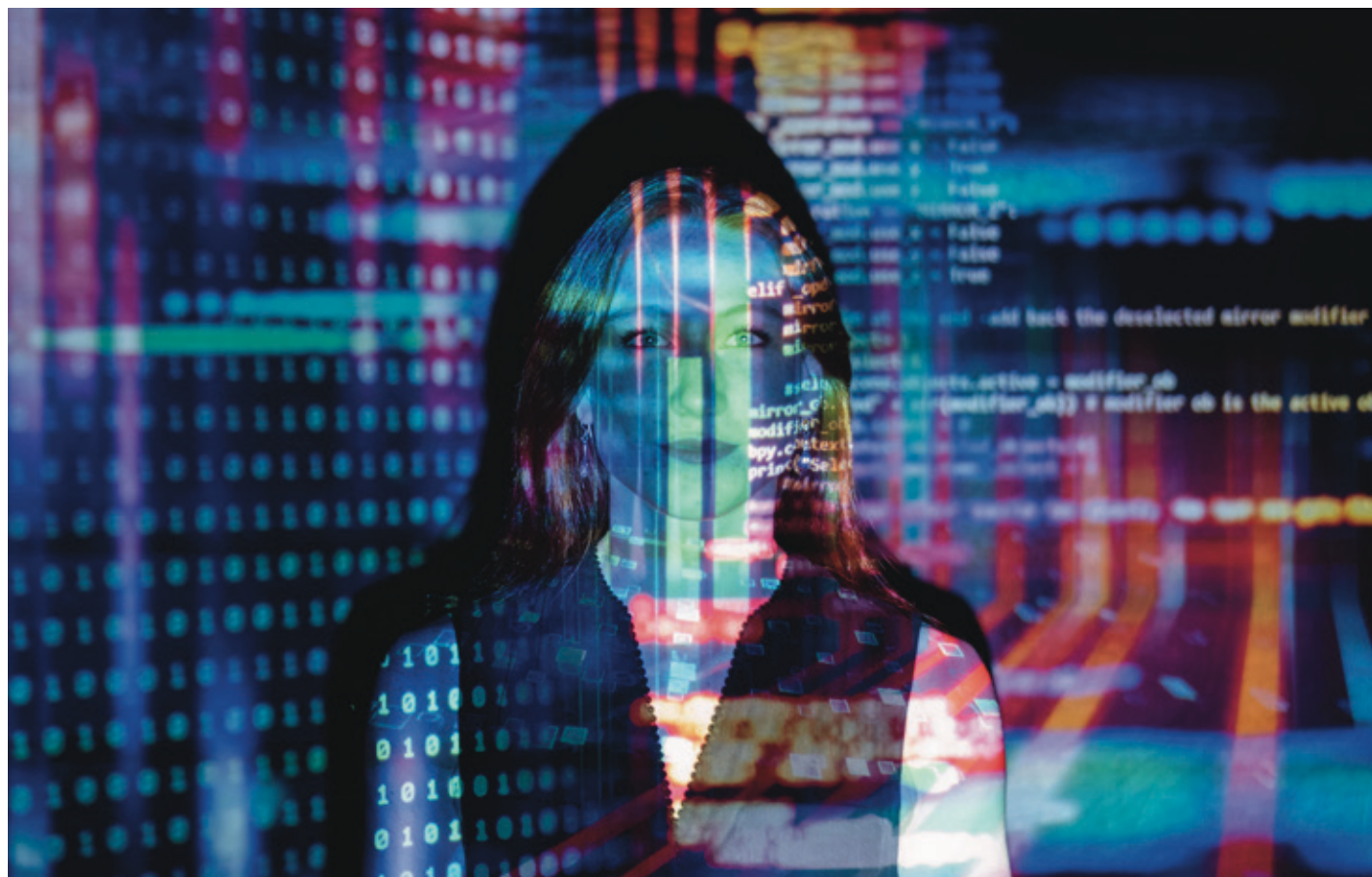




LEGAL PROFESSION'S GLOBAL CHALLENGE WITH THE UNCRITICAL USE OF ARTIFICIAL INTELLIGENCE

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INTRODUCTION

The application of artificial intelligence ("AI") to legal proceedings is a rapidly expanding phenomenon. The legal profession is one of the industries that has both benefitted and been negatively impacted by the use of AI to draft legal documents as well as conduct legal research. In *Parker v Forsyth NNO and Others*,¹ the plaintiff's attorneys used ChatGPT to conduct legal research. ChatGPT is an AI tool which is also used, among others, to conduct legal research. In the aforementioned case, the court defined a chatbot (ChatGPT) as an "artificial intelligence chatbot that uses natural language processing to create humanlike conversational dialogue. The language model can respond to questions and compose various written content, including articles, social media posts, essays, code and email, and a chatbot is a 'computer program designed to

simulate conversation with human users, especially over the internet'. The GPT in ChatGPT means Generative Pre-trained Transformer".

Additionally, the possible advantages of using Google to prepare legal documents (heads of argument) were demonstrated in *Makunga v Barlequins Beleggings (Pty) Ltd t/a Indigo Spur*.² The court in this case commended the calibre of the heads of argument submitted by an unrepresented applicant, who used Google to draft them. The court highlighted that even counsel for the respondent acknowledged in argument that many of his colleagues shared his disbelief and believed that only a lawyer could have drafted them. The court further highlighted that it had witnessed worse heads of argument drafted by members of the Bar, and further that the applicant's tenacity and

dedication is an indication that lawyers need to watch out for AI as legal jobs will soon be replaced by computers.

Makunga demonstrates the critical usage of AI and Google to draft legal documents and to conduct legal research, as the court acknowledged that the applicant's heads contained extensive use of case law without being a legally trained person. This is a distinct stance from members of the legal profession who have not used AI ethically. The uncritical use of AI is not only a South African but a global problem. Furthermore, there are several risks posed by the uncritical use of AI. The risks include, among others, fabricated case law, ethical and professional risks, and maintaining privilege and confidentiality when it comes to clients' information.

UNCRITICAL USE OF AI – DRAWING FROM INTERNATIONAL JURISPRUDENCE

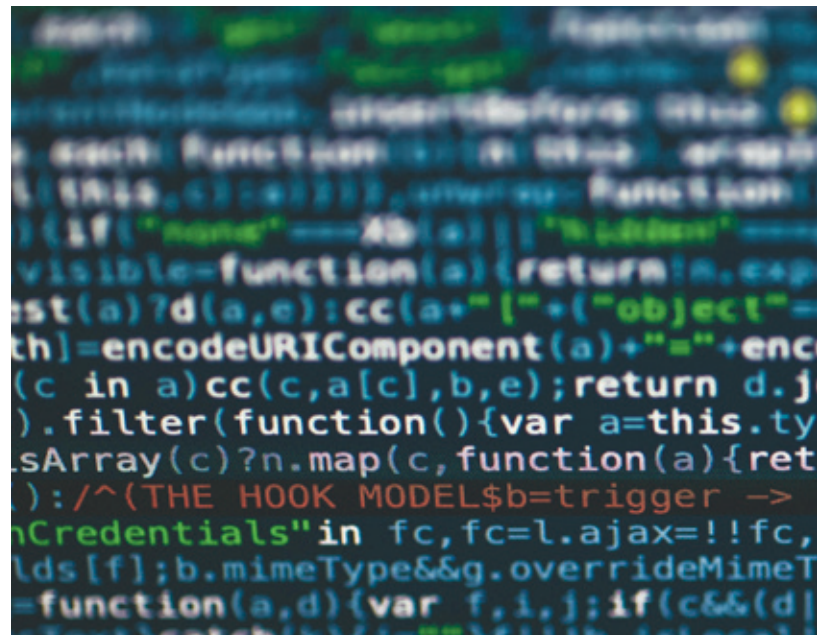
The uncritical use of AI as a tool for legal research is not only a South African but a global problem. International jurisprudence, in particular, the English and Wales High Court, as well as United States courts, have had to deal with cases of non-existent case law contained in the heads of argument filed by lawyers. In the recent English case of *Ayinde, R (On the Application Of) v London Borough of Haringey*³ the court had to deal with the use of non-existent cases cited by applicant's lawyers (Haringey Law Centre), who were represented by a solicitor, Ms Sarah Forey. The applicant's solicitor denied having used AI to conduct legal research and stated she was "aware that AI is not a reliable source", and in her defence, she alluded that, among other things, she was called to the bar in 2021 and started her pupillage in September 2023. She said that during her second six months of pupillage, she had an extremely busy practice, she did not receive any supervision and none of her written work was checked.

In response to the use of AI, she further said she may also have carried out searches on Google and Safari and that she may have taken account of AI-generated summaries of the results without realising what they were. The solicitor was thereafter referred to the Solicitors Regulation Authority.

The English and Wales High Court in the *Ayinde R* case acknowledged that AI is a powerful technology which can be useful in litigation, both civil and criminal. The court further acknowledged that AI is a tool that carries with it risks and opportunities. Its use must take place with an appropriate degree of oversight, and within a regulatory framework that ensures compliance with well-established professional and ethical standards if public confidence in the administration of justice is to be maintained.

In relation to the suspected lawyers, the court held that it has a range of powers to ensure that lawyers comply with their duties to the court. Where those duties are not complied with, the court's powers include public admonition of the lawyer, the imposition of a costs order, the imposition of a wasted costs order, striking out a case, referral to a regulator, the initiation of contempt proceedings and referral to the police. However, each case will be decided on its facts and merits. However, relevant factors are likely to include:

- The importance of setting and enforcing proper standards;
- the circumstances in which false material came to be put before the court;

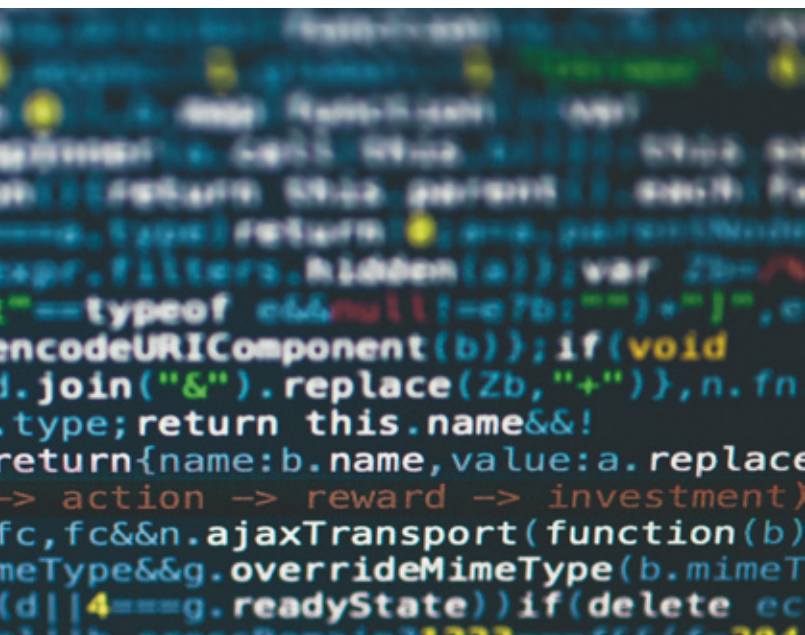


- whether an immediate, full and truthful explanation is given to the court and to other parties to the case;
- the steps taken to mitigate the damage, if any;
- the time and expense incurred by other parties to the case and the resources used by the court in addressing the matter;
- the impact on the underlying litigation; and
- the overriding objective of dealing with cases justly and at proportionate cost.

Also, in the United States of America's jurisprudence in *Mata v Avianca Inc*⁴ the court highlighted that in conducting legal research and drafting court submissions, good lawyers appropriately obtain assistance from junior lawyers, law students, contract lawyers, legal encyclopaedias and databases. Further that technological advances are commonplace, and there is nothing inherently improper about using a reliable AI tool for assistance. However, the court also contended that the respondents' attorneys abandoned their responsibilities when they submitted non-existent judicial opinions with fake quotes and citations created by an AI tool, ChatGPT, and continued to stand by the fake opinions after judicial orders called their existence into question.

The opposing party in the legal proceedings and the court were unable to find seven of the cases that had been cited. The court contended that the opposing party wasted time in exposing deception. Not only this, but also the court's time was also wasted. The attorney in this case (Mr Schwartz) conceded to have used ChatGPT and that he was of the view that ChatGPT could not fabricate cases on its own. He thought ChatGPT was finding cases somewhere, maybe unpublished or appealed. Judge Castel explained some of the consequences of citing non-existent authorities:

"Many harms flow from the submission of fake opinions. The opposing party wastes time and money in exposing the deception. The Court's time is taken from other important endeavours. The client may be deprived of arguments based on authentic judicial precedents. There is potential harm to the reputation of judges and courts



whose names are falsely invoked as authors of the bogus opinions and to the reputation of a party attributed with fictional conduct. It promotes cynicism about the legal profession and the American judicial system. And a future litigant may be tempted to defy a judicial ruling by disingenuously claiming doubt about its authenticity."

Furthermore, the judge imposed a sanction of \$5,000 on each of the two lawyers and on the law firm.

Lawyers are ordinarily in charge of the information and the filing of legal documents. Therefore, strict safeguards are necessary to reduce dependence on uncritical use of AI. Above all, lawyers must make sure that the information placed before the court is accurate and pertinent.

UNCITICAL USE OF AI – DRAWING FROM SOUTH AFRICA'S JURISPRUDENCE

The foundation for examining South Africa's jurisprudential experience with AI is the fact that the uncritical application of AI has had a detrimental impact on both lower and higher courts. The lower court, being detrimentally impacted by *Parker* in this case held that plaintiff's attorneys use of AI to conduct legal research and accepted the results that AI generated without satisfying themselves as to its accuracy. The court also noted that names and citations were fictitious, and the facts and decisions were fictitious. Although the non-existent cases were not submitted to the court as binding authorities, they were submitted to the respondent's attorneys. This case was preceded by *Mavundla v Member of the Executive Council, Department of Co-operative Government and Traditional Affairs, KwaZulu-Natal*,⁵ where the applicant's attorneys had also cited non-existent cases in their supplementary notice of appeal papers. It transpired that of the nine cases, only two could be located in the law reports. It also transpired that the supplementary notice of appeal papers were drafted by a candidate attorney, without the assistance of the principal in checking if the authorities cited were correct.

In *Mavundla*, the court raised concerns about the candidate attorney's correctness and truthfulness about the citations, and the fact that she only found one citation in the journal. The

court, in addition, held that in this era of instant gratification, this occurrence is a timely reminder to the lawyers involved in this case, at the very least, that independent reading was still necessary to supplement the effectiveness of modern technology when it comes to legal research. Furthermore, courts anticipate that attorneys would approach new legal issues with a questioning, legally independent mind, rather than simply repeating in a parrot-like manner the unverified research of a chatbot. The court also took issue with the instructing attorneys for their failure to verify cited cases. The court granted against the firm an order *de bonis propriis* pertaining to appearances on two occasions which were necessitated by the discovery of the various non-existent and incorrect authorities relied upon by the applicants.

In *Northbound Processing (Pty) Ltd v South African Diamond and Precious Metals Regulator and Others*,⁶ the presiding judge indicated that he became aware when scribing the judgment that two of the cases cited by the applicants did not exist. A version presented by a junior advocate contended that an incorrect version of the heads was filed. He further contended that "confusion arose from short-form citations used during drafting" and that different citations were "initially intended for inclusion in support of the relevant legal propositions".

However, the respondent's attorneys pointed out to the presiding judge that even the "correct" version still contained two other incorrect citations. The court thereafter enquired from the advocate whether the incorrect citations constituted so-called AI "hallucinations," and he confirmed that they appeared to be so.

Counsel thereafter explained that, aside from the time-pressure caused by various factors, including:

- the urgency of this application;
- severe time-pressure to complete the heads; and
- the indisposition of a colleague (who initially acted as Northbound's junior counsel but fell out of the matter after doing an initial draft of the heads without the incorrect citations),

he used an online subscription tool called "Legal Genius", which claimed that it was "exclusively trained on South African legal judgments and legislation".

Counsel also stated the senior counsel leading him did not rely on the non-existent cases in oral argument, and that no one was prejudiced due to the errors in Northbound's heads of argument. He accepted full responsibility for the mistakes but emphasised that there was no intent to mislead the court.

The senior counsel leading him also apologised unreservedly for the oversight on behalf of Northbound's legal team. He stated that it was inconceivable to him that the authorities had been identified in the manner that the junior explained. He also explained that he relied upon an experienced legal team (which included two competent junior counsel) upon whom he believed he could (and indeed did) rely. He only did a "sense-check" on Northbound's heads before they were filed and did not have sufficient opportunity to check the accuracy of the citations but considered that the propositions to which they related were trite and did not even require case law references. Finally, he emphasised that he independently prepared his oral argument, which made no reference to the heads as filed.

The court thereafter drew the parties' attention to Article 16(1) of the Code of Judicial Conduct. This provision obliges a judge with clear and reliable evidence of serious professional misconduct or gross incompetence on the part of a legal practitioner to inform the relevant professional body of such misconduct. It was on that basis that the presiding judge held that "even negligence in this context may have grave repercussions, particularly to the administration of justice and, in appropriate circumstances, could constitute serious professional misconduct. As a consequence, it is appropriate to make the same order as in *Mavundla*, namely that the conduct of the applicant's legal practitioners is referred to the Legal Practice Council for investigation".

South Africa is yet to develop a legislative framework that regulates the use of AI. However, the courts rely on the Judicial Code as well as the Legal Practice Act's Code of Conduct for Legal Practitioners, Candidate Legal Practitioners and Juristic Entities to hold accountable those may have been found to have uncritically used AI. Moreover, the aforementioned *Ayinde R* and *Northbound* cases developed the following crucial points to be considered when conducting legal research:

- "a) In the context of legal research, the risks of using artificial intelligence are now well known. Such tools can produce apparently coherent and plausible responses to prompts, but those coherent and plausible responses may turn out to be entirely incorrect. The responses may make confident assertions that are simply untrue. They may cite sources that do not exist. They may purport to quote passages from a genuine source that do not appear in that source.
- b) Those who use artificial intelligence to conduct legal research notwithstanding these risks have a professional duty to check the accuracy of such research by reference to authoritative sources, before using it in the course of their professional work (to advise clients or before a court, for example).
- c) There are serious implications for the administration of justice and public confidence in the justice system if artificial intelligence is misused. In those circumstances, practical and effective measures must be taken by those within the legal profession with individual leadership responsibilities and by those with the responsibility for regulating the provision of legal services. Those measures must ensure that every individual currently providing legal services understands and complies with their professional and ethical obligations and their duties to the court if using artificial intelligence.
- d) The court has a range of powers to ensure that lawyers comply with their duties to the court. Where those duties are not complied with, the court's powers include public admonition of the lawyer, the

imposition of a costs order, the imposition of a wasted costs order, striking out a case, referral to a regulator, the initiation of contempt proceedings, and referral to the police. The course of action followed will depend on the circumstances of the case.

- e) Where a lawyer places false citations before the court (whether because of the use of artificial intelligence without proper checks being made, or otherwise) that is likely to involve a breach of ethical and regulatory requirements, and it is likely to be appropriate for the court to make a reference to the appropriate regulator.
- f) The risks posed to the administration of justice if fake material is placed before a court are such that, save in exceptional circumstances, admonishment alone is unlikely to be a sufficient response."

The referral of practitioners to the Legal Practice Council, even in the case of pupil advocates (as in the aforementioned English and Wales High Court case), candidate legal practitioners, (as witnessed in *Mavundla*), show that care and diligence should be taken when conducting legal research because it may impact their legal careers before they even begin. Moreover, a sense check alone is also insufficient when it comes to senior members of the profession. Senior members are responsible for making sure that the information presented before the court is accurate and appropriate.

CONCLUSION

The legal profession should embrace artificial intelligence since it offers chances to make legal research and document preparation simple for legal practitioners. Nonetheless, it must be accepted with caution and diligence in order to uphold the profession's ethical standards. It is a duty of legal practitioners to uphold not only the profession's ethical standards but also their professional standards, as the aforementioned international and domestic cases have proven that uncritical use of AI has major consequences not only for the practitioners involved but also for the administration of justice and public trust in the legal profession. 

Notes

- 1 *Parker v Forsyth NNO and Others* (1585/20) [2023] ZAGPRD 1 (29 June 2023)
- 2 *Makunga v Barlequins Beleggings (Pty) Ltd t/a Indigo Spur* (19733/2017) [2023] ZAWCHC 196 (1 December 2023).
- 3 *Ayinde, R (On the Application Of) v London Borough of Haringey* [2025] EWHC 1383 (06 June 2025).
- 4 *Mata v Avianca Inc* Case No. 22-cv-1461 (PKC), 2023 WL 4114965 (SDNY 22 June 2023).
- 5 *Mavundla v Member of the Executive Council, Department of Co-operative Government and Traditional Affairs, KwaZulu-Natal* 2025 (3) SA 534 (KZP).
- 6 *Northbound Processing (Pty) Ltd v South African Diamond and Precious Metals Regulator and Others* (2025/072038) [2025] ZAGPJHC 661 (30 June 2025).
- 7 *Northbound* at para 93.

