LEGAL NOTES VOL 11/2017

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EDITORIAL

The Big Five Aspects Scale

What You Do and Why You Do It:

As lawyers we need to be open-minded. Lawyers like the *status quo* and lawyers like to look after vested interests. Perhaps it is time to look again at how objective you are. I recently had a look at "The Big Five Aspect Scale" which is a measure, which is scored, so that you will receive information about five major personality traits. If you want more information about this go to https://www.understandmyself.com/personality-assessment.

The five-dimensional descriptions are:

1.Enthusiasm (spontaneous joy and engagement) and Assertiveness (social dominance, often verbal in nature) for Extraversion.

Are you enthusiastic about life? Or are you always complaining?

2.Withdrawal (the tendency to avoid in the face of uncertainty) and Volatility (the tendency to become irritable and upset when things go wrong) for Neuroticism.

Do you get upset easily? Do you avoid situations where your opinion or vote, for that matter, is needed? You might be a chairperson whose vote is needed yet you do not

[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!**

vote because you have the casting vote in the event of a tie? But have you thought of this: If 6 voters (including yourself) are on the panel and you do not vote, that means 5 are voting, 3 for the proposal you do not support, too bad for you, you will not be able to exercise your casting vote.

3.Compassion (the tendency to empathically experience the emotion of others) and Politeness (the proclivity to abide by interpersonal norms) for Agreeableness.

Is it necessary to become personal or insulting when you differ from people? Does making a point need to be sarcastic or can pure reasoning do the job? Oh, how we all fail on this! But if you consistently fail on this then you are in the wrong profession.

What do you understand about agreeableness? Judge Daniels once remarked: When I give a judgment that is not in your favour, do not curse and get cross, wait three weeks, then you might agree with me!

4.Industriousness (the ability to engage in sustained, goal-directed effort) and Orderliness (the tendency to schedule, organize and systematize) for Conscientiousness.

How good are you when it comes to goals? Do you make an effort to read something new?

5.Openness (creativity and aesthetic sensitivity) and Intellect (interest in abstract concepts and ideas) for Openness to Experience.

Openness include the willingness to talk!

At the end of the show the clown goes home.
Matthew

SOUTH AFRICAN LAW REPORTS NOVEMBER 2017

GENESIS MEDICAL AID SCHEME v REGISTRAR, MEDICAL SCHEMES AND ANOTHER 2017 (6) SA 1 (CC)

Medicine — Medical aid — Medical aid scheme — Contributions — All contributions, including funds allocated to members' personal medical savings accounts (PMSAs), constituting assets of scheme — Scheme may retain interest accruing to PMSAs — Medical Schemes Act 131 of 1998, s 35(9)(c).

Administrative law — Administrative action — Review — Grounds — Action materially influenced by error of law — Position if error only subsequently established — Materiality of error — Promotion of Administrative Justice Act 3 of 2000, s 6(2)(d).

In 2012 the Registrar of Medical Schemes rejected Genesis Medical Scheme's annual financial statements because they (i) classified funds in its members' personal medical savings accounts (PMSAs) as assets; and (ii) excluded the interest accumulated on PMSAs from its liabilities. Genesis's approach was contrary to the decision in *Registrar of Medical Schemes v Ledwaba NO and Others* [2007]

ZAGPHC 24 (TPD 18454/06) (the *Omnihealth* case), which held that PMSA funds constituted trust property that was protected from an insolvent scheme's creditors. To clarify its position in the wake of *Omnihealth*, the Registrar issued two circulars stipulating the form which medical schemes' financial statements had to take. Genesis's statements did not comply with the circulars.
Genesis brought a High Court application for the review of the Registrar's decision. It was based on the assertion that, since *Omnihealth* was wrongly decided, the Registrar's rejection of Genesis' financial statements was materially influenced by an error of law. The High Court agreed and set aside the Registrar's decision. The Supreme Court of Appeal upheld an appeal by the Registrar, thereby effectively restoring his decision. Genesis then launched the present application for leave to appeal to the Constitutional Court. The Constitutional Court granted leave and upheld the appeal. It delivered four judgments: a majority judgment by Cameron(the first judgment); a concurring majority judgment by Zondo(the fourth judgment); a dissenting judgment by Jafta(the second judgment); and a dissenting judgment by Mojapelo AJ (the third judgment).
Atthe heart of the matter were the following statutory provisions:

- Section 6(2)*(d)* of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), which allows courts to review administrative actions that were materially influenced by errors of law.
- The Medical Schemes Act 131 of 1998 (the MSA), which (in s 1) defines the'business of a medical scheme' as the undertaking of liabilities in return for premiums or contributions and then (in s 35(9)*(c)*) provides that PMSAs constitute such liabilities.
- The Financial Institutions (Protection of Funds) Act 28 of 2001 (the FIA), which in s 1 defines 'trust property' as assets invested, controlled, administered or alienated by one person for or on behalf of another person.

Majorityjudgment per Cameron J
There were two issues at stake: (i) was Genesis the rights-holder of the PMSAs or did it hold them in trust; and (ii) could Genesis claim the interest earned on them? The Registrar rejected Genesis's financials solely on the basis of *Omnihealth*, which was therefore 'material' to his decision, so that if *Omnihealth* was wrong, the decision was also wrong (see [10], [22], [46]).
For members' contributions to be 'trust property' under the FIA, a scheme had to hold a member's contributions 'for or on behalf of' that member as principal, ie the contributions had to enter the scheme's bank account impressed with a fiduciary obligation (see [33]). Yet the MSA's definition of the 'business of a medical scheme' did not contemplate a trust or fiduciary obligation, but the undertaking of liability in exchange for money (see [26]). The relationship was commercial, and the members' premiums entered the scheme's bank account without being impressed by a trust or fiduciary obligation (see [34], [37]).
This view was reinforced by s 35(3) of the MSA, which required schemes to maintain solvency margins (see [6], [16], [39] – [40]). If PMSAs were trust funds to be excluded as assets for all purposes, this would require a scheme to obtain — contrary to logic and accounting practice — outside, non-PMSA assets to offset them (see [41] – [42]).
Hence the language, logic and practical sense of the MSA negated the notion that a medical scheme ordinarily held PMSA funds as a trustee for its members (see [44]). It followed that s 35(9)*(c)* entailed that Genesis, not its members, was the rights-

holder of the PMSA funds, and that Genesis could keep the interest earned on PMSA funds (see [44], [52]).
As *Ominhealth* tumbled, so did the Registrar's decision, and with it also the circulars (see [62]). It followed that the order of the SCA had to be reversed (see [65]).
Dissenting judgment per Jafta J
The error of law relied on by Genesis had to arise from the misinterpretation or misapplication of MSA provisions by the Registrar that related to the submission of annual financial statements (see [93]). Since *Omnihealth* was good law when the Registrar decided to reject Genesis's financial statements, he committed no error of law, and even if he did, it could not have influenced the rejection of the financial statements in amaterial way as required by s 6(2)*(d)* of PAJA (see [95], [103]). And even if the error was material, the circulars were binding on medical schemes until set aside on review, which was never sought by Genesis. Hence the appeal had to be dismissed. **Dissenting judgment per Mojapelo AJ**
A trust relationship was created when a medical scheme created and allocated funds to a PMSA of a particular member, whereupon the scheme became the holder of the funds as 'trust property' as contemplated in the FIA (see [147]). The perceived accounting problem arising from this was resolved by experts in the field and the circulars and conduct of the Registrar were based on their guidance (see [150]). There was no confusion and no need for the medical scheme to raise additional funds to cover the PMSA liability (see [152]). After *Omnihealth* medical scheme members were afforded a layer of protection that the court should not remove without access to proper facts.For these additional reasons, the appeal should be dismissed.
Majority judgment per Zondo J
Affidavits revealed that the parties approached the High Court on the basis that if *Omnihealth* was wrong, the Registrar's decision was materially influenced by an error of law and voidable (see [163] – [164]). Courts were required to decide cases on the basis of the issues between the parties, and materiality grounds not relied on by the Registrar could not be used to decide the present matter; and if a litigant was permitted to engage in trial by ambush, neither could the court. And if *Omnihealth* was wrong, then the legal foundation for the circulars was gone (see [173] – [178]). For these additional reasons, the appeal should be upheld

KLD RESIDENTIAL CC v EMPIRE EARTH INVESTMENTS 17 (PTY) LTD 2017 (6) SA 55 (SCA)

Evidence — Privilege — Legal professional privilege — Scope — Without prejudice rule — Exceptions — Acknowledgment of liability made in settlement offer admissible in evidence for limited purpose of interrupting prescription — Prescription Act 68 of 1969, s 14.

Evidence — Admissibility — Without prejudice rule — Scope — Exceptions — Acknowledgment of liability made in settlement offer admissible in evidence for limited purpose of interrupting prescription — Prescription Act 68 of 1969, s 14.

Prescription — Extinctive prescription — Interruption — By acknowledgment of liability— Without prejudice communications — Acknowledgment of liability made in settlement offer admissible in evidence for limited purpose of interrupting prescription — Prescription Act 68 of 1969, s 14.

The without prejudice rule, a part of South African law, provided that, generally speaking, statements, including admissions of liability, made in an attempt to settle litigation between parties, were inadmissible in subsequent litigation between them. The sole issue in the present matter was whether our law should recognise an exception to such rule, such that an acknowledgment of liability made in a settlement offer by a debtor, and thus 'without prejudice', may nonetheless be admitted in evidence for the limited purpose of interrupting prescription within the meaning of s 14 of the Prescription Act 68 of 1969. This was an appeal against the court a quo's * refusal to recognise such an exception on the grounds that there was no compelling reason of public policy to limit the protection afforded by the rule in the manner sought.
In approaching the question in issue, the SCA recognised that there were competing policy considerations involved (see [3]). On the one hand, there was the policy underlying the without prejudice rule, ie that it was in the public interest that parties to disputes should be encouraged to avoid litigation, which usually entailed expense, delay, hostility and inconvenience, by resolving their disputes amicably in frank discussions without the fear that if negotiations failed, admissions made by them in the course of negotiating may be used against them subsequently (see [8] and [19]).On the other hand, there was the policy underlying s 14 of the Prescription Act. One of the principal reasons for extinctive prescription was to provide certainty to a debtor. However, where the debtor acknowledged liability, thereby removing any uncertainty, the reasons for providing the protection of the prescription period fell away. Hence s 14. It aimed at protecting the creditor, and recognised that it was in the public interest that a debtor who acknowledged his or her debt, and so induced the creditor not to have immediate resort to litigation, should not be able to claim that his or her debt had prescribed because the creditor held his or her hand.
The SCA, in arriving at its conclusion, sought to achieve a balance between the public interests concerned.
Held, that the exception should be recognised. It properly served the policy interests underlying both s 14 of the Prescription Act and the without prejudice rule. The exception allowed for the prevention of the abuse of the without prejudice rule, and ensured the protection of a creditor. The admission remained protected insofar as proving the existence and the quantum of the debt concerned. This exception however was not absolute and would depend on the facts of each matter. And there was nothing to prevent the parties from expressly or impliedly ousting it in their discussions.
Appeal accordingly upheld.
Schippers AJA, dissenting, *held*, that the exception as contended for could not be recognised as it would contradict the public policy and contractual foundations of the without prejudice rule, and was at odds with the rationale as expounded in South African and English case law.

PA PEARSON (PTY) LTD v ETHEKWINI MUNICIPALITY AND OTHERS 2017 (6) SA 82 (SCA)

Local authority — Rates — Credit-control and debt-collection measures — Right of municipality to transfer credits between accounts — Single accountholder in respect of accounts associated with properties A and— Properties having different owners — Municipality demanding payment of outstanding rates on property A from its owner when account holder failing to pay — Right to do so where municipality having

previously transferred credits from account for property A to account for property B, with effect that contingent liability of owner of property A increased — Municipality entitled to claim from owner of property A increased balance owed — Local Government: Municipal Systems Act 32 of 2000, s 102(1)(b) and s 118(3).

The appellant was the owner of property A. Another party, the occupant, was the account holder in respect of the supply of utilities and municipal services to such property. Such occupant also held an account in respect property owned by another party. When this account holder failed to pay outstanding rates on property A, the Municipality with jurisdiction demanded payment of such debt from the appellant based on its right in terms of s 118(3) of the Local Government: Municipal Systems Act 32 of 2000 to hold a property as security for charges levied against it. The appellant paid, but under protest. It disputed its liability to pay a portion of such amount. Previously the Municipality, acting in terms of s 102(1)*(b)* of the Act, had credited payments by the occupant totalling R1,4 million in respect of the account for property A to the occupant's other account in respect of property B. The effect of this was to increase the appellant's contingent liability, and to decrease that of the owner of B. Owing to the unfairness of such result, the appellant instituted proceedings in the court a quo for payment from the Municipality of R1,4 million, arguing that the latter had unlawfully exercised its statutory powers. The appellant appealed to the SCA when the court a quo refused its application.
The issue to be resolved was whether the conduct of the Municipality in seeking payment from the appellant of the outstanding balance on the property A account was rendered unlawful by the Municipality's prior exercise of its right in terms of s 102(1)*(b)* of the Act to transfer credits from the property A account to the property account, bearing in mind the unfair consequences to the appellant. The SCA found that it was not. It held that s 102(1)*(b)* of the Act, as well as the credit-control and debt-collection policy implemented in terms of the Act, authorised the Municipality to credit payments of an account holder in respect of one of its accounts to another. Further, in terms of s 118(3) of the Act and the policy, the owner of a property bore liability for payment of debts owing on its property. The amount paid by the appellant was the amount owing on its property. The fact that that amount would have been reduced if the Municipality had not transferred credits could have no bearing on the lawfulness of the Municipality's subsequent conduct in seeking payment of the increased balance owing on property A from the appellant. The court accordingly dismissed the appeal.

MULAUDZI v OLD MUTUAL LIFE ASSURANCE CO (SOUTH AFRICA) LTD AND OTHERS 2017 (6) SA 90 (SCA)

Judge — Recusal — When required — Litigant's attorney is judge's attorney.

Keyfacts in this case were as follows:
- Mr Mulaudzi invested a sum in an Old Mutual * bond policy;
- He later ceded his rights in the policy to Nedbank Ltd, and Nedbank requested Old Mutual to endorse the policy to this effect. It failed to do so.
- Years later, on the policy's maturity, Mulaudzi requested to be paid, and Old Mutual duly did so, into a nominated bank account.

• Shortly thereafter Nedbank requested payment and Old Mutual realised its error. It then reported the matter to the police and the National Director of Public Prosecutions obtained a provisional restraining order over Mulaudzi's property from the Western Cape Division of the High Court (Weinkove AJ). The order was coupled with a rule nisi, and Mulaudzi anticipated the rule's return date, and obtained the order's discharge (Hlophe JP). This caused the National Director and Old Mutual to seek and receive leave to appeal to the Supreme Court of Appeal (SCA).

• Separately, shortly after Hlophe JP discharged the restraining order, Old Mutual obtained an order in the Gauteng Division (De Vos J) that Mulaudzi pay it the policy sum, and pending payment be restrained from dealing with certain of his investments. Mulaudzi then obtained De Vos J's leave to appeal to the SCA; gave the SCA's registrar his notice of appeal; but failed to lodge the record within three months, causing the appeal to lapse. Eleven months after giving notice he delivered the record, along with an application for condonation and reinstatement of the appeal.

• Thereafter, Mulaudzi's estate was sequestrated.

The issues were:

• Whether the trustees of Mulaudzi's estate should be substituted for Mulaudzi in each appeal. *Held*, that they should be.

• Whether Mulaudzi should be permitted to intervene in each appeal. *Held*, that he should be: he had an interest in the estate's value, and the appeals might affect this; and where trustees did not act in a matter concerning an estate (here they abided the court's decisions), the insolvent could do so.

• Whether Mulaudzi's failure to lodge the record in time could be condoned. *Held*, that it could not be: the delay was unreasonable, its explanation unsatisfactory, and the appeal's prospects of success nil. Condonation would also prejudice Old Mutual and the administration of justice.

• Whether there was a reasonable apprehension that Hlophe JP was biased. *Held*, that there was. It arose from the following:

(i) Mulaudzi's attorney, Mr Xulu, was Hlophe's longstanding attorney, and was currently representing Hlophe in disciplinary proceedings (see [49] – [50]);

(ii) Hlophe was not a duty judge on the return day, yet assigned himself the matter (see [60]);

(iii) Both the National Director and Old Mutual submitted papers to Hlophe on the return day (the National Director's opposing discharge; Old Mutual's in support of its intervention), yet without reading them, Hlophe discharged the restraint order, and dismissed the application (see [44] and [60]);

(iv) Hlophe's later written reasons were only six pages long (see [61]);

(v) His findings in support of discharge were untenable (see [62] and [64] – [65]); and

(vi) He misapplied the relevant principles in denying leave to intervene (see [66] – [67]).

• The effects of the finding. *Held*, that the proceedings before Hlophe JP were a nullity, and fell to be set aside retrospectively. This meant the provisional restraining order revived, and that the property subject to the restraint was excluded from the insolvent estate of Mulaudzi (see [68], [70] and [72]).

Mulaudzi's application for condonation and reinstatement dismissed. The National Director and Old Mutual's appeal upheld; Hlophe JP's order set aside; and the rule nisi extended until confirmed or discharged.

ORGANISASIE VIR GODSDIENSTE-ONDERRIG EN DEMOKRASIE v LAERSKOOL RANDHART AND OTHERS 2017 (6) SA 129 (GJ)

Constitutional law — Human rights — Right to freedom of religion — Religious observances in public schools — Public schools holding out that they adhered to single religion — Offending right to freedom of religion and conscience for public school to do so — Order granted declaring that conduct offending s 7 of Schools Act — Constitution, s 15(1) and (2); South African Schools Act 84 of 1996, s 7.

Constitutional law — Human rights — Right to freedom of religion — Religious observances in public schools — Application for orders declaring as unconstitutional range of religious practices by public schools, as well as interdictory relief in respect of certain schools — Principle of subsidiarity applied — Applicant obliged to rely either on breach of subsidiary laws or on unconstitutionality of subsidiary laws, as opposed to directly invoking constitutional right to freedom of religion.

The applicant, 'Organisasie vir Godsdienste-Onderrig en Demokrasie', was a voluntary association which assisted learners and parents of learners at public schools when those schools violated the learners' constitutional rights. In the High Court it sought an order declaring as unconstitutional and a breach of the National Religion Policy a range of practices adopted at public schools. These included a public school's promoting, and associating itself with, one particular religion (Christian in this instance) to the exclusion of others; requiring of a learner to disclose adherence to any particular religion; and permitting religious observances during school programmes on the basis that a learner may elect to opt out. The applicant in the same order also sought interdictory relief against six specified public schools (who appeared as respondents) located in the Western Cape and Gauteng provinces, prohibiting them from taking part in the abovementioned conduct.
Apart from its argument based on a contravention of the National Religion Policy, the applicant's central submission was that s 15(1) of the Constitution — which ensured everyone the right to freedom of conscience, religion, thought and opinion — prohibited the adoption by a public school of any religion at all. The respondent schools argued that the conduct complained of was justified on the basis of s 15(2) of the Constitution, which permitted the conducting of 'religious observances' at public schools provided they followed 'rules issued by the governing body', were conducted 'on an equitable basis', and that 'attendance at them by learners and members of staff [was] free and voluntary'. However, the applicant responded that, since it offended s 15(1) of the Constitution for a public school to adopt any religion(s), the adjective 'equitable' could never justify the adoption by the school of a single religion. Further, the notion of 'free and voluntary', the applicant submitted, also proscribed indirect coercion: a learner's right to freedom of religion would as such be infringed were they simply asked to indicate whether they subscribed to a particular faith, and where they were given the option to opt out of attending religious observances. Finally, as to 'religious observances', the applicant argued that the framers of the Constitution, by using the word 'at' as opposed to 'by', intended to merely permit someone else, and not the public school itself, to conduct religious observances at the school.
Held, that, by virtue of the *principle of subsidiarity* (see [26]), the applicant could not directly invoke s 15 of the Constitution for its cause of action in circumstances where legislation had been enacted giving effect to such right. (Those laws are set out in [27] – [48].) In framing its cause of action, the applicant had to rely either on a breach

of the applicable subsidiary laws — in this case the rules of the relevant school governing bodies dealing with religious observances — or the unconstitutionality of such laws (see [55]). The applicant had done neither (see [56]). At the same time, the applicant could not directly rely on the National Religion Policy. As was clear from the policy itself, it was never intended to constitute law directly enforceable against public schools. Rather, it was intended merely to establish broad parameters within which people of goodwill could work out common ground. (See [52] – [54].) The court accordingly could not grant the relief in the form the applicant sought (see [70] and [77]).
Held, however, that a declaratory order was appropriate in respect of the practice of a public school's holding out that it adhered to one particular religion to the exclusion of others (see [78] and [97]). Such conduct, even in circumstances where 100% of the school feeder community subscribed to the endorsed faith, could not be allowed (see [79] and [92]). The Constitution, in its preamble, and s 31, recognised the *diversity* of society, and case law emphasised the need to celebrate such diversity. Specific rights were conferred and dealt with in pursuance of that principle. Public schools, as public assets serving the interests of society as a whole, had to respect such diversity. Further, neither the Constitution in s 15, nor the South African Schools Act 84 of 1996 in s 7 (which largely mirrored that of s 15(2)), conferred on public schools the right to adopt the ethos of a single religion to the exclusion of others. Rather, the Constitution and the various subsidiary laws provided for appropriately representative bodies that were required to make rules that provided for religious policies and for religious observances to be conducted on a 'free and voluntary' and an 'equitable' basis. And, this requirement of equity demanded the state act even-handedly in relation to different religions. (See [82] – [92].)
Held, that it was appropriate for the court, in terms of its powers accorded to it in terms of s 172(1)*(b)* of the Constitution, to declare that it offended s 7 of the Schools Act for a public school, one, to promote or allow its staff to promote that it, as a public school, adhered to only one or predominantly only one religion to the exclusion of others; and, two, to hold out that it promoted the interests of any one religion in favour of others. The remainder of the relief was refused. (See [97] and [100] – [102].)

NCP CHLORCHEM (PTY) LTD v NATIONAL ENERGY REGULATOR AND OTHERS 2017 (6) SA 158 (GJ)

Electricity — National Energy Regulator — Dispute resolution — Not constituting administrative action regulated by Promotion of Administrative Justice Act 3 of 2000 — But decision subject to review under principle of legality — Decision to be lawful and rational — Electricity Regulation Act 4 of 2006, s 30.

Electricity — Supply — Price — Industrial consumer directly supplied by Eskom — Not subject to municipal tariff — Eskom to contract directly with consumer — Constitution, s 156(1)(a) and sch 4 part B.

Electricity— Supply — By municipality — Municipalities not having monopoly on electricity supply, merely right to set up and administer grids within their areas — If consumer obtains electricity directly from Eskom, then Eskom to contract directly with consumer — Constitution, s 156(1)(a) and sch 4 part B.

NCP, the country's largest producer of liquefied chlorine used in water purification, drew its electricity directly from Eskom but was charged the 50% more expensive municipal (or 'retail') rate by the Ekurhuleni municipality. Dissatisfied, NCP called on the first respondent (Nersa) to exercise its dispute-resolution powers under s 30 of the Electricity Regulation Act 4 of 2006 (ERA), arguing that it should be allowed to contract directly with Eskom. Nersa ruled that NCP should pay Ekurhuleni the Eskom rate plus 24%. It was common cause that NCP built and paid for the substation that connected it to the Eskom grid and that Ekurhuleni's only involvement was in the metering and billing of the electricity supplied to NCP.
NPC challenged Nersa's decision on review. It asked the Johannesburg High Court for an order directing Eskom to supply it with electricity at the Eskom rate. Ekurhuleni and Nersa argued that since s 156(1)*(a)* read with part of sch 4 of the Constitution made electricity reticulation a local government matter, municipalities had exclusive power to supply electricity within their jurisdictions.
Held
When Nersa exercised its dispute-resolution power under s 30 of ERA, its decision was not administrative action subject to review under the Promotion of Administrative Justice Act 3 of 2000 (see [17]). But it was nevertheless an exercise of public power that was reviewable under the principle of legality (see [18]). As an organ of state, Nersa was obliged to conduct itself in a fair, transparent and accountable manner, and since admitted flaws in the dispute-resolution process had resulted in procedural unfairness, its decision fell to be set aside on review (see [19]). The court would, given the lack of consensus between NCP and Ekurhuleni, and Ekurhuleni's opposition to the remittal of the matter, take the exceptional step of substituting its own decision for that of Nersa (see [26]).
Eskom was, in view of the common-cause facts, obliged to supply NCP with electricity on application (see [44]). No Act of Parliament gave municipalities the exclusive right to supply electricity to consumers within their area of jurisdiction, and s 156(1)*(a)* read with part of sch 4 of the Constitution meant no more than that a municipality was entitled to set up and administer its own electricity distribution network (see [44] – [46], [48]). There was no reason why NCP should pay Ekurhuleni a substantial surcharge for electricity it did not provide (see [47]). The direct transfer of electricity from an Eskom substation to an end user was not 'reticulation' in the sense of the creation of a network, and it accordingly fell outside sch 4 of the Constitution (see [48]). This would accord with a purposive interpretation that excluded large-scale (industrial or mining) consumers from its ambit. Such customers were not appropriately served by municipalities (see [48] – [50]). Hence Nersa's finding that Ekurhuleni had exclusive power to provide electricity to consumers in its area of jurisdiction was wrong (see [51]). Ekurhuleni's conduct in defending the Nersa decision when Nersa itself accepted that it was flawed justified a punitive costs order against it.

BELWANA v MEC FOR EDUCATION, EASTERN CAPE AND ANOTHER 2017 (6) SA 182 (ECB)

Administrative law — Access to information — Access to information held by public body — Request — Refusal — Whether justified — Applicant failing to make short list of candidates to be interviewed for position in Department of Education for which she applied — Requesting information on short-listing meetings of school governing body and deliberations of interview panel — Not entitled to information about process of

which she was not part — Request 'manifestly frivolous or vexatious' and application dismissed — Promotion of Access to Information Act 2 of 2000, s 45.

Administrative law — Access to information — Generally — PAIA giving effect to constitutional right to access to information by entitling a person to any information about him or her — Applicant not entitled to information about process of which she was not part.

Ms Belwana and Ms Langeveldt were educators in the employ of the Eastern Cape Department of Education (the Department). Both unsuccessfully applied for certain posts within the Department. Acting in terms of the Promotion of Access to Information Act 2 of 2000, they made requests to the Department for information held by it in respect of their unsuccessful job applications. Their requests were refused, and their internal appeals failed. In the present consolidated proceedings in the High Court, each applicant sought an order in terms of PAIA directing the Department to furnish them with the information sought.

The appointment procedure for the school posts applied for by both Ms Belwana and Ms Langeveldt involved a short-listing process, such that only applicants who had been short-listed on the basis of their meeting certain criteria could expect to be interviewed by the relevant school governing body. Ms Belwana in her request for information sought the minutes of the short-listing meeting of the governing body of the school concerned, and the deliberations, minutes and score sheets of the panel charged with interviewing the short-listed candidates. Ms Langeveldt similarly sought information pertaining to the short-listing and interview processes in respect of the post she applied for. A key distinction between the applications was that Ms Belwana had *failed to make the short list* of candidates — her application was rejected from the outset — whereas Ms Langeveldt had been short-listed and interviewed. In respect of Ms Langeveldt, the court largely granted the order requested. * However, the court rejected Ms Belwana's application, finding that the Department was entitled to refuse the request on the basis of s 45 of PAIA, as it was 'manifestly frivolous or vexatious'. The court reasoned as follows.

Held, that, bearing in mind that Ms Belwana was not short-listed, the information which she sought did not relate to her as a requester. She requested information pertaining to interviews from which she had already been excluded, and meetings in which she was not the subject of discussion. There was no valid reason why she should be entitled to information regarding a process of which she was not part. (See [33] – [34].) PAIA sought to give effect to the constitutional right to access to information by entitling a person to any information *about him or her* held by a state department. (See [5] – [6], [31] and [36].)

Held, further, that, given that Ms Belwana had not distinguished her position in any way from the other candidates who were unsuccessful from the outset, to provide her with the minutes of a short-listing meeting would likely open up the floodgates and create expectations from all the other unsuccessful applicants in this matter, and further afield, to be provided with the same information. This could not possibly be the purpose of PAIA. To allow such a request would not only give effect to frivolous and/or vexatious demands brought under a guise of legitimacy, but the work involved in processing such requests or orders would no doubt result in a substantial and unreasonable diversion of resources as envisaged in s 45 of PAIA. (See [36] – [37].)

Held, accordingly, that the application was manifestly frivolous and vexatious and fell to be dismissed.

SOUTH AFRICAN RESERVE BANK v PUBLIC PROTECTOR AND OTHERS 2017 (6) SA 198 (GP)

Constitutional law — Chapter 9 institutions — Public Protector — Powers — Ambit — Public Protector issuing remedial action directing Parliament to amend Constitution to change mandate of Reserve Bank — Proposed remedial action contrary to doctrine of separation of powers and unconstitutional— Set aside — Constitution, s 182 and s 224.

Banking — Reserve Bank — Independence and mandate confirmed — Attempt by Public Protector to instruct Parliament to amend primary object of Reserve Bank from currency protection to economic growth ruled unconstitutional and set aside on review — Constitution, s 182 and s 224.

On 19 June 2017 the Public Protector, acting in terms of s 182(1)*(b)* of the Constitution, issued a final report on the government's alleged failure to recover funds used in an apartheid-era Reserve Bank bailout of a commercial bank (Bankorp). Paragraph 7.2 of the report, the subject of the present review, instructed Parliament to amend s 224 of the Constitution by altering the constitutional mandate of the Reserve Bank from currency protection (in consultation with the Minister of Finance), to the promotion of 'balanced economic growth' (in consultation with Parliament).

The report was badly received by financial markets and caused an immediate drop in the value of the rand. To contain the damage, the Reserve Bank launched the present urgent application for the setting-aside of the report. The Public Protector, the Speaker of Parliament, the Chairperson of the Portfolio Committee, and Absa Bank were cited as first, second, third and fifth respondents, respectively. The Reserve Bank argued that para 7.2 was a 'gross overreach' which had to be overturned to bring certainty to the Reserve Bank's role.

Despite initially opposing the application, the Public Protector subsequently conceded the merits and consented to all the relief sought. She agreed that her remedial action was unlawful, that only Parliament had the power to amend the Constitution, and that she has no power to dictate to Parliament. She conceded error only in respect of the constitutionality issue, holding firm to her views on the Reserve Bank's mandate and the rationality of the remedial action.

Held

Paragraph 7.2 trenched on Parliament's exclusive authority and violated the doctrine of the separation of powers in s 1*(c)* of the Constitution (see [43] – [44]). It also encroached on the national executive's prerogative to set economic policy (see [45]). Paragraph 7.2 should, therefore, be set aside for violating the doctrine of the separation of powers and for being unconstitutional (see [46]).

The remedial action was, in addition, irrational in relation to its stated purpose of securing socioeconomic progress for the poor because it would, on the uncontested evidence, result instead in impoverishment (see [49] – [52]). Moreover, the superficial reasoning and erroneous views on the Reserve Bank's mandate contained in the Public Protector's answering affidavit did not bear scrutiny on any reasonable basis (see [56] – [57]). The remedial action had to be set aside for both irrationality and unreasonableness (see [57]).

Since the Public Protector failed to disclose beforehand that she intended to amend the primary object of the Reserve Bank, the remedial action also had to be set aside on the basis of procedural unfairness (see [58]).

The court closed by pointing out that the Public Protector, as the constitutionally appointed custodian of legality and due process in the public administration, risked damaging her reputation and legitimacy by adopting a dismissive and procedurally unfair approach to important matters placed before her. She would do well to reflect on her conduct of the present investigation and the criticism of her by the Governor of the Reserve Bank and the Speaker of Parliament (see [59]).

PASSENGER RAIL AGENCY OF SOUTH AFRICA v SWIFAMBO RAIL AGENCY (PTY) LTD 2017 (6) SA 223 (GJ)

Government procurement — Procurement process — Irregularities — Where invalidating award — Appropriate remedy where invalid contract partially completed — Factors to consider — Innocence of tenderer — Whether tenderer involved in fronting practice — Broad-Based Black Economic Empowerment Act 53 of 2003, s 1 sv 'fronting practice'.

Government procurement — Procurement process — Irregularities — Fronting — What constitutes — Broad-Based Black Economic Empowerment Act 53 of 2003, s 1 sv 'fronting practice'.

The applicant (Prasa) had applied, inter alia, for the review and setting-aside of its own decisions awarding and subsequently entering into a contract with the respondent, Swifambo Rail Agency (Pty) Ltd (Swifambo), for the supply of locomotives. Swifambo sourced these from the manufucturer, Vossloh AG, a German company. The court agreed with Prasa that the decisions to award and enter into the contract was tainted by corruption, fraud and other irregularities, that it was therefore unlawful, and declared it invalid.

When, as in this case, an invalid contract has already been partly implemented, a court may consider a number of factors in exercising its discretion (under s 8 of the Promotion of Administrative Justice Act 3 of 2000 and s 172 of the Constitution) to order an appropriate, 'just and equitable' remedy. One of these was whether the tenderer was innocent (see [88]). In support of its opposition to Prasa's prayer to have the contract set aside ab initio, Swifambo claimed that such a remedy would not be 'appropriate, just and equitable in the circumstances' because, inter alia, it was an innocent tenderer. Prasa alleged that Swifambo was not an innocent tenderer because, inter alia, the contractual arrangement between Swifambo and Vossloh constituted a 'fronting practice' as defined in s 1 of the Broad-Based Black Economic Empowerment Act 53 of 2003 (the B-BBEE Act).*Swifambo however insisted that the arrangement was consistent with the B-BBEE Act because it was not a case of a third party exploiting a black individual to gain an opportunity, to the black individual's prejudice.

Held

The definition of 'fronting practice' did not require exploitation of the relevant B-BBEE entity, nor misrepresentation of the true nature of the arrangement to the organ of state or public entity concerned. Fronting practices existed where organs of state and public entities or individuals within their ranks conspired or colluded in such conduct. The definition only required an arrangement that undermined or frustrated the achievement of the objectives of the B-BBEE Act or the implementation of its provisions. (See [108] – [109], [111] and [114].)

It was clear from a proper analysis of the agreement between Swifambo and Vossloh that it amounted to fronting. Their relationship met the broader definition under the B-

BBEE Act. The public had a clear interest in the social and economic rights sought to be given effect to in the B-BBEE Act. At the core of B-BBEE was viable and effective participation in the economy through the ownership of productive assets and the development of advanced skills. Here, there was no transfer of skills during the agreement or after; no substantive empowerment was evident. Their arrangement undermined and frustrated substantive empowerment, exploiting the intended beneficiaries— 'black people' as defined in the B-BBEE Act. (See [95] – [96], [98] and [110].)

Their arrangement also frustrated and undermined the implementation of the provisions of the B-BBEE Act, specifically 'Statement 103' entitled 'The Recognition of Equity Equivalents for Multinationals' (issued under s 9 of the B-BBEE Act under the Codes of Good Practice on Black Economic Empowerment). This statement provided that a foreign business needed to invest a substantial amount of money into empowerment initiatives in order to qualify for B-BBEE equivalent programmes. To interpret the B-BBEE Act in a way that excluded from the definition of fronting practice a relationship such as that which existed between Swifambo and Vossloh, would permit foreign companies that do not comply with the requirements of the B-BBEE Act to frustrate its implementation by evading the obligation to invest a substantial amount of money in empowerment. (See [100] – [102].)

It also satisfied the criteria under para *(d)*(i) and (ii). Vossloh performed 100% of the work in a foreign jurisdiction, without Swifambo having any knowledge or access to any of Vossloh's suppliers, service providers, clients or customers. There was therefore an inherent limitation on the identity of suppliers, service providers, clients or customers as contemplated in para *(d)*(i). And, as to para *(d)*(ii), the maintenance of business operations was, reasonably considered, improbable, given the extremely limited resources that Swifambo had available. Vossloh would not have entered into the contract with Swifambo — it had absolutely nothing to offer Vossloh —other than its B-BBEE status. Swifambo, under the agreement with Vossloh, was merely a token participant that received monetary compensation in exchange for the use of its B-BBEE rating.

ESCHERICH AND ANOTHER v DE WAAL AND OTHERS 2017 (6) SA 257 (WCC)

Local authority — Municipality — Streets and roads — Public street — Owner of land through which public street passes having no right to unilaterally close or obstruct road — Common-law remedy of neighbouring landowner — Divisional Councils Ordinance 18 of 1976, s 121.

Local authority — Buildings — Demolition — Unauthorised structure encroaching on public street — Local authority having locus standi to seek relief under applicable legislation — Neighbouring landowner having common-law remedy — National Building Regulations and Building Standards Act 103 of 1977, s 21; Divisional Councils Ordinance 18 of 1976, s 127(1).

The first and second applicants and the first respondent owned neighbouring plots in the George/Sedgefield area, being portions of Hoogekraal Farm 182. A road (among others) — Seaview Drive East — passed through Hoogekraal, giving access to the first applicant's property (portion 29) before proceeding through the first respondent's property (portion 20) and continuing, through other land, to the second applicant's property (portion 28), giving access to it. The present matter arose out of the following conduct of the first respondent. Within his property, he erected, without building plan approval, two structures on the road, completely obstructing it. He also built a gate across the road where it entered his property. The effect was that,

without his consent, no one could use Seaview Drive East from the point where it entered his property, and, even if they were to do so, they would be unable to proceed any further than the structures. Those wishing to access portion 28 had to make use of a diversion road that the first respondent had built through his property. Apart from the loss of physical access to portion 28 previously provided by Seaview Drive East, the applicants complained that the location of the diversion road meant that their rights to privacy were impaired and a plantation belonging to the first applicant was placed at risk of fire. The applicants consequently brought an application in the High Court to restore access to Seaview Drive East, seeking an order directing the first respondent to demolish the structures erected, clear the road of other obstructions, and remove the gate.

The first respondent resisted the relief sought. He argued that Seaview Drive East was not, as the applicants insisted, a public road, in which case nothing prevented him from acting in the manner he did. This called for the court to decide the legal status of the road and, depending thereon, whether the first respondent was entitled to obstruct it by erecting a gate and structures on it. The first respondent further challenged the locus standi of the applicants. He argued that, by virtue of s 21 of the National Building Regulations and Building Standards Act 103 of 1977 and s 127(1) of the Divisional Councils Ordinance 18 of 1976, respectively, only a local authority (with jurisdiction) had locus standi to approach a court to seek the demolition of unauthorised structures, or the removal of an encroachment on a public road.

Held, that the applicants had established that Seaview Drive East was a public road. As per s 121 of the Ordinance, the ownership of the road therefore vested in the relevant local authority. It followed that the first respondent had no right to unilaterally close or obstruct the road simply to suit his own convenience since to do so was to entirely abrogate the public character of the road. That he had established a diversion road and offered to register servitudes of way did not advance his case. These arrangements were temporary and could be disavowed by subsequent owners of the first respondent's property. Further, there was an established procedure for changing the location of a public street, which the first respondent had not followed. (See [23] – [24] and [27] – [31].)

Held, that the applicants themselves had locus standi to pursue, under common law, the relief they sought in respect of the first respondent's unauthorised structures and his encroachment upon and/or obstruction of the road, given(i) their general interest in ensuring the system of public streets on the estate was maintained and not unilaterally changed (except by lawful procedures), as well as (ii) their direct interest in the encroachment due to its impact on their rights. (See [36] – [42].)

Held, further, that having unlawfully obstructed Seaview Drive East, the first respondent was required to restore access by demolishing the structures in question and clearing the street so that it might be used as a road again. (See [43] and [46].)

NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA v OOSTHUIZEN AND OTHERS 2017 (6) SA 272 (GJ)

Practice — Class action — Certification — Application — Requirements — Timing — Application for certification must be brought before instituting action — Whether ex post facto certification in already pending action should beallowed if in interests of justice.

The applicant (Numsa) applied for leave, as a class representative, to continue as a class action a pending action it had already instituted. This raised the issue of the timing of a certification application: whether a party seeking to represent a class must apply to court for authority to act as a class representative before summons is issued.

Held

In *Children's Resource Centre Trust* (cited at n14), the Supreme Court of Appeal concluded that a prospective class representative ought first to apply to court for class certification before they would have the right to litigate on behalf of a class (see [16] and [45]). In that case the SCA also concluded that a number of substantive requirements would generally have to be met in class certification applications (see [16]). It was in regard to the latter finding — not the timing of the application — that the Constitutional Court on appeal (in the *Mukaddam* case, cited at n15) held that the 'substantive requirements' should only be considered as factors that assist in determining whether the interests of justice require certification. But on the requirement that the application should precede the summons, the Constitutional Court clearly approved *Children's Resource Centre.* (Paragraph [47].)

Even assuming that *ex post facto* certification in the interests of justice were permissible, the circumstances of the present case did not justify the relaxation of the requirement of prior certification on that basis. Therefore, prior class certification was required, and the already pending action could not now be certified *ex post facto* as a class action.

JORDAAN AND OTHERS v TSHWANE METROPOLITAN MUNICIPALITY AND OTHERS 2017 (6) SA 287 (CC)

Local authority — Municipal service charges — Statutory charge on property in respect of amount due — Statutory history — Common-law meaning — Constitutionality — Charge not surviving transfer — Municipality not entitled to reclaim from new owner of property debts predecessor in title incurred — Local Government: Municipal Systems Act 32 of 2000, S 118(3).

Section 118(3) of the the Local Government: Municipal Systems Act 32 of 2000 (the Act) provides that 'an amount due for municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties is *a charge upon the property* in connection with which the amount is owing and enjoys preference over any mortgage bond registered against the property'.

The court a quo had declared s 118(3) constitutionally invalid 'to the extent only that the security provision a charge upon the property survives transfer of ownership into the name of a new or subsequent owner who is not a debtor of the municipality with regard to municipal debts incurred prior to such transfer'. In this application for the confirmation of this order (consolidated two appeals by municipalities concerned against the order sought to be confirmed), the central issue was whether s 118(3) permitted a municipality to reclaim, from a new owner of property, debts a predecessor in title incurred.

Held

The statutory history showed that the mechanism for which the municipalities contended — transmissibility — never arose. No attempt was made to confer a right of execution on municipalities that survived transfer to a new owner. The phrase

'charge upon the property' in the present Act originated from a 1939 Transvaal Local Government Ordinance which imposed 'a charge upon the premises' in respect of rates and taxes owed which was 'preferent to any mortgage bond passed over such property'. This charge was linked to an embargo against transfer until rates for a certain period were paid, and so did not survive transfer — only the original owner was on the line. (Paragraphs [18] and [22] – [23].) Section 118(3), unlike its predecessors, however evinced no clear link to the embargo in its earlier subsection (s 118(1)). This effectively allowed the charge to operate independently of the embargo, without any retrospective time limit on the debt that it covered. The question was whether this delinking meant that the 'charge upon the property' survived transfer. Given the statutory history, the words 'charge upon the property' must be seen in the light of the meaning they previously bore within the common-law setting of limited real rights of security in property for indebtedness. The case law pointed to the conclusion that a mere enactment, without more, that a claim for a specified debt was a 'charge' upon immovable property, did not make the charge transmissible.

This conclusion was strengthened by the way in which real rights have historically been conferred on creditors — that a real right of security over immovable property could arise only by giving notice of its creation to the world in general by the formal act of registration in the deeds office. Against this background the absence in s 118(3) of a requirement that the charge be registered or noted on the register of deeds was a strong interpretative indicator that the limited real right s 118(3) created was defeasible on transfer of ownership. Were there no Constitution, one would thus conclude, on the wording of s 118(3) alone, that the unregistered charge it created was enforceable against the property only as long as the original owner held title.

The question whether the Constitution pointed to the conclusion that the s 118(3) charge on property survived transfer had to be considered against the objective fact of the powerful armoury of existing statutory debt collection weapons. All outstanding debt could be recovered, as a charge against the property, *before* transfer. Historical debts existed only because municipalities had not recovered them even though they were by statute expressly obliged to collect 'all money that is due and payable to [them]'and to implement a credit-control and debt-collection system. In addition, for the sake of service delivery, it was imperative that municipalities did everything reasonable to reduce amounts owing. (Paragraphs [53] and [56] – [57].)

Against the municipalities' arguments in favour of the survival of the charge (see [45] – [51]) had to be weighed the severe consequences of imposing historical debts on a new owner. Allowing the charge to take effect post-transfer would cause substantial interference with or limitation of the transferee's ownership as well as the mortgagee's real right of security. If a debt were enforced against the property of an owner who had no connection with it at all, a constitutionally cognisable deprivation would occur. This was precisely what would happen if the charge in s 118(3) were to take effect on new owners. The new owner paid more precisely because of the urban location of the property, and its accessibility to municipal services. To make a new owner pay for this value again by making historical debts enforceable against them, was a form of double debit that made it a constitutional deprivation. If the charge in s 118(3) survived transfer, there could be a significant deprivation of property. The imposition on a new owner of municipal property of un-prescribed debts without historical limit would constitute an arbitrary deprivation of property. (Paragraphs [58], [61], [67] – [68] and [74].)

It followed that, because the provision could properly and reasonably be interpreted without constitutional objection, it was not necessary to confirm the High Court's declaration of invalidity. This meant that the appeal succeeded (though not for the reasons advanced by the appellants). (Paragraph [78].)

NEDBANK LTD v ZEVOLI 208 (PTY) LTD AND OTHERS 2017 (6) SA 318 (KZP)

Company — Business rescue — Moratorium on legal proceedings against company — Enforcement of suretyship — Sureties cannot claim benefit of moratorium — Absent specific provision in business rescue plan for sureties, their liability remaining unaffected by business rescue — Companies Act71 of 2008, s 133(1).

Nedbank Ltd applied for summary judgment against the first respondent company (Zevoli) as its principal debtor and against the other respondents as sureties for Zevoli's indebtedness. However, before the matter was heard, Zevoli resolved to commence business rescue proceedings. The result was that Nedbank was barred from proceeding against Zevoli by the general moratorium on legal proceedings against companies under business rescue (in s 133(1) of the Companies Act 71 of 2008). The application against Zevoli was adjourned *sine die* and the summary judgment application proceeded only against the sureties. One of the defences they raised was that they were also entitled to the benefit of the moratorium, because of the possibility that Nedbank may possibly not pursue its action against Zevoli after it was placed under business rescue.

Held

Implicit in the decided cases (see [23] – [27]) was that the statutory moratorium was only intended to benefit the company which had been placed under business rescue proceedings; it was a personal privilege or benefit of the company in question. The sureties therefore could not claim such benefit. In the absence of a specific provision in the business rescue plan for the situation of the respondents, as sureties, their liability would remain unaffected by the contemplated business rescue.

SACLR NOVEMBER 2017

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES v WALUS 2017 (2) SACR 473 (SCA)

Prisoner — Parole — Release on — Application for — Consideration of by Minister — Minister not considering victim impact statement in circumstances where not provided to prisoner with opportunity to respond thereto — All relevant information required had to be considered — Application remitted to Minister for reconsideration of application, including victim impact statement and prisoner's response.

The appellant appealed against a decision of the High Court in which it had reviewed and set aside a decision of the appellant refusing the respondent's application for parole and instead postponing it for a further 12 months to obtain another profile of the respondent.

On appeal, the court mero motu raised the question whether the fact that the victim impact statement had not been considered by the appellant gave rise to a reviewable procedural irregularity in the decision-making process, and if it did, what a just and equitable order would be under s 172(1) of the Constitution read with s 8 of the

Promotion of Administrative Justice Act3 of 2000 (PAJA). The appellant conceded that a procedural irregularity had occurred but that it did not constitute a material deviation amounting to a ground of review.
Held, that the appellant's concession was correct, the procedural irregularity having begun when the parole board submitted the respondent's profile for the appellant's consideration on the basis of certain information, including the victim impact statement, without affording the respondent an opportunity to respond. The irregularity was completed when the appellant made the decision without considering those representations because they were not placed before him. (See [13].)
Held, further, that it was clear from the provisions of the Correctional Services Act 111 of 1998 that all relevant information had to 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 formed a substantive requirement in that process. (See [17].)
Held, further, that the appellant's assertion that the victim impact statement would have further militated against the respondent's placement on parole was obviously misguided. It overlooked that he would have had to consider the respondent's representations as well, and it was unknown what impact they would have had on the decision. By the same token, his decision — if the matter were remitted for his reconsideration — was not a foregone conclusion. The omissions constituted a fatal procedural irregularity and a breach of s 6(2)*(b)* of PAJA, in that a mandatory and material procedure prescribed by an empowering provision had clearly not been complied with.
Held, further, that the matter had to 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, if any, thereto. (See [21].) The appeal was upheld and the matter remitted to the appellant for a fresh decision.

S v CHABALALA 2017 (2) SACR 486 (LT)

Trial— Presiding officer — Conduct of — Manner of addressing accused — Addressed as 'accused' and not by name — Practice deprecated.
Review — Queries by reviewing judge — Duty of magistrates to provide reasons in terms of s 304(2)(a) of Criminal Procedure Act 51 of 1977 —Judicial management oversight of queries suggested.
While serving a sentence of imprisonment for housebreaking and theft, the accused escaped when given the task of washing cars. He was charged with a contravention of s 117*(a)* of the Correctional Services Act 111 of 1998, pleaded guilty and was sentenced to eight years' imprisonment. The matter came on review and the reviewing judge directed a query to the magistrate as to the competence of the sentence, given that the magistrate's maximum jurisdiction was three years' imprisonment and the Correctional Services Act did not give the magistrates' court enhanced jurisdiction for the offence (unlike its predecessor in Act 8 of 1959). The judge also asked for comment on the magistrate's addressing the accused as 'accused'. The magistrate did not respond to the second query but requested the court to reduce the sentence accordingly.
Held, that the sentence had to be reduced to one of three years' imprisonment. (See [8].)

Held, further, that the practice of addressing an accused, as the magistrate had done, was deprecated and was not in keeping with the decorum of the court. The manner in which judicial officers addressed litigants, witnesses and accused was a reflection in some instances of the temperament of the bench as a whole. (See [13].) *Held*, further, that magistrates needed to be reminded that the duty to provide reasons derived from a statutory injunction (s 304(2)*(a)* of the Criminal Procedure Act 51 of 1977) and not the whim of a reviewing judge. It was becoming commonplace for reasons to be written in an unacceptable manner and in some instances with a level of disrespect for the higher courts. It would be beneficial for the leadership of the magistracy to develop a culture of judicial management oversight over matters in which reasons were requested, provided that same did not compromise the independence of the judicial officer but protected the collegial relationship between judicial officers serving in a single judiciary.

VAN BREDA v MEDIA 24 LTD AND OTHERS 2017 (2) SACR 491 (SCA)

Fundamental 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.

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. (See [10] – [11]and [15] – [16].)
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 interests 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.
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.

S v BARLOW 2017 (2) SACR 535 (CC)

Court — Constitutional Court — Appeal to — Application for leave to appeal — Application based on failure of High Court on appeal to consider merits of one of counts on which applicant convicted — High Court's rejection of applicant's version as untrustworthy meant his defence could not stand and therefore no prospects of success — Application dismissed.

The applicant had appealed against his convictions in the High Court on various counts to the full court. The court considered his appeal, but in doing so failed to take into account that he had also appealed against a conviction for theft. It accordingly did not consider the merits of that conviction.
In the present application for leave to appeal, the court noted that this omission might be said to have infringed the applicant's rights to a fair trial. It nevertheless held that although the full court did not specifically make mention of the theft charge, it had dismissed the appeal on the basis that there was no reason to interfere with the factual findings of the trial court. There was no ground for faulting that approach and on those findings the applicant had appropriated the firearm which was the subject of the theft charge, and had not returned it. The rejection of his version by the trial judge as untrustworthy meant that his defence, of not having any intention to permanently deprive the owner of the firearm, could not stand. Although this aspect of the application raised a constitutional issue, there were no prospects of success and the application for leave to appeal had to be dismissed.

S v JACOBS AND SIX SIMILAR MATTERS 2017 (2) SACR 546 (WCC)

Review— Automatic review — Delay in submission of matter on review — In seven matters submitted on review from outlying magistrates' courts, some delays were of egregious nature, up to three years late — Systemic problem identified and solution proposed.

In seven cases that were submitted to the court on automatic review, they were all submitted well outside the requisite period of seven days of the passing of sentence. In fact, one was three years late; another two years late; and one was one year and eight months late.
The court remarked that to maintain the integrity of the criminal justice system I and public confidence in it, it was important that the system of automatic review, which was supposed to provide for a free, far-ranging and expeditious review by the High Court of proceedings in the lower courts, be an effective process, otherwise there was no point to it. The system fulfilled an extremely important function in the administration of justice at a time when great poverty and rampant crime, combined with a lack of legal-aid resources, often coincided, and were common features of their daily experience in the criminal justice system.
The court held that if an accused's constitutional right of review was effectively stymied and rendered nugatory by egregious delay, his constitutional right to a fair trial had been infringed. This might constitute a failure of justice and a ground for the court to not only decline to certify that the proceedings were in accordance with justice, but also set aside or correct the proceedings, or make any other order that was likely to promote the ends of justice.
The court noted further that the seven-day period within which the matter had to be submitted on review was impractical in most circumstances. It also noted that attempts had been made to ensure that matters were sent on review timeously, but, as the control over automatic review was still largely a matter for the individual presiding magistrate, and not regulated as part of a systemic uniform practice applicable throughout the province, the systems were fragmented and inadequate (see [42] – [44]). It was proposed that an outstanding automatic review list be introduced in which the particulars of all outstanding judgments requiring automatic review from each magistrates' court within the Western Cape were recorded.

Collated regionally, it would immediately be apparent to the chief magistrates and the regional head of the Department of Justice when difficulties were being experienced at a particular court, and the necessary resources could immediately be diverted there to address the problem (see [45]).
Given that there appeared to be particular problems in two of the districts where severe delays had been experienced in submitting matters on review, the heads of those courts were required to report retrospectively in respect of all matters involving reviewable sentences imposed in the court within a period of three years from the date of the court's judgment (see [48] and [80]). The court proceeded to examine the merits of the individual cases and made appropriate orders in each of the cases.

S v GUZU AND TWO SIMILAR MATTERS 2017 (2) SACR 575 (ECM)

Sentence — Generally — Formulation of sentence — Ill-expressed sentences posing difficulties of understanding by accused and could not be altered by simple clerical amendment — Sloppiness in expression of sentence deprecated.

In three matters emanating from the same magistrates' court there had been a response from the magistrate to a query raised on review, seeking clarity on the way the sentence imposed by the magistrate had been expressed. In each case the response gave that clarity.
Held, that it was distressing to encounter errors in the way in which sentences were expressed. Not only was it impossible for an unrepresented accused person to understand a sentence which was ill-expressed, but the record of that sentence could not be altered simply by clerical amendment. (See [2].)
Held, further, that the imposition of sentence was a crucial part of court proceedings. It had to be attended to with a level of care and attention to detail commensurate with the utmost level of diligence expected of a judicial officer in the performance of their duties. Sloppiness in the manner in which a sentence found expression not only led to an undesirable state of uncertainty, but reflected badly on the judicial officer concerned and, indeed, upon the judiciary as a whole. (See [3].)
Review. Orders relating to revised sentences appear in [5] – [7].
[5] In *S v Guzu*, case No475/2015, the sentence imposed by the magistrate is set aside and is replaced with the following: '1. The accused is sentenced to payment of a fine of R1000,00 or, in default of payment thereof, to a period of six (6) months' imprisonment. 2. The sentence imposed is wholly suspended for a period of five years on condition that the accused is not convicted of assault with the intention to do grievous bodily harm arising from any offence committed during the period of suspension.'
[6] In *S v Mgidi*, case No153/2016, the sentence imposed by the magistrate is set aside and is replaced with the following: '1. The accused is sentenced to the payment of R500,00 or, in default of payment thereof, to a period of six (6) months' imprisonment.'
[7] In S v Nombuya, case No131/2016, the sentence imposed by the magistrate is set aside and is replaced with the following: '1. The accused is sentenced to the payment of a fine of R500,00 or, in default of payment thereof, to a period of four (4) months' imprisonment. 2. The sentence imposed is wholly suspended for a period of five (5) years on condition that the accused is not convicted of any offence arising from the possession by him of dagga without authority during the period of suspension.'

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS v PDP AND OTHERS 2017 (2) SACR 577 (NCK)

Prevention of crime — Preservation of property order — When to be granted — Illicit drugs being conveyed in motor vehicle allegedly belonging to 6-year-old child — Child's interests in vehicle requiring protection by appointment of curator ad litem.
Prevention of crime — Preservation of property order — When to be granted — Illicit drugs being conveyed in motor vehicle — Police manning road block observing bag being thrown out of window of vehicle — No indication whether driver or one of passengers had possessed the drugs — Insufficient nexus being shown for order in respect of vehicle.

The police manning a road block observed a black bag being thrown out of the window of a vehicle approaching them. Seven smaller bags were subsequently found in this bag, all containing Mandrax. The vehicle was being driven at the time by the respondent and was registered in the name of his 6-year-old daughter. Almost 18 months later, the applicant obtained an interim order in terms of s 38 of the Prevention of Organised Crime Act 121 of 1998 in respect of the vehicle. On the return day, the confirmation of the order was opposed by the first respondent and his wife, acting as the mother and guardian of the minor child.
Held, that, although the first respondent and his passengers had lied about the plastic bag, it was still incumbent upon the National Director of Public Prosecutions to prove possession thereof — it was immaterial whether or not the vehicle was registered in the name of the child, a very unusual and highly suspicious deed. Be that as it may, a court could not act on suspicions, even if such suspicions were strong, and the first respondent had to be given the benefit of the doubt. (See [17] – [18].)
Held, further, that, if the evidence before the court that the vehicle belonged to the minor child was correct, then a curator ad litem should have been appointed for her because an order forfeiting her presumptive vehicle to the state would be inimical to her best interests. The application accordingly had to fail, firstly, because there was no clear nexus with the illegal transportation of the Mandrax tablets, and, secondly, because no curator ad litem had been appointed for the child to protect her interests. (See[21] – [22].) The rule nisi was discharged.

S v KNIGHT 2017 (2) SACR 583 (GP)

Sentence — Plea-and-sentence agreement — Requirements for — Certificate of authorisation by National Director of Public Prosecutions required to be handed in to court — Court required to pronounce on conviction of accused — Without such pronouncement there could be no valid sentence imposed.

In an appeal against a conviction in a regional magistrates' court for kidnapping, rape and assault that had been finalised in a plea-and-sentence agreement in terms of s 105A of the Criminal Procedure Act 51 of 1977, it appeared that no certificate of authorisation by the National Director of Public Prosecutions (the NDPP) had been handed in to court, and furthermore, that the court had failed to pronounce on a conviction as required by the section. By the time that the appeal was heard, the

certificate of authorisation by the NDPP, or an affidavit in that regard, had still not been filed.
Held, that the failure to pronounce on the conviction of the appellant was a fatal irregularity, in that, without a conviction, there could be no sentence. The manner in which the court a quo had proceeded was simply not in accordance with the law. (See [18].)
Held, further, that the fact, that the details that appeared on the J15 form constituted the face of the case record, did not cure the inescapable fact that the record did not contain a recordal of the conviction of the appellant.

S v HECTOR 2017 (2) SACR 588 (ECG)

Indictment and charge— Duplication of convictions — Robbery and unlawful possession of firearms — Firearms in question having been taken from victim during course of robbery — Appellant in process making himself guilty of two separate and distinct offences, each with its own elements and requiring its own evidence, with different mens rea for each offence — No duplication of convictions.

The appellant appealed against his conviction for the unlawful possession of firearms on the basis that this constituted a duplication of convictions in circumstances where he had been found guilty of robbery with aggravating circumstances, and the items taken from the complainant in the conviction for robbery were the same firearms that formed the subject of the unlawful- possession-of-firearms counts.
Held, that the appellant had made himself guilty of robbery when he stole the firearms by using violence or a threat, with the intention of forcing the complainant to submit to the taking of the firearms. Once the firearms were taken following the appellant's violence or threat of violence, and once the complainant submitted to the taking of the firearms, the crime of robbery was completed. Thereafter, the appellant exercised control over the firearms with the knowledge that what he possessed were firearms and that it was unlawful to possess those firearms. In that process, the appellant made himself guilty of two separate and distinct offences, each with its own elements and requiring different evidence to prove such. Furthermore, the mens rea for the robbery was different from the mens rea required for the unlawful possession of the firearms. (See [10].)
Held, further, that the conviction on the charge of unlawful possession of a firearm was accordingly not a duplication of the conviction on the charge of robbery with aggravating circumstances, and the appeal against the conviction of the unlawful possession of firearms had to be dismissed. (See [13] – [14].) Appeal dismissed.

All SA [2017] Volume 4 November 2017

Big Five Duty Free (Pty) Ltd v Airports Company South Africa Ltd and others [2017] 4 All SA 295 (SCA)

Corporate and Commercial – Contract – Settlement agreement – Interpretation of – Binding nature of agreement – Agreement binding on all the parties to the litigation, including one who has not participated but has chosen to abide the outcome of the appeal.

Pursuant to an invitation to tender, the first respondent ("ACSA"), in 2009, awarded the appellant ("Big Five") a contract to operate duty-free shops for a ten-year period in three of its international airports. The second respondent ("Flemingo"), being an unsuccessful bidder, applied to the High Court for an urgent interdict precluding ACSA from implementing the terms of the lease, and for the review and setting aside of the award. An interdict was granted by Phatudi J, and although Big Five and ACSA opposed the review application, that application was also successful, with the court setting aside the award on the basis that it was unlawful because in the tender process ACSA had taken into account an irrelevant consideration, and the process was not transparent or fair.

On appeal, only Big Five challenged the decision of the High Court. ACSA abided the decision of the Full Court and did not participate in the appeal proceedings. Before judgment was handed down, Big Five and Flemingo settled their dispute. Flemingo abandoned the judgment in its favour, and Big Five withdrew the review application.

At the request of the parties, the Full Court made their settlement agreement an order of court. The terms of the settlement agreement and their interpretation lay at the heart of the present appeal. The question was whether the award in Big Five's favour stood and was binding, or whether ACSA was free to start the tender process anew. A further question was whether the third respondent ("Tourvest") was entitled to bid again.

ACSA took the view, after the settlement agreement was made an order of court, that as it was not a party to the agreement, it was not bound thereby and it was thus entitled to start the tender process again. Big Five accordingly sought an order from the High Court, that ACSA was bound by the award it had made in 2009 and that it was obliged to conclude the written lease agreements anticipated with Big Five within 30 days of the order. The court refused the application, holding that the order of Phatudi J was a public remedy and could not be set aside by private parties, and that even though the Full Court had made the agreement between Big Five and Flemingo an order of court, the court was not bound by that order because it was wrong. That led to the present appeal.

On appeal, Big Five argued that it was of no consequence that the judgment of Phatudi J made a finding that the award of the tender was unlawful. Only Flemingo had sought the review and setting aside of the order. ACSA and Big Five had opposed Flemingo's review. Tourvest had not participated in the review or the appeal. Only Big Five had appealed against the decision. ACSA abided the decision of the Full Court. The Full Court made the agreement of settlement an order of court. In the circumstances, Big Five argued, all the parties to the litigation before Phatudi J were bound by the Full Court order.

ACSA and Tourvest argued, on the other hand, that a judgment in a public law matter, such as Phatudi J's judgment on the lawfulness of the exercise of public power, cannot be set aside by private agreement between parties. It is for a court to determine the lawfulness of administrative action. Thus a private party cannot abandon a review judgment or settle matters pertaining to lawfulness where a court has held that the award was unlawful. It was thus contended that Phatudi J's judgment setting aside the award stood until it was set aside by a court on appeal.

Held – The principles governing the making of an agreement of settlement an order of court makes it clear that the court making the agreement an order of court does not

enter into the merits of the litigation. It must do no more than satisfy itself that the agreement relates to the litigation between the parties and that it is not contrary to policy or the law. According to ACSA and Tourvest, the Full Court, in making the agreement between Group Five and Flemingo an order of court, did not make a finding that the Phatudi J order was wrong, or that it should be set aside. It did no more than endorse the ending of the *lis* between the parties.

The Court held that the agreement had to be construed in the light of the circumstances attendant upon it – the factual matrix or context. The context *in casu* was that Flemingo and Big Five had made bids for the lease of the duty free shops at three international airports on the terms set out in ACSA's invitation to tender. ACSA awarded the tender to Big Five. One of the unsuccessful bidders, Flemingo, took the award on review arguing that it was unlawful. Phatudi J found that it was unlawful for reasons that may or may not be good. Big Five appealed against the order, and before the appeal was heard, Flemingo and Big Five agreed that the appeal would not be prosecuted to finality but that Flemingo would abandon the order and withdraw the review proceedings – as if they had never happened. The only purpose of the withdrawal and abandonment, coupled with the agreement of settlement, had to be to set aside the order of Phatudi J, and to agree that the award to Big Five by ACSA was to stand. There could be no inference other than that the parties did not intend the Phatudi J order to stand.

It was thus not open to the court *a quo* to decide that the Full Court had erred in making the agreement of settlement an order of court as the court *a quo* was bound by the doctrine of *res judicata*. The appeal was upheld with the costs.

Nkabinde and others v S [2017] 4 All SA 305 (SCA)

Criminal law and procedure – Attempted murder, robbery with aggravating circumstances, and unlawful possession of explosives, firearms and ammunition – Acting in concert with common purpose – Appeal against convictions and sentences – Purported special entries in terms of section 317 of the Criminal Procedure Act 51 of 1977 – Nature of explained.

Convicted of murder, numerous counts of attempted murder, robbery with aggravating circumstances, and unlawful possession of explosives, firearms and ammunition, as a result of a cash-in-transit heist, the appellants appealed against their convictions.

Based on the evidence before it, the court *a quo* held that it was clear that the attack was committed by a group of robbers acting in concert with the common purpose of armed robbery. The appellants were part of that group.

In their application for leave to appeal against their convictions and sentences, the appellants also applied for the recusal of the trial judge on the ground that he was biased; and for special entries to be made on the record in terms of section 317(1) of the Criminal Procedure Act 51 of 1977. The trial judge dismissed the application for his recusal. He granted the application for the special entries, and granted the appellants leave to appeal to a Full Court of the High Court against their convictions and sentences. The Full Court did not decide the appeal against the convictions and sentences. It held that the order the court below was incompetent since appeals based on special entries under the Act may not be referred to a Full Court; and that it had no jurisdiction to hear the appeal. It struck the appeal from the roll. The matter then came before the present Court.

Held – The purpose of a special entry is to raise an irregularity in connection with or during the trial as a ground of appeal against conviction under section 318(1) of the Criminal Procedure Act. Most of the so-called special entries were not true special entries as contemplated in section 317(1)of the Act. The court *a quo* should not have made them special entries on the record. They were properly grounds of appeal. An application for a special entry is not there for the asking. The requirements of section 317(1) of the Act must be met, and the court must satisfy itself that the application is *bona fide* and that it is not frivolous, absurd or an abuse of the process. The court *a quo* failed to do so.

On the merits, the Court found that the only reasonable inference to be drawn from these facts was that the appellants had the common intention to possess the firearms and explosives. On a conspectus of all the evidence, what emerged was that the remaining special entries were frivolous and absurd. Even considered as grounds of appeal, they had no merit. They were unsustainable on the evidence. The State had proved its case beyond reasonable doubt and accordingly, the appellants were rightly convicted.

The sentences were also confirmed as appropriate in the circumstances and the appeal was dismissed.

Van Heerden and another v National Director of Public Prosecutions and others [2017] 4 All SA 322 (SCA)

Criminal law and procedure – Permanent stay of prosecution – Lengthy delays in finalisation of criminal trial – Infringement of constitutional right to a fair trial entrenched in section 35(3) of the Constitution of the Republic of South Africa, 1996, which includes the right to have trial begin and conclude without unreasonable delay – While an application for a permanent stay of prosecution is an extraordinary remedy, that does not mean that such relief cannot be granted in appropriate circumstances.

Until their dismissal in March 2010, the appellants were both employed by the third respondent ("BATSA"). In January 2010, the first appellant was accused by BATSA of the theft of cigarettes, and was summarily suspended and subjected to disciplinary proceedings by BATSA after which his services were terminated. During March 2010, the second appellant's services were also terminated.

On 18 August 2011 the National Director of Public Prosecutions ("NDPP"), in anticipation of criminal charges to be preferred against the appellants, applied for and obtained a provisional restraint order in terms of the provisions of section 25(1)(b) of the Prevention of Organised Crime Act 121 of 1998 ("the Act"). The restraint order was made final on 5 October 2011, and prevented the appellants from dealing in any manner with virtually all their property. The property under attachment consisted of cash in an amount of R2 106 922,86 as at 11 May 2015. In August 2011, they were charged with the theft of hundreds of boxes of cigarettes valued at over R3 million. In November 2011, the magistrates' court was informed that the investigation was incomplete and that the State required a postponement for three months. The matter was postponed until 2 March 2012 with a note indicating that the postponement was final, but on that date, the State's investigation was still not complete. When the appellants appeared in court for the first time at the end of March 2012, the matter had to be postponed again so that racketeering charges could be added to the indictment. The case was subsequently postponed on several occasions.

In February 2014, shortly before the trial was due to commence, the appellants served a lengthy and comprehensive document requesting further particulars and documentary evidence and gave written notice of an intention to object to the charge sheet. On the day on which the trial was scheduled to start, the appellants presented written submissions concerning the State's response to the request for further particulars, which it was alleged was wholly unsatisfactory and formed the basis for the contention that the charges against the appellants should be quashed. No documentation was attached to the response. The State required a postponement in order to reply to the appellants' written submissions. The matter was postponed to 17 November 2014. On that day, without adjudicating on the objection to the charge sheet and dealing with the respective submissions of the parties, the magistrate refused a postponement and struck the matter from the roll without indicating why.

That led to the appellants seeking the release of their assets from the restraint order and wrongly declaring that the charges against them had been quashed. The State disputed that and undertook to have the charge sheet amended by 17 April 2015. The deadline was not met by the State, and the authorisation by the NDPP to amend the charge sheet was only issued on 30 July 2015. According to the appellants the charge sheet was virtually the same as the one that had previously been objected to.

In September 2015, the matter came before another magistrate, and was again struck from the roll. By that time, more than four years had passed since the appellants first appeared in court, and in all that time, their assets were under restraint. In December 2015, the appellants launched the application which was the subject of the present appeal. In their application, they sought the setting aside of the restraint orders granted against them, the release of their assets, and a permanent stay of the prosecution against them. The dismissal of the application led to the present appeal.

On appeal, the appellants contended that the court below had failed to consider relevant factors in relation to the application for a permanent stay of prosecution and treated it as if it was an application for the release of funds in terms of section 26(6) of the Act.

Held – At the heart of the appellants' case were the contentions that due to the very many delays and the paucity of information supplied by the State, including a defective charge sheet, they had in effect been denied a fair trial. In that regard, they rely on their constitutional right to a fair trial entrenched in sec-tion 35(3) of the Constitution, which includes the right to have their trial begin and conclude without unreasonable delay.

While an application for a permanent stay of prosecution is an extraordinary remedy, that does not mean that such relief cannot be granted in appropriate circumstances. The first step in considering whether a permanent stay of the prosecution is appropriate relief in terms of section 38 of the Constitution, is to determine whether there has indeed been an infringement of the appellants' right to a trial within the reasonable time provided for in section 35(3)(d) as a component of the right to a fair trial.

The Court was satisfied that inadequate consideration, if any, was given by the State to the appellants' rights to a trial within a reasonable time and that a material and substantial part of the delay was due to the State's tardiness and lack of application and concern. The State's conducting of the prosecution was also found not to have

been in good faith at times. The delays resulted in serious prejudice to the appellants, who were deprived of their funds for an extended period of time.

The appeal was, accordingly, upheld with costs and all the restraint orders related to the appellants' assets were set aside.

Blair Atholl Homeowner Association v City of Tshwane Metropolitan Municipality [2017] 4 All SA 344 (GP)

Local government – Supply of bulk water by municipality – Determination of applicable rate (tariff) at which such water was supplied – Interpretation of Engineering Services Agreement concluded between municipality and homeowners' association – Court finding applicable tariff to be the rate at which the municipality supplied bulk water to other municipalities or water service providers – Principles of contractual interpretation restated by court.

The plaintiff was a homeowners' association in a residential estate situated with the defendant municipality's jurisdictional area. The main issue in dispute pertained to the determination of the applicable rate (tariff) at which the defendant supplied bulk water to the plaintiff. It required the interpretation of the Engineering Services Agreement ("the ESA") concluded between the parties on 3 February 2006 and particularly clause 6.16 thereof which provided that the defendant agreed to supply water to the plaintiff at "the normal rate of the Municipality" and not to raise a sewerage charge.

Two key issues were at the heart of the dispute between the parties. The first involved the meaning of the wording "in recognition of the acceptance of responsibility by the Section 21 Company of the duties normally performed by the Municipality" in the introduction to clause 6.16; and secondly what was intended and agreed between the parties in clause 6.16.1 when providing that water would be supplied at "the normal rate of the Municipality".

The plaintiff was billed as a single user via two bulk meters for the total bulk water supplied to the estate (ie total consumption), even though the ultimate consumers of the bulk water supply are the individual residents within the estate. The defendant had six possibly applicable rates or scales of rates in relation to charges for the supply of water. The plaintiff contended that the applicable "normal rate of the Municipality" was the rate at which the defendant supplied bulk water to other municipalities or water service providers, being Rate 6. The defendant contended for Scale D, which was for all consumers who did not fall under Scale A, B or C.

Held – The Court had to determine which of the rates (be it Rate 6 or Scale D) was applicable, or accorded with the principle of legality, to the bulk water supply relationship between the plaintiff and the defendant. The parties agreed to separate the question of the amount payable for the water supplied before hearing of the other issues.

The ultimate determination of the parties' dispute in respect of clause 6.16 depended on its proper interpretation. The correct approach to the interpretation of contracts is that due regard must be had to the language of the clause within the context of the contract as a whole (the intra-textual context), the background to the preparation and production of the contractual document, that is, the circumstances attendant upon its coming existence, the material known to those responsible for its production, the apparent purpose to which the clause was directed, and a sensible meaning producing the most business-like result. From the outset the interpreter must consider the context

and the language together, with neither predominating over the other. Any evaluation of the circumstances attendant upon the contract coming into existence requires that evidence be admissible to contextualise the document to establish its factual matrix which includes both background circumstances and surrounding circumstances. In addition to the language and context, the purpose of a provision may be paramount. The interpreter must endeavour to arrive at an interpretation which gives effect to such purpose. The purpose (which is usually clear or easily discernible) is used, in conjunction with the appropriate meaning of the language of the provision, as a guide in order to ascertain the intention.

The Court considered the evidence in relation to the background, surrounding circumstance and purpose of clause 6.16. It agreed with the plaintiff's interpretation that the only possible, sustainable, reasonable and business-like interpretation applicable to clause 6.16.1 was that the reference to "normal rate" was a reference to the bulk rate, Rate 6. That was a normal rate of the defendant and not a special rate, payable by municipalities to the defendant for the bulk supply of water when the defendant rendered no other services than the supply of bulk water. Both the language and the purpose of clause 6.16.1 were found to reflect an intention to offer a *quid pro quo* in exchange for the plaintiff assuming responsibility for the duties normally performed by the defendant which was consistent with the entire tenor of the ESA as a whole. A requirement to pay according to Scale D would not offer any consideration for the assumption of the duties of the municipality.

The plaintiff was therefore entitled to the declaration it sought. It was declared that the reference in clause 6.16.1 of the ESA to the "normal rate of the Municipality" was a reference to the normal rate charged for bulk water supply to other local governments as contemplated in paragraph 6 of annexure "C" to the declaration. The defendant was directed to render accounts to the plaintiff in accordance with the bulk charge rate as provided for in its schedule of tariffs.

Dube and others v Zikalala and others [2017] 4 All SA 365 (KZP)

Interpretation of statutes – Interpretation of constitution of political party – Starting point is the words of the document, which should be considered in the light of all relevant and admissible context, including the circumstances in which the document came into being.

Local government – Provincial elective conference of political party – Lawfulness – Whether conference was properly convened – On proper interpretation of relevant rule of party's constitution, conference found to have been convened irregularly and was therefore unlawful.

In dispute in the present application was the propriety of a provincial elective conference of the African National Congress ("ANC") for the Province of KwaZulu-Natal ("KZN") held from 6 to 8 November 2015. The applicants were members of the ANC, seeking an order declaring the conference to have been unlawful and invalid, and setting aside all decisions, resolutions and elections flowing therefrom. The grounds on which the lawfulness of the conference were impugned were that the requirements of rule 17.2.1 of the ANC's constitution were not complied with, as the conference had not been requested by at least one-third of all branches in the province of KZN; and that the conference was affected by various material irregularities which occurred during the pre-conference period and/or at the conference itself relating to the auditing of branch membership, branches being allowed inadequate time for

remedying any errors found, insufficient time being allowed for appeals against findings of the auditing committee, discrepancies in the accreditation of delegates, and the manipulation of the voting results at the conference.

Opposing the relief claimed by the applicants, the respondents argued that the applicants, being private individual members of the ANC acting without any authority from any of the branches of the ANC implicated in their alleged complaints, lacked the required *locus standi in iudicio*; that the applicants were time-barred from bringing the present application, which the respondents construed as a review either under the Promotion of Administrative Justice Act 3 of 2000, or in the alternative, the common law; the applicants wrongly interpreted rule 17.2.1 of the ANC constitution, in the context that although the respondents admitted that no request by one-third of the branches was made for the holding of the conference, no such request was necessary, and the conference accordingly was valid; and that the alleged irregularities were not proven, but in any event there was a requirement of only 70% compliance in respect of qualifying branches in order to hold a valid conference, which requirement was met.

Held – What constitutes a legitimate ANC conference was set out in documents adduced into evidence by the parties. The procedures and rules contained in the aforesaid documents apply generally whenever a conference is planned. It was not in dispute that those procedures and rules need to be adhered to, although they were not rules contained in the ANC constitution.

In deciding whether the conference was properly convened, the Court had to interpret rule 17.2.1 of the ANC constitution. The rule appeared to provide in peremptory terms for two eventualities, namely that a provincial conference shall be held at least once every four years; and a provincial conference shall be held more often if requested by at least one-third of all branches in the Province. The issue was what was meant by “at least once every 4 (four) years”. Interpretation is the process of attributing meaning to the words used in a document, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. The starting point is the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The previous distinction between permissible background and surrounding circumstances has fallen away. Interpretation is no longer a process that occurs in stages but is essentially one unitary exercise. The Court found that concluding that a provincial conference had to be held at least once every fourth calendar year seemed to be the most sensible and business-like or practical interpretation of rule 17.2.1. By necessary implication, the meaning was that provincial conferences may be held more often than once every four calendar years, but that they could not be held at intervals greater than that. The issue in this case was whether the conference held from 6 to 8 November 2015 amounted to a provincial conference held more often than at least once every four years, thus being held early. That required a consideration of how the four-year period had to be determined. The Court agreed that the holding of the conference exceeded the once every four year requirement, and as there was no request by a third of the branches, the conference was held in breach of rule 17.2.1 of the ANC constitution and was therefore unlawful.

That conclusion rendered a consideration of the alleged irregularities strictly unnecessary. Nevertheless, the Court briefly considered the allegations made and found that while certain irregularities had occurred, that did not assist the applicants' case.

The respondents contended that the applicants, as branch members, had no right to participate directly in a provincial conference and that their right was limited to voting as part of the branch. The submission was that it is the branch, not the individual, who sends delegates to the provincial conference that would have *locus standi.* The Court disagreed. It held that branches do not join the ANC, individual members do. When the constitution is violated, it is not a violation possibly of only rights of the branches, but the violation of rights of individual members. The applicants' standing was confirmed.

In averring that the application was time-barred, the respondents stated that the nature of the application was in the form of a review, which would fall within the scope of the Promotion of Administrative Justice Act 3 of 2000, which required an application for review to be brought within 180 days of the impugned decision. The Court pointed out that the Promotion of Administrative Justice Act is concerned with the conduct of the administration, and not concerned with the internal conduct of political parties, unless they directly affect the public or political process. The Act did not apply in this case as the application did not concern administrative action. Accordingly, the time limitation in section 7 of the Act was no bar to the relief claimed. It also could not be found that there was an unreasonable delay at common law.

Finally, the respondents submitted that even if the applicants were otherwise to establish an entitlement to the relief sought, the court had a discretion as to whether or not to grant that relief taking into account all relevant factors in the exercise of that discretion. As the ANC constitution gives effect to the political rights in section 19 of the Constitution, in deciding on the relief claimed the court was deciding a constitutional matter as contemplated in section 172. A just and equitable order may be granted even in instances where the outcome of a constitutional dispute does not hinge on constitutional invalidity of legislation or conduct. The Court was disinclined to determine how the ANC should regulate its internal processes. Consequences would follow from a declaration of invalidity which, going forward, were best dealt with by the ANC itself in regulating its internal processes.

The relevant conference was declared unlawful and void.

East Cape Game Properties (Pty) Ltd v Brown and others [2017] 4 All SA 414 (ECP)

Civil procedure – Motion proceedings – Disputes of fact – Correct approach – Where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order.

Administrative law – Official act – Validity of – Maxim omnia praesumuntur rite esse acta – Where an official act has been executed, it is presumed that any condition precedent to the validity of the official act has been complied with and that the official (or body of officials) was qualified to perform the act in question and complied with the necessary formalities.

Property – Zoning of – Zoning of land is binding and remains in force until set aside by a court in proceedings for judicial review, having legal consequences that may not simply be ignored.

The applicant purchased certain property from the first respondent's father in 2011. The declared intention of the applicant in acquiring the property was in due course to seek the rezoning of the property for purposes of residential development. At the time of the purchase of the property there was a sand mine on the property where the first respondent conducted mining activities in accordance with a permit duly issued in terms of section 27 of the Mineral and Petroleum Resources Development Act 28 of 2002. The permit (referred to as the "first permit") was due to expire in December 2015 and accordingly posed no difficulty to the applicant's intentions with the property.

In the latter part of 2014 the second respondent also applied for a mining permit (the "second permit") on the property. The second permit was duly authorised for the mining of sand on a demarcated area on the property (the "second site"). Early in 2015, the applicant and the first respondent entered into an agreement which recorded, *inter alia*, that the applicant wished to take over the existing and future mining activities of the first and second respondents and, on completion of such mining activity, to rezone the land and develop the property for residential purposes. In terms of the agreement the applicant would take full control of the physical mining and rehabilitation activities and would pay the first and second respondents a royalty for sand mined within the mining area. The applicant commenced to fulfil its obligations under the agreement and continued to mine sand for a period in accordance with the agreement. The agreement was terminated during or about January 2016. In 2015 the deponent to the founding affidavit in the main application, acquired the shares in the applicant and made enquiries about the rights held by the first and second respondents. He established that the first permit had lapsed and that the first respondent had no mining rights under the permit. In the main application launched on 5 August 2016, as against the first respondent the applicant contended that the first respondent was still mining on the first site notwithstanding the lapse of the first permit. In respect of the second respondent it was contended that the property was zoned agricultural zone 1 in terms of the applicable zoning scheme of the fifth respondent. Mining is not permitted as a primary or a consent use on property zoned agricultural zone 1 in terms of the applicable zoning scheme. In the circumstances, notwithstanding the grant of the mining permit it would be unlawful to mine on the property unless and until the property was zoned so as to permit mining.

The first respondent, although contending that the first permit only came to an end in April 2016, denied that he has at any time continued mining activities in terms of the first permit on the first site after April 2016. There was therefore a factual dispute between the parties in respect of the first respondent's activities at the time that the main application was launched.

Held – Where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The Court did not consider the averments on behalf of the first respondent to be so far-fetched or clearly untenable as to be rejected merely on the papers. A real, genuine or *bona fide* dispute of fact had been raised in respect of the activity of the first respondent. Neither party requested that oral evidence be heard in respect of the

prayers as sought against the first respondent and the dispute could not be resolved on the papers. Consequently, it could not be held, on the stated approach, that the first respondent had conducted any mining activity since April 2016. The application as against the first respondent could therefore not succeed.

In the main application against the second and third respondents, the Court noted that the applicant's entire application was based on the premise that the land was zoned "Agriculture 1". The respondents adduced into evidence a zoning certificate to prove otherwise, but the Court found the certificate not to advance their case.

Where an official act has been executed, as in the present matter, the maxim *omnia praesumuntur rite esse acta* finds application. It is presumed in such circumstances that any condition precedent to the validity of the official act has been complied with and that the official (or body of officials) was qualified to perform the act in question and complied with the necessary formalities. Thus, once the applicant had established, as it had, that the property was zoned "agricultural 1" then it was presumed that every necessary preceding step was complied with before the zoning was granted. To set up a dispute of fact the first to third respondents were required to put up primary and not secondary facts to show the contrary.

Finding that the bald averment made in the counter-application did not raise a real, genuine or *bona fide* dispute of fact, the Court found that the applicant has made out a clear right and an injury actually committed – and had made out a proper case for the interdictory relief which it sought against the second and third respondents. Such relief would be granted unless the respondents succeeded in their counter-application.

The main relief sought in the counter-application (that the main application be dismissed) could not be granted. The alternative relief sought was for the main application to be stayed pending the finalisation of an application for review of the decision regarding the zoning of the land and a final determination by the Minister of Mineral Resources in respect of the mining permit held by the second respondent. The Court held that none of the said relief could be granted. The zoning of the land was binding and remained in force until set aside by a court in proceedings for judicial review. It existed in fact and had legal consequences that could not simply be ignored. For as long as the zoning allocated to the property stood, any mining activity on the property would constitute a criminal offence. What the first to third respondents sought in the counter-application was that the court should sanction such criminal activity pending the resolution of the review application. That was impermissible.

The second and third respondents were interdicted from utilising the property for the purposes of mining or removal of sand as prayed.

Erasmus and another v Minister of Defence and others [2017] 4 All SA 434 (FB)

Administrative law – South African National Defence Force – Air Force members – Transfer instructions – Refusal to obey – Application for interdictory relief – Applicants required to first follow grievance procedure specified in Regulations applicable to them – Requirements for interdict not met, and application dismissed.

The applicants each held the rank of major in the South African Air Force ("Air Force"). They were both resident in Bob Rogers Park, Bloemspruit in the Free State Province. Each received written transfer instructions in December 2016, in terms whereof they had to report for duty at Bredasdorp and Pretoria respectively. In terms of the Air Force's Career Management Policy, members could not serve longer than four years

in a post on the establishment of the Air Force or at a Division. Both applicants were dissatisfied with the instructions contained in their transfer documents (referred to as a signal), and failed to adhere to the instructions, instead remaining as residents at Bob Rogers Park. They averred that the transfer instructions were issued without considering their personal circumstances.

In March 2017, they obtained urgent interim relief, preventing the respondents from taking various steps to deal punitively with the applicants pending finalisation of the dispute.

According to the respondents, the applicants were part of a structured military environment where discipline and hierarchy were essential aspects, and the applicants could not flout lawful instructions pertaining to their transfers. It was maintained that the applicants no longer had any right to be at the Bloemspruit base, and that their continued presence there was unlawful and equivalent to trespassing. It was argued that the interdictory relief sought was contrary to the Defence Act, the Air Force's Career Management Policy and the Military Disciplinary Code.

Held – Section 61 of the Defence Act 42 of 2002 deals with the procedures for redress of grievances. A grievance by any person to whom the Act applies and is aggrieved by any act or omission of any other person to whom the Act applies may lodge his grievance in writing in accordance with the procedures to be prescribed by the Minister of Defence. Those procedures must specify the expeditious processing of grievances and the chain of command through which individuals and groups within the Department may address individual and collective grievances. The Court confirmed that a member of the South African National Defence Force ("SANDF") aggrieved by any aspect pertaining to his conditions of service – transfer included – is bound to utilise the promulgated grievance procedure.

Individual Grievances Regulations ("the Regulations") were promulgated in *Government Gazette* 40347 dated 14 October 2016 and regulation 17 of the Regulations provided that a member could only seek an external remedy to address a grievance once he had exhausted all his internal remedies.

Although the respondents did not rely on the provisions of the Military Ombud Act 4 of 2012, the Court held that Act to be another stumbling block that the applicants needed to overcome to be successful. The Office of the Military Ombud was established to investigate and ensure that complaints are resolved in a fair, economical and expeditious manner.

The Court took cognisance of the unique nature of the military service, which functions within a unique command structure and strict obedience to lawful orders and professional respect for those in command is required within such structure.

The transfers had been considered in terms of the military hierarchy and the Court was satisfied that there was substantial compliance with the applicable policy. However, the dispute was one to be dealt with by the military in the first instance. The applicants had failed to follow the prescribed grievance procedure. Civil courts should not be allowed to interfere with the processes of the military, save in exceptional circumstances and only when there is clear proof of a breach of a member's constitutional rights. While the transfers might inconvenience the applicants, the Court was not prepared to find that they had shown a well-grounded apprehension of irreparable harm if the interim relief was not granted and the ultimate relief was

eventually granted. The balance of convenience did not favour the applicants, and they did have other reasonable satisfactory remedies.

The only respect in which the applicants were successful in their application was with regard to the disconnection of the water and electricity supply to their homes without due legal process. That was conceded by the respondents as having been unlawful, and an undertaking to restore such supply was made. Save for that, the rule *nisi* was discharged and applicants' application was dismissed.

Haarhoff and another v S [2017] 4 All SA 446 (ECG)

Criminal law and procedure – Multiple rape of complainant with mental difficulties – Appeal against conviction and sentence – Assessment of evidence – Trial court correctly assessing all relevant facts, and applying legal principles correctly.

Convicted of the repeated rape of a 24-year old woman, the appellants were sentenced in terms of section 51(1) of the Criminal Law Amendment Act 105 of 1997, to 20 years' imprisonment. The complainant was described as having the mental age of a 10-year old child. However, the State presented the evidence of a clinical psychologist, who confirmed that the complainant was able to testify in Court and that she had a basic understanding of what it means to tell the truth and what it means to tell a lie. The psychologist also testified that the complainant understood what it meant to have sexual intercourse and that she understood the possible consequences of sexual intercourse. She was, accordingly, able to express her consent, or otherwise, to sexual intercourse.

The appellants alleged that the complainant did not understand the moral or legal obligation of the necessity to speak the truth. They further argued that the veracity of the complainant's evidence was questionable and a cautionary approach should be adopted.

Held – Deficiencies in the complainant's testimony were found by the Court not to be destructive of the State's case. The Court found further that both the appellants knew the complainant reasonably well and would have known of her mental difficulties. They must have known at all material times that they were dealing with a vulnerable person who was mentally challenged. Although Counsel for the appellants argued that the complainant had a history of promiscuity, there was no such evidence in the record. The appellants contended that the medico-legal examination of the complainant did not support her version as there were no serious visible injuries, and no evidence of torn clothing. However, the Court found that the medico-legal examination does not contradict the complainant's version of what had occurred during the incident.

The State must prove an accused person's guilt beyond a reasonable doubt and the onus rests· on it to prove every element of the crime alleged. No onus rests on the accused to prove his innocence. In order to be acquitted, the version of an accused need only be reasonably possibly true.

The trial court took into account all relevant facts and applied the legal principles correctly. The present Court found no grounds to interfere with the trial court's findings. The complainant's evidence was corroborated in material respects and the appellants were poor witnesses whose version of events was so improbable as to be beyond the realm of reasonable possibility. The Court confirmed that the State had discharged the onus both in respect of lack of consent and repeated rape. The versions of the appellants were not reasonably possibly true.

Turning to the question of sentence, the Court stated that sentencing is within the discretion of the trial court, and the Court of Appeal will interfere only if there is a clear misdirection on the part of the trial court or the sentence is shockingly severe. It was submitted by the appellants on appeal, that an appropriate sentence would be 10 years' direct imprisonment instead of 20 years. While the offence in this case attracted the prescribed minimum sentence of life imprisonment, the Court was satisfied that the trial court did not err in finding there to be substantial or compelling circumstances to impose a lesser sentence, and that it sufficiently took into account the totality of the facts in ordering a 20-year sentence of direct imprisonment.

The appeal was, accordingly, dismissed.

KOS and others v Minister of Home Affairs and others [2017] 4 All SA 468 (WCC)

Family law and Persons – Marriage – Alteration of gender of spouse in civil marriage – Difficulties experiences by transgendered persons in marriages solemnised in terms of the Marriage Act 25 of 1961, in obtaining the recordal by the Department of Home Affairs of their sex/gender change, as provided for under the Alteration of Sex Description and Sex Status Act 49 of 2003 – Department of Home Affairs wrong in maintaining that applications by the transgender spouses under the Alteration Act could not be granted while their marriages remained registered as having been solemnised in terms of the Marriage Act.

The first to sixth applicants were three married couples whose marriages were solemnised in terms of the Marriage Act 25 of 1961. The first, third and fifth applicants were transgender spouses in each of the marriages, having been born biologically male but undergone surgical and/or medical treatment to alter their sexual characteristics to female after they married. The latter step was taken because they experienced gender dysphoria in that that they were aware of being female trapped in a male body. The difficulties which transgendered persons in marriages solemnised in terms of the Marriage Act 25 of 1961 were experiencing in obtaining the recordal by the Department of Home Affairs of their sex/gender change, as provided for under the Alteration of Sex Description and Sex Status Act 49 of 2003 ("the Alteration Act") led to the present litigation.

The transgender spouses applied in terms of section 2(1) of the Alteration Act for the alteration of their sex descriptions on their respective birth registers. None of the parties to the marriages considered the fact that the registration of the altered sex status of the transgender parties would result in the public records showing that their marriages had become same-sex marriages to be relevant to their marriage status. However, the Department of Home Affairs maintained that the applications by the transgender spouses under the Alteration Act could not be granted while their marriages remained registered as having been solemnised in terms of the Marriage Act.

The primary relief sought by the applicants included various types of declaratory relief affirming the subsistence of their marriages; declaring that the second respondent was required by law to alter a person's sex description in terms of the Alteration Act irrespective of that person's marital status; and declaring that the Department's refusal to process the applications of the first and third applicants in

terms of Alteration Act because they were married in terms of the Marriage Act was unconstitutional and unlawful, and that its deregistration of the marriage between the fifth and sixth applicants was also unlawful and unconstitutional. They also sought interdicts directing the second respondent to grant the applications by the first and third applicants under the Alteration Act and to correct the population register to reflect that the fifth and sixth applicant were married to each other.

As secondary relief, sought in the alternative to the primary relief, and contingently upon the court upholding the Department's understanding of the statutory scheme, the applicants sought a declaration that the Alteration Act and/or the Marriage Act and/or the Civil Union Act 17 of 2006were inconsistent with the Constitution and invalid to the extent that any or all of them fail to allow the alteration of a person's sex description and sex status while that person was in a marriage that was solemnised under the Marriage Act.

Held – The Alteration Act makes provision for the formal acknowledgment, recordal and legal consequences of such transitions. It allows for the alteration, upon application to the Director-General of the Department of Home Affairs (cited as the second respondent in these proceedings), of a person's sex description on the birth register and the provision to the person concerned of an altered birth certificate. It also provides that a person whose sex description has been altered is deemed for all purposes to be a person of the sex description so altered as from the date of the recording of such alteration. The legal consequences of the recognition of a sex/gender-change in terms of the Alteration Act are therefore wholly prospective from the date of the recordal, and the Act does not have any retrospective effect.

Marriage brings about mutual rights and obligations that have been recognised to be contractual in legal character, albeit *sui generis* and entailing public law consequences. The effect of section 3(3) of the Alteration Act is that the recordal of a postnuptial sex/gender change in respect of either or both the spouses have no effect on their mutual marital rights and obligations. The formal recording of a person's gender or sex description is a matter of material legal and practical significance, impacting on the population register and the person's identity card.

The respondents did not identify a single provision in any of the legislation to which they referred that expressly forbade the processing and positive determination of the transgender spouses' applications under the Alteration Act. Also, strikingly absent from the respondents' arguments was any acknowledgment of the expressly enshrined constitutional principle that statutes must be interpreted in a manner consistent with the promotion of the spirit, purport and object of the Bill of Rights. They did concede that there is nothing in the Alteration Act itself that expressly or impliedly indicates that the applicant's marital status has any bearing on the ability or entitlement of a person who has transitioned to obtain administrative relief under the provisions of the statute. The Alteration Act did not contain anything to support the respondents' interpretation of the statutory framework. The problem with the implementation of the Alteration Act that the respondents sought to identify seemed to arise from their understanding of the Marriage Act and the Civil Union Act. The notion propounded by the respondents was that there was scope for a conversion from one type of duly solemnised marriage to another in the case of transgender persons. The Court found that to be based on a false premise. Both the Marriage Act and the Civil Union Act treat marriage as a union of *two persons*, to the exclusion, while it lasts, of all others.

There is thus no parallel system of civil marriage, as contended by the respondents – only a parallel system for the solemnisation of marriages.

The applicants were held to be entitled in the circumstances to the primary relief for which they applied.

It was declared that the Department of Home Affairs' dealing with the applications by the first, third and fifth applicants under the Alteration Act was inconsistent with the Constitution and unlawful in that it infringed the said applicants' rights to administrative justice, and to equality and human dignity. It was also inconsistent with the State's obligations in terms of section 7(2) of the Constitution. It was further declared that the second respondent was authorised and obliged to determine applications submitted in terms of the Alteration Act by any person whose sexual characteristics had been altered by surgical or medical treatment or by evolvement through natural development resulting in gender reassignment, or any person who is intersexed, for the alteration of the sex description on such person's birth register irrespective of the person's marital status and, in particular, irrespective of whether that person's marriage or civil partnership was solemnised under the Marriage Act or the Civil Union Act.

Moosa NO and others v Harnaker and others (Women's Legal Centre Trust as *amicus curiae*) [2017] 4 All SA 498 (WCC)

Wills, Trusts and Estates – Section 2C(1) of the Wills Act 7 of 1953 – Extension to protect surviving spouses in polygynous Muslim marriages – Violation of equality provisions of section 9 of the Constitution of the Republic of South Africa, 1996 – Exclusion of widows in polygynous Muslim marriages from the protection of section 2C(1) was constitutionally unacceptable and unjust as the provision affords a widow in a civil monogamous marriage some benefits but deny the same to a widow in a Muslim polygynous marriage.

The second and third applicants were both married to the same person (the "deceased") according to Muslim rites. They were therefore party to polygynous Muslim marriages.

In 1982, the deceased applied for a home loan from a bank in order to purchase the current family home. In order to qualify for such a loan the deceased needed to be married lawfully, as at the time under our legal system polygynous Muslim marriages were not recognised and were still treated as a common law crime. In August 1982, the deceased and the second applicant with the consent of the third applicant formalised their marriage under South African law. The property was purchased and held in the names of the deceased and second applicant. The deceased's religious marriage to the third applicant was not formalised under the Civil Union Act 17 of 2006.

Upon the deceased's death, the Muslim Judicial Council of South Africa issued a certificate regarding the distribution of the estate, certifying that it was to be divided in 1/16th shares to each of the second and third applicant, 7/52 to each of the four surviving sons and 7/104 to the five surviving daughters. The children of the deceased all renounced their benefits. As a result of the renunciation, the executor relied upon the provisions of section 2C(1) of the Wills Act 7 of 1953, and considered both the second and third applicant to be a surviving spouse. The executor then sought to effect registration of transfer of the immovable property of the deceased. The twelfth respondent approved the registration of that portion of the benefits renounced by the

deceased's descendants to the second applicant, as her marriage to the deceased was protected in terms of their civil marriage. However, he refused to recognise the third applicant as a surviving spouse, and decided that no proprietary benefits could be registered in her name under the Deeds Registries Act.

Held – The issue for consideration was whether in view of the equality provisions in terms of section 9 of our Constitution, the provisions of section 2C(1) of the Wills Act can be extended to protect surviving spouses in polygynous Muslim marriages.

The Court was satisfied that the third applicant was directly discriminated against, premised upon her religion and marital status and in the present context section 2C(1) was withholding benefits from a certain group of persons, namely, those woman in polygynous Muslim marriages. The exclusion of widows in polygynous Muslim marriages from the protection of section 2C(1) was constitutionally unacceptable and unjust as the provision affords a widow in a civil monogamous marriage some benefits but deny the same to a widow in a Muslim polygynous marriage. The differentiation constituted an unjustifiable infringement of section 9(3) of the Constitution.

The defect could only be cured by a reading-in of words that the term "surviving spouse" in section 2C(1) of the Wills Act encompassed in its meaning not only a surviving spouse in the legal sense but also every surviving husband or wife who was married by Muslim rites to a deceased testator contemplated by section 2C(1), irrespective of whether such marriage was *de facto* monogamous or polygynous.

National Director of Public Prosecutions v Ivanov (alias Alex Novak) and another [2017] 4 All SA 508 (WCC)

Criminal law and procedure – Entry into country with jewellery – Duty to declare item – Sections 81 and 83 of the Customs Act 91 of 1964 deal with the consequences of non-declaration of declarable goods and/or irregular dealing with, or in, declarable goods – Bracelet brought into South Africa by second respondent did not qualify as prohibited or restricted for purposes of the Customs Act.

Criminal law and procedure – Organised crime – Search and seizure operation – Seizure of property – Application for forfeiture order in terms of section 50 of Prevention of Organised Crime Act 121 of 1998 – Inadequate explanation provided for large sums of cash found during search and seizure operation leading to conclusion that National Director of Public Prosecutions had proved case on balance of probabilities.

In February 2014, the Directorate for Priority Crime Investigation received information from a reliable source that mandrax was being manufactured in the garage at a residential property in Cape Town. After conducting a preliminary investigation, the relevant warrant officer obtained a warrant and conducted a search and seizure operation at the premises. Bags of cash, including foreign currency were seized, as well as other items including cell-phones and laptops. The cash seized was found to be made up of South African currency totalling R2 032 040 and an undisclosed amount of foreign currency, mainly in US dollars and Euros. The foreign currency was later exchanged into South African currency totalling R617 285,90.

In an application for a preservation order, the applicant contended that the cash constituted the proceeds of unlawful activities. A preservation order was granted in terms of section 38 of the Prevention of Organised Crime Act 121 of 1998. In July 2015, a forfeiture order was obtained by the applicant, but the respondents then

applied for rescission thereof, and the applicant consented thereto. The present Court was presently faced with the forfeiture application.

Held – A central pin of the applicant's case was that the second respondent had entered South Africa with diamonds, without declaring them, for the specific purpose of purchasing immovable property in order to promote the first respondent's money-laundering activities. The central question then was whether the second respondent had a duty to declare the goods on her arrival in South Africa. Sections 81 and 83 of the Customs Act 91 of 1964 deal with the consequences of non-declaration of declarable goods and/or irregular dealing with, or in, declarable goods.

The second respondent's version that she arrived in South Africa with a bracelet, a personal effect, was supported by the evidence. The facts before the Court did not support the allegation that she was conspiring with the first respondent to launder money. The only purpose of declaring goods is to enable the customs officer to determine whether duty is payable, and to prevent prohibited or restricted goods being brought into the country. The evidence showed that the bracelet which the second respondent brought into South Africa did not qualify as prohibited or restricted for purposes of the Customs Act; and in any event, no duty would have been payable even if she had declared it. The Court was thus not persuaded that the second respondent's failure to declare the bracelet upon her arrival in South Africa was unlawful or constituted a contravention of section 15(1)(a) of the Customs Act. The applicant's case against the second respondent could therefore not succeed.

The position of the first respondent was markedly different. His explanation for the presence of the large sums of local and foreign currency found on the premises was found not be credible. The Court concluded that the applicant had proven its case against the first respondent on a balance of probabilities. The cash seized during the search and seizure operation was therefore declared forfeit to the State.

Notyawa v Makana Municipality and others [2017] 4 All SA 533 (ECG)

Administrative law – Appointment of municipal manager – Re-advertising of position – Review application – Bringing of application as legality review instead of review in terms of Promotion of Administrative Justice Act 3 of 2000 – As municipality's decision to rescind appointment of municipal manager was administrative action, review application had to brought in terms of the Promotion of Administrative Justice Act within 180 days of impugned decision – No full and reasonable explanation for the delay in bringing the application provided, resulting in application being dismissed.

The applicant was appointed by the council of the first respondent municipality as its municipal manager. The second respondent (the "MEC") informed the municipality that he was not satisfied with the appointment and that he would not confirm the appointment on the basis that the applicant did not meet the minimum requirements for the post. The MEC instructed the municipality to readvertise the vacant post of municipal manager. The council of the municipality thereafter rescinded the applicant's appointment and decided to re-advertise the post.

In the present application, the applicant sought the review of the decision to re-advertise the position of municipal manager. The application was expressly brought as a legality review and not a review in terms of the Promotion of Administrative Justice

Act 3 of 2000 (“PAJA”). One of the grounds on which the municipality and the MEC opposed the application was that the decisions sought to be reviewed and set aside amounted to administrative action and the application should have been brought in terms of PAJA. That being the case, the applicant had not applied in terms of section 9 of that Act for an extension of the 180-day period within which the application for the review of administrative action should be brought. It was submitted that a decision upholding that ground of opposition would be dispositive of the application.

According to the applicant, prior to his appointment, he was advised that it had been decided at a joint meeting of the Regional Executive Committee and the Provincial Executive Committee of the African National Congress (the “ANC”) that he should withdraw his candidacy for the post of municipal manager. He declined and was allegedly warned of harsh repercussions. Subsequently, the MEC informed the mayor that the applicant’s appointment was not in compliance with the relevant legislation, and that the municipality should therefore re-advertise the post.

Held – The relevant legislation pertaining to the appointment of municipal managers had to be considered. Section 54A of the Local Government: Municipal Systems Act 32 of 2000 deals with the appointment of municipal managers and acting municipal managers, while section 57(1) and (2)regulates employment contracts for municipal managers and managers directly accountable to municipal managers.

In the advertisement for the post of municipal manager, the minimum requirements for the post were stipulated. The applicant applied for the position and attached to his application various certificates pertaining to his qualifications and work experience. A selection panel was appointed and the applicant was shortlisted and was the panel’s eventual first choice of candidate. He was appointed as municipal manager at a full council meeting. However, as stated above, the municipality revisited its decision in respect of his appointment. In his founding affidavit, the applicant set out his qualifications and experience. The grounds for the review were essentially that the municipality had not validly rescinded the applicant’s appointment for want of the proper procedure, and that the MEC’s intervention was unlawful, in that he had not complied with the time period contained in section 54A(7) of the Local Government: Municipal Systems Act, that there was no basis for intervention, and that he had acted for an ulterior (party political) motive and thereby abused his powers. The applicant, so it was submitted, did have the required managerial experience and the MEC was not empowered to decree unilaterally that the applicant lacked the required managerial experience.

Addressing the issue of whether the impugned decision amounted to administrative action, the Court held that when the MEC indicated that he was not satisfied with the appointment of the applicant and instructed the council to re-advertise the post, he was exercising his powers in terms of section 54A(8) of the Local Government: Municipal Systems Act to take appropriate steps to enforce compliance by the Council with section 54A. He was thus exercising a public power. The municipality’s decision to rescind the appointment was therefore administrative action. As already mentioned, the application was brought as a legality review and was expressly not brought in terms of PAJA. The applicant in the present matter was obliged to proceed in terms of PAJA but did not do so. Even if there had been a substantive application for an extension of the 180-day period, the applicant did not furnish a full and reasonable explanation for the delay in bringing the application.

In addition to the unsatisfactory explanation for the delay in bringing the application and the disruption to the municipality, the granting of the relief claimed would have no practical effect. By the time the application was heard, the employment contract of the applicant, had it been concluded, would have come to an end in a very short time. That rendered a decision in the matter moot.

The application was dismissed with costs.

South Africa Sugar Association v Minister of Trade and Industry and others [2017] 4 All SA 555 (GP)

Trade (Customs and Excise) – Customs duty – Changes to import duties – Powers of Minister of Finance, as conferred by section 48 of the Customs and Excise Act 91 of 1964 – Minister of Finance is given wide powers to legislate amendments to customs tariffs, and is vested with a full decision-making power in that regard.

As the representative body in the South African sugar industry, the applicant complains that the respondents had failed to implement the customs duty regime relating to imported sugar in a procedurally fair and rational manner. The matter was settled with the first and third respondents, leaving only the second respondent relevant to the present judgment.

Held – One of the purposes of import duties is to protect industry local to South Africa from some of the effects of competition with firms outside our borders. The import duties relevant for present purposes were to be found in Schedule No 1 to the Customs and Excise Act 91 of 1964. Under section 48 of the Customs and Excise Act, the Minister of Finance is empowered to effect changes to import duties by notice in the *Government Gazette*. In doing so, the Minister of Finance amends national legislation. The duty applicable to the present urgent application was that relating to sugar.

As fluctuations in the world price of certain commodities and the exchange rate of the South African rand influence international trade, the duties applicable to such commodities must therefore be amended from time to time. The third respondent ("ITAC") is tasked with establishing an efficient and effective system for the administration of international trade. One of its duties is to investigate and evaluate the amendment of customs duties. If the Minister of Trade and Industry accepts a recommendation of ITAC that a customs duty should be amended, the Minister of Trade and Industry is empowered by the same regime to request the Minister of Finance to amend the relevant Schedule to the Customs and Excise Act. The Minister of Finance is given wide powers to legislate amendments to customs tariffs. He may do so at any time by tabling a taxation proposal in the National Assembly. In such a case, the proposal becomes payable not when the proposal is adopted by the National Assembly but upon its mere tabling. The Minister of Finance has various related powers as set out by the court in its judgment, and is the only organ of State (other than Parliament through national legislation) which can impose, withdraw or amend any such duty or measure. At the heart of the present application was the scope of the powers of a Minister of Finance who has received a request from the Minister of Trade and Industry to implement a recommendation of ITAC to amend a Schedule to the Customs and Excise Act by changing an item of customs duty.

On 28 July 2017, the Minister zero rated imported sugar. That meant that imported sugar was subject to no import duty at all. But the zero rating was based on outdated information. The applicant sought undertakings from the three respondents that they would process information provided by the applicant within a day and submit a recommendation to the Minister of Trade and Industry. No such undertaking was forthcoming from the Minister of Finance, and the applicant therefore sought an order directing the Minister to effect any consequential amendments to the Schedules to the Customs and Excise Act within five working days, or such other time as the court considered just, of having received the recommendation of the Minister of Trade and Industry. The issue in dispute related to the powers of the Minister of Finance on receipt of a request by the Minister of Trade and Industry to amend the import duty on sugar. The applicant contended that the applicable legislative scheme reduced the function of the Minister of Finance to a status approximating that of a registrar. The Minister on the other hand, claimed to be vested with a full decision-making power. The Court found nothing in the language of the Customs and Excise Act which reduces the role of the Minister to that akin to a registrar. Instead, the Court found that the power conferred on the Minister of Finance is one which he may generally exercise when he has come to the conclusion that it is in the public interest that he do so. The Customs and Excise Act is replete with powers conferred on the Minister of Finance in relation to duties which he may exercise when he deems it expedient in the public interest to do so. Satisfied that section 48(1)(b) of the Act confers a wide discretion on the Minister of Finance, the Court dismissed the application.

Starways Trading 21 CC v Pearl Island 714 (Pty) Ltd [2017] 4 All SA 568 (WCC)

Civil procedure – Leave to appeal – Requirements – Section 17(1) of the Superior Courts Act 10 of 2013 – There must be a reasonable prospect of success, the amount must not be trifling and must be a matter of substantial importance to one or both the parties concerned, and a practical effect or result should be achieved by the appeal.

Contract – Terms of – Issue was whether reference in the sugar contract, particularly the phrase “ex-warehouse”, constituted an agreement to the contrary as contemplated in section 59(2) of the Customs and Excise Act 91 of 1964 – Court found that it was accepted that what is contemplated is that risk passes to the purchaser, upon the purchaser taking delivery of the goods at the seller’s premises and the “ex-warehouse” clause was intended to mean no more than “from the applicant’s warehouse”.

The applicant sought leave to appeal against the dismissal of its application aimed at enforcing an agreement with the first respondent, in terms of which the latter party purchased 25 000 metric tons of white refined sugar from the applicant. The first respondent considered that it had cancelled the sugar contract pursuant to a repudiation thereof by the applicant. Applicant denied the repudiation, submitted that there was no basis for the cancellation of the contract, and denied that there was any act of cancellation on its part.

The totality of relief sought was dismissed by the court, triggering the present application for leave to appeal.

Held – There are now three requirements for the granting of leave to appeal pursuant to section 17(1) of the Superior Courts Act 10 of 2013, namely that there is a

reasonable prospect of success, that the amount is not trifling and is a matter of substantial importance to one or both the parties concerned and further that a practical effect or result can be achieved by the appeal.

The parties, just before the hearing, submitted detailed legal argument raising fresh points of law. Despite those complex arguments, an appeal has to be evaluated in terms of the facts of the case, as opposed to novel legal arguments.

On the merits of the appeal, the Court identified the following issues as being critical in the matter. The first was whether another court would find that the reference in the sugar contract, particularly the phrase “ex-warehouse”, constituted an agreement to the contrary as contemplated in section 59(2) of the Customs and Excise Act 91 of 1964 (“the Act”). If there was no “agreement to the contrary”, the next question was whether another court would find that, by its conduct, the applicant repudiated the contract, leading to its cancellation. Whereas the first ground placed an onus on the applicant, the second ground placed the onus on the respondents. The third question was whether another court would find that the applicant established an alleged tripartite agreement, an issue which only affected the second respondent and on which the onus was upon the applicant.

The term “ex-warehouse” has not been the subject of thorough academic analysis in South Africa, but it was accepted that what is contemplated is that risk passes to the purchaser, upon the purchaser taking delivery of the goods at the seller’s premises. Under an ex-works term, the materialisation of a risk such as the imposition of a customs levy in the period before delivery, which under the common law risk rule and the statutory manifestation thereof embodied in section 59 of the Customs and Excise Act would be for the account of the buyer after the contract became *perfecta*, will remain with the seller. The allocation of risks turns on the moment of delivery. Events prior thereto are for the account of the seller and everything thereafter this point are for the buyer.

In the present case, when the facts were examined, there were a number of considerations which militated against another court finding that the applicant had discharged the onus resting upon it, of showing that it and first respondent concluded “an agreement to the contrary” by the use of the words “ex-warehouse” in the contract.

The sugar contract was finalised and signed on 14 July 2016 after exchanges between applicant and first respondent during the course of negotiations. The “ex-warehouse” clause was intended to mean no more than “from the applicant’s warehouse”. Applying the established principles of contractual interpretation to the matter, the Court found that there was no prospect that another court would arrive at a different conclusion regarding the meaning of the relevant words.

There being no “agreement to the contrary”, the next question was whether the applicant had repudiated the contract, leading to its cancellation. Repudiation is conduct from which a reasonable person can conclude that the alleged repudiator, without having a lawful ground, will not comply with all or some of its contractual obligations. Section 59(2) of the Customs and Excise Act, imported an implied term into the sugar contract. Therefore, there was a duty on the applicant to reduce or permit a reduction of the contract price. Performance of that duty entailed reducing or permitting a reduction of the contract price. To the contrary, the applicant unequivocally indicated that although it was willing to perform its obligation to deliver,

it would upon such delivery not perform its duty to reduce or permit the reduction of the contract price. That was an act of repudiation.

On the final question, the Court found that the applicant had not discharged the onus of proving the existence of a tripartite agreement.

The application for leave to appeal was found not to meet the relevant test, and was therefore dismissed with costs.

Zimmerman v Ndlambe Municipality and others [2017] 4 All SA 584 (ECG)

Property – Residential properties – Rezoning of – Application for review of municipality's approval of rezoning of property – A rezoning decision taken by a municipality as an organ of State is reviewable in terms of the Promotion of Administrative Justice Act 3 of 2000 because in the exercise of this power and taking of a decision to approve a rezoning, the municipality exercises a public power derived from legislation.

Words and phrases – "administrative action" – Definition in section 1 of the Promotion of Administrative Justice Act 3 of 2000 – Refers to any decision taken, or any failure to take a decision, by an organ of State, when exercising a power in terms of the Constitution or a provincial constitution; or exercising a public power or performing a public function in terms of any legislation.

The applicant and second respondent were neighbours, owning adjoining properties situated within the geographic area of the first respondent municipality. The third and fourth respondents were property developers contacted to provide student accommodation for the fifth respondent university. In furtherance thereof, the third and fourth respondents concluded a lease agreement in 2011 over the second respondent's property to provide accommodation to some 12 students.

According to the applicant, all the properties on this street, save for a hotel, were zoned historically for single residential purposes, ie, dwelling homes. The hotel building was acquired by the fifth respondent for use as a university. Applicant alleged that the progressive conversion of abutting properties on the street had led to vast numbers of a student population with attendant disruption, noise, loss of enjoyment of amenities and similar consequences for retired homeowners. The added financial consequence was a drastic drop in the market value of properties due to little interest and sales from private buyers on the open market. As a result, the applicant challenged the fairness of the first respondent's administrative decision to approve rezoning and departure applications submitted to it by the second respondent in respect of her property – calling into play the right to administrative fairness set out in section 3(1) of the Promotion of Administrative Justice Act 3 of 2000.

Held – Section 33(1) of the Constitution provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair, and section 33(2) provides that everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

A rezoning decision taken by a municipality as an organ of State is reviewable in terms of the Promotion of Administrative Justice Act because in the exercise of this power and taking of a decision to approve a rezoning, the municipality exercises a public power derived from legislation. In that setting, the applicable municipal town

planning framework is governed by the Spatial Planning Land Use Management Act 16 of 2013 and the Ndlambe Spatial Planning and Land Use Management By-laws (2015).

Despite a belated attempt by the first respondent to contest applicant's right to object to the rezoning, the first respondent's own answering affidavit gave recognition to such right on the part of the applicant. Moreover, the applicant was directly affected by the consequences of a rezoning that could impact negatively on her own property.

In applications of rezoning, a site development plan must be annexed to the rezoning application at the time of lodging the application. The second respondent did not comply with that requirement in submitting her application.

A further irregularity was that despite the applicant's notice of objection to the rezoning, no advance notice and communication informing applicant of the Tribunal hearing convened to consider the application was conveyed to her. She was also not afforded a right to appeal against the rezoning approval.

In light of the conduct of the first respondent's officials, the applicant's constitutionally and legislatively enshrined rights to just administrative action were violated.

The first respondent's approval of the rezoning of second respondent's property was reviewed and set aside. The first respondent was ordered to take all reasonable steps to facilitate the demolition and/or re-instatement of any structures erected and/or modified by the second and/or third and/or fourth respondents.

End-for now