LEGAL NOTES VOL 12/2017

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EDITORIAL

Congratulations!

This is now to the Law Faculty of the University of Pretoria for being the number one law faculty in Africa and for being among the top 100 in the world! I attended a function to celebrate this achievement with the Dean and others, prof Boraine as dean sure made his mark.

I am also a graduate of Tukkies, did my degrees part time, first at Unisa (B.A. Law) and then at U.P. , the LLB and LLM. Going the part-time route was not easy, but there will always be room for part-time study, that is why even with the pupillage program that the NBCSA offers, in it being based on distance learning, same is to be welcomed.

But yes, congratulations to Law at Tukkies!

I just hope Tukkies will protect our children. The surrounding streets where the children (actually students, my apologies) park are full of criminal activities. If you do not pay a car guard then your car gets scratched. Not to talk about cars being stolen and intimidation. A student, whom I happen to know indirectly, lost two fingers when attacked to get hold of her laptop. I think that the streets in the area should be closed and be treated as if on campus. Although on campus one also gets crime.

Matthew

[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!**

By the way, merry Christmas and a happy new year!

Matthew

SOUTH AFRICAN DIAMOND PRODUCERS ORGANISATION v MINISTER OF MINERALS AND ENERGY AND OTHERS 2017 (6) SA 331 (CC)

Constitutional law — Human rights — Right to property — Deprivation of property — Interference with property rights must be substantial to constitute actionable deprivation — Market regulation not qualifying as such — Property owner having no protectable interest in obtaining specific price for goods, or valuing them according to particular method — Constitution, s 25(1).

Constitutional law — Human rights — Right to property — Deprivation of property — Regulation of trade in unpolished diamonds — Not constituting substantial, actionable interference with dealers' property rights — Constitution, s 25(1).

Constitutional law — Human rights — Right to choose trade, occupation or profession freely — Regulation of trade in unpolished diamonds — Not constituting actionable limit on either choice or practice of diamond trade — Constitution, s 22.

Minerals and petroleum — Diamonds — Diamond trade — Regulation — Constitutionality — Prohibition on unlicensed assistance in s 20A of Diamonds Act 56 of 1986 — Outlawing tender-house system under which unpolished diamonds would be sold to foreign buyers via unlicensed proxies who 'assisted' licensed buyers — Not unconstitutional.

Before 2007 diamond producers under the umbrella of the applicant (SADPO) operated a 'tender house' system under which unpolished diamonds from local producers were offered on an anonymous-tender basis to licensed South African buyers, assisted by non-licensed 'experts' acting on behalf of foreign buyers. While the sale was ultimately concluded between the producer or licensed dealer and the South African buyer, the system ensured that foreign buyers were lined up in case it was decided to on-sell the diamonds. The state (represented by the various respondents) * argued that the practice was unlawful and that it exploited a loophole in the regulatory framework to allow unlicensed persons to participate in the diamond trade. In 2007 a newly introduced s 20A of the Diamonds Act effectively outlawed the tender-house system by providing that licensees could not be assisted by non-licence holders during the viewing, buying or selling of unpolished diamonds, except at a diamond exchange and export centre (DEEC).

In2016 SADPO asked the Pretoria High Court to declare s 20A unconstitutional because it impinged (i) on their property rights under s 25 of the Constitution by depriving them of 30% of the value of the market value of their diamonds; and (ii) on their freedom of profession under s 22 of the Constitution by preventing them from conducting their business in the manner they saw fit. They also argued that s 20A was irrational and unreasonable. The High Court agreed and declared s 22A unconstitutional pending confirmation by the Constitutional Court. The matter was duly referred to the Constitutional Court.

Held

Deprivation of property: To be constitutionally cognisable, a deprivation had to involve a substantial limitation of or interference with property rights, ie the intrusion had to be so extensive that it had a legally relevant impact on the rights of the affected party (see [43] – [44] and [48]). But SADPO's argument on the alleged price drop was too vague and speculative to warrant a finding that there had been interference amounting to a deprivation (see [50]). And even had such a loss been proved, there would still be no deprivation since s 20A did not prohibit the sale of diamonds but merely limited the way in which sales could be conducted, which was not sufficient to constitute a deprivation of property in those diamonds (see [52] – [53]). The market was an inherently regulated place, and property holders did not generally have a legally protectable interest in conducting sales according to a particular practice or obtaining a specific price (see [53]). As a result the limitation imposed by s 20A did not constitute a substantial interference with licensees' rights of ownership in their diamonds (see [54]). For similar reasons, s 20A did not interfere substantially either with licensees' rights of property in their dealers' licences or with their diamond exchange certificates (see [56] – [62]). Hence there was no limitation of rights under s 25 of the Constitution (see [63]).

Interference with the right to freely choose one's profession or trade: The right had two elements, the right to choose and the right to practise, and the level of constitutional scrutiny attaching to limitations on each of these aspects differed (see [65]). If a legislative provision limited choice by prohibiting certain persons from entering or practising a trade, it had to be tested for reasonableness, but if it only regulated its practice, it had to be tested for rationality and possible infringement of other fundamental human rights (see [65]). Section 20A was neither a formal legal bar nor a practical (effective) one: it simply regulated diamond producing and dealing (see [68] – [70]). Nor was it irrational: prohibiting unlicensed persons from being involved in the unpolished-diamond trade except at DEECs was rationally related to the legitimate purpose of monitoring the movement of unpolished diamonds to promote local beneficiation (see [77] – [79]). Hence there was no limitation of rights under s 22 of the Constitution, and the order of invalidity based on it could not stand (see [79]).
The court accordingly declined to confirm the declaration of invalidity and upheld the appeal (see [80]).

ADVERTISING STANDARDS AUTHORITY v HERBEX (PTY) LTD 2017 (6) SA 354 (SCA)

Media — Advertising — Advertising Standards Authority — No jurisdiction over non-members — May not, absent submission to its jurisdiction, require non-members to participate in its processes, issue any instruction, order or ruling against non-member or sanction it — May consider and issue rulings to its members on whether they should publish or withdraw from publication any advertisement, regardless of who published it.

The respondent (Herbex) had obtained a High Court order inter alia declaring that the appellant, the Advertising Standards Authority of South Africa (the ASA), a voluntary association of which Herbex was not a member, had no jurisdiction over non-members such as itself; that absent Herbex's submission to its jurisdiction the ASA may not require Herbex 'to participate in its processes, issue any instruction, order or ruling against [Herbex] orsanction it'; and that all its rulings against Herbex were void.
In this case — the ASA's appeal against that order — the dispute related mainly to whether the High Court's order was overbroad in that, as the ASA contended, it curtailed the performance of its regulatory functions, more specifically in that it precluded it from considering any complaints whatsoever in respect of non-member advertisements without the non-member concerned submitting to its jurisdiction (see [10] – [11]). However, during the hearing of the appeal the parties settled on an order confirming the High Court declaration as to the ASA's lack of jurisdiction over non-members, but also curtailing its impugned overbroadness by enabling the ASA to consider complaints concerning non-member advertisements so as to determine whether its members should accept such advertisements for publication or withdraw them if already published (see [12] and [18]). They could, however, not agree on the issue of costs, requiring the Supreme Court of Appeal to consider whether to interfere with the High Court's costs order against the ASA.
Held, that there was no basis to interfere. Herbex had been substantially successful in the court a quo, and that court had undoubtedly been correct in holding that, in the absence of a submission to its jurisdiction, the ASA had no jurisdiction over non-members and could not require them to participate in its processes.

ASLA CONSTRUCTION (PTY) LTD v BUFFALO CITY METROPOLITAN MUNICIPALITY 2017 (6) SA 360 (SCA)

Administrative law — Administrative action — Review — Application — Delay in application — Condonation — Applicant must provide explanation that covers entire duration of delay — Promotion of Administrative Justice Act 3 of 2000,s 7 and s 9.

Administrative law — Administrative action — Review — Application — Delay in application — Condonation — Substantive application required — Promotion of Administrative Justice Act 3 of 2000, s 7 and s 9.

Administrative law — Administrative action — Review — Application — Delay in application — Condonation — Obligation of court to consider prejudice to those affected by decision — Promotion of Administrative Justice Act 3 of 2000, s 7 and s 9.

Administrative law — Administrative action — Review — Application — Delay in application — Condonation — Impermissible for court to decide merits of review application before considering and determining application for condonation— Promotion of Administrative Justice Act 3 of 2000, s 7 and s 9.

Asla Construction (Pty) Ltd (Asla) had been awarded a contract by the Buffalo City Metropolitan Municipality (the Municipality) to address the desperate housing needs of the residents of Duncan Village. In the court a quo Asla sought provisional sentence against the Municipality based upon payment certificates issued in terms of the contract. In response, the Municipality, in a counter-application, sought the review and setting-aside of the awarding of the contract on the basis that it was void ab initio in light of non-compliance with s 217 of the Constitution and various procurement legislation and policies. The Municipality argued that no reliance could beplaced on the certificates and provisional sentence had to be refused. In its opposing affidavit Asla raised the failure of the Municipality to bring its review without unreasonable delay and within 180 days of its award, as required by s 7 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). The Municipality, in reply, submitted that it was not out of time; in the alternative, it argued that it was in the interests of justice that its failure to adhere to the time limits as set out in s 7 of PAJA should be condoned in terms of s 9 of *PAJA*. The court a quo found the Municipality was indeed out of time, but held that it was in the interests of justice that an extension of the statutory time period should be granted, on the basis that the award of the contract constituted a 'serious breach' of s 217 of the Constitution and various other procurement instruments. It concluded that the invalidity of the decision to award the contract to the appellant could not be validated, set aside the contract, and refused provisional sentence. Asla appealed to the SCA.

The question that formed the focus of the SCA's attention was whether the court a quo had correctly exercised the discretion available to it in terms of s 9 of PAJA to grant an extension of time where it was in the interests of justice to do so. (It accepted that the delay in launching the application for a review exceeded 180 days.) A further issue was whether the Municipality was at fault in failing to make a substantive application for an extension.

Held, that s 9 of PAJA contemplated a substantive application for an extension of the 180-day period referred to in s 7. Once Asla had raised the issue of compliance with PAJA, the Municipality was obliged to launch an application in terms of the section for an extension of the fixed period. It failed to do so.

Held, that the court a quo, in granting condonation on the basis of the illegality of the contract, had impermissibly entered into and decided the merits of the review application without having first decided the merits of the condonation application. In considering what was in the interests of justice, it was correct that a court was obliged to consider the prospects of success, which in turn required a court to examine the merits; however, that did notencompass their determination.

Held, that, as a result of its erroneous approach, the court a quo had failed to properly consider whether the Municipality had, as it was required to, furnished a full and reasonable explanation for the delay in bringing the review which covered the entire duration thereof. The Municipality had neglected to provide such an explanation. (See [15].)

Held, that the court a quo, in deciding whether the interests of justice demanded condonation, did not take adequate account of the prejudice that would result were the contract set aside. On the one hand, it understated the prejudice to Asla. On the other, it failed to take any consideration of the prejudice that would result to the residents of

Duncan Village as a result of the inevitable delay in providing them with adequate housing. (See [18] – [20].)
Held, accordingly, that the court a quo erred in granting an extension of the time period in terms of s 9 of PAJA. The application for the review and setting-aside of the award of the contract to the appellant should have been refused. The award of the contract, accordingly, had been 'validated' by the undue delay of the Municipality, and the payment certificates could be properly relied upon. (See [24].) However, in the light of a without prejudice payment made by the Municipality which excussed Asla's claims, provisional sentence could not be granted.

BONDEV MIDRAND (PTY) LTD v PULING AND ANOTHER AND A SIMILAR CASE 2017 (6) SA 373 (SCA)

Land — Rights in — Registered title condition entitling transferor to claim retransfer of land if transferee not erecting dwelling within certain period — Nature of rights created — Such condition creating real right to erect dwelling and personal right for retransfer.

A condition in the title deeds of land transferred from the appellant, a property developer (Bondev), to each of the respondents, entitled Bondev to claim retransfer (against payment of the original purchase price) should the respondents as transferees, or their successors in title, fail to erect a dwellingon the transferred property within a prescribed period. This case concerned two appeals (heard together) against the High Court's dismissal of Bondev's claims, in two cases, for retransfer after the respondents concerned had failed to erect dwellings within the prescribed periods. The High Court did so on the basis of prescription, more than three years having lapsed (as contemplated in s 11*(d)* of the Prescription Act 69) after expiry of the prescribed period before Bondev had sought to enforce these claims.
Bondev accepted that if its right to claim retransfer were held to be a personal right, it would have prescribed (see para [21]) but argued that, while it appeared to be a personal right, the right to claim retransfer was so inextricably wound up with the obligation to erect a dwelling (which created a real right), that read together, they constituted a real right 'capable ofregistration' as contemplated in s 63(1) of the Deeds Registries Act 47 of 1937. Accordingly, so the argument went, the registered condition did not merely give rise to a personal right in favour of the appellant but to a real right which did not prescribe within three years (see para [6]).
Held
A condition in a registered title deed entitling the transferor to claim retransfer if neither the transferee nor their successors in title erect a dwelling thereon within a certain period, gave rise to both a real right (to have a dwelling erected) and a personal to right (to claim retransfer). This personal right to claim retransfer was not so inextricably wound up with the real right to have a dwelling erected that together they formed a 'composite whole' restricting the respondents' use of the property (see [19] – [20]).
The court a quo therefore correctly dismissed Bondev's claim in each case on the basis of prescription (see [22]).

MAHAEEANE AND ANOTHER v ANGLOGOLD ASHANTI LTD 2017 (6) SA 382 (SCA)

Administrative law — Access to information — Access to information held by private body — Request for access after certification of class action for damages — Meaning of 'documents required' — In context of litigation, documents must be reasonably required to formulate claim — Right of access relied on to decide whether or not to claim damages — Records requested not reasonably required to exercise or protect right relied on — Test not met — Promotion of Access to Information Act 2 of 2000, s 50(1).

Administrative law — Access to information — Records not reasonably required to exercise or protect right relied upon after commencement of proceedings — Proceedings commenced by certification application — Promotion of Access to Information Act 2 of 2000.

Practice — Class action — Commencement — Certification application signalling commencement of class action — Promotion of Access to Information Act2 of 2000.

The appellants, formerly employed by the respondent mining company and later medically boarded after contracting silicosis, instituted a High Court application for the certification of a class action against the respondent. The class was defined as current and former mineworkers with silicosis who worked or had worked on the respondent's gold mines. The certification was granted and went on appeal.
The present appeal concerned the respondent's refusal to grant the appellants access to records requested under s 50(1) of the Promotion of Access to Information Act (PAIA). It provides that a requester must show that the requested record is required for the exercise or protection of 'any rights'. The respondent argued that since the appellants' request was received after the commencement of the certification application, the operation of PAIA was excluded under s 7(1). It provides that PAIA does not operate where the record is requested after the commencement of proceedings and the production of or access to that record is provided for in any other law.The appellants first approached the High Court for relief, but the court agreed with the respondent that they were excluded by s 7(1). The court in addition found that the appellants had not shown that the records were required for the exercise or protection of any rights as intended in s 50(1). In an appeal —
Held per Gorven AJA for the majority
The onus was on the appellants to show that the request fell within the ambit of s 50(1), and if it was discharged, then the question of exclusion under s 7(1) arose (see [10]). The first enquiry was whether the appellants had prima facie established a right which required protection via access to the record (see [11]). The right the appellants wanted to exercise was the right to claim damages, and the question was whether the requested records were required for the exercise or protection of that right (see [14], [16]). But the reasons supplied by the appellants related not to the exercise of the right to claim damages but to the evaluation of whether they should do so, which meant that they were not required to 'exercise or protect' the right relied on (see [17]). And even on the supposition that the reasons were related to the right, the question was whether the records were reasonably required for its exercise or protection (see [18]). In the present case most of the facts were within the knowledge of the appellants or admitted by the respondent (see[18]). Since the appellants were clearly in a position to formulate their claim without the requested documents, they were not reasonably required for the exercise of the appellants' right to claim damages from the respondent (see [20] – [21]).
Since a certification application was a necessary precursor to the bringing of a class action, it had to be regarded as its commencement (see [23] – [24]). Since the proceedings relating to the appellants' class action had commenced its certification, the requested documents could not be said to be required for the exercise or protection of their right to claim damages. The appellants failed to meet the threshold test in s 50(1) and it was not necessary to deal with the respondent's further defence to the application under s 7(1) (see [27]). Appeal dismissed.
Held per Mbatha AJA dissenting
The appellants' shift in position from one of needing the documents for the assessment of their damages claims to one of needing them to decide whether or not to opt out of the class action was understandable: their appeal had been overtaken by events (see [35]). 'Any rights' in s 50(1) should be given a wide interpretation, and asking for the requested documents was a reasonable exercise of their constitutional right of access to information (see [39] – [40] and [44]). In addition, the individual rights of class members should not be disregarded by equating a certification application to the commencement of proceedings (see [55] – [56]). The appeal should accordingly be upheld (see [62]). **Molemela AJA** also disagreed with the majority judgment, but for somewhat different reasons (see [63]).

MBETHE v UNITED MANGANESE OF KALAHARI (PTY) LTD 2017 (6) SA 409 (SCA)

Company — Proceedings by and against — Derivative action — Leave — Requirements— Good faith — Ulterior purpose, while relevant, not constituting independent component of good faith — Companies Act 71 of 2008, s 165(5)(b).

Company — Proceedings by and against — Derivative action — Leave — Onusand discretion of court — Applicant must establish requirements on balance of probabilities — But court retaining residual discretion to refuse relief — Companies Act 71 of 2008, s 165(5)(b).

Section 165 of the Companies Act 71 of 2008 abolished the common-law shareholders' derivative action and replaced it with an action that can be instituted by a wide range of persons, including the company's directors. It provides that they may serve a demand on the company to commence or continue proceedings to protect its legal interests (s 165(2)), and if no steps are taken, apply to a court for leave to bring or continue proceedings in the name of the company (s 165(5)). Section 165(5)*(b)* provides that the court may grant such leave only if it 'is satisfied that (i) the applicant is acting ingood faith; (ii) the proposed . . . proceedings involve the trial of a serious question of material consequence to the company; and (iii) it is in the best interests of the company that the applicant be granted leave to commence the proposed proceedings . . .'.
In the present case the appellant (Mbethe), a director of the respondent (United), sought to advance various demands on United by way of derivative action. The demands were, inter alia, that the company suspend all board committee meetings and invalidate their decisions, take action against certain officers, and reinstate a contract with the Z company (the latter being the principal demand). The court a quo (the Johannesburg High Court) refused leave to proceed on the ground that Mbethe had, by failing to prove lack of ulterior purpose in bringing the application, also failed to prove that he was acting in good faith. In an appeal to the Supreme Court the issue was essentially whether an applicant under s 165(5) was required to establish, as an element of good faith, lack of ulterior purpose (see [10]).

Held

While the applicant bore an onus of proving each of the requirements of s 165(5)*(b)*, the court had an overriding discretion to refuse relief (see [8],[16], [18]). The requirements should not be seen in isolation: in considering whether the 'proceedings involve the trial of a serious question of material consequence to the company', a finding that the applicant had an ulterior purpose would also be of relevance in deciding whether the applicant was acting in good faith (see [19]).
The court a quo was wrong in concluding that such an applicant bore an onusof proving the absence of an ulterior purpose as a self-standing requirement of the good-faith enquiry: the presence or absence of ulterior purpose was subsumed by the requirement in s 165(5)*(b)*(ii) that the envisioned proceedings had to involve 'a serious question of material consequence to the company'. But a finding that an ulterior motive was present would nevertheless constitute cogent evidence of an absence of good faith (see[11], [19], [22]).
The test for good faith, while subjective in that it related to the state of mind of the applicant, was nevertheless subject to evidence-based objective control (see [20]). The enquiry was whether the evidence revealed reasonable (and therefore objective) grounds for Mbethe's statement that he was acting in good faith. If it were found that there were none, or insufficient, reasonable grounds to support his statement, this might establish an absence of good faith. And if the evidence established the presence of a collateral or ulterior purpose, the pursuit of which did not involve the trial of a serious question of material consequence to the company, or which was not in the best interests of the company, this might also constitute cogent evidence of the absence of good faith (see [22]).
The facts did not disclose reasonable grounds to support Mbethe's statement that he acted in good faith in wanting the contract with Z reinstated, which in turn pointed to the presence of an ulterior purpose of some kind. As a result, he failed to discharge the onus of proving on a balance of probabilities that the proposed proceedings involved the trial of a serious question of material consequence to United. He also failed to discharge the onus of showing that he held the honest belief that United had a good cause of action.

Since the absence of good faith also permeated Mbethe's other demands, he altogether failed to prove on a balance of probabilities that it was in the best interests of United that he be granted leave to commence the proposed proceedings on behalf United. (See [24], [31] – [32], [39].) Appeal dismissed.

MOOSA NO AND OTHERS v HARNEKER AND OTHERS 2017 (6) SA 425 (WCC)

Constitutional law — Legislation — Validity — Wills Act 7 of 1953, s 2C(1) — Providing that if descendant of testator renounces benefit of will, surviving spouse obtaining benefit — Term 'surviving spouse' not including spouses in monogamous and polygynous Muslim marriages solemnised according to Islamic law — To such extent, section unconstitutional — Words to be read in such that 'surviving spouse' including 'every husband and wife of de facto monogamous and polygynous Muslim marriages solemnised under the religion of Islam'.

In terms of s 2C(1) of the Wills Act 7 of 1953, '(i)f any descendant of a testator,excluding a minor or a mentally ill descendant, who, together with the surviving spouse of the testator, is entitled to a benefit in terms of a will renounces his right to receive such a benefit, such benefit shall vest in the surviving spouse'.
The term 'surviving spouse' did not include spouses in monogamous and polygynous Muslim marriages solemnised according to Islamic law. To such extent, s 2C(1) of the Wills Act, in breach of s 9 of the Constitution, was unfairly discriminatory on the grounds of religion and marital status. (See [28], [31] – [35] and [39].)
Appropriate relief in terms of s 172(1)*(b)* would be to read in the following words at the end of s 2C(1): '. . . For purposes of this sub-section, a''surviving spouse'' includes every husband and wife of a de facto monogamous and polygynous Muslim marriage solemnised under the religion of Islam.' (See [36] – [37] and [39].)

PIENAAR BROTHERS (PTY) LTD v COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE AND ANOTHER 2017 (6) SA 435 (GP)

Constitutional law — Legislation — Validity — Retrospective amendment of fiscal legislation — Whether, if enacted without adequate notice, offending rule of law and/or constituting arbitrary deprivation of property —No overriding duty to give notice of retrospective amendment, nor to give notice stating precisely what intended legislation would entail — Standards for constitutional review of statutes decisive in determining validity of retrospective legislation — Legality to be assessed on case-by-case basis — No arbitrary deprivation of property where sufficient reason for retrospective amendment — Constitution, ss (1)(c), 25(1) and 36.

In August 2007 an amendment to s 44 of the Income Tax Act 58 of 1962 (the ITA) was enacted by s 34(1)*(c)* of the Taxation Laws Amendment Act 8 of 2007 (the Amending Act), effectively removing an existing exemption from secondary tax on companies (STC) of distributions made by a 'resultant company' pursuant to an amalgamation transaction. Section 34(2) of the Amending Act deemed the amendment 'to have come into operation' on 21 February 2007, and provided that it would be applicable 'to any reduction or redemption of the share capital or share premium of the resultant company . . .'. The significance of 21 February 2007 was that that was when the first respondent (the Commissioner) issued a press release announcing the immediate withdrawal of the exemption. This announcement followed an earlier indication by the Minister of Finance, in his budget speech of 20 February 2007, that the exemption created a loophole for avoidance of STC that would be dealt with. (See [25] for a detailed explanation of how the loophole arose.)
Following a 2011 audit of the applicant (the taxpayer), the Commissioner, relying on retrospectivity of the amendment, assessed the taxpayer, a 'resultant company', for STC in respect of distributions it had made to its shareholders on 3 May 2007 pursuant to an amalgamation transaction. This case concerned the taxpayer's application to set aside this assessment. It advanced two grounds for the invalidity of the amendment: that retrospective amendments without adequate advance notice to taxpayers — which it

alleged was absent here — was inconsistent with the principle of legality and the rule of law enshrined in s (1)*(c)* of the Constitution because it prevented taxpayers from regulating their affairs according to the law; and also amounted to an arbitrary deprivation of property and was therefore inconsistent with s 25(1) of the Constitution. In the alternative, the taxpayer contended that, properly interpreted, the amendment did not apply retrospectively to completed transactions (see [18]). The court, dealing with the alternative ground first, held that the amendment was clear that it applied to all transactions, including completed transactions (see [37]). In respect of the constitutional challenges —

Held

There was nothing in our Constitution which prohibited Parliament from passing retrospective legislation, nor was there such a prohibition in other jurisdictions of similar constitutional structure. Also, there was nothing internal in the rule of law which rendered retrospective legislation per se unconstitutional. (Paragraphs [97] and [102].)

There did not appear to be any authority in our Constitution or in foreign law requiring knowledge of the proposed retrospective amendment, or that such knowledge would be fundamental to the rule of law. There was also no overriding duty to give notice stating precisely what the intended legislation would entail. In any event, even if such 'knowledge' or 'adequate warning' were essential, the process that was followed in the present case was sufficient to have placed any taxpayer who was contemplating an amalgamation transaction with a view to deriving an STC exemption, on guard that legislation was going to be amended to remove the particular exemption retrospectively. (Paragraphs [97], [107] and [110].)

The constitutional validity of retrospective legislation must be judged with reference to the standards of review laid down by our courts when challenging the constitutional validity of statutes. There were two main standards: 'rationality' (ie that the means chosen must be rationally connected to the end sought to be achieved) which applied to all legislation under the rule of law entrenched in s 1*(c)* of the Constitution; and the more exacting standard of 'reasonableness' or 'proportionality' which applied when legislation limited a fundamental right in the Bill of Rights and the limitation had to be justified under s 36 of the Constitution. A third standard applied when assessing whether a law violated the prohibition on arbitrary deprivation of property in s 25(1) of the Constitution, ie that there must be 'sufficient reason' for the deprivation. So, if the law did not infringe the Bill of Rights, then only the basic 'rationality' standard applied. The proper approach would be to judge the legality of retrospective amendments on a case-by-case basis. In the present case, the government's purpose in removing the tax exemption in respect of amalgamated transactions was rational. There was permanent loss of STC revenue arising from amalgamations which the exemption only intended to defer. And to amend it retrospectively was also justified: a mere prospective amendment would have encouraged taxpayers to exploit the loophole in the last few months before the loophole was closed. (Paragraphs [37], [80] – [85] and [99].)

Section 25(1) was intended to deal with situations where the law took away or interfered with the use and enjoyment of assets. The fact that a law created a civil liability did not in itself deprive taxpayers of property unlawfully;taxes could not without qualification be regarded as unjust deprivation of property use. There was, as already held, no overriding duty to give notice of a retrospective amendment irrespective of the facts, and in the present instance there was sufficient notice of general impact. The amendment adopted by Parliament was not arbitrary and therefore not in breach of s 25(1) of the Constitution; it was reasonable and justifiable in terms of s 36(1) of the Constitution. The property challenge could therefore not be upheld. (Paragraphs [107] – [108] and [110] – [111].)

STRUTFAST (PTY) LTD v UYS AND ANOTHER 2017 (6) SA 491 (GJ)

Insolvency — Compulsory sequestration — Application — Sequestration of two or more individuals in single application — Impermissible, except where parties married in community of property or where complete identity of interests existing.

Court — Precedent and stare decisis — Court bound by prior decision of its own unless 'clearly wrong' — Test — Precise test unavailable — But certain that clearly wrong judgment would pertain to type of case where error so profound that it amounted to judicial blunder or resulted in manifest and unsustainable absurdity or injustice.

It was an established rule of practice in the Gauteng Local Division that, savewhere parties were married in community of property or in the case of a complete identity of interests, one should not seek the sequestration of multiple respondents in a single application. However, recently, and against such practice, a court of the same division in the matter of *Maree and Another v Bobroff and Another* [2017] ZAGPJHC 116 (*Bobroff*) allowed a single application for the sequestration of two parties — partners in a lawfirm in that case. In doing so, the court declined to follow the authority for the established approach — *Ferela (Pty) Ltd v Craigie and Others* 1980 (3) SA 167 (W) — on the basis that it was clearly wrong. More particularly, it felt that the suggestion in the matter of *Business Partners Ltd v Vecto Trade 87 (Pty) Ltd and Others* 2004 (5) SA 296 (SE) — that the qualification for allowing multiple respondents in a single sequestration application should be, instead of a 'complete identity of interests', a 'substantial coincidence of interests' — was preferable.
In the present matter, the applicant, following *Bobroff*, sought in a single application the sequestration of two parties who were married, but not in community of property, and where there was no allegation of identity of interests between the parties or their estates. Thus, the question to be decided was whether the 'established practice' was still good law. According to the rules of stare decisis, the court in *Bobroff* was only entitled to depart from *Ferela*, a decision of a court of the same division, if the latter was '*clearly, plainly or palpably* wrong'. Had this standard then been met?
Held, that there appeared to be no clearly articulated or precise test as to when a decision was not only wrong but clearly wrong. It was nonetheless clearthat the stare decisis doctrine required something more than a mere conclusion that a previous judgment was incorrectly decided. Whatever the precise test, a clearly or patently wrong judgment would pertain to a type of case where the error was so profound that it amounted to a judicial blunder or resulted in a manifest and unsustainable absurdity or injustice. (See [30].)
Held, that the reason provided in *Bobroff* for declining to follow *Ferela* and preferring the qualification as set out in *Business Partners* — namely that it was almost impossible to conceive of a situation where there would be a complete identity of interests — did not indicate a palpable error in *Ferela*. (See [31].) Further, *Ferela* was not wrong, even less so clearly or palpably wrong. The established approach was appropriate, given, one, that an application for sequestration involved a diminution in the status of a particular debtor; and, two, the difficulty of establishing in a single application for the sequestration of multiple respondents whether there was a likelihood of advantage to creditors in respect of each debtor. (See [3], [10] and [32].) Accordingly, the decision in *Bobroff* to disregard the earlier judgment in *Ferela* was itself an error of such a nature that it had to be held to be clearly wrong, and should be departed from (see [32]).
Held, that in the present application there was no rationale for having launched sequestration proceedings against both respondents in one application. Application dismissed. (See [33] – [36].)

MY VOTE COUNTS NPC v PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS 2017 (6) SA 501 (WCC)

Constitutional law — Human rights — Right of access to information — Details of private funding of political parties — Disclosure required for exercise and protection of right to vote — Constitution, s 32(1), read with ss 1(d), 7(2) and 19.

Constitutional law — Legislation — Validity — Promotion of Access to Information Act 2 of 2000 — Constitution requiring disclosure of details of private funding of political parties — *PAIA* unconstitutional and invalid insofar as it did not allow for disclosure of private funding details of political parties — Constitution, s 32(1), read with ss 1(d), 7(2) and 19.

Section 32(1) of the Constitution provided that '(e)veryone has the right of access to . . . *(b)* any information that is held by another person and that is required for the exercise or protection of any rights'. It was the position of the applicant — the non-profit voluntary association My Vote Counts NPC — that the above s 32, read with ss 19(1) and (3), of the Constitution entitled citizens to have access to the private funding information of political parties, because such information was reasonably required for the effective exercise of the right to vote (s 19(3)) and to make political choices (s 19(1)). This constitutional imperative, it argued, was reinforced by ss 7(2) and 1*(d)* of the Constitution. It followed, according to the applicant, that the Promotion of Access to Information Act 2 of 2000 (PAIA) was inconsistent with the Constitution and invalid insofar as it did not allow for the continuous and systematic recordal and disclosure of private funding information of political parties. Consequently, in the present proceedings in the High Court, the applicant, acting under s 172(2) of the Constitution, sought declaratory relief in support of the above. The Minister of Justice and the political party the Democratic Alliance opposed the application.
The issues then included the following: *(a)* Did the Constitution require the disclosure of private funding information of political parties? *(b)* If so, did PAIA fail to allow for such disclosure, resulting in its being inconsistent with the Constitution?
Held, as to *(a)* — endorsing the findings of the minority judgment in *My Vote Counts NPC v Speaker of the National Assembly and Others* 2016 (1) SA 132 (CC)(2015 (12) BCLR 1407; [2015] ZACC 31) — that s 32, read with s 19, reasonably required the disclosure of private funding information of political parties for the exercise of the right to vote. Political parties were the 'vehicles the Constitution had chosen for facilitating and entrenching democracy', and public funding impacted on whether such parties achieved those aims. Further, the right to vote was a right to cast an informed vote; in this regard, the identity of funding contributors, and what they contributed, provided important information to voters about a party's likely behaviour; further, such funding information could facilitate the detection of post-election favours. (See [13], [24] and [26] – [30].)
Held, further, that the ability of the state to discharge its duties under s 7(2) of the Constitution — to respect, protect, promote and fulfil the Bill of Rights —and under s 1*(d)* — which envisioned an electoral system that gave effect to accountability, responsiveness and openness — was corroded by the impacts of corruption. Thus, the Constitution required the state to put in place effective preventative measures to safeguard against corruption, which secret funding encouraged or concealed. (See [34] – [35] and [37] – [39].)
Held,accordingly, that s 32(1), read with s 19 of the Constitution, and also ss 7(2) and 1*(d)* thereof, required disclosure of information on political parties' private funding for the exercise and protection of the right to vote. (See [42].)
Held, as to *(b)*, that PAIA did not as a whole provide for the disclosure of private funding information of political parties. This followed from the limited nature of the mechanisms and processes provided in PAIA (see [64]). Firstly, there was doubt whether political parties fell under the definition of either 'public body' or 'private body', ie those entities to which PAIA allowed access to records. Secondly, information was available only upon request, in a particular prescribed form, and in respect of a specific record. Thirdly, information was restricted to 'records', ie recorded information. Fourthly, PAIA provided for numerous grounds on which an entity could refuse a request for information, grounds upon which a political party could well be able to rely. (See [48] – [61].) As such, PAIA was not in sync with s 32 of the Constitution, limiting that section and, concomitantly, the right to vote and make political choices in terms of s 19 (see [64]). That limitation was not justified in terms of s 36 of the Constitution (see [69]). Accordingly PAIA was unconstitutional and invalid insofar as it did not allow for the disclosure of private funding of political parties (see [69]). (The court could not grant the applicant's order to the extent that it called for 'continuous' and 'systematic' recordal and disclosure. To do so would amount to an 'attempt at prescribing to Parliament to legislate in a particular manner', contrary to the principle of the separation of powers.)

KING AND OTHERS NNO v DE JAGER AND OTHERS 2017 (6) SA 527 (WCC)

Will — Fideicommissum — Provision confining beneficiaries of subject property to male descendants — Whether justifiable limit to right to equality of female descendants — Whether contrary to public policy — Constitution, s 9.

Testators in this case bequeathed their immovable property to their children subject to a fideicommissum. One of its terms was that beyond their children, the property could devolve only to male descendants (see [19] and [56]).
The testators had, among others, a son, who had two grandsons (J and K). Grandson had great-grandsons (respondents 1 – 3); and grandson K, great- granddaughters (applicants 2 – 6), who in turn had great-great-grandsons.
After grandson K died, the great-granddaughters applied to the High Court to amend the fideicommissum provision such that female descendants could inherit. (They asserted that the provision unjustifiably limited their right to equality or was contrary to public policy.) In the alternative, they asked the court to interpret the provision such that their sons could inherit. (See [20] – [21], [27] and [80].)
The issues were as follows (see [57]):

- Whether the provision was unfairly discriminatory. ***Held***, that it was (see [58]).
- Whether the provision's limitation of the equality right was justifiable. ***Held***, that it was (see [71] and [80]). This was on consideration, inter alia, of:
- the nature of the right (it was fundamental; though freedom of testation was important too) (see [73] and [80]);
- the importance of the limitation (without it, freedom of testation would be derogated, with the negative consequences at [59]) (see [74]);
- the nature and extent of the limitation (it was confined to the private sphere; affected a limited number of persons for a limited time; and was not aimed to infringe dignity) (see [75]).
- Whether it was contrary to public policy. ***Held***, that it was not (see [81]).
- Whether the provision should be interpreted to benefit the great-great-grandsons. ***Held***, that it should not be (see [104]).

Application dismissed (see [110]).

MINISTER OF HOME AFFAIRS AND ANOTHER v AHMED AND OTHERS 2017 (6) SA 554 (SCA)

Immigration — Refugee — Asylum seeker — Whether asylum seekers validly applied for visas under Immigration Act while in South Africa — Immigration Act13 of 2002, s 10(2).

Second to fourth respondents were asylum seekers who applied in South Africa for a visitor's visa (second respondent) and critical skills visas (third and fourth respondents). Second respondent's application was not accepted; and third and fourth respondents' were rejected. They applied to the High Court and obtained an order that the Director-General of the Department of Home Affairs permit second respondents' application; and consider and decide third and fourth respondent's appeals of the refusals, in light of its finding, inter alia, that an asylum seeker may apply for a visa or permit under the Immigration Act 13 of 2002. *The Minister of Home Affairs and the Director-General appealed to the Supreme Court of Appeal.
It held that it was a precondition to apply for a visa or permit under the Immigration Act, that the application be made outside of South Africa (s 10(2) read with reg 9(2) of the Immigration Regulations). The applications were accordingly invalid. (See [9] – [10] and [14].)
Appeal upheld, and order of the High Court set aside

BUILDCURE CC v BREWS AND OTHERS NNO 2017 (6) SA 562 (GJ)

Arbitration— Award — Delivery — Whether parties may vary statutory procedure for — Meaning of — Remittal to arbitrator to resolve dispute as to date of delivery — Arbitration Act 42 of 1965, s 25.

Respondent trust had contracted appellant corporation to make alterations to a home it owned. When the trust failed to make a payment, the corporation cancelled the agreement, and referred the matter to arbitration. (See [1], [17] and [32].)
The arbitrator's finding was that the cancellation was without basis. He signed his award on August 14, 2014; and had a hard copy of it delivered to each party on August 18. (The parties' agreement provided that 'the arbitrator shall be entitled to initially furnish his award to the legal representatives of the parties by way of electronic mail and, thereafter, furnish the respective parties with a signed hard copy thereof'.) (See [5], [23] and [38].)
The corporation later applied to review the arbitrator's award; the application was dismissed; and the corporation appealed to the full court. (See [1].)
The issues were:

- Whether parties could agree to a procedure for delivery of an arbitration award, which differed from the procedure in s 25(1) of the Arbitration Act 42 of 1965. (The section provides that 'The award shall be delivered by the arbitration tribunal, the parties or their representatives being present or having been summoned to appear'.) ***Held***, that they could. (See [18] – [19].)
- Whether the agreed procedure differed from that in s 25(1). ***Held***, that it did. (See [6.2], [20] – [21] and [29.2].)
- Whether the arbitrator had complied with the agreed procedure. ***Held***, that he had. (See [6.3] and [29.3].)
- The date of publication. ***Held***, that it was August 18. (See [25] and [29.4].)
- (The court also expressed the view, in passing, that (1) 'delivery' meant receipt by the parties; that (2) where the dates of receipt differed, the date of delivery would be the day on which the last party to receive the award received it; and (3) that if there was a dispute as to the date of delivery, a court had the power to remit the award to the arbitrator, to deliver it under s 25(1). (See [26] and [28].))
- Whether the arbitrator had committed a gross irregularity in the conductof the arbitration. (The corporation alleged it was not heard on an issue.) Held, that he had not. Appeal dismissed.

SERENGETI RISE INDUSTRIES (PTY) LTD AND ANOTHER v ABOOBAKER NO AND OTHERS 2017 (6) SA 581 (SCA)

Local authority — Buildings — Demolition — Order — Validity — Court finding that rezoning and subsequent building plan approvals unlawful and, without setting approvals aside, ordering demolition of parts of building exceeding original municipal zoning — Order vitiated by court's failure to set approvals aside, its failure to clearly identify portion(s) of the building to be demolished and to determine just and equitable remedy.

The issue in this appeal was the validity of a demolition order granted by the KwaZulu-Natal Division of the High Court, Durban. Although the order was based on its finding that the eThekwini Municipality's rezoning and subsequent deviation plan approvals in respect of the appellants' building were invalid, the High Court made no order to that effect — ordering only (apart from awarding costs) that '(t)he development on the property . . . that exceeds GR1 zoning be demolished'. The High Court's approach was that it was '[bound] by operation of the legality doctrine . . . to order that the part of the structure that [was] illegal be demolished'.

Held

The demolition order was unsustainable for the following reasons:

- Until the approvals were set aside, they remained valid. The court had granted a remedy of a consequential nature without granting the primary relief sought — the setting-aside of the municipality's rezoning and deviation plan approval — on which the consequential relief depended. (Paragraph [12].)
- The order lacked certainty and clarity: on a plain reading of the order only the portion of the building that 'exceeds GR1 zoning' would have to be demolished. There was, however, no description of that portion. There was also no evidence on whether the structural integrity of the building could survive the execution of the partial-demolition order. It would appear that the only way it could be executed would be by demolition of the entire building. Nor was consideration given to the constitutional proportionality of that remedy. (Paragraph [13].)
- The High Court erred in finding that it was compelled by the legality doctrine to issue the demolition order that it did; it failed to exercise its discretion to grant a just and equitable remedy in considering the order to be made.

KOS AND OTHERS v MINISTER OF HOME AFFAIRS AND OTHERS 2017 (6) SA 588 (WCC)

Births and deaths — Birth — Birth register — Alteration of sex description — Marital status — Impact — Whether persons married under Marriage Act 25 of 1961 who subsequently underwent sex/gender change prohibited by current legislative framework from securing alteration of sex description on birth register — Persons who had obtained sex/gender change entitled to determination of their application for alteration of sex description, irrespective whether person's marriage or civil partnership (if any) solemnised under Marriage Act or Civil Union Act — Alteration of Sex Description and Sex Status Act 49 of 2003, s 2(1); Marriage Act 25 of 1961; Civil Union Act 17 of 2006.

The applicants in the present matter included three transgender persons (KOS, GNC and WJV) who had been born male, but had subsequently undergone sex/gender changes to become female. Each had female spouses, whom they had married prior to their sex/gender change, and in terms of the Marriage Act 25 of 1961 (Marriage Act). (Those spouses also entered as applicants.) The present proceedings arose out of the many difficulties they had experienced in securing from the Department of Home Affairs, in terms of s 2(1) of the Alteration of Sex Description and Sex Status Act 49 of 2003 (Alteration Act), the recordal of their sex/gender change on the birth register. For one, the processing of their applications was significantly delayed because of the relevant officials' ignorance of the applicable legislation. The Department eventually refused the applications of KOS and GNC.
It explained that the registration of the sex/gender change would have the effect of reflecting persons in a same-sex relationship as being married to each other under the Marriage Act. This could not be allowed, however, where, under the current legislative framework, the Marriage Act did not permit same-sex marriages. KOS and GNC and their spouses were advised to divorce and then remarry under the Civil Union Act 17 of 2006, which did allow same-sex marriages. But this advice was of no assistance: divorce could only be obtained on limited grounds, none of which applied here. Regarding WJV, the Department effected the recordal of her sex/gender change but it deleted the particulars recorded in the population register of her marriage.
Prompted by the above, the applicants sought an order in the High Court declaring (i) that the Department 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 (ii) that the Department's refusal to process the applications of KOS and GNC because they were married in terms of the Marriage Act, and its deregistration of the marriage between WJV and her spouse, were unlawful and unconstitutional.
The Department opposed the application. It argued that the present 'parallel' regime of law governing marriage had a direct impact on the matter at hand. When addressing the failure of the Marriage Act to allow for same-sex marriages, the legislature decided to leave it unamended, but at the same time introduce the Civil Union Act to make

allowance for those in same-sex relationships wishing to marry. The upshot was that a person in a same-sex relationship could not conclude or remain in a marriage under the MarriageAct. At the same time the law did not allow persons to convert a marriage under the Marriage Act to one under the Civil Union Act. In light of this lacuna in the law, persons who were in marriages concluded under the Marriage Act (and being at the time of such marriage in a heterosexual relationship) were deprived of registering a sex alteration under the Alteration Act.

Such argument, the court held, had to be rejected. There was nothing in the Alteration Act itself that expressly or impliedly indicated that the marital status of a person who had transitioned had any bearing on his or her ability to obtain administrative relief under that statute (see [69] and [73]). At the same time, while the Marriage Act had the effect of precluding same-sex couples from having their partnerships 'solemnised' under the Marriage Act, there was nothing in that Act that prohibited a party to such a marriage from subsequently undergoing a sex change or obtaining an altered birth certificate in terms of the Alteration Act (see [69] and [81] – [82]). Further, the Department was mistaken in its understanding that there existed a parallel system of civil marriages. The Civil Union Act affirmed that unions solemnised under it would have the same consequences as those under the Marriage Act, with both regarding marriage as 'a union of two persons, to the exclusion, while it lasts, of all others'. The notion put forward then that there was scope for a 'conversion' from one type of duly solemnised marriage to another had as such been advanced on a false premise. (See [85].)

The court stressed the direct administrative interrelationship between the Alteration Act and the Identification Act 68 of 1997, which was aimed at the maintenance of an accurate and meaningfully informative population register to assist in matters of public administration, and the issuing of Identification Documents with a view to assist in law administration and enforcement. The alteration of a person's sex/gender description on the birth register meant that the description of gender in the population register had to be changed. But, significantly, the description of 'marital status' did not call for alteration. Further, the refusal of the Department to register the transgender spouses' sex/gender change meant that they could not obtain replacement IDs in terms of the Act to accurately reflect their actual identities as presented to the outside world. An inaccurate record was the result, thwarting the effective operation of the Identification Act. (See [8]and [74] – [76].)

The court accordingly held, and declared, that the Department was obliged to determine the applications submitted in terms of the Alteration Act by persons who had undergone a sex/gender change for the alteration of the sex description on such person's birth register, irrespective of the person's marital status and, in particular, of whether that person's marriage or civil partnership (if any) was solemnised under the Marriage Act or the Civil Union Act. (See [87] and [90.2].)

The court further held that the Department, in interpreting the legislation on which it relied in the way it did, and given its plain meaning, had failed in its obligation under s 7(2) of the Constitution 'to respect, protect, promote and fulfil the rights in the Bill of Rights'. (See [70] and [82].) The manner in which the Department had dealt with the applications had further infringed the applicants' rights to administrative justice and to equality and human dignity. The applicants were entitled to a declaration to such effect. (See [70] and [90.1].) The Department's rejection of KOS and GNC's applications had to be set aside, and such applications reconsidered. The deletion of the particulars of WJV's marriage in the population register was declared unlawful, and the director-general called upon to reinstate such particulars.

AREVA NP INCORPORATED IN FRANCE v ESKOM HOLDINGS SOC LTD AND ANOTHER 2017 (6) SA 621 (CC)

Government procurement — Procurement process — Award — Review — Locus standi — Party that did not submit bid in its own right but as agent for another company in same group instituting review to challenge award —Party lacking locus standi to institute review proceedings.

Electricity — Supply — Eskom — Challenge to award of tender to replace Koeberg nuclear power station's steam generators — Court finding that party seeking review acting as agent for losing bidder and therefore lacking locus standi to challenge award.

Constitutional law — Human rights — Enforcement — Own-interest litigation — Issue of locus standi usually dispositive of own-interest litigant's claim — If litigant fails to show locus standi, court should enter into merits only in exceptional case or where public interest demands it — Constitution, s 38(a).

Second respondent Westinghouse Belgium and applicant Areva submitted competing bids for first respondent Eskom's 2012 invitation to tender for the replacement of six generators at its Koeberg nuclear power station, a contract worth over R5 billion. Eskom awarded the contract to Areva. Westinghouse Belgium applied for the rescission of the award on the ground of irregularity, in particular that extraneous 'strategic considerations' were taken into account by Eskom's board tender committee. Areva opposed the application on the ground that Westinghouse Belgium lacked locus standi (standing) to bring the application because it had acted as a mere agent for Westinghouse USA, the real tenderer and correct applicant. Westinghouse Belgium replied that it had been accepted as the bidder by all concerned, including Eskom, and that it and Westinghouse USA were in any event both members of the overarching Westinghouse group.

The High Court rejected Areva's argument on standing on the ground that Eskom had always treated Westinghouse Belgium as one of the two bidders, but nevertheless dismissed its review application, finding that it took part in the negotiations with no complaint about the strategic considerations. Westinghouse Belgium appealed to the Supreme Court of Appeal (SCA), where it was partially successful in that the court found that the strategic considerations fell outside the bid criteria and that Areva's argument on standing should be dismissed because it was 'surplusage'. But the SCA turned down Westinghouse Belgium's request that it be awarded the tender, instead remitting the matter to Eskom for reconsideration. Aggrieved, Areva and Eskom sought leave to appeal to the Constitutional Court, while Westinghouse Belgium sought leave to cross-appeal against the SCA's refusal to directly award it the tender. Areva also persisted in its argument on Westinghouse Belgium's lack of standing.

Held by Zondofor the majority

Neither the High Court nor the SCA adequately addressed Areva's argument on standing, and leave to appeal should be granted on this issue and on the merits, on which the lower courts had reached opposite conclusions (see [28]). Westinghouse Belgium's averment that it had standing was plainly wrong: correspondence addressed to Eskom by Westinghouse Belgium indicated that the latter had acted not for itself but on behalf of Westinghouse USA (see [19] – [23]). It was also abundantly clear from the language of the final offer in the tender that Westinghouse USA was the real bidder (see[31], [34]). The fact that Westinghouse Belgium and Westinghouse USA were part of the same group of companies was irrelevant since they were separate legal entities (see [37] – [39]).

It was established law that an own-interest litigant had no broad or unqualified capacity to litigate against illegalities, but had to demonstrate that its interests or potential interests were directly affected by the unlawfulness sought to be impugned. Since Westinghouse Belgium's argument on standing had failed, the court would enter the merits only if exceptional circumstances or public interest demanded it (see [41]). This was not so in the present case because (i) the bidders were neck and neck in the competition for the tender and seemed equally capable of doing the job; and (ii) time was of the essence and Areva had already been working on the project for two years (see [40] – [41]). Since Westinghouse Belgium therefore lacked standing, Areva's appeal would succeed (see [42]). The decisions of the High Court and the Supreme Court of Appeal would be set aside and replaced with one dismissing Westinghouse Belgium's application with costs (see [42], [48]).

Heldby Moseneke DCJ for the minority

As to standing: Westinghouse Belgium had standing both under the common law (via its direct and substantial interest in the matter) and in its own right under s 38*(a)* of the Constitution (via its right to just administrative action) (see [49] – [50]). It was not in the interests of justice to dispose of a matter of this magnitude and public interest by way of a technical and dilatory bar like locus standi (see [50]). The main judgment should have found that Westinghouse Belgium had the requisite standing and decided the merits of Areva's appeal and the counter-appeal (see [63]).
As to the merits: Eskom had been meticulous and proper in its assessment of the bids, and there was no suggestion that its board tender committee was actuated by malice, irrationality, corruption or other improper motive (see [82]). The tender process was characterised by careful consideration of all the relevant factors, and the strategic considerations were integral to the bid evaluation criteria or, at the very least, could be properly inferred therefrom (see [83] – [84]). Since the tender process was procedurally fair, Areva's appeal should be upheld and the counter-appeal dismissed

SNYDERS NO v LOUISTEF (PTY) LTD AND ANOTHER 2017 (6) SA 646 (CC)

Mineralsand petroleum — Petroleum — Fuelling station — Site licence — Nature of — Petroleum Products Act 120 of 1977, s 2D.

Louistef (Pty) Ltd leased a property from its owner, a trust; obtained site and retail licences for the property under s 2D of the Petroleum Products Act 120 of 1977; and in the course of the lease, sold and transferred the site licence to the trust.
The trust thereafter obtained a High Court order invalidating the sale; the Supreme Court of Appeal reversed the order; and the trust applied for leave to appeal to the Constitutional Court.
The court considered the nature of a site licence (it was an asset with commercial value, subject to constraints); and ultimately dismissed the application (see [13] and [16]).

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NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS v KALMAR INDUSTRIES SA (PTY) LTD 2017 (2) SACR 593 (SCA)

Prevention of crime — Restraint order in terms of Prevention of Organised Crime Act 121 of 1998 — Over which assets — Not applicable to property which was subject of bona fide civil dispute.

The appellant appealed against the dismissal by the High Court of applications for preservation and forfeiture orders in respect of a rigging platform constructed for a company (Q6) to perform engineering work for the respondent.
A dispute arose between Q6 and the respondent over payment for work andQ6 took the view that it had a lien over the platform and the crane to which it was attached. Q6 further alleged that the respondent had unlawfully taken possession of the platform at night and laid charges of theft against the respondent with the police. Based on the allegations of theft, the National Director of Public Prosecutions (the NDPP) applied for the above orders.
Held
The NDPP knew, or must have known, that there were numerous, genuine disputes of fact which could never have been resolved on the papers. Those related to the terms of the agreement between the respondent and Q6; ownership of the platform and equipment; the return of the crane to Transnet; the circumstances under which Q6 had been ejected from the site; and the use of the platform and equipment by the respondent thereafter. More fundamentally, the commercial dispute between Q6 and the respondent was far removed from the objectives of the Prevention of Organised Crime

Act 121 of 1988, which was enacted to combat organised crime, money-laundering and criminal gang activities, and to prohibit certain acts relating to racketeering activities. The dispute also had nothing to do with the purposes of civil forfeiture of property under ch 6 of the Act and, on this basis alone, the appeal had to be dismissed. (See [18] – [20].)
The court remarked that the NDPP's decision to apply for preservation and forfeiture in the present case was inexplicable, irrational, and had to be severely deprecated. (See [33].) The appeal was dismissed with costs.

DIRECTOR OF PUBLIC PROSECUTIONS, GAUTENG DIVISION, PRETORIA v HEUNIS 2017 (2) SACR 603 (SCA)

Evidence — Accused — Statement in terms of s 115 of Criminal Procedure Act 51 of 1977 — Weight to be attached to — Accused failing to testify and expert evidence conclusively showing that his defence in s 115 statement false — Guilt of accused proven beyond reasonable doubt.

The High Court had acquitted the respondent of murder and convicted him instead of culpable homicide in circumstances where he had admitted shooting the deceased, the bullet having entered her body in the lower left breast and exiting just below her right shoulder blade before hitting the door of the vehicle in which she was sitting. The forensic expert testified that the trajectory clearly showed that, at the time the deceased was shot, she was facing forward, and it was not possible for her to have pushed down the firearm (held by the respondent) in the position described in his statement in terms of s 115 of the Criminal Procedure Ac 51 of 1977 (the CPA). The High Court rejected the evidence of the forensic expert without giving any reasons therefor and relied instead on the respondent's s 115 statement (that he had been attempting to commit suicide when the deceased had pushed down the firearm). In an appeal by the NDPP in terms of s 319 of the CPA,
Held, that the court a quo had not applied the law relating to the weight to be attached to the incriminating and exculpatory parts of a s 115 statement, and the only reasonable inference in the circumstances was that the respondent intended to shoot the deceased. (See [16] – [17].)
Held, further, that the damning evidence against the respondent called for an answer from him. Instead he had declined to testify and relied solely on his unsworn s 115 statement, which was problematic in its essential feature. His failure to tender evidence under oath resulted in the state's strong evidence becoming conclusive proof of his guilt beyond reasonable doubt and it therefore followed that the trial court had erred in deciding the case solely on the s 115 statement. (See [18] and [20].)
The appeal was upheld and the conviction of culpable homicide and the sentence imposed in respect of it were set aside and the matter remitted to the trial court for the reconsideration of the sentence in the light of the substituted conviction. (See [23].)

RAUTENBACH v MINISTER OF SAFETY AND SECURITY 2017 (2) SACR 610 (WCC)

Domestic violence — Protection order — Breach of — Arrest in terms of s 8(4) of Domestic Violence Act 116 of 1998 — Lawfulness of — Belief of arresting officer that complainant in imminent danger — Full and complete investigation not required into all allegations in complainant's statement— Arresting officer required only to exercise discretion rationally within boundaries of Act.

The plaintiff instituted action against the defendant for unlawful arrest and detention arising from his arrest under s 8(4)*(b)* of the Domestic Violence Act 116of 1998 (the Act) for the breach of a protection order. He contended that in the circumstances the

arresting officer had not had sufficient reason to believe that the complainant would suffer imminent harm, and further, that he had not properly investigated the matter and should rather have acted in terms of s 8(4)*(c)* of the Act.
A magistrate had previously granted a final protection order against the plaintiff, and authorised a warrant of arrest that was suspended on condition that the plaintiff not commit further domestic violence, assault or insult the complainant, enter her premises or be present at her home. The complainant contacted the police after the plaintiff sent her an email early one morning which was offensive, vulgar and derogatory, expressing that he would not let go, that he bit like a bulldog and would not rest until he had his way. After this complaint, the arresting officer interviewed the complainant who indicated that she was frightened and felt threatened, and that she could not sleep at her own house. She said that the plaintiff had peeped through her windows during the night and she feared for her life. She pleaded for protection and reiterated a threat the plaintiff had made to set her and her house alight.
The plaintiff contended that he had a court order to remove certain items from the complainant's home and that he had done so in the company of a deputy sheriff. After considering the matter and establishing from the sheriff that the plaintiff had misled the deputy sheriff in obtaining his assistance, the arresting officer contacted the plaintiff on his cellphone and arranged with him to come to the police station on the following Monday morning, the plaintiff having said that he was out of town at the time. The plaintiff then contacted the complainant telephonically about her complaint to thepolice. She in turn contacted the arresting officer after his call and repeated her concerns about her safety. The arresting officer then went to the plaintiff's house and discovered that he was not out of town. He arrested him and held him until the following morning when he was released.
Held, that the contents of the email were, on the face of it, a breach of the restraint order. The arresting officer's belief that the complainant could be in imminent danger could not in the circumstances be faulted. The information at his disposal at the time was more than sufficient to have alerted any reasonable officer that the plaintiff was emotionally unstable and abusive towards the complainant and that she needed to be protected from him to avoid further abuse. (See [42].)
Held, further, that the criticism that the arresting officer had failed to investigate the matter and had acted unreasonably or capriciously in arresting him was without merit. A full and complete investigation regarding all the allegations in a statement by the complainant before an arrest in terms of ss 8(4) and (5) of the Act was not what our law required: all that was required was that the arrestor exercise discretion rationally within the boundaries of the Act and bring the arrestee to justice. (See [43].) The claim was dismissed.

S v ELS 2017 (2) SACR 622 (SCA)

Conservation — Rhino horn — Unlawful purchase, possession and conveying of — Sentence — Trial court misdirected itself in approaching matter as if appellant was poacher — Rhino horn had been lawfully obtained by owner without animals being killed — Sentence reduced on appeal.

The appellant pleaded guilty in a regional magistrates' court to three counts of unlawfully purchasing, possessing and conveying rhino horn in contravention of s 41(1)*(a)* of the Limpopo Environmental Management Act 7 of 2003. He was convicted and was sentenced to 10 years' imprisonment on the first two counts, which were taken as one for sentencing purposes (two years were suspended for five years). On the third count he was sentenced to four years' imprisonment which was totally suspended for five years. In addition, he was sentenced to a compensatory fine of R1 million. He was partially successful in an appeal to the High Court against the sentence, in that the compensatory fine was set aside.
The appellant's uncontested evidence was that he was a game consultant manager and that he had bought the rhino horn from the manager of a game and conservation farm

who had been authorised by the owners to sell it. He had hoped to hold onto the rhino horn until the trade in it was legalised, when he would sell it at a profit.
On further appeal against the sentence the Supreme Court of Appeal held that the regional magistrate had committed a number of misdirections in imposing the sentence and had taken into consideration factors that were based on his own assumptions and had no basis in fact: these included that the rhinos had been hunted and killed, whereas they had only been dehorned; and that the manager of the farm from whom he had bought the horn had not had any permission to dehorn the animals. (See [10] – [12].) Both the trial court and the court a quo had made an assumption, incorrectly, and without any rational basis, that the purchasing of the rhino horns by the appellant emanated from the illegal hunting of rhinos, and this impermissible approach by the courts constituted a misdirection, entitling the court to interfere. In the circumstances, the sentence on the first two counts taken together had to be set aside as being inappropriate and replaced with a sentence of four years' imprisonment. (See [14] and [20].) The appeal was upheld.

S v KHANYE AND ANOTHER 2017 (2) SACR 630 (CC)

Evidence — Admissibility — Hearsay evidence — Admissibility of in terms of s 3 of Law of Evidence Amendment Act 45 of 1988 — Admissibility as against accused of extra-curial statements by co-accused — Such statements inadmissible.

The two applicants and their five co-accused were convicted in the High Court of murder and robbery with aggravating circumstances. They were sentenced to life imprisonment in respect of the count of murder and to terms of imprisonment for the robbery and certain firearm offences. They applied for leave to appeal against their convictions and sentences on the same ground that had been successful in appeals by three of their erstwhile co-accused, namely that the only evidence against them was that of extra-curial statements made by their co-accused. Their application for leave to appeal was late by more than two years.
Held, that, although the explanation provided by the applicants for the late filing of their application for leave to appeal left much to be desired, their having relied on fellow prisoners who were studying law to assist them in drafting and submitting their applications, there were prospects of success and the state would suffer no prejudice. It was therefore in the interests of justice that condonation be granted.
Held, further, that, there being no evidence other than the extra-curial statements made by their co-accused incriminating them, and that such evidence being inadmissible, the convictions and sentences of the applicants had to be set aside.

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS v IVANOV AND ANOTHER 2017 (2) SACR 639 (WCC)

Prevention of crime — Forfeiture order — Application for in terms of s 50 of Prevention of Organised Crime Act 121 of 1998 — Which property liable to civil forfeiture — Proceeds of crime — Immovable property bought with proceeds of bracelet brought into country without owner declaring such — Bracelet being personal effects of owner, not requiring to be declared and no offence committed under s 15(1)(a) of Customs Act 91 of 1964.

In April 2015 the applicant obtained a preservation order in terms of s 38 of the Prevention of Organised Crime Act 121 of 1998 (POCA) in respect of R2,6 million in cash found during a search conducted at a suburban house in Cape Town, as well as an order in respect of the immovable property itself (registered in the name of the second respondent, a Slovak citizen). The police suspected that the house in question was being used for the manufacture of drugs and they obtained a search warrant. On executing the

warrant, they met the first respondent, a Bulgarian national, who identified himself as overseeing the premises — he was in the company of two other men, also foreign nationals. The police found no drugs but in various places found large amounts of cash, approximately R600 000 in foreign currency and R2 million in local currency. The first respondent could not explain the source of the money but in respect of some of it he said that it was proceeds of foreign-exchange transactions of money he had brought into the country, and some were loans from other foreign nationals. He had no receipts or proof of any of these transactions. On further investigation, it was discovered that the immovable property had been acquired by the second respondent in a transaction paid for by means of payments made by a locally registered jeweller to an attorney's trust account. The second respondent alleged that she financed the purchase of the property by selling a diamond bracelet to the jeweller. She had brought the bracelet into the country as part of her personal effects and had therefore not been required to declare it on entering the country.
In the present proceedings, the applicant applied for a forfeiture order under s 50 read with s 53 of POCA. It contended that the cash, on the probabilities, constituted the proceeds of unlawful activities, namely the contravention of s 15(1)*(a)* of the Customs and Excise Act 91 of 1964. Further, in respect of the immovable property, that it had been acquired by the second respondent who had smuggled diamonds and/or jewellery into the country.
Held, as to the cash found by the police, taking into account that the first respondent's failure to provide a reasonable explanation either to the police or the court, together with his false and dubious explanations, the applicant had proven its case against the first respondent on a balance of probabilities.
Held, as to the immovable property, that the evidence showed that the bracelet which the second respondent had brought into the country 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. Her failure to declare the bracelet upon her arrival was not unlawful and did not constitute a contravention of s 15(1)*(a)* of the Customs Act. In the circumstances where the applicant relied on a contravention of this nature to constitute unlawful activity for the purposes of POCA, its case against the second respondent could not succeed. (See [94].) Application upheld in part and dismissed in part.

S v MAKHUBELA AND ANOTHER 2017 (2) SACR 665 (CC)

Arms and ammunition — Unlawful possession of firearms and ammunition — Joint possession — By individual members of group of robbers, of firearms held by other members of group — No evidence from which it could be inferred that accused intended to possess firearms through perpetrators who had firearms in their possession, or that intended to hold firearms on behalf of co-accused — Convictions set aside.

The two applicants were part of a group of seven men who were convicted in the High Court of robbery with aggravating circumstances, murder, and the unlawful possession of firearms and ammunition. They admitted that they were present at the scene of the murder and robbery but contended that they had not participated in it. Their convictions were based on the application of the doctrine of common purpose and this was the only issue for decision (other than a necessary application for condonation that was granted by the court) in the present applications for leave to appeal.
It appeared that the applicants had spent the afternoon together and had then left with their co-accused in the same car and travelled together to the town where the offences were committed. They spent some time in the same tavern upon their arrival, before going to the home of the deceased, a warrant officer in the police. When the deceased

arrived at home he was shot three times by intruders in the presence of his daughter. The intruders also took the deceased's service pistol.
The court held that the fact that the two applicants were at the scene of the crime was no chance event; the facts suggested that it was coordinated. There was furthermore no evidence that the applicants were at any stage forced to travel and remain with the group. If they had not known about the plan or had not intended to be involved in any manner, then they should have enquired of their co-accused what their intentions were when they parked the vehicle at a distance from the scene of the fatal shooting. Or, at least, they should have raised questions once they became aware that their co-accused had been carrying firearms when they alighted and proceeded to the house, and they should have then distanced themselves from their co-accused. Upon their return, they did not ask why the vehicle had to be driven at a very high speed from the scene or where the extra firearm had come from. It was reasonable to infer that the two applicants, far from being caught up unawares in illicit conduct, had an intention to commit a crime with their co-accused. (See [39] – [40].)
The court held further that the applicants had made common cause with those committing the armed robbery and had the requisite mens rea to commit this offence, and their convictions in respect of the robbery charge had to stand. Although the applicants may not have intended the criminal result of murder, they had to have foreseen the possibility of the criminal result of murder ensuing by virtue of the fact that the other perpetrators were carrying firearms, which they must have known would be used if the plan went awry. They had nonetheless actively associated themselves with the criminal acts and it followed that their convictions in respect of the murder charge also had to stand. (See [43] – [44].)
In respect of the charges of the unlawful possession of firearms and ammunition, however, the court held that it was clear that awareness alone was not sufficient to establish the intention of jointly possessing a firearm or the intention of holding a firearm on behalf of another. There was no evidence from which it could be inferred that the applicants had the intention to exercise possession of the firearms through the perpetrators who had those firearms in their possession, or that those persons had the intention to hold the firearms on behalf of all of the co-accused. The fact that the applicants had conspired with others to commit armed robbery, even if they were aware that some of the co-accused possessed firearms, did not lead to the conclusion beyond reasonable doubt that they had possessed the firearms jointly with their co-accused. The appeal against these convictions accordingly had to be upheld and the convictions and sentences for these offences set aside. (See [55] – [57].)

S v NCOMBO 2017 (2) SACR 683 (ECG)
Rape — Sentence — Factors to be taken into account — Number of times that accused raped complainant — Where accused discussed complainant reporting him to police after first act of penetration and thereafter penetrated her again — Discussion causing sufficient interruption in conduct to constitute two separate acts of rape.

In an appeal against a sentence of 16 years' imprisonment imposed in a regional magistrates' court for rape, the court was required to determine whether the appellant had raped the complainant more than once, thereby triggering the application of s 51(1) of the Criminal Law Amendment Act 105 of 1997.
Held, that in circumstances where, after ejaculating inside the complainant and withdrawing from her, the appellant had a discussion with the complainant about her reporting him to the police and then penetrated her again, such discussion caused a sufficient interruption for the incidents to constitute two separate acts of rape. (See [15].) The appeal was dismissed.

S v MAQUBELA 2017 (2) SACR 690 (SCA)
Murder — Actus reus — Proof of — Expert evidence could not exclude reasonable inference of natural death — Conviction of murder precluded in such circumstances.

Murder— Causation — Proof of — Distinction between scientific measure of proof and judicial measure thereof considered where expert evidence not excluding reasonable inference of natural death.

In an appeal against a conviction in the High Court of murder, the appellant contended that the court a quo had erred in finding her guilty of murder in circumstances where the expert evidence did not exclude the reasonable inference of sudden death by reason of cardio-pathology (in other words, a natural death), and the actus reus of murder had therefore not been committed.
The court held on appeal that the High Court had erred in its application of the scientific measure of proof to the medical evidence, which had produced an inconclusive answer as to the cause of death. This had the serious consequence that the court failed to recognise that the deceased had probably died of natural causes, which was the correct finding when the judicial measure of proof was applied to that medical evidence. The court's decision should have been that proof of natural causes, as a probable cause of death, precluded a finding of murder. (See [13] and [16].)
The court held further that the High Court had incorrectly relied upon the evidence of the appellant's guilty conduct, without more, to prove her guilt, and in the result the appeal against the conviction of murder had to be upheld.

VAN HEERDEN AND ANOTHER v NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS AND OTHERS 2017 (2) SACR 696 (SCA)

Trial — Stay of prosecution — On ground that constitutional rights of accused infringed — Lengthy delay of prosecution and dishonest conduct by prosecution — Permanent stay granted.

The appellants appealed against the refusal by the High Court to grant them orders setting aside restraint orders granted earlier by that court under the Prevention of Organised Crime Act 121 of 1998 (POCA); ordering the curator (appointed under the provisions of POCA) to release all their assets; and permanently staying the prosecution against them.
The first appellant was accused by his employer, a cigarette manufacturer, of stealing cigarettes from it. In August 2011 the first respondent (the NDPP), in anticipation of criminal charges against the first appellant and his wife, obtained a provisional restraint order in terms of s 25(1)*(b)* of POCA, which was made final on 5 October 2011. This order prevented the appellants from dealing with virtually all their property.
They appeared in the magistrates' court on 29 August 2011 charged with the theft of cigarettes to the value of R5 million — they were released on bail three days after their arrest. The value of the cigarettes allegedly stolen was later reduced to R3,4 million. The case was postponed on numerous occasions and, six months after their first appearance in court, the state indicated that the NDPP intended to add charges under POCA to the charge-sheet, but, as this had not yet been done, the prosecutor was instructed by his superiors to proceed only with the charge of theft in a regional court. The state was instructed by the magistrate to provide the appellants with a charge-sheet on or before the end of the court day on 19 March 2012. When they appeared in the regional court on 23 March 2012, ostensibly to proceed with the prosecution on the theft charge as a matter of priority, the court was informed that the state intended to include racketeering charges in terms of s 2 of POCA, and the matter was then postponed to 4 May 2012. Postponements were granted for various reasons after that and on 17 November 2014, without adjudicating on an objection to the charge-sheet, the magistrate refused a further postponement and struck the matter from the roll, without indicating why.
The appellants then sought the release of their assets, but the state responded by indicating that the prosecution team had undertaken to have an amended charge-sheet drafted by 17 April 2015. That 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. An amended

charge-sheet was presented to the appellants before the new hearing date of 4 September 2015, to which they once again objected, it being virtually the same as the one that had previously been objected to. When the matter came before a new magistrate, who was under the misapprehension that there had been an enquiry in terms of s 342A(3), he struck the matter from the roll for the second time.
In December 2015 the appellants launched the present application in which argument was heard in March 2016 and judgment delivered on 16 March 2016, with the court refusing the application. On appeal against this decision, the appellants complained that a period of six years had elapsed since the opening of the police docket, and a period of five and a half years after the arrest of the appellants and the seizure of all of their property. They contended that this infringed their rights to a trial within a reasonable time guaranteed in terms of s 35(3) of the Constitution. The events on which the charges were based covered a period stretching back to January 2009.
Held, that the state had been irresponsibly lax in investigating the case, finalising the charge-sheet and moving forward with the prosecution. It was clear that substantial and material parts of the delays had been occasioned by the inertia and vacillation of the prosecutors involved on behalf of the NDPP. Distressingly, the state had been disingenuous, in that it had no intention to proceed on the restricted basis of the theft charge as indicated to the magistrate when it sought a transfer to the regional court on a priority basis, and had given that assurance to the court to prevent the matter from being struck from the roll. (See [56] – [57].
Held, further, that the passage of time in the present matter, relative to its facts, was unreasonable. Importantly, the dishonest and unacceptable conduct of the state could not go unnoticed and had to be taken into account in favour of the appellants and against the NDPP. The relief sought was an extraordinary remedy and the conclusion was ineluctable, that the appellants' right to a trial to begin and conclude without unreasonable delay had been infringed, and that the appropriate relief in terms of s 38 of the Constitution was the principal relief sought by them. The appeal was upheld and the orders sought by the appellants were granted. (See [69].)

ALL SA LAW REPORTS DECEMBER 2017

Cipla Agrimed (Pty) Ltd v Merck Sharp Dohme Corporation and others
[2017] 4 All SA 605 (SCA)

Civil procedure – Interlocutory interdict – Appealability – Test for appealability – An interim interdict pending the determination of an action is not final in effect, which is why matters decided for purposes of granting an interim interdict do not become res judicata.

Words and phrases – "decision" – Section 19(2) of the Patents Act 57 of 1978 providing that a decision or order of the Court of the Commissioner of Patents has the same effect and shall for all purposes be deemed to be a decision or order – Generally a ruling does not constitute a decision unless it has three attributes: it must be final in effect; it must be definitive of the rights of the parties; and it must have the effect of disposing of at least a substantial part of the relief claimed.

As proprietor of a patent ("the 1992 patent"), the appellant ("Cipla") sought the revocation of the patent ("the 1998 patent") owned by the first and second respondents. Both patents concerned injectable veterinary formulas. The third respondent was the registered licensee of the 1998 patent. All three respondents (collectively referred to by the court as "Merck") were the plaintiffs in a pending action against Cipla in which they claimed a final interdict against infringement and an enquiry into damages or a reasonable royalty (the "infringement action"). The revocation application and infringement action were brought in the Court of the Commissioner of Patents (the "CCP").

Cipla's revocation application was based on section 61(1)(c) of the Patents Act 57 of 1978 read with section 25(1), averring that the 1998 patent was not a new invention as contemplated in section 25(1) as it was anticipated by the 1992 patent ("the anticipation point"), and that to the extent it was a new invention, it did not involve an inventive step as contemplated in the same provision ("the obviousness point").

The parties agreed to stay the infringement action pending the final determination of the revocation application.

The application was argued on the papers because the first ground could be determined without recourse to oral evidence. Cipla did not abandon the second ground but intended referring it to oral evidence. Merck argued that, absent a separation order, the argument on the papers would dispose of all the issues in the application and recourse could not be sought to oral evidence thereafter.

The court below heard the revocation application and upheld the anticipation point, granting revocation. However, that decision was reversed on appeal, with the result that the revocation application was dismissed and each of the claims of the 1998 patent certified as being valid. That did not end Cipla's attempt to challenge the 1998 patent. It served a notice to amend its plea by deleting the anticipation point and adding a new attack on the patent's validity. Merck argued that the issue of validity of the 1998 patent had been finally determined and brought an application to amend its replication by setting up the relevant judgment as rendering the validity of the 1998 patent *res judicata*. That matter was pending at the time of the present proceedings. In the meantime, Merck applied to the Court of the Commissioner of Patents to interdict Cipla from infringing the 1998 patent pending the finalisation of the action for a final interdict. The court found that although only the anticipation point had been argued in the CCP, Cipla had been obliged to put forward, in the revocation application, all its attacks on the validity of the 1998 patent. In regard to the obviousness point, Cipla should have sought a separation of issues if it wanted that point to stand over for later decision. The validity of the patent was thus *res judicata*. The interim interdict was granted, resulting in Cipla appealing to the present Court.

Held – The starting point in the present appeal was the question of whether the court *a quo*'s judgment was appealable. In terms of section 19(2) of the Patents Act, a decision or order of the CCP has the same effect and shall for all purposes be deemed to be a decision or order. The appealability of CCP decisions thus stands on the same footing as decisions of the High Court. Section 16(1) of the Superior Courts Act 10 of 2013provides for an appeal, with leave granted, to be brought against any decision of a High Court. An interim interdict pending the determination of an action is not final in effect, which is why matters decided for purposes of granting an interim interdict do not become *res judicata*. Cipla argued that, because the final determination of the *res judicata* point was unlikely to take place prior to December 2018 when the patent expired, the interdict, while interim in form, was final in substance and thus appealable. The Court disagreed. It found that the interdict granted by the court *a quo* was not only interim in form but interim in substance, and on ordinary principles was not appealable. The appeal was, therefore, struck from the roll with costs.

For Civil Procedure: Superior Courts see:

Drift Supersand (Pty) Ltd v Mogale City Local Municipality and another
[2017] 4 All SA 624 (SCA)

Administrative law – Approval by municipality of establishment of township on land – Fairness of procedure adopted by municipality before township application was approved – Failure to afford interested party a hearing – Breach of legitimate expectation.

Administrative law – Judicial review – Section 7(2) of the Promotion of Administrative Justice Act 3 of 2000 requires internal remedies to be exhausted before judicial review may occur – A party who has been excluded from a decision-taking process, cannot be expected to appeal in that process.

Civil procedure – Replying affidavit – Content of – Striking-out application – Application refused insofar as what was set out by the appellant in the replying affidavit was a variation of what it had already been set out in the founding affidavit.

Civil procedure – Standing – Owner of land in close proximity to proposed township having standing as an interested person to challenge establishment of township.

In August 2012, the first respondent ("the municipality") approved the second respondent's application to establish a township on certain land. Being the owner of land situated in close proximity, the appellant applied to the High Court for the review and setting aside of the municipality's decision. Its application having been dismissed, the present appeal was noted.

A cross-appeal was also noted by the second respondent, against the court *a quo*'s refusal to strike out certain factual allegations made by the appellant in its replying affidavit.

All the parties accepted that the decision to approve the township application, being one which adversely affected the rights of a person and which had a direct, external legal effect, constituted administrative action by an organ of State as contemplated by the Promotion of Administrative Justice Act 3 of 2000. The review application was based on the averment that the municipality's decision was the result of a process that was not procedurally fair.

The respondents relied on the fact that the right to mine the appellant's property had in fact not been granted to the appellant itself but to one of its subsidiaries. The respondents therefore argued that any rights likely to be affected by a township being developed nearby were not those of the appellant but its subsidiary. They, therefore, argued that whilst its subsidiary might have had standing to review the impugned decision, the appellant did not. They also argued that the allegation that the appellant was mining the land lacked detail and cogency and that, as that had emerged in reply, the appellant had impermissibly tried to make out its case in reply. They therefore submitted that the appellant's allegations in reply should either be ignored or struck out.

Held – Not only must a court exercise practical, common sense in regard to striking-out applications but there is a tendency to permit greater flexibility than might previously have been the case to admit further evidence in reply. As such, if the new matter in the replying affidavit is in answer to a defence raised by the respondent and is not such that it should have been included in the founding affidavit in order to set out a cause of action, the court will refuse an application to strike out. In this case, the Court found that what was set out by the appellant in the replying affidavit was a variation of what it had set out in its founding affidavit. It was not seeking to make out a fresh cause of action in reply, and there was no reason either to strike out the explanation made in reply or to ignore it.

In disputing the appellant's standing, the respondents sought to limit the rights of the appellant which were potentially adversely affected by the decision, solely to those associated with the mining activities being conducted on its property. Those were not the only legal rights to which regard could be had in considering whether the establishment of a township in the immediate vicinity impacted upon the appellant's rights as owner. As owner of property situated in the immediate vicinity, the appellant clearly had standing to question the validity of the decision to allow a township to be established on property in the immediate vicinity of the site of its quarrying operations.

The Court then turned to deal with the question of the fairness of the procedure adopted by the municipality before the township application was approved. The requirements for such approval were set out in the Town Planning and Townships Ordinance 15 of 1986. Furthermore, those authorised to take administrative decisions must do so in a manner consistent with the Promotion of Administrative Justice Act. Section 3(3) of that Act provides that in order to give effect to the right to procedurally fair administrative action, an administrator in his discretion may also give the person whose rights or legitimate expectations are materially and adversely affected, the opportunity to, *inter alia*, present and dispute information. That led to the appellant's contention that it had a legitimate expectation to a hearing before the decision was taken, and that the failure of the municipality to afford it such a hearing rendered the decision void. The requirements for a legitimate expectation are that the representation inducing the expectation must be clear, unambiguous and devoid of any relevant qualifications; the expectation must have been induced by the decision-maker and must be reasonable; and the representation must be one which is competent and lawful for the decision-maker to make. Those requirements were all met in the present case. The appellant, an interested party, was denied the opportunity of placing its views before the executive mayor who was the functionary entrusted with the discretion to approve the application. That was not procedurally fair.

A further contention raised by the respondents was that the Court ought not to grant relief in favour of the appellant as it had failed to exhaust its domestic remedies under the Ordinance. Section 7(2) of the Promotion of Administrative Justice Act requires internal remedies to be exhausted before judicial review may occur. Section 104(1) of the Ordinance provided that an applicant or objector who is aggrieved by a decision of an authorised local authority, may appeal within a prescribed period. The Court described as nonsensical and absurd, the argument that a party such as the appellant, having been excluded from the decision-taking process, should be expected to appeal in that process. The appellant could not be expected to exhaust its internal remedies when it was not afforded any remedies at all.

The appeal was, accordingly, upheld and the cross-appeal dismissed.

Passenger Rail Agency of South Africa v Moabelo [2017] 4 All SA 648 (SCA)

Personal injury/Delict – Injury sustained after falling from train – Claim for damages against rail commuter service operator – Alleged negligence – Rail commuter services carry a positive obligation to implement reasonable measures to ensure the safety of rail commuters who travel on trains, and such obligation should give rise to delictual liability where there is a risk of harm to commuters resulting from falling out of the crowded trains running with open doors, which is foreseeable.

In the respondent's damages action against the appellant ("PRASA"), the latter disputed liability. The respondent's claim arose out of an incident in which he was injured just outside a railway station after being pushed off a crowded train. The defence raised by the appellant was that the respondent had run or walked in front of an oncoming train outside the confines of the station, when it was dangerous or inopportune to do so. At the conclusion of the trial, the trial court found that the appellant's negligence was the cause of the respondent's injuries and consequently held it liable for damages. On appeal, the Full Court confirmed the order of the trial court and dismissed the appeal with costs. Special leave was obtained by the appellant to proceed with the appeal in the present Court.

Held – The issues on appeal were whether the trial court was correct in accepting the version given by the respondent to the extent that it could be relied upon for purposes of deciding whether he had discharged the onus of proving that he was pushed out of the train; whether the trial court was correct in rejecting the version put forward by the train driver that the respondent in fact ran in front of the train that ran him over; and whether the finding that the respondent's version was cogent, reliable, plausible and inherently probable and the rejection of the evidence put forward by the appellant's witnesses, was correct.

The respondent based his cause of action on the appellant's negligence in that it owed a duty of care to the respondent to ensure that the doors of the train were closed before the train started moving out of the station, and to ensure that passengers on board the train would not fall or be ejected therefrom. The onus to prove negligence rested on the respondent, who was required to prove that harm to others was reasonably foreseeable and that a reasonable person would have taken steps to guard against such harm occurring. He had to adduce evidence as to the reasonable steps that ought to have been taken by the appellant to prevent or reduce the risk of such harm. It is accepted that the rail commuter services carry a positive obligation to implement reasonable measures to ensure the safety of rail commuters who travel on the trains, and that such obligation should give rise to delictual liability where there is a risk of harm to commuters resulting from falling out of the crowded trains running with open doors, which is foreseeable. The issue to be considered was whether it could not have been reasonably foreseeable that a train operating at peak hours, with open doors in motion, would cause injury to the commuters. The Court held that injury was foreseeable and the train should not have been in motion with open coach doors. As a result, the appeal was dismissed by the majority of the court.

In the minority judgment, it was held that the respondent had failed to establish factual causation, or legal causation, and therefore that his claim should not have succeeded.

Pather and another v Financial Services Board and others [2017] 4 All SA 666 (SCA)

Financial Services Regulation – Securities Services Act 36 of 2004 – Nature of proceedings before enforcement committee – Court confirming that such proceedings are not criminal in nature and that the civil standard of proof applies – Administrative penalties imposed by enforcement committee are not in the nature of a penal sanction.

In 2005, the Directorate of Market Abuse (the "DMA") conducted an investigation in terms of section 83(1) of the Securities Services Act 36 of 2004 (the "Act") into the conduct of the appellants. The first appellant was the chief executive officer of the second appellant. Between November 2006 and May 2007 a number of persons, including the first appellant, were interrogated under oath in terms of section 82 of the Act by the first respondent, the Financial Services Board (the "FSB"). It was concluded that the appellants had contravened section 76 of the Act. The second respondent, the Enforcement Committee (the "EC") imposed an administrative penalty of R1,5 million on each of the appellants. The appellants' appeal to the FSB failed, and a review application in the High Court was dismissed. Leave to appeal to the present Court was granted.

Three contentions were advanced on behalf of the appellants on appeal. First, it was contended that the court below erred in finding that the civil standard of proof is applicable to proceedings before the EC, which are criminal or, at least, quasi-criminal in nature. Second, it was submitted that the court below erred in concluding that the EC did have jurisdiction to make the findings that it purported to make against the appellants under section 76 of the Act. Finally, in the alternative to

the two grounds, it was contended that the court below erred in not finding sections 102 to 105 of the Act unconstitutional.

Held – An effective and credible financial regulatory system must be capable, at least in its design, to produce reasonably speedy results. Relative to the courts, the process adopted by the EC is informal and inexpensive. The powers of the EC and Appeal Board are limited to the imposition of a monetary penalty. They do not include the power to impose imprisonment or indeed any form of deprivation of liberty. What is more, those proceedings are susceptible to review by a court, *inter alia*, on the ground that the monetary penalty is unreasonably high or severe.

Arguing that some guidance could be derived from foreign jurisprudence, the appellants sought to avoid the consequences of the analysis that the lawgiver had in mind administrative rather than criminal proceedings before the EC, by various arguments based principally on foreign authorities. However, the Court pointed out that in the proceedings before the EC, neither the police nor the prosecutorial authority is involved at all. That the facts underpinning the complaint can as well give rise to a criminal offence does not alter the nature of the complaint before the EC. The EC is primarily concerned with the exercise of a disciplinary power in respect of a limited group of persons possessing a special status. The Court concluded that proceedings before the EC do not lie within the criminal sphere and cannot be classified as being criminal in nature. The court below was, accordingly, correct in holding that the EC, when imposing administrative penalties remained administrative.

Underlying the question of the characterisation of the nature of the proceedings, were two further contentions advanced by the appellants. The first was that if the proceedings before the EC are not to be regarded as criminal, it is a civil proceeding of such a character that the criminal standard of proof should be applied. Section 104 of the Act provides that "if a panel is satisfied that a respondent has contravened or failed to comply with the Act", it must impose an administrative penalty. The appellants' argument that the EC is obliged to apply the criminal yardstick was, in effect, an argument that the phrase "is satisfied" had to be interpreted to mean "is satisfied beyond a reasonable doubt". The Court held that the phrase "is satisfied" in section 104 of the Act is not reasonably capable of being interpreted to require proof beyond a reasonable doubt. That is clearly not what the provision expressly states and such a meaning was also not necessarily to be implied. It was confirmed that the applicable standard of proof is the civil standard.

The appellant's second contention was that the proceedings before the EC may result in a penalty or have a true penal consequence. The appellants contended that notwithstanding the fact that the penalty does not constitute a deprivation of liberty, it is intended to punish and deter in a manner characteristic of a criminal charge. The Court rejected that submission, and held that the fact that the penalty was intended to have a deterrent effect does not mean it is not administrative in nature.

The appeal was dismissed with costs.

Scalabrini Centre, Cape Town and others v Minister of Home Affairs and others [2017] 4 All SA 686 (SCA)

Immigration – Refugee Reception Office – Decision of Director-General of the Department of Home Affairs to close Refugee Reception Office in terms of section 8(1) of Refugees Act 130 of 1998 – Appeal against dismissal of review application – In exercising his section 8(1) power, the Director-General is constrained by the constitutional principle of legality, namely that the exercise of public power is only legitimate where lawful – Decision falls to be reviewed and set aside on the basis of the legality principle if it is not rationally related to the purpose for which the power was given; if the decision-maker failed to act in accordance with the empowering provision; if the decision-maker's failure to consider a relevant factor had an impact on the rationality of the entire process; or if the decision breaches the Constitution of the Republic of South Africa, 1996.

The decision of the Director-General of the Department of Home Affairs (the "Department") taken on 31 January 2014 to close the Cape Town Refugee Reception Office in terms of the Refugees Act 130 of 1998 was at the heart of the present appeal. The effect of the decision was that new applicants could no longer apply for asylum in Cape Town, and would be required to do so in Musina, Pretoria or Durban. Secondly, existing applicants for asylum who had applied at other refugee reception offices were now precluded from having their files transferred to the Cape Town Temporary Refugee Facility, unless they could show that their circumstances were exceptional.

The High Court dismissed the appellants' application for an order reviewing and setting aside the impugned decision. On appeal, the question was whether the decision of the Director-General was

unlawful and reviewable. The grounds of review were that the impugned decision was irrational and unlawful because it did not comply with section 8(1) of the Refugees Act, as the decision-maker ignored relevant considerations and made a material error of law. The second was that the decision was unconstitutional because it violated fundamental rights of those affected and the respondents' constitutional obligations towards them.

Held – The relevant provisions of the Act point to the need to establish and maintain a functional refugee reception office. They also show that an asylum seeker must repeatedly report to the refugee reception office to exercise his rights under the Act. An asylum seeker must report to a refugee reception office to obtain and renew a section 22 permit; to be interviewed by a refugee status determination officer; to collect the decision on his application for refugee status; to lodge an appeal to the Refugee Appeal Board; and to attend the hearing and receive the decision of the Board.

Whether a refugee reception office is necessary for achieving the purposes of the Act is quintessentially one of policy. The number and locality of refugee reception offices involve an assessment of the need for such facilities; the number of refugee reception officers, refugee status determination officers and other staff required; and issues relating to administrative effectiveness and efficiency, budgetary constraints, and policies of the Department. Thus, a decision to close a refugee reception office in terms of section 8(1) of the Act constitutes executive rather than administrative action, and is not subject to the Promotion of Administrative Justice Act 3 of 2000. In exercising his section 8(1) power, the Director-General is nevertheless constrained by the constitutional principle of legality, namely that the exercise of public power is only legitimate where lawful. Consequently, the impugned decision falls to be reviewed and set aside on the basis of the legality principle if it is not rationally related to the purpose for which the power was given; if the decision-maker failed to act in accordance with the empowering provision; if the decision-maker's failure to consider a relevant factor had an impact on the rationality of the entire process; or if the decision breaches the Constitution.

Regarding rationality, the first question was whether the Cape Town Refugee Reception Office was necessary when the Director-General decided to close it. Rationality concerns the relationship between the exercise of a power and the purpose for which the power was granted. Having regard to the facts, the Court found that a refugee reception office continued to be necessary in Cape Town. The Director-General's decision was based on incorrect facts, and could therefore not be regarded as rational. He was also found to have exercised the section 8(1) power for a purpose contrary to that for which it was given.

It was concluded that the impugned decision was irrational and fell to be set aside. The Court found that the only effective remedy was an order directing the first to third respondents to maintain a fully functional refugee reception office in or around Cape Town.

Yarona Healthcare Network (Pty) Ltd v Medshield Medical Scheme
[2017] 4 All SA 705 (SCA)

Corporate and Commercial – Contract – Erroneous payments – Unjust enrichment – Condictio indebiti – Requirements – Onus rests on claimant to prove excusability of error – Excusability not a requirement where claimant is a medical scheme.

The respondent ("Medshield") was a medical scheme registered in terms of the Medical Schemes Act 131 of 1998 (the "Act"). It sued the appellant for payments allegedly made in the *bona fide* and reasonable but mistaken belief that they were owing. It was averred that Yarona was unjustifiably enriched by the payments and Medshield correspondingly impoverished. Medshield's pleaded case was the *condictio indebiti*.

Held – It is not every mistake which entitles the mistaken party to recover payment. The onus rests on the claimant to prove the excusability of the error. Having regard to each of the payments made to Yarona, the Court found that other than for one of the payments, it could not be said that they were excusable. Faced with that reality, Medshield argued that the requirement of excusability should be relaxed in the case of medical schemes. The Court held that relevant considerations of policy focused on the persons in whose interests the representative is meant to act. Healthcare is a matter of fundamental importance to everyone. Medical schemes provide a way of ensuring as far as possible that people have access to adequate healthcare. Members of medical schemes are particularly vulnerable to abuse. Many of them earn modestly. If the funds which should be administered for their benefit are abused, they stand not only to lose moneys deducted from their earnings but to have their access to health care jeopardised. The scheme exists for the benefit of its members, often vulnerable people, and is administered by persons who owe a fiduciary duty to them. The persons charged with the administration of the scheme can be viewed as representatives

standing in a similar position to executors, trustees and liquidators. In that light, although Medshield had failed, in respect of all but one of the payments, to prove that such payments were made as a result of excusable error, its right to recover them by way of the *condictio indebiti* was not barred.

Yarona contended that Medshield was required to prove not only that Yarona was enriched by the amounts claimed but also that such enrichment occurred at Medshield's expense, ie that Medshield was impoverished by the amounts claimed. Since Yarona received unowed moneys, its enrichment was presumed and it bore the onus to plead and prove loss of enrichment which it did not do. It argued however, that Medshield failed to prove its impoverishment, as it had benefited from the services rendered by Yarona. The Court disagreed, holding that whenever a mistaken payment was made, Medshield was impoverished by the relevant amount. For Yarona to seek to rely on any enrichment caused by its having rendered services to Medshield, it should have instituted a *condictio* against Medshield by way of a counterclaim.

The final issue for the Court's consideration was that of prescription. The onus rested on Yarona to establish the date by which Medshield acquired, or could by exercising reasonable care have acquired, knowledge of the facts giving rise to the claim. It was not proved that Medshield's board had knowledge of the mistaken payments or could by exercising reasonable care have acquired such knowledge at an earlier date.

The appeal was thus dismissed with costs.

Zuma v Democratic Alliance and others; Acting National Director of Public Prosecutions and another v Democratic Alliance and another [2017] 4 All SA 726 (SCA)

National Prosecuting Authority – Decision to terminate prosecution based on section 179(5)(d) of the Constitution of the Republic of South Africa, 1996 – Reliance on inapposite provision of the Constitution – Decision to terminate prosecution found to be irrational.

Before the Court were two applications for leave to appeal. In referring the applications for oral argument, the Court called upon the parties to be prepared to argue the merits of the appeal. The two applications were consolidated as they arose out of the same facts. The first application was by the current President of the Republic of South Africa ("Mr Zuma") and the other was by the Acting National Director of Public Prosecutions (the "ANDPP") and the Head of the Directorate of Special Operations ("DSO"). The applications were directed against a judgment of the High Court in terms of which the decision on 1 April 2009 by the then ANDPP ("Mr Mpshe") to discontinue the prosecution of Mr Zuma on serious criminal charges, including charges of racketeering, corruption, money laundering and fraud, was held to be irrational and was reviewed and set aside.

Initially, corruption charges were brought by the National Prosecuting Authority ("NPA") against Mr Zuma during 2005, before he was elected President, after the conviction of his former business associate, Mr Shabir Shaik, on fraud and corruption charges. In 2006, the case was struck from the roll after an application by the State for a postponement to complete its investigation and finalise an indictment was refused. In December 2007, a new indictment containing charges of corruption and money laundering was served on Mr Zuma. More than a year after the new indictment was served, Mr Zuma's legal representatives, in an attempt to persuade the NPA to discontinue the prosecution, made written representations, purportedly for consideration by Mr Mpshe, in terms of the provisions of section 179(5)(d) of the Constitution. Mr Zuma's legal representatives then made oral representations to the NPA, claiming that individuals in the NPA, past and present, conspired to discredit him. They claimed to have recordings of telephone conversations proving that. Mr Mpshe was concerned about whether the telephone conversations in issue had been lawfully intercepted and the recordings properly obtained. On 6 April 2009, he announced publicly that he had made the decision to discontinue the prosecution of Mr Zuma. His media statement contained his reasons for his decision. Those reasons and the legality of Mr Mpshe's decision to terminate the prosecution were at the centre of the present applications for leave to appeal. According to Mr Mpshe's statement, the recordings of the telephone calls were considered to be crucial in that they reflected a manipulation of the prosecution process for ulterior purposes. The court below held that Mr Mpshe had disregarded the prosecution team's recommendations that even if the allegations regarding the telephone recordings were true, the decision to halt the prosecution had to be made by the trial court. The court below agreed with the view of the prosecution team and held that it was for a court of law to deal with allegations of abuse of process. The court, accordingly, reviewed and set aside the decision to discontinue the prosecution.

Held – The present case raised issues of public importance. It was part of a longstanding litigation saga that involved the President of South Africa. It concerned the office of the NDPP and its powers

and obligations. Furthermore, the conduct of prosecutors within the NPA fell to be considered. Therefore, the Court held, apart from the question of prospects of success, leave should be granted in terms of the provision of section 17(1)(a)(ii) of the Superior Courts Act 10 of 2013.

The Court then turned to the merits of the decision to discontinue the prosecution.

Faced with the clear difficulty in relation to Mr Mpshe's incorrect invocation of section 179(5)(d) of the Constitution in reviewing the decision to discontinue the prosecution, Counsel on behalf of the NPA conceded that Mr Mpshe's decision to discontinue the prosecution was liable to be set aside. Counsel on behalf of Mr Zuma, in turn, also conceded that the decision to discontinue the prosecution was liable to be set aside. The Court was highly critical of the manner in which the NPA conducted the case. It confirmed the correctness of the concessions made by the parties as referred to above. The reasons for discontinuing the prosecution provided by Mr Mpshe did not bear scrutiny for the recordings themselves on which Mr Mpshe relied, even if taken at face value, did not impinge on the propriety of the investigation of the case against Mr Zuma or the merits of the prosecution itself. The exclusion of the prosecution team from the final deliberations leading up to the decision to discontinue the prosecution appeared to have been deliberate and was in itself irrational. Mr Mpshe's decision to terminate the prosecution was based on case law which did not support his decision. Thus the conclusion of the court below, that the decision to terminate the prosecution was irrational, could not be faulted.

The applications for leave to appeal were granted but the appeals were dismissed.

Brooklyn and Eastern Areas Citizens Association and another v Chairperson of Municipal Appeals Tribunal, City of Tshwane and others [2017] 4 All SA 763 (GP)

Administrative law – Appeal against approval of property rezoning application – Whether mistakes in identifying statutory regime under which Appeals Tribunal operated in adjudicating the appeal warranted dismissal of appeal – Appeals Tribunal required to develop its own procedures, and constrained in that regard by the need to act fairly, meaning that it had to develop a procedure making provision for mistakes in the process before it, to be corrected in circumstances in which it would be fair to do so.

The fourth respondent, a developer, applied for the rezoning of two properties to enable it to erect a block of flats. The applicant objected to the rezoning application.

The rezoning application was dealt with by the second respondent (the "Planning Tribunal"), which ultimately approved the rezoning. On being notified of the decision, the applicant noted an internal appeal. The developer challenged the appeal as being invalid due to procedural defects. That led to a second notice of appeal by the applicant. The Appeals Tribunal heard and dismissed the appeal, finding it to be invalid due to procedural defects as alleged by the developer. One of the findings of the Appeals Tribunal was that the applicant had wrongly identified the statutory regime under which the Tribunal operated in adjudicating the appeal.

In the present application, the application sought to review the above decisions.

Held – What was in issue in this case was the source of the Appeal Tribunal's power to adjudicate the appeal. The rezoning application was dealt with by the Planning Tribunal, whose approval thereof fell within its area of competence based on section 41(1)(a) of the Spatial Planning and Land Use Management Act 16 of 2013.

There was nothing in any of the applicable legislation which required a prospective appellant to identify the statutory regime under which it appeals. The respondents' contention that the Appeals Tribunal had no power to condone deviations from its procedures was held by the Court to be incorrect. The powers of an Appeal Tribunal arise from section 33(1) of the Constitution, which guarantees the right to lawful, reasonable and fair administrative action. The Appeals Tribunal is required to develop its own procedures, and is constrained in that regard by the need to act fairly. That means that it should develop a procedure which makes provision for mistakes in the process before it, to be corrected in circumstances in which it would be fair to do so. Not only were the applicant's procedural mistakes not foundational to the appeal, but no prejudice was caused to anyone. Moreover, the mistakes were reasonable as two parallel procedures remained on the statute books.

The review application had to be adjudicated in terms of the Promotion of Administrative Justice Act 3 of 2000, which provides that if administrative action is taken which materially and adversely

affects the rights of a person, the person must be informed of his rights to request reasons and to appeal or seek review. The third respondent (the "City") failed to inform the applicant of such rights or of the procedures to be followed. As such, the applicant's notices of appeal were not invalid.

The Court went on to confirm that the lodging of the notice of appeal after the decision appealed against but before publication of the notice was not premature.

In the premises, the appeal was upheld and the matter was remitted to the Appeals Tribunal for it to deal with the developer's point in light of the present judgment.

Minister of Environmental Affairs v Recycling and Economic Development Initiative of South Africa NPC; Minister of Environmental Affairs v Kusaga Taka Consulting (Pty) Ltd [2017] 4 All SA 783 (WCC)

Corporate and Commercial – Company law – Piercing corporate veil – Test – There must be some misuse or abuse of the distinction between the corporate entity and those who control it which results in an unfair advantage afforded to the latter.

Corporate and Commercial – Company law – Winding-up of companies – Court finding it just and equitable in terms of section 81(1)(c)(ii) or section 81(1)(d)(iii) of the Companies Act 71 of 2008, to grant final winding-up orders.

A consolidated application was brought by the Minister of Environment Affairs for the final liquidation of two entities associated with each other. In each of the *ex parte* applications brought by the Minister, the provisional liquidation of the relevant respondent was obtained.

In the first application, the Minister alluded to problems in the relationship with the respondent ("Redisa") in that application. Redisa had been appointed to implement a waste tyre management, and had appointed the respondent ("KT") in the second application to handle all operational aspects of the plan. The Chief Executive Officer ("CEO") of Redisa was said to have contravened the Companies Act 71 of 2008 because as a majority shareholder in the company that owned KT, he directly benefited from his involvement in Redisa a non-profit company. He failed to disclose his interest in KT, or any conflict of interest, to the Minister. Highlighting various other corporate governance issues, the Minister argued that it would be just and equitable for Redisa to be wound up.

In the application against KT, the Minister's reason for seeking liquidation was based on the view that KT and Redisa were involved in a scheme to divert public funds that was earmarked for the furtherance of a specific environmental objective. It was submitted it would be just and equitable for KT to be wound up on one or more of the following grounds. Firstly, the executive directors of Redisa (all indirectly owning 100% of the shareholding in KT) had unconscionably abused the corporate personality of KT by utilising it to unlawfully divert and misappropriate public funds generated by the non-profit company, Redisa. Secondly, the Minister submitted that Redisa and KT were, for all intents and purposes, merged in direct contravention of the subordinate legislation and Redisa's Memorandum of Incorporation. The final ground on which the Minister stated it would be just and equitable to grant an application for the liquidation of KT, was that KT's only client, Redisa, gave notice on 1 June 2017 that it would seize all operations with effect from 1 June 2017. It was therefore submitted that the substratum of KT, who only existed to conduct the day-to-day activities of Redisa, had thus disappeared.

Redisa and KT's main attack against the application brought by the Minister in respect of both applications was raised by means of the following points *in limine*. The respondents challenged the Minister's *locus standi* to bring the application. It was argued that in terms of section 79(1) of the Companies Act, a solvent company may only be wound up voluntarily by the company or its creditors (under section 80), or by an order of court (under section 81). The respondents took issue with the Minister's reliance on section 157(1)(d) of the Companies Act which provides for extended standing to persons "acting in the public interest", with leave of the court, stating that the section was inapplicable.

The second preliminary point was raised by Redisa which submitted that an *ex parte* application in terms of rule 6(4)(a) was not suitable to wound up a solvent company, especially where neither the company nor any of its creditors were the applicant. It was also contended that the Minister had not made full disclosure of all the facts in the *ex parte* application justifying the setting aside of the *ex parte* orders.

On the merits, the respondents disputed that it was just and equitable that the two entities be wound up.

Held – Regarding the disputes raised, the Court in its attempt to determine the actual facts upon which the application was based would not seek to deal with each and every fact that was raised by the Minister in her founding affidavit, which was placed in dispute by the respondents. As these were motion proceedings in which the Minister sought final relief, it would be appropriate to deal with the application on the basis of those facts, as stated by the respondents, together with the admitted facts or facts which were not in dispute, in the Minister's affidavits that warranted the granting of the relief being sought by the Minister. The nature of the relief sought by the Minister required an unravelling of the corporate entities making up the respondents. The test as to whether it would be appropriate to pierce the corporate veil requires that there be some misuse or abuse of the distinction between the corporate entity and those who control it which results in an unfair advantage afforded to the latter. The Court found that there was clearly a misuse or abuse of the distinction between the corporate identity of KT and those who controlled it. Turning to the issue of the Minister's standing to bring the application, the Court held that section 157(1) seeks to broaden the standing of persons who would ordinarily not have such standing to bring a matter before the court in terms of the Companies Act. The Court was satisfied that the Minister had established that she had the necessary *locus standi* to have brought the applications in the public interests in terms of the provisions of section 157(1)(d). During the provisional stage of both applications, the judges seized with the matter clearly understood that the Minister did not have standing in the ordinary course in terms of section 81, but had to be permitted on the basis of extended standing in terms of section 157(1) of the Companies Act, to bring such an application.

The Court summarily dismissed the non-disclosure point raised by the respondents, finding no merit therein. The Court went on to confirm that the Minister had made out a sufficient case to launch the proceedings on an urgent basis.

While courts are generally reluctant to grant orders against a party on an *ex parte* basis, the Minister had made out a sufficient case why the application had to be brought *ex parte*.

The final question was whether it would be just and equitable, in respect of both respondents to grant a final order for liquidation. There were sufficient grounds in terms of the provisions of section 81(1)(c)(ii) or section 81(1)(d)(iii) of the Companies Act where the Minister, in substitution of those persons or entities as mentioned in the two sections, had made out a case that it was just and equitable to wind up both Redisa and KT.

Final liquidation orders were granted against both entities.

My Vote Counts NPC v President of the Republic of South Africa and others
[2017] 4 All SA 840 (WCC)

Constitutional law – Funding of political parties – Disclosure of private funding information – Whether in terms of section 172(2) of the Constitution of the Republic of South Africa, 1996, information about the private funding of political parties is reasonably required for the effective exercise of the right to vote in section 19(3)(a) of the Bill of Rights – Insofar as the Promotion of Access to Information Act 2 of 2000 did not allow for the disclosure of private funding of political parties as required under section 32(1) of the Constitution for the effective exercise of the right to vote and make political choices enshrined in section 19(1) and (3) of the Constitution, it was unconstitutional.

Words and phrases – "State" – Dictionary meaning – A nation or territory considered as an organised political community under one government" and also as "civil government of a country".

The applicant was a non-profit voluntary association aimed at improving the accountability, transparency and inclusiveness of elections and politics in South Africa. It brought the present application in terms of section 172(2) of the Constitution of the Republic of South Africa, 1996 for a declaration that information about the private funding of political parties is reasonably required for the effective exercise of the right to vote in section 19(3)(a) of the Bill of Rights. It also sought a declaration that the Promotion of Access to Information Act 2 of 2000 was inconsistent with the Constitution and invalid, insofar as it did not allow for the continuous and systematic recordal and disclosure of private funding information of political parties. The basic premise of the application was that the right of access to information in section 32(1) of the Constitution entitles citizens to have access to the private funding information of political parties. Such information, according to the

applicant, was reasonably required for the effective exercise of the right to vote in elections and to make political choices, which are rights enshrined in sections 19(1) and (3) of the Constitution, respectively.

The application was opposed by two of the respondents only, namely the second respondent, the Minister of Justice and Correctional Services, ("the Minister"), and the sixth respondent, the Democratic Alliance, ("the DA").

In a preliminary point, the DA raised the issue of the non-joinder of the Independent Electoral Commission ("IEC") and of some 540 political parties, not represented in Parliament, who the DA contended were registered with the IEC for the 2016 local government elections.

Held – The IEC did not have a direct and substantial interest in the relief sought by the applicant, rendering its joinder unnecessary. With regard to the political parties not joined, the Court referred to case law which made it clear that where the interests of a very large, and effectively indeterminable, number of persons might be affected by the order sought, it would be impracticable to require that they should all be joined. A pragmatic approach has to be adopted in such cases in identifying who needs to be joined as a necessary party. The non-joinder point was thus dismissed.

Whether or not the Constitution requires the disclosure of private funding was an issue considered by the Court in three sections. First, it analysed the right to information in section 32(1), read with the right to vote in section 19 of the Constitution. Secondly, the Court considered whether private funding information is required for the exercise of the latter right, having regard to the unique nature of political parties in our constitutional democracy. Finally, sections 7(2) and 1(d) of the Constitution were considered as well as a number of international agreements in the context of the State's duty to prevent corruption, and their impact on private funding disclosure. A plain reading of section 32 shows that it is everyone who has the right of access to any information. Section 32 envisages two holders of information. Under section 32(1)(a) there is an unqualified right of access to information held by the State, whilst under section 32(1)(b) there is a qualified right of access to information held by another person, in the sense that such information must be required for the exercise or protection of "any rights". Political parties fall within the category of "another person". Sections 32 and 19 must be read together in order to determine what the Constitution requires. The Court found further that private funding information is required for the exercise of the right to vote as contended by the applicant. It also accepted the applicant's argument that the constitutional requirement for disclosure of private funding information is reinforced by sections 7(2) and 1(d) of the Constitution, as well as a number of international agreements which have been ratified by South Africa.

The next issue addressed by the Court was whether the Promotion of Access to Information Act allows for the disclosure of private funding of political parties, as required under section 32(1) of the Constitution, for the effective exercise of the right to vote and make political choices, enshrined in section 19(1) and (3) of the Constitution. The Promotion of Access to Information Act gives access to records that are held by two entities, namely public bodies and private bodies as defined in section 1 of the Act. Political parties did not fall under either of those categories.

The Court found that the Promotion of Access to Information Act as a whole does not provide for the disclosure of private funding information of political parties. The Act's mechanisms and processes are inherently limited. The Act is not in sync with section 32 of the Constitution and limited that section and concomitantly the right to vote and make political choices in sections 19(1) and (3). Whether that rendered the Act unconstitutional, depended on whether the limitation was reasonable and justifiable in an open and democratic society, taking into account all relevant factors, under section 36 of the Constitution. The Court found the limitation neither reasonable nor justifiable in an open and democratic society, taking into account all relevant factors, in particular the nature of the rights and the nature and extent of the limitation. That accordingly renders the Act unconstitutional and invalid. The Court granted declaratory relief in that regard. That included a declaration that the Act was constitutionally invalid. The latter order was referred to the Constitutional Court for confirmation.

NT v Kunene and others [2017] 4 All SA 865 (GJ)

Constitutional law – Unauthorised publication of images of private individual by online news site – Allegation that the publication of the images, of a graphic sexual nature, were justified insofar as they authenticated the accompanying article about the Deputy President of the country – In determining what is appropriate evidence to use for purposes of authenticating its reports, the media

must be sensitive to, consider very carefully, and respect countervailing rights such as the rights to privacy and dignity – Where images in question simply showed an ordinary person engaging in sexual activities in her private space, they did not serve to authenticate the allegations contained in the article – Rights to privacy and dignity found to be infringed.

The first respondent was the owner of the second respondent, an online newspaper. The publication of images of the applicant on the news site led to the present urgent application, for an order directing the respondents to remove certain video material (and any derivative content) from their site, and to prohibit them from publishing similar material in the future. The images of the applicant were of a graphic sexual nature. The applicant's case was that by posting her private and intimate videos on their website without her consent, the respondents exceeded the legitimate bounds of media freedom, and unjustly encroached on the core of her rights to privacy and dignity. The images of the applicant were featured in an article alleging that the Deputy President of South Africa had engaged in extra-marital relationships with a number of women. The applicant was alleged to be one of those women, and was alleged to have sent erotic pictures and intimate videos to the Deputy President. The applicant's videos were embedded in the article.

The core of the respondents' case was that the videos were a necessary element of the article because the videos authenticated the textual content of the article, which gave details of the alleged extra-marital relationship that the Deputy President had with the applicant.

Held – The Court was satisfied that the application was urgent and remained so for as long as the videos remained on the respondents' website, widely accessible to the public on an ongoing basis.

Having been requested by the respondents to view the article and the videos, the Court did so and found that although the respondents had "blurred" the film, it was still possible to see general identifying features of the applicant, and her voice was also recognisable on the audio component of the video. If the viewer knew the applicant, she would be easily recognisable to them, regardless of the blurring. The respondents accepted that the videos were intended by the applicant to be personal and private, in the sense that she never intended them to be distributed more broadly than to a person or persons of her choosing. They also conceded that they did not obtain the consent of the applicant before publishing the videos on their website.

The Court accepted that there is an inherent public interest element in the authentication of media reports, particularly when high profile public persons are involved, and even more so when the media reports in question involve allegations of unlawful, immoral or otherwise reprehensible conduct on the part of our constitutional leaders. However, that did not mean that the respondents' conduct in publishing the videos was justifiable. It was not true that the public interest in providing authentication for media reports requires a level of proof beyond any doubt. That was the level of authentication the respondents claimed was provided by the videos. The press serves the critical function of facilitating the free flow of information and ideas to and among citizens. Its function is not to provide a channel for a trial by media. It is only in criminal trials that proof beyond any form of doubt is required, and even then it is reasonable doubt. In determining what is appropriate evidence to use for purposes of authenticating its reports, the media must be sensitive to, consider very carefully, and respect countervailing rights such as the rights to privacy and dignity. Individual sexual choices lie at the heart of the right to privacy. The videos in question did not feature anyone but the applicant. Although alleged by the respondents that the videos were sent to the Deputy President, that could not be established from viewing the videos themselves. Viewed on their own, the videos showed no more than an ordinary person engaging in sexual activities in her private space. The conduct depicted in the videos did not authenticate the alleged relationship with the Deputy President. Very little value could be attached to the videos as a means to authenticate the allegations contained in the article.

The Court concluded that the respondents did not act responsibly and with due regard to the applicant's rights to privacy and dignity. They failed to exact the appropriate balance between her rights and the public interest.

The relief sought by the applicant was, accordingly, granted.

Oosthuizen v Castro (Centriq Insurance Company Ltd as Third Party)
[2017] 4 All SA 876 (FB)

Financial Planning and Investments – Delictual claim against financial services provider – Alleged negligence in providing investment advice – Duties of a financial services provider – Generally, a

provider of financial services will be under an implied if not express contractual duty to exercise reasonable care and skill in carrying out the services required of him and the standard of care and skill will be, at least in most respects, that to be expected of a like provider engaged to provide the relevant services.

Insurance – Contract of insurance – Interpretation of – Ordinary rules relating to the interpretation of contracts must be applied in construing a policy of insurance – Court must endeavour to ascertain the intention of the parties.

On becoming a widow in 2010, the plaintiff was paid the proceeds of her husband's life insurance policy. She decided to invest an amount of R2 million of the money, and enlisted the services of the defendant to advise her in that regard. Based on the defendant's advice, the plaintiff invested the money in an investment scheme and apart from an amount of R1 400 that she received in August 2010, she received no further interest and/or dividends and the total amount of the capital was lost. According to the plaintiff, the defendant had referred her to an article critical of the investment scheme, but had allayed any fears, stating that the criticism was unfounded.

Suing for damages, the plaintiff alleged that the defendant had failed to act honestly and fairly in the interest of plaintiff in recommending the investment scheme, and failed to furnish objective financial advice to plaintiff appropriate to her needs and interest. She alleged further that the defendant had failed to exercise the degree of skill, care and diligence to be expected of an authorised financial services advisor furnishing investment advice.

Held – The duties of a financial advisor or broker such as the defendant had to be considered, as well as the rules of construction of contracts in general and insurance contracts in particular.

The Court referred to extensive authority on the subject of the duties of a financial services provider. Generally, a provider of financial services will be under an implied if not express contractual duty to exercise reasonable care and skill in carrying out the services required of him. The standard of care and skill will be, at least in most respects, that to be expected of a like provider engaged to provide the relevant services.

The ordinary rules relating to the interpretation of contracts must be applied in construing a policy of insurance. A court must therefore endeavour to ascertain the intention of the parties. The defendant was insured in this matter by the third party cited in the case. The third party ("the insurer") placed reliance on an exclusion of liability clause contained in the insurance contract. The insurer had a single prong of attack, which was to show that the consequences of the defendant's action and/or advice fell squarely within the parameters of the exclusion clause.

In this case, the defendant was aware that the plaintiff was in a vulnerable position and was anxious about not losing any of her investment. There were sufficient red flags around the investment scheme to require that he proceed with caution in advising the plaintiff. His poor advice was indicative of lack of skill, care and diligence and was not commensurate with the extremely commission received by the defendant. He acted contrary to the provisions of section 16 of the Financial Advisory and Intermediary Services Act 37 of 2002 and the Codes of Conduct published since then and what the law expects of financial service providers when he provided the financial advice that led to the investment. It was thus concluded that plaintiff's case against defendant had been proven on a balance of probabilities.

Turning to the third party action against the insurer, the Court held that the insurer had placed too much emphasis on the wording of the exclusion clause and in doing so, disregarded the purpose of the insurance contract entered into between defendant and the insurer. What was critical was that the insurer had undertaken to indemnify the defendant against losses arising out of any legal liability arising from claims first made against the defendant and reported during the period of insurance for breach of duty in connection with his business by reason of any negligent act, error, or omission, committed in the conduct of the defendant's business. The exclusion clause had to be interpreted restrictively so that it made business sense in the eyes of both insurer and insured. It could not be applicable where the insured advised a client to invest in a scheme that was a hopeless investment from the onset, contrary to legislation and probably a fraudulent and unlawful scheme. As a result, the defendant was entitled to be indemnified by the insurer, subject to the limit of R2,5m and deduction of an excess of R10 000.

The defendant was ordered to pay the plaintiff the capital amount of R2 000 000 and interest as set out in the court order. The third party shall indemnify defendant against defendant's liability to plaintiff, subject to the limitations referred to above.

Propshaft Master (Pty) Ltd and others v Ekurhuleni Metropolitan Municipality and others [2017] 4 All SA 901 (GJ)

Environment – Application to compel municipality to take all reasonable steps to remediate a river affected by flash floods – Section 24 of the Constitution of the Republic of South Africa, 1996 – Right of individuals to an environment not harmful to health or wellbeing and to have the environment protected, for the benefit of present and future generations, through legislative and other measures – Municipality having constitutional and statutory obligations and duties to the applicants in the above regard – Court issuing order directing municipality to take steps required by applicants.

The applicants were private companies, owning immovable property in the area of jurisdiction of the first respondent ("the municipality").

At the heart of the present application was a portion of a river which passed under a bridge in the area, and the three culverts beneath the bridge. During the summer rainfall season, the area experiences an increase in water flow in the river and the storm water system of which it formed part. Pursuant to flash floods in November 2016, the walls of the riverbed at the area which formed the subject matter of this application collapsed. Dividing walls of one of the applicants also collapsed from the force of the water. Around January 2017 the river flooded again and further damage was caused to properties and the business operations of, *inter alia*, the applicants. According to the applicants, the current state of the particular portion of the river was that two out of three of the culverts under the bridge were completely blocked with rubble and debris. That put the applicants' properties and businesses at risk of further damage. None of the damage which the bridge sustained during the floods had been repaired and it was feared that any further structural damage could lead to its collapse.

Although the municipality had consented to a court order directing it to take steps to address the problems faced by two other businesses in a predicament similar to that of the applicants, it maintained that each case had to be decided on its own facts and circumstances and the previous order did not mean that there should be a similar order in the present application.

Despite the consent order, nothing further was done by the municipality after certain preliminary steps. No clean-up or clearances of the culverts or any other area had been conducted, no internal mechanism by the municipality had been utilised and there was no indication that any of the possible provisions for services envisaged in sections 76(a)(i), (ii) or (iii) of the Local Government: Municipal Systems Act 32 of 2000 were explored. As a result, the applicants sought interdictory relief directing the municipality to take all reasonable steps to remediate the river, and ancillary relief.

Held – As the applicants were claiming a "*mandamus* interdict" against an organ of State, the Court had to be mindful of the boundaries of the separation of powers. The relief sought by the applicants was based on the right in section 24 of the Constitution, to an environment that was not harmful to their health or wellbeing and to have the environment protected, for the benefit of present and future generations, through legislative and other measures. The municipality had constitutional and statutory obligations and duties to the applicants in the above regard.

The common cause facts indicated that a disaster with environmental consequences had occurred, and that no post-disaster rehabilitative work had been conducted by the municipality on the portion of the river in question since the disaster. As a result, the applicants' section 24constitutional rights were being infringed upon and were being prejudiced without the municipality doing anything about it.

A structural interdict, such as that sought by the applicants, consists of five elements. First the court declares the respects in which the violator's conduct falls short of its constitutional obligations. Secondly, the court orders the violator to comply with its constitutional obligations. It then orders the violator to produce a report within a specified period of time setting out the steps it had taken. The applicant is subsequently afforded an opportunity to respond to the report and finally the matter is enrolled for a hearing and, if satisfactory, the report is made an order of court. In all instances, appropriate relief should be granted. The Court issued an order directing the municipality to take the steps required by the applicants.

Theron v Premier of the Western Cape Province and another [2017] 4 All SA 916 (WCC)

Labour and Employment – Fixed-term contract of employment – Termination prior to end of term – Contractual relief under common law sought by employee – Where performance of contract was

rendered impossible, parties were excused from performing and no action lay either way for damages – Where there is no breach but a lawful termination, the measure of a party's claim is limited to the loss of salary for the notice period.

In terms of a written contract of employment, the plaintiff was appointed as chief executive officer ("CEO") of the Western Cape Provincial Development Council ("the PDC") for a fixed term of 3 years. About 15 months after his appointment, the plaintiff received a letter from the first respondent informing him that the Provincial Cabinet had taken a decision that the PDC should be disestablished and that all its assets, liabilities, contracts, rights and obligations would be transferred to the Department of the Premier ("the Department"). He was then told that employees of the PDC had to be retrenched, and that, as CEO, he was required to manage that process. That included his own retrenchment. However, ultimately, no agreement as to the basis for the termination of the plaintiff's employment with the PDC was concluded and there was no "retrenchment package" to which he could lay claim.

Upon the disestablishment of the PDC, all of its outstanding liabilities were required to be settled by the Department. With effect from the disestablishment of the PDC, the plaintiff's contract of employment was effectively terminated as the entity which employed him ceased to exist. In December 2011, the plaintiff was informed that his contract had been terminated by operation of law with effect from 5 December 2011. It was common cause that he was later paid two amounts totalling R325 961,42. He was dissatisfied with the amount paid to him believing that he was entitled to be remunerated up to the expiry of his contract on 30 June 2102.

Having abandoned proceeding in terms of employment law, the plaintiff approached the present Court for contractual relief under the common law. In his particulars of claim, he sought damages from the defendants in the sum of R352 728,89 being the difference between what he had been paid by the first defendant and the amount of R678 690,31, which he claimed was the amount that would have accrued to him if the contract had run its full term. His claim was therefore one for damages based on his positive *interesse* – the right to be put in the position that he would have been in had the contract not been terminated. Essentially, his case was that the Provincial Development Council Repeal Act 5 of 2011resulted in his employment being effectively terminated by the Premier of the Western Cape Government when she assented to the Act.

Held – The position where the termination of a fixed term contract of employment occurs through circumstances other than a breach by one of the parties, had to be considered.

In the circumstances that prevailed in December 2011, the only basis upon which the PDC could have terminated the employment relationship on notice was for operational requirements. That term was not defined by the parties in their agreement and it had to bear its ordinary meaning. However, given that the contract arose from an employment relationship it was not unreasonable to have regard to the definition of the term as it appeared in section 213 of the Labour Relations Act 66 of 1995. On being informed that its funding was to be curtailed and that it was to be dissolved, the PDC would no doubt have been entitled to consider dismissing its staff for operational requirements as defined under the Labour Relations Act. It would then have been bound to apply section 189 of the Labour Relations Act and the failure to do so would afford a dissatisfied employee relief under the Act for an unfair dismissal. Unfairness might have afforded the plaintiff a cause of action under the Labour Relations Act but that did not fall for consideration in the present Court. As stated above, the case for the plaintiff had not been pleaded on the basis that there was a breach of the contract of employment by the PDC, but that the Premier of the Western Cape Government terminated his employment when she assented to the Provincial Development Council Repeal Act.

The issues were narrowed by the parties, and the first issue presented for determination was whether the termination of the plaintiff's fixed term employment contract could be considered a premature termination. The position was that the performance of the parties' reciprocal obligations were rendered impossible by an act of an organ of State in the form of the promulgation of the Provincial Development Council Repeal Act. In such circumstances, the parties were excused from performing and no action lay either way for damages.

The second issue was whether the plaintiff was entitled to contractual damages calculated with reference to the balance of the contract period or only payment of one month's notice arising out of the termination. Where there is no breach but a lawful termination, the measure of a party's claim is limited to the loss of salary for the notice period. As such, the plaintiff had been paid what was due to him.

The plaintiff's claim was dismissed with costs.

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