LEGAL NOTES VOL 10/2017

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BARON AND OTHERS v CLAYTILE (PTY) LTD AND ANOTHER 2017 (5) SA 329 (CC)

Land — Land reform — Statutory protection of tenure — Protected occupation of land — Duty of state to provide lawfully evicted occupiers with suitable alternative accommodation — Extension of Security of Tenure Act 62 of 1997, s 10; Constitution, s 25.

The applicants were formerly employed at the first respondent's brick factory (Claytile), where they were housed free of charge. The applicants were dismissed on disciplinary grounds during 2006 – 2011, but they stayed on despite notices to vacate (issued in 2012). Claytile, arguing that it required the housing for its current employees, obtained an eviction order in a magistrates' court. The court ruled that the relevant requirements of the Extension of Security of Tenure Act 62 of 1997 (ESTA) were met. After confirming the eviction order on review, the Land Claims Court dismissed an appeal by the applicants, finding that Claytile, and its current employees, were suffering undue hardship due to the applicants' continued occupation. The LCC found that the provision of suitable alternative accommodation under s 10(3) of ESTA * was just one of the factors it had to consider; that alternative accommodation was not a precondition for an eviction order; and that the obligation to provide alternative accommodation rested solely on the state (represented in casu by the second respondent, the City of Cape Town). Leave to appeal to the Supreme Court of Appeal having been refused, the applicants turned to the Constitutional

[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!**

Court. The parties were agreed that the sole issue was that of the provision of suitable alternative accommodation. A few days before the hearing, on 27 February 2017, the City made an offer of alternative accommodation in serviced prefabricated housing at Wolwerivier near Atlantis, some 30 kilometres from Claytile. The applicants rejected the offer on the ground of the distance from Wolwerivier to their current workplaces and their children's school.

Held

The present matter was not one in which a positive obligation to provide alternative accommodation would be imposed on Claytile as private landowner: the fact that it accommodated the applicants for several years weighed heavily on imposing a further obligation on it (see [36], [43]). † Hence the issues were whether the City fulfilled its obligation to provide the applicants with suitable alternative accommodation, and whether it was obliged to continue doing so until the applicants were satisfied (see [38] – [40]). Eviction was ordinarily just and equitable if alternative accommodation is made available, and in the present case housing at Wolwerivier qualified as suitable accommodation provided by the City within its available resources (see [47], [50]). The applicants would not be allowed to delay their eviction by objecting time and again to the alternative accommodation provided by the City (see [50]). The court granted the eviction order but pointed out that it was, given its constitutional duty to provide alternative accommodation where occupiers are legally evicted and rendered homeless, astounding that the City had waited until a few days before the hearing to make its offer.

OCCUPIERS, BEREA v DE WET NO AND ANOTHER 2017 (5) SA 346 (CC)

Land — Unlawful occupation — Eviction — Statutory eviction — Joinder of local authority — Required when risk that eviction may lead to homelessness — Requirement remaining where such risk present but unlawful occupier consenting to eviction order — Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, s 4(7).

Land — Unlawful occupation — Eviction — Statutory eviction — Consent to eviction — Validity — Invalid if unlawful occupier not informed of statutory and constitutional rights waived by consenting to eviction — Minimum rights unlawful occupier must be informed of — Constitution, s 26(3); Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, ss 4(6) and 4(7).

Land — Unlawful occupation — Eviction — Statutory eviction — Role of court — Duty to be proactive — Where unlawful occupier consenting to eviction —Court not absolved from duty under PIE to proactively determine whether eviction would be just and equitable in relevant circumstances — Consent one of relevant circumstances to consider — Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, ss 4(6) and 4(7).

Land — Unlawful occupation — Eviction — Statutory eviction — Meaning of 'valid defence' in Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, s 4(8) — When unjust or inequitable to evict, unlawful occupiers having valid defence.

The applicants, 184 unlawful occupiers of a block of flats, mandated four amongst them to appear at the hearing of an application for their eviction and to seek a postponement thereof. At the hearing, the mandated occupiers, who were not legally represented, instead consented to an eviction order which was then made an order

of court. Their consent was confirmed at the request of the court by their ward councillor who assisted them at the hearing. Upon learning of this, the occupiers launched a number of legal challenges against the eviction order, including an application for rescission thereof, all of which were unsuccessful.
This case concerned their application to the Constitutional Court for leave to appeal and their appeal against the High Court judgment dismissing their application for rescission. The High Court that granted the eviction order (the eviction court) had held, inter alia, that once the parties had reached agreement the mandate of the court to determine the issues was terminated (see [53]). The court that dismissed the rescission application (the rescission court) accepted that the eviction court did not conduct an enquiry as to whether the eviction would be just and equitable under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) but held that, since the occupiers were legally represented, the court was excused from having to conduct such an enquiry. It further held that, even if the eviction court had conducted the requisite enquiry, it would still have been satisfied that the eviction was just and equitable (see [56] – [57]).

Held

Section 4(7) of PIE enjoined a court to make an eviction order only 'if . . . of the opinion that it is just and equitable to do so, after considering all the relevant circumstances'. This duty required courts to be proactive in establishing the relevant facts. A court may grant an eviction order only where it had all the information about the occupiers to enable it to decide whether their eviction would be just and equitable; where no information was available, or only inadequate information, the court must decline to make an eviction order. When faced with a settlement agreement, a court must take it into account as one of the relevant circumstances in its just and equitable interrogation. It must also be alive to the risk of homelessness and the issue of joining the local authority. (Paragraphs [41], [48], [51] – [52] and [66].)

The duties of a court when dealing with proceedings for eviction from residences generally, and when faced with actual or purported consent to eviction, arose from the protection of the rights of residents and were therefore inextricably intertwined with the issue of informed consent and waiver. In this instance, the court must as a first step be satisfied that the parties freely, voluntarily and with full knowledge of their rights agreed to the eviction. While it was probable that the mandated occupiers factually consented to the order, neither the four mandated occupiers nor the ward councillor had the requisite mandate to bind the absent occupiers regarding the eviction order ([31] and [36] – [37]). A consent to an eviction order would entail the waiver of, at a minimum, the following: the constitutional and statutory rights to eviction only after a court has considered all the relevant circumstances (s 26(3) of the Constitution); to the joinder of the local authority and production by it of a report on the need and availability of alternative accommodation (see n22); to a just and equitable order in terms of ss 4(6) – 4(7) and s 6(1) of PIE; and to temporary alternative accommodation in the event that eviction would result in homelessness (see n24). If these rights were capable of waiver, such waiver would need to be free, voluntary and informed. It was unlikely, given that they had no legal representation at the time, that the occupiers would have been aware of the full extent of their rights under PIE and the Constitution. Since it was undisputed that they were not informed of any of these rights, it must be accepted that they were unaware thereof. Accordingly, the factual consent that they gave was not informed and therefore not

legally valid, and so not binding on them. (Paragraphs [25], [32] – [35], [38] – [39] and [66].)
The application of PIE was mandatory; a court faced with a purported agreement to eviction was not absolved of its duties under PIE. The eviction court assumed incorrectly that where there was consent to eviction the court was relieved of its duties under PIE. And the rescission court, by taking the view that because occupiers were legally represented it was excused from making the necessary enquiries, also failed to appreciate the proactive role required of a court in considering an eviction application. The fact that the eviction court did not conduct the required PIE enquiries was sufficient reason to have rescinded the order. (Paragraphs [54] – [57].)
The rescission court was also wrong to conclude that if the eviction court had held the enquiry, it would have concluded that the eviction was just and equitable. This was so because, on the facts, resulting homelessness was an undisputed risk and therefore the local authority's duty to provide temporary emergency accommodation was triggered. This duty must be read together with the provisions of s 4(7) of PIE, that one of the circumstances which may be relevant to the just and equitable enquiry was 'whether land has been made available . . . by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier'. It followed that where there was a risk that eviction may result in homelessness, the availability of alternative accommodation became a relevant circumstance that must be taken into account. A court would therefore not be able to decide the justice and equity of an eviction without hearing from the local authority upon which a duty to provide temporary emergency accommodation may rest. In such an instance the local authority was a necessary party to the proceedings, and so, where there was a risk of homelessness, the local authority must be joined. (Paragraphs [57] – [58] and [61].)
Unlawful occupiers had a 'valid defence' as contemplated in s 4(8) of PIE when it was unjust or inequitable to evict. All of the applicants have valid defences to the eviction, namely the non-joinder of the City in circumstances where the eviction would result in homelessness, and the violation of their rights under s 26(3) of the Constitution, and PIE. And, as there was no legally valid consent, the consent order was granted in error. Accordingly, on the basis of rule 42(1)*(a)* and the common law (iustus error), the eviction order made purportedly by agreement between the parties fell to be rescinded.

SWART v STARBUCK AND OTHERS 2017 (5) SA 370 (CC)

Insolvency— Trustee — Realisation of assets — Sale of property on authorisation of master — Sale in anticipation of formal appointment as trustee — Sale subsequently authorised by master — Sale valid until authorisation set aside — Insolvency Act 24 of 1936, s 80bis.

One of the future trustees of Mr Swart's insolvent estate accepted, in anticipation of his appointment as provisional trustee, a conditional offer to purchase land belonging to the estate. The condition was that the Master would authorise the sale. The Master appointed the (provisional) trustees and consented to the sale, after which the land was transferred to the purchaser. The sale and transfer were approved at the second meeting of creditors. The issue that arose in the present case was whether the sale was valid even though the first trustee was not yet appointed

provisional trustee when he accepted the offer to purchase. Mr Swart claimed that the sale was unlawful and sought R11,4 million in damages on the ground that the land would have fetched more on auction. His claim was dismissed by the Pretoria High Court.

The governing provisions of the Insolvency Act 24 of 1936 were:

Section 18(3), which granted provisional trustees the same powers as final trustees, except that they had to obtain the authority of the Master or the court to sell estate property.

Section 80*bis*, which enabled trustees, before the second meeting of creditors, to obtain such authorisation by recommending the sale to the Master.

Section 82(8), which, read with s 82(1), protected innocent purchasers against liability arising from unauthorised sales by trustees, by validating the sales and holding the trustees liable to the estate, in double, for any damages incurred by it. This was the section relied on by Mr Swart for his damages claim, but the trustees argued that it was not applicable because they had been granted authority to sell under s 80*bis*.

In an appeal the Supreme Court of Appeal found that the Master's authorisation under s 80*bis* constituted a valid administrative act and that s 82 did not apply because the sale had taken place pursuant to the Master's authorisation. Finally, the SCA found that since the sale was subject to a suspensive condition and only became binding on the fulfilment of the condition, it did not matter that the trustees had not yet been appointed when the offer to purchase was accepted. It accordingly dismissed the appeal with costs.

In an application for leave to appeal to the Constitutional Court, Mr Swart claimed, in addition to damages, that s 18(3) and s 80*bis* were unconstitutional.

Majority judgment per Khampepe J

Leave to appeal should, for the following reasons, be refused. The applicability of s 82(1) read with s 82(8), on which Mr Swart's claim was based, depended on the absence of a valid authorisation of the sale by the Master (see [26]). But the Master's authorisation under s 80*bis*, which was never challenged by Mr Swart, remained a binding administrative act with valid consequences, including the sale, until set aside (see [27] – [33]). The effect of the suspensive condition was that once the Master's authorisation was obtained, a legally binding sale came into effect (see [34]). The validity of the sale would endure, regardless of the validity of the Master's authorisation, until the authorisation was set aside, something Mr Swart never attempted (see [35] – [36).

It would in any event be inappropriate for the court to consider the legality of the Master's authorisation in the absence of a rule 53 process (see [37] – [40]). And even if there were a proper review application before the court, it was 10 years overdue (see [42]). A further impediment to Mr Swart's attack was s 157 of the Act, which shielded the Master's conduct from invalidity based on a formal defect, and Mr Swart was not able to show the substantial injustice required to undo this protection (see [43] – [45]).

Dissenting judgment per Jafta

Leave to appeal should be granted and the appeal upheld. Since the trustees purported to exercise a power under s 80*bis* when no such power vested in them, and the Master knew when he granted the approval that he lacked the required recommendation, there was no compliance with s 80*bis* (see [89] – [94]). Since the nature and extent of non-compliance could not be described as a mere formal defect, it was fatal to the Master's approval (see[95], [103]).

Concurring judgment per Zondo J
It was not in the interests of justice that leave to appeal should be granted (see [117]). The question that arose was what the trustees should have done after they were appointed if they sought to avoid the alleged non-compliance with the Act? The only answer was that they ought to have withdrawn the application and resubmitted it, which would constitute the height of formalism (see [120]). Hence it was in order that they did not withdraw it (see [120]).

NTLEMEZA v HELEN SUZMAN FOUNDATION AND ANOTHER 2017 (5) SA 402 (SCA)
Appeal — Execution — Application to execute pending appeal — May precede lodging of appeal — Dismissal of application for leave to appeal not removing jurisdictional underpinning for execution order — Superior Courts Act10 of 2013, s 18(1).

Section 18 of the Superior Courts Act 10 of 2013 regulates the suspension of decisions pending appeal. Final judgments are suspended (s 18(1)) while interlocutory judgments remain operational (s 18(2)), but in both cases the court may order differently if certain requirements are met (s 18(3)). The present appeal was against an execution order made by a three-judge High Court in a review application by the appellant (General Ntlemeza). The High Court ruled that its order setting aside the appointment of General Ntlemeza as head of the Directorate for Priority Crime Investigation (the Hawks) on the ground of unfitness (the principal order) would continue to be operational and be executed in full during the appeal process (the execution order). In the present appeal against the execution order General Ntlemeza argued in a jurisdictional point that the respondents' application for execution was prematurely granted because at the time there was no appeal pending against the principal order, and that this point was dispositive of the appeal. It was common cause that if the jurisdictional point were unfounded, the next issue was whether the court had due regard to the requirements of s 18(1) when it granted the order to execute.
Held
As to the jurisdictional point: The purpose of s 18(1) was to reiterate the common-law position on the ordinary effect of the appeal process — the suspension of the order being appealed — and not to nullify it (see [28]).This appeared from its wording: s 18(1) did not say that the court's power to reverse the automatic suspension of a decision was dependent on the decision being subject to an application for leave to appeal or an appeal, but that, unless the court ordered otherwise, such a decision was automatically suspended (see [29]). Moreover, the High Court's execution order reasonably anticipated the inevitable further appeal processes, thereby avoiding an undesirable multiplicity of actions (see [31] – [32]). There was thus no merit in the jurisdictional point (see [32]).
As to compliance with s 18(1): The High Court could not be faulted in its finding that the respondents proved exceptional circumstances in the sense intended in s 18(1) and the public, not General Ntlemeza, would suffer irreparable harm if the order were not granted (see [45] – [47]). The reputation of the Hawks, the foremost corruption- and crime-fighting unit in South Africa, was a matter of great importance, and correctly held by the High Court to constitute an exceptional circumstance (see [45]). Appeal dismissed with costs against the appellant personally.

PRIMAT CONSTRUCTION CC v NELSON MANDELA BAY METROPOLITAN MUNICIPALITY 2017 (5) SA 420 (SCA)

Contract — Breach — Repudiation — Repentance principle — No further act of repudiation required — Sufficient if aggrieved party reasonably perceived defaulting party would not, after having been given opportunity to do so, repent of its breach.

The repentance principle allows a party who has elected to abide by a repudiated contract, claiming specific performance, to change that election (and instead choose to cancel the agreement and claim damages) where the defaulting party persists with its refusal or failure to perform, despite having been given the opportunity to repent of its breach. For this principle to apply it is sufficient that the aggrieved party reasonably perceives that the defaulting party will not remedy its breach despite having been given the opportunity to do so; no further act of repudiation is required.

BALKAN ENERGY LTD AND ANOTHER v GOVERNMENT OF GHANA 2017 (5) SA 428 (GJ)

Arbitration — Enforcement of foreign arbitration award — Both parties peregrini — Ex parte application for attachment to found jurisdiction granted — Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977,s 2 — Application of New York Convention — Restrictions in Protection of Businesses Act 99 of 1978, s 1, not applicable where underlying contract not connected with raw materials.

The first applicant, a company registered in the United Kingdom, and the second applicant, a company registered in Ghana, sought to make a foreign arbitral award an order of court in accordance with s 2 of the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977 (the Act). The second applicant and the respondent, the Government of Ghana (GoG), had in 2007 concluded an electricity-supply contract under which disputes would be referred to international arbitration. Article 24 of the contract stipulated that GoG waived immunity, 'in any jurisdiction', from ‘suit, execution, attachment . . . or other legal process'.
A dispute led to an arbitral award, made in London, of USD 12,35 million in favour of the second applicant. The matter came before court as an ex parte application to confirm or establish jurisdiction by the attachment of GoG's shares in a South African company.
For their argument that the attachment of the shares was sufficient to found jurisdiction even though the parties were all peregrini and the cause of action arose outside South Africa, the applicants invoked s 2(1) and 2(3) of the Act, which provide that 'any foreign arbitral award may . . . be made an order of court by any court' and that '(a)ny such award which has . . . been made an order of court, may be enforced in the same manner as any judgment or order'.
Held
The court in *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd* 1984 (3) SA 233 (D) held that s 2 of the Act was intended to invest the High Court with jurisdiction to recognise any foreign arbitral award, even one between peregrini, subject only to the condition that a degree of effectiveness was provided by an attachment of property or person (see [12]). The reasoning in *Laconian* — which was applicable to the present case — was bolstered by s 231(5) of the Constitution, which provided that South Africa was bound by international agreements like the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958

(to which South Africa acceded in 1976 and which resulted in the promulgation of the Act) (see [17]).
The New York Convention provided a common legislative standard for the recognition of arbitration agreements, and court recognition and enforcement of foreign and non-domestic arbitral awards. Its principal aim was to ensure that foreign and non-domestic arbitral awards 'will not be discriminated against', and parties were obliged to ensure that such awards were 'recognised and generally capable of enforcement in their jurisdiction in the same way as domestic awards' (see [13]).
A potential obstacle to the court's jurisdiction, the restriction on the enforcement of certain foreign awards in s 1 of the Protection of Businesses Act 99 of 1978, did not arise in casu because the agreement between the parties was not connected with raw materials or substances from which physical things were made (see [18] – [20], [24]).
Although GoG was a foreign state, article 24 of the electricity-supply contract constituted a waiver of immunity as intended in s 3(1) of the Foreign States Immunities Act 87 of 1981 (see [25]). Hence GoG was prima facie not immune from the jurisdiction of South African courts (see [25]).
The court accordingly found that the applicants were entitled to the relief sought and ordered the sheriff to attach GoG's AngloGold Ashanti shares *ad fundandam jurisdictionem*.

VENTER JOUBERT INC AND ANOTHER v DU PLOOY 2017 (5) SA 439 (NCK)
Interest— A tempore morae — Mora interest on unliquidated debt — Court's discretion under s 2A(5) of Prescribed Rate of Interest Act 55 of 1975 — Not arising in absence of principal debt.

Du Plooy claimed contractual damages from attorneys Venter Joubert Inc for allowing her damages claim against the state to prescribe. Prior to the trial, Du Plooy filed a notice of intention to amend her particulars by introducing a claim for damages for loss of interest, alternatively interest on the amount to be awarded as damages. She subsequently accepted a settlement and abandoned the proposed amendment.
Since the settlement made no provision for interest, the parties agreed that the question of whether interest was payable, and if so from what date, would be submitted to the court a quo. The court availed itself of the discretion in s 2A(5) of the Prescribed Rate of Interest Act 55 of 1975 to direct that interest should accrue from the date of notice of the claim against the state.
On appeal the full court pointed out that the principal debt was the one owed by Venter Joubert Inc flowing from its breach of agreement to provide Du Plooy with competent professional services, which could only have arisen *after* the prescription of the claim against the state (see [13]). The interest awarded by the court a quo boiled down to interest as a component of damages, which Du Plooy, by abandoning her proposed amendment, never claimed (see [14]). Since the court a quo failed to judicially exercise its discretion under s 2A(5), its order would be replaced with one directing that interest should accrue at the prescribed rate from the date of summons against Venter Joubert Inc to the date of payment of the capital amount.

MFENGWANA v ROAD ACCIDENT FUND 2017 (5) SA 445 (ECG)

Attorney — Misconduct — Overreaching — Attempt to charge, under contingency fee agreement, 25% of award in motor vehicle accident claim — Such agreements contrary to Contingency Fees Act and invalid — Attorney's attempt to claim 25% of award constituting overreaching — Copy of judgment to be delivered to Law Society for consideration of measures to combat abuse of contingency fee agreements — Contingency Fees Act66 of 1997, s 2(2).

Mr Mfengawana and his attorney, one Mr Rubushe, had entered into a contingency fee agreement in respect of his claim against the Road Accident Fund. The parties settled the matter before it went to trial. This case concerned a request to make the settlement agreement an order of court, as required under s 4(3) of the Contingency Fees Act 66 of 1997 (the Act) in respect of '(a)ny settlement made where a contingency fees agreement has been entered into'. At the first hearing the court postponed the matter so that a copy of the contingency fee agreement could be made available for its perusal, and for filing of the affidavits required by s 4(1) and 4(2) of the Act, ie one by Mr Rubushe stating the information specified in s 4(1)*(a) – (g)*; and another by Mr Mfengwana stating the information required in s 4(2)*(a) – (c).* (See [10] of judgment, where s 4 is quoted.)
Before the second hearing Mr Rubushe filed an affidavit in which he claimed compliance with the Act, 'in that will charge fee of 25% from the client or (double my fees and take whichever is lesser which would not be more than25% agreed fees)'; and that 'this was explained to client' when signing the contingency agreement. No affidavit by Mr Mfengwana was filed. At the second hearing Mr Rubushe's correspondent attorney provided the court with a copy of the contingency fee agreement. Clauses 5 and 6 entitled Mr Rubushe to 25% of the damages awarded by the RAF to Mr Mfengwana. The court again postponed the matter, directing that on resumption Mr Rubushe show cause why the contingency fee agreement should not be set aside; and that affidavits that comply with s 4 of the Act be furnished. These directions were not complied with.
Held
Section 2(2) of the Act did not permit an attorney to charge 25% of the damages awarded to his or her client. All s 2 did was allow an attorney who was party to a contingency fee agreement to recover from an award to their client a success fee based on the work done at a maximum of twice his or her usual fee. That amount may not, however, exceed 25% of the award. It was evident that clauses 5 and 6 of the contingency fee agreement were in conflict with s 2(2). Contingency fee agreements that do not comply with the provisions of the Act were invalid. What was said in Mr Rubushe's affidavit about his fee and its computation was contrary to what was contained in the contingency fee agreement. He appeared to accept that the contingency fee agreement was contrary to the Act, seeking to tender to amend it unilaterally and retrospectively. That could not avail him in his attempt to sidestep the difficulty posed by clauses 5 and 6: they were essential terms of the contingency fee agreement and therefore could not be severed from it. As a result, the contingency fee agreement as a whole was invalid for its failure to comply with s 2(2) of the Act. The common law therefore applied, meaning that Mr Rubushe was only entitled to a reasonable fee in relation to work performed. And, as the contingency fee was invalid, an order could be made in the absence of the otherwise required affidavits

confirming the settlement, which appeared to be fair.(Paragraphs [12], [20], [22], [24] – [26], [30].)
Anecdotal evidence within the legal profession points towards widespread abuses of contingency fee agreements, practitioners interpreting s 25(2) of the Act as entitling them to take 25% of their award (when case law had settled its correct interpretation). Strict compliance with the Act was necessary to prevent abuses on the part of unscrupulous legal practitioners willing to take advantage of their clients — a phenomenon that was unfortunately all too common. This was yet another case in which an attorney — an officer of the court who was supposed to act with integrity and comply with the highest ethical standards — was guilty of an attempt to grossly overreach his client. Given the limited amount (and the poor quality) of work performed in this matter, a 'fee' of 25% of the settlement amount (ie R226 222,30) was grossly disproportionate and amounted to overreaching on an outrageous scale. This was a cause for grave concern, a manifestation of possibly endemic corruption embedded in the attorneys' profession. For this reason, the registrar of this court would deliver a copy of this judgment to the Cape Law Society so that it, as custodian of the ethical standards of the profession in the public interest, may consider ways and means of stopping the rot.

MOKONE v TASSOS PROPERTIES CC AND ANOTHER 2017 (5) SA 456 (CC)

Lease — Extension — Rule that agreement to extend lease extending only terms incidental to lease — Rule developed so that collateral terms also extended.

Land — Sale — Pre-emption — Formalities — Need not comply with formalities in Alienation of Land Act 68 of 1981, s 2(1).

Court — High Court — Powers — Stay — Court has power to stay proceedingsbefore it, pending determination of material issue in other proceedings.

Events in this case were as follows.
- For 2004 – 5 Ms Mokone and Tassos concluded a written lease. It contained a pre-emption (if Tassos wished to sell the property, Mokone had the right of first refusal, the price to be negotiated) (see [3]).
- For2005 – 6 they had an oral lease on the terms of the written one.
- For 2006 – 14 they agreed to extend the written lease. (Tassos wrote on its cover 'Extend till 31/5/2014 monthly rental R5500', and signed.)
- In 2009 Tassos sold, and in 2010 transferred, the property to Blue Canyon. ‡
- In2012 Mokone instituted an action to set aside the sale and transfer, and to compel a sale to her.
- In mid-2014 the lease ended. Mokone remained and continued to pay rent to Blue Canyon. In December it gave her notice to vacate by the end of January 2015. She failed to, and it applied to evict her. The magistrates' court dismissed the application, on the basis that an issue relevant (BlueCanyon's ownership) was awaiting determination in the action. (Ultimately, Blue Canyon appealed to the High Court, which ordered eviction; Mokone applied for leave to appeal to the Supreme Court of Appeal (it declined), and then to the Constitutional Court.)
- In late-2015 the High Court determined, in the 2012 action, the separated issue of whether the parties had, in extending the lease, extended the pre-emption. It held that they had not. It postponed determination of the other issues. Mokone applied for leave to appeal to the Supreme Court of Appeal (it refused), and then to the Constitutional Court.

The issues were:
• Whether to develop the common-law rule that when parties agree to extend a lease, they are taken as intending to extend only those terms incidental to the lease relationship, and not those collateral to it, such as a pre-emption. ***Held***, that the rule should be developed: in such an instance, the parties should be taken as intending to extend both the terms that are incidental to the lease, and those which are collateral to it. (See [20], [22], [36] and [41].)
• Whether Mokone and Tassos, in agreeing to extend the lease, had also extended the pre-emption. ***Held***, that they had (see [15], [39] and [43]).
• Whether a pre-emption in respect of land need comply with the formalities (writing, signature) in s 2(1) of the Alienation of Land Act 68 of 1981.
Held, that it need not: this was consonant with the wording of ss 2(1) and 1(1); *Hirschowitz*'s conclusion to the contrary was incorrect; the aims of the Act would not be subverted; and the reach of the formalities requirements would be appropriately confined. (See [44], [46] – [47], [50] – [51] and [61] – [63].)
• Could a court, if it were in the interests of justice, suspend proceedings before it, pending determination of a material issue in other proceedings.
Held, that it had the inherent power to do so. (See [66] – [67], [69] – [70] and [79] – [80].)
• Should the High Court have stayed determination of Blue Canyon's appeal against the magistrate's refusal to evict?
Held, that it should have done so in the interests of justice: Blue Canyon's ownership might yet be impugned in the action (see [69] – [70]).
The High Court declaration, that the pre-emption was not extended, set aside and replaced with a declaration that it was extended. The action on the pre-emption remitted to the High Court for determination of the outstanding issues (see [75]).
The High Court order of eviction (granted in the appeal from the magistrates 'court) set aside, and the appeal stayed, pending finalisation of the action (see [75]).
Froneman supported the majority's order on extension, remittal and suspension. He would not, though, have overruled *Hirschowitz*.

LAWYERS FOR HUMAN RIGHTS v MINISTER OF HOME AFFAIRS AND OTHERS 2017 (5) SA 480 (CC)

Immigration — Illegal foreigner — Detention — Provisions concerning confirmation, duration and extension of detention declared invalid — Constitution, ss12(1)(b) *and 35(2)*(d)*; Immigration Act 13 of 2002, ss 34(1)*(b) *and 34(1)*(d).

Applicant asked the Constitutional Court to confirm a High Court declaration that ss 34(1)*(b)* and *(d)* of the Immigration Act 13 of 2002 were invalid because they were inconsistent with s 35(2)*(d)* of the Constitution. First and second respondents opposed confirmation and appealed the High Court's order.
The issues were:
• Whether ss 12(1) and 35(2) of the Constitution applied to illegal foreigners detained under s 34(1) of the Immigration Act.
Held, that they did. (See [12], [24], [26] – [27] and [42].)
• Whether ss 34(1)*(b)* and *(d)* limited the rights in ss 12(1)*(b)* and 35(2)*(d)* of the Constitution. (Section 34(1)*(b)* provides that a detained illegal foreigner may request that his detention be confirmed by warrant of a court; s 34(1)*(d)* that an illegal foreigner may be detained for 30 days without a warrant, and that a court may, if

there are grounds, extend the detention for up to 90 days. Section 12(1)*(b)* of the Constitution affords the right not to be detained without trial; and s 35(2)*(b)* the right of a detained person to challenge the lawfulness of his detention in court, in person. The full texts of these sections are in [29], [41] and [46].)
Held, that they did. (See [16], [28] and [58].)
• Whether the limitations were justifiable.
Held, that they were not (see [63]).
Ordered, inter alia, that:
• Sections 34(1)*(a)* and *(b)* were inconsistent with the Constitution and invalid.
• The declaration of invalidity was suspended for 24 months, to allow Parliament to correct the sections' defects.
• Pending corrective legislation, any illegal foreigner arrested and detained was to be brought before a court within 48 hours of his arrest.
• Illegal foreigners in detention at the date of the order were to be brought before a court within 48 hours of the order.
Appeal dismissed.

BRAYTON CARLSWALD (PTY) LTD AND ANOTHER v BREWS 2017 (5) SA 498 (SCA)

Cession — Validity — Third party paying bank amounts owed by judgment debtor — Bank ceding its rights in judgment to third party — Whether cession competent.

Brayton Carlswald (Pty) Ltd borrowed amounts from a bank, failed to repay them, and the bank obtained judgment. Brayton then, to forestall the bank executing against its property, arranged for Brews to pay what was owed. Brews did so and, some time later, the bank ceded Brews its rights in the judgment.
Brewslater applied to be substituted for the bank in the execution process, but this relief was denied by the High Court. The relief was however allowed by the full court, causing Brayton to appeal to the Supreme Court of Appeal.
In issue was the competence of the purported cession to Brews. *Held*, that it was incompetent: Brews' payment of the amount owing extinguished the bank's right to payment, rendering it incapable of transfer.

MORAITIS INVESTMENTS (PTY) LTD AND OTHERS v MONTIC DAIRY (PTY) LTD 2017 (5) SA 508 (SCA)

Practice — Judgments and orders — Rescission — Consent judgment — Grounds —Lack of authority — Order may be rescinded on basis of lack of authority to conclude settlement agreement made order of court.

Company — Contracts — Freedom of contract — Restrictions — Disposal of whole or greater part of undertaking or assets of company — Directors may not dispose of whole or greater part of undertaking or assets of company without approval by special resolution at general meeting of shareholders — In appropriate circumstances doctrine of unanimous assent may apply — Companies Act 71 of 2008, ss 112 and 115(2)(a).

Mr Moraitis and Mr Kebert together conducted a dairy business. They each held their interests indirectly. In respect of Mr Moraitis, that vehicle was the Moraitis Trust (the Trust), of which he and his brothers were trustees. The Moraitis Trust was the sole shareholder of Moraitis Investments, which in turn held stakes in the various

companies through which the business was conducted. A falling-out between Mr Moraitis and Mr Kebert gave rise to various pieces of litigation. But the parties resolved their numerous disputes, and entered into a settlement agreement, which was made an order of court by consent. Mr Moraitis signed the agreement on behalf of both the Moraitis Trust and Moraitis Investments. That fact gave rise to the present matter. In the court a quo the trustees sought to set aside the settlement agreement, and the order making it an order of court. They argued that the agreement was invalid because Mr Moraitis had not been authorised by either the Trust or Moraitis Investments to conclude it. Among alternative arguments raised was one that, given that the settlement agreement involved a disposal of the whole of Moraitis Investments as contemplated in s 112 of the new Companies Act 71 of 2008, a special resolution was called for in terms of s 115(2)*(a)*. That however did not take place, rendering the agreement void. The court of first instance upheld the application but an appeal to the full bench succeeded, and the appellants approached the SCA on appeal.

The approach adopted by the appellants in the court a quo was to argue that, because the settlement agreement was authorised it was invalid and the consent order making it an order of court should be set aside. However, the SCA stressed that the starting point should be the court order obtained by consent. It, like all court orders, could not be disregarded for as long as it stood, and could only be rescinded on limited grounds. (See [9] and [10].) The court stressed that the appellants' case had to fall within those grounds (see [10], [16] and [17]), which it set out in detail.

Held, that, generally speaking, the only recognised grounds upon which a court order obtained in contested proceedings could be rescinded were fraud and, in exceptional circumstances, justus error (see [12] and [13]). However, where, as here, the argument was that a signatory to a settlement agreement made an order of court was acting in a representative capacity, but lacked authority, another principle came into play. That was that a court could only grant a consent judgment if the parties to the litigation had agreed to the court granting it. If they had not done so, but the court was misled into thinking that they had, the judgment had to be set aside. This was something different from avoiding a contract on the grounds of fraud, duress, misrepresentation, or the like. In those cases the injured party had an election to abide by the agreement. When one was concerned with an absence of authority to conclude the agreement in the first place, that was not a matter of avoiding the agreement, but of advancing a contention that no agreement came into existence. (See [17] – [20].)

Held, however, that in the present instance the appellants had failed to discharge the onus placed on them to establish that the Trust and Moraitis Investments had not authorised Mr Moraitis to act on their behalf in entering into the settlement agreement and agreeing to make it an order of court (see [33] and [35]).

Held, further, as to the appellants' arguments based on ss 112 and 115, that the lack of a special resolution did not invalidate the settlement agreement. The Moraitis Investments' single shareholder — the Trust — had agreed to Moraitis Investments' becoming a party to the settlement agreement. In such circumstances, the doctrine of unanimous assent — a principle long recognised in South African law as applying to companies and equally applicable under the new Companies Act — operated to render the agreement lawful. (See [36] – [38].)

Appeal dismissed with costs.

MAN FINANCIAL SERVICES SA (PTY) LTD v PHAPHOAKANE TRANSPORT AND ANOTHER 2017 (5) SA 526 (GJ)

Credit agreement — Consumer credit agreement — Whether agreement subject to NCA — Parties by transactio concluding settlement agreement in full and final settlement of all obligations arising out of prior suretyship agreement— Prior agreement not subject to NCA, as principal debt not arising from agreement falling within scope of NCA — New agreement describing respondent as principal debtor, and no longer as surety — New settlement agreement calling for compliance with NCA, despite original agreement's falling outside NCA — National Credit Act 34 of 2005, s 4(1).

This case demonstrated that, where parties effect a transactio — ie an agreement of compromise which finally disposes the issues in dispute — such new agreement may require compliance with the provisions of the National Credit Act 34 of 2005, despite the prior replaced agreement's falling outside the provision of such Act. The present facts were briefly the following. The second respondent bound himself as surety and co-principal debtor in favour of the applicant for any debts owing by the first respondent to the applicant in terms of several truck rental agreements. The first respondent breached the rental agreements and they were cancelled by the applicant. The parties entered into negotiations for payment of the outstanding amounts, and another agreement was entered into, in full and final settlement of the applicant's claims against the first and second respondents with regard to the rental agreements in question. This settlement agreement provided that the first and second respondents were liable jointly and severally for the debt (the capital amount of R5 million plus additional fees or interest). The second respondent was no longer described or bound as surety.

The second respondent opposed the present application — in which the applicant claimed payment of outstanding amounts due to it — on the basis that the settlement agreement was subject to the NCA and the applicant had failed to comply with the notice requirements set out in s 129. The question of the applicability of the NCA to the settlement agreement formed the focus of the dispute. This question was one of pertinence, given that the prior agreement, in terms of which the second respondent had stood surety for the obligations of the first respondent arising out of the rental agreements, was *not subject to the NCA*: the first respondent was a juristic person in respect of whom the s 4 exclusions set out in the NCA applied; as a credit guarantor for those principal obligations, the NCA would similarly not apply to the second respondent. The second respondent however argued that the settlement agreement fully terminated the parties' rights and obligations in terms of the original agreement. And in respect of the new settlement agreement, its (the second respondent's) obligation arose as a principal debtor, and it was not a juristic person to which the NCA exceptions applied. In such circumstances the new settlement agreement was subject to the NCA.

Held, that the settlement agreement, being one in full and final settlement of the issues between the parties, was a transactio in the legal sense.Hence, given that the transactio was one without reservation of the terms of the original agreement, the parties were precluded from enforcing rights and obligations arising from the compromised claims (see [9], [10] and [13]). It ended the relationship between the parties as far as the rental agreements and suretyships were concerned (see [9]). It constituted a new agreement, and one amounting to a credit agreement within the

meaning of the NCA, given the circumstances of the case. The applicant had thus been obliged to comply with the s 129 notice requirements. (See [9] and [15].) Application postponed *sine die* to ensure compliance with the provisions of s 129.

VAN BREDA v MEDIA 24 LTD AND OTHERS 2017 (5) SA 533 (SCA)

Constitutional law — Human rights — Right to freedom of expression — Freedom of press and other media — Right of media to broadcast court proceedings — Right to freedom of expression extending to public's right to receiving information and to open justice — Preventing media from broadcasting proceedings amounting to limitation of both media and public's right to freedom of expression — Default position being that no objection in principle to broadcasting — Media to request permission to broadcast on case-by-case basis — Court to use constitutionally mandated discretion to protect and regulate its own processes, in deciding such applications — Constitution, ss 16(1) and 173.

Media — Freedom of expression — Limitations — Right of media to broadcast court proceedings — Default position being that no objection in principle to broadcasting — Media to request permission to broadcast on case-by-case basis — Court to use constitutionally mandated discretion to protect and regulate its own processes, in deciding such applications — Court to harmonise competing rights of freedom of expression and open justice principle, on one hand, and right to fair trial, on other — Courts ought not restrict nature and scope of broadcast unless prejudice demonstrable and real risk of it occurring — Mere conjecture or speculation that prejudice might occur not enough — Constitution, s 173.

The right of the media to gather and broadcast information, footage and audio recordings of court proceedings flows from the right to freedom of expression in s 16 of the Constitution. This right, which includes the right to receive information and ideas, is for the benefit of both the media and the public. Not only is the media protected by the right to freedom of expression but it is also the 'key facilitator and guarantor' of the right. Free speech and open justice — a fundamental principle of the common law, that trial proceedings be conducted publicly in open court — are closely interrelated. Open justice, recognised by the Constitutional Court as a right of its own, has evolved so that the right does not belong only to the litigants but to the public at large. It means more than merely keeping the courtroom doors open; it means that court proceedings must where possible be meaningfully accessible to any member of the public who wishes to be timeously and accurately apprised of such proceedings. In an open democracy based on the values of equality, freedom and human dignity, the right of the public to be informed is one of the rights underpinned by the value of human dignity. The media, reporting accurately and fairly on legal proceedings and judgments, make an invaluable contribution to public confidence in the judiciary and, thus, to the rule of law itself.

Given the high levels of illiteracy, the print media is the preserve of a few. The majority of South Africans rely principally on radio and television for their news and information. The print media simply does not operate with the same kind of interactive speed or attract so wide and responsive an audience as television broadcasting does. There simply can be no logic in a court permitting journalists to utilise the reporting techniques of the print media but not permitting a television journalist to utilise his or her technology and method of communication, being the broadcasting and recording of proceedings, despite the fact that 'live camera footage

will be more accurate than a reporter's after-the-fact summary'. In the light of the fact that members of the public acquire most of their news through the electronic media, precluding that sector of the media from taking cameras and microphones (their tools of trade) into the courtroom, self-evidently limited the s 16(1) rights of both the media and the public.
Permitting televising of court proceedings is the appropriate starting point; the default position had to be that there could be no objection in principle to the media recording and broadcasting counsel's address and all rulings and judgments (in respect of both conviction and sentence) delivered in open court. However, the right to a public hearing does not automatically mean that trials must necessarily be broadcast live in all circumstances. It is for the media to request access from the presiding judge on a case-by-case basis. The question whether, and under what circumstances, the media should be allowed to broadcast court proceedings provokes tension between the constitutional rights of the press to freedom of expression, on the one hand, and the fair trial rights of an accused person, on the other. These competing constitutional rights, both essential to the proper functioning of any true democracy, should as far as possible be harmonised. It remained for the court — in exercising its discretion under s 173 of the Constitution to protect and regulate its own process, in the interest of justice — to balance the competing interests and the degree of risk involved in allowing cameras into the courtroom against the degree of risk that a fair trial might not ensue, and limit the nature and scope of the broadcast where necessary to ensure the fairness of the proceedings before it. Thus, concerns of privacy and security may justify imposing appropriate restrictions on how the media go about gathering and transmitting information about judicial proceedings. A one-size-fits-all approach, banning all audio or visual broadcasting of criminal proceedings, could not amount to a proper exercise of a court's s 173 discretion. (Paragraphs [8], [42], [57], [59] – [60] and [69] – [72].)
When a witness objects to coverage of their testimony, such witness should be required to assert such objection before the trial judge, specifying the grounds therefor and the effects such coverage would have upon their testimony. Courts must not restrict the nature and scope of the broadcast unless the prejudice is demonstrable and there is a real risk that such prejudice will occur; mere conjecture or speculation that prejudice might occur ought not to be enough. This approach entails a witness-by-witness approach. Such an individualised enquiry is more finely attuned to reconciling the competing rights at play than is a blanket ban on the presence of cameras from the whole proceeding when only one participant objects. If the judge determines that the witness has a valid objection to cameras, alternatives to regular photographic or television coverage could be explored that might assuage the witness's fears.

DE SOUSA AND ANOTHER v TECHNOLOGY CORPORATE MANAGEMENT (PTY) LTD AND OTHERS 2017 (5) SA 577 (GJ)

Company — Oppressive conduct — What constitutes — 'Unfair prejudice' —Test — Objective — Whether conduct fair or unfair depending on context — Effect of conduct being real issue — Requirement of 'prejudice' meant that conduct had to have harmed member in commercial, not merely emotional, sense — Companies Act 61 of 1973, s 252(1) and (3).

Company — Oppressive conduct — What constitutes — Minority shareholders in company bringing action for relief from oppressive conduct on part of majority —

Majority causing income to be diverted from company — Wrongfully using company funds to pay legal costs incurred by majority shareholders in resisting action — Causing company to enter into simulated retention agreements with employee, where true aim to fund shareholder's purchase of shares — Annual financial statements undervaluing assets to suppress share value — Conduct amounting to misuse of company funds to financial prejudice of minority — Lack of probity in manner affairs conducted — Conduct unfairly prejudicial to minority — Action granted — Companies Act 61 of 1973, s 252(1) and (3).

Constitutional law — Human rights — Right to a fair trial — Whether violated where judicial officer limiting time for cross-examination of witnesses in civil trial — Right to cross-examine witnesses not absolute — May be limited to prevent unnecessary wasting of time and increase in costs — Whether limitation violating fair trial rights dependent on whether litigant suffering any prejudice — Presently, no prejudice suffered as only time allowed for cross-examination limited, not scope.

Costs — Special order — When to be awarded — Minority shareholders bringing action against majority for relief from oppressive conduct — Defendants prolonging trial through unwarranted interlocutory applications, long and irrelevant cross-examination, and groundless objections — Majority withholding dividends to which plaintiffs were entitled, to deprive them of their means to litigate — Majority wrongfully using company funds to pay defendant shareholders' legal costs — Special costs order on attorney and client scale appropriate.

Evidence — Witnesses — Calling, examination and refutation — Cross-examination — Right to cross-examine witnesses not absolute — May rightfully be limited by judicial officer to prevent unnecessary wasting of time and increase in costs.

Technology Corporate Management (Pty) Ltd (TCM) was an information technology company, comprising the shareholders De Sousa, Diez, Cornelli, Da Silva and the Hassim Family Trust (controlled by Hassim), each of whom was also a director (Hassim on behalf of the Trust). From its inception TCM had been conducted as a domestic company in a manner akin to a partnership, primarily between its founding members, De Sousa and the current CEO Cornelli, who together controlled and managed the company. The present matter — in which the minority shareholders De Sousa and Diez launched an application in terms of s 252 of the Companies Act 61 of 1973 for relief from oppressive conduct — arose from a break-down in the relationship between the shareholders that followed the purchase of shares in TCM by the Hassim Family Trust. When it had become apparent that the Trust (or Hassim) could not afford the original price agreed to, Cornelli attempted to persuade the shareholders to agree to the amendment of the shareholders' agreement to reflect a lower price; De Sousa and Diez resisted this as being against the interests of the company and shareholders. The plaintiffs alleged that the majority, under Cornelli's direction, had subsequently excluded them from the management of the company, and Cornelli had undermined and humiliated them by various means. They cited instances of conduct on the part of Cornelli (or those acting under his supervision) — often aimed at indirectly securing funding for the Trust to afford the shares — that were harmful to TCM and its shareholders. The plaintiffs further claimed that, when attempts were made by the plaintiffs to dispose of their shares in TCM, Cornelli did not negotiate in good faith to arrive at a fair price. De Sousa was ultimately dismissed as an employee of TCM, while Diez was sent away to a post in the Namibian office.

The plaintiffs' principal argument was that Cornelli (acting alone, alternatively supported by the other shareholders) had conducted himself in a manner that brought about a state of affairs that was, in the words of s 252(1), 'unfairly prejudicial' and inequitable to them. 'Just and equitable' relief in terms of s 252(3), they argued, would be for TCM to purchase their shares. In addition to Cornelli and the other shareholders, against whom the plaintiffs' complaint was in substance directed, TCM was cited as a nominal defendant.

Relief in terms of s 252(3)

The principal question was whether the plaintiffs had satisfied the jurisdictional requirements for relief in terms of s 252(3). The court undertook a comprehensive survey of the law relevant to a s 252 application, and reiterated the following:

- The conduct complained of had not only to be prejudicial, but also unfairly so (see [34]). Fairness was an elastic concept, and whether conduct was 'fair' or 'unfair' would depend on the context (see [36]). The test for unfair prejudice was an objective one (see [35]). The effect of the challenged conduct was the real issue, and depending on the circumstances of the case, the motive for the conduct might also be relevant (see [55]). The requirement of prejudice meant that the conduct had to be shown to have caused the member harm in a commercial and not in a merely emotional sense (see [53]).
- The law recognised the following kinds of conduct as being unfairly prejudicial: where there was an unfair abuse of power and an impairment in the probity with which the company's affairs were being conducted (see [39] – [41]); where a minority shareholder who had a right or legitimate expectation to participate in the management of the company was excluded from so doing by the majority without a reasonable offer or arrangement being made to enable the excluded shareholder to dispose of his shares (see [44] – [48]); where the financial interests of a shareholder were adversely affected as a result of unfair conduct on the part of those who controlled the company (see [43]).

Held

The affairs of TCM had been conducted by Cornelli, and the majority shareholders under his instruction, in a manner that was detrimental to the plaintiffs' financial interests, as follows:

- The business of TCM's profitable Supplies Division had been operated as if it were a separate entity from TCM; with all its income and profits being diverted to another company, of which Hassim was a shareholder. This resulted in a loss to TCM of the business and profit derived by the Supplies Division and jeopardised shareholder value.
- In circumstances in which the dispute was one between the shareholders, TCM unjustly paid for the legal costs incurred by the defendant shareholders in resisting the s 252 action, conferring a distinct financial advantage on the majority at the expense of the minority.
- TCM undervalued its assets in its annual financial statements for 2008 – 2012 by understating its inventory. For the same period, and indicative of inefficient management, operating expenses rose dramatically, in the form of increases in staff costs, directors' emoluments, management fees, the payment of bonuses and other operating expenses. The profits available to shareholders were decreased dramatically, which negatively impacted on the level of dividends payable to the plaintiffs, and shareholder value. (See [258], [260], [289] – [293] and [333] – [334].)
- TCM concluded so-called retention agreements with Hassim. They were in fact simulated agreements whose true aim was to assist Hassim or the Trust to pay for

the shares. They unduly favoured Hassim at the expense of TCM and the other shareholders. (See [329].)
The manner in which the Supplies Division was operated, the payment of the legal fees of the shareholders and the retention agreements all constituted a misapplication of TCM's funds (see [204], [333] – [335]). This demonstrated a lack of probity or fair dealing in the way the affairs of TCM were operated. So too did the way in which the annual financial statements were prepared, in that the probabilities were that the assets were deliberately undervalued in order to suppress share values in the event that TCM was compelled to purchase the plaintiffs' shares. (See [329], [333] – [335].)
The plaintiffs, who had a legitimate expectation to participate in the management of TCM owing to its quasi-partnership nature, had been denied by the majority the ability to do so, in circumstances in which they had not been afforded an opportunity to dispose of their shares at fair value. Cornelli refused to engage in good faith, and also prevented the plaintiffs' access to financial information of TCM. The plaintiffs were unduly prejudiced, as they remained passive shareholders in the company which appeared to be mismanaged by the majority with whom they had fallen out. It could not reasonably be expected of the plaintiffs who had lost their employment to keep their assets locked in TCM. (See [128], [149], [154], [163] and [332].)
In the premises, the plaintiffs were entitled to relief in terms of s 252. The affairs of TCM had been, and continued to be, conducted by Cornelli in a manner that was unfairly prejudicial, unjust and/or inequitable to the plaintiffs as members of TCM. There was every reason to believe that the conduct complained of would continue and that the plaintiffs would be prejudiced by such conduct unless relief were given to them in terms of s 252(3). The only practicable order would be for TCM to purchase the plaintiffs' shares at their value on the date of the order. A referee had to be appointed to determine a fair value. As per the law, no allowance or deduction could be made for the fact that the plaintiffs held a minority shareholding. Further, the valuation had to include the value of the TCM Supplies Division. (See [330], [337], [358], [359] and [361].)

Prolonged length of proceedings

A distinguishing feature of the present action was its prolonged duration, its being marked by an excessively long record, and, on the part of the defendants, lengthy cross-examination of witnesses, constant objections, and numerous unsuccessful interlocutory applications. In the light of the aforementioned the court imposed a timetable on the parties during the course of the trial, and, when it became clear that the defendants would not stick to it, it limited cross-examination by the defendants. Two questions arose: *(a)* whether the defendants' fair trial rights had in any way been compromised by the court's decision to limit cross-examination;
and *(b)* whether, given the manner in which the trial was conducted, the defendants should be subject to a punitive costs order.

Held

As to *(a)*, while the right to cross-examine a witness was a fundamental procedural right, it was not an absolute one, and could be limited where continued cross-examination would waste time and add unnecessarily to costs. Whether the limitation infringed a litigant's fair trial rights depended on whether they had suffered prejudice as a result, given the circumstances of the case. In the present matter, the court was fully justified in imposing a time limit on the cross-examination, given the unduly protracted nature of the trial, the defendants' repeated failure to abide by the timetable, and their insistence on cross-examining witnesses on points that were not

dispositive of the case. At the same time, no prejudice was suffered by the defendants, given that only the time allowed for questioning was limited. (See [94] – [101] and [112].)
As to *(b)*, the following conduct of the defendants demanded that costs be awarded against them on a punitive scale of attorney and client. They had litigated in an obstructive fashion, taking every opportunity to prolong proceedings through unwarranted interlocutory applications, long and irrelevant cross-examination, and groundless objections. The defendants had purposely withheld dividends owing and due to the plaintiffs, with the intent of depriving the plaintiffs of their means to litigate. They had refused to negotiate in good faith with the plaintiffs with the aim of permitting the plaintiffs to dispose of their shares at a fair value and without resort to litigation. They had made wrongful use of company funds to resist present proceedings where the dispute was in truth one between the shareholders. (See [338] – [353] and [355].)
Action granted as per order above. Costs to be paid by the defendant shareholders on the attorney and client scale.

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S v RAMOBA 2017 (2) SACR 353 (SCA)

Arms and ammunition — Unlawful possession of firearm in contravention of s 3 of Firearms Control Act 60 of 2000 — Joint possession — Proof of — Firearm found between front seats of robbers' getaway vehicle — No indication of who put firearm there — Possession not proven.
Sentence — Imprisonment — Duration of — Lengthy period of imprisonment — Effective term of 52 years' imprisonment — Sentence possibly surpassing lifespan of accused — Sentence inappropriate and set aside.

The appellant was one of a gang of three who robbed a cash-in-transit vehicle. Two of the assailants carried rifles during the attack and the third a handgun. Immediately after the robbery they attempted to rob a man of his vehicle, but without success. They later succeeded in robbing another man of his vehicle in which they made their getaway, their car having stalled. All three were later observed walking in a road towards a farmhouse, the men in front and at the back carrying rifles, and the man in the middle carrying the boxes containing the money.
The appellant and another were convicted in a regional court of various counts, including robbery with aggravating circumstances and the unlawful possession of firearms and ammunition. They were sentenced to an effective term of 52 years' imprisonment.
After an unsuccessful appeal to the High Court, the appellant was given special leave to appeal against certain of the convictions, as well as the cumulative effect of the sentences. One of the counts was in respect of the possession of a semi-automatic 9 mm pistol which was subsequently found to have been a weapon taken from one of the security guards in the robbery. It was discovered between the front seats of the getaway car. The court had found the appellant and his co-accused guilty of this offence on their joint possession of the firearm. On appeal —
Held, that there was no evidence showing who had put the pistol inside the getaway car, and importantly, whether the appellant was aware of its presence. Accordingly, there were no facts from which it could be inferred that the appellant had the

intention to possess the pistol through the actual detentor thereof, who was in any event unknown, and whether the person who put it inside the vehicle intended holding it on behalf of the group, including the appellant. In these circumstances that conviction was unsustainable and had to be set aside. (See [15].)
Held, further, as to sentence, that an effective term of 52 years' imprisonment was shockingly inappropriate and warranted interference by the court. The appellant was 33 years old at the time of sentencing, which meant that he would be 85 years old when he completed his sentence. It was generally accepted that a sentence designed to surpass the natural lifespan of an offender, such as happened in the present case, ought not to be imposed. (See [23] – [24].) The court substituted the sentences in such a way that the effective term would be 28 years' imprisonment.

S v THETHA 2017 (2) SACR 363 (ECG)

Sentence — Addressing court on sentence — Accused not legally represented — Magistrate asking accused whilst still in witness box whether he had anything further to say to court before sentence — Such not amounting to compliance with s 274 of Criminal Procedure Act 51 of 1977.
The accused was convicted of theft in a magistrates' court and gave evidence in mitigation of sentence. Whilst still in the witness box, the magistrate asked him whether there was anything else he wanted to tell the court before sentence.
The court held on review that the procedure adopted by the magistrate did not amount to compliance with s 274 of the Criminal Procedure Act 51 of 1977 (the CPA) because the unrepresented accused may have construed that to have meant any other factors, apart from those already mentioned in his evidence. This was also indicated by the fact that the magistrate then called upon the prosecutor to cross-examine the accused. It was not made clear that the accused was required to address the court as to what type of sentence, in his view, might be appropriate and why. (See [7].) The conviction was upheld but the matter was remitted back to the magistrate for proper compliance with the section.

S v BAADJIES 2017 (2) SACR 366 (WCC)
Evidence — Witnesses — Calling, examination and refutation of — Oath — Admonition to speak truth — Duties of court — No procedural requirement that court first had to enquire of witness whether she understood what oath was— Criminal Procedure Act 51 of 1977, s 164(1).
Sentence — Imposition of — Global sentence imposed in respect of multiple offences — When appropriate — Inappropriate in circumstances where vastly differing sentences required — Such sentence might also present difficulties on appeal.

The appellant was convicted in a regional magistrates' court of two counts of contravening s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 in respect of the sexual penetration of a 7½-year-old girl, and one count of sexual violation of the same girl in contravention of s 5(1) of the same Act. The convictions were taken as one for the purposes of sentence and he was sentenced to life imprisonment.
On appeal, his counsel contended that the evidence of the complainant had been improperly admitted as she had not been properly cautioned in terms of the Criminal

Procedure Act 51 of 1977 (the CPA) — she had not been specifically asked whether she understood what the concept of an oath embraced.
Held,that there was no procedural requirement that the court first had to enquire of the witness whether she understood what the oath was and it was left up to the court to assess whether this was probable or not. The magistrate had obviously satisfied herself as to the inability of the complainant to formally take the oath and had correctly applied the provisions of s 164 of the CPA, thereby ensuring that the evidence was admissible. Most importantly, the trial court had formally admonished her to speak the truth as required by that section. (See [30] – [31].)
Held, as to sentence, that the court had erred in imposing one global sentence in the circumstances. The assault count justified a lesser sentence and the legislature had seen fit to prescribe minimum sentences of life imprisonment for the sexual penetration of a minor. It was appropriate that each offence be dealt with individually, particularly because the court had to assess whether substantial and compelling circumstances, to avoid the ultimate sentence, had been established in respect of each contravention. The method adopted by the magistrate might also present difficulties on appeal if one or more of the convictions were set aside. (See [37] – [38].) The sentence was accordingly altered to one of five years' imprisonment on the conviction of sexual assault, and to life imprisonment in respect of each of the two remaining counts.

S v MALI 2017 (2) SACR 378 (ECG)

Evidence— Witness — Oath — Admonition to speak truth — Irregularity committed where magistrate requiring child to 'confirm' that she would tell truth — Could be corrected by requiring child to listen to evidence and confirm it.

The conviction and sentence of the appellant in the regional court on charges of kidnapping and rape were based largely on the evidence of the 11-year-old complainant who, before testifying, was asked a number of pertinent questions by the regional magistrate to establish that she knew the difference between truth and lies. She was then asked to 'confirm' that she would tell the truth. The magistrate did not admonish the child in terms of s 164 of the Criminal Procedure Act 51 of 1977. After having given her evidence-in-chief, the matter was postponed for five months before she was cross-examined. On the resumption of the trial and before cross-examination, the magistrate reminded the complainant that she was still under oath.
Held, that the irregularity was procedural and technical in nature and the case was such that it should be corrected in the interests of justice. This would not infringe the appellant's constitutional right to a fair trial nor would it be a miscarriage of justice. (See [22] – [23].)
Held further, that the irregularity could be corrected by the trial being reopened and the complainant being properly admonished in accordance with s 164, and for her evidence to be read to her and for her to confirm it. (See [25] – [26].)
Semble: The statement in *S v Matshivha* 2014 (1) SACR 29 (SCA) at para 11, that for the provisions of s 164(1) to be triggered there had to be a formal finding that the witness did not understand the nature and import of the oath, appeared to be obiter and in conflict with earlier precedents of the same court.

DIRECTOR OF PUBLIC PROSECUTIONS, GAUTENG DIVISION, PRETORIA v MOABI 2017 (2) SACR 384 (SCA)

Appeal— Leave to appeal — Application for — By Director of Public Prosecutions on question of law in terms of s 311(1) of Criminal Procedure Act 51 of 1977 — Such appeal one of right and leave to appeal not required.
Rape — Sentence — Life imprisonment — Minimum sentence in terms of s 51 of Criminal Law Amendment Act 105 of 1997 — Where grievous bodily harm inflicted — Enhanced minimum-sentence provisions not requiring state to show that accused had intention to cause grievous bodily harm.

In an appeal against a conviction in a regional magistrates' court on a charge of housebreaking with intent to rape and rape (read with the provisions of s 51(1) of the Criminal Law Amendment Act 105 of 1997) the High Court had confirmed the conviction but set aside the sentence of life imprisonment and replaced it with a sentence of 14 years' imprisonment. The basis for the interference in the sentence was the court's opinion that the state had not proved the respondent's intention to inflict grievous bodily harm on the complainant.
In the present proceedings, the state applied for special leave to appeal to the Supreme Court of Appeal on a question of law in terms of s 311(1) of the Criminal Procedure Act 51 of 1977 (the CPA). The question was whether the High Court had been correct in holding that rape contemplated in part 1*(c)* of sch 2, read with s 51(1) of the Criminal Law Amendment Act 105 of 1997 (the Act), required intent on the part of the convicted person to cause grievous bodily harm.
Held, that the question raised involved the interpretation of the Act to ascertain what had to be proved to bring the offence of rape within the ambit of either part 1 or III of sch 2 to said Act. The Director of Public Prosecutions had accordingly raised a question of law. (See [12].)
Held, further, that by importing the intention of the respondent into the enquiry, the High Court had disregarded previous authority. It had committed an error of law in that intent was irrelevant in the determination of whether grievous bodily harm was inflicted on a complainant in the rape. Rather, the question to be answered was whether, as a matter of fact, the victim had sustained grievous bodily harm. (See [15].)
Held, further, that special leave to appeal was not required in a matter arising from s 311 of the CPA, which provided for an appeal as of right, without leave. An appeal under that section was also an appeal 'regulated in terms of the Criminal Procedure Act' and was therefore one to which the provisions of ch 5 of the Superior Courts Act 10 of 2013, and in particular s 16(1)*(b)* thereof, did not apply. (See [27].)
Held, further, that the appeal had to be upheld on the question of law and theorder of the High Court on sentence set aside. The sentence imposed by the regional court was accordingly reinstated and the matter remitted to the High Court for the appeal to proceed on sentence.

S v AR 2017 (2) SACR 402 (WCC)

Sexual offences — Child pornography — Sentence — Accused guilty of numerous counts relating to child pornography, sexual assault and using children for pornography — Accused 36-year-old engineer who photographed friends' and

neighbours' children whilst sleeping, after partially undressing them — Seriousness of offence requiring custodial sentence— Sentenced to 10 years' imprisonment of which two were suspended.

The respondent was convicted in a regional magistrates' court after having pleaded guilty to 2130 counts relating to child pornography and sexual exploitation of children. The counts included contraventions of s 5(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (sexual assault); s 20(1) of Act 32 of 2007 (the use of a child for child pornography); and of s 24B(1)*(a)*, *(b)* and *(c)* of the Films and Publications Act 65 of 1996 (possession, creation and importation of child pornography). Fourteen of the counts attracted a minimum sentence of10 years' imprisonment under part III of sch 2 to Act 105 of 1997, but the magistrate found that there were substantial and compelling circumstances justifying a lesser sentence; and imposed a term of eight years' imprisonment, wholly suspended for five years (all the counts were taken together). The state appealed against the sentence on the basis that it was too lenient, inappropriate and disproportionate to the crimes committed, the interests of society and the respondent's personal circumstances.
The offences came to light when the respondent went on holiday and asked his friend and neighbour to look after his house. The neighbour obtained access to the respondent's computer where he found images of his 8-year-old son, as well as a 6- and 9-year-old girl, the daughters of another friend, which depicted the children with their private parts exposed. There were also images of the respondent's sister-in-law, who lived with the respondent and his wife, and at the time was between 13 and 15 years old. According to the respondent, she was not shy to expose her naked body to him. The photographs of the other children had been done without their knowledge or whilst asleep. There were also videos taken of the respondent's son whilst in the bath with a friend, and the pictures concentrated on the private parts of the young friend. A number of video recordings were made of the respondent's sister-in-law and in one she was encouraged to manually stimulate herself. The respondent's psychologist testified that the respondent, who was a 36-year-old engineer, was not a paedophile as there was no evidence of grooming or any sexual encounters with his victims. According to the state's expert witness, a professor of psychology, the most recent Diagnostic and Statistical Manual of Mental Disorders' classification of a paedophilic disorder did not require physical sexual contact between the offender and victim.
Held, that the magistrate had misdirected herself in a number of respects, inter alia, in regarding it as mitigating that the complainants were unaware of the nature of the sexual assaults because they were asleep. This could hardly be regarded as a factor that diminished the seriousness of the offence, and the respondent had in fact touched his victims. Similarly, that the magistrate had found that the respondent's sister-in-law was a willing participant and the pictures and videos taken of her had no negative impact on her as a victim, was clearly wrong. The videos and pictures of her could not be regarded as harmless or less serious since she was at the time pre-pubescent, fully trusted the respondent and could hardly have appreciated the full psychological impact of her actions at the time. Common sense dictated that the respondent must have, over a period of time, created a false sense of security and trust with her (see [37] – [38]).
Held, further, that the magistrate had erred in finding that the state had failed to prove any kind of propensity on the part of the respondent to commit offences of that

nature. On the established facts there was no doubt that he had such a propensity. He had physically abused some of his victims whilst they were asleep and had exploited his victims when they were at their most vulnerable. To suggest that he was not a danger to society was simply misguided (see [39]).
Held, further, that a non-custodial sentence would not achieve an appropriate balance between the seriousness of the offences and the interests of society but would rather focus unduly on the rehabilitation of the respondent. An appropriate sentence would be one of 10 years' imprisonment of which two years were suspended (see [50] – [52]). Sentence altered accordingly.

CENTRE FOR CHILD LAW AND OTHERS v MEDIA 24 LTD AND OTHERS 2017 (2) SACR 416 (GP)

Evidence — Witnesses — Children — Identification of — Prohibition of identification of child witness — Extending to victim under age of 18 years — Prohibition not extending into child's majority — Criminal Procedure Act51 of 1977, s 154(3).

The abduction 18 years ago of a baby girl from her biological mother led to the woman, whom the girl thought was her mother, being charged with abduction and criminally prosecuted. This unusual story provoked an exceptional public and media interest in the court proceedings and in the fate of the young girl, the second applicant (KL) in the present application which was brought to prevent her true identity from being disclosed. As a witness in the proceedings KL would be able to protect her anonymity by virtue of s 154(3) of the Criminal Procedure Act 51 of 1977 (the CPA), but since she was to turn 18 before the proceedings started she would lose that status upon becoming a major and the media would then be able to publish her identity. The applicants obtained an interim order ensuring that her anonymity remained in place until after the finalisation of the case, including until any appeals that might be lodged.
In the present proceedings (referred to as part of the application) the applicants sought further relief to avoid other difficulties potentially faced by KL, including that s 154 appeared not to provide anonymity to a child victim under the age of 18 if the victim was not a witness in the matter, and also to secure her anonymity after she turned 18. These deficiencies, it was contended, rendered s 154(3) unconstitutional.
Held, that ss 153(1) and 154(3) read together with s 63(5) of the Child Justice Act 75 of 2008, did not differentiate between whether the child referred to was an accused, a witness, a complainant or a victim. Applying a purposive interpretation, the child victim was covered by s 154(3). There was accordingly no need to declare the section unconstitutional. (See [54] – [57].)
Held, further, that there could not be open-ended identity protection in favour of children, even into their adulthood, as this would violate the rights of other parties and the other rights of the children themselves when they were adults. The object of s 154(3) was to protect the child and only the child, and not the adults, as was sought by the applicants. The relief sought by the applicants in this respect would accordingly not be granted.

S v NKABINDE AND OTHERS 2017 (2) SACR 431 (SCA)

Appeal — Special entry in terms of s 317(1) of Criminal Procedure Act 51 of 1977 — Requirements of — Application not there for asking — Court to ensure that application bona fide and not frivolous, absurd or abuse of process.

The four appellants were part of a gang of 20 armed robbers who attacked a cash-in-transit vehicle and its escort vehicle with automatic firearms. They held up traffic on the N8 at the same time as robbing the occupants of those vehicles of their possessions. Whilst they attempted to open the doors of the safe of the vehicle (which they had forced off the road) with explosives and an angle grinder powered by a generator, they shot and killed a man who was attempting to escape from the scene.
The appellants were convicted of numerous offences and sentenced to terms of imprisonment that were ordered to run concurrently with the sentence of life imprisonment that was imposed upon them for the conviction of murder. They applied for special entries to be made on the record, contending that their trial was irregular and not according to law. The items they listed as special entries ranged from a complaint that the judge was a white Afrikaans-speaking farmer (like the deceased), which strongly suggested bias, to suggestions that the judge had fallen asleep during the trial, ignored and misdirected himself in assessing the evidence, and allowed the state to put leading questions to witnesses.
The court held that the suggestion of racial bias was untenable and offensive (see[33]); the allegation that the judge had fallen asleep had been raised for the first time three years after the trial and was not borne out by the record (see [34]); and the other allegations were not bona fide and were frivolous and absurd (see [35] – [38]). It held furthermore that none of the so-called special entries were true special entries as contemplated in s 317(1) of the Criminal Procedure Act 51 of 1977 (the CPA). They were more properly grounds of appeal. The court also stressed that an application for a special entry was not there for the asking. The requirements of s 317(1) of the CPA had to be met and the court had to satisfy itself that the application was bona fide and not frivolous, absurd or an abuse of process. The court a quo had failed to do so and should not have made them special entries on the record. The appeal was dismissed.

S v NTOZINI AND ANOTHER 2017 (2) SACR 448 (ECG)

Sentence— Imprisonment — Term of — Non-parole period — Order in terms of s 276B of Criminal Procedure Act 51 of 1977 to be made only in exceptional circumstances — Court sentencing young first offenders to terms of imprisonment and specifying that they be trained in certain skills for duration of sentence — Such sentence infringing provisions ofs 276B(1) and falling foul of separation of powers doctrine.

The two accused, both young first offenders, were respectively convicted in a magistrates' court of housebreaking with intent to steal and theft, and to receiving stolen property in contravention of s 37(1) of the General Law Amendment Act 62 of 1955. Accused 1 was sentenced to three years' imprisonment and it was ordered that he serve his sentence at Cradock prison where he was to be enrolled for courses offered by the said institution '(w)oodwork/plumbing etc. for the duration of his sentence'. Accused 2 was sentenced to two years' imprisonment and it was

further ordered that he serve his sentence at the same prison and that he be enrolled in 'skills/trade courses' for the duration of his sentence. On review,
Held, that the magistrate had erred in making an order in terms of s 276B(1) of the Criminal Procedure Act 51 of 1977 (the CPA) without providing both the state and the accused an opportunity of addressing it on whether or not a non-parole period ought to be imposed. Such an order should only be made in exceptional circumstances and when the sentencing court was possessed of facts that would justify it. (See [15] – [16].)
Held, furthermore, that, in imposing the sentences, the magistrate had also exceeded the maximum non-parole period set out in s 276B(1)*(b)*, namely two-thirds of the term of imprisonment, and had fallen foul of the separation-of-powers doctrine by prescribing where the accused person had to serve his sentence and specifying the courses to be undertaken during the serving of the sentence. (See [20] – [21].)
Held, further, that the sentences, even trimmed of the further non-parole period orders and those relating to the prison and manner in which their sentences were to be served, were shockingly severe. An appropriate sentence in respect of accused 1 would be one year's imprisonment of which seven months were suspended for three years, and, in respect of accused 2, eight months' imprisonment of which four months and six days were to be suspended for three years.

S v SIBEKO AND OTHERS 2017 (2) SACR 457 (FB)
Review — Inherent review powers of High Court — Part-heard trial —Accused's legal representative not qualified to practise — Fair-trial rights at stake justifying review before conclusion of trial.

During a trial in a magistrates' court on charges of stock theft, the accused's legal representative was struck off the roll of advocates for not having the necessary academic qualifications, an apparently forged certificate having been provided for his admission. The hearing was adjourned and the matter sent on review before a conviction was entered.
Held, that the High Court had power in terms of s 173 of the Constitution to regulate its own process, taking into account the interests of justice, and the magistrate was therefore entitled to refer the matter for review before conviction, and the High Court had power to review the proceedings before the conclusion of the trial. (See [14] – [15].)
Held, further, that, where an accused was represented by a person who did not have the necessary qualifications to practise as a legal practitioner, the accused's right to a fair trial as contained in s 35(3) of the Constitution was infringed. Such infringement was a gross irregularity, requiring the proceedings to be set aside. (See [20] – [22].) The court ordered accordingly and that the trial had to commence afresh before a different presiding officer.

S v MIYA AND OTHERS 2017 (2) SACR 461 (GJ)
Bail — Evidence adduced at bail proceedings — Admissibility of at subsequent proceedings — Compliance with provisions of section — Warning by presiding officer that evidence might be used against him at subsequent trial — Warning not given — Use of statement in other proceedings for purposes of cross-examining

witness — Protection applicable in other proceedings — Criminal Procedure Act 51 of 1977, s 60(11B)(c).

The state raised an objection to the proposed use by counsel for accused 1 of an affidavit made by a state witness in his earlier bail application. The witness had previously been a co-accused but was being used in the present proceedings as a witness in terms of s 204 of the Criminal Procedure Act51 of 1977. The bail application in question was in respect of another case (the Sandton case) in which the witness was standing trial, together with accused 2 in the present case. The witness had not been warned in terms of s 60(11B)*(c)* in that case. Counsel for accused 1 contended that the accused's right to a fair trial would be compromised if he was not allowed to challenge evidence by testing the witness's credibility, using the statement in question. The state submitted that there was no reason why accused 2 should be protected in both the Sandton case and in the present case while the witness, according to the defence argument, should only be protected in the Sandton case and not in the present one.
Held, that the question was not whether the witness in question was a witness or an accused, because the protection was drawn from s 60(11B)*(c)*, and s 203 or 204 was not the issue. The correct interpretation of s 60(11B)*(c)* was that by reason of the protection the witness enjoyed in the Sandton case, he was equally protected in the present case, even though he was a witness. He had not been warned in the bail proceedings in the Sandton case, and the section accordingly applied. (See [30] – [31].)
Held, further, that if the intention of the legislature was that the applicability or admissibility of evidence was restricted to the trial to which the bail recordrelated, it would not have added the words 'in any subsequent proceedings' in the section. The objection accordingly had to be sustained.

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Minister of Justice and Correctional Services v Walus [2017] 4 All SA 1 (SCA)

Criminal procedure – Application for parole brought by respondent serving sentence of life incarceration for murder in terms of section 136(1) of the Correctional Services Act 111 of 1998 – Refusal of – Failure by Minister to consider victim impact statement and failure to furnish the respondent therewith constituting material procedural irregularities in terms of section 6(2) of the Promotion of Administrative Justice Act 3 of 2000 vitiating the refusal to place the respondent on parole – Decision reviewed and set aside and matter remitted to appellant for reconsideration.

In October 1993, the respondent was convicted of the murder of anti-apartheid activist Chris Hani (the “deceased”) and the illegal possession of a firearm. He was sentenced to death for the murder and five years’ imprisonment for the illegal possession of a firearm. On appeal against the death sentence, that sentence was commuted to life imprisonment, antedated to the date of sentence. In April 2015, following a hearing of the respondent’s application for parole, the appellant refused to grant parole. Aggrieved by the decision, the respondent launched application proceedings in the court a quo on 4 June 2015. He sought the review and setting aside of the decision, an order in terms of section 8(2) of the Promotion of Administrative Justice Act 3 of

2000 placing him on parole with immediate effect on such conditions as the court deemed appropriate under section 65 of the Correctional Services Act 8 of 1959 (the "1959 Act") and ancillary relief. The grounds of review were that the the appellant had failed to consider all the relevant facts and circumstances; that the decision displayed bias; and that the respondent was not furnished with the representations made by the deceased's wife in a victim impact statement. The court a quo decided the matter in the respondent's favour and granted the relief sought. Thus, the decision was set aside and orders were made placing the respondent on parole and remitting the matter to the appellant to impose the necessary parole conditions. In the court's view, the decision overemphasised the nature of the crime committed by the respondent and the remarks of the sentencing court (which harshly criticised it) and failed to balance, fairly and equally, all the criteria for parole selection which it was satisfied the respondent met. The court a quo found that referring the matter back to the Minister for the reconsideration of the respondent's application would cause unnecessary delay to the respondent's prejudice whereas all the relevant facts which informed the decision and placed it in as good a position to determine the matter as the Minister were before it. It therefore decided that a substitution order granting parole was just and equitable relief.

On appeal, the essence of the dispute and the parties' respective contentions remained unchanged.

Held – The appellant eventually admitted that a procedural irregularity had occurred but contended that it did not constitute a material deviation amounting to a ground of review. The procedural irregularity began when the parole board submitted the respondent's profile for the appellant's consideration on the basis of information, which included the victim impact statement submitted to it, without affording the respondent an opportunity to respond thereto. It was completed when the appellant made the decision without considering those representations because they were allegedly not placed before him. The only question was whether the omissions constituted a reviewable procedural irregularity under the Promotion of Administrative Justice Act, having regard to the purpose of the victim representations.

The inevitability of a certain outcome is not a factor to be considered in determining the validity of the decision. Therefore, neither party could argue that the consideration of the victim impact statement by the appellant would make no difference. The proper approach was rather to establish, factually, and not through the lens of the final outcome, whether an irregularity occurred. Then the irregularity had to be legally evaluated to determine whether it amounted to a ground of review under the Promotion of Administrative Justice Act. In that exercise, the materiality of any deviance from the legal requirements had to be taken into account, where appropriate, by linking the question of compliance to the purpose of the provision before concluding that a review ground under the Promotion of Administrative Justice Act had been established. Thus, if the process leading to the decision was compromised, it could not be known with certainty what the administrator would have finally decided had the procedural requirements been properly observed.

All relevant information ie the full record of the proceedings, must be considered for a proper decision on the placement of a prisoner on parole. The victim impact statement and the representations in response thereto by the prisoner seeking parole unquestionably form a substantive requirement in that process.

The omissions constituted a fatal procedural irregularity and constituted a breach of section 6(2)(b) of the Promotion of Administrative Justice Act as a mandatory and material procedure or condition prescribed by an empowering provision was clearly not complied with.

In light of the above, it was unnecessary to deal with the merits of the appeal.

The Court ruled that the matter should be remitted to the appellant for a fresh decision regarding whether the respondent should be placed on parole, taking into account the victim impact statement and the respondent's response thereto. It also confirmed that it was entitled *mero motu* to have raised the legal point regarding failure to consider the victim impact statement and to require argument thereon.

The appeal was upheld with no order as to costs, and the matter was remitted to the appellant for his reconsideration.

GPC Developments CC and others v Uys and another [2017] 4 All SA 14 (WCC)

Contract – Breach – Contractual remedy of lex commissoria – Refers to term which permits a contracting party to resile from an agreement on the ground of delay, but has also acquired a wider and more general meaning, viz, a stipulation conferring the right to cancel an agreement on the basis of any recognised form of breach.

Contract – Cancellation of – Where a contract specifies a procedure for cancellation, that procedure must be followed or a purported cancellation will be ineffective.

Contract – Interpretation of – Court must consider the language chosen by the parties in their agreement contextually against the background facts and circumstances known to them and considered at the time of conclusion of the contract and give it its ordinary grammatical meaning – A sensible and businesslike interpretation should be sought provided it does not violate the actual wording of the agreement.

The first appellant ("GPC"), as owner of certain immovable property occupied by the first respondent, sought the eviction of the first respondent and all those occupying under him, from the property. The dismissal of its application led to the present appeal.

In July 2012, the appellants and the first respondent concluded a written deed of sale in terms whereof the property was effectively sold to the first respondent through the disposal of the members' interest in GPC. At the time the second and third appellants (the "sellers") each held 50% of such members' interest and the deed of sale made provision for the transfer of their entire interest (which included their loan accounts and any claims they held against GPC) to the purchaser for a consideration of R2,8m on a date described in the deed of sale as "the effective date". The effective date was the date when the purchase price had been paid in full to the sellers and the members' interest was legally capable of being transferred to the purchaser.

Although the deed of sale did not expressly say so, it was reasonable to infer that the parties contemplated that the purchaser might finance the balance of the purchase price through a mortgage loan which would be used to liquidate the bond by the effective date. Further, it appeared to have been an implied (or tacit) term of the agreement that the purchaser would be liable to pay the monthly instalments on the bond as they fell due until such time as the bond was settled in full. However, the

purchaser did not liquidate the bond by the agreed time, and an addendum to the agreement was concluded. In terms thereof, the outstanding amount was to be paid into the trust account of a firm of attorneys, and the purchaser was to repay the bond.

Failure by the purchaser to comply with his contractual obligations led to the eviction application being brought. The application was based on the allegation that the occupation of the property had become unlawful in light of the purported lawful cancellation of the sale.

In the present appeal against the dismissal of the eviction application, the only issue before this Court was the question whether the purchaser unlawfully occupied the property on the relevant date. The first respondent admitted that he was in arrears with the payment of various amounts due under the addendum to the agreement. He complained that the property was generally in a poor condition and that he had unexpectedly been required to spend vast amounts to render it habitable.

Held – Where a contract specifies a procedure for cancellation, that procedure must be followed or a purported cancellation will be ineffective. The court below found that in the absence of a tender to repay the purchase price, the cancellation was a nullity. GPC contended that it had an option, upon default by the purchaser of his obligations under the deed of sale (and in particular the failure to pay the outstanding balance due on the purchase price), to cancel under the relevant contractual provision (clause 10) and, having exercised that election, were not bound to resort to the provisions in the addendum (clause 3) regarding the purchasers' obligation to repay the bond. The question then was whether clause 10 of the deed of sale survived the addendum with its own cancellation provisions in clause 3, and, if so, whether the sellers unequivocally relied on the former clause when purporting to cancel. The sellers submitted that it was common cause that the purchaser had breached clause 3 of the addendum with the result that the sellers were entitled to cancel the agreement utilising clause 10, which it was submitted was the only *lex commissoria* in either the deed of sale or the addendum permitting cancellation in the event of breach. The Court pointed out that the term "*lex commissoria*" has acquired a somewhat flexible meaning in our law of contract. The phrase denotes, primarily, a term which permits a contracting party to resile from an agreement on the ground of delay, but it has also acquired a wider and more general meaning, *viz*, a stipulation conferring the right to cancel an agreement on the basis of any recognised form of breach. Such a term may include a right on the part of the creditor to claim forfeiture of amounts already received, but it is not limited to that right.

On the correct approach to contractual interpretation, the Court is required to consider the language chosen by the parties in their agreement contextually against the background facts and circumstances known to them and considered at the time of conclusion of the contract and give it its ordinary grammatical meaning. A sensible and businesslike interpretation should be sought provided it does not violate the actual wording of the agreement.

Clause 10 constituted a classic *lex commissoria* in the sense discussed above. It afforded the sellers the right to cancel in the event of default on the part of the purchaser after the latter had been given notice to remedy within 10 days and had failed to do so. In such event, the sellers could claim, *inter alia*, forfeiture of the amounts already paid to them by the purchaser. However, clause 10 was not the only *lex commissoria* available to the parties as clause 3 fell into the same category.

At the time the addendum was concluded, the sellers had a right to rely on clause 10 at that stage and resile from the contract. But that did not happen. On the contrary, the parties took positive steps to keep the agreement alive by concluding the addendum. Clause 3 thereof had its own breach provisions as regards notice and included a term which was the complete antithesis of a forfeiture clause – an obligation on the sellers to repay the purchase price paid in defined circumstances. Thus, upon the breach by the purchaser the sellers made an election to pursue a particular remedy, and so were bound by the contractual terms implicit in that choice. Having opted to invoke the *lex commissoria* incorporated in clause 3, the sellers were bound to observe the cancellation requirements of that clause, which required a tender to repay the purchase price paid, and did not permit a claim for forfeiture.

The court *a quo* was correct in finding that the cancellation was not lawful, and the appeal had to be dismissed.

Harper and others v Crawford NO and others [2017] 4 All SA 30 (WCC)

Wills, Trusts and Estates – Testamentary trust – Application to amend trust deed – Section 13 of the Trust Property Control Act 57 of 1988 – In order for a court to exercise its statutory power to amend a trust deed, the offending provision must bring about consequences which in the opinion of the court the donor did not contemplate or foresee, and the provision must either hamper the achievement of the object of the founder or prejudice the interests of the beneficiaries or be in conflict with the public interest.

Wills, Trusts and Estates – Testamentary trust – Only biological descendants of donor's children capable of being capital beneficiaries of the trust – Application to recognise words used in trust deed as including adopted children – In interpreting a trust deed, the point of departure is the grammatical or ordinary meaning of the words used – Having regard to the accepted meaning of the words "descendant", "progeny" and "issue", the court held that the trust deed under discussion had the effect that only the biological descendants of the donor's children could be capital beneficiaries of the trust.

Words and phrases – "descendant" – Includes only blood relations in the descending line and excludes adopted children.

Words and phrases – "issue" – Meaning in the context of offspring denotes blood descendants.

In 1953, a trust deed was executed by an individual ("the donor"). The income and capital beneficiaries of the trust were the donor's four children (one of whom was the first supplicant) and any of their children. The first applicant was the only surviving child of the donor. Accordingly, her one fourth share of the capital of the trust and its income therefrom remained to be distributed upon her death in terms of the trust deed. She had no biological children, but in 1955 and 1957, had lawfully adopted the second and third applicants respectively. The remaining children of the donor (the first applicant's siblings) had biological children.

The applicants sought an order declaring that the words "children", "descendants", "issue" and "legal descendants" used in the trust deed included the second and third applicants; alternatively that in terms of section 13 of the Trust Property Control Act 57

of 1988, the trust deed be amended, declaring the said words used in the trust deed to read “second and third applicants”.

Held – The challenge to the first applicant’s *locus standi* on the ground that she was only an income beneficiary of the trust fell to be dismissed. The Court pointed out that upon the first applicant’s death her one-fourth share of the capital would be paid to her descendants in equal shares. She clearly had a substantial interest in the outcome of the application. The second and third applicants were her adopted children whom she desired to be made trust deed beneficiaries.

The Court then tracked the development of the law on the subject, and the impact of our constitutional dispensation on case law.

The three grounds for the application were found to all be based on the equality provisions of section 9 of the Constitution.

If a provision in a trust infringes a constitutionally protected right to equality or freedom, the offending provision may be deleted or varied by the court. In any event, the principle that the courts will refuse to give effect to a testator’s directions which are contrary to public policy is a well-recognised common law ground. The right to equality is a core value of our Constitution. The enactment of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 is indicative of public policy and the community’s legal convictions. The current statutory position of adopted children is certainly indicative of the Legislature and the court’s willingness to place adopted children on the same footing as biological children. The Children’s Act 38 of 2005 presently regulates the rights of children including that of adopted children. The Legislature, by introducing section 242(3) of the Children’s Act (which equalises adoptive children with natural children) has been mindful of the constitutional imperative placed on it.

It was argued for the applicants that on a purposive interpretation, section 242 should be applied retrospectively, namely to the provisions of the trust deed notwithstanding the common law presumption against retrospectivity. It was submitted that the court should be mindful that any finding which brings about the result of not acknowledging the equal footing of adoptive children will (in present terms) fall foul of public policy and the equality clause in the Constitution. The applicants contended that if the terms of the trust deed were interpreted only to include the donor’s biological descendants, the exclusion of the second and third applicants would amount to unfair discrimination falling foul of section 9(4) of the Constitution.

In interpreting a trust deed, the point of departure is the grammatical or ordinary meaning of the words used. Those words must be read within the context of the trust deed as a whole. Having regard to the accepted meaning of the words “descendant”, “progeny” and “issue”, the Court held that the trust deed under discussion had the effect that only the biological descendants of the donor’s children were capital beneficiaries of the trust.

The Court then turned to the issue of freedom of testation. Section 25 of the Constitution protects a person’s right to dispose of their assets as they wish upon their death. Inroads into freedom of testation are not made lightly. Such discrimination as might exist in this case, was found not to be unfair. Courts have no competency to vary the provisions of the donor’s trust deed just as they would have no power or

authority to change any testator's will. Effect should always be given to the wishes of the testator.

In the alternative, the applicants sought the application of section 13 of the Trust Property Control Act with a view to amending the trust deed. In order for a court to exercise that statutory power, two jurisdictional facts are required. First, the offending provision must bring about consequences which in the opinion of the court the founder did not contemplate or foresee. Second, the provision must either hamper the achievement of the object of the founder or prejudice the interests of the beneficiaries or be in conflict with the public interest. Neither of the conditions was met in this matter.

The application was, accordingly, dismissed with costs.

King NO and others v De Jager and others [2017] 4 All SA 57 (WCC)

Wills, Trusts and Estates – Will establishing a fideicommissum containing a condition discriminating against female descendants – Whether court can amend the wording of will – Competing rights of freedom of testation and the right to equality (more specifically the right not to be unfairly discriminated against) weighed up – Whether the challenged provisions of the will were contrary to public policy or susceptible to a direct challenge in terms of the equality provisions of the Constitution of the Republic of South Africa, 1996 – Court finding that although the terms of the fideicommissum discriminated against the testators' female descendants simply on the grounds of their gender, allowing the right to equality to trump the right to freedom of testation in the present circumstances, although superficially equitable, would produce an arbitrary result.

The first applicant was an attorney and one of six co-executors in the deceased estate of a person who died testate. The second to sixth applicants were the daughters of the deceased, and were co-executors with the first applicant in the deceased's estate. The fourth to eighth respondents were the sons of the second to sixth applicants. The first to third respondents were the sons of the deceased's late brother. Only the latter three respondents opposed the application.

The deceased's grandparents ("the testators"), who were married in community of property, executed a joint will in November 1902. In clause 7 of the will they bequeathed various fixed properties, including many farming properties, to their six children. All the properties were made subject to *fideicommissa*. Until the deceased's death the terms of the *fideicommissa* were interpreted and applied as appointing only the sons of the testators' children, and thereafter their sons, as *fideicommissary* beneficiaries. In other words, both the first and the second substitutions limited the *fideicommissary* beneficiaries to descendants of the male gender. One of the testators' children (Cornelius de Jager) was the deceased's father. The present application was said by the applicants to concern only certain farming properties which were initially bequeathed to him. The primary issue was whether a court can amend the wording of a will which establishes a *fideicommissum* containing a condition discriminating against female descendants. The issue brought to the fore two potentially competing rights, *viz* the right to freedom of testation on the one hand and the right to equality (more specifically the right not to be unfairly discriminated against) on the other.

On the death of Cornelius de Jager, his three sons each became fiduciary heirs to a one third share in the farms, subject to the *fideicommissum* in the will. Thus, the first substitution of fiduciaries in respect of those properties ie to the testators' grandsons, occurred after Cornelius' death in 1957. Of those three grandsons, one (Corrie de Jager) left no children upon his death and his one third share in the properties devolved, in terms of relevant clause in the will, in equal parts upon his two surviving brothers, namely John de Jager and the deceased. Upon the death of John de Jager, his half share of the properties in question (ie his original one third share plus his one sixth share which he inherited from his brother, Corrie) devolved upon his three sons, the first to third respondents, but now free of any *fideicommissum*. That was the second in the series of substitutions of fiduciaries, namely, to the testators' great grandchildren in their capacity as *fideicommissaries*. After the first to third respondents received their inheritance they, and one of their trusts, concluded an agreement with the deceased dividing up their respective interests in the *fideicommissary* property. According to the first applicant's founding affidavit the result was that in terms of certain title deeds the deceased became the co-owner in undivided shares of three farms. The title deeds in terms of which the deceased held his respective half shares in each of the three properties stipulated that his title in each case was subject to clause 7 of the will. The deceased was the last grandson of the testators in whose estate a fiduciary asset in terms of the will fell to be dealt with. The substitution following his death would therefore be the last substitution as required by the terms of the will and thus the heirs in terms of that substitution would inherit the property free of the *fideicommissary* burden.

In the founding affidavit, the first applicant expressed the view that the terms of the *fideicommissum* which discriminated against the female descendants of the testators were against public policy and could not stand. He stated that there were three groups of claimants to the *fideicommissary* property. The first group comprised the deceased's daughters (second to sixth applicants) who contended that the provisions of clause 7 of the will which referred to "*sons*" and "*male descendants*" discriminated against them unfairly as members of the female gender. They sought the deletion and amendment of these provisions in clause 7 of the will thereby making them the heiresses to the *fideicommissary* property. The first to third respondents formed the second group of claimants, and based their claim to the *fideicommissary* property on the fact that the deceased left no sons and they contended that according to the *fideicommissum*'s terms they were the lawful heirs to it. The third group of claimants (the fourth to eighth respondents) comprised the grandsons of the deceased namely, the five sons of the first group of claimants. Their claim was based on the assumption that the claim of their mothers based on unfair discrimination against female descendants did not succeed. They contended that in such event, clause 7 of the will had to be interpreted in such a way that the *fideicommissary* property devolved on them as the deceased's male descendants rather than upon the second group of claimants.

Held – On a proper reading of the will, the *fideicommissa* were not indefinite but were intended to terminate after the second substitution ie when the property devolved upon the third line of heirs. It is common cause that the next substitution of fiduciaries will be the last.

Freedom of testation, according to which testators are free to dispose of their assets in a will in any manner they see fit, is a basic principle of our law of succession. The

Court endorsed the view that the golden rule for the interpretation of testaments is to ascertain the wishes of the testator from the language used and when those wishes are ascertained, the court is bound to give effect to them, unless prevented by some rule or law from doing so. The principle of freedom of testation is, however, not completely unrestricted since our law allows for limitations on this freedom based on relevant social and economic considerations, some statutory, others founded in common law principles. One such restriction is that the courts will not give effect to testamentary provisions if they offend against public policy. The general principle is that courts will not authorise the variation of the provisions of a will which are capable of being carried out and are not contrary to law or public policy, save in exceptional circumstances or under statutory authority.

In casu, the bequests made by the testators more than 100 years previously had not yet been completed in the sense that the *fideicommissary* property was yet to devolve upon the final heirs. Moreover, the *fideicommissa* established by the testators discriminated against certain of their female descendants ie all but their own daughters, solely on the grounds of their gender. The right to equality is guaranteed by section 9 of the Constitution. National legislation in furtherance thereof was enacted in the form of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. Listed amongst the prohibited grounds of discrimination therein are gender and sex. The Court acknowledged that the constitutionally protected right to property includes a right to freedom of testation (with the qualification that this is not absolute). It also accepted that the wishes of the testators in this matter were that, beyond the first generation, the *fideicommissary* property would, as far as the second and the third generations were concerned, not devolve upon their female descendants.

The enquiry was whether the challenged provisions of the will were contrary to public policy or susceptible to a direct challenge in terms of the equality provisions of the Constitution. Finding that the impugned clause was discriminatory, the Court then had to decide whether in the absence of any legal right by any of the testators' descendants to testamentary inheritance, the discriminatory effect could be said to be legally relevant.

The Court saw the case as involving a choice between the lesser of two evils – perpetuating gender discrimination or undue interference with the right to freedom of testation. However, whilst the terms of the *fideicommissum* discriminated against the testators' female descendants simply on the grounds of their gender, allowing the right to equality to trump the right to freedom of testation in the present circumstances, although superficially equitable, would produce an arbitrary result. At the same time it would represent a broad incursion into a vital corollary of the right to property, a fundamental constitutional right.

The next stage of the enquiry was whether the impugned provision of clause 7 of the will, could be justified under the limitation clause in section 36 of the Constitution. The envisaged limitation, namely, that one cannot dispose of one's property without first complying with an equality equation, would make a significant inroad upon the right to freedom of testation and could well produce unintended consequences as detailed in the court's judgment. Regarding the nature and extent of the limitation, weight had to be given to the fact that the discriminatory provisions of the will occurred in the private and limited sphere of the testators and their direct descendants. It thus affected only

a limited number of persons, was of limited duration and was not manifestly directed at infringing the complainants' dignity.

It was concluded that even if it was assumed in favour of the female descendants of the testators that they notionally had a right to be treated equally with the male descendants in the exercise by the testators of their freedom of testation, the limitation on the second to sixth applicants' rights to equality in the form of the discrimination against them effected by clause 7 of the will was reasonable and justifiable, particularly given the importance accorded to the right to freedom of testation. The direct constitutional challenge to the disputed provisions of the will, therefore, had to fail.

The Court then considered the alternative argument advanced on behalf of the applicants, one in favour of the fourth to eighth respondents, namely, that on a proper interpretation of clause 7 of the will the deceased's grandsons had to be substituted as fiduciary heirs to the property. The general rule of construction which raises a presumption against the creation of a *fideicommissum* applies also to questions concerning its ambit with the result that a *fideicommissum* is strictly interpreted and a construction favoured which imposes the least possible burden upon the fiduciary. The presumption and approach to a *fideicommissum*'s construction applies only where there is a reasonable doubt as to the intention of the testator, having regard to the will's wording. However, the Court found that the proper interpretation of clause 7 was that the testators intended to limit the *fideicommissum* or the *fideicommissaries* to their grandsons and great grandsons, drawing the line at the third generation. That excluded the third group of claimants.

The application was, accordingly, dismissed.

Law Society of the Northern Provinces v Bobroff and others [2017] 4 All SA 85 (GP)

Legal practice – Attorneys – Misconduct by attorneys – Sanction – Striking off from roll or suspension – Nature of application described by court – Court required to determine whether person is fit and proper to practise and whether in all the circumstances the person in question is to be removed from the roll of attorneys or whether an order suspending him from practice for a specific period will suffice.

In December 2016, the first and second respondents were struck from the roll of attorneys, and the third respondent was suspended from practice for a year. All three were attorneys and directors in the fourth respondent law firm. Reasons for the orders were furnished in the present judgment.

An application was initially brought by the applicant law society for the striking-off of the names of all three attorneys from the roll of attorneys. It was ordered that the first and second respondents (the "Bobroffs") be suspended from practice pending the determination of the present application as well as one by the fifth and sixth respondents (the "Grahams") for the striking-off of the names of the Bobroffs from the roll of attorneys. The reason for the suspension rather than the striking-off of the Bobroffs was to allow them an opportunity to respond to the amended application by the Grahams for the striking-off of the Bobroffs whereas previously merely their suspension was sought.

The Bobroffs dealt mainly with claims against the Road Accident Fund ("RAF") for damages sustained by claimants as a result of motor vehicle accidents. The sixth respondent became a client of the firm when he brought a damages claim arising from injuries he sustained in a motor vehicle accident. On finalisation of his claim, he and his wife (the "fifth respondent") lodged a complaint with the law society against the Bobroffs, regarding overcharging. Accusing the Bobroffs of overreaching, the Grahams alleged that the Bobroffs claimed inflated fees. Dissatisfied with the law society's perceived tardiness in dealing with the complaint, the Grahams brought their own application as set out above. The Court referred to the various applications, counter-applications and interlocutory applications made by the parties in the course of the matter.

Although the law society's investigation was continuously hampered by the Bobroffs, it was eventually reported that several cases of overreaching clients through the use of unlawful contingency fee agreements were identified. The firm also failed to keep accurate records of time spent on matters.

Held – The evidence clearly established serious overreaching by the firm. Evidence was also uncovered of misappropriation of trust funds and fictitious disbursements being claimed as a general practice at the firm. Various other contraventions of the Attorneys Act 53 of 1979 (the "Act") and the Law Society's rules were found.

The Court, accordingly, moved on to discuss the nature of proceedings for the striking-off of an attorney. When a Law Society approaches the court under section 22(1)(d) of the Act, it brings the attorney before the court by virtue of a statutory right, informs the court what the attorney has done and asks the court to exercise its disciplinary powers over him. The application involves a three-stage enquiry. First, the court must determine whether the offending conduct has been established on preponderance of probabilities, which is a factual enquiry. The second enquiry is whether the person concerned is in the discretion of the court not a fit and proper person to continue to practise. It involves the weighing-up of the conduct complained of against the conduct expected of an attorney and, to such extent, is a value judgment. The third enquiry is whether in all the circumstances the person in question is to be removed from the roll of attorneys or whether an order suspending him from practice for a specific period will suffice. The first stage of the inquiry involves purely factual findings, while the second and third stages involve the exercise of a discretion.

The instances of serious misconduct and breach of the law were extensive in this matter. The Court was convinced that the Bobroffs were not fit and proper persons to practise as attorneys.

The third respondent attempted to blame the Bobroffs and the firm's bookkeeper for the contraventions. That was not an acceptable defence. As a member of the firm, he had a duty to participate in the administration and control of the trust accounts.

The issue of sanction was for the court's discretion. Relevant factors were the nature of the conduct complained of, the extent to which it reflects upon the person's character or shows him to be unworthy to remain in the ranks of an honourable profession, the likelihood or otherwise of a repetition of such conduct and the need to protect the public. The third respondent's contraventions were such that the Court believed that suspension with appropriate conditions would be appropriate. Such conditions were attached to the suspension order.

Madiba and others v Minister of Arts and Culture and others [2017] 4 All SA 111 (GP)

Administrative law – Pan South African Language Board – Decision by Minister to dissolve Board – Application for review of decision – Under section 5(5) of the Pan South African Language Board Act 59 of 1995, the Minister may terminate the Board on any reasonable grounds – Minister's decision would pass muster if the decision was one to which a reasonable person could have resorted – Court finding that based on the evidence before the Minister, his decision was unassailable.

In April 2014, the first respondent ("the Minister") appointed the first to remaining applicants as members of the second respondent (the "Board"). However, in January 2016, the Minister gave notice to the first applicant as chairperson of the Board, of the Minister's decision to dissolve the Board. That led to the applicants seeking orders declaring the decision of the Minister to dissolve the Board to be unlawful and invalid and for the decision to be reviewed and set aside.

Held – Whether the second to tenth applicants were indeed applicants before the court was a matter which had to be addressed before addressing the merits. In his founding affidavit, the first applicant alleged that he had been authorised to depose to the affidavit on behalf of his co-applicants. No confirmatory affidavits were delivered on behalf of the alleged co-applicants, and the Minister challenged the allegation of authority. In the absence of confirmatory affidavits, the Court was driven to conclude that the first applicant was never authorised to represent the alleged co-applicants and that his false assertion of authority was a deliberate untruth designed to mislead the Court. It was held that the first applicant was the only applicant before the Court.

A second preliminary issue related to the role of the first applicant's advocate ("Feni"). The concern raised was that Feni was the acting CEO of the Board. The court called for argument on the question of whether allowing the applicants' case to be presented by Feni would not lead to a failure of justice. When the court proposed, *mero motu*, to direct the issue of a rule calling upon Feni to show cause why he should not be joined to the proceedings and interdicted from representing the applicants, Feni withdrew as Counsel for the applicants. The Court was led to believe that both the first applicant's attorney of record and Feni might have acted unprofessionally. It therefore directed the State Attorney, who represented the Minister, to deliver copies of the judgment to the Law Society of the Northern Provinces and the Pretoria Society of Advocates for such investigations and disciplinary actions as they might see fit.

The Board was an organ of State as contemplated by section 239 of the Constitution. Its aim was to promote the development of and the equal use and enjoyment of official languages, the development of other languages relevant in the Republic, multilingualism, the provision of translation and interpreting facilities and combat the use of any language for the purpose of exploitation, domination or division.

Under section 5(5) of the Pan South African Language Board Act 59 of 1995, the Minister may terminate the Board on any reasonable grounds. The nature of the relationship between the Minister and the Board was at the heart of the enquiry. The context in which the Minister made his decision to dissolve the Board was that the Board had had several periods of crisis since its establishment. The Court recorded the history of troubles within the Board. Included therein was a lack of fiscal probity on the part of the Board. In the report of the Auditor-General in relation to the Board's 2014/2015 financial year, the Auditor-General recorded his opinion that there had

been a failure of function by the Board in many material respects. That led to further intervention and in March 2015, a meeting was held between a parliamentary portfolio committee and members of the Board. The portfolio committee addressed a specific problem which had arisen connected to the employment by the previous acting CEO of the Board (Zwane) of 49 employees who were not necessary for the functioning of the Board. The Board took the opinion of an advocate (referred to by the court as "advising counsel"). However, the advising Counsel was deliberately given incorrect information resulting in his opinion being totally inaccurate. The Board and Feni nevertheless proceeded to act on the said opinion by dismissing the employees, knowing that the opinion was based on false information. The resultant litigation by the 49 employees cost the Board more than R3 million in damages, and led to the Minister's decision to dissolve the Board.

The Minister's decision would pass muster if the decision was one to which a reasonable person could have resorted. Put conversely: it had to be asked whether the decision was so unreasonable that no reasonable person would have resorted to it. There had to be a rational objective basis justifying the connection made by the decision-maker between the material made available and the conclusion arrived at. Based on the evidence before the Minister, his decision was unassailable.

The review application was dismissed, and the first applicant was ordered to pay costs.

Mathe v Minister of Police [2017] 4 All SA 130 (GJ)

Civil procedure – Unlawful arrest and detention – Claim for damages – Scale of costs to be awarded – In awarding costs, a court has a discretion, to be exercised judicially upon a consideration of the facts of each case, and in essence it is a question of fairness to both sides.

Personal injury/Delict – Unlawful arrest and detention – Duties of police towards women and the identification of women as a vulnerable sector in our society discussed – Claim for damages – Assessment of quantum of general damages.

In February 2014, the plaintiff was arrested on a charge of prostitution. She was then was unlawfully detained overnight in police custody. The relevant police officers were at the time, acting within the course and scope of their employment with the South African Police Services ("SAPS").

According to the plaintiff, she was waiting for a taxi with her friends on the night in question, when she was arrested. She claimed that she had been detained with five others in a filthy police cell, with a single, non-functioning toilet situated in the middle of the cell with no privacy. She also referred to the alleged damage to her reputation after her release. She claimed R500 000 in damages, representing infringement of her constitutional rights to equal protection and benefit of the law, human dignity, freedom and security of a person, freedom of movement and conditions of detention that are not consistent with human dignity. The damages were also based on an infringement of her personal rights to physical integrity, dignity, privacy, reputation and sense of self-worth. The particulars of claim alleged that as a result of her arrest and detention, she suffered shock, psychological trauma, emotional shock and *contumelia.*

Flowing from the arrest and detention, the plaintiff sued the defendant for damages. The defendant conceded that the arrest and detention was unlawful.

Held – The issues for the Court's determination were the quantum of general damages and the scale of costs to be awarded to the plaintiff.

The plaintiff suffered an arbitrary deprivation of personal liberty and was humiliated and traumatised by virtue of her unlawful arrest and detention. In assessing damages for unlawful arrest and detention, the idea is not to enrich the aggrieved party, but to offer some sort of *solatium* for her injured feelings, commensurate with the injury inflicted.

In working towards an appropriate assessment of damages, the Court referred to relevant cases. It then highlighted the pertinent facts of the case at hand. It was suggested that the police had no lawful reason for arresting the plaintiff. The plaintiff and her friends were merely waiting at a petrol station for a taxi. The police abused the power entrusted upon them – not even taking the basic step of identifying themselves to their victims prior to starting their interrogation. They then bundled the women into the car and told them that they would find out what they were being arrested for when they arrived at the police station. The plaintiff was only informed of her constitutional rights the next morning. The Court was of the view that the plaintiff (and her friends) had only attracted the negative attention of the police because they were female. She was subjected to prejudices which were exclusively based on gender.

Having regard to the facts as a whole, past awards and relevant case law, the Court found that a fair and reasonable amount for the damages to be awarded to the plaintiff was R120 000.

Next, the Court turned to the issue of costs. In awarding costs, a court has a discretion, to be exercised judicially upon a consideration of the facts of each case, and in essence it is a question of fairness to both sides. The amount of the claim is not the only factor that should be considered by this Court when considering an appropriate cost order. The underlying principle in awarding costs in such matters relates to the nature of the cause of action. The courts attach importance to the questions of unlawful arrest and detention, because they involve the violation of important constitutional rights and issues of public interest. The present matter was of great importance to the plaintiff because her dignity was impaired by the unlawful conduct of police officials. The case was also of public interest. The conduct of the police officials involved was unconstitutional and unlawful.

Finally, the Court pointed out that the parties had agreed at the pre-trial conference that the case should not be transferred to another court. It was on the basis of that agreement that the trial proceeded in the present Court instead of being transferred to the Magistrates' Court. Consequently, the defendant could not be allowed to resile from the agreement by arguing for costs on the Magistrates' Court scale.

Minister of Finance v Oakbay Investments (Pty) Ltd and others; Oakbay Investments (Pty) Ltd and others v Director of the Financial Intelligence Centre [2017] 4 All SA 150 (GP)

Administrative law – Application brought by Minister of Finance – Whether State Attorney was properly authorised to act for Minister in the application – Scope of authority of the State Attorney is set out in section 3 of the State Attorney Act 56 of

1957 – Where Minister brought application in his official capacity, the State Attorney was acting for the Minister within the scope of the duties set out in section 3 of the State Attorney Act.

Banking and Finance – Minister of Finance – Powers and duties – Whether Minister of Finance is by law, empowered or obliged to intervene in the relationship between banks and clients – Court confirming that there is no statute which empowers the Minister to intervene in a private bank-client dispute, and that an application for declaratory relief in that regard was unnecessary.

Two main applications and a parallel application were before the court. In the first main application, the incumbent Minister of Finance (Mr Gordhan or "the Minister") at the time of the launching of the application, sought declaratory relief to the effect that he was not by law empowered or obliged to intervene in the relationship between a number of companies consisting of Oakbay Investments (Pty) Ltd and associated entities (first to seventh, ninth to twelfth and fourteenth respondents) and their various banks (fifteenth to eighteenth respondents).

In the second main application, several entities within the Oakbay group sought in terms of section 40(1)(e) of the Financial Intelligence Centre Act 38 of 2001, to compel the Director of the Financial Intelligence Centre to disclose certain information relating to reports made to the Financial Intelligence Centre ("FIC") by the applicants' erstwhile bankers.

The seventeenth respondent ("Standard Bank") applied in the parallel application, for declaratory relief in broader terms.

The background to the applications involved the four banks terminating their relationships with the entities in the Oakbay group and to close their bank accounts. The Oakbay group did not challenge the appropriateness of legality of the closure of the bank accounts. In April 2016, the Chief Executive Officer of the group wrote to Mr Gordhan regarding the closure of the bank accounts, and the resultant crisis for the group. An appeal was made for any assistance Mr Gordhan might be able to offer. Mr Gordhan advised that there was no legal basis for his intervention in the dispute between the banks and the Oakbay group, and subsequently brought his application as described above.

Four interlocutory matters had to be dealt with at the commencement of the proceedings. The first related to the position of the interested party (President Zuma). The second was an application by the fourteenth respondent for condonation for the late filing of its notice in terms of rule 7 of the Uniform Rules of Court and an application to compel Mr Gordhan to comply with the notice. Finally, the Oakbay group brought two applications to strike out certain material from Mr Gordhan's founding and replying affidavits and Mr Gordhan applied for the striking out of certain material from the Oakbay respondents' answering affidavits.

Held – In filing its answering affidavit to the application for declaratory relief, Standard Bank anticipated that the President might be interested in the proceedings and brought the application to the attention of the President. It did not join him as a party to the proceedings. The State Attorney objected to the irregular procedure in an affidavit filed with the court. It briefed Counsel to appear on behalf of the President at the hearing and sought the striking-off of Standard Bank's application due to non-joinder of the President. The Court held that there was no legal basis for it to hear the President's

Counsel in those circumstances. The President had no standing before the Court and lacked any basis to file papers or address the Court.

In terms of the rule 7 notice filed by the fourteenth respondent, Mr Gordhan was called on to satisfy the court that the State Attorney was properly authorised to act for him in the application for declaratory relief. The Court held that the scope of authority of the State Attorney is set out in section 3 of the State Attorney Act 56 of 1957. Mr Gordhan's application was brought in his official capacity as Minister. Therefore, the State Attorney was acting for the Minister within the scope of the duties set out in section 3 of the State Attorney Act. Any suggestion that the State Attorney was acting *mero motu* or was not authorised to act for the Minister was without merit. The rule 7 notice was clearly vexatious and the fourteenth respondent failed to explain the late filing. The application or condonation was refused.

All the applications to strike out were granted. That led to the withdrawal of the second main application by the Oakbay entities against the Director of the Financial Intelligence Centre. The Court then turned to the first main application.

As in most applications for declaratory relief, the facts are secondary to the questions of law raised.

The basis for the relief sought by the Minister was section 21(1)(c) of the Superior Courts Act 10 of 2013. The exercise of the court's jurisdiction in terms of the section involves a two-legged enquiry. The first leg requires an applicant to establish that he has an interest in an existing, future or contingent right or obligation. If that is satisfied, then the second leg is whether the case is a proper one for the exercise of the court's discretion. *In casu*, the first leg related to whether the Minister was obliged by law to intervene in the dispute between the Oakbay group and the banks. The Court confirmed that there is no statute which empowered the Minister to intervene in a private bank-client dispute. In the second leg of the enquiry, the Court set out the factors to be taken into account in determining whether or not to grant declaratory relief. Those include the existence or not of a dispute; the utility of the relief sought; whether the order would result in a tangible and justifiable advantage to the applicant; considerations of public policy, convenience and justice; the practical significance of the order; and the availability of other remedies. Most of those factors were answered against the granting of declaratory relief to the Minister. The essential point was that the legal position was that there is no statute which empowered the Minister to intervene in a private bank-client dispute. That was his stance throughout, and was what he sought to confirm through a declaratory order. However, the Court held that such an application was unnecessary, and that it was not proper for a Minister to draw the judiciary into the exercise of his executive functions. The application for declaratory relief was thus dismissed.

The parallel application by Standard Bank also could not succeed. The application was fatally defective for failure to comply with rule 6(2) and 6(5). It was unclear who the respondents were in the application as they were not cited therein. A more serious impediment was the non-joinder of the President and members of the National Executive. That was fatal to the application, which was, accordingly, dismissed.

Pienaar Brothers (Pty) Ltd v Commissioner for the South African Revenue Service and another [2017] 4 All SA 175 (GP)

Tax (Income Tax) – Secondary tax on companies – Section 44(9) of the Income Tax Act 58 of 1962 – Retrospective application – Constitutionality – Presumption against the retrospective operation of legislation has to yield to the clear intention of the Legislature – Retrospective laws are permissible in terms of the rule of law.

In March 2007, an amalgamation transaction in terms of section 44 of the Income Tax Act 58 of 1962 ("the Act") was entered into between the applicant and a third party ("the taxpayer"), in terms of which the latter obtained all the assets of the applicant. As part settlement of the purchase consideration the taxpayer issued shares to the applicant at the purchase price less the assumed liabilities ("equity consideration"), which equity consideration less the par value of the shares was credited to the share premium account of the tax payer. On 3 May 2007, the Board of Directors of the taxpayer resolved, in terms of section 90 of the Companies Act 61 of 1973 to make a distribution to its shareholders *pro rata* to their shareholding, of an amount of R29 500 000 out of the tax payer's share premium account. The applicable law on 3 May 2007, in the context of the definition of a "dividend" in section 1 of the Act, meant that a "dividend" excluded from its ambit any amount distributed out of the share premium account (not being profits previously capitalised to the share premium account). It was applicant's submission that as at 3 May 2007 when the distribution was made, the distribution did not constitute a "dividend" as defined in the Act and no secondary tax on companies ("STC") was therefore due and payable by the tax payer on the distribution as the distribution was made out of the share premium account of the tax payer which share premium arose from the issue of ordinary shares at a premium over the par value.

Before the Court, the applicant sought to have section 34(2) of the Taxation Laws Amendment Act 8 of 2007 declared unconstitutional and invalid to the extent that it provided that section 44(9A) of the Income Tax Act should be deemed to have come into operation on 21 February 2007 and to be applicable "to any reduction or redemption of the share capital or share premium of a resultant company, including the acquisition by that company of its shares in terms of section 85 of the Companies Act, on or after that date". In the alternative, the applicant sought a declaration that section 44(9A) of the Act did not apply to the distribution by the applicant on 3 May 2007 – and that the first respondent's assessment of the applicant to secondary tax on companies was invalid.

Held – The present dispute pertained to the liability of the applicant for STC on the distribution. The crux of the applicant's complaint was that it related to the constitutionality of the retrospective amendment in that such retrospective legislation, which *ex post facto* deemed the law at a particular time to be what it was not, offended against the principle of legality and the rule of law which lie at the heart of our constitutional dispensation. Even if the retrospective amendment was not unconstitutional *per se*, the applicant contended, it did not apply to the distribution, either because that transaction was already completed at the time of the amendment or because section 44(9A) was not capable of being applied in a manner that is fair and practically effective in the context of the Act as a whole.

In the context of retrospectivity of legislation, South African case law distinguishes between retrospectivity of legislation in the "weak" and "strong" sense. A statutory

provision is retrospective in the weak sense if it prospectively effects, or changes the consequences for the future of, pre-existing transactions and matters. An enactment is retrospective in the strong sense if the provision is deemed to have been in force from an earlier date than that on which it was in fact enacted.

STC was introduced by section 64B and 64C of the Act. It was the tax on net dividends, that is, on a company's distribution of its profits to its shareholders. It was not meant to tax capital distributions. Section 44 of the Act facilitates amalgamations. Section 44(1) defines an amalgamation as a transaction by which a company (the "amalgamated company") disposes of all of its assets to another company (the "resultant company") as a result of which the amalgamated company is terminated. Section 44(9) catered for amalgamations, such as the applicant's amalgamation, where the resultant company issued shares to the amalgamated company which the latter then distributed to its shareholders as a dividend *in specie*. Such a dividend would ordinarily have attracted STC. Section 44(9), however, exempted it from STC by deeming the distribution not to be a dividend for purposes of STC.

It was clear that the amendment of the Act in 2007 was intended to close a loop-hole which allowed the parties in the circumstances described above to avoid STC that would otherwise have been payable by the amalgamated company on its distributable income. Section 34(1)(c) of the Act, which introduced the amended section 44(9A), gave retrospective effect to the amendment.

The presumption against the retrospective operation of legislation had to yield to the clear intention of the Legislature. In the present case, having regard to the clear and express language of the amendment, it could not be argued that the Legislature intended the amendment to have meaning incompatible with its express and clear language. The Court concluded that the amendment was clear, its purpose was rational and that it applied to all transactions including completed transactions.

An alternative argument by the applicant was that the Taxation Laws Amendment Act was invalid on the grounds of being inconsistent (to the extent of its retrospectivity) with the foundational constitutional value, the rule of law. The applicant's complaint in that regard was that it had been made subject to a retroactive tax assessment subjecting it to a substantial and unexpected STC bill. The Court pointed out that not only do certain statutes affect rights or vested rights retrospectively, but that decisions of courts do so in many cases. The Court was not aware of any authority to the effect that those results would mean that any such statute or decision is unconstitutional *per se*, irrespective of the reason for the adoption of the statute or the facts of a particular case before a court of law, and irrespective of its wording. Although the applicant contended that the rule of law compelled a conclusion that was strongly retrospective, tax statutes should be presumed to be constitutionally invalid, it was not suggested that our constitutional dispensation would never allow the Legislature to expressly introduce retrospective legislative amendments. There could well be exceptional cases where this could be done without attracting constitutional sanction. The touchstone would always be whether the retrospectivity amounts, in the particular circumstances of their case, to a contravention of the rule of law.

The applicant submitted further that to the extent that a warning of retrospective legislation may be potentially relevant as justification for retrospectivity, that warning must self-evidently pertain to the actual amendment that is implemented. It was argued that it does not help to warn of a specific change, and then to implement something

different with retrospective effect as happened in this case. According to the applicant, that was fatal to the validity of the statutory provision. The Court was unaware of any authority or legislative provision that provides that a fairly precise warning need to be given before the Legislature can pass retrospective legislation, whether in general, or in the case of a tax statute. If the tax statute is rationally connected to a legitimate purpose, no precise warning is required.

It was submitted that a foreign law comparison makes it clear that retrospective laws are permissible and indeed common place in countries based on the rule of law. At the same time it was not suggested that Parliament may legislate with retrospective effect as it pleases. The real question was what the standard is by which the constitutional validity of retrospective legislation is judged. This question had to be answered with reference to the standards of review laid down by our courts when the constitutional validity of a statute is challenged. There are two main standards, *viz*, a rationality test, and a reasonableness or proportionality test. If the law limits a fundamental right, the reasonableness standard applies. If the law permits a deprivation of property under section 25(1) of the Constitution, the intermediate standard of sufficient reason applies. If, however, the law does not infringe upon the Bill of Rights, then the question is merely whether it passes muster under section 1(c) of the Constitution, then the basic rationality standard applies.

There is no authority for the proposition that retrospective tax legislation would survive constitutional scrutiny only if there were "good reasons" for it. The only question was whether a legitimate legislative purpose is indicated. In the present case, the government's purpose was to remove the tax exemption in amalgamated transactions. To do so retrospectively was also justified, because there was loss of STC revenue rising from amalgamations which was previously intended to be deferred and not permanently lost. More importantly, there was a general announcement that the intended amendment would remove that loop-hole. That was sufficient. There being nothing in our Constitution which prohibits Parliament from passing retroactive or retrospective legislation, the constitutional attack on the impugned provision had to fail.

An attempt by the applicant to rely on the arbitrary deprivation of property in contravention of section 25 of the Constitution was unsuccessful. The Court rejected the notion that all taxes involve a "deprivation" of property, in the context of section 25.

In the premises, the application was dismissed.

South African Human Rights Commission v Qwelane (Freedom of Expression Institute and another as amici curiae) and a related matter [2017] 4 All SA 234 (GJ)

Constitutional law – Discrimination – Hate speech – What constitutes – Offending words must be based on a prohibited ground as contemplated in section 1 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, or any other ground where discrimination based on that other ground promotes or perpetuates systemic disadvantage, and undermines human dignity, and must be reasonably construed to indicate a clear intention to be hurtful, be harmful or incite harm, or to promote or propagate hatred.

Words and phrases – “discrimination” – Section 1 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 – Refers to any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly imposes burdens, obligations or disadvantage on; or withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds.

Words and phrases – “equality” – Section 1 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 – Refers to the full and equal enjoyment of rights and freedoms as contemplated in the Constitution and includes de jure and de facto equality and also equality in terms of outcomes.

Words and phrases – “harassment” – Section 1 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 – Unwarranted conduct which is persistent or serious and demeans, humiliates or creates a hostile or intimidating environment or is calculated to induce submission by actual or threatened adverse consequences and which is related to sex, gender or sexual orientation, or a person’s membership or presumed membership of a group identified by one or more of the prohibited grounds or a characteristic associated with such groups.

Proceedings were brought in terms of section 10(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (“the Equality Act”) in the Johannesburg Magistrate’s Court (sitting as an Equality Court) by the South African Human Rights Commission (the “Commission”) against Mr Dubula Jonathan Qwelane (“Qwelane”).

Shortly before the Equality Court proceedings were heard, Qwelane, applied in the High Court as applicant there, for the stay of the proceedings, based on his challenge against the constitutionality of section 10(1) read with sections 1, 11 and 12 (the “constitutional challenge”).

The two proceedings were then consolidated for hearing before the present Court.

The source of the complaint against Qwelane was a newspaper article published in his regular newspaper column titled “*Call me names – but gay is not okay*” (the “offending statements”). The Commission stated that the offending statements contravened the provisions of section 10(1) of the Equality Act. In his article, Qwelane expressed his view that homosexuality is wrong. The article was met by a huge public outcry expressing disapproval.

Held – Section 10(1) proscribes the publishing or advocating by any person of “words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to *be hurtful*; *be harmful or to incite harm*; *promote or propagate hatred.*”

Section 9 of the Constitution, which unequivocally entrenches the right to equality where it guarantees everyone the right of equality before the law, as well as the right to equal protection and benefit of the law, makes provision for the enactment of national legislation to prevent or forbid unfair discrimination, and to achieve the objective of an equal society. The envisaged national legislation exists in the form of the Equality Act.

The Equality Court before which proceedings are instituted in terms of or under the Equality Act, must hold an inquiry in the prescribed manner and determine whether unfair discrimination, hate speech or harassment, as the case may be, has taken

place, as alleged. In doing so, the Equality Court, must bear in mind the burden of proof as set out in section 13 of the Act, which provides that, the complainant (in this case, the Commission) must make out a *prima facie* case of discrimination, in which event, the respondent (in this case Qwelane), must prove, on the facts before the court, that the discrimination did not take place as alleged, or that the respondent must prove that the conduct is not based on one or more of the prohibited grounds.

Qwelane disputed that the offending statements were hurtful or caused harm to the Lesbian, Gay, Bisexual, Transgender and Intersex ("LGBTI") community. He, however, claimed entitlement to the publication of the offending statements, with exemption based on his right to freedom of expression as entrenched in section 16 of the Constitution. He, in essence, contended that the offending statements were protected under the Constitution, and therefore did not amount to hate speech, and he could not therefore be held accountable under the equality legislation. Section 16 of the Constitution guarantees the right to freedom of expression.

The Court pointed to the potential tension between the constitutionally entrenched right to freedom of expression and local national legislation or regulation. It is accepted generally that the right to freedom of expression, although indispensable in a democratic society, especially, in a developing democracy like ours, is however, not limitless. It will always depend on the particular circumstances of each case, and having due regard to other entrenched rights, such as the critical rights to human dignity and equality before the law, and the local or national legislation concerned, as well as the interpretational instruments applicable thereto. The question of hate speech is properly addressed in section 16(2) of the Constitution. The section stipulates that the right to freedom of expression, guaranteed in section 16(1), does not in fact extend to the conduct set out in section 16(2), with the result that such conduct is excluded from the purview of the constitutional protection that is otherwise afforded to expressive conduct.

The approach to section 10 of the Equality Act is that the provisions of the section ought to be interpreted having due regard to the necessity of striking the correct and delicate balance between the right to freedom of expression and the right to equality and dignity which the Equality Act aims to protect.

The offending statements uttered by the applicant, when evaluated objectively, in content and context, spoke ill of the gay and lesbian community, and went further by suggesting that the next step for South Africa would be allowing people to marry animals. It can never be acceptable, in the context and content of the equality legislation, and our democratic society, to equate human beings to bestiality or animals, and suggest to them that they are "other" or "unnatural". Gay and lesbian people, constitute a vulnerable group in society, and have been subjected to societal discrimination purely on the ground of sexual orientation. They are a permanent minority in society and have suffered in the past from various patterns of disadvantage. The applicant's conduct was exacerbated by his refusal to apologise.

Section 10 of the Equality Act creates two requirements for hate speech. It must be based on a prohibited ground, as contemplated in section 1of the Act, or any other ground where discrimination based on that other ground promotes or perpetuates systemic disadvantage, and undermines human dignity. And it must be reasonably construed to indicate a clear intention to be hurtful, be harmful or incite harm, or to promote or propagate hatred. The Court concluded that the Commission had

succeeded in making out a case, on a balance of probabilities, that the offending statements amounted to hate speech as contemplated in section 10(1) of the Equality Act.

The final question for determination was whether the constitutional challenges raised by Qwelane were capable of withstanding scrutiny. One of the objections raised was that the hate speech provisions of the Equality Act, in particular, sections 1, 10, 11 and 12, were unconstitutional on the basis that the sections were overbroad and vague. The question should be asked if so construed whether the legislative provision under attack, indicated with reasonable certainty to those bound by it, what was required of them. Reasonable certainty is required, and not perfect lucidity. The Court found no merit in the allegations of vagueness or overbreadth.

The Commission's complaint was upheld and the offending statements were declared to be hurtful; harmful, incite harm and propagate hatred; and amount to hate speech as envisaged in section 10 of the Equality Act. Qwelane was ordered to tender to the LGBTI community (in particular the homosexuals) an unconditional written apology. The constitutional challenge raised by Qwelane was dismissed, and he was ordered to pay the costs of the proceedings.

South African Reserve Bank v Public Protector and others [2017] 4 All SA 269 (GP)

Banking and Finance – South African Reserve Bank – Role of – Section 224 of the Constitution of the Republic of South Africa, 1996 defines the primary object of the South African Reserve Bank as to protect the value of the currency in the interest of balanced and sustainable economic growth in the country.

Constitutional law – Public Protector – Powers of – Prescribing of remedial action that would result in an amendment of section 224 of the Constitution of the Republic of South Africa, 1996 with a view to altering the primary object of the South African Reserve Bank – Decision of Public Protector reviewed and set aside on grounds of overreaching of powers, unconstitutionality, violation of doctrine of separation of powers and procedural unfairness.

The Public Protector is a State institution established by Chapter 9 of the Constitution. The office is constitutionally mandated to protect the public from any conduct in State affairs or in any sphere of government that could result in any impropriety or prejudice. The person occupying the office is required by the governing legislation, the Public Protector Act 23 of 1994 to be "a fit and proper person to hold such office" and to be a Judge or to have substantial experience in the administration of justice or public affairs. Section 182(1) of the Constitution is the primary source of the powers of the Public Protector.

In June 2017, the incumbent Public Protector, acting in terms of section 182(1)(b) of the Constitution, issued a final report into the alleged failure by government in 1999 to recover misappropriated funds paid by the Reserve Bank to Bankorp, a private commercial bank. The final report set out the remedial action to be taken. It ordered the fourth respondent ("the SIU") to re-open earlier investigations into the issue with the aim of recovering the "misappropriated public funds", and instructed the third respondent ("the Chairperson of the portfolio committee") to take certain steps to amend the Constitution to alter the constitutional mandate of the Reserve Bank.

The present application was concerned solely with the remedial action directed at the Chairperson of the portfolio committee requiring him to initiate a process that would result in an amendment of section 224 of the Constitution with a view to altering the primary object of the Reserve Bank. The instruction to amend the constitutionally mandated primary object of the Reserve Bank was received with consternation, and had immediate negative consequences for the economy and investor confidence.

As a result of the immediate economic damage caused by the final report, the Reserve Bank filed the present urgent application to review and set aside the ordering of the remedial action. In the founding affidavit, the Governor of the Reserve Bank maintained that the remedial action was a "gross overreach" that had to be stopped in its tracks so that certainty and predictability about the Reserve Bank's role was affirmed.

Despite initially opposing the application, the Public Protector filed an answering affidavit in which she conceded the merits and consented to all the relief sought. She agreed that her remedial action was unlawful in that only Parliament has the power to amend the Constitution and that she had no power to dictate to Parliament. The Reserve Bank, however, in view of the importance of the matter, requested that the court give full consideration to the issues and to satisfy itself that the order was competent and accorded with the Constitution and the law.

Held – A full ventilation of the issues was necessary in the interests of justice and it would be in the public interest to clarify the nature and scope of the Public Protector's powers and functions.

The report was the consequence of a complaint lodged with the Public Protector's office by the Director of the Institute for Accountability in Southern Africa, a public interest organisation devoted to upholding constitutionalism. The main focus of the complaint appeared to have been the so-called "lifeboat" extended initially by the Reserve Bank to Bankorp some years before the advent of democracy in South Africa in 1994. Although a report commissioned by the government in 1999 alleged impropriety and irregularity in relation to these transactions, no steps were taken by the government or the Reserve Bank to recover the purportedly misappropriated funds. It was therefore alleged in the complaint that the government had failed in its duties by not implementing the 1999 report and sought remedial action directing recovery of the funds from the fifth respondent ("ABSA"). The Public Protector issued a preliminary report, and after receiving further submissions, a final report. The final report did not refer to or discuss the submissions made by the Reserve Bank or any other person in response to the preliminary report and largely restated the analysis and findings of the preliminary report. More importantly, the Public Protector without notice to any affected person broadened the scope of the investigation in the final report by adding a further leg to the investigation which had not been presaged in any way in the preliminary report. She offered no reasons for expanding the scope of the investigation in that manner and did not explain whether it was done at her own instance or at the instance of another interest group.

Section 224 of the Constitution as it currently reads defines the primary object of the South African Reserve Bank as to protect the value of the currency in the interest of balanced and sustainable economic growth in the country. The Reserve Bank is required to perform its functions independently and without fear, favour or prejudice, but there must be regular consultation between the Bank and the Cabinet member

responsible for national financial matters. The Public Protector's amendment, if given effect to would introduce three significant changes. First, the primary object of the Reserve Bank would no longer be to protect the value of the currency but to promote balanced and sustainable growth to ensure the socio-economic well-being of the citizens. Second, the Bank would be required to regularly consult Parliament and not the Minister of Finance. Third, the purpose of any consultation with Parliament would be to achieve meaningful socio-economic transformation. Furthermore, the remedial action removed the primary object of the Reserve Bank to protect the value of the currency without allocating that function to anybody else – leaving the currency unprotected.

On a proper interpretation of the powers of the Public Protector under section 182(1) of the Constitution, the decision of the Public Protector was open to challenge. Section 182(1)(a) gives the Public Protector power to investigate improper conduct in State affairs or in the public administration. Section 182(1)(b) requires the Public Protector to report on "*that*" conduct, that is, the conduct that has been investigated. Section 182(1)(c) empowers the Public Protector to take appropriate remedial action. Interpreted contextually and purposively, the latter provision means that the Public Protector may take such action as is appropriate to remedy the improper conduct she has found to be committed in State affairs or in the public administration. Nothing in the final report reflected that any allegation was made by any person in relation to the Reserve Bank's mandate. Moreover, it was doubtful whether the constitutional definition of the Reserve Bank's primary object could ever constitute maladministration, improper or prejudicial conduct as contemplated in section 182(1) of the Constitution. The remedial action had to be set aside on that ground alone in terms of section 6(2)(a)(i) of the Promotion of Administrative Justice Act 3 of 2000. However, given the importance of the matter and the interest of the financial markets in the resolution of the questions raised, it was necessary for the Court to consider the other grounds of review raised by all the parties.

The Reserve Bank governor, the second respondent (the Speaker of Parliament) and Absa challenged the constitutionality of the remedial action. The Public Protector's order trenched unconstitutionally and irrationally on Parliament's exclusive authority. The enactment of national legislation is within the exclusive constitutional domain of Parliament. Sections 43 and 44 of the Constitution vest legislative authority in Parliament, including the power to amend the Constitution. The Public Protector does not have the power to prescribe to Parliament how to exercise its discretionary legislative powers. Section 224 of the Constitution can only be amended with a supporting vote of at least two-thirds of the members of the National Assembly. The remedial action therefore violated the doctrine of the separation of powers guaranteed by section 1(c) of the Constitution, which principle requires constitutionally established institutions to respect the confines of their own powers and not to intrude into the domain of others. The impugned remedial action could therefore also be reviewed and set aside on that ground.

A further challenge raised by the Reserve Bank governor attacked the rationality and reasonableness of the remedial action. It was pointed out that central banks enjoy autonomy in protecting the value of currency because this form of long-term price stability may, at times, come into conflict with a government's shorter-term goals. In an affidavit filed on behalf of ABSA, an acknowledged expert in economics and finance confirmed that the remedial action was both unscientific and irrational because it

ignored the fact that the central bank is limited to financial markets, and its toolbox of policy variables comprises two interrelated instruments: interest rates and money supply. To change the primary object of the bank to the promotion of balanced and sustainable economic growth would require a central bank to have control over an array of additional policy variables. In her answering affidavit, the Public Protector did not engage with those criticisms, but maintained that the remedial action was reasonable and rational. Finding the criticisms of the remedial action to be well-founded, the Court held that the remedial action should be reviewed and set aside under section 6(2)(f)(ii) and section 6(2)(h) of the Promotion of Administrative Justice Act.

Finally, the remedial action also had to be reviewed and set aside under section 6(2)(c) of the latter Act on the ground that it was procedurally unfair insofar as the scope of the investigation and the remedial action was extended by the Public Protector without notice being given to any person likely to be affected.

END-FOR NOW