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The corporate law firms supporting without prejudice are:
Editor’s note
The editor’s view
MYRLE VANDERSTRAETEN

Medical Law – COVID-19
6 | COVID-19 Ensure opportunistic product offerings are legally compliant
Demand for new products presents opportunities and challenges
BERNADETTE VERSFELD and JODI HARDY - WEBBER WENTZEL

7 | When did saving lives become a decision on who gets to live?
The role of ventilators
MARTHA SMIT – FASKEN (SOUTH AFRICA)

8 | Genetic-link requirement for surrogacy
AB and Surrogacy Advisory Group v The Minister of Social Development (Centre for Child Law as Amicus Curiae) CCT155/15
SONNIE BADENHORST - MAPONYA

Opinion – COVID-19
10 | Being a good enough parent
Setting realistic goals in unprecedented times
CANDICE FLETCHER - THE RIDGE SCHOOL

11 | Academics and pandemics: A student's perspective during the lockdown
Lockdown – a student's view
ROSS BOOTH

Company Law
13 | Retrenching the efforts of SAA's business rescue practitioners
An order declaring the BRPs conduct in issuing the notices procedurally unfair
KERRI WILSON and NADIA HARTEN - FALCON & HUME

15 | Interests of justice and public interests came to the rescue a chronically ill company
Ziegler South Africa (Pty) Ltd v South African Express Airways SOC Limited and Others (2020) ZAGP JHC 29 (6 February 2020)
BLESSING SICELO MAKHATHINI

Company Law – COVID-19
16 | A perspective on directors' duties in the time of COVID-19
Covid-19 pandemic will not absolve directors from breach of their duties
BOUWER VAN NIEKERK and PRAVEEN MUNGA - SMIT SEWGOOLAM

18 | Success fees to business rescue practitioners - important aspects to consider
Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd [2020] ZASCA 17 (25 March 2020)
MALACHIZODOK MPOLOKENG - WERKSMANS

Management-Leadership
20 | Cometh the hour, cometh the man'
DEANNE WOOD – FASKEN (SOUTH AFRICA)

Employment Law
21 | The last word on whether a union may ignore its constitution
National Union of Metal Workers of South Africa v Lufi Packaging (Isithebe) and Others (CCT 172/19) [2020] ZACC 7 (26 March 2020).
VERUSHKA REDDY and KRIYANKA REDDY - NORTON ROSE FULLBRIGHT (SOUTH AFRICA)

23 | Arbitrary ≠ discriminatory
K Naidoo & Others v Parliament of the Republic Of South Africa
LUDWIG FRAHM-ARP and VENOLAN NAIDOO – FASKEN (SOUTH AFRICA)

24 | High stakes, low thresholds - Dismissing senior managers for poor work performance
Fairness is still the underlying criterion
NEIL COETZER and COURTNEY WINGFIELD – COWAN-HARPER-MADIKIZELA

Employment Law – COVID-19
26 | Post COVID-19 labour law considerations
The employee/employer relationship
JONATHAN GOLDBERG and GRANT WILKINSON – GLOBAL BUSINESS SOLUTIONS

Competition Law
27 | Initiation and prescription
Competition Commission v Pickfords Removals SA (Pty) Ltd Pickfords (167/CAC/Jul10)
LESETJA MORAPI – HERBERT SMITH FREEHILLS (SOUTH AFRICA)

Competition Law – COVID-19
29 | More bark and bite: Competition Law as an additional means of post-pandemic support
Weathering the storm
SUSAN MEYER PRIANKA GOUDEN and CHARISSA BARDEN – CUFFE DEKKER HOFMEYR

Contract Law
30 | A divorce, the settlement agreement and a parcel of game
JJ VAN DER WALT – BAKER MCKENZIE

32 | Strict compliance with the cancellation clause is peremptory
Godbold v Tomson 1970 (1) SA 61 (D) (at 65A-D)
NAPE MASIPA – MAPONYA
Consumer Protection Act

33 | Bundling in terms of the Consumer Protection Act
   Great caution must be used when selling bundled goods or services
JUSTINE KRIGE - CLIFFE DEKKER HOFMEYR

International

36 | Tales from the US of A
   PATRICK BRACHER - NORTON ROSE FULBRIGHT (SOUTH AFRICA)

Platteland perspective

38 | Kenya Law School
   A satisfying outcome
   CARMEL RICKARD

Advertising Law

40 | Incongruent realities
   incongruencies in business and in advertising
   LEON GROBLER - PERSPECTIVE CONSULTING

Intellectual Property Law

41 | The case of the interdict for which the Plaintiff did not ask
   Nu-World Industries (Pty) Ltd v Strix Ltd [2020]
   ZASCA 28 (Strix.2)
   OWEN SALMON - MAISELS GROUP


43 | South Africa: COVID-19, Amazon and the changing face of brand enforcement
   Ensuring the safety of brands
   GAELYN SCOTT - ENSAFRICA

44 | South Africa: COVID-19, technology and patents: the good, the bad and the ugly
   Trade mark issues around COVID-19
   ROWAN FORSTER - ENSAFRICA

46 | National news
   Legal firm news

47 | Constitutional Court Art Collection – Cover ‘Judge’
   THE CONSTITUTIONAL COURT TRUST

Law of Succession

47 | Limitations on the right to freedom of testation – Part 2
   An analysis of the limitations with regard to discrimination
   MUNEER ABDUROAF - UNIVERSITY OF THE WESTERN CAPE

Road Accident Fund

48 | A change of direction for the Road Accident Fund
   Mabunda Incorporated v Road Accident Fund (15876/2020)
   BERNA MALAN - ABSA

Financial Law

50 | Living annuities and divorce: Are non-member spouses being deprived of accrued retirement benefits
   Courts must consider matrimonial principles to protect the rights of non-member spouses
   CLEMENT MARUMOAGAE - UNIVERSITY OF THE WITWATERSRAND

Financial Law – COVID-19

52 | COVID-19 – Trends that continue to influence Africa
   Sustainable financing, and South Africa’s role to facilitate sustainable investment deals
   PIETER VAN WELZEN - CMS (SOUTH AFRICA)

53 | Estate planning during a pandemic: are your affairs in order?
   WILLS
   DEON BEACHEN - ENSAFRICA (FISA MEMBER)

Property Law – COVID-19

55 | To pay or not to pay in the context of COVID-19
   Retail tenants and lease agreements
   Thato Mashishi - KPMG Legal Services

The Law – COVID-19

56 | COVID-19 law enforcement incompetence and brutality not a new thing
   An urgent need ‘to fix the leaking roof’
   MTHO MAPHUMULO - ADAMS & ADAMS

57 | Covid-19 Lockdown gently nudges court into 4th Industrial Revolution
   Setting the tone for the courts in the 4th Industrial Revolution
   KYLIE SLAMBIERT AND YURI TANGUR – LAWTONS AFRICA

Deal Selection

60 | Who did what in May
   DEALMAKERS

Cover: Artwork: Jaco Sieberhagen, ‘Judge’ 1999, carved wood, 824 x 227 x 230 mm. Donated by the artist to the CCAC. Cover image courtesy of the Constitutional Court Trust, as part of the Constitutional Court Art Collection (CCAC). For more information, visit ccac.concourttrust.org.za or follow @concourt_art on Instagram and Twitter.

Photograph by Ernest Bellingan Scott.
Editor's note

Over a third of the articles in *without prejudice* this month are COVID-19 related. Since life is currently dictated by regulations surrounding the virus, this comes as no surprise. But what these articles do is to highlight how wide COVID-19’s reach is – and the articles barely scratch the surface.

South Africans remain perplexed by the reasoning for some of the bans; those in power appear equally confused as they contradict each other. Of course, we all have our own views about why various industries should remain closed while others are permitted to open. Some are desperate and the black market has thrived as a result (it is reported that 90% of smokers have managed to buy cigarettes under lockdown) while government has lost out. In keeping with the ability of those who operate outside the law to thrive in any circumstances, when owners of a particular liquor store went to open their store to get ready for Level 3 sales, apparently a tunnel had been dug under the floor and the thieves had removed R300 000 worth of liquor. The owner is offering a R 50 000 reward for the arrest of the criminals.

Although remote trials have taken place globally and are being hailed as part of the 4th Industrial Revolution and our ‘new world’, not everyone agrees. In America, it was reported in Law 360 it was reported that District Judge Rodney Gilstrap is concerned. He says remote trials requires a delicate balancing act, “This is a very difficult set of first impression circumstances where you’re trying to balance a constitutional mandate and an interest in speedy justice with real public health concerns.” He is not alone. Justice could be put on hold for many and in the US it is possible that keeping within the social distancing rules and general safety procedures required under COVID-19 will result in most (all) jury trials being delayed to August/September – at the earliest.

The reason for the tragic death of George Floyd is not lost on anyone, anywhere. That some people believe themselves to be better than others is not new, nor is it new that for some, this view is rooted in the belief that one race is superior to another. We carry an article on police incompetence in this issue and the incidents to which this is related are not entirely based on race. However, South Africa certainly has its own history of racial incidents to damn and shame. It is beyond comprehension that not one of the three officers who were with Derek Chauvin intervened. We concur with Minneapolis Police Chief Arradondo when he said, ‘Silence and inaction, you’re complicit. If there was one solitary voice that would have intervened ... that’s what I would have hoped for’. And decent people will agree with Houston’s – Floyd’s home town – Police Chief Art Acevedo when he said, ‘I am just hopeful that we have reached a watershed moment here and we will see some meaningful reform in terms of the way that we deal with bad police officers and the way we deal with police officers involved in criminal conduct that completely undermines the good work of the vast majority of police officers’. Tragically George Floyd’s death is at risk of being obscured by an emphasis on the looting and rioting, which will be reframed by those who want to obscure the real problems of racism.

Will environmentalists be able to put together some stats that will tell the story of the impact of the global lockdown on the environment and what can be retained as the world re-emerges? Unrelated to the lockdown, but good news for coral reefs, was the announcement in May that scientists have ‘trained microalgae to tolerate higher sea temperatures and could help save the coral reefs’. It was reported that Australia’s Great Barrier Reef has endured its third mass bleaching event in five years. It is hoped that if the heat tolerance of the resident algae is raised, the coral reefs would be able to survive the rising ocean temperatures. Madeleine van Oppen of Melbourne University told The Times: “We found that the heat tolerant microalgae are better at photosynthesis and improve the heat response of the coral animal.

“These exciting findings show that the microalgae and the coral are in direct communication with each other. We’re putting all our efforts into this now in case we need it to have it ready as an intervention in the future.”

We carry an article on surrogacy written by Sonnette Badenhorst, an attorney with Maponya. It was interesting, albeit disturbing, to read the majority judgment of Justice Bess Nkabinde which finds that there is the rational purpose of creating a bond between child and commissioning parent, or parents that requires at least one of the parent’s gametes. If this is so important, where does that leave children who are adopted – without any hope of a bond? And that is certainly not true, as many adopted children will testify.

Everyone has their own particular challenge during this lockdown period. Parents have a particular challenge – to remain positive and keep the family positive too, school children, produce their usual standard of work and provide a happy environment. We have been permitted to publish an article written for parents of The Ridge School written by Candice Fletcher; take the time to read it – it really is for everyone.

As readers of *without prejudice* will know, we carry artworks from the Constitutional Court Art Trust on the front cover of the magazine each month. The first artwork that appeared in March 2019 was that of the Amsterdam Rainbow Dress.

The very beautiful and dramatic photographs by Neo Ntsomi featuring transgender model and activist Yaya Mavundla wearing the Amsterdam Rainbow Dress were donated by the Dutch Embassy in South Africa to the Constitutional Court Trust (CCT), custodian of the Constitutional Court Art Collection (CCAC), to mark the 2020 International Day Against Homophobia, Transphobia and Biphobia (IDAHOT), held on 17 May. For those who do not know and, as a reminder to others, The Amsterdam Rainbow Dress is a work of art made from the flags of all countries in the world where homosexuality is illegal. A country’s flag is changed to a rainbow flag when such legislation is changed. It aims to create awareness of the persecution of LGBTQI+ people, and is a powerful example of how art can be used to champion the cause of justice and humanity.

Look out for ‘The Class of 2014 – Where are they now?’ feature which will appear mid-June.

MYRLE VANDERSTRAETEN
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COVID-19: Ensure opportunistic product offerings are legally compliant

BERNADETTE VERSFELD AND JODI HARDY

Demand for new products to combat COVID-19 infections presents an opportunity for businesses under strain, but they should be aware of advertising, medical and intellectual property restrictions.

Businesses are adapting their business models in an effort to remain profitable and avoid job losses through the various levels of the COVID-19 lockdown. The result is that several non-medical businesses are turning to manufacturing, distributing and/or retailing medical-related products, and are doing so in haste.

Demand for face masks, hand sanitisers and other personal protective equipment (PPE), as well as vitamins and medications which purport to boost the immune system, represents a rapidly-growing market. In response, certain alcohol and perfume manufacturers, including the likes of Absolut Vodka, Givenchy and Dior, have begun producing hand sanitisers while clothing manufacturers, such as Zara and Gucci, have also expanded their product ranges to include face masks and medical scrubs. Businesses like these need to ensure that their new product offerings comply with all applicable laws and regulations.

The Advertising Regulatory Board (the Board) is a self-regulating body which is constituted by the marketing and communications industry. Section 55(1) of the Electronic Communications Act (36 of 2005) empowers the Board to determine and administer the Code of Advertising Practice. Businesses not adhering to the Code open themselves up to the risk of a complaint being filed against them with the Board. In terms of clause 4.1.1 of Section II of the Code of Advertising Practice, businesses need to be able to substantiate any claims they make with evidence. Clause 4.2.5 of Section II of the Code also prohibits businesses from making claims that appear to have a scientific basis, which in reality they do not possess. This same clause provides that when statistics or scientific information that substantiate a claim do exist, businesses must be careful not to misuse research data, statistics or quotations in a way that implies that they have greater validity than they really do. Businesses and advertisers must also be cognisant of the overarching duty, which has been codified in clause 4.2.1 of Section II, that their advertisements should not be misleading to consumers.

Since the Board provides for a quick and cost-effective remedy for complaints who believe that advertisers have not adhered to the Code, it is imperative that businesses comply with it before launching a new product.

Businesses should not only be mindful of advertising considerations, but also the requirement to comply with the provisions of the Medicines and Related Substances Act (101 of 1965). Section 20(1) of the Act prohibits anyone from making false or misleading advertisements or claiming in an advertisement that the therapeutic efficacy of any medicine or medical device is other than that stated by the South African Health Products Regulatory Authority (SAHPRA). In terms of s30(1), perpetrators may face a fine or imprisonment of up to 10 years.

SAHPRA is empowered to monitor, evaluate, regulate, investigate, inspect and register medicines and medical devices, among other medical-related products, in terms of s2A of the Act. Section 14 provides that certain medical-related products need to be registered with SAHPRA prior to being sold, and failure to do so is an offence. Bearing the provisions of the Code and the Act in mind is more important than ever, due to the numerous businesses presently engaged in the manufacture, distribution and/or sale of medicines, vitamins, face masks, face shields, medical scrubs and other PPE.

Businesses that are venturing outside their areas of expertise must also be cautious of intellectual property laws. In the fourth industrial revolution, innovation has become increasingly imperative for businesses to remain relevant. Now, with the challenges associated with COVID-19, this imperative has become even more acute. With innovation comes the creation of IP. Businesses must ensure that in developing and launching new products, they are not infringing on third party IP rights. They must also ensure that the IP they have developed is appropriately protected by way of registration, if possible, or by way of agreement in order to safeguard their ability to exploit their IP and to avoid future costly disputes.

In summary, given the legal and reputational consequences of non-compliance with laws and regulations, businesses must not lose sight of the need to observe their obligations to comply with advertising standards, IP laws and industry-specific regulations.

VERSFELD is a Partner and HARDY an Associate with WEBBER WENTZEL.

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When did saving lives become a decision on who gets to live?

MARThA SMIT

“I had the worst day of my whole Nursing career today. We were literally discussing who gets to live and who dies – there are not enough ventilators in our hospital for all who need one. My heart is broken. How did we get here?”

Since COVID-19 hit, I have been reading posts like these from my nursing colleagues across the globe; people I had worked with, as well as those I have never met – everyone feeling despondent about a situation that you hope you never encounter as a health-professional. A situation where the life or death decisions become yours – not the family’s – not as a result of a DNR order (Do-not-resuscitate order), and not where a person enters the terminally ill stage despite your best efforts.

Ask any person working in the medical field – it is the one situation we all despise and pray never happens. Because the whole point of becoming a doctor, a nurse or any type of health care worker is to save lives, not to decide who will die. That has never been, and still is not part of the deal.

So we must ask ourselves, as my friend did: How did we get here? Why did this happen and more importantly, how can we fix this? Because at their core that’s what health professionals do – they fix people. They work tirelessly under difficult circumstances and go home knowing that, today, they saved someone’s life. That makes the long hours, the exhaustion of busy night-shifts and the salary that doesn’t pay what it should, worth it. They don’t do it for the money.

In mid-April, CNN reported that the coronavirus could “devastate the countries that lack healthcare equipment and infrastructure”. According to data provided by the IRC, South Sudan reportedly had just four ventilators and 24 ICU beds for a population of 12 million people.

But that was not the worst of it, the list continued. Burkina Faso had 11 ventilators, Sierra Leone 13 and the Central African Republic had three. Places like Venezuela had only 84 ICU beds for a population of 32 million people. The numbers were alarming to say the least, and the experts became more and more concerned as the virus took hold of big economies and established countries, wreaking havoc everywhere it went. The world was scrambling to get itself to a place of readiness before the COVID-19 wave hit. For many countries, their response time was dismal – the death toll confirms it to this day.

The WHO estimated that, more or less, one in every five people who contracted the virus would require some form of hospital care. At the centre of this disaster was the fact that no one appeared to have enough ventilators ready to be used as needed.

This shone a light on a bigger, more difficult problem, a problem not easily fixed – the cost of health care.

Because what we have to understand is that mechanical ventilators, like the ones needed in treating symptoms of COVID-19, are highly complex, sophisticated and extremely technical medical devices which require considerable expertise in research, design and manufacturing.

As a result, they are costly to manufacture and require rigorous testing and proof of safety to be approved by regulatory bodies like the FDA in the US and SAHPRA in South Africa.

This testing and all the associated processes before a ventilator makes it to market, are part of what makes them so expensive.

A mechanical ventilator comprises a computerised box which sits on top of a mobile trolley. The screen is either a touch screen, or controlled with different buttons and dials. The settings chosen via the different screen-pages and treatment options allow for a patient’s breathing to be either sensed and supported by the ventilator or completely controlled by the ventilator which allows adjustments such as how long inhalation for a patient lasts, how much and how often air is received, the concentration of oxygen within the air, how much pressure the patient’s lungs are inflated to and the temperature and humidity of the air.

In other words, these machines perform life-saving interventions each second they are in use.

The only problem with these human lungs is their price. One medical ventilator can cost up to US$50 000, which is about R920 000.

R920 000 for one ventilator...and we need thousands of them. The fact is that there aren’t hundreds of warehouses filled with ventilators on shelves waiting to be picked up and put to use. They are made to order. Add to this the fact that you need highly trained and experienced nurses to control and monitor the functioning of the ventilator and your problem just got a bit bigger – there are not enough of them either.

This is partially how we got here.

The world reached this point, to an extent, because the cost of ensuring the safety and efficacy of highly sophisticated and technical medical products
such as a mechanical ventilator is high. Companies spend millions of dollars in R&D each year to ensure their pipeline products reach a point where testing is possible but, from there, the road is still a long and expensive one.

However, we need to remember the bigger picture and, though a ventilator would take centre stage in the picture the world is currently looking at, it can’t carry the blame alone. In fact, one could argue that it should carry no blame at all. Had governments across the globe had their affairs in order when COVID-19 hit, the outcomes may have been very different. Instead, we witnessed health systems buckle and crumble under this challenge. Many questions around cost and allocation of funds arose and people took a long and hard look at what the actual picture of health care looked like in their respective countries. It wasn’t pretty.

Italy reported 919 COVID-19 deaths per day on 27 March. To 1 June their death toll reached 33,415 with 233,197 confirmed cases. It was an onslaught like no other. The fact that their country had a big elderly population that was most at risk of contracting and dying from the virus, did not help. Yet, despite the incredible strain on their health system, the mammoth effort by all health professionals saw the largest drop in new COVID-19 cases (17,8) on 1 June. Active cases fell to 42,367 cases. The number of deaths reported in a 24 hour period fell to 60 on 31 May – the least since 26 February.

The UK and the US have their own horror story to tell. The US having 1.7 million confirmed cases of COVID-19 and a death toll of 102,640. Fights over ventilators between Senators of different states made headline news and serious questions were asked about President Trump since response times were slow and federal support to different states seemed to be non-existent.

In the UK nothing hit home more than when it was confirmed their Prime Minister, Boris Johnson, had contracted COVID-19 and was being treated in ICU. Their numbers reached 38,489 deaths and 274,766 confirmed cases on 1 June.

This continues to point to a single problem: the cost of health care – the burden on state facilities when they are not actually fully equipped to handle extreme situations like COVID-19, and the fact that budgets for health care are always lacking and never 100% of what they should be.

This cost, which includes facilities, infrastructure, medical devices and machinery like ventilators, sufficient trained and qualified staff and capacity to be able to treat additional patients for any unknown event, now includes 373,548 lives.

The tragedy of COVID-19 has been a great equaliser, and a reminder that we are only as prepared as our preparation in the past allows. You can’t magically, overnight, expect a hospital which has not received funding in ten years to update their emergency department capacity, build extra theatres or ICU beds and have sufficient numbers of trained staff, or become a first class facility with capacity to deal with extreme situations like COVID-19.

What can be done is to be consistent in how the health care system in a respective country is addressed – not all countries have the same capacity to spend on health care, but all countries have the capacity to look at health care in a new and different manner. To see healthcare as something into which you put money and effort today, in order for it to return the favour in three, ten or fifty years when you have an outbreak of COVID-19 or Ebola, or something new and far worse than we have seen.

Because, let’s be honest, with the new age we are in, the surge in technology and the mix of culture and tradition with new developments, some superbug (or many of them) is bound to make its way into the world again at some point. It is for an unknown situation like that to which funding must go now.

Only then will we be truly ready to face it head-on. Only then will the number of fatalities, such as we have seen in this pandemic, be fewer. Only then will we truly understand the actual cost of health care.

Smit is a Partner with Fasken (South Africa).

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**Genetic-link requirement for surrogacy**

**Sonnette Badenhorst**

Legalities pertaining to surrogacy in South Africa are prescribed by the Children’s Act, (38 of 2005) Chapter 19.

The following are the main requirements needed for a successful surrogacy application:

- One or both commissioning parents must be domiciled in South Africa;
- A medical reason must exist for commissioning parents to go the surrogacy route;
- The gametes (male or female reproductive cell that contains half the genetic material of the organism) of at least one of the commissioning parents must be used in the conception;
- A surrogacy contract must be ratified as part of the surrogacy agreement;
- The surrogate mother may not profit from the surrogacy arrangement;
A court order relinquishing parental rights and responsibilities from the surrogate mother must be obtained before embryos are transferred into the surrogate.

Chapter 19, in particular s294, of the Children’s Act reads:

“No surrogate motherhood agreement is valid unless the conception of the child contemplated in the agreement is to be effected by the use of the gametes of both commissioning parents or, if that is not possible due to biological, medical or other valid reasons, the gamete of at least one of the commissioning parents or, where the commissioning parent is a single person, the gamete of that person,” – the genetic origin of the child.

During August 2015, the North Gauteng High Court of Pretoria heard AB and Surrogacy Advisory Group v. The Minister of Social Development (Centre for Child Law as Amicus Curiae) CCT155/15 (http://www.safii.org.za/cases/SACC/2016/43.pdf).

The first applicant was a 56 year old single woman who has been trying for 14 years to conceive a child of her own. Between 2001 and 2011, she underwent 18 unsuccessful rounds of In-Vitro Fertilization (IVF) and two miscarriages. She was advised to consider surrogacy as a next option. As her eggs that were donated for the IVF process were no longer viable and because she had no partner to contribute sperm, she was informed that she could not legally enter into a surrogacy agreement due to the restriction set out in s294 of the Children’s Act.

This case centered around a claim that s294, the requirement of a genetic link in surrogacy was against her constitutional rights, including those related to equality and human dignity.

Judge Anneli Basson agreed and held that this section “is inconsistent with the Constitution for violating rights including equality, privacy, dignity, the right to bodily and psychological integrity, the right to health care of persons who are unable to contribute a gamete or gametes in the surrogacy arrangement.” In her judgment, she said, “A family cannot be defined with reference to the question whether a genetic link between the parent and the child exists. More importantly, our society does not regard a family consisting of an adopted child as less valuable or less equal than a family where children are the natural or genetically linked children of the parents”.

This ruling would have a profound effect on the lives of many people including couples where both the man and woman are infertile, gay couples and elderly couples.

The matter was referred to the Constitutional Court in Bloemfontein for confirmation of constitutional invalidity.

On 29 November 2016, the Constitutional Court ruled on the matter of AB and Surrogacy Advisory Group v. The Minister of Social Development and found that the “genetic-link” requirement for surrogate motherhood agreements is constitutionally valid. It does not unjustifiably limit the rights of persons who cannot contribute their own gametes for surrogate motherhood agreements and upheld that at least one parent must donate gametes for a surrogacy agreement to be legal.

In the majority judgment, Justice Bess Nkabinde found that the provision does not unjustifiably limit the rights of the applicants to equality, reproductive autonomy, reproductive health and privacy. She said that the requirement of donor gametes within the context of surrogacy served a rational purpose of creating a bond between the child and the commissioning parents or parent.

The Constitutional Court found that s294 of the Children’s Act was rationally connected to its purpose, which is to safeguard the genetic origin of a child and to create a bond between the child and the commissioning parents or parent, and acknowledged that children born of surrogate motherhood agreements do have an interest that needs to be protected by laws that will ensure that they can know at least one of the genetic parents.

Should it not be possible for a parent to contribute a gamete, the parent still has other options available, for example, adoption or even applying for Gestational surrogacy (where embryos are usually derived from gametes from one or both of the intended parent(s) but also may be derived from donated oocytes, donated sperm, or both) in overseas countries like the United States where international parents can apply for surrogacy and where it is legal in 46 of the 50 U.S. States.

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Opinion/Covid-19

Being a ‘good enough’ parent

Candice Fletcher

Coronavirus and the Lockdown have cast us into a ‘new reality’ that has in many ways merged our personal and professional lives. Shrouded in the unknown, we have been stretched in new ways and forced to take on novel roles.

In many ways, this whole situation seems to have exacerbated our need for perfection in all spheres, including our parenting, which is underpinned by a need to regain a sense of control. Keeping up with professional commitments and taking on remote-learning endeavours for our children, has likely felt immensely overwhelming, igniting feelings of angst and fuelling predictions of future outcomes for yourselves and your children. It may have even sparked competition between parents as they strive for perfection in times of unpredictability.

To some of us the thought of being ‘good-enough’ sounds less than appealing and in some ways is associated with the concept of being ‘not enough’, especially in your efforts to strive to be the very best parent that you can be. Parenting is a marathon though, and in reality, it is not about who wins the race first, or who gets things done the best, or about being perfect.

Being a ‘good enough’ parent is, as it turns out, the very best you can do for your child. Donald Winnicott, paediatrician and psychoanalyst, coined this phrase and it has become one of the most popular developmental theories of our time. Its merits hold true, especially during this period of uncertainty and insecurity. The bottom line is that children actually benefit from imperfect parenting. Naturally, we strive to meet our children’s emotional needs as best we can, but we also need to give ourselves grace when we “mess up”, as this allows our children to learn about reality and limitations.

Failing our children in small and tolerable ways allows them to function more effectively and build resilience in an imperfect world that will regularly, and inevitably, frustrate and disillusion them. They build frustration tolerance and learn that sometimes they have to try and solve problems on their own. Through these experiences, children come to learn that life can be difficult, and that they will sometimes feel let down, and that they will not always get their way, but despite all of that, they will get through it. They also come to learn that their behaviour impacts others and that it is okay to feel bored, angry, helpless and disappointed.

Good enough parents don’t expect perfection of themselves or their children. They realise that mistakes foster learning and development.

At this unprecedented time, more than ever, we need to own our vulnerability as parents.

You may be worried that your child is not learning enough, you could have difficulty concentrating and multitasking, you may be stressed that your house is a mess. We need to acknowledge the uncertainty and fear that we are all experiencing and put our normal expectations on hold for now. We also need to support each other, as we are all in this together.

Even as things return to some sense of normalcy, we are likely to face new challenges that emerge as our families or those in our community become infected with the virus, or as we navigate the ‘new normal’, which is likely to bring trials of its own.

Allowing ‘good enough’ to be ‘enough’ is the very best way of coping. Perfection is not an option! You need to do the very best you can and that is enough! Take regular time to debrief and reflect with other parents.

Lean on and support each other and talk about your successes and your mess-ups.

You don’t have to function at the exact same level as before, and in fact you probably can’t. Be gentle in the expectations you have of yourself and forgive yourself when slips-ups occur. Remind yourself that this will not last forever.

As parents, we need to fess up that we don’t always have it all figured out, and that sometimes we don’t get it right. Attuning to your children’s needs most of the time is good enough parenting and raises healthy children. Some days you will lose your temper, you will lock into a power struggle, you may give in to a limit that you have set, or you may sometimes not always be as empathic as you would have liked.

That’s okay, you always have an opportunity to fix it.

Two traits that characterise good-enough parents are, their willingness to repair when they have over- or under-reacted, and their ability to tolerate their child’s learning process in the face of inevitable frustration.

If things have gone wrong set aside some one-on-one time later in the day to talk it through with your child. Be honest about where you feel you have gone wrong and apologise, as they learn through modelling. Replay all the good moments of the day too as you go to bed, to put into perspective the many things you also got right that day.

Trusting your intuition is key, as it has been carefully honed by your...
lived experience as parents, your natural instinct in attuning to your children’s needs, and the incredible power of your attachment relationship.

The most vital element that nurtures resilience in children is having a stable and committed relationship with a trusted adult, to whom the child can turn to in times of challenge or need.

Being emotionally available for your child through the highs and lows, allows you to nurture resilience within them. Remember, you are enough. If you have any doubt, dive into the present moment, listen to what your gut is telling you and trust yourself to do the next ‘good enough’ thing.

When something goes wrong, rather than blame yourself or your child, try to see the need behind their behaviour, which is usually them needing you to organise their feelings.

Take your child’s distress seriously and acknowledge their experience, as this will provide containment for them, while they learn about their feelings.

Consider your child’s personality and their developmental stage. Think about what they could handle in pre-COVID-19 times and try to determine where they might need the most support right now – and what would be a good enough way of meeting their needs now. Calm your own anxiety and model that for your children.

Living through a pandemic can present an array of mixed emotions. Your goal should be to tolerate the stress you feel, manage uncertainty by forgiving yourself and those around you, and acknowledge that ‘This Too Shall Pass’.

Acknowledge the emotions that you are feeling and think about whether they are a reminder that you need to adjust your lens.

Relationship ruptures and conflict will inevitably arise in every family. The important thing is how you repair these, which not only provides a valuable opportunity to strengthen your relationships with your children, but also models for them how healthy relationships work. Being a ‘good enough’ parent helps you to set realistic goals and focus on your wellbeing during uncertain times.

Fletcher is a Psychologist at The Ridge School.

References


Academics and pandemics:
A student’s perspective during the lockdown

ROSS BOOTH

For many people (including myself), the 1st of January 2020 felt like a day that couldn’t come sooner. 2019 had been an especially difficult study year, with the leap from first to second year comparable to an Olympic long jump. However, what I didn’t anticipate is that 2020 would spiral into disaster, almost from the get-go.

UKZN students began the year in the usual fashion – one or two introductory lectures followed by an extra two weeks of holiday as our colleagues vented their frustration at the University and NSFAS respectively. However, the SRC and relevant university officials managed to quash the unrest relatively early on and lectures slowly recommenced. In conversation with a classmate shortly thereafter, I recall uttering the phrase “the worst is over” regarding the likelihood that the strikes would continue.

However, good old Murphy was eavesdropping, holding his satchel of bad luck – preparing the unthinkable. And like clockwork, a virus initially described as a strong case of the sniffles managed to globetrot its way from
Wuhan to sunny Durban – taking a few pit stops on the way. With that, the university was once again closed and lectures ground to a halt.

At first, my fellow students and I were a little less than upset to learn that we would be given 21 days to get ahead with work and take a productive break from the daily grind. However, the severity of the situation manifested itself into what we now acknowledge to be one of the darkest moments of the 21st century. And so, here we are, six months after COVID-19 was originally detected. The global economy has shut down, tens of millions of people have filed for unemployment worldwide, and the word of the day is “uncertain”. What I’d give to go back to a time where I could buy milk without a mask fogging up my glasses. But, with a roof over my head, running water and a fully stocked fridge, the issue of misty specs pales in comparison to what the majority of South Africans are experiencing right now. So often, we take for granted the luxuries that millions of people go without, and this pandemic has only highlighted what we have known for decades. That being said, while I am definitely privileged to find myself in a position of safety and security, the virus and subsequent lockdown have certainly impacted my life as a student.

This morning, I got up at half past twelve in the afternoon (a joke my parents found amusing). Sleeping in late is not something I have developed as a consequence of having nothing to do, but rather as a result of how time seems non-existent in the lockdown. Because I have nowhere to go all day, I can work at what would generally be considered ungodly hours and get twice as much work done. I have always found studying at night a lot easier than I ever thought I could. The change over from physical lectures, a classmate said:

“M y experience w ith online learning has helped m e realise the bene fit of w orking at n ig ht. I have always foun d studying at night a lot easier than I ever thought I could.”

It seems that, for a vast number of students, the lockdown has been nothing more than a demoralising ordeal and I lament with them that, had the virus never touched our country, we would currently be nearing the end of our semester syllabus.

This virus also comes at an especially stressful time for a lot of law students in particular. Most third and fourth year LLB students have no doubt already began the process of applying for articles of clerkship and would probably have received concrete feedback by this stage, if the lockdown hadn’t occurred. Students who have already secured articles are in no way exempt from the stress that encumbers those without. Those who have signed their two year contracts are uncertain as to whether their periods as candidate attorneys will start later, or whether the companies they have signed on with will even be in a position to accommodate them. A classmate who has obtained her two year contract commented:

“The lockdown has definitely increased my anxiety. I am concerned about finishing my degree on time and worried about my future.”

It is evident that uncertainty is the biggest factor eating away at students. As it is impossible for anyone to predict what might happen in the near future, we are stuck in a form of limbo from which there seems no escape.

The “new normal” implies an emphasis on growing accustomed to online learning, and interaction has been somewhat changed. The lecture staff of UKZN have done their best to keep us abreast with module content, and the human aspect of understanding through oral communication has not disappeared. To supplement this requirement, Zoom calls have made it possible to communicate directly from the comfort of one’s home. However, lecture hall interactions will never fully be replaced; I for one can attest to learning a lot through the questions asked by other students that I would never otherwise have considered.

As I write this, the university has just sent out an email providing data bundles to students without network access. UKZN has had an immensely difficult year, and, as a student, I am proud to attend a university that cares deeply about the future of its students. With regards to online learning and the change over from physical lectures, a classmate said:

“My experience with online learning has helped me realise the benefits of contact learning. The situation is not ideal however I do believe the University has made reasonable provisions in light of its current financial situation.”

In summation, to all my fellow students reading this, it is important to remember that we are all in the same boat, and it is up to us to plug the hole in the hull. I hope that collectively, we will not allow the situation to make us despondent or discouraged but rather, that we will emerge from this as stronger students.

Booth is a student at the University of KwaZulu-Natal.

Opinion

/COVID-19

June 2020
Retrenching the efforts of SAA’s business rescue practitioners

**KERRI WILSON AND NATALIE HARTEN**

On 9 March, the business rescue practitioners (BRPs) of South African Airways (SAA) issued notices in terms of s189(3) of the Labour Relations Act (LRA) inviting employees to consult on retrenchment processes. With the consultation process period set to expire on 8 May, the National Union of Metalworkers of South Africa (NUMSA) and the SA Cabin Crew Association launched urgent proceedings out of the Labour Court against SAA and its BRPs, in terms of which the applicant unions sought an order declaring the BRPs’ conduct in issuing the notices procedurally unfair. The court upheld the urgent application, and ordered the BRPs to withdraw the notices.

The issues

At the time that the application was brought by the applicant unions, the business rescue practitioners for SAA had not yet published their business rescue plan because they were required to determine the effect of the COVID-19 pandemic on SAA’s business, given that the President had declared a national state of disaster on 15 March, and a nation-wide lockdown preventing and restricting air travel. Consequently, the business rescue practitioners, who had initially planned to publish the business rescue plan in the week of 16 March, applied for, and were granted, an extension until 29 May 2020.

The crisp issue which the court had to deal with was whether s136(1)(b) of the Companies Act permitted the BRPs to initiate retrenchment proceedings prior to the publishing and acceptance of the business rescue plan, or whether the BRPs could only retrench employees as part of a business rescue plan. The Labour Court summarised this in the following question: “can a business rescue practitioner appointed under the Companies Act dismiss employees for reasons related to operational requirements before a business rescue plan that contemplates retrenchments has been prepared and presented?” (own emphasis)

In brief, s136 deals with the effect of business rescue on a company’s employees. Section 136(1)(b) states that any retrenchment of employees as contemplated in a company’s business rescue plan is subject to s189 and s189A of the Labour Relations Act, 1995, and other employment-related legislation.

The facts

On 9 March, the business rescue practitioners for SAA issued a “section 189(3) notice”, being an invitation to consult with SAA’s employees regarding proposed retrenchments. This notice had the effect of triggering a 60-day consultation process.

The crux of the application was that the applicant unions sought to declare the consultation process initiated by the business rescue practitioners procedurally unfair on the basis that they issued the notices before the business rescue plan had been published and presented to SAA’s employees. The unions did not attend further consultation sessions and ultimately withdrew from the consultation process entirely.

On 23 April, the business rescue practitioner communicated the dire state of SAA to all interested and affected parties, including the employees of SAA. Government would no longer provide funding to the business rescue practitioners to develop and implement a business rescue plan which would have contemplated a restructuring of SAA until travel bans are lifted.

Notwithstanding the BRPs’ communications, the applicant unions launched the application to ensure that the notices were withdrawn. The unions also sought to suspend the consultation process initiated by the BRPs until such a time as the BRPs had prepared a business rescue plan contemplating retrenchments.

Furthermore, the unions also sought an order from the Labour Court “directing SAA and the business rescue practitioners not to terminate the services of any SAA employee in terms of section 189 of the Labour Relations Act”.

The decision

Section 189A(13) of the LRA empowers the court to intervene in retrenchment processes and make orders to ensure that any retrenchment ultimately meets the requirements of fair procedure.

In order to determine whether or not the BRPs’ conduct in issuing the notices was procedurally unfair, the Labour Court considered the right
to fair labour practices contained in the Bill of Rights (s23(1) of the Constitution). In the past the Constitutional Court has recognised that this right includes the right to security of employment which is considered a “core value” of the LRA. Therefore, s136(1) of the Companies Act must be read in light of the purpose of the LRA, as well as s23 of the Constitution. This means that when interpreting s136(1) of the Companies Act, the interpretation which ought to be preferred is the one which promotes the preservation of work security.

The Labour Court held that a business rescue practitioner may initiate retrenchment processes only after a business rescue plan has been presented to all interested and affected parties. The business rescue plan which is presented must contemplate retrenchments in order for s136(1)(b) to be complied with, as s136 “locates the right to retrench in the business rescue plan” even if it “might not provide for an absolute moratorium”. Furthermore, the Labour Court held that “section 136(1) should be construed so as to provide continuity of employment in business rescue proceedings, subject to natural attrition and the variation of any conditions of employment by agreement, and to locate the right to terminate employment for reasons related to operational requirements in the terms of a business rescue plan”.

Therefore, the Labour Court held that where a business rescue plan has not been presented or adopted which contemplates retrenchments, any notices which have been issued to commence a consultation process relating to proposed retrenchments are procedurally unfair. The Labour Court ordered the business rescue practitioners to withdraw the notices issued in terms of s189(3) of the LRA, and precluded the business rescue practitioners from offering any voluntary retrenchment packages to employees, and any employees from accepting such packages.

The effect
In terms of s128 of the Companies Act, “business rescue” means “proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for the temporary supervision of the company, and of the management of its affairs, business and property…”. The BRPs’ task is to step into the shoes of the board, in a supervisory role, to manage the company’s affairs, business and property.

Retrenchments are often resorted to when there is a need to lower or reduce the costs of a business’s operations in certain circumstances. In so far as SAA was concerned, the BRPs clearly considered the need to preserve the viability of the business. The first step was to close off various flight routes and reduce numbers of flights. Following the President’s declaration of a national state of disaster on 15 March, prohibitions on travel and restrictions on movement resulted in flight cancellations, grounding of aircrafts and the closure of airports worldwide. Consequently, the BRPs were required to assess the implications of COVID-19 and revisit the proposed restructuring options that they had initially identified.

The only option available to the BRPs was to proceed with a retrenchment process.

The court interpreted s136(1)(b) to place some form of moratorium on retrenchments prior to the publishing of a business rescue plan. This interpretation appears to afford employees an elevated status in business rescue. This undermines the requirement for balancing the rights of all affected persons in business rescue.

As a wave of concern washes over all South African BRPs, we can only hope that the Labour Appeal Court considers the impact that such a decision will have on the future of business rescue.

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The applicant approached the South Gauteng High Court in terms of s131(1) of the Act for an order to place the respondent under supervision and commence business rescue proceedings. For present purposes, the court may, in terms of s131(4)(a) of the Act, make an order as envisaged in s131(1) if it is satisfied that:
(i) the company is financially distressed;
(ii) …;
(iii) … and there is a reasonable prospect of rescuing the company.

Rescuing a company has been held to be either achieving solvency or a better return for creditors or shareholders (Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others 2013 (4) SA 539 (SCA) para 31). The aim of this note is to assess the approach adopted by the judge, Dippenaar J in interpreting the 'reasonable prospect of rescuing the company'.

Brief facts
On the merits, it was common cause that the respondent was, in terms of s128(1)(f) of the Act, financially distressed in the sense that it was not able to pay all its debts when they fell due and payable; nor was it reasonably likely that it could make such payments within the immediately ensuing six months. It was also not disputed that the respondent had relied on the government for substantial cash injection since 2017. The applicant’s case was based on the information contained on the report from the Auditor General regarding the respondent’s affairs.

Court findings
Dippenaar J held that the respondent had failed to provide cogent and comprehensive information to rebut the applicant’s argument about its affairs. The court further held, in favour of the applicant, that the contents of the report from the Auditor General were enough to constitute a reasonable prospect of rescuing the respondent.

The court was not in doubt about issues of inaccuracy on the financial information before it. However, it sought to justify the discrepancies by indicating that a proper assessment could only be made once the respondent’s affairs were properly disclosed (para 57). Although this justification may be true in appropriate circumstances, it is questionable in this instance. In essence, this justification gives rise to the question of whether the application was based on hope, this being an approach which earlier judgments had correctly criticised (Welman v Marcelle Props 193 CC and Another [2012] ZAGP JHC 32 (24 February 2012) para 26.

The court proceeded to find that even if there was insufficient funding for business rescue, the sale of the respondent would yield a better return than immediate liquidation. It is submitted, with respect, that this line of reasoning suggests that the shortage of funding and sale of the respondent was, on the facts, foreseeable. As a result, the granting of a business rescue order appears to have prolonged the inevitable sale of the respondent. This approach was rejected in Oakalene because it offered nothing more than an informal alternative to liquidation.

In Welman, it was established that business rescue is not for terminally ill companies. After acknowledging that there were discrepancies in the financials before the court and that the respondent was in a dire financial position, Dippenaar J concluded that the respondent was not terminally ill. The silence or failure of the respondent to adduce evidence on its financials could not, in the writer’s view, be a legally justified reason for holding that a reasonable prospect of rescue had been established. This view is supported with reference to Oakalene where the court held that a reasonable prospect of rescuing a company requires more than a prima facie case or an arguable possibility. However, Dippenaar J appears to have placed more emphasis on the respondent’s failure to rebut the applicant’s case and little on what the applicant had adduced.

The court’s view was ad idem with the Auditor General’s report indicating that the financial distress of the respondent could be attributed to poor management. However, the judgment is silent on how the new management was going to salvage the sinking ship. Although a case is decided on its own merits, it bears mentioning that the court in New City Group (Pty) Ltd v Pellow, China Construction Bank Corporation Johannesburg Branch v Crystal Lagoon Investments 53 (Pty) Ltd [2014] ZASC 162 (1 October 2014) rejected the mentioning of new management as a reason-
able ground for the purposes of s131(4)(a)(iii) of the Act. The reasoning would have been of assistance to the court.

It is further submitted, with respect, that the judgment appears to have lowered the bar quite severely and to the discomfort of the regime of business rescue. Although in New City Group, Maya JA warned that the bar must not be too high, a low yardstick may also prove a threat for all stakeholders.

While a trend of unsuccessful business rescue applications may stigmatise the system, successful applications may contribute to an even greater form of stigma if the merits clearly indicated lack of reasonable prospect, and where immediate liquidation would have been better for creditors and other stakeholders. An order authorising business rescue of a chronically ill company will diminish the purposes of the system, mainly to expedite the recovery of ailing companies. Our courts need to give cognizance to s7(k) of the Act by adopting a more balanced approach when interpreting s131(4)(a).

In the positive, the high court has since granted provisional liquidation of the respondent – just less than three months after business rescue proceedings commenced. Although the proceedings are still pending, this provisional liquidation may be seen as redeeming the principles laid down in Oakdene.

Makhathini is an Admitted Legal Practitioner (non-practising), and an LLM Candidate (UKZN). He writes in his own capacity.

A perspective on directors’ duties in the time of COVID-19

BOUWER VAN NIEKERK AND PARVEEN MUNGA

The standard of directors’ conduct is key to the success, or failure, of companies. The Companies Act of 2008 sets out the duties, standards of conduct and liabilities of directors. These duties include fiduciary duties, a duty to act in the best interests of the company and a duty of reasonable care. Directors may be held liable for any loss, damages or costs sustained by a company as a consequence of any breach by directors in the execution of these duties.

The COVID-19 pandemic has impacted virtually all aspects of commerce. The manner in which goods and services are supplied has changed, companies face daily challenges in running their businesses and those in charge are confronted with circumstances, unseen in decades, that may affect their decision-making. During these uncertain times, directors’ conduct will be put to the test as never before.

This being said, the fundamental principles of running a company, and the responsibilities antecedent thereto, have not changed – these are still governed by statute and the common law.

The prohibition of reckless trading
Section 22 of the Act provides that:
(1) A company must not carry on its business recklessly, with gross negligence, with intent to defraud any person or for any fraudulent purpose.
(2) If the Companies and Intellectual Property Commission (CIPC) has reasonable grounds to believe that a company is engaging in conduct prohibited by subsection (1), or is unable to pay its debts as they become due and payable in the normal course of business, the CIPC may issue a notice to the company to show cause why the company should be permitted to continue carrying on its business, or to trade, as the case may be.

The CIPC Notice to Customers of 24 March 2020
On 24 March, the CIPC issued a practice note in terms of paragraph 4(1)(b) of the Companies Regulations (GNR 351 of 26 April 2011) advising that, in light of the COVID-19 pandemic and the national state of disaster, it would not be invoking its powers under s22 of the Act in the case of a company which is temporarily insolvent and still carrying on business or trading. CIPC will not be issuing notices in terms of s22(2) or compliance notices in terms of s22(3) where they have reason to believe that the insolvency is due to business conditions caused by the COVID-19 pandemic.

Why the CIPC Notice is problematic
This CIPC Notice is problematic as it may create the misapprehension of a reprieve, allowing companies to trade in insolvent circumstances.

It must be understood that issuing notices in terms of s22(2) and s22(3) of the Act has no bearing on the statutory obligations placed on companies in terms of s22(1). The prohibitions contained in s22(1) are
not discretionary; they are peremptory, and apply in all circumstances, including a worldwide pandemic.

So what manner of carrying on of a business would be prohibited? The most obvious example that comes to mind is trading under insolvent circumstances. The inescapable inference is that a company which continues to do business, knowing that it will unable to pay its creditors, is that they are trying to defraud them by letting them continue to deliver goods or services despite knowing that they will not be paid. To do so would be reckless (or, at the very least, grossly negligent), and would place a company firmly within the ambit of s22(1).

Financial distress and insolvent circumstances
The Act provides recourse for companies faced with financial difficulties and directors must consider whether their companies are, or are likely to become, financially distressed.

In terms of Chapter 6 of the Act, a company is financially distressed if it appears to be:
(i) reasonably unlikely that the company will be able to pay all of its debts as they become due and payable within the immediately ensuing six months (section 128(1)(f)(i)); or
(ii) reasonably likely that the company will become insolvent within the immediately ensuing six months (section 128(1)(f)(ii)).

In such circumstances, the board of a company may resolve that the company should voluntarily begin business rescue proceedings and be placed under supervision.

The aim of business rescue proceedings is to rehabilitate a financially distressed company by restructuring its affairs to maximise the likelihood of the company continuing to exist or, if that is not possible, to result in a better return for the company's creditors or shareholders than would result from immediate liquidation. This is achieved by providing for:
(i) the temporary supervision on the company and the management of its affairs, business and property;
(ii) a temporary moratorium on the rights of claimants against the company or in respect of property in its (lawful) possession, thereby safeguarding it against immediate claims by creditors;
(iii) the development and implementation of a business rescue plan to restructure the affairs, business, property, debt, and other liabilities and equity of the company. (Section 128(b) of the Act)

If there appears to be no reasonable prospect of rescuing the company, the directors may resolve to wind-up the company or apply to court to have the company wound-up. This entails the orderly administration of the dissolution of the company by a liquidator, including selling off company assets to settle creditors.
Directors’ duties and liabilities
While neither business rescue nor winding-up are ideal prospects for any company, it is the duty of directors to consider these options, if a company is in financial distress. In making these decisions, the board has a duty to account to affected persons (shareholders, creditors, employees/registered trade unions representing employees). In terms of s129(7) of the Act, if the board of a company has reasonable grounds to believe that the company is financially distressed, but does not begin business rescue proceedings, a written notice must be delivered to each affected person setting out the nature of financial distress and the reasons for not placing the company in business rescue. Failure to do so may be seen as a breach of the duty to act with reasonable care and in the best interests of the company, and, in terms of s77, may incur liability for any loss, damages or costs sustained by the company. Trading in insolvent circumstances would expose directors to liability for the company’s losses, including being held accountable in terms of s424 of the Companies Act 1973 (still applicable by virtue of item 9 of schedule 5 of the Act). In terms of this, anybody party to permitting the company to continue to operate recklessly or with the intent to defraud its creditors may be held personally responsible for all or any of the debts or other liabilities of the company.

These extraordinary times have given rise to extraordinary circumstances and many companies are likely to face financial distress and insolvency. The COVID-19 pandemic will not, however, absolve directors from a breach of duty. If directors anticipate the effects that the pandemic may have and are aware of the options available, this will enable directors to fulfil their duties with the necessary skill.

Van Niekerk is a Director and Munga a Junior Associate at Smits Sewgoon in Johannesburg.

Success fees to business rescue practitioners: important aspects to consider

MALACHIZODOK MPOLOKENG

Setting the scene
The COVID-19 pandemic has had a devastating global impact. Governments have had to take drastic steps to curb its spread; South Africa is no exception. On 25 March, the South African government took decisive action by declaring a nationwide lockdown in an effort to flatten the COVID-19 curve. This initial five week lockdown was set to end on 30 April and was a necessary step, given the critical and life-threatening nature of the pandemic. However, it is undeniable that the economic cost and impact of the extended lockdown will be far-reaching, and will undoubtedly result in challenging trading conditions in South Africa for the foreseeable future.

Against this adverse backdrop, directors of South African companies and businesses are encouraged to take practical and proactive steps to mitigate losses to facilitate the survival of their businesses during these difficult times. However, with that said, challenges such as financial distress remain a serious consideration, and business rescue proceedings will certainly be one of the options considered in the months and years ahead.

Business rescue and remuneration of practitioners
Business rescue was introduced by Chapter 6 of the Companies Act (71 of 2008) as a means of facilitating the rehabilitation of a financially distressed company in a manner that balances the rights and interests of all relevant stakeholders. This is achieved by reorganising or restructuring the distressed company’s affairs and business in a manner that maximises the likelihood of the company continuing to exist on a solvent basis, as a commercially viable entity. In this regard, business rescue practitioners play a pivotal role and are tasked with managing and overseeing the distressed company, in substitution for the company’s incumbent board of directors. The objective is to turn the company around according to a business rescue plan.

Practitioners are entitled to remuneration in terms of s143 of the Companies Act. Section 143 provides for remuneration in terms of statutory tariffs or by agreement between the practitioner and the company. In all instances, it is important to consider carefully the basis of remuneration.
paid to practitioners and its impact on the impartiality and the independence of the practitioner. Practitioners are officers of the court and are required to act impartially and honestly; a high standard of conduct is expected during business rescue proceedings. Therefore, whether practitioners may receive remuneration from third-parties (including creditors of the distressed company) is an important question, which was recently dealt with by the Supreme Court of Appeal in Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd [2020] ZASCA 17 (25 March 2020) (Caratco).

The findings of the Supreme Court of Appeal in Caratco

In the Caratco case, the Supreme Court of Appeal had to determine whether the payment of special fees (or so-called "success fees") by creditors to practitioners is prohibited, void for illegality, or otherwise contrary to public policy. Caratco (Pty) Ltd (the appellant), a creditor of the financially distressed company, entered into a “success fee” agreement with Independent Advisory (Pty) Ltd (the respondent). The respondent is a company specialising in business rescue, and two of its directors were appointed as joint practitioners by the financially distressed company. The agreement provided that the appellant would pay a sum of money to the respondent once the joint practitioners had implemented the business rescue of the financially distressed company. After complying with their obligations in terms of the “success fee” agreement, the respondent invoiced the appellant for payment of the special fee. The appellant ignored the respondent’s invoice and their subsequent demand for payment. Consequently, the respondent brought the matter before the court a quo. The court a quo held that the appellant had failed to establish any of its defences, and ordered it to pay the success fee to the respondent, in terms of their agreement. After being denied leave to appeal by the court a quo, the appellant applied for leave to appeal to the Supreme Court of Appeal.

In its application for leave to appeal, the appellant relied on three main arguments. Firstly, that the special fee agreement was illegal on the basis that fees agreed upon outside the parameters of s143 of the Companies Act were impliedly prohibited by the Companies Act and should be declared void. Secondly, the appellant alleged that the joint practitioners had breached their responsibilities and duties in terms of s140(3)(b). The appellant specifically relied on s75(3) and s76, and alleged that since the joint practitioners had failed to fulfil their responsibilities and duties, the special fee agreement ought to be declared void. Lastly, the appellant contended that the success fee agreement was contrary to public policy, on the basis that the practitioners “subverted the democratic vote of the majority of creditors” and breached their duties to act independently and impartially towards the company by entering into the agreement.

In a well-reasoned judgment delivered by Cachalia JA, the Supreme Court of Appeal found that the special fee agreement was not invalid, illegal, or otherwise contrary to public policy, and dismissed the appellant’s application for leave to appeal. Its judgment was based on the following findings:

Firstly, the court held that s143 of the Companies Act only applies to the remuneration of practitioners by the company under business rescue and does not deal with fee arrangements concluded between practitioners and third parties. Furthermore, it found that there is nothing in s143 which suggests that an agreement not falling within its ambit is void. In addition, the Companies Act does not penalise the conclusion of such agreements, nor does it contain language entitling a court to draw an inference that the lawmaker intended to invalidate such agreements. Therefore, the Supreme Court of Appeal found that there was no substance to the appellant’s “illegality” complaints.

Secondly, the Supreme Court of Appeal held that the appellant’s reliance on s75(3) and s76 of the Companies Act were unmeritorious in that the appellant failed to plead facts to bring the conclusion of the fee agreement within the ambit of these sections. For instance, the appellant had failed to show that the distressed company had an interest in the fee agreement, which is a requirement of s75(3). Furthermore, as to s76, the appellant failed to plead the specific subsection on which it relied. Accordingly, the Supreme Court of Appeal rejected the appellant’s second argument regarding the breach of the practitioners’ responsibilities and duties.

Lastly, on the issue of public policy, the Supreme Court of Appeal held that the appellant’s submissions were without merit and were not supported by any evidence. The appellant’s contention that the practitioner had “subverted the democratic vote of the majority of creditors” had no factual basis since the practitioners had intended to include the success fee in the draft business rescue plan, which was to be voted on. The practitioners only agreed to delete the fee agreement from the business rescue plan at the appellant’s request. Furthermore, the facts indicated that the “success fee” agreement was such that it did not cause any prejudice to the body of creditors, as it did not affect the distribution paid to them. The court accordingly concluded that the appellant’s public policy defence was without any merit.

The Caratco judgment – not a blanket authorisation for success fees paid by creditors

The conclusion of the Supreme Court of Appeal in Caratco was that the “success fee” agreement concluded by the parties was neither prohibited, illegal nor contrary to public policy. However, it must be noted that this finding was based on the facts and circumstances of the case, as well as the peculiar approach to litigation adopted by the appellant. Where the courts are confronted with different facts and circumstances, a different conclusion may be reached. In certain circumstances, the acceptance of a “success fee” by a practitioner may constitute a breach of the practitioners’ responsibilities or duties, including the duty to act with the utmost good faith. This can occur where the payment of special fees impacts the practitioners’ ability to act impartially and independently towards the court, the distressed company and the general body of creditors. Accordingly, it is important to note that this judgment should not be viewed as providing a general seal of approval or a blanket authorisation for the payment of success fees in all circumstances. There will be instances where the payment to and the acceptance of fees by practitioners will indeed be declared invalid by the courts, particularly where the
remuneration paid to the practitioner has an impact on the distribution paid to creditors or where the impartiality and independence of the practitioner is affected.

Duties of practitioners remain paramount
Given the wide range of powers conferred upon practitioners during business rescue proceedings, including full managerial control of the company, it is imperative that they conduct themselves with integrity. The payment of fees by third parties to practitioners must not be for an improper purpose and must in no way cause a breach of their duties towards the court, the company, and the general body of creditors. In terms of s140(3)(b) of the Companies Act, practitioners have the same responsibilities, duties and liabilities as directors. Therefore, practitioners have the duty to exercise their powers and perform their functions in good faith and for a proper purpose, in the best interests of the company, with reasonable care and skill.

Failure to adhere to these responsibilities and duties may result in the removal of the practitioner in terms of s139(2) of the Companies Act, on the grounds that the practitioner failed to perform his or her duties or has shown a lack of independence. The practitioner may also be held personally liable in terms of s218(2) of the Companies Act, if anyone suffers any loss or damage as a result of their contravention of the Companies Act. This is undesirable as it will hamper the smooth running and proper conclusion of business rescue proceedings.

Therefore, it goes without saying that when a success fee agreement is concluded, the duties of the practitioner remain paramount and must be kept in mind. ♦

Mpolokeng is a Candidate Attorney with Werksmans. The article was reviewed by Dr. Eric Levenstein, Director and Head of the Insolvency, Business Rescue & Restructuring practice.

Management/leadership

‘Cometh the hour, cometh the man’

DEANNE WOOD

Over the past few months, the aphorism “cometh the hour, cometh the man” has frequently come to mind. Regrettably though, this thought has not echoed in a Winston Churchillian way but rather, owing to the global dearth of impressive leaders coming to the fore during this time of crisis, as a question. This lack of leadership is particularly confusing at a time when leadership has become a commoditised skill – something to be taught through on-line effective leadership articles, 8-step PowerPoint presentations outlining leadership essentials, TED talks, personal coaches, courses at colleges and so forth.

This then begs the question: Is the world truly facing a lack of leadership? Or have we, as the people who are to be led, become unleadable? Were we too well taught in school to think independently and to make up our own minds? Have we become too cynical? Is it the fault of the millennials? Or has the abundant access to information provided to us by the internet made it too difficult to be brainwashed, allowing us to become instant overnight experts in every new issue that we confront? If this is indeed so (a mere glance at any social media platform's commentary page provides ample evidence in support of the theory), how then do we lead the unleadable?

Leadership, at its most basic, is nothing more than the ability to persuade. For many years, lawyers have been earmarked as making great leaders. According to author Deborah L. Rhode (Lawyers as Leaders: Published September 9th 2013 by Oxford University Press, USA), no occupation in America supplies a greater proportion of leaders than the legal profession. This is not particularly surprising given that the art of persuasion is a fundamental skill taught to lawyers during the foundation phase of their career. Other key leadership traits that lawyers generally possess – whether by assimilation or innately – are decisiveness, strategic thinking and clarity of thought.

But the art of persuasion and razor-sharp and robust decision-making ability, while being powerful attributes, are no longer enough. This is particularly true in a world where the so-called “soft-skills” of emotional intelligence, empathy and the ability to connect and communicate are considered fundamental attributes, sometimes even outweighing intellectual capabilities. Lawyers (as a generalisation) tend to adopt a “because I said so” style of leadership. This is to be expected given the nature of their work. They are not accustomed to asking for permission to hold a certain view or to worrying about how their opponents might feel if a specific argument is advanced. They are specifically taught and expected to be unswerving, unapologetic, headstrong, dogmatic, robust and outspoken.

If lawyers wish to remain at the top of the leadership leader board, they will need to learn that today's leadable require new ways of being persuaded. A heavy handed leadership style will no longer suffice. They too have become opinionated and outspoken. They have a voice
and are (mostly) not afraid to use it. They will not automatically be led by a person in authority. They must instead be persuaded to follow and must be encouraged to be a part of the journey.

I learned this lesson the hard way. When, after 16 years of practice as an advocate at the Johannesburg Bar, I was parachuted into a leadership position at a relatively small organisation with fifty employees, I immediately adopted a top-down approach to my running of the business. When employees rallied against the changes that I sought to enforce, I confronted their disquiet by advising them to “suck it up”. I focused my energy on developing persuasive and logical strategic outlines that were successfully adopted by my board and senior management team, but I wholly forgot about the need to persuade the bulk of my staff (primarily because I did not need their permission or approval) that they should walk the journey with me. In the process, I lost the buy-in of my employees and was consistently met with resistance, hostility and passive-aggressive disapproval. While my efforts at motivating my workforce by providing them with erudite arguments justifying my decisions may have been persuasive to submissive, obedient and biddable followers, it failed to find traction with employees who had been taught to question, to expect answers and to think for themselves. By the end of my almost four-year stint in office, and thus perhaps too late to be of any benefit to that role, I discovered a new way of being persuasive. Instead of intimidat- ing those in the room to do what I did, I learned to listen more, to demonstrate empathy and understanding, to communicate effectively and transparently and to assess and anticipate the response of my audience before acting.

As we confront, in the weeks and months to come, the inevitable fall-out from the coronavirus pandemic and the measures implemented to stem the tide of its spread, ample opportunities for leadership positions will present themselves on micro and macro platforms across the country. If ever there was a time in modern history when the hour was nigh for the proverbial man to cometh, it is now. With businesses facing financial ruin, employees losing their jobs and government exceeding the bounds of authority, lawyers may find themselves to be an invaluable commodity in leading the way through the crisis and, potentially even in leading the unleadable.

Naturally, there is not a single uniform leadership style that works for everyone, all of the time. Leaders may need to adjust their style based on the people they are managing, or the context in which they are leading. Some situations call for a more directive style, while others call for a more compassionate, empathetic approach. However, and in the wake of this unprecedented crisis, this is the opportune time for empathy and human connection. The human factor will be more important than ever before, especially due to the fallout. There is an arrogance that lawyers often display that alienates, and which will be poorly received. The answer lies not just in the mechanics of a solution, but also in providing a platform to support the more human needs.

Wood is a Partner with Fasken (South Africa).

The last word on whether a union may ignore its constitution

The facts before the Court were simple and were common cause. NUMSA recruited employees of Lufil Packaging (Isithebe) as members. Its members constituted the majority of employees at the workplace, at a representation level of 70%. Lufil falls within the paper and packaging industry. This industry does not form part of NUMSA’s registered scope. Nonetheless, NUMSA sought stop order deductions under s13 of the Labour Relations Act 1995 (LRA). Lufil refused to make the deductions.

NUMSA referred an organisational rights dispute to the CCMA. Lufil challenged the CCMA’s jurisdiction on the basis that NUMSA did not
have standing to refer the dispute on behalf of its members because its constitution did not permit it to organise and recruit in the paper and packaging industry. The CCMA issued a ruling that NUMSA had standing to seek organisational rights in workplaces that fell outside of its registered scope.

The Constitutional Court was required to determine whether the Union could ignore its own constitution (specifically relating to the eligibility of its members) and demand organisational rights in respect of employees who were ineligible for membership.

The Court held that the LRA sets out the essential contents of a union's constitution (including the union's membership qualification and the procedure for amending a union's constitution), all of which must be dealt with prior to the registration of the union. The Court indicated that s4(1)(b) of the LRA effectively mirrored the Freedom of Association and Protection of the Right to Organise Convention (87 of 1948), which provides that “workers without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.”

The Court found that freedom of association “in this context is not a unilateral, self-standing right to be exercised without considering other rights. There may be many reasons why members who currently fall under NUMSA's scope would not want NUMSA to diversify and add another unrelated industry to its scope. NUMSA's blatant disregard for the provisions in its own constitution may violate the existing members' right to associate and disassociate. A flaw in NUMSA's argument is its reliance on its own right and its members' right to freedom of association, without having regard to the rights of the employer.”

The Court held that “the contractual purpose of a union's constitution and its impact on the right to freedom of association of its current members is founded in its constitution. A voluntary association, such as NUMSA, is bound by its own constitution. It has no powers beyond the four corners of that document. Having elected to define the eligibility for membership in its scope, it manifestly limited its eligibility for membership. When it comes to organisational rights, NUMSA is bound to the categories of membership set out in its scope. NUMSA's definition of its scope is binding upon it.” The Court said it was “difficult to accept that NUMSA can choose to ignore the provisions of its own constitution and claim an infringement of its right to freedom of association and an unfair labour practice.”

NUMSA ought to have amended its constitution in accordance with the procedure set out in its constitution, if it wished to admit Lufil employees as its members.

When faced with similar cases, an employer should not challenge the CCMA's jurisdiction on the basis of the union's standing to refer a dispute on behalf of its members. The correct approach is to challenge the representation of the union. If an employer's business does not fall within a union's scope, as defined in its constitution, the union may not admit the employees as members. As stated by the Court, a union's constitution is not a document that simply regulates its relationship with its members. It is an indication to employers in which industries the union may organise. If a union were to disregard its constitution at will, it would run counter to the values of accountability, transparency and openness espoused in the Constitution.
Arbitrary ≠ discriminatory

LUDWIG FRAHM-ARP AND VENOLAN NAIDO0

In 2013, s6(1) of the Employment Equity Act was amended to include the phrase at the end of the list of the grounds on which an employer may not discriminate against an employee “or any other arbitrary ground”.

So ensued a debate as to whether that phrase created a new basis for unfair discrimination, namely whether it was arbitrary.

The term “arbitrary” has been interpreted in our law to mean capricious or proceeding merely from whim and not based on reason or principle. Put differently, it means acting irrationally or without a proper reason.

This distinction is important within the context of unfair discrimination claims, in relation to remuneration. Where the employee claims he or she performs the same work or work of equal value to another employee and they claim that the reason for the difference in pay is because of the employee’s gender, race or religious belief, there is no complexity in resolving the matter. But there is complexity where the claim is that the discrimination was on an arbitrary ground.

The complexity is whether the employee complaining had merely to assert and prove that the reason for the difference in treatment was without reason (arbitrary), or whether the employee had to assert and prove something more, namely that the different treatment impairs his or her fundamental human dignity in a manner comparable to one of the listed grounds.

It will be appreciated that the distinction is crucial. If it is the former, the basis to claim unfair discrimination on an arbitrary ground is not only significantly broader, but it is also a lower hurdle to overcome. As a result, this may have also created its own category of unfair discrimination.

The Labour Court was divided on which interpretation to prefer, the narrow approach – that of having to prove an impairment of human dignity analogous to a listed ground – or the broader approach. The argument for the broader interpretation is that it was necessary to give effect to the meaning of the phrase.

The debate has now been settled by the Labour Appeal Court in a judgment delivered on 7 May in K Naidoo & Others v Parliament of the Republic Of South Africa, which endorsed the line of authority from the Labour Court which accepted that the narrow approach was correct. In this regard, and in commenting on the argument that a broad approach was necessary to give effect to the meaning of the phrase, the Labour Appeal Court stated the following:

“This is a radical idea. It would make section 6(1) a font of a remedy for grievances with virtually no limits. But the EEA is not intended to be a catch all or a panacea. Indeed, the EEA is the instrument of section 9 of the Constitution and therefore its mission is to give teeth to that Constitutional guarantee within the scope of the terms expressed in that section. Section 9 is not an all-encompassing injunction, rather its purpose is to give recognition to the value of our humanity and provide a remedy for aggression against us on the grounds of our intimate attributes, whether inherent or adopted. In other words, section 9 has a specific and concrete focus, intelligible within the context of the historical experience of South Africa’s legacy of oppression. The writers, Garbers and Le Roux, rightly caution against being seduced by the idea that anti-discrimination law can be weaponised to solve all labour market ills. Other vicissitudes of life find remedies elsewhere, not least of all in the panoply of protections in Labour Legislation.”

The Labour Appeal Court went on to consider how the phrase should be interpreted and pointed out that not only the word “arbitrary” needs to be given meaning, but rather the whole phrase, “or any other arbitrary ground”. The Labour Appeal Court found that the insertion of the word “other” supports the conclusion that the phrase “any other arbitrary ground” was accordingly not meant to be a self-standing ground, but rather one that referred back to the specified grounds, so that a ground of a similar kind would fall within the scope of s6.

Furthermore, in the context of the whole phrase, the word “arbitrary” is not a synonym for the word “capricious”. The injunction in s6(1) is to outlaw, not “arbitrariness”, but rather to outlaw unfair discrimination that is rooted in “another” arbitrary ground. Capriciousness, by definition, is bereft of a rationale, but unfair discrimination on a “ground” must have a rationale, albeit one that is proscribed. The glue that holds the listed grounds together is the grundnorm of Human Dignity.

The Labour Appeal Court then endorsed the view of Garbers and Le Roux (Christoph Garbers and Pieter Le Roux, Employment Discrimination
High stakes, low thresholds

NEIL COETZER AND COURTNEY WINGFIELD

Employers are often cautious when seeking to discipline senior managerial employees who fail to meet the performance standards required of them. There are a number of reasons for this. The nature of a dismissal for poor performance often involves ‘soft’ issues and requires employers to demonstrate a deficiency in proper management, acumen or leadership. Such qualities are not easy to prove. Senior employees also often have the financial resources to engage attorneys to represent them during any disciplinary proceedings and this can lead to delays and disruptions in the process. Fallouts between senior managers are also often extremely disruptive to a business and can sometimes lead to factionalism within a senior management team.

In view of all these problems, it has become commonplace for employers to conclude mutual separation agreements to facilitate the departure of the recalcitrant manager, in full and final settlement, and get on with their business. While there may be sound business reasons for this approach, setting such precedents may suggest to other employees that poor performance is rewarded in the workplace, and make dealing with poor performing managers more difficult in the future.

Navigating these problems need not necessarily be overly burdensome or costly for the employer. Item 9 of the Code of Good Practice: Dismissal sets out the requirements that should be met before an employee may be dismissed for poor work performance. It provides that when determining whether a dismissal for poor work performance is fair, consideration should be had to whether the employee failed to meet a performance standard, whether they were aware or could reasonably be expected to be aware of that performance standard, whether they were given a fair opportunity to meet the performance standard and whether dismissal was the appropriate sanction in the circumstances.

Senior managers and the Code of Good Practice

An employer’s decision to dismiss senior managerial employees who fail to cut the mustard should not be subject to the same scrutiny as in other dismissal cases. The reasons for this are obvious and are aptly described in the well-known judgment of the Labour Appeal Court in JDG Trading (Pty) Ltd t/a Price ‘n Pride v Brunsdon (2000) 21 ILJ 501 (LAC) where it found that it is important that the employer’s business should not have to suffer, to the detriment of all concerned, through the ineptitude or inefficiency of a particular employee.

This is one of the fundamental reasons why the ‘normal’ requirements for a dismissal for poor work performance, as set out in the Code of Good Practice, may be relaxed substantially or completely in the case of a senior managerial employee. This was confirmed in Somyo v Ross Poultry Breeders (Pty) Ltd [1997] 7 BLLR 862 (LAC) where the Labour Appeal Court found inter alia that the ‘normal’ requirements do not find application in two circumstances. Firstly, where the manager or senior employee has the knowledge and experience to judge for themselves whether they are meeting the standards and, secondly, where the degree of professional skill is so high and the potential consequences of a departure from the standards is so serious that even one failure to comply with the standards is enough to justify a dismissal.

What is the standard to be met?

In Brodie v Commission for Conciliation, Mediation and Arbitration and others (2013) 34 ILJ 608 (LC) the Labour Court confirmed that the legal principles applicable to dismissals for poor performance depend on the particular
position and level of seniority of the employee. The court reiterated the position set out in Sun Couriers (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and others (2002) 23 ILJ 189 (LC) where it was held that courts should be slow to interfere with performance standards set by the employer. It found that performance standards should only be interfered with if they are grossly unreasonable or unattainable.

When dealing with whether an employer is required to set out performance standards for senior employees, the Labour Court in New Forest Farming CC v Cachalia (2003) 24 ILJ 1995 (LC) and A-B v SA Breweries Ltd (2003) 24 ILJ 1995 (LC) held that in circumstances where a senior managerial employee asks for a job description, this is a clear indication that such an employee is not senior managerial material. The court further found that a senior managerial position, and the salary attached thereto, presuppose a function beyond that of the ordinary foot soldier, and more in keeping with that of a field commander. It is clear therefore that senior managerial employees should be reasonably aware of the required standards of their performance without further counselling by the employer in this regard, and should be given a reasonable time to meet these standards.

What is a ‘reasonable time’?
The Labour Court in Boss Logistics v Phopi (2010) 31 ILJ 1644 (LC) set out the relevant factors to be considered when determining whether the employee has been afforded a reasonable time to comply with the standards required. The Labour Court found that relevant factors are the complexity of the job, the volume and nature of the work, the nature of the employer’s business, and the qualifications and experience of the employee. Therefore, in these circumstances, no set period can be established but rather fairness should guide the employer.

In line with the fundamental theme of the Code of Good Practice, the opportunity to be heard has significant importance when considering dismissing a senior employee for poor work performance. The Labour Appeal Court in JDG Trading found that it would be unfair for the employer to apply the ‘normal’ guidelines regarding counselling to senior managerial employees. It commented that an experienced executive who needs to be counselled is probably not fit to be an executive. Following on from this, the court found that an employee in these circumstances cannot oversee other employees if they cannot even oversee themselves.

**Soft issues such as acumen, judgement and leadership**
The Labour Appeal Court in JDG Trading recognised that there could be considerable difficulties in proving soft issues such as “leadership, resolve, business acumen, judgment and effective administration are not readily provable in a court. A deficiency in such qualities is not readily provable either”.

Coupled with the acknowledgement from the court that an employer is entitled to choose, with as much freedom as is compatible with the honest exercise of discretion, who it wants near or at the helm of its enterprise, the
Employer's prerogative is given greater emphasis when dealing with the dismissal of senior managerial employees.

**Giving managers the right tools and support**
The courts have made it clear that an employer must provide a senior manager with the resources required in order to perform at the level necessary. In *Palace Engineering (Pty) Ltd v Ngcobo & other* (2014) 35 ILJ 1971 (LAC), the Labour Appeal Court found that the dismissal of a senior managerial employee for poor work performance was unfair in circumstances where the employer had not provided the employee in question with the tools required to satisfactorily perform these functions. This position has been confirmed by the Labour Appeal Court in *Damelin (Pty) Ltd v Solidarity on behalf of Parkinson & others* (2017) 38 ILJ 872 (LAC).

It is clear from the case law that although the requirements for the dismissal of senior managerial employees for poor work performance are not as onerous as those applied to ‘ordinary’ employees, fairness is still the underlying criterion. In these circumstances, employers are not required to extensively counsel the employee in question. The employer should provide the employee with a reasonable opportunity to comply with the standards in line with the criteria established in *Boss Logistics* and ensure that the employee is afforded all of the required resources to ensure that they can comply with the standards.

Should the employee nevertheless fail to comply with the requirements, the employer will be entitled to dismiss the employee in order to prevent or avert any dire and potentially catastrophic consequences that may arise as a result of the employee’s inability, inaction or poor performance. Although the courts may be inclined to defer to the decision of the employer more readily in dismissals of senior managerial employees for poor performance, legal advice should nevertheless be sought to ensure that the principle of fairness is adhered to in the unique circumstances of each matter.

Coetzer is a Partner and Wingfield an Associate with Cowan-Harper-Madikizela.

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**Post COVID-19 labour law considerations**

**Jonathan Goldberg and Grant Wilkinson**

The recent lockdown, which has been extended in several countries around the world, has posed a number of challenges from a legal perspective. This has forced us to consider the impact on the employer-employee relationship. As organisations are forced to close down temporarily, barring certain exceptions for essential services, it is necessary to consider the variety of options available in order to keep organisations afloat.

**Employees who can work from home**
If working from home is practically viable, from a delivery perspective, the employer-employee contractual obligations remain as they are. In other words, if the employee can work from home and renders the work required, the employer is obliged to pay the employee according to the terms and conditions set out in the employment contract.

Where employees are not practically able to render services in a work-from-home arrangement – and are, therefore, unable to fulfil their contractual obligations owing to lockdown – the obligations stemming from the employer-employee relationship are suspended.

As such, there would be no obligation on the employer to pay the employees. In addition, the employees would not be required to take unpaid leave as their contracts of employment would be suspended. Put another way, the ‘no-work-no-pay’ principle comes into effect because of the lockdown provisions.

**Employees who refuse to work from home**
If an employee is capable of working from home but refuses the employer’s instruction to do so, he or she is not entitled to any remuneration as the ‘no-work-no-pay’ principle will be applied. In addition, the employee may also be subject to disciplinary action.

**Changes to conditions of employment**
Many organisations are considering the future of their businesses. Among other things, there have been discussions around the changing conditions of employment. Unless these changes provide for lesser terms than those stipulated in the Basic Conditions of Employment Act (BCEA) or Bargaining Council, most issues are capable of change by agreement.

This principle of a unilateral change was confirmed by the Labour Appeal Court (LAC) in NUMSA vs Aveng Steel & another [2019] 9 BLLR 899 (LAC), which was handed down on 13 June 2019. It was found that
Employment law/COVID-19

June 2020

an employer may change the terms and conditions of employment contracts if the survival of the business depends on it.

The LAC put it as follows:

“[68] Hence, the essential inquiry under section 187(1)(c) of the LRA is whether the reason for the dismissal is the refusal to accept the proposed changes to employment. The test for determining the true reason is that laid down in SA Chemical Workers Union v Afrax Ltd. The court must determine factual causation by asking whether the dismissal would have occurred if the employees had not refused the demand. If the answer is yes then the dismissal is not automatically unfair. If the answer is no, as in this case, that does not immediately render the dismissal automatically unfair; the next issue is one of legal causation, namely whether such refusal was the main, dominant, proximate or most likely cause of the dismissal.”

When employees are faced with a reduction in salary

Employees are perfectly entitled to reject a proposal to reduce their salaries. However, if they decide to do this, they might not be able to claim that the employer dismissed them.

To take this debate further, in the case of Armapak Manufacturing Holdings v CEPFWAWU [2013] 12 BLR 1194 (LAC), the LAC concluded that the employees who had rejected a lower wage offer were not entitled to severance pay.

“25. Although it is difficult to demarcate precisely when the offer can be refused by an employee without the danger of s41(4) of the BCA being invoked against him or her, in my view, once an employee is faced with a wage decrease it cannot be said that he or she should not have the choice of refusing the offer and seeking employment elsewhere notwithstanding the extremely difficult conditions which pertain to employment in general within the South African economy”.

We are going through an event that has not been experienced in our generation. As a result, there are a number of challenges facing us as individuals and companies. Some tough but fair decisions need to be made for the long-term sustainability of business and employment in South Africa.

Goldberg is CEO and Wilkinson an Executive of Global Business Solutions.

Initiation and prescription

Lesetja Morapi

Where a complaint initiation in a competition matter is amended to include additional firms, does the three year limitation apply from the date of first initiation or from the date of the amendment?

In Competition Commission v Pickfords Removals SA (Pty) Ltd (Pickfords) (167/CAC/Jul10), the Competition Appeal Court (CAC) dealt with a number of issues including the effect of an amendment to a complaint initiation on the application of the statute of limitation prescribed by s67(1) of the Act.

The CAC had to determine the effective date of complaint initiation in circumstances where a firm was only expressly identified as a party to a prohibited practice by an amendment to an original complaint initiation, which did not expressly name that firm. In particular, the CAC had to decide whether the three year period prescribed by s67(1) should be calculated from the date of cessation of the prohibited practice to the date:

■ of the Commissioner's first initiation for all parties involved in the cartel, including those that were not expressly named in that first initiation; or
■ that a party is expressly named in a complaint initiation, particularly where that party is brought into the first complaint initiation by a subsequent amendment.

At the time of the Pickfords decision, s67(1) provided that “[a] complaint in respect of a prohibited practice may not be initiated more than three years after the practice ceased”. Section 67(1) was amended on 12 July 2019, after the Pickfords judgment to prescribe that “[a] complaint in respect of a prohibited practice that ceased more than three years before the complaint was initiated may not be referred to the Competition Tribunal”.

Whether this amendment has any significant practical effects remains
to be seen but its most obvious (and indeed intended effect) is to remove a statutory impediment against the initiation and investigation of complaints by the Commission in circumstances where the prohibited practice may have ceased three years prior to the complaint initiation. The Commission will, of course, still not be able to prosecute firms before the Competition Tribunal in respect of that prohibited practice if the conduct ceased more than three years prior to the complaint initiation by the Commission.

Whatever the effect of the amendment in practice, the date of initiation remains important for s67(1) as in either circumstance (pre- and post-amendment), it is this date and the date of cessation of a prohibited practice that are relevant to whether the participants to that prohibited practice can competently be held to account by the Tribunal. A determination on this issue was also important for the Commission's decision on the process to be used against a firm whose involvement in a prohibited practice only becomes apparent during an investigation, pursuant to a valid complaint initiation that did not specifically name that party as a party to the prohibited practice. In this respect, it is accepted since the dictum of the Supreme court of Appeal (SCA) in Woodlands (Woodlands Dairy (Pty) Ltd & Another v Competition Commission 2010 (6) SA 108(SCA) para 55) that the Commissioner may, “... during the course of a properly initiated investigation, obtain information about other transgressions. If it does, it is fully entitled to use the information so obtained for amending the complaint or the initiation of another complaint and fuller investigation.”

In Pickfords, Van der Linde AJ confirmed that the effective date of a complaint initiation against a firm for purposes of s67(1) is the date on which it is expressly named as a participant to the prohibited practice. This is irrespective of whether the firm was expressly named by way of a subsequent amendment, or the initiation of a new complaint in respect of that firm.

The effect of Pickfords is, therefore, to confirm that the Commission’s decision as to whether to amend its complaint initiation or initiate anew is irrelevant, at least insofar as s67(1) is concerned. This decision is in line with SCA and CAC jurisprudence since Woodlands, in which the SCA set the minimum requirements for a competent complaint initiation. It is apposite at this point to record those minimum requirements as they have been developed and endorsed by the Tribunal and the courts since Woodlands:

- A complaint initiation must be based on reasonable suspicion of a prohibited practice. The Commissioner must therefore be in possession of information which could give rise to a reasonable suspicion of the existence of a prohibited practice – either through a third party complaint or by virtue of information that came to the Commission’s knowledge in another way (for example, publication of information by the firms involved in the conduct).

- A complaint can only be initiated into the horizontal or vertical practices prohibited by ss 4 and 5, or the abuse of dominance prohibited by s8 of the Act. A complaint cannot be initiated into conduct that the Commissioner believes is anti-competitive as that does not fall within the specific practices prohibited by ss 4, 5 and 8.

- Complaints can only be initiated into prohibited conduct involving a firm or firms. Accordingly, a complaint initiated into prohibited practices must identify at least some of the firms that are alleged to be involved in the prohibited practice, as prohibited practices cannot exist absent the conduct of firms.

- A complaint initiation must survive the test of legality and intelligibility. In other words, it must have sufficient particularity to enable the target of the complaint initiation to understand the charges against it and to be able to answer them.

Van der Linde AJ’s conclusion is consonant with the CAC’s jurisprudence in other matters that came before it, particularly in respect of the requirements that a complaint must only be initiated against named firms, and contain sufficient particularity to enable those firms to understand the charges levelled against them.

In Loungefoam (Pty) Ltd & Others v Competition Commission & Others, Feltex Holdings (Pty) Ltd v Competition Commission & Others (102/CAC/Jun10) (6 May 2011) (Loungefoam), Wallis J overturned the Tribunal’s finding which allowed the Commission to amend its complaint referral to include Feltex Holdings Limited to a price fixing conspiracy. The CAC held that, following Woodlands, because the complaint initiation did not refer to Feltex as a party to any price fixing conspiracy, a price fixing complaint was not initiated against Feltex. The Commission was, therefore, not allowed to require Feltex to answer a price fixing case for the first time before the Tribunal without having initiated a complaint against Feltex for that conspiracy.

In Power Construction (West Cape) & Another v Competition Commission (145/CAC/Sep16) (2 May 2017) (Power Construction), Davis J found that the appellants in that case had been added to a complaint that was first initiated in September 2009. The subsequent amendment took place at the latest in November 2011 when the Commission expressly informed the appellants that it had become aware of their involvement in a bid-rigging conspiracy. The initial complaint was initiated against 19 named respondents in the construction industry and “other firms including joint ventures in the construction industry” but did not expressly name the appellants. Having found that the appellants were added by amendment in November 2011, Davis J then had to determine “…whether the prohibited practice ceased three years prior to November 2011, at the latest…” (own emphasis) (para 41 in Power Construction) for purposes of s67(1). On the evidence before him, Davis J found that the prohibited practice had not ceased within three years before November 2011. Therefore, the statute of limitation did not apply to the appellants’ conduct.

It appears, therefore, that even before Pickfords, the CAC was already minded to reach the conclusion that a complaint against a firm is not initiated until such time as it is expressly named in the complaint initiation, whether by amendment or initiation de novo.

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More bark and bite: Competition Law as an additional means of post-pandemic support

SUSAN MEYER, PREANKA GOUNDEN AND CHARISSA BARDEN

The Competition Act (89 of 1998) and its noble purpose of, among other things, supporting historically disadvantaged persons (HDPs) and small, medium and micro enterprises (SMMEs), has been in force for just over two decades. Certain 2019 amendments to the Act specifically sought to strengthen efforts to promote economic inclusiveness of SMMEs and HDPs. It is in this regard that competition law may provide additional support, a proverbial bark and bite, to existing government efforts aimed at achieving a more equitable society. This has particular relevance in a post-pandemic context.

COVID-19 has inequitable consequences

Globally, South Africa consistently ranks as one of the most unequal countries. Efficient SMMEs have been identified as a catalyst to advancing socio-economic inclusion and development. However, even at the best of times, the economic role of South African SMMEs is marginalised owing to, among other things, more significant barriers to entry and growth, in comparison with their larger established counterparts.

Then enter COVID-19, placing global economic activity into an induced coma. Some industries, such as aviation, tourism, retail, hospitality and many other ‘non-essential’ services, are affected more severely than others. In the context of South Africa’s deep structural economic imbalances, the unequal distribution of the hardships caused by the crisis will be felt even more keenly. The imperative move to digitisation is one of the examples of experienced inequality, whereby those who were unable to adapt swiftly, were left behind.

Government has adopted several COVID-19 support mechanisms aimed at the likes of HDPs and SMMEs, for example, debt relief, business incentive schemes, and COVID-19 relief funding. Despite government’s commendable efforts, these support initiatives, on their own, may not be adequate.

The need for further support

Dovetailing non-financial support to HDPs and SMMEs to help bridge the gap will be critical. The competition authorities may be an apt avenue in this respect.

(a) Mergers conditions

SMME and HDP support are not novel to the assessment of mergers in South Africa. Prior to the Amendments, the Act provided that, when determining whether a merger could be justified on public interest grounds, the competition authorities were obliged to consider the effect on, among other things, the ability of small businesses or firms controlled or owned by HDPs, to become competitive.

However, a notable expansion introduced by the Amendments was the mandatory consideration of a merger’s effect on HDPs as well as small and medium businesses to effectively enter into, participate in or expand within the relevant market. The Amendments also introduced the promotion of a greater spread of ownership for HDPs and workers as a new factor that must be taken into account. Given the unprecedented economic strife that will likely plague this ‘protected class’ pursuant to the COVID-19 pandemic, we may see the competition authorities relying more heavily on their powers in this regard.

The imposition of public interest merger conditions with a SMME/HDP focus has been on the increase, before and during the COVID-19 crisis, for example:

- In Petre Dusk (Pty) Ltd & Lubeco (Pty) Ltd and Others, the Competition Commission imposed a condition requiring the parties to contribute financially to the upskilling of a HDP shareholder;
- The Commission in the merger of Outotec Oyj & The Minerals Business of Metso Oyj imposed a condition requiring the parties to
provide funding for bursaries and learnerships for HDP development in the mineral processing value chain;

- The Competition Tribunal in Marine S.r.l. and Another & C.S.p.A and Another (LM122Oct19, 16 March 2020) imposed a condition that the merged entity continue to support SMME suppliers. Conditions to continue supporting SMME distributors and suppliers have also previously been applied in cases such as Telefonatiebolaget LM Ericsson & The antenna and filter products business of Kathrein SE; Mondi Plc & Mondi Limited (LM247Jan19, 10 July 2019) and Cheetah Chrome South Africa (Pty) Ltd & Ditokong Chrome Mine (Pty) Ltd (in business rescue);

- The bark and bite of the Amendments was recently showcased by the Tribunal in Simba (Pty) Ltd & Pioneer Food Group Ltd (LM108SEP19, 5 March 2020). It imposed conditions requiring the merged entity to invest R200 million in education and university partnerships, and additional learnships to support HDPs who have no formal education and are unemployed. The Tribunal also grappled with the new public interest consideration of increased spread of ownership amongst HDPs and workers, by requiring that the merging parties implement an extensive Broad-Based Black Economic Empowerment ownership plan.

When considering merger activity post-pandemic, merger conditions of the kind described may operate as a fitting means of additional support for HDPs and SMMEs. These powers must, of course, be used in a rational and fair manner, so as to not inadvertently act as a deterrent to much-needed investment.

(b) Buyer power/price discrimination by dominant firms

The Amendments further provide that a dominant firm may not:
(i) engage in price discrimination which impedes the ability of SMMEs and/or firms controlled or owned by HDPs, to participate effectively in the economy; and
(ii) impose unfair prices or trading conditions in designated sectors on suppliers who are SMMEs and/or firms controlled by HDPs, and refuse to and/or avoid purchasing goods and services from such firms merely to circumvent the aforesaid. The designated sectors include: grocery wholesale, retail, agro-processing, e-commerce and online services.

Contraventions of these provisions attract severe penalties. The practical import of these new provisions is still not clear. In particular, it is unknown what the cogent defences to such conduct would be. We surmise that bona fide efforts by dominant firms, such as the active support of SMME/HDP business relationships and SMME/HDP-centred funding, and other socio-economic development programmes, may well assist in mitigating any allegations of contravening the Act by impeding SMME/HDP economic participation in terms of these provisions.

Any financial relief offered by government for SMMEs/HDPs is a necessary and important support measure. However, in isolation, it is unlikely to be capable of riding the deleterious impact of COVID-19. Competition law, if used carefully, may be leveraged as a further tool in weathering the storm, bearing in mind that reckless over-regulation could have unintended consequences. More specifically, the responsible imposition of merger conditions by competition authorities and the constructive compliance efforts by dominant firms may make significant strides in reducing the socio-economic vulnerability of SMMEs and HDPs.

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A divorce, the settlement agreement, and a parcel of game

J J VAN DER WALT

Who knew that a divorce, the relevant settlement agreement, and a parcel of game could have provided for yet another case where the Supreme Court of Appeal (SCA) had to interpret a contract? In L M and Others v. T M (343/2019) [2020] 2020 ZASCA 43 (21 April 2020), A divorced B and, to finalise the divorce proceedings, they entered into a settlement agreement in terms of which B would pay A R5 500 000 (Settlement Amount) in full and final settlement of the dispute, including any claim of maintenance that A might have had against B. However, the Settlement Amount was, in fact, payable as fol-
June 2020

Van der Walt

for payment of the Settlement Amount.

The SCA was called upon (based on an interpretation of the settlement agreement) to determine the following crisp question: was the coming into existence or continuation of the obligation to pay the Settlement Amount conditional upon compliance with the Payment Method. A argued that B's obligation to pay was not conditional upon compliance with the Payment Method (i.e. (i) purchase of the game by C and (ii) payment by C to A), whereas B argued the converse.

The SCA held that the interpretation of a contract entails giving meaning to the words used in the contract, within the context in which the words were used, which includes the purpose of the contract.

As to the context: A and B were married for 20 years under the accrual system and it was not disputed that A was entitled to be paid under that system. The purpose of the settlement agreement included the final determination of the financial consequences of the dissolution of the marriage. The agreement did not provide for payment of maintenance to A after the divorce and it was not disputed that A was entirely financially dependent on the payment of the Settlement Amount. In this context, the agreement contained a clear recognition of the family law rights of A to a financial award. Therefore, so the SCA held, it is highly improbable that the parties could have intended that A's right to payment would be entirely dependent on whether C would purchase the game or not.

One final nail in the proverbial coffin for B is the fact that the SCA held that, at best for B, the settlement agreement was ambiguous. However, this entitled the SCA to adopt an "equitable construction" of the settlement agreement.

The principle is that where an expression, term, or clause in a contract is capable of two constructions, and if there is nothing in the context, which points specially to one of them, it would be proper to apply the meaning that would avoid a manifestly inequitable result. Similarly, whilst a court is not entitled to superimpose on the clearly expressed intention of the parties its notion of fairness, the position is different when a contract is ambiguous. In such a case, the principle that all contracts are governed by good faith is applied and the intention of the parties is determined on the basis that they negotiated with one another in good faith.

If, upon an interpretation of the agreement, it is determined that the obligation to pay was conditional upon compliance with the Payment Method, A "would simply have [had] to walk away with nothing" and this would be, so the SCA held, a "most inequitable result".

This judgment is important for two reasons. First, context (which includes the purposes of a contract) colours the meaning of the express wording of a contract, since a court must, when interpreting a contract, determine and give effect to the intention of the parties. Second, to the extent that the express wording of a contract, used within the specific context, is ambiguous, a court may adopt an “equitable construction” that would avoid a manifestly inequitable result.

The second raises a most interesting consequence, which seems to have translated into an accepted principle in the South African law of contract (common law): Parties, so it seems, are free to agree to, and negotiate, a most inequitable result – provided that it is expressed in clear and unambiguous language.

The facts referred to in the article are a simplified reproduction of the facts in this case. ♦

Dr van der Walt is an Associate, Dispute Resolution Practice, Baker McKenzie (South Africa). The article was overseen by John Bell, a Partner.
Strict compliance with the cancellation clause is peremptory

N A P E  M A S I P A

The traditional roles of attorneys have not evolved much over the years, barring the fact that in South Africa, they can appear in the High Court, Supreme Court of Appeal and the Constitutional Court in terms of s25 of the Legal Practice Act. The general duties of attorneys, as imported from duties of Solicitors in Commonwealth jurisdictions, involve considerable paper work.

Nevitably, an attorney is expected to be apt at drafting and overseeing their clients’ day-to-day documents. In a country like South Africa, where there is an impetus to revive the entrepreneurial spirit of its citizens to achieve economic growth, the majority of the documents one is likely to encounter as an attorney are contracts and, accordingly, attorneys ought to know their way around them.

Contracts vary in complexity and content, however, the general clauses of a contract are largely the same and may have the following six general clauses:
- Commencement Clause;
- Confidentiality Clause;
- Breach Clause;
- Dispute Resolution Clause;
- Domicilium Clause;
- Cancellation Clause;

This article focuses on the Cancellation clause. The client places significant reliance on the attorney’s knowledge and skill, should they ever be involved in a contractual dispute. A lack of proper application and skill may expose the client to a damages claim and the attorney to a professional malpractice claim.

When exercising a cancellation clause, a strict analysis of the interplay between the breach clause and the cancellation clause is a prerequisite, and it is necessary to first exhaust the breach clause before getting to the cancellation clause.

Logically speaking, notice in terms of a breach clause serves as a “warning shot”, as described in the matter of Godbold v Tomson 1970 (1) SA 61 (D) (at 65A-D), “The purpose of such a notice is to inform the recipient of what he is required to do in order to avoid the consequences of default…”.

If the contract lays down a procedure for cancellation, that procedure must be followed or a purported cancellation will be ineffective. This was held in the Constitutional Court in the matter of Bekker v Schmidt Bouw.

Contract law

In the Middleton case stipulated the following:
1. Clause 1(ii) provided that the balance of the purchase price was to be paid against registration of transfer of the property and to be secured by the issue of suitable guarantees within 90 days of signature of the contract.
2. Clause 11 obliged the purchaser to notify the agent that such loan had already been granted within 90 days of signature.
3. Clause 12 is the cancellation clause and refers to a written notice “calling upon [the purchaser] to remedy such default”.

The breach notice given as per the facts of the case, which was held to be deficient, informed the purchaser, “I therefore give you 7 days’ notice in which to make payment, failing which this agreement will be cancelled”.

The court dealt with the notice as follows, “It is perfectly clear, however, that nowhere does the agreement between the parties impose any obligation upon the applicant to pay the balance of the purchase price, or to arrange for it to be paid to the respondent, until transfer is passed… The 2nd paragraph of the letter does not require that default to be remedied, but instead requires payment of the purchase price within 7 days”.

The consequences of sending a defective breach notice on behalf of a client, and proceeding to institute legal proceedings on the basis of a defective breach notice, can be disastrous and may expose the client to a counterclaim on a repudiation basis.

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Masipa
Bundling in terms of the Consumer Protection Act

JUSTINE KRIGE

“Bundling” entails offering one product or service on the basis that the consumer will also receive another product or service if they conclude a sale. In some cases, consumers are offered a choice: to purchase the bundle at a discount or buy the individual item separately; in other cases there is no choice, the consumer is simply required to purchase the “bundled” product or service. Bundling can be positive for consumers. It can lead to a greater choice of products or services at discounted prices.

However, it can also be used as a means to lure uninformed consumers into purchasing goods or services that they do not need, may not understand and which are exorbitantly priced. The bundling of goods and services has recently come under scrutiny in terms of the Consumer Protection Act, (68 of 2008) (CPA). In particular, mobile operators and satellite network providers have been challenged for the manner in which they bundle their products and services. But bundling is even more widespread, and is used by numerous retailers across multiple industries. So, what does the CPA say about bundling and when is bundling allowed?

Section 13 of the CPA

Section 13 of the CPA deals with the consumer’s right to select suppliers. For ease of reference, s13 provides as follows:

“13. Consumer’s right to select suppliers.—(1) A supplier must not require, as a condition of offering to supply or supplying any goods or services, or as a condition of entering into an agreement or transaction, that the consumer must—
(a) purchase any other particular goods or services from that supplier;
(b) enter into an additional agreement or transaction with the same supplier or a designated third party; or
(c) agree to purchase any particular goods or services from a designated third party;
unless the supplier—
(i) can show that the convenience to the consumer in having those goods or services bundled outweighs the limitation of the consumer’s right to choice;
(ii) can show that the bundling of those goods or services results in economic benefit for consumers; or
(iii) offers bundled goods or services separately and at individual prices.
(2) Except to the extent that any other law provides otherwise, in any transaction between a franchisee and franchisor, in terms of their franchise agreement, it is a defence to an allegation that the franchisor, as supplier to the franchisee, has contravened this section if any goods or services that the franchisee was required to purchase from or at the direction of the franchisor are reasonably related to the branded products or services that are the subject of the franchise agreement.” (our emphasis)

Thus, in making an offer to a consumer in relation to the supply of goods or services, a supplier is not permitted, as part of that offer, to require the consumer to purchase any other goods or services from that supplier or any third party supplier (i.e. the goods or services cannot be bundled together with other goods) unless certain requirements are satisfied. The purpose of s13 is to ensure that the consumer is placed in a position where he can choose which goods or services to purchase and the supplier(s) from whom to purchase them.

However, a supplier is permitted to bundle products or services if they can demonstrate: (1) convenience to the consumer; (2) an economic benefit to the consumer; or (3) that the goods or services are offered both together as a bundle and also individually. It appears from the plain wording of s13(1) that the three exceptions are “disjunctive” – separated by an “or” – and, thus, that a supplier need only fall within one of the exceptions for the instance of bundling to be permitted. We consider each of the three requirements in turn.

Convenience to the consumer

The first exception allows a departure from the general prohibition on bundling in the event that the supplier can show that the convenience to the consumer in having the goods or services bundled outweighs the limitation on the consumer’s right to choose. But what “convenience” is con-
Zyl suggests that circumstances will also impact the outcome of an analysis of this section: “If, for example, a competitor offers the bundled products only separately and at a higher cost for each, it is arguable that bundling by the supplier at a lower price results in an economic benefit to consumers. The saving of the cost to the consumer in searching for alternative separate products might also give rise to an economic benefit.”

The onus is similarly on the supplier to prove that the bundling is permissible under this exemption. As with the first exception, the risk in respect of this exemption is, still that despite the goods or services being cheaper bundled together, the consumer may still be forced to purchase goods or services that he does not need or want (assuming a cost is associated with the inclusion of the additional goods or services) and, thus, if not also available individually, it would still be more expensive on the whole.

The goods or services are offered both together as a bundle and individually

The third exception allows a departure from the general prohibition on bundling in the event that the supplier offers bundled goods or services separately at and individual prices. Again, the onus is on the supplier to prove that any departure falls within the ambit of this exception. This is arguably the simplest and least controversial exception. Van Zyl notes that: “If bundled goods are sold separately, the consumer’s right to choose is not limited, and any price advantage of bundling automatically equates to an economic benefit to the consumer. In such an instance it should be easy for a consumer to make an informed choice whether the purchase of bundled goods is in his best interests or not.”

In summary, the bundling must be to the consumer’s clear advantage or the goods or services must also be offered individually. In practice, the third exception is straightforward as it is easy to ascertain whether or not a supplier provides goods and services individually and at individual prices.

Franchise agreements

A further exemption is provided in s13(2) of the CPA in respect of franchise agreements. In any transaction between a franchisee and franchisor in terms of their franchise agreement, it is a defence to an allegation that the franchisor, as supplier to the franchisee, has contravened the CPA’s bundling provisions if:

- any goods or services that the franchisee is required to purchase directly from the franchisor or from a third party at the direction of the franchisor, are reasonably related to the branded products; and
- services that are the subject of the franchise agreement.

Van Zyl, however, cautions that the bundling must be reasonably related to the branded products that are the subject of the franchise agreement, from either the franchisor or a third party: “…a pizzeria franchisee might lawfully be required to purchase the branded take-away boxes the franchisee provides. The franchisee may not, however, require the franchisee to purchase unbranded napkins from a designated third party, as the plain napkins are not reasonably related to the branded products or services.”

The onus is again on the franchisor to prove that the bundled products are reasonably related to the brand.

Enforcement and consequences of non-compliance with the CPA

The CPA provides for two types of sanctions for contraventions of s13: penalties and administrative fines. Offences under the CPA may attract liability for a fine, or imprisonment of up to 12 months. Quite significant...
administrative fines are imposed in terms of the CPA – these fines may not exceed the greater of
(i) 10% of the contravener’s annual turnover during the preceding financial year; or
(ii) R 1 million.

Recommendations
If a supplier can demonstrate that bundling offers convenience to consumers, then the first ground (convenience to the consumer) will have been satisfied. That said, given the vagueness and limited judicial interpretation of the exception in s13(1)(i) (convenience to the consumer) at this stage, it may still risk challenge from consumers.

If it is more cost effective for a consumer (i.e. a clear financial saving) to purchase the products in a bundle, than if the consumer were to purchase each of the same items available in the bundle individually, then the second ground (economic benefit to the consumer) will have been satisfied. However, that said, if suppliers simply rely on the exception in s13(1)(ii) (economic benefit to the consumer), without also offering the products individually, this may be subject to challenge from:
1. consumers, given the difficulty in sometimes quantifying the economic benefit; and
2. those consumers being forced to purchase goods or services that they do not need or want (unless no cost is associated with the inclusion of the additional product(s)).

Balancing convenience/economic benefit to a consumer versus the limitation on the right to choose is a matter of interpretation and each case will have to be judged on its own merits.

The easiest route is offering bundled goods or services, while also offering those goods or services individually. If the products are still available to purchase individually, consumers will be able to clearly calculate whether it is more cost effective for them to purchase the products individually or in a bundle, then notwithstanding that the products are bundled as contemplated in s13(1) of the CPA, a supplier will be able to rely on the exceptions in both s13(1)(ii) (economic benefit to the consumer) and (iii) (goods or services are offered both together as a bundle and individually).

Great caution must be used when selling bundled goods or services. 
Section 13 has, unfortunately, not had the benefit of extensive judicial consideration by the National Consumer Tribunal and courts and we will, therefore, have to wait and see how they interpret these exceptions.

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Our Artificial Intelligence in Africa initiative has given 120 young girls a greater understanding of opportunities beyond the classroom. Spirit of Youth and the high school debating challenge all give young people a platform to engage with critical thinking and communication skills.

These programmes and platforms all have one thing in common: they create spaces and opportunities for the youth to bring their creativity, tenacity and ingenuity to life.

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<table>
<thead>
<tr>
<th>Title</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tales from the US of A . . .</td>
<td>April 20</td>
</tr>
<tr>
<td>Privilege doesn't protect law firm's client information from IRS</td>
<td>April 28</td>
</tr>
<tr>
<td>Lawyer suspended for stealing from mentally ill client and charging legal rates for lawn mowing</td>
<td>April 29</td>
</tr>
<tr>
<td>Wilful infringement isn't required to award profits in trademark cases</td>
<td>April 20</td>
</tr>
<tr>
<td>Annotated state code cannot be copyrighted</td>
<td>April 23</td>
</tr>
<tr>
<td>Unanimous jury verdict needed to convict</td>
<td>April 27</td>
</tr>
</tbody>
</table>

Privilege doesn't protect law firm's client information from IRS

According to the New Orleans federal appeals court, a Texas law firm must comply with an Internal Revenue Service summons seeking information about any clients who created overseas accounts and entities on the firm's advice. The IRS was conducting a tax-evasion investigation and sought the identity of clients of a law firm that provided estate and tax planning advice to its clients. This was after a taxpayer audit found that the law firm had created offshore accounts which the taxpayer used to evade income taxes in the United States. The IRS wanted to learn whether other clients similarly used the law firm. Generally, in the US, client identities are not protected by the attorney-client privilege. The law firm argued that its clients' identities were protected under an exception that bars disclosure when it would result in the release of confidential communication. The court found that the exception is a "limited and rarely available sanctuary" that applies when revealing the identity of a client would disclose confidential communications such as the confidential motive for hiring a lawyer. The exception did not apply because disclosure of clients who participated in overseas transactions did not reveal motive or legal advice.

Debra Cassens Weiss April 28

Lawyer suspended for stealing from mentally ill client and charging legal rates for lawn mowing

The Ohio Supreme Court suspended a lawyer indefinitely. He is accused of transferring more than $147,000 from the accounts of a mentally ill client, although he and his law firm were only owed about $19,000. The lawyers charged legal rates to perform personal services for the client. These included helping her with household tasks, mowing her lawn, organizing her finances and doing her shopping. The lawyer charged his $250 hourly rate for some of the services and his law firm's $125 paralegal rate for others. On some days he billed the client twice, at both the lawyer and the paralegal rate for what appeared to be the same services. The lawyer has been convicted of felony theft and sentenced to two years of community control and 100 hours of community service after paying back some of the money.

Debra Cassens Weiss April 29

Wilful infringement isn't required to award profits in trademark cases

The US Supreme Court ruled unanimously that a trademark infringement plaintiff doesn't have to show wilful infringement by the defendant to obtain an award of profits. The wording of the Lanham Act does not support a wilfulness requirement in suits for false or misleading use of trademarks. A maker of magnetic fasteners for purses and wallets alleged that factories in China were making handbags and other products using counterfeits of its fasteners and the US dealer in handbags was doing little to stop it. The court said the defendant's mental state is an important consideration in determining whether an award of profits is appropriate but that does not necessarily mean insisting on wilfulness as an inflexible precondition to recovery. Wilfulness is a highly important consideration but not an absolute pre-condition.

Debra Cassens Weiss April 20

Annotated state code cannot be copyrighted

The US Supreme Court has ruled that annotations in Georgia's official annotated code are not eligible for copyright protection. The State sued an open law advocate for copyright infringement when he posted 186 volumes of Georgia's annotated code to the website Public.Resource.org. Georgia's official annotated code is assembled by the 15 member Georgia code revision commission, the majority of whom are state lawmakers. The annotations appear beneath each statutory provision and include summaries of relevant judicial decisions and state attorneys' general opinions, along with a list of related law review articles and reference material. Editor's notes often provide information about the origins of statutory text. A law publisher had been given the exclusive right to publish the annotated code provided it limited the price and made an unannotated version available free online. The court said that the annotations cannot be copyrighted under the government edicts doctrine, which holds that government officials who speak with the force of law cannot copyright the works that they create in the course of their official duties.

Debra Cassens Weiss April 23

Unanimous jury verdict needed to convict

The US Supreme Court ruled that a unanimous jury verdict is needed to convict a defendant of a serious criminal offence. The right to a unanimous jury is guaranteed by the Sixteenth Amendment as applied to the States by the Fourteenth Amendment. The decision overruled a contrary 1972 decision. The defendant in the new case was convicted of second-degree murder in Louisiana by a ten-two jury vote in 2016. Louisiana subsequently amended the state constitution to bar non-unanimous verdicts but the change did not apply retroactively. Oregon is the only other state to allow non-unanimous verdicts. The judgment mentioned that the unanimity requirement had emerged as a common law right in 14th-century England and was adopted by the 6th Amendment.

Debra Cassens Weiss April 27
### Lawyer can be reinstated if his wife has no access to his accounts
A New Jersey lawyer must provide proof that his wife has no access to his accounts, books or records before he can be reinstated after a three month suspension for deficiencies in his books and his trust account. He relied on his wife to run his books and she made numerous errors, including drafting a trust cheque for a settlement before the funds were received, misplacing a settlement cheque and preparing false account statements to hide errors.  
*Debra Cassens Weiss April 22*

### Judge of small claims court shuts down remote hearing after interruptions by ‘listening audience’
An Atlanta federal judge allowed public access to a remote hearing on gun rights but shut it down after interruptions from the audience, some of them intentional. The hearing was to consider whether issuing licenses to carry guns is an essential right that cannot be shut down. It was frequently interrupted by loud music, running water, background conversations and occasional vocal interjections by at least one person who took issue with the lawyers’ assertions. Some people put the hearing on hold to take phone calls leading to background music. After an hour, and a warning from the judge, the hearing was shut down.  
*Debra Cassens Weiss April 16*

### Public defenders’ budgets slashed as traffic ticket funding plummets
Public defenders in Louisiana face uncertainty over the future of their jobs because the Covid-19 pandemic has affected traffic tickets, which is a big source of their funding. Staff have been laid off and contracts with outside contractors ended. About two-thirds of public defence money in the State comes from fines on traffic tickets which the stay-at-home orders have significantly affected. One public defender said that this has left thousands of clients in jail with no representation.  
*Debra Cassens Weiss April 9*

### How will Californian online bar exams work?
California has proposed that the bar exams will be done online if the lockdown continues. Although the exams will be monitored with controlled test-taking environments, there can be major differences between candidates. Some people will have the privilege of taking the test from a well-lit, comfortable, quiet home office with plenty of space while others will be forced to make do in cramped living quarters with many disturbances, and are therefore more likely to be accused of cheating. The Florida bar exam will take place in July and will require masks, monitors, thermometers and 14 days quarantine for people coming from outside the State.  
*Stephanie Francis Ward May 5*

### Supreme Court won’t block shutdown
The US Supreme Court has refused to block enforcement of a Pennsylvania executive order that shuts down businesses if they are not “life-sustaining”. A group of businesses had contended that the order violated their right not to have their property taken from them without due process of law, their right not to have their property taken without just compensation, their right to judicial review, their right to equal protection, and their right to free speech and assembly. None of these arguments found favour in the country’s highest court. 800 COVID-19 lawsuits have been filed and more than 230 of them deal with prison conditions. Other lawsuits targeted defendants such as hospitals, long-term care facilities, airlines, cruise lines, fitness chains and the entertainment industry.  
*Debra Cassens Weiss May 7*

### Lawyer’s request for almost $665,000 in attorneys’ fees withdrawn
A major law firm has withdrawn a request for nearly $665,000 in attorneys’ fees after a federal judge ruled that the law firm has to disclose its billing rates and detailed hours spent on specific tasks. Rather than disclose the details, the firm abandoned its claim for fees against the justice department allegedly responsible for a four-year delay in providing documents about a federal investigation. The court said that the public interest in disclosure is arguably at its height when the fee demand is made against the public fiscus. It said there was something untoward about the plaintiff asking to conceal their hourly rates and the work done from public view while demanding hundreds of thousands of dollars from the public treasury.  
*Debra Cassens Weiss April 8*

### Moves to drop charge despite guilty plea
The US Department of Justice has filed a motion to dismiss the criminal case against the former National Security Adviser after a review held that it would not serve the interests of justice. The accused pleaded guilty in December 2017 to lying to the FBI about his interactions with the Russian ambassador during the presidential transition. When the prosecution sought a six month sentence, the accused sought to withdraw the plea. The Department of Justice now says the interview was not conducted on a “legitimate investigative basis” and that the statements, even if untrue, were not material.  
*Debra Cassens Weiss May 7*

### All these stories are summaries by Patrick Bracher of Norton Rose Fulbright (South Africa) of articles in the ABA Journal eReport.
From its behaviour, described by a student who eventually went to the high court of Kenya for redress, the law faculty of the Catholic University of Eastern Africa sounds more than a little disorganised. Maybe even worse.

For Lennoxie Lusabe, the problems all began in December 2018, when he sat his second semester university law exams. Anyone who knows the tension of exam writing must sympathise with him and how he felt when he opened his Tort II paper and found that two out of the three questions before him covered issues that were not in the syllabus.

He and some of his classmates took up the matter with the university administration. They were told ‘that such an incident would not recur’. They were also assured ‘that moderation would be done in respect of the examination.’

According to Lusabe, however, that was hot air because they were marked as having failed the exam. They asked to re-sit the exam in April 2019 and were allowed to do so. But, by the time he went to court, he still didn’t know how he had fared in the Administrative Law exam that he wrote in April 2019, as the university had refused to release his results.

He told the court that even though the dispute around the December 2018 exams and the questions that weren’t in the syllabus had been ‘amicably settled’ during a meeting in March 2019, a notice was put up that he and some other students were to meet with the head of the law department ‘before 1 April’. Lusabe said he did not see the notice and, because he was unaware of the meeting, he did not attend.

Later, he discovered that the meeting related to a disciplinary hearing; it was held in his absence on 5 April 2019, and his case was considered though he was not there. On 25 April, after he found out what had happened, he wrote to the dean, explaining his side of the story.

Nearly two months later, he received a letter dated 11 June 2019 from the law school authorities, suspending him for three semesters. He tried to sort things out by asking for an appointment with the vice-chancellor. But his request came to nothing; there was no meeting and the suspension was not reviewed.

Lawyers acting for Lusabe wrote to the law school authorities in September 2019, but he heard nothing further about his suspension and his request that the decision be reviewed.

Following all of this, Lusabe wanted the court to declare that his rights were infringed, that his suspension be cancelled and that he be re-admitted, that his Admin Law results be released, that he be awarded compensation for the violation of his rights and that the university pay the legal costs of the case.

The law faculty argued that Lusabe had avenues open to him to deal with the matter but did not follow the proper procedures. According to the university, Lusabe and four others were involved in ‘examination mal-practices’ that were not allowed in terms of rules in the student handbook. What Lusabe had done wrong was to have ‘walked out of an examination protesting that he could not sit the paper as it had been set outside what had been covered by the internal examiner.’ In the process, Lusabe and the other ‘caused a disturbance’ to the rest of the students who were also writing exams.

Lusabe was then ‘invited’ to appear before a departmental disciplinary committee but had ‘refused’ to comply. He had thus waived his rights and was bound by the decision of the committee. Moreover, he had the chance to appeal within seven days of the decision but had not lodged an appeal. The university also argued that if the court were to grant Lusabe’s application it would be an ‘administrative disaster’ because there were
others students ‘dutifully serving their disciplinary sentences’ after being suspended over exam irregularities.

The judge found that Lusabe had indeed made more than one attempt for a meeting with the vice-chancellor but without success. It was also clear that the university did not tell Lusabe about the appeal process that was available to him.

Though Lusabe had not followed to the letter the rules on internal appeals, there were ‘special circumstances’ to warrant bypassing the normal processes: He wasn’t made aware of the disciplinary proceedings and, by the time he learned of them, the avenue for appeal had been closed. It was a mistake ‘not of his own making.’

The university’s law school ‘was squarely to blame and it cannot be allowed to urge the court to deny justice because of its shortcomings.’

Though some of Lusabe’s documents in the court file were illegible, it was still clear that no reasons had been given for the proposed actions against him. And how had he been notified of the pending proceedings? Through a notice on the law school notice board. Such a process could not guarantee that anyone would see a notice that affected him or her, or that they would see it in time. ‘Given the urgency and severity of the matter, it would have been appropriate to serve [Lusabe] personally with a notice’. And, moreover, ‘an invitation to meet the head of department cannot by the remotest chance be equated to a summons for disciplinary proceedings.’

Though Lusabe might not have received notice of whether he passed Administrative Law, he clearly has a grasp of the principles: the judge remarked that he agreed with Lusabe that the university had not complied ‘with the law on fair administrative action’.

It was clear that the disciplinary meeting and the senate meeting were held on 5 and 7 April 2019. Yet Lusabe was only made aware of the pending disciplinary committee meeting on 22 April 2019. It was the law school’s responsibility to ensure that they followed the constitution and relevant legislation when making the disputed administrative decision.

‘I am convinced that [Lusabe] was not made aware that the disciplinary hearing would take place at the time it did. It follows that he was not accorded an opportunity to prepare his defence’.

SUSPENDING LUSABE WITHOUT HIS HAVING BEEN GIVEN A PROPER HEARING WITH AN OPPORTUNITY TO DEFEND HIMSELF AMOUNTED TO AN INFRINGEMENT OF HIS RIGHT TO EDUCATION WITHOUT ANY LEGITIMATE GROUNDS FOR DOING SO.

Against all this, the court found Lusabe’s rights were indeed violated and that he was entitled to relief – a declaration of his rights, an injunction on his suspension, and compensation.

But what compensation would be appropriate? Lusabe seemed to think that about Kshs 1 million might be a suitable award, though the university was not keen on that – or any other – sum. Normally, a declaration on its own would be enough in cases involving students and educational institutions, said the court. But in this case, Lusabe had lost a year of studies through no fault of his own. He should thus be compensated.

Now comes the best part of the judgment. The court said that instead of ordering the university to pay Lusabe ‘some money’, he would instead direct that the university must be responsible for a year’s fees.

There’s something quite satisfying about the outcome. The university suspended Lusabe for a year – now they must readmit him and pay for a year’s tuition. In addition, his administrative law results must be released – and the university must pay the costs of the case.

By the end of the judgment, I confess I was wondering how effective the university’s law school really was, especially in their teaching of the principles of administrative law. Not to mention how much faith students will have in those who set the school’s exams: that two out of three questions on an exam paper were invalid for being ‘beyond the syllabus’ is quite an achievement.

Rickard is among the foremost of South African legal journalists; she is a regular columnist in without prejudice.
Incongruent realities

Leon Grobler

In their book, *The 22 Immutable Laws of Marketing*, Al Ries and Jack Trout confirmed at least one suspicion that cynics have held for years: marketing is about perception, not quality. In other words, perception ultimately trumps reality. While this might not reflect well on our collective capacity for empirical reasoning, it does explain why we often find odd incongruencies in business and, of course, in advertising.

A recent decision by the Advertising Regulatory Board (ARB) reminded me of this “law”, albeit in an indirect manner. The deal touted a R1,000 saving “on hardware” for all new Fixed LTE customers. To be specific, customers who signed up for this deal on a SIM-Only basis were charged R50 a month less than those who took the deal inclusive of an LTE router. I should emphasise that those who opted for the router-inclusive option paid R2,499 upfront for said router. Both SIM-Only and SIM+Router options offered the same amount of monthly data and data speeds, meaning that ceteris paribus, customers who opted to buy a router from the advertiser, were “penalised” by R50 each month for as long as they utilised this service.

The “hook”? These routers would ordinarily cost customers R3,499 upfront, so customers who took the deal “saved” R1,000 on their hardware (the router).

The astute customer pointed out that the R50 price discrepancy allowed the advertiser to recoup its R1,000 “discount” over 20 months, negating any real benefit to these customers and, arguably, prejudicing them beyond this period. I should add that customers who tried to cancel this service within the first six months were liable for a cancellation fee of R999 – perhaps just an ironic coincidence. To the advertiser, this was a non-issue; its R3,499 routers would now be sold for R2,499. The only justification offered for the additional R50 monthly cost was that sourcing and providing these routers for customers took a chunk out of its operating costs. For this reason, it conceived the SIM-Only option to incentivise an easier product and service supply chain.

Ultimately, the ARB dismissed the complaint, pointing out that customers would technically save R1,000 on upfront costs.

Here’s where Ries & Trout’s maxim cropped up; customers who paid upfront for their perceived saving would ultimately pay back this “saving” and continue to pay more than their SIM-Only counterparts each month. This probably would not matter though, because they “scored” that initial saving of R1,000 on their new router. Post Purchase Cognitive Dissonance doesn’t really exist anyway, right? The perception of a great saving was created and, unless the customer interrogated the R50 discrepancy, he would probably be bragging about his R1,000 saving. Perception is often mightier than reality. A psychological assumption evident in all spheres of life.

Arguably, the ARB decision is not wrong. The saving is attached to the “hardware” and customers are out of pocket R1,000 less than they would ordinarily be – at least on day one. However, I’m not certain that everyone would agree. Conceptually, its similar to those “no deposit” deals where the contract stipulates a fairly inconvenient residual value. I concede, however, that a questionable deal does not automatically render the advertising misleading.

Segue into another ARB example, one which still has the recipient of an adverse ruling licking its wounds, and one which points to Ries and Trout’s argument, albeit from an opposite angle. The offender, a mobile network giant, was called to order for creating a perception that it offered unlimited calls when, in reality, it only did so for on-network calls while capping calls to other networks. The ARB pointed out that advertisers should not create impressions that are incongruent with reality. This is, after all, a fundamental principle of honest advertising, and a concept that permeates virtually all ARB disputes.

The irony here is that it is absolutely not the only South African network giant to do so. It is, however, the only one – to date – which has had a customer interrogate the perception deeper than the surface of its advertising claims. Perhaps these incongruent perceptions have been so strongly established that they now garner dogmatic belief?

The common denominator in both instances was an astute consumer who looked a little deeper than superficial advertising claims and flashy promises. This reminded me of another pearl of wisdom heard long ago … “The consumer is no fool. You’re married to one”.

Perhaps our interconnected world is creating an environment where consumers start interrogating advertising more intensely. Perhaps these complaints were motivated by increasing pressure on the consumer purse. Perhaps these consumers just had a sense of unease at a deal that seemed too good to be true.

Irrespective, the lesson is the same; make sure your advertising claims align with reality. This remains the simplest way to avoid dealing with ARB complaints.

Grobler is an industry consultant, Perspective Consulting. He offers a range of services to the Marketing and Advertising industry.
The case of the interdict for which the Plaintiff did not ask

Owen Salmon

In October 2017, without prejudice published an article in which I expressed some criticism of the finding of patent infringement by the SCA in Strix Limited v Nu-World Industries [2015] ZASCA 126. The issue revolved – as patent infringement invariably does – around interpretation of the patent’s claims, and which is where the forbidden territory is staked out. In the SCA’s order, having found infringement by Nu-World of the patent, Navsa JA ordered an enquiry into the damages Strix suffered as a result of the infringement. This case will be referred to as Strix.1

A few weeks ago, the SCA handed down judgment in a further round of the dispute. This time, in Nu-World Industries (Pty) Ltd v Strix Ltd [2020] ZASCA 28 (Strix.2) the dispute was not about the interpretation of patent claims; it concerned interpretation (for purposes of implementation) of the court’s order. On second thoughts, perhaps it is about the interpretation of patent claims.

Whilst the SCA’s order in Strix.2 is correct (in my respectful view) the judgment of Gorven AJA incorporates – perhaps, even, introduces – a statement of law which can lead to uncertainty, and potentially unnecessary litigation. Important consequences attach to SCA dicta, of course, and the imprimatur which the learned Justice seems to have placed on interdictory orders, I suggest, must be approached with caution.

The background is this: In Strix.1, the Plaintiff claimed infringement of its patent because the Defendant (Nu-World) was selling kettles which had a certain kind of cut-out switch; these are termed ‘thermally sensitive overheat controls’ in the patent – a safety mechanism, in other words. In fact, Nu-World was selling different models of kettles, and it was alleged by Strix that four different cut-out switches infringed the Strix patent. These were identified as Liang Ji LJ-06A, Liang Ji LJ-06, Sunlight SLD-105A IL and Jia Tai KSD688-A thermally sensitive overheat controls. To simplify, I’ll call them LJ-06, LJ-06A, Sunlight IL, and KSD-688A.

The fact that there were four different controls is of some significance. In the result of Navsa JA’s finding, rationalised by the learned judge according to the principles of patent infringement, KSD-688A did not infringe the Strix patent, but the other three did. His order was:

‘The defendant is interdicted from infringing claim 1 of South African Patent 95/4779 (“the patent”) by making, using, disposing, offering to dispose of, or importing liquid heating vessels containing Liang Ji LJ-06A, Liang Ji LJ-06 or Sunlight SLD-105A IL thermally sensitive overheat controls or any other thermally sensitive overheat controls as claimed in claim 1 of the patent.’

It will be noted that the interdict is against not only LJ-06, LJ-06A and Sunlight IL controls, but also any other thermally sensitive overheat controls as claimed in claim 1 of the patent.

Now Strix had never asked for such an interdict. It is open to debate as to whether it is competent for a court to grant relief that is not sought. Moreover, this extended interdict was not put to the parties for them to make submissions, another ground for potential query. Even leaving these issues aside, either way, this is where the problem started. The question I wish to discuss arises as follows.

The determination of patent infringement involves an (often rigorous) inquiry into whether the Defendant’s product embodies all of the essential features (integers) of the invention as claimed in the patent. Sometimes expert evidence is invaluable in guiding the court. In addition, some claims of a patent might be invalid (but others not) and thus not susceptible to infringement. Strix.1 itself demonstrates a good example of why the extended interdict added by Navsa JA is potentially problematic: the mere fact that Strix claimed infringement by four different controls, but it took proceedings before the SCA to finalise its entitlement only to three, indicates that infringement of a patent claim is not always as the patentee claims it is. Practitioners reading this will already be wondering – yes, and how will contempt proceedings work in relation to this extended interdict?

Come round 2, the Plaintiff (Strix) proceeded with the enquiry into damages in respect of the sale by Nu-World of kettles incorporating the LJ-06, LJ-06A, and Sunlight IL overheat controls. It also sought to amend its claim to introduce into the enquiry sales made by Nu-World of kettles incorporating other controls, which had not been subject to the scrutiny of the trial court, or the SCA, in Strix.1 but which it nevertheless claimed infringed the same patent. This became the dispute in Strix.2: if Strix can claim such damages, can it amend its pleadings? Put differently, and rather the crux of the matter before the SCA, can Strix claim such damages?

Nu-World objected to the amendment on the basis that claiming damages on any controls other than the three controls identified in the order...
of the SCA in Strix. I was impermissible; and, because the infringement part of the case was decided, it is not capable, in effect, of being reopened. Strix, on the other hand, relied on the clear wording of the order granted by the SCA in Strix. I: the interdict is against use of the three identified infringing controls ‘or any other thermally sensitive over heat controls as claimed in claim 1 of the patent’.

The SCA, per Gorven AJA, refused the amendment. He stated that the order in Strix. I for an enquiry into damages was, pertinently, in respect of the damages suffered by the Plaintiff:

“as a result of the infringement of the patent by the defendant. What infringement is implicated? It can only refer to that which had been found in the infringement part of the action. The enquiry… is firmly based on, and limited to, the finding of actionable past conduct. The infringement which has given rise to the order… is that of the three infringing controls and those alone.” (Court’s italics).

With this statement there can be little criticism. The court also held that, as the infringement part of the case had been separated from the enquiry into damages, it was the subject of a final judgment which disposed of that portion of the action concerning:

“which of the controls of Nu-World infringed claim 1 of the patent. This has been finally determined: … To allow an enquiry into whether Nu-World has infringed by other or modified controls amounts to dealing with material which belongs under the infringement part of the action on which a final judgement has been given. This is impermissible.”

With this there can also be little criticism.

However, it will be remembered, the court was having to deal with a dispute brought on by the extended interdict in the order granted by Navsa JA. This interdict had not been sought by Strix. It is in this regard that, in my view, Gorven AJA was given to an unfortunate recordal. He states:

‘[14] The interdictory relief which was granted is not limited to the three infringing controls. It includes the additional words. It goes beyond what was sought by Strix in its prayer. But interdictory relief is essentially forward looking and geared to prevent future unlawful conduct. The patent affords Strix, as holder, a clear right to prevent any infringement, past or future, established or not. Infringements not yet committed frequently form the basis of interdictory relief. It is designed to protect against any future infringement, both by the three infringing controls and by any other controls. Paragraph (a) of the order of this court is accordingly widely framed. It is unremarkable that the interdict goes beyond the three infringing controls to include the additional words.’

What did the learned Judge have in mind? First, let’s look at the notion of a right to prevent any infringement, past or future, established or not. Yes, a patentee – like any other right holder – has a clear right to prevent any infringement of its right. But the infringement must be established before the jurisprudential premise for interdictory relief comes into being. Surely, otherwise where is the ‘injury actually committed or reasonably apprehended’ so entrenched in our law as being one of the tripartite requisites for the grant of an interdict?

There is a different difficulty with the statement though. Interdicts are available in terms of s65(3) of the Patents Act, 1978, but only as relief ‘in proceedings for infringement’. Absent proceedings for infringement, therefore, the power of the Commissioner of Patents (who has exclusive jurisdiction in patent infringement matters) to grant an interdict is uncertain; indeed, I suggest it is non-existent. Put differently, the question from the Bench would no doubt be: “Counsel, you’re asking me for an interdict, but you can’t tell me what for?”

Next, we must examine the statement that ‘[I]nfringements not yet committed frequently form the basis of interdictory relief’. Gorven AJA does not cite authority nor does he refer to examples.

Amer’s Precedents of Pleadings frames all of the offered precedents in intellectual property claims in terms of the actual conduct complained of. Actually, there should be no surprise in this, because every (alleged) intellectual property infringement requires an assessment of the right relied upon with the alleged infringement. In patents, as already alluded to, infringement turns on a comparison between the article and the scope of the claims; in copyright, infringement occurs when there is (firstly, and inter alia) a sufficient degree of objective similarity between the copyrighted work and the alleged infringement; in trade marks, the allegedly infringing mark must be compared with the registered trade mark in a value judgment exercise which holistically takes into account semantic, visual, and auditory considerations; and in designs, the comparison is of the allegedly infringing article with the registered design allowing for features commonplace or part of prior art, and then judged by the eye. So, with all intellectual property rights, infringement follows an assessment of the very article complained of. There is no premise for declarations of infringement – and, ergo, interdicts – when the court does not know with what it is dealing.

It is true that in some older trade mark cases, extended orders of a sort have been made. The party concerned is interdicted from infringing the rights in the registered trade mark relied upon (A) by using its trade mark (AB) as well as ‘any mark confusingly similar to (A)’. It must be said that this is not a uniform practice, and it is a practice anyway open to question inter alia for the reasons mentioned. In copyright and design cases, where the interdict is not specific to the product to be interdicted, the judgment makes clear precisely what the subject matter of the dispute was.

But in patent cases, interdicts such as the one ordered by Navsa JA are somewhat of a rarity. A quick survey of patent infringement cases in Burrell’s Intellectual Property Reports going back to the 1970’s reveals that, with two exceptions, interdicts were ordered in terminology specific to the particular article or process. More commonly, the interdict is in terms such as ‘an order is granted in terms of prayers ABC of the Notice of Motion’, which is most likely coextensive with the other variation: ‘the defendant is interdicted from infringing claims 1 (etc) of patent number XYZ’. In this latter scenario, it is because the subject matter of the suit has been found to infringe such claims and so no more needs be detailed. It does not take much to rationalise, indeed as Gorven AJA pointed out in the passage quoted, that the extended interdict granted in Strix. I is a different animal altogether.

In conclusion, whereas Gorven AJA records that it is ‘unremarkable that the interdict goes beyond the three infringing controls to include the additional words’, I respectfully disagree – at least, when it comes to intellectual property matters. Respectfully, I also suggest that practitioners write with a fastidiously discerning pen in framing relief, so that it is specific to the subject matter of their dispute. To rely on this (probably obiter) dictum of the learned Justice as authoritative carte blanche for undefined and/or open-ended interdicts is an invitation to difficulty.

Adviser: Salmon SC is a member of the Maisels Group.
South Africa: COVID-19, Amazon and the changing face of brand enforcement

GAE LY N S COTT

The coronavirus (COVID-19) has changed the world dramatically. It has certainly changed business, with many of us now having to work from home. It has changed the way we shop, with many more of us now shopping online. It has affected many businesses very badly, yet some have profited handsomely. None more so than the king of online shopping, Amazon.

The statistics are astounding: customers spend USD11 000 every second on Amazon products and services; the company has captured some 50% of the US e-commerce market; the company is in the process of hiring tens of thousands of new staff members; Amazon’s share price is at record levels; and the personal fortune of founder Jeff Bezos has grown by some USD24 billion.

As The Guardian newspaper put it recently, “Amazon is having a great pandemic” and it is the “clear winner from the COVID-19 crisis.” The media have even suggested that the pandemic has made Amazon a “public utility”, which doesn’t sound so silly when you consider that US Vice President Mike Pence recently sent a tweet to thank Amazon staff for “working every day to meet the needs of the American people as we face this pandemic together”.

Meanwhile, Daniel Bennett of Corsearch, an online brand screening, searching and investigation company, has written an interesting two-piece article entitled “COVID-19 and Counterfeiting: How the pandemic is reshaping brand protection”. Bennett makes a number of points:

- As a result of the pandemic, a very serious recession (if not a depression) is now clearly on the cards. Sectors that have been particularly hard hit include aviation, hospitality and events.
- Just as the social isolation caused by the SARS epidemic in 2003 led to a huge rise in mobile data usage and online shopping in China, the same thing is happening now in the rest of the world. People who are stuck at home realise that they need to adjust, but that certainly doesn’t stop them from shopping.
- E-commerce is on the rise, as Amazon’s amazing success shows.

Bennett goes on to suggest that, as a result of the resumption of the Chinese supply chain (with China having seemingly moved on somewhat from COVID-19), the surge in online shopping, and an immediate reduction in household income, mean that we are facing a “perfect storm” as regards cybersecurity and brand integrity. He says, “Even at this early stage this has encompassed new listings of counterfeit goods, new forms of counterfeiting, and the development of a series of other assorted scams and malicious activities designed to exploit the situation.”

Bennett makes a few short, medium and long-term predictions:

Short term

There has already been significant counterfeiting activity in product areas such as face masks, sanitisers and coronavirus test kits. As a result, brands that operate in the fields of medical devices and pharmaceuticals have already been impacted.

But brands that traditionally have counterfeiting problems in physical markets (fashion, sportswear, luxury goods, tobacco and the like) will also start to feel the effects as regular enforcement actions such as customs checks and physical policing reduce because of other pressures on enforcement authorities. These brand owners should seek to counter the impacts by focusing on online monitoring and removals.
**Medium term**
There is clearly a move towards online shopping. Shoppers will be looking for bargains. This opens up new opportunities for counterfeiters, and there will be ever-more counterfeit listings. Bennett suggests that brands involved in gaming, film and music, foods and beverages, fashion and sportswear should be very aware. His advice: “Anticipate this new peak by finding an enforcement program that can encompass marketplaces, domains and social media adapted to your specific region and audience.”

**Long term**
Online shopping is likely to become the norm and brand owners will have to address this through new online monitoring and enforcement strategies. This will be the case even in product areas where shoppers are older and online shopping is less prevalent, including pharmaceuticals, medical devices, hobbies, travel and leisure. Brand owners should also take account of the fact that global supply chains might become less China-centric.

Bennett suggests that product areas that are likely to thrive in the longer term include tech and wearables (webcams, computer peripherals, mobile phones), particularly if the trends of telecommuting and online meetings continue. One product area that might struggle in the future is automobiles, especially if working from home becomes the norm.

Clearly Bennett is someone who is in the business of selling brand monitoring and enforcement solutions, but that does not detract from the fact that there is much food for thought in his observations. Brand owners should be thinking far more about the online threats and the monitoring and removal of online trade mark infringements. The obvious forerunner to infringement actions is ensuring that your brands are registered as trade marks, to ensure easier and more effective legal action.

Scott is an Executive and Head of the Intellectual Property practice at ENSafrica.

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**South Africa: COVID-19, technology and patents: the good, the bad and the ugly**

**RO W A N  F O R S T E R**

There is no doubt that the coronavirus (COVID-19) pandemic has had a profound effect on the world and it is perhaps unsurprising that the world of intellectual property has not marched on unaffected. There will be consequences for the way in which we and our colleagues in the IP profession work and deal with “our” business going forward but, in the meantime, our clients have their hands full. In our other article, ‘Amazon and the changing face of brand enforcement’ by Gaelyn Scott, we look at trade mark issues surrounding COVID-19. In this article, we will look at some issues dealing with technology and patents.

**The good**
We’ve seen plenty of good:

**Joint ventures**
By way of example, we’ve seen the Chinese company Fosun Pharma enter into a US$135-million deal with the German company BioNTech (Biopharmaceutical New Technologies) with a view to developing a COVID-19 vaccine. Fosun Pharma will pay some US$85-million in licensing fees to use BioNtech’s mRNA therapeutics, and it will also invest a sum of US$50-million in the company. This is simply one of a number of significant commercial transactions that have been triggered by COVID-19.

**Emergency use authorisation**
Under s564 of the US Federal Food, Drug, and Cosmetic Act, the FDA Commissioner may, in times of an emergency, allow unapproved medical products or unapproved uses of approved medical products to be used in the diagnosis, treatment or prevention of serious or life-threatening diseases or conditions.

An example of an emergency use authorisation (EUA) was the FDA’s approval of Abbot’s molecular test for COVID-19. This relates to the Abbot m2000 Real Time System, a molecular solution featuring a broad menu of tests, including one for infectious diseases. As a result of the EUA, Abbot was able to ship some 150 000 laboratory tests immediately.

**FDA’s notification without an EUA pathway**
A further Abbot test is being made available as part of the FDA’s notification without an EUA pathway.

Whereas a molecular test detects if someone has a virus, an antibody test determines if someone was previously infected. Abbot’s third
COVID-19 test, announced on 25 April, is an antibody test. This laboratory-based blood test seeks to detect the antibody IgG, which identifies if someone has had COVID-19. The hope is that this may provide an understanding of how long antibodies stay in the system, and if they do indeed provide immunity. Such knowledge could help with the development of treatments and vaccines. The company announced that it intended to distribute some four million tests in the USA during April, and up to 20 million a month as from June.

Patent filings
COVID-19 will certainly have an impact on patent filings in 2020 as companies seek to develop vaccines, test equipment and the like. But you may be surprised to hear that the first coronavirus patent was issued in France in 1974 or that by 13 February, some 9,200 coronavirus patents had been issued by 24 different patent offices. This, of course, relates to the fact that COVID-19 is just one of many coronaviruses: SARS is an earlier example.

Some 5% of these coronavirus patents were in the field of nanotechnology, with many of them having been filed in the period 2017-2019. The big-name universities figure strongly here, and amongst the top filers are Harvard College, University of California, Massachusetts Institute of Technology and California Institute of Technology. More about these patents can be read in ‘Patents focusing on Coronaviruses’ – (https://statnano.com/news/67513/An-Overview-of-Nanotechnology-Patents-Focusing-on-Coronaviruses).

The bad
It’s been well reported that COVID-19 has encouraged criminal behaviour. By way of example, the UK National Crime Agency (NCA) announced on 15 April that a pharmacist and a surveyor were arrested over the illegal sale of coronavirus test kits. The pharmacist was arrested under the Fraud Act after making false and misleading claims about the tests’ capabilities. The surveyor, who was found to be in possession of 250 COVID-19 testing kits that he had apparently been planning to sell to construction workers, was also arrested under the Fraud Act for making false and misleading claims. The authorities also took down a website that sought to sell non-existent personal protective equipment (PPE) through phishing emails. A NCA spokesman said this: “COVID-19 is increasingly being used as a hook to commit fraud.”

The ugly
On 18 March, The Register reported that a private equity company, Fortress Investment Group, which in 2018 bought patents relating to a testing machine from a testing company that had collapsed (because its tech didn’t work), was suing a company called Bio-Fire for patent infringement. It was using a medical testing machine that is being used to detect the presence of COVID-19. Fortress Investment Group is, in fact, a subsidiary of a company
called Softbank, and there is apparently a history of buying patents with a view to suing for infringement rather than working the patents. When the news of the case spread, the patentee backtracked, claiming that it hadn’t known that the allegedly infringing machine was being used for COVID-19 tests. It promptly offered royalty-free licences to those involved in COVID-19 testing.

And finally, the makes you proud to be South African

On 14 April, Business Insider reported that a robot called Quintin is doing virtual ward rounds in the intensive care section of Cape Town’s Tygerberg hospital. Quintin, who can be employed remotely from phone or laptop, has a microphone and a zoom function that allows doctor and patient to communicate with absolutely no risk of infection to the doctor.

Forster is an Executive in the Intellectual Property practice of ENSafrica.

National news

Cliffe Dekker Hofmeyr

Appointment: Rachel Kelly has been appointed a director in the Corporate & Commercial practice. Keshen Govindsamy has been appointed as a Senior Associate in the Tax practice.

Webber Wentzel

Appointment: Julian Jones has joined the Restructuring & Insolvency practice. He is a business rescue and insolvency specialist and joins the team from Cliffe Dekker Hofmeyr. He has considerable knowledge of liquidation and insolvency proceedings and their implications for contractual agreements and debt recovery.

Maitland

Maitland appointed Dena Brumpton and Denise Everall to the Board as non-executive directors. Dena brings over 30 years’ experience as a senior financial services professional and most recently served as CEO for Barclays Savings, Investments and Wealth Management. Denise is a Senior Executive, Trustee, Director and chair with over 30 years’ experience in global operations line management, with a focus on fund administration within the financial services industry. Her most recent executive position was that of Global Head of Investment and Fund Services Operations at BNP Paribas.

Bowmans

Bowmans’ leadership in East and South Africa was recognised in The Legal 500’s Europe, Middle East and Africa Report for 2020. Chairman and senior partner, Robert Legh, says: ‘We are very proud of this achievement, which provides clear affirmation that our ‘one firm’ approach is gaining traction within the market’. The firm was recognised in 22 practice areas, 11 of which were in the top tier, 23 of its lawyers were named in the elite list of ‘leading individuals’; six were recognised as ‘next generation partners’ and three were included in the ‘rising stars’ category.

MMC ASAFO

The founding partners Edmund Muriu and Njoroge Nani Mungai and their colleagues celebrate the firm’s 25th anniversary. The firm now has offices in Nairobi, Mombasa, Johannesburg, Abidjan, Casablanca and Paris.
Limitations on the right to freedom of testation

MUNEEER ABDUROAF

Part 2

In the previous article, I discussed two case studies involving discriminatory testamentary provisions. We now move on to the third example; the matter of Curators, Emma Smith Educational Fund v University of KwaZulu-Natal 2010 (6) SA 518 (SCA) (Emma Smith Educational Fund). The judgment was handed down by the Supreme Court of Appeal (SCA). It dealt with discriminatory testamentary provisions in a public charitable trust. Eligibility for the bursary was limited to European girls who were born of British South African or Dutch South African parents. It was further required that they must have been resident in Durban for a period of at least three years immediately preceding the grant.

An order was sought for the deletion of the discriminatory provisions from the trust deed based on s13 of the TPCA that allows the court to vary provisions in a trust instrument. The court held that the constitutional obligation to remove provisions that are in conflict with public policy takes precedence over freedom of testation. The court did not answer the question as to whether the Constitution can be applied directly to the law of succession (Kung NO and Others v De Jager and Others 2017 (4) All SA 57 (WCC)). It must be noted that the court placed considerable emphasis on the fact that the trust was a public charitable one which operated in the public sphere. It held that there can be no question that racially discriminatory testamentary dispositions in the public sphere will not pass constitutional muster. The court stated that testamentary dispositions in the private sphere would require a totally different approach.

The fourth case to look at is In re: Heydenrych Testamentary Trust and Others 2012 (4) SA 103 (WCC). Judgment was handed down by the Western Cape High Court. It dealt with discriminatory testamentary provisions in a number of public charitable trusts. It was argued that the trusts
discriminated on the grounds of race, descent, and gender. An order was sought for the deletion of the discriminatory provisions from the trust deeds, on the basis of s13 of the TPCA. The court held that the provisions constituted unfair discrimination on the grounds of race and gender and were in conflict with the Constitution and the public interest. What makes this case different from the three previous cases is that it dealt with multiple charitable trusts. The issue in Heydenrych Testamentary Trust was quite similar to that of Syfrets Trust Ltd. The relief sought in Heydenrych Testamentary Trust was simply to widen the pool of prospective applicants for the bursaries. It was not to take away benefits from particular beneficiaries. It applied in the public sphere and for an indefinite period of time.

The fifth case is Harper and Others v Crawford NO and Others 2017 (4) All SA 30 (WCC) (Harper). The judgment was handed down by the Western Cape High Court and dealt with discriminatory testamentary provisions in a private trust deed. It was argued that the trust discriminated against certain persons on the ground of gender. An order was sought to amend the will in order to include the excluded persons based on the common law which prohibits bequests that are contrary to public policy, and on direct application of the equality provisions found in the Constitution. The court noted that there were a number of problems with granting the relief sought. It would mean that the court would be the final arbiter in the choice of beneficiaries in testamentary dispositions of a non-public nature, and would lead to situations where the last wishes of a testator or testatrix are second-guessed by a court, by including excluded persons. This is quite different to ‘amending the terms’ of a charitable trust as discussed in the first five cases. Those cases involved ‘determining altered terms for how property has been bequeathed should be administered’ by the trustees. This is quite different from determining whether property should be bequeathed to a particular person. The application in De Jager was dismissed and the will was not amended by the court.

The discussion in Parts 1 and 2 has clearly shown that the right to freedom of testation has been limited in South Africa, in terms of both the common law and constitutional provisions. The investigation shows that discriminatory provisions that apply in the public sphere are more open to scrutiny than those in the private sphere. It recommended that these cases be kept in mind when drafting last wills and testaments.

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Roadaccidentfund

A change of direction for the Road Accident Fund?

BERNA MALAN

On 27 March 2020, the North Gauteng High Court handed down judgment in the case of Mabunda Incorporated v Road Accident Fund (15876/2020) (the RAF Judgment).

The urgent application by the applicants, 42 firms of attorneys, was prompted by changes that the Road Accident Fund (the RAF) is planning to implement to its existing litigation model.

The applicants had previous service level agreements with the RAF which were to terminate on 31 May. As the termination date of the service level agreements approached, the RAF called on the various applicants to return the litigation files in their possession (in certain time-based tranches). The RAF also cancelled a pending tender that would have led to the award of...
new, similar service level agreements.

The court noted that, on average, the value of the claims settled by the RAF on a monthly basis amounted to approximately R4.1bn. The RAF’s fixed operational expenses were approximately R800m a month, and it received approximately R3.5bn a month from the fuel levy. The RAF’s current unpaid claims amounted to R19bn. It was clear that the current model was not working.

In their application, the applicants are asking that the RAF: “…be interdicted and restrained from implementing and/or giving effect to its notices of handover addressed to the applicants and all panel attorneys … dated 18 February 2020 and 20 February 2020 respectively”. This request took the form of interim relief, pending a full review of the RAF’s decision. The applicants alleged that chaos would erupt if they had to hand their litigation files over to the RAF as these matters were pending before court. Should the applicants withdraw as attorneys of record, the RAF would subsequently be unrepresented in all these matters. This, they alleged, would obviously be to the detriment of the public.

The court discussed the requirements that the applicants needed to comply with in order to establish an interim interdict – a clear right, an injury in the form of irreparable harm actually committed or reasonably apprehended, and the absence of an alternative remedy. In addition, the court held, where the interdict is of an interim nature, two further requirements are added: the right need not be clear as long as it is prima facie established, even if open to some doubt, and the balance of convenience must favour the relief claimed.

The court then held that once a tender is awarded, the law of contract will govern the relationship between the parties. Prima facie, the notices of handover issued by the RAF in February therefore merely amounted to it exercising its contractual rights. Furthermore, the RAF did not actively terminate the service level agreements, but the terms of these agreements would simply end on 31 May. This situation could, therefore, be distinguished from cases where the state actively cancelled contracts prior to the end of their term.

The court also found that the review of the decision to cancel a tender prior to its consideration or award was not an administrative act, but an executive one. It is, therefore, not reviewable under the Promotion of Administration of Justice Act of 2000. In the interim, and until the RAF’s decision was reviewed and set aside, the decision would constitute a valid exercise of executive authority. Accordingly, the applicants had no rights that were actively being infringed, nor would they have any rights which would be infringed after 31 May 2020, when the service level agreements would end. The court did not, however, exclude the possibility that the applicants could be successful in a subsequent review application.

In the absence of any prima facie right, the court further found that there could also be no harm or perceived imminent harm against which an interim order should offer protection.

In considering the balance of convenience, the court had regard to each particular applicant firm’s “convenience” to “litigate as before and charge fees as they had always done”. This was juxtaposed with the RAF’s financial outlook. In the court’s view, any reduction of the R10-million costs, whether by way of cost savings due to early settlement, or due to a saving of having done away with the panel attorneys, would far outweigh each individual applicant’s private (as opposed to public) “convenience”.

With reference to the “chaos” that the applicants alleged would ensue were the RAF to proceed with the currently pending matters on an unrepresented basis, the court held that “the real chaos that would occur should the panel attorneys not hand over the files to the RAF”. In the court’s view, it would in fact be the applicants who, by refusing to hand over their files, would be preventing the RAF from settling matters out of court more expeditiously and at better rates.

Shortly after the RAF judgment was handed down, the applicants filed an application for leave to appeal. The applicants allege that the court erred in finding that they did not establish a prima facie right “when they have abundantly done so”. The applicants also, amongst other things, allege that the court should have found that the RAF had no plan for dealing with all the unfinished pending files it demanded that the applicants return. This would, in their opinion, lead to the disruption of the administration of justice, and would affect the resolution of active claims.

The RAF, for its part, launched an urgent application during the first week of April 2020, in which it requested that the court order 160 panel attorneys to hand over their files immediately, failing which the sheriff be ordered to seize them.

Several of the Applicants have subsequently laid a complaint against Davis, J with the Judicial Services Commission, alleging misconduct by the judge. The Applicants are of the view that Davis, J should not have presided over their urgent application against the RAF. It is alleged that Judge Davis, who was part of a contingent of judges that included Judge Mlambo, attended meetings at the RAF’s head office in Centurion almost a year ago, when the future of lawyers who benefited from their relationship with and fees received by the RAF was discussed.

The RAF judgment is, therefore, not the end of the story, as both sides are clearly not going to give up without a fight. It remains to be seen what the outcome will eventually be, and one can only hope that the interests of the actual claimants will not be casualties in this process.

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Living annuities and divorce: Are non-member spouses being deprived of accrued retirement benefits?

Clement Marumoagae

Are non-member spouses being deprived of accrued retirement benefits? The law, as it is currently applied, enables retirement fund members, married in community of property, to deprive their spouses of ‘their’ retirement benefits that accrued before the parties divorce. Before the divorce, retirement fund members can purchase living annuities with accrued retirement benefits, which will ensure that non-member spouses do not have access to these benefits. It is unfortunate that while there appears to be some statutory regulation for pension interests when spouses are divorcing, the same is not true for living annuities purchased through retirement benefits in South Africa. The current legal position enables retirement fund members, through living annuities, to arbitrarily deprive their non-member spouses of the assets which they are entitled to share, in accordance with the matrimonial property system applicable to the marriage.

Pension interest
In terms of s1 of the Divorce Act, a pension interest is that amount which the member spouse would be entitled to receive from his or her retirement fund had he resigned on the date of the divorce. In terms of s7(7) of the Divorce Act (72 of 1979), when a retirement fund member is divorcing, and the patrimonial benefits of his or her marriage are determined, his or her pension interest will be deemed to be part of his or her assets (see Old Mutual Life Assurance Co (SA) Ltd & another v Swemmer 2014 (5) SA 373 (SCA) para 18). If such a member is married in community of property, then the pension interest will also be regarded as part of the parties’ joint estate. Similarly, if the member is married out of community of property with the application of the accrual system, the pension interest will be taken into account when the accrual of his or her estate is calculated (see M v M (4906/2016) [2018] ZAFSHC 161 (30 July 2018) para 86).

The parties’ matrimonial property regime will determine whether the non-member spouse is entitled to receive any portion of the member spouse’s pension interest which accrued as a result of the divorce. In Ndaba v Ndaba 2017 (1) SA 342 (SCA) para 26, the Supreme Court of Appeal held that s7(7) of the Divorce Act ‘vests in the joint estate the pension interest of the member spouse for the purposes of determining the patrimonial benefits, to which the parties are entitled as at the date of their divorce’ (see also Marumoagae ‘The Law Regarding Pension Interest in South Africa has been settled! Or has it?’ With Reference to Ndaba v Ndaba (600/2015) [2016] ZASCA 162 (2017) 20 PER/PELJ 5). Despite being entitled to the member’s pension interest, the non-member spouse will only receive part thereof when a court has made an order directing the retirement fund to make such a payment to him or her in terms of s7(8) of the Divorce Act. In M v M (HCA18/2015) [2016] ZALMPPHC 2 (17 June 2016) para 12, the court held that function of s7(8) ‘… is to enable the Court to give effect to a division of the joint estate by ordering a pension fund to recognise that division and pay or appropriate a portion for the non-member spouse’.

In fact, various pension legislation including the Pension Funds Act (24 of 1956) recognises a pension interest as one of the allowable deductions that can be made from retirement fund members’ benefits. In particular, s37D(4)(a) of the Pension Funds Act provides that for the purposes of s7(8)(a) of the Divorce Act, the portion of the pension interest assigned to the non-member spouse in terms of a decree of divorce is deemed to accrue to the member on the date on which the decree of divorce is granted. The Supreme Court of Appeal in M N v F N (714/2018) [2019] ZASCA 185 (3 December 2019) held that the object of this provision is ‘… to ensure that the non-member spouse receives payment of the amount assigned from the member’s pension interest, in terms of a decree of divorce and within the statutorily defined periods …’.

Living annuities
There are, however, some non-member spouses who are ‘lawfully’ prevented from accessing part of their member spouses pension interests upon divorce. Particularly, when non-member spouses retire from their employment and cease to be members of their retirement funds before the parties’ divorce. On retirement, some retirement fund members may decide to purchase living annuities using their retirement benefits from third party insurance companies. Some retirement funds have in-fund annuity structures that enable their members to purchase in-fund living annuities. It is important to note that Regulation 39 to the Pension Funds Act requires all retirement funds regulated by this Act to establish an
annuity strategy which will enable retirement fund members to select an annuity structure, such as a living annuity. The challenge, unlike with pension interests, is that there is no statutory provision that adequately regulates living annuities in South Africa. Section 1 of the Income Tax Act defines a living annuity as a right that a retirement fund member or his or her nominee has to ‘an annuity purchased from a person or provided by that fund on or after the retirement date of that member or former member’.

South African courts have declared that living annuities purchased through accrued retirement benefits do not form part of the retirement fund members’ estates, and cannot be shared by non-member spouses when the parties divorce (see M v M (14/26868) [2016] ZAGP [HC] 387 (10 August 2016) paras 29-30 and ST v CT 2018 (5) SA 479 (SCA) para 108). The effect of these judgments is that the capital amount that has been invested in a living annuity by married retirement fund members, using retirement benefits which were likely to be shared at divorce had the member spouse not retired and purchased the living annuity, will not be shared on divorce. Before the member purchased the living annuity, the accrued retirement benefits were part of his or her estate. But, after purchasing the living annuity, the capital amount is no longer part of his estate and has been turned into an insurance product that belongs to the insurance company which is providing the living annuity. The reasoning behind this is simply that once the annuitant has concluded an agreement with an insurance company regarding the living annuity, the annuitant cannot claim the capital value. The annuitant’s enforceable right during his or her lifetime is to receive annuity instalments.

This legal position totally disregards the rights of divorcing non-member spouses. Their rights arise by virtue of their marital regime at the time the retirement benefits accrue to member spouses. In my view, such benefits, in relation to those married in community of property, accrue directly into their joint estate. It is necessary to engage in matrimonial principles when dealing with living annuities. Section 15(2)(c) of the Matrimonial Property Act provides that a spouse ‘… shall not without the written consent of the other spouse alienate … any investment by or on behalf of the other spouse in a financial institution, forming part of the joint estate’ (Van den Berg v Van den Berg [2004] JOL 12404 (T) para 10). The SCA in Naikoo v Discovery Limited and Others [2018] JOL 39960 (SCA) para 16, held that ‘Section 15(2)(c) of the Act creates an exception to the general rule by prohibiting a spouse married in community of property from alienating an asset in the joint estate without the written consent of the other spouse’. Once the retirement benefits have accrued to the joint estate, it is submitted that, in terms of this provision, the member spouse cannot unilaterally and independently decide to use these benefits to purchase a living annuity. The non-member spouse is legislatively bound to get written consent from the other spouse. In addition, I believe living annuities that are purchased using retirement benefits without the written consent of non-member spouses should be regarded as unlawful. These transactions have the effect of reducing the value of the joint estate to the prejudice of non-member spouses.

### Arbitrary deprivation of property

Further, in my view, this conduct amounts to arbitrary deprivation of the non-member spouses’ property because they are the co-owners in undivided shares of all the assets in the joint estate (D v D (15402/2010) [2013] ZAGP [HC] 194 (10 May 2013) para 14). Section 1(a) and (b) of the Tax Administration Act (28 of 2011) defines the word ‘asset’ as including ‘property of whatever nature, whether movable or immovable, corporeal or incorporeal and a right or interest of whatever nature to or in the property’. Section 25(1) of the Constitution, 1996 clearly provides that ‘[n]o one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property’. The deprivation of property usually occurs when the interference with property is substantial (see South African Diamond Producers Organisation v Minister of Minerals and Energy N.O. and Others 2017 (6) SA 331 (CC) para 48). It cannot be denied that purchasing living annuities using financial assets that have accrued to the joint estate permanently precludes non-member spouses from using, enjoying and exploiting these benefits (First National Bank of SA Ltd t/a Wesbank v Minister of Finance (FNB) 2002 (4) SA 768 (CC) para 57). Once living annuities have been purchased, they will benefit the annuitant exclusively. At best, the non-member spouse at the date of divorce will have a claim for spousal maintenance. In the FNB case, the Constitutional Court held that ‘… a deprivation of property is “arbitrary” as meant by section 25 when the “law” referred to in section 25(1) does not provide sufficient reason for the particular deprivation in question or is procedurally unfair’ (para 102). In order to assess whether there is sufficient reason to deprive non-member spouses of portions of their entitled member spouses’ retirement benefits, part of which at the date of divorce may have been regarded as pension interest, one must look at, among others, the relationship between the purpose for the deprivation and the person whose property is affected (FNB case para 100(c)). There appears to be no rational connection between the deprivation and the non-member spouses. The infringement of their right to property cannot be justified under s36 of the Constitution.

The Pension Funds Adjudicator in Atkinson and Others v Southern Field Staff Defined Contribution Pension Fund [2000] 4 BPLR 367 (PFA) para 35, determined that arbitrary deprivation is not limited to the state and can be carried out by private bodies, ‘… hence there should be no reason why the guarantee in section 25 cannot be applied to protect the individual from any arbitrary conduct by such bodies, including pension funds performing a public function’. Retirement fund members are enabled not only by the manner in which the law has been stated in M v M and ST v CT but also by the rules of their funds which allow them to purchase living annuities directly from them once their benefits have accrued, without taking into account the rights of non-member spouses or their possible claims.

### Concluding Remarks

In conclusion, the SCA had another opportunity to clarify the law in Montanari v Montanari (1086/2018) [2020] ZASCA 48 (5 May 2020). However, the SCA disappointingly held that ‘… there is no basis to deviate from the judgment in ST v CT’ (para 38). Without adequately engaging with the matrimonial principles and the constitutional right to property, the court, nonetheless, arrived at the correct decision that the annuitant’s right to future annuity payments in a living annuity is an asset in his estate for the purposes of calculating the accrual of his estate. While it is not entirely clear from the judgment whether this order relates to the unique circumstances of this case or whether it applies generally, it can safely be argued that living annuities will be taken into account during divorce.
Although the reasoning of the case is suspect, its outcome should, nonetheless, be welcomed. This case will enable non-member spouses to protect their rights to share in their member spouses accrued retirement benefits, which clearly forms part of the parties’ joint estate, or the accrual of the member’s estate, depending on the applicable marital regime. Maya P correctly endorsed the approach of the high court in De Kock v Jacobson 1999 (4) SA 346 (W) 349C, that there was no logical or legal reason why both the cash component and the accrued right to the pension should not form part of the community of property existing between the parties prior to the divorce’ (paras 37 – 38). With this judgment, it will be difficult for member spouses to continue to hide their retirement benefits in living annuities.

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Financial Law

Trends that continue to influence finance deals in Africa

PIETER VAN WELZEN

There are two main trends that currently influence, and will continue to influence, finance deals in Africa. The first trend is the move towards sustainable financing, and the role South Africa is likely to continue playing to facilitate sustainable investment deals. The second main trend is the need for country-specific knowledge when putting together deals in, for example, Lusophone Africa, which is much less uniform than its shared language of Portuguese would suggest.

In this first of a two article series, I tackle the first main trend – the move towards sustainable financing, and South Africa’s role.

South Africa’s legal profession is perfectly positioned to support sustainable financing

In the words of the World Economic Forum: “Much has been said about the opportunities to reset that COVID-19 affords us. We can reset specific industries (such as aviation, healthcare and energy); the way financial systems work; the way we tackle climate change; and even our chosen brand of capitalism.” Therefore, the focus on projects relating to sustainability will certainly continue post COVID-19.

Currently, many of the initiatives for sustainable investment originate and are executed in Europe and the USA. The market for these products is relatively new but is developing fast. On the financing side this has, for example, resulted in green bonds and blue bonds, as well as loans where the borrower can benefit from a reduced interest rate if certain sustainability targets are met.

Role of the South African legal market

Given its strong financial and legal sector, its history of nature conservation and its experience in the African financial markets, South Africa should logically play an important role as a legal and financial innovation hub in developing these products.

The fact that green bonds have already been issued in South Africa, and the recent creation of the “Sustainability Segment” by the Johannesburg Stock Exchange, further supports this role. For South African lawyers, this market could create interesting opportunities.

Sustainability focused projects, for example in renewable energy, agriculture, and community transport, can benefit from various public and private facilities that support these projects, often financially. The growing number of “impact investors” – often family offices but also pension funds and investment funds – reflects a trend towards investors’ willingness to receive a lower return on their investment if, by making the investment, they can improve people’s lives and the global environment.

An interesting example of impact investment is a fund which the Dutch development bank FMO set up for high net-worth individuals who co-finance loans with FMO for projects in emerging markets. These are other examples:

Blue Bonds

One innovative “green” instrument is the US$15 million blue bond that was issued in October 2018 by the Republic of the Seychelles. The proceeds from the bond are used to support the expansion of protected marine areas, improve governance of priority fisheries, and to develop the Seychelles’ blue economy. The bond is partially guaranteed by the World Bank and supported by a concessional loan from the Global Environment Facility, which will partially cover interest payments for the bond.

The Seychelles blue bond has already been followed by the Nordic Investment Bank through the issuance of a SEK 2 billion (Swedish Krone)
Nordic-Baltic Blue Bond and an issuance by the World Bank of a sustainable development bond to draw attention to the challenge of plastic waste pollution in oceans. The Nature Conservancy, an international and USA-based NGO, recently announced a plan to raise US$1.6 billion of funding for global ocean conservation efforts through blue bonds.

Agriculture
Another interesting initiative is AGR|P, a fund that has been set up to promote sustainable agriculture and protect forests. This fund is a public-private partnership between the Dutch government and investors, such as development finance institutions and institutional investors. The purpose of the fund is to improve the conditions that apply to the financing of sustainable agricultural activities by, for example, providing guarantees and subordinated financing. The fund itself is part of a programme to unlock at least US$1 billion in finance towards deforestation-free sustainable agriculture and land use.

Sustainability-linked financing
As mentioned earlier, financial institutions have also developed loan products where the interest rate is no longer dependent on only credit risk and market rates, but also on the borrower’s sustainability performance, a so-called sustainability improvement loan.

The borrower’s sustainability rating (which includes social and governance elements) is benchmarked by a sustainability rating partner. If the rating goes up, the interest rate goes down, and vice versa.

The difference between a green loan and a sustainability loan is that the former is linked specifically to sustainable projects, green product development or a client’s green project portfolio, whereas the latter can be used for general corporate purposes. The financial industry has, based on similar concepts, developed sustainability bonds and swaps.

The Loan Market Association website describes the various initiatives in the sustainable and green lending markets (https://www.lma.eu.com/sustainable-lending) as useful for following the developments.

Banks and supervision
The focus of banks on sustainable financing is not completely voluntary. For example, the European Bank Association has developed guidelines that require an EU-based bank to include environmental, social, and governance (ESG) factors in their risk management policies, including credit risk policies and procedures.

Furthermore, ESG risks will be treated as a distinct risk category, and must be disclosed and assessed as part of the supervision exercised on banks.

Although this development may not affect South African banks directly, it could impact on transactions that involve banks based in EU member states if, for example, they are part of a syndicate. From a more practical perspective, when documenting transactions that involve banks with head offices in EU member states, the banks may be subject to particular requirements in relation to ESG risks. As a result, this may require inclusion of additional provisions in the transaction documentation, and also that the cost of funding loans that comply with ESG criteria may be cheaper.

Role of the South African legal market
As already mentioned, many of the initiatives for sustainable investment originate and are executed in Europe and the USA, but could create interesting opportunities for South African lawyers.

The legal know-how that is available locally can be applied to develop financial and other products that support sustainable economic development. A considerable part of the sustainable and green financing initiatives focus on Africa and it would be somewhat against their philosophy if the location for legal support is based in the US or Europe, with concomitant relatively high legal costs.

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Estate planning during a pandemic: are your affairs in order?

Deon Beachen

The coronavirus (COVID-19) pandemic, which has disrupted lives and continues to wreak havoc on the global economy, has seen a sudden and dramatic shift in the way we live.

Previously uncommon concepts and practices such as social distancing, lockdown, quarantine and self-isolation have now rapidly become part of our daily parlance. Unsurprisingly, in view of the swift rise in death rates associated with the pandemic, many people are being reminded of their own mortality. Intensified by the fact that prominent people such as Prince Charles and Boris Johnson have contracted the virus, it is clear
that nobody is exempt from the risks posed by the pandemic.

The primary risk, undoubtedly, is a matter of health. Parallel, however, there are financial risks, many of which can be severe and extremely difficult to manage. Consequently, it is understandable that many fiduciary practitioners around the world have observed an increase in the demand for wills, as well as estate planning. In view of this, what follows is a brief explanation of the significance of proper estate planning and the execution of a valid and well-drafted will, and how they can be employed to benefit those that you care for the most. Also included are a few questions and comments that are aimed at assisting readers to gauge their specific needs.

Estate planning involves the arrangement and implementation of legal and administrative processes to ensure that your interests and those you care for are protected during your lifetime and after your death. Various factors are taken into account by a fiduciary practitioner when considering an individual’s needs and requirements.

Arguably, the most fundamental component of an estate plan is the preparation and execution of a well-considered will. A good will must be drafted to cater for the specific objectives and requirements of the relevant individual and, accordingly, the use of templates should be avoided or, at a minimum, used with extreme caution. It is also vital that a will accurately records the intention of the relevant individual and that it has legal certainty. An experienced fiduciary practitioner will be able to highlight any areas of concern and guide the individual through the process of preparing a good and legally defensible will.

Fiduciary practitioners are frequently highly qualified lawyers and their field of practice is commonly known as private client law. Many are members of the Fiduciary Institute of Southern Africa (FISA) which sets a high bar for professional fiduciary standards and whose members are bound by a code of ethics. Private client lawyers have specialised knowledge in succession laws and a good working knowledge of the law across other disciplines. They are able to assess the feasibility and limitations of structures and mechanisms that can be used to tailor and implement an estate plan that will work well for the particular individual.

Although an unexpected and truly unpleasant event is the impetus behind this article, it is hoped that the points conveyed may help individuals to avoid the negative consequences of poor estate planning. Below are various questions and considerations that should help readers to structure their thinking on the topic.

- Do you have an up-to-date will? If not, have you considered the repercussions of dying without one? In a few cases, experience has shown that it might have been more efficient, administratively, for the individual to have died without a will, than with one that was badly drafted. Although quite simple and straightforward, the requirements for the valid execution of a will should not be overlooked as it is not uncommon for a will to be declared invalid for failing to adhere to the relevant legal requirements.

- Is your will tailored to your specific asset base? For example, should you have a separate will covering your offshore assets?

- Do the provisions of your will align with the provisions of your residual heir, for example, in the case of a trust that is to inherit your estate? Some trusts provide that the trustees should terminate the trust a few months after the death of the founder which may have an effect contrary to the one that you desire.

- Consider any declarations and revocations with a view to ensuring that multiple wills do not inadvertently revoke one another.

- Do the executors and trustees whom you have appointed have appropriate experience and knowledge to carry out your directions and act in your best interests?

- Are there any vague, imprecise or ambiguous provisions in your will? Does the document, where applicable, seek to create a usufruct, for example (where someone is given a right to use and enjoy the asset and to take its net income but cannot alienate the asset), a usufruct (a right to live in the property of another but the holder may lease the property), a full fiduciarium (the provision for the asset to be passed successively but where the asset may not be alienated), or a fiduciariun residui (where up to three-quarters of the asset may be disposed of by the heir but one-fourth thereof must pass to the ultimate heir)? As expressed, the rights of the parties associated with the various mechanisms can differ considerably.

- Where conditions are imposed in a will, consider the legal validity of those conditions and the repercussions of the condition being invalid. If the condition was invalid, the beneficiary could inherit the subject matter of the bequest free of the condition.

- Even conditions that are legally valid, can, at times, be notoriously difficult to execute practically. Consider the practical implications of conditions attached to bequests.

- What will be the costs and timeframe in winding-up your estate? Are sound financial provisioning and other mechanisms in place to alleviate the administrative and potential financial burden on those you care for? Failing to ensure sufficient liquidity in an estate to settle debts, meet tax obligations and address financial obligations can lead to forced sales and auctions of your assets.

- Does your inheritance plan clearly include your chosen beneficiaries, while excluding any undesirable but potential beneficiaries? It should be noted that the financial and emotional costs involved in inheritance-related litigation can be particularly high.

In the same vein that social distancing and heightened hygiene are steps that you can take to avoid COVID-19, there are steps that you can take to mitigate the harsh realities of poor estate planning and an inappropriate will. Depending on your answers to the considerations above, it may be in the best interests of those that you care for to revisit the actions that you have taken so far and, to the extent that you have not yet taken any action, the old adage of “there is no time like the present” surely applies in the light of the current pandemic.

Beachen, FISA member and Director: Private Clients at ENSafrica.
To pay or not to pay in the context of COVID-19

THATO MASHISHI

The extension of the lockdown period means that retail tenants who do not provide goods and services which have been categorised as essential have not been allowed to operate their businesses from the end of March until the end of April, and in some cases, longer. The consequence of the lockdown restrictions and halting business operations means no income is generated from the sale of the goods and services. However, from a contractual perspective, retail tenants may be expected to continue paying rental as agreed to in lease agreements.

Rental amount
Typically, the rental amount in commercial lease agreements is determined by the greater of X amount (which is usually the price per square metre of the total leased premises) or a fixed percentage of the total monthly turnover of a retail tenant. If a retail tenant fails to remit the agreed rental amount, this would constitute a material breach and trigger default provisions that may entitle a retail landlord to claim specific performance or damages. This means that regardless of whether a retail tenant is in operation or not, on a strict and purely contractual approach, the landlord is still entitled to the rental.

COVID-19, however, presents an unprecedented dynamic which may require a lenient and pragmatic approach to be adopted in the treatment of rental which is legally due, but with which, as a result of the lockdown, retail tenants may not be in a financial position to pay.

Proposals on the table
There are numerous proposals on the table which are being negotiated. Initially some retail tenants decided not to pay any rental amount due on the basis that their business operations have been halted as a result of the restrictions imposed by the lockdown and its subsequent extension. However, it is reported by IOL that some of those retail tenants have reconsidered their positions pursuant to ongoing sector negotiations and are now proposing to remit a certain percentage of the rental amount. It is further reported that retail tenants and landlords are locked in discussions aimed at reaching an amicable resolution (https://www.iol.co.za/business-report/companies/pepkor-woolies-truworths-mr-price-tfg-offer-r220-million-to-landlords-during-lockdown-46655204, 14 April 2020). The resolution may be a deviation from the agreed terms in lease agreements due to the unprecedented circumstance of COVID-19.
**Competition Act exemption**

On 24 March, Minister of Trade, Industry and Competition, Ebrahim Patel, promulgated the COVID-19 Block Exemption for the Retail Property Sector, 2020 (the “Regulations”) in response to the declaration of COVID-19 as a national disaster. The Regulations provide exemption to retail tenants and retail landlords from the application of s4 and s5 of the Competition Act (89 of 1998), in order to minimise the financial impact of COVID-19 on tenants in clothing, footwear, home textile, personal care services and restaurant industries.

The scope of the Regulations is currently limited to agreements and practices between retail tenants and landlords in the context of payment holidays and/or rental discounts, limitations on evictions and the suspension or adjustment of certain clauses in lease agreements which would impede retail tenants from implementing reasonable measures to ensure the survival of business operations during the national disaster. However, should tenants and landlords identify additional agreements or practices which may foster the efficacy of the Regulations the Minister may be requested to expand the scope of the exemption in terms of Regulation 6.

The global community is in uncharted territory which might necessitate a temporary deviation from the terms of lease agreements between retail tenants and landlords. A lenient and pragmatic approach in resolving the impasse between may be preferred under these circumstances, as opposed to a strict and purely contractual approach.

Mashishi is a Legal Consultant with KPMG Legal Services.

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**COVID-19 law enforcement incompetence and brutality not a new thing**

**MTHO MAPHUMULO**

It is often said that the best time to fix a leaking roof is in winter when there are no storms or heavy rains. This has proved to be true as South African law enforcement agencies inabilities have been exposed by the COVID-19 outbreak.

The exposure of incompetence follows the national lockdown which started on 26 March. The incompetence and brutality of the police is not a new thing – there are thousands of civil suits against the Minister of Police each year. Members of the public often institute claims for, among others, unlawful unrest; unlawful detention; claims for being subjected to brutality and ill treatment. One can reasonably postulate that there will be a rapid rise in claims of this nature, as well as claims against the Minister of Defence post the COVID-19 lockdown. Not only do the police fail to execute their duties as mandated by the law, they themselves also commit crimes. The statistics of police non-compliance, released by the IPID, include assaults, discharge of firearms, deaths in police custody and deaths due to police action.

The law:

The law relating to peoples’ security is regulated at a national, regional and international level – bodily integrity; safety and protection of the people is pivotal.

What rights and protection do members of the public have amidst continuing police brutality?

The President pleaded with law enforcement officers not to be violent and to protect the lives of people. He publicly expressed that officers are not “entering a hostile territory”. Amid the growing number of complaints about police action, the same message has been echoed more than once by the Ministers of Police and Defence.

The Constitution, 1996, protects peoples’ rights to bodily security, explicitly and implicitly. From the preamble to the objectives, purpose and spirit of the Constitution, it is clear that dignity, fair treatment and security, amongst others, are of great importance. Implied in our Constitution, as our courts have often held, is the right of Ubuntu – “I am because we are”. To safeguard these rights, s200(2) mandates the SANDF to defend and protect the Republic, its territorial integrity and its people in accordance with the Constitution and the principles of international law regulating the use of
force. Further, the Constitution forms and mandates the Police Services to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic.

There are other pieces of legislation which promote and protect the security of persons, including the Criminal Procedure Act. Several court cases have stipulated how police and law enforcement officers must conduct themselves – including Carmichele v Minister of Safety & Security; Fose v Minister of Safety & Security; etc. In all the cases, constitutional rights have been prioritised and police behaviour has been reprimanded. The gravity of the right to life is well explicated in the infamous case of Makwanyane.

A victim, depending on the circumstances surrounding and leading to an incident, may sue for damages. If a victim dies as a result of law enforcement brutality, the dependents may sue for loss of support. If the victim is injured, s/he can also sue for various heads of damages such as medical expenses, loss of earnings (or loss of capacity to earn); general damages; severe emotional stress and trauma and, potentially, constitutional damages (albeit with a slim chance of success). The applicability of these heads of damages will be determined on a case-by-case basis. It is important to note that the monetary worth of the claim will depend on the personal circumstances and nature and extent of the injuries of the victim.

The incompetence of our law enforcement officers has been highlighted by the lockdown, and, as in the past, they fail to execute their duties in accordance with the law and the simple directives of the President and Ministers. Despite numerous court decisions against police conduct, it appears that no drastic measures have been implemented to curb violations of law by police. This period may be a wake-up call for government to make drastic and aggressive changes, and to realise the urgent need to “fix the leaking roof”.

While victims can and should sue for damages, criminal charges and proper action must be taken against the relevant officers to prevent them from continuing to break the law and subject people to inhumane treatment without fear of repercussions. ◆

Maphumulo is an Associate with Adams & Adams.

COVID-19 Lockdown gently nudges court procedure into the 4th Industrial Revolution

KYLIE SLAMBERT AND YURI TANGUR

The COVID-19 pandemic has tested our time-honoured court system. Initially, most court work was curtailed, but it has since adapted valiantly. This period may be an unlikely but promising opportunity for the courts to catch up with technology.

High Court: Gauteng Division
At first, using the digital CaseLInes system was encouraged, but not mandatory. That soon changed. In the Judge President’s Directive of 25 March, dealing with the special arrangements to address the COVID-19 implications for litigation, he advised that until 20 April, the court would be open to hear urgent matters only. Similarly, concerning new case numbers and new matters to be enrolled, only urgent matters would be entertained. Papers would be uploaded on the
CaseLines platform or sent by email. Where this was not possible, physical papers would be delivered. Orders of the court would be communicated by CaseLines or email. Parties (in urgent matters) could agree to vary the rules to facilitate the electronic exchange of papers and condonation would be granted ipso facto. Hearings would be conducted by tele/videoconferencing and other electronic means, unless the presiding Judge directed differently.

At first, limiting court hearings to urgent matters seemed like a missed opportunity. However, laudably, the courts were trying something new, giving due consideration to health and safety, with a smaller number of matters.

On 11 May, consolidating directives were issued, which took into account prolonged restrictions in movement and health and safety considerations. According to that directive, documents in all matters must be uploaded to CaseLines unless a judge permits the use of email. Submissions for matters on paper should be made via CaseLines and email, and oral hearings, where required, will be dealt with by video conferencing. Judges will use their discretion to determine the mode of hearing evidence, as well as whose responsibility it will be to set up video conferencing, and the costs involved. Innovatively, the directives include options for judges on how to use links to increase efficiency. There is significant reliance on email transmission and, in cases where a litigant appears in court, the directives make provision for the use of a ‘virtual courtroom’. In specific instances where video conferencing is used, the Applicant holds the responsibility for setting up the conference and ensuring that all parties have the appropriate access link. In certain matters, presiding officers have the discretion to determine the manner in which proceedings are dealt with, which may include a teleconference using the ‘Zoom’ platform.

Gauteng had been moving towards a more digital system and was better prepared than some areas. The thoroughness of the recent directives indicates recognition of the long-term approach that needs to be taken; it will be interesting to see if, and how, the directives develop in tune with lockdown restrictions in the months to come. This is an investment in the court’s technological future.

Labour court
Initially no matters were allocated for hearing in the Labour Court. Matters already allocated were removed from the roll. No judges were available, and staff members were not available to receive documents. Parties with urgent matters contacted the registrar, who would contact the judge on duty to ask whether they would consider the matter. If this was agreed, it was done telephonically and documents were served and filed by email.

Although it is commendable that the Labour Court remained open for urgent matters, these directives seem like a missed opportunity since the court, arguably, has a slightly lesser caseload than the high court. The wheels of the court system could have continued to turn more swiftly had the court been open to hearings by other means, such as video conferencing.

On 28 April, new directives were issued, recognising the inevitable need to adapt to prolonged lock-down restrictions. In motion proceedings, submissions will be submitted by email unless a judge allows oral hearings by video conference. If video conferencing is used, the Applicant bears the burden of the costs to set it up, unless a judge decides differently. Concerning trials, the parties must submit a joint practice note that provides the email address and contact numbers of the parties and must indicate what teleconference arrangements have been decided on, what evidence can be adduced by affidavit, and to what extent a physical hearing is impossible.

Unfortunately, there is no provision for a ‘virtual courtroom’ or a version of CaseLines. However, there is detailed etiquette for video conferencing which refers to, amongst others, audio recordings, dress, ambient noise, and procedure for speaking. This is useful and may serve other courts well.

Like the high court, there is no firm commitment to a video-conferencing platform. It may be prudent for firms to prepare primary, secondary, and even tertiary video conferencing platforms, and possibly the accompanying hardware, so that these are prepared should the need arise.

CCMA
The CCMA initially operated minimally during the lockdown period. It remained open for general enquiries by telephone, email, and social media. Temporary Relief Scheme (TERS) applications were done electronically. It re-opened on 18 May and parties are now allowed to submit physical copies of referral forms. Physical hearings may take place, subject to directives and regulations. However, parties are still able to submit referrals electronically. Conciliations may also take place telephonically or via a video conferencing platform with which the CCMA or commissioner is satisfied and which is available to both parties and the CCMA.

Parties to arbitrations must hold a pre-arbitration conference and reach consensus on numerous factors including whether the evidence would be admitted by video-conferencing or at the employer’s premises, and how the evidence would be adduced if a witness does not have access to video-conferencing technology. Like the Labour Court, the CCMA has its own etiquette to be followed during video conferences, and sometimes as to how audio recordings are to be handled.
The SCA paves the way
The SCA initially considered not conducting any physical hearings in May and explored the possibility of using a specific web-based platform, but at the end of April, it was decided that virtual hearings would take place by telephone or video-conference. Since there is no specific platform, parties must agree beforehand. However, the court’s permission is still required for a virtual hearing and record of the hearing.

The court’s own etiquette must be followed and includes some factors not mentioned by the other courts such as firewalls, background lighting, participants needing to be alone (in a secure room with a door closed). These rules establish a ‘new normal’.

Obstacles to overcome
Remote litigation requires technology, which is an obstacle that participants to a private arbitration might not experience. If a court decides that it will only hear matters by video conference, participants will need access to this technology. Given the socio-economic make-up of the country, amongst other obstacles, it is not a given that everyone has such access. This may explain why the courts have decided to be flexible when it comes to electronic mediums, and why the CCMA and the Labour Court have decided to focus only on basic electronic forms for the sake of efficiency and access by everyone.

It is a laudable start which, if successful, may lead to permanent directives. The ‘virtual court’ proposed in Gauteng is a welcome development and may address the ‘lack of technology’ issue, depending on movement restrictions, among other factors.

Other challenges may arise from the doctrine of effectiveness in civil matters, which is why these directives may have been limited to urgent matters which will be dealt with on a case-by-case basis.

Overall, the Gauteng High Court and SCA are leading this court system revolution and, if others follow, it will streamline the process for the entire country.

The technological advances to the court system during this lockdown period have been commendable. There will be challenges and the courts are likely to continue to adapt directives as the situation unfolds – particularly with deference to possible health risks and to ensure that the wheels of the legal system continue to turn. Although more can be done, the courts’ actions taken during lockdown could set the tone for their future place in the 4th Industrial Revolution. ◆

Slambert is an Associate, Commercial Litigation practice and Tangura Candidate Attorney, Employment practice with Lawtons Africa.
Who did what in May 2020 . . .

SA Exchange Listed M&A
Barloworld, through its wholly-owned subsidiary KLL, issued a material adverse change (MAC) notice to Tongaat Hulett in terms of the sale and purchase agreement (SPA) signed in February. Barloworld is of the view that the consequences of the global pandemic is likely to cause the EBITDA of the starch business for the financial year ending March 31 2021 to be 82.5% or less of the EBITADA of the sale business for the financial year ended March 2020. Since the parties are unable to reach an agreement on whether a MAC has occurred, the SPA provides for the matter to be referred to an independent accountant. This process is expected to take approximately six to eight weeks.

Imperial Logistics advised shareholders it had concluded an agreement, through its subsidiary Imperial Logistics International, to dispose of its European shipping business to Hüfen und Güterverkehr Köln AG for €176 million (c. R3,64 billion) in cash.

Ninety One and RMB Holdings, via their private equity arms have disposed of a 24% stake in Kamoso Africa to Botswana Development Corporation. The parties acquired a 72% stake in 2017 from Standard Chartered Private Equity and Development Capital Partners. Financial details of the transaction were undisclosed.

Sasfin received an unsolicited, conditional non-binding offer for its entire minority interest in Efficient Group at a valuation of R5.60 per Efficient share valuing the investment at R1,463 million.

General Corporate Finance
Harmony Gold Mining announced it intends to raise up to $200 million in equity capital to fund the first tranche payment of its acquisition of the remaining assets of AngloGold Ashanti — announced in February this year. The move comes as the company seeks to preserve cash and maintain a strong balance sheet.

Lighthouse Capital announced an equity raise through the issue of new ordinary shares for cash at R7.00 per share or in consideration for JSE-listed shares in Hammerson plc or Rockcastle plc at 12,45 LTE shares for one share in NEPI Rockcastle plc or 2,1 LTE shares for one share in Hammerson plc. High demand for the stock necessitated an increase of the amount to be raised from R2 billion to R4,2 billion. 600,000,000 shares were issued either for cash or specified shares. The cash will be used to pursuit strategies and opportunities within its investment policy.

Middle East Diamond Resources has decided to undertake a partially underwritten rights offer of R20 million in order to raise cash to prepare the outstanding financial statements and pay long outstanding creditors.

Trenor advised shareholders that it intends to distribute the retained 3,000,158 inward secondary JSE listed shares in Textainer Group as a dividend in specie to shareholders pro rata to their shareholdings. Details will be released in due course.

Unlisted Deals
Afrisam, a supplier of construction materials and technical solutions, has reached an agreement with South Africa’s four big banks to convert the majority of its debt into equity. The restructure will see the banks taking meaningful but not controlling stakes in Afrisam and a reduction of its total debt from R$6,6 billion to R$2,1 billion.

Tetra Pak, a multinational food packaging and processing company has acquired South African Gaussian. Gaussian is a management consultancy focusing on physical asset management, data quality and reliability. Financial details of the transaction were undisclosed.

Lebashe Investment Group announced the disposal of a significant stake in Gallo Music Investments (GMI) to FlightMode Digital for an undisclosed sum. GMI was purchased by Lebashe Investment from Tiso Blackstar in February 2019 for R75 million.

RunwaySale, a Cape-based e-commerce fashion retailer, has received R100 million in investment from international private equity firm SPEAR Capital.

And in the rest of Africa . . .

Egypt: Pioneers Holdings, one of the Egyptian largest financial services groups, is to acquire stakes in the following companies: a 42% stake in Cairo for Housing and Development, a 25% stake in United for Housing and Development, a 35% interest in Electro Cable Egypt, A 14% stake in El Saeed Contracting & Real Estate Investment and a 56% interest in Giza General Contracting. The acquisitions will be implemented through share swaps.

Ghana: Total advised that given the current market conditions, it has decided not to pursue the completion of the purchase of the Ghana assets from Occidental Petroleum. The parties entered into an agreement in order for Total to acquire Anadarko’s assets in Africa. Under this agreement, the parties have completed the sale and purchase of the Mozambique and South African assets.

Kenya: Fanisi Capital, the East African private equity firm, has acquired a minority stake in Nairobi-based St Bakhita School, a move which is in line with its investment strategy which aims to invest in ambitious entrepreneurs providing high quality education. The School operates three campuses with over 1,300 students. The deal is valued at US$2.5 million.

Mal: Roscan Gold, a Canadian-based gold exploration company focused in Mali, West Africa, is to acquire 100% of the issued and outstanding shares of Komet Mali SARL, a wholly-owned subsidiary of Komet Resources. Komet Mali owns the Dabia Sud Project, including 35km² of concessions with highly prospective exploration potential directly adjoining the company Kandiole Property. Roscan will pay C$1,6 million in cash and C$1,6 million in Roscan shares.

Zambia: ZCCM Investments Holdings subsidiary Consolidated Gold Company Zambia, entered into a 65%/35% joint venture with Array Metals, a global mining firm. The joint venture will process gold ore in Mumbwa, west of Lusaka. An initial $2,5 million will be invested in the first stage of the project with mining and processing operation earmarked to start by mid-June 2020.

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<tr>
<th>NATURE OF DEAL</th>
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<th>ASSET</th>
<th>SA LAW FIRM</th>
<th>LAWYERS</th>
<th>ESTIMATED DEAL VALUE</th>
<th>ANNOUNCEMENT DATE</th>
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<td>Atlantic Leaf Properties</td>
<td>Cliffe Dekker Hofmeyr</td>
<td>Peter Hesseling; Dave Kroger</td>
<td>£152m</td>
<td>May 22</td>
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Through our success in commercial litigation, administrative law, national legislation, mineral and mining law, public procurement, property law, industrial and employment relations, and competition law, we have been shaping the economy and social development of South Africa since 1996.

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