LEGAL NOTES VOL 1/2017

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EDITORIAL

WELCOME BACK!

Hope you enjoyed a well-deserved rest!

1) JUDGMENTS ONLINE IS ALSO BACK (JOL)

Since October 2016 "JOL" was not on Butterworths, but it has now miraculously re-surfaced.
See the case below, I knew the day was coming when it would be legal to not stop for the police at night, rather meet them at the SAPS station!! Ha ha!

Coetzee v National Commissioner of Police and another
[2015] JOL 34050 (GP)

The applicant alleged that an attempt to stop his vehicle had been made whilst he was driving with his family in his car. As he was uncertain whether he was being stopped by legitimate police officials, he explained that he would stop at the nearest police station. Thereafter a number of police vehicles forced the applicant's vehicle off the road after which he was arrested by the police and taken to a police station where he was charged and held. His request for bail was refused.

When the matter came before the Court, in respect of the release of the applicant, the court ordered his immediate release.

[1] **A reminder that these Legal Notes are my summaries of all reported cases as are set out in the Index. In other words where I refer to the June 2012 SACR , you will find summaries of all the cases in that book. It is for private use only. It is only an indication as to what was reported, a tool to help you to see if there is a case that you can use!**

Held that the Court was satisfied on the probabilities and the evidence that the applicant had requested bail to be granted and that it was refused. It was highly improbable that the applicant wanted to remain in custody for the night, as was suggested by the respondents. The Court's request for information around the issue was ignored by the respondents.

The Court accepted the explanation of the applicant that, because of the current high crime rate in South Africa, and as a result of the fact that criminals pretend to be law-enforcement officials in order to commit crimes, it was reasonable for the applicant to have indicated that he was driving to the nearest police station.

Section 35(1)(d) of the Constitution provides that everyone who is arrested for allegedly committing an offence, has the right to be brought before a court as soon as reasonably possible, but not later than 48 hours after the arrest or the end of the first court day after the expiry of the 48 hours if the 48 hours expire outside ordinary court hours, or on a day which is not an ordinary court day. Section 35(1)(f) provides that everyone who is arrested for allegedly committing an offence has the right to be released from detention if the interests of justice permit, subject to reasonable conditions. Arrest is the most drastic method to secure a person's attendance at his trial and it ought to be confined to serious cases. It is a serious restriction of an individual's freedom of movement and it may also affect a person's dignity and privacy. Arrest should be effected only where it is likely that a summons or written notice to appear will be ineffective.

The Court found the arrest in this case to have been unlawful, as was the subsequent detention.

It was deemed appropriate to issue an order deterring public officials such as the police officers in this case, from acting unlawfully against the public. Those responsible, who were derelict in their duties, and who did not act in accordance with their constitutional obligations, were to bear the costs of the application de bonis propriis on the scale of attorney and own client.

2) The joke of the month is the people who got shelter and then took the Samaritan to court because he discriminated by having shelter rules! (They had to be in and out certain times and males and females were separated!

SA LAW REPORTS DECEMBER 2016

VIKING INSHORE FISHING (PTY) LTD v MUTUAL & FEDERAL INSURANCE CO LTD 2016 (6) SA 335 (SCA)

Shipping — Marine insurance — Hull policy — Inchmaree clause — Whether insurer may rely on breach of Merchant Shipping Act (MSA) warranty to avoid liability — Interpretation of due-diligence proviso to Inchmaree clauses — Proviso not concerned with operational negligence — Where insured vessel lost due to negligence of crew, peril covered by Inchmaree clauses — Neither MSA warranty nor due-diligence clause availing insurer.

On 8 May 2005 fourteen crew of the *Lindsay*, a fishing boat, drowned after it had collided with a much larger bulk carrier near Cape St Francis. The appellant (Viking)

was the owner of the ill-fated boat and the respondent (M&F) its insurer. Viking claimed an indemnity for the agreed value of the boat, but its claim was rejected by M&F. A failed High Court action led to the present appeal.
The policy incorporated the standard Institute Clauses for fishing vessels. The specific clauses relied on by Viking, known as *Inchmaree* clauses, added coverage for damage or loss caused, inter alia, by the negligence of the vessel's captain or crew. The *Inchmaree* clauses contained the usual 'due diligence' proviso, namely that such loss or damage should not result 'from want of due diligence by the assured, owners or managers'.
The policy also contained an MSA warranty (a standard clause in all marine hull policies issued by South African underwriters in relation to South African vessels) that stated that the insured would at all times comply with the Merchant Shipping Act 57 of 1971 (and regulations) pertaining to the vessel's safety or seaworthiness, but that the warranty should '[not] be construed to nullify the *Inchmaree* Clause . . . attached to this policy'.
The issue was whether Viking's claim for indemnity was barred by virtue of a breach of the MSA warranty.
Viking said that once it claimed in respect of a risk insured against under the *Inchmaree* clauses M&F could no longer rely on the warranty as a ground for avoiding liability. M&F argued that the warranty could be reconciled with the *Inchmaree* clauses and that breaches of the warranty could therefore properly be raised as a defence to Viking's claim. It sought to harmonise the two by suggesting that the loss would not be indemnified if the loss resulted from want of due diligence or if the owner did not at all times ensure compliance with the warranty, ie that Viking was obliged to comply with every regulation promulgated under the MSA for the safety and seaworthiness of the boat.
Held
As to liability under the Inchmaree clause: The evidence left no doubt that the collision would not have occurred and the *Lindsay* would not have sunk had it not been for the negligence on the part of either or both of the crews of the *Lindsay* and the bulk carrier (see [16]). Therefore the risk that materialised was covered by the *Inchmaree* clauses and obliged M&F to indemnify Viking *unless* M&F was able to show —

- that it was entitled to rely on a breach of the MSA warranty to avoid liability; or
- that the loss of the *Lindsay* was due to a want of due diligence by Viking as intended in the *Inchmaree* clauses (see [17]).

As to the MSA warranty: Since Viking's claim arose under the cover provided by the *Inchmaree* clauses, the warranty was not available to M&F as a ground for resisting it. To hold otherwise would be to allow that which the proviso to the warranty specifically prohibited, namely to 'nullify the *Inchmaree* Clause . . . attached to this policy' (see [18]). Given this conclusion, it was unnecessary to explore M&F's grounds for contending that the warranty had been breached.
As to due diligence: Want of due diligence in the context of Inchmaree cover was concerned with the equipment and loading of the vessel for voyage and not with seagoing or operational negligence, which was one of the perils insured against. It did not depend on the conduct of the vessel's crew but rather on the conduct of those responsible at a higher level of management, ie the 'assured, the owners or managers'. It had to be a personal failure on their part, not that of a subordinate (see [29]).

Since the evidence did not establish that the loss of the *Lindsay* was the result of want of due diligence, in this sense, on the part of Viking, the appeal would succeed and M&F be ordered to indemnify Viking under the policy.

eTV (PTY) LTD AND OTHERS v MINISTER OF COMMUNICATIONS AND OTHERS 2016 (6) SA 356 (SCA)

Media — Broadcasting — Television — Minister of Communications amending Broadcasting Digital Migration Policy without consulting broadcasters or relevant statutory bodies — Amendment markedly changing policy — Consultation required in terms of relevant statutory provisions — Electronic Communications Act 36 of 2005, ss 3(1), (5) and (6).

Review — Grounds — Legality — Minister of Communications amending Broadcasting Digital Migration Policy without consulting broadcasters or relevant statutory bodies — Amendment markedly changing policy — Rights of broadcasters impacted, as well as powers and duties of statutory bodies — Failure to consult irrational and procedurally unfair — Electronic Communications Act 36 of 2005, ss 3(1), (5) and (6).

Review — Grounds — Legality — Minister of Communications amending Broadcasting Digital Migration Policy without consulting broadcasters or relevant statutory bodies — Amendment failing to achieve its purpose — Amendment thus itself irrational — Electronic Communications Act 36 of 2005, ss 3(1), (5).

Review — Grounds — Minister of Communications amending Broadcasting Digital Migration Policy — In doing so, effectively issuing a binding direction — Could not do so, not having been given regulatory powers in respect of broadcasting in terms of Act — Electronic Communications Act 36 of 2005.

Since 2005 a process has been under way to give effect to the government's decision to change (or 'migrate') broadcasting services from analogue to digital. (At the time the policy was made, as well as when this matter was heard, both free-to-air commercial broadcasters, the SABC and eTV, used analogue signals.) As part of this process the government had also decided to subsidise the manufacture of set-top (ST) boxes, capable of converting digitally broadcast signals, for those who did not possess televisions that had the ability to do so — a majority of South Africans. In 2008 the then Minister of Communications, acting in terms of s 3(1) of the Electronic Communications Act 36 of 2005 (the ECA), made and published the Broadcasting Digital Migration Policy, which dealt with these issues. The policy was amended in 2012; notice of a further amendment was given in 2013, but nothing came of that; and the policy was again amended — without consultation — in 2015. Disputing the legality of this 2015 amendment, eTV (Pty) Ltd, supported by various public-interest bodies, instituted an application in the court a quo to set it aside. The pertinent issue was the extent to which the policy, in its various amended forms, provided for the capability of the ST boxes to decrypt encrypted digital signals. The applicants were in favour of such 'encryption capability' for various reasons, including inter alia to prevent the importation or sale of poor products; and because only through encryption could high-quality, high-definition broadcasting be ensured and piracy prevented, for broadcasters would not be able to acquire high-quality programmes from studios unless they could assure them of the security of the broadcasts. The policy in its original and amended 2012 forms required ST boxes to have encryption capability. In terms of the 2013 *proposed* amendments broadcasters

were permitted to encrypt their signals, and the ST boxes had encryption capability, but the broadcaster would have to pay government to make use of encryption. However, the 2015 amendments stated that ST boxes *would not have* encryption capability. The grounds of review raised by eTV in the court a quo were inter alia that the 2015 amendment, not being preceded by a consultation process, was unlawful and should be set aside; that it was irrational and thus breached the principle of legality; and that it was ultra vires. Rejecting all eTV's arguments, the High Court dismissed the application. It based much of its reasoning on the assumption that the 2015 amendment was not different in substance from the policy in its 2012 amended form, as well as from the proposed amendments advanced in 2013 in respect of which submissions were received from interested parties.

Whether consultation required by Act

Section 3(5) of the ECA provided that, when issuing a policy or a policy direction, the Minister had to consult the 'Authority' or the 'Agency', 1
as the case might be. It also required the Minister to publish the text of the intended policy or policy direction, by notice in the *Gazette*, inviting interested persons to submit submissions. Section 3(6) of the ECA provided that the provisions of s 3(5) did not apply to *amendments* to policy *directions* which were the result of submissions made after publication or consultation.

Held, that the Minister was obliged by the ECA to publish for comment the 2015 policy amendment she introduced and to consult before it was enacted. Such a construction would give effect to the constitutional values of openness, participation and accountability and thus give effect to the purpose of s 3(5), namely the promotion of openness and the proper consultation in the process of shaping policy that affected the public. It was clear that s 3(6) simply excluded the need to publish amendments to policy *directions*; amendments to policies still had to be published.

Held, further, that the court a quo was incorrect in its conclusion that, even if s 3(5) of the ECA obliged the Minister to have consulted on an amendment to the policy, she had in fact done so by considering the submissions made pursuant to the proposed amendments in 2013. This position was based on an assumption that the encryption amendment in 2015 was not markedly different from the proposed amendment in 2013. This, however, was incorrect; while the proposed 2013 amendments made provision for encryption capability in the ST boxes, at the expense of the broadcaster, the 2015 amendment did away with this completely.

The principle of legality

Held, that, where a policy was issued, or a policy was amended such that it differed markedly from previous version(s), and impacted on rights (and in this case on powers and duties of statutory bodies such as ICASA and USAASA), the requirements of rationality and fairness in procedure, which were both at the heart of legality, called for those affected to be consulted.

Held, that the Minister was required by the principle of legality, which encompassed the obligation to act rationally, to consult the statutory bodies charged with implementing the Act and all broadcasters (eTV among them) with an interest in the digital migration process. The Minister's failure to consult was procedurally unfair and was irrational.

Irrationality of the amendment itself

Held, that the amendment was inherently irrational for the reason that the amended policy did not achieve the goals which the Minister intended to achieve in making the amendment: The Minister indicated that, while government would not subsidise encryption, free-to-air broadcasters would be permitted, and free to decide, to

broadcast their signals in encrypted form; it was stated in the 2015 amended policy that 'individual broadcasters may at their own cost make decisions regarding encryption of content'. At the same time, however, the 2015 amended policy expressly prohibited encryption for the ST boxes. The effect of this was that broadcasters were effectively prevented from encrypting their signals: on the one hand, they could not broadcast encrypted signals to viewers with the subsidised ST boxes; on the other, the cost of supplying their own ST boxes with encryption capability to those who could not afford them would be prohibitively expensive.

The ultra vires challenge

Held, that the effect of the 2015 encryption amendment was to require free-to-air broadcasters to procure ST boxes with encryption capability for those viewers reliant on terrestrial television, and it would not be able to recover the costs from those viewers who could not afford them. The Minister had effectively issued a binding direction. This she could not do, having not been given regulatory powers in respect of broadcasting by the ECA.

The court, accordingly, declared to be unlawful the provision in the policy requiring that subsidised ST boxes were not to have encryption capabilities.

CITY OF JOHANNESBURG v DLADLA AND OTHERS 2016 (6) SA 377 (SCA)

Local authority — Powers and duties — To shelter evicted persons — Rules of shelter — Entry and exit time — Male-only and female-only dormitories — Rules not unconstitutional — Constitution, ss 10, 12, 14, 18 and 21.

In this case a private landowner obtained a High Court order evicting the occupiers of a building in the inner city of Johannesburg. The order was upheld in the Supreme Court of Appeal (SCA) and the Constitutional Court, which also ordered the City to provide temporary accommodation. To this end, the City arranged for the occupiers to be accommodated at a shelter run by a not-for-profit company. A precondition was that the occupiers agree to the rules of the shelter. One of the rules was that residents enter by eight in the evening, and leave by eight in the morning (nine on weekends); and another was that its dormitories were separated by gender — they were male only, or female only. The occupiers successfully challenged the constitutionality of the rules in the High Court, and the City appealed to the SCA. The issue was whether the rules justifiably or unjustifiably limited the constitutional right to freedom of movement, and the right of married couples and permanent life partners to live together.

Held, that the entry-and-exit rule was reasonable in the circumstances: it was intended to ensure the safety of residents, to discourage dependency, and to reduce the running costs of the shelter. So too, the gender-separation rule was reasonable: it was necessary in order for the shelter to accommodate all and yet maintain decency and decorum.

Appeal upheld.

CONSTANTIA INSURANCE CO LTD v MASTER OF THE HIGH COURT, JOHANNESBURG AND OTHERS 2016 (6) SA 386 (GJ)

Insolvency — Creditors — Proof of claims — Procedure — Liquidator's report disputing creditor's claims proved at meeting of creditors — Creditor substantiating claim after being afforded opportunity by Master — Master affording further

opportunity to liquidator to respond to substantiation, where no statutory authority therefor — Power of Master to do so — Procedure in Insolvency Act fair — Master limited to liquidator's report and creditor's substantiation in deciding whether to reduce or disallow claim — Insolvency Act 24 of 1936, s 45(3).

At a second meeting of creditors of the insolvent estate of a company in liquidation, a creditor proved three claims. The liquidators of the company, as they disputed such claims, submitted a report to the Master in terms of s 45(3) of the Insolvency Act 24 of 1936, detailing their concerns. Prior to deciding whether to reduce or disallow the creditor's proven claims, the Master, acting also in terms of s 45(3), gave an opportunity to the creditor to substantiate its claims. The creditor did so. The next step taken by the Master forms the subject-matter of this case. Without there being express provision for it in the Insolvency Act, the Companies Act 61 of 1973, or the winding-up regulations under the latter, the Master afforded the liquidators an opportunity to respond to the creditor's substantiation of its claims. The creditor argued that the Master had no power to take such a step, and sought a declaration to the effect that the Master, in making a decision under s 45(3) whether to reduce or disallow the claims, was confined to the liquidators' report and the creditor's response to it. It argued that *audi alteram partem (audi*) did not apply: firstly, the liquidators were not persons who were potentially affected by the decision to be taken by the Master; and, secondly, in any event, *audi* did not permit the filing of a document that the Act did not permit. The liquidators took the view that the *audi* principle would apply to s 45(3), unless expressly or by necessary implication excluded. They argued that, despite there being no express provision for the allowance of further submissions in the statutory regime, the audi principle, if not compelling it, at the very least permitted such a course. As the Master's decision was of a quasi-judicial nature, the liquidators' right to be heard permitted the further steps.
Held, that, given that the system of administrative law had been codified in the Promotion of Administrative Justice Act 3 of 2000 (PAJA), and the *audi* principle hence reposed there, it was unhelpful to go down the path of enquiring whether s 45(3) of the Insolvency Act excluded *audi*.
Held, further, that a decision under s 45(3) by the Master would constitute administrative action and could potentially affect the liquidators' rights and legitimate expectations. As such, the process under s 45(3) had to be procedurally fair in terms of s 3(1) of PAJA.
Held, further, that the procedure provided for in s 45(3) — in which form no right was afforded to liquidators to respond to the creditors' substantiation of their claims — was procedurally fair. Firstly, the subsection expressly made provision for a process whereby the liquidators (as well as the creditors) could be heard, in that they were entitled to submit a report to the Master if they disputed the creditors' claims. In this regard, the liquidators would be fully equipped to present their case considering that they would have already, in terms of their obligations under s 45(2), examined all available books and documents relating to the insolvent estate for the purpose of verifying the creditors' claims. They might too have undertaken an examination of a creditor in terms of s 44(7) at which they would acquire relevant information. Secondly, the legislature in s 44 envisioned a simple and expeditious procedure for the proof of creditors' claims. At the same time, a decision under s 45(3) did not represent a definitive and final determination of the validity of the creditors' claim: an aggrieved party could still review the decision under s 151, and also challenge the Liquidation and Distribution Account.

Held, further, that in this case the liquidators did not disclose any special facts or circumstances that rendered the procedure laid down in s 45(3) procedurally unfair, or showed how the demands of *audi* were not met by the rule in its present form. Application granted, and declaration made to the effect inter alia that the Master, in making a decision under s 45(3) whether to reduce or disallow the claims, was confined to the liquidators' report and the creditor's substantiation.

FIRSTRAND BANK LTD t/a FIRST NATIONAL BANK v ZWANE AND TWO OTHER CASES 2016 (6) SA 400 (GJ)

Mortgage — Foreclosure — Judicial execution — Sale in execution — Application for (i) judgment for accelerated full outstanding balance and (ii) order declaring property executable — Where mortgaged property debtor's primary residence, court may postpone both applications to afford debtor opportunity to pay arrears.

A court faced with an application by a mortgage lender for (i) default judgment for the accelerated full balance of the mortgage loan and (ii) an order declaring the mortgaged property executable would, if the mortgaged property were the debtor's primary residence, have a discretion to postpone both applications to afford the debtor the opportunity to pay the arrears.

LYONS v SKYWAYS BODY CORPORATE 2016 (6) SA 405 (WCC)

Sectional title — Body corporate — Members — Rights and duties — To service and maintain elevators servicing buildings — Elevators servicing four-storey buildings inoperable for two years, forcing residents and visitors to use stairs — Elderly owner of unit seeking final interdict compelling body corporate to repair elevators forthwith — Whether adequate alternative remedies available — Body corporate having acted in unreasonably dilatory fashion in attempting to repair elevators — Inoperable elevators creating unsustainable, undignified and intolerable situation for elderly and infirm persons, which class constituting most vulnerable in society — Alternative remedies proposed by body corporate not engendering prompt and enforceable action with tangible results for vulnerable — Final interdict granted, and body corporate ordered to repair elevators within three months.

The applicant was the owner of a unit in a sectional title scheme, which scheme included six four-storey buildings each with its own elevator. The elevators had not been operational for two years, except in respect of one of the six buildings, which had been only recently repaired. This had an adverse impact on the freedom of movement and the health and wellbeing of those residents and visitors who were elderly, like the applicant, and infirm. As a consequence, the applicant instituted an urgent application for a final interdict compelling the body corporate of the sectional title scheme to take steps to ensure that all the elevators were repaired and rendered operational forthwith. The actions which the body corporate had taken prior to the application — and which the applicant insisted were inadequate — included the following. The trustees of the body corporate adopted a resolution in December 2013 to repair the lifts and service them afterwards, and resolved to approve a quotation from a contractor A. In November 2014, owing to persistent non-performance on the part of A throughout the term of its contract, the body corporate cancelled that contract. Five months later it obtained a quotation from another contractor, B, and

the trustees passed a resolution in June 2015 to instruct B to effect repairs to the lifts. The latter failed to perform from July 2015. The body corporate met on various occasions to address this, and the trustees resolved to engage, through its managing agent, the management of B and insist on performance. These efforts did not resolve B's non-performance. The result was that only one lift was repaired in February 2016.
To establish the first requirement of a final interdict, namely the existence of a clear right, the applicant relied on the provisions of s 37(1)*(j)*, *(o)* and *(r)* of the Sectional Titles Act 95 of 1986, which set out the various functions of a body corporate. Ultimately, the existence of a clear right was conceded by the respondent, with the court adding that the owners of the units in the respondent body corporate were entitled to expect the latter to maintain the elevators in a state of good and serviceable repair. The dispute that remained for resolution was whether there were alternative adequate legal remedies available.
Held, that, at crucial times when a reasonable intervention on the part of the body corporate was required, it had acted in a dilatory fashion. In particular, it failed to implement the trustees' resolutions within a reasonable time, and in doing so it had acted with gross incompetence. No adequate explanation was provided for these failures. In the result, the steps taken by the body corporate through its managing agent were wholly inadequate, resulting in unreasonable delays in repairing or replacing the elevators in the building.
Held, that the class of people most affected by the state of affairs, namely the elderly and infirm, constituted the most vulnerable in our society and the inoperable elevators served to create an unsustainable, undignified and intolerable situation for them.
Held, that the alternative available internal remedies suggested by the respondents — ie holding a special meeting of the members of the body corporate in order to obtain a mandate for the trustees to take specific steps with clear time frames; or disposing of the trustees and replacing them with new trustees who could do what was necessary in the circumstances — would not provide adequate redress or offer a reasonable remedy for the persistent marginalisation of the rights of the applicant and other vulnerable people. The proposed remedies did not engender prompt, enforceable action, with clear time lines, and would not necessarily result in tangible relief for the applicant and the other vulnerable people using the buildings. Having regard to the fact that the applicant was an elderly person with a very good reason to bring the application as a matter of urgency, the applicant's right had to be fulfilled and the injury taking place needed to end forthwith.
Held, that the applicant had established on a balance of probabilities that he had exhausted other remedies at his disposal and had made out a case for a final interdict. The body corporate was to take the steps necessary to ensure that elevators in and serving all the buildings under its control were repaired and rendered fully operational within three months of the date of the order.

ATTORNEYS FIDELITY FUND BOARD OF CONTROL v INTIBANE MEDIATES AND OTHERS 2016 (6) SA 415 (GP)

Agency and representation — Agent — Commission — Disclosure — Of commission earned by purchaser's agent from seller — Disclosure necessary if earned without purchaser's knowledge.

Delict — Specific forms — Pure economic loss — Claim for damages by purchaser against seller arising from purchase price being inflated with secret commission paid by seller to purchaser's agent — Seller's non-disclosure of secret commission amounting to negligent misrepresentation giving rise to delictual liability.

Delict — Specific forms — Negligent misrepresentation — Non-disclosure — Seller not disclosing commission agreement with purchaser's agent — In circumstances of case, policy considerations requiring that legal duty to disclose be imposed.

The Law Societies of South Africa (the LSSA) and the Attorneys Fidelity Fund (the AFF) mandated one Mr Ramothibe (trading as the first defendant) to find a suitable property to serve as their joint headquarters. Mr Ramothibe discharged his mandate and a building he had identified was purchased from the third and fourth defendant companies for R37,5 million — this having been presented by one Mr Roome on behalf of the sellers as his 'bottom line' price. However, before transfer of the property, it came to light that Mr Roome had entered into an agreement with Mr Ramothibe that any balance of an offer over R32 million could be retained by Mr Ramothibe as a commission not to be disclosed. Transfer was nevertheless proceeded with, the 'secret commission' remaining in the seller's attorneys' trust account pending the outcome of this case — against the sellers, after Mr Ramothibe had passed away — for the recovery of the R5,5 million by which the purchase price had been inflated.

At issue was whether, in the circumstances of the unchallenged evidence as set out at [9] – [92], Mr Roome was under a legal duty to have disclosed the secret commission. If so, then his non-disclosure thereof would constitute a negligent misrepresentation giving rise to delictual liability (see [109]). The unchallenged evidence pointed to Mr Roome having been aware of collusion between Mr Ramothibe and the chief executive officer of the LSSA at the time (one Mr Daya) for the latter to promote the acquisition of the property at a price that would accommodate secret commission (see [107]). The common-cause facts also established that during the negotiation process the AFF had no, and could not have had, any knowledge that Ramothibe for his services would also earn any secret commission from the seller.

Held

Policy considerations placed a legal duty on Roome, as the seller, to inform the AFF that his real bottom-line price was R32 million and that pressure was being placed on the AFF to pay more to accommodate a secret-commission deal. The reflection of commission was most definitely necessary where the agent of the purchaser was, unbeknown to the purchaser, also receiving a secret commission. Roome should reasonably have contemplated that the AFF would not pay Ramothibe an exorbitant commission — secretly agreed to by them — as an inflated purchase price, and he should have disclosed this. The community's legal convictions demanded Roome's disclosure of the secret commission, and his non-disclosure was therefore wrongful. In the circumstances, there could be no reluctance to impose a duty to disclose to the AFF that he struck this deal with Ramothibe.

Thus, by representing that his bottom-line price was in fact R37,5 million when there was a duty to disclose the secret commission, Roome made a negligent misrepresentation to the AFF about the purchase price and commission pertaining to the sale transaction. This was a material misrepresentation (intrinsically relevant to the sale agreement); causally linked to the damages (it induced the contract); and caused the AFF patrimonial damages of R5,5 million (that they would not have paid

but for the misrepresentation). The sellers were therefore jointly and severally liable to pay the AFF this amount in damages.

EDUCATED RISK INVESTMENTS 165 (PTY) LTD AND OTHERS v EKURHULENI METROPOLITAN MUNICIPALITY AND OTHERS 2016 (6) SA 434 (SCA)

Local authority — Town planning — Municipality intending to allow building of temporary informal housing on land zoned Residential 1 — Objection by neighbouring property owners — No reason for informal housing to be excluded from ambit of applicable town-planning scheme — Moreover, municipality permitted to depart from zoning scheme if to the benefit of community or surrounding areas.

Housing — Right to housing — Informal settlements — Upgrading — Municipality may, pending upgrade, relocate residents to temporary informal housing on township designated Residential 1.

The appellants opposed the first respondent municipality's plan to relocate the residents of the Everest informal settlement, located in a township called Payneville 3, Springs, to nearby Payneville 1. Everest was earmarked for urgent attention because it lacked basic services and was threatened by dangerous levels of radiation from nearby mining works. The idea was to subdivide some of the erven in Payneville 1 and allow the Everest residents to build themselves informal housing on the subdivided erven pending their return to an upgraded Payneville 3. The intended informal housing consisted of wood, corrugated iron and fibreglass sheeting.
The appellants contended that the planned subdivision of Payneville 1 was intended to circumvent the existing town-planning scheme (the zoning scheme) by establishing an informal settlement instead of a residential development. The appellants, who were developing properties in an adjacent township, argued that the construction of ablution facilities in Payneville 1 was putting off potential buyers who did not want to live next to an informal settlement. They argued that the municipality's conduct amounted to the unlawful rezoning of Payneville 1 from Residential 1 to Special or Temporary Use, and that it would be unlawful for anyone to occupy the township until all the conditions attaching to its initial proclamation had been complied with.
The zoning scheme provided that properties zoned Residential 1 could be used for the erection of 'dwelling house', which was defined as 'single, a free-standing unit'. A 'dwelling unit' was defined as an 'interconnected suite of rooms . . . designed for occupation and use by a single family'. The appellants' complaint was that the informal housing contemplated by the municipality, being informal and temporary, would be impermissible in a Residential 1 zone since they would not constitute dwelling houses as contemplated in the scheme. Clause 32 of the scheme permitted the local authority to depart from the scheme if it were deemed 'beneficial to the community or surrounding areas'.
In November 2012 the appellants asked the Johannesburg High Court to interdict the municipality from taking further steps to implement the Jsubdivision approval or allowing any person to Payneville 1 pending the outcome of a claim for final relief. An interim order was granted on A 5 December 2012 and extended from time to time thereafter, but an application for final relief was dismissed in May 2014. The judge granted leave to appeal to the SCA.
Held

Town-planning schemes, which were difficult to reconcile with the housing needs of poor South Africans, should not be rigidly interpreted in cases such as the present.There was no reason why the informal houses contemplated by the municipality could not, provided they were free-standing units, be described as 'dwelling houses' as intended in the scheme (see [20] – [24]). Even if the municipality had, in implementing the proposal, departed from the scheme, it would not have been unlawful because clause 32 expressly authorised the local authority to depart from it for the benefit of the community (see [36]). So, even had the implementation of the municipality's plans for Payneville Extension 1 in some respect involved a departure from the use provisions of the Scheme, that departure was one that it was entitled to authorise. Appeal upheld.

JVJ LOGISTICS (PTY) LTD v STANDARD BANK OF SOUTH AFRICA LTD AND OTHERS 2016 (6) SA 448 (KZD)

Business rescue — Moratorium on legal proceedings against company — Meaning of '[property] lawfully in its possession' — Companies Act 71 of 2008, s 133(1).

In this case the applicant company and first respondent bank entered into an instalment sale agreement for a vehicle. Under the agreement, the company (the buyer) took possession, but the bank retained ownership pending full payment. Ultimately, the company defaulted on its instalments, the bank cancelled the agreement, and obtained an order confirming the cancellation and for the vehicle's return. Soon thereafter the company was put into business rescue, and when the rescue plan was eventually voted on, the bank voted decisively against it. The bank then notified the company that it intended executing the order for return of the vehicle.
This prompted the company to approach the High Court, contending that the moratorium in s 133 of the Companies Act 71 of 2008 applied, and that it justified granting an interdict against enforcement of the order of return (see [5]). The company also applied for the setting-aside of the bank's vote.
The key issue was whether the requirement for the operation of the moratorium, that the vehicle be 'lawfully' in the possession of the company, was satisfied. This raised the further question of what 'lawful' possession meant.
Held, that there were two possible meanings. The first was possession under right — for example under a right to possess granted by an extant instalment-sale agreement; while the second was possession without right but in circumstances where possession had been acquired lawfully — ie without force or stealth. Of these meanings, the first was to be preferred. This had the consequence that the moratorium did not apply and support the grant of the interdict.As for the prayer to set aside the bank's vote, *held* that it would not be reasonable and just to do so. Application dismissed.

ERSTWHILE TENANTS OF WILLISTON COURT AND OTHERS v LEWRAY INVESTMENTS (PTY) LTD AND ANOTHER 2016 (6) SA 466 (GJ)

Judgments and orders — Rescission — Whether order suspended by application for its rescission — Superior Courts Act 10 of 2013, s 18.

Applicants were the erstwhile occupiers of a building, respondents its owners or controllers. The owners had obtained an interim eviction order, and the occupiers had applied for its rescission. While the application was pending the sheriff evicted the occupiers, who applied for a mandament van spolie. One of its requisites, unlawful deprivation of possession, was in focus: if the eviction order was suspended by the rescission application, the eviction would be unlawful; if the order were not suspended, the eviction would be lawful. The issue was whether there existed a rule that an order was suspended by an application for its rescission.
Held, that it was doubtful that there was a common-law rule to this effect; and that neither s 18 nor any other section of the Superior Courts Act 10 of 2013 created such a provision. The order not having been suspended, eviction under it had been lawful, and the occupiers not unlawfully deprived of possession. The application for the mandament van spolie was consequently refused.

REGISTRAR OF MEDICAL SCHEMES AND ANOTHER v GENESIS MEDICAL SCHEME 2016 (6) SA 472 (SCA)

Medicine — Medical aid scheme — Annual financial statements — Credit balance in members' personal savings accounts (PMSA funds) — Constituting trust property and to be accounted for separately — Financial Institutions (Protection of Funds) Act 28 of 2001, s 4(4) and s 4(5); Medical Schemes Act 131 of 1998, s 35(9)(c).

Insolvency-concursus creditorum- in the event of the insolvency of a medical scheme- Since funds invested in their savings accounts by medical scheme members clearly constituted incorporeal assets invested, controlled and administered by the scheme for and on behalf of its members-'trust property'- ring-fenced against claims by the general body of creditors.

The Registrar of Medical Schemes (the appellant) rejected the respondent medical scheme's 2012 annual financial statement because it reported the funds in its members' personal medical savings accounts (PMSA funds) as its own assets. The registrar argued that the funds were trust property of the members as intended in s 4(5) of the Financial Institutions (Protection of Funds) Act 28 of 2001 (the FI Act), and therefore had to be accounted for separately. He based his standpoint on *Registrar of Medical Schemes v Ledwaba NO and Others* TPD 18454/06 ([2007] JOL 19202) (the so-called *Omnihealth* decision), which held that since the funds were trust property, they were not available to the general body of creditors (concursus creditorum) of an insolvent medical scheme. On review the court a quo (the Cape Town High Court) upheld the scheme's view that the PMSA funds were its own. The registrar appealed to the Supreme Court of Appeal.
Of relevance to the issue before the court were the following statutory provisions: Section 35(9)*(c)* of the Medical Schemes Act 131 of 1998 (the MSA), which provides that amounts standing to the credit of members' PMSAs constitute 'liabilities of a medical scheme' for the purposes of the MSA.The definition in the FI Act of 'trust property' as 'any corporeal or incorporeal . . . asset invested, . . . controlled, administered or alienated by any person . . . for or on behalf of, another person'.
Held per Willis JA for the majority

The appeal would be upheld. It would offend against justice if PMSA funds were to be available to the predations of the concursus creditorum in the event of the insolvency of a medical scheme. Since funds invested in their savings accounts by medical scheme members clearly constituted incorporeal assets invested, controlled and administered by the scheme for and on behalf of its members, *Omnihealth* was correct in finding that they constituted 'trust property' as defined in the FI Act.. They would, in the event of the insolvency of the scheme, be ring-fenced against claims by the general body of creditors. The scheme's accounts were misleading because they did not reflect the special status of funds standing to the credit of the PMSAs (see [58]). Section 35(9)*(c)* of the MSA required the scheme's corresponding liability to be an 'on balance sheet' item, its corresponding asset being found in the scheme's cash holdings (see [60] – [62], [71]). The scheme's balance sheet had to designate, in a manner consistent with generally accepted accounting practice, the extent to which such cash holdings were held for and on behalf of members in respect of their savings accounts; and its ledgers would have to keep account of the amount standing to the credit of each individual member's savings account. The funds designated on the balance sheet as 'trust property' would be distinguished from other funds by being ring-fenced, as a matter of law, from the concursus.
Held per Cachalia JA dissenting
It was clear that the MSA did not treat PMSA funds as trust property. The relevant provisions of the MSA permitted no interpretation other than that the funds allocated to the PMsAs remained the assets of the medical scheme and that the scheme was obliged to treat these funds as its own assets and to reflect them accurately as such in its annual financial statements.

ARENDSE AND OTHERS v VAN DER MERWE AND ANOTHER NNO 2016 (6) SA 490 (GJ)

Business rescue — Moratorium on legal proceedings against company — Exceptions — Leave of court to proceed — Criteria for leave that applicant must establish — How court to exercise its discretion — Companies Act 71 of 2008, s 133(1)(b).

The applicants applied here for the court's leave to institute proceedings against a company in business rescue (Companies Act 71 of 2008, s 133(1)*(b)*).
The issues were (1) what the criteria were for grant of leave; and (2) the way in which the court should exercise its discretion.
Held, as to (1), that the applicant had to establish a prima facie case against the company; and give reasons why the proceedings were necessary and appropriate. A prima facie case would be established where the applicant's averments revealed a cause of action or triable issue.
Held, as to (2), that the court's discretion should be exercised judicially, and should be guided by the interests of justice.
Here, the court would have granted the applicants leave.

SOUTHERN VALUE CONSORTIUM v TRESSO TRADING 102 (PTY) LTD AND OTHERS 2016 (6) SA 501 (WCC)

Business rescue — Moratorium on legal proceedings against company — Property owner cancelling lease with company and instituting proceedings for ejectment —

Company then put into business rescue, and defence raised that moratorium barring proceedings — Whether so — Companies Act 71 of 2008, ss 133(1) and 134(1)(c).

A company failed to pay the rent for the premises it occupied, causing the owner-landlord to cancel the lease and begin proceedings for ejectment. (The proceedings were based on the rei vindicatio.) The company was then put into business rescue, and the business rescue practitioners raised the defence that the proceedings were barred by the moratorium in s 133(1) and by the provisions of s 134(1)*(c)* of the Companies Act 71 of 2008 (see [25]).
Held, that the owner's cancellation of the lease meant that the property was no longer in the lawful possession of the company, a requirement for the operation of s 133(1)'s moratorium or s 134(1)*(c)*. The owner was thus not barred from proceeding. Ejectment ordered.

MASANGO v ROAD ACCIDENT FUND 2016 (6) SA 508 (GJ)

Attorney — Fees — Contingency fees — Statutory limitation — Whether legal practitioner entitled to charge as fees 25% of capital amount recovered for client — 'Normal fees' and 'success fees' defined — No basis for legal practitioner to charge as fees percentage of capital amount awarded — Contingency Fees Act 66 of 1997, s 2(1)(b) and s 2(2).

In issue was the lawfulness of a contingency fees agreement concluded between a firm of attorneys and its client. The agreement provided that 'if the client [were] successful in [the envisioned legal] proceedings a fee [would] be payable to the attorney, calculated at 25% (exclusive of VAT) of the total amount awarded and/or obtained by the client in consequence of the proceedings'. Section 2(1)*(b)* of the Contingency Fees Act 66 of 1997 provides that a legal practitioner may in terms of an agreement entered into with the client charge fees 'higher than his or her normal fees, set out in such agreement, for any such services rendered, if such client is successful in such proceedings to the extent set out in such agreement'. Pertinently, such higher fee — a 'success fee' — is subject to two caps, as provided in s 2(2). One, it shall not exceed such normal fees by more than 100%. And, two, *in the case of claims sounding in money* such success fee 'shall not exceed 25 % of the total amount awarded or any amount obtained by the client in consequence of the proceedings concerned, which amount shall not, for purposes of calculating such excess, include any costs'.
The questions to be answered here were the following: *(a)* Was a legal practitioner entitled to charge *as his or her fees* 25% of the capital amount recovered for his or her client? *(b)* And, if he or she could do so, might VAT be imposed on top of the 25% capital amount? Or, to put it another way, for the purposes of calculating the 25% cap on the 'success fees', was the latter taken to include or exclude VAT?
Held, as to *(a)*, that the Act envisioned the 'normal fee' as the base from which a percentage increase was permissible, and that the validity of the clause in question therefore depended on the meaning of 'normal fees' and 'success fees' (ie the increased normal fee).
Held, that 'normal fees' in litigation were fees which were recoverable by a practitioner from his or her own client for professional services actually rendered and which would be allowable on taxation of an attorney and client bill by the taxing master outside of any special arrangements.

Held, further, that a 'success fee' was a normal fee which had been increased by a pre-agreed percentage.
Held, further, that an attorney cannot charge for anything but services actually rendered.
Held, further, that there was no basis, in the CFA or elsewhere, for the practitioner to charge as his or her fees 25% (or a smaller percentage) of the client's capital. The 25% referred to in s 2(2) was introduced only as a cap: the practitioner charged a success fee which could not exceed 25% of the client's capital award; 25 % of the capital claim was therefore not a fee. An attorney's charge was neither a percentage commission nor a share in the injuries or damages suffered by his client. Outside the strict confines of the CFA there was no basis for a legal practitioner to share in the capital of his or her client's claim.
Held, accordingly, that the agreement was unlawful and stood to be declared invalid.
Held, as to *(b) (and on the assumption that the court was incorrect as to (a)*), that the 14% VAT payable by the client formed part of the fee charged by the attorney, and that that fee was subject to the 25% cap. This followed from the fact that VAT was levied on the supply of legal services by the legal practitioner, and it was payable by the practitioner as a vendor. It was therefore a tax on the practitioner — and not the client. And it was not a cost to the practitioner which he or she was entitled to recover from the client over and above the practitioner's maximum fees. *Held*, further, that VAT was not a 'cost' for the purposes of the proviso to s 2(2) of the CFA.
Held, accordingly, that, as the contingency agreement in question sought to authorise the attorney to recover VAT above the 25% cap imposed by s 2(2) of the CFA, it was also for this reason invalid.

DE SOUSA AND ANOTHER v TECHNOLOGY CORPORATE MANAGEMENT (PTY) LTD AND OTHERS 2016 (6) SA 528 (GJ)

Company — Oppressive conduct — Relief — Whether available — Conduct affecting company and thence shareholders — Conduct affecting all members — Companies Act 61 of 1973, s 252.

The plaintiffs were minority shareholders of a company. They asserted that its controller had diverted its business to a second company and its profits to third parties, and that this had reduced the value of their shares. They sought an order under s 252 of the Companies Act 61 of 1973 that the company or majority shareholders purchase their shares.
The defendants applied to separate a question of law in the form of an exception. They asserted firstly that s 252 was unavailable where the impugned conduct impacted on the company and thence only indirectly on the shareholders. *Held*, that there was no such restriction on the section's use.
The second contention was that the section was only available if 'part of the members' were hit by the conduct, and not, as here, where all were. *Held*, that this was not so — the section could be used even where all of the members were affected. In such a situation, the conduct might be merely prejudicial to some, unfairly prejudicial to others. Application dismissed.

ABSA BANK LTD v NAUDE NO AND OTHERS 2016 (6) SA 540 (SCA)
Business rescue — Business rescue plan — Application to set aside — Creditors to be joined — Companies Act 71 of 2008.

Appellant creditor had applied for a declaration that a vote approving a business rescue plan was invalid. (Appellant, which had voted against the plan, contended that the size of its voting interest had been erroneously calculated and that, properly determined, it would have had a sufficient interest to oppose the plan.) However, appellant had failed to join the other creditors in the application and had instead given them notice of it in terms of s 130 of the Companies Act 71 of 2008. This had prompted the High Court to dismiss the application for non-joinder, and the appellant had thereafter appealed the High Court's decision to the Supreme Court of Appeal.
Held, that the creditors had a direct and substantial interest in the subject-matter of the application, and would have been prejudiced had the order that the appellant sought been granted. Consequently they ought to have been joined.
Appeal dismissed.

ABRAHAMS v ROAD ACCIDENT FUND 2016 (6) SA 545 (WCC)

Motor vehicle accident — Compensation — Claim against Road Accident Fund — Single-vehicle collision — Claim based on negligence of owner — Alleged failure to maintain vehicle — Owner having consented to claimant's use of vehicle — Consent constituting sufficient linkage between parties to trigger liability — Special plea against claim dismissed — Road Accident Fund Act 56 of 1996, s 17(1)

Section 17(1) of the Road Accident Fund Act provides that the RAF must 'compensate any person (the third party) for any loss or damage . . . suffered as a result of any bodily injury . . . caused by . . . the driving of a motor vehicle by any person . . . if the injury . . . is due to the negligence… of the driver or owner of the motor vehicle or of his or her employee in the performance of the employee's duties'. Section 18 limits the liability of the RAF where the loss or damage contemplated in s 17 was suffered by someone who was being conveyed 'in or on the motor vehicle concerned and who was an employee of the driver or owner of that motor vehicle'. In such a case the claim had to be instituted under occupational injury legislation and the balance then claimed from the RAF.
The plaintiff, who was injured in a burst-tyre accident while doing contract work for the owner of the vehicle, instituted a third-party claim under s 17(1) based on the owner's alleged negligent maintenance of the vehicle. The RAF raised special pleas against the claim, arguing that since the plaintiff was not an employee of the owner as intended in s 18, he was, being the only driver involved in the accident, disqualified from claiming under s 17(1). The RAF argued that the plaintiff was attempting to portray himself as a third party while he was actually a first — ie the insured — party. In response the plaintiff argued that since he had driven the vehicle with the express permission of the owner, who had been negligent in not properly maintaining it, his claim fell squarely within the realm of s 17(1). The only issue before the court was whether it would uphold the special pleas. All other matters, including the issue of causal negligence, stood over for later determination.
Held
The RAF Act had to be interpreted in favour of the third party to afford him or her the widest possible protection (see [20] – [21]). The RAF's reasoning in respect of the designation of the parties was flawed: in a RAF claim the first party was always the insured, which in the present case was the owner, not the plaintiff. The fact that the plaintiff drove the insured vehicle did not transform him into the first party. While a

driver had no claim against the RAF if he were injured in a single-vehicle collision and there was no other driver to blame, this was not the case where the wrongdoer was the owner of the vehicle who had consented to its use by the injured driver. The consent established the required legal nexus to support a common-law claim by the plaintiff against the owner, and in the circumstances the RAF's special pleas had to be dismissed

ELS v JAGGA NO AND OTHERS 2016 (6) SA 554 (FB)

Marriage — Divorce — Maintenance — Spouse — Deed of settlement incorporated in divorce order providing for payment by husband to wife of maintenance until death or remarriage of wife — Whether claim for maintenance enforceable against husband's estate — In general, agreement to pay maintenance until death or remarriage of receiving partner terminating on death of paying partner, unless sufficient indication or express stipulations to contrary — Divorce Act 70 of 1979, s 7(1).

A deed of settlement incorporated in a divorce order provided for the payment of maintenance by the defendant husband to the plaintiff wife until the death or remarriage of the latter, whichever event occurred earlier. Did the husband's obligation to pay maintenance come to an end on his death such that the deceased estate would not be bound by the agreement? The court found that it did, holding that, in general, an agreement to pay maintenance until the death or remarriage of the receiving partner terminated at the death of the paying partner, unless there were sufficient indications or express stipulations to the contrary.

DANIELS v MINISTER OF DEFENCE 2016 (6) SA 561 (WCC)

— Elements — Negligence — What constitutes — Plaintiff suffering perforation of bowel resulting in sepsis — Failure of medical practitioners treating plaintiff's prior complaints to definitively diagnose small bowel pathology by conducting laparotomy/laparoscopy — Circumstances calling for procedure as matter of urgency — Medical practitioners negligent and liable.

Delict — Elements — Unlawfulness or wrongfulness — Liability for omission — Plaintiff suffering perforation of bowel resulting in sepsis — Failure of medical practitioners treating plaintiff's prior complaints to definitively diagnose small bowel pathology by conducting laparotomy/laparoscopy — Circumstances calling for procedure as matter of urgency — Medical practitioner's oath demanding of them to place interests of patient before any cost-saving considerations or other conditions of employment — Failure to do so wrongful.

Medicine — Medical practitioner — Negligence — Action for damages — Medical practitioner's oath demanding of them to place interests of patient before any cost-saving considerations or other conditions of employment — Failure to do so wrongful.

Medicine — Medical practitioner — Negligence — Action for damages — Plaintiff suffering perforation of bowel resulting in sepsis — Failure of medical practitioners treating plaintiff's prior complaints to definitively diagnose small bowel pathology by conducting laparotomy/laparoscopy — Circumstances calling for procedure as matter of urgency — Medical practitioners negligent and liable.

This is an action for damages instituted by the plaintiff, a corporal in the South African Air Force, against the defendant — his employer, the Minister of Defence — arising out of the alleged negligent medical treatment he received from employees of the defendant at 2 Military Hospital in Wynberg, Cape Town. The plaintiff claimed that the inadequate treatment he received there led to his sustaining a perforation of his bowel, resulting in sepsis, and various damages. The facts were as follows. On 22 May 2011 the plaintiff became ill while on board a vessel, complaining of a swollen and painful stomach, nausea and vomiting. He was airlifted to the military hospital in Pretoria, where the possibility of a bowel obstruction was raised. After he had returned to Cape Town, he was admitted on 2 June at 2 Military Hospital where he stayed until he was discharged on 7 June. Various investigations were conducted, and, further, a request was made for a small bowel follow-through study with a private practitioner — the relevant machine at the military hospital was not working — though nothing came of this. No definitive diagnosis had been made at the time of the plaintiff's discharge. He returned on 8 June to the hospital, complaining of severe abdominal pain and vomiting. The treating doctor decided not to admit him, and was of the view that he was malingering. He returned on 24 June, again complaining of pain and nausea, was admitted and stayed there until 18 July when he was discharged, once again without any definitive diagnosis having been made. During this stay a small bowel follow-through study was eventually carried out, on 7 July, which revealed swelling of the small bowel and a delayed transit time. On 3 and 10 August the plaintiff again saw doctors in the urology department at the military hospital. They strongly recommended that the plaintiff be admitted for the purpose of conducting a laparoscopy/laparotomy, to no avail. The plaintiff eventually had an emergency laparotomy on 15 August 2011 at Tygerberg Hospital after being admitted there. It revealed a perforation of his small bowel.

The plaintiff submitted that the medical practitioners who treated the plaintiff at the 2 Military Hospital were negligent in, inter alia, failing to diagnose, and provide appropriate treatment for, a perforation of the bowel and the resultant sepsis; in failing to diagnose and treat a bowel obstruction which had led to the perforation; and in failing to carry out, timeously or at all, in order to establish the cause of the bowel obstruction, special investigations, namely a laparotomy/laparoscopy. The plaintiff was of the view that a laparotomy/laparoscopy conducted at an earlier stage, and while the plaintiff was under the care of the practitioners at the Wynberg military hospital, would have revealed that the small bowel was in danger of perforating, and the ultimate harm could have therefore been avoided.

Held, that the doctors treating the plaintiff at 2 Military Hospital were negligent, which negligence was made up of a continuous series of omissions and failures which culminated in the necessary procedure not being performed timeously and at all. The remissness of the attending doctors was demonstrated by inter alia their: discharging the plaintiff the day after obtaining authorisation to have done privately, on an emergency basis, a small bowel follow-through study, and then only doing the study on 7 July; discharging the plaintiff without a definitive diagnosis; not admitting the plaintiff on 8 July despite his complaints; and not by 8 July considering it imperative to do a laparotomy/laparoscopy, where the findings of the study clearly called for such a procedure in order to investigate the internal condition of the small bowel.

Held, that investigations conducted by the treating doctors, together with the symptoms and signs exhibited by the plaintiff, which were indicative of a small bowel pathology, called for further investigation as a matter of urgency, in the form a

laparotomy/laparoscopy, in order to discover the cause of the pathology. The failure to do so on the part of the treating doctors in the employ of the defendant also amounted to negligence.
Held, that the moral convictions of society, the National Health Act 61 of 2003 and ethical considerations required medical practitioners to treat patients promptly to establish the cause of an illness, or to refer the patient to someone who could attempt to establish that cause, and to explain to a patient the consequences of not making a definitive diagnosis.
Held, that the attitude of the treating medical practitioners was indicative of either a cavalier approach or an overemphasis on cost-saving at the expense of the wellbeing of the patient. (The failure to have the bowel follow-through study performed by a private hospital appeared to be a cost-saving measure.) Ultimately, a medical practitioner's oath demanded of him/her to place the interests of the patient before any cost-saving considerations or other conditions of employment. A failure to do so was wrongful conduct.
Held, that the defendant's failure to do a laparotomy/laparoscopy led to the eventual perforation and emergency surgery.
Application granted, defendant being found liable for such damages as the plaintiff might prove to have arisen out of the defendant's employees' negligent treatment of the plaintiff at 2 Military Hospital over the period 2 June to 10 August 2011.

ERAVIN CONSTRUCTION CC v BEKKER NO AND OTHERS 2016 (6) SA 589 (SCA)

Company law — Business rescue — Prohibition against enforcement of pre-business rescue 'debt owed' — Meaning of 'debt owed' in Companies Act 71 of 2008, s 154(2).

Company law — Business rescue — Prohibition against enforcement of pre-business rescue 'debt owed' — Void disposition made to recipient subsequently placed under business rescue, constituting pre-business rescue 'debt owed' — Companies Act 71 of 2008, s 154(2); Companies Act 61 of 1973, s 341(2).

Company — Winding-up — Unlawful alienations and preferences — Void disposition — Void disposition made to recipient subsequently placed under business rescue, constituting pre-business rescue 'debt owed' — Companies Act 61 of 1973, s 341(2); Companies Act 71 of 2008, s 154(2).

The liquidators of a company being wound up sought to recover as a void disposition (under s 341(2) of the Companies Act 61 of 1973) a payment made by the company to the appellant, a close corporation subsequently placed under business rescue. At issue was whether, as contemplated in s 154(2) of the Companies Act 71 of 2008, the void disposition constituted a pre-business rescue 'debt owed' that 'a creditor is not entitled to enforce'.
Held Section 341(2) of the old Act and s 154(2) of the new Act were concerned with *when* debts were owed, not with whether they were due and claimable. The recipient of a void disposition had no right to retain it and consequently owed a debt to the body that made the prohibited disposition — as soon as it was received. Accordingly, debt arising from a void disposition made to a recipient subsequently placed under business rescue constituted an unenforceable pre-business rescue 'debt owed' as contemplated in s 154(2).

UNIVERSITY OF STELLENBOSCH LEGAL AID CLINIC AND OTHERS v MINISTER OF JUSTICE AND CORRECTIONAL SERVICES AND OTHERS 2016 (6) SA 596 (CC)

Constitutional law — Human rights — Right of access to courts — Requiring judicial supervision of execution against all forms of property — Constitution, s 34.
Constitutional law — Legislation — Validity — Magistrates' Courts Act 32 of 1944, s 65J(2)(a) *and s 65J(2)*(b)(i) — Invalid to extent of authorising issuing of emoluments attachment orders without judicial supervision — Severance and reading-in ordered to ensure required judicial supervision.
Execution — Attachment of salary — Constitutionality of process — Constitution requiring judicial supervision of execution process against all forms of property — Relevant sections of Magistrates' Courts Act constitutionally invalid in that they authorise issuing of emoluments attachment orders without judicial supervision — Severance and reading-in ordered to ensure required judicial supervision — Magistrates' Courts Act 32 of 1944, ss 65J(2)(a) *and 65J(2)*(b)(i).

This case concerned an application to the Constitutional Court for confirmation of a High Court order that ss 65J(2)*(a)* and 65J(2)*(b)*(i) of the Magistrates' Courts Act 32 of 1944 (the Act) were 'inconsistent with the Constitution and invalid to the extent that they fail to provide for judicial supervision of the issuing of an emoluments attachment order against a judgment debtor'. The impugned sections read in relevant part that —
'an emoluments attachment order shall not be issued . . . (a) unless the judgment debtor has consented thereto in writing or the court has so authorised . . . ; or (b) unless the judgment creditor or his or her attorney has first (i) sent a registered letter to the judgment debtor . . . warning him or her that an emoluments attachment order *will* be issued if the said amount is not paid . . . ; and (ii) . . . .' [Emphasis added.]
The first judgment (a minority judgment, Jafta J alone dissenting) held that s 65J was capable of being interpreted as requiring judicial supervision when emoluments attachment orders (EAOs) were issued — ie that it may only be issued by the magistrates' court and not by the clerk of the court — and assuming that the Constitution required judicial supervision, that requirement was therefore met, and so the High Court's order could not be confirmed (see [94]).
The concurring majority judgments (the second and third judgments per Cameron J and Zondo J, respectively) *held* as follows:
It must be affirmed definitively — not merely assumed — that it was a constitutional requirement that when orders issued from a court were executed there must be judicial supervision. Execution orders were part of the judicial process, and judicial supervision of the execution process against all forms of property was constitutionally indispensable. Primarily, the debtor's s 34 right of access to court was breached by an execution process not sanctioned by a court.
To determine whether the Act provided for judicial supervision it was necessary to inquire into whether it was the court or someone else that had the power to issue EAOs (see [163]). Section 65J, the crucial provision for putting into operation the issuing of EAOs, nowhere required a magistrate's intervention (see [142]). The scene for s 65J(2) was set by s 65J(1), which provided that, subject to ss (2), 'a judgment creditor may cause an order . . . to be issued from the court'. The prime agency was clear — it was the judgment creditor — and the EAO was issued not 'by'

the court, but 'from' the court (see [143]). This meant that the judgment creditor had the authority to ensure that the EAO was issued (see [173] and [177]). And once issued s 65J(5) provided that the order may be executed 'as if it were a court judgment', further signalling licence for absence of judicial sanction.
The minority judgment's proposition — that s 65J(1)*(a)* must be given the meaning that it was the court that issued EAOs — overlooked that such a meaning could only be attributed to that provision if the word 'from' were to be replaced with the word 'by'; that 'from' in this provision was used as part of the concept of issuing; that the role of the court was not the issuing of EAOs but only to authorise issuing thereof; and that 'issue' in s 65J(1)*(a)* was contemplated as an administrative and not as a judicial function. When s 65J(1)*(a)* said that 'a judgment creditor may cause an [emoluments attachment] order . . . to be issued from the court', it was referring to the process outlined in s 65J(3), and since there was no role for the court in that process, there was no judicial supervision. Under s 65J(1)*(a)* an emoluments attachment order was not issued by a court but by the clerk of the court.
The view that the Act provided for judicial supervision in every case before an EAO could be issued was also irreconcilable with one of the scenarios contemplated by s 65J(2)*(a)*. Section 65J(2)*(a)* licensed the issue of an EAO in two circumstances, posited as alternatives: if the debtor consented in writing, *or* if 'the court has so authorised'. The conjunction 'or' made it linguistically plain that an emoluments attachment order may be obtained through the debtor's written consent even when the court had not authorised it. Where a judgment debtor had consented thereto in writing, there was no judicial supervision in regard to the issuing of an EAO. To the extent that the Act made provision for this category of case, it was inconsistent with s 34 of the Constitution and, therefore, constitutionally invalid.
The appropriate remedy was a combination of reading-in and severance (with prospective effect only) — severance of the word 'or' in ss 65J(2)*(a)* and its replacement with 'and', so as to ensure that under ss (2)*(a)* an EAO would not be issued unless the judgment debtor not only consented to it in writing but the court also authorised its issue; that after the word 'authorised' in s 65J(2)*(a)*, the words 'after satisfying itself that it is just and equitable that an emoluments attachment order be issued and that the amount is appropriate' should be read in so as to ensure that a court would consider whether it would be just and equitable that an EAO be issued and that the amount was appropriate before it authorised the issuing of the EAO; that, in acknowledgement of the fact that whether or not an EAO would be issued was not certain but would depend upon the court's exercise of a discretion, in s 65J(2)*(b)*(i) the word 'will' be replaced with 'may', and that at the end of s 65J(2)*(b)*(ii) the full stop be severed, a semicolon and the word 'and' read in, and a new s 65J(2)*(b)*(iii) be read in —

'(iii) been granted an order of court authorising that an emoluments attachment order be issued after satisfying itself that it is just and equitable that the order be issued and that the amount is appropriate'.

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S v MHLONGO 2016 (2) SACR 611 (SCA)

Sentence — Imprisonment — Term of — Non-parole period — Section 276B of Criminal Procedure Act 51 of 1977 — Imposition of — Accused to be given notice

of court's intention to invoke provision and had to be heard before such period imposed — Court obliged to give reasons for order.
Rape — Sentence — Evidence to be led by state on sentence — Essential that state acquires victim-impact statement.

The appellant was convicted in a regional magistrates' court of rape and sentenced to life imprisonment, which was replaced by a sentence of 18 years' imprisonment on appeal to the High Court. In addition a period of 12 years was imposed — in terms of s 276B of the Criminal Procedure Act 51 of 1977 — during which the appellant could not be released on parole. He appealed further against the sentence and the non-parole period. He contended that no application had been made by the state to fix a non-parole period either before the regional court or before the High Court; that he had not been given notice that the provision would be invoked; and that neither of the parties had been given an opportunity to present argument or evidence for or against the imposition of such a period. The evidence indicated that the appellant had effectively abducted the complainant and subjected her to a night of terror and repeated rapes. She subsequently died, possibly of having being infected with HIV by the appellant as a result of the rape.
Held, that the fixing of a non-parole period was part of a criminal trial and thus had to accord with the dictates of a fair trial, in that an accused had to be given notice of the court's intention to invoke s 276B of the CPA and that he had to be heard before such non-parole period was fixed. Failure to do so amounted to a misdirection by the sentencing court.
Held, further, that the failure by the High Court to give reasons for its judgment on sentence in respect of the invocation of s 276B was highly prejudicial to the accused. The court was therefore bound to set aside the order and remit the matter to the court a quo to afford the parties an opportunity to address it. (Paragraph [12] at 617*e–g*.)
Held, further, as to the sentence imposed by the court a quo, that there was no justification for that court to interfere with the sentence imposed by the regional court. Unfortunately, since the state had failed to cross-appeal, the present court was not at liberty to intervene.
Held, further, that it was disturbing that in the present case the state had failed to obtain a victim-impact statement (VIS) which formed an integral part of the last phase of the trial and was essential for the court in arriving at a decision that was fair to the offender, the victim and the public at large. It served a greater purpose than merely contributing to the quantum of punishment, by giving the sentencing court a balanced view of all aspects, in order to impose an appropriate sentence and to give the victim the only opportunity to participate in the last phase of the trial. The criminal-justice system required the permanent infusion of a VIS into the justice process, and comprehensive guidelines, protocols and model VIS instruments had to be drafted by the National Director of Public Prosecutions in order to achieve this.
Held, further, that it was a travesty of justice that the state had failed to lead expert evidence on the impact of the rapes on the complainant and, in particular, the possible link between her death and having been infected with HIV by the appellant. It was also of concern that it had failed to cross-appeal the sentence and took the initial view that the sentence of 18 years' imprisonment was appropriate. (Paragraph [24] at 623*b–c*.)
Appeal upheld and non-parole portion of sentence deleted and the matter remitted to the court a quo for representations on the desirability of granting such an order.

S v LOURENS 2016 (2) SACR 624 (WCC)

Traffic offences — Driving under influence of liquor — Contravention of s 65(1) of National Road Traffic Act 93 of 1996 — Sentence — Suspension of driver's licence — Circumstances to be taken into account — Include personal circumstances of accused and interests of community.

The accused was convicted in a magistrates' court of driving a motor vehicle while under the influence of alcohol in contravention of s 65(1) of the National Road Traffic Act 93 of 1996 (the Act). He was sentenced to a fine and his driver's licence was suspended for six months. This was despite the fact that the accused was a first offender and required a licence in order to perform his work. On review,
Held, having regard to the wording of the tariff of mandatory sentences in s 35 of the Act after its amendment by the National Road Traffic Amendment Act 64 of 2008, that the 'circumstances relating to the offence' included the personal circumstances of the accused and the interests of the community and were not limited only to those circumstances relating to the commission of the offence itself.
Held, further, that the magistrate, although having had regard to the provisions of s 35 of the Act, had failed to take account of the personal circumstances of the accused, including that he required his driver's licence for his work; that he was a first offender; and that there was no injury or accident caused by his offence. Given that he was gainfully employed and ran the risk of losing his employment in difficult economic times if the court confirmed the suspension of his licence, the sentence was unduly harsh. The order of the magistrate that the accused's licence be suspended was accordingly deleted from the sentence imposed by the magistrate.

S v SHELDON-LAKEY 2016 (2) SACR 632 (NWM)

Sexual offences — Sexual intercourse with boy child under age of 16 years — Contravention of s 15(1) of Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 — Sentence — Thirty-nine-year-old married woman in educator – learner relationship with boy whom she was supposed to be counselling — Sexual intercourse occurring on more than one occasion — Sentence of four years' imprisonment confirmed on appeal.

The appellant had been employed as a temporary educator at a school and was convicted in a regional magistrates' court on a charge of having committed an act of consensual sexual penetration with a boy child under the age of 16 years to whom she had offered counselling sessions at the school. She was sentenced to four years' imprisonment. On appeal it was contended on her behalf that the court a quo had erred inter alia in rejecting the probation officer's recommendation that she be sentenced to correctional supervision. The court on appeal rejected, on the evidence, her defence relating to knowledge of the age of the boy and proceeded to consider the merits of the appeal against sentence.
Held, that, while due weight had to be given to the appellant's personal circumstances, the offence she had committed remained a serious one. Right-thinking members of society expected adults to protect children and not to abuse them. The exploitation of emotionally immature children and the risks of sexually transmitted diseases were cause for serious concern.

Held, further, that in the present instance the offence pertained to an instance of consensual intercourse between a 39-year-old married woman and a schoolboy under the age of 16. The fact that the appellant was in a educator – learner relationship with the boy aggravated the matter, which was compounded further by the fact that the sexual encounters occurred more than once, even after the appellant received the victim's birth certificate. The offence was committed by a person who also clearly knew what the law and the Scripture had to say about morality.
Held, further, that the correctional-supervision sentence suggested by the probation officer and by the appellant's counsel would be wholly inappropriate in the circumstances of the case. The sentence imposed had to clearly indicate that sexual intercourse by an adult with a child would not be tolerated. In the circumstances the appeal was dismissed in its entirety.

S v NTETA AND OTHERS 2016 (2) SACR 641 (WCC)

Child — Sentence — Generally — When accused to be treated as child for purposes of Child Justice Act 75 of 2008 — Required to have been under age of 18 at time of commission of offence as well as at time of arrest.

Accused 4 was one of three accused who were convicted of the murder and rape of the deceased, whom they had brutally attacked and assaulted before throwing his body off the side of a bridge. At the time of committing the offence accused 4 was under the age of 18, but hours before his arrest the following day he turned 18. It was contended on his behalf that, since he was under the age of 18 at the time of the offence, the provisions of the Child Justice Act 75 of 2008 (the CJA) were applicable during the sentencing proceedings.
Held, that there was a perfectly logical and rational reason why the legislature required that the child offender should have been under the age of 18 years when he was alleged to have committed the offence and also when he was arrested, in order for the CJA to find application. The very purpose of the Act was to establish criminal justice for children, and children only, who were in conflict with the law and accused of committing offences. It was tailor-made to suit the needs of the child offender, and not that of an adult offender.
Held, accordingly, that accused 4 was to be treated as an adult for the purposes of the sentencing proceedings. However, as he was under the age of 18 years when he committed the offence, in terms of s 51(6) of the Criminal Law Amendment Act 105 of 1997, the prescribed sentencing provisions of that Act did not apply to him. The court therefore had to exercise its ordinary jurisdiction in respect of sentence as far as he was concerned.Accused 4 was sentenced to an effective 15 years' imprisonment in respect of both counts.

S v MATSHABA 2016 (2) SACR 651 (NWM)

Evidence — Expert evidence — DNA analysis — Presentation of such evidence — Chain of handling of samples from collection to analysis to be properly presented.

The appellant was convicted in a regional magistrates' court on a charge of housebreaking with intent to rape and rape and was sentenced to life imprisonment.

His conviction was based on DNA evidence which linked his blood type with that found on the complainant's nightdress. There was, however, no evidence that the appellant's blood sample was sealed or what number was allocated to it. The forensic expert's evidence lacked reference from whom the samples of blood were received, contrary to what was provided for in s 212(8)*(a)*(ii)*(aa)* of the Criminal Procedure Act 51 of 1977. The investigating officer also testified that he was not the one who delivered the samples to the laboratory for testing, but that it was another police official whom the state failed to call. There was also no evidence in relation to the gathering, marking and storage of the samples. On appeal against the conviction,
Held, that the importance of proving the chain of evidence was to indicate the absence of alteration or substitution of the exhibits. If no admissions were made by the defence, the state bore the onus to prove the chain of evidence and it had to establish the name of each person who handled the evidence, the date on which it was handled and the duration. Failure by the state to establish this chain of evidence affected the integrity of the evidence and rendered it inadmissible. The sequence from collecting of the samples to the DNA-testing was accordingly flawed and the conviction and sentence had to be set aside.

DLAMINI v MINISTER OF SAFETY AND SECURITY 2016 (2) SACR 655 (GJ)

Arrest — Without warrant — Legality of — Arresting officer in possession of sworn statement made by complainant to colleague in domestic-violence matter — Complainant confirmed allegations to him and identified husband — Allegation of assault partly borne out by fact that complainant limping — Arresting officer not required to conduct further investigation at couple's home in order to verify allegations before arresting.

The appellant appealed against the dismissal by the High Court of his claim for damages for unlawful arrest and detention. The arrest was effected by a police official who was shown a docket opened by the complainant, the appellant's wife, in which she stated that she had been assaulted by him and that he had damaged certain property. The policeman, accompanied by the complainant, proceeded to the couple's home where, after the complainant identified the appellant, he informed him that he was arresting him.
The court a quo, in dismissing the claim, held that the arresting officer had reasonable grounds to arrest the appellant, which could not be impugned. On appeal, the appellant contended that the discretion to arrest him had been improperly exercised and that the police official should have conducted a further investigation to verify the truth of the allegations in the complainant's statement after his arrival at their house.
Held, that the court a quo had correctly found that reasonable grounds for the arrest had been proved: the arresting officer was in possession of a statement made by the complainant to a colleague under oath, revealing serious allegations concerning domestic violence. He had also had the opportunity of interviewing the complainant who confirmed the allegations of domestic violence, which were further corroborated by the fact that she was limping.
Held, further, that there was no obligation on the arresting officer to conduct any further investigation as, on the facts of the matter, such investigation would have been superfluous. As a general rule, and depending on the circumstances of each

case, it could not be expected of a reasonable police officer in those circumstances to conduct a further investigation. The appeal accordingly fell to be dismissed.

NOGWEBELE v MINISTER OF POLICE AND ANOTHER 2016 (2) SACR 662 (WCC)

Arrest — Procedure after arrest — Further detention after court appearance — Whether further detention amounting to malicious prosecution where matter withdrawn because child rape victim was insufficiently mature to testify — This not amounting to withdrawal on merits or acquittal — Eminently reasonable procedure adopted by prosecution in circumstances — Not amounting to malicious prosecution.

The plaintiff instituted damages against the first defendant, the Minister, and the second defendant, the Director of Public Prosecutions (DPP), for wrongful arrest and malicious prosecution, respectively. He was arrested on an allegation of the rape of a 5-year-old girl. After appearing in court he was held in custody for four and a half months, his application for bail having been refused. He was released when the charge against him was withdrawn, since, in the opinion of the prosecutors employed by the DPP, the complainant was not mature enough to testify at that stage. The plaintiff contended that he mentioned at his bail application that he had an alibi, yet the prosecutors had not investigated it. If they had done so it would have established his innocence. He contended further that the lack of DNA evidence linking him with the rape showed that the prosecution had failed.
After examining the evidence, the court concluded that there was no basis for upholding the claim against the Minister and dismissed it. It then proceeded to examine the merits of the submissions of the plaintiff concerning the claim for malicious prosecution against the DPP.
Held, as to the plaintiff's alibi, that the mere fact that a person raised a defence or presented evidence thereof, did not mean there was no reasonable or probable cause for a prosecution. If this were to happen, then most prosecutions would be regarded as malicious. This alone, weighed in the light of all the evidence, could not constitute sufficient grounds on which to find that the defendants could not have believed in the guilt of the plaintiff. The plaintiff had therefore failed to show that his prosecution was without reasonable or probable cause.
Held, that the plaintiff's argument that the prosecution had failed as there was no DNA evidence was incomprehensible as the charge-sheet clearly showed that the matter had been withdrawn as the complainant was not ready to testify. There had been no acquittal or withdrawal on the merits and it was always the intention to reinstitute the proceedings against him. The reason for the withdrawal was eminently reasonable and rational. In cases where a sexual offence had been committed against a minor child, special circumstances had to be taken into consideration to ensure a successful prosecution, as a lot of pre-trial preparation had to be undertaken. Were prosecutors not given the opportunity to deal with matters involving children in this manner, perpetrators of sexual offences against children might be acquitted and set free.

MOGALE AND OTHERS v MINISTER OF SAFETY AND SECURITY AND OTHERS 2016 (2) SACR 682 (GP)

Search and seizure — Search warrant — Warrants in terms of s 21 of Criminal Procedure Act 51 of 1977 — Application for — Supporting affidavit — Attestation of — Commissioners of oaths to satisfy themselves of identity of deponent and that person who signs as deponent actually swears to affidavit — Deponents must therefore sign affidavit in commissioner's presence — Failure to fulfil such requirement may lead to potential abuse — Justices of the Peace and Commissioners of Oaths Act 16 of 1963, ss 2 – 5 and 7.
Affidavit— Search warrant — Validity of — Warrants in terms of s 21 of Criminal Procedure Act 51 of 1977 — Affidavit in support of application for search warrant signed by deponent before it was presented to commissioner of oaths — Commissioner therefore not witnessing signing of affidavit — Defect could not be condoned, as there had been no substantial compliance with statutory formalities — Warrants invalid and set aside — Criminal Procedure Act 51 of 1977, s 21; Justices of the Peace and Commissioners of Oaths Act 16 of 1963, ss 2 – 5 and 7.

The commissioner of oaths, who declares that an affidavit, on the strength of which people's lives may be negatively affected (in the present case, an affidavit in support of an application for a search warrant), has been finalised in accordance with the statutory prescripts, must satisfy herself or himself of the identity of the deponent and must be certain that the person who signed as the deponent actually does swear to the affidavit — and therefore the deponent must sign in the commissioner's presence. A failure to fulfil this condition may lead to affidavits being presented to commissioners, that have not been prepared and signed by the purported deponent. The potential for abuse if this condition is not met is self-evident.
The third respondent, at the time a captain in the Johannesburg Commercial Branch of the South African Police Service, had applied for and obtained two search warrants, in terms of s 21 of the Criminal Procedure Act 51 of 1977, for searches for documents and electronic storage devices at premises in Carletonville and Bruma, Johannesburg. The search warrants were alleged to be required to investigate the affairs of the appellants and to obtain proof of the commission of offences related to theft, fraud and the illegal running of a pyramid scheme. The appellants thereafter applied in a High Court for an order setting aside the warrants and the return of all documents, data and other property seized in terms of the warrants. The appellants alleged inter alia that the affidavits of the third respondent in the applications for the search warrants were not complete and regular when presented to the magistrates concerned. It appeared that the affidavits had already been prepared and signed before being presented to the commissioner of oaths for the administering of the oath. The applications for the search warrants were supported by an affidavit of a potential witness, M, which had been properly completed and attested, and which, it was contended, contained information justifying the issuing of the search warrants. The High Court dismissed the application, holding that, although it had serious misgivings about the validity of the warrants, in view of the serious doubts cast upon the lawfulness of the third respondent's affidavits, the affidavit of M had been properly completed and contained information justifying the issuing of the warrants. In an appeal to a full bench of the High Court, *Held*, that it was clear that the commissioner of oaths, whose signature appeared at the end of the third respondent's affidavit, had not witnessed the signing of the declaration, contrary to the statement recorded in her preprinted confirmation.
Held, further, that the defects could not be condoned, as there had not been substantial compliance with the formalities prescribed for the attesting of the

affidavits, namely in ss 2 – 5 and 7 of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963: the document purporting to be an affidavit had not been signed at all, or had been signed in the absence of the commissioner before the oath was taken. Had the magistrates noticed this defect, they would not have issued the relevant warrants.
Held, further, that since M's affidavit did not identify the persons or entities who were alleged to have been involved in unlawful activities, nor the residences that were sought to be searched, it did not sufficiently supplement the inadmissible affidavit (of the third respondent) to allow any warrant to be issued on the strength thereof. Its contents accordingly did not justify the conclusion that there were reasonable grounds for the attachment of any article or document in the possession of any person or at any residence.
Held, accordingly, that the application for the setting-aside of the warrants should have been granted. (Paragraph [25] at 690*d*.)
Appeal upheld.

S v JIMMALE AND ANOTHER 2016 (2) SACR 691 (CC)

Sentence — Imprisonment — Non-parole period — Section 276B of Criminal Procedure Act 51 of 1977 — Imposition of — Not to be resorted to lightly and not without inviting oral argument — Relevant factors justifying order to be properly proved.

The applicants applied for leave to appeal against a part of the sentences imposed upon them in the High Court for a murder committed in the course of a robbery. They were sentenced to 25 years' imprisonment and it was ordered in terms of s 276B of the Criminal Procedure Act 51 of 1977 that they were only to be considered for parole after having served 20 years of their sentence. They contended that the imposition of the non-parole period was a misdirection, since they had not been afforded an opportunity to make representations before it was made, and that the trial court had made no findings as to the existence of exceptional circumstances to warrant such an order.
Held, that a s 276B(1)*(b)* non-parole order should not be resorted to lightly and not without inviting oral argument on the issue, as the imposition of such an order had a drastic impact on the sentence to be served.
Held, further, that the trial court seemed to have operated from the premise that the applicants were incorrigible and beyond redemption, but that did not follow from the fact that they had committed a horrendous crime. Their incorrigibility had to be established as a fact relevant to the later consideration of parole.
Appeal upheld and non-parole order set aside.

S v PORRITT AND ANOTHER 2016 (2) SACR 700 (GJ)

Trial — Centralisation — Application for — On grounds that discomfort and expenditure of lengthy trial at centre far from accused's home would infringe fair-trial rights — Accused not satisfying court that their inability to prepare property for trial would amount to infringement of their rights — Application dismissed.

The applicants had been arraigned for trial in the High Court in Johannesburg on multiple charges contained in an indictment running to 1500 pages. They applied for

orders that the case be postponed for hearing in Pietermaritzburg and that the offences allegedly committed in Johannesburg be centralised in the High Court sitting in Pietermaritzburg. The basis for the application was that the head offices of the business entities involved in the alleged crimes were all based in Pietermaritzburg and that all the documentation needed for their defence was based there and would be easily available to them during the course of the trial. The first applicant lived in Pietermaritzburg and had relatives there, whereas the second applicant lived in Knysna, but had only recently relocated there in order to be close to her daughter. They contended that their constitutional rights to have adequate time and facilities to prepare their defence would be infringed due to the high cost of conducting a very lengthy trial in Johannesburg, their inability to prepare for and conduct a trial away from where the documentary evidence was located, and the emotionally debilitating effect of being away from home and family for protracted periods.
Held, that the applicants had not dealt in their papers with the residence in an upmarket area in the north of Johannesburg which they could occupy during the trial, and the first applicant did not explain why he could not use the car he had in Pietermaritzburg to drive to Johannesburg each week and use that car whilst he was there. *Held*, further, that the accused had had ample opportunity to consider the documents that the state would rely upon that were not contained in the exhibit files and these should therefore already have been assimilated by them. They had also previously sought the production of documents which they claimed that the state had seized from them and therefore had a good idea of what documents might still be required and from whom they could be obtained.
Held, further, that the applicants, on whom the onus rested, had not made out a sufficient case in regard to their inability to prepare for trial and in regard to the physical and psychological distress they might endure, even if those could be construed as a justifiable basis for the purposes of invoking fair-trial prejudice under s 35(3)*(b)* of the Constitution, and irrespective of a consideration of any s 36 constitutional limitation. They had accordingly not satisfied the court that they would not receive a fair trial if the case continued in Johannesburg. Application dismissed.

S v DE JAGER AND OTHERS 2016 (2) SACR 716 (ECG)

Culpable homicide — Negligence — What constitutes — Child dying when brick wall collapsed after crowd stormed out of pavilion when accused threw bottles — Reasonable man would not have foreseen that death would result as consequence of bottle-throwing.

The appellants were convicted in a regional magistrates' court of culpable homicide. It was proved that they had thrown bottles at the supporters of a rival rugby club during a match, causing people on the stands to flee to an exit where the pressure caused by the throng resulted in a brick wall collapsing onto a child, who died as a result of his injuries. On appeal against the conviction, it was contended that the court a quo erred in finding that the appellants should have foreseen that the wall would collapse and kill the deceased.
Held, that, although a reasonable man could have foreseen that the throwing of bottles at spectators would cause them to flee and that they would, in search of safety, run towards the exit points of the pavilion, there was no way that a reasonable man in the shoes of the appellants could or should have foreseen that,

as a result of the pressure from the fleeing throngs, the brick wall would collapse and fall on top of the deceased. In the circumstances the conviction had to be set aside.

S v TAFENI 2016 (2) SACR 720 (WCC)

Sentence — Prescribed minimum sentences — Criminal Law Amendment Act 105 of 1997 — Substantial and compelling circumstances — Power of appellate court to interfere with finding by trial court on existence of such circumstances — Position analogous to discretion of court to grant interdictory relief — Court not restricted from interfering only if able to identify material misdirection or failure of exercise of discretion.

In an appeal against a sentence of 15 years' imprisonment for murder, where the appellant had stabbed and killed a woman with whom he was having an extramarital affair, the state contended that the court would only be entitled to interfere with the prescribed minimum sentence imposed in terms of s 51(3) of the Criminal Law Amendment Act 105 of 1997 if there were a material misdirection on the part of the sentencing magistrate.

Held, that, while the approach contended for by the state was generally correct in regard to appeals against sentence, it would be counterintuitive to apply it when the initial question was not whether the sentence itself was vitiated by such a material misdirection, but whether the court was right or wrong to have determined on the facts that there were no substantial or compelling circumstances justifying a departure from the prescribed minimum sentence. It was clear that the determination of an appropriate sentence entailed the exercise of judicial discretion in the narrow or strict sense of the word (sometimes termed 'true discretion'). It was for that reason that an appellate court's powers to interfere were circumscribed. (Paragraph [3] at 723*a* – *c*.)

Held, further, that the exercise of a narrow discretion was not involved in the making of a finding by a sentencing court in terms of s 51(3). While the range of relevant circumstances falling to be taken into account would in the nature of such matters necessarily be disparate and incommensurable, there was not a range of equally permissible options available to the decision-maker. The court was either properly satisfied as to the existence of substantial and compelling circumstances, or it was not. (Paragraph [4] at 723*d* – *f*.)

Held, further, that the position was analogous to that which pertained in regard to a court's discretion in respect of the grant of interdictory relief which involved the exercise of its discretion in the wide sense, and the appeal court was thus less constrained in its ability to interfere than it would have been had the discretion involved been one in the true sense. (Paragraph [5] at 723*f* – *h*.)

Held, further, that neither principle nor policy supported one court holding that substantial and compelling circumstances existed and another concluding on identical facts that they did not, and a court of appeal not being able to interfere with either's choice. Thus the court was not restricted from interfering only if it were able to identify a material misdirection or a failure of the exercise of discretion. (Paragraphs [7] – [8] at 725*c* – 726*d*.)

Held, further, that, having regard to all the circumstances of the case, the magistrate was wrong to have found that there were no substantial and compelling circumstances to depart from the prescribed minimum sentence of 15 years' imprisonment. The imposition of such a sentence was manifestly disproportionate if proper regard were had to the circumstances of the commission of the offence and

the personal characteristics of the appellant. It was accordingly necessary to set aside the sentence imposed and replace it with a sentence of 10 years' imprisonment, of which two years were suspended for five years.

ALL SA LAW REPORTS DECEMBER 2016

Airports Company South Africa Soc Ltd v Airports Bookshops (Pty) Ltd t/a Exclusive Books [2016] 4 All SA 665 (SCA)

Civil procedure – Application proceedings – Eviction application – Factual dispute – Court having to accept those facts averred by the applicant that were not disputed by the respondent, and respondent's version in so far as it was plausible, tenable and credible.

Contract – Lease agreement – Termination provisions – Interpretation of – Lease to be interpreted to determine what is reasonable in the circumstances.

In terms of a lease agreement between the appellant ("ACSA") and the respondent ("Exclusive"), the latter rented premises at the OR Tambo International Airport in Johannesburg, from where it operated a bookshop. The lease was for five years and was to terminate on 31 August 2013.

When, by mid-August 2013, ACSA had still not started the process necessary for the renewal of the lease or the award of a new tender either to Exclusive or anyone else, negotiations commenced and ACSA and Exclusive signed an agreement that renewed the agreement on a month by month basis.

Exclusive remained in occupation of the premises and continued to trade there. When ACSA issued a request for bids in respect of the premises on 4 December 2013, Exclusive submitted a bid, seeking to remain the lessee. In June 2014, ACSA informed Exclusive that its bid had been unsuccessful and that it could request a debriefing within 21 days. Exclusive did make such a request, but before the debriefing, it was given notice to vacate the premises by 31 July 2014. It therefore applied for the review and setting aside of the tender award, alleging that it had been made in conflict with a number of the provisions of the Promotion of Administrative Justice Act 3 of 2000.

Despite the pending review application, ACSA brought an urgent application for the eviction of Exclusive. The court *a quo* considered that the case ACSA made out in its founding affidavit was based on its interpretation of the contract as providing that it was entitled to give one month's notice to terminate the lease. The court found, against ACSA, that the extension agreement included a tacit term that neither party was entitled to terminate the lease on notice until completion of a valid and lawful tender process to identify a new tenant. It was found that Exclusive was entitled to challenge the lawfulness of the tender process by way of a collateral challenge. It was concluded that the tender had been made unlawfully, and that ACSA was thus not entitled to terminate. The dismissal of the application led to the present appeal.

On appeal, ACSA argued that the tacit term was contrary to the express terms of the extension agreement (on its version a monthly tenancy terminable on a month's notice), and that the challenges to the lawfulness of the tender award, being made only in an attachment to the answering affidavit, cannot be sustained.

Held – A factual dispute between the parties centred on the interpretation of the letter recording the extension of the lease. As the eviction order sought was in application proceedings, the court *a quo* was bound to accept those facts averred by ACSA that were not disputed by Exclusive, and Exclusive's version in so far as it was tenable and credible.

The present Court held that it was not necessary to consider whether there was a tacit term at all. Whether the lease was terminable on a month's notice, or on reasonable notice, which was dependent on the circumstances, depended on the interpretation of the lease extension itself. And since ACSA did not deal at all with the challenges raised by Exclusive to the tender award, they fell to be considered on Exclusive's version alone.

In Exclusive's answering affidavit it was alleged that the parties contemplated that the lease would continue until the conclusion of the tender process. If that were not so, and the lease could be terminated by either party on a month's notice, the results would be distinctly contrary to the commercial realities of which the parties were aware. It would mean that, if Exclusive were ultimately the successful bidder, it might be required to vacate on a month's notice, only to return to the same premises after the award of the bid. That interpretation was not in any way controverted by ACSA in its reply. It did not show that the interpretation of the lease for which Exclusive contended was untenable and implausible. And ACSA did not show that its interpretation – that the lease was a monthly tenancy terminable on one month's notice – was correct. ACSA had to prove that the lease extension agreement had been validly terminated on the giving of the required notice. It had not done so, and the appeal was, accordingly, dismissed by the majority of the court.

Bonitas Medical Fund v Council for Medical Schemes and another [2016] 4 All SA 684 (SCA)

Interpretation of statutes – Medical Schemes Act 131 of 1998 – Whether a decision of the registrar to order an inspection in terms of section 44(4)(a), was appealable in terms of section 49(1) – Court looked at purpose of the Medical Schemes Act, the context of section 44(4) read with section 49(1), the nature of an inspection in terms of section 44(4)(a) and the Afrikaans version of section 49(1) – Court held that a decision to order an inspection in terms of section 44(4)(a) is clearly not a decision envisaged in section 49(1).

The appellant was a medical scheme registered under the Medical Schemes Act 131 of 1998. The first respondent was the Council for Medical Schemes ("the council") and the second respondent was the Registrar of Medical Schemes ("the registrar").

Section 44 of the Act deals with inspections and reports, and in subsection (4) provides that the Registrar may order an inspection if of the opinion that such an inspection will provide evidence of any irregularity or of non-compliance with this Act by any person; or for purposes of routine monitoring of compliance with this Act by a medical scheme or any other person. Section 49(1) provides that any person who is aggrieved by any decision of the Registrar under a power conferred or a duty imposed upon him under this Act, excluding a decision that has been made with the concurrence of the Council, may within 30 days after the date on which such decision was given, appeal against such decision to the Council.

The central issue in the present appeal was whether a decision of the registrar to order an inspection in terms of section 44(4)(a), was appealable in terms of section 49(1).

In November 2014, the registrar appointed an inspector, and ordered him to inspect the affairs of the scheme. The inspector was principally directed to investigate whether or not irregularities occurred or existed in respect of certain matters.

In December 2014, the scheme delivered a notice of appeal to the registrar. In terms of the notice, the scheme lodged an appeal to the council against the decision to order the inspection. However, on 26 February 2015, the council resolved that the registrar's decision to order the inspection was not appealable in terms of section 49(1). As a result of the dispute, the council and the registrar approached the High Court for declaratory relief that the registrar's decision to order the inspection into the affairs of the scheme in terms of section 44(4)(a) was not a decision that was appealable in terms of the provisions of section 49(1). The court granted the declaratory order but granted the scheme leave to appeal. The court *a quo* also granted leave to the council and the registrar to cross-appeal in respect of its failure to make any order as to costs.

Held – It was necessary to determine the meaning of the word "decision" in section 49(1). In the present matter, the word could mean a decision of a dispute or issue in the sense of the determination thereof or simply a decision to do something, ie the making up of one's mind.

An inspection in terms of section 44(4)(a) was purely investigative. The inspector merely gathered evidence and did not determine or affect any rights. There was therefore no need to provide for the protection of substantive rights by way of an appeal against a decision to order an inspection. The purpose of the Act, the context of section 44(4) read with section 49(1), the nature of an inspection in terms of section 44(4)(a) and the Afrikaans version of section 49(1) led to the conclusion that the interpretation favoured by the court *a quo* was correct. A decision to order an inspection in terms of section 44(4)(a) was clearly not a decision envisaged in section 49(1). The appeal, therefore, had to fail.

In declining to make an order as to costs, the court below relied primarily upon application of the principles set out in *Biowatch Trust v Registrar*, *Genetic Resources and others* 2009 (10) BCLR 1014 (CC). The respondents submitted that those principles did not find application in this matter. The issue was whether a constitutional issue was raised. The case of the scheme was about the avoidance of the inspection of its affairs by relying on an interpretation of the statute *per se*. It did not assert a right under the Constitution nor did it seek to vindicate any fundamental right. In the result, the costs in the court *a quo* should have followed the result. The cross-appeal is upheld with costs.

Edwards v FirstRand Bank Ltd t/a Wesbank [2016] 4 All SA 692 (SCA)

Consumer credit – Credit agreement – Instalment sale agreement – Cancellation of agreement – Claim for return of goods – Whether or not credit provider complied with service of notices in terms of section 127(2) and (5) of National Credit Act 34 of 2005 – Evidence showing that credit provider did send notices in terms of section 127(5) of the Act to the address furnished by consumer.

In July 2009, the appellant and the respondent concluded an instalment sale agreement in terms of which the appellant purchased a motor vehicle. He paid an initial deposit and was then to pay fifty nine monthly instalments. The provisions of the National Credit Act 34 of 2005 applied to the agreement.

When the appellant fell into arrears in April 2011, the respondent issued summons against him cancelling the agreement and claiming the return of the vehicle, plus the shortfall as it was entitled to in terms of the credit agreement. Although an appearance to defend was filed, the respondent obtained summary judgment and the appellant was ordered to return the vehicle to the respondent. The vehicle was eventually repossessed and sold at an auction.

Held – The issue on appeal was whether or not the respondent had complied with the requirement around section 127(2) and (5) notices of the Act before disposing of the vehicle. The appellant contended that he did not receive the said notices and also contended that the vehicle was not sold for the best price reasonably obtainable as contemplated in section 127(4)(b) of the Act. The respondent contended that, if the appellant did not receive the notices, it was a direct result of his having provided a physical address at which, knowingly, there was no street delivery of the post.

Section 127(2) of the Act provides that within 10 business days of receiving a notice in terms of subsection (1)(b)(i); or receiving goods tendered in terms of subsection (1)(b)(ii), a credit provider must *give* the consumer written notice setting out the estimated value of the goods and any other prescribed information. Section 127(1) was not applicable in this case because the appellant did not voluntarily terminate the agreement, but the respondent secured, by the court process, the termination of the agreement, and subsequently the attachment and sale of the vehicle in question. Therefore, the appellant was wrong when submitting that section 127 of the Act expressly provides that the appellant must actually receive the section 127(2) and (5) notices. From the evidence adduced during the trial, it was clear that the respondent did send a notice in terms of section 127(5) of the Act to the address furnished by the appellant. The appellant did not dispute that the notice was sent, but denied that he received it. The court held that the reason for that was the appellant's own fault.

A question raised *mero motu* by the Court was whether section 127 applied at all in the circumstances of this matter, where the *merx* forming the subject of a credit agreement was repossessed by order of the court. The court held that whilst generally section 127(2) to (9) of the Act is applicable it was not applicable in the present case because the agreement had already been cancelled.

It was concluded that the respondent succeeded in showing that the notices were duly given and/or sent to the appellant. The appellant had himself to blame by providing an address in respect of which street deliveries could not take place.

The appeal was, therefore, dismissed.

Gumede v S [2016] 4 All SA 708 (SCA)

Evidence – Criminal proceedings – Evidence obtained as a result of an unlawful search in violation of right to privacy, and evidence of pointing-out obtained after failure to explain consequences of not remaining silent and coercion – Whether trial court was correct in ruling that evidence of both the search and seizure operation and

pointing-out and confession, was admissible – Section 35(5) of the Constitution of the Republic of South Africa, 1996 requires the court to exclude evidence obtained in a manner that violates any right in the Bill of Rights if either the admission of that evidence will render the trial unfair or otherwise be detrimental to the administration of justice.

The appellant was charged with murder, robbery with aggravating circumstances, and unlawful possession of a firearm and ammunition.

Two sets of evidence formed the basis of the State's case against the appellant. The first was a firearm with ammunition allegedly discovered by the police during search and seizure operation at the appellant's house and the second was verbal statements that he had allegedly made at a pointing-out. Pleading not guilty, the appellant challenged the admissibility of the said evidence. He alleged that the search, pursuant to which a firearm was allegedly discovered, was unlawful and that he was assaulted by police officials resulting in him making a pointing-out which was done under duress.

In a trial-within-a-trial, the trial court ruled both sets of evidence admissible, and at the conclusion of the main trial, the appellant was convicted on all charges. He was sentenced to life imprisonment for murder; 15 years' imprisonment for robbery with aggravating circumstances; and 3 years' imprisonment for possession of an unlicensed firearm and ammunition. His appeal to the Full Court was dismissed, leading to the appeal to the present Court.

In relation to the search and seizure operation conducted at the appellant's house without a search warrant, the trial court was prepared to assume that despite the urgency, a search warrant could have been obtained and that the illegal entry was unnecessary. Although the trial court was of the view that in certain circumstances the evidence concerned would be inadmissible, it nevertheless regarded it to be admissible because of the provisions of section 35(5) of the Constitution. The court reasoned that the exclusion of the impugned evidence would, on the facts of the case, have brought the administration of justice into disrepute. The court found further that the pointing out by the appellant had been done freely and voluntarily, that the appellant had full knowledge of his rights, and that he had waived them.

The findings of the trial court were confirmed by the Full Court which dismissed the appellant's appeal. The current appeal was with the special leave of the present Court.

It was argued before the present Court that the evidence concerning the discovery of the firearm ought to have been declared inadmissible on the grounds that the search and seizure operation was patently unlawful and fell to be excluded in terms of section 35(5) of the Constitution. It was argued that the search in the appellant's home was illegal and irregular because it was conducted without a search warrant and after entry into the house had been illegally obtained. In relation to the pointing-out and confession, it was submitted that the State failed to prove that the appellant's constitutional rights were explained to him prior to and during the pointing-out and confession. It was further submitted by the appellant that the State failed to prove that the pointing out and confession were freely and voluntarily made.

Held – The issue in the present appeal was whether the trial court was correct in ruling that the evidence of both the search and seizure operation and the pointing-out and confession, was admissible.

Section 35(5) of the Constitution requires the court to exclude evidence obtained in a manner that violates any right in the Bill of Rights if either the admission of that evidence will render the trial unfair or otherwise be detrimental to the administration of justice. Section 35(5) does not provide for automatic exclusion of unconstitutionally obtained evidence. Evidence must be excluded only if it renders the trial unfair or is otherwise detrimental to the administration of justice.

The first question (and the first leg of an enquiry under section 35(5)) was whether the admission of the impugned evidence rendered the trial unfair. The evidence relating to the discovery of a firearm and one emanating from the pointing-out was the only evidence on which the State relied to prove its case against the appellant. The evidence of a firearm came to light as a result of a search the police conducted at the appellant's home. That search was unlawful as it occurred without a search warrant. The explanation by the relevant police official for not having obtained a search warrant prior to going to the appellant's home was rejected by the court as not reasonably possibly true. The police were not faced with circumstances of urgency or emergency, and a search warrant ought to have been sought and obtained and there was sufficient time for it to be obtained. The firearm was obtained by means of the search which because of its illegality violated the appellant's right to privacy. However, the Court held that the fact that the evidence of a firearm was obtained in that manner did not affect the fairness of the trial because the firearm was real evidence that the police probably would have found if they had entered the premises lawfully in terms of a search warrant and without breaching the appellant's right to privacy. The existence of the firearm would have been revealed independently of the infringement of the appellant's right to privacy. Accordingly, the admission of the evidence of the discovery of the firearm did not render the appellant's trial unfair.

The second question (and the second leg of an enquiry under section 35(5)) was whether the firearm evidence should in any event have been excluded on the ground that its admission was detrimental to the administration of justice. This inquiry involved public policy. In this case, there was an inextricable link between the firearm evidence and the pointing-out evidence, which was obtained by some degree of coercion. The appellant's right to privacy and the right against self-incrimination were flagrantly violated by the police during the investigation. The degree of coercion which the Court found to have occurred rendered the appellant's conduct neither free nor voluntary.

In all the circumstances of this case, the admission of the evidence of the discovery of the firearm and the pointing-out evidence was detrimental to the administration of justice under section 35(5) and it ought to have been excluded.

Upholding the appeal, the Court set aside the convictions and sentence.

Hotz and others v University of Cape Town [2016] 4 All SA 723 (SCA)

Civil procedure – Interdicts – Final interdict – Requirements – An applicant for a final interdict must show a clear right; an injury actually committed or reasonably apprehended; and the absence of similar protection by any other ordinary remedy.

Constitutional law – Right to protest – Scope of right – All rights are to be exercised in a manner that respects and protects the foundational value of human dignity of other people.

A protest on the respondent university's campus led to the present appeal. In February 2016, as part of the protest action, a group of some 20 or 30 people gathered on the campus and erected a shack in the middle of a road which served as a major route for vehicular traffic through the university. The shack obstructed traffic and pedestrians. The group then marked off a large area around the shack with the red and white plastic tape used on construction sites and elsewhere to demarcate areas of danger. The shack and the demarcated area constituted a substantial hindrance to traffic on Residence Road and to the ordinary movement of pedestrians in that area of the campus. During the protest, university property was defaced with slogans; students forced their way into a residence and helped themselves to food intended for resident students; removed portraits, paintings and photographs from the walls of several buildings and defaced and burnt them.

Threats of further plans to damage university property led to the university making an urgent application to the High Court for an interdict. A final interdict was ultimately handed down against the five appellants, leading to the present appeal.

Held – An applicant for a final interdict must show a clear right; an injury actually committed or reasonably apprehended; and the absence of similar protection by any other ordinary remedy. Once the applicant has established the three requisite elements for the grant of an interdict the scope, if any, for refusing relief is limited. There is no general discretion to refuse relief.

The Court considered the factual allegations made by the university against each of the appellants and the grounds for saying that it was entitled to a final interdict against each of them.

It was acknowledged that the right to protest against injustice is protected under our Constitution. But the manner in which the right is exercised is the subject of constitutional regulation. Thus, the right of freedom of speech does not extend to the advocacy of hatred that is based on race or ethnicity and that constitutes incitement to cause harm. The right of demonstration is to be exercised peacefully and unarmed. And all rights are to be exercised in a manner that respects and protects the foundational value of human dignity of other people.

The evidence in respect of each of the appellants disclosed that they were all engaged in the erection of the shack; they were all either involved in or parties to the destruction, damage or defacing of university property; they all participated in unlawful conduct and encouraged others to do the same. Those actions had the effect of interfering with the acknowledged rights of the university.

The Court concluded that the university was entitled to a final interdict. However, it was not entitled to an order in the broad terms that it sought and was granted by the High Court. The Court therefore limited the scope of the interdict to unlawful conduct on the university's premises.

Mbele v Road Accident Fund [2016] 4 All SA 752 (SCA)

Motor vehicle accidents – Road Accident Fund – Claim for future medical expenses based on an undertaking in terms of section 17(4)(a)(i) of the Road Accident Fund Act 56 of 1996 – Whether undertaking had prescribed and whether governed by Prescription Act 68 of 1969 or Road Accident Fund Act – Undertaking in terms of section 17(4)(a)(i) of the Road Accident Fund Act not constituting a discrete action,

but flows directly from third party claim, and the period of prescription of such claim under section 17(4)(a) of the Road Accident Fund Act can only be determined in terms of section 23 of that Act.

On being injured in a motor vehicle collision in July 2006, the appellant instituted action proceedings against the respondent fund in terms of section 17(1) of the Road Accident Fund Act 56 of 1996. The summons in that action was lodged timeously in 2007 and the claim was subsequently settled. The settlement agreement was made an order of court on 21 April 2009 and included, *inter alia*, payment of a lump sum in excess of R2 million for general damages and the costs of suit. Prior to the conclusion of the settlement agreement the fund made an undertaking, on 23 October 2008, in terms of section 17(4)(a)(i) of the Act to compensate the appellant for the costs of future medical and hospital expenses. Based on the undertaking, the appellant, around October 2010, sent a letter of demand to the fund and requested payment in respect of hospital and medical expenses, and presented proof of the expenses he allegedly incurred. The letter was received by the fund in November 2010, but no payment was made. Consequently, in April 2013, the appellant served a summons on the fund claiming, in terms of the undertaking, the sum of R94 063,28. The fund filed a special plea that the appellant's claim had prescribed within a period of three years from the date that the abovementioned expenses were allegedly incurred. According to the appellant, the expenses were incurred in or about June 2009. Therefore, the fund contended, the claim had prescribed in or before July 2012.

In the court *a quo*, the parties agreed on a stated case upon which the fund's special plea of prescription was to be argued. The court's view was that the undertaking was a contractual obligation which was separate from the section 17(1) claim instituted by the appellant in 2006. It equated the undertaking to a discrete and new agreement and accordingly found that the Prescription Act 68 of 1969 was applicable. Therefore, since the appellant had failed to claim within three years from the date upon which the debt became due, his right to claim had prescribed as provided in section 11(d) of the Prescription Act.

The present appeal was against the upholding of the special plea.

Held – The appellant consistently argued that claims in terms of an undertaking in terms of the Act do not prescribe at all, but could provide no authorities to support such a proposition. The Court rejected the contention as being without merit. The law encourages finality in litigation therefore no claim can exist indefinitely.

It was held that the undertaking provided by the respondent was not regulated by the Prescription Act. The undertaking flowed directly from the claim filed in terms of section 17(1) read with section 24 of the Road Accident Fund Act. It therefore could not be a separate claim unrelated to the claim in terms of section 17(1). Consequently, the period of prescription of a claim under sec-tion 17(4)(a) of the Road Accident Fund Act can only be determined in terms of section 23 of the Act and not in terms of the Prescription Act. Section 17(4)(a) of the Act does not create any new and independent contractual obligation or a debt independent of section 17(1). A complete cause of action in respect of future medical claims covered by an undertaking must arise when the costs are incurred. If the fund declines to pay the medical costs claimed, the third party will have to institute action within five years of the complete cause of action arising, being the date when the costs were incurred. The appellant's hospital and medical expenses were incurred in June 2009 and summons was issued on 9 April

2013 to recover those expenses. Summons was, accordingly, issued within the period of five years as provided for in section 23(3) of the Act and the claims of the appellant had not prescribed. The appeal was, accordingly, upheld.

Municipal Employees Pension Fund v Natal Joint Municipal Pension Fund (Superannuation) and others [2016] 4 All SA 761 (SCA)

Pensions – Pension funds – Right of employer to associate with fund – In terms of provincial legislation, local authorities in KwaZulu-Natal obliged to associate as employer with one or more of the respondents and no other fund – Not entitled to associate with appellant fund to the exclusion of the respondents – Local authority employees obliged to be members of one of the respondents.

The appellant was a pension fund which, like the respondent funds, was established by provincial legislation to provide pension and related benefits to employees of local authorities. The dispute in this matter was between the appellant and the respondent funds, over the right of the appellant to admit, as participating employers, to the exclusion of the three respondent funds, local authorities within the province of KwaZulu-Natal and to provide retirement benefits to municipal employees within that province.

The court *a quo* found that the provincial legislation relating to the respondent funds, as well as the regulations promulgated thereunder, oblige local authorities within the province to be associated only with the respondent funds. The appellant brought that decision on appeal before the present Court.

In 2011, the appellant had approached a local authority's employees, representing to them that it was a fund entitled to solicit members from local authorities within KwaZulu-Natal and a fund with which the municipality could be associated. Following on the presentation, 25 employees became members of the appellant. However, the municipality formed the view that its employees were not entitled to be associated with the appellant and suspended payment of contributions due to the appellant in respect of the 25 employees. The appellant thereafter instituted an application in which it sought, *inter alia*, an order compelling the municipality to make payment to it of the pension fund contributions of the 25 employees. Although the High Court granted an order in favour of the appellant, the respondents managed to have that order rescinded, and also obtained an interdict restraining the appellant from conducting pension fund business within KwaZulu-Natal. That gave rise to the present appeal.

Held – The Ordinances establishing the respondent funds and the KwaZulu-Natal Joint Municipal Provident Fund Act 4 of 1995 expressly provided that the Legislature's objective in establishing the respondents was to provide benefits for the employees of local authorities and their dependants. Those could only be local authorities located within the province of KwaZulu-Natal. It was to give effect to that objective that the regulations promulgated under the enactments obliged all local authorities within KwaZulu-Natal to be associated with the respondent funds. Local authorities therefore had to be associated with the respondent funds for the purpose of providing pension benefits to their employees. Were local authorities entitled to be associated with a fund other than the respondents, in order to provide pension benefits to their employees, the purpose of the Ordinances and the Act would be subverted. The purpose of the compulsory membership provisions of the legislation served to enhance pension benefits and secure the viability of the respondent by ensuring that they had significant

numbers of members. There was nothing to indicate that the legislation did not serve its purpose.

The appeal was, accordingly, dismissed with costs.

Okah v S and others [2016] 4 All SA 775 (SCA)

Criminal law – Extra-territorial jurisdiction – Protection of Constitutional Democracy Against Terrorist and Related Activities Act 33 of 2004 – Section 15 of the Act provides that a South African court has jurisdiction in respect of any specified offence committed in the circumstances listed in the section – Court setting out interpretation and application of section 15.

Words and phrases – "specified offence" – Protection of Constitutional Democracy Against Terrorist and Related Activities Act 33 of 2004 – Section 15(1) – A South African court has jurisdiction in respect of any specified offence committed in the circumstances listed in the section.

The appellant was a Nigerian citizen who had permanent residence status in South Africa. He was implicated in two separate bombings in Nigeria, as a result of which 12 people were killed, 64 severely injured and property was damaged. Based on his alleged involvement in the planning and execution of the bombings, he was arrested in South Africa on 2 October 2010 and was charged with 13 counts under the Protection of Constitutional Democracy Against Terrorist and Related Activities Act 33 of 2004 (the "Act"). It was uncontested that the appellant was a leader of the Movement for the Emancipation of the Niger Delta ("MEND") during 2010 and that he had in the past supplied arms and ammunition to that organisation. It was accepted during the trial that MEND had claimed responsibility for the two bombings. The appellant denied that he had been involved in the terrorist activities alleged by the State and suggested, when his legal representative cross-examined witnesses, that he had been the victim of a conspiracy between them and the Nigerian government to falsely implicate him. He was nevertheless convicted and sentenced as charged.

He applied for leave to appeal against his convictions on counts 1 to 12, principally on the basis that the court had no jurisdiction to adjudicate on those counts because they were acts of terrorism committed beyond the borders of South Africa, namely in Nigeria. A secondary ground on which leave to appeal was sought was that there had been a duplication of charges. In respect of count 13, leave to appeal was sought on the basis that no link could be established between the appellant and the email threatening South African interests in Nigeria.

Held – The only issues on appeal were whether the court below had jurisdiction to entertain any or all of the first 12 counts which related to the bombings, and whether the evidence in the court below justified a conviction on count 13, which alleged that the appellant had threatened certain South African entities that were commercially active in Nigeria with destabilising terrorist activities.

Jurisdiction is an important aspect of the sovereignty of the State. Sovereignty entitles a State to exercise its functions within a particular territory to the exclusion of other States. In most circumstances the exercise of State power, as aforesaid, is limited to its own territory. It is a fundamental principle that a State can assert its jurisdiction over all criminal acts that occur within its territory and over all persons present in its territory, who are responsible for such acts, whatever their nationality.

While our courts have declined to exercise jurisdiction over persons who commit crimes in other countries, it is recognised that there are exceptions to that general rule. The primary question in this case was to what extent extra-territorial jurisdiction is conferred by the Act in relation to offences created thereby.

Section 15 of the Act provides that a South African court has jurisdiction in respect of any specified offence committed in the circumstances listed in the section. The present Court found that the court below failed to conduct a proper interpretation of section 15, resulting in it wrongly assuming jurisdiction in relation to counts 1, 3, 5 and 7. In respect of those convictions, the appeal had to succeed. The rest of the convictions on the first 12 counts were confirmed. The setting aside of the convictions referred to above required the court to reconsider sentences. In doing so, it imposed an effective sentence of 20 years' imprisonment.

On the thirteenth count, the Court pointed out that there was no acceptable evidence connecting the appellant with the email threatening South African interests in Nigeria. The court below therefore erred in convicting the appellant on the relevant count, and the appeal had to succeed in that regard.

Primedia Broadcasting (A Division of Primedia (Pty) Ltd) and others v Speaker of the National Assembly and others [2016] 4 All SA 793 (SCA)

Constitutional law – Parliamentary proceedings – Right of media to broadcast – Rules and policy adopted by Parliament governing broadcasts – Restrictions on broadcast of disorder in the Parliamentary Chamber violating the public's right to an open Parliament – Policy and rules declared unconstitutional.

Constitutional law – Parliamentary proceedings – Right of media to broadcast – Use of a telecommunications signal disrupting device prior to State of the Nation address – Court declaring disruption of the cell phone signal in Parliament during the State of the Nation address was in contravention of the section 4(1) of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004 and was unlawful.

At the heart of the present appeal was the issue of access, particularly by the media, to Parliamentary proceedings. Section 21 of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004 ("the Act") regulates television and radio broadcasts. In terms thereof, the broadcast of Parliamentary proceedings has to be by order or under the authority of the parliamentary House concerned, and in accordance with the conditions, if any, determined by the Speaker or Chairperson in terms of the standing rules. Parliament has adopted both a broadcasting policy and rules pursuant to sec-tion 21. The constitutional validity of some of the provisions of the rules and policy was challenged in this matter.

In February 2015, the President of the Republic, Mr Jacob Zuma, was scheduled to address a joint sitting of Parliament, delivering the State of the Nation Address ("SONA"). The appellants maintained that the respondents, the Speaker of the National Assembly, the Chairperson of the National Council of Provinces, the Secretary to Parliament and the Minister of State Security violated the public's rights to see and hear what was said and done in Parliament on that day in two ways. First, the State Security Agency (the "Agency"), without seeking the authority of Parliament, employed a device that disrupted or jammed telecommunication signals when the sitting began. Second, when there was a disruption of the proceedings at the start of

the sitting, the parliamentary television broadcast feed was limited to showing the face of the Speaker, and showed nothing of a scuffle that broke out between members of an opposition political party ("EFF") and security officials as they tried to force EFF members of Parliament out of the Parliamentary chamber.

The appellants only learned of the policy in question during the course of the court proceedings and therefore amended the relief sought to include an order that the rules and policy that precluded coverage of the scuffle between the security staff and the EFF MPs were unconstitutional. Although acknowledging the respondents' objection that the appellants should not be allowed to make up their case as they went along, the court found the explanations proffered by the appellants for the late attack on the policy and the rules to be reasonable. It therefore proceeded to consider the appellants' complaint about the lack of constitutional compliance in the policy and rules.

While not challenging the validity of section 21, the appellants contended that the rules adopted must be framed in such a way as to ensure that the public may see for itself, and hear, precisely what happens in Parliament.

Held – The policy regulates the filming and broadcasting of parliamentary proceedings. The Director of the Sound and Vision Unit ("SVU") of Parliament is given guidelines for filming. The policy's provisions on the management of disorder are quite specific, requiring that televising may continue, but with the director focusing on the occupant of the Chair. The constitutionality of those provisions was challenged by the appellants. Any contravention of the rules or the policy constitutes a criminal offence, by virtue of section 27 of the Act.

The right to vote held by all adult citizens in the country can be exercised meaningfully only if voters know what their representatives do and say in Parliament. And since the vast majority of people are not actually in Parliament, they must rely on public reports and broadcasts. While the appellants accepted that the right to see and hear what happens in Parliament is not unlimited, they contended that the limitation must be reasonable. The test to be applied in terms of section 36(1) of the Constitution is not only whether the limitation is proportionate to the end sought to be achieved, but also whether other measures would better achieve the end, or would do so without limiting others' rights. The Court found no merit in any of the justifications raised by Parliament in respect of the limitation of the right to an open Parliament. It was thus concluded that the manner in which the SONA 2015 proceedings was broadcast was unconstitutional.

The Court also held that the use of a telecommunications signal disrupting device was unlawful in the circumstances in which it was used prior to the SONA.

Upholding the appeal, the Court declared the impugned policy and rules of Parliament to be unconstitutional and unlawful in that they violated the right to an open Parliament.

Registrar of Pension Funds v British American Tobacco Pension Fund and others
[2016] 4 All SA 812 (SCA)

Pensions – Pension fund – Utilisation of pension fund actuarial surplus – Interpretation of section 15H(1) of Pension Funds Act 24 of 1956 – Approval by registrar of Pension

Funds of allocation of surplus to fund members and pensioners – Subsequent use of surplus to address deficit in fund not permissible.

Section 15B of the Pension Funds Act 24 of 1956 provides for a pension fund to submit a scheme to the registrar for the proposed apportionment of an actuarial surplus in the fund between various classes of stakeholders whom the fund has selected to participate in the apportionment. On 1 February 2006, the first respondent fund submitted a surplus apportionment scheme, to the registrar for allocation of a surplus in the fund to members, former members, pensioners and deferred pensioners. The registrar approved the scheme on 28 November 2006, but it had not yet been implemented when the fund's actuarial valuation as at 31 March 2005, submitted to the registrar on 6 September 2007, revealed a deficit.

The fund prepared a report as at 30 September 2007, showing no deficit, and submitted it to the registrar. The report revealed that the fund had used a portion of the allocation approved by the registrar to reduce the deficit. The fund contended that it was entitled to reduce the deficit in that way by resorting to section 15H(1), which permits any credit-balance in a member or employer surplus account to be reduced so as to reduce a deficit following an actuarial evaluation.

However, the registrar contended that section 15H(1) does not apply once the surplus apportionment scheme is approved. He maintained that section 15D(2), read with sections 15A(2) and (4), required the fund to use the surplus only in the manner specified in the surplus apportionment scheme after he had approved it in terms of section 15B(9). And so, acting in terms of section 15(3) read with section 16(9) of the Act he was obliged to reject the 30 September 2007 report because, by using the deficit to reduce the approved allocation in this manner, the report did not reflect the fund's correct financial condition. According to the registrar, once the surplus had been apportioned to members, former members, pensioners and deferred pensioners under the surplus apportionment scheme with effect from 31 March 2002, they acquired rights to use the surplus for their benefit by virtue of section 15A(2) and 15A(4). And, read with section 15D(2), which specifies that any credit balance in the member surplus account as at that date must be used in the manner for which the scheme has provided, those sections precluded the fund's use of the credit balance for another purpose ie to fund the deficit that had subsequently arisen.

The Financial Services Board's Appeal Board dismissed the fund's appeal against the registrar's decision, and the fund then approached the High Court for the review and setting aside a decision of the Financial Services Board's Appeal Board. The court *a quo* accepted the fund's submissions and held that the Appeal Board had erred in dismissing the appeal. The granting of the review application led to the present appeal by the registrar.

Held – The critical facts on which the dispute had to be resolved were as follows. The registrar had approved the revised scheme and issued a certificate on 28 November 2006. The scheme acquired the force of law on that date, but it took effect retrospectively from 31 March 2002, which was the surplus apportionment date. In 2010, the fund purported to apply section 15H(1) to reduce the deficit as at 31 October 2006. But it could not do so because on 31 October 2006, which was a few weeks before the registrar approved the scheme, there was no approved surplus apportionment scheme, and therefore no credit balance available to reduce the deficit as envisaged in section 15H(1).

Even if accepted that there was a credit balance in the member surplus account, it did not necessarily follow that it could lawfully have been used to reduce the deficit, as that would mean ignoring or overriding the rights of the beneficiaries to the actuarial surplus that had accrued as at the surplus apportionment date. Once the right had accrued and the member surplus account was credited with the surplus amount, the beneficiaries immediately became entitled to it, and a liability in the fund thus arose simultaneously.

The court *a quo* was thus incorrect to adopt the fund's submissions and to set aside the Appeal Board's decision. The appeal was upheld and the High Court's order replaced with one dismissing the review application.

Snyers and another v MGRO Properties (Pty) Ltd and another [2016] 4 All SA 828 (SCA)

Land – Eviction – Validity of eviction notice – Notice given of eviction in terms of section 8 of the Extension of Security of Tenure Act 62 of 1997 not valid if given before final determination of labour dispute – Determination of the disputed labour matter is thus clearly a pre-condition for terminating the occupier's right of residence under the Extension of Security of Tenure Act.

Land – Eviction – Validity of eviction notice – Right to family life in terms of section 6(2)(d) of the Extension of Security of Tenure Act 62 of 1997 prevents eviction of one spouse while the other remains.

In November 1981, the first appellant ("Snyers") commenced employment as a farm labourer with the previous owners of a farm. In 2000, he acquired tenancy as a housing allowance stemming from his employment. His contract of employment stipulated that his tenancy on the farm was conditional to his continued employment and thus would terminate concurrently and automatically with his employment. His wife (the "second appellant") and their two children resided with him on the farm through his tenancy. In 2010, the respondents acquired ownership of the farm, and concluded a new employment contract with Snyers in similar terms to those Snyers had concluded with his previous employer. It was a term of their agreement that it would be terminated by either party on four weeks' notice.

About a month later, on 17 December 2010, Snyers tendered his resignation to the respondents in which he indicated that he would work until 17 January 2011. On ceasing employment, Snyers referred a constructive dismissal dispute to the CCMA. While he cited the respondents' management style and human relations on the farm as his reasons for resigning, the nub of his referral was that he had sought his pension proceeds in respect of his previous employment on the farm and he alleged that he had been induced to resign by the respondents, who had told him that he could not access his pension proceeds unless he resigned.

On 7 March 2011, the respondents, purporting to act in terms of section 8(3) of the Extension of Security of Tenure Act 62 of 1997, served a notice on Snyers giving him a period of two months within which to vacate the farm. Under the Act, an owner's right to apply for eviction is dependent on a number of prerequisites, one of which is that the right of occupation should be validly terminated in terms of section 8. Snyers refused to vacate the premises contending that he was awaiting the outcome of the dispute which he had referred to the CCMA. The CCMA subsequently informed Snyers

that he had to apply for condonation as his referral had been made out of time. Although disputing that, he applied for condonation. The condonation application was refused and the CCMA ruled that it consequently lacked jurisdiction to entertain the dispute.

Snyers still refused to vacate the farm, and the respondents proceeded to apply for his eviction. The court *a quo* held that because a dispute was referred to the CCMA late, there was no dispute pending when the notice to vacate and terminating the appellants' right of residence was given. It held that the notice to vacate was therefore valid. The present appeal was noted against that finding.

Held – When the respondents served the notice to vacate on Snyers, his labour dispute in the CCMA had not yet been determined. That contravened the provisions of section 8(3) requiring that where there is a labour dispute relating to the termination of the occupier's right of residence, the termination only takes effect when such dispute is determined. Determination of the disputed labour matter is thus clearly a pre-condition for terminating the occupier's right of residence under the Extension of Security of Tenure Act. The validity of the notice given was vitiated by the lack of determination of the labour matter. That in turn vitiated the entire eviction proceedings against him.

While proper notice to vacate had been given to the second applicant, due to the irregular eviction proceedings brought against Snyers, if an application for eviction were allowed against her, while it was refused against her husband, the result would be to divide their family. That would be undesirable.

In the premises, the appeal was upheld and the eviction application dismissed.

State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd [2016] 4 All SA 842 (SCA)

Administrative justice – Judicial review – Reliance of principle of legality to avoid review under Promotion of Administrative Justice Act 3 of 2000 – Principle of legality may not be used to side step the Promotion of Administrative Justice Act.

Administrative justice – Judicial review – Whether Promotion of Administrative Justice Act 3 of 2000 applies when an organ of State seeks to set aside its own decision – A decision by a State entity to award a contract for services constitutes administrative action in terms of section 1 of the Promotion of Administrative Justice Act, and there is no good reason for excluding administrative decisions taken by the State from review under the Act.

The appellant ("SITA") was a State entity which had contracted with the respondent ("Gijima"). The parties collaborated on several projects for more than ten years. SITA provided information technology, information systems, and related services to government departments. It performed that function by entering into agreements with private service providers, such as Gijima, which in turn provided IT services to the government department. The relationship between the parties had, since 2006, been regulated by a contract that became known as "the 433 contract", which set forth the general terms and conditions applicable to all service level agreements between them. The parties had since entered into a number of agreements for the provision of IT services to different government departments. One such agreement was one in terms of which Gijima was to provide IT services to the South African Police Service (the "SAPS agreement"). In January 2012, SITA unlawfully terminated the SAPS

agreement as a result of which Gijima stood to suffer R20 million in lost revenue. That prompted Gijima to institute urgent proceedings to protect its rights under the SAPS agreement. Following negotiations between the parties, SITA suggested that Gijima abandon its claim arising from the termination of the SAPS agreement in return for which it would receive a new service contract to offset its potential losses. Gijima was concerned about SITA's competence to conclude such contract without having gone through a competitive bidding process and raised those reservations with SITA. SITA assured Gijima that it had the authority to conclude the contract. Relying on that assurance, Gijima agreed to settle the dispute on the basis proposed by SITA. The new contractual arrangement was embodied in a settlement agreement.

A payment dispute developed between the parties during the existence of the agreement, and was referred to arbitration for resolution. SITA then informed Gijima of its intention not to extend the agreement any further. Gijima submitted its statement of claim to the arbitrator in the payment dispute in which it claimed R9,5 million for services rendered under the agreement. In response, SITA pleaded that the agreement was concluded in contravention of the procurement system contemplated in section 217 of the Constitution and was therefore invalid and unenforceable against it. Faced with a constitutional challenge to the main agreement, the arbitrator ruled that he had no jurisdiction to determine the issue, and SITA launched the present proceedings in the court *a quo* seeking a declaration that its contract with Gijima was unenforceable for want of compliance with the public procurement requirements of section 217 of the Constitution. The court *a quo* dismissed the application because SITA had relied directly on the constitutional principle of legality, instead of instituting review proceedings under section 6 of the Promotion of Administrative Justice Act 3 of 2000. It had also not applied under section 9(1)(b) to condone its failure to institute such proceedings within 180 days of the contract having been concluded. That led to the present appeal.

Held – The first contention to be addressed, raised by SITA, was that the Promotion of Administrative Justice Act does not apply at all when an organ of State seeks to set aside its own decisions. The Court rejected that submission, holding that a decision by a State entity to award a contract for services constitutes administrative action in terms of section 1 of the Promotion of Administrative Justice Act, and there is no good reason for excluding administrative decisions taken by the State from review under the Act.

The next question was whether the 180-day delay rule in section 7 was applicable to SITA, who contended that the provision did not apply. The Court held that the 180-day rule does apply to organs of State, and to the SITA decision at issue in this case. Nevertheless, SITA maintained that it was entitled to avoid instituting review proceedings under the Promotion of Administrative Justice Act – and the procedural requirement under section 7 to institute its proceedings within 180 days – by relying directly on the constitutional principle of legality to obtain declaratory relief against Gijima. Put differently, it contended that if the said Act applied, it had a choice to initiate a review under its provisions or bypass it, and formulate its cause of action as a legality challenge. The Court rejected the notion that the principle of legality may not be used to side step the Promotion of Administrative Justice Act. The proper place for the principle of legality in our law is to act as a safety-net or a measure of last resort when the law allows no other avenues to challenge the unlawful exercise of public power. It cannot be the first port of call or an alternative path to review, when the Act applies.

Even if this case was approached as a legality review, SITA failed to place facts before the court to overcome the hurdle of the unreasonable delay in commencing proceedings against Gijima. As a result, the appeal was dismissed with costs.

Ahmed and others v Minister of Home Affairs and another [2016] 4 All SA 864 (WCC)

Immigration – Asylum seeker – Rights of – Whether a failed asylum seeker may apply for a temporary residential permit in terms of our immigration law – Court finding nothing in either the Refugees Act 130 of 1998 or the Immigration Act 13 of 2002 which would, make it inherently inimical or offensive to their legislative scheme, for a failed asylum seeker to apply for temporary residence and work rights.

The question in the present matter was whether a failed asylum seeker may apply for a temporary residential permit in terms of our immigration law.

The first applicant was an attorney who specialised in migration law, and the bulk of his clients were asylum seekers. In this matter, he represented the second to fourth applicants, who were failed asylum seekers.

Of significance in this case was a directive issued by the Director-General of the Department of Home Affairs (the "second respondent"). Prior to the issue of the Directive ("Directive 21"), the Department of Home Affairs had been processing applications from failed asylum seekers for temporary residence visas in terms of the Immigration Act 13 of 2002. That was stopped by Directive 21.

The applicants sought an order declaring Directive 21 to be inconsistent with the Constitution and invalid, and setting it aside. They claimed that the contents of the Directive were irrational and based on an incorrect interpretation of certain provisions of the Immigration Act and the Refugees Act 130 of 1998. They also contended that Directive 21 was inconsistent with, and contrary to, the provisions of an order ("the Dabone order") which was granted by this court by agreement between the self-same respondents in this matter and a number of applicants who were also asylum seekers, in 2003.

Held – Despite the matter being principally concerned with issues of interpretation of the provisions of the Refugees and Immigration Acts, neither of the parties attempted to focus on the legislative scheme of each statute.

In interpreting a statute, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax, in the context of the statute as a whole and the relevant circumstances which were attendant upon its coming into existence. At all times when interpreting legislation, the court is required to do so against the backdrop of the Constitution.

In order to determine whether a failed asylum seeker is excluded from applying for the right to "sojourn" in the country by applying for a visa which will allow him to remain temporarily, regard had to be had to the legislative scheme of the two Acts in question and whether there were any express or implied contra-indications to such a construction, therein.

Examining the objectives and provisions of the legislative scheme, the Court stated that the fact that the Legislature may not have expressly granted the right sought by the applicants to asylum seekers, did not in itself necessarily mean that the Legislature

deliberately intended to exclude them from having such a right. The Court also pointed to indications in proposed amendments to the Refugees Act that supported the applicants' case. In terms of the proposed amendments in terms of the Refugees Amendment Act 33 of 2008, an asylum seeker will be entitled to formal written recognition of his status, pending the outcome of his application for asylum and will have the right to remain in the Republic pending the finalisation of such application, the right not to be unlawfully arrested or detained, and the protection of the rights set out in the Constitution, insofar as such rights may apply to an asylum seeker. The Court found nothing in either Act which would, make it inherently inimical or offensive to their legislative scheme, for a failed asylum seeker to apply for temporary residence and work rights under the Immigration Act.

The Court emphasised that it is a requirement of the rule of law and the principle of legality which is an incident of it, that the exercise of public power by functionaries of the State should not be arbitrary and their decisions should be rationally connected to the purpose for which the power was given, otherwise such decisions and any actions taken pursuant thereto would be similarly be arbitrary and unconstitutional. In stating in Directive 21 that, because section 27(c) of the Refugees Act, read together with the provisions of section 27(d) of the Immigration Act, provides that a refugee with 5 years' continuous residence in the country may be entitled to apply for a permanent residence permit, it "therefore follows" that the holder of an asylum seeker permit who has not been certified as a refugee may not apply for a temporary residence permit in terms of the Immigration Act, second respondent acted arbitrarily and irrationally. The provisions of Directive 21 were therefore arbitrary and liable to be set aside on that ground alone as well as on the grounds that they were inconsistent with the Constitution, on the basis that they offended against second applicant's rights to dignity in terms of section 10 of the Constitution.

That finding rendered it unnecessary for the court to address the correctness of the Dabone order.

Directive 21 was declared to be inconsistent with the Constitution, invalid and was set aside.

Buttertum Property Letting (Pty) Ltd v Dihlabeng Local Municipality [2016] 4 All SA 895 (FB)

Summary judgment – Rule 14 of the Magistrate's Courts' Rules – Plaintiff must deliver notice of application for summary judgment within 15 days after the date of service of notice of intention to defend, together with an affidavit made by the plaintiff or by any other person who can swear positively to the facts verifying the cause of action and the amount, if any, claimed and stating that in his opinion there is no bona fide defence to the action and that notice of intention to defend has been served solely for the purpose of delay – Failure by deponent to affidavit in support of summary judgment to verify the separate causes of action rendering summons defective.

The respondent municipality obtained summary judgment against the appellant in respect of rates and taxes due on appellant's immovable property.

The history of the litigation was as follows. Summons was served on the appellant on 6 May 2014, and on 5 June 2014, a notice of intention to defend was filed. That was followed on 26 June 2014, by service on the appellant of the respondent's application for summary judgment. The acting municipal manager of respondent

deposed to an affidavit in support of summary judgment, averring that he could confirm the action as stated in the summons against the defendant as well as the amount claimed therein. On the date of the hearing of the summary judgment application, the respondent's attorney argued that appellant's answering affidavit had to be filed before 12 noon on 29 July 2014, but that had not occurred and therefore appellant's attorney should not even be heard by the court as there was no valid opposition of the application for summary judgment. Judgment was thus granted. The present appeal was noted against the judgment.

Held – Rule 14 of the Magistrate's Courts' Rules requires the plaintiff to deliver notice of application for summary judgment within 15 days after the date of service of notice of intention to defend, together with an affidavit made by the plaintiff or by any other person who can swear positively to the facts verifying the cause of action and the amount, if any, claimed and stating that in his opinion there is no *bona fide* defence to the action and that notice of intention to defend has been served solely for the purpose of delay.

The Court looked at the authorities regarding summary judgment applications and the legislation applicable *in casu*, to wit the Local Government: Municipal Systems Act 32 of 2000 ("the Systems Act") and the Local Government: Municipal Property Rates Act 6 of 2004. Municipal accounts may be issued for sanitation fees, refuse removal fees, water and electricity levies as well as water and electricity consumption. Rates are levied on all rateable property within a municipality's area of jurisdiction and these rates are levied in accordance with a rates policy. Although a municipality may consolidate accounts,from a legal point of view, separate causes of action arise in the event of failure by a property owner to pay his dues to the municipality.

In the present case, the Court found that the summons was defective, rendering it unnecessary to even consider the defences raised. The respondent's deponent failed to verify the separate causes of action, and did not even verify or confirm any cause of action. The respondent necessarily had to rely on more than one cause of action and each of those should have been verified by its deponent in the founding affidavit. The respondent should have pleaded separate causes of action and it was not good enough to claim one amount. Summary judgment should, therefore, have been refused due to the summons being defective.

Grayston Technology Investment (Pty) Ltd and another v S [2016] 4 All SA 908 (GJ)

Theft – Whether a VAT vendor who has misappropriated an amount of VAT which it has collected on behalf of SARS can be charged, with the common-law crime of theft – In absence of essential elements of theft, trial court erring in convicting appellants of common law theft – Convictions changed to failure to remit money to SARS in terms of relevant legislation.

The appellants were charged with numerous tax-related offences. The first set of charges concerns the failure to submit VAT returns under the Value-Added Tax Act 89 of 1991 and the failure to submit PAYE returns under the Income Tax Act 58 of 1962. In addition, both appellants were charged with common law theft of both VAT and PAYE money. The appellants were convicted of failing to submit the tax returns and received suspended sentences. They were also convicted on all the theft charges and received suspended sentences.

On appeal, the appellant referred the court to a case (*Director of Public Prosecutions, Western Cape v Parker* [2015] 1 All SA 525 (SCA)) which addressed the question of whether a VAT vendor who has misappropriated an amount of VAT which it has collected on behalf of SARS can be charged, with the common-law crime of theft. In light of *Parker*, the State accepted that the appeal had to succeed in respect of the first appellant's theft conviction for VAT monies. The remaining issues were whether the second appellant could be found personally guilty of theft in respect of the VAT monies; whether both appellants were guilty of theft of the amounts deducted as PAYE from the employees' pay packages; and whether the appellants could be charged with common law theft or only with the statutory offences under the relevant tax legislation.

Held – In the present case the issues concerned whether the property or interest in dispute was capable of being stolen in law and if so whether it was owned by SARS or whether SARS had any special property or interest in the funds they represented, or alternatively, whether there was a failure to effect proper accounting entries pursuant to funds that were received under an obligation to so account. Aside from the element of unlawfulness, the crime of theft is generally understood to require that the thing stolen is movable incorporeal property, that the property belongs to or is in the lawful possession of the victim and that the intention to appropriate includes an intention to permanently deprive the victim of possession. The present case raised questions around whether the thing stolen is limited to property, and if so whether it is one of the exceptions in terms of which incorporeal property can be stolen, whether the victim had to be in possession of the right at some stage prior to the theft and if so how delivery would be have been effected if the right was held or otherwise under the control of the perpetrator or a third party. A final issue was what would be required to constitute the unlawful act of appropriation if an interest short of ownership can be stolen while it is under the control of another.

Developments which occurred in banking and general monetary exchange systems resulted in our criminal law accepting that the incorporeal right in funds standing to the credit of an account could be stolen and that in such circumstances accounting entries may be equated with physical transfer. Having regard to case law and the authorities, the Court held that theft of credit has been entrenched in our law for a significant period. Theft of credit is committed when an agent for collection, nominee or person in a relationship of trust appropriates or dissipates funds which, if regard is had to proper accounting practice represents "a credit entry in books of account" held on behalf of a principal or in respect of which, to his knowledge, another person has a special proprietary right or interest despite the fact that the former can access the funds in question or exercises a degree of control over them. Theft will also be committed in cases where only the personal liability of the debtor can to be relied on provided there is a duty to account for monies, negotiable instruments or other property (or their proceeds) received from a third party and there is not a proper accounting in the debtor and creditor account between the debtor and the person entitled to the accounting.

The main issue was whether the magistrate erred in finding that both the VAT and PAYE monies were monies held in trust for and on behalf of SARS. The Court found that SARS had no special right or interest whether under statute or contract to either that portion of any payment which represented the VAT amount added onto the price of the goods or services supplied by the first appellant or to the net VAT amount that

became payable under section 28(1)(b), and when moneys were received from clients there was no duty to separately account. Therefore, any appropriation by the first appellant under the hand of the second appellant could not have satisfied the requirement of unlawfulness for theft. The second appellant's appeal against his theft convictions therefore succeeded.

Regarding PAYE, there was no evidence of either an unlawful appropriation of funds or that the requisite intent was present. The State failed to prove that, at the time the credit entry was made, the first appellant had any available funds that were capable of being appropriated and in respect of which SARS could have a special property or interest. The State also failed to prove theft of the PAYE monies by reason of a failure to properly account, as there was no evidence to demonstrate that Grayston failed to properly record any part of the proceeds of such monies in its accounting to SARS. Consequently, neither of the appellants should have been found guilty of common law theft.

The court altered the convictions and sentences appropriately.

Mdlalose and another v Minister of Police and another [2016] 4 All SA 950 (WCC)

Criminal law – Malicious prosecution – Plaintiffs required to allege and prove that the defendants set the law in motion or instituted proceedings; acted without reasonable and probable cause; acted with malice (animo injuriandi); and the prosecution failed.

Criminal procedure – Arrest and detention – Arrest without warrant – Arrest without a warrant would be justified if the following jurisdictional facts are present: the arresting officer is a police officer; he entertains a suspicion; the person arrested must be suspected to have been committing a Schedule 1 offence; and the suspicion must be based on reasonable grounds – Once jurisdictional requirements are present, the peace officer may invoke the power conferred on him by section 40(1)(b) of the Criminal Procedure Act 51 of 1977 and arrest the suspect, but he is not obliged to arrest, and has a discretion in that regard – Test regarding whether the peace officer reasonably suspects a person to have committed an offence is an objective one.

Criminal procedure – Rights of accused – Section 35(1)(d) of the Constitution provides that a person has a right to be brought before a court as soon as reasonably possible but not later than 48 hours after arrest; or the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day – Detention of plaintiffs after expiry of 48 hours, without having appeared in court, held to be unlawful.

Two matters were consolidated by agreement between the parties, as the issues pertaining to the action arose at the same time, involving the two plaintiffs. The parties having agreed to separate the issue of merits from the quantum, the matter accordingly proceeded on merits only.

The plaintiffs were arrested in November 2012 by members of the South African Police Service acting within the course and scope of their employment with the first defendant. They were subsequently detained and charged with house robbery. They remained in custody until 19 March 2013 when they were released after charges were withdrawn. Pursuant thereto, they brought an action for damages against the

defendants on the basis that they were wrongfully and unlawfully arrested, unlawfully detained by the police and maliciously prosecuted.

The defendants denied allegations of wrongfulness and unlawfulness and alleged that the arrest and detention were carried out in terms of sections 40(1)(b) and section 50(1) of the Criminal Procedure Act 51 of 1977 (the "Act"). They further denied any malice in the prosecution of the plaintiffs, alleging that the charges against the plaintiffs were withdrawn provisionally pending further investigation.

Held – The issue to be determined was whether the arrest of the plaintiffs and further detention were lawful and whether their prosecution was malicious. Key to the determination was whether the police officers acted within the bounds of sections 40(1)(b) and 50(1) of the Act, and whether the plaintiffs meet the threshold set for malicious prosecution to be proved.

It is the duty of peace officers to ensure that those suspected of committing crimes against society are brought to justice. Prompt action is often necessary when an opportunity to catch suspects who have committed serious crimes may be lost and the police might later be blamed for not taking action when information relating to the suspects was given by members of the community. A balance is, however, required in that a police officer should keep an open mind and be alive to the possibility that the information he may have may not be sufficient to meet the requirements set by law as to when an arrest without a warrant can be effected.

Section 12 of the Constitution guarantees everyone the right to freedom and security including the right not to be deprived of freedom arbitrarily or without just cause and not to be detained without trial.

Arrest without a warrant would be justified if the following jurisdictional facts are present: the arresting officer is a police officer; he entertains a suspicion; the person arrested must be suspected to have been committing a Schedule 1 offence; and the suspicion must be based on reasonable grounds. Once those jurisdictional requirements are present, the peace officer may invoke the power conferred on him by section 40(1)(b) and arrest the suspect. However, he is not obliged to arrest, and has a discretion in that regard.

The onus to prove the lawfulness of the arrest lay with the arrestor, in this case the first defendant. The test regarding whether the peace officer reasonably suspects a person to have committed an offence is an objective one.

It was not in dispute in this case that the arresting officer was a police officer acting within the course and scope of his employment with the first defendant. The question was whether the arresting officer formed a suspicion that a Schedule 1 offence was committed, which suspicion rested on reasonable grounds, before effecting the arrest. The Court found no basis for such suspicion on the part of the arresting officers. Although the plaintiffs were identified in a photo album after they had been arrested, that was *ex post facto*, and did not justify the initial act of unlawful arrest as the arrest that occurred in terms of section 40(1)(b) of the Act. The arrests were, therefore, not lawful.

Section 35(1)(d) of the Constitution provides that a person has a right to be brought before a court as soon as reasonably possible but not later than 48 hours after arrest; or the end of the first court day after the expiry of the 48 hours, if the 48 hours expire

outside ordinary court hours or on a day which is not an ordinary court day. Section 50(1)(d) of the Act has the same effect. The detention of the plaintiffs after the expiry of 48 hours, without having appeared in court, was therefore unlawful in this case.

The onus of proving that their prosecution was malicious lay with the plaintiffs. They were required to allege and prove that the defendants set the law in motion or instituted proceedings; acted without reasonable and probable cause; acted with malice (*animo injuriandi*); and the prosecution failed. The plaintiffs could not prove any of the required elements except to show that the prosecution was withdrawn, which in itself was not sufficient to overcome the hurdle.

The first defendant was held liable for the damages which plaintiffs might prove as having been suffered as a result of their unlawful arrest and their subsequent detention prior to their first appearance in court. The claim based on malicious prosecution was dismissed.

SA LAW REPORTS JANUARY 2017

GEES v PROVINCIAL MINISTER OF CULTURAL AFFAIRS AND SPORT, WESTERN CAPE AND OTHERS 2017 (1) SA 1 (SCA)

National monuments — Buildings of historical interest — Alteration or demolition — Building older than 60 years — No formal heritage status — Heritage authority granting demolition permit on condition that new development in harmony with existing building's (i) town-planning envelope and (ii) façade — Conditions lawfully imposed — National Heritage Resources Act 25 of 1999, s 34(1) and s 48(2).

The appellant, who wanted to redevelop property with an unwanted building on it, sought a demolition permit from Heritage Western Cape (HWC, the third respondent). Neither the property nor the building had formal heritage protection under the National Heritage Resources Act 25 of 1999 (the Act), but the building's 60-years-plus age meant that demolition would require a permit under s 34(1) read with s 48(2) of the Act. The parties agreed that, while the building was not worthy of protection, the surrounding area was, due to its large concentration of art deco buildings, conservation-worthy. The City of Cape Town (the City) was at the time conducting a survey of the area in order to convert it into a 'heritage protection overlay zone' (HPOZ). This would mean, inter alia, that approval would be required for the addition of new buildings. The City also graded the building a proposed IIIC for its 'contribution to the significance of [its] surrounding area'.

After initially refusing permission to demolish, HWC in a subsequent appeal to its appeals tribunal granted the requested permit, but on condition that (i) the development not exceed 'the town-planning envelope' of the existing building; (ii) the materials used in the new façade were 'in keeping' with the existing building; and (iii) building plans were submitted to HWC for approval before work was commenced. The appellant sought a High Court order setting aside the imposed conditions, alternatively directing the responsible provincial minister (the first respondent) to reconsider the appeal. The High Court refused the application and the appellant appealed to the Supreme Court of Appeal, arguing that the third respondent had exceeded its powers under s 48(2) of the Act. He argued that the Act did not

authorise Heritage officials granting demolition permits to impose conditions on the development of property that had no formal heritage status.

Held

The word 'including' in s 48(2) meant that the tribunal had a wide discretion to impose conditions on the issuing of permits (see [17], [18]). In the present case, the heritage resources the authorities were bound to protect extended beyond the building or property to the surrounding area with its large complement of art deco buildings, which were worthy of protection and recognised as such by the City. Although the proposed designation of the area as a heritage area required further refinement and engagement between the owner and the public, that was an ongoing process that would in the near future result in its formal protection (see [24]). Where a heritage resource was potentially affected by an application brought under the Act, heritage authorities were obliged to impose such conditions as the Act would permit for the conservation of the affected area, even if that area were unprotected (see [25], [28]). Since the present conditions were clearly designed to enable HWC to fulfil its duties under the Act, they were lawfully imposed (see [29]). While they to a certain extent constituted a deprivation of the appellant's property rights, the imposed conditions accorded with the conservation mandate of the HWC under the Act and were directly in line with its principles. In the circumstances, there was no arbitrary deprivation of the appellant's rights of ownership: the imposition of the conditions was reasonable and equitable, having regard to the inherent responsibility of the appellant towards the community in the exercise of his entitlements as owner of the property in question (see [34]). Appeal dismissed.

GERSTLE AND OTHERS v CAPE TOWN CITY AND OTHERS 2017 (1) SA 11 (WCC)

Local authority — Buildings — Building plans — Approval — Properties for which plans submitted located in 'group housing scheme' — Putting plans into effect would obscure view of other owners — Whether plans complying with zoning scheme regulations — 'Group housing' defined in amended Cape Townships Ordinance 33 of 1934 as inter alia a group of dwellings planned, designed and built as a 'harmonious architectural entity' — Whether plans negatively affecting 'harmonious architectural entity' — National Building Regulations and Building Standards Act 103 of 1977, s 7(1)(a)*; Cape Townships Ordinance 33 of 1934.*

This matter concerned the decision of the Cape Town Municipality (the City) to approve building plans in respect of two properties situated in the Mill Row Housing Development (Mill Row), a group housing development located in Bloubergrant. Mill Row was made up of two rows of dwellings facing the ocean; the back comprising double-storey dwellings, and the front single-storey. The two properties relevant to this matter were located in the front row, and their owners' intention as set out in the building plans was to add a further storey to their homes. The effect would be to obscure the view of those in the back row. Various registered owners of dwellings in Mill Row unsuccessfully instituted an application in the court a quo for the review and setting-aside of the approval by the City. This is their appeal against that decision.
In respect of the building plan approval, the National Building Regulations and Building Standards Act 103 of 1977 obliges a local authority to consider the recommendations of a building control officer and, once having done so, grant approval if it is satisfied that the application meets the requirements of the Act, and *any other applicable law*. (Section 7(1)*(a)*.) Inter alia the appellants argued that the application did not comply with the relevant zoning scheme promulgated on the

basis of the Land Use Planning Ordinance 15 of 1985. Mill Row was classified as a group housing scheme. The amended Cape Townships Ordinance 33 of 1934 — containing the relevant zoning scheme regulations — defines 'group housing' inter alia as a group of dwellings 'planned, designed and built as a *harmonious architectural entity*'. The appellants argued that, by taking away the back-row owners' view and their access to sunlight, the proposed development negatively affected the 'harmonious architectural entity'. For this reason, a reasonable decision-maker would not have approved the plans.
Held, accepting the stance adopted by the court a quo, that, as per its ordinary meaning, the phrase 'harmonious architectural entity' meant that all the structures within a group housing development, taken together, had to form an orderly or pleasing style of building. But whether the requirements of the definition had been met called for a fair amount of subjectivity.
Held, that, when looking at the development from the outside, it could not be said that the addition of a further storey would create any incongruence with the harmonious architectural entity. On the evidence of the appellants, any such incongruence could only be perceived when looking from the inside out. Notwithstanding that a fair amount of subjectivity was involved in the determination of the meaning of the concept, all of the other definitions were premised on an examination from the 'outside looking in'.
Held, further, that, irrespective of the professed intention of the developers that access to light and a view informed the basis of the development, they never imposed any legal limitations restricting the height of the first-row dwellings to a single storey. It appeared that the appellants' case was an attempt to utilise the concept of an 'harmonious architectural entity' to be extended so as to create rights to a view, to privacy and to light, notwithstanding that none of these claims were specifically provided for in any of the applicable legal mechanisms which were available to the developers.
Held, that there was no reason to interfere with the approach of the City in adopting the recommendations of the building control officer, which were carefully considered and justifiable. The fact that the appellants' case represented an attempt to extend the concept of 'harmonious architectural entity' to include rights that could be safeguarded by clear legal means, including light, privacy and view, was, in itself, an indication, absent the most compelling evidence to the contrary, that there was no reason offered by which to interfere with the approach adopted by the City. Appeal dismissed.

NORTHERN ENDEAVOUR SHIPPING PTE LTD v OWNERS OF MV *NYK ISABEL* **AND ANOTHER 2017 (1) SA 25 (SCA)**

Shipping — Admiralty law — Maritime claim — Enforcement — Arrest — Associated-ship arrest — Guilty ship subject to charterparty — Deemed ownership of charterer — Charterer including slot-charterer — Admiralty Jurisdiction Regulation Act 105 of 1983, s 3(7)(c).

Shipping — Admiralty law — Security — Security for counterclaim — Court having wide discretion to order — But applicant must first establish (i) prima facie existence of counterclaim and (ii) genuine and reasonable need for security — Owner of arrested ship applying for countersecurity in respect of claim reinforced by judgment in foreign court — Both parties peregrini but respondent having subjected itself to jurisdiction of

court — Court exercising discretion in favour of owner and ordering arresting party to provide countersecurity for foreign judgment — Admiralty Jurisdiction Regulation Act 105 of 1983, s 5(2)(b) *and* (c).

A number of containers aboard *Northern Endeavour*, a ship belonging to the appellant (NES), were lost or damaged en route from Durban to Brazil. NES blamed the respondent (NYK), a slot-charterer of a number of container slots on the ship, for the incident, arguing that it had been negligent when it stowed the containers. In Brazil, cargo underwriters acting under rights of subrogation sued NYK to recover the losses. Relying on an indemnity, NYK joined NES to the proceedings. The Brazilian court upheld both the cargo underwriters' claim against NYK and NYK's indemnity claim against NES.

Aggrieved by this result, NES caused *NYK Isabel*, a ship controlled by NYK, to be arrested as an associated ship in an action in rem brought in the Durban High Court. NES argued that any amount it was obliged to pay NYK under the Brazilian judgment constituted damages it was entitled to recover from NYK. NES relied on s 3(7)*(c)* of the Admiralty Act * for its argument that, as a slot-charterer of Northern Endeavour at the time of the incident, NYK had to be deemed its owner for the purposes of the associated-ship arrest.

NYK defended the action and brought a counterclaim under s 5(2)*(b)* and *(c)*† of the Act for a matching provision of security by NES, failing which it asked the court to cancel the arrest. The security sought by NYK was in respect of the indemnity claim granted against NES by the Brazilian court. Both parties were peregrini of the Durban court, and NES argued that NYK was not a party to the South African action, and that unless it became one it could not ask the court to order that NES provide it with security. Security was furnished to secure the release of *NYK* Isabel with the result that there was a deemed arrest in place under s 3(10) of the Act. Other than a reduction in the amount of security, the High Court granted relief in accordance with the prayer.

In an appeal by NES to the Supreme Court there were three issues to be decided:(1)whether a slot-charterer such as NYK counted as a 'charterer' for the purposes of s 3(7)*(c)*;(2)whether NYK was a party to the action; and (3)whether NYK was entitled to invoke s 5(2)*(b)* and *(c)* of the Act in order to obtain the security it sought.

Held

As to (1): It did. When the Act spoke of charterparties the expression had to be given a meaning that was consistent with current commercial usage (see [27]). Slot charters had evolved to meet an emerging commercial need, and there was no reason the preclude them from being characterised as charterers as intended in the Act (see [28] – [29]). Since NYK was a charterer of *Northern Endeavour* for the purposes of the deeming provision in s 3(7)*(c)*, it was not open to NYK to set aside the arrest of *NYK Isabel* as defective (see [30]).

As to (2): It was. The effect of rules 8(2) and 10 of the Admiralty Court Rules was that when NYK entered an appearance to defend the in rem action instituted by NES against *NYK Isabel*, it ipso facto became a party to the action (see [31] – [39]).

As to (3): It was. While courts had in the past expressed divergent views on the extent of their power to order security under s 5(2)*(b)* and *(c)*, the preferable view was that they conferred a wide discretion (see [43] – [45]). Such an interpretation would allow the courts to balance the interests of claimants and defendants by ordering countersecurity in appropriate cases and attaching conditions to arrest and attachment orders (see [45]). However, for the discretion to arise the applicant first

had to show that it had (i) a prima facie enforceable claim; and (ii) a genuine and reasonable need for security (see [46], [51], [58]).
In the present case NYK complied with both requirements: It had a claim for indemnity, reinforced by the Brazilian court's judgment, against NES; and since NES had disposed of *Northern Endeavour* and had neither assets nor income, a genuine and reasonable need for security (see [47], [55], [57]). Though both parties were peregrini, NES had subjected itself to the power of the court to grant countersecurity under s 5(2)*(b)* and *(c)*, and it did not matter that the security was sought in respect of payment of a judgment NYK had obtained in Brazil (see [50]). The court would, in view of the following considerations, exercise its discretion in favour of NYK by ordering NES to provide security for its claim in Brazil (see [58] – [63]):judicial comity — it would assist a fellow Brics nation to enforce a judgment by one of its courts; having invoked the jurisdiction of the South African court in order to obtain security for its claim against NYK, NES could not complain if NYK made use of the same jurisdiction for the same purpose; since NYK seemed to have a strong claim and NES a weak one, considerations of fairness suggested that NYK should also have security;NES was unable to point to policy or equity reasons why it would be unjust to require it to provide security; the provisions of the slot charterparty and applicable slot-exchange agreement favoured NYK's case.
The SCA accordingly dismissed the appeal and confirmed the High Court's order save for certain amendments.

THOMANI AND ANOTHER v SEBOKA NO AND OTHERS 2017 (1) SA 51 (GP)

Mortgage — Mortgage bond — Interpretation — Bank and mortgagor concluding mortgage bond to secure sum owed under home loan — Whether bond securing sum owed by mortgagor to bank under suretyship agreement.

Suretyship — Liability — Whether, while principal debtor company is deregistered, its surety may be sued.

In late 2004 the applicants and fourth respondent bank concluded a home loan and mortgage bond (see [33]). The bond contained a clause stating that:
'The bond shall remain in force as continuing covering security for the capital amount, the interest thereon and the additional amount, notwithstanding any intermediate settlement, the bond shall be and remain of full force, virtue and effect as a continuing covering security and covering bond for each and every sum in which the mortgagor may now or hereafter become indebted to the bank from any cause whatsoever to the amount of the capital amount, interest thereon and the additional amount.' (See [14].) In 2007 the bank and a company concluded a loan, and as security therefor, the bank and the applicants entered into a suretyship. In 2008 the company made its last payment to the bank and failed to make any payments thereafter; and then in 2010 the company was deregistered. In 2013 the bank summonsed the applicants claiming payment under the mortgage bond, of the applicants' (possibly prescribed) debt under the suretyship. Default judgment was granted, and flowing from it, the applicants' home was sold in execution. This caused the applicants to apply to rescind the judgment, and set aside the sale.
Among the issues were (1) whether the bond covered the applicants' debt under the suretyship; and (2) whether the sureties could be sued while the principal debtor, the company, was deregistered (see [15], [19] and [90]).

Held, as to (1), that the bond only covered amounts owing under the home loan; and as to (2), that the sureties could not be sued while the company was deregistered. Default judgment rescinded, and the sale in execution set aside

BUSUKU v ROAD ACCIDENT FUND 2017 (1) SA 71 (ECM)

Motor vehicle accident — Compensation — Claim against Road Accident Fund — Claim form —Sufficiency of information furnished in claim form — Medical report left blank — Tantamount to no medical report having been submitted — Not possible to substitute with hospital notes — Issue of substantial compliance only arising in regard to content of form and not in its absence — Submission of blank medical report on form RAF 1 having no legal effect, resulting in prescription of claim — Road Accident Fund Act 56 of 1996, s 24(1)(a) read with reg 7.

Section 24 of the Road Accident Fund Act 56 of 1996 sets out the procedure to be followed in a claim against the Fund. The claim form, the RAF 1 form, contains a 'medical report' section which must be completed by the practitioner who attended to the claimant. On the plaintiff's RAF 1 form the medical report was left blank, and the issue before court was whether this meant that his claim had prescribed. The plaintiff contended that his claim did not prescribe because it complied substantially with the requirements of the Act. He argued that the details of his medical treatment, while not disclosed in the RAF 1 form, could be gleaned from his hospital records. The plaintiff also relied on s 24(5), which provides that if the Fund does not object to the validity of a claim within 60 days, it shall be deemed valid in all respects.
Held
The submission of a blank medical report, which formed an integral part of the claim, violated the peremptory requirements of the Act relating to the submission of claims (see [14], [21]). A blank report had no legal effect, and the issue of substantial compliance could not arise where there had been no compliance at all (see [23], [28] – [29]). Nor could hospital records substitute a duly completed medical report as the source of the information required by the Fund (see [20], [24]). The deeming provision in s 24(5) would not be triggered where there had been — as in the present case — a total lack of compliance in respect of the submission of the claim (see [40]). Since no valid claim was lodged, the special plea of prescription would be upheld

ABSA BANK LTD v EXPECTRA 423 (PTY) LTD AND OTHERS 2017 (1) SA 81 (WCC)

Practice — Judgments and orders — Summary judgment — Deferral — Court clarifying and approving principle that summary judgment may not be deferred by delivery of notice to produce documents or tape recordings in terms of rule 35(12) and (14) — Uniform Rules of Court, rule 35(12) and (14).

Suretyship — Surety — Discharge of — Prejudice to surety — In application for summary judgment against sureties, defence raised that creditor delaying in acting against principal debtor, causing prejudice to sureties — Whether conduct of creditor together with 'surrounding circumstances' justifying sureties' release from suretyships — No reliance placed upon any breach by creditor of any terms of underlying

agreements — Sureties arguing that creditor's conduct so unreasonable that not falling within terms of loan agreement or deed of suretyship — Position unsustainable in law — Impermissibly seeking to create exception to general rule that no general 'prejudice principle' existing in our law.

The plaintiff had entered into a loan agreement with the company West Dunes in terms of which it lent and advanced to the latter a sum of money, repayable, together with interest, in monthly instalments. Arising out of West Dunes' non-payment of outstanding amounts, the plaintiff sued the defendants in their capacity as sureties and co-principal debtors with West Dunes, the principal debtor. The plaintiff then sought summary judgment against the second and third defendants (the defendants). Shortly before the hearing date the defendants filed a notice in terms of Uniform Rule of Court 35(12) calling for the plaintiff to produce certain documents. And in answer to the summary judgment application they filed what they termed a provisional affidavit resisting summary judgment. In addition they sought leave to file a 'supplementary answering affidavit', as well as an extension of the time period in which to do so to a date after the plaintiff had responded to the rule 35(12) notice. Lastly, a postponement was requested, to allow these various steps to be fulfilled.

Deferment of summary judgment application by rule 35(12) or (14) notice

The approach adopted by the defendants called for the court to consider whether the hearing of a summary judgment application could be deferred pending a response to a rule 35(12) application. In the matter of *Business Partners Ltd v Trustees, Riaan Botes Family Trust, and Another*2013 (5) SA 514 (WCC) the court held that it could not. However, the court in that matter also stated that '(i)t [was] of course open to the defendants to invoke Rule 35(12) and (14)', and the defendants placed reliance on this seemingly contradictory dictum in invoking rule 35(12). The court in the present matter clarified the legal position, and in particular the meaning of the above dictum.

Held, that the learned judge's dictum to the effect that a defendant might invoke rule 35(12) and (14) meant at most that a defendant might issue a notice in terms of rule 35(12) and (14), but this could not defer an application for summary judgment on the basis that no reply had been forthcoming. Should the plaintiff not produce any document or tape so sought, a defendant could, at best, aver in its opposing affidavit that, in its evaluation of the nature and grounds of its defence and the material facts upon which it was based, the court had to take into account that the defendant had not been able to gain access to such documentation.

Held, further, that, in the event that it was incorrect in its interpretation of the disputed dictum, and that the learned judge in *Business Partners* was implying that rule 35(12) and (14) could be utilised to defer an application for summary judgment until such time as an appropriate response was received from a plaintiff, it was in disagreement therewith. Such a position would be incompatible with the purpose and nature of summary judgment proceedings.

Held, accordingly, that the applications for the postponement of the summary judgment application, for an order that the plaintiff be directed to furnish a reply to the defendants' rule 35(12) notice, and for leave for the defendants to thereafter file a supplementary opposing affidavit were without merit and had to be dismissed.

The merits of the defence raised

The proposed defence was that the plaintiff inordinately delayed in taking action against the principal debtor when the latter defaulted on its repayments, as a result of which the defendants suffered prejudice. It was argued that the plaintiff's conduct, together with the surrounding circumstances — inter alia the plaintiff's acquiring

knowledge that the defendants had no prospects of exercising their right of recourse against West Dunes (see [42]) — justified the defendants' release from the suretyships. The high-water mark of the defendants' case was that, if the 'surrounding circumstances' were proved on trial, it would establish that the plaintiff's conduct was so unreasonable that it could not be considered as falling within the terms of the loan agreement or deed of suretyship. (The defendants did not place any reliance on any breach by the plaintiff of any provisions of the underlying agreements.)
Held, that this conclusion was not sustainable in law, and, even if the alleged delay and the 'circumstances' were proved, they did not constitute a defence for at least two reasons. First, they sought to create an exception to the general rule that our law did not recognise an unbounded 'prejudice principle' to the effect that, if a creditor should do anything in its dealings with the principal debtor which has the effect of prejudicing the surety, the surety was released. 'Prejudice' could only be relied upon if it were the result of some breach of some or other legal duty or obligation owed by the creditor to them; in this case no reliance was placed on any breach of the underlying agreements. Secondly, not only did the defendants not found their putative defence on the breach of any specific provisions in the underlying agreements, but various provisions therein expressly granted the plaintiff the right to conduct itself in the alleged dilatory manner which was criticised by the defendants.
Held, accordingly, that the defendants had failed to establish a bona fide defence that was good in law. (Paragraph [49] at 95I.) Summary judgment application upheld.

KT v MR 2017 (1) SA 97 (GP)

Marriage — Divorce — Proprietary rights — Forfeiture of patrimonial benefits of marriage — Undue benefit — Parties married in community of property — Where consideration of circumstances leading to breakdown of marriage and presence of substantial misconduct not decisive of whether benefit undue — Consideration of fault-neutral factor such as duration of marriage should be based on considerations of proportionality — The longer the marriage, the more likely that benefit would be due and proportionate — Conversely, the shorter the marriage, the more likely benefit would be undue and disproportionate — Not, however, translating into rigid and mechanical exercise, as court enjoined to make value judgment — Divorce Act 70 of 1979, s 9(1).

The plaintiff wife instituted a divorce action against the defendant husband, to whom she had been married in terms of customary law, in community of property. The husband contended that he was entitled to an order that the wife forfeit her patrimonial benefits of the marriage. This matter is the determination of that point.
In terms of s 9(1) of the Divorce Act 70 of 1979 a court may make a forfeiture order if, 'having regard to the duration of the marriage, the circumstances which gave rise to the break-down thereof and any substantial misconduct on the part of either of the parties, [it] is satisfied that, if the order for forfeiture is not made, the one party will in relation to the other be unduly benefited'. It was common cause that the wife would be 'benefited' in the event of an equal division. This was so given the significantly greater contribution made by the husband, as compared to the wife, regarding the assets brought into the marriage and accumulated during its existence. The key issue was whether the benefit was 'undue', the determination of which called for the court to have regard to the considerations mentioned in s 9(1) of the Act. As to the

circumstances giving rise to the breakdown of the marriage, the court found that both parties were at fault. The court rejected the wife's assertions that various conduct on the part of the husband amounted to 'substantial misconduct'. Given that the aforementioned considerations were not decisive of the issue, could it be said the wife stood to gain, were forfeiture not granted, an undue benefit, given the short duration of the marriage — it endured for only 20 months — and the substantial estate the husband had built up?
Held, taking into account the *South African Concise Oxford Dictionary* definition of 'undue' — 'unwarranted or inappropriate because excessive or disproportionate' — if regard were had to the duration of the marriage, then considerations of what might be proportional were valid and appropriate in deciding whether a benefit was undue or not. (Paragraph [20.17] at 104G.)
Held, further, that in circumstances where the other factors relating to substantial misconduct and the circumstances giving rise to the breakdown of the marriage were not decisive in determining whether a benefit was undue, the consideration of a fault-neutral factor such as the duration of the marriage should be based on considerations of proportionality.
Held, further, that, while not cast in stone, it followed that in the determination of whether a benefit was undue a court was more likely to make such a determination where the marriage was of short duration, as opposed to circumstances where the marriage was of a long duration. Simply put, the longer the marriage the more likely it was that the benefit on dissolution would be due and proportionate, and, conversely, the shorter the marriage the more likely the benefit would be undue and disproportionate. This did not, however, translate into a rigid and mechanical exercise, as the court was enjoined to make a value judgment in this regard. (Paragraphs [20.19] – [20.20] at 105A – C.)
Held, accordingly, that the wife would be unduly benefited if an order for forfeiture were not made. However, in the circumstances, an order of partial, rather than full, forfeiture against the wife would be appropriate.

MEC FOR HEALTH, GAUTENG v LUSHABA 2017 (1) SA 106 (CC)

Court — Judicial authority vesting in courts — Medical negligence case instituted against Gauteng MEC for Health — Court issued rule nisi calling upon MEC to show cause why he should not be held liable for costs de bonis propriis in his personal capacity; alternatively, to indicate those officials in offices of Department and State Attorney who should be held liable — One cannot be judge in own matter — Court not competent to authorise party to litigation before it to exercise judicial authority — Constitution, s 165.
Constitutional law — Human rights — Right of access to courts — Right to fair hearing — In medical negligence case instituted against Gauteng MEC for Health, costs order holding liable in their personal capacities officials in health department and State Attorney's office — Officials punished without notice and without having been given any opportunity to make representations — Violation of officials' right to fair hearing — Constitution, s 34.

The applicant, the Gauteng MEC for Health, sought leave to appeal against inter alia a punitive costs order that had been granted against him in a medical negligence case successfully instituted by the respondent. The trial court had initially issued a rule nisi calling upon the MEC to show cause why he should not be held liable for the

costs *de bonis propriis* in his personal capacity; alternatively, to indicate those officials in the offices of the Department and the State Attorney who should be held liable. The court confirmed the rule, and ordered four officials which it deemed responsible to pay *de bonis propriis* 50% of the costs jointly and severally with the defendant on an attorney and client scale. The MEC was discharged from personal liability. On appeal the MEC argued that such an award was improperly issued.
Held, that it was not competent for the High Court to allow, as it did in the rule nisi, the MEC to be the judge of whether he should be held personally liable for costs and, if he should not be held personally liable, to identify who should be. Such an approach did not accord, firstly, with s 165 of the Constitution which declared judicial authority to vest in the courts and, secondly, with the entrenched principle that no one should be a judge in their own case.
Held, further, that the final order to the effect that certain officials should be held liable for costs in their personal capacity was irregular. Firstly, the officials had not been joined to the matter. Secondly, the rule nisi did not call any of them to show cause why they should not be held liable, the effect being that the court had no legal basis to exercise its judicial authority over them.
Held, further, that in punishing these officials without notice and without having given them any opportunity to make representations, the High Court violated the officials' right to a fair hearing guaranteed by s 34 of the Constitution. While the officials did depose to affidavits, they did so in support of the MEC's case, and in particular so that *he* could not be held personally liable; the affidavits were not meant to show cause why *they* should not be found personally liable for costs.
Held, accordingly, that the costs order be set aside.

COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE v MARSHALL NO AND OTHERS 2017 (1) SA 114 (SCA)
Revenue — Value-added tax — Zero rating — In terms of s 11(2)*(n)* of VAT Act on payments for services deemed under s 8(5) to have been made by designated entity to public authority or municipality — Section 8(5) only applicable where no link between actual supplies made and payments received — Actual supplies not qualifying for zero rating under s 11(2)*(n)* — Value-Added Tax Act 89 of 1991, ss 8(5) and 11(2)*(n)*.

In terms of s 11(2)*(n)* of the Value – Added Tax Act 89 of 1991 (VAT Act) payment in respect of a deemed supply as contemplated in s 8(5) and which relates to services supplied by a 'welfare organisation' as defined, is zero rated for value-added tax (VAT). Section 8(5) of the VAT Act provides that a 'designated entity shall be deemed to supply services to any public authority to the extent of any payment made by the public authority in the course or furtherance of an enterprise carried on by that designated entity'.
Here the Supreme Court of Appeal (reversing a High Court decision) *held* that payments received for aero-medical services supplied by the South African Red Cross Air Mercy Service Trust — a VAT vendor and 'welfare organisation' and 'designated entity' as defined — to provincial government health departments nationally, were not zero rated for VAT in terms of s 11(2)*(n)* read with s 8(5).
This, the SCA held, was because s 8(5) was the gateway to a zero rating under s 11(2)*(n)* but s 8(5) did not apply in the present case, where actual services were supplied; it dealt only with payments *not* linked to the actual supply of services, such

as incentives in the form of grants or subsidies to supply goods on behalf of public authorities. It was only where a payment could *not* be so linked that it became necessary to 'deem' it to have been provided in terms of s 8(5), creating an imagined supply which may qualify for a zero rating. The actual supply of services fell outside the scope of s 8(5). The deeming provision not being applicable to these (actual) services, they therefore did not qualify for zero-rating under s 11(2)*(n)* but instead were taxable at the standard rate under s 7(1)*(a)*.

WILE AND ANOTHER v MEC, DEPARTMENT OF PUBLIC WORKS, GAUTENG AND OTHERS 2017 (1) SA 125 (WCC)

Provisional sentence — On foreign judgment — Use of provisional-sentence procedure ruled inappropriate but foreign court's judgment nevertheless recognised in interests of justice.

Practice — Judgments and orders — Foreign judgment — Recognition — Plaintiff C seeking order directing state to give effect to name change resulting from foreign adult-adoption order — Limited relief sought not offending public policy and granted in interests of justice — Court making order recognising foreign judgment and authorising plaintiff to use order in support of name-change application.

The first plaintiff used provisional sentence proceedings to seek an order directing the Department of Home Affairs * to give effect to a judgment of a German court that recognised the adoption of the first plaintiff, a South African living in Cape Town, by the second plaintiff, a German living in Germany. Later the first plaintiff limited the relief sought to an order directing Department officials to give effect to the German judgment only to the extent of changing her name and surname in its records. The Department was opposed to the relief sought on the ground that the first plaintiff was adopted when she was 47 years old and South African law did not provide for adult adoption. It also argued that the Births and Deaths Registration Act 51 of 1992 (the Act) did not provide for the proposed name change.

Held

The plaintiffs' use of provisional sentence procedure was inappropriate. While provisional sentence provided a creditor with a speedy remedy for the recovery of moneys on the basis of a liquid document, in the present case the plaintiffs sought the enforcement of a foreign judgment concerning the first plaintiff's status (see [6]). But since the parties approached the matter as if it were brought by way of application, there was a strong case for approaching the matter on the basis of its substance rather than form (see [7], [27]).

There were thus two issues for the court to determine: (i) the procedural question of whether the plaintiffs should be granted the relief sought through the provisional sentence procedure; and if so (ii) whether the plaintiffs had made out a case on the papers that the German court's order should be recognised to the limited extent sought (see [25]).

As to (i): While it was true that the provisional sentence procedure was inappropriate, it was also inappropriate for the defendants to have engaged with the plaintiffs' case without raising any objection (see [27]). In substance the matter was from the beginning treated as an opposed application, and dismissing the claim on the ground that inappropriate procedure was followed would be to elevate form over substance (see [28]). The interests of justice and those of the parties were best served by simply treating the proceedings as an application (see [30]).

As to (ii): The requirements for the recognition and enforcement of a foreign judgment were that the foreign court had international competency under SA law; that the judgment was final and conclusive in its effect; that its recognition and enforcement would not be contrary to public policy; that it could not be impeached under the common law; that it was not obtained by fraudulent means; and that it did not involve the enforcement of a penal or revenue law of the foreign state (see [31]). In view of the limited relief sought, the argument that the court would by granting it give recognition to the institution of adult adoption was exaggerated and without merit (see [38] – [40]). There was no closed list of reasons for which the Department could authorise a name change under s 26(2) of the Act and, all things considered, the limited recognition of the German court's order would not offend against public policy (see [49] – [58]). The first plaintiff would be authorised to use the recognition order to support her name-change application.

DANIELSON v HUMAN AND ANOTHER 2017 (1) SA 141 (WCC)

Practice — Judgments and orders — Foreign judgment — Enforcement — Dispute concerning licensing of battery technology resulting in American civil judgment of treble damages — Whether Act or public policy precluding recognition and enforcement of judgment — Protection of Businesses Act 99 of 1978, ss 1(1) and 1(3).

Applicant American and respondent South Africans became involved in a venture to develop and market a battery technology that the respondents had invented. To this end the applicant invested moneys and obtained ownership interests in certain entities, as well as the right to license the technology.
Ultimately a dispute developed and the applicant obtained a judgment from an American court awarding him damages. He now applied to a High Court for an order recognising and enforcing it.
The first issue was whether the judgment had arisen from a transaction connected with (raw) materials. If it had, a minister's permission would be required before it could be enforced (ss 1(1) and 1(3) of the Protection of Businesses Act 99 of 1978). *Held*, that it had not (see [5], [19]).
The second issue was whether the judgment contained a punitive element. (If it did, public policy would bar its enforcement.) The background was that the respondents' conduct fell within the scope of American legislation, which provided that any damages resulting from the conduct should be trebled. The question was whether the trebled damages were punitive. *Held*, that they were not.Ordered, that the judgment be recognised and enforced.

MNYANDU v PADAYACHI 2017 (1) SA 151 (KZP)

Harassment — Nature of — Whether single act may constitute — Protection from Harassment Act 17 of 2011, s 1.

Appellant sent an email to respondent and several of their colleagues in which she made false accusations about him. He later obtained a protection order in the magistrates' court under the Protection from Harassment Act 17 of 2011. She appealed.
In issue was whether a single act could constitute harassment. *Held*, that it could.

Appeal ultimately upheld

On 24 May 2013 the respondent, Thivianathan Padayachi (applicant in the court a quo), applied for a protection order in terms of s 2(1) of the Act against the appellant, Sindisiwe Lovedaly Mnyandu (respondent in the court a quo), at the Magistrates' Court, Durban, alleging that the appellant had harassed and subjected him to slander, false allegations and defamation in an email she had sent to their colleagues at Mondi Paper Ltd, Merebank (Mondi), where they were both employed. The appellant denied the allegation. After the hearing of oral evidence, the court a quo found in favour of the respondent and issued a final protection order against the appellant on 29 November 2013. This is an appeal against the judgment delivered by the magistrate, Durban, on 29 November 2013.

Mr *Shepstone* submitted that the magistrate had misdirected herself by regarding statements made by the respondent during his closing argument as constituting evidence. He contended further that she had erred in failing to refer to the definitions of 'harassment' and 'harm' as set out in s 1 of the Act or to make a finding in respect of the harm caused to the respondent by the sending of the email. Further there was no evidence that any 'harm', as defined in the Act, was caused to the respondent, no physical harm had been alleged, and there was no evidence to substantiate the respondent's allegations of potential economic harm.

Thereafter, holding that the Act 'has a very wide interpretation', the magistrate found that, although the appellant had only sent one email, it was sufficient to constitute 'harassment in the workplace'. She was therefore satisfied that the respondent's constitutional rights had been infringed by the appellant and granted a final protection order against her, interdicting her from defaming the respondent and his colleagues, making false accusations of a gender based attack against the respondent, and sending malicious defamatory emails. She also ordered that the appellant pay the respondent's taxed attorney and client costs.

In my view the conduct of the appellant in sending the email may have been unreasonable, as she allowed her emotions to cloud her perception, but I am not persuaded that her conduct was objectively oppressive or had the gravity to constitute harassment.

Further, the appellant levelled accusations of abuse against all four men who were at the meeting. Only the respondent took serious umbrage at the allegations against him, and resorted to the application for an interdict. Although he alleged that his prospects of promotion and his dignity and reputation within Mondi and in the community may be compromised as a consequence of the email, there was no evidence to this effect. I am therefore unable to find that the facts of this matter sustain a finding that the conduct of the appellant constituted harassment as contemplated by the Act, and the appeal must succeed. The following order do issue: The appeal is upheld. The judgment of the court a quo delivered on 29 November 2013 is set aside. The respondent is directed to pay the costs of appeal

BLUE NIGHTINGALE TRADING 397 (PTY) LTD t/a SIYENZA GROUP v AMATHOLE DISTRICT MUNICIPALITY 2017 (1) SA 172 (ECG)

Local authority — Municipality — Procurement — Of services under contract secured by other organ of state — Exemption from compliance with statutory provisions regulating procurement — Only (i) if goods or services procured by municipality same as those required by other organ of state and at same contract price; and (ii) if contract

for procurement concluded between municipality and other organ of state — Local Government: Municipal Finance Management Act 56 of 2003, s 110(2), and regulations in terms of s 168, reg 32(1).

The procurement of goods and services by a municipality is subject to the provisions of part 1 of ch 11 (ss 110 – 120) of the Local Government: Municipal Finance Management Act 56 of 2003 (the LGMFMA). It aims to ensure a procurement system that is fair, equitable, transparent, competitive and cost-effective, as called for by s 217(1) of the Constitution, and each municipality is enjoined to implement a supply chain management policy that gives effect to the provisions of part 1. An exemption from compliance with such part is provided for in s 110(2), applying with respect to contracts between a municipality and an organ of state for *(a)* the provision of goods or services to the municipality; *(b)* the provision of a municipal service or assistance in the provision of a municipal service; or *(c)* the procurement of goods and services under a contract secured by that other organ of state, provided that the relevant supplier has agreed to such procurement. Regulation 32 of the Municipal Supply Chain Management Regulations promulgated under s 168 gives effect to such exemption. It declares that '*(a)* supply chain management policy may allow the accounting officer to procure goods or services for the municipality or municipal entity under a contract secured by another organ of state' if certain requirements are met. This matter called for an interpretation of reg 32 and the provisions of s 110(2), and in particular the circumstances in which an exemption would apply.
The respondent, a district municipality in the Eastern Cape (the Municipality), had embarked on a sanitation backlog eradication programme with respect to its district. At that stage an organ of state, the Municipal Infrastructure Support Agent (MISA), for the purposes of implementing a sanitation programme in the Northern Cape, had already contracted with the applicant, a service provider, and pursuant to a lengthy, proper tender process. Purporting to act in terms of reg 32, the Municipality sought permission from MISA to 'participate' in the contract between the latter and the applicant implementing MISA's sanitation programme. This led to the Municipality's entering into a contract (the Amathole Agreement) with the applicant for the provision of a number of latrines of a certain type. In respect of this contract no tender or procurement processes had been followed. This present matter arose out of the Municipality's decision to cancel the Amathole Agreement. The applicant's subsequent attempts to enforce certain terms of the Amathole Agreement were met with the response that the agreement was unlawful and void ab initio in the absence of due tender and procurement processes having been followed. The Municipality submitted that reg 32 had no application to the facts of the case and reliance could not be placed on an exemption.
Held, that the procurement policy of an organ of state, as required by s 217(2) of the Constitution, had to be compliant with s 217(1), namely that contracts for goods and services required by an organ of state had to be concluded in accordance with a system which was fair, equitable, transparent, competitive and cost-effective, and had to be implemented within the framework prescribed by national legislation, namely the Preferential Procurement Policy Framework Act 5 of 2000 (PPPFA) and part 1 of ch 11 (Goods and Services) (ss 110 – 120) of the LGMFMA.
Held, that the exclusionary provisions of s 110(2) of the LGMFMA and of reg 32 had not only to be restrictively interpreted, but the exclusion of part 1 under ch 11 of the LGMFMA could not detract from or erode the constitutional imperatives of fairness, equity, competitiveness and cost-effectiveness. The enquiry had always to be

whether the constitutional imperatives had been compromised by the exemption; if so, it was unconstitutional; if not, the exemption was permissible under s 110(2).
Held, further, that the constitutionality of the exemption would always depend on the facts of the particular case: it was inconceivable that there would be compliance with the constitutional imperatives of s 217 of the Constitution unless the goods or services procured by the second organ of state (in the present case, MISA) were the same as those required by the first organ of state (ie the Municipality), and the contract price was the same. If the procurement by the second organ of state had withstood the scrutiny of due process, there was no need to duplicate the same process provided the goods or services and the contract price remained the same.
Held, further, that reg 32 could not cut down the meaning of s 110(2) of the LGMFMA and had to be read, and the procurement policy interpreted, subject to the requirements set under s 110(2)*(a)*, *(b)* and *(c)* of the LGMFMA. As per its ordinary meaning, s 110(2)*(a)* referred to the situation where a municipality contracts with another organ of state for the provision of goods or services to such municipality. In these instances the other organ of state became the supplier who supplied the municipality. Section 110(2)*(c)* only referred to the situation where the municipality, with the consent of the supplier, either became a party to the existing contract between the other organ of state and the supplier; or where the other organ of state concluded a contract with the supplier for the benefit of a third party, namely for the benefit of the municipality, against payment by the municipality of the approved contract price. In either case, the material terms and contract price of the contract already secured by that organ of state remained binding, and thus remained compliant with s 217 of the Constitution and with the procurement policy of the other organ of state, and therefore with the LGMFMA.
Held, further, that reg 32 simply gave effect to the constitutional requirements under s 217 of the Constitution and the PPPFA and LGMFMA, and they all served the same purpose and catered for the same eventuality. Regulation 32 was neither ultra vires the LGMFMA nor did it detract from or add to s 217 of the Constitution or the LGMFMA.
Held, that the requirements set out under s 110(2) for the application of the exemption from the need to comply with part 1 of ch 11 had not been met. Here the Municipality had contracted directly with the supplier, as opposed to with the organ of state (MISA in this instance), as was required by s 110(2). Further, the procurement of the goods and services relied on by the applicant was clearly not a procurement under the MISA agreement in terms of s 110(2)*(c)*. Reliance was placed upon the new Amathole Agreement, whilst the contract referred to in s 110(2)*(c)* was the original agreement entered into between the organ of state and the supplier. Once that original agreement was cancelled and/or the material terms thereof were amended, the goods and services could no longer be procured under the original agreement or under its terms and the exemption allowed under s 110(2)*(c)* came to an end.
Held, further, that the material terms of the MISA agreement had been amended to such an extent in the contract between the Municipality and the applicant that they could no longer be said to constitute a procurement under the MISA agreement or under its terms.
Application dismissed and Amathole Agreement declared unconstitutional, invalid and unlawful, and void.

STANDARD BANK OF SOUTH AFRICA LTD v MIRACLE MILE INVESTMENTS 67 (PTY) LTD AND ANOTHER 2017 (1) SA 185 (SCA)

Prescription — Extinctive prescription — Commencement — Amount claimable under acceleration clause — Loan, to be repaid in instalments, and containing provision that full amount could be claimed on fulfilment of certain conditions, including default on an instalment, and notice of election to claim full amount — Whether prescription on full amount started to run on default, or election — Prescription Act 68 of 1969, s 12(1).

Standard Bank (the creditor) concluded a loan facility with a debtor, with the debtor to repay what it borrowed in instalments. The agreement contained a provision that the creditor could claim the full amount owing if the debtor failed to pay an instalment; the creditor gave notice demanding payment; the debtor failed to pay; and the creditor gave notice that it elected to claim the full amount (see [6]). The debt was secured by suretyships and mortgage bonds executed by the respondents.
The debtor later failed to pay instalments; the creditor gave it notice to do so; and the debtor made a last payment. However the creditor did not then give notice of its election to claim the full amount.
Years later, with an action for the full amount pending, the respondents applied for an order that the creditor consent to cancellation of the bonds. This on the basis that the debt they secured — the full amount owing — had prescribed.
The High Court, following authority, held that the debt had indeed prescribed. (The authority was to the effect that on the first failure to pay an instalment, prescription began to run on the full amount claimable under the acceleration clause.This caused the creditor to appeal to the Supreme Court of Appeal.
The issue there was when the debt comprising the full amount became 'due', so causing prescription to begin to run (s 12(1) of the Prescription Act 68 of 1969). Did it become due on the first default; or only on notice of election to claim the full amount (see [2])?
It *held* that only when a debt could be claimed, was the debt 'due'; and it was only when all of the agreed preconditions had been fulfilled (including notice of election), that the full amount could be claimed and was due.
Here this meant that the debt comprising the full amount had not prescribed, and that the High Court's decision had to be reversed.

W v H 2017 (1) SA 196 (WCC)

Contract — Legality — Contracts contrary to public policy — Specific instances — Clause in antenuptial contract constituting unilateral waiver by wife of right to claim maintenance should marriage be dissolved, regardless of conduct of parties — Clause offending against core constitutional values upon which public policy grounded.
Marriage — Divorce — Maintenance — Unilateral waiver prior to time of divorce — Legality — Clause in antenuptial contract constituting unilateral waiver by wife of right to claim maintenance should marriage be dissolved, regardless of conduct of parties — Clause contrary to public policy.

This matter concerned the legality of a clause in an antenuptial contract (ANC) which incorporated an accrual system governing the marriage which was entered into in Germany between the plaintiff wife and the defendant husband. It provided that, in

consideration of her acceptance of certain donations, the wife waived any present or future right to claim maintenance for herself should the intended marriage be dissolved in whatever manner and for whatever reason, and regardless of the conduct of the parties. The husband sought to rely on such clause to defeat the wife's claim for personal maintenance that she included in a divorce action she instituted against the former. However, the wife argued that the clause was per se contrary to public policy and unenforceable. In the alternative, she argued that, even if it were not illegal per se, the clause should not be enforced, because to do so would be so palpably unfair and unreasonable that it would offend the notions of fairness, equality, justice and reasonableness which informed public policy. This was so given the circumstances under which the waiver agreement was concluded; and given the husband's systematic divesting of his estate of assets, thereby subverting the wife's claim to accrual, to which right she was entitled in terms of the broader provisions of the ANC.

Held, that the clause incorporating the unilateral waiver of maintenance was per se so manifestly unreasonable that it offended against public policy, and was voidable on the grounds of unfairness. In particular, the ANC offended, in the manner set out below, core constitutional values of this country (among them human dignity, equality, the enhancement of human rights and freedoms, and the rule of law), in which public policy was now deeply rooted. It sought to exclude the statutory power of the court to award maintenance at a future time, when neither of the parties had any basis for apprehending the existence of the wife's potential entitlement to maintenance upon divorce.It even sought to exclude the statutory power which was awarded to the wife in terms of s 2 of the Maintenance of Surviving Spouses Act 27 of 1990 to claim maintenance from the husband's estate on the dissolution of the marriage by the husband's death, that is, in the absence of any divorce. It specifically exempted the husband from the consequences of all misconduct on his part, including that misconduct which was cognisable by the court in terms of s 7(2) of the Divorce Act 70 of 1979. It was a unilateral waiver and was not accompanied by a corresponding waiver on the part of the husband. This tended towards the achievement of inequality. The donations in clauses 6 and 8 of the ANC were ostensibly given as a benefit in return for the waiver, but at the same time, contrary to s 5(2) of the Matrimonial Property Act 88 of 1984, such donations were not excluded from the donee's estate for accrual purposes. Nevertheless, in terms of clause 3 of the ANC, these donations were expressly to be taken into account as part of the wife's estate.

Held, further, that the doctrine of *pacta sunt servanda* did not apply to the present matter. The ANC was a contract sui generis. Any pacta that found its way into an ANC would always be subject to the test of public policy because ANCs were unique in the sense that they could only be executed in a prescribed manner and form because this was the very foundation of a contract of marriage. The legislator and our courts consistently monitored contracts of this nature. It was not helpful to refer to commercial contracts or to import the findings of the courts in commercial cases into ANCs as if ANCs stand on the same footing.

Held, further, having regard to the conditions which prevailed at the time the ANC was concluded, the husband's subsequent conduct and the present circumstances, that to ask the court to enforce this waiver would be unreasonable and unfair, and offensive to public policy. As to those circumstances at the time of the agreement the court held that inter alia:

- The parties were in unequal bargaining positions when negotiating the agreement. The husband (53 years old at the time) exerted unfair pressure on the wife (who was 28 years old) to obtain her consent to the waiver clause, rushing her and threatening not to marry her and be a father to their child (with whom she was pregnant at the time) if she failed to agree to it.
- At the time of her entering the contract she did not have a real knowledge and understanding of the law applicable, and in particular the impact of the particular ANC and the clause in question in the context of South African law. She was not given an opportunity further to acquire this knowledge, and the advice she did receive was insufficient.
- Furthermore, the husband structured the accrual system in such a way that the donations, which were to be compensation for the wife's waiver of her right to claim maintenance, had to be treated as part of the wife's accrual. Her compensation was thereby denuded.

As to the husband's subsequent conduct, and the present circumstances, the court held that inter alia:The husband systematically attempted to hide his assets and denude his estate, thus prejudicing the wife. He, additionally, refused to make proper I disclosure as required by s 7 of the Matrimonial Property Act 88 of 1984. (Paragraphs [45] – [46] at 206F – 207C.)Throughout the marriage the wife's actual earnings and future earning capacity in South Africa was limited. If the wife were not able to pursue her claim for maintenance, she would suffer prejudice, deprivation and indignity. The husband failed to discharge his obligations in terms of the ANC to transfer a half-share in an unbonded property he had purchased prior to the marriage. (Paragraph [50] at 207H – I.)

Held, that the maintenance waiver in the antenuptial contract concluded between the parties was void and unenforceable. Divorce, maintenance and accrual granted as per order.

URAMIN (INCORPORATED IN BRITISH COLUMBIA) t/a AREVA RESOURCES SOUTHERN AFRICA v PERIE 2017 (1) SA 236 (GJ)

Evidence — Witness — Giving of evidence via video link — Procedure for.

Ms Perie, an ex-employee of the applicant (Uramin), sued it on an alleged oral agreement for a sum of money. Here Uramin encountered a difficulty, in that neither its employee who had allegedly concluded the agreement, nor an employee who had executed a settlement agreement pertinent to the claim, was any longer in its employ; and neither was living or working in South Africa. It now applied to lead their evidence via video link (see [3], [46]).

The question was whether on the facts it was convenient (Uniform Rule 39(20)) and in the interests of justice (Constitution, s 173) to vary the general trial procedure (viva voce evidence of witnesses — rule 38(2)) to have them testify in this manner. *Held*, that it was (see [26], [30]). This as neither was in the country, nor under the control of Uramin, nor prepared to travel here; and because their evidence was vital to Uramin's defence.The application was accordingly granted.

The court then went on to detail the procedure that had been followed, describing inter alia the local and foreign venues; who had been present at each venue; what could be seen and heard; how the oath had been administered; and how technological difficulties had been resolved

BARNARD NO v ROAD ACCIDENT FUND 2017 (1) SA 245 (ECP)

Motor vehicle accident — Compensation — Claim against Road Accident Fund — Undertaking in terms of s 17(4)*(a)* of RAF Act — 'Rendering of service or supplying of goods' — Whether restricted to health-related services — Court considering purpose behind section, as well as manner in which it, as well as predecessors, had been interpreted — Wording of section wide enough to cover non-health-related services or goods, such as services of domestic assistant and/or costs of curator bonis appointed to administer estate of claimant — Road Accident Fund Act 56 of 1996, ss 17(4)*(a)* and 17(4B)*(a)*.

The plaintiff's action for damages, arising from injuries sustained in a motor vehicle collision, included a claim for the costs of the future employment of a domestic assistant (in respect of services of a purely domestic nature). The defendant, the Road Accident Fund (the Fund), acting in terms of s 17(4)*(a)* of the Road Accident Fund Act 56 of 1996, undertook to provide for the future costs associated with the provision of such domestic assistance. The sole question to be decided was whether s 17(4)*(a)* permitted an undertaking in respect of services of such a nature.
Section 17(4)*(a)* provides that, where an action for compensation 'includes a claim for the costs of the future accommodation of any person in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to him or her', the Fund or an agent shall be entitled, after furnishing an undertaking to such effect, to provide compensation for such costs '*in accordance with the tariff contemplated in subsection (4B)*'. The italicised qualification phrase, as well as ss (4B), was introduced by Act 19 of 2005. As per ss (4B)*(a)*, the tariff contemplated was one 'based on the tariffs for health services provided by public health establishments contemplated in the National Health Act [61 of] 2003'.
The plaintiff argued against the permissibility of the domestic assistance undertaking. Reliance was placed on a recent Free State decision which held that the nature of the 'services' envisaged by the section was 'health-related'. That court reached such a conclusion based on the express wording of ss 17(4)*(a)* read with s 17(4B) to the effect that the liability of the Fund was based on tariffs for *health services* provided by *public health establishments* contemplated in the *National Health* Act. As no other service was indicated or defined, rendering of services could only mean health services. Domestic assistance did not fall within the classification of health services.
Held, that the underlying purpose of s 17(4) was to avoid all of the obvious difficulties and risks associated with the quantification of future loss — those imponderables which were impacted by contingencies — which were incapable of precise determination in advance. It was a purpose which had been consistently promoted throughout the legislative history of statutory schemes designed to compensate the victims of road accidents. (Paragraph [18] at 251C – D.)
Held, further, that the present provision, as well as its predecessors, had consistently been interpreted as to include the supply of services other than medical or health-related services. (Paragraph [28] at 252H – I.)
Held, further, that the effect of the restrictive interpretation favoured by the plaintiff would be to confine the purpose of the provision only to the future provision of medical services and treatment and leave all other recognised and accepted categories of future loss to be determined as lump-sum payments of patrimonial loss, subject to the vagaries and uncertainties that the legislature has sought to address by the introduction of the provision. The provision of an undertaking served

not only to avoid the difficulties of quantification of such claims, it served also to provide a claimant who required future treatment or the rendering of services with a measure of security of access to such services that the payment of a lump-sum award could not provide. This served to protect the dignity of claimants. That the statutory scheme of compensation for victims of road accidents served as a form of social security was well recognised. An interpretation of s 17(4)*(a)* which was consonant with the values of human dignity and equality had to be favoured if there was any ambiguity in the proper construction to be placed on the section. (Paragraph [29] at 252I – 253D.)
Held, accordingly, that the phrase 'in accordance with the tariff contemplated in subsection (4B)' as read with the provisions of ss (4B) served only to restrict the liability of the Fund in relation to such services as were regulated by a prescribed tariff and did not confine the ambit of an undertaking only to such services. The wording of the section was wide enough to cover liability for the supply of goods or the rendering of services the provision of which was not regulated by a tariff promulgated in terms of the National Health Act, such as the services of a domestic assistant and/or the costs of a curator bonis appointed to administer the estate of a claimant.

ABSA BANK LTD v MOORE AND ANOTHER 2017 (1) SA 255 (CC)

Debtor and creditor — Discharge of debt — Payment by third party acting in furtherance of fraudulent scheme — Payment effective to discharge debt even if made in fraud of creditor and with funds provided by it. **Land** — Transfer — Fraud inducing transfer — Ambit of maxim 'fraud unravels all' — Effect on cancellation of mortgage bond — Whether bank entitled to reinstatement of bond — Court will not write new contract for parties.

Mortgage — Mortgage bond — Cancellation — Mortgagee bank cancelling bond after mortgage debt paid by third party in furtherance of fraudulent scheme — Whether bank entitled to reinstatement of bond.

Payment — What constitutes — Payment by third party may discharge debt even if payment made in furtherance of fraudulent scheme.

In 2009 the Moores fell prey to the Brusson property scam. Lured by an ad promising 'money without capital outlay or risk', the Moores signed three agreements: an 'offer to purchase', a 'deed of sale' and a 'memorandum of agreement'. But the 'deed of sale', under which they thought they were buying back the house, was fake: they had unwittingly signed away their home to Brusson's accomplice, Kambini. Having discharged the Moores' bond debt, Kambini obtained, then defaulted on, a new home loan from Absa. Absa, who had cancelled the Moores' existing bonds when the underlying debt was discharged, took judgment against Kambini and attached the house (which was still occupied by the Moores) in execution. In the meantime the Moores had received the promised loan.
A High Court found that the agreements signed by the Moores were invalid by reason of simulation and granted the Moores' application for an interdict prohibiting the proposed sale in execution. The court ordered the restitution of the property to the Moores subject to the reinstatement of their original mortgage bonds.

In an appeal by Absa the Supreme Court of Appeal held the agreements to be invalid for fraud, not simulation, and undid the condition imposed by the High Court, which it found to be unjustified and incompetent.
In an application for leave to appeal to the Constitutional Court, Absa sought only the re-imposition of this condition. Absa argued that the cancellation of the Moores' bond debt was part of a grand fraudulent scheme which should be undone so as to restore Absa to its pre-fraud position. Absa argued that even if the cancellation of the Moores' bonds was valid, then the Moores had been enriched at its expense, and the appropriate remedy was for the court to develop the law of enrichment by implementing restitutionary subrogation, an equitable remedy afforded under English law to a creditor in its position. The proposed remedy would recognise that, in releasing the Moores' bonds and accepting Kabini as its secured creditor, Absa had acted on the supposition that Kambini had good title to offer. That not being the case, it had to be restored to the benefit of its original security.
Held
While a debt may be paid without the consent of the debtor (in casu the Moores), provided the payer (Kambini) intended to pay and the payee/creditor (Absa) intended to accept payment, the question was whether the 'fraud unravels all' principle could aid Absa by undoing the debt discharge and the bond cancellation (see [33] – [36], [38]). The answer was that it could not: the payment was valid despite the fraud, and effective to discharge the Moores' debt to Absa (see [37]). Unless the Moores chose to rescind their loan agreement with Brusson because of the fraud, it was binding (see [38]). Absa could not disregard it because of the fraud, nor did the fraud unravel the cancellation of the Moores' bonds: they were accessory to the main debt they owed Absa, which was validly cancelled (see [39] – [40]).
Even if Absa's argument for subrogation were accepted, it would require the court to write a new contract for it and the Moores, which it could not do (see [43] – [44]). The argument also presupposed that the Moores were enriched at the expense of Absa, which was not the case, since the release of the Moores' property from the bonds came at the cost of their new debt to Brusson (see [45]). And even if the Moores had been enriched, Absa had not been impoverished, for it had a claim against Kambini and a judgment enforcing it (see [49]).
Beneath the contention of enrichment was Absa's complaint that the Moores received an unmerited windfall at its expense. But the discharge of the Moores' debt was not subject to the condition that Kambini would prove a worthy debtor, and there was no basis to develop the law so as to impose one (see [56]). This outcome was fair: Absa, which enjoyed the institutional resources and power to protect itself against the fraudulent scheme, but didn't do so, had to suffer the loss its loan to Mr Kabini caused to it (see [57]).
Lastly, Absa's failure to make a convincing argument on constitutional principles meant that the jurisdiction of the Constitutional Court was barely engaged (see [58] – [60]). Leave to appeal accordingly refused.

MAKHWELO v MINISTER OF SAFETY AND SECURITY 2017 (1) SA 274 (GJ)

State — Actions by or against — Actions against — Notice — To be served within six months of debt sued on becoming due — Unlawful arrest and detention — When debt due — Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002, s 3(2).

The Minister of Safety and Security's servants arrested and detained plaintiff for over a year, then withdrew the charges against him and released him.
Plaintiff then gave notice of his intention to proceed against the Minister (s 3(2) of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002), and served summons. He asserted he had been unlawfully arrested and detained, and claimed damages.
The matter proceeded toward trial and a pre-trial conference was held, at which plaintiff indicated that he would amend his particulars of claim. He duly did so, to increase the damages he sought, and delivered the amended particulars about seven weeks before the start date of the trial. Then, two court days before the trial, the Minister delivered an amended plea, as well as a special plea.
The special plea was that plaintiff's notice was defective because served out of time, and this barred him from proceeding.
Plaintiff then applied urgently for an order that the notice was competent because timeous; or failing that, for condonation.
The issues were: Whether the matter should be heard urgently. *Held*, that it should be (see [22] – [23] and [40]).Whether the urgent court or the trial court should hear the application. *Held*, that the urgent court should (see [29]). Whether the notice was defective. The Act says the notice must be served within six months of the debt sued on becoming due (s 3(2)). The question with unlawful arrest and detention was whether the debt became due on arrest (the Minister's contention), or on release (plaintiff's assertion). (Plaintiff had served notice more than six months after arrest, but within six months of release.) *Held*, that it became due on release. Plaintiff's notice was thus valid. Application granted.

BALISO v FIRSTRAND BANK LTD t/a WESBANK 2017 (1) SA 292 (CC) A

Credit agreement — Consumer credit agreement — Debt enforcement — Preliminary procedures — Instalment agreement — Surrender of goods — Notices credit provider required to send to consumer — Notice of estimated value of goods surrendered under instalment sale agreement — Method of delivery — Majority acknowledging merits of requiring registered mail but not deciding issue; minority deciding registered mail required — National Credit Act 34 of 2005, s 127(2).

Credit agreement — Consumer credit agreement — Debt enforcement — Preliminary procedures — Instalment agreement — Surrender of goods — Notices credit provider required to send consumer — Notice of estimated value of goods surrendered under instalment sale agreement — Proof of delivery — Probable receipt by reasonable consumer required — In opposed matters this determined by way of evidence at trial — National Credit Act 34 of 2005, ss 127(2), 130(3)(a).

Section 127 of the National Credit Act 34 of 2005 (the Act) provides for the 'surrender of goods' by a consumer under an instalment agreement, secured loan or lease. After the goods have been surrendered in the manner provided for in s 127(1), the credit provider must in terms of s 127(2) within 10 days give the consumer a written notice inter alia setting out the estimated value of the goods. Section 127(3) then affords the consumer an election to 'unconditionally withdraw' their surrender of the goods within 10 days of receiving the s 127(2) notice.
Here the consumer (Mr Baliso) raised an exception that the particulars of claim in action against him — by the credit provider (FRB) to collect the shortfall between the consumer's outstanding balance under an instalment agreement and the proceeds of

the sale at a public auction of the relevant surrendered goods — lacked the necessary averment that notice in terms of s 127(2) had been sent to him by registered mail. Mr Baliso contended that the requirement in the *Sebola* case, that notice under s 129 be sent by registered mail, also applied to the s 127(2) notice. This case concerned his application for leave to appeal to the Constitutional Court, his exception having been dismissed by the High Court and leave to appeal refused.

Held (the majority decision)

Given the serious consequences of non-compliance with the notice required under s 127(2), there was merit in the submission that no good reason existed to differentiate materially between the method of complying with s 129(1) and s 127(2). A summons may well be excipiable if it did not meet the *Sebola/Kubyana* standard, but it was not necessary to make a definitive holding in this regard. The issue here was the appealability of a dismissal of an exception.

In terms of s 130(3)*(a)* of the Act compliance with the notice requirements of, inter alia, s 127(2) was a prerequisite for 'determin[ing] the matter'. When a matter was 'determined' depended on whether the matter was unopposed and default judgment was sought, or whether it was opposed and judgment was to follow only upon hearing evidence at a trial. In an opposed matter the consumer may give evidence to contradict the credit provider's evidence of proper notice. The guidance in *Sebola* was restricted to unopposed matters where default judgment was sought, and was not exhaustive of the manner in which notice could probably be brought to the attention of a reasonable consumer. For the purpose of s 127, what was required before a court may determine a matter was proof that the s 127(2) notice was probably received by, or came to the attention of, a reasonable consumer — an issue that in an opposed matter must be determined by way of evidence at the trial. Because this was an opposed matter the outcome of the exception (either way) would have no final effect on the issues between the parties. Even if the exception were upheld, the respondent would have the opportunity to amend its particulars of claim. The question of Mr Baliso's probable receipt of the s 127(2) notice, or of it probably having come to his attention, was one of the issues that must be determined by way of evidence at the trial. The exception procedure was inappropriate in the circumstances. Leave to appeal would be refused.

Held (the minority decision)

The dismissal of an exception to the jurisdiction of a court was regarded as final and appealable. The decision sought to be appealed against related to the jurisdiction or competence of the High Court to determine the matter before it. As such it was appealable, and so it must be concluded that it was in the interests of justice that leave to appeal be granted.

Once it was accepted that the decision appealed against was appealable, the question was whether or not the sending of a s 127(2) notice by a credit provider to a consumer by ordinary mail constituted compliance with s 127(2). It did not. Section 127(2) had to be complied with in the same manner as s 129 — by registered mail.

EDWARDS v FIRSTRAND BANK LTD t/a WESBANK 2017 (1) SA 316 (SCA)

Credit agreement — Consumer credit agreement — Debt enforcement — Preliminary procedures — Instalment agreement — Surrender of goods — Notices credit provider required to send to consumer — Notice requirements only applicable where surrender voluntary, not if consumer in default, or instalment agreement

cancelled or goods attached — National Credit Act 34 of 2005, ss 127(2), 127(5) and 131.

Credit agreement — Consumer credit agreement — Debt enforcement — Preliminary procedures — Instalment agreement — Surrender of goods — Notices credit provider required to send to consumer — Method of delivery — May be advisable to send by registered mail but not required — Adequate proof of delivery — What constitutes — National Credit Act 34 of 2005, ss 127(2), 127(5).

When goods held under an instalment agreement are surrendered by a consumer in a manner provided for in s 127(1) of the National Credit 34 of 2005 (the Act), the credit provider must in terms of s 127(2) notify the consumer of the valuation amount of the goods. Section 127(3) then affords the consumer the option of withdrawing the notice of intended termination and to resume possession of the goods after consideration of the credit provider's valuation. If the credit provider sells the surrendered goods, written notice must be given in terms of s 127(5) informing the consumer inter alia of the proceeds of the sale.

Here the credit provider respondent (Wesbank) had issued summons against the consumer appellant (Mr Edwards) after he fell into arrears with his instalments under an instalment sale agreement between them, inter alia cancelling the credit agreement and claiming return of the vehicle that was its subject-matter. Having obtained summary judgment against Mr Edwards, Wesbank then repossessed the vehicle, and after notices in terms of ss 127(2) and 125 of the Act — dispatched to Mr Edwards by ordinary post using the address he had furnished in the credit agreement — sold the vehicle at an auction.

The issues were whether Wesbank was required to send the ss 127(2) and 127(5) notices by registered mail; whether Mr Edwards' actual receipt thereof was required; and whether s 127 was applicable at all where, as in this case, the merx under the instalment agreement was not surrendered voluntarily but was repossessed by order of court, attached and sold. In regard to the last issue, the following sections of the Act were also relevant — s 131, which provides that 'if a court makes an attachment order with I respect to property that is the subject of a credit agreement, section 127(1) to (9) read with the changes required by context apply to goods attached under that order'; and ss 129(3) and 129(4) which respectively provide that 'a consumer may at any time before the credit provider has cancelled the agreement' remedy a default but 'may not reinstate or revive a credit agreement after [inter alia] the sale of any property pursuant to an attachment order'.

Held (majority judgment) It may be advisable to send the notice in terms of s 127(2) by registered mail but that was not what the law required. The credit provider must place facts before the court showing that notice, on a balance of probabilities, reached the consumer. The court would then determine whether facts presented constituted adequate proof of delivery. From the evidence it was clear that the respondent did send a notice in terms of s 127(5) of the Act to the address furnished by Mr Edwards. Since he knew there was no street delivery of mail, he only had himself to blame for not having received it. (Paragraphs [9], [10], [11], [13] and [17] at 320E – 321J, 322C – G and 323F – G.)

Section 127(1) was not applicable in this case because the appellant did not voluntarily terminate the agreement but the respondent secured, by the court process, the termination of the agreement and subsequently the attachment and sale of the vehicle in question. Section 131 of the Act squarely answered the question whether s 127(2) – (9) was applicable in the positive. However, in the present case,

because the consumer was in default of the agreement and because the agreement had already been cancelled, it could not be reinstated in terms of s 127(3).

Held (concurring majority judgment)

These provisions dealt with a situation where the consumer had surrendered goods to the credit provider voluntarily. Where, however, there had been an attachment of goods following upon a court order, as happened in this case, s 131 required the application of ss 127(2) – 127(9) but importantly they were to be read with the changes that the context required. Wesbank had cancelled the agreement. This meant that Mr Edwards was not entitled to reinstate the agreement and resume possession of the car, which was what the s 127(2) notice invited him to consider doing. Mr Edwards was of course also in default under the agreement before the cancellation, which meant that he could not take repossession of the goods after having received the estimated value of the goods in terms of ss 127(3) and 127(4) either. Section 127(2) simply did not apply.

And even if s 127(2) did apply, Mr Edwards' contention that he did not receive it had no merit because, once it was proved that the notice was sent to him, he bore the burden of rebutting the inference of delivery. He had to explain why it was not reasonable to expect the notice to have reached his attention. If he did not receive the notice because of his own unreasonable conduct, it would not matter whether he received the notice or not because he would not have rebutted the inference of delivery. Also, the credit agreement contained a clause in which Mr Edwards agreed that he would be 'deemed to have received a notice or letter five business days after we have posted it to' him. This meant that he accepted that he would be regarded as having received the notice, whether or not he had in fact received it. Mr Edwards bore the risk that the notice would not be delivered to his chosen address. His conduct in choosing this address for the mode of delivery despite his knowledge that he would not receive the mail was unreasonable. It mattered not whether the notice was sent by ordinary or registered mail. He would still not have received it. He was thus 'deemed' to have received the s 127(2) notice.

As for the defence of a s 127(5) notice not having reached him, this defence must fail for the same reasons. The purpose of a s 127(5) notice was to put the consumer in a position to contest, before the trial started, Wesbank's calculations regarding the amount he still owed after the sale of the car. Here, even if he did not receive this notice through the post, it was annexed o the amended particulars of claim which Mr Edwards received three months before the trial commenced.

SA CRIMINAL LAW REPORTS JANUARY 2017

S v OKAH 2017 (1) SACR 1 (SCA)

Jurisdiction — Extraterritorial jurisdiction — Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004 — Whether activities outside of South Africa covered by offence created in s 15(1) of Act.

The appellant appealed against his conviction in the High Court on a number of counts under the Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004 (the Act) and his sentence of an effective 20 years' imprisonment. The offences related to two of the bombings that took place in Nigeria, in Warri on 15 March 2010, and in Abuja on 1 October 2010. The appellant was a Nigerian national who had come to South Africa in 2005 and acquired permanent-

resident status in 2007. He was a leader of the Movement for the Emancipation of the Niger Delta (MEND), a militant group opposed to the Nigerian Government's handling of the activities of oil exploration and mining companies in the Niger Delta. The appellant was in Nigeria at the time of the Warri bombing and every act relating to those offences was committed outside of South Africa. He did, however, supply financing for that bombing. As to the Abuja bombing, it was found that the appellant conspired, planned and instructed people in relation to the execution of that bombing while he was in South Africa. He was arrested in South Africa the day after the Abuja bombing. Four of the counts relating to the Warri attack were based on the appellant's activities in Nigeria and not on his financing of the attack. The state contended that s 15(1) also covered such activities and that it would be absurd for the legislature to provide only for extraterritorial jurisdiction in respect of the more circumscribed offence of financing terrorist activities, rather than the wide definition of 'terrorist activity' which the Act was intended to regulate.
Held, that to adopt such an interpretation would strain the language of the legislation. On a proper interpretation of s 15(1), only activities involved in the financing of terrorist activities were covered by the section.
The convictions on those four counts were therefore set aside on appeal and the sentence altered accordingly. The effective period of imprisonment remained however 20 years' imprisonment.

S v PRINS 2017 (1) SACR 20 (WCC)

Sexual offences — Unlawful intercourse with person unable to appreciate consequences of sexual intercourse by virtue of mental disability — Proof of — Expert evidence by psychologist and nature of victim's testimony establishing mental disability as envisaged by s 1 of Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

The appellant was convicted in a magistrates' court of two counts of contravening s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (SORMA) (rape through penile penetration of the vagina) and one contravention of s 5(1) (an act of sexual assault through the touching of the complainant's vagina). The complainant was the 19-year-old stepdaughter of the appellant and her IQ ranged between 50 and 69, which placed her in the range of mild intellectual disability. In regard to her scholastic aptitude, her 'test age' was 6 years and she functioned as a grade 1 child — on this assessment she was regarded as suffering from a moderate intellectual disability. A clinical psychologist testified for the state that she had investigated the complainant's understanding of sexual matters and noted that, while she had received sex education at school and was aware of the correct names for the various sexual organs, she had no knowledge whatsoever of sexual matters and no understanding of the concepts of contraception, sexually transmitted illnesses, or conception. The psychologist came to the conclusion that the complainant was in these circumstances unable to consent to sexual intercourse by virtue of the provisions of s 57(2) of SORMA.
The appellant contended that the issue of the complainant's disability had to be considered holistically before the court could be satisfied that she was unable to appreciate the consequences of engaging in sexual intercourse, as she was contemplating marriage at the time of the attack. Furthermore, despite two charges of sexual penetration and one of sexual assault having been laid against the

appellant, the victim expressly denied that anything other than one admitted incident had occurred. It was accordingly suggested for the appellant that the complainant's ability, to distinguish between incidents that had occurred and those that had not, implied that she had more knowledge of sexual matters than originally appeared to be the case.
Held, that the properly qualified expert witness made it clear that the complainant's mental disability fell squarely within the ambit of the definition of mental disability as contained in s 1*(a)* of SORMA. (Paragraph [15] at 24*ab*.)
Held, further, that the impression that one gained after reading the record was that the victim was indeed an unsophisticated young woman with intellectual disability, as the evidence of the psychologist suggested. The state had l proven beyond reasonable doubt that she was unable to understand the possibility of conception or of the contraction of sexually transmitted illness, should she engage in sexual intercourse, nor that she understood what contraception embraced. (Paragraph [22] at 25*d*–*f*.)
Held, further, that the sentence of 15 years' imprisonment was appropriate in the circumstances. The appeal was dismissed.

S v MALISWANE AND ANOTHER 2017 (1) SACR 26 (ECG)
Sentence — Factors to be taken into account — Where convicted person primary caregiver of minor child — Imperative that investigation be undertaken into fate of child before sentence of primary caregiver to incarceration.

The two appellants were convicted in a magistrates' court of theft of goods from supermarkets, respectively of groceries and shoes. They were both sentenced to 36 months' imprisonment. Despite the fact that they were convicted (in the same case) of theft from different shops on the same day, the magistrate assumed that they were part of a syndicate and felt that it was necessary to make an example of them, despite there being no evidence before the court for this. Both appellants were young mothers who had young children who relied upon them. The magistrate effectively brushed aside their request for a probation officer's report and proceeded to sentence them.
Held, that, in circumstances where the court a quo was dismissive of the interests of the children, whose primary caregivers were being sent to prison, and when there had been no investigation as to the care the children would receive in their absence, the magistrate had misdirected herself, and the sentences imposed accordingly fell to be set aside. As the sentences would probably have already been served, there was no point in referring the matter back to the magistrate, and instead a sentence of 12 months' imprisonment was imposed in respect of each appellant.

S v RAMDASS 2017 (1) SACR 30 (KZD)
General principles of liability — Criminal capacity — Sane automatism — Amnesia — Induced by alcohol and drugs — Proof of — Accused, described as humble and gentle person, having killed woman he was intending to marry — Accused appearing confused on following morning and unaware of what he had done — Accused acquitted.
General principles of liability — Criminal capacity — Sane automatism — Amnesia — Induced by alcohol and drugs — Competent verdict — Contravention of s 1(1) of Criminal Law Amendment Act 1 of 1988 — Difficulties with convicting

accused of statutory offence in certain circumstances unable to be solved without legislative intervention.

The accused was charged with the murder of his girlfriend with whom he lived and whom he was planning to marry. On the day of the deceased's death, the accused and the deceased, as well as the deceased's mother, who also lived in the same house, went to a shopping mall and had lunch. On the way home they dropped the accused at a tavern. The accused returned homelater, looking intoxicated. He and the deceased then went out, possibly to buy drugs, and returned before the deceased's mother went out to a casino. When she returned home she found the house ransacked and her daughter lying with a plastic bag over her head. She was already dead. The accused was found the next morning in Umhlanga Rocks. He looked disorientated and smelt of liquor. He had no knowledge of the death of the deceased and claimed at the trial that this was because of the combination of alcohol and crack cocaine. The evidence for the state was that the accused was a humble and gentle person, and good to the deceased and her mother. Her mother testified that they were a happy couple and, although they argued from time to time, she regarded this as normal. There was no evidence of any argument or other unpleasantness before the deceased's mother left for the casino.
Counsel for the state contended that the accused could not have been so intoxicated that he lacked criminal capacity, having regard to his actions when he left the house: he would have had to unlock and open the front door and security gate, open the driveway gate, drive the car out, close the gate and then drive to the city centre. He had also taken the deceased's phone, camera charger and GPS device.
Held, that there was need for caution in too readily finding that a person who had killed someone was not criminally responsible because he acted involuntarily or without criminal capacity, as this may bring the administration of justice into disrepute. This, however, did not mean that the court could shirk its duty to determine whether the guilt of an accused person had been established beyond a reasonable doubt. If there were a reasonable doubt as to his criminal capacity, then he had to get the benefit of that doubt. (Paragraph [29] at 40*h*.)
Held, further, that the accused had established a sufficient foundation for the defence of lack of criminal capacity. The evidence regarding their relationship; that they were planning to get married; the absence of any motive to kill the deceased; the fact that the accused was regarded as a gentle and humble person; that what he did was completely out of character; that he had consumed alcohol and smoked crack cocaine; and that he could not remember what he had done when he was found in Umhlanga the following morning, and still had the bag with the items which he had taken from the house and did not try to hide it, raised a reasonable doubt whether he had the required capacity when he strangled the deceased. There was no expert evidence to suggest that it was likely that he did so, well knowing that what he was doing was wrong.
Held, further, that the court could not — as the state suggested — find that the accused was instead guilty of culpable homicide, as it too required that he was able to appreciate the wrongfulness of his conduct and to act in accordance with such appreciation.
Held, further, that the difficulty with the statutory offence of contravening s 1(1) of the Criminal Law Amendment Act 1 of 1988 was the requirement that the accused must have been so drunk that he lacked criminal capacity. In the case where an accused is acquitted on a charge of murder on the basis that there was a reasonable

possibility that he was so drunk that he lacked the required capacity, he could not be convicted of the statutory offence unless the court could find beyond reasonable doubt that he did not have such capacity. This difficulty had been pointed out more than once by the courts and academic writers and it was up to the legislature to decide whether or not the statute should be amended. The accused was accordingly acquitted.

MSIZA v MSIZA AND OTHERS 2017 (1) SACR 42 (NWM)

Contempt of court — What constitutes — Failure of police to render assistance with execution of civil order of High Court — Order providing that assistance had to be given by police if requested by sheriff — No request made by sheriff in instant case — Contempt of court not proven.

The applicant applied for an order for the committal of the Minister of Police and the station commander of the South African Police Service (SAPS) at Rustenburg for contempt of court for the failure by the police to serve a court order prohibiting the applicant's former spouse from removing their minor child from South Africa. The order granted by the High Court provided that the sheriff could enlist the assistance of SAPS to give effect to the order. The applicant and his legal team immediately attempted to serve the order on SAPS at Rustenburg, but complained that the police were uncooperative. It appeared that the applicant's former wife managed to take the child to Botswana.

Held, that the primary responsibility for the execution of court orders is that of the sheriff of the High Court concerned. The order of the court directing the police to assist the sheriff, should he request assistance, was made specifically because it was not the responsibility of SAPS to execute civil orders of the High Court. Their duty was only to render assistance to the sheriff if this were requested. As no such request had been made, there was no merit in the applicant's application to find the respondents guilty of contempt of court. The application had to be dismissed.

GENERAL COUNCIL OF THE BAR OF SOUTH AFRICA v JIBA AND OTHERS 2017 (1) SACR 47 (GP)

Legal practitioners — Advocate — Removal from roll — On ground that advocate not fit and proper person to remain on roll of advocates — Advocates in National Prosecuting Authority — Found to have failed to comply with rules of court in filing record in application for review of decision to discontinue prosecution and reasons given therefor unreasonable, unwarranted and in bad faith — Also found to have acted contrary to oath taken as advocates and having brought prosecuting authority into disrepute — Further findings made that evidence in disciplinary hearing of prosecutor was dishonestly given, as also statements in answering affidavits — Court finding that advocates in question not fit and proper persons to remain on roll of advocates — Ordered that their names be struck off roll of advocates — Admission of Advocates Act 74 of 1964, s 7(1)(d).

Legal practitioners — When fit and proper person for legal profession — Appropriate legal training may improve qualities required for profession — Qualities lawyers should possess are integrity, dignity of self and of court, possession of legal knowledge and technical skills, capacity for hard work, respect for legal order, and sense of equality and fairness.

Legal practitioners — Advocate — Removal from roll — On ground that advocate not fit and proper person to remain on roll of advocates — Test for consisting of three-stage enquiry — First, court to decide whether conduct complained of established on preponderance of probabilities — Secondly, court to consider whether in its discretion person concerned not fit and proper person to continue in practice — Thirdly, court to consider whether in circumstances person concerned should be removed from roll or whether suspension from practice would suffice — Last-mentioned decision one for discretion of court — In deciding what course to follow, court not imposing penalty, but acting in protection of public — Admission of Advocates Act 74 of 1964, s 7(1)(d).
Prosecution — National Director of Public Prosecutions and Deputy — Removal or suspension — Distinct difference between removal or suspension of such officers under s 12 of National Prosecuting Authority Act 32 of 1998 (*NPA* Act) and removal from roll of advocates under s 7 of Admission of Advocates Act 74 of 1964 — Removal or suspension under *NPA* Act not necessarily meaning that such person automatically removed from roll of advocates — For latter, process under s 7 of Admission of Advocates Act to be followed — But National Director or Deputy who is removed from roll of advocates cannot continue in that office because of provisions of s 9 of *NPA* Act — Processes under two Acts can, however, run parallel to each other — Any choice of two processes not rendering process unfair.
Prosecution — National Director of Public Prosecutions and Deputy — Power to institute criminal proceedings on behalf of state — Also has power to carry out functions incidental to institution of criminal proceedings —Exercise of such power to be done in accordance with rule of law and Constitution — Failure to do so would be in conflict with Constitution and national legislation (National Prosecuting Authority Act 32 of 1998) — Failure to prosecute in face of prima facie evidence would offend against law and Constitution — Constitution, 1996, s 179(1) and (2).

A successful legal practitioner (attorney or advocate) should possess and display certain qualities, most of which cannot be acquired through learning. Having these qualities could indicate that a person is indeed a 'fit and proper' person for the profession. An appropriate academic training may, however, play a vital part in improving them, as they are 'by nature at least latent'. The following are listed as the least of the qualities a lawyer should possess: integrity — meaning impeccable honesty or an antipathy to doing anything dishonest or irregular for the sake of personal gain; dignity — practitioners should conduct themselves in a dignified manner and should also maintain the dignity of the court; the possession of knowledge and technical skills; a capacity for hard work; respect for legal order; and a sense of equality or fairness. (Paragraphs [2] – [3] at 53*g* – 54*b*.)
Section 7(1)*(d)* of the Admission of Advocates Act 74 of 1964 authorises a court to remove an advocate from the roll of advocates if satisfied that he or she is not a 'fit and proper' person to continue to practise as such. The test is a three-stage inquiry. First, the court must decide if the alleged conduct complained of has been established on a preponderance of probabilities — this is a factual inquiry. Secondly, it must consider if the person concerned is, in its discretion, not a fit and proper person to continue to practise. This involves a weighing-up of the conduct complained of against the conduct expected of a fit and proper person to practise, and is a value-judgment consideration. Thirdly, the court must inquire whether, in all of the circumstances, the person in question is to be removed from the roll or whether an order of suspension from practice would suffice. This is also a matter for

the discretion of the court. In deciding on what course to follow, the court is not first and foremost imposing a penalty. Rather, the main consideration is the protection of the public. (Paragraph [9] at 55*g* – 56*a*.)

Section 12 of the National Prosecuting Authority Act 32 of 1998 (the NPA Act) deals with the term of office of National Director and Deputy National Director of Public Prosecutions, and ss (5), (6) and (7) deal with the removal or suspension of these persons. There is a distinct difference between the removal or suspension of these persons under s 12 and removal from the roll of advocates or suspension from practice under s 7 of the Admission of Advocates Act. In terms of the NPA Act, the National Director or Deputy National Director may be removed or suspended as such, but this would not necessarily mean that such a person is automatically removed from the roll of advocates. For any such removal one has to follow the process envisaged in s 7 of the Admission of Advocates Act. However, the National Director or Deputy National Director who is removed from the roll of advocates cannot continue to be National Director or Deputy National Director of Public Prosecutions because of the provisions of s 9 of the NPA Act, which require that any person appointed as National Director, Deputy National Director must — '*(a)* possess legal qualifications that would entitle him or her to practise in all courts in the Republic; and *(b)* be a fit and proper person, with due regard to his or her experience, conscientiousness and integrity, to be entrusted with the responsibility of the office concerned'.

So, if a person ceases to be a fit and proper person under s 7 of the Admission of Advocates Act, and is removed from the roll of advocates, he or she cannot be entitled to practise in all courts in the Republic as contemplated in para *(a)* of s 9(1) of the NPA Act. These processes can sometimes run parallel to each other, but any choice of the two would not render the process unfair. (Paragraphs [20] – [23] at 59*h/i* – 61*g*.)

There is a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament, namely the NPA Act. The prosecuting authority has the power inter alia to institute criminal proceedings on behalf of the state and to carry out any necessary functions incidental to instituting criminal proceedings (s 179(1) and (2) of the Constitution). Anyone within the prosecuting authority who exercises this power must do so in accordance with the rule of law and the Constitution. Anything short of this would be in conflict with the Constitution and the national legislation. Failure to prosecute any case in the face of prima facie evidence would offend against the law and the Constitution (being the supreme law of the Republic of South Africa).

The applicant applied in a High Court in terms of s 7(1)*(d)* and (2*)* of the Admission of Advocates Act for an order removing the names of the three respondents from the roll of advocates on the ground that they were not 'fit and proper' persons to continue to practise as advocates. Various complaints were made against the respondents arising out of their conduct in the handling of three cases, and adverse remarks by judges in both the High Courts and the Supreme Court of Appeal. These cases were known as the 'Booysen case'; the 'spy-tapes case' — a case arising out of the termination by a former head of the National Prosecuting Authority of the prosecution of Mr J Zuma (who subsequently became the President of the Republic of South Africa) on a number of charges; and the 'Mdluli case', in which an applicant had applied for the review of a decision to withdraw fraud and corruption charges against Mdluli. The applicant, in its case against the first respondent, relied on the Booysen case, the spy-tapes case and the Mdluli case. The court found, however, after considering the affidavits of the applicant and the answering affidavits of the first

respondent (which were not before the court in the Booysen and the spy-tapes case), that no case had been made out on the facts for her removal. The applicant, however, also raised a number of complaints arising out of the Mdluli case against all three respondents.

First respondent Jiba

On these complaints the court found that the first respondent had failed to comply timeously with the provisions of rule 53 of the Uniform Rules of Court regarding the filing of the record relating to the decision to withdraw the charges against Mdluli, and that the reasons given for the delay were of the first and second respondents' own making, and were in the circumstances completely unreasonable, unwarranted and signified bad faith on their part. (Paragraph [114.2.7] at 95*b* – *d*.) The court held further that an incomplete or inadequate record had been supplied and that the reasons given therefor by the first respondent had no merit from the start. She had acted contrary to the oath she took when she was admitted as an advocate and in a way flouted the rules of the high office she held in the prosecuting authority at all material times.

A further complaint against the first respondent was that she had failed to comply with a directive by the Deputy Judge President to file an answering affidavit by a certain date. The court found that she had indeed failed to comply with the directive and that she had attempted 'to wash her hands' of responsibility for the failure, and did not seem concerned at the snail's pace at which the review proceedings were conducted. The court found that this conduct was wanting and, cumulatively considered with other complaints relating to her handling of the Mdluli case, should justify a removal from the roll of advocates. It was found further, in respect of a further complaint, that the first respondent had not heeded the advice of counsel briefed to defend her in her capacity as Acting National Director of Public Prosecutions, in relation to the affidavits to be served and filed in response to the review application, and that she had filed affidavits contrary to said advice. The court held that this was very serious and unprecedented, and the kind of conduct that made her cease to be a fit and proper person to remain on the roll of advocates.

A new team of counsel was then briefed to take over the defence of the review proceedings. This team advised that the flaws in the prosecution of the matter, for the first respondent and others, were —

'fundamental — so much so that we are under no doubt that as matters now currently stand our clients are headed towards a certain judgment against them, with every potential of irreparable harm to the credibility and reputation of the National Prosecution Authority. . . . As the papers correctly stand there is simply no defence.'

Counsel further advised that, should opposition continue on the basis of attempting to justify the decision to discontinue the prosecutions of Mdluli, 'our client will regrettably have to find yet another team of counsel'. The first and second respondents insisted on continuing with the defence. The review application was eventually granted and in its judgment the court made a number of adverse remarks against the first respondent. The court held that the first respondent had steadfastly done everything in her power to ensure that the charges against Mdluli were permanently withdrawn, despite the prima facie evidence against him. Further, that in so doing she acted mala fide and thus offended against the rule of law and the Constitution, and had to be found no longer fit and proper to remain on the roll of advocates.

A further complaint against the first respondent was that she had failed to disclose to the court in the review application that a prosecutor in the Mdluli case had sent a

memorandum to her, requesting her to review the decision to discontinue the prosecution of Mdluli. In opposing the review application the first respondent deposed that the 'matter (had) not been brought to my office for consideration in terms of regulatory framework'. The court found that this was a deliberate attempt to mislead the court and that her motivation in adopting this attitude had to be found in her willingness to protect Mdluli by all means. It held that, in doing so, she offended against s 179 of the Constitution and the rule of law, and that this was of direct relevance to the question whether she should remain on the roll of advocates.
The court accordingly concluded that the first respondent had ceased to be a fit and proper person to remain on the roll of advocates

Second respondent Mrwebi

Various complaints relating to the conduct of the second respondent (a Special Director of Public Prosecutions), in connection with his decision to discontinue the prosecution of Mdluli, and the application for the review of that decision, were raised in the applicant's founding affidavit.
The first complaint was that he had lied about the nature of a so-called 'consultative document' he had prepared concerning the decision to discontinue the Mdluli prosecution. The court found that the second respondent had indeed lied about the document. (Paragraphs [141] – [141.4] at 116*a* – 120*g*.)
It was also found that he had failed to disclose a memorandum and consultative note setting out the reasons for the decision to discontinue the prosecution, as part of the record of the decision under review. The court found further that the failure was deliberate.
It was further found that the second respondent had not acted in accordance with an understanding he had with the third respondent (the Director of Public Prosecutions in charge of the Mdluli prosecution), and that the second respondent wanted to research the effect of certain legislation which was relevant to the decision whether or not to discontinue the prosecution. The decision to discontinue the prosecution was taken by the second respondent contrary to the understanding with the third respondent. The court held that this amounted to a betrayal and consultation in bad faith by an officer of the court, and justified a removal from the roll of advocates.
Furthermore, the court held that the second respondent had given evidence in disciplinary proceedings against one of the prosecutors in the Mdluli case on the question whether or not the third respondent (as Director of Public Prosecutions in the North Gauteng High Court) had agreed with him that the prosecution should be discontinued. The court found that by doing so the second respondent had 'turned himself into an unreliable and dishonest witness' and that this had found 'its way into the present proceedings'. The court found that his answer on this issue in the present proceedings was not only a lie but was intended to mislead the court. There was no excuse for his lies and he should therefore be found to have ceased to be a fit and proper person to remain on the roll of advocates. He had betrayed his oath of office as an advocate and, in doing so, had also brought the prosecuting authority into disrepute. The court held further that the attempt by the second respondent, as the decision-maker in question, to distance himself from the first respondent's defiance of the advice of counsel that the decision to discontinue the prosecution of Mdluli would 'not stand in court', smacked of him being untruthful and dishonest. That he and the first respondent had together ignored 'solid and right advice' given by counsel did not accord with a fit and proper requirement for remaining on the roll of advocates.

A further finding was that the second respondent's refusal to reinstate the charges, after a particular difficulty that he thought existed had been cleared away, displayed that the second respondent was determined to flout the rule of law and the Constitution by discontinuing the prosecution against Mdluli in the face of prima facie evidence and in contravention of the provisions of s 24(3) of the NPA Act, that is, without concurring with the third respondent.

Finally, the court held that, in a supplementary affidavit in the review application in the Mdluli case, the second respondent alleged that he had taken the decision to withdraw the charges against Mdluli 'in consultation' with the third respondent, which evidence was 'patently, dishonestly given', and he had thereby made himself liable to a finding that he had ceased to be a fit and proper person to remain on the roll of advocates.

The court held accordingly that the second respondent had ceased to be a fit and proper person to remain on the roll of advocates.

Third respondent Mzinyathi

The court found further, in respect of the complaint against the third respondent, that his statement in the review application of the Mdluli case was found not to be creditworthy in that case; that, taking into consideration his explanation of its context, there was insufficient information against him to justify the relief sought.

The court accordingly granted an order striking the names of the first and second respondents from the roll of advocates, and dismissed the application against the third respondent.