, the presiding judge (Goosen J) flagged an affidavit filed by the plaintiff under r 14A of the Eastern Cape Division Rules. Its commissioning and the administration of the oath took place in terms of a new process adopted by the plaintiff had adopted during the COVID-19 pandemic to limit the spread of the virus. Under it, the deponent to an affidavit and the appointed commissioner of oaths would meet remotely via Microsoft Teams. After each had accessed an electronic version of the affidavit deposed to, the deponent – in the 'virtual presence' of the commissioner – would take the oath, and the deponent and commissioner would in turn append their digital signatures. The question was whether this met the requirements of the applicable Regulations Governing the Administration of an Oath promulgated under the Justices of the Peace and Commissioners Oaths Act 16 of 1963, in particular r 3(1), which provided that the deponent 'shall sign the declaration in the presence of the commissioner of oaths'. The applicant argued that the process described above met this requirement, given that

'presence', although ordinarily meaning proximity, may also be achieved by sight and sound.

The court held that, contrary to the applicant's view rule 3(1) required the deponent to append his signature to the declaration in the physical presence or proximity of the commissioner. It did not cover a deposition like the present one that takes place in the 'virtual presence' of a commissioner. In doing so, the ECGq acknowledged that the concept of what it meant to be in 'the presence' of others had undergone dramatic changes brought about by technological innovation, itself accelerated by the global pandemic. Further, there was no doubt of the potential benefits to the justice system of innovative technologies such as those involving Internet communication and the like. However, the wording of the rules in question simply did not support the interpretation favoured by the plaintiff. In line with the well-known principle of interpretation, judges had to guard against the temptation to substitute what they regarded as reasonable, sensible or business like for the words actually used. Because to do so in regard to statutes would be to cross the divide between interpretation and legislating.

Despite the above, the ECGq elected to admit the affidavit in question, in line with the discretion available to it to condone non-compliance with regulated formalities, in the case of 'substantial compliance'. In the circumstances of the present case, the purpose of r 3(1) had been met – that is, to provide assurance to a court receiving an affidavit that the deponent, properly identified as the signatory, had taken the oath. Here, there was no doubt that the deponent did take the prescribed oath and affirmed doing so. It would serve no purpose other than to delay finalisation of the matter and increase costs, and would not be in the interests of justice, to refuse the affidavit, and demand that the plaintiff seeks afresh default judgment on an affidavit properly commissioned. As to the merits, the ECGq found that default judgment could be granted.

- See Danielle Hugo 'Determining what 'in the presence' means for the virtual commissioning of oaths' 2022 (Nov) *DR* 16 and Donald Msiza 'Virtual commissioning in South Africa – understanding *FirstRand Bank Ltd v Briedenhann*' 2022 (Oct) *DR* 6.

Tax

Is a tax judgment in terms of s 172 of the Tax Administration Act 28 of 2011, susceptible of rescission? Under s 172 read with s 174 of the Tax Administration Act 28 of 2011 (TAA) a certified statement by the South African Revenue Service (Sars) will, if filed with in court, serve as a civil judgment for a liquid debt against the taxpayer.

The facts in *Barnard Labuschagne Inc v Commissioner, South African Revenue Service and Another* 2022 (5) SA 1 (CC) (Rogers AJ) were that Sars had filed in the WCC such a statement in respect of tax allegedly due by attorneys firm Barnard Labuschagne Inc (BLI). The statement recorded that BLI owed Sars R 804 747.

BLI approached the WCC for an order rescinding this 'tax judgment', arguing that the statement – which had arisen from BLI's self-assessments for VAT, employees' tax, unemployment insurance fund contributions and skills development levies – was wrong because BLI had made payments, which Sars failed to appropriate to the relevant assessed taxes. The WCC, however, refused BLI's application on the ground that the tax judgment against it was, according to precedent, not susceptible of rescission. When both the WCC and the SCA refused BLI leave to appeal, it approached the CC.

The CC ruled the question of the rescindability of these tax judgments raised an arguable point of law of public importance because several recent High Court judgments, one of which the WCC's judgment in the present matter, appeared to have failed to apply binding precedent, an omission which clothed the CC with jurisdiction in this matter. The CC proceeded to discuss the prece-

dents in question – including some of its own decisions – in which tax judgments made under similar earlier provisions were held to be capable of rescission. Yet the WCC chose to ignore them in favour of recent High Court decisions that in themselves had failed to address binding authority. The CC chastised the WCC's disregard of binding precedent (of which it was aware) as unacceptable. The CC stressed that the earlier decisions would have been distinguishable only if ss 172(1) and 174 had brought about substantive changes bearing on the question of rescindability, which they did not.

The CC concluded that the position was still that a tax judgment under the TAA could be rescinded under s 36(1)(*a*) of the Magistrates' Courts Act 32 of 1944, or in the High Court, under its common-law power to rescind default judgments.

The CC accordingly upheld BLI's appeal, set aside the WCC's decision, and remitted BLI's application for rescission to the WCC for hearing before a different judge to determine the merits of the application.

Other civil cases

Apart from the cases and material dealt with above, the September SALR also contained cases dealing with –

- judicial execution against a mortgage debtor's primary residence;
- qualified privilege in defamation cases;
- the approval by shareholders of a scheme of arrangement;
- the legality of the 2015 sale of the national strategic crude oil reserves;
- the powers of international tribunals;
- the reviewability of a decision of the Auditor-General; and
- the transmissibility of bodily injury claims.

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

By Kgomotso Ramotsho

It is for a good reason that the legal profession has strict ethical rules to prevent malfeasance

The South African Legal Practice Council v Teffo (GP) (unreported case no 10991/21, 16-9-2022) (Bokako AJ)

The Gauteng Division of the High Court has struck controversial legal practitioner Malesela Daniel Teffo (the respondent) off the roll, after the Legal Practice Council (LPC) (the applicant) brought the application to the High Court in accordance with the disciplinary procedures to adjudicate over his conduct, which was alleged to be unprofessional, dishonourable or unworthy as provided for in s 44(1) of the Legal Practice Act 28 of 2014 (the LPA).

The LPC, which is a statutory regulatory body regulating the legal profession, took the decision to launch an application for the striking off alternatively, suspension after a number of complaints, which it received against the respondent, as well as other irregularities concerning his practice. The court said that the purpose of the application, the LPC contended that actions of the respondent constitute deviation from the standards of professional conduct and that the respondent is not a fit and proper person to continue to practice as an advocate.

The LPC pointed out that some of the alleged offences the respondent committed, are as follows –

- On 17 October 2019, the applicant received a complaint from the Provincial Commission of the South African Police Service (SAPS), which requested the applicant to embark on an urgent investigation into the respondents conduct. A copy of the complaint, together with its annexures were sent to the respondent.
- The complaint outlines that on 27 September 2019, Moosa J ordered that the respondent's conduct should be reported to the LPC as a matter of urgency, following that, on 4 October 2019, Fisher J granted an urgent interdict against the respondent in the Gauteng Local Division High Court on behalf of the SAPS and the State Attorney of Johannesburg.
- On 20 August 2019, Ms Sindi Manitshana from the State Attorneys' Office in Johannesburg was in the Labour Court (LC) attending to matter where she discovered that one of her matters that she was handling on behalf of SAPS, was on the unopposed roll before Rabkin-Naicker J. The respondent informed Ms Manitshana that it was a matter for the Office of the State Attorney in Pretoria. The respondent further made submissions to the court that there was an agreement between the parties that the matter would proceed unopposed. Ms Manitshana to her dismay requested the court to stand the matter down due to the opposed roll by Rabkin-Naicker J. Ms Manitshana perused the court file and discovered that the notice to oppose by the office of the Johannesburg State Attorney, as well as the answering affidavit by SAPS had been removed from the LC file.
- The court pointed out that this was done with the intention of misleading the court and getting the matter back on the unopposed roll to secure a default judgment against SAPS. Ms Manitshana went back to court and brought the matter to the judge's attention. The judge ordered the respondent and his attorney to file affidavits wherein they explain how the

matter got placed on the unopposed roll again.

- The respondent contravened s 37(2)(*a*) of the LPA in that he failed to cooperate with the LPC investigations against him. The respondent failed to reply to the correspondence sent to him by the LPC.
- The respondent consulted with clients without acceptance of a brief from an attorney, instead, he accepted instructions directly from clients, thus contravening s 34(2)(*a*)(i) and para 27.2 of the Code of Conduct for all Legal Practitioners, Candidate Legal Practitioners and Juristic Entities.

The court said that the applicant submitted that the court will find that the applicant has made out a sufficient case to have the respondent struck off with immediate effect. The court added that the respondent, in his papers contended that on 19 May 2021 he received the applicant's notice of the motion and the applicant called on him to answer to the allegations of being unfit and improper to practice as a legal practitioner, indicating that he must admit that he had difficulties in relation to understanding what was expected from him, insofar as his answering affidavit should be, due to the fact that the allegations were serious wild-hearsay he could not understand what informed the allegations as the person who had deposed the affidavit seemingly was deposing the affidavit on behalf of unknown complaints against him, however, he had to answer to the allegations as best as he could. In answering he denied all allegations levelled against him without any contra submissions or averments.

The court said that the respondent replied with a bare denial and further pleaded that certain allegations and matters are *sub judice*. The court added that the respondent further submitted in court that –

- the application by the LPC is premised on the contentions that the LPC has violated the rules of natural justice by not affording him an opportunity to make representations before the disputed decisions were taken;
- the LPC did not have the powers to make impugned decisions without first finalising the disciplinary proceedings;
- the LPC failed to apply itself to the holistic legal framework regulating the disciplinary hearing process; and
- the disputed allegations and decisions are unreasonable.

The court said that the respondent further contended that, he responded to the complaints by filling his answering affidavit in response thereto. The court added that it was clear the respondent's grievance was that no formal disciplinary hearing was conducted by the LPC and that it would have been ideal for him that he should have been called for a proper disciplinary hearing and that the hearing conducted and concluded. The court added that the respondent was of a view that it was unfair and unjust that the LPC took the decision based on faceless complaints, hearsay allegations and the responses thereto. The court said that it was of the view that the respondent's contentions were incorrect. That nothing expels the applicants from taking a decision based on the evidence in the form of affidavits.

The court said that the LPC submitted legal argument in that bare denials and *sub judice* pleas are not substantial, that the respondent wholly fails to plead with sufficient particularity and specify as required in terms of the Uniform Rules of Court. The court pointed out that the LPC said that accordingly, in terms of the rule as set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A), this application must be granted. Making reference to the salient decision of the SCA applies:

'A real, genuine and *bona fide* dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rest his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say "generally" because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all the relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter' (*Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) at para 13).

The applicant referred to a pertinent decision of the SCA in that: 'Advocates are required to be of complete honesty, reliability and integrity. The need for absolute honesty and integrity applies both in relation to the duties owed to their clients as well as to the courts. The profession has strict ethical rules to prevent malfeasance. This is for good reason. As officers of the court, advocates serve a necessary role in the proper administration of justice. Given the unique position that they occupy, the profession has strict ethical rules.'

The court said it is of a view that the rules of natural justice were observed by the LPC in its instance because the respondent seized the opportunity to answer to the complaints by filling answering affidavits in response thereto. The *audi alteram partem* principle was adhered to. The court in its exercise of discretion, having consider the facts in their totality and having heard submissions of both parties, found that the respondent's acts of misconduct were serious and dishonest. The court pointed out that it was mindful that the main consideration was the protection of the public.

The court said that the respondent was admitted as an advocate in 2009. The court added that given his years of experience, he is required to be completely honest and reliable and perform with integrity. That the need for absolute honesty and integrity applies both in the relation to the duties owed to their clients as well as the courts. The court said that the legal profession has strict ethical rules to prevent malfeasance. The court pointed out that it is for a good reason. And as officers of court, advocates serve a necessary role in the proper administration of justice. Given the unique position that they occupy, the profession has strict ethical rules.

The court said that the respondent as a legal practitioner should have concentrated in fulfilling a dual function by assisting his clients on the one hand and by promoting justice in society on the other hand. The court pointed out that the respondent had no absolute regard for justice.

Some of the orders the court made in the premises were as follows:

- The respondent, advocate Malesela Daniel Teffo, is hereby removed from the roll of legal practitioners.
- The respondent must surrender and deliver his certificate of enrolment as a legal practitioner to the Registrar of this court.
- In the event of the respondent failing to comply with the terms of this order detailed in para 2 above within two

weeks from the date of this order, the Sheriff of the district in which the certificate is, be authorised and directed to take possession of the certificate and hand it to the Registrar of this court.

- The respondent is prohibited from handling or operating on his banking accounts, used in receiving monies for clients (referred to herein as creditors).
- The respondent be and is hereby removed from office as:

– executor of any estate of which the respondent has been appointed in terms of s 54(1)(*a*)(v) of the Administration of Estates Act 66 of 1965 or the estate of any other person's referred to in s 72(1);
– curator or guardian of any minor or other person's property in terms of s 72(1) read with s 54(1)(*a*)(v) and s 85;
– trustee of any insolvent estate in terms of s 59 of the Insolvency Act 24 of 1936;
– liquidator of any company in terms of s 379(2) read with 379(1)(*e*) of the Companies Act 61 of 1973 and together with the provisions of the Companies Act 71 of 2008;
– trustee of any trust in terms of s 20(1) of the Trust Property Control Act 57 of 1988;
– liquidator or any close corporation appointed in terms of s 74 of the Close Corporations Act 69 of 1984; and
– administrator appointed in terms s 74 of the Magistrates' Courts Act 32 of 1944.

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

By Lusapho Yaso

Enforceability of warranties and indemnification in sale of business contracts

EBS International (Pty) Ltd and Another v Wright (WCC) (unreported case no 19128/2020, 9-5-2022) (Wille J)

It is often prudent that in any agreement, particularly sale of business transactions that there are certain warranties made by the seller in respect of the business to the purchaser *vis-à-vis* indemnifications provided to the purchaser by the seller. These warranties and indemnifications form a critical and integral part of the agreement as they operate as security to the purchaser in respect of any past, present, and future liabilities that may arise after the conclusion of the agreement.

On 9 May 2022, Wille J issued a decision in *EBS International*, which highlights the importance of having warranties and indemnifications in agreements of this nature. Wille J focuses on the application, enforcement, and execution of warranties, which were given by the shareholder/director in the sale of business as it related to the tax obligations and affairs of the company.

In this case, the seller signed warranties on the tax obligations and affairs of the company and with an indemnification to assume liability for any losses incurred by the purchaser as a result of a breach of the written warranties in the agreement of sale.

In terms of the agreement of sale, the seller (respondent) agreed and undertook through representation by way of warranties and indemnification that the company's tax affairs and obligations were in order. It was only after the sale of business agreement was concluded that the purchaser (applicant) found that the company's tax affairs and obligations to the South African Revenue Services (Sars) were in fact, not in order and that the company had a tax liability in excess of R 6 286 600,55 and a further R 4 219 108,27 which was due and payable to Sars.

The purchaser invoked the breach clause against the seller for breach of the warranty as it related to the tax affairs and obligations of the company in that the seller was not honest about the company's tax obligations and it had now suffered a financial loss as result of such breach. Wille J ruled in favour of the purchaser and opined that:

'The respondent [seller] breached his warranties under and in terms of the sale agreement (as at the effective date of the sale agreement) in that the second applicant [company] had not timeously, fully, or accurately accounted for and paid to the South African Revenue Services all its lawfully imposed obligations.'

In accordance with the indemnification clause – the seller agreed to be held liable for any damages suffered by the purchaser as a result of the reports, undertaking and warranties he made about the company's tax affairs. In this regard, Wille J, reasoned and stated that:

'Accordingly, the respondent [seller] is liable to indemnify the first applicant [purchaser] for all additional taxes, interest, penalties, and other charges assessed by the South African Revenue Services to be payable by the second applicant [company] in respect of the period before the effective date of the sale agreement. … [T]o indemnify the first applicant for all costs, charges, disbursements, expenses, and fees (including legal and other professional fees) incurred in investigating and remedying the second applicant's breaches of its obligations.'

The proceedings teach us that contracts, are important when concluding any commercial transaction, particularly the importance of undertakings – given in such agreements, namely, warranties and indemnifications and that they are binding and have legal implications and consequences to the parties to the agreement.

As both can be comprehended: If not

complied with or untruths statements are made in the conclusion of the agreement – warranties and indemnification give rise to a breach of contract and have a consequence of providing compensation for financial loss (ie, damages) for the aggrieved party to the agreement.

In *EBS International*, the judge applied the warranties and indemnification clauses of the agreement and held that the respondent had dismally breached these solely because the tax assessment proved that the respondent had intentionally failed to ensure that the second applicant complied with its tax obligations. The judge also found that the respondent had ample time before the tax assessment process to ensure that the second applicant was registered with Sars and made its tax payments in accordance with Sars requirements. However, the respondent instead paid himself dividends on an annual basis, implying that he intentionally refused to do so, resulting in a breach of the warranty and as such needed to indemnify the first applicant from the financial loss he suffered.

Conclusion

In this case, Wille J, opined that the seller did not take active and positive steps to ensure that the company met its tax obligations, despite the fact that the seller was the company's sole director and shareholder. This case highlights the critical importance of compliance with warranties, as failure to do so will result in a breach of contract and damages as was held in *EBS International.*

Lusapho Yaso *LLB (UWC)* is a candidate legal practitioner at MRT Law Inc in Cape Town. ❑

By Marcus Zulu

What constitutes a sufficient trigger for the National Credit Regulator to initiate complaints into alleged contraventions of the National Credit Act?

National Credit Regulator v Dacqup Finances CC t/a ABC Financial Services – Pinetown and Another (SCA) (unreported case no 382/21, 24-6-2022) (Nicholls JA (Makgoka and Gorven JJA and Phatshoane and Savage AJJA concurring))

The National Credit Regulator (the Regulator) was established in terms of s 12 of the National Credit Act 34 of 2005 (the Act) as an impartial and independent juristic person, which bears the responsibility to promote and support a fair and accessible credit market that caters for the needs of the most vulnerable people in society. The Regulator also plays a fundamental role in investigating and evaluating alleged contraventions of the Act (ss 13 and 15).

In terms of s 136 of the Act, any person, alternatively the Regulator, may submit a complaint of reckless credit. Sections 80 and 81 of the Act deals with reckless credit and its prevention, where a credit provider is prohibited from entering into a reckless credit agreement without taking reasonable steps to assess the customer's understanding of the risk and costs associated with the granting of the proposed credit. In doing so, the expectation is for the credit provider to take into account the customer's debt repayment history along with the consumer's existing financial means, prospects and obligations. The credit agreement will be deemed reckless in instances where the credit provider has not conducted the necessary assessments required by s 81(2). The Regulator may also appoint an inspector to investigate a complaint, summon a person to appear before it or subpoena a document (s 139(3)).

One of the challenges the Regulator may face is identifying a possible contravention of the Act and upon identifying such contravention, there may be no *prima facie* proof that any contravention has taken place. This issue was addressed in *Dacqup Finances CC t/a ABC Financial Services*, where the court was tasked with determining what constitutes a sufficient trigger for the Regulator to initiate a complaint into alleged contraventions of the Act. A complaint was received by the National Consumer Tribunal (the Tribunal) against Dacqup, a micro-lender, on alleged contraventions of the Act and alleged engagements in prohibited conduct. The Tribunal found against Dacqup and ordered it to pay a fine and for the independent audit of all its credit agreements entered into within a specified period. Dacqup appealed against the decision of the Tribunal to the High Court, which subsequently ruled in favour of Dacqup, based on a point *in limine* and without consideration being given to the merits of the appeal (para 2).

The Regulator appointed an inspector that noticed a sign outside Dacqup's property advertising 'instant loans', which raised suspicion as to how such loans would be in compliance with the Act and if they were not instant, how such an advert could be deemed as misleading and deceptive advertising of credit. When enquiring of the interest rate charged on these loans, the inspector was advised that a 30% per month interest rate was charge on the short-term loans, which was in excess of the permissible statutory maximum. This led to an investigation by the Regulator, which concluded that there was contravention of the provisions of the Act. An application was made to the Tribunal, where the

relief sought was for the deregistration of Dacqup as a credit provider among other requests. The Tribunal found against Dacqup and ordered an administrative fine as opposed to the cancellation of Dacqup's registration (paras 6, 7 and 9).

On appeal to the High Court, a ruling was made in favour of Dacqup and no consideration was given to the merits of the matter. The issue dealt with before the Supreme Court of Appeal was weather the High Court correctly upheld the appeal by Dacqup, where the basis of the appeal was that there was no reasonable suspicion to initiate an investigation. The court confirmed that hearsay evidence, in the form of a memorandum by the investigator, is accepted as sufficient evidence to create reasonable suspicion and whether the evidence is later found to be inadmissible is irrelevant. 'Reasonable suspicion' was defined as a suspicion that cannot be immediately proved, where such suspicion is the starting point of an investigation and obtaining *prima facie* proof is at the end. The court confirmed that when suspicion lacks actual proof, such suspicion should have a factual basis, the standard for reasonable suspicion is relatively low and that the complaint being initiated occurs before the commencement of an investigation. The court reiterated that a complaint triggers an investigation which may or may not lead to a referral and the rights of a respondent are uneffaced at this point since the purpose of the compliant, followed by possible investigation, is not to afford the suspected party an opportunity to state its case. The principals of administrative justice ought to be observed once a matter has been referred to and is being heard before the Tribunal. In addressing the possibility of the infringement of constitutional rights in the event of such investigations taking place, the court accepted the position that highly regulated institutions that are more likely to pose a potential hazard to the public. Due to this, such institutions ought to accept that their activities will be monitored and that there will be an occurrence of regular inspections. It was found to be irrelevant whether the investigator's suspicions were factually incorrect or not. However, what was of importance was the existence of a reasonable suspicion of a contravention by Dacqup. The investigators interpretation of 'instant' was held to be probable and reasonable within the micro-lending context (paras 18 – 21, 24 and 26).

It is evident that reasonable suspicion, whether proven to be true or not at a later stage, constitutes a sufficient trigger for the Regulator to institute an investigation into alleged contraventions of the Act. The slightest indication of non-compliance with any of the above-stated statutory provisions might result in a credit provider finding itself caught in the crossfire with the Regulator.

Marcus Zulu *LLB (UKZN)* is Legal Counsel (Credit and Pricing) at Absa Group Ltd in Johannesburg.

By Shanay Sewbalas and Johara Ally

New legislation

Legislation published from 2 – 30 September 2022

Acts

Compensation for Occupational Injuries and Diseases Act 130 of 1993
Increase in monthly pensions and amendment of sch 4: Manner of calculating compensation. GenN1275 *GG*46884/9-9-2022.
Customs and Excise Act 91 of 1964
Amendment of part 1 of sch 2 (no 2/1/64). GN R2485 *GG*46913/16-9-2022. Amendment to part 1 of sch 4 (no 4/1/383). GN R2486 *GG*46913/16-9-2022.

Bills and White Papers

Financial Matters Amendment Bill B20 of 2022.
Municipal Fiscal Powers and Functions Amendment Bill B21 of 2022.
Tobacco Products Electronic Delivery System Control Bill, 2018. GN R2560 *GG*46994/29-9-2022.
Promotion of Access to Information Act 2 of 2000
National Council on Gender Based Violence and Femicide Bill, 2022. GN2558 *GG*46991/30-9-2022.
Public Finance Management Act 1 of 1999
Draft National Water Resource Infrastructure Agency Bill for comment. GN2508 *GG*46917/16-9-2022.

Government, General and Board Notices

Agricultural Product Standards Act 119 of 1990
Revocation of appointment as assignees: (1) Impumelelo Agribusiness Solutions (Pty) Ltd, and (2) Nejahmogul Technologies and Agric Services (Pty) Ltd. GN2490 *GG*46917/16-9-2022.
Air Service Licensing Act 115 of 1990
Application for the grant or amendment of Domestic Air Service Licences and International Air Service Licences: Various places. GenN1299 *GG*46959/23-9-2022.
Border Management Act 2 of 2020
Transfer of administration and powers or functions entrusted by legislation to certain Cabinet members in terms of s 97 of the Constitution. Proc89 *GG*46868/6-9-2022.
Co-operatives Amendment Act 6 of 2013
Co-operatives that have been removed from the Register of Co-Operatives by conversion to any other form of juristic in terms of ss 62 and 64 of the Co-operative Act 14 of 2015, as amended. GN2507 *GG*46917/16-9-2022.
Disaster Management Act 57 of 2002
Classification of a provincial disaster in terms of s 23 of the Act: Impact of a mine sludge flooding incident: Jagersfontein. GN2514 *GG*46932/22-9-2022.
Division of Revenue Act 5 of 2022
Departure from the 2022 Provincial Emergency Housing Grant Framework. GN2510 *GG*46919/19-9-2022.
Electronic Communications Act 36 of 2005
Notice of the oral public hearings to be held in respect of the draft amendment regulations regarding the Processes and Procedures in respect of Applications, Amendments, Renewals, Surrender and Transfer of Individual Licences. GenN1279 *GG*46885/12-9-2022.
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Heraldry Act 18 of 1962
Bureau of Heraldry: Registration and/or amendments of Heraldic Representations. GN2506 *GG*46917/16-9-2022.
High Education Act 101 of 1997
Publication of cancellation of the registration of Dermatech (Pty) Ltd as a private higher education institution. GN2519 *GG*46959/23-9-2022.
Appointment of an independent assessor to conduct an investigation into the affairs of the University of South Africa. GN2480 *GG*46904/13-9-2022.
Immigration Act 13 of 2002
Minister's Immigration Directive no 2 of 2022: Implementation of the decision to extend Zimbabwean Nationals' Exemptions granted in terms of s 31(2)(*b*), read with s 31(2)(*d*) of the Act. GN2460 *GG*46865/5-9-2022.
Income Tax Act 58 of 1962
African Tax Administration Forum Agreement on Mutual Assistance in Tax Matters. GN2523 *GG*46959/23-9-2022.
Independent Communications Authority of South Africa Act 13 of 2000
Notice to prohibit usage and sale of Baofeng Radio, Model: UV-5R. GenN1304 *GG*46990/28-9-2022.
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Extension of the application of the provisions of the Interim Protection of Informal Land Rights Act. GN2553 *GG*46991/30-9-2022.
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Grant/amendment of International Air Service License. GenN1319 *GG*46991/30-9-2022.
International Trade Administration Commission of South Africa
Sunset review of the anti-dumping duties on polyethylene terephthalate originating in or imported from Chinese Taipei, the Republic of Korea (South Korea) and India: Final determination. GenN1277 *GG*46884/9-9-2022.
South African Geographical Names Council Act 118 of 1998
Publication of official geographical names. GN2488 *GG*46916/16-9-2022.
Use of Official Languages Act 12 of 2012
Notice of exemption of the South African National Biodiversity Institute from establishing a language unit in terms of s 12(1) of the Act. GenN1286 *GG*46923/20-9-2022.

Rules, regulations, fees and amounts

Animal Diseases Act 35 of 1984
Control measures relating to foot and mouth disease. GN R2465 *GG*46870/8-9-2022.
Architectural Profession Act 44 of 2000
South African Council for the Architectural Profession (SACAP): Council Nomination Rules. BN346 *GG*46991/30-9-2022.
Banks Act 94 of 1990
Amendments to regulations in terms of Act. GN2561 *GG*46996/30-9-2022.
Broad-Based Black Economic Empowerment Act 53 of 2003
Broad-Based Black Economic Empowerment Amendment Act 46 of 2013: Application for market access permits for agricultural products in terms of World Trade Organisation agreement for 2023. GN2512 *GG*46922/20-9-2022.
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 the year 2023. GN2513 *GG*46931/22-9-2022.
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, on the one part, and the Southern African Customs Union Member States and Mozambique, on the other part, for the year 2023. GN2517 *GG*46951/23-9-2022.

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Customs and Excise Act 91 of 1964

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Imposition of Provisional Payment (PP/166). GN R2467 *GG*46874/9-9-2022.

Amendment to rules (DAR 238). GN R2470 *GG*46883/9-9-2022.

Employment of Educators Act 76 of 1998

Section 4 of the Act: Personnel Administrative Measures (PAM). GN2468 *GG*46879/9-9-2022.

Health Professions Act 56 of 1974

Health Professions Council of South Africa: Rules for the registration of speech and hearing correctionists: Repeal. BN324 *GG*46884/9-9-2022.

Health Professions Council of South Africa: Rules for the registration of audiometricians: Repeal. BN325 *GG*46884/9-9-2022.

Regulations relating to the qualifications for the registration of optometrists. GN2554 *GG*46991/30-9-2022.

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Grant/amendment of International Air Service License. GenN1285 *GG*46917/16-9-2022.

Liquor Act 27 of 1989

Notice of applications for Liquor Licenses. GenN1270 *GG*46869/2-9-2022.

Marketing of Agricultural Products Act 47 of 1996

Amendment of statutory measure – records and returns in respect of maize and wheat imports and exports. GN R2515 *GG*46934/23-9-2022.

National Railway Safety Regulator Act 16 of 2002

Railway Safety Standards Development Regulations, 2022: Schedule. GenN1284 *GG*46917/16-9-2022.

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Unclaimed benefits from the Nzalo Umbrella Provident Fund. GN2537 *GG*46982/30-9-2022.

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Regulations in respect of the single maximum national retail price for illuminating paraffin. GN R2461 *GG*46866/6-9-2022.

Amendment of the regulations in respect of petroleum products. GN R2462 *GG*46866/6-9-2022.

Maximum retail price for liquefied petroleum gas. GN R2463 *GG*46866/6-9-2022.

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Amendment to the National Policy Pertaining to the Programme and Promotion Requirements of the National Curriculum Statement Grades R-12. GN2473 *GG*46884/9-9-2022.

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Consumer Price Index: July 2022 – 7.8. GenN1282 *GG*46917/16-9-2022.

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Nomination of candidates for appointment to the Agricultural Produce Agents Council. GN R2482 *GG*46912/16-9-2022.

Agricultural Product Standards Act 119 of 1990

Invitation for the public to comment on Regulations relating to the quality, grading, packing and marking of tomatoes intended for sale in the Republic of South Africa. GN2491 *GG*46917/16-9-2022.

Architectural Profession Act 44 of 2000

Invitation to the public to nominate two Council members to serve on the sixth term Council for the Architectural Profession. BN347 *GG*46991/30-9-2022.

Auditing Profession Act 26 of 2005

Maximum monetary fines in terms of the Act. GN2504 *GG*46917/16-9-2022.

Civil Aviation Act 13 of 2009

Civil Aviation Regulations, 2011. GN2511 *GG*46921/19-9-2022.

Competition Act 89 of 1998

Competition Commission South Africa:

Guidelines on the Exchange of Competitively Sensitive Information between Competitors under the Act. GN2525 *GG*46959/23-9-2022.
Draft Guidelines on the Exchanges of Competitively Sensitive Information under the Competition Act: Explanatory note. GN2526 *GG*46959/23-9-2022.

Continuing Education and Training Act 16 of 2006
The Draft Policy on the Remuneration of Council Members of Public Technical and Vocational Education and Training Colleges in terms of s 41D of the Act for comment. GN2502 *GG*46917/16-9-2022.

Draft Game Meat Strategy for South Africa, 2022
Extension of comment period on the draft White Paper for conservation and sustainable use of biodiversity and Draft Game Meat Strategy. GN2481 *GG*46908/14-9-2022.

Electronic Communications Act 36 of 2005
Extension of the closing date of the public representations on the Information Memorandum to 30 September 2022. GenN1280 *GG*46910/14-9-2022.
Notice to conduct public hearings on the draft End-user and Subscriber Service Charter Amendment Regulations, 2022. GenN2534 *GG*46978/26-9-2022.
Sections 3(1) read with subs (5) of the Act: Invitation to provide written submissions on the proposed Next Generation Radio Frequency Spectrum Policy for Economic Development. GenN1271 *GG*46873/8-9-2022.

Expanded Public Works Programme Policy
Request for comment. GN2505 *GG*46917/16-9-2022.

Financial Markets Act 19 of 2012
Proposed amendments to the JSE Derivatives Rules, the JSE Interest Rate and Currency Derivatives Rules and the JSE Fidelity Fund Rules. BN322 *GG*46872/8-9-2022.

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Regulations defining the scope of the profession of Dental Therapy. GN2555 *GG*46991/30-9-2022.
Regulations defining the Scope of the Profession of Medical Orthotics and Prosthetics. GN2474 *GG*46884/9-9-2022.
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Shanay Sewbalas and Johara Ally are Editors: National Legislation at LexisNexis South Africa. ❑

Employment law update

By Monique Jefferson

Reinstatement

In *Mthethwa v Commission for Conciliation, Mediation and Arbitration and Others* [2022] 9 BLLR 814 (LAC) the employee had been dismissed following altercations that she had with two employees. In this regard, she allegedly held one employee by her clothes and poked her in the face, threatening to assault her. There was also another altercation with another employee on the same day where she accused the employee of trying to 'steal her man'. The two employees who were involved in the altercations were issued with final written warnings.

The employee pleaded guilty to charges of assault, harassment, intimidation and bringing the employer's name into disrepute and was dismissed. The employee then approached the Commission for Conciliation, Mediation and Arbitration (CCMA) seeking reinstatement on the basis that the dismissal was substantively and procedurally unfair. The commissioner at the CCMA found that the dismissal was indeed substantively unfair but did not order reinstatement as the commissioner formed the view that the employee's tenure with the employer would not be secure should she be reinstated. The Labour Court (LC) also found that compensation was the appropriate remedy in the circumstances although the LC found that the commissioner's finding that employment would be insecure was meaningless as there was no evidence to suggest that reinstatement would be intolerable or impracticable. On appeal, the Labour Appeal Court (LAC) found that arbitrators are obliged to order reinstatement or re-employment if a dismissal is substantively unfair unless there is an exception recognised in law. The LAC accordingly found that it was able to revisit the relief ordered because the LC had made a misdirection by finding that a reinstatement order would not necessarily have the desired effect of safeguarding the employee's tenure of employment as no evidence had been lead that reinstatement would be intolerable and impracticable in the circumstances. Therefore, the appeal was upheld, and reinstatement was ordered with no order as to costs.

In *Sibiya v South African Police Service* [2022] 9 BLLR 822 (LAC) the employee was a major-general of the South African Police Service (SAPS) and was dismissed for his alleged involvement in the unlawful return of Zimbabwean suspects held in South Africa to the Zimbabwean authorities. The employee alleged that his dismissal was part of a conspiracy to remove him from office. He referred an unfair dismissal dispute to arbitration, which was referred to the LC. The employee initially sought compensation and then subsequently sought to change the relief sought to reinstatement. The LC found that the charges had been trumped up and, therefore, that the dismissal was substantively unfair. The employee was awarded one year's compensation because the employee did not seek reinstatement in his statement of claim because he knew that his position had since been filled. The employee then instituted an appeal contending that the LC had erred in not granting reinstatement. This is because the employee had given notice in a pre-trial minute and practice note that he intended to amend his claim from compensation to reinstatement. It was held that in the case of a substantively unfair dismissal arbitrators are obliged to reinstate employees unless exceptions apply, such as reinstatement would be intolerable and impracticable. It was held that there was no reason to deny reinstatement because no evidence had been led to prove that reinstatement would be impracticable. Although the position the employee held at the time of his dismissal might have been filled, there were several different positions at the same rank that the employee could fill.

It was found that the LC had erred in finding that the employee was bound by the fact that he initially sought compensation and not reinstatement as the LC had disregarded the pre-trial minute and practice note. It further held that nothing in the Rules for the conduct of proceedings in the LC precludes an amendment to pleadings verbally and courts have a discretion to allow amendments provided that the other party is not prejudiced. Therefore, the appeal was upheld, and SAPS was ordered to reinstate the employee and pay 14 months' salary as backpay unless the employee decided not to return to service, in which case he would be entitled to the 12 months' compensation ordered by the LC.

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

By Moksha Naidoo

Doctrine of common purpose

NUMSA obo Dhludhlu and Others v Marley Pipe System (SA) (Pty) Ltd (CC) (unreported case CCT233/21, 22-8-2022) (Madlanga J (Kollapen J, Majiedt J, Mathopo J, Mhlantla J, Mlambo AJ, Theron J, Tshiqi J and Unterhalter AJ))

On 14 July 2017 and following wage negotiations, which took place nationally at the bargaining council, the employer informed employees of the wage increase for that year.

Unhappy with the increase, 148 of National Union of Metalworkers of South Africa (NUMSA) members embarked on an unprotected strike demanding to meet with the employer's head of human resources.

When the head of human resources did not arrive at the canteen, the employees marched to his office, singing, and holding up placards which read, 'away with Ferdi, we want 15%'.

On exiting the building to meet the striking employees; the head of human

resources was severely assaulted. He was kicked, punched, and pushed through a glass window.

A disciplinary hearing against all 148 of the employees, took place during July to August 2017. The employees were charged with embarking on unprotected strike action and assaulting a fellow employee. Pursuant to being found guilty of both counts, all 148 employees were dismissed.

Twelve of the employees were found to have been directly involved in the assault while the remaining employees, on application of the doctrine of common purpose, were found guilty of the same charge.

NUMSA, acting on behalf of all the dismissed employees, referred a matter to the Metal and Engineering Industries Bargaining Council (MEIBC) and once conciliation failed, lodged a statement of claim at the Labour Court (LC).

In court, NUMSA's defence was that there was no strike nor was anyone assaulted.

The court, through documents, video footage and photos; found 12 employees actively engaged in the assault, while 95 were on the scene and actively associated themselves with the assault. Despite 41 employees not being at the scene, the court, on application of the doctrine of common purpose, nevertheless found them guilty of assault.

NUMSA appealed the decision only in respect of the 41 employees who were not at the scene when the assault took place. The appeal failed with the Labour Appeal Court (LAC) having found:

- There was no evidence to show there were only 107 (12 together with the 95) employees at the scene of the assault. It was common cause that all employees, including the 40, embarked on an unprotected strike, marched from the canteen to the place where the assault occurred. Thus, the LAC found that, on a balance of probabilities, the 40 employees were present when the head of human resources was assaulted.
- Having made this finding, the LAC further found that there was no evidence that any of the 148 employees distanced themselves from the assault. None of the employees intervened while the assault took place or disassociated themselves, before, during or after the assault.

In dismissing the appeal, the LAC held:

'From the evidence before the Labour Court, it is clear that the appellant employees associated with the actions of the group before, during or after the misconduct. This included Mr Mokoena who, although he arrived on the scene after the assault, through his conduct associated directly with the actions of the group. It also included the employees who, in [the opinion of Ms Crowie, were] … bystanders. There was no dispute that these employees were present at the scene and associated with the events of the day. They too took no steps to distance themselves from the misconduct either at the time of, during or after the assault. Instead, they persisted with the denial, both in their pleaded case and the evidence of Mr Ledwaba, that any assault had occurred and refused the opportunity to explain their own conduct in relation to it.'

On appeal to the Constitutional Court (CC), NUMSA argued that the LAC incorrectly applied the doctrine of common purpose in respect of the 41 employees.

The CC began by firstly reiterating the point, that in applying the doctrine of common purpose, an employee can be found guilty of misconduct, if they actively associate themselves with the misconduct either before, during or after the act.

In this case, even if one accepts the 40 employees were on the scene when the assault took place, there was no proof that they actively associated themselves with the assault. The CC questioned the basis on which the LAC found that for an employee to disassociate themselves with the assault, they were required to intervene in an attempt to stop the assault. While there may have been a moral obligation to intervene, there was certainly no legal obligation to do so. The CC further held that the mere presence of an employee, at the scene of the misconduct, does not in itself attract liability. The obligation to disassociate oneself from an act of misconduct does not arise if there is no proof, on a balance of probabilities, that one firstly associated themselves with the misconduct.

The fact that the 40 employees marched from the canteen to the admin building, held placards and were present when the assault occurred did not establish that they actively associated themselves with the assault. There was no evidence that the assault was planned and may well have been spontaneous. Thereby, there existed the possibility that the 40 employees did not anticipate the assault and were mere bystanders when the assault occurred.

In respect of one of the dismissed employees, it was common cause he arrived at work after the assault had occurred. The court found that there was no evidence that he associated himself with the assault after it had taken place.

The employer relied on the judgment in *Commercial Stevedoring Agricultural and Allied Workers' Union and Others v Oak Valley Estates (Pty) Ltd and Another* [2022] 6 BLLR 487 (CC), wherein the CC held:

'Two important principles can be distilled from this court's jurisprudence … . First, mere participation in a strike, protest, or assembly, in which there is unlawful conduct, is insufficient to link the impugned respondent to the unlawful conduct in the manner required for interdictory relief to be granted. Second, the necessary link can however be established where the protesters or strikers commit the impugned unlawful conduct as a cohesive group. Whether this is established will, of course, turn on the particular facts of the case. Where, for instance, unlawful conduct during protest action is ongoing, widespread, and manifest, individual protesters or strikers will usually have to disassociate themselves from the conduct, to escape the inference that it is reasonably apprehended that they will cause injury to the applicant.'

In distinguishing the present matter from that of *Oak Valley Estates*, the CC held:

'*Oak Valley Estates* is distinguishable. It concerns interdicts, not termination of employment on the basis of common purpose. The issue in that case was whether an employer faced with unlawful conduct committed during a protected strike can obtain an interdict against employees participating in that strike *without linking each employee to the unlawful conduct*. As the second principle quoted from the case shows, in certain circumstances a "link" may consist in merely being within a cohesive group committing acts of violence at the workplace without the individual concerned being actually linked to the violence. Failure by an individual employee to, so to speak, walk away from the guilty cohesive group may result in an employer being entitled to obtain an interdict against that employee without her or him specifically being linked to the acts. Also, an interdict is distinguishable because – although it may concern conduct that is already taking place – it is often concerned with future conduct. It may not be necessary to obtain an interdict against an employee who has readily undertaken not to participate in any future unlawful action. Where there is no such undertaking, an interdict is usually warranted. Past conduct founding disciplinary action is on a different footing.

On the other hand, it would definitely be a non-starter to suggest that an employee could be dismissed on the basis that – through common purpose – she or he was "involved" in acts of violence without linking that employee to those acts. A verdict of guilt cannot appropriately be returned for merely being where the acts of violence took place. An employee could simply have been there as a spectator, or the acts could have happened so spontaneously or suddenly that the employee could not avoid being there.'

The CC found that the 41 employees were not guilty of assaulting the head of human resources and, on the basis that all 41 were found guilty of embarking on an unprotected strike; remitted the matter to the LC to decide on a sanction afresh.

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
LDD	Law, Democracy and Development	University of the Western Cape, Faculty of Law	(2022) 26
LitNet	LitNet Akademies (Regte)	Trust vir Afrikaanse Onderwys	(2022) 19(1) (2022) 19(2)
Obiter	Obiter	Nelson Mandela University	(2022) 43.1
PER	Potchefstroom Electronic Law Journal	North West University, Faculty of Law	(2022) 25
PLD	Property Law Digest	LexisNexis	(2022) 26.1 (2022) 26.2

Abduction and kidnapping

Kruger, B 'Op soek na regsekerheid in die warboel van abduksie, menseroof en mensehandel' (2022) 19(1) *LitNet* 538.

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Artificial intelligence

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Customary law

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Pieterse, M 'Corporate power, human rights and urban governance in South African cities' (2022) 25 *PER*.

Intellectual property

Chidede, T 'The role of intellectual property rights' protection in advancing development in South Africa' (2022) 26 *LDD* 168.

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Intra-regional trade

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Iyer, D 'Online learning: Shaping the future of law schools' (2022) 43.1 *Obiter* 142.

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Vinti, C 'An evaluation of Lesotho's right to "expropriate" the water in the treaty on the Lesotho Highlands Water Project in a "conflict of uses"' (2022) 43.1 *Obiter* 79.

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Nel, N and Van der Merwe, Z 'The new holistic role of a managing agent' (2022) 26.2 *PLD*.

Smith, DB 'The "Property Condition Report" explained' (2022) 26.2 *PLD*.

Sono, NL 'Re-examining the Constitutional Court's approach to the property question since *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC)' (2022) 25 *PER*.

Protected areas

Blackmore, A 'Concurrent national and provincial legislative competence: Rethinking the relationship between nature reserves and national parks' (2022) 26 *LDD* 26.

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Mudau, P 'The role of the African Charter on values and principles of public service and administration in promoting good governance' (2022) 26 *LDD* 148.

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Singh, A and Tembo, S 'Constitutionalism and public health emergencies: COVID-19 regulations in South Africa and the constitutional and human rights slippery slope' (2022) 43.1 *Obiter* 152.

Refugee rights

Kavuro, C 'The disappearance of refugee rights in South Africa' (2022) 43.1 *Obiter* 49.

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Subramanien, D 'SCA clarifies the term "motor vehicle" in Road Accident Fund Act 56 of 1996: *The Road Accident Fund v Mbele* [2020] ZASCA 72' (2022) 43.1 *Obiter* 180.

Stem cell transplant

Slabbert, M and Labuschaigne, M 'Misplaaste weldade en griewe van die "Liquorice Allsorts-gesinnetjie": 'n Regsletterkundige verkenning van Zelda Bezuidenhout se die waarde van stil bure' (2022) 19(2) *LitNet*.

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Du Toit, P 'Vonnisbespreking: Beheer oor eiendom as faktor by die oorweging van die toelaatbaarheid van getuienis wat by wyse van onregmatige visentering verkry is' (2022) 19(1) *LitNet* 586.

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Faber, JT 'Uncertainty about the condonation of formally non-compliant wills, and the rectification of cross-signed mirror wills: Is an act-based model the solution?' (2022) 25 *PER*.

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

The urgent need for a swift criminal justice system in South Africa

By Proud Mpofu

Many times, the words 'justice delayed is justice denied' have echoed throughout history, at some point even by icons, such as William Ewart Gladstone, Martin Luther King Jr and even former President Nelson Mandela among others. The words no doubt sound like a cliché when uttered, but if you have at any point been faced with a criminal case (be it in your capacity as an accused, a complainant, a presiding officer, a legal practitioner or even merely as a spectator) you immediately resonate and are reminded of just how unreasonable delays have led to the decay in the criminal justice system as we know it.

It is of principal essence to credit the fact that s 35 of the Constitution provides for the overall right to a fair trial. Section 35(3)(*d*) was subsequently enacted in 1997 to specifically cater for the right to have all trials begin and conclude without any unreasonable delays. It goes without saying that these unreasonable delays emanate from postponements, which can be granted or denied by courts in terms of s 168 of the Criminal Procedure Act 51 of 1977 (CPA), as amended. In 2003, the legislature further enacted s 342A of the CPA, which in turn places discretionary powers on courts so as to enable them to grant remedies against any such unreasonable delays.

When looking at all the above mentioned statutory provisions, one would conclude or assume that the criminal justice system is in good hands and that it is well on its way to achieve a proper functioning administration of criminal justice. A closer and more critical look would, however, result in a crushingly sad realisation that in fact, the system is flawed and a very long way from achieving the requisite expeditious status. One might wonder why most criminal cases go on for years with absolutely no hope of finalisation and it does not take a genius to observe that this is all due to a disturbing tradition of unreasonable delays.

It would, therefore, seem that indeed the legislature's intentions were pure in putting in place all these provisions that promote the right to a speedy trial. However, it is quite unfortunate that the law as it is right now is not effective in encouraging the preservation of this right, as it keeps falling victim to unreasonable delays. It would further seem that there is an urgent need for change and improvement of the existing remedies if the South African criminal justice system is to really achieve the efficiency it sorely desires and needs.

One observation is that one of the remedies available is that of granting of a costs order against the delaying party. Courts have for the longest time, however, been reluctant to grant this remedy as it poses a variety of challenges, such as what tariffs to apply and so forth. On this note, enactment of a specific regulation of the costs order remedy with regulated tariffs as in civil procedure, might just be the answer we seek in eradicating these delays.

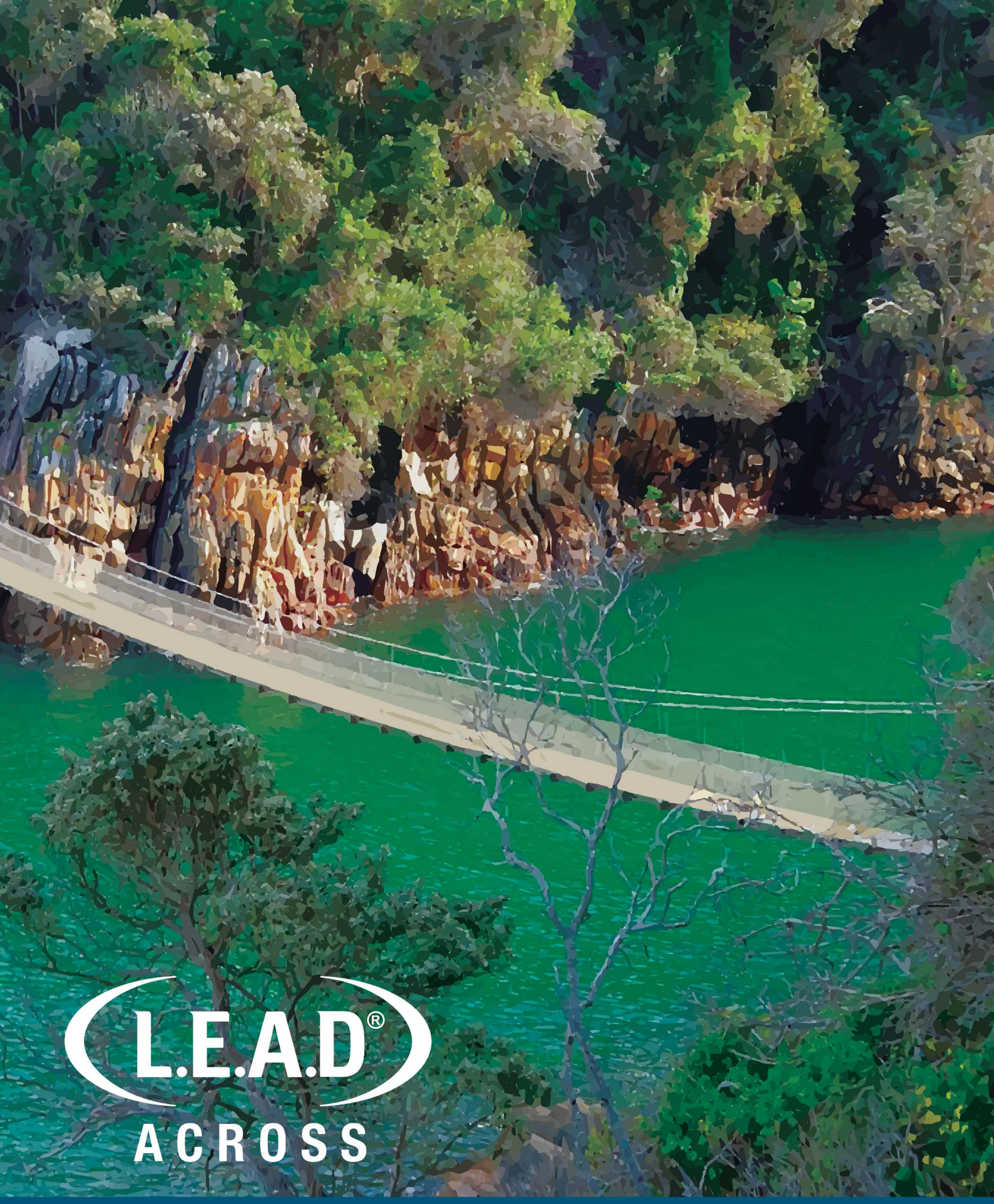
Furthermore, courts are empowered to withdraw charges in cases of unreasonable delays. However, this remedy is only temporary in nature as the state still holds the right to reinstate the same charges in future. Perhaps improvement of this remedy to permanent withdrawal of charges might also aid in the quest to eradicate these delays.

Another disturbing observation is that as it stands, most criminal courts are saddled with trivial cases that unnecessarily consume the court's time and in turn cause unreasonable delays. The law provides for the option of mediation of certain cases between parties, as well as diversion of some cases for instance for evaluation of young and first offenders by social workers. In practice, however, mediation and diversions are not as common as it should be. One would, therefore, recommend that certain trivial cases be removed from the trial roll and referred for mediation and diversion so as to ease the overburdened criminal justice system.

It is to be further noted that prior to the enactment of s 342A of the CPA, courts would apply the common law principle of a permanent stay of prosecution, which still remains in force, but can only be exercised by higher courts. One would, therefore, recommend enactment of a statutory provision that extends the power to grant a permanent stay of prosecution to lower courts especially bearing in mind that most delays occur in lower courts than in higher courts.

The abovementioned problems and the recommended solutions are merely a non-exhaustive drop in the ocean and are an indication that indeed there is an urgent need for a swift criminal justice system in South Africa (SA). As a nation that takes pride in constitutionalism, democracy and the recognition of fundamental human rights, SA desperately needs to take steps towards deterrence of unreasonable delays in the criminal justice system, which will ultimately protect the right to a speedy trial as enshrined in the Constitution.

Proud Mpofu *LLB (Walter Sisulu University)* is a legal practitioner in Johannesburg. ❑



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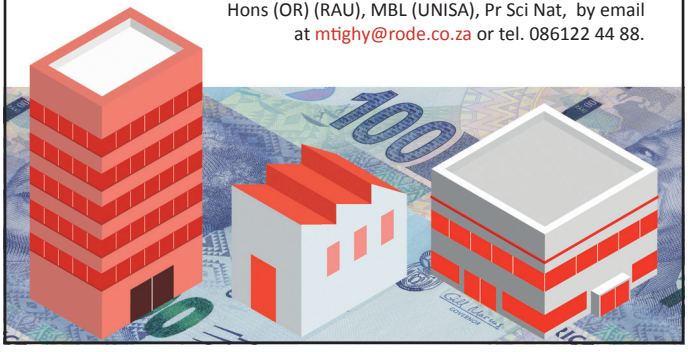

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RISKALERT

NOVEMBER 2022 NO 5/2022

IN THIS EDITION

RISK MANAGEMENT COLUMN

Legal Practitioners Indemnity Insurance Fund: Thomas Harban, General Manager, 1256 Heuwel Avenue, Centurion 0127• PO Box 12189, Die Hoewes 0163 • Docex 24, Centurion • Tel: 012 622 3900 Website: www.lpiif.co.za • Twitter handle: @LPIIFZA

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RISK MANAGEMENT COLUMN

Sans satis scientia lex, legalis praxis est periculosum: Insufficient legal knowledge is risky for practitioners

Thomas Harban,
Editor
and General Manager
LPIIF, Centurion
Email: thomas.harban@lpiif.co.za
Telephone: (012) 622 3928 or 010 501 0723

In the practice of law, the core is about providing specialised knowledge and services to clients. This article aims to examine some of the risks flowing from incompetence in the law. The structure of the article is to first give a broad outline of the risk. The second section looks at what the Legal Practice Act 28 of 2014 (the LPA) and the Code of Conduct issued in terms of that legislation prescribe in relation to competence. The third section examines how competence has been dealt with in some decided cases. Lastly, I make some risk management suggestions for practitioners to consider.

The risk outlined

A lack of knowledge of the law is a significant risk for legal practitioners. A legal practitioner with inadequate knowledge of the law in the field in which their firm practises will not meet the required standard of care, skill and diligence expected of legal practitioners. A rudimentary knowledge of the law is fertile ground for errors or omissions to materialise. Legal practitioners will be well advised to keep abreast of developments in all areas of law in which they practise and to implement regular training sessions for all staff in their firms. If a firm fails to constantly update its knowledge of the law, it runs the risk of not being able to provide contemporary expertise and that does not ensure value for its clients.

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Most legal practitioners in South Africa are competent in their respective areas of practise and provide a high standard of service to their clients. Such firms are lauded for the manner in which they conduct their practices and for the time and effort spent honing their expertise in the areas of law in which they practise. This is evident, *inter alia*, from an analysis of the underlying reasons for the breaches that ultimately result in claims notified to the Legal Practitioners Indemnity Insurance Fund NPC (LPIIF). On an annual basis, a relatively small number of claims arise from a lack of adequate legal knowledge. This is, however, a risk that requires ongoing attention. Not all professional indemnity claims arise from a lack of legal knowledge. This article is aimed at raising awareness of the risks for those legal practitioners who have not yet discovered the value of investing in measures to ensure that they have the requisite knowledge of the law in their respective areas of practice.

Remember the maxim *ignorantia juris non excusat*? (I stretch that maxim from criminal law to civil law of liability merely to illustrate a point.) Fortunately for those suffering damages because of incorrect legal advice, the legal practitioners concerned will not be able to argue an ignorance of the law to escape liability, and the ignorance of the law on the part of such legal practitioners will be the *causa* for liability, rather than an *excusatio* to avoid it. Also consider the embarrassment, and consequent damage to your reputation, of having been found to be incompetent or lacking adequate knowledge about the law in the area in which you have accepted a mandate and held yourself out as an expert. An opponent who realises that their legal knowledge on a subject is superior to yours may have the propensity to gloat, at your expense (justifiably, perhaps).

While this articles focuses on the risk of professional indemnity claims flowing from incompetence of legal practitioners, the topic has wider implications, including compliance and operational risks. Consider, for example, the consequences of not knowing and applying the law in the conduct of your legal practice as an entity. Do you know what your obligations are in respect of legislation such as the LPA, the Protection of Personal Information Act 4 of 2013, the Cybercrimes Act 19 of 2020, the Financial Intelligence Centre Act 38 of 2001 or even the Contingency Fees Act 66 of 1997? Are you aware of the consequences that flow from non-compliance with any of these statutes? Have you, and everyone else in your firm, undergone training on all the laws applicable to your practice? Do you have a training program in place for updates on the law or professional ethics? Competence and compliance must be at the root of every function carried out in a law firm.

Over the years, the LPIIF has made substantial resources available to the legal profession aimed at educating members of the profession on how to avoid the common errors that result in claims. A wide range of topics have been covered in the education initiatives, ranging from partnership agreements, agreeing/accepting and documenting the mandate, risks to look out for in clients, prescription, cyber risks, under-settlement of matters, personal stressors and how to close-off a mandate when the instruction has been carried out. The underlying reasons for claims have also been examined by looking at the common errors made in legal practices that ultimately result in those claims. All these risk management suggestions will be ineffective if there is a dearth of technical legal skills in the firm.

A particular concern was raised for me this year while conducting risk management training sessions when it became apparent that some candidates did not know what the ethical duties of attorneys are. Participants struggled with basic concepts such as the doctrine of *stare decisis*, knowledge of substantive and procedural law in some cases. Some participants admitted that they were unable to conduct legal research or to write legal opinions. Unfortunately, for some people, reading the law is something that was last done while at university. This stems partly from an inability to undertake quality legal research as is evi-

RISK MANAGEMENT COLUMN continued...

dent in the reliance on general search engines such as Google or Wikipedia to purportedly find technical legal information on questions of law. The internet can potentially be as dangerous as it may be useful. There are no guarantees that the information that pops up after your Google search will be accurate, current material or even have been written by someone with formal legal training in South African law. It is evident that not all firms have formal training programs in place. The likelihood of the practitioners concerned facing claims or disciplinary action in future is very high, while the probability of such practitioners conducting successful, sustainable practices is low. Some of these challenges may be addressed with the implementation of the "high standards of legal education and training, and compulsory post-qualification professional development" referred to in section 5 (h) of the LPA. Many other professions already have a system of compulsory post-qualification professional development in place which they refer to as continuous professional development (CPD).

It will be noted from the claim statistics published by the LPIIF that incorrect application of the law and the rendering of incorrect legal advice, respectively, are some of the common errors made by legal practitioners. Many of the other errors and omissions that ultimately result in claims can also be linked to a lack of competence.

While some claims result from *bona fide* mistakes made in legal practices, many claims result from circumstances where the practitioners concerned took on mandates that they did not have the necessary competence to execute or simply got the applicable legal principles wrong.

The sausage factory mentality that has creeped into some firms exacerbates this problem. For example, it can be noted from the information provided to the LPIIF by firms dealing with Road Accident Fund (RAF) claims that a tick-box approach is applied in some practices to deciding on the documents to be submitted, sometimes irrelevant precedents are used repeatedly and there is no regard for updates in legislation or the applicable legislation or any other applicable legal principles. Poorly drafted documents are a common occurrence and what is pleaded may have no relevance at all to the facts (or the applicable law) pertaining to the matter at hand. The fact that the matters result in professional indemnity claims against the practices concerned is thus unsurprising. The LPIIF often also sees poorly drafted pleadings from the legal representatives acting for plaintiffs in professional indemnity claims. An inability to frame a sustainable cause of action or inadequate knowledge on the legal principles in respect of professional indemnity claims is commonplace. This is one of the reasons that professional indemnity claims take a long time to be finalised and also why some of the firms initially instructed by a plaintiff to pursue a claim against another firm subsequently face claims themselves from their erstwhile clients. Considering the poor quality of some of the work produced by certain legal practitioners, it is unsurprising that they may be unflatteringly referred to with by expressions such as "a claim waiting to happen" or even as "walking claims".

There are numerous reported cases where non-compliance with, or an incorrect application of, the Contingency Fees Act has been highlighted. There are also many applications to strike-off or suspend legal practitioners where it can be gleaned from the underlying circumstances that there was a lack of knowledge and that the root of the problem lies in a lack of competence.

Prescription remains one of the main risks faced by the legal practitioners. This is evident from the consistently high number and value of prescription related claims notified to the LPIIF. This is the case despite the considerable amount of time spent focusing on this risk and suggesting measures that firms can implement to mitigate the likelihood of it occurring. Applying this to the present topic, it is concerning that many of the practices which have had prescription related claims display inadequate knowledge on the law relating to prescription. Adequate knowledge of the legal principles (the law and

how it applies to the facts before them) which determine when prescription commences running, is suspended or interrupted is often lacking on the part of some of the practitioners concerned. The lack of adequate knowledge on this important legal principle results in these firms not being armed with the legal arguments to overcome a special plea of prescription in circumstances where such a special plea could be successfully challenged. Such firms also run the risk of blissfully trotting along oblivious of the imminent risks that they face. The proverb "where ignorance is bliss, 'tis folly to be wise" springs to mind.

Cybercrime related claims can similarly be avoided if the legal prescripts relating to payments (see rule 54.13) are applied consistently.

For more information see:

- The information on prescription available under the risk management section of the LPIIF website (www.lpiif.co.za) and in the Practice Management column of *De Rebus* (www.derebus.org.za)
- DC Harms SC, *Procedural Timetables and Prescription Periods* (LexisNexis, 2017)
- MM Loubser, *Extinctive Prescription* (Second Edition) (Juta, 2019)
- "The importance of the in-house compliance function in a law firm", *De Rebus*, September 2019, and
- "Written records of instructions: meeting the regulatory requirements" in the August 2021 edition of the *Bulletin*
- "Until a claim do us part: Does your partnership agreement address the event of a claim against the firm?", *De Rebus*, October 2017

The LPA

The purpose of the LPA is to, *inter alia*, promote the public's interest (s 3(d)) and to create a framework for the "development and maintenance of appropriate professional and ethical norms and standards for the rendering of legal services by legal practitioners" (s 3 (g) (i)).

The Code of Conduct for all legal practitioners, candidate legal practitioners and juristic entities issued in the terms of the LPA (the Code) prescribes that:

"3. Legal practitioners, candidate legal practitioners and juristic entities shall-

3.1 maintain the highest standards of honesty and integrity;

…

3.11 use their best efforts to carry out work in a competent and timely manner and not take on work which they do not reasonably believe they will be able to carry out in that manner;

…

3.13 remain reasonably abreast of legal developments, applicable laws and regulations, legal theory and the common law, and legal practice in the field in which they practice;

18. Specific provisions relating to the conduct of attorneys

An attorney shall-

…

18.14 perform professional work or work of a kind commonly performed by an attorney with such degree of skill, care and attention, or of such quality or standard, as may reasonably be expected of an attorney;"

The provisions that I have quoted are aligned with the principles of liability of attorneys developed by the courts (see below). Time will tell whether an enterprising litigant will also plead a breach of the LPA, the rules and the Code as a basis for liability on the part of a legal practitioner.

A failure by a legal practitioner to either:

- carry out work in a competent and timely manner;
- remain abreast of legal developments, and the various legal principles applicable to their area of practice; or
- perform work at the standard and quality and with the degree of care, skill and attention reasonably expected of an attorney

exposes that practitioner to regulatory action by the Legal Practice Council and may simultaneously serve as the basis for a profes-

RISK MANAGEMENT COLUMN continued...

sional indemnity claim against such practitioner.

It is particularly concerning that a substantial number of legal practitioners with whom I have interacted on some of the training platforms have not even read the LPA. Several legal practitioners persisted, in 2022, in referring to the repealed Attorneys Act 53 of 1979, though four years have already elapsed since the LPA came into effect on 1 November 2018. This is exacerbated by the failure by the legal practitioners concerned to read the LPA which is the primary legislation regulating the profession. This can only be described as egregious. Remember that claims arising from legal services carried out in violation of the LPA or the rules issued in terms of that Act are excluded from the LPIIF Master Policy (clause 16 (t)).

Practitioners can have regard to:

- Bernard Wessels, *The Legal Profession in South Africa: History, Liability and Regulation* (Juta, 2021), and
- P Ellis, AT Lamey and L Kilbourn, *The South African Legal Practitioner: A commentary on the Legal Practice Act* (LexisNexis, 2021)

Lessons learned from decided cases

Chapter 4 of the book by Bernard Wessels sets out an in-depth analysis of the contractual liability of legal practitioners and the delictual liability of legal practitioners is covered in chapter 5 of that instructive and scholarly work. That book is highly recommended for all legal practitioners.

For current purposes, I will restrict the focus to a selection of cases where the competence of the legal practitioners concerned was raised. It is not practically possible in an article of this nature to give a detailed analysis of all decided cases on this subject. I also do not conduct a detailed analysis of incompetence as a form of negligence or the duty of care (if the cause of action is based in delict) or a breach of the mandate (in the event that the case is pleaded in contract). It is hoped that the general principles gleaned from the highlighted cases will become apparent for the reader. Readers are also urged to have regard to the various cases referred to as they provide important lessons on what is expected of legal practitioners. These can be used in internal training sessions in firms and for the development of internal measurers to prevent claims. The facts of many of the cases are interesting and the "war stories" documented in the cases can make for instructive case studies in your training material.

In the often-cited passage from *Van Der Spuy v Pillans* 1875 Buch 133, De Villiers CJ stated the following:

"I do not dispute that an attorney is liable for negligence and want of skill. Every attorney is supposed to be reasonably proficient in his [or her] calling, and if he [or she] does not bestow sufficient care and attention in the conduct of business entrusted to him [or her], he [or she] is liable; and where this is proved the court will give damages against him [or her]." (at 135)

Knowledge of the law will enhance proficiency, while significantly mitigating the risk of liability for negligence and the lack of skill referred to by De Villiers CJ.

Mlenzana v Goodrick and Franklin 2012 (2) SA 433 (FB) is a case arising from circumstances where the plaintiff had instructed to the defendant to pursue a loss of support claim against the RAF. The plaintiff's husband had been killed in a motor vehicle accident. The defendant did not pursue the claim timeously resulting in the prescription of the plaintiff's claim against the RAF. The plaintiff then instituted a professional indemnity claim against the defendant. The following findings by Rampai J are relevant for present purposes:

- a failure by the defendant to, "as knowledgeable practitioners often do", perform a rough calculation of the quantum of the compensation in order to lodge the claim timeously [at 71];
- the "clear misconception of the law" by the attorney, Ms Smith, dealing with the matter in the defendant's office [at 72];

RISK MANAGEMENT COLUMN continued...

- the failure by Ms Smith to apply for copies of the full birth certificates of the plaintiff's minor children herself as a "knowledgeable, skillful and diligent attorney" would have done in the circumstances and that "on account of poor knowledge, skill and care, Ms Smith made such onerous demands on her client that would probably have discouraged and frustrated even a very prudent and cooperative client." [at 79];
- the considerable time taken by Ms Smith to realise that she had the necessary information in her possession to pursue the matter timeously, but she repeatedly wrote to her client asking for [at 81];
- that an "ordinary competent attorney, with a proper perception of the importance of the claim to her client" would have written to the police (before the end of the month in which she was initially instructed) requesting copies of the accident report, accident plan and witness statement [at 79];
- the defendant "did not take reasonable steps, not only to obtain the information [Ms Smith] believed she required, but this is very important, also to exercise the skill, knowledge and diligence expected of an average attorney. As a result of such disturbingly shocking lack of skill, knowledge, diligence and care she failed to appreciate the value of information her client had supplied almost three years before the expiry date of the prescription period." [at 92]
- "I have to say, and it is not pleasant saying it at all, that the plain truth about this whole problem was not Ms Smith's own making. She was admitted as an attorney in 2003 and on 2 October 2003 she was given a huge responsibility to run not only the MVA department of the defendant but also the conveyancing department. She was a virtual novice in the legal profession at the time. She was put in the deep end and left all by herself to navigate the stormy waters of the deep ocean. She was not at all equipped to do such intricate work. Her legal knowledge was still very limited. Since then she hardly ever attended a MVA seminar. Yet she regarded herself as an expert in the field. Her evidence was that a two-day practical training course she was compelled to attend as a candidate attorney was the only meaningful training she ever received. That, in brief, explained why the plaintiff's claim prescribed" [at 93]; and
- "Since Ms Smith failed to exercise the skill, knowledge and diligence expected of an average attorney, she acted negligently and her negligence made the defendant liable to the plaintiff. In my view the defendant neglected to lodge the plaintiff's claim. Its omission was due to the fact that its representative did not have the requisite degree of knowledge, skill and diligence which, as an attorney, she was supposed to have" [at 101].

The *Mlenzana* judgment is essential reading material for all firms conducting personal injury claims. The numerous lessons to be learnt from that judgment include the need to know the law applicable to your mandate, meaningfully engaging with information provided by a client, the dangers of procrastination, lack of adequate training for staff, the need for effective supervision supervision of all staff (professional and support staff), managing workloads and the dangers of throwing staff into the proverbial deep end, without support. Expecting staff in the firm to simply "get on with it" when these lessons have not been applied is fertile ground for errors to occur that will result in liability on the part of the firm.

Judgments on this subject are replete with unflattering comments about the competence (or lack thereof) of the legal practitioners concerned. Some rather interesting cases that readers can have regard to are:

- *Law Society of the Cape of Good Hope v C* 1985 (1) SA 754 (C) where the evidence in an application to have the at-

RISK MANAGEMENT COLUMN continued...

torney's name struck from the roll for misconduct disclosed a "fairly brief career of blundering incompetence in bookkeeping" rather than a "systematic course of rascality";

- *Lushaba v MEC for Health, Gauteng* 2015 (3) SA 616 (GJ) where the state employees were held personally responsible for a portion of the costs due to their degree of incompetence and indifference. An appeal against that order was successful in *MEC for Health, Gauteng v Lushaba* 2017 (1) SA 106 (CC);
- *Viljoen v Schumann VD Heever & Slabbert Attorneys* 2015 JDR 0123 (GP) where the court stated that "[in] order to succeed with his claim for breach of mandate the plaintiff was required to prove the mandate and its terms, a breach of the mandate, usually in the form of a negligent failure on the part of the attorney to exercise the skill, adequate knowledge and diligence expected of a legal practitioner, a reasonable likelihood of success in the proceedings to have been instituted and damages within the contemplation of parties when the mandate was concluded' [at 5]. The court went on to state that "[it] is inconceivable that an attorney could expect to adduce evidence that he did not contemplate harm arising from his incompetence in the present circumstances' [at 12];
- *Ramonyai v LP Molope Attorneys* 2014 JDR 0772 (GSJ)
- *Fourie v Van der Spuy and De Jongh Inc. and Others* 2020 (1) SA 560 (GP) (30 August 2019)
- *Jurgens and Another v Volschenk* (4067/18) [2019] ZAECPEHC 41 (27 June 2019) (unreported)
- *Slomowitz v Kok* 1983 (1) SA 130 (AD)
- *Mazibuko v Singer* 1979 (3) SA 258 (W)
- *Margalit v Standard Bank of South Africa Ltd and Another* 2013 (2) SA 466 (SCA)
- *Hirschowitz Flionis v Bartlett and Another* 2006 (3) SA 575 (SCA) ; and
- *Du Preez and Others v Zwiegers* 2008 (4) SA 627 (SCA).

The following resources also contain useful information for internal staff training materials:

- The risk management documents available on the LPIIF website
- The articles published in the Practice Management column of *De Rebus*
- Marius van Staden, "The Conveyancer's Mandate", in the May 2015 edition of the *Bulletin* and
- Michelle van Eck, "A framework for professional duties and the liability of legal practitioners in the payment of trust monies", 2020 *TSAR* 846
- Chapter 8 of the book by Bernard Wessels dealing with personal cost orders against legal practitioners
- IH Hoffman, *Lewis and Kyrou's Handy Hints on Legal Practice: Second South African Edition* (LexisNexis, 2011), and
- Kevin William Gibson, *Legal Malpractice Avoidance Guide* (2014)

The competence of legal representatives has also been raised in several criminal cases. The subject is commonly raised in an appeal where the accused asserts that his or her fundamental right to a fair trial was compromised due to the inadequate handling of the matter by the legal representative. Regard can be had, for example, to the following cases where this was considered by the courts:

- *S v Tshepo Mbungi* 2011 JDR 0811 (GNP)
- *Ramonyathi v S* (A470/2014) [2014] ZAGPPHC 915 (23 October 2014), and
- *Odhiambo v Regional Court Magistrate, Stellenbosch and Another* (11054/2019) [2019] ZAWCHC 109; 2020 (1) SACR 266 (WCC) (27 August 2019)

Readers can also have regard to the following publications:

- Peet M Bekker, "The right to legal representation, including effective assistance, for an accused in the criminal jus-

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tice system of South Africa", XXXVII CILSA 2004, p173

- WH Hulburt, "Incompetent Service and Professional Responsibility", Alberta Law Review (1980), Vol XVIII, No. 2, p 145;

Risk management suggestions

- Invest in training for yourself and everyone else in your firm. Many institutions offer informative training sessions that provide real value to legal practitioners. Having said that, not everyone who holds themselves out as an expert on a particular subject in fact has the claimed expertise. Beware of marketing gimmicks clothed as expert training sessions. Do some research and only use accredited institutions and those with a verifiable training history. If you go into a training session having done some background reading on a topic you will extract more value and are more likely to spot imposters.
- Training is particularly important for new members of your team, irrespective of their level of experience. Even a seasoned practitioner can benefit from a refresher course where new skills can be learnt and the benefits of the years of experience, in turn, shared with less experienced staff. Senior practitioners participating in the training sessions will also go a long way to getting buy-in from less experienced staff members.
- Only accept instructions in matters where you are confident that the matter falls within your knowledge and capacity. If not, refer the client to another legal practitioner who has specialist knowledge and experience in that area of legal practice.
- Do not follow advise from counsel or any other expert blindly. Do not serve as a mere postbox between counsel and the client. Give meaningful, knowledgeable input on the matter at all times. Apply a degree of professional skepticism where necessary.
- Do not simply "wing it" hoping that by some stroke of luck you will succeed in legal practice with a rudimentary knowledge of the law.
- Remember the Proverb "A little knowledge is dangerous" and abide by it.
- The internet can be your friend, but also your enemy.
- Subscribe to legal research websites and platforms run by experts and only use those to conduct legal research.
- Information and Technology systems are useful for enhancing efficiency but are not a substitute for diligence and competence.
- Develop a tradition of reading law and legal developments. Publications such as *De Rebus* and the *Bulletin* are a useful starting point. Get into the habit of reading judgments and legislative updates. Subscribe to the various products and platforms that provide legal updates.
- The implementation of the compulsory post-qualification professional development system provided for in the LPA will go a long way to address the risks highlighted in this article.
- All stakeholders have a responsibility to address the risks highlighted above, failing which other entities and professions will continue making inroads into the domain of legal practitioners.
- The LPIIF provides risk management training for practices at no cost. Email Risk.Queries@lpiif.co.za to arrange a training session for your firm. The training will address the specific areas of practice conducted by your firm. If there is a specific area of law on which you require training, indicate that in your email and the training will be tailored to suit your needs.
- Take heed of the maxim *ignorantia iuris nocet*: not knowing the law is harmful