# SA MERCANTILE LAW JOURNAL

SA Merc LJ (2023) Volume 35

INDEX



# SA MERCANTILE LAW JOURNAL

#### **FDITOR**

DR NZUMBULULO SILAS SIPHUMA

LLB (NWU) LLM LLD(Stell)

## MANAGING EDITOR

MRS ZUENÉ TALJAARD

LLB LLM (Pret)

#### **DEPUTY EDITORS**

PROF REHANA CASSIM

BA LLB LLM (Wits) LLD (Unisa)

# PROF DOROTHY MMAKGWALE FARISANI

B Proc LLB LLM (Unisa) PhD Law (UKZN)

PROF TUKISHI MANAMELA

B Proc LLB (Unin) LLM LLD (Unisa)

#### ASSISTANT EDITORS

MR BONGANI KHUMALO

LLB LLM (Unisa)

MR RICHARD M SHAY

LLB LLM (Stell)

PROF ME MANAMELA

B Proc LLB (Unin) LLM LLD (Unisa) PROF PALOLLO MICHAEL LEHLOENYA

LLM (Pret) LLD (Free State)

**ADV MAPHUTI TUBA** 

LLB (Wits) LLM (Unisa)

DR VELA MADLELA

LLB LLM (Wits) LLD (Pret)

# **EDITORIAL ADVISORY BOARD**

#### PROF J KIGGUNDU

University of Botswana

#### THE HON FR MALAN

Retired Judge of Appeal, Supreme Court

of Appeal

Honorary Professor, University of Johannesburg

# THE HON KK MTHIYANE

Retired Deputy President, Supreme Court of Appeal

## THE HON D MOSENEKE Retired Deputy Chief Justice, Constitutional

Court

# Appeal THE HON CME O'REGAN

THE HON PM NIENABER

THE HON BM NGOEPE

Tax Ombudsman

Retired Judge President, North Gauteng,

South Gauteng and Limpopo High Courts

Retired Judge of Appeal, Supreme Court of

# Retired Justice, Constitutional Court

THE HON PE STREICHER Retired Judge of Appeal, Supreme Court

of Appeal

# THE HON R H ZULMAN

Retired Judge of Appeal, Supreme Court of Appeal

#### EDITORIAL PANEL

#### PROF JL BRINK

Professor extraordinarius, University of South Africa Attorney, Johannesburg

# PROF DW BUTLER

Professor emeritus, University of Stellenbosch

#### PROF HJ DELPORT

Professor emeritus, Nelson Mandela

Metropolitan University

# PROF PA DELPORT

Professor emeritus, University of Pretoria

## PROF CJ VISSER

University of South Africa

# PROF A ITZIKOWITZ

University of the Witwatersrand

Attorney, Johannesburg

PROF VA LAWACK

Deputy Vice-Chancellor (Academic)

University of the Western Cape

## PROF PAK LE ROUX

Professor extraordinarius,

University of South Africa

Attorney, Johannesburg

PROF J NEETHLING

Research Fellow, University of the Free State

## PROF JT PRETORIUS

Professor emeritus, University of South Africa

This peer reviewed journal is approved by the Department of Higher Education for SAPSE purposes

ISSN: 1015-0099 Typeset by CBT Typesetting & Design Printed and bound by Digital Action

# **TITLES OF ARTICLES**

Digital platform workers and the conundrum of the definition of an 'employee' in the era of the Fourth Industrial Revolution	
South Africa's NINA debtor plight: Lessons from the Scottish	1
consumer debt relief system post the Covid-19 pandemic	
Shammah Boterere & André Boraine	27
The impact of regulatory pluralism and complexity on the	
governance of state-owned companies in South Africa	
Tebello Thabane	49
Demystifying the value-added tax effects of foreign branches in	
South Africa: The Wenco case	123
A comparative assessment of the treatment of unincorporated	
business entities in financial distress in South Africa	138
Hiding behind the veil: On whom does liability for discriminatory	130
practices by recruitment agencies fall	
Davy Rammila & Ernest Manamela	162
Translation of transfer pricing adjustments in South Africa: A	102
seemingly insignificant detail	190
South African governance legal framework for corporate disclosures	
and reporting: Part 2-Mandatory financial disclosure and	
reporting Werner Schoeman	213
The balancing act continues: Recommendations for reform of the	
National Credit Act 34 of 2005 Bronwyn Le-Ann Batchelor	241
The application of the Compensation for Occupational Injuries and	
Diseases Act on impairment caused by sexual harassment	272
Evaluating South Africa's maternity protection legal regime	273
applicable to non-standard female workers' compliance with the	
Maternity Protection Convention 183 of 2000	
Mpho Mhlongo & Clarence Itumeleng Tshoose	298
Using market inquiries: A sharper tool for competition authorities?	
Itumeleng Lesofe & Siphosethu Tetani	327
Does a settlement agreement between litigants in a civil dispute	
terminate the jurisdiction of the court? R C Williams	370
TITLES OF CASE NO	TEC
	JIES
The unfortunate dearth of judicial precedent in transfer pricing	
continues	74
Do taxpayers have to pay tax when SARS has not complied with	
sections 92, 95 and 96 of the Tax Administration Act? Nondabula	94
v Commissioner: SARS & another explained Moseki Maleka Retraction of a 'hot-headed resignation' caused by depression:	74
Lessons from Cairncross/Legal and Tax (Pty) Ltd 2019 (2) BALR	
137 (CCMA) Mafanywa Jeffrey Mangammbi	110

Is the foreign business establishment lagging behind new business models? Commissioner for the South African Revenue Service v  Coronation Investment Management SA (Pty) Ltd [2023] ZASCA  10	232
A discussion of penalties for non-compliance with picketing rules: Clover SA (Pty) Ltd v General Industries Workers Union of South Africa & others [2021] 4 BLLR 419 (LC) Mashudu Monica	
Mulaudzi	390
MAIN CASES DISCUSSED IN CASE NO	OTES
Colombia vs Carbones El Tesoro S.A. September 2021,	
Administrative Court, Case No. 22352	77
Commissioner for Inland Revenue v Ticktin Timbers CC (1997) 59	90
SATC 260 (C)	80
Revenue Service [2018] ZAGPHC 311	81
ABC (Pty) Ltd v Commissioner for the South African Revenue	01
Service Case No: IT 14305	87
The Coca Cola Company (TCCC) and Subsidiaries v The	
Commissioner of Internal Revenue US, November 2020, US Tax	
Court, 155 T.C. No. 10	89
Canada vs AgraCity Ltd and Saskatchewan Ltd August 2020, Tax	0.0
Court, 2020 TCC 91	89
Denmark v ECCO A/S, October 2020, High Court Case No. SKM2020.397.VLR	89
Roshcon (Pty) Limited v Anchor Auto Body Builders CC & others	05
(49/13) [2014] ZASCA 40; [2014] 2 All SA 654 (SCA); 2014 (4)	
SA 319 (SCA)	91
South African Revenue Services v NWK Limited 2011 (2) SA 67	
(SCA)	91
Du Plessis v Joubert 1968 (1) SA 585 (A)	91
Commissioner of Taxation v SNF (Australia) Pty Ltd ([2011]	
FCAFC 74; 193 FCR 149	92
Nondabula V Commissioner: Sars & Another 2018 (3) SA 541	0.4
(ECM)	94
Metcash Trading Ltd v Commissioner for SARS 2001 (1) SA 1109 (CC)	96
Nedbank Ltd v Pestana 2009 (2) SA 189 (SCA)	96
Minister of Health & another v New Clicks SA (Pty) Ltd & others	70
(Treatment Action Campaign and Innovative Medicines SA as	
Amici Curiae) 200 (1) BCLR 1 (CC)	103
SANDU v Minister of Defence 2007 (8) BCLR 863 (CC)	103
S v Makwanyane 1995 (3) SA 391 (CC)	104
Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd	
2012 (1) SA 256 (CC)	105
Metropolitan Health Risk Management v Majatladi 2015 (36) ILJ 958 (LAC)	110
Cairncross/Legal and Tax (Ptv) Ltd 2019 (2) BALR 137 (CCMA)	110

Bakker v CCMA (2018) 39 ILJ 1568 (LC)	
Murray v Minister of Defence 2008 (3) All SA 66 (SCA)	
SA Rugby Players Association v SA Rugby (Pty) Ltd 2008 (29) ILJ	
2218 (LAC)	
Grootboom v National Prosecuting Authority 2014 ILJ 121 (CC)	
Solid Doors (Pty) Ltd v Commissioner Theron (2004) 25 ILJ 2337 (LAC)	
NUMSA obo Williams and Southern Wind Shipyard (2003) 24 ILJ 1454 (BCA)	
Sothern v Franks Charlesly & Co 1981 IRLR	
Sovereign House Services Ltd v Savage 1989 IRLR	
CEPPWAWU v Glass and Aluminium 2000 CC (2002) 23 ILJ 695 (LAC)	
Barclay v City of Glasgow District Council 1983 IRLR	
Marks v Melbourne Health 2011 FWA	
Commissioner for the South African Revenue Service v Coronation	,
Investment Management SA (Pty) Ltd [2023] ZASCA 10	. 2
Clover SA (Pty) Ltd v General Industries Workers Union of South	
Africa & Others [2021] 4 BLLR 419 (LC)	
KPMM Road and Earthworks (Pty) Ltd v AMCU 2018 (39) ILJ 609	)
Dis-Chem Pharmacies Ltd v Malema & others (2019) 40 ILJ 855	
(LC)	
SATAWU v Garvas & others (2012) (33) ILJ 1593 (CC)	
Robertson Winery (Pty) Ltd v CSAAWU 2017 (38) ILJ 1171 (LC)	
Commercial Stevedoring Agricultural and Allied Workers' Union & others v Oak Valley Estates (Pty) Ltd & another (CCT 301/20) (2022) ZACC 7; (2022) 6 BLLR 487 (CC)	
National Union of Food Beverage Wine Spirits & Allied Workers &	
others v Universal Product Network (Pty) Ltd (2016) 37 ILJ 476	,
(LC)	
Rustenburg Platinum Mines v MPWU (2001) 22 ILJ 2035 (LC) Algoa Bus Company (Pty) Ltd v Transport Action Retail and	. 4
General Workers Union & others (P368/13) [2015] ZALCPE 31; [2015] 9 BLLR 952 (LC); (2015) 36 ILJ 2292 (LC)	. '
Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA	. '
Workers Union & others (2012) 33 ILJ 998 (LC)	
Mangaung Local Municipality v SAMWU (2005) 24 ILJ 405	. '
Xstrata South Africa (Pty) Ltd v Association of Mineworkers and	
Construction Union & others (J1239/13) [2014] ZALCJHB	•
Dunlop Mixing and Technical Services (Pty) Ltd & others v	
National Union of Metalworkers of South Africa (NUMSA) obo	
Nganezi & others (D345/14) [2016] 10 BLLR 1024 (LC)	
Mediterranean Textile Mills (Pty) Ltd v SA Clothing & TWU (2012) 33 ILJ 160 (LAC)	

# **CONTRIBUTORS**

Bronwyn Le-Ann Batchelor: THE BALANCING ACT	
CONTINUES: RECOMMENDATIONS FOR REFORM OF THE	
NATIONAL CREDIT ACT 34 OF 2005	241
Shammah Boterere & André Boraine: SOUTH AFRICA'S NINA	
DEBTOR PLIGHT: LESSONS FROM THE SCOTTISH	
CONSUMER DEBT RELIEF SYSTEM POST THE COVID-19	
PANDEMIC	27
Itumeleng Lesofe & Siphosethu Tetani: USING MARKET	
INQUIRIES: A SHARPER TOOL FOR COMPETITION	
AUTHORITIES?	327
Mpho Mhlongo & Clarence Itumeleng Tshoose: EVALUATING	
SOUTH AFRICA'S MATERNITY PROTECTION LEGAL	
REGIME APPLICABLE TO NON-STANDARD FEMALE	
WORKERS' COMPLIANCE WITH THE MATERNITY	
PROTECTION CONVENTION 183 OF 2000	298
Kudzai Mpofu & Hermanus Johannes Moolman: A	
COMPARATIVE ASSESSMENT OF THE TREATMENT OF	
UNINCORPORATED BUSINESS ENTITIES IN FINANCIAL	
DISTRESS IN SOUTH AFRICA	138
Ntando Ncamane: DIGITAL PLATFORM WORKERS AND	
THE CONUNDRUM OF THE DEFINITION OF AN	
'EMPLOYEE' IN THE ERA OF THE FOURTH INDUSTRIAL	
REVOLUTION	
Kamalesh Newaj: THE APPLICATION OF THE	
COMPENSATION FOR OCCUPATIONAL INJURIES AND	
DISEASES ACT ON IMPAIRMENT CAUSED BY SEXUAL	
HARASSMENT	273
Davy Rammila & Ernest Manamela: HIDING BEHIND THE VEIL:	
ON WHOM DOES LIABILITY FOR DISCRIMINATORY	
PRACTICES BY RECRUITMENT AGENCIES FALL	162
Werner Schoeman: SOUTH AFRICAN GOVERNANCE LEGAL	
FRAMEWORK FOR CORPORATE DISCLOSURES AND	
REPORTING: PART 2—MANDATORY FINANCIAL	
DISCLOSURE AND REPORTING	213
Faeeza Soni: DEMYSTIFYING THE VALUE-ADDED TAX	
EFFECTS OF FOREIGN BRANCHES IN SOUTH AFRICA:	
THE WENCO CASE	12:
Tebello Thabane: THE IMPACT OF REGULATORY PLURALISM	
AND COMPLEXITY ON THE GOVERNANCE OF STATE-	
OWNED COMPANIES IN SOUTH AFRICA	49
Michelle van Heerden: TRANSLATION OF TRANSFER PRICING	
ADJUSTMENTS IN SOUTH AFRICA: A SEEMINGLY	
INSIGNIFICANT DETAIL	190
R C Williams: DOES A SETTLEMENT AGREEMENT BETWEEN	-2
LITIGANTS IN A CIVIL DISPUTE TERMINATE THE	
	370
LITIGANTS IN A CIVIL DISPUTE TERMINATE THE JURISDICTION OF THE COURT?	3

# **SUBJECT INDEX**

COMPANY LAW	
THE BALANCING ACT CONTINUES: RECOMMENDATIONS FOR REFORM OF THE NATIONAL CREDIT ACT 34 OF 2005	
DEMYSTIFYING THE VALUE-ADDED TAX EFFECTS OF FOREIGN BRANCHES IN SOUTH AFRICA: THE WENCO CASE Faeeza Soni	241 123
COMPETITION LAW	120
USING MARKET INQUIRIES: A SHARPER TOOL FOR COMPETITION AUTHORITIES?	
Itumeleng Lesofe & Siphosethu Tetani	327
CONSUMER LAW SOUTH AFRICAN GOVERNANCE LEGAL FRAMEWORK FOR CORPORATE DISCLOSURES AND REPORTING: PART 2—MANDATORY FINANCIAL DISCLOSURE AND REPORTING	213
CIVIL PROCEDURE	
DOES A SETTLEMENT AGREEMENT BETWEEN LITIGANTS IN A CIVIL DISPUTE TERMINATE THE JURISDICTION OF	270
THE COURT?	370
INSOLVENCY LAW SOUTH AFRICA'S NINA DEBTOR PLIGHT: LESSONS FROM THE SCOTTISH CONSUMER DEBT RELIEF SYSTEM POST THE COVID-19 PANDEMIC Shammah Boterere & André Boraine	27
A COMPARATIVE ASSESSMENT OF THE TREATMENT OF UNINCORPORATED BUSINESS ENTITIES IN FINANCIAL DISTRESS IN SOUTH AFRICA	
	138
LABOUR LAW DIGITAL PLATFORM WORKERS AND THE CONUNDRUM OF THE DEFINITION OF AN 'EMPLOYEE' IN THE ERA OF THE FOURTH INDUSTRIAL REVOLUTION	
HIDING BEHIND THE VEIL: ON WHOM DOES LIABILITY FOR DISCRIMINATORY PRACTICES BY RECRUITMENT AGENCIES FALL	1
THE APPLICATION OF THE COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT ON IMPAIRMENT CAUSED BY SEXUAL HARASSMENT	162
Kamalesh Newaj	273

EVALUATING SOUTH AFRICA'S MATERNITY PROTECTION	
LEGAL REGIME APPLICABLE TO NON-STANDARD	
FEMALE WORKERS' COMPLIANCE WITH THE	
MATERNITY PROTECTION CONVENTION 183 OF 2000	
Mpho Mhlongo & Clarence Itumeleng Tshoose	298
TAX LAW	
THE IMPACT OF REGULATORY PLURALISM AND	
COMPLEXITY ON THE GOVERNANCE OF STATE-OWNED	
COMPANIES IN SOUTH AFRICA Tebello Thabane	49
TRANSLATION OF TRANSFER PRICING ADJUSTMENTS IN	
SOUTH AFRICA: A SEEMINGLY INSIGNIFICANT DETAIL	
Michelle van Heerden	190