LEGAL NOTES VOL 1/2018

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EDITORIAL

BIAS

I was thinking about 2018 and especially what would be the most important attribute of an advocate. One of the attributes of which an advocate should strive to have is that of impartiality. We have many ways of defining the traits of an advocate and I always like to say we must be prepared to stand up for a client, the famous "we agree to disagree" slogan. But what if we lose sight of the fact that the other side might be right?

Also, if the other side could be correct, how correct is correct? Or put it in another way, how did I come to the conclusion that I am correct (or my opponent is more correct)? It would have been easy to feed information to a computer and say: "give us the correct answer". But this brings us to "artificial intelligence", we are then on dangerous ground especially pertaining to the law. (I have no knowledge about polygraph tests but assume that is why it is not allowed as evidence, there are still risks involved that it could be manipulated. I heard that a psychopath or hard drug addict can "pass" a test.)

So, what are we looking at? Bias. If one can see both sides. (Reminds me of an old song, I can see clearly now the rain has gone, I can see all obstacles in my way..) But one must see both sides without bias! Yet it is said that every person has some bias. But the worst is a prosecutor of many years' experience who becomes a magistrate, unless he/she makes a deliberate attempt to shake off the prosecutor 's

[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!**

robe, he will be biased. I have read true stories from advocates who did not believe their client's version but nevertheless continued with it just to see that it was legit!

There is one kind of bias that stands out and which should be avoided. It is called "confirmation bias" which I understand as "looking for something to confirm my view". Or, to make it more academic: "A confirmation bias is a type of cognitive bias that involves favouring information which confirms previously existing beliefs or biases."[2]

For example, imagine that a person holds a belief that left-handed people are more creative than right-handed people. Whenever this person encounters a person that is both left-handed and creative, they place greater importance on this "evidence" that supports what they already believe. This individual might even seek "proof" that further backs up this belief while discounting examples that do not support the idea.

Confirmation biases impact how people gather information, but they also influence how we interpret and recall information. For example, people who support or oppose a particular issue will not only seek information to support it, they will also interpret news stories in a way that upholds their existing ideas.

A judge must work against bias, a normal person, when arguing about something should also at least try and see and investigate or read up about all the views. An advocate? The same is applicable to an advocate! But you always follow "instructions".

How would "following instructions" be in the new dispensation? The Legal Practice Act is due to be operational in October 2018. A draft Code of Conduct has been published, section 22 might be of importance:

22.10 Counsel shall, in giving any advice about the prospects of success in any matter, give a true account of counsel's opinion and shall not pander to a client's whims or desires. However, in any matter in which counsel's opinion is adverse to the prospects of success, counsel may upon client's insistence place before a court the client's case for the adjudicating officer to decide the matter and counsel shall advance that case as best as the circumstances allow.
22.11 Counsel shall not abuse their positions of influence over clients by undue pressure upon them to:
22.11.1 plead guilty or plead guilty to a lesser charge;
22.11.2 accept a settlement of a matter.

LEGAL PRACTICE ACT: Timelines – summarized

A) 21 January 2018 – National Forum (NF) Plenary meeting to approved s94 regulations & s95 rules
B) 26 January 2018 – Draft Rules published by National Forum in Gazette, calling for comments
C) 31 January 2018 – National Forum submits recommended regulations to Minister in terms of sec 94

[2] https://www.verywell.com/what-is-a-confirmation-bias-2795024, sourced on 11 January 2018

D) During February 2018 – NF Exco and DOJ finalises supply chain process for procuring an Elections administration service provider
E) 28 Feb 2018 – Comments on draft Rules, published on 26 January 2018, close
F) March 2018 – NF deliberates, reviews, amends and finalises s95 Rules
G) 26 April 2018 – NF publishes final Rules in terms of sec 95 on the Gazette
H) 30 July 2018 – The Minister publishes the Regulations in terms of section 109
I) **30 July 2018 – The President proclaims in the Gazette the coming into effect of Chapter 2**
J) 1 Aug 2018 – Chapter 2 comes into effect - call for nominations for legal practitioners for LPC (Legal Practice Council)
K) 25 Aug 2018 – LPC Nominations submissions close
L) 1 Sept 2018 – Ballot papers distributed and voting process begins
M) 15 Sept 2018 – Voting process closes and counting and verification of votes begin
N) 30 Sept 2018 – LPC is announced
O) 31 October 2018 – Dissolution of the National Forum
P) 31 October 2018 – Dissolution of the Law societies
Q) 31 October 2018 – All other Chapters of the LPA come into effect

WISHING YOU A PROSPEROUS NEW YEAR!

MATTHEW KLEIN

SA LAW REPORTS JANUARY 2018

MATJHABENG LOCAL MUNICIPALITY v ESKOM HOLDINGS LTD AND OTHERS 2018 (1) SA 1 (CC)

Contempt of court — Criminal and civil contempt distinguished — Though both punishable as crime, standard of proof depending on whether remedy involving imprisonment — If so, proof beyond reasonable doubt required — For civil remedies short of imprisonment, proof on balance of probabilities sufficient.

Contempt of court — Procedure — Joinder — Need to cite parties in their personal capacities, particularly where committal to prison in offing — Effect of non-joinder.

Contempt of court — Procedure — Summary procedure — Should be invoked only in exceptional circumstances where there exists pressing need for swift measures to preserve integrity of judicial process — Contemnor to be accorded, as far as possible, fair trial rights.

In these matters the applicants sought leave to appeal decisions of the Free State High Court and the Supreme Court of Appeal in which Messrs L and M were declared to be in contempt of court and sentenced to suspended terms of imprisonment. The applications concerned the standard of proof in civil and criminal contempt proceedings, the appropriateness of the summary contempt procedure, and the effect of the non-joinder of Messrs L and M, in their personal capacities, in the contempt proceedings (see [1], [18], [49]).
The case of Mr L, the municipal manager of the Matjhabeng Municipality, involved alleged non-compliance with a court order directing the municipality and Mr L, in his

official capacity, to settle municipal electricity bills due to Eskom. A subsequent order contained a rule nisi requiring Mr L, in his official capacity, to file a report justifying non-compliance with the earlier order. On the appointed day Mr L was sworn in, cross-examined, convicted of contempt, and sentenced to six months' imprisonment, suspended (see [10]).

The case of Mr M, the compensation commissioner for workplace injuries, involved alleged non-compliance with a court order directing him, in his official capacity, to process medical accounts submitted to him by a company called CompSol. The High Court dismissed a contempt application by CompSol on the grounds of payment and lack of mala fides, but the decision was overturned by the SCA, which found mala fides, held Mr M in contempt and sentenced him to three months' imprisonment, suspended (see [38]).

Held

Although contempt of court may be criminal or civil depending on the conduct of the contemnor, all contempt was punishable as a crime (see [50], [52]). Criminal contempt brought the moral authority of the judicial process into disrepute and covered a multiplicity of conduct constituting interference with court proceedings to the detriment of a fair trial (see [52]). Civil contempt, by contrast, involved the disobedience of court orders, and could result in remedies other than criminal sanctions, including declaratory orders, mandamuses and structural interdicts (see [53] – [54]). But the availability of declaratory relief did not mean that the civil remedy of committal could not be imposed (see [57]).

The standard of proof to be applied in contempt cases varied in accordance with the consequences of the remedy. If the sanction involved committal, the criminal standard of proof — ie beyond reasonable doubt — was always required. But if it involved civil remedies, the civil standard of proof — ie a balance of probabilities — sufficed (see [60] – [67]). In cases of contempt *ex facie curiae* the summary procedure should be invoked only in exceptional circumstances, where there was a pressing need for firm or swift measures to preserve the integrity of the judicial process, and even then the contemnor had as far as possible to be accorded his or her fair trial rights (see [79] – [81]).

The court found that in Mr L's case wilfulness or mala fides had not been established. Where public officials were cited for contempt in their personal capacities, the officials themselves, rather than the institutional structures for which he or she was responsible, must have wilfully or maliciously failed to comply with an order (see [76]). In particular, the High Court did not consider various attempts made by Mr L and other senior personnel of the municipality to settle the dispute with Eskom (see [78]). Moreover, the summary procedure adopted by the High Court was unfair to Mr L, who was cross-examined without leading evidence and without being warned imprisonment might ensue — an infringement of his right to personal freedom and security under s 12(1)*(a)* of the Constitution (see [80] – [81]).

The court made a similar finding of lack of mala fides in respect of Mr M's case (see [102]). The reason for the failure to pay was logistical problems at the compensation fund, and the averments in the explanatory affidavit were telling and should have been investigated by the SCA (see [85] – [86]).

Messrs L and M should both have been cited in their personal, not nominal, capacities, and it was inconceivable how they could have been committed to prison when they were not informed in their personal capacities of the cases they were to face (see [103]). Convictions and sentences set aside.

MYATHAZA v JOHANNESBURG METROPOLITAN BUS SERVICES (SOC) LTD t/a METROBUS AND OTHERS 2018 (1) SA 38 (CC)

Labour law — Arbitration proceedings — Award — Prescription — Whether Prescription Act applying to arbitration awards made under Labour Relations Act 66 of 1995 — Whether Prescription Act consistent with Labour Relations Act — Meaning of 'inconsistent' in Prescription Act 68 of 1969, s 16(1).

Labour law — Arbitration proceedings — Award — Prescription — Interruption — Whether referral of dismissal dispute to Commission for Conciliation, Mediation and Arbitration interrupting prescription — Whether instituting review of CCMA award interrupting prescription — Prescription Act 68 of 1969, ss 15(1) and 15(6).

Prescription— Extinctive prescription — Debt — What constitutes — Whether arbitration award and/or claim for unfair dismissal under Labour Relations Act 66 of 1995 constituting 'debt' for purposes of Prescription Act — Meaning of 'debt' — Prescription Act 68 of 1969, s 10(1).

An arbitration award, issued on 16 September 2009 in an unfair dismissal dispute, ordered the respondent employer (Metrobus) to reinstate the appellant employee (Mr Myathaza), with back pay. Metrobus however would not allow Mr Myathaza to return to work, pending an intended review of the arbitration award. Review proceedings in the Labour Court were instituted on 21 October 2009 but despite closure of pleadings, Metrobus sought and fixed no date for a hearing and accordingly the matter remained pending. Eventually, in August 2013, Mr Myathaza approached the Labour Court to have the arbitration award made an order of court. One of Metrobus' grounds for opposing this relief was that the award had prescribed under the Prescription Act 68 of 1969, after the expiry of three years since it was made, ie on 16 September 2012.

The Labour Court held that the award for reinstatement constituted a 'debt' for the purposes of prescription and agreed with Metrobus that it had prescribed. Mr Myathaza next approached the Labour Appeal Court (the LAC) where his appeal was heard together with two similar matters, one of which held that the Prescription Act did not apply to awards for reinstatement under the Labour Relations Act 66 of 1995. The LAC held that the applicability of the Prescription Act depended on whether it was a 'debt' as contemplated in s 10 of the Prescription Act. Relying on case law (*Desai* below n6) which construed the word 'debt' to include any obligation to do or refrain from doing something, the LAC concluded that arbitration awards constituted such obligations and were therefore debts; that the Prescription Act was applicable; and that Mr Myathaza's award had prescribed.

In this case, Mr Myathaza's application for leave to appeal and his appeal against the LAC order, the Constitutional Court upheld Mr Myathaza's appeal but was evenly split (over three judgments) on the legal basis for doing so.

The first judgment (Jafta J, with Nkabinde ADCJ, Khampepe J and Zondo J concurring) upheld the appeal on the basis that the Prescription Act did not apply to LRA awards. This followed, it was held, because the LRA and the Prescription Act were inconsistent (as a result of fundamental differences between them, set out at [43] – [56]), and s 16(1) of the Prescription Act excluded its own operation in the event of 'inconsistency with provisions of another Act'. In arriving at this conclusion the first judgment held that, interpreted in the proper constitutional context,

'inconsistent' did not mean that the two Acts had to be mutually exclusive but that it was sufficient that there were material differences between them (see [42]). It further held that, even if the Prescription Act did apply, Mr Myathaza's reinstatement award would not prescribe because it did not constitute a 'debt' for the purposes of the Prescription Act. This was because the dictum in *Desai* as to what constituted a debt was overruled in *Makate* (see n12 below) which restricted its meaning to 'an obligation to pay money or deliver goods or render services', which the order of reinstatement was not (see [59]).
The second judgment (Froneman J, with Madlanga J, Mbha AJ and Mhlantla J concurring) held that the Prescription Act did apply (ie was consistent with the LRA — see [66]); that a claim for unfair dismissal under the LRA, being a claim to enforce a legal obligation, qualified as a 'debt' under the Prescription Act (see [77] – [78]); and that service of process commencing proceedings before the Commission for Conciliation, Mediation and Arbitration (the CCMA) interrupted prescription in accordance with ss 15(1) and 15(6) of the Prescription Act (see [75] and [82]), as did institution of a review of the arbitration process (see [88]). It accordingly upheld the appeal on the basis that until the review was finalised, Mr Myathaza's claim would not prescribe (see [90]).
The third judgment (Zondo J), in addition to concurring with and elaborating on the approach of the first judgment, questioned the second judgment's ratio: a referral to the CCMA of an unfair dismissal dispute, it was held, did not constitute service on the debtor of 'any process' contemplated in s 15(1) read with s 15(6) of the Prescription Act, which was what was required to interrupt prescription (see [140]).

MOGAILA v COCA COLA FORTUNE (PTY) LTD 2018 (1) SA 82 (CC)

Labour law — Arbitration proceedings — Award — Prescription — Whether Prescription Act applying to arbitration awards made under Labour Relations Act 66 of 1995 — Whether Prescription Act consistent with Labour Relations Act — Whether award constituting 'debt' for purposes of Prescription Act — Whether prescription interrupted by review of award — Prescription Act 68 of 1969, ss 10(1), 15(1), 15(6) and 16(1).

This case concerned the alleged prescription of an arbitration award that had been made in Ms Mogaila's favour in an unfair dismissal dispute. The court held its decision in abeyance pending the outcome of *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Ltd t/a Metrobus and Others* 2018 (1) SA 38 (CC)([2016] ZACC 49), a case which raised similar issues: *(a)* whether the Prescription Act 68 of 1969 was consistent with the Labour Relations Act (LRA); and *(b)*whether an arbitration award under the LRAconstituted a 'debt' for the purposes of the Prescription Act. However, in *Myathaza* the court's vote was split evenly on these issues, so that no ratio emerged from it. The first and third judgments in *Myathaza* answered both questions in the negative. The second judgment held that the Prescription Act did apply; that claims for unfair dismissal under the LRA did constitute 'debts', the prescription of which was interrupted by service of process initiating a Commission for Conciliation, Mediation and Arbitration (CCMA) dispute resolution process; and that prescription was also interrupted by the institution of review proceedings of an arbitration award, such interruption persisting until the review proceedings were finalised (see [14] – [26]).
Held

On either of the *Myathaza* approaches — that the arbitration award in her favour could not have prescribed because the Prescription Act did not apply, or that the referral of her claim for reinstatement to the CCMA interrupted prescription until the finalisation of the review proceedings — Ms Mogaila was entitled to an order declaring that the arbitration award ordering her reinstatement had not prescribed. (See [27] – [29].)

TRINITY ASSET MANAGEMENT (PTY) LTD v GRINDSTONE INVESTMENTS 132 (PTY) LTD 2018 (1) SA 94 (CC)

Prescription — Extinctive prescription — Period of prescription — When it commences— Loan 'repayable on demand' — Whether debt becoming due when loan advanced, or when demand made — Debt becoming due when loan advanced, unless clear indication to contrary — Prescription Act 68 of 1969, s 12.

Prescription — Extinctive prescription — Period of prescription — When it commences — General rule — Prescription beginning to run when debt arising, unless parties clearly stipulating otherwise — Prescription Act 68 of 1969, s 12.

Company — Winding-up — Application — By creditor — Abuse of process — Rule that court will refuse application as constituting abuse of process where company bona fide disputing debt on reasonable grounds (Badenhorst principle) — Ambit — Whether rule applicable to dispute on legal issues.

On 1 September 2007 Trinity Asset Management (Pty) Ltd (Trinity) and Grindstone Investments 132 (Pty) Ltd (Grindstone) entered into a written loan agreement in terms of which Trinity lent a sum of money to Grindstone. A key term was that the loan capital would be 'due and repayable to the Lender within 30 days from the date of delivery of the Lender's written demand' (clause 2.3). While the capital loan was only paid over (in three tranches) during February 2008, the agreement deemed it to have been lent and advanced on 1 September 2007. Trinity made demand towards the end of 2013. When Grindstone failed to make payment in response, Trinity, in July 2014, applied to the High Court for the provisional liquidation of the former. In defence, Grindstone argued that the debt in respect of the loan paid over during February 2008 had prescribed in October 2010 (given the deemed advancement date), alternatively 13 March 2011, 15 March 2011 and 21 March 2011, being three years after the loan amount was lent and advanced. The High Court dismissed the application on the basis that Grindstone's raising of prescription amounted to a 'valid defence'. The court purported to rely on the *Badenhorst* principle, which held that, generally speaking, an application for liquidation should be dismissed where there existed a genuine and bona fide dispute of fact. Leave to appeal was granted to the SCA, where, by agreement, the only issue to be determined was the question of prescription. The SCA majority upheld Grindstone's prescription defence, and hence dismissed the claim for provisional liquidation. The applicant applied to the Constitutional Court for leave to appeal.
The principal issue in the Constitutional Court was whether the debt had prescribed. The answer depended on when the debt became 'due' (hence triggering the running of prescription) for the purposes of the Prescription Act 68 of 1969. Was it the date on which the loan was advanced (as Grindstone argued, and in which case the debt

would have prescribed), or was it the date on which demand was made (as Trinity argued)?
A preliminary issue was whether the defence of prescription was properly before the court. The point raised was that the *Badenhorst* principle barred both the SCA and the Constitutional Court from considering the prescription point, given that there existed a dispute on it.

Cameron J (Khampepe J, Madlanga J, Mhlantla J and Pretorius AJ concurring)— majority judgment

Held, that the *Badenhorst* principle did not preclude a liquidating or sequestrating court from deciding a straightforward legal issue on common-cause facts. That was what the High Court in fact did, in finding that prescription amounted to a 'valid defence' (this despite the court's apparent reliance on *Badenhorst*). (See [91] – [93].) It conclusively extinguished Trinity's claim. That was how the parties understood the ruling, in setting aside their other disputes and agreeing that the only issue on appeal would be the law point (see [90). The prescription point was therefore properly before the SCA. And it was properly before the Constitutional Court. Leave to be appeal had to be granted. (See [93].)

Held, that a loan without stipulation as to a time for repayment was 'repayable on demand'. Unless the parties agree otherwise, such a loan was repayable from the moment the advance was made and no specific demand for repayment needed to be made for the loan to be immediately due and repayable. The same principle applied where a loan afforded a debtor 30 days after demand to make payment, the key point being that the creditor had the sole power to demand performance at any time. It was this point that gave rise to the general rule applying to loans 'payable on demand', namely that prescription began to run when the debt arose, unless there was a clear indication to the contrary. (See [102] – [105].)

Held, further, that the plain and un-extraordinary nature of the loan agreement, coupled with the absence of a clear signification to the contrary, led to the conclusion that the parties did not delay prescription until demand (see [137]). Accordingly, in the circumstances, the debt had prescribed, and the appeal had to be dismissed (see [3] and [139]).

Mojapelo AJ (Mogoeng CJ, Nkabinde ADCJ, Jafta J and Zondo J concurring) — dissenting judgment

Held, that a contractual debt became due as per the terms of that contract. Whenno due date was specified, the debt was generally due immediately on conclusion of the contract. However, the parties might intend that the creditor be entitled to determine the time for performance, and that the debt would become due only when demand had been made as agreed. Where there was such a clear and unequivocal intention, the demand would be a condition precedent to claimability, a necessary part of the creditor's cause of action, and prescription would begin to run only from demand. (See [47].)

Held, that the contract here, properly interpreted, indicated a clear intention that the debt would become due — and prescription would start running — only once demand had been made, and not earlier. On a reading of clause 2.3, written demand was a material condition to be fulfilled by the lender, without which the due date could not be determined; it was a condition precedent to enforceability. Further, in using the term 'due and payable' in providing for repayability, thereby mirroring the language of the Prescription Act, the parties indicated their intention to shift the commencement of prescription — the due date of the debt. Accordingly, Trinity's claim had not prescribed. (See [56], [60], [64] and [72].)

Froneman J— concurring that appeal should be dismissed, but principally because of Badenhorst principle
Held, that the High Court judgment had applied the *Badenhorst* principle in dismissing the provisional liquidation application. An appeal against the High Court's judgment could only succeed if its application of the principle was incorrect, more particularly, that the principle did not properly apply to a dispute on legal issues. (See [146].) The SCA and the Constitutional Court did not make any finding to such effect; they merely assumed the matter was properly before court. In the absence of such a finding, the appeal had to fail and refusal of the provisional liquidation application in the High Court confirmed on this ground. (See [4], [142] and [151] – [152].) (If he was wrong on this, he agreed with the majority judgment that the claim for repayment of the loan had prescribed, and that the appeal should be dismissed for that reason as well (see [153] and the discussion of prescription in [154] – [165]).)

FINANCIAL SERVICES BOARD v BARTHRAM AND ANOTHER 2018 (1) SA 139 (SCA)

Financial institution — Financial services providers — Representatives— Debarment — Effect — Financial Advisory and Intermediary Services Act 37 of 2002, s 14(1).

Barthram was an employee and representative of Discovery Life Ltd, a financial services provider. He resigned, and Discovery, concluding he was not fit and proper, deauthorised him acting for it, and deregistered him from its register of representatives, so debarring him rendering financial services (Financial Advisory and Intermediary Services Act 37 of 2002, s 14). It then informed the Registrar of Financial Services Providers, which recorded the debarment, and publicised it on the web.
Thereafter, Barthram obtained interim relief, before instituting a review of Discovery's debarment and the Registrar's recordal thereof (see [3] and [5]). The High Court dismissed the review of the debarment, but confirmed the interim order against the Registrar (see [4] and [7]).
Barthram and the Financial Services Board appealed to the Supreme Court of Appeal. The issues were:

- Did a provider's debarring of a representative preclude him acting for it alone, or for all providers? *Held*, that the latter was the case (see [11] and [16]).
- Should Discovery's debarment be reviewed? *Held*, that it should be: Barthram was not heard before the decision was made (see [18] – [19] and [21] – [22]).

The Board's appeal upheld; and the High Court's order substituted, to dismiss Barthram's application against it, and to set aside the interim order (see [23]).
Barthram's appeal upheld; and the High Court's order substituted, to set aside Discovery's debarment decision (see [23]).

ODINFIN (PTY) LTD v REYNECKE 2018 (1) SA 153 (SCA)
Delict — Elements — Unlawfulness or wrongfulness — Liability for omission — Failure to comply with s 3 of PAJA — Financial services provider giving no notice or hearing to representative before removing him from its register — Promotion of Administrative Justice Act 3 of 2000, s 3; Financial Advisory and Intermediary Services Act 37 of 2002, s 14.

Odinfin (Pty) Ltd, a financial services provider, employed Mr Reynecke as a representative. It dismissed him, inter alia, for dishonesty, and as required by s 14 of the Financial Advisory and Intermediary Services Act 37 of 2002, removed him from its register of representatives (debarment). This caused Reynecke's then employer, Nedbank Ltd, to dismiss him.
Reynecke later obtained the review and setting-aside of the debarment, an administrative action, on the ground that Odinfin had failed to give him notice and a hearing before doing so (see [8]).
He then instituted a delictual action for damages, alleging Odinfin was dutied to give him notice and a hearing, before disbarring him. The High Court upheld his claim.
On appeal to the Supreme Court of Appeal, the issue was whether non-compliance with PAJA's s 3 was wrongful. (Section 3 requires administrative action to be procedurally fair.) Held, that it was not: nothing in PAJA suggested non-compliance with the section should be delictually actionable. (See [19], [21] and [23].)
Appeal upheld; and the High Court's order substituted to dismiss Reynecke's action (see [24]).

PATHER AND ANOTHER v FINANCIAL SERVICES BOARD AND OTHERS 2018 (1) SA 161 (SCA)

Financial institution — Enforcement committee — Proceedings — Nature of — Standard of proof — Penalties — Nature of — Securities Services Act 36 of 2004.

The enforcement committee established under the Securities Services Act * found Pather and Ah-Vest Ltd to have contravened s 76 † of the Act and imposed financial penalties. The Board of Appeal dismissed their internal appeal, and the High Court their application to review the enforcement committee's decision.
On appeal, the Supreme Court of Appeal considered the High Court'sconclusions (in bold, below), and Pather and Ah-Vest's challenges thereto.

(1) The civil standard of proof applied to proceedings before the enforcement committee.
Pather and Ah-Vest's assertions were that:
(i) The criminal standard of proof should apply, because the proceedings were criminal in nature (see [5]);
(ii) The proceedings were civil, but owing to *(a)* their criminal character;
and *(b)* the criminal nature of the penalties, the criminal standard of proof should apply (see [26]).
Held, as to (i), that proceedings before the enforcement committee were of an administrative nature (see [25]). This was suggested by the factors in [10] – [11] and [23] – [24].
As to (ii)*(a)*, the proceedings' character suggested the criminal standard should not apply (there was no risk of imprisonment). Moreover, the Act could not be interpreted to require the criminal standard; and in similar foreign bodies the civil standard applied. (See [28] and [30] – [32].)
Regarding (ii)*(b)*: that the penalties were deterrent, did not render them criminal (see [34] – [35]).
(2) The enforcement committee had jurisdiction in a s 76 (false-statement) matter.

Pather and Ah-Vest's contention was that ss 79 and 115 implied that only a criminal prosecution in a High Court or regional court was permitted for non-compliance with s 76.
(Section 79 provides: 'Only a High Court or a regional court . . . has jurisdiction to try any offence referred to in sections . . . 76 and to impose a penalty . . . in section 115*(a)*.' Section 115: 'A person who commits an offence referred to in section . . . 76 is liable on conviction to a fine not exceeding R50 million or to imprisonment for a period not exceeding 10 years, or to both such fine and imprisonment; . . . .')
Held, that this could not be implied:

- The enforcement committee did not try an offence or impose a criminal penalty (see [39]); and
- the implication would negate the enforcement committee provisions of the Act (see [40]).

(3) Sections 102 – 105 of the Act were constitutional.
It was asserted that they contravened s 35 of the Constitution. *Held*, that the proceedings not being criminal, s 35 did not apply. (See [36] – [37].)
Appeal dismissed.

PRO TEMPO AKADEMIE CC v VAN DER MERWE 2018 (1) SA 181 (SCA)

Delict — Elements — Unlawfulness or wrongfulness — Erection of steel posts in playground.

Appellant corporation, the owner of a school, caused saplings to be planted in the playground. Alongside them, as supports, it erected steel posts, which protruded 60 cm out of the ground. Respondent's son, 13, during a cricket game, leaned or sat on one of these, and was impaled, injuring his rectum and bladder.
Respondent sued for her son's damages; the High Court found the corporation liable on the merits; and it appealed to the Supreme Court of Appeal.
The issue was whether its action was wrongful (see [14]). *Held*, that it was:

- The action was positive, and resulted in physical injury (see [17]);
- Appellant created the danger (see [21]);
- The Appellate Division had recognised a duty to prevent danger on similar facts — planting of wooden stakes in a playground (see [10] and [21]);
- Teachers were dutied to prevent harm to children in their care (see [20]);
- Children had a constitutional right to appropriate care when removed from their families (see [21]); and
- The school, which was for children with learning disabilities, knew of respondent's son's hyperactivity.

Appeal dismissed.

VAN VUUREN v ETHEKWINI MUNICIPALITY 2018 (1) SA 189 (SCA)

Delict — Elements — Unlawfulness or wrongfulness — Liability for omission — Failure by municipality to control access to or supervise use of water slide at its pool.

Appellant's 8 year old son, John, while sliding down a water slide in one ofrespondent municipality's pools, was pushed or bumped by a child sliding behind

him, causing him to lose his balance and, at the slide's termination, to strike his face on the bottom of the pool.
At the time, appellant was keeping watch on John from afar, and there was no municipal official controlling access to the slide or supervising its use. The slide itself was restricted for the use of under-12s, with a municipalbylaw making it an offence for anyone above that age to enter on or use it.
Appellant sued respondent for her and John's damages, but her action was dismissed by the High Court. On appeal to the Supreme Court of Appeal, the issues were:

- Whether the municipality's failure to control access to and to supervise the slide was wrongful. *Held*, that it was (see [19] and [29]). Factorssupporting this conclusion were:
- the municipality created the risk of harm by providing the pool and slide (see [21] and [29]);
- the users would be immature and undisciplined (see [22]);
- public policy required the prevention of chaotic use, such as pushing, sliding in groups or colliding (see [2], [11], [13] and [23]); F
- the constitutional norm of the best interests of the child (see [22]);
- imposition of a duty would not result in 'an abdication of parental control' or 'an intolerable financial burden'; nor would it extend to all facilities controlled by the municipality (the High Court's conclusions) (see [25] – [27]).
- Whether the municipality's omission was negligent. *Held*, that it was (see[30] – [32]).

The municipality's defence of *volenti non fit iniuria* abandoned; and the determining of any contributory negligence on appellant's part left for the High Court to adjudicate, along with the quantum of damages (see [32] and [34]).
The municipality liable for any damages appellant could prove were owed to her or John (see [36]). H

ZUMA v DEMOCRATIC ALLIANCE AND OTHERS 2018 (1) SA 200 (SCA)

Prosecution— Discontinuance — Decision to discontinue prosecution — Acting National Director of Public Prosecutions reviewing and setting aside own decision to prosecute on ground that political interference with timing of prosecution constituted abuse of prosecuting process — Acting director conceding review based on inapposite provision of Constitution and that decision to discontinue flawed as being irrational — Such concessions correctly made — Additional grounds present for setting aside decision, such as lack of evidence of political interference, that manner in which *NPA* conducted litigation deserving of judicial censure, deliberate exclusion of prosecuting team, and incorrect application of case law relied on.

On28 December 2007, 10 days after he was elected president of the African National Congress (the ANC) at its elective conference, Mr JG Zuma was indicted on criminal charges including racketeering, corruption, money- laundering and fraud. The prosecuting team wanted the indictment served as soon as possible, without regard to political considerations, but the Acting National Director of Public Prosecutions at the time (the ANDPP), Mr Mphse, (on his version of events) was persuaded by Mr McCarthy, at the time the Director of Special Operations (the DSO), to hold service over until after the ANC's elective conference. Mr Mpshe had

also consulted with the Minister of Justice and Constitutional Development who indicated that it would be best to serve the indictment after conference so as not create an impression of political interference. Mr Mpshe accordingly informed the prosecuting team that he had decided to delay the indictment until after conference. As it happened, the indictment was in any event not ready for service until seven days after the conference. However, on 20 February 2009, in oral representations to the NPA to discontinue Mr Zuma's prosecution, the timing of indictment was placed in issue by Mr Zuma's legal representatives. They presented the National Prosecuting Authority (the NPA) with transcripts of recordings of telephone conversations, intercepted by the National Intelligence Agency, allegedly showing political interference with the timing of the indictment, designed to disadvantage Mr Zuma. In relevant part it included Mr McCarthy discussing the timing of the indictment with Mr Ngcuka, a former National Director of Public Prosecutions said to be allied to Mr Zuma's main opposing candidate for election as ANC president, the incumbent, Mr Mbeki. Mr Zuma's legal representatives threatened that should their representations be unsuccessful, they would apply for a stay of prosecution, in which they would make use of the recordings.

The impact of the recordings on their case against Mr Zuma was the subject ofa number of discussions between Mr Mpshe, his deputies and the prosecution team. All agreed that the prosecution was untainted (see [19]). Yet, on 1 April 2009, Mr Mpshe and his deputies — without consulting the prosecution team — decided to discontinue the prosecution. The minutes of that meeting recorded that it was specifically decided not to advise the prosecution team of the decision until shortly before its announcement (see [20]).Mr Hofmeyr, a Deputy National Director of Public Prosecutions and head of the Asset Forfeiture Unit of the NPA, was the most vociferous of those within the NPA management in advancing the argument that the prosecution should be discontinued (see [33]); notes of meetings that Mr Mpshe held with the NPA management recorded Mr Hofmeyr as being pessimistic about their chances of opposing an application for a permanent stay of prosecution (see [78]). On 6 April 2009 Mr Mpshe publicly announced the discontinuance of Mr Zuma's prosecution, issuing a detailed media statement explaining the decision with reference to both foreign and domestic case law. It was apparent from Mr Mpshe's statement that his decision to discontinue the prosecution was driven principally, if not exclusively, by what he considered to be Mr McCarthy's abuse of the prosecution process in relation to the timing of the service of the indictment (see [31]).

The NPA's decision was however eventually set aside on review by the High Court on 29 April 2016, following a successful rationality challenge by the Democratic Alliance (see [36] – [43]). Mr Hofmeyr was the principal deponent for the NPA in that case. In his replying affidavit he denied that 'Zuma's involvement as a contender for the President of the ANC was a relevant consideration or that it impacted on the finalisation of the charge at all', contradicting his earlier assertion (in his founding affidavit) that Mr McCarthy had manipulated the timing of the service of the indictment. And Mr Mpshe, the principal decision-maker, who initially provided only a brief confirmatory affidavit but later filed a supplementary affidavit explaining the interactions between him and Mr McCarthy, in the latter affidavit stated that the decision to delay the prosecution until after the elective conference was in fact made by Mr McCarthy, and that he (Mpshe) was only supporting it, yet acknowledging that he advised the prosecuting team's Advocate Downer that it was solely his decision (see [40]). The High Court took a dim view of these contradictory versions (see [41]).

In this case, Mr Zuma and the NPA's consolidated applications for leave to appeal against the High Court's decision, both applicants conceded, shortly after the hearing commenced, that the NPA's decision to discontinue the prosecution was flawed, in particular that it was irrational, and that Mr Mpshe had incorrrectly invoked s 179(5)*(d)* of the Constitution and s 22(9) of the National Prosecuting Authority Act 32 of 1998 (the NPA Act) in reviewing his own decision to prosecute, when that section only authorised him to review decisions to prosecute of other directors of public prosecution.

The Supreme Court of Appeal, in assessing whether these concessions were correctly made and whether there were additional reasons to set aside the decision to discontinue the prosecution —

Held

The recordings on which Mr Mpshe relied, even if taken at face value, did not impinge on the propriety of the investigation of the case against Mr Zuma or the merits of the prosecution itself. Collectively, the conversations did not show a grand political design, nor was there any indication of clarity of thought on the part of Mr Ngcuka or Mr McCarthy about how either former President Mbeki or Mr Zuma would be decisively advantaged or disadvantaged by the service of the indictment on either side of the elective- conference time line. (Paragraphs [79] and [94].)

The authenticity and legality of the recorded conversations on which the NPA relied ought to have received greater consideration. The question of the admissibility of the recordings as evidence and the issues referred to above was never seriously addressed by the NPA. Instead, the NPA allowed itself to be cowed into submission by the threat of the use of the recordings, the legality of the possession of which was doubtful. (Paragraphs [63] and [94].)

The allegations of political machinations to influence the timing of the indictment were based largely on conjecture and supposition. And even if it were accepted that he had an ulterior purpose, Mr McCarthy's alleged motive was in any event irrelevant. This was because such conduct would be unconnected to the integrity of the investigation of the case and the prosecution itself; it was not practically possible to have the indictment served before the conference; and there were other sound reasons — accepted by both Mr Mpshe and the Minister of Justice and Constitutional Development — that dictated service of the indictment after the elective conference. (Paragraphs [65] – [74], [80], [90] and [94].)

The manner in which the affidavits were drawn and the case conducted on behalf of the NPA was inexcusable. The picture that emerged from the documents filed in the court below was of an animated Mr Hofmeyr, straining to find justification for the discontinuation of the prosecution. He discounted the objective fact the indictment could in any event not be served before the ANC conference because it had only been finalised on 27 December 2007. One was left in the dark as to how the service of the indictment after the conference would ultimately and conclusively have impacted more severely on Mr Zuma than if it had been served before the conference. (Paragraphs [80] and [94].)

The submission on behalf of the NPA and Mr Zuma, that Mr McCarthy had a central role in the timing of the service of the indictment, was at odds with the contradictory account provided by the NPA in relation to who had made the decision about the timing of the service of the indictment. That explanation itself impacted negatively on Mr Mpshe's credibility and on the soundness of his decision to discontinue the prosecution. (Paragraphs [85] and [94].)

The exclusion of the prosecution team from the final deliberations leading up to the decision to discontinue the prosecution appeared to have been deliberate, and was in itself irrational. They were senior litigators steeped in the case, acquainted with the legal issues and had a critically important contribution to make regarding the ultimate decision to terminate the prosecution. (Paragraphs [89] and [94].)
The case law cited in his media announcements as forming the basis for the decision to discontinue prosecution did not, in fact, support it. On the contrary, the cases, including an appeal court decision overlooked by Mr Mpshe, were to the effect that questions of abuse of process in relation to a prosecution should be decided by a trial court and not be determined by way of an extra-judicial pronouncement. (Paragraphs [28] – [29],[86] – [88] and [94].)
Mr Mpshe's stated purpose for discontinuing the prosecution was to preserve the integrity of the NPA and to promote its independence. In the circumstances set out above, this could hardly be said to have been achieved; the opposite was true. It was inimical to the preservation of the integrity of the NPA that a prosecution be discontinued because of a non-discernible negative effectof the timing of the service of an indictment on the integrity of the investigation of the case and on the prosecution itself. There was thus no rational connection between Mr Mpshe's decision to discontinue the prosecution on that basis and the preservation of the integrity of the NPA. (Paragraphs [83] – [84] and [94].)
In reviewing his own decision to institute criminal proceedings against Mr Zuma, and ultimately making the decision to terminate the prosecution, Mr Mpshe wrongly invoked and relied on s 179(5)*(d)* of the Constitution and s 22(2)*(c)* of the NPA Act. These provisions deal with the review by an NDPP of a decision of a DPP and were inapposite. Thus, the concessions on behalf of Mr Zuma and the NPA that, on that basis, the decision to terminate the prosecution was liable to be set aside, was correctly made. (Paragraph [94].)

LOMBARD INSURANCE CO LTD v SCHOEMAN AND OTHERS 2018 (1) SA 240 (GJ)

Contract — Specific contracts — Demand guarantee or performance guarantee — Compliance — Strict or substantial — Core issues being what guarantee actually required, and whether factually there was compliance — Question of interpretation — Necessary to construe terms of guarantee in their appropriate contractual setting, regard being had to commercial purpose of relevant provisions, guarantee as a whole, and defining features of demand guarantees.

GoldenSun purchased fuel on credit from Sasol. With a view to obtaining a source of funds for the payment of any outstanding amounts that might be due, Golden Sun requested the applicant, Lombard Insurance, to issue a demand guarantee to Sasol. In exchange, Golden Sun executed a counter-indemnity in favour of the applicant, for which the respondents stood surety. The guarantee provided that the applicant had to pay under the guarantee on the receipt by it (as guarantor), *at Sasol's own address*, of Sasol's (as beneficiary) written demand, which demand would state that an amount of up to R60 500 000 was then due and payable by Golden Sun (as client) to the beneficiary. Two demands for payment were made by Sasol with which the applicant duly complied. The applicant launched the present application against the respondents for payment under the counter-indemnity after unsuccessfully demanding payment from Golden Sun. The principal ground upon which the

respondents opposed the relief sought was that Sasol's demands did not comply with the terms of the guarantee in that they *did not* take place at Sasol's address; but at that of the applicant. As such, no legal liability arose on the part of the applicant to pay Sasol under the guarantee, and therefore neither Golden Sun nor the sureties were liable to indemnify the applicant in respect of its payment.
In considering the above defence, the court addressed the issue of the degree of compliance required in the case of demand guarantees, ie whether strict compliance was called for, or whether substantial compliance was sufficient. It was a question of some debate in both English and South African law.
Held, that it was not of any real assistance to discern whether demand guarantees called for 'strict' or 'substantial' compliance. The core issue to be determined was simply whether there was compliance with the terms of the guarantee under consideration. That involved determining what the relevant terms actually required, being a matter of interpretation, on the basis and in the manner laid down, inter alia, in the *Natal Joint Pension Funds* decision. (See [48].) More particularly, it was necessary to construe the terms of the guarantee in their appropriate contractual setting, regard being had to the commercial purpose of the particular provisions and the provisions of the guarantee as a whole, whilst bearing in mind the innate defining features (see [45]) of a demand guarantee (see n52).
Held, further, given the wording of the demand guarantee, the surrounding circumstances, and the purpose of a demand — to inform the recipient (the guarantor) that payment was being requested — that the essential requirement giving rise to liability was the receipt by the guarantor of a demand containing a statement confirming that a debt was due and payable by the client. That occurred in this case, notwithstanding the demand's not having being made at Sasol's address. As such, there was sufficient compliance with the terms of the Sasol guarantee, and the applicant was entitled to claim against the respondents based on the counter-indemnity.

PARKSCAPE v MTO FORESTRY (PTY) LTD AND ANOTHER 2018 (1) SA 263 (WCC)

Administrative law — Administrative action — Review — When competent — Action taken in contractual context — Execution of policy — External effect — Right to be heard.

Environmental law — Protection of the environment — Environmental management — National park — Eradication of undesirable species — Felling of exotic trees under commercial contract — Decision of South African National Parks to consent to accelerated felling of plantation on Table Mountain — Constituting reviewable exercise of public power — Public consultation required — National Environmental Management: Protected Areas Act 57 of 2003, s 55.

State — Contracts by — Decision under — Reviewable if constituting exercise of public, as opposed to private, power — Decision of state to permit lessee to proceed with accelerated felling of trees in national park held to constitute reviewable exercise of public power.

In 2005 the first respondent (MTO) concluded a lease with the government agency responsible for the management of South Africa's national parks (now SANParks, the second respondent). The lease allowed MTO to clear invasive plantations on the

Table Mountain National Park (the Park). While the felling was a purely commercial venture for MTO, SANParks was acting in terms of a Cabinet policy decision that all plantations on Table Mountain would, over time, be felled. The lease contained a felling schedule that could be accelerated — subject to approval by SANParks — if plantations were destroyed or partially destroyed by fire.
In July 2016 SANParks approved a request by MTO for the accelerated felling of trees damaged by the mountain fires of March that year. MTO stated that an expedited felling programme was required to save the commercial value of the fire-damaged timber. Shortly after MTO initiated the programme, the applicant (Parkscape), a non-profit organisation dedicated to the preservation of Cape Town's urban forests, obtained an order interdicting the felling of the so-called Dennendal compartment (near the suburb of Tokai), and a rule nisi calling on MTO and SANParks to show cause why its consent to accelerated felling should not be set aside. Parkscape was particularly concerned about the resultant loss of shade in the Tokai area of the Park.
Parkscape argued that the Park was a public amenity managed by SANParks under statutory authority; that the consent was the exercise of a public power; and that public consultation was therefore needed before the accelerated felling could take place. SANParks argued that its agreement to MTO's request remained rooted in contractual rights and did not introduce any public-power considerations, and challenged Parkscape to identify a statutory source of its power to agree to an expedited felling schedule. SANParks further argued that since no statutory provision required public consultation and the public had never before objected to deviations from the harvesting schedule, it had no legitimate expectation of being consulted.
Held
As to the nature of SANParks' decision: Though SANParks was by its nature a public actor, the question here was whether it was just going about the private-law business of a contractor when it considered MTO's request, or whether there were public-power considerations at play (see [34]). The following circumstances indicated that SANParks had indeed exercised a public power when it agreed to the expedited felling: the decision was governmental in nature, regulated by legislation, had immediate and direct legal consequences for both MTO and Parkscape's members, and the balance of power was in SANParks' favour (see [65] – [69]). The decision constituted reviewable administrative action (see [71]).
As to whether there was a legitimate expectation of a process of public participation: SANParks' assertion that Parkscape or the public had no legitimate expectation of a hearing was incompatible with its past conduct, when it held hearings prior to proposed clear-felling (see [76] – [82]). SANParks had failed to discharge its responsibilities to the public and had unlawfully breached Parkscape's right to be informed of the true state of affairs and to be heard in relation thereto (see [88], [90]). The decision fell far short of procedural fairness (see [93] – [94]).
Decision set aside and the respondents interdicted from felling any trees in the Dennendal compartment until lawful decisions to that effect were taken (see Order).

STARGROW (PTY) LTD v OCKHUIS AND OTHERS 2018 (1) SA 298 (LCC)

Land— Land reform — Statutory protection of tenure — Protected occupation of land — Occupier — Exclusions — Person with income exceeding prescribed amount — Calculation — Whether one had to take into account income of spouse for purposes

of determining whether prescribed amount exceeded — Extension of Security of Tenure Act 62 of 1997, s 1 sv'occupier'.

The Extension of Security of Tenure Act 62 of 1997 applies to an 'occupier' as defined in s 1 thereof. The definition expressly excludes '(a) person who has an income in excess of the prescribed amount', at present R5000.To determine whether the prescribed amount is exceeded, one must assess the income of only the person seeking protection of the Act. One does *not* assess the combined income of such person and their spouse, or their entire household; to hold that ESTA demands such an approach would be contrary to the injunction of the Constitutional Court to interpret the Act purposively and generously in order to afford persons with insecure tenure on land the fullest possible protection of their constitutional guarantees (those implicated here being the right to have access to adequate housing, to not be evicted from one's home without an order of court made after considering all relevant circumstances, to equality, and to have one's human dignity respected and protected). (See [34] and [42] – [45].)

STEENKAMP AND ANOTHER v CENTRAL ENERGY FUND SOC LTD AND OTHERS 2018 (1) SA 311 (WCC)

Minerals and petroleum — Petroleum — PetroSA — Board — Dismissal of directors by holding company (Central Energy Fund) — Constituting administrative act — Reasonable in circumstances.

Company — Directors and officers — Directors — Removal — Appropriate procedure — Removal by shareholders and removal by board in case of ineligibility or disqualification — Companies Act 71 of 2008, s 71(1) and s 71(3) read with s 71(8).

On 5 July 2017 the applicants, then the only two board members of PetroSA (the second respondent), were fired by PetroSA's holding company, the CEF (the first respondent). The CEF and PetroSA were both state-owned companies. The applicants were removed under s 71(1) of the Companies Act 71 of 2008, which deals with the removal of directors by shareholders. In the present application the applicants sought the review of the CEF's decision to remove them (the 'disputed decision'). The reasons given for the disputed decision — set out for the first time in the CEF's answering affidavit — included the poor performance of PetroSA; differences between the two boards as to the role of PetroSA; and concerns about the PetroSA board's reliability, in particular its ability to implement a proposed turnaround strategy (see [61]). The CEF board had earlier, on 28 March 2017, written a letter to the PetroSA board, inviting the applicants to give reasons why they should be allowed stay on as directors. In the letter the CEF voiced concerns about the strategic direction and finances of PetroSA (see [9]). The applicants responded with detailed written representations that were placed before court by way of an annexure to their papers.

The applicants contended in their papers that the facts showed that the CEF had predetermined the disputed decision, which was therefore mala fide and unlawful under the Promotion of Administrative Justice Act 3 of 2000. They argued that they were fired even though their written representations had 'firmly refuted' the complaints levelled against them in the CEF's March 2017 letter, and that the disputed decision was, moreover, so unreasonable and disproportionate as to be

arbitrary and irrational. As an alternative to the review relief the applicants claimed that they were wrongly removed under s 71(1) instead of s 71(3) read with s 71(8) of the Companies Act.
For its part the CEF contended that since the disputed decision was taken in terms of s 71, which had its own rules, it was not administrative action that was reviewable under PAJA, and that even if it were, the action taken had met its requirements.
Held
Since the applicants were removed pursuant to a shareholder meeting, the CEF correctly proceeded under s 71(1) instead of s 71(8). The fact that PetroSA had only two directors when the disputed decision was taken, was irrelevant: s 71 made a primary distinction between removals by shareholders and removals by the board, and since the PetroSA board had never dealt with the removal of directors, s 71(3) and s 71(8) were not applicable (see [27] – [29]). The challenge based on s 71 would therefore fail (see [34]).
Theremoval, by one state-owned entity, of directors serving on the board of another state-owned entity, where both were wholly funded by public levies and taxes, was an administrative decision (see [52]). That it was done through s 71 of the Companies Act did not detract from this conclusion (see [53]). The disputed decision constituted administrative action that was subject to PAJA (see [59]).
The fact that the CEF had formed a preliminary view — as set out in its letter of 28 March 2017 — that PetroSA's board was not performing satisfactorily and needed to be changed, did not mean that it had predetermined the matter, provided it had kept an open mind (see [64] – [66]). Nor did the applicants' unsubstantiated written representations serve to 'refute' the allegations against them, given the applicability of the *Plascon – Evans* rule (see [67] – [68]). The CEF's reasons as furnished in its opposing affidavit were not, to the extent that they differed from those informing its preliminary view, necessarily irregular, nor did they betray mala fides or an improper motive (see [72]). And they could not be dismissed as irrational or unreasonable, particularly in view of PetroSA's financial troubles and the strained relationship between the two boards (see [77]). The applicants' challenge on administrative-law grounds would therefore also fail (see [77] – [79]).

S v RANTLAI 2018 (1) SACR 1 (SCA)

Sentence — Combined sentence — Undesirability of reiterated.
On conviction in a regional magistrates' court of three counts of robbery, the court imposed a globular sentence of 20 years' imprisonment for the three counts taken as one for the purposes of sentence. On appeal to the High Court against the conviction and sentence, the court set aside the conviction on one of the counts but left the sentence intact. In a further appeal, the appellant contended that, having had one of the convictions set aside, he deserved to get the benefit of that conviction falling away reflected in his sentence.
Held, that although there was no bar to imposing a globular sentence, it was imperative for judicial officers to consider the desirability of such a sentence carefully before imposing it, bearing in mind the kind of problems it might cause. The present case was a classic example of the kind of serious, if not intractable, problems which would occur on appeal where some counts were set aside and there was a need to alter the globular sentence imposed. Although useful at times, such a sentence had to be imposed in exceptional circumstances only. (See [15].)
Held, further, that what had happened in the present case amounted to an injustice and the sentence had to be altered. An appropriate method of doing this would be to sentence the appellant to 15 years' imprisonment on each of the remaining two counts, such sentences being ordered to run concurrently.

S v CACAMBILE 2018 (1) SACR 8 (ECB)

Review— Of detention at psychiatric hospital pending decision by judge in chambers — Not subject to review in terms of s 302 of Criminal Procedure Act 51 of 1977.
Trial — Mental state of accused — Order in terms of s 47 of Mental Health Act 17 of 2002 — Reviewability under s 302 of Criminal Procedure Act 51 of1977.
Trial — Mental state of accused — Order in terms of s 47 of Mental Health Act 17 of 2002 — Lawyers encouraged to use term 'psychiatric hospital' or 'institution' for 'mental hospital'.

A magistrate had found the accused guilty of assault with intent to do grievous bodily harm, and, applying the provisions of s 77(6)*(a)*(i) of the Criminal Procedure Act 51 of 1977 (the Act), ordered that he be detained at a 'mental hospital' pending a decision by a judge in chambers in terms of s 47 of the Mental Health Care Act 17 of 2002. The magistrate recorded that the matter was subject to automatic review, as provided for in s 302 of the Act.
Held, that an order for the detention of an accused person pending a judge's decision was not a sentence and as such was not automatically reviewable. (See [2].)
Held, further, that the court had not been informed of the nature and extent of any admissible evidence against the accused, and this was fatal to the proceedings. (See [10].)
Semble: The magistrate made reference to the accused being detained at a 'mental' hospital pending a judge's decision in terms of s 47 of the Mental Health Care Act or until a further lawful order was given for the accused's 'disposal'. Lawyers were

encouraged to use the term 'psychiatric hospital ‘or 'institution' instead. It was unclear what the word 'disposal' was intended to convey, but it was simply offensive. (See 15].)

S v HAUPT 2018 (1) SACR 12 (GP)

Evidence — Witnesses — Children — As complainants in sexual offences — Required to respond to and answer all questions — In light of inadequate responses, it could not be said that evidence clear and reliable in all material respects.

The appellant appealed against his conviction in a regional magistrates' court of a count of attempted rape and one count of sexual assault. The record of the proceedings showed that the complainant, a girl who was 12 years old at the time of the offences and was testifying three years later, was unable to respond to some questions under cross-examination or gave replies to the effect that she would prefer not to respond to a particular question. The court appeared not to attach any weight to the inadequate responses.
Held
The state relied on the complainant's evidence and it was accordingly imperative for her to respond and answer all questions put to her. In light of the inadequate responses it could not be said that her evidence was clear and reliable in all material respects. The trial court had therefore not applied the cautionary rules adequately in evaluating her evidence and this constituted a misdirection (see [18]). In the circumstances, the state had not proven its case beyond reasonable doubt and the appeal had to be upheld (see [26]).

S v MM 2018 (1) SACR 18 (GP)

Plea— Plea of guilty — Written statement in terms of s 112(2) of Criminal Procedure Act 51 of 1977 — Court establishing after conviction that not all necessary elements of liability admitted — Powers of trial court — Court entitled to proceed in terms of s 113(1) of Act and not necessary to have matter reviewed by High Court.

The accused was a boy under the age of 14 years who had pleaded guilty in a regional magistrates' court to a charge of contravening s 51(3) of the Criminal Law Amendment Act 105 of 1997, in that he had inserted his fingers into the anus of a 6-year-old complainant. His legal representative handed in a statement in terms of s 112 of the Criminal Procedure Act 51 of1977 and he was convicted on the basis of that statement. The magistrate only became aware after conviction that the accused was under the age of 14 at the time of the offence and that there was nothing on record to prove that the accused had criminal capacity. The conviction had to be set aside and the magistrate sent the matter on special review where differences emerged as to the proper procedure to be followed.
The court held that it was appropriate to act in terms of s 304(2)*(c)*(v) of the Criminal Procedure Act 51 of 1977. As the regional magistrate was empowered under s 113(1) to correct the error, there was no need for the court itself to make any such order. (See [7].)

S v DOS SANTOS 2018 (1) SACR 20 (GP)

Human trafficking — Sentence — Imprisonment — Life imprisonment — Woman part of criminal enterprise trafficking young women to South Africa for sexual purposes — Sentence upheld on appeal.

Theappellant appealed against a sentence of life imprisonment imposed on her in a regional magistrates' court on conviction of three counts of trafficking in persons for sexual purposes in contravention of s 71(6)*(a)* of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. She was also sentenced to 12 months' imprisonment for living off the earnings of sexual exploitation of a child in contravention of s 17(5) of the same Act. It appeared that the appellant was not only instrumental in securing the presence of the complainants in South Africa, having lured them into the country from Mozambique, but was also responsible for keeping them in the country under threat of prosecution as illegal immigrants. They were forced, against their will, to perform sexual acts, on occasion up to eight times a day, on the instructions of the appellant. They were not allowed to leave the house where they were kept unless they were accompanied by the appellant. They received little food, no money, and very little clothing. On appeal,
Held, that the abuse of the young complainants was the result of an elaborate and organised criminal enterprise and the regional magistrate had correctly found that several persons had participated in the facilitation of the crimes. There was clearly an illicit infrastructure to transport the young women across the border into South Africa under escort and the mere existence of such infrastructure justified the inference that the crimes of which the appellant had been convicted, comprised but a fraction of the criminal activity the United Nations Convention against Transnational Organised Crime and its protocol aimed to address. The transport of the complainants to and from South Africa further demonstrated the involvement of corrupt government officials. These circumstances created a climate that lent itself to the commission of the crimes and collectively constituted compelling reasons for imposing harsh sentences in appropriate cases such as the present. (See [11].) The appeal was dismissed.

S v FREDERIKSEN 2018 (1) SACR 29 (FB)

Health offences — Human tissue — Unauthorised removal of — Statutory offences that existed under former Human Tissue Act 65 of 1983 repealed by and not included in National Health Act 61 of 2003.
General principles of liability — Conspiracy — Jurisdiction — Conspiracy in South Africa to murder victim in another country — Court in South Africa having jurisdiction.

The accused was charged in the High Court with numerous offences, including 10 counts of contravening of s 58 of the National Health Act 61 of 2003 (the Health Act) and 10 counts of contravening s 55 read with s 56 ofthe Health Act relating to the removal of human tissue from persons without their written consent and outside a hospital or another institution (in the case of the first group of 10 counts), and not done in accordance with the prescribed manner or procedure (in the second group of 10 counts). He was also charged with conspiracy to commit murder under s 18(2) of the Riotous Assemblies Act 17 of 1956.
At the end of the prosecution's case, the accused applied for his discharge on these counts. He contended, in respect of the charges under the Health Act, that no

provision had been made in that Act for creation of offences in respect of the acts he was accused of. In respect of the conspiracy charge, he contended that, since it related to an agreement he had allegedly made with a fellow prisoner for the murder of a witness outside the borders of South Africa (in Lesotho), the court could not convict him on this count.
Held, as to the 20 counts under the Health Act, that offences relating to the removal of human tissue had been created by the repealed Human Tissue Act 65 of 1983, but for an unknown reason, the legislature, supposedly well aware of the offences in that Act, failed to create criminal offences for similar transgressions in the Health Act. The Act could further not be interpreted to the extent that criminal offences had been created for transgressing the provisions of ss 55 and 58: the court could not venture into the arena of the legislature merely because it might be of the view a casus omissus had occurred. The accused accordingly had to be discharged on these counts. (See [11] and [16].)
Held, as to the conspiracy charge, that it would have grave consequences for South Africa's international standing if it allowed its citizens and others to conspire in South Africa to commit crimes in neighbouring or other countries without sanction. The essential factual findings on the charge were sufficient for a reasonable court to convict upon and the accused had to be put to his defence in respect of this charge.

S v TSOAELI AND OTHERS 2018 (1) SACR 42 (FB)

Gatherings and demonstrations — Public gathering — Attendance at — Mere attendance at gathering for which no prior notice given insufficient for criminal liability in terms of s 12(1)(e) of Regulation of Gatherings Act 205 of 1993.

The appellants appealed against their conviction in a magistrates' court of a contravention of s 12(1)*(e)* of the Regulation of Gatherings Act 205 of 1993, in that they had attended a gathering for which no prior notice had been given. They contended that they were mere attendees of the gathering, and not the organisers thereof, and the provision did not visit them with criminal liability in such circumstances.
Held
Section 12(1)*(e)* was not couched in a language that unequivocally proclaimed that a gathering for which no prior notice was given was automatically prohibited. Such a result, with grave consequences of imprisonment up to a period of a year, ought not to be inferred from the provision when it was also capable of a meaning that recognised the right to peaceful demonstrations and gatherings, and therefore passed constitutional muster.
The converse interpretation, suggested by the state, offended against the principle of legality as expressed in the maxim *nullum crimen sine lege.* (See [35].) Appeal upheld.

S v YG 2018 (1) SACR 64 (GJ)

Assault— Common assault — Defences — Parent's right of moderate chastisement of child — Constitutionality of — Defence infringing ss 9, 10 and 12 of Constitution.
Constitutional practice — Courts — Power to consider and determine constitutional issue — Whether matter moot — Declaration of invalidity of defence of

moderate chastisement by parent to charge of assault on child — Would always be prospective in nature and therefore always moot in that particular case — Court determining issue on grounds of public interest.

The appellant appealed against his conviction in a regional magistrates' court on two counts of assault, one in respect of his 13-year-old son and the other his wife. In respect of the conviction of assaulting his son, the appellant contended that what he did was to chastise his son within the bounds of the law, after he had caught him viewing pornography on his tablet computer. He did so for this, as well as for lying about what he had been doing. He also contested the court's acceptance that he had punched his son on his thighs and chest with his fists and kicked him three or four times with his bare foot whilst he was on the floor. He alleged that he had merely spanked his son on the buttocks.
The court on appeal rejected the appellant's version and held that the trial court had correctly accepted the state's evidence and that the appellant had exceeded the bounds of moderate or reasonable chastisement in acting as he had. In the circumstances there was no merit in the appeal against the charge in respect of his son. (See [93] – [95].) It found that there was no merit in the appeal on the second charge either. (See [106].)
The court nevertheless raised the issue of whether the defence of moderate chastisement to a charge of assault, based on the common-law right of a parent to inflict corporal punishment on their child, was compatible with the Constitution. It accordingly requested counsel for both the appellant and the state to make submissions in this respect and issued directions inviting interested parties to be joined as amici curiae. It also invited submissions from the Minister of Justice and Correctional Services, and the Minister of Social Development. With the exception of one of the amici curiae, the Minister of Social Development and the others agreed that the defence was incompatible with the Constitution.
The court then proceeded to decide the constitutional issue, holding that a determination thereof would have important practical implications for how the state dealt with charges of assault involving parents and their children in other cases. It was important for all parties to know whether the common- law defence was still available to an accused parent. Because of the application of the principle of legality that it would always be the case that any order declaring the common-law defence to be unconstitutional would be prospective, rather than retrospective, in effect. This meant that, as a matter of course, the issue would always be moot when it arose for consideration, in the sense that it would not determine the rights of the particular accused before the court, but only those coming before a court subsequently. If the court declined to consider the issue only on the basis of mootness, it would mean that children's rights would continue to be placed in potential jeopardy unless and until the legislature took action. It seemed that any legislative interaction was still a long way off and the public interest would not be served by the court declining to determine the issue. (See [26] – [30].)
Held, that the defence breached children's rights to bodily and psychological integrity for disciplinary purposes. Even if the level of chastisement was ‘reasonable', it inevitably involved a measure of violence. It undoubtedly also breached the physical integrity of the child and was a violation of the rights guaranteed under s 12 of the Constitution. It also breached the child's right to dignity under s 10 and was not a rational differentiation that would fall within the bounds of different treatment permissible under s 9 of the Constitution. (See [70] – [76].)

The court accordingly dismissed the appeal and held that the common-law defence of reasonable chastisement was unconstitutional and no longer applied in our law. This development of the common law was applicable only to conduct that took place after the date of judgment. (See [107].)

DIRECTOR OF PUBLIC PROSECUTIONS, GAUTENG LOCAL DIVISION, JOHANNESBURG v REGIONAL MAGISTRATE, KRUGERSDORP AND ANOTHER 2018 (1) SACR 93 (GJ)

Review — Of discharge of accused at end of prosecution's case — Evidence against accused sufficient for him to be put on his defence — Discharge constituting gross irregularity and set aside.

The Director of Public Prosecutions (the DPP) applied for the review of the discharge of the respondent by a magistrate in terms of s 174 of the Criminal Procedure Act 1 of 1977 on a charge of murder. The DPP contended that the decision of the magistrate amounted to a gross irregularity that vitiated the proceedings. The evidence before the magistrate was that the respondent and the deceased were arguing in a place where they were drinking until the owner threw them out because of their noise. They went to the respondent's home across the street and a short while later the deceased was seen to run from the respondent's house and fell to the ground. The respondent followed the deceased with a knife in his hand and later told a witness that he had stabbed the deceased.
Held, that the magistrate's decision to discharge the accused at the end of the state's case, contrary to legal precedent, was such an error of law that it constituted a gross irregularity in the trial and prejudiced the state. (See [13].)
Held, further, that in the circumstances the proceedings had to be set aside and the trial commenced de novo before another magistrate. (See [16].)

S v ESSOP 2018 (1) SACR 99 (GP)

Bail — Application for — Pending appeal against sentence — Prospects of success— Magistrate misdirecting himself as to nature of offences — Bail granted.

The appellant was convicted in a regional magistrates' court of 45 counts of the possession of child pornography in contravention of the Films and Publications Act 65 of 1996 and on one count of kidnapping of a minor female child. He pleaded guilty to all the counts and was sentenced to 10 years' imprisonment. He applied for leave to appeal and this was granted. He then applied for bail pending appeal but this was refused by the magistrate. He contended in the present appeal that he was not a flight risk and that he had attended each and every sitting of the court during his trial, even after having been convicted, while he waited eight months for sentencing proceedings to be finalised.
Held, that the magistrate's remarks and comments showed that he was labouring under the impression that the appellant was convicted of contravening the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 and/or sexual assault of the complainant, which carried a more severe punishment. The present was a case where bail pending appeal had to be granted but the original bail amount of R10 000 was too low and had to be increased to R30 000. (See [35], [38] and [41].)

S v SMOUS 2018 (1) SACR 108 (NCK)

Murder— Sentence — Imprisonment — Murder of former girlfriend — Prevalence of violence in country — Prescribed minimum sentence of 15 years' imprisonment insufficient in circumstances — Sentence of 18 years' imprisonment imposed.

The appellant was convicted in the High Court of the murder of his former girlfriend. The pathologist who compiled the post-mortem report described the attack on the deceased as being consistent with that of having been carried out by a person with a high level of anger. The appellant made two attempts at suicide immediately after the murder, first by hanging and then by consuming rat poison.
The indictment only referred in general terms to murder read with the provisions of the Criminal Law Amendment Act 105 of 1997. It did not specify whether the murder charge fell within the ambit of part I of sch 2, prescribing life imprisonment on conviction, or part II of sch 2, prescribing the minimum sentence of not less than 15 years' imprisonment for first offenders, should there be a finding that there were no substantial and compelling circumstances justifying a departure from the prescribed sentence.
The trial court made a finding that there were no substantial or compelling circumstances justifying a lesser sentence than life imprisonment, and imposed that sentence. On an appeal against the sentence,
Held, that, in the light of the particulars in the indictment, the trial court had misdirected itself by not embarking upon an enquiry as to whether there were substantial and compelling circumstances present to justify a sentence less than the 15 years' imprisonment prescribed in part II of sch 2 to the Act. The court was accordingly entitled to intervene in the sentence imposed. (See [16] and [18].)
Held, further, that violence in our society, particularly by men against women, was prevalent and the interests of society dictated that a strong message be sent to the public that violence would not be tolerated. Failure to do so would feed into the unjustifiable trend of the society taking the law into their own hands by punishing, without due process, alleged suspects of crime. The aggravating features of the case outweighed the mitigating circumstances. There were no substantial and compelling circumstances justifying a lesser sentence than the prescribed sentence. However, the prescribed minimum sentence of 15 years' imprisonment would not adequately cater for the gravity of the offence and its prevalence, the interests of society and would not be fair to the appellant for what he had done. A sentence of 18 years' imprisonment was imposed instead. (See [23] – [24].)

All SA [2018] Volume 1 January

Smyth and others v Investec Bank Ltd and another [2018] 1 All SA 1 (SCA)

Corporate and Commercial – Company law – Locus standi – Whether agreements concluded by company constituted or involved an act or omission which was unfairly prejudicial, unjust or inequitable as contemplated in section 252(1) of the Companies Act 61 of 1973 as read with section 252(3) – Section 252 of the Companies Act 61 of 1973 providing a remedy to a member of a company in case of oppressive or unfairly prejudicial conduct – Interpretation of section 252 – A member is someone whose

name has been entered in the company's register of members – Beneficial owners of shares in a company not eligible to join as co-applicants with relevant nominees holding the shares on their behalf.

The main issue in this case was whether the remedy provided for in section 252 of the Companies Act 61 of 1973 is available to beneficial owners of shares in a company who have elected to hold their shares through nominees. Section 252 provided a remedy to a member of a company in case of oppressive or unfairly prejudicial conduct. A related issue was whether beneficial owners who cannot invoke the remedy for which section 252 of the Act provides because their legal interest falls short of a right to assert a claim, may nonetheless join as co-applicants together with their relevant nominees in proceedings for relief in terms of section 252 of the Act in relation to their shares by virtue of a direct and substantial interest in such proceedings.

In the main application in the court below, the first to seventh appellants sought a declaration that two agreements concluded by the second respondent constituted or involved an act or omission which was unfairly prejudicial, unjust or inequitable as contemplated in section 252(1) as read with section 252(3) of the Act. In two other applications, the eighth to thirty-fourth appellants and the thirty-fifth to forty-first appellants sought leave to intervene in the main application as co-applicants.

The agreements referred to above related to four claims instituted by the second respondent, following an alleged fraudulent scheme perpetrated against the second respondent. In essence, the appellants complained that both agreements were, as a direct result of the first respondent's machinations, calculated to benefit the first respondent, to the financial prejudice of the appellants as shareholders of the second respondent.

The respondents challenged the *locus standi* of the appellants in the main application. It was not in dispute that the nominee applicants who sought to intervene in the main application did so at the behest of the beneficial shareholders and were thus carrying out their instructions in furtherance of the beneficial shareholders' interests. The first respondent raised a preliminary point contesting the legal standing of some of the appellants, asserting that they were not members of the second respondent and therefore could not seek relief under section 252. The appellants disputed the assertion that they were not members of the second respondent. In the alternative, they sought to meet the challenge to their legal standing by contending that, as beneficial owners, they had a beneficial interest in the shares registered in the names of their respective nominees. Consequently, they asserted that it was they, as beneficial owners of the shares in the second respondent, and not their respective nominees, who stood to suffer patrimonial loss flowing from the respondents' unfairly prejudicial conduct. By virtue of such interest, they contended that they had a direct and substantial interest in the relief sought in the main application, entitling them to either remain or join as co-applicants in the main application.

Upholding the *locus standi* point, the court below non-suited the seven main applicants and dismissed the applications for leave to intervene brought by the beneficial shareholders, resulting in the present appeal. The court held that, on a proper construction of section 252, the term "member" in section 252 does not include a beneficial shareholder. It also held that the legal interest asserted by the beneficial shareholders did not avail them as they could not be joined as co-applicants (with their

respective nominees) because they would not be asserting a claim under section 252 nor could they competently do so.

Held – Section 252 had to be given such construction as would advance the remedy rather than limit it.

The appellants accepted that a shareholder has a right to hold shares in his own name or through a nominee; a nominee acts in accordance with the instructions given by the beneficial owner; a beneficial owner has the right to terminate the nomination and to hold the shares in his own name; and the nominees who were permitted to intervene in the main application would act in the furtherance of the interests of the beneficial owners. Their primary criticism of the judgment of the court below was that it erred in holding that the remedy under section 252 of the Act is not available to a beneficial owner of shares in a company who has freely elected to hold those shares through a nominee.

The crux of the dispute between the parties was the interpretation of sec-tion 252 of the Act. Principles of interpretation require a court to pay due regard to the overall scheme of the Act. During an interpretative process, it is a fundamental principle of statutory interpretation is that words in a statute must be given their ordinary meaning, unless to do so would result in an absurdity. That general principle is, however, subject to three interrelated qualifications. First, the statutory provision should be interpreted purposively. Second, the relevant statutory provision must be contextualised. Finally, closely related to the purposive approach is the requirement that statutes must be interpreted consistently with the Constitution so as to preserve their constitutional validity, where it is reasonably possible to do so. Accordingly, the logical point of departure is the language of the provision itself read in the context of the overall scheme of the Act, having regard to the purpose of the provision and against the background to the production of the relevant statute.

The Court reminded that the present appeal was about whether the appellants – being beneficial shareholders – were members of the second respondent as contemplated in section 252 read with section 103. It was accepted that a company should concern itself only with registered owners of shares. The thrust of the appellants' argument was that because it is the beneficial shareholder who suffers the prejudice contemplated in section 252 of the Act and not the nominee although a member in terms of section 103, it is permissible to go behind the register of members for purposes of section 252. The Court restated the principle that a nominee acts in the interests of and subject to the instructions of the beneficial owner. It declined to permit the intervention of the appellants in the main application in circumstances where the remedy created by section 252 is available only to a member of the company as defined in section 103 as the Legislature saw it fit. It was a simple matter for the appellants, if they wished to avail themselves of the remedy provided for in section 252 in their own names, to terminate the nomination of their respective nominees so as to procure the entry of their names in the register of the second respondent's members. For as long as the nominees' names remained in the register of members, the beneficial owners lacked a legal interest in the subject-matter of the litigation.

The appeal was, accordingly, dismissed with costs.

Geffen and others v Martin and others [2018] 1 All SA 21 (WCC)

Corporate and Commercial – Section 49 of the Close Corporations Act 69 of 1984 and section 163 of the Companies Act 71 of 2008 – Protection to minority shareholders against unfairly prejudicial conduct on the part of majority shareholders – Whether, objectively, the applicants had suffered prejudice which was sourced in the conduct of the majority shareholders and which was unfair, or at least, unreasonable or unethical – Court finding it not to have been established on the papers, that the alleged conduct complained of had adversely affected or was detrimental to the financial interests of the applicants.

At the centre of the dispute between the parties in this case was a restaurant and entertainment business conducted by a person ("Richard") who began a restaurant ("Bombay Bicycle Club") located on premises in respect of which the first applicant held a long-term lease. The second applicant was employed as the holding entity of the Bombay Bicycle Club, with first applicant as its sole member. At a later stage, first applicant and Richard started the Side Walk Café, with second applicant again being the holding entity thereof.

With a view to restarting a concept restaurant previously owned by Richard, in terms of which a particular dining experience would take place in a circus tent, the sixth respondent was incorporated to act as the holding company for the various restaurants and ventures to be established in the future. Subsequent thereto, the twelfth respondent was incorporated to act as the operating company for the restaurant and circus entertainment business. The sixth respondent held an 80% shareholding therein, with the second applicant being the remaining shareholder. The sixth respondent thereafter obtained an 80% interest in the Sidewalk Café and in the Bombay Bicycle Club, in each case with the second applicant holding the balance of the shares in the respective businesses. It was decided that the restaurant experience conducted by twelfth respondent should expand, but costs spiralled out of control and inevitably that led to the demise of the business. The twelfth respondent ended up being liquidated.

In January 2017, first respondent's attorneys wrote to first applicants attorneys advising that first respondent was willing to pay first applicant R2,4 million for his interest in the group, an offer which was not accepted.

In the present application, relief was sought in terms of section 49 of the Close Corporations Act 69 of 1984, and section 163 of the Companies Act 71 of 2008. The relief sought in the notice of motion, included the appointment of a chartered accountant who was requested to compile a report which would include the financial statements of the sixth to the fifteenth respondents for the financial years 28 February 2011 to 28 February 2017; a determination of whether any amounts were due to applicants by sixth to fifteenth respondents and, if so, the actual amounts; a determination of whether amounts were due to the first and/or third respondent by sixth to the fifteenth respondents, and, if so,the actual amounts, as well as amounts due to the second, fourth and fifth respondents; and finally the determination of the fair and reasonable values of the third applicant's membership interest in the thirteenth and fourteenth respondents, second applicant's shareholding in the sixth respondent and the fourth applicant's shareholding in the fifteenth respondent.

Held – Both section 49 of the Close Corporation Act and section 163 of the Companies Act afford protection to minority shareholders against unfairly prejudicial conduct on the part of majority shareholders. Section 163 provides that a shareholder or a director of a company may apply to court for relief if any act or omission of the company, or a related person, has had a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant; the business of the company, or a related person, is being or has been carried on or conducted in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interest of, the applicant; or the power of a director or prescribed officer of a company, or a person related to the company, are being or have been exercised in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant. The conduct of the majority shareholders has to be evaluated in the light of a fundamental principle of company law, namely by becoming a shareholder; the latter undertakes to be bound by the decisions of the majority shareholders. Not all acts which prejudicially affect a minority shareholder or which disregard his interests will entitle a minority group to the relief set out in the section. The consequence of the act or omission must either be oppressive or unfairly prejudicial which, at the very least, connotes a significant element of unfairness. The inquiry was thus about whether, objectively, the applicants had suffered prejudice which was sourced in the conduct of the majority shareholders and which was unfair, or at least, unreasonable or unethical.

Apart from the analysis of section 163, and its implication in the present case, the fact that an offer was made by first respondent to purchase first applicant's interests required further legal analysis. In particular, the Court considered whether the making of the offer to purchase the minority shareholding ruled out the notion of unfairly prejudicial conduct by the first respondent. Two issues in that regard were argued extensively before the Court, namely the reasonable nature of the offer made by first respondent to buy out first applicant and an argument that relief sought in terms of section 163 of the Companies Act in respect of fifteenth respondent and sixth respondents, in particular, should be based upon the lifting of the corporate veil.

Undertaking a detailed analysis of the facts and the allegations made by the applicants the Court concluded that on the papers, the applicants had failed to show on objective grounds, any prejudice sourced in unfair conduct on the part of the majority shareholders. On the papers, it was not shown that the alleged conduct had adversely affected or was detrimental to the financial interests of the applicants.

The Court then addressed the argument relating to lifting of the corporate veil. It found no justification for taking that course of action.

Emphasising that the applicant's case had to be based on the founding papers, the Court concluded that on examining the founding papers and the averments contained in the answering affidavit, the conduct complained of was not found to be oppressive or unfairly prejudicial to the applicants. The application was dismissed with costs.

Gelyke Kanse and others v Chairman of the Senate of Stellenbosch University and others [2018] 1 All SA 46 (WCC)

Civil procedure – Application for leave to admit a further affidavit and to lead oral evidence – While the courts may permit the filing of further affidavits in exceptional circumstances, the court will not exercise its discretion in the absence of an explanation of why it is necessary to file the affidavit concerned; and will always act

subject to considerations of fairness and justice and the absence of prejudice to other parties.

Civil procedure – Striking-out application – Uniform Rule 6(15) of the Uniform Rules of Court – For an application to strike out to succeed, the matter to be struck out must be of an offending kind as indicated above; and the court must be satisfied that if the matter is not struck out the party seeking to have the matter struck out would be prejudiced.

Constitutional law – Right to basic education and to receive education in official language of choice – Section 29 of the Constitution of the Republic of South Africa, 1996 – Right to receive education in an official language of choice is modified because in terms of section 29(2), the choice is available only when it is reasonably practicable.

In June 2016, the Senate and Council of Stellenbosch University took a decision in terms of section 27(2) of the Higher Education Act 101 of 1997, to adopt a new language policy for the university. The applicants sought the review and setting aside of that decision. They also sought an order setting aside the policy itself; and an order directing the university to implement its previous language policy ("the 2014 policy") until it was validly amended or replaced. The application was made on constitutional as well as administrative law grounds, and sought essentially to secure the continuation of Afrikaans as a primary language of instruction at the university.

Held – It was common cause that the Higher Education Language Policy ("the LPHE") was implicated in the matter. As pointed out by the applicants, the language policy determined by the council of the university had to be informed by the LPHE and all such policies had to comply with sections 29(1)(b) and 29(2) of the Constitution.

Section 29 of the Constitution was key to the dispute in this case. The section entrenches the right to a basic education, and to further education, and to receive education in an official language of choice. However, that choice is modified because in terms of section 29(2), the choice is available only when it is reasonably practicable.

In the case of *University of the Free State v Afriforum and another* [2017] 2 All SA 808 (2017 (4) SA 283) (SCA), in which judgment was handed down after the present application was filed, the Supreme Court of Appeal (SCA) reaffirmed that a negative duty on the State exists not to take away or diminish the right to being taught in Afrikaans without justification. Key to the assessment of the justification, according to the SCA, is whether the context and the circumstances have changed, and if so, whether good reason has been proffered for the change of policy.

Since the decision to adopt the new policy was said to be subject to review in that it was made in the exercise of a public power, the question was whether, viewed objectively, the decision was rationally connected to the purpose for which the power was given. That is a factual enquiry and if a decision-maker acts within its powers, and considers the relevant material in arriving at a decision so that there is a rational link between the power given, the material before it and the end sought to be achieved, the rationality threshold would be met.

The Court examined the provisions of the 2014 and 2016 policies, as well as the reason for changing the 2014 policy. Sound reasons existed for the change in policy. The Court could not accept the applicants' contention that the new policy intended to reduce Afrikaans. Instead, the new policy was designed to retain the extent of

Afrikaans tuition under the 2014 policy and to offer as much Afrikaans tuition as the university was reasonably able to do so, considering what was reasonably practicable.

Significant in the case was the fact that the applicants sought to challenge the 2016 policy but did not seek to challenge the State's language policy (the "LPHE"). The applicants' real complaint appeared to be the cumulative effect of such decisions by multiple universities that negatively impact Afrikaans-speakers. As the SCA held in the *Afriforum* case, the target then is the State's language policy, not the university's policy.

The applicants failed to persuade the court that the 2016 policy was in any way unconstitutional.

The Court then raised the question of whether the impugned decisions constituted executive or administrative action. Following the court in the *Afriforum* case, the Court held that the policy itself did not amount to administrative action. It would only be decisions taken in the implementation of the policy that would be subject to administrative review. Therefore, the Promotion of Administrative Justice Act 3 of 2000 did not apply to this case. Consequently, the only grounds of review that the applicants could rely on were that the decision was substantively irrational – which posed a lower standard than reasonableness required under the Promotion of Administrative Justice Act.

After examining the purpose of section 29(2), the Court turned to consider the notion of what is reasonably practicable. The assessment of what is reasonably practicable requires a consideration both of resource constraints and logistics (the factual criterion), and what is reasonable which clearly includes considerations of equity, redress, and non-racialism. A university need consider the reasonable education alternatives only if education in the language of choice is reasonably practicable as properly understood.

It was concluded that the university in this case appeared to have decided that its multiple purposes of preventing exclusion, promoting multilingualism, ensuring integration, and fostering Afrikaans were best served by the 2016 policy it adopted. It clearly considered multiple factors and weighed them all. The Court found no irrationality, and declined to interfere with the decision.

An application was brought by the applicants, for leave to admit a further affidavit and to lead oral evidence thereon. The general rule is that only three sets of affidavits are permitted in motion proceedings. However, that rule is not always rigidly applied and the court enjoys a discretion to permit the filing of further affidavits. While the courts may permit the filing of further affidavits in exceptional circumstances, the court will not exercise its discretion in the absence of an explanation of why it is necessary to file the affidavit concerned; and will always act subject to considerations of fairness and justice and the absence of prejudice to other parties. Other considerations will include the degree of materiality of the evidence, the stage which the litigation has reached, and the general need for finality in judicial proceedings. The Court found that no adequate explanation was furnished for seeking to adduce the further affidavit or to compel the oral testimony of another witness at the current extremely late stage.

Two other applications brought were by the university, for striking out in terms of Uniform Rule 6(15) of the Uniform Rules of Court. The first application was aimed mainly at the substantial quantity of hearsay and what the respondents describe as

irrelevant allegations contained in the applicants' founding papers. The second application pertained to the applicants' replying papers, as being replete with new and irrelevant matters. Although the Rule under discussion dealt expressly with the striking out of scandalous, vexatious or irrelevant matter, those grounds are not at all exhaustive or intended to be exhaustive as to the grounds on which a court will strike out allegations; the court enjoys an inherent jurisdiction to grant relief where appropriate. For an application to strike out to succeed, the matter to be struck out must be of an offending kind as indicated above; and the court must be satisfied that if the matter is not struck out the party seeking to have the matter struck out would be prejudiced. The Court agreed that the impugned affidavits contained irrelevant and hearsay evidence. Both striking-out applications were therefore granted.

The main application was dismissed with costs.

Isaacs and others v City of Cape Town and another [2018] 1 All SA 135 (WCC)

Civil procedure – Eviction order – Rescission application – Error – Before granting the urgent order of eviction, the court must give written and effective notice of the intention of the owner or person in charge to obtain an order evicting an unlawful occupier and the municipality in whose area of jurisdiction the land is situated – Failure by applicant for eviction to provide the court with accurate information relating to the language of the occupiers, resulting in court failing to appreciate the necessity of issuing an order directing that the notice of eviction proceedings be issued in Afrikaans – Further error existing in incorrect legislation being applied – Rescission application accordingly granted.

In terms of rule 42 of the Uniform Rules of Court, alternatively the common law, the applicants sought the rescission of eviction and demolition orders granted against them. The applicants contended that they were occupiers in terms of the Extension of Security of Tenure Act 62 of 1997 ("ESTA") and that their removal was unlawful because it was sought and granted in terms of the Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998 ("PIE"). In the alternative, and in the event that the latter Act was held to be applicable, the applicants contended that the eviction and demolition orders were granted in error on the basis that the court, granting the eviction and demolition order, was not appraised of the facts necessary for the court to determine whether an eviction order was a just and equitable order.

Held – Prior to the first respondent ("the City") pursuing the eviction and demolition application, a concerted effort should have been made, within the parameters of the principle of co-operative government between the City and the second respondent ("the Department"), to resolve the matter in favour of a removal process that affirmed the dignity of the applicants. The City and the Department had an opportunity to address the removal of the applicants in a manner consonant with the underlying values of the Constitution. That failed when the City launched its application for the removal of the applicants on an urgent basis.

Section 5 of PIE regulates the launching of eviction proceedings on an urgent basis for a final order of eviction. It provides that such final order may be granted if the court is satisfied that there is a real and imminent danger of substantial injury or damage to any person or property if the unlawful occupier is not forthwith evicted from the land; the likely hardship to the owner or any other affected person if an order for eviction is not granted, exceeds the likely hardship to the unlawful occupier against whom the order is sought, if an order for eviction is granted; and there is no other effective

remedy available. Even where all those facts are established, the court remains with a discretionary power to refuse an order of eviction. Before granting the urgent order of eviction, the court must give written and effective notice of the intention of the owner or person in charge to obtain an order evicting an unlawful occupier and the municipality in whose area of jurisdiction the land is situated. Contemplating the urgent eviction and demolition proceedings, the City successfully approached the court on an ex parte basis for the aforementioned notice in terms of section 5(3). The applicants did not respond and the eviction application went before the court on an unopposed basis. In seeking rescission of the eviction order, the applicants submitted that the order in the notice application was delivered to them only in English and not in Afrikaans. They therefore contended that the execution of the eviction order should be suspended and the service order rescinded.

The requirements for a rescission of an order must be present before such an order is granted. With regard to the service order, the applicants had to show that it was granted in error. The error relied upon by the applicants was that the City failed to provide the court with accurate information relating to the language of the applicants, the result of which was that the court failed to appreciate the necessity of issuing an order directing that the notice of eviction proceedings in terms of section 5(3) be issued in Afrikaans. The notice was therefore not effective as required in section 5(2). The Court agreed that if there was no compliance with section 5(2) in that the notice sought and authorised by the court was issued in a language that the applicants were not conversant with, then it lacked the material facts necessary for it to exercise its judicial powers in terms of section 5(2) to issue an effective notice. It followed that the notice was sought on the basis of incomplete or inaccurate information. The application for rescission had to succeed on that basis. A failure to point out the language of the occupiers to the court considering a section 5(2) notice is a fatal omission and strips the eviction process of the attributes of fairness and lawfulness. Such an omission not only undermines the right of the occupiers to access the court as guaranteed in section 22 of the Constitution, but has the real potential of violating the right of the occupiers to access housing in section 26 of the Constitution.

A lawful and appropriate notice that complies with the requirements of section 5(2) is a jurisdictional requirement for a lawful eviction. The rescission of the service order meant that the eviction order also had to be rescinded.

That was, however, not the only basis on which the eviction and demolition orders had to be rescinded. As stated above, according to the applicants, a rescission order also had to be granted because the eviction and demolition orders were obtained by the respondents relying upon incorrect legislation.

Since the property occupied by applicants was agricultural land, and since the applicants alleged that their incomes did not exceed the prescribed amount of R5000 per month, the applicability of ESTA, and thus this Court's jurisdiction, turned primarily on whether the applicants had the consent of the owners at the relevant time to reside on the land. An eviction – no matter how justified – must be obtained lawfully and not arbitrarily. An occupier in terms of ESTA cannot lawfully be evicted in terms of PIE. While both pieces of legislation aim to regulate the manner of evicting unlawful occupiers, each has special mandatory features that must be complied with. ESTA provides statutory protection against eviction of occupiers of agricultural land. The land from which the applicants were evicted in terms of PIE was agricultural land. The City's argument in that regard was that the fact that the land concerned is agricultural land

is not decisive for the application of ESTA. It contended that what is decisive is that the occupier must occupy the land with the consent of the owner. Absent that consent, so the argument went, an occupier on agricultural land may be evicted, as an unlawful occupier, by reliance on PIE. The Court accepted that the applicants had established a prima facie case that they had consent to occupy the land. The City was thus incorrect to approach the eviction of occupiers of this agricultural land on the basis of PIE.

Referring to case law, the Court confirmed that an eviction order may be rescinded where it is granted in error. The present Court could therefore rescind the eviction order on the basis that the court applied incorrect legislation in error. The rescission was, accordingly, granted.

Karani v Karani NO and others [2018] 1 All SA 156 (GJ)

Civil procedure – Evidence – Expert witnesses – Function of experts in litigation – An expert must be objective irrespective of the party for whom he is testifying, and must also be properly qualified and provide the factual basis for his opinion.

Wills, Trusts & Estates – Validity of will – Contested will not complying with formal requirements set out in section 2(1)(a) of the Wills Act 7 of 1953 and shown to be a forgery – Court declaring will invalid.

At the centre of the dispute in this case was the validity of a will ("the contested will") executed by the plaintiff's sister ("the deceased") in February 2013. The plaintiff sought an order declaring the said will to be null and void, and an earlier will dated 15 September 2006 to be valid. The second and third defendants were the nephews of the plaintiff and the deceased.

In contending that the contested will was invalid, the plaintiff alleged non-compliance with the mandatory provisions of the Wills Act 7 of 1953, and further, that the will was a forgery. The plaintiff bears the onus that the Disputed Will dated 7 February 2013 is a fraudulent document with a forged signature.

Held – The plaintiff bore the onus of proving that the contested will was a fraudulent document with a forged signature. The second and third defendants had to demonstrate that the contested will complied with the legal formalities. In both instances the standard was on a balance of probabilities.

Section 2(1)(a) of the Wills Act 7 of 1953 provides the formalities in respect of execution of wills. Section 2(1)(a)(ii) provides that two or more witnesses must sign a will and do so in the presence of the testator and in the presence of each other. That was not complied with in this case. While the formalities were peremptory, section 2(3) affords some deviation from the strict implementation of those provisions. Two requirements must be satisfied before relief can be granted in terms of section 2(3). The document must have been drafted by the deceased personally, and the deceased must have intended the document to be her will.

The issue in this case was that the contested will was not signed by two or more witnesses in the presence of the deceased and in the presence of each other. Furthermore, the witnesses did not sign and/or initial each page of the document. The non-compliance with the formal requirements for validity rendered the will invalid.

Finally, the Court turned its attention to the probative value of the testimony of the expert witnesses of each of the parties. Forming the view that the defendant's expert

witness, a forensic graphologist, was predisposed to the facts, the Court found it necessary to comment on the function of experts in litigation. An expert must be objective irrespective of the party for whom he is testifying.

He must also be properly qualified and provide the factual basis for his opinion, and the evaluation of such evidence must be done according to accepted principles. The Court found the defendants' expert's findings to be unsubstantiated and improbable, and his reasons unconvincing. The plaintiff's expert materially substantiated her findings, and her opinion was more probable and reliable.

It was concluded that the plaintiff had discharged the burden of proving that the signature on the contested will was a forgery. The contested will was declared invalid, and the 2006 will was declared to be the last will and testament of the deceased.

Lusithi and others v Cape Lifestyle Investment Ltd and another [2018] 1 All SA 166 (WCC)

Constitutional law – Right to fair trial – Section 34 of the Constitution providing that everyone has the right throughout the dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum – Granting of eviction order in chambers without affording parties an opportunity to be heard on issue in dispute constituting a violation of the right to a fair trial.

An application for the eviction of the appellants from certain property was brought by the first respondent in May 2014. The appellants gave notice of their intention to oppose the eviction application. The notice filed on behalf of the third appellant (described as the class of persons unlawfully occupying the property) was signed by the first appellant. It was not determined who exactly the individual appellants were until they sought leave to appeal in the Supreme Court of Appeal.

The court below was satisfied that the appellants' occupation of the property was unlawful, and advised Counsel of its view. Once Counsel had consulted with their clients, they reverted to the presiding judge who made an eviction order, but suspended the operation of that order to a later date with certain directions. The court *a quo* granted an order in terms of which the appellants were directed to vacate the property on which they lived and to remove any structures or possessions from the property on or before 31 January 2015, failing which the sheriff was authorised and directed to evict the occupiers. That led to the present appeal against the eviction order.

Held – The case of *Occupiers of Erven 87 and 88 Berea v De Wet NO and another* (*Poor Flat Dwellers Association as amicus curiae*) 2017 (8) BCLR 1015 (CC) was similar to the present case. In that case, the Constitutional Court was confronted with the question as to whether in eviction proceedings, where an unlawful occupier had purportedly consented to his eviction, the court is absolved from the obligation to consider all relevant circumstances before ordering an eviction. The occupiers in that case argued that even if consent could be found, such consent was not legally valid as the court was still under a constitutional and statutory obligation to satisfy itself that the eviction would nevertheless be just and equitable after considering all the relevant circumstances. The Constitutional Court found that for consent to be legally effective, it must have been given by the applicants freely and voluntarily with a full awareness of the rights being waived. It must be an informed consent to be valid. The Court found

that the applicants in that case were not aware of their rights, and that the factual consent that they gave was not informed and therefore, was not legally valid.

Section 26(3) provides that no one may be evicted from their home or have their home demolished without a court order authorising such eviction after having due regard to all relevant circumstances. Courts dealing with eviction matters have a specific duty to ensure that the order made is fair and just. An eviction order can only be granted by a court if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances. An agreement by the parties as to the unlawfulness of the occupation does not absolve a court of its constitutional duties to approach eviction proceedings in a manner that ensures that the protection granted in section 26 of the Constitution is fully complied with.

On appeal, the majority judgment addressed only one of the issues raised, *viz* whether the appellants had a fair trial. The eviction order was made after the judge addressed Counsel in chambers. The parties did not have an opportunity to make submissions in open court about their respective cases, neither was there any indication that there was substantial debate or argument on the issues before the judge in chambers, with a view to persuade the judge before the granting of the eviction order. The appellants raised a dispute relating to whether or not they occupied the property with the respondent's consent. The court *a quo* did not enquire nor did it deal with that issue fully. Section 34 of the Constitution provides that, “Everyone has the right throughout the dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum”. The appellants before the court *a quo* were deprived of the constitutionally guaranteed right to a hearing in public before the court. The majority of the Court upheld the appeal and directed that the matter be heard afresh before a different judge.

Premier of the Eastern Cape and others v Hebe and others [2018] 1 All SA 194 (ECB)

Civil procedure – Traditional leadership – Statutory interpretation – Starting point is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity – Statutory provisions should always be interpreted purposively; the relevant statutory provision must be properly contextualised; and all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity.

Local Government – Traditional leadership – Duties imposed by legislative framework – Legality of process in terms of which the Commission on Traditional Leadership Disputes and Claims and the provincial Premier performed their functions regarding appointments of chiefs of traditional community.

At the centre of the present appeal was a dispute about senior traditional leadership of a traditional community. Upon the establishment of the community, the first respondent’s father was appointed chief. He was succeeded by the first respondent.

A claim by the second respondent that he should rightfully have been appointed chief was investigated by the provincial committee of the fourth appellant (“the Commission”), which then upheld the claim. The committee’s recommendation to the

first appellant ("the Premier") was that the second respondent's claim should be upheld. The Premier decided to accept the recommendation by issuing a written pronouncement to that effect ("the decision").

The third appellant (the "Superintendent-General") informed the first respondent thereof, and invited him to make written representations as to why the annulment of his appointment should not be given effect to, and his salary terminated.

After making the said representations, the first respondent decided to institute legal proceedings seeking to interdict the Premier, the MEC, and the Superintendent-General from implementing the decision of the Premier pending a determination of the relief claimed in the second part of his application. In the second part of the application, the court was asked to review and set aside the recommendation of the Commission and the decision of the Premier to uphold the second respondent's claim to the disputed chieftaincy. The interim interdict was granted and when the review proceedings were heard, the court set aside the recommendation of the Commission and the decision of the Premier to accept and implement it. She remitted the matter to the Commission and ordered the Premier and the Commission to pay the costs of application. The Premier, the MEC, the Superintendent-General and the Commission brought the present appeal.

On appeal, the court decided to deal with two of the three findings made by the court below. The first dealt with the lawfulness of the implementation of the decision of the Premier to accept the recommendation of the Committee. It was found that the correspondence addressed to the first respondent by both the Premier and the MEC showed that the Premier had appointed the second respondent to the disputed position without first removing the first respondent therefrom. As the recognition and appointment of the first respondent remained valid until it was set aside, it effectively meant that two persons were appointed to the same position. That was held to be in conflict with the principle that until administrative action is set aside by a court in proceedings for judicial review, it exists in fact and has legal consequences. The second finding dealt with one of the grounds on which the legality of the Committee's recommendation and the Premier's decision to accept it was disputed, and was concerned with the manner in which the Committee arrived at its recommendation. The court below found that the recommendation, and with that the decision of the Premier to accept the recommendation, had to be reviewed and set aside by reason of the Committee's failure to consider relevant evidence.

Held – As the issues raised in the appeal required an application of statutory provisions, it was necessary to establish the correct approach to their interpretation. The starting point is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. Three important interrelated riders to that general principle are that statutory provisions should always be interpreted purposively; the relevant statutory provision must be properly contextualised; and all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity.

Highlighting an apparent conflict between section 26 of the Traditional Leadership and Governance Framework Act 41 of 2003 and section 33 of the Eastern Cape Traditional Leadership and Governance Act 4 of 2005 ("the Provincial Act"), the Court referred to section 146 of the Constitution, which deals with conflicts between national

legislation and provincial legislation. It held that national and provincial governments have concurrent legislative authority over traditional leaders.

Sections 211 and 212 of the Constitution deal with the recognition of traditional leaders and the enactment of national and provincial legislation to deal with the role of traditional leadership and matters related thereto. Section 28 of the Traditional Leadership and Governance Framework Act serves to ensure the continued existence of traditional leadership institutions that existed in terms of legislation that preceded the Constitution and the Act. Of importance for present purposes was that the continued recognition of a traditional leader and a traditional community is made subject to a decision of the commission as contemplated in terms of section 26. The duties of the Commission are set out in section 25 of the Act. The Act compels the Commission to carry out its functions in a fair, objective and impartial manner.

Turning to the first finding of the court below, as referred to above, the present Court pointed out that what was at issue in the minds of the appellants was the wrongful appointment of the first respondent. The question therefore related to how a Premier gives effect to his decision made in terms of section 26 of the Traditional Leadership and Governance Framework Act to accept the recommendation of the Commission that the appointment or recognition of an iNkosi is wrongful. The finding of the court below was in essence that the decision of the Premier could not achieve the removal of an iNkosi without also first setting aside his preceding decision to recognise and appoint the person concerned as an iNkosi.

Section 26 must be read in the context of Chapter 6 of the Act. Chapter 6 contemplates the creation of a mechanism for the resolution of disputes and claims in relation to customary matters. Section 26 requires the President or the Premier concerned to "make a decision on the recommendation." While the relevant functionary is obliged to make a decision on the recommendation, the decision itself may be different from the recommendation. The court below appeared to have premised its finding on an incorrect factual basis, that is, that the Premier removed the first respondent from his position, and appointed the second respondent in his stead. However, as the first respondent correctly pointed out, the letter on which the first respondent placed reliance for seeking an order setting aside the decision to remove him from his position and to appoint the second respondent, did not embody such a decision at all. On a careful reading of the letter, it went no further than inviting the first respondent in terms of section 20(3) of the Provincial Act to make representations as to why the decision of the Premier to accept the recommendation of the Committee should not be implemented. The factual position was that there was no intention to remove the first respondent without more from his position on the basis as contended by the appellants, and the second respondent was not appointed in his place.

Next, the Court considered the legality of the process in terms of which the Commission and the Premier performed their functions. The relief claimed in the application was in the form of proceedings for review in terms of the Promotion of Administrative Justice Act 3 of 2000. The recommendation and the decision constituted administrative action which was subject to judicial review. Whether or not a decision is of an administrative nature is a question that must not be determined in the abstract, but in the context of the facts of each case by a careful analysis of the nature of the power or function and its source or purpose.

The Premier cannot take a binding decision without the recommendation of the provincial committee of the Commission. If the committee's role in the decision making process was flawed, the entire process will be tainted. The committee was shown to have failed to take critical evidence into account in this case – including an earlier judgment concerned with the chieftaincy of the abaThembu Council and a challenge to the chieftaincy of the first respondent's father. That was undoubtedly relevant to the events that gave rise to the dispute which the committee was tasked to investigate in the present matter. The failure by the committee rendered its recommendation flawed and it had to be reviewed and set aside. The committee's recommendation was also unlawful and invalid in that the committee strayed beyond the terms of its mandate by deciding an issue beyond the actual issue it was tasked to consider. The finding that the recommendation of the Committee, and with that the decision of the Premier, were flawed and fell to be set aside, rendered it unnecessary for the Court to consider the remaining questions before it.

The appeal was dismissed with costs.

S v Panayiotou and others [2018] 1 All SA 224 (ECP)

Criminal law and procedure – Statements made by witness to police – Recanting of statements – Admissibility in court – Such evidence is hearsay evidence, the reception of which is regulated by section 3(1) of the Law of Evidence Amendment Act 45 of 1988 –Probative value of the hearsay evidence depends primarily on the credibility of the declarant at the time of the declaration and not at the time of the trial.

Criminal law and procedure – Trial-within-a-trial – Determination of voluntariness of confession – Procedure of holding a trial-within-a-trial to determine the voluntariness of a confession is available to an accused person.

Criminal law and procedure – Undercover police operation – Recording of meeting between accused and State witness – Section 252A of the Criminal Procedure Act 51 of 1977 deals with the authority to make use of traps and undercover operations and admissibility of evidence so obtained – Where accused resists admission of evidence, he must furnish the grounds on which the admissibility of the evidence is challenged.

The first accused was charged with the murder of his wife. The specific charges facing him and his co-accused were conspiracy to commit murder, robbery with aggravating circumstances, kidnapping, murder, unlawful possession of a firearm and unlawful possession of ammunition. The first accused additionally faced a charge of defeating and obstructing the course of justice. They pleaded not guilty on all counts.

In his plea, the first accused denied the allegations against him and requested that the court order a trial-within-a-trial on the ground that the main State witness' evidence was inadmissible, being tainted as a result of the police assaulting, intimidating and unlawfully pressurising the witness to implicate the first accused.

In April 2015, the first accused's wife disappeared after leaving her home to wait outside for her lift to work. Her body was found the following day, and it was clear that she had been murdered. A tip-off to the police by an informant led them to look for a person allegedly involved in the murder. That person ("Siyoni") was the State witness whose evidence the first accused sought to be held inadmissible.

Held – The request for a trial-within-a-trial was an exercise in opportunism and a disingenuous attempt to exclude otherwise admissible testimony, and was denied. The problem facing the first accused was that the procedure of holding a trial-within-a-trial to determine the voluntariness of a confession is available to an accused person. Siyoni was not an accused person, but a State witness.

The State's case was that Siyoni was intimately involved in securing the assassin, and it was evident from his statements to the police that the acceptance of his evidence heralded dire consequences for the accused, and in particular the first accused. The Court found that the defence's stratagem devised for the exclusion of Siyoni's evidence required his collusion. Both Siyoni and his girlfriend ("Breakfast") had been questioned by the police, and had made statements which they later recanted. Siyoni's claim that he had made the statements after being assaulted by police and compelled to make the statements was rejected by the Court. The Court found that on being faced with the revelations in Breakfast's statements, Siyoni admitted his complicity in the murder and directed the police to various places where the money from the contract killing was eventually retrieved.

The question of whether the contents of the statements, which were disavowed by Siyoni and his girlfriend when they were called to testify, constituted admissible evidence was then considered. Such evidence is hearsay evidence. Its reception is regulated by section 3(1) of the Law of Evidence Amendment Act 45 of 1988. The Court referred to case authority in which it was held that the probative value of the hearsay evidence depends primarily on the credibility of the declarant at the time of the declaration and not at the time of the trial. The Court was satisfied that the interests of justice imperatively called for the admission and the substantive use of the statements of both Siyoni and Breakfast. Having regard to the contents of Breakfast's statement, the Court noted the detail with which she had described the events of the day leading up to the murder, and the days after. The attention to detail and identification of key players attested to Breakfast's truthfulness at the time of making the statement. That led Siyoni to realise the quandary he was in and he therefore set in motion the process to broker a deal with the police and prosecuting authority. He made a statement in which he alleged that he had been asked by the first accused to find someone who could kill his wife.

In the statement, Siyoni also mentioned a meeting with the first accused in a car outside a fast food outlet. It was common cause that the meeting had taken place in an unmarked police vehicle equipped with listening and filming devices and that the conversation and interaction between Siyoni and the first accused had been recorded in both audio and video format. Such activity finds legislative sanction in section 252A of the Criminal Procedure Act 51 of 1977, which deals with the authority to make use of traps and undercover operations and admissibility of evidence so obtained. Resisting the admission of the recordings into evidence, the defence applied for a trial-within-a-trial to decide the point. In such circumstances, the accused is directed by the section, in peremptory terms, to furnish the grounds on which the admissibility of the evidence is challenged. After hearing argument, the Court ruled that the video and audio recording was admissible as evidence against the first accused. The sole ground initially advanced by the defence for the exclusion of the video and audio footage was the alleged ill-treatment of Siyoni by the police members involved in his earlier interrogation. However, the exclusionary ground was then widened to include the scenario postulated by section 252A(2)(e) and (h). The gist was that unjustifiable

pressure was placed on the first accused to meet with Siyoni. The Court rejected the notion that the police team conducting the undercover operation acted impermissibly. The decision to meet rested with the first accused. Siyoni, for his own part, was not only the initiator, but a willing and active participant in the undercover operation. In considering whether the undercover unit's conduct went beyond providing an opportunity

Singh and another v Mount Edgecombe Country Club Estate Management Association Two (RF) (NPC) and others [2018] 1 All SA 279 (KZP)

Transport – Roads – Regulation by private body of public roads within residential estate – Control of public roads, and the entitlement of any person to place signs and markings is regulated by the National Road Traffic Act 93 of 1996 – Private bodies are required to seek permission from authorities before imposing private controls on roads.

Words and phrases – "public road" – Section 1 of the National Road Traffic Act 93 of 1996 – Any "road, street or thoroughfare or any other place (whether a thoroughfare or not) which is commonly used by the public or any section thereof or to which the public or any section thereof or to which the public or any section thereof has a right of access . . . "

The appellants each lived in a residential estate managed by the first respondent. By virtue of the appellants' ownership of properties on the estate, they were obliged to be members of the first respondent ("the association"). In October 2013, the first appellant's daughter was issued with three speeding fines by officials of the association for speeding on the roads in the estate. The fines were levied against the first appellant's account. Attempts by the first appellant to engage with the association on the issue of the fines were ignored, with the association insisting that the fines be paid in terms of its "pay first, argue later" rules. When the first appellant failed to pay the fines, the family's access along the roads to their home was suspended. In consequence, they were barred from passing through the association's boom control which was located on the entry road to the estate.

As a result of the above, the first appellant instituted an urgent application for spoliatory relief and the first and second appellants each instituted a separate application in which they challenged certain aspects of some of the association's rules ("the rules application"). In a counter-application, the association sought an order entitling it to suspend the use of access cards to the first appellant, his invitees and members of his family, together with the biometric access for such persons, for as long as certain fines issued in terms of its conduct rules were not paid. In a third application ("the trespass application") the first appellant sought an order directing the association to allow certain contractors engaged by him access to the estate and for a further order restraining the association or any person acting through or on its instructions, from entering upon various specified immovable properties within the estate.

The High Court dismissed the rules application by the appellants and the counter-application by the association. The present appeal was against the dismissal of the rules application.

In challenging the association's conduct rules, the appellants took issue with the rules which permitted the association to control the roads within the estate and to impose speeding fines. The essence of the challenge was that the association was purporting to carry out the functions of traffic officers as defined in the National Road Traffic Act 93 of 1996 ("the Act"). The appellants also challenged "the contract rules"

which restricted the right of an owner to choose a contractor or service provider of his choice to perform work on the owner's property within the estate. The latter point was abandoned on appeal. Finally, the appellants objected to "the domestic rules" which imposed restrictions on the domestic workers employed by owners and residents on the estate relating to their hours of work and their movements into and out of the estate.

The High Court held that since the relationship between the association and the appellants was located firmly in contract, the conduct rules and the restrictions imposed by them were of a private nature arising out of the appellants' voluntary choice of purchasing property on the estate.

Held – A finding in respect of the roads rules would have an impact on the rules relating to domestic employees and the alleged restrictions placed on them by the association.

It became common cause that the roads within the estate were public roads. The control of public roads and the entitlement of any person to place signs and markings is regulated by the Act. The enforcement of the Act vests in the municipality in whose area of jurisdiction public roads fall. The appellants contended that while the Act vests the power to regulate and control traffic on public roads in statutory State organs and functionaries, no such power vested in the association.

The Court held that the public road status of the roads within the estate (including all through roads) carried with it certain public law legal consequences. Inherent in the concept of a public road is that the public has access to it and that the regulatory regime is a statutory one. Private bodies such as the association are obliged to seek the necessary permission from the MEC and/or the municipality concerned. In granting such permission the MEC and/or municipality concerned would be entitled to impose such conditions as considered necessary in the circumstances. It was common cause that the association did not apply for such permission at any stage. Such failure rendered the association's rules and the contractual arrangement with the members illegal. The basic defect in the judgment of the court *a quo* was that it failed to enquire into whether the rules infringed upon relevant legislation and were in fact contrary to law. None of the provisions of the Act, its regulations, the Constitution and the Criminal Procedure Act 51 of 1977 were considered by the court *a quo* because they all were considered to be trumped by the contractual model contended for by the association. The association's road rules were thus unlawful.

In their remaining challenge on appeal, the appellants contended that the system of conduct rules relating to domestic employees in the estate was repressive. The appellants contended that the rules in question restricted the rights of domestic employees to use the public roads freely. The High Court held that the rules merely prescribed a set of procedures to ensure an orderly ingress and egress of domestic employees onto and off the estate, and were neither restrictive nor unlawful. What that view ignored was that the rules physically denied access to domestic employees working in the estate save in accordance with the association's system of ingress and egress and use of the public roads. The rules were, therefore, held to be unreasonable and unlawful.

The appeal was, accordingly, upheld.

Twine and another v Naidoo and another [2018] 1 All SA 297 (GJ)

Civil procedure – Evidence – Expert evidence – Validity of a will according to section 2 of the Wills Act 7 of 1953 – Court explaining role, duties and functions of an expert witness – Expert's evidence must be capable of being tested and it must be verifiable.

Wills, Trusts & Estates – Validity of will – Section 2(1)(a)(ii) of the Wills Act 7 of 1953 – No will is valid unless the signature made by the testator is made in the presence of two or more competent witnesses present at the same time.

The plaintiffs' father (the "deceased") died in July 2014. He had been in a romantic relationship with the first defendant since 2006.

The deceased was alleged to have executed two wills during his lifetime. They were referred to as the 2011 will and the 2014 will. This matter concerned the validity of the wills. The plaintiffs maintained that the 2014 will was invalid and should be declared null and void. At the same time, they sought confirmation of the validity of the 2011. In the 2011 will, the testator made monetary bequests to the first defendant and two other individuals, and left the remainder of his estate in equal shares to the plaintiffs. In the 2014 will, he bequeathed R10 000 to each of the plaintiffs, R5 000 to each of his three grandchildren, and the remainder of his estate to the first defendant.

The plaintiffs alleged that the 2014 will was invalid because a stipulation by the deceased that no will should be recognised as valid unless co-signed by his niece, was not complied with. Secondly, it was contended that the will had not been signed by the deceased, and to the extent that it might have been signed by him, was invalid as the deceased lacked the mental capacity to execute a valid will by reason of dementia brought about by the onset of old age.

Held – The two critical issues for determination were whether the deceased had signed the 2014 will, and whether the will had been legally executed.

The plaintiffs called two handwriting experts to testify – one employed by the plaintiffs and the other representing the first defendant. Their testimonies focussed on the signatures of the testator on the two wills. The expert employed by the plaintiffs was adamant that the 2014 will was not signed by the deceased. The Court found her evidence that the 2014 will was not signed by the deceased to be tailored to suit the plaintiffs' case. The defendant's expert witness was found to be more candid. The Court found it appropriate, in light of the divergent approaches adopted by the two experts, to comment on the role, duties and functions of an expert witness as well as the role and functions of the court before analysing their respective testimonies. A witness claiming to be an expert has to establish and prove her credentials in order for her opinion to be admitted. The expert testimony should only be introduced if it is relevant and reliable. Otherwise it is inadmissible. The expert witness should bring specialised knowledge to the court. All facts and assumptions upon which they base their opinions must be stated. Their overriding duty is to the court and not for the parties.

The evidence of the plaintiff's expert did not meet many of the above principles referred to by the court. She failed to extricate herself from the case of the plaintiffs to the point where she became an advocate for their case. As a result, she lost the degree of independence required of an expert witness who provides the court with an unbiased opinion. The Court therefore disqualified her as an expert and her testimony was to be disregarded.

The defendant's expert's testimony though candidly expressed, was too uncertain to be of any probative value in determining the central question before the Court.

In terms of section 2(1)(a)(ii) of the Wills Act 7 of 1953, no will is valid unless the signature made by the testator is made "in the presence of two or more competent witnesses present at the same time." Accordingly, the witnesses who attest to the signature of the testator have to be present when the testator actually signs the will. That requirement is mandatory. If not met, the will is invalid for want of compliance with a statutorily required formality. Both witnesses who were supposed to attest to the signing of the 2014 will by the deceased were not present when he signed it. The 2014 will was thus invalid. That left the 2011 will as the last will and testament of the deceased. Accordingly, the plaintiffs were entitled to a declaration that the 2011 will was valid.

End-for now