LEGAL NOTES VOL 2/2017

Compiled by: Adv M Klein

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EDITORIAL

YOU WILL NOTE THREE SETS OF ALL SA LAW REPORTS. THEY MANAGED TO PUBLISH ALL THE REPORTS. THEY ARE NOW UP TO SPEED.

Congratulations to two National Bar members still acting as judges! Cassim Moosa and Carla van Veenendaal ! (I am also still acting but I cannot congratulate myself!)

SA LAW REPORTS FEBRUARY 2017

ESKOM HOLDINGS LTD v HALSTEAD-CLEAK 2017 (1) SA 333 (SCA)

Consumer protection — Supplier — Strict liability — Unsafe or defective goods — Ambit of liability — Not extending to electricity supplier if plaintiff not consumer vis-à-vis it — Plaintiff injured by low-hanging Eskom power line while cycling — No supplier/consumer relationship — Eskom not liable — Consumer Protection Act 68 of 2008, s 61.

Electricity — Supply — Liability of Eskom for injuries sustained as result of supply to person who is not in supplier/consumer relationship with Eskom.

[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!**

Respondent, Mr Halstead-Cleak (the plaintiff), suffered burns when he cycled into a low-hanging live power line under Eskom's control. He instituted a claim for damages against Eskom, relying on delict and product liability under s 61 of the Consumer Protection Act 68 of 2008. * The High Court made an order for separation of the issues, and the present case dealt only with the question of Eskom's strict liability. The High Court found for Mr Halstead-Cleak, holding that the Act did not E require the plaintiff to be a consumer in a contractual sense for a defendant to be strictly liable.

Held

Since the Act's purpose was to protect consumers, there had to be a supplier/consumer relationship for strict liability to ensue (see [21], [22]). In the present case Mr Halstead-Cleak was not a consumer vis-à-vis Eskom because he (i) did not enter into any transaction with Eskom as a supplier or producer of electricity in the ordinary course of Eskom's business; and (ii) was not at the time utilising the electricity, or a recipient or beneficiary thereof.

GN v JN 2017 (1) SA 342 (SCA)

Marriage — Divorce — Proprietary rights — Pension benefits — Non-member spouse's share — Parties married in community of property — Court decreeing divorce not making order declaring pension interest of member spouse to form part of joint estate — Whether in circumstances non-member spouse entitled to pension interest of member spouse — Pension interest of member by operation of law vesting in joint estate, to which parties entitled as at date of divorce — Divorce Act 70 of 1979, ss 7(7)(a) and (8).

The appellant had previously obtained a divorce order in the regional court against her husband, the respondent, to whom she had been married in community of property. The deed of settlement which was incorporated included a term, headed 'Immovables and movables', providing that 'the joint estate shall equally be divided between the parties'. The appellant some time later, and arising out of a dispute as to the method of the division of the joint estate, approached the High Court on notice of motion, seeking an order inter alia for the appointment of a liquidator and a declarator that she and the respondent were entitled to an amount equal to 50% of each other's pension interest. The High Court refused the application. This is an appeal against that decision.

The principal argument raised by the respondent in opposing the relief sought was that s 7(7)*(a)* of the Divorce Act 70 of 1979, entitling a spouse to a share of her spouse's pension interest, had to be read with s 7(8). The effect was that a spouse in a marriage in community of property would only be entitled to the pension interest of the other spouse in circumstances where the court granting the decree of divorce had made an order, in terms of s 7(8), declaring such pension interest to be part of the joint estate. No such order had been made here. This issue formed the focus of the appeal. The respondent further relied on the failure of the appellant to mention the pension interest in her divorce action or anywhere in the settlement agreement.

Held, that s 7(7)*(a)* was self-contained and not made subject to s 7(8). As per its clear and unequivocal language, s 7(7*)(a)* vested in the joint estate the pension interest of the member spouse for the purposes of determining the patrimonial benefits, to which the parties were entitled as at the date of their divorce. Further, the legislature's choice of the word 'shall' coupled with the word 'deemed' in s

7(7)*(a)* was indicative of the peremptory nature of this provision. (Paragraphs [25] – [26] at 352A – G.)
Held, accordingly, that the entitlement of a non-member spouse to a share of the members' spouse was not dependent on a declaration in terms of s 7(8) to such effect by the court decreeing divorce. Neither was it necessary for the non-member spouse to make such a claim for the pension interest in the divorce summons, or for mention to be made of it in the settlement agreement.
(The other issue arising concerned the correct interpretation of the settlement agreement itself, and in particular whether the 'joint estate' which was to be 'equally divided between the parties' included the pension interest of a member spouse, in the light of the heading referring only to 'Immovables and movables'. The majority held that it did. This conclusion was based on: what it considered to be the clear language of the clause under consideration; the accepted definition of a 'pension interest' as qualifying as a notional asset; given that, the marriage being one in community of property, the joint estate necessarily included the pension interest of either party as contemplated in s 7(7)*(a)* of the Act; and the fact that a party's entitlement to a pension interest fell within the rubric of movables. The minority reached the opposite conclusion, based on what it viewed as the clear language of the settlement agreement and the circumstances in which it came into being.

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HELEN SUZMAN FOUNDATION v JUDICIAL SERVICE COMMISSION AND OTHERS 2017 (1) SA 367 (SCA)

Judge — Appointment — Judicial Service Commission — Selection process — Review — Record on review — Extent of record — Claim of confidentiality — Confidentiality considerations warranting non-disclosure of Judicial Service Commission's private deliberations on judicial appointments — Such deliberations not forming part of record on review — Uniform Rules of Court, rule 53(1)(b).

Review — Procedure — Record on review — Extent of record — Claim of confidentiality — Confidentiality considerations warranting non-disclosure of private deliberations on judicial appointments by Judicial Service Commission — Such deliberations not forming part of record on review — Uniform Rules of Court, rule 53(1)(b).

Uniform Rule 53(1)*(b)* provides for the 'record of . . . proceedings' in respect of which an application for review has been launched to be made available to the party seeking the review. Audio recordings of private deliberations on judicial appointments held in a closed session by the respondent, the Judicial Service Commission (the JSC) — in the execution of its mandate to advise the President of the Republic of South Africa on the appointment of judges under s 174(6) of the Constitution, and properly conducted in terms of the Judicial Service Commission Act 9 of 1994 and reg 3*(j)* made thereunder — did not form part of the record of its proceedings for the purposes of Uniform Rule 53(1)*(b)*.

The Supreme Court of Appeal so held in dismissing HSF's appeal against a High Court decision which had dismissed their interlocutory application for an order directing the JSC to deliver the full record of the proceedings sought to be reviewed, including the audio recording of the JSC's private deliberations after its interviews with judicial candidates.

The main issue was whether the confidentiality considerations insulated the JSC's deliberations from disclosure under rule 53. The SCA held that the JSC was set apart from other administrative bodies by its unique features which provided sufficient safeguards against arbitrary and irrational decisions; and that to include the deliberations in the record of proceedings would undermine the JSC's constitutional and legislative imperatives by, inter alia, stifling the rigour and candour of the deliberations, deterring potential applicants, harming the dignity and privacy of candidates who applied with the expectation of confidentiality of the deliberations and would generally hamper effective judicial selection.

AFRIFORUM AND ANOTHER v PIENAAR 2017 (1) SA 388 (WCC)

Defamation — Defences — Fair comment — Social media postings that during 'rape culture' awareness campaign first applicant's supporters 'shouted rape threats' at campaigners, and that second applicant had 'use[d]' rape to intimidate campaigner' — Reasonable reader would understand comments in context, and within such context comments were fair — Politically C charged nature of event entitling commentator to some latitude in describing it — Comments constituted exercise of constitutional right to freedom of expression.

Media — Social media — Defamation — Remedies — Interim interdict restraining further social media postings of allegedly defamatory comments pending Daction for defamation — Requirements for interim interdict not met — Application dismissed.

Afriforum and an employee of theirs, Mr Pawson, applied on an urgent basis for a final interdict that the respondent (Mr Pienaar) remove certain allegedly E defamatory postings from his Facebook and Twitter accounts, and for a temporary interdict that he be prohibited from posting any such statement in any form of social media pending the finalisation of an action for defamation and possible further interdicts to be instituted by the applicants against him. (The court found it unnecessary to consider the alternative relief that was sought, ie that the orders sought operate as an interim order F pending a return date — see [18].)

Mr Pienaar had posted on social media that 'he had witnessed Afriforum supporters threaten to rape women today', and in three further posts invited readers to watch attached video footage showing that Afriforum supporters 'shouted rape threats' and that 'Marcus Pawson from Afriforum use[d] rape to intimidate a rape survivor'. These posts related to an altercation which had occurred on the University of Stellenbosch campus between students from the 'End Rape Culture Campaign' (the ERCC) and

Afriforum employees and student supporters. (The court observed that only those postings which referred to the applicants personally could sustain a delictual claim of defamation, ie those against Mr Pawson — see [12] and [69].)
As to the final interdict, held:
Because of the dispute of fact about what exactly happened and was said during the incident which gave rise to the postings, the *Plascon-Evans* rule applied so that the matter fell to be decided on the respondent's version (see [53].) This version (set out in affidavits from respondent's witnesses at [22] – [52]) showed that Afriforum supporters sexually assaulted and intimidated three female ERCC protestors, and that Mr Pawson and another Afriforum supporter sexually intimidated two of them by shouting rape related comments. These facts embodied the 'rape culture' that the ERCC sought to eliminate, and did not justify granting a final interdict. The application for a mandatory interdict was therefore without merit

CHAPELGATE PROPERTIES 1022 CC v UNLAWFUL OCCUPIERS OF ERF 644 KEW AND ANOTHER 2017 (1) SA 403 (GJ)

Land — Unlawful occupation — Eviction — Statutory eviction — Illegal foreigners — Whether eligible for temporary emergency accommodation — Order that provision of accommodation conditional on illegal foreigners regularising status — Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, s 4(12); Immigration Act 13 of 2002, s 1.

In this case the applicant had applied to evict the occupiers of a factory building it owned in downtown Johannesburg. The court had ordered the occupiers to vacate and also called on the City of Johannesburg to show why it should not provide them with temporary emergency accommodation. This generated the question whether occupiers who were 'illegal foreigners' were eligible for such accommodation (see [3] – [5], [9], [14]; and s 1 of the Immigration Act 13 of 2002).
Held, that illegal foreigners could not, per se, be barred from receiving temporary emergency accommodation. However, here provision of the accommodation was made contingent on the illegal foreigners regularising their status (see [56], [60], [72], [77], [89]; and s 4(12) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998).
The court's order, in summary, was as follows (see Postea):

- The occupiers' attorneys were to give the City a list of occupiers who would require temporary emergency accommodation after eviction, including details of their age, income, family circumstances, and residence status;
- the City was to then file a report of which occupiers were eligible for the accommodation;
- hereafter the occupiers or landowners could file comments on the report, and occupiers found eligible who were illegal foreigners were to produce to the City proof that they were entitled to remain in South Africa;
- the City could then apply for an order that any eligible illegal foreigners who had not produced proof, were not entitled to the accommodation;
- the City was to start relocating persons who were eligible;
- the occupiers were to vacate the factory building; and
- the sheriff was to remove any occupiers who had not left.

EX PARTE MDYOGOLO 2017 (1) SA 432 (ECG)

Attorney — Admission and enrolment — Application for — Criminal conviction — Approach to be taken by Law Society.

In his application for admission as an attorney, applicant disclosed that in June 1994 he had committed a robbery for which he had been convicted. He also explained that the robbery had had a political aim, and that he had applied for amnesty for it. Concerned about his explanation, the court had requested the applicant to supplement his papers, and had also asked the Cape Law Society to appear to give its view. The society had filed an affidavit endorsing the application but had not participated further in the proceedings. This had caused the court to request the Eastern Cape Society of Advocates to appear in its stead.
The first issue was whether the applicant was a fit and proper person to be admitted as an attorney (s 15(1) of the Attorneys Act 53 of 1979). *Held*, that he was not, in that his explanation for the robbery in his court papers was a lie.
The second issue was the approach that the society ought to have followed. *Held*, that it ought to have thoroughly considered the application, and to have then appeared in order to make submissions which could assist the court.
Application dismissed

MBATHA v ROAD ACCIDENT FUND 2017 (1) SA 442 (GJ)

Motor vehicle accident — Compensation — Claim against Road Accident Fund — Costs — Draft order seeking costs for lawyers and experts after merits settled but trial on quantum postponed — No experts heard and their evidence not before court — Court condemning practice of asking for costs before evidence on quantum heard — Ordering costs to be costs in cause.

In a damages claim against the Road Accident Fund the court was presented with an agreement containing a draft order settling the merits of the action and postponing the issue of quantum sine die. The agreement provided that the RAF would be liable for costs to date, including the costs of counsel and (unidentified) medico-legal experts 'who assessed and filed medico-legal reports on behalf of the plaintiff'.
The court — pointing out that there was no expert evidence yet before the court, and also no tangible result in the form of proven damages for the plaintiff — refused to endorse the agreement as to the payment of costs, ordering instead that the costs be costs in the cause. (See [4] for the contents of the draft order; and [9] – [33] for the court's reasoning as to why costs should not be awarded in these cases, which make up 30 % of the cases on the roll.)
Case Information

SPAR GROUP LTD v FIRSTRAND BANK LTD AND ANOTHER 2017 (1) SA 449 (GP)

Banking — Duty of bank in respect of deposits attached by third party — Wholesale supplier (third party) operating customer's businesses subsequent to attaching them in terms of notarial bond — Customer withdrawing funds from bank accounts it operated connected with businesses — Supplier claiming to be entitled to such funds,

and that bank should have prevented withdrawals — Whether bank under legal duty to prevent pure economic loss to supplier where bank knew that supplier true owner of funds.

Banking — Relationship between bank and client — Rights of bank in respect of money in client's account — Wholesale supplier operating customer's business after attaching it under notarial bond — Customer's bank setting off business proceeds deposited in relevant account against overdraft indebtedness — Bank entitled to do so, its not being party to agreement with its client accountholder (customer) to warehouse funds deposited into account on behalf of a third party.

In terms of an agreement entered into between them, Spar Group Ltd supplied, as wholesaler, goods and services on credit to a business, Umtshingo (represented by one Paulo). Umtshingo operated three businesses in Nelspruit: a supermarket and two liquor stores. When, in breach of a notarial bond registered over its movable property in favour of Spar, Umtshingo failed to pay amounts due timeously, Spar successfully launched an application in the magistrates' court for the perfection of the bond. The provisional order obtained was executed, and Spar took possession of the three businesses, as it was empowered to do in terms of the bond. Subsequently, owing to Umtshingo's reluctance to have the businesses closed down pending the further court proceedings, negotiations were conducted with a view to entering a business lease agreement. It was agreed that Spar would be entitled to operate the Umtshingo businesses solely for its own profit or loss, subject to the proviso that all net profits earned during the lease would be set off against Umtshingo's indebtedness to Spar. This Spar did, but a final lease agreement was not signed; the parties disputed certain particulars.

What gave rise to the present dispute was the following. Umtshingo deposited the proceeds of 'speed-point' sales of its three businesses into three bank accounts held with FirstRand Bank (the Bank): accounts A, B and C. In respect of all these accounts, Umtshingo reached debit balances. At times subsequent to the abovementioned lease arrangement's being reached, the Bank set off the speed-point credits against the overdraft indebtedness of Umtshingo, thereby extinguishing the debts. This, as well as Umtshingo's withdrawals from these accounts, prompted Spar to institute these proceedings.

(a) In respect of account A, Spar claimed an amount of R1 343 422,92. This was a quasi-vindicatory claim based on alleged unlawful appropriation. The position of Spar was that, in respect of the speed-point and cash moneys credited to account A, the personal rights to these funds vested in Spar at all times and the Bank was aware that the funds credited to account A did not belong to Umtshingo. The Bank was not entitled to apply set-off in the manner it did. (Spar made another claim in respect of account C on a similar basis, but this claim was rejected because it had prescribed — see [32] – [42].)

(b) In respect of accounts B and C, Spar claimed further amounts of R2 039 948,68 and R1 358 890,90, respectively. These were delictual claims for pure economic loss. They were founded on the contention that the Bank should have prevented — through positive conduct — Umtshingo's withdrawing funds from accounts B and C, because the funds were transferred to these accounts not to make them available to Umtshingo, but for the purpose of 'warehousing' moneys belonging to Spar. It was contended that the Bank owed Spar, who was a customer of its Durban branch, a duty of care to avoid economic loss to it in circumstances where the Bank knew that

it was the true owner of the moneys. The Bank wrongfully breached this duty of care, as a result of which Spar suffered damages.
As to *(a)*, *held*, that the general rule was that moneys deposited into a bank account fell into the ownership of the bank in which event a set-off between debit and credit entries would lawfully take place, unless the bank was party to an agreement with its client (the accountholder) to warehouse funds deposited into that account on behalf of a third party claiming to be entitled thereto. (Mere knowledge of an arrangement between its client and a third party did not suffice for a departure from the rule.) In this case, there was no evidence of any such agreement and therefore Spar's claim of R1 343 422,92 in respect of account A fell to be dismissed. (Paragraphs [50] and [53] at 462I – 463C and 464A – C.)
As to *(b)*, *held*, that, based on a consideration of all the circumstances of the case, and applying the general criterion of reasonableness, having regard to the legal convictions of the community, the Bank was under no legal duty to act positively to prevent the harm suffered by Spar. The Bank's conduct was therefore not wrongful. The relevant circumstances were the following: Spar, although it operated a bank account at the Bank's Durban Corporate Division, did not have one at the Bank's Nelspruit branch, at which Umtshingo operated its bank accounts. The Bank therefore had a duty of confidentiality towards Umtshingo and was obliged not to disclose any particulars concerning the accountholder's bank accounts and the transactions concluded by such accountholder. Further, there was no agreement between the Bank and Umtshingo to the effect that the latter's account would be used to warehouse moneys belonging to Spar.
Held, further, that public policy did not require the imposition of a duty of care on the Bank. Spar's claim that the public would be benefited by a better safeguarding of 'their funds' in similar circumstances if a liability on the Bank were imposed to prevent pure economic loss was to be rejected on two grounds. One, the assumption inherent in such a submission, namely that the funds in question belonged to Spar after their being deposited into Umtshingo's account, was incorrect. Two, the imposition of such a duty would probably place too heavy a burden on banks to protect the interests of third parties in circumstances where the interests of their own clients were also to be taken into account. ACTION DISMISSED

SOUTH AFRICAN NATIONAL ROADS AGENCY LTD v CAPE TOWN CITY 2017 (1) SA 468 (SCA)

Road — Toll road — Declaration of national road as toll road — Legality — Failure to comply with formalities — No proper resolution by Sanral to apply for Cministerial approval of toll road — No foundation for its approval by minister — Declaration of toll road set aside on review despite lateness of application — South African National Roads Agency Limited and National Roads Act 7 of 1998, ss 27(1) and 27(4).

Administrative law — Administrative action — Review — Application — Delay in bringing application — Condonation — Delay unreasonable but interests of justice requiring granting of condonation.

Constitutional law — Constitution — Foundational values — Principle of legality — Applying to both administrative and executive acts.

In March 2012 the City applied in the Cape High Court for the review and setting-aside of (i) Sanral's September 2008 decision to propose that parts of the N1 and N2

national roads near Cape Town be declared toll roads; and (ii) the Minister of Transport's subsequent approval, under s 27(1) and (4) of the Sanral Act, * of the proposal.

On 30 September 2015 the High Court, proclaiming itself satisfied that both the proposal and the Minister's approval were administrative acts under the Promotion of Administrative Justice Act 3 of 2000, granted the application for review after condoning the City's inordinate delay in bringing it. †

The High Court found, in respect of the legality of the process, that Sanral's failure to produce any documentation to show that its board (the Board) had formally resolved to submit a s 27(1) proposal to the Minister was sufficient ground for the rescission of the toll-road declaration.

In an appeal to the Supreme Court of Appeal the issues were whether the High Court correctly condoned the City's delay in bringing the review application; whether the decisions by the Board (the proposal) and the Minister (the approval) were lawful; and whether Sanral should be interdicted from entering into a proposed concession contract with a preferred bidder in respect of the contemplated toll roads.

Sanral's primary focus was on the High Court's decision to condone the lateness of the application, but it also attacked the merits of the application. To overcome its inability to produce a formal Board decision to seek the Minister's approval, Sanral relied on a 2014 memo of its CEO, Mr Alli, to a newly installed Board, asking for a round-robin resolution in this regard.

The resolution (the 2014 resolution) was subsequently adopted by the Board.

The City, which conceded on appeal that its three-year delay in bringing the application was unreasonable, cross-appealed the High Court's (i) refusal to make an order in respect of the 2014 resolution; and (ii) to grant the abovementioned interdict against Sanral. The minister did not oppose the appeal.

Held

Whether they be classified as administrative or executive in nature (and the Minister's function was likely executive), the actions of the Minister and the Board were subject to constitutional control and the principle of legality, and the decision whether to condone the delay would depend on what the interests of justice required (see [74] – [75], [78], [80]).

In order to determine whether the High Court correctly condoned the delay (which was indeed unreasonable), the court had to consider the merits of the review, beginning with the question whether the Board had in fact taken a decision under s 27(1) (see [85]). The City correctly submitted that there was no evidence that the Board even considered making a recommendation to the Minister, let alone that it made a decision in that regard (see [96]). The attempt to recover the situation by means of the 2014 resolution was ineffective because it was insufficient to enable the new Board to apply its mind to the relevant considerations (see [99]). The High Court correctly held that the Board's failure to make a decision to seek ministerial approval left the toll-road declaration liable to be set aside (see [100]). It was a fundamental flaw that was not saved by the 2014 resolution — which, whatever its true nature, was also subject to judicial scrutiny (see [99], [102], [113]).

While the absence of a valid Board decision was on its own decisive of the appeal, it at the same time deprived the Minister of a jurisdictional basis for the exercise of his functions under s 27(1) and (4), leaving his decision also liable to be set aside (see [103], [106]). The Minister's role was not, as argued, merely clerical: as a member of the executive branch exercising a control function over an organ of state that was

accountable to him, he was obliged to bring an independent mind to bear on what was a matter of national interest (see [74], [105]).
The court would, in view of the above, and considering the public interest in the finality of decisions by repositories of state power, confirm the High Court's decision to condone the City's delay in bringing the review application (see [79], [107] – [108]).
Since there was no certainty about its final terms and conditions, the court would refuse the City's request to interdict Sanral from concluding the proposed concession agreement, and that portion of the City's cross-appeal would be dismissed

MINISTER OF WATER AND ENVIRONMENTAL AFFAIRS AND ANOTHER v REALLY USEFUL INVESTMENTS 219 (PTY) LTD AND ANOTHER 2017 (1) SA 505 (SCA)

Environmental law — Protection of the environment — Control of activities detrimental to environment — Compensation for loss in terms of s 34 of ECA — Whether available to landowner for loss resulting from steps taken as per directive in terms of s 31A of ECA — Since s 31A was a regulatory provision to prevent environmental harm, statutory compensation claim not available — Environment Conservation Act 73 of 1989, ss 31A and 34.

Environmental law — Protection of the environment — Compensation for loss in terms of s 34 of ECA — Statutory provisions providing for limitation of Dliability not applicable thereto — Environment Conservation Act 73 of 1989, ss 34 and 37; National Environmental Management Act 107 of 1998, s 49.

Really Useful Investments (the Company) was the owner of a number of immovable properties in Cape Town located next to a river, and near the seashore. With a view to developing them, it raised the height of the lower-lying properties to four metres above sea level, by dumping waste matter and fill in, and adjacent to, the river. This prompted the City of Cape Town, acting in terms of ss 31A(1) and (2) of the Environment Conservation Act 73 of 1989 (the ECA), to issue a directive to the Company, aimed at environmental preservation and protection in relation to the land owned by the latter, and setting out a number of steps it was required to undertake. The Company complied with the directive, and then instituted action in the court a quo against the City, the Minister and the MEC. It claimed payment of compensation in terms of s 34 of the ECA on the basis that the directive issued by the City resulted in a substantial diminution in the value of the land, in that the extent to which the land could be developed was greatly restricted as a result of the steps taken. The City excepted to the claim, on the basis that the Company had disclosed no cause of action. Reliance was placed on s 49 of the National Environmental Management Act 107 of 1998 (NEMA), which provided that inter alia the state was not liable for loss caused by the exercise of any power under NEMA or 'any specific environmental management Act' unless it was unlawful, negligent or in bad faith. The ECA, in terms of ss 1(1) of NEMA, was such an environmental management Act. Given that no allegation of unlawfulness, negligence or bad faith was made, no cause of action was made out, the City alleged. Rejecting this argument, the court a quo granted the order sought by the Company. It found that a statutory right to recover compensation was clearly provided for in s 34 of the ECA, and was not limited or restricted by s 49 of NEMA nor by the similarly worded s 37 of the ECA, both of whose purpose was to provide a defence in delict.

The Supreme Court of Appeal reversed the decision of the court a quo. It agreed with the High Court's finding that ss 49 of NEMA and 37 of ECA did not operate to exclude a claim for compensation under s 34 of ECA in circumstances where the City did not act either unlawfully, in bad faith or negligently. However, the SCA found that the circumstances of the case were such as to fall outside the purview of s 34 of the ECA.
Held, that s 31A of the ECA (in terms of which the City issued the directive) was one of several distinct regulatory provisions set out in the ECA and NEMA that regulated the activities of owners of land or of holders of real rights in land, and were aimed at preventing such activities from causing environmental harm. Section 34 could not have been directed at providing compensation for actions taken under those provisions. It was difficult to conceive of a right to compensation for restrictions rightly put in place to prohibit harmful processes. To interpret s 34 so as to allow compensation in such circumstances would be to discourage environmental authorities from fulfilling their constitutional obligation to protect the environment. It would, perversely, encourage landowners to act in an environmentally offensive manner so as to solicit compensation. (Paragraphs [34], [39] and [40] at 518B, 519E – 520B and 520C.)
Held, that the Company's claim could be rejected also on the basis that a claim in terms of s 34 for compensation could only be brought against 'the Minister or competent authority concerned'. That did not include a local authority. The Company's claim in terms of s 34 of the ECA against the City was thus not sustainable. (Paragraph [55] at 524G.)
Held, that, while s 34 of the ECA provided a statutory right to compensation in restricted circumstances (namely in the case of the curtailment of real rights as a result of the creation of limited development areas in terms of s 23), s 37 provided protection against liability to pay damages in delict arising out of the proper exercise of powers or functions under the ECA. The protection did not extend to acts that were performed negligently or in bad faith or outside the terms of the statute, as such actions were by definition not lawful. It followed that s 37 had no application in relation to situations falling within s 34 and did not operate to exclude the right of any landowner or holder of a real right in land to claim compensation under that section.
Held, that s 49 of NEMA could not be construed in the manner suggested on behalf of the City, ie that it excluded claims for compensation under s 34 where the interference occurred as a result of lawful, non-negligent acts undertaken in good faith, but to afford such a claim where the interference was unlawful, negligent or undertaken in bad faith. Section 34 of the ECA provided a holder of a real right in land with a real right to compensation as a result not of regulatory interference, but because of the creation of protected environmental areas. The interpretation contended by the City would have had the effect of nullifying the right to compensation that had existed since the enactment of the ECA. Appeal upheld.

TRANSNET SOC LTD v TOTAL SOUTH AFRICA (PTY) LTD AND ANOTHER 2017 (1) SA 526 (SCA)

Minerals and petroleum — Petroleum — Tariffs payable for transportation of crude oil — Setting and approval — Contract pertaining to tariff entered into with Transnet under previous legislative regime governing conveyance of crude oil — Contract affording discount to petroleum supplier — Whether still enforceable despite subsequent change in legislative regime, and establishment of new regulatory body

tasked with setting and approving tariffs — Relevant legislation entitling Transnet, as licensee, to allow discount — Not amounting to discrimination under Act where differentiation based on sound reasons — Application of principle that new legislation presumed not to interfere with vested rights — Transnet bound by contract — Petroleum Pipelines Act 60 of 2003, ss 21 and 28.

This matter concerned the present enforceability of a contract entered into with the former Government of South Africa under a prior legislative regime. The appellant in this matter was Total South Africa (Pty) Ltd (Total). As a supplier of petroleum, it was subject to tariffs payable for the transportation of crude oil. The 'Authority' responsible for setting tariffs — the National Energy Regulator — had been established in terms of the National Energy Regulator Act 40 of 2004 (NERSA Act), in terms of which it had been tasked with regulating the electricity, piped-gas and petroleum pipeline industries. Its functions were set out in the Petroleum Pipelines Act 60 of 2003 (the PPA). Transnet, a wholly owned government company, as a licensee under the PPA in terms of which it was allowed to operate petroleum pipelines, was obliged to charge the tariff.

Total disputed the application to it of a tariff determination made by the Authority. It asserted that an agreement pertaining to tariffs entered into under a prior legislative scheme remained enforceable and bound Transnet. Total years previously had entered into an agreement with a government predecessor of Transnet responsible for the operation of petroleum pipelines and empowered to determine tariffs. In terms thereof it had been agreed that it (Total) would be afforded a discount in respect of the tariff payable for the transportation of crude oil. This was in acknowledgement of the additional costs Total, as operator of an inland refinery, was subject to in having to transport crude oil compared with operators of refineries situated at the coast. The principle underpinning this agreement was referred to as the neutrality principle. A variation of such agreement ('variation agreement') was entered into with Transnet in 1991, but again underpinned by the neutrality principle, and it was on this agreement that Total in the present instance relied.

The question was whether the variation agreement remained binding on Transnet despite the change in the regulatory regime governing the transport and conveyance of fuel in South Africa, as brought about by the promulgation of the NERSA Act and the PPA. The present matter was an appeal against the decision of the court a quo supporting Total's argument that it did. In disputing the application of the variation agreement, Transnet chiefly relied on s 28(6) of the PPA, which provided that a licensee may not charge a tariff for the licensed activity in question other than that set or approved by the Authority. Transnet argued that the neutrality principle could not co-exist with this provision. Only the Authority established by NERSA could set a tariff that licensees were obliged to charge, and s 28 did not permit of any deviation. A further argument was that the variation contract breached the PPA's prohibitions against licensees' discriminating against customers (ss 28(2)*(a)*(ii) and 21).

Held, that the PPA as a whole was intended inter alia to achieve competition in the construction and operation of petroleum pipelines and associated facilities; to achieve environmentally responsible transport, loading and transport of petroleum products; to facilitate investment in the industry and to promote companies owned or controlled by historically disadvantaged South Africans. There was no reason why it would be intended to discriminate against long-established suppliers.

Held, that the differentiation as expressed in the neutrality principle was based on sound reasons, and did not amount to discrimination. Total, as a primary shareholder

in the body running the inland refinery at Sasolburg, would be treated unfairly if it were not able to recover the cost of piping crude oil: that would mean they were discriminated against vis-à-vis coastal refineries. The neutrality principle was designed to avoid this result, and the position was not different now that the tariff was set by the Authority and not Transnet. This construction appeared to be shared by the Authority, as was apparent from its referring to the tariffs it set as 'maximum tariffs thus permitting the licensee to discount'. Transnet as such was entitled to discount, and the neutrality principle embodied in the variation agreement obliged it to allow a discount for the conveyance of crude oil to the Sasolburg refinery. (Paragraphs [21] – [23] at 532A – F.)
Held, that Transnet was bound by the variation agreement of 1991. This was in keeping with the general principle that new legislation was presumed not to interfere with vested rights.

FIRSTRAND BANK LTD v KRUGER AND OTHERS 2017 (1) SA 533 (GJ)

Practice — Applications and motions — Unopposed motions — Affidavits — Requirement that deponent have personal knowledge of facts — Extent to which hearsay could be admitted — Unopposed application by credit grantor to enforce debt based on credit agreement to which National Credit Act 34 of 2005 applying — Persons from whom founding and supplementary affidavits required, and evidence required to be set out — Law of Evidence Amendment Act 45 of 1988, s 3(1)(c).

Evidence — Hearsay — When admissible — In unopposed application by credit grantor to enforce debt based on credit agreement to which National Credit Act 34 of 2005 applying — *Persons from whom founding and supplementary affidavits required, and evidence required to be set out — Law of Evidence Amendment Act 45 of 1988, s 3(1)*(c).

This was an unopposed application, brought on long-form notice of motion, by a financial institution as credit provider against a defaulting credit receiver in relation to a credit agreement entered between the parties and subject to the National Credit Act 34 of 2005 (the NCA). The key issue to be addressed was whether the deponent to the founding affidavit had set out enough facts to demonstrate personal knowledge. In this case the only basis upon which the deponent was claiming personal knowledge was by virtue of the position he held of commercial recoveries manager; not that he had been involved in any attempt to recover the alleged debt or that he had accessed any of the bank's records. Information obtained from other individuals and on which he relied was not confirmed by affidavits attested to by those persons. The court addressed the impact of s 3(1)*(c)* of the Law of Evidence Amendment Act 45 of 1988, which sets out the circumstances in which hearsay evidence was admissible — the core base for the reception of what would otherwise constitute hearsay being the reliability and probative value of the evidence sought to be tendered (para [24]). In determining whether hearsay evidence should be admitted, the court found of assistance a body of case law dealing with summary judgment applications. That line of cases had come to accept that, where a person is in control of the relevant files and is directly involved in the matter at hand, whether having engaged the defendant directly or by correspondence without comeback, then that person qualifies to depose to an affidavit verifying the facts. The court concluded that an applicant credit grantor seeking judgment in an unopposed matter could rely on —

(a) the evidence of a person who exercised custody and control of the documents in issue to introduce them into evidence through the founding affidavit: provided an allegation to such effect was made, or such a fact appeared from the contents of the affidavit as a whole, and provided the agreements were attached and alleged to be true copies. This would usually be a bank manager or an official holding the position of a recoveries manager;

(b) the evidence of a person who had personal knowledge of the current status of the credit receiver's account by reason of having access to the account and being involved in the present management of the account or collection process, in respect of the allegations contained in the founding affidavit regarding the current outstanding balance. This would be subject to the terms of the agreement which might permit a certificate of indebtedness to constitute prima facie proof, provided it was signed by a designated official at the financial institution and provided further that the court was otherwise satisfied that such person would, in the ordinary course, have personally accessed the records, accounts and other relevant records of the respondent and provided the certificate was otherwise reliable;

(c) the evidence of a person who positively attested that notice was properly sent to the respondent under either s 129(1) or s 86(10) of the NCA.

Applying these principles the court found to be not in order the papers of the applicant, and requested supplementary affidavits from relevant persons.

WINGATE-PEARSE v COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE 2017 (1) SA 542 (SCA)

Revenue — Income tax — Appeal — Against 'decision' of tax court — Interlocutory order not 'decision' and therefore not appealable — Tax Administration Act 28 of 2011, ss 129 and 133(1).

The right to appeal from a decision of the tax court is dealt with in s 133(1) of the Tax Administration Act 28 of 2011 (the Act). It provides that '(t)he taxpayer or [the South African Revenue Service] may in the manner provided for in this Act appeal against a decision of the tax court under sections 129 and 130'.

Section 130 of the Act deals with costs orders and had no bearing on this case — an appeal to the High Court against a tax court's interlocutory order on a point in limine raised by a taxpayer (concerning the onus of proof and the duty to commence leading evidence) in his tax-court appeal against a revised assessment.

Therefore, whether the tax court's interlocutory order — the decision on the point in limine — was a 'decision' in terms of s 129 of the Act, was determinative of the issue of appealability; if not a 'decision' in terms s 129, the order was not appealable in terms of s 133(1). Upon examination of the section, the court *held* that it was not such a 'decision' because —

- s 129(1) was a clear indication that the right of appeal may only arise once the appeal on the merits had been finalised; it was only concerned with an assessment or decision by the tax court that finally resolved the point in issue and not with decisions on interlocutory matters; and
- s 129(2) (quoted at [8] below) was concerned with the decisions a tax court may make in considering an appeal, and conspicuously absent was any provision for the tax court's powers when dealing with an interlocutory matter. (Paragraphs [9] – [12] at 545E – 546D)

SOUTH AFRICAN REVENUE SERVICE v COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION AND OTHERS 2017 (1) SA 549 (CC)

Labour law — Dismissal — Racist statement — White employee referring to African employee as 'kaffir' — Whether continued employment relationship Cintolerable — Labour Relations Act 66 of 1995, s 193(2)(b).

Mr Kruger and Mr Mboweni became involved in an altercation, after which Kruger referred to Mboweni as a 'kaffir'. This caused the South African Revenue Service (Sars), their employer, to begin disciplinary proceedings, charging Kruger with using the racist remark, and alternatively derogatory and abusive language. Kruger pleaded guilty, and the chairperson of the disciplinary inquiry imposed a sanction of a warning, suspension and counselling. However when the decision came before the Commissioner of Sars, he, without hearing Kruger, changed the sanction to dismissal. This prompted Kruger to refer an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration. There, an arbitrator found the dismissal unfair, reversed it, ordered reinstatement, and that the original sanction stand (see [21]). Sars then took the arbitrator's decision to the Labour Court on review but was unsuccessful; and then appealed to the Labour Appeal Court (LAC), again unsuccessfully. It thereafter approached the Constitutional Court.
The issues were as follows:
(1) Whether Sars had perempted (abandoned) its right to appeal to the Constitutional Court. (Sars had informed Kruger it would not appeal the LAC's order, but had three days later reversed its decision.) *Held*, that it had done so (see [24] – [25], [27]).
(2) Whether it was in the interests of justice to disregard the peremption. *Held*, that it was. This as Sars had quickly reversed its decision; the racism at the centre of the case was a persistent problem requiring the court's attention; and because the court had a duty to promote the Constitution's values (see [25], [27], [29]).
(3) Whether leave to appeal should be granted. *Held*, that it should be. This, in that the matter raised issues which were constitutional (the reasonableness of the arbitrator's award of reinstatement) and of general importance (employers' approach to workplace racism; arbitrators' handling of reinstatement in such cases; and courts' response); because fundamental values were central to the issues; and because Sars had strong prospects of success.
(4) Whether the arbitrator's award of reinstatement was unreasonable. *Held*, that it was. This as she had failed to take account of s 193(2)*(b)* of the Labour Relations Act 66 of 1995, which provides that 'the arbitrator must require the employer to reinstate . . . the employee unless the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable'; and where Sars' evidence and further factors were to this effect. Those factors were the gravity of the word used; Kruger's attitude; and the likely offence to employees in retaining Kruger. Sars, moreover, as an organ of state, was required to combat racism.
(5) Whether Sars should be ordered to compensate Kruger (s 193(1)). *Held*, that it should be. Factors supporting this conclusion were the Sars Commissioner's 'marked deviation' from fair procedure in failing to hear Kruger; that Sars had caused Kruger unnecessary legal expenditure; and that Sars had offered to pay compensation. These factors outweighed the gravity of Kruger's conduct; the need to respond firmly; and Kruger's disingenuity.

Ordered, inter alia, that the arbitrator's award of reinstatement be set aside; and that Sars pay compensation equivalent to six months' salary.

PRIMEDIA (PTY) LTD AND OTHERS v SPEAKER OF THE NATIONAL ASSEMBLY AND OTHERS 2017 (1) SA 572 (SCA)

Constitutional law — Constitution — Foundational values — Rule of law — Open justice — Right to open Parliament — Nature of — Test for reasonableness of its limitation — Unreasonable limitation imposed by Parliament's rules and policy limiting broadcasting of unparliamentary conduct and grave disorder in Parliament — Constitution, ss 59(1)*(b)* and 72(1)*(b)*.

Parliament — Proceedings — Broadcasting — Limitations on broadcasting of unparliamentary conduct and grave disorder — Parliament's rules and policy limiting broadcasting of unparliamentary conduct and grave disorder in Parliament violated public's right to open Parliament and were therefore unconstitutional and unlawful — Constitution, ss 59(1)(b) *and 72(1)*(b).

Parliament — Proceedings — Policing — Presiding officer's permission for security-services members to perform policing function — Lawfulness of disruption by security services, without presiding officer's permission, of cell-phone signal in Parliament during State of the Nation Address — Unlawful in circumstances of present case, where policing function affecting parliamentary communications — Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004, s 4(1).

Sections 59(1)*(b)*(i) and 72(1)*(b)*(i) of the Constitution provide that the National Assembly (NA) and the National Council of Provinces (the NCOP) must conduct their business in an open manner and hold their sittings in public, but that they may regulate public access (including the media) if it 'is reasonable and justifiable to do so in an open and democratic society'.

Parliament's standing rules relating to the broadcasting of parliamentary proceedings (the Rules) provide that during incidents of disorder or unparliamentary conduct the camera must focus on the occupant of the chair, ie the Speaker of Parliament or the Chairman of the NCOP. This measure is repeated for incidents of 'grave disorder' in Parliament's later Policy on Filming and Broadcasting (the Policy), but '(o)ccasional wide-angle shots of the chamber are acceptable' in the case of unparliamentarily behaviour.

Primedia Broadcasting (a division of Primedia (Pty) Ltd), the South African National Editor's Forum, the Right2Know Campaign and the Open Democracy Advice Centre challenged the constitutionality of these measures (the disruption clauses) on the basis that they were not reasonable and justifiable limitations of the open and public nature of parliamentary sittings as contemplated in ss 59(1)*(b)* and 72(1)*(b)* of the Constitution; alternatively, that the Policy and the Rules as a whole were irrational for lack of public consultation before they were adopted, and were therefore unconstitutional.

An order was also sought declaring the continued use of a device jamming electronic signals in Parliament unconstitutional and therefore unlawful. This arose from a 'jamming incident' which had prevented cellphone use during the first part of the same joint sitting of the NA and the NCOP — the President's annual State of the Nation Address (Sona) — in which the disruption clauses where invoked to limit coverage of proceedings when it was deemed to have descended into 'grave

disorder'. The Speaker, it was common cause, did meet with the State Security Agency before the Sona but was unaware of the existence of the device. Her contention that how they went about securing the parliamentary precint was left to their dicretion, was upheld by the High Court (a full bench by a majority), which also otherwise held against the applicants.

In their appeal, the Supreme Court of Appeal *held* as follows:

As to the nature of the rights implicated

The default position with regard to public participation in the proceedings of Parliament (flowing from the provisions of ss 59 and 72 of the Constitution) was that there must be public access to proceedings unless there was strong justification for departing from it. The behaviour of MPs in Parliament was something which the public had the right to see and hear. It was political speech of the first order; and freedom of speech in Parliament was fundamental to an open and democratic state. Also, the right to vote could only be meaningfully exercised if voters knew what their representatives did and said in Parliament, and since the vast majority of people were not actually in Parliament, they must rely on public reports and broadcasts. Whether the broadcasts, relayed to the public in the manner dictated by the Rules and the Policy, were sufficiently informative and accurate, was the essential question.

As to the test for the reasonableness of the limitation imposed by the disruption clauses on these rights

In considering whether a measure was reasonable, a court had to balance parliamentary autonomy with the right of the public to participate in public affairs. The test to be applied was not only whether the limitation was proportionate to the end sought to be achieved, but also whether other measures would better achieve the end, or would do so without limiting others' rights. Also, the principle for determining the reasonableness of administrative action — that while a court must pay respect to the route chosen by the decision-maker, it must also not rubber-stamp unreasonable decisions — also applied to the determination of the reasonableness of the adoption by Parliament of the measures.

As to why limitation imposed by the disruption clauses was unreasonable

The Policy and Rules were not clear on the basis for deciding between grave disorder or merely unparliamentary behaviour. The limitation on the right to an open Parliament should be clear in order to be reasonable.

Members of the public had the right to see and hear elected Members of Parliament misbehave; they were entitled to know what happened in the legislature so that they could see for themselves how their elected representatives fared. None of the justifications for the limitation of this right survived scrutinty: the dignity of Parliament would not be impaired if disruptions were broadcast; the right did extend to viewing disruptions; it was not a minor limitation; Parliament did not show how its limitation mitigated the encouragement of ill discipline; and the argument that such limitation constituted international best practice was not compelling.

The disruption clauses were therefore unconstitutional and thus unlawful, and the manner in which the Sona 2015 proceedings were broadcast was unconstitutional. (It was not necessary to consider the appellant's alternative argument that the entire Policy was unlawful since it was concluded through an irregular process.)

As to the jamming incident

Under s 4(1) of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004 (see [61]), only the presiding officers may decide what the security services may do on its precinct. In the circumstances of the present case —

where it interfered with communication in Parliament — the use of the jamming device without the Speaker's consent was unlawful.

CAPE TOWN CITY AND OTHERS v KOTZÉ 2017 (1) SA 593 (WCC)
Evidence — Medical evidence — Second medical examination — Criteria to assist court in exercising its discretion to order — Uniform Rules of Court, rule 36(5).

The City of Cape Town, the defendant in a damages claim, applied for an order that Mrs Kotzé, the plaintiff, attend a second medical examination (Uniform Rule of Court 36(5)). The issue was whether the examination was 'necessary or desirable for the purpose of giving full information on matters relevant to the assessment of such damages' (see [44]).
Held, that, in the exercise of its discretion to make the order, a court had to weigh inter alia the importance of the information sought from the examination, against the examination's likely effect on the examinee. If it were likely to be 'materially prejudicial' to the examinee, the order ought to be refused.
Here, the balance was against ordering the examination. This as the information sought had already been established; the examination was an attempt by the applicant to obtain a more favourable opinion than its own expert had already provided; and because it would have an unduly oppressive effect on Mrs Kotze.
Application accordingly dismissed.

MASSTORES (PTY) LTD v PICK N PAY RETAILERS (PTY) LTD 2017 (1) SA 613 (CC)

Delict — Specific forms — Interference with contractual relationship — Deprivation of contractual rights — Wrongfulness — When presumed — Only when there is both deprivation and simultaneous usurpation of right — If only deprivation proved, then wrongfulness to be positively established by plaintiff.

Delict — Specific forms — Interference with contractual relationship — Nature of protected interest — Must be universally enforceable — No legal duty on third parties not to infringe contractually derived exclusive trading rights —Interdict refused where applicant sought to rely on contractual interest to restrict competition — Applicant should have enforced right at origin, ie in contract.

Competition — Unlawful competition — Interference with contractual relationship — Extension of delict — Protection of exclusive trading rights — Third parties in general having no obligation to respect exclusive trading rights conferred by contracts they were not party to — To import obligation would stifle competition — Court refusing to extend delict.

Hyprop (H), the owner of a shopping centre, entered into a lease with Pick n Pay (P) that gave P exclusive rights to trade as a supermarket. When a supermarket owned by Masstores (M) began selling groceries there, P obtained a High Court interdict against M on the ground of its alleged interference with P's contractual relations with H (P abandoned its claim against H). M's appeal was dismissed by the Supreme Court of Appeal.
In an application for leave to appeal to the Constitutional Court, M argued that the Supreme Court of Appeal erred because it incorrectly interpreted the Constitutional Court's judgment in *Country Cloud*. M argued that wrongfulness was wrongly presumed against it and that it was in fact not guilty of wrongful conduct.

P argued on the other hand that its claim fell squarely into the 'deprivation of interests' category of interference cases recognised in *Country Cloud*, and was therefore a case in which wrongfulness could be presumed instead of having to be positively established. P argued that this legally presumed wrongfulness, together with fault in the form of dolus eventualis, justified a finding that an actionable delict was committed by M. P also contended that it had in any event proved wrongfulness without recourse to the presumption. Finally, P relied on an extended delict of unlawful competition.

Held, per Froneman J for the majority

In order to obtain interdictory relief P had to show that the contractual right it obtained from H protected an interest enforceable against outside parties such as M; that M unlawfully infringed or threatened to infringe that right; and that there was no alternative remedy. Since there was no contract between P and M, the only basis for the unlawfulness of M's alleged interference would lie in delict. This was a relatively undeveloped area of the law, and since it was in the interests of justice to obtain clarity, leave to appeal would be granted.

The first issue was whether M's conduct was such that wrongfulness could be presumed, which in turn depended on the correct interpretation of the Constitutional Court's judgment in *Country Cloud*). *Country Cloud* did not establish that the deprivation of contractual rights, without their simultaneous usurpation, was prima facie unlawful. Nor did it say that in inducement cases the breach of a legal duty or the infringement of a subjective right did not form part of the wrongfulness enquiry. M's trading as a general supermarket did not deprive P of its entitlement to continue trading as a supermarket; what was deprived instead was P's trading interest, namely its exclusivity. Since M did not usurp any exclusive right of P and appropriate it as its own, it failed to establish prima facie wrongfulness on the part of M.

If the court were to extend the delict of unlawful competition, it had to be accomplished in terms of the general principles of Aquilian liability (see [30]). Since the law did not impose a duty on third parties not to infringe contractually derived exclusive trading rights, the question was whether the law should be so developed in the present case (see [33], [36]). P's problem was that it was seeking to protect a contractually derived exclusive trading right without resorting to its origin, the contract (see [38]). A bare restriction on competition, not linked to protectable interests like goodwill, may in general not be enforced against a third party like M (see [40]). Since existing authority did not regard M's breach of its lease with H as automatic wrongfulness against P, grounds for development would be sought in general principles (see [46] – [47]). The boni mores or reasonableness criterion should be used to establish wrongfulness in cases not covered by existing precedent (see [48]). In competition cases this criterion had crystallised into the competition principle, namely that the competitor who delivered the best or fairest must achieve victory (see [49]). In the present case its application did not, however, compel departure from the general principle that there was no legal duty on third parties not to infringe on contractually derived exclusive trading rights (see [51]). The rationale was the same: exclusive trading rights made the competitive field uneven.

Minority judgment of Jafta J

Leave to appeal should have been refused on jurisdictional grounds, but even assuming jurisdiction, the interdict should not have been granted. P's action was likely based on contract and delict, and it would be unfair to dismiss the application on the basis that a claim in delict was not established. There was no reason in principle that militated against the granting of an interdict to P to restrain a third party

like M from interfering in its contractual rights. Since the relief sought was an interdict and not specific performance or enforcement of the contract, the principle that a contract could not be enforced against a non-party was not applicable (see [86]). And the view that a prohibitory interdict could be granted only when the applicant had established the essential elements of a delict could not be supported (see [91]). Since P was entitled to rely on its contractual right for an interdict against M, it was not necessary for P to prove that M had committed a delict.

LAWYERS FOR HUMAN RIGHTS v MINISTER IN THE PRESIDENCY AND OTHERS 2017 (1) SA 645 (CC)

Costs — Constitutional litigation — General costs rule in constitutional litigation — High Court's discretion to make adverse costs orders against private litigant so as to prevent abuse of process — Where High Court exercising its discretion judicially and on correct principle, no basis for interference therewith on appeal.

This case concerned LHR's application for leave to appeal and its appeal in the Constitutional Court against an adverse High Court costs order made in its unsuccessful constitutional challenge to the manner in which a certain large-scale security operation was conducted. The High Court had considered the placing of the matter on the urgent roll as 'uncalled for and inappropriate' because LHR had launched the application some six weeks after the operation was completed and did so on an urgent basis, giving the state respondents less than a day to respond. LHR invoked the general rule (as stated in the *Biowatch* case) that costs should not be awarded against unsuccessful private litigants who seek to vindicate constitutional rights against state parties, unless the litigation was frivolous, vexatious, improperly motivated or other circumstances made it in the interests of justice to order costs. It contended that it *was* appropriate for it to have applied for urgent relief because the state respondents would not disavow the possibility of future operations, and that the costs order therefore flouted the general rule.

The Constitutional Court granted leave to appeal (see para [12]) but would not uphold the appeal. It *held* that despite the constitutional nature of the application, the adverse costs order was triggered by the High Court's considered view that proceedings had been managed in an inappropriate way — it had exercised its discretion to make an order it deemed appropriate to protect its process. Unless it exercised that discretion unjudicially or on a wrong principle, there was no basis to interfere with such order on appeal. LHR however advanced no such basis, and the High Court's ire could not be regarded as unwarranted given the improper nature of the proceedings. The *Biowatch* principles should not be abused to avoid ordinary court process. A worthy cause or worthy motive cannot immunise a litigant from a judicially considered, discretionarily imposed adverse costs order.

SA CRIMINAL LAW REPORTS FEBRUARY 2016

S v SEEDAT 2017 (1) SACR 141 (SCA)

Rape — Sentence — Restorative justice in terms of provisions of s 297(1) of Criminal Procedure Act 51 of 1977 — Inappropriate in rape case.

Appeal — By Director of Public Prosecutions — Against sentence imposed by provincial or local division on appeal occasioned by error on question of law — Such appeal competent in terms of provisions of s 311 of Criminal Procedure Act 51 of 1977.

The appellant, a 60-year-old man, was convicted in a regional magistrates' court of raping the 58-year-old complainant, to whom he had delivered a bedside lamp and groceries. After connecting the lamp and testing it, he pushed the complainant onto her bed where he raped her. He was regarded as a first offender and was sentenced to seven years' imprisonment. On appeal to the High Court against the sentence, the court adopted a proposal made at the trial by the complainant that the appellant pay her compensation. It suspended the sentencing of the appellant for a period of three years on condition that he pay her the amount of R100 000 in instalments. The state appealed against the sentence on the grounds that it was incompetent and invalid.
Held, as to the right of the state to appeal from a decision of a provincial or local division on appeal where it sought to set aside a decision occasioned by error on a question of law, that the appeal in the present case fell squarely within the scope of s 311 of the Criminal Procedure Act 51 of 1977 (the CPA) and the court had jurisdiction to entertain it. (Paragraph [30]at 151*h*–152*c*.)
Held, further, that the postponement of sentence in terms of s 297(1) of the CPA was not available as a sentencing option in the matter as it specifically prohibited postponement of the sentence where the accused was convicted of an offence for which the law prescribed a minimum sentence. If, however, it was the intention of the High Court to invoke the provisions rather of s 297(4) it could have done so, but it would then have had to impose a sentence for a specific term of imprisonment and then order that the operation of a part of it be suspended for a specified period not exceeding five years on any condition, including compensation.
Held, further, that although there were clearly substantial and compelling circumstances that justified deviation from the prescribed minimum sentence, restorative justice was not an appropriate sentencing option in the matter. (Paragraph [38] at 153*g*–154*c*.)
Held, further, that without in any way endorsing the award of compensation for such an offence, the appellant's willingness to comply with what he thought to be a competent court order had to be taken into account in his favour. In the circumstances the sentence imposed by the High Court had to be set aside and replaced by a sentence of four years' imprisonment.

S v STEWARD 2017 (1) SACR 156 (NCK)

Prosecution — Conduct of — Rape trial in regional court — Prosecution conducted incompetently and amounting to dereliction of duty, leading to acquittal of appellant — Numerous aspects not properly investigated, resulting in many unanswered questions — Those culpable ought to account to their superiors.
Evidence — Alibi — Proper treatment of by police, prosecutor and presiding officers — Need by all role players to familiarise themselves with proper treatment of alibi.
In an appeal against a conviction and sentence of 15 years' imprisonment in a regional magistrates' court for the rape of a 16-year-old girl, the court noted that there had been an unacceptable delay in finalising the trial. Although the appellant was arrested within a few hours of the rape, the trial only got under way a year later, and then dragged on with numerous prosecutors and defence representatives entering and exiting the case. Some of the postponements were totally unjustified and amounted to an abuse of process. The presiding officer should have directed the proceedings before him with a firm, but fair, hand. Such an approach would obviate uncalled-for applications for permanent stays of prosecution. Needless enquiries in

terms of s 342A of the Criminal Procedure Act 51 of 1977 (the CPA) into inordinate delays in the disposal of cases would also be avoided. What happened in the present case was strongly deprecated and should not be repeated. Those who were culpable should account to the bodies to which they belonged. (Paragraph [6] at 159*c*–*e*.)
The court also commented on the dereliction of duty by the state. The police failed to obtain statements from essential alibi witnesses. The investigating officer should have been called to explain whether the appellant's alibi was investigated and, if not, why not. If the alibi *was* investigated, he ought tohave explained the result to the court. The requirement that the police, the prosecuting authority and the presiding officers should familiarise themselves with the proper treatment of alibi defences could not be emphasised enough. The state also failed to call one of the police witnesses to whom the description of the assailant and his car was given at the complainant's home. The arresting officer should also have been called as the complainant had been taken to the appellant where she pointed him out as her rapist. Moreover, unauthorised people were allowed to contaminate the accused's vehicle shortly after he was arrested. In the circumstances it was simply too risky to uphold the appellant's conviction with so many unanswered questions. The court ultimately found that the police and the state had failed the complainant, her family and society at large. The case was not investigated or properly prosecuted due to complacency, indifference and indolence. Those responsible for such shoddy work should not be promoted to higher office without first accounting for their dereliction of duty. (Paragraph [63] at 180*g* – *h*.) In view of the above the conviction and sentence would be set aside on appeal. Olivier concurred in the judgment of Kgomo JP and Phatshoane J, but disagreed on the reliability of the evidence of the complainant and her mother.

S v BARENDS 2017 (1) SACR 193 (NCK)

Trial — Record of proceedings — Lost, destroyed or incomplete — Record reconstructed but no copy of judgment available — Court could, in giving directions for reconstruction, ask magistrate to simply give reasons for judgment.
Evidence — Trial-within-a-trial — When necessary — Not required when state witness deviates from written statement — Proper procedure set out.
In March 2007 the appellant was convicted in a regional magistrates' court of murdering the deceased, and sentenced to eight years' imprisonment. He was granted leave to appeal in June 2007. The mechanical recordings of the trial went missing and, when they were eventually found, there were many defects which were subsequently reconstructed to the satisfaction of the regional magistrate. However, the judgment could not be reconstructed as the magistrate's handwritten notes had been sent for typing and were then mislaid. Because of the long delay, the magistrate could no longer remember the details of the case and his conclusions on the reliability of thewitnesses. The appeal was postponed on numerous occasions in order for the reconstruction of the record, and various judges had made orders in this regard.
Held, that it boggled the mind how the clerk of the court could so easily — and not for the first time in the same case — have lost an official document. There was a problem at the Upington District and Regional Courts, which the Northern Cape Provincial Efficiency Enhancement Committees had dealt with, having urged disciplinary and/or criminal consequences. (Paragraph [5] at 196*d*.)

Held, further, that the directives by other members of the court concerning the reconstruction of the record should have rather incorporated an alternative, to the effect that, failing the reconstruction of the judgment, the magistrate,based on the record, simply give reasons for his conviction. This would not be dissimilar to a district magistrate whose records were in manuscript, but who gave an unwritten ex tempore judgment which was not mechanically recorded. In such instances written reasons for judgment were only furnished on request. (Paragraph [6] at 196*e–j*.)
It appeared that, during the course of the trial, the court ordered, on theapplication of the appellant's attorney, that a trial-within-a-trial be held as there was a conflict between the testimony of a state witness and his statement to the police.
Held, that the ruling that a trial-within-a-trial be held was irregular and unprocedural, as this was not a statement made by an accused person to apolice officer or a magistrate involving an admission or a confession, the admissibility of which was called into question as not having been made freely or voluntarily. What ought to have happened is that the defence should have cross-examined the witness on the discrepancy and then left it to the state to call the police officer who obtained the statement, as well as his interpreter. If the prosecutor did not do so, the defence could have called them when it presented its case.
The court proceeded to consider the appeal and, on the evidence available to it, dismissed it.

WICKHAM v MAGISTRATE, STELLENBOSCH AND OTHERS 2017 (1) SACR 209 (CC)

Sentence — Victim — Rights of victim — Right to participate in plea-and-sentence agreement — Extent of right not including grant of standing, nor unqualified right to give evidence or hand up papers, nor right to be heard on demand.
The applicant lost his son in a motor vehicle collision in which his son was a passenger in the vehicle driven by the fourth respondent. She was subsequently convicted and sentenced in a magistrates' court for culpable homicide in respect of the death of the applicant's son, as well as that of the occupant of the stationary vehicle with which she had collided. Despite the applicant having obtained accident-reconstruction reports by experts (these tended to show that the fourth respondent had driven the vehicle at speed), which were made available to the prosecution, and his regular engagements with the prosecution, the Director of Public Prosecutions (DPP) proceeded with a plea-and-sentence agreement with the fourth respondent. The DPP did, however, concede that the applicant could attach an affidavit stating his objections to the agreement, which would be given to the magistrate.
The DPP later changed its stance on the basis that the affidavit did not qualify as a victim-impact statement, and suggested that the applicant should instead be available to testify if the court required him. When the matter came before the magistrate, the applicant's attorney attempted to hand in the statement, but the prosecutor objected on the basis that he had no standing. The fourth respondent's attorney also so objected. The magistrate found that the applicant indeed lacked standing and declined to accept the statement. The fourth respondent was then convicted of two counts of culpable homicide and was sentenced to a fine of R10 000 or 12 months' imprisonment suspended for 3 years, and a further 18 months of correctional supervision.
The applicant then applied to the High Court for an order setting aside the plea-and-sentence agreement and remitting the matter to the magistrates' court for a new

hearing before another magistrate. The High Court dismissed the application, holding that the applicant lacked standing to have the agreement set aside and that the magistrate's failure to exercise his discretion in terms of s 105A(7)*(b)*(i)*(bb)* of the Criminal Procedure Act 51 of 1977 (CPA) could not be reviewed at his instance. The difficulty raised by the statement was that it was at odds with the facts on which the state and defence had agreed in the plea-and-sentence agreement. The applicant then applied for leave to appeal against this decision.
Held, that the Victims' Charter adopted in terms of s 234 of the Constitution, relied upon by the applicant, conferred neither standing nor an unqualified right to give evidence or hand up papers, nor a right to be heard on demand. (Paragraph [26] at 216*b*.)
Held, further, that a victim's right to participate in sentencing proceedings in relation to the plea-and-sentence agreement had to be read together with s 105A of the CPA, which dealt specifically with plea-and-sentence agreements and included the rights of the victim to participate in the process. Although the prosecutor was obliged to give the victim an opportunity to make representations, the prosecutor was not obliged to agree with the victim. The applicant's rights as a victim had been duly addressed through the extensive participation that he had been afforded by the prosecutor for the duration of the prosecution, and there was no reason to disagree with the High Court's reasoning and decision on this aspect. (Paragraphs [27]–[29] at 216*c*–*g*.)
Held, further, that the exercise of the victim's right, to place evidence before the court either by way of a statement or by oral evidence, was in terms of s 105A(7)*(b)*(i)*(bb)* of the CPA wholly within the court's discretion.(Paragraph [31] at 217*a*–*b*.)
Held, further, that during the proceedings the magistrate had been made aware of the factual inconsistencies with the applicant's statement by the accused's attorney, and exercised his discretion to refuse the statement. There was nothing on record to show that the magistrate improperly exercised this discretion, and the proceedings leading to the fourth respondent's conviction and sentence were lawful, proper and just. (Paragraph [33] at 217*d*–*e*.)
Held, further, that the loss of the child was a terrible and difficult one to bear and the situation in which the applicant found himself commanded the court's sympathy. The High Court's observation that the magistrate could have exercised some degree of judicial maturity, civility and empathy to allow the applicant latitude to express his feelings at having lost his son, provided that this could be done without infringing the rights of the fourth respondent, had to be supported. (Paragraph [34] at 217*e*–*f*.)
Application for leave to appeal was dismissed.

S v BYLEVELD 2017 (1) SACR 218 (NWM)

Prosecution — Authorisation of by Director of Public Prosecutions (DPP) — Section 252A(5)(b) of Criminal Procedure Act 51 of 1977 — Prosecution of agent or informer conducting covert operations — Requirement that prosecution be authorised not only applicable to operations authorised by DPP in terms of s 252A(2)(a), but even where agent may have acted outside of mandate — That indictment signed by Deputy DPP not justifying inference that DPP had authorised prosecution.

The accused was accused 8 in a trial in the High Court involving charges of racketeering and corruption. After the trial had been under way for sometime, he brought an application declaring that his prosecution had not been authorised and was therefore a nullity. The application was based on the allegation that he was an 'agent' who had participated in 'an undercover operation to detect, investigate or uncover or to obtain evidence of or to prevent the commission of an offence' and therefore, in terms of s 252A(5)*(a)* of the Criminal Procedure Act 51 of 1977 (CPA), he was not criminally liable for any act which constituted an offence and which related to said operation. prosecution for such an offence could not be instituted against an agent 'without the written authority of the attorney-general' in terms of s 252A(5)*(b)* and in the present case there had been no such authorisation. The undercover project or operation involving accused 8 had also not been authorised in terms of s 252A(2)*(a)*.
Held, that the fact that the operation had not been authorised by the DPP, but by the police, did not mean that accused 8 was not an agent or an informer. It was not a prerequisite for the use of an undercover operation. Additionally, although there might be a difference between an agent and an informer in respect of their roles, s 252A did not make this distinction. Accused 8 was an informer and he was obliged to keep his connection with the police secret while he continued to associate with the syndicate members.
Held, further, that the fact, that the informer may have acted outside his or her mandate, did not excuse the requisite authorisation. (Paragraph [25] at 225*h–i*.)
Held, further, that it could not be inferred, from the fact that the indictment had been signed by a Deputy Director of Public Prosecutions, that the prosecution had been authorised against accused 8. The authorisation in writing was a separate administrative decision from the decision to indict an accused. The prosecution of accused 8 had accordingly not been authorised and the prosecution on those counts relating to the undercover operation was a nullity and was declared to be of no force and effect.

S v VAN IEPEREN 2017 (1) SACR 226 (WCC)
Crimen injuria — What constitutes — Whether competent verdict on charge of sexual assault.

The appellant, an attorney, was charged in a magistrates' court on one count of sexual assault in contravention of s 5(1) read with various provisions of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, in that he had slapped the buttocks of the female complainant, the manager of three Legal Aid offices, and made sexual remarks to her. He was charged in the alternative with common assault. After hearing the evidence, the magistrate convicted him of crimen injuria, holding that this was a competent verdict in terms of s 270 of the Criminal Procedure Act51 of 1977 (the CPA), as all the essential elements of the offence were included in the original charge against him.
Held, that the court could only apply the provisions of s 270 if the state had given the appellant notice of its intention to rely on crimen injuria (which was not done), by applying to have the charge-sheet amended to include a reference to the allegation that the verbal utterances impaired the complainant’s dignity. The provision could also apply if the charge put to the accused person were not referred to in the preceding sections of ch 26 of the CPA.As the main charge of 'sexual assault' put to

the appellant was referred to in s 261(2) of the CPA, and the alternative charge of common assault in s 267, both of which were in ch 26, the magistrate was not empowered to invoke s 270, and the conviction could not be sustained.
Held, further, that it was incumbent upon attorneys and legal practitioners generally to develop a consciousness about constitutional rights and obligations which they ought to apply in the course of practising their profession. It was necessary for legal practitioners to be alert to the imperative of upholding the dignity of others and to refrain from humiliating colleagues with sexist and undermining innuendos. Therefore, if it had not already been done, the matter should be investigated by the Law Society of the Cape.

S v PARKINS 2017 (1) SACR 235 (WCC)

Jurisdiction — Res judicata — Requirements for — Whether issue estoppel to be accepted in criminal law — Court not deciding, as not appropriate case.
Evidence — Hearsay — Weight to be attached to — Deceased, after having been shot, telling police sergeant (who knew both deceased and accused) that accused had shot him, giving his nickname and first name — Evidence corroborated by ballistic evidence — Hearsay evidence sufficient to convict accused of murder.

In convicting the appellant on one count of murder, two counts of possession of9 mm semi-automatic pistols, and one count of possession of ammunition for the two pistols, the regional magistrate took into account the hearsay statement of the deceased, as well as evidence of a search of the appellant's wife's home, which revealed the presence of the firearms.
The appellant contended that the evidence of the search should not have been admitted, as in a previous case against him (in respect of another fatal killing involving the use of one of the pistols) another regional magistrate had concluded that the same search had been improperly conducted and the evidence inadmissible, as it had infringed his constitutionally protected rights. It was argued that the matter was res judicata and that the court should recognise issue estoppel as part of South African criminal law. A further objection to the hearsay statement was that it was, in either event,unreliable and insufficient to sustain a conviction against the appellant. The statement in question was made to a police sergeant at the scene of the shooting, where the official (who knew both the deceased and the appellant) had asked the deceased who had shot him, and the deceased had answered, 'Dit was Kleinkop.' The sergeant had then asked him which 'Kop' it was, to which the deceased had replied 'Bradley' (the appellant's first name).
Held, as to issue estoppel, that, in deciding to develop the common law in this instance, the court had to tread carefully, lest unintended consequences followed. In such a clearly legislated context, it should not lose sight of the imperative that the legislature was the major engine for law reform, rather than the judiciary. Even on the assumption that the court was able to do so, which finding it was not making in this particular case, there were cogent reasons not to do so.
Held, further, that the regional magistrate's findings in the other shooting case were procedurally fatally flawed, in that he had raised the matter mero motu without giving the parties an opportunity to address him before making his finding.
Held, further, that, even though the search in the present case was without a warrant, the police had the permission of the appellant's wife to conduct the search,

and the appellant himself had not objected to the search being conducted. Their denial at the time was rather a denial of any knowledge of the firearms and ammunition found. The regional magistrate accordingly was correct in admitting this evidence against the appellant.
Held, as to the hearsay statement, that the correct procedure for the admission of the evidence would have been by way of a trial-within-a-trial, as proposed by the state, and not as the court did by determining the admissibility and its value at the same time.
Held, further, that it was so unlikely that, at the residence of the person to whom the deceased referred as 'Kleinkop' or 'Bradley', whom he accused as the person who had shot him, two firearms would be found, linked by means of ballistic evidence to that same shooting incident, that, in the absence of an answer, it had to be considered to have been proven beyond reasonable doubt. Appeal dismissed.

ALL SOUTH AFRICAN LAW REPORTS DECEMBER 2016

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

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

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

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

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

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

Despite the pending review application, ACSA brought an urgent application for the eviction of Exclusive. The court *a quo* considered that the case ACSA made out in its founding affidavit was based on its interpretation of the contract as providing that it was entitled to give one month's notice to terminate the lease. The court found, against ACSA, that the extension agreement included a tacit term that neither party was entitled to terminate the lease on notice until completion of a valid and lawful tender

process to identify a new tenant. It was found that Exclusive was entitled to challenge the lawfulness of the tender process by way of a collateral challenge. It was concluded that the tender had been made unlawfully, and that ACSA was thus not entitled to terminate. The dismissal of the application led to the present appeal.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

the costs in the court *a quo* should have followed the result. The cross-appeal is upheld with costs.

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

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

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

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

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

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

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

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

The appeal was, therefore, dismissed.

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

Evidence obtained as a result of an unlawful search in violation of right to privacy, and evidence of pointing-out obtained after failure to explain consequences of not remaining silent and coercion – Whether trial court was correct in ruling that evidence of both the search and seizure operation and pointing-out and confession, was admissible – Section 35(5) of the Constitution of the Republic of South Africa, 1996 requires the court to exclude evidence obtained in a manner that violates any right in the Bill of Rights if either the admission of that evidence will render the trial unfair or otherwise be detrimental to the administration of justice.

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

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

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

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

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

It was argued before the present Court that the evidence concerning the discovery of the firearm ought to have been declared inadmissible on the grounds that the search and seizure operation was patently unlawful and fell to be excluded in terms of section

35(5) of the Constitution. It was argued that the search in the appellant's home was illegal and irregular because it was conducted without a search warrant and after entry into the house had been illegally obtained. In relation to the pointing-out and confession, it was submitted that the State failed to prove that the appellant's constitutional rights were explained to him prior to and during the pointing-out and confession. It was further submitted by the appellant that the State failed to prove that the pointing out and confession were freely and voluntarily made.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Motor vehicle accidents – Road Accident Fund – Claim for future medical expenses based on an undertaking in terms of section 17(4)(a)(i) of the Road Accident Fund Act 56 of 1996 – Whether undertaking had prescribed and whether governed by Prescription Act 68 of 1969 or Road Accident Fund Act – Undertaking in terms of section 17(4)(a)(i) of the Road Accident Fund Act not constituting a discrete action, but flows directly from third party claim, and the period of prescription of such claim under section 17(4)(a) of the Road Accident Fund Act can only be determined in terms of section 23 of that Act.

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

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

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

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

It was held that the undertaking provided by the respondent was not regulated by the Prescription Act. The undertaking flowed directly from the claim filed in terms

of section 17(1) read with section 24 of the Road Accident Fund Act. It therefore could not be a separate claim unrelated to the claim in terms of section 17(1). Consequently, the period of prescription of a claim under sec-tion 17(4)(a) of the Road Accident Fund Act can only be determined in terms of section 23 of the Act and not in terms of the Prescription Act. Section 17(4)(a) of the Act does not create any new and independent contractual obligation or a debt independent of section 17(1). A complete cause of action in respect of future medical claims covered by an undertaking must arise when the costs are incurred. If the fund declines to pay the medical costs claimed, the third party will have to institute action within five years of the complete cause of action arising, being the date when the costs were incurred. The appellant's hospital and medical expenses were incurred in June 2009 and summons was issued on 9 April 2013 to recover those expenses. Summons was, accordingly, issued within the period of five years as provided for in section 23(3) of the Act and the claims of the appellant had not prescribed. The appeal was, accordingly, upheld.

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

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

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

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

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

Held – The Ordinances establishing the respondent funds and the KwaZulu-Natal Joint Municipal Provident Fund Act 4 of 1995 expressly provided that the Legislature's

objective in establishing the respondents was to provide benefits for the employees of local authorities and their dependants. Those could only be local authorities located within the province of KwaZulu-Natal. It was to give effect to that objective that the regulations promulgated under the enactments obliged all local authorities within KwaZulu-Natal to be associated with the respondent funds. Local authorities therefore had to be associated with the respondent funds for the purpose of providing pension benefits to their employees. Were local authorities entitled to be associated with a fund other than the respondents, in order to provide pension benefits to their employees, the purpose of the Ordinances and the Act would be subverted. The purpose of the compulsory membership provisions of the legislation served to enhance pension benefits and secure the viability of the respondent by ensuring that they had significant numbers of members. There was nothing to indicate that the legislation did not serve its purpose.

The appeal was, accordingly, dismissed with costs.

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

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

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

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

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

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

Jurisdiction is an important aspect of the sovereignty of the State. Sovereignty entitles a State to exercise its functions within a particular territory to the exclusion of other States. In most circumstances the exercise of State power, as aforesaid, is limited to its own territory. It is a fundamental principle that a State can assert its jurisdiction over all criminal acts that occur within its territory and over all persons present in its territory, who are responsible for such acts, whatever their nationality. While our courts have declined to exercise jurisdiction over persons who commit crimes in other countries, it is recognised that there are exceptions to that general rule. The primary question in this case was to what extent extra-territorial jurisdiction is conferred by the Act in relation to offences created thereby.

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

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

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

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

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

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

rules pursuant to sec-tion 21. The constitutional validity of some of the provisions of the rules and policy was challenged in this matter.

In February 2015, the President of the Republic, Mr Jacob Zuma, was scheduled to address a joint sitting of Parliament, delivering the State of the Nation Address ("SONA"). The appellants maintained that the respondents, the Speaker of the National Assembly, the Chairperson of the National Council of Provinces, the Secretary to Parliament and the Minister of State Security violated the public's rights to see and hear what was said and done in Parliament on that day in two ways. First, the State Security Agency (the "Agency"), without seeking the authority of Parliament, employed a device that disrupted or jammed telecommunication signals when the sitting began. Second, when there was a disruption of the proceedings at the start of the sitting, the parliamentary television broadcast feed was limited to showing the face of the Speaker, and showed nothing of a scuffle that broke out between members of an opposition political party ("EFF") and security officials as they tried to force EFF members of Parliament out of the Parliamentary chamber.

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

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

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

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

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

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

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

Pensions – Pension fund – Utilisation of pension fund actuarial surplus – Interpretation of section 15H(1) of Pension Funds Act 24 of 1956 – Approval by registrar of Pension Funds of allocation of surplus to fund members and pensioners – Subsequent use of surplus to address deficit in fund not permissible.

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

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

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

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

dismissing the appeal. The granting of the review application led to the present appeal by the registrar.

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

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

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

XXX

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

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

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

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

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

On 7 March 2011, the respondents, purporting to act in terms of section 8(3) of the Extension of Security of Tenure Act 62 of 1997, served a notice on Snyers giving him a period of two months within which to vacate the farm. Under the Act, an owner's right to apply for eviction is dependent on a number of prerequisites, one of which is that the right of occupation should be validly terminated in terms of section 8. Snyers refused to vacate the premises contending that he was awaiting the outcome of the dispute which he had referred to the CCMA. The CCMA subsequently informed Snyers that he had to apply for condonation as his referral had been made out of time. Although disputing that, he applied for condonation. The condonation application was refused and the CCMA ruled that it consequently lacked jurisdiction to entertain the dispute.

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

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

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

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

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

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

Administrative justice – Judicial review – Whether Promotion of Administrative Justice Act 3 of 2000 applies when an organ of State seeks to set aside its own decision – A

decision by a State entity to award a contract for services constitutes administrative action in terms of section 1 of the Promotion of Administrative Justice Act, and there is no good reason for excluding administrative decisions taken by the State from review under the Act.

The appellant ("SITA") was a State entity which had contracted with the respondent ("Gijima"). The parties collaborated on several projects for more than ten years. SITA provided information technology, information systems, and related services to government departments. It performed that function by entering into agreements with private service providers, such as Gijima, which in turn provided IT services to the government department. The relationship between the parties had, since 2006, been regulated by a contract that became known as "the 433 contract", which set forth the general terms and conditions applicable to all service level agreements between them. The parties had since entered into a number of agreements for the provision of IT services to different government departments. One such agreement was one in terms of which Gijima was to provide IT services to the South African Police Service (the "SAPS agreement"). In January 2012, SITA unlawfully terminated the SAPS agreement as a result of which Gijima stood to suffer R20 million in lost revenue. That prompted Gijima to institute urgent proceedings to protect its rights under the SAPS agreement. Following negotiations between the parties, SITA suggested that Gijima abandon its claim arising from the termination of the SAPS agreement in return for which it would receive a new service contract to offset its potential losses. Gijima was concerned about SITA's competence to conclude such contract without having gone through a competitive bidding process and raised those reservations with SITA. SITA assured Gijima that it had the authority to conclude the contract. Relying on that assurance, Gijima agreed to settle the dispute on the basis proposed by SITA. The new contractual arrangement was embodied in a settlement agreement.

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

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

reason for excluding administrative decisions taken by the State from review under the Act.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The history of the litigation was as follows. Summons was served on the appellant on 6 May 2014, and on 5 June 2014, a notice of intention to defend was filed. That was followed on 26 June 2014, by service on the appellant of the respondent's application for summary judgment. The acting municipal manager of respondent deposed to an affidavit in support of summary judgment, averring that he could confirm the action as stated in the summons against the defendant as well as the amount claimed therein. On the date of the hearing of the summary judgment application, the respondent's attorney argued that appellant's answering affidavit had to be filed before 12 noon on 29 July 2014, but that had not occurred and therefore appellant's attorney should not even be heard by the court as there was no valid opposition of the application for summary judgment. Judgment was thus granted. The present appeal was noted against the judgment.

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

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

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

enough to claim one amount. Summary judgment should, therefore, have been refused due to the summons being defective.

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

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

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

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

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

Developments which occurred in banking and general monetary exchange systems resulted in our criminal law accepting that the incorporeal right in funds standing to the credit of an account could be stolen and that in such circumstances accounting entries

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

The main issue was whether the magistrate erred in finding that both the VAT and PAYE monies were monies held in trust for and on behalf of SARS. The Court found that SARS had no special right or interest whether under statute or contract to either that portion of any payment which represented the VAT amount added onto the price of the goods or services supplied by the first appellant or to the net VAT amount that became payable under section 28(1)(b), and when moneys were received from clients there was no duty to separately account. Therefore, any appropriation by the first appellant under the hand of the second appellant could not have satisfied the requirement of unlawfulness for theft. The second appellant’s appeal against his theft convictions therefore succeeded.

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

The court altered the convictions and sentences appropriately.

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

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

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

arrest, and has a discretion in that regard – Test regarding whether the peace officer reasonably suspects a person to have committed an offence is an objective one.

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

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

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

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

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

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

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

Arrest without a warrant would be justified if the following jurisdictional facts are present: the arresting officer is a police officer; he entertains a suspicion; the person arrested must be suspected to have been committing a Schedule 1 offence; and the suspicion must be based on reasonable grounds. Once those jurisdictional requirements are present, the peace officer may invoke the power conferred on him

by section 40(1)(b) and arrest the suspect. However, he is not obliged to arrest, and has a discretion in that regard.

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

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

Section 35(1)(d) of the Constitution provides that a person has a right to be brought before a court as soon as reasonably possible but not later than 48 hours after arrest; or the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day. Section 50(1)(d) of the Act has the same effect. The detention of the plaintiffs after the expiry of 48 hours, without having appeared in court, was therefore unlawful in this case.

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

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

ALL SOUTH AFRICAN LAW REPORTS JANUARY 2017

Kruger v Joint Trustees of the Insolvent Estate of Paulos Bhekinkosi Zulu and another [2017] 1 All SA 1 (SCA)

Banking and Currency – Unlawful conducting of business of bank – Contravention of provisions of the Banks Act 94 of 1990 – Appointment of a repayment administrator in terms of section 84 of Banks Act to recover and take possession of assets of the unregistered person – Powers of repayment administrator – Administrator entitled to seek an anti-dissipation order on an urgent basis.

Following an inspection conducted in terms of section 12 of the South African Reserve Bank Act 90 of 1989, the registrar of banks concluded that an entity (“TVI”) controlled by the first respondent (Mr Zulu) had engaged in the business of obtaining money by conducting the business of a bank without being registered as such in terms of section 17 of the Banks Act 94 of 1990 or being authorised to conduct such a business under

section 18A(1) of the Banks Act. The business entailed the marketing and sale of a travel voucher, mostly in electronic form. The voucher purportedly gave members significant discounts for international travel and accommodation. The structure of the institution and its business was that of a typical pyramid scheme.

In March 2011, the registrar appointed the appellant ("Mr Kruger") as a temporary inspector in terms of section 11(1), read with section 12(1), of the South African Reserve Bank Act, to conduct an inspection into the business practices of, amongst others, TVI. As a result of the inspection, the registrar was satisfied that TVI and Mr Zulu had obtained money by unlawfully conducting the business of a bank. As a result, the registrar issued a repayment direction in terms of section 83(1) of the Banks Act and appointed Mr Kruger as a repayment administrator in terms of section 84(1), to manage and control repayment of all the moneys obtained by Mr Zulu in contravention of the Banks Act. Mr Kruger brought an urgent application in the High Court, seeking a declarator that he was empowered to take possession of certain assets and that Mr Zulu be ordered to declare the whereabouts of all his assets.

In opposing the application, Mr Zulu contended that it constituted an abuse of court process and was unnecessary. He raised three points *in limine*. The first was lack of urgency. The second was that he should have been given notice of the application. The third was non-joinder of interested parties. Mr Zulu contended, *inter alia*, that there had been no reason for Mr Kruger to approach the High Court as a matter of urgency and without giving him notice of his intention to approach the court because the two of them had previously interacted on the matter and he had co-operated with Mr Kruger during the earlier interaction. He contended that there was no reason to fear that he would dissipate the assets. The High Court agreed with the argument based on previous interaction and dismissed Mr Kruger's application on the basis thereof.

By the time the appeal came before the Court, Mr Zulu's estate had been sequestrated and the trustees of his insolvent estate had been substituted in his stead. The question then was whether, in the light of the trustees having assumed authority over the assets in Mr Zulu's insolvent estate, it would be competent for the Court, on appeal, to reverse the order of the court *a quo* and thus also authorise Mr Kruger to (also) take the same assets into his possession.

Held – Section 16(2)(a)(i) of the Superior Courts Act 10 of 2013 provides that where, at the hearing of an appeal, the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone. However, where questions of law, which are likely to arise frequently, are in issue, the court of appeal has a discretion, and may hear the merits of an appeal and pronounce upon it. The test is whether, notwithstanding that the issues between the parties have become moot, there remains a discrete legal issue of public importance that will affect matters in future. The Court held that although Mr Zulu's assets could no longer be placed in Mr Kruger's possession, it was still necessary for the court to consider the appeal to clarify the powers and obligations of a repayment administrator under section 84(1A)(b)(i) of the Banks Act and to set out the correct approach when considering similar matters.

In finding that because of previous interaction between Mr Kruger and Mr Zulu, there was no basis for approaching the court on an urgent basis, the High Court ignored the purpose of the application and the underlying concern that the assets might be dissipated. The court erred in that regard. The fact that Mr Kruger had previously

interviewed Mr Zulu was irrelevant to the attachment of assets under section 84(1A)(b)(i) of the Banks Act to facilitate investigations in preparation for repayment of money in terms of section 84. A court considering urgency of a matter and whether notice should be given to the respondent must be mindful of the nature and purpose of the application. In this case, because Mr Kruger sought an anti-dissipation order and had explained the reasons why he anticipated resistance, the matter was urgent and notice to Mr Zulu would have defeated the purpose of the application.

The Court confirmed that there was no merit in the points *in limine* raised by Mr Zulu. The court *a quo* therefore erred in upholding the point which found favour with it. The appeal was upheld and the order of the court below was replaced with one dismissing all three points *in limine*.

Minister of Water and Environmental Affairs and another v Really Useful Investments No 219 (Pty) Ltd and another [2017] 1 All SA 14 (SCA)

Environmental law – Energy and environment – Degradation of land in property development – Directive aimed at environmental preservation and protection – Claim for compensation in terms of section 34 of the Environmental Conservation Act 73 of 1989, flowing from inability to develop land after complying with directive – Section 34 provides a statutory right to compensation in restricted circumstances – Such a claim can only succeed if that power was exercised unlawfully, negligently or in bad faith and is not applicable to a regulatory directive issued in terms of section 31A of the Act.

In May 2014, first respondent ("RUI") instituted action against the second respondent, the City of Cape Town (the "City"), the first appellant (the "Minister") and the second appellant (the "MEC"), claiming payment of compensation in terms of section 34 of the Environmental Conservation Act 73 of 1989 on the basis that a directive issued by the City, aimed at environmental preservation and protection in relation to land owned by RUI, and duly complied with by the latter, resulted in a substantial diminution in the value of the land. According to the RUI, the directive prevented it from undertaking any development on the properties below the 1:100year flood line and the properties within the wetland boundary.

Raising an exception to the claim, the City argued that the claim was for payment of compensation in terms of section 34 of the Environment Conservation Act for loss allegedly incurred pursuant to the City's exercise of its powers and performance of its duties under section 31A of the Act. The City then referred to section 49 of the National Environmental Management Act 107 of 1998 which provided that neither the State nor any other person is liable for any damage or loss caused in relation to the exercise of any power or the performance of any duty under any Environmental Management Act. The City pointed out that the Environmental Conservation Act was a specific environmental management Act contemplated in section 49(a) of the National Environmental Management Act and in the absence of allegations of exercise of power thereunder unlawfully, negligently or in bad faith, the City was exempted from liability for any loss sustained by RUI. Based on that, the City contended that the particulars of claim did not disclose a cause of action. The pleas of the Minister and the MEC followed similar lines.

The High Court dismissed the exception raised by the City. It held that section 34 of the Environment Conservation Act clearly provided a statutory right to recover

compensation, which right was neither limited nor restricted by section 49 of the National Environmental Management Act. The present appeal was against that order.

Held – Section 34 of the Environment Conservation Act provides a statutory right to compensation in restricted circumstances. Section 37, on the other hand, provides protection against liability to pay damages in delict arising out of the proper exercise of powers or functions under the Act. The protection does not extend to acts that are performed negligently or in bad faith or outside the terms of the statute, as such actions are by definition not lawful.

Section 49 of the National Environmental Management Act expressly incorporates the common law requirements of lawfulness, good faith and absence of negligence in order to enjoy protection against liability.

Examining RUI's claim, the Court held that it was erroneously based on a purported entitlement to compensation arising from the City's actions taken under section 31A(1) of the Environment Conservation Act. As stated above, a claim based on such actions can only succeed if that power was exercised unlawfully, negligently or in bad faith. None of those factors applied in this case, with the result that RUI's case as pleaded disclosed no cause of action. The relevant parts of the pleas of the Minister and the MEC, and the City's exception that the particulars of claim did not disclose a cause of action ought therefore to have been upheld.

The appeal succeeded and RUI's claim was dismissed.

Ndaba v Ndaba [2017] 1 All SA 33 (SCA)

Marriage – Termination – Divorce – Division of property – Inclusion of pension interest of spouses – Whether a non-member spouse in a marriage in community of property, is entitled to the pension interest of a member spouse in circumstances where the court granting the decree of divorce did not make an order declaring such pension interest to be part of the joint estate – If there is no reference in the divorce order of parties married in community of property to a member spouse's pension interest, the non-member spouse is not precluded in perpetuity from benefitting from such pension interest as part of his or her share of the joint estate.

Words and phrases – "pension interest" – Section 7(7) and 7(8) of Divorce Act 70 of 1979 – Definition of "pension interest" in section 1 of the Act, in relation to a party to a divorce action, refers to the benefits to which that party as such a member would have been entitled in terms of the rules of that fund if his membership of the fund would have been terminated on the date of the divorce on account of his resignation from his office.

The appellant and respondent were formerly married in community of property. The marriage was terminated by divorce in May 2012 with a deed of settlement entered into by the parties being made an order of court. The deed of settlement provided that their joint estate would be divided equally between the parties. The appellant's attorneys subsequently requested proposals from the respondent regarding the division of the joint estate, advising him that if no proposals were forthcoming the appellant would institute legal proceedings in which a determination of that dispute would be sought. No response was received and the appellant instituted legal proceedings in the High Court, seeking, *inter alia*, the appointment of a liquidator. She also sought a declarator that she and the respondent were entitled to an amount equal

to 50% of each other's pension interest. Finally, she sought an order directing each pension fund to make an endorsement in its records that a portion of the pension interest of the member spouse, as at the date of divorce, shall be payable to the non-member spouse when the pension benefits accrued.

Although not opposing the appointment of a liquidator, the respondent disputed that either party's pension interest formed part of the assets to be divided between them. He asserted that the appellant had unequivocally renounced her claim in relation to the pension interest in her prayers in the divorce action. Secondly, he contended that the pension interest nowhere featured in the settlement agreement. Finally, he argued that the divorce court which granted the decree of divorce had not made an order deeming the pension interest part of the joint estate, as contemplated in section 7(7)(a) and (8) of the Divorce Act 70 of 1979. However, it was not contested that the joint estate had still not been divided between the parties.

The court below dismissed the application, finding that the Divorce Act contemplates that any order in terms of section 7(7)(a) and (8) can be granted only by the court granting the decree of divorce, and that section 7(7)(a) and (8) do not avail a party who seeks to invoke them after the dissolution of the marriage. It concluded further that absent a court order by the divorce court declaring the pension interest of the member spouse as part of the joint estate, such pension interest did not form part of the joint estate.

That led to the present appeal.

Held – Section 7(7) provides that a pension interest will be deemed to be a part of the assets at divorce and section 7(8) provides for a court granting a decree of divorce to order that a portion of the pension interest of a member of a pension fund be awarded to the spouse.

The real issue on appeal was whether a non-member spouse in a marriage in community of property, is entitled to the pension interest of a member spouse in circumstances where the court granting the decree of divorce did not make an order declaring such pension interest to be part of the joint estate.

A pension fund's statutory competence to make deductions from a member's pension benefits is regulated by section 37 of the Pension Funds Act 24 of 1956. In the context of a divorce action, section 37D(1)(d)(i) of the Pension Funds Act is of relevance. It authorises a pension fund to deduct from a member's or deferred pensioner's benefit, member's interest or minimum individual reserve, or the capital value of a pensioner's pension after retirement, as the case may be, any amount assigned from such benefit or individual reserve to a non-member spouse in terms of a decree granted under section 7(8)(a) of the Divorce Act or in terms of any order made by a court in respect of the division of assets of a marriage under Islamic law pursuant to its dissolution.

Section 7(7)(a) is self-contained and not made subject to section 7(8). It deems a pension interest to be part of the joint estate for the limited purpose of determining the patrimonial benefits to which the parties are entitled as at the date of their divorce. The entitlement of the non-member spouse to a share of the member spouse's pension interest is not dependant on section 7(8). It would be inimical to the scheme and purpose of section 7(7)(a) if it only applied if the court granting a divorce made a declaration that in the determination of the patrimonial benefits to which the parties to

a divorce action might be entitled, the pension interest of a party should be deemed to be part of his assets. The grant of such a declaration would amount to no more than simply echoing what section 7(7)(a) decreed. For the same reasons, it was not necessary for the parties in this case to mention in their settlement agreement what was obvious, namely that their respective pension interests were part of the joint assets which they had agreed, would be shared equally between them. The contention that if there is no reference in the divorce order of parties married in community of property to a member spouse's pension interest, the non-member spouse is precluded in perpetuity from benefitting from such pension interest as part of his or her share of the joint estate was thus rejected by the Court.

The appeal was upheld and it was declared that each party was entitled to an amount equal to 50% of the other's nett pension interest.

The Helen Suzman Foundation v Judicial Service Commission (Police and Prisons Civil Rights Union and others as *amici curiae*) [2017] 1 All SA 58 (SCA)

Civil procedure – Rule 53 of the Uniform Rules of Court – Primary purpose of the rule is to facilitate and regulate applications for review by granting the aggrieved party seeking to review a decision of an inferior court, administrative functionary or State organ, access to the record of the proceedings in which the decision was made, to place the relevant evidential material before court – A key enquiry in determining whether the recording should be furnished is its relevance to the decision sought to be reviewed.

Judicial Service Commissions – Judicial appointments – Recording of the private deliberations on judicial appointments by the Judicial Service Commission, properly conducted in terms of the Judicial Service Commission Act 9 of 1994 and regulation 3(k) made thereunder – Whether a decision-maker's private deliberations form part of the rule 53 record in terms of rule 53 of the Uniform Rules of Court – Court finding that a decision-maker's deliberations do not automatically form part of the record of the proceedings as contemplated in rule 53, and the extent of the record must depend upon the facts of each case.

In an interlocutory application brought in the High Court, the appellant ("HSF") sought an order directing the respondent ("the JSC") to deliver the full record of the proceedings sought to be reviewed, including the audio recording and any transcript of the JSC's private deliberations after the interviews of judicial candidates on 17 October 2012. The application was brought due to the JSC's failure to furnish the recording, which was the most immediate and accurate record of its decision and the process leading thereto. The present appeal was against the dismissal of that application. The High Court held that the record produced by the JSC met the objectives and purpose of rule 53 of the Uniform Rules of Court.

Held – Firstly, the purpose and applicability of rule 53 had to be considered. The primary purpose of the rule is to facilitate and regulate applications for review by granting the aggrieved party seeking to review a decision of an inferior court, administrative functionary or State organ, access to the record of the proceedings in which the decision was made, to place the relevant evidential material before court. The applicant must be given access to the available information sufficient for it to make its case and to place the parties on equal footing in the assessment of the lawfulness and rationality of such decision. It is unnecessary to furnish the whole record

irrespective of whether or not it is relevant to the review. It is those portions of a record relevant to the decision in issue that should be made available. A key enquiry in determining whether the recording should be furnished is therefore its relevance to the decision sought to be reviewed.

The JSC relied on case authority for the proposition that a decision-maker's private deliberations do not form part of the rule 53 record. However, the JSC conceded that a disclosure of its deliberations, or at least some aspects thereof, may be warranted in appropriate circumstances.

The next question was whether the confidentiality of the JSC's deliberations insulated it from disclosure under rule 53. The Court referred to legislation which recognises the confidentiality of JSC deliberations. It was clear therefore, that there is no absolute requirement of disclosure of the JSC's proceedings. Rather, it is a question of weighing, *inter alia*, the nature and relevance of the information sought, the extent of the disclosure and the circumstances under which the disclosure is sought and the potential impact upon anyone, if disclosure is ordered or refused, as the case may be, in a manner that would enable the JSC to conduct a judicial selection process that does not violate its positive obligations of accountability and transparency. That being the case, it had to be determined if there were any reasons, consistent with the Constitution and the law, justifying the non-disclosure of the deliberations. Protecting the confidentiality of the deliberations clearly served legitimate public interests in the present circumstances. Therefore, a decision-maker's deliberation does not automatically form part of the record of the proceedings as contemplated in rule 53. The extent of the record must depend upon the facts of each case. In certain cases the decision-maker may be required to produce a full record of proceedings which includes its deliberations. But there may be cases, such as this one, where confidentiality considerations may warrant non-disclosure of deliberations for the reasons set out above.

The appeal was dismissed with costs.

University of the Free State v Afriforum and another [2017] 1 All SA 79 (SCA)

Appeal in terms of section 18(4)(ii) of the Superior Courts Act 10 of 2013 – Effect of appeal on order – Section 18(1) of the Superior Courts Act states that an order implementing a judgment pending appeal shall only be granted under exceptional circumstances – Applicant must also prove on a balance of probabilities that he will suffer irreparable harm if the order is not made, and that the other party will not suffer irreparable harm if the order is made.

In March 2016, the council of the appellant university decided to adopt a new multilingual language policy with effect from the commencement of the 2017 academic year. In terms of the new policy, English would become the primary medium of instruction at the university. Prior thereto, the institution's language policy provided for parallel medium instruction in Afrikaans and English. Aggrieved by the change, the first respondent ("Afriforum") launched an application to review and set aside the decision. The High Court reviewed and set aside the decision to adopt the new policy and subsequently ordered that such order would not be suspended pending the university's appeal, with the result that the implementation of the new policy could not proceed. The university appealed and Afriforum approached the High Court for an order implementing its order pending the finalisation of the appeal. The court ordered

that its order would remain in force pending the finalisation of the appeal against it. The university then exercised its automatic right of appeal in terms of section 18(4)(ii) of the Superior Courts Act 10 of 2013 against that order.

Held – The common law rule of practice in our courts has been that generally the execution of a judgment is automatically suspended upon the noting of an appeal, with the result that, pending the appeal, the judgment cannot be carried out and no effect can be given thereto, except with the leave of the court which granted the judgment. The common law rule of practice was adopted in Uniform Rule of Court 49(11), promulgated under the Supreme Court Act 59 of 1959. Section 18 of the Superior Courts Act has replaced rule 49(11). The provisions of section 18(1) and (3) show that the Legislature has proceeded from the well-established premise of the common law that the granting of relief of this nature constitutes an extraordinary deviation from the norm that, pending an appeal, a judgment and its attendant orders are suspended. Section 18(1) states that an order implementing a judgment pending appeal shall only be granted under exceptional circumstances.

The requirements introduced by sections 18(1) and (3) are more onerous than those of the common law. Apart from the requirement of exceptional circumstances in section 18(1), section 18(3) requires the applicant also need to prove on a balance of probabilities that he will suffer irreparable harm if the order is not made, and that the other party will not suffer irreparable harm if the order is made. Whether or not exceptional circumstances for the purposes of section 18(1) are present, must necessarily depend on the peculiar facts of each case. The Court confirmed that the prospects of success in the appeal are relevant in deciding whether or not to grant the exceptional relief, but in the present case, as the appeal record in the review application was not before the Court, it would not feature on the Court's consideration of the question.

Turning to Afriforum's contentions, the Court found that not only did Afriforum in its founding affidavit grossly exaggerate the number of prospective students whose interests it proclaimed to safeguard, but it also failed to show that any prospective first-year student in fact stood to be adversely affected by the introduction of the new language policy in 2017. Even if there had been an infringement of rights as contended for, that would not constitute exceptional circumstances as envisaged in section 18(1) of the Act. Afriforum's application was misconceived and ought to have been dismissed. In the result, the appeal was upheld.

Wishart NO and others v BHP Billiton Energy Coal South Africa (Pty) Ltd and others [2017] 1 All SA 90 (SCA)

Winding up of company – Objections to a Liquidation and Distribution Account must first be made to the Master and only when he has made such a decision can a review of it be undertaken by a court.

Winding up of company – Proof of claim – Late claim – Whether the application of section 44(1) of the Insolvency Act 24 of 1936, and particularly the proviso to it which deals with fixing a period for the proof of claims, and the late proof with the leave of the Master or the court, is excluded by the terms of section 366 of the Companies Act 61 of 1973 – Court confirming that section 44(1) is applicable to claims against a company being wound up.

The fourth and fifth appellants were the plaintiffs in the High Court. They sought to appeal against the High Court's upholding two exceptions to their particulars of claim in which they had sought to prove a late claim in the winding up of the estate of the second respondent ("Euro Coal").

In seeking leave to prove a late claim in the winding-up of Euro Coal, the appellants alleged that they had objected to the first Liquidation and Distribution Account (the "L & D account") lodged by the liquidators with the Master, and asked, in terms of section 44(1) of the Insolvency Act 24 of 1936, for special leave to prove their respective claims. The exception raised to that claim was that section 44(1) was not applicable in the winding-up of a company, and that section 366 of the Companies Act 61 of 1973 governed proof of claims in a winding-up. The question was whether the application of section 44(1) of the Insolvency Act, and particularly the proviso to it which deals with fixing a period for the proof of claims, and the late proof with the leave of the Master or the court, is excluded by the terms of section 366 of the 1973 Companies Act.

The second claim made by the appellants was for the expungement from the L & D account of the first respondent's claim in the winding-up of Euro Coal.

Held – Section 366(1) regulates the proof of claims in a winding up, and section 366(2) gives the Master a discretion to fix a time within which creditors are to prove their claims. Section 44 of the Insolvency Act regulates proof of liquidated claims against an estate. It provides that a person with a liquidated claim against the estate may prove such claim at any time before the final distribution of that estate, provided that no claim shall be proved against an estate after the expiration of a period of three months as from the conclusion of the second meeting of creditors of the estate, except with the leave of the court or the Master, and on payment of such sum to cover the cost occasioned by the late proof of the claim. The Court referred to case authority stating that the two statutory provisions are complementary rather than mutually exclusive. Section 44(1) is thus applicable to claims against a company being wound up. Accordingly, the exception to the claim for the leave of the court to prove a claim on the terms and conditions set by the Master should not have been upheld, and the appeal against the order upholding the first exception had to succeed.

In the second exception, the respondents contended, in response to the particulars of claim, that as there was no allegation in the particulars that a decision had been taken by the Master, by which the appellants were aggrieved, the claim was excipiable. The gist of the exception was that objections to an L & D account must first be made to the Master and only when he has made such a decision can a review of it be undertaken by a court. It was argued that in the absence of an allegation that the Master had made a decision, the particulars disclosed no cause of action. The Court confirmed that the appellants should have invoked the procedures set out in section 407 of the Companies Act of 1973. The power to expunge a claim or to reduce it is conferred on the Master alone. Only when the Master has made a decision in this regard may an interested person approach a court to review it. The second exception was thus correctly upheld by the court *a quo*.

Atlantic Beach Home Owners Association NPC v City of Cape Town and another [2017] 1 All SA 99 (WCC)

Interdict – Suspension of operation – A court has the power to suspend an interdict against a party operating in breach of land use laws to allow that party a period of time to redress the unlawfulness.

Property – Title deed restriction – Use of property in contradiction to title deed restriction impermissible – Defence of tacit waiver failing where not proved by conduct of relevant party.

The applicant ("HOA") was a homeowners association in a golf estate. It sought interdictory relief against the second respondent ("ABM") restraining it from conducting certain activities from the golf club house situated on the estate. ABM counter-applied for a similar order against HOA in respect of certain activities conducted by it since about 2011 through appointed contractors from its leisure centre which was erroneously built on the same land as the clubhouse.

HOA premised its relief on two bases. The first was a restrictive title deed condition imposed in its favour in the title deed to the property. The second was the City of Cape Town Municipal Planning By-law 2015 (the "planning by-law"). HOA contended that ABM's activities were in breach of both. ABM, on the other hand, only relied on the planning by-law in support of its counter-application. HOA initially also sought relief against the first respondent ("the City"), but the City undertook to take certain steps which led to HOA not proceeding further against it.

ABM owned and operated the golf club house, using it to host functions such as weddings, gala dinners, cocktail parties and conferences. The leisure centre used by HOA was also the venue for weddings, birthday parties, conferences and corporate gatherings arranged by HOA. ABM's defences were that the title deed restriction, properly interpreted, permits the activities complained of to be conducted, alternatively that HOA had acquiesced in ABM's having conducted the relevant activities for 15 years, thereby waiving the benefit of the title deed restriction.

Held – The title deed restriction itself stipulated that the golf course land was to be used for a golf course and golf club facilities only. The deeds of sale of the residential erven referred expressly to the title deed restriction and that in terms thereof the golf course land could not be used for any purpose other than a golf course. The only reasonable interpretation to be placed on the title deed restriction was that the club house facilities had to relate only to the primary function and purpose of the land, namely promoting and supporting the sport of golf, and that the restriction did not permit any activity or use which did not achieve those purposes. ABM's main defence therefore failed.

On the issue of tacit waiver, the Court examined the historical facts and was unable to find that HOA's conduct over the years since 2005 was consistent with no other hypothesis than that it tacitly waived the title deed restriction. Consequently, the alternative defence also failed.

HOA was found to have succeeded in establishing all the requirements for the interdictory relief sought, and such interdicts were granted. ABM asked that, in the event of HOA succeeding in the main application, the Court should suspend the operation of the interdict until the City had considered and adjudicated on its consent use application. The Court referred to authority for the proposition that a court has the power to suspend an interdict against a party operating in breach of land use laws to allow that party a period of time to redress the unlawfulness. Such discretion must be

exercised after giving due consideration to all the relevant circumstances. Finding sufficient grounds therefor, the Court suspended the operation of the interdicts for 6 months.

City of Tshwane Metropolitan Municipality v Brooklyn Edge (Pty) Ltd and another [2017] 1 All SA 116 (GP)

Judgment by default – Application for rescission – Appeal against dismissal – Court held that the rescission application had to be governed by either rule 42(1)(a), the common law or both – Court having a wide discretion to grant or refuse a rescission – Court concluded that the appellant had succeeded in making out a case for good cause in order to succeed with a common law rescission application.

In terms of a written deed of sale, entered into in July 2003, the first respondent (with the second respondent as its nominee), bought certain immovable properties (collectively referred to by the court as "the property") from the appellant. The property was zoned as "Public Open Space" in terms of the Pretoria Town Planning Scheme, 1974, and was used mainly as public tennis courts. The respondents acquired the property in order to develop it into a mixed-use development leading to the necessity for them to rezone the property. Because the property was zoned as a public open space, the respondents had to ensure its closure in terms of certain provisions of the Local Government Ordinance 17 of 1939. The deed of sale specifically provided for the rezoning and closure. In terms of the deed of sale the appellant had the responsibility to secure closure of the property and the respondents the responsibility to apply for the rezoning of the property. The deed of sale provided that the property could not be transferred into the name of the respondents before the rezoning process was completed. For that to happen, the closure had to be firstly completed. In terms of the deed of sale the existing tennis courts, clubhouse and sport facilities on the property had to be relocated by the respondents to another property of the appellant's choosing.

In December 2003, the respondents successfully applied for removal of restrictive conditions and rezoning of the property. The prescribed closure of the property was not effected as required by certain sections of the 1939 Ordinance. In October 2010, more than seven years after the deed of sale was signed, the respondents launched an application for relatively wide-spread relief, including a *mandamus* to force the appellant to issue the closure certificate and, after compliance with certain other requirements, to sign transfer documents to enable the respondents to take transfer. The application was aborted after the appellant served a notice of intention to defend and, in June 2012, almost nine years after the deed of sale was signed, the respondents instituted action, for essentially the same relief applied for in terms of the aborted application. In that action, orders were granted by default against the appellant.

Leading up to the granting of default judgment, the appellant's attorneys failed in their duty to serve a discovery affidavit timeously and also to formulate comprehensive answers to questions posed by the respondents during a pre-trial conference. Reminders sent by the respondents were ignored leading them to file an application to compel. That application was also ignored and default judgment was granted.

The present appeal was against the dismissal of an application for rescission of the default judgment. The appellant argued that the default judgment was erroneously

sought and granted in the spirit of rule 42(1)(a), and for that reason alone, fell to be rescinded.

Held – Once a court holds that a judgment was erroneously granted, it should without further enquiry rescind or vary the judgment. The applicant is not required to then also show good cause.

In the present matter, no mention was made in the founding papers of the rescission application of the specific rule in terms of which the application was brought, or whether it was brought in terms of the common law. However, it was not argued that the application was flawed because the specific rules or the common law were not mentioned or identified.

Examining the appellant's explanation of its failure to make discovery timeously or file pre-trial answers timeously, the Court found that it was not true that the appellants were disinterested and did not follow the proceedings with the necessary diligence. The said failures also resulted in no real prejudice to the respondents. The respondents' submission regarding a lack of *bona fides* on the part of the appellant was without foundation and malicious. The defences raised were *bona fide* and pointed to triable issues.

Finding that rule 31 did not apply in this case, the Court held that the rescission application had to be governed by either rule 42(1)(a), the common law or both. The Court has a wide discretion to grant or refuse a rescission.

The Court found no basis to justify the conclusion of the court below that the appellant manifested a complete disinterest in the conduct of the defence of the action. Similarly, it could not support the finding that the appellant should be blamed for the failures of its attorneys. The court *a quo* therefore committed a misdirection.

It was concluded that the appellant had succeeded in making out a case for good cause in order to succeed with a common law rescission application. The Court accepted that there was a reasonable and acceptable explanation for the appellant's default. The appeal was upheld and the rescission of the default judgment granted.

Crous International (Pty) Ltd v Printing Industries Federation of South Africa [2017] 1 All SA 146 (GJ)

Estate agents – Claim for commission – Onus of proof – Estate agent having to prove on a balance of probabilities that it had a mandate to find a purchaser for the property, that it had duly performed its mandate, and was the effective cause of the sale.

Estate agents – Claim for commission – Whether the plaintiff was entitled to claim commission when not in possession of a valid fidelity fund certificate – Sections 26 and 34 of the Estate Agency Affairs Act 112 of 1976 regulate the practice of the profession of an estate agent and require that a valid certificate be issued to an estate agent or to every person employed by him as an estate agent – An estate agent will only be entitled to remuneration for an act performed as estate agent if at the time of performance of that act a valid fidelity fund certificate had been issued to him – Court is constitutionally obliged, when interpreting the sections, to seek to promote the right to freely choose a trade, occupation, or profession, rather than restrict that right.

The plaintiff was an estate agency claiming commission for the sale of the defendant's property. The main issue was whether the plaintiff had introduced the purchaser

("ALA") to the defendant and was the effective cause of the sale. A secondary issue was whether the plaintiff was entitled to claim commission when not in possession of a valid fidelity fund certificate.

According to the defendant, the plaintiff did not introduce ALA to the property or to the defendant and did not negotiate the sale agreement which was ultimately concluded between ALA and the defendant. It was alleged further that the plaintiff's efforts were confined to brokering a lease agreement between ALA and the defendant for which it was paid in excess of R600 000.

Held – The onus was on the plaintiff to prove that it was the effective cause of the sale. It had to prove on a balance of probabilities that it had a mandate to find a purchaser for the property, and that it had duly performed its mandate. An agent's conduct, even though it is a *causa sine qua non*, will only be an effective cause (*causa causans*) if there is no new, sufficiently weighty intervening cause breaking the chain of causation between the agent's conduct and the eventual conclusion of the sale. In the absence of a new weighty intervening cause between the estate agent's endeavours, in relation to the sale and the conclusion of the sale, those endeavours constitute the effective cause of the sale. On the facts, the Court found that the plaintiff had established on a balance of probabilities that it had carried out the terms of its mandate to find a buyer for the property – *viz* ALA – and that the plaintiff was the effective cause of the sale between ALA and the defendant.

However, the mere fact that the plaintiff fulfilled its mandate and was the effective cause of the sale did not entitle it to be paid the agreed commission. It would only be entitled to the commission, if at the time of performing the acts as an estate agent, section 26 read with section 34A of the Estate Agency Affairs Act 112 of 1976 had been complied with. It was common cause that during 2008 and 2009, including the dates of the conclusion of the lease between ALA and the defendant, which the plaintiff was actively involved in, the plaintiff was not in possession of a certificate because certificates had not been issued to it. According to the plaintiff, although it was not in physical possession of certificates, those certificates ought to have been issued to it, because it had complied with the requirements for their issue and the failure to issue was purely due to a technical system problem at the Estate Agents Board, as a result of which certificates were not printed and consequently issued to the plaintiff. On the other hand, the defendant argued that section 34A required strict compliance which meant that a certificate must have been produced and given to the plaintiff. The Court confirmed that sections 26 and 34A of the Act specifically require that a valid certificate be issued to an estate agent or to every person employed by him or her as an estate agent. Section 34A specifically provides that an estate agent would only be entitled to remuneration for an act performed as estate agent if at the time of performance of that act a valid fidelity fund certificate had been issued to that estate agent. In terms of both sections, where the agent is a company, certificates are issued to the company and its directors.

Sections 26 and 34 regulate the practice of the profession of an estate agent. The Court was constitutionally obliged, when interpreting the sections, to seek to promote the right to freely choose a trade, occupation, or profession, rather than restrict that right. A strict, narrowly textual, or literal approach, as contended for by the defendant, was not apposite to achieving that objective. A more purposive, or substantive, approach was called for. The enquiry therefore had to proceed from the point of determining what the purpose of the provisions under discussion was and whether

that purpose had been achieved in circumstances where certificates for the relevant periods were not issued to the company, but only to its directors, because of a technical difficulty the Board had in printing the company's certificates. If the purpose or object of the provisions had been achieved those sections would, substantively, have been complied with. The Court found that the plaintiff had complied with all of the provisions of the Act and there was no reason at all why certificates for 2008 and 2009 could not have been issued by the Board to the plaintiff, save for the fact that the Board had not been able to print those certificates. Therefore, in substance (though not form) the plaintiff was authorised by the Board to perform acts as estate agent for payment. The plaintiff's claim to be remunerated for the acts it performed as estate agent during 2008 and 2009 and which resulted in the conclusion of the sale agreement, had to succeed. Judgment was granted against the defendant.

Free State Social Housing Company v Rossouw and others [2017] 1 All SA 170 (FB)

Property – Unlawful occupation – Application for eviction – Section 4(7) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act provides that if an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances.

Words and phrases – "person in charge" – Section 1 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 – Refers to a person who has or at the relevant time had legal authority to give permission to a person to enter or reside upon the land in question.

Words and phrases – "unlawful occupier" – Section 1 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 – A person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land, excluding a person who is an occupier in terms of the Extension of Security of Tenure Act, 1997, and excluding a person whose informal right to land, but for the provisions of this Act, would be protected by the provisions of the Interim Protection of Informal Land Rights Act 31 of 1996.

In the present application the eviction of the first to ninety-ninth respondents from certain immovable property was sought.

The hundredth respondent was the local municipality which owned the land in question. In May 2009, it had entered into a property management agreement with a consortium, in terms of which the consortium was appointed as the lawful agent of the municipality for the management and maintenance of a social housing project. In October 2009, the municipality ceded, assigned and transferred all its rights and obligations in terms of the property management agreement to the applicant. The applicant and the municipality subsequently concluded a notarial agreement of lease in terms of which the applicant leased the property from the municipality. The lease agreement required the applicant to develop the property by the construction of housing units and rental accommodation suitable for low to medium income households.

The first to ninety-ninth respondents were said to be in unlawful occupation of the property in that they did not qualify for housing in terms of the scheme; they did not verify their particulars, and they did not pay rent.

The respondents opposed the eviction application on the grounds that the applicant lacked *locus standi*; that the matter was *res judicata*; and on the basis of *lis alibi pendens*. They also alleged that they had valid lease agreements with the municipality, which had not been ceded to any third party and which had not been cancelled by the municipality.

Held – Section 4(1) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 applies to proceedings by an owner or person in charge of land for the eviction of an unlawful occupier. When the rights and obligations of the applicant, in terms of the lease agreement, were considered in conjunction with the definition of "person in charge", it was evident that the applicant was the person who had legal authority to give permission to a person to enter or reside upon the land in question. The applicant therefore did have the necessary *locus standi* to have instituted the application.

The defence of *res judicata* could also not be sustained as the respondents failed to satisfy the court that the same relief was sought in a previous application which was unsuccessful. Although similar relief was being sought in this application to that which was sought in the unsuccessful application, it was based on a new ground or cause, namely, the cancellation of the lease agreements. In such circumstances *res judicata* could not successfully be raised as a defence.

In raising the defence of *lis alibi pendens*, some of the respondents alleged that similar applications had previously been instituted against them by the applicant, based on the same cause of action and in respect of the same subject-matter – which applications were still pending. The Court held that insofar as there might be other applications pending against some of the respondents, it was still just and equitable that the merits of the current application be determined.

Addressing the respondents' reliance on their lease agreements, the Court found that the said agreements had been validly cancelled by the applicant. As the respondents' entitlement to occupy the property emanated from their lease agreements with the municipality, the validity of the cancellation of the lease agreements by the municipality meant that the respondents were illegal occupiers of the property.

Section 4(7) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act provides that if an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances. The six-month period is calculated from the date that the occupation becomes unlawful. The issue of the availability of suitable alternative housing and a municipality's obligation in that regard was a critical factor in deciding the question of whether the eviction would be just and equitable. The Court took into account the steps taken by the municipality in that regard. Although there were a number of pensioners, elderly people, women and children who would be affected by an eviction order in the particular circumstances of this matter, they had had ample opportunity to make alternative arrangements for accommodation, either

by themselves or in conjunction with the relocation initiatives of the municipality. It was therefore just and equitable to order their eviction.

Lewis Group Ltd v Woollam and others (1) [2017] 1 All SA 192 (WCC)

Company law – Section 165 of the Companies Act 71 of 2008 – Section 165(2)(a) entitling any shareholder or person entitled to be registered as a shareholder to serve a demand upon a company to commence or continue legal proceedings, or take related steps, to protect the legal interests of the company – Derivative action – Section 165(3) permits a company upon which such a demand has been served to apply to a court to set aside the demand only on the grounds that it is frivolous, vexatious or without merit.

Words and phrases – "shareholder" – Section 1 of the Companies Act 71 of 2008 – A shareholder as defined in section 1 refers to the holder of a share issued by a company and who is entered as such in the certificated or uncertificated securities register, as the case may be.

The applicant was the holding company of over 700 retail outlets in Southern Africa. It also owned all the shares in an insurance company.

In terms of section 165(3) of the Companies Act 71 of 2008, it sought the setting aside of a demand in terms of section 165(2) of the Act, served on it by the first respondent.

The first respondent had acquired 3010 shares in the applicant. The shares were currently held for him by a nominee. In serving the demand, he purported to exercise the right conferred in terms of section 165(2)(a) of the Companies Act. That provision entitles any shareholder or person entitled to be registered as a shareholder to serve a demand upon a company to commence or continue legal proceedings, or take related steps, to protect the legal interests of the company. Service of the demand is the first step that any person with standing is required to take to enable such person, if the company does not accede to the demand, with the leave of the court to be obtained in terms of section 165(5), to commence or continue the relevant legal proceedings in the company's name. The demand sought to get the company to protect its interests by commencing proceedings to declare as delinquent four of the company's directors. The proceedings that the first respondent wanted the company to commence were those provided for in terms of section 162 of the Act. The effect of a declaration of a person as delinquent is that he is thereupon disqualified, for so long as the declaration remains in force, from being a director of any company.

Held – Section 165(3) permits a company upon which such a demand has been served to apply to a court to set aside the demand only on the grounds that it is frivolous, vexatious or without merit.

A preliminary question was whether a person is able to proceed derivatively for the given relief when that person is given standing under the Act to proceed for such relief personally. Despite his ownership of 3010 shares in the applicant company, the first respondent was not a shareholder within the defined meaning of the word.

The statutory demand provided for in terms of section 165(2) is a procedural precursor to the possible institution by the person serving it of a derivative action. Assuming the company did not accede to his demand, the first respondent sought to use the derivative action remedy in terms of section 165 to achieve a declaration in

terms of section 162 in respect of four of the company's seven directors. Section 165 was discussed by the Supreme Court of Appeal in the case of *Gihwala and others v Grancy Property Ltd and others* [2016] 2 All SA 649 (SCA), and it was held that the conduct in question must relate to the use of the position as director, and does not relate to the performance by the person concerned of his duties and functions as a director. What is required is conduct intended to harm the company, alternatively an attitude of recklessness by the director in the face of an appreciation that his conduct could cause the company harm. The relevant causes of delinquency entail either dishonesty, wilful misconduct or gross negligence. Establishing ordinary negligence, poor business decision-making, or misguided reliance by a director on incorrect professional advice will not be enough.

The first respondent did not allege that that the second to fifth respondents conducted themselves with the intention of harming the company.

There was nothing in the nature of the first respondent's complaints or the content of his demand to indicate why he should be allowed to proceed derivatively for relief that he was able to claim personally. Therefore, his resort to section 165 of the 2008 Companies Act was vexatious in the circumstances. The Court found in any event, no merit in the demand to have the second to fifth respondents declared as delinquent persons at the instance of the company.

The demand served on the applicant by the first respondent was, accordingly, set aside.

Lewis Group Ltd v Woollam and others (2) [2017] 1 All SA 231 (WCC)

Civil procedure – Discovery – Rule 35 of the Uniform Rules of Court – Applicability to motion proceedings – Rule 35(13) providing that the provisions of the rule relating to discovery shall mutatis mutandis apply, in so far as the court may direct, to applications.

Company law – Demand to company to institute proceedings in terms of section 162 of the Companies Act 71 of 2008 to have four of the company's directors declared to be delinquent directors – Application to set aside demand – Whether demand made out a cognisable claim for a declaration of delinquency on the grounds set forth in section 162(5)(c) of the Companies Act.

In the main proceedings between the parties, the applicant ("Lewis") applied in terms of section 165(3) of the Companies Act 71 of 2008 for the setting aside of the first respondent's demand to institute proceedings in terms of section 162 of the Act to have four of the company's directors declared to be delinquent directors.

The present judgment concerned two interlocutory applications.

In the first interlocutory application, the first respondent ("Woollam") sought an order that the rules pertaining to discovery should apply in the principal application; that Lewis be compelled to make discovery as set out in the application; and that Woollam be allowed to deliver his answering affidavit 15 days after receipt of the reports discovered.

In the second interlocutory application, Lewis applied by way of a counter-application for an order directing Woollam to deliver his answering papers in the principal application within ten days.

Held – Rule 35 regulates the discovery procedure in general civil litigation, and is primarily applicable in action proceedings. However, rule 35(13) provides that the provisions of the rule relating to discovery shall *mutatis mutandis* apply, in so far as the court may direct, to applications. The Court pointed to indications that the availability of the procedure in applications is out of the ordinary, and, to that extent, exceptional. The essential criterion is whether discovery would be material to the proper conduct and fair determination of the case.

Applying that to the present case, the central enquiry was whether Woollam's demand, assessed in the context of the evidence in the application in terms of section 165(3), made out a cognisable claim for a declaration of delinquency on the grounds set forth in section 162(5)(c) of the Companies Act, *viz* that the directors in question grossly abused their position as directors, took personal advantage of information or an opportunity, contrary to section 76(2)(a) of the Act, intentionally or by gross negligence inflicted harm on the company contrary to section 76(2)(a) or acted in a manner that amounted to gross negligence, wilful misconduct or breach of trust in relation to the performance of the director's functions within, and duties to, the company; or contemplated in section 77(3)(a), (b) or (c) of the Act. Lewis had to show that Woollam's demand, assessed in the context of the evidence taken on its face, did not make out a *prima facie* case of conduct by the allegedly delinquent directors of the sort described in section 162(5)(c). The declared object of the discovery sought by Woollam went towards demonstrating the prospects of success, alternatively the lack thereof, of establishing the allegations he had made of accounting fraud to found the derivative action he would wish to pursue if the company did not do so on its own initiative. That was an irrelevant question for the purposes of determining the application by Lewis in terms of section 165(3). He was not prejudiced for present purposes by not having the other reports sought by him. If Lewis chose not to make them available, it did not stop Woollam from extrapolating the information he had in the reports already available to him for the purpose of explaining the basis for his demand. On that basis, he failed to make out a case for the court to exercise its discretion in favour of making an order in terms of rule 35(13) that there should be discovery in the application in terms of section 165(3).

Woollam's interlocutory application was, accordingly, dismissed and Lewis's counter-application granted.

Minister of Home Affairs and another v Public Protector of the Republic of South Africa and another [2017] 1 All SA 239 (GP)

Administrative justice – Public Protector – Report on irregularity in State department – Application for review – Decisions and actions of the Public Protector amounted to administrative action and therefore had to be procedurally fair – Court satisfied that the outcome of the Public Protector's investigation was rationally justifiable and her decisions and the remedial action taken fell within the bounds of reasonableness, with the result that the review application was dismissed.

Words and phrases – "organ of State" – Definition – Section 239 of the Constitution of the Republic of South Africa, 1996 – Any department of State or administration in the

national, provincial or local sphere of government; or exercising a power or performing a function in terms of the Constitution or a provincial constitution; or exercising a public power or performing a public function in terms of any legislation; excluding a court or a judicial officer.

The applicants sought an order reviewing and setting aside the final report by the first respondent ("the Public Protector") on an investigation into certain alleged conduct of employees of the Department of Home Affairs. In the alternative, orders were sought to review and set aside certain specific findings contained in the report. Further relief sought included a declaratory order to the effect that the Public Protector acted *ultra vires* her powers in making the findings and imposing the remedial actions contained in the report.

During 2009, the second respondent ("the complainant") was employed by the Department of Home Affairs but attached to the South African Embassy in Cuba as a First Secretary. In February 2010, the Cuban Deputy Minister of Foreign Affairs called the South African Ambassador to discuss certain alleged serious incidents in which the complainant and a Second Secretary had allegedly been involved. The Cuban Ministry of Foreign Affairs then sent an *aide memoire* to the South African Ambassador setting out certain details of the alleged misconduct of the complainant and the Second Secretary.

Held – The applicable legislation included the Constitution and the Public Protector Act 23 of 1994. After setting out the relevant provisions, the Court confirmed that the findings and remedial measures taken by the Public Protector are binding, and in a proper case, reviewable by a court. Consequently, the findings of the Public Prosecutor in this particular matter, and the remedial action she decreed, were binding unless set aside in the present review application.

The Court then turned to consider whether the decisions of the Public Protector amounted to administrative action as intended by the provisions of the Promotion of Administrative Justice Act 3 of 2000. Having regard to the definition of an "organ of state" in section 239 of the Constitution, the Court concluded that the Public Protector, performing her functions in terms of the Constitution and the Public Protector Act could properly be described as an organ of State. The Court referred to doubt around whether the Public Protector's actions could be classified as "administrative action" insofar as the definition of administrative action appears to require that it "adversely affect the rights of any person and which has a direct, external legal effect". However, the Court found that the definition was not intended to restrict administrative action to decisions that, as a fact, "adversely affect the rights of any person", but conveyed that administrative action is action that has the capacity to affect legal rights. As a general proposition, the decisions and actions of the Public Protector amounted to administrative action – and therefore had to be procedurally fair. It was clear that the Public Protector had properly applied her mind to all the issues and acted within her powers. The Court was satisfied that the outcome of the Public Protector's investigation was rationally justifiable and her decisions and the remedial action taken fell within the bounds of reasonableness.

A proper case not having been made out by the applicants, the review application failed.

Phutuma Networks (Pty) Ltd v Telkom SA Ltd [2017] 1 All SA 265 (GP)

Appeal – New evidence – Section 19(b) of the Superior Court's Act 10 of 2013 allows a division of the High Court exercising appeal jurisdiction to receive further evidence on appeal.

Postponement – Court's discretion – A court has a discretion as to whether a postponement should be granted or refused, which discretion must be exercised judicially – A court should be slow to refuse a postponement, where the true reason for a party's non-preparedness has been fully explained, where his lack of preparedness to proceed is not due to delaying tactics and where justice demands that he should have further time for the purpose of presenting his case.

The present appeal was against a refusal of a postponement on the second day of the trial in this matter, and against the granting of absolution from the instance after the refusal of the postponement.

Although the appeal record was incomplete, the respondent agreed that the court could nevertheless entertain the appeal if certain statements in the respondent's heads of argument were accepted as correct. The appeal proceeded on that basis.

The respondent stated on appeal, that at the commencement of the trial, it had drawn the court's attention to two paragraphs of the pre-trial minute and alerted the appellant to the fact that it had no evidence available to support its pleaded case. After the opening address, the appellant's director ("Dr Scott") was called as the only witness for the appellant. During his evidence, the respondent's Counsel successfully objected to the admissibility of speculative allegations made by him. When the court adjourned at the end of that day, Dr Scott's evidence was not concluded. The next morning when the trial resumed, the entire legal team of the appellant withdrew. As the appellant's case was not yet closed at that point, Dr Scott requested a postponement, which the respondent opposed. The matter stood down to allow Dr Scott, to obtain legal representation and to bring an application for postponement. At the next date of the hearing, the appellant appeared with a new legal team and brought an application for postponement. An affidavit in support of the application was also filed. According to the appellant, the suggestion that no evidence was available to prove its claim was incorrect, and the witnesses necessary to substantiate the content of the particulars of claim were simply not available as they had not been subpoenaed. The postponement was refused on the basis that the existence of the witnesses who could prove the appellant's claim was dubious.

Attached to the application for leave to appeal was a memorandum by previous legal representatives of the appellant. The memorandum had only come to the knowledge of the appellant's attorney at a late stage and had not been before the trial court. It, therefore, constituted new evidence.

Held – Section 19(b) of the Superior Court's Act 10 of 2013 allows a division of the High Court exercising appeal jurisdiction to receive further evidence on appeal. The respondent submitted that it would be in the interest of justice for the Court to take the content of that memorandum into account, but only to the extent that it clarified certain ambiguities in Dr Scott's affidavit, and established that Counsel at no time consulted with any witnesses other than Dr Scott. The Court rejected that proposal, stating that it should not rely on parts of the memorandum which suits a certain party's case and ignore the rest. The memorandum identified several people as potential witnesses.

On the issue of the refusal of the postponement, the present Court pointed out that a trial judge has a discretion as to whether a postponement should be granted or refused. Such discretion must be exercised judicially. A court should be slow to refuse a postponement, where the true reason for a party's non-preparedness has been fully explained, where his lack of preparedness to proceed is not due to delaying tactics and where justice demands that he should have further time for the purpose of presenting his case. A party is not as a matter of right entitled to a postponement and should be able to show *prima facie* that if it is granted the indulgence, it will be able to place facts before the court which will constitute a ground of opposition to the relief sought.

In the present case, the appellant's legal team had withdrawn suddenly, leaving the appellant in a predicament as new representatives had to be found overnight and would not have been in a position to prepare on the merits. The fact that the appellant was left in the lurch by his legal team meant that a postponement should have been granted. In not recognising the untenable situation in which the appellant found itself, and in finding that the appellant had no evidence to prove its case, the court *a quo* misdirected itself.

In the event of another court finding that the postponement was correctly refused, the present Court addressed the issue of the granting of absolution from the instance.

An order of absolution from the instance is generally not appealable as it is not final in its effect and the order is still susceptible to being revisited and rescinded. Standing on its own, the order of absolution from the instance was therefore not appealable. The Court was in any event of the view that such order should not have been granted in the circumstances in which the appellant found itself as referred to above.

Potgieter v University of Stellenbosch [2017] 1 All SA 282 (WCC)

Delict – Personal injury – Fire at university residence – Claim for damages – Negligence – Wrongfulness – Reasonableness of steps taken by defendant to prevent fire – Court finding steps taken by defendant to fall far short of standard for reasonableness – Defendant's conduct both negligent and wrongful.

Whilst a student residing in a hostel of the defendant, the plaintiff sustained serious and permanent injuries when he had to escape a fire through the window of his top floor room. He sued the defendant for damages, averring that the defendant was obliged to ensure that proper and reasonable measures and procedures were in place, and were implemented, for the safety of students in its hostels, including in the case of fire. The absence of fire stops in the common roof void of the hostel in question was said to pose a real and imminent fire risk to the residents of the top floor immediately below the roof void, because once a fire reached a roof void it would spread rapidly unless proper preventative measures were in place. The plaintiff contended that the defendant was aware of the risk which a fire in non-compartmentalised roof voids posed to the residents in such hostels, and had previously taken steps to mitigate the risk, after a similar fire at a women's residence. It was contended that the steps taken by the defendant in installing smoke detectors linked to an alarm in the roof void of the plaintiff's hostel, were completely inadequate.

Held – In order to succeed with his claim the plaintiff had to show that the defendant was guilty of conduct (in the form of an omission) which was negligent, wrongful and the cause of the plaintiff's injuries.

The test for negligence is that for purposes of liability, *culpa* arises if a *diligens paterfamilias* in the position of the defendant would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; would take reasonable steps to guard against such occurrence; and the defendant failed to take such steps. Fault would be established if a reasonable person in the defendant's position would have realised that harm to the plaintiff might be caused, even though the exact nature of the ensuing harm fell outside that realisation.

The issue for determination in this case boiled down to whether or not the steps taken by the defendant in relation to the plaintiff's hostel were reasonable. If they were, then no negligence could be attributed to the defendant and the question of wrongfulness did not arise. However, if they were not, then negligence was necessarily established in the particular circumstances of this matter and it then would have to ne determined whether or not the defendant's conduct was also wrongful.

On assessing the evidence adduced by the parties, the Court found that the plaintiff had discharged the onus of showing, on a balance of probabilities, that defendant was negligent. A *diligens paterfamilias* in the position of the defendant would have foreseen, after the earlier fire, that its failure to take reasonable steps to guard against a similar occurrence would cause injury to students in its hostels. A *diligens paterfamilias* in the position of the defendant would also have taken reasonable steps to guard against such an occurrence. The steps taken by the defendant were not reasonable and fell far short of the reasonableness standard. Apart from being negligent, the defendant's conduct was also wrongful. Our law has developed an explicitly normative approach to determining the wrongfulness element in our law of delict, on grounds rooted in the Constitution, policy and legal convictions of the community.

The plaintiff's claim succeeded and the defendant was declared liable to the plaintiff for such damages as might be agreed upon or proven in consequence of the injuries he sustained in the fire.

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Fluxmans Incorporated v Levenson [2017] 1 All SA 313 (SCA)

Prescription – Section 12 of the Prescription Act 68 of 1969 – Prescription shall commence to run as soon as the debt is due – A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care – Knowledge that the relevant agreement did not comply with the peremptory provisions of the Contingency Fees Act 66 of 1997 is not a fact needed to complete cause of action – Prescription begins to run as soon as the creditor acquires knowledge of the minimum facts necessary to institute action.

An application had been brought by the respondent against the appellant, a firm of attorneys, for an order declaring a contingency fees agreement concluded between them to be invalid, void and of no force and effect. It was common cause that the agreement did not comply with the requirements of the Contingency Fees Act 66 of

1997. The respondent sought a declaration of invalidity in respect of the agreement. He also sought payment from the appellant of the amount by which he had allegedly been overreached.

Denying that it had overreached the respondent or that the agreement was invalid, the appellant alleged that the respondent's claim, if legally sustainable, has been extinguished by prescription. The High Court held that the respondent's claim had not become prescribed, and referred the issue of the quantum for trial. It also declared the agreement invalid. The order that the respondent's claim has not become prescribed was the sole aspect challenged on appeal.

The respondent had instructed the appellant to institute action on his behalf for damages in respect of injuries sustained in a motor vehicle collision. The appellant accepted the instructions on a contingency fee basis. The claim was subsequently settled, and the terms of the settlement were made an order of court on 23 May 2008. In August 2008, the appellant sent him a statement of account reflecting his award of compensation. More than five years thereafter, on 9 April 2014, the respondent wrote a letter to the appellant in which he alleged that it had recently been brought to his attention that the contingency fees agreement entered into between him and the appellant in February 2006, did not comply with the provisions of the Act. The High Court found that the minimum facts necessary for the debt to have become due was the respondent's knowledge that the agreement was unlawful and thus invalid – which knowledge he was accepted as having acquired only in 2014.

Held – The question to be determined on appeal was therefore, whether the High Court correctly found that the respondent's claim had not become prescribed.

Section 12 of the Prescription Act 68 of 1969 provides that prescription shall commence to run as soon as the debt is due. If the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt. A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.

Both the majority and minority views were that the High Court erred in its finding that the invalidity of the agreement was a factual and not a legal conclusion.

In the majority judgment, the question for determination was identified as being whether before February 2014, the respondent had knowledge of the facts from which his claim arose. It was found that he did have knowledge of such facts. Immediately after he paid the fees to the appellant on 20 August 2008, the respondent knew all the facts even though he did not know the legal conclusion flowing from those facts. Knowledge that the relevant agreement did not comply with the provisions of the Act was not a fact which the respondent needed to acquire to complete a cause of action and was therefore not relevant to the running of prescription. Action should therefore have been instituted in August 2011 which was three years from the date on which the cause of action arose. When the respondent instituted these proceedings in July 2014, his claim had become prescribed. The High Court erred in dismissing the appellant's special plea of prescription. The appeal, accordingly, succeeded.

Minister of Justice and Constitutional Development and another v South African Restructuring and Insolvency Practitioners Association and others [2017] 1 All SA 331 (SCA)

Insolvency – Appointment of insolvency practitioners – Policy issued by Minister in terms of section 18(1) of the Insolvency Act 24 of 1936 and also applicable to appointments of liquidators in terms of sections 368 and 374 of Companies Act 61 of 1973 – Constitutionality of – Policy found to put in place a rigid regime in which the Master became a rubberstamp, compelled to appoint designated persons by rote from the Master's list, which was arranged alphabetically on a race and gender basis – Court declaring policy unlawful and invalid.

The appellants were the Minister of Justice and Constitutional Development (the "Minister") and the Chief Master of the High Court of South Africa (the "Chief Master"). The respondents were the South African Restructuring and Insolvency Practitioners Association ("SARIPA"), the Concerned Insolvency Practitioners Association ("CIPA"), the National Association of Managing Agents ("NAMA"), Solidarity and the Vereniging van Regslui vir Afrikaans. The respondents represented various interested groups of persons who are involved, either as insolvency practitioners, legal practitioners and academics, creditors and employees, in the sequestration or liquidation of insolvent estates.

The appeal concerned the constitutionality of a policy that sought to regulate the appointment of insolvency practitioners, primarily as provisional trustees and liquidators, but also as co-trustees and co-liquidators, as well as appointments to certain other comparable positions under various statutes. Although the policy applied to various appointments, the Court in the present judgment dealt with it as if it applied only to appointments of trustees on insolvency. The policy was determined by the Minister of Justice and Constitutional Development pursuant to his powers in terms of section 158(2) of the Insolvency Act 24 of 1936 (the "Act"). The first respondent challenged the policy by way of an application in two parts – Part A being an interim interdict restraining its implementation, and Part B review proceedings directed at having it set aside. The High Court dealt with the urgent application in respect of Part A and interdicted the appellants from implementing the policy. The review application in Part B sought to challenge the policy on four bases. Those were that it infringed the right to equality provided for in section 9 of the Constitution; it unlawfully fettered the discretion of the Master; is *ultra vires* the Act; and was irrational. Acting in terms of section 172(1)(a) of the Constitution, the High Court declared the policy inconsistent with the Constitution and invalid. The present appeal was with the leave of this Court.

Held – At the heart of the dispute between the parties lay clauses 6 and 7 of the policy. According to the appellants, the objective of the policy was to promote consistency, fairness, transparency and the achievement of equality for persons previously disadvantaged by unfair discrimination and it was intended to form the basis for the transformation of the insolvency industry. The policy empowered the Master to appoint provisional trustees on a rotational basis in line with the categories set out in clauses 6 and 7 which were based on race and gender. The policy did not provide for the wishes of creditors to be taken into account in such discretionary appointments. The High Court agreed with the respondents and found that the policy put in place a rigid regime in which the Master became a rubberstamp, compelled to appoint designated persons by rote from the Master's list, which was arranged alphabetically on a race

and gender basis. It therefore held that the policy could not pass constitutional muster and declared the policy inconsistent with the Constitution and invalid.

Affirmative action measures are designed to ensure that suitably qualified people, who were previously disadvantaged, have access to equal opportunities and are equitably represented in all occupation categories and levels. The respondents, however, submitted that the policy was rigid in its application and calculated to establish a barrier to the future advancement of affected people, contrary to section 9(2) of the Constitution. Remedial measures must operate in a progressive manner assisting those who, in the past, were deprived, in one way or another, of the opportunity to practise in the insolvency profession. Such remedial measures must not, however, encroach, in an unjustifiable manner, upon the human dignity of those affected by them. The policy embodied in clause 7.1 a strict allocation of appointments in accordance with race and gender. Insolvency practitioners were for that purpose divided into four groups stratified by race, gender and age. Appointments were to be made from these groups in strict order. The Court found that the rigid and unavoidable appointment process prescribed by clause 7.1 was arbitrary and capricious because it had been formulated with no reference to its impact when applied in reality. The Court agreed with the High Court that the policy failed to meet the relevant test, and was thus unconstitutional.

It also upheld the argument that the policy was irrational as it required the Master to appoint the next-in-line practitioner in each case and failed to take into account factors such as the nature of the individual estate, and the industry specific knowledge, expertise or seniority of the practitioner concerned.

The appeal was thus dismissed with costs.

Minister of Justice and Correctional Services and others v Estate Late Stransham-Ford (Doctors for Life International NPC and others as *amici curiae*) [2017] 1 All SA 354 (SCA)

Law in relation to physician administered euthanasia and physician assisted suicide – Terminally ill patient seeking order that a medical practitioner could either end his life by administering a lethal substance, or provide him with the lethal substance to enable him to administer it himself – Patient dying before order could be handed down – On death of patient, claim ceased to exist and court's granting of order was erroneous.

The present case arose around the wishes of a person ("Mr Stransham-Ford") dying of cancer. He approached the High Court claiming an order that a medical practitioner could either end his life by administering a lethal substance, or provide him with the lethal substance to enable him to administer it himself, and that in either event such medical practitioner would not be subject to prosecution or disciplinary steps by the relevant professional body. To that end he sought an order that the common law in relation to the crimes of murder and culpable homicide should be developed in terms of section 39(2) of the Constitution.

Two hours after Mr Stransham-Ford died, the High Court granted an order to the effect that the medical doctor who acceded to the request of the Mr Stransham-Ford would not be acting unlawfully, and hence, would not be subject to prosecution by the

fourth appellant or subject to disciplinary proceedings by the third appellant for assisting the patient. The present appeal was against the order, and was resisted by the estate of Mr Stransham-Ford (the "Estate") on the basis that it was entitled to step into his shoes for that purpose.

Held – The appeal had to succeed and the order granted had to be set aside for three inter-related reasons. Firstly, on the death of Mr Stransham-Ford two hours before the making of the order, the cause of action ceased to exist. None of the parties was aware of the death at the time the order was granted but the following week, before the judge delivered his reasons, he was informed of the fact and was asked to recall his order. He refused to do so on the ground that his judgment had broader societal implications. In terms of rule 42(1) of the Uniform Rules of Court, an order may be rescinded where it was erroneously sought or granted in the absence of a party and where it was made on the basis of a mistake common to the parties. It may also be rescinded under the common law where it was made as a result of *justus error*. In this case those reasons for rescinding the order were satisfied because it was granted on the erroneous basis that Mr Stransham-Ford was still alive. On those grounds alone, the judge was wrong not to rescind his order and then dispose of the application in the light of the fact that Mr Stransham-Ford was dead, after hearing proper argument and possibly evidence. Had he done that then, the proper conclusion would have been that the proceedings had terminated on the death of Mr Stransham-Ford and that he no longer had the power to grant an order upholding his claim.

Secondly, there was no full and proper examination of the present state of our law on the subject. Thirdly, the order was made on an incorrect and restricted factual basis, without complying with the Uniform Rules of Court and without affording all interested parties a proper opportunity to be heard.

In the above regard, the Court pointed out that a doctor in South Africa does not commit a criminal offence by ceasing treatment or other forms of medical intervention that serve neither a therapeutic nor a palliative purpose. Furthermore, a medical practitioner commits no offence by prescribing drugs by way of palliative treatment for pain that the doctor knows will have the effect of hastening the patient's death. The High Court proceeded from an incorrect view of the current state of the law and had failed to distinguish between the legal implications of an order authorising a medical practitioner to administer a lethal substance to a patient with the latter's consent and a medical practitioner prescribing drugs that the patient could take, if he or she wished, in an act of suicide. In the current state of the law the former is murder, notwithstanding the consent of the patient, because consent to being killed does not affect the unlawfulness of the act causing the person's death.

The appeal was upheld and the High Court's order was set aside.

Nuance Investments (Pty) Ltd v Maghilda Investments (Pty) Ltd and others [2017] 1 All SA 401 (SCA)

Prescription – Sale agreement – Invalidity of – Claim for repayment of purchase price – Whether claim had prescribed – Section 12(3) of the Prescription Act 68 of 1969 provides that a debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises –

provided that a creditor shall be deemed to have such knowledge if could have acquired it by exercising reasonable care.

A proposed development of agricultural land gave rise to three agreements. The first was a sale agreement in terms of which the appellant ("Nuance") purchased certain immovable property. The second was a development agreement in terms of which it was agreed that Nuance would undertake the proposed development in keeping with an agreed development structure. And the third agreement was a lease agreement between Nuance and the first respondent ("Maghilda").

Transfer of three of the portions of land was effected into Nuance's name in May 2008 after payment of R60m by Nuance to Maghilda and the second to fourth respondents ("Sanjont").

It was common cause that there was no compliance with the provisions of section 3 of the Subdivision of Agricultural Land Act 70 of 1970 before the sale and lease agreements were concluded in that the written ministerial consent prescribed in sections 3(d) and (e) had not been obtained.

In May 2009, Maghilda and Sanjont accused Nuance of breach of the agreements in several respects and demanded that Nuance remedy the respective breaches within 30 days after the date of the notice. Nuance took the view that due to the non-compliance referred to above, the agreements (which were part of a single transaction) were null and void. It issued summons against the first to the seventh respondents in the High Court, claiming repayment of the amounts paid on the basis that the sale, lease and incidental development agreements were null and void from the outset, being in breach of section 3 of the Subdivision of Agricultural Land Act, alternatively that the sale agreement was invalid as it was in breach of the Alienation of Land Act 68 of 1981. The action was subsequently withdrawn against the fourth and fifth respondents. In their plea, Maghilda and Sanjont averred that the sale agreement was both illegal and invalid, and simultaneously raised a special plea of prescription in terms of section 11(d) read with section 12(3) of the Prescription Act 68 of 1969. They contended that any action based on the voidness and the illegality of the sale agreement and the incidental development agreement ought to have been brought by no later than 20 November 2010, and that in respect of the lease agreement, by no later than 14 January 2011. In the alternative, they alleged that in the event that the court found that prescription arose when the payments were made, ie on 13 May 2008, then the action ought to have been instituted by no later than 12 May 2011. They also filed a counterclaim alleging that by virtue of the fact that no legal consequences flowed from the void sale agreement, they remained owners of the portions of land already transferred and the Register of Deeds fell to be rectified. The High Court upheld the plea of prescription and dismissed Nuance's claim for repayment. He also upheld the counterclaim and ordered rectification of the Deeds of Transfer. The effect of the order was that Maghilda and Sanjont would retain the amount of R60 million and that the land would also be re-registered in their name. That led to the present appeal.

Held – Maghilda and Sanjont bore the onus to prove that the claim had prescribed.

Section 12(3) of the Prescription Act 68 of 1969 provides that a debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises – provided that a creditor shall be deemed to have

such knowledge if could have acquired it by exercising reasonable care. In order to meet the requirements of section 12(3), Maghilda and Sanjont had to show the facts that Nuance was required to have knowledge before prescription could commence running. They also had to prove that Nuance knew those facts before the date on which prescription was alleged to have commenced running. The facts that must have been known were those that were material to the debt. There was no evidence at all that Nuance knew that Maghilda and Sanjont had failed to obtain the ministerial consent. Time begins to run against the creditor when it has the minimum facts that are necessary to institute action. The running of prescription is not postponed until a creditor becomes aware of the full extent of its legal rights. Knowledge is not confined to the mental state of awareness of facts that is produced by personally witnessing or participating in events, or by being the direct recipient of first-hand evidence about them. It extends to a conviction or belief that is engendered by or inferred from attendant circumstances. On the other hand, mere suspicion not amounting to conviction or belief justifiably inferred from attendant circumstances does not amount to knowledge. It was thus accepted that until the lack of the ministerial consent for the sale was mentioned for the first time in a letter dated 23 June 2009 from Nuance's attorneys, all the parties were under the impression that the agreements were valid.

The next question was whether Nuance could, by the exercise of reasonable care, have known that the ministerial consent had not been obtained before the agreements were signed. Reasonable care for the purposes of section 12(3) of the Prescription Act is not measured by the objective standard of the hypothetical reasonable or prudent person but by the more subjective standard of a reasonable person with the creditor's characteristics. It could not be found that Nuance could have done anything more than it had in the circumstances. The special plea of prescription was dismissed.

The Court also dismissed the first to fourth defendants' counterclaim. The counterclaim was based on the proposition that ownership of the three properties did not in law pass to Nuance, despite the registration of transfer thereof to its name. The court pointed out that ownership passes on registration if there is a real agreement and intention to transfer and receive ownership. It was clear from the evidence that real agreements existed in respect of the three properties. What Maghilda and Sanjont had to show in order to succeed in their counterclaim was that there was a defect in the real agreements. That they failed to do.

The appeal was upheld with costs.

Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Tourism and Environmental Affairs: KwaZulu Natal and others [2017] 1 All SA 429 (SCA)

Interpretation of statutes – KwaZulu-Natal Liquor Licencing Act 6 of 2010 – Conversion of liquor licences granted under repealed Liquor Act 27 of 1989 – Impact of proximity of licenced premises to religious or learning institutions – Section 101(1) of the KwaZulu-Natal Liquor Licencing Act read with section 48(5)(e) not imposing an absolute prohibition to valid pre-existing liquor licences relating to liquor premises located within a circumference of 500 metres of a religious or learning institution.

The appellant was a national supermarket licenced to sell liquor in its grocery stores and liquor outlets throughout the country for consumption off its licenced premises. It

was the holder of 110 licences operative in the province of KwaZulu-Natal, as contemplated in section 39(b) of the KwaZulu-Natal Liquor Licencing Act 6 of 2010. The majority of those licences were granted under the Liquor Act 27 of 1989. Twelve related to premises situated within approximately 80 metres of religious and learning institutions. They were all granted under the 1989 Liquor Act, substantial parts of which were repealed on 28 February 2014.

As contemplated in section 101(1) read with section 101(2) of the KwaZulu-Natal Liquor Act, the appellant applied to the Liquor Authority for licence certificates in respect of its pre-existing liquor licences. Section 101 provided for conversion, subject to certain requirements, of old-order licences granted under the 1989 Liquor Act. The appellant's application for conversion was refused on the ground that the terms and conditions of the appellant's pre-existing liquor licences that permitted it to operate its liquor outlets within a circumference of 500 metres of religious and learning institutions were hit by the prohibition in section 48(5)(e) read with section 101(1)(a)(ii) and (iii) of the KwaZulu-Natal Liquor Act. The appellant asserted that the first respondent (the "MEC") was not empowered to render unlawful, by way of a regulation, that which the KwaZulu-Natal Liquor Act had not declared unlawful. Nor was the MEC empowered to compel it to apply for temporary amnesty when it had not contravened any law or to oblige it to apply for the removal of its licences from the licenced premises when its operations on such licenced premises are not unlawful. The court *a quo* found in favour of the MEC and held that the provisions of section 48(5)(e) read with section 101(1)(a)(iii) prohibited Shoprite Checkers from selling liquor for consumption off licenced premises as either a liquor or a grocers' store, where such premises were situated within a circumference of 500 metres from a learning institution and/or a religious institution.

Held – On appeal, an analysis of the relevant statutory framework was appropriate. The resolution of the divergent contentions advanced by the parties lay in the proper interpretation of the key provisions of the KwaZulu-Natal Liquor Act and regulation 47(1). It was held to be clear from the provisions of section 101 that holders of pre-existing licences are entitled to licence certificates in terms of section 62 of the KwaZulu-Natal Liquor Act without having to comply with the application procedure for such licence. The entitlement of the holder of a licence to such a licence certificate was subject to the Liquor Authority being satisfied, upon presentation of proof of the licence and payment of the prescribed annual fee, that the holder had a valid licence on the date of commencement of the KwaZulu-Natal Liquor Act.

The appellant's submission that had the provincial legislature intended to impose an absolute prohibition in respect of pre-existing licences in relation to licenced premises located within a circumference of 500 metres of religious or learning institutions, it would have done so in the clearest of terms, found favour with the Court. The Court found it to be significant that the location of the appellant's premises was not a term or condition of its licences under the old Act.

Although that finding was dispositive of the appeal, the Court addressed the application to review and set aside regulation 47(1)(a), and found it to be without merit.

The appeal was upheld with costs.

Babaletakis and another v Minister of Local Government, Environmental Affairs and Development Planning (Western Cape) and others [2017] 1 All SA 447 (WCC)

Administrative law – Local authority – Building plans – Approval of departure from zoning scheme regulations and dismissal of appeal – Application for judicial review of decision – Section 6(2)(h) of Promotion of Administrative Justice Act 3 of 2000 pertains to the court's power to judicially review an administrative action if the exercise of the power authorised by the empowering provision in pursuance of which the administrative action was purportedly taken was so unreasonable that no reasonable person could have so exercised the power – Review court unable to find that the decisions to grant the respondent's application for the departures he required were decisions that a reasonable decision-maker could not have made.

The applicants were owners of two immovable properties situated in Bantry Bay, Cape Town. Across the road from their properties was a property owned by the respondent.

The respondent wished to renovate the old house which existed on his property, and obtained permission to do so. However, it emerged during the renovations, that the structure of the building was too fragile to support the additional load. The respondent therefore demolished the old house and erected a new structure in its place – without obtaining a demolition permit in terms of the National Heritage Act. An interim prohibitory interdict was obtained pending the determination of this review application, by which time the structure was at an advanced stage of completion. The structure was non-compliant with various restrictions on the development of the property that applied in terms of the zoning scheme regulations and the City's Scenic Drive Regulations.

The applicants appealed in terms of section 44(1)(a) of the Land Use Planning Ordinance ("LUPO"), against the decision by the Planning and General Appeals Committee of the City of Cape Town to uphold the fourth respondent's application to depart from the Cape Town zoning scheme regulations, as well as against the consent granted to him by the City to deviate from the restrictions applicable to development along the scenic drive. The appeal was rejected by the MEC for Local Government, Environmental Affairs and Development Planning (Western Cape). That led to the present application for review of the MEC's decision in terms of section 6(2)(h) and (e)(iii) of the Promotion of Administrative Justice Act 3 of 2000.

Held – Section 6(2)(h) pertains to the court's power to judicially review an administrative action if the exercise of the power authorised by the empowering provision in pursuance of which the administrative action was purportedly taken was so unreasonable that no reasonable person could have so exercised the power. Section 6(2)(e)(iii) goes to the court's review power if the administrative action in issue was taken because irrelevant considerations were taken into account or relevant considerations were not considered.

The statutory question that the administrator was required to answer was whether it was "desirable", within the meaning of section 36 of LUPO, to grant the departures that had been applied for. The decision whether or not to grant applications in terms of Chapter II of LUPO for departures from the land use provisions of a zoning scheme entailed the exercise of a discretion by the decision-maker. Another factor for consideration in terms of section 36 was that of existing rights. Those were the rights

of other persons to require the local authority to enforce the restrictions applicable to the development of land units in terms of the zoning scheme, but were not to be regarded as absolute.

Examining each of the four categories of departures granted to the fourth respondent, the Court was unable to hold that the decisions to grant the respondent's application for the departures he required were decisions that a reasonable decision-maker could not have made. That finding applied equally to the decision made by the MEC on appeal. As a result, the application for review was dismissed.

Bridgman NO v Witzenberg Municipality (JL and another as third parties) [2017] 1 All SA 466 (WCC)

Delict – Rape of guest at municipal resort – Claim for damages – Negligence – Test for negligence – Would a diligens paterfamilias in the position of the defendant foresee the reasonable possibility of his conduct injuring another in (her) person or property and causing patrimonial loss; and would take reasonable steps to guard against such occurrence; and did the defendant fail to take such steps – Absence of adequate security measures at resort where rape occurred facilitating commission of rape, rendering defendant municipality liable for damages.

In January 2009, an 18-year-old woman ("Ms L") suffering from a mild mental disability, was raped at a resort owned and managed by the defendant municipality. In his capacity as the curator *ad litem* of Ms L, the plaintiff sued the municipality for damages. The issue that remained was whether the rape was caused by the lack of ordinary care and diligence on the part of the municipality and its servants acting in the course and scope of their employment. The municipality denied being liable for negligence. It further denied that any negligence on its part caused or contributed causally to the injury suffered by Ms L. In the alternative, it contended that if negligence on its part did exist, the rape was caused partly through its own negligence and partly through the negligence of Ms L's adoptive parents and guardians ("Mr and Mrs L") in failing to properly supervise their daughter despite knowing that she was vulnerable due to her disability.

Being an organ of State, the defendant was bound to protect the rights contained in the Bill of Rights. In failing to protect Ms L from being raped, it was guilty of a wrongful omission.

Held – The wrongfulness of the omission was tested by reference to the legal convictions of the community, which by necessity were underpinned and informed by the norms and values of our society embodied in the Constitution. Because of its constitutional duties, and because it owned, managed and controlled the resort in the circumstances described further below, the failure on the part of the Municipality to prevent the rape was unlawful.

The fact that Ms L might have been vulnerable to exploitation, lacking in social skills, judgment and defence mechanisms, as well as emotionally vulnerable and socially inept, were not grounds which allowed the court to limit her rights and freedoms as a woman. Both as a woman and a disabled person, Ms L enjoyed entrenched rights to her dignity and security, control over her body, her freedom of movement, and equality before law. To attribute delictual liability to Ms L's adoptive parents (as wrongdoers)

because they allowed her to exercise independence, freedom of movement and control over her body, would conflict with the aforementioned constitutional principles.

The only relevant consideration in this case was whether Ms L was possessed of capacity to deny consent to sexual intercourse to the perpetrators. That was a separate question to whether she had the capacity to consent to intercourse. The material element of rape, as defined in common law and the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, is lack of consent by the victim. Mere submission is not consent. On the facts before the Court, Ms L neither consented to sexual intercourse nor led the perpetrators to think that she had done so. It was clear that she was abducted against her will and then sexually assaulted.

Although Mrs L was put to the proof of showing that a rape had occurred, the evidence and admissions made by the perpetrators established conclusively that Ms L had been raped by the two perpetrators.

The rape was predated by a report on defective security at public resorts. A security expert who testified for the plaintiff was adamant that security at the resort was inadequate on the day in question. The municipality did not enter into a proper contractual arrangement with a security company to ensure that the resort was protected. The Court rejected the defendant's conclusion that the rape was not due to any lack of security on the part of the municipality.

The test for negligence is that *culpa* arises for the purposes of liability is a *diligens paterfamilias* in the position of the defendant would foresee the reasonable possibility of his conduct injuring another in (her) person or property and causing (her) patrimonial loss; and would take reasonable steps to guard against such occurrence; and the defendant failed to take such steps.

As a result of a plethora of criminal incidents which had occurred at the resort in the year before Ms L's rape, the rape of a resident at the resort was reasonably foreseeable. The four basic considerations which influence the reaction of the reasonable person in a situation posing a reasonable risk of harm to another are the degree or extent of the risk posed by the actor's conduct; the gravity of the possible consequences if the risk of harm materialises; the utility of the actor's conduct; and the burden of eliminating the risk of harm.

The Court was satisfied on the evidence that there was a complete absence of the necessary personnel at the resort at the time of the incident, facilitating the misdeeds of the perpetrators of Ms L's rape. That led to the conclusion that the municipality had caused the rape of Ms L through its omission. The plaintiff was therefore entitled to damages arising from the rape.

The evidence established that the rape of Ms L had adversely affected her development.

The plaintiff claimed certain future medical and psychotherapy expenses for Ms L. He also claimed R250 000 in respect of *contumelia* and R750 000 for general damages for shock, pain and suffering and disability in respect of the enjoyment of amenities of life. Because the heads of damage claimed for *contumelia* as well as shock, pain and suffering were the consequence of one and the same omission, the Court attempted a holistic process and made a single award. In the circumstances of this case, the appropriate award of damages for *contumelia*, shock, pain, suffering,

and disability in respect of Ms L's enjoyment of amenities of life was set at R750 000. To that was added the future medical costs of psychotherapy. The municipality was ordered to pay the plaintiff an amount of R780 780 plus interest and costs of suit.

Democratic Alliance v South African Broadcasting Corporation Soc Ltd ("SABC") and others; Democratic Alliance v Motsoeneng and others [2017] 1 All SA 530 (WCC)

Administrative law – Public Protector – Investigative findings contained in report – Status of – Where Public Protector found appointment of Chief Operating Officer of SABC to have been irregular, no action contrary to such findings may occur without findings first being set aside on review – Remedial action required to be undertaken by Public Protector's report is binding and could not be disregarded.

A report by the Public Protector into governance at the South African Broadcasting Corporation Ltd ("SABC") and the litigation which ensued in relation to the appointment of Mr GH Motsoeneng ("Motsoeneng") as the SABC's Chief Operating Officer ("COO") led to the present litigation.

In the first of the two applications before the Court, the focus was a disciplinary tribunal's decision in December 2015 dismissing charges of misconduct brought against Motsoeneng by the SABC. The second application's focus was Motsoeneng's subsequent appointment as Group Executive: Corporate Affairs ("GECA").

Having received complaints from former employees relating to alleged irregular appointments by Motsoeneng and systemic maladministration, the Public Protector launched an investigation over 2012 and 2013. In the Public Protector's final report, issued in February 2014, she made various findings adverse to Motsoeneng, the Minister of Communications and others. Amongst her findings were that Motsoeneng's appointment was irregular as the SABC board chairman had acted irregularly by altering the qualification requirements for the appointment to remove the academic qualifications previously advertised, so as to overcome Motsoeneng's lack of appropriate qualifications. It was also found that Motsoeneng had committed fraud by stating in his employment application form that he had completed matric. The Public Protector directed the Minister and SABC board to submit implementation plans indicating how remedial action set out in the report would be implemented.

In July 2014, at a time when Motsoeneng had been dismissed from his employment, the SABC board decided to reappoint him as COO, without having taken steps to have the Public Protector's report set aside on review. As a result, the applicant ("the DA") applied to set aside Motsoeneng's appointment. It claimed interim relief in Part A and final review relief in Part B of its notice of motion. The Court deciding on the Part A relief directed the board to commence disciplinary proceedings against Motsoeneng within 14 days. However, Motsoeneng continued in office as COO and no disciplinary proceedings were initiated. An appeal by the SABC, Motsoeneng and the Minister was dismissed,meaning that disciplinary proceedings had to be initiated and completed in accordance with the order and that Motsoeneng was to be suspended on full pay.

When the Part B relief was heard, the Court set aside Motsoeneng's appointment as COO. In the meantime, the disciplinary proceedings against Motsoeneng proceeded.

By the end of 2015 there was a pending application for leave to appeal against the dismissal of the Part A appeal, a pending application to appeal against the setting

aside of Motsoeneng's appointment as COO, and a disciplinary decision clearing Motsoeneng on the attenuated charges.

Held – In the second application before the present Court, the DA sought a declaration that Motsoeneng was not able to hold any position within the SABC until the negative findings made by the Public Protector in her report were set aside on review. An order was also sought holding unlawful and invalid the decision to re-employ Motsoeneng in 2014. Motsoeneng launched several technical attacks against the application. It was submitted that the application should be struck from the roll because it did not have sufficient urgency to justify the time constraints under which he was placed, and that service of the summons was not effected on Motsoeneng. The Court was satisfied that there was no merit in either contention. On the merits, the Court held that Motsoeneng's subsequent appointment as GECA was invalid and had to be set aside.

Turning to the first application, the Court started with a consideration of the nature of the disciplinary proceedings required by the Public Protector's remedial action. Clearly, strong adverse factual findings were made against Motsoeneng. The remedial action was, however, directed not at him but at the Minister and the board. Having regard to her factual findings, the remedial action was binding on the board. The SABC could not fail to take disciplinary action on the grounds specified by the Public Protector unless her factual findings regarding Motsoeneng and the resultant remedial action were set aside by a court. It was held that the disciplinary process contemplated by the Public Protector's remedial action was one in which the merits of the charges had to be investigated. However, because the institution of disciplinary proceedings against Motsoeneng was not a voluntary decision by the SABC but compulsory by virtue of the Public Protector's remedial action, those involved could not disregard the Public Protector's report. Contrary to the DA's position, the contemplated remedial action were full disciplinary proceedings and not just an enquiry into sanction on the ground that guilt had already been established in the report.

The Court did agree with the DA, and issued a declaration in that regard, that the disciplinary proceedings already held against Motsoeneng had to be set aside as not being in accordance with the Public Protector's remedial action and thus unlawful. Directives were issued by the Court regarding the new disciplinary process which was to be held.

Jordaan and another v City of Tshwane Metropolitan Municipality and another and related matters [2017] 1 All SA 585 (GP)

Property – Rates clearance certificate – Rateable property may only be transferred after the municipality concerned certifies that all debts have been settled in respect thereof for a period of two years preceding the date of application for the certificate – Section 118(3) of the Local Government Municipal Systems Act 32 of 2000 providing a municipality with security for repayment of the debt and enjoys preference over any mortgage bond registered against the property – Constitutionality – Court finding section 118(3) to constitute severe limitation of a new owner's property rights in terms of section 25(1) of the Constitution – Arbitrary deprivation not justified leading to relevant provisions of section 118(3) being declared unconstitutional.

Five applications were before the court, the first two against one municipality, and the remaining three against another municipality. In the first four applications, a declaratory order was sought relating to the municipality's alleged obligation to render

municipal services and to open a services account under circumstances where there is a debt outstanding in respect of the property concerned beyond the two year period provided for in section 118(1) of the Local Government Municipal Systems Act 32 of 2000. A constitutional attack was also raised against the provisions of section 118(3) of the Act. The applicants in the fifth case were not proceeding with their application and the only issue related to costs.

The applicants in the first three applications had each bought an immovable property at a sale in execution. In the fourth application, the applicant bought immovable property from a company in liquidation, the sale having been accepted and approved by the liquidators. In all the cases, the applicants took transfer of the immovable properties after a certificate in terms of section 118(1) of the Act had been issued by the municipality concerned. In terms thereof, the municipality certified that all amounts that became due in connection with that property for municipal service fees as well as property rates and taxes during the two years preceding the date of application for the certificate, had been fully paid. However, in all the cases, there were debts which had been incurred by previous owners and/or occupiers prior to the two year period envisaged by section 118(1). The municipality in the first two applications relied on its policy to demand that all historical debts in respect of a property be paid before entering into a service agreement with a new consumer. It adopted the approach that it had the right to refuse municipal services to the applicants when municipal debts in respect of the property concerned, remained outstanding. It contended that it was entitled to do so, because the historical debts, as "a charge upon the property" as contemplated in section 118(3), survived transfer of ownership and were therefore enforceable against the applicants and their successors-in-title. As far as the other two applications were concerned, there appeared to be a dispute regarding the question whether or not the municipality had also refused to enter into agreements with the applicants for the supply of municipal services.

The dispute led to the present Court being seized with the question of the constitutionality of section 118(3) of the Act.

Held – Section 118(1) of the Act provides for an embargo against the transfer of a rateable property, unless the municipality concerned certifies that all debts have been settled in respect thereof for a period of two years preceding the date of application for the certificate. Section 118(3) provides a municipality with security for repayment of the debt and enjoys preference over any mortgage bond registered against the property. As no time limit exists with regard to the security provision contained in section 118(3), that right (or statutory hypothec) is not extinguished by the transfer of the property from one owner to another whilst there is still a debt outstanding with regard to that property. Therefore, nothing would prevent a municipality from perfecting its security over the property to ensure payment of an outstanding historical debt. It was in that sense that the new owner of the property could be said to be liable for the historical debt.

In the constitutional challenge, the applicants argued that section 118(3) provides for a charge upon the property only in relation to the amount owing by a specific property owner, which may not be applied against subsequent property owners as it would constitute a violation of the right to property which is not supported by sufficient reason. The Court held that section 118(3) could result in a loss of ownership for new or subsequent owners and consequently a loss of the ability to use, enjoy or exploit the property. Even in the absence of actual loss, the mere existence of such a drastic

remedy as a security provision constituted a severe limitation of a new owner's property rights in terms of section 25(1). It was therefore concluded that the infringement or limitation of rights constitutes a deprivation for the purposes of section 25(1) of the Constitution. The next question was whether the deprivation was arbitrary. A deprivation will be arbitrary when the law referred to in section 25(1) does not provide sufficient reason for the particular deprivation in question or is procedurally unfair. Assessing the extent of the deprivation, the purpose and reason therefor, the Court found that in the absence of any such relevant relationship between the purpose for the deprivation and the person whose property was affected (ie the new or subsequent owner), no sufficient reason existed for section 118(3) to deprive new or subsequent owners (other than the current owner before transfer takes place) of their title in the property concerned. It was concluded that the deprivation with regard to new or subsequent owners was arbitrary for purposes of section 25(1) of the Constitution.

It then had to be determined whether the infringement could be justified as a permissible limitation of that right in terms of section 36 of the Constitution. The Court was unable to find that the infringement served a legitimate purpose.

The Court then turned to consider the other relief sought against the municipalities.

Taking all considerations into account, the Court held that the appropriate remedy would be an order declaring the provisions of section 118(3) to be constitutionally invalid to the extent only that the security provision "a charge upon the property" survived transfer of ownership into the name of a new or subsequent owner who was not a debtor of the municipality with regard to debts incurred prior to transfer.

Rhodes University v Student Representative Council of Rhodes University and others (Concerned Staff at Rhodes University as Interveners) [2017] 1 All SA 617 (ECG)

Interdict – Final relief – Requirements – Requirements for a final interdict are a clear right; injury actually committed or reasonably apprehended; and no other suitable alternative remedy.

Motion proceedings – Nature of – Not designed to resolve factual disputes – Where, in motion proceedings, disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in applicant's affidavits, which have been admitted by the respondent, together with the facts alleged by the latter, justify such order.

Constitutional law – Right to assemble and protest – Section 17 of the Constitution guarantees the right to peacefully and unarmed, assemble, demonstrate, picket and present petitions – Rights must be exercised in a manner that respects and protects the foundational value of human dignity of other people and the rights of others enjoyed under the Constitution – Unlawful activities fall beyond the protection of section 17.

The applicant university obtained an interim interdict against the respondents, arising from what the university described as unlawful protest action. The relief sought included preventing the respondents from participating in, encouraging, facilitating and/or promoting any unlawful activities on the applicant's campus. The university set

out a number of incidents in which a mob headed up by the fourth and fifth respondents caused damage to university property, blocked access and free movement on campus, disrupted lectures and assaulted students.

Following the fourth, fifth and sixth respondents' filing of a notice of intention to oppose the application, a group of the university staff filed a notice of motion asking for leave to intervene in the main application and seeking the discharge of the interim interdict. They stated that their interest in the proceedings arose from the vagueness and broadness of the interim interdict and alleged that it could be used to threaten staff who were engaging with students on their concerns regarding rape and gender-based violence at the university and the protest action that they embarked upon to challenge such violence. The intervening staff did not join issue factually, but concentrated on the legal question as to whether the interdict was constitutional and lawful on the grounds of vagueness, infringement on the right to protest, freedom of expression, academic freedom and the absence of any prior attempt to meaningfully engage with the protesters spearheading the complaints. According to the intervening staff, the concept of engagement was such that the university ought to have engaged with both students and the lecturers, and ought to have done so before seeking an interdict. The intervening staff argued that the right to freedom of expression, and the right to academic freedom and particularly to crucial rights in this matter were interrelated with the right to protest, and that the university wished to unjustifiably limit these rights seeking to restrain any action by any person which action it considered unlawful.

The fourth, fifth and sixth respondents essentially contended that the breadth of the relief sought in the interdict was an attempt by the university to lay the basis for policing its own student body. They also denied any unlawful activity on each of their parts or having associated themselves therewith.

Held – The requirements for a final interdict are a clear right; injury actually committed or reasonably apprehended; and no other suitable alternative remedy.

Motion proceedings are not designed to resolve factual disputes. Unless concerned with interim relief, such applications are all about the resolution of legal issues based on common cause facts. Where, in motion proceedings, disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in applicant's affidavits, which have been admitted by the respondent, together with the facts alleged by the latter, justify such order.

The Court recognised that the university had clear rights which it was entitled to protect. It was also accepted that there was an infringement of rights, actual or apprehended, and at the time the interdict was sought a very real apprehension that that might be repeated.

Section 17 of the Constitution guarantees the right to "peacefully and unarmed" assemble, demonstrate, picket and present petitions. Mass protest continues to be an important form of political engagement and is an essential role player in any liberal democracy. Meaningful dialogue may well require the collective efforts of demonstrators, picketers and protesters. Crowd action albeit loud, noisy and disruptive is a direct expression of popular opinion, and is protected in section 17 of the Constitution. However, the exercise of the relevant rights is subject to constitutional regulation. In the present case, the right to demonstrate was limited by the fact that it had to be exercised peacefully and unarmed. The rights had to be exercised in a

manner that respected and protected the foundational value of human dignity of other people and the rights of others enjoyed under the Constitution. The kidnapping of students from their residence, their being held in the midst of a crowd for some considerable period, the barricading of roads and destroying of university property were unlawful activities beyond the protection of section 17. The Court was satisfied that there was no reasonable alternative adequate remedy in the absence of any undertaking that the unlawful conduct would not be further pursued.

The Court then turned to consider the direct involvement of each of the fourth, fifth and sixth respondents. It was concluded that the said respondents were involved to a greater or lesser extent in the unlawful conduct. There was however, some merit in the respondents complaining that the order was unduly broad. The Court's order therefore curtailed the scope of the order originally sought in the notice of motion. The application for an interdict was thus granted.

WL v SH and another [2017] 1 All SA 652 (KZD)

Family law – Enquiry conducted by office of the Family Advocate – Entitlement of party attending enquiry to have legal representative present – Court finding that the constitutional right to a fair public hearing could not be violated by not being allowed to have her attorney present at the Family Advocate enquiry – As the enquiry conducted by the office of the Family Advocate does not amount to legal proceedings contemplated in section 34 of the Constitution, legal representation of the parties in such enquiries should not be permitted.

The applicant and first respondent were the unmarried parents of a minor child.

In the main application, the applicant had sought to have the Family Advocate conduct an enquiry and submit a report to the court setting out its recommendations regarding the relief sought in the application. The first respondent's insistence on attending the enquiry with her attorney present, despite the applicant's objection to the attorney's presence, led to the present application in which an order was sought directing the first respondent to attend the enquiry alone and preventing her from having her attorney present at the enquiry.

Although conceding that the order sought in effect dictated to the Family Advocate how it was to conduct an enquiry, the applicant argued that the Constitution provides that the High Court has the inherent power to protect and regulate its own processes and to develop common law, taking into account the interests of justice, and that the Family Advocate itself recognised that its office was an extension of the Court in that it assist the Court when it comes to minor children involved in a legal dispute.

Held – The main issue to be determined was whether the parties' legal representatives should be present at all times during the interviews conducted by office of the Family Advocate.

The Family Advocate is appointed by the Minister of Justice and Constitutional Development to exercise its powers and perform its duties in terms of the Act or any other law. Section 5(1) of the regulations under the Mediation in Certain Divorce Matters Act 24 of 1987 provides that the Family Advocate shall institute an enquiry in such a manner as maybe deemed "expedient or desirable".

Section 9 of the Children's Act 38 of 2005 provides that in all matters concerning the care, protection and well-being of a child, the standard that the child's best interest is

of paramount importance, must be applied. Section 34 of the Constitution provides that everyone has a right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or where appropriate another independent and impartial tribunal or forum. However, section 34 deals with disputes that can be resolved by the application of law, and the Family Advocate's findings and recommendations are not necessarily to be equated to a resolution of legal disputes by a court of law. The Family Advocate's role in these proceedings is not to make orders, findings, awards or rulings of a judicial or quasi-judicial nature. It only makes reports and recommendations that can be considered by the court. The Court held that the first respondent's constitutional right to a fair public hearing in this matter could never be violated by not being allowed to have her attorney present at the Family Advocate enquiry. As the enquiry conducted by the office of the Family Advocate did not amount to legal proceedings contemplated in section 34 of the Constitution, legal representation of the parties in such enquiries should not be permitted. Family Advocates should be able to conduct these enquiries freely and unhindered by the presence of third parties or legal representatives.

Section 6(2)(a) of the Children's Act requires that all proceedings, actions or decisions in a matter concerning a child must respect, protect, promote and fulfil the child's rights and best interests as set out in the Bill of Rights subject to any lawful limitations. Section 6(4)(a) further provides that in any matter concerning a child an approach which is conducive to conciliation and problem solving should be followed and confrontational approach be avoided. The behaviour and the conduct of the parties in this matter was highly confrontational and not consistent with the provisions of the Constitution and the Children's Act. If the parties were interviewed in the absence of their legal representatives, the Court believed that that would go a long way in having the effect of encouraging settlements of the dispute between the parties.

Consequently, the first respondent was ordered to attend and participate in the enquiry to be conducted by the office of the Family Advocate without any other person present.

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