LEGAL NOTES VOL 2/2018

Compiled by: Adv Matthew Klein

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EDITORIAL

Deferred prosecution agreement.

I read with interest about the term "deferred prosecution agreement", HSBC paid a then-record $1.9 billion settlement in 2012 for helping Mexican drug cartels launder money and breaching international sanctions by doing business with Iran. The lender pledged to cooperate with Justice Department probes for five years and by doing so was spared the stigma of a criminal record in the U.S. -- and the threat that it might lose access to some of its most lucrative institutional banking activities in the world's largest economy.

It made me think: Do we have similar legislation in the RSA? I know young people get a deferred sentence for drugs to enable them to rehabilitate.

The Legal Practice Act.[2]

[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!**

[2] **Timelines – summarized**

A) 28 Feb 2018 – Comments on draft Rules, published on 26 January 2018, close
B) March 2018 – NF deliberates, reviews, amends and finalises s95 Rules
C) 26 April 2018 – NF publishes final Rules in terms of sec 95 on the Gazette
D) 30 July 2018 – The Minister publishes the Regulations in terms of section 109
E) **30 July 2018 – The President proclaims in the Gazette the coming into effect of Chapter 2**
F) 1 Aug 2018 – Chapter 2 comes into effect - call for nominations for legal practitioners for LPC (Legal Practice Council)
G) 25 Aug 2018 – LPC Nominations submissions close
H) 1 Sept 2018 – Ballot papers distributed and voting process begins
I) 15 Sept 2018 – Voting process closes and counting and verification of votes begin
J) 30 Sept 2018 – LPC is announced

It is now panic stage. The different Bar Associations are gearing for change, the LSSA hold roadshows. They have a nice 4-page pamphlet in this regard claiming to represent 25 800 attorneys. Page four is important, the heading is “Moving forward, the LSSA in transition”, they give 7 aspects “which the Legal Practice Council will not do”.

The seven are: 1) Be the voice of the profession 2) Represent practitioner’s interest 3) Provide a forum to gather and debate 4) Provide advice, practice support and information 5) Lobby government 6) Comment on proposals that affect practitioners 7) Provide practice management resources.

I think I can add one more: Provide articles/practical vocational training. The National Forum is of the opinion that there will be a form of practical vocational training,the details are not clear yet.

The “panic” that I referred to is based on the “uncertain” future of law societies and bar associations, it is certain that these will continue, only uncertain which ones will continue to exist due to members joining or not joining. I speculate now: if NADEL or BLA form their own “Bar” , how will it influence other Bar associations? If the NBCSA decide to allow attorneys in as members, how will it influence other attorney societies and vica versa!

Matthew Klein

S.A. LAW REPORTS FEBRUARY 2018

MEC FOR HEALTH AND SOCIAL DEVELOPMENT, GAUTENG v DZ OBO WZ 2018 (1) SA 335 (CC)

Damages — Bodily injuries — Medical expenses — Future medical expenses — Once and for all rule and rule that damages must sound in money — Development of common law to provide for periodic payments and payment in kind — Insufficiency of evidence tendered — Question of development left open — Possibilities discussed.

Having admitted liability in a claim for damages by DZ (on behalf of her child WZ) flowing from medical negligence during WZ's birth, the defendant (the Gauteng MEC), in an amended High Court plea, sought to satisfy the award of R20 million in respect of WZ's future medical expenses by paying them as they arose instead of in a lump sum. The Gauteng MEC argued that if the common law did not allow her to do this, it should be developed. The High Court and the Supreme Court of Appeal dismissed the amended plea. The SCA found that the common-law 'once and for all' rule precluded defendants from making periodic payments instead of a global one, and declined to develop the common law on the grounds that s 39 of the Constitution did not require it and that delictual reform was in any event the province of the legislature. In an appeal to the Constitutional Court the MECs for Health of the Eastern and Western Cape were on various grounds (see [5] – [7]) admitted as

K) 31 October 2018 – Dissolution of the National Forum
L) 31 October 2018 – Dissolution of the Law societies
M) 31 October 2018 – All other Chapters of the LPA come into effect

amici. They were concerned about legal defences or programmes that might be compromised by the present judgment.
In issue was the suggested development of the common-law rules that delictual compensation must sound in money and be claimed at once (the once and for all rule). The Gauteng MEC and the amici advanced three propositions: (i) that delictual compensation need not sound in money but could be paid in kind; (ii) that the once and for all rule applied to the determination of liability, not to the quantification of damages; and (iii) that a defendant could challenge the amount claimed on the ground that the plaintiff was likely to use cheaper public healthcare of equal standard. There were also arguments based on the deleterious effect of malpractice awards on public finances; an alternative 'undertaking-to-pay' defence; and a suggested 'top-up/claw-back' mechanism used in the Western Cape.

Held per Froneman J for the majority

While propositions (i) and (ii) above clashed with the abovementioned common-law rules, (iii) was on surer footing: it was currently open to a defendant who wished to dispute a claim for future medical expenses to show that the plaintiff could reasonably obtain similar services from a public healthcare facility (or elsewhere) at a lower rate than the one underlying the claim. If the evidence was sufficiently cogent, the plaintiff's claim for higher (private) expenses would fail. Whether the courts were entitled to order periodic payments had not yet been conclusively decided, but such a system would not in principle be unconstitutional. (See [14] – [25], [35], [49].)
Since the Gauteng MEC had failed to show that DZ's claim was unreasonable, her amended plea would fail on the existing common law (see [26]).
Because development of the common law could not happen in a factual vacuum, and because the Gauteng MEC had failed to provide a factual matrix for it, the court would not extend the common law in the way sought by her (see [28] – [32], [57]).
The fact that the appeal would therefore fail did not, however, mean that the door to further development of the common law was shut: if in the future the factual evidence was sufficiently cogent, it could carry the day (see [58]).
The judgment discussed the possibilities for the future development of the common-law rules (see [37] – [55]). It pointed out that compensation in a form other than money was not incompatible with the aim of redressing damages, and that the actual rendering of medical services would fulfil the twofold purpose of redressing damage and compensating the victim (see [43] – [44]). While the common-law rule of measurement in money was not contrary to constitutional principles, the right to universal healthcare and the state's obligation to provide it introduced factors that did not exist in the pre-constitutional era (see [45]). An award for periodic payments was an alternative to a lump-sum award, and both forms were compatible with the Constitution (see [49], [54]). An accommodation between the two systems at the individual level was called for (see [54] – [55]). Periodic payments subject to a 'top-up/claw-back' would comply with general principles (see [56]).

Held per Jafta J concurring

The once and for all rule prohibited a multiplicity of lawsuits based on a single cause of action, not periodic payments (see [75] – [76], [79], [87]). And even if the common law precluded payment of damages in instalments, this did not mean that the granting of such order was not competent (see [89]).

HOTZ AND OTHERS v UNIVERSITY OF CAPE TOWN 2018 (1) SA 369 (CC)

Costs — Constitutional litigation — Proper approach — Unsuccessful party in constitutional litigation against state — Litigants involved in student protests at university campus, which turned violent, in support of free and decolonised education — Unsuccessfully opposing interdict brought against them by university — Court ordering unsuccessful litigants to pay costs — Students protesting in vindication of rights to education, freedom of association, freedom to demonstrate and freedom of expression — Given constitutional context, inappropriate to award costs against students.

During February 2016 on the campus of the University of Cape Town (UCT) a student protest took place in which the applicants — students and ex-students — participated. The protest fell under the umbrella of the '#RhodesMustFall' and '#FeesMustFall' movements sweeping across South African higher-learning institutions, whose respective goals were the decolonisation of education in South Africa, and free education. The protest at UCT, however, went beyond being peaceful and non-violent. Unlawful conduct in which the applicants were implicated took place — inter alia, the destruction of property through acts of vandalism and arson, and violence and threats of violence. An interdict at the instance of UCT was successfully obtained in the High Court against the applicants, who had opposed it, inter alia, prohibiting them from committing various unlawful acts on the campus. The order went as far as barring the applicants from entering the campus, unless they had the consent of the university to be there. The applicants were ordered to pay costs. On appeal the SCA largely confirmed the interdict, but limited its scope, finding that, in excluding students from campus, the order of the court a quo violated the applicants' rights of free movement. The SCA confirmed the costs order against the applicants.

The Constitutional Court granted the applicants leave to appeal. On the merits, it agreed with the decision of the SCA (see [18] – [20]). However, it found that, in ordering the applicants to pay the costs of UCT in respect of the Hight Court proceedings, the High Court and the SCA had failed to exercise their discretion judicially (thus entitling it to interfere with the costs award). More particularly, the matter called for them to apply the *Biowatch* principle, which they did not do. (See [37].) That principle provided that in constitutional litigation an unsuccessful litigant in proceedings against the state ought not to be ordered to pay costs. This general rule was subject to various exceptions, for example, where the unsuccessful party had litigated in a frivolous or vexatious manner. (See [22] – [25].)

The starting point, the Constitutional Court held, was to have regard to the nature of the issues (see [29], [31] and [33]). In addition to seeking to vindicate their rights to freedom of association, freedom to demonstrate and freedom of expression, the applicants had embarked on their protests (which led to the interdict) in support of their belief that the state and universities should provide free and decolonised education to South Africans. The issue was one impacting the right to education in terms of s 29 of the Constitution of not only the protesters, but also of South African students generally. (See [31], [33] and [39].) While the applicants' conduct went beyond peaceful and non-violent protest, which left the university with no choice but to interdict their unlawful conduct, this constitutional context should have been taken into account by the High Court and the SCA in deciding costs. Although the applicants were unsuccessful, the courts a quo should have considered the chilling

effect the costs order would have on the litigants, in the context of constitutional justice, and erred in not doing so. (See [32] and [34].) The Constitutional Court further held that the applicants had not acted in a frivolous or vexatious manner in opposing the interdict application. This fact was illustrated by the finding — indicating at least partial success on the part of the applicants — by the SCA that the order of the High Court was overbroad. (See [37].) In conclusion, the Constitutional Court upheld the appeal on costs, and ordered that each party pay its own costs in the High Court, Supreme Court of Appeal and Constitutional Court (see [40]).

ETHEKWINI MUNICIPALITY v MOUNTHAVEN (PTY) LTD 2018 (1) SA 384 (SCA)

Land — Rights in — Registered title condition entitling transferor to claim retransfer of land if transferee not erecting building of prescribed value within prescribed period — Nature of rights created — Right to claim retransfer personal right, not limited real right.

Prescription — Extinctive prescription — Debt — What constitutes — Claim for retransfer of property under contractual reversionary clause registered as title condition — Such claim constituting 'debt' as contemplated in Prescription Act 68 of 1969, ch III.

Prescription — Extinctive prescription — Debt — Meaning — Including obligation to deliver immovable property — Prescription Act 68 of 1969, ch III.

A transferor's right in terms of a contractual reversionary clause incorporated as a title condition, to claim retransfer should the transferee fail to erect a building of a specified value within a specified time —

- is a personal right, not a limited real right (see [13] – [16]); and
- such claim for retransfer constitutes a 'debt' for the purposes of prescription (see [16]), this because the meaning of 'debt' in ch III of the Prescription Act 68 of 1969 includes an obligation to deliver immovable property.

HOME TALK DEVELOPMENTS (PTY) LTD AND OTHERS v EKURHULENI METROPOLITAN MUNICIPALITY 2018 (1) SA 391 (SCA)

Delict — Elements — Unlawfulness or wrongfulness — City manager's non-issue of s 82 certificates to developers — Not wrongful (majority judgment) — Absence of 'something more' justifying liability — Wrongful (dissenting judgment) — Abuse of power justifying such liability — Town Planning and Townships Ordinance 15 of 1986.

In a delictual action, first and second appellant, who were property developers, claimed damages from respondent municipality. Their assertion was that the city manager had mala fide failed to issue them with s 82 certificates and that the failure had caused them financial losses. (The municipality eventually issued the certificates, but the delay before issue was said to have resulted in: lost interest on invested property-sales proceeds (first and second appellant); lesser proceeds (second appellant); and unnecessary payment of rates and taxes (first and second appellant). (See [46].)
Third appellant, which was also a property developer, claimed that the manager's behaviour dissuaded it rectifying the municipality's erroneous non-proclamation of

land third appellant owned; and that the delay before proclamation occasioned it financial loss. (That included, allegedly, reduced sales proceeds (owing to a market decline); and lost interest on the invested proceeds.) (See [46].)
The High Court dismissed the action, and the appellants appealed to the Supreme Court of Appeal.
The issues were:
(1) Whether the failure to issue the certificates was wrongful. *Held*, per Ponnan JA, that it was not (see [44]):

- The Ordinance provided for an internal appeal against the refusal of a s 82 certificate (s 139), which suggested its drafters did not intend there to be a damages action for such a refusal. (See [22] – [23].)
- 'Something more' justifying liability, was not present. (Appellants asserted it to be mala fides on the city manager's part (an attempt to extort a benefit for issue of the certificates); or an ulterior purpose. But they failed to prove either.) (See [24], [27], [30], [32], [35], [39] and [42].)

(2) Whether the failure to issue the certificates and consequent delay was the factual cause of first and second appellant's loss? *Held*, that it was not:

- After non-issue of the certificates, first appellant was aware there would be delay (and loss) were it to proceed with its development, yet it did so. (See [45] and [47].)
- First and second appellant's sales agreements, which non-issue of the certificates had allegedly delayed in implementation, so causing loss, could not ground any claims, in that they were unlawful and void. (See [48] – [50].)

(3) Whether the failure to issue the certificates was the factual or legal cause of third appellant's alleged loss. *Held*, that it was not the factual cause: third appellant's (self-interested) non-insistence on proclamation of the township was. Nor was it the legal cause: the market-decline-related loss was unforeseeable. (See [51] – [52].)
Appeal dismissed (see [53]).
In a concurring judgment, Schippers JA held that:

- The non-issue of the s 82 certificates was not the factual cause of first or second appellant's loss. The sales agreements, giving rise to the proceeds, which would have been invested earlier, and which would have generated more interest, were contrary to the Ordinance, and to be regarded as not having been concluded. (See [68] and [85].)

Regarding the allegedly loss-causing delay before third appellant's properties were proclaimed: it was not factually caused by non-issue of the s 82 certificates, but by third appellant's non-insistence on proclamation. (See [88].)

- Nor was non-issue the legal cause of appellants' loss. This as the loss arose from an illegality (first and second appellants); was too distant from the non-issue (first – third appellants); and in its forms (lost interest (first and second appellants); and reduced property value owing to a market decline (second and third appellants)), was unforeseeable to the municipality. The relationship of municipality and appellants was also insufficiently proximate. (See [75], [83], [86] and [91].)
- Moreover, the claims for unnecessary rates and taxes were incompetent — they were settled. (See [80] and [85].)
- Appellants had also failed to prove their damages (see [93], [105]): there was no evidence first or second appellant would have invested the sales proceeds, or that third appellant suffered a loss (see [92], [101] – [102]); and first and second appellant's allegedly lost interest, derived from unlawful agreements, was uncognisable as damage (see [104]).

Cachalia JA, dissenting, would have upheld the appeal (see [223]). He held as follows:

- A state employee need not have acted fraudulently or for illicit gain, in order to find the state's conduct wrongful.
- Public and legal policy would generally require the imposing of delictual liability for loss resulting from an abuse of power. (Abuse of power embraced dishonesty, bad faith and improper or ulterior purpose.)
- The city manager's dishonesty and mala fides in, and in connection with, the withholding of the certificates was an abuse of power, and wrongful. So too, his attempts to extort a stand in one of the developments; transfer of a shareholding to a third party; and his extortion of a sales list, were mala fide exercises of public power, and wrongful.
- Non-issue of the certificates was the factual cause of first and second appellant's loss. (This was not negated by the sales agreements concerned being invalid. It was also the factual cause of the delay in proclaiming third appellant's properties and the resultant loss.)
- And it was the legal cause of their loss.

MAHARAJ AND OTHERS v MANDAG CENTRE OF INVESTIGATIVE JOURNALISM NPC AND OTHERS 2018 (1) SA 471 (SCA)

Investigation under s 28 of NPA Act — Proper exercise of NDPP's discretion — Discretion to be exercised on case-by-case basis, weighing up public interest against likelihood of harm — Failure to consider s 28 record rendering decision to refuse permission irrational — National Prosecuting Authority Act 32 of 1998, s 41(6)(c).

Prosecuting authority — National Director of Public Prosecutions — Discretion to permit or refuse disclosure of record of evidence given at investigation under s 28 of NPA Act — Proper exercise of — National Prosecuting Authority Act 32 of 1998, s 41(6)(c).

In terms of s 41(6)*(c)* of the National Prosecuting Authority Act 32 of 1998 (the NPA Act), 'no person shall without the permission of the National Director . . . disclose to any other person . . . the record of any evidence given at an investigation as contemplated in section 28(1)'. In this case the National Director of Public Prosecutions (the NDPP) refused the *Mail & Guardian* (the *M&G*), a national newspaper, permission to disclose the record of an interview conducted in 2003 in terms of s 28 of the NPA Act by the former Directorate of Special Operations with Mr Maharaj and his wife. This refusal frustrated the publication of an *M&G* article claiming that Mr Maharaj — a former Cabinet Minister and presidential spokesperson — and his wife had failed to disclose certain information, and provided false information during the s 28 investigation.

The NDPP notified the *M&G* of its refusal in a letter setting out its reasons which included 'compelling considerations of policy' and 'the balancing of different interests involved' (see [10]). In response, the Mandag Centre of Investigative Journalism NPC, its managing partner and the *M&G*, brought a successful High Court application to have the NDPP's refusal set aside; the court granting the requested permission and also dismissing the Maharajs' application to have allegations referring to the s 28 record struck out of the applicants' founding affidavit. On appeal, the Supreme Court of Appeal first dealt with the Maharajs' appeal

(against the dismissal of the striking-out application) and held that it was without merit (see [17 – 20]).
As to the NDPP's appeal against the rest of the High Court's order, the main issue was whether the NDPP had properly exercised her discretion to give or deny permission to disclose the s 28 record of evidence. This was against the factual background that the Maharajs' s 28 testimony was already in the public domain (see [7]), and that the NDPP conceded that she did not consider the s 28 record in arriving at her decision but was only aware of it in 'general terms' (see [24]).
Held
Section 41(6) constituted a limitation on the right to freedom of expression contained in s 16 of the Constitution: it limited freedom of the media as also the correlative right of the public to receive and impart information. The NDPP, in exercising its discretion, must strike the appropriate balance, in each case, between its purpose — securing the integrity of the criminal justice system — and upholding freedom of expression. The *M&G* submitted its request for permission in circumstances where it had not just a right to publish, but indeed also a duty to keep the public informed on an issue of high public interest involving a senior and high-ranking government official. On the facts of this case, no valid countervailing concern regarding the integrity of the administration of the criminal justice system was discernible. (Paragraphs [21] – [22].)
The express conferral of a discretion clearly contemplated that there would be circumstances where disclosure would be appropriate. The Act did not spell out the factors which the NDPP must consider in exercising her discretion in terms of s 41(6) of the Act. However, a consideration of the s 28 record would be the first and most obvious factor. That it was not properly considered rendered the decision irrational; it was susceptible to being set aside for this reason alone. (Paragraphs [23] – [26].)
In exercising her discretion the NDPP must weigh up public interest in the publication against the likehood of harm. This case concerned the probity of a senior public office bearer, implicating overarching constitutional values of accountability, openness and responsiveness. Our courts recognised the key role the media played in a democratic society in ensuring that members of the public were informed about issues that were in the public interest. Given the scourge of corruption, the role of the media in reporting on such activities is indubitably in the public interest. Once confronted with the possible implications of the appellants' participation in the investigation, the NDPP was obliged to consider the record carefully to ascertain whether the issues raised were genuinely of public interest and what the extent of that interest might be. Her reliance on public interest, based only on a general awareness of the investigation, suggested a superficial consideration thereof. (Paragraphs [27] – [29].)
The very purpose of s 41(6) was to require the NDPP to exercise an appropriate discretion on a case-by-case basis — to examine each application with care and to exercise a proper discretion by balancing the competing interests at stake and weighing the relative degree of risk involved. Such an individualised enquiry was more finely attuned to reconciling the competing rights at play than was the rigid, inflexible denial which characterised the approach encountered here. Consistent with such approach, mere conjecture or speculation that prejudice might occur would not be enough to refuse permission. (Paragraphs [32] and [39].)
The NDPP's rigid and inflexible adherence to the policy of non-disclosure meant that she had completely lost from sight that the appellants had themselves placed their

evidence in the s 28 proceedings in the public domain. The fact that extensive prior publication of the allegations had taken place was an important consideration; the public-domain doctrine — that it was basic to the principle of confidentiality that information could not be protected once it lost its secrecy — was well established in our and in international case law.
The factors that appeared to have weighed with the NDPP neither individually nor collectively survived scrutiny. This was a case where the administrative body should not be given a further opportunity to make a new decision; one where the court itself would make the decision. It followed that the appeals failed.

SMYTH AND OTHERS v INVESTEC BANK LTD AND ANOTHER 2018 (1) SA 494 (SCA)

Company — Oppressive conduct — Relief — Who may apply — Whether beneficial owner of shares, whose shares registered in name of nominee, may apply — Relief available only to 'member' of company — 'Member' confined to persons entered in company's register of members — Beneficial owner of shares not included in register — Accordingly not entitled to apply for relief from oppressive conduct — Further, not eligible to join as co-applicants with relevant nominees — Companies Act 61 of 1973, ss 252 and 103.

In the High Court the first to seventh appellants — beneficial owners of shares in the company Randgold (second respondent), which shares were registered in the names of their nominees — brought an application under s 252 of the Companies Act 61 of 1973. Their complaint was that Randgold, in entering into certain agreements with Investec (first respondent) and another party, had committed acts 'unfairly prejudicial' to them within the meaning of s 252. They sought various declaratory relief, as well as an order that Investec purchase their shares. Alongside the above 'main application' were applications brought by various other beneficial shareholders (8th – 34th appellants) and nominee shareholders (35th – 41st appellants), in which they sought leave to intervene in the main application, similarly seeking relief under s 252.
The court granted the applications to intervene of the various nominee shareholders. The court, however, dismissed the main application and intervention applications by the various beneficial shareholders on the basis of lack of legal standing: the remedy under s 252 was only available to 'members of a company' (section quoted in [15]) of judgment); beneficial shareholders, the court held, and contrary to the assertions of the appellants, did not fall into such a category, in the light of the clear meaning of 'member' as provided in s 103 (section quoted in [16] of judgment). The court rejected the alternative argument raised by the appellants that the beneficial owners, if found not to be members of Randgold, were nevertheless entitled to intervene in the main application as co-applicants with their respective nominees on the ground that they had a direct and substantial interest in the subject-matter of the main application. The appellants were granted leave to appeal to the Supreme Court of Appeal, where the above two points formed the focus of the proceedings.
Held, that, implicit in the definition of 'member' located in s 103 of the Act was that, for a person to become a member, it was necessary that the name of such a person had to be entered in the register of members of the company concerned (see [19]). And in South African law, in respect of shares held by a nominee on behalf of a

beneficial shareholder, only the nominee was eligible to have his or her name entered in the register of members, and who would only become a member once his or her name was so entered (see [23]). Accordingly, a beneficial shareholder, not being a member of a company, could not avail him- or herself of the s 252 remedy.
Held, further, that the purposive interpretation of s 252 of the Act favoured by the appellants — that, given that it was the beneficial owner who sustained the prejudice sought to be redressed by s 252, he or she should be considered a 'member' for the purposes of that section, despite the meaning provided in s 103 (see [30] – [31]) — could not be accepted. This interpretation would do violence to the language of the provision, by placing upon it a meaning of which it was not reasonably capable. (See [45] – [46].)
Held, as to the alternative argument, that the rules and common-law principles relating to joinder of interested parties could not avail the appellants in circumstances where they sought to be joined as co-applicants with their nominees and invoke a statutory remedy that specifically catered for someone who was a member of the company in terms of the Act. To allow them to do so would fly in the face of the clear provisions of s 252 of the Act, which unambiguously confined the remedy only to members of a company, which the appellants were not. (See [54].)
Accordingly, appeal dismissed with costs.

YARONA HEALTHCARE NETWORK (PTY) LTD v MEDSHIELD MEDICAL SCHEME 2018 (1) SA 513 (SCA)

Enrichment — Condictio indebiti — Requirements — Excusability — Exceptions — Excusability of mistake not requirement in case of mistaken payments by medical aid schemes.

Enrichment — Condictio indebiti — Requirements — Impoverishment — In case of bilateral performances under void or putative contracts — No requirement that plaintiff claiming under condictio must prove value of, or tender return of, what they received — If plaintiff enriched by performance of defendant, latter should counterclaim with condictio indebiti.

Over the period 6 August 2007 to 17 July 2009, Medshield, a medical scheme registered in terms of the Medical Schemes Act 131 of 1998, made a number of payments to the company Yarona Healthcare Network (Yarona). Medshield was however mistaken in its belief that such amounts were owing — purportedly for the provision by Yarona to Medshield of network management services. There had never in fact been any contract between the parties. In the High Court, Medshied, by way of the *condictio indebiti*, sought recovery from Yarona of the sum of such payments, arguing that they had been made in the bona fide and reasonable belief that they were owing, when in truth they were not, and that Yarona had been unjustifiably enriched by the payments and Medshield correspondingly impoverished. Medshield was successful in its claim to the High Court. Yarona was granted leave to appeal to the SCA.
Aside from unsuccessfully raising a special plea of prescription (see [61] – [66]), Yarona defended the relief in the SCA on the following grounds: *(a)* Yarona argued that Medshield could not succeed on the condicto indebiti, because it had failed to discharge the onus of proving that its error in making payment had been 'excusable'. Medshield disputed that its error had been inexcusable, but added, in the alternative, that in the circumstances of the present case excusability was not a

requirement. More particularly, it argued that the exception to this requirement previously recognised in relation to mistaken payments by executors, as well as liquidators and trustees, should similarly apply to errors made in the administration of a medical scheme's affairs. *(b)* Yarona further argued that Medshield had failed to prove its true impoverishment, in that it had not taken into account the value that it had received from services in fact provided to it by Yarona, in return for payment. *Held*, that, in light of the evidence, Medshield had been inexcusably slack in approving payment to Yarona (see [37]). However, despite this, Medshield's right to recover such payments by way of the *condictio indebiti* was not barred (see [46]). A medical scheme existed solely for the benefit of its members, who were often vulnerable persons. Legislation closely regulated it, to ensure prudent administration of its funds, and imposed a duty upon the board charged with running the scheme's affairs to always act in the best interests of the members. In such circumstances, considerations of policy demanded that an exception to the excusability requirement be recognised, such that a medical scheme should, in the interests of members, be able to recover under the *condictio indebiti*unowed payments even though its office bearers had acted with inexcusable slackness in making such payments. *Held*, further, that Medshield had correctly proven its impoverishment in the sum of the unowed payments made to Yarona (see [52] – [53]). To the extent that Medshield might itself have been enriched at Yarona's expense, given the services provided to it, the appropriate course would have been for Yarona to counterclaim also using the *condictio indebiti*. It did not do so. (See [54] and [60].) But there was no authority in law that a person who instituted a *condictio indebiti* in respect of a performance made under a putative or void contract had to prove the value of what was received from the defendant, or to tender the return of what was received (see [49]). Accordingly, appeal dismissed

AJP PROPERTIES CC v SELLO 2018 (1) SA 535 (GJ)

Eviction — Discretion of court — Common-law discretion of court to stay or suspend execution of eviction order — Commercial property — Cancellation of lease should not, where lessee has complied with its terms, result in demise of tenant's business — Court suspending eviction to afford shopping mall tenant three months to relocate.

Lease — Eviction — Suspension of eviction order — Discretion of court — Commercial property — Cancellation of lease should not, where lessee has complied with its terms, result in demise of tenant's business — Court suspending eviction to afford shopping mall tenant three months to relocate.

The applicant, a shopping mall landlord, sought the eviction of the respondent, a shop owner with whom it had concluded a standard-form five-year lease in 2010. Since the lease continued beyond its expiry date, clause 2.4 of the lease, which, like the common law, set a one-month notice period, was triggered. On 30 May 2017 the applicant gave the respondent one month's notice, requiring it also to return the property to its original condition. It appeared that by this time the applicant had already secured a new tenant, Pepkor, for the shop. In its papers the respondent argued that the one-month notice period was *contra bonos mores* because, inter alia, of the potentially devastating effect eviction would have on the business and its employees.

Held: While a termination clause that mirrored the common law could never be *contra bonos mores*, this was not the end of the present enquiry: the court retained a residual common-law power to stay or suspend (but not decline) an eviction order so as to give the tenant a reasonable time to vacate the premises (see [14] – [17], [21]). Secondly, the court had to take account of the commercial realities underlying the balancing of the parties' competing contractual or other economic interests (see [23], [26]). And, thirdly, the court had to consider inroads made on freedom of contract by the *contra bonos mores* principle and s 39 of the Constitution (see [28]). The court's powers to stay or suspend were the same whether the eviction was from residential or commercial property. In the latter case a reasonable period was determined by the nature of the commercial activity undertaken and time required for the tenant to relocate it (see [35]).
Relevant to the court's decision whether to stay the present eviction order were the unequal bargaining power of the parties, the fact that the respondent never breached the lease, and prevailing commercial realities such as that the applicant had negotiated the new lease with Pepkor without informing the respondent (see [37] – [41]). It was in the interests of justice to shun an applicant who, despite having secured a new tenant, failed to afford the respondent a fair opportunity to relocate when it could have done so (see [42]). The economic reality was that the respondent faced financial ruin if it did not find suitable alternative premises (see [44]). It would be inimical to the interests of justice to compel the respondent to vacate immediately instead of affording it the opportunity of finding suitable alternative premises that would serve not only its interests but that of its clientele (see [46]). In all the circumstances real and substantive justice required that the respondent be afforded three clear months to relocate (see [50]). So ordered

BEADICA 231 CC AND OTHERS v TRUSTEES, OREGON UNIT TRUST AND OTHERS 2018 (1) SA 549 (WCC)

Contract — Enforcement — Public policy — Court refusing to enforce strict terms of lease where tenant, though in technical breach, substantially compliant and sanction claimed by landlord (cancellation and eviction) disproportionate.

Lease — Cancellation — Court's power to interfere — Failure by tenant to renew as stipulated — Court on public policy grounds refusing to enforce strict terms of lease where tenant, though in technical breach, substantially compliant and sanction claimed by landlord (cancellation and eviction) disproportionate — Court declaring that option to renew validly exercised and barring landlord from evicting tenant.

When the applicants, four black-owned franchise operators, failed to comply with the notice period for the renewal of their leases, the respondents sought cancellation of the lease and eviction. The applicants applied for an order declaring that emails they sent the second respondent, though admittedly not strictly compliant with contractual requirements, nevertheless constituted a valid exercise of their renewal option. They argued that enforcing the strict terms of the renewal provisions, which would inevitably result in their eviction and the collapse of their businesses, would be contrary to public policy.
Held: This case turned on the question whether the applicants complied strictly in substance with the provisions of the lease (see [39]). When the contracts were concluded both sides envisaged that the franchise agreements would endure for ten

years, that applicants' businesses would be located in the leased premises, and that after five years the applicants would have a right (a substantively unqualified right) to renew their leases (see [40]).
The normative framework of the Constitution allowed a court to examine the substance of an agreement and to conclude that the sanction that might follow a strict application of a formal rule was insufficient to justify the relief sought where the key intention of the parties could be inferred from their agreement — in this case the lease and franchise agreements read together (see [43]). The sanction sought to be invoked by the respondents was disproportionate, given the parties' intention, when signing the agreements, to promote the economic interests of the applicants as historically disadvantaged persons (see [44]).
The court accordingly found that the applicants had, through their emailed communications with the second respondent, validly exercised the option to extend the leases and that the first respondent was prohibited from evicting the applicants until the end of the extended leases

ANNEX DISTRIBUTION (PTY) LTD AND OTHERS v BANK OF BARODA 2018 (1) SA 562 (GP)

Banking — Relationship between banker and client — Based on contract — Bank may terminate on reasonable notice or as contractually provided for — Motives irrelevant, save perhaps where there was abuse of rights — Termination on basis of reputational risk posed by client.

Interdict — Interim interdict — Requirements — No such thing in our law as 'interim-interim' interdict based on requirements other than those for common-law interim interdict.

Interdict — Interim interdict — Requirements — Balance of convenience — Weighing heavily in favour of party seeking to uphold integrity of established financial system and rule of law.

The applicants, the Oakbay group of companies linked to the controversial Gupta family, filed an urgent application for an interdict that would prohibit the respondent bank, the Bank of Baroda (the bank), from closing their accounts and calling up their loans. The bank made the decision to close the accounts on the grounds of reputational harm and the risks posed by the applicants' presumed involvement in money laundering.
In the present application the applicants sought 'interim-interim' relief to keep their accounts open until their application for an interdict was heard early in December 2017. The applicants argued that, for the proposed interim-interim relief, they were not required to prove the traditional requirements for an interdict, but merely had to show that there was a 'triable issue' that required the court's attention under s 34 of the Constitution. They also argued that the notice period given by the bank was not reasonable, that they would suffer irreparable harm because they would be unable to find another bank or pay their employees or suppliers, leading to their 'inevitable demise'.
Held: Although the proceedings were of an interim-interim nature, this did not absolve the applicants from having to establish the traditional requirements for an interim interdict, for if there was no merit in the 'main' December 2017 application for an interim interdict, there would be no purpose in granting the present one either.

Our law did not recognise a cause of action for an 'interim-interim' interdict based on requirements other than the existing common-law ones (see [8] – [9], [43]). The applicability of s 34 of the Constitution was never properly raised by the applicants, and while they had at least a prima facie right to be heard, it was subject to the requirements of substantive and procedural law.
The banker – client relationship between the parties was of a contractual nature and the bank's decision to terminate it was governed by the ordinary rules of contract, which allowed banks to terminate their contracts with clients on proper notice (see [22.4]). The bank was under no obligation to give reasons: its motives were irrelevant, save perhaps where there was found to be an abuse of rights (see [22.2]). Banks were fully entitled terminate on the ground that the client had a bad reputation or because of business or reputational risks (see [22.5] and [22.6]).
Apart from being the applicants' counterparty in the private-law sphere, the bank was also subject to statutory and other legal duties, under both domestic and international law, to report on and combat money-laundering and other unlawful activities (see [34] – [35]). Since the bank would be liable to administrative and even criminal penalties if it failed to comply with these duties, the logical course for the bank was to avoid these risks by cutting its ties with the applicants (see [36] – [37]). Such a decision would enhance the integrity of the financial system and enhance the rule of law (see [37]). The harm the bank would likely suffer if it were forced, against its will, to continue with its relationship with the applicants meant that it was entitled to terminate its banker – client relationship with the applicants and that their December 2017 application therefore had little prospects of success (see [41]). Since the bank sought to uphold the integrity of the financial system while the applicants were suspected of subverting it, the balance of convenience also clearly favoured the former (see [41]). Application dismissed.

HARPER AND OTHERS v CRAWFORD NO AND OTHERS 2018 (1) SA 589 (WCC)

Trust — Trust deed — Interpretation — Descendants — Issue — Whether including adopted children — Constitution, ss 9 and 25.

In this case a trust's founder executed the trust deed in 1953. It provided that from his death, trust income could be paid to his children; and at the death of each child, that child's share of the trust's capital should be paid to the child's 'descendants'. If a child had no 'issue', its share of the capital would devolve to the other children or their descendants.
First applicant was a child of the founder; and second and third applicants were her adopted children. She applied for a declaration that 'descendants' and 'issue' included adopted children.
The court dismissed the application on the following grounds (see [37]).

- It was bound by *Cohen v Roetz*, which held that 'descendants' meant blood relations, and excluded adopted children. (See [9], [24] and [26].)
- The *Oxford Dictionary* suggested 'issue' meant blood descendants (see [25]).
- The founder's failure to indicate adopted children should benefit, suggested he intended them not to benefit . (The deed had to be given the meaning it had at the time of execution; and at the time the Children's Act of 1937 was in force. It provided that where a dispositional instrument predated an adoption (as here), property would

not devolve on the adopted child, unless this was clearly intended. (See [8], [21] and [24] – [25].))

- The adopted children's equality right was justifiably limited by the founder's right of ownership, encompassing his right to dispose of his property as he chose.

The applicants' alternate claim, for amendment of the deed, was dismissed on the basis that the preconditions therefor in the Trust Property Control Act 57 of 1988, were not met.

SINGH AND ANOTHER v MOUNT EDGECOMBE COUNTRY CLUB ESTATE MANAGEMENT ASSOCIATION TWO (RF) (NPC) AND OTHERS 2018 (1) SA 615 (KZP)

Voluntary association — Homeowners association — Conduct rules — Lawfulness of rules setting and enforcing speed limits on public roads within gated estate, and restricting domestic employees' access to such roads — Unlawful without authorisation and/or consent required under *NRTA* — No contractual arrangement between homeowners association and its members could remedy such illegality — National Road Traffic Act 93 of 1996, s 57(6).

The appellants, Messrs Singh and Ramnandh, were homeowners in a gated security estate and as such, members of the first respondent homeowner's association. The court a quo had dismissed their application challenging the lawfulness of the association's conduct rules regulating and enforcing speed limits on public roads within the estate ; and those controlling domestic employees' use of such roads (see [37] – [39]). It held the relationship between the association and the homeowners was located in contract, and the restrictions imposed by them were of a private nature arising out of the homeowners' voluntary choice of purchasing property on the estate. In respect of the domestic employee rules challenge, it held that the rules were non-restrictive. This case concerned the homeowners' appeal against that decision.

Held, as to the roads-rules challenge

The public-road status of the roads within the estate carried with it certain public-law consequences. Inherent in the concept of a public road was that the public had access to it, and that the regulatory regime was a statutory one — that of the National Road Traffic Act 93 of 1996 (the NRTA). Chapter IX of the NRTA contained various provisions having a bearing on the road rules as formulated and implemented by the first respondent. It was only the Minister of Transport or someone authorised by him, by virtue of delegated authority, who had the power to regulate any aspect of public roads. Significantly, s 57(6) of the NRTA obliged private bodies (such as the respondent association) to seek permission for regulating traffic on and access to public roads from the MEC and/or the municipality concerned. It was common cause that the respondent association did not apply for such permission at any stage. This failure rendered both the rules and the contractual arrangement with its members illegal.

The court a quo erred in failing to consider public-law aspects at all. The road rules clearly had public-law content, involving as it did the exercise of public power and the functions of a number of officials such as municipalities, traffic officials and the courts. The impugned rules were against public policy because they were in direct conflict with the relevant provisions of the NRTA. The respondent association and its

members could not contract out of the obligations imposed by the NRTA. No contractual arrangement could remedy such an illegality. The respondent association simply had no authority to regulate any aspect of public roads. (See [29] – [31] and [35] – [36] and [45].)

Held as to domestic employee rules challenge

The restrictions placed on domestic employees, with regard to their movements on the roads in the estate, flowed from a misconceived notion on the part of the first respondent that it was entitled to exercise control over the public roads in the estate through its conduct rules. The conduct rules physically denied domestic employees freedom to traverse the public roads in the estate, save in accordance with the first respondent's conduct rules. (From a constitutional point of view, their rights in this regard were severely restricted. The restrictive nature of these rules also affected other of their basic rights, such as the rights to human dignity, equality, freedom of association, freedom of movement, freedom of occupation and fair labour practices.) To the extent that these rules restricted the rights of domestic employees from freely being on and traversing public roads in the estate, they were therefore unreasonable and unlawful . It followed that the appeal would succeed

ALI AND OTHERS v MINISTER OF HOME AFFAIRS AND ANOTHER 2018 (1) SA 633 (WCC)

Persons — Citizenship — Naturalisation — South African Citizenship Act providing that child born in SA of non-SA parents qualified to apply for citizenship upon becoming major, if had lived in SA from date of birth — Interpretation — Whether provision, introduced with effect from 1 January 2013, applying only to persons born after such date — Provision applying to persons who meet requirements of section, irrespective of whether they were born before or after 1 January 2013 — South African Citizenship Act 88 of 1995, s 4(3).

Section 4(3) of the South African Citizenship Act 88 of 1995, which provision was introduced by the South African Citizenship Amendment Act 17 of 2010, came into operation on 1 January 2013. It provided that a child born in South Africa of parents who were not South African citizens qualified to apply for South African citizenship upon becoming a major, if he/she had lived in the Republic from the date of birth to the date of becoming a major. The respondents (the Minister of Home Affairs and the DG of Home Affairs) had refused the s 4(3) citizenship applications of the applicants on the basis that, as they saw it, the provision could not apply retrospectively to persons, such as the applicants, who had been born *before* 1 January 2013.
In the present matter — in which the applicants sought various relief, including an order directing the respondents to grant their citizenship applications — the court found to be mistaken the respondents' understanding of the Act. It held that the correct interpretation was that the section applied to persons born, whether before or after 1 January 2013, in South Africa to non-South African parents and who had attained majority after 1 January 2013. The applicants had met such requirements, and were thus entitled to have their applications considered. The court rejected the argument that on this interpretation there was an incorrect application of retrospectivity. Further, the court held that the interpretation of the Act in the manner favoured by the respondents — such that those who had been born before 1 January 2013 but who otherwise met the requirement of the Act were excluded from

protection — took no account of a court's duty as per s 39(2) of the Constitution to interpret statutes in a manner that promoted the spirit, purport and objects of the Bill of Rights. On the respondents' interpretation, the rights to equality and dignity were undermined. The court ultimately granted a declarator on the correct interpretation of the Act and ordered the respondents to consider the applications of the applicants.

RAHUBE v RAHUBE AND OTHERS 2018 (1) SA 638 (GP)

Constitutional law — Legislation — Validity — Upgrading of Land Tenure Rights Act 112 of 1991, s 2(1) — Automatic conversion of certain land tenure rights into ownership — Provision unconstitutional and invalid to extent that it fails to afford opportunity, prior to conversion, to occupants and affected parties lacking tenure rights to make submissions to appropriately established forum — Order made with limited retrospective effect and suspended for 18 months to give legislature opportunity to remedy defect.

Section 2(1)*(a)* of the Upgrading of Land Tenure Rights Act 112 of 1991 provides for the automatic conversion into ownership of '(a)ny land tenure right mentioned in Schedule 1 . . .'. The first respondent, Mr Rahube, became the owner of property by virtue of his land tenure rights in respect thereof having been so converted to full ownership. His tenure rights were conferred by a deed of grant — a category included in sch 1 to the Upgrading Act — issued in his favour on 13 September 1988 in terms of Proclamation R293 of 1962. * Section 9(1) of sch 2 to the Proclamation provides for the issuing of a deed of grant in respect of residential units but limits its issuing to the head of the family who desires to purchase a dwelling for 'occupation *by him* and members of *his family* for residential purposes' (own emphasis).
The applicant and her brother (Mr Rahube), together with other family members, had moved into the property concerned in 1970. In 1987 the relevant authority, acting under the Proclamation, as a precursor to issuing the deed of grant, issued a certificate of occupation in Mr Rahube's favour, listing other members of the family, including the applicant, as occupants. This case concerned her application for, inter alia, an order declaring s 2(1) of the Upgrading Act unconstitutional to the extent that —

- it deprived occupants of the property who were not registered on a deed of grant of the opportunity to claim ownership of the property, an exclusion that was based on gender discrimination in that the Proclamation excluded women from consideration as rights-holders (see [55]);
- it failed to ensure that occupants of property subject to a land tenure right listed in sch 1 thereto were given notice and opportunity to be heard prior to the conversion of those rights into full ownership.

Held
The land tenure rights that the Upgrading Act sought to recognise and convert in this case had been acquired under a legislative or regulatory scheme that was discriminatory. Given the sexist nature of the Proclamation, the applicant would not have succeeded in becoming the holder of a land tenure right in respect of the property she occupied. That being the case, the Upgrading Act perpetuated the exclusion of women from the rights of ownership insofar as it provided for automatic conversion and failed to provide any mechanism in terms of which any other competing rights could be considered and assessed and a determination made. It

followed that s 2(1) of the Upgrading Act was unconstitutional in that it violated her right to equality. (Paragraphs [50] – [51] and [61] and [63].) The Upgrading Act's automatic conversion mechanism was also unconstitutional in that the lack of notice of the conversion and the absence of a procedure for raising issues with the conversion of land rights into ownership, defied the *audi alteram partem* principle. (See [59] and [61].)
As to the order, it would be declared that s 2(1) of the Upgrading of Land Tenure Rights Act 112 of 1991 was unconstitutional and invalid — with retrospective effect to 27 April 1994, the operative date of the interim Constitution — insofar as it automatically converted holders of land tenure rights into owners of property, without, prior to the conversion of the land tenure rights into ownership, providing the occupants and affected parties lacking ownership rights notice or opportunity to make submissions to an appropriately established forum. This declaration would be suspended for 18 months to afford Parliament an opportunity to craft a mechanism to deal with instances where aggrieved parties may well seek redress under circumstances where a grant of land tenure rights and automatic conversion are considered unfair and unjust.

SACR FEBRUARY 2018

DIRECTOR OF PUBLIC PROSECUTIONS, GAUTENG v PISTORIUS 2018 (1) SACR 115 (SCA)

Murder — Sentence — Imprisonment — Accused convicted on basis of dolus eventualis, having shot girlfriend through wooden toilet door with heavy-calibre pistol — Accused not taking court into his confidence as to circumstances of offence and not displaying any remorse — Sentence of six years' imprisonment shockingly lenient and no justification for not imposing statutory minimum of 15 years' imprisonment.
The respondent's conviction by the High Court for culpable homicide had been set aside on appeal and the matter remitted back to the High Court for sentence on the basis that the respondent was convicted of murder with dolus eventualis. He had shot his girlfriend with a heavy-calibre pistol through the wooden door of a toilet in his home, alleging that he thought that there was an intruder in the toilet. In the subsequent sentencing proceedings, the High Court found that there were substantial and compelling circumstances justifying a sentence less than the statutory minimum of 15 years' imprisonment that would otherwise have to be imposed, and sentenced him to six years' imprisonment. In a further appeal by the state against the sentence,
Held, that it was difficult to believe that the respondent was, as found by the High Court, genuinely remorseful: he had failed to explain why he fired the fatal shots and had failed to take the court fully into his confidence. It was clear that the respondent was unable to appreciate the crime he had committed. The logical consequence was that he displayed a lack of remorse and did not appreciate the gravity of his actions. (See [21].)
Held, further, that the trial court had overemphasised the respondent's personal circumstances (see [22]); it seemed to have given rehabilitation undue weight as against the other purposes of punishment, being prevention, deterrence and retribution (see [23]); and there were no substantial and compelling circumstances which could justify the departure from the prescribed minimum sentence. It had erred

in deviating from the prescribed minimum sentence by imposing a sentence that was shockingly lenient, to the point where it had the effect of trivialising the serious offence. The facts demanded the imposition of the minimum sentence of 15 years' imprisonment, to be ameliorated by the 12 months of imprisonment and seven months of correctional supervision already served. (See [24] – [25].) The sentence was accordingly increased to imprisonment for a period of 13 years and five months.

ZUMA v DEMOCRATIC ALLIANCE AND OTHERS 2018 (1) SACR 123 (SCA)

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

On 28 December 2007, 10 days after he was elected president of the African National Congress (the ANC) at its elective conference, Mr JG Zuma was indicted on criminal charges including racketeering, corruption, money- laundering and fraud. The prosecuting team wanted the indictment served as soon as possible, without regard to political considerations, but the Acting National Director of Public Prosecutions at the time (the ANDPP), Mr Mpshe (on his version of events), was persuaded by Mr McCarthy, at the time the Director of Special Operations (the DSO), to hold service over until after the ANC's elective conference. Mr Mpshe had also consulted with the Minister of Justice and Constitutional Development who indicated that it would be best to serve the indictment after conference so as not to create an impression of political interference. Mr Mpshe accordingly informed the prosecuting team that he had decided to delay the indictment until after conference.

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

The impact of the recordings on their case against Mr Zuma was the subject of a number of discussions between Mr Mpshe, his deputies and the prosecution team. All agreed that the prosecution was untainted (see [19]). Yet, on 1 April 2009, Mr Mpshe and his deputies — without consulting the prosecution team — decided to discontinue the prosecution. The minutes of that meeting recorded that it was

specifically decided not to advise the prosecution team of the decision until shortly before its announcement .

Mr Hofmeyr, a Deputy National Director of Public Prosecutions and head of the Asset Forfeiture Unit of the NPA, was the most vociferous[3] of those within the NPA management in advancing the argument that the prosecution should be discontinued; notes of meetings that Mr Mpshe held with the NPA management recorded Mr Hofmeyr as being pessimistic about their chances of opposing an application for a permanent stay of prosecution.
On 6 April 2009 Mr Mpshe publicly announced the discontinuance of Mr Zuma's prosecution, issuing a detailed media statement explaining the decision with reference to both foreign and domestic case law. It was apparent from Mr Mpshe's statement that his decision to discontinue the prosecution was driven principally, if not exclusively, by what he considered to be Mr McCarthy's abuse of the prosecution process in relation to the timing of the service of the indictment (see [31]).

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

The High Court took a dim view of these contradictory versions (see [41]).
In this case, Mr Zuma and the NPA's consolidated applications for leave to appeal against the High Court's decision, both applicants conceded, shortly after the hearing commenced, that the NPA's decision to discontinue the prosecution was flawed, in particular that it was irrational, and that Mr Mpshe had incorrrectly invoked s 179(5)*(d)* of the Constitution and s 22(9) of the National Prosecuting Authority Act 32 of 1998 (the NPA Act) in reviewing his own decision to prosecute, when that section only authorised him to review decisions to prosecute of other directors of public prosecutions.
The Supreme Court of Appeal, in assessing whether these concessions were correctly made and whether there were additional reasons to set aside the decision to discontinue the prosecution —

Held: The recordings on which Mr Mpshe relied, even if taken at face value, did not impinge on the propriety of the investigation of the case against Mr Zuma or the merits of the prosecution itself. Collectively, the conversations did not show a grand

[3] synonyms: vehement, outspoken, vocal, forthright, plain-spoken, frank.

political design, nor was there any indication of clarity of thought on the part of Mr Ngcuka or Mr McCarthy about how either former President Mbeki or Mr Zuma would be decisively advantaged or disadvantaged by the service of the indictment on either side of the elective-conference time line. (See [79] and [94].)
The authenticity and legality of the recorded conversations on which the NPA relied ought to have received greater consideration. The question of the admissibility of the recordings as evidence and the issues referred to above were never seriously addressed by the NPA. Instead, the NPA allowed itself to be cowed into submission by the threat of the use of the recordings, the legality of the possession of which was doubtful. (See [63] and [94].)

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

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

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

The exclusion of the prosecution team from the final deliberations leading up to the decision to discontinue the prosecution appeared to have been deliberate, and was in itself irrational. They were senior litigators steeped in the case, acquainted with the legal issues and had a critically important contribution to make regarding the ultimate decision to terminate the prosecution. (See [89] and [94].)

The case law cited in his media announcements as forming the basis for the decision to discontinue prosecution did not, in fact, support it. On the contrary, the cases, including an appeal court decision overlooked by Mr Mpshe, were to the effect that questions of abuse of process in relation to a prosecution should be decided by a trial court and not be determined by way of an extra-judicial pronouncement. (See [28] – [29], [86] – [88] and [94].)

Mr Mpshe's stated purpose for discontinuing the prosecution was to preserve the integrity of the NPA and to promote its independence. In the circumstances set out above, this could hardly be said to have been achieved; the opposite was true. It was inimical to the preservation of the integrity of the NPA that a prosecution be discontinued because of a non-discernible negative effect of the timing of the service of an indictment on the integrity of the investigation of the case and on the prosecution itself. There was thus no rational connection between Mr Mpshe's decision to discontinue the prosecution on that basis and the preservation of the integrity of the NPA.

In reviewing his own decision to institute criminal proceedings against Mr Zuma, and ultimately making the decision to terminate the prosecution, Mr Mpshe wrongly invoked and relied on s 179(5)*(d)* of the Constitution and s 22(2)*(c)* of the NPA Act. These provisions deal with the review by an NDPP of a decision of a DPP and were inapposite. Thus, the concessions on behalf of Mr Zuma and the NPA that, on that basis, the decision to terminate the prosecution was liable to be set aside, was correctly made.

S v TAUNYANE 2018 (1) SACR 163 (GJ)

Murder — Sentence — Life imprisonment — When to be imposed — Planned or premeditated murder — What constitutes — Period of time between accused forming intention to murder and carrying out murder not always decisive.

The appellant was charged in the High Court with murder read with s 51(1) of the Criminal Law Amendment Act 105 of 1997. The summary of substantial facts provided by the state gave no indication as to which portion of part 1 of sch 2 it relied on and the court convicted him of 'murder read with s 51(1) of Act 105 of 1997'. It was only at judgment on sentence that it became clear that it was the aspect of planning and premeditation that was applicable — the trial court found that there had been such planning or premeditation and sentenced the appellant to life imprisonment.

In the present appeal against the conviction and sentence, the court held that the court a quo had erred in setting out a conviction of a planned or premeditated murder (in its judgment on sentence) when it had not dealt with this issue in the judgment on conviction. As to the finding of planning or premeditation, the court held that the period of time which might elapse between a perpetrator forming an intention to commit the murder, and carrying out such murder, was of importance but did not always provide the answer to the question whether the murder had been planned or premeditated.

The evidence indicated that the appellant's wife had entered a relationship with the deceased whilst the appellant was imprisoned. On the day of the murder, Father's Day, the appellant had gone to visit his children, armed with a loaded firearm. There was, however, no evidence indicating that he had planned to use the firearm that day, but rather that he regularly carried it. When the appellant arrived at his wife's home he found the deceased there and started insulting him and showed him that he was armed. A neighbour intervened in the argument that ensued and led the appellant away, but he later turned around and shot at the deceased (missing him).

When the deceased attempted to flee, the appellant followed him and shot him at least four more times.
The court held that, although his behaviour was provocative towards the deceased, it could not be found that there had been a deliberate course of action which was so planned as to increase the likelihood of success or enable evasion of arrest thereafter.
The appeal against the conviction of murder as contemplated in s 51(1) of Act 105 of 1997 accordingly had to be upheld and the conviction changed to one of a finding of murder with dolus directus, and the finding that the murder was premeditated set aside. In the circumstances, the sentence of life imprisonment was set aside and replaced with a sentence of 18 years' imprisonment.

S v KORDOM 2018 (1) SACR 173 (NCK)

Murder — Sentence — Factors to be taken into account — Provocation — What constitutes — Period between provocative act and commission of offence — Clear that short period between two actions — Provocation present.

The appellant, a 36-year-old widower with no previous convictions for offences involving violence, was convicted in a regional magistrates' court on his plea of guilty to murder, in that he had stabbed the deceased who had a short while earlier stabbed his father in the face with a broken bottle. The fatal stab wound was in the deceased's neck. It appeared that the appellant had, after the deceased's attack on his father in their home, fetched a knife and followed the deceased into the street where he inflicted the fatal wound.

The magistrate found that provocation played no part in the appellant's attack, holding that he had had sufficient time and opportunity to come to his senses after the attack on his father and had consciously chosen to take the law into his own hands. He further held that there were no substantial and compelling circumstances which justified a lesser sentence than the prescribed sentence of 15 years' imprisonment, and accordingly sentenced the appellant to that term of imprisonment.
On appeal against the sentence,
Held, that it was clear that there could not have been a considerable period of time between the attack on the appellant's father and his attack on the deceased, and the circumstances under which the appellant had stabbed the deceased could by no stretch of the imagination be described as peaceful. There was accordingly no factual basis for a finding that the appellant had consciously chosen to take the law into his own hands, rather than laying a charge against the deceased, and the magistrate's finding that provocation had not played a role was incorrect.
Held, further, that in the circumstances a sentence of 12 years' imprisonment would be appropriate.

S v ROSSOUW 2018 (1) SACR 179 (NCK)

Sentence — Prescribed minimum sentence — Criminal Law Amendment Act 105 of 1997 — Substantial and compelling circumstances — Consideration of on appeal — Proper enquiry required — Cumulative factors including provocation; consumption of alcohol; prior assaults of appellant by deceased; and that appellant mother of three

children and gainfully employed, constituting substantial and compelling circumstances justifying lesser sentence.

The appellant was convicted in a magistrates' court of murder and was sentenced to 15 years' imprisonment in terms of s 51(2) of the Criminal Law Amendment Act 105 of 1997. The incident had occurred at night following a scuffle between the appellant and deceased which ended in the appellant stabbing the deceased in the chest, the wound penetrating to his heart.
On appeal, the court dismissed the challenge to the conviction but held, in respect of the sentence, that it had to be kept in mind that ordinarily the test on appeal was not whether the court would have imposed a different sentence, but whether the court a quo had exercised its discretion judicially. Where a sentence had been imposed in terms of Act 105 of 1997 and the prescribed sentences could not be departed from lightly or for flimsy reasons, a proper enquiry was required on appeal as to whether the facts, that had been considered by the sentencing court, constituted substantial and compelling circumstances.
Held, that the personal circumstances of the appellant, namely that she was a 40-year-old first offender who had three daughters ranging between the ages of 19 and 4; that she had been gainfully employed and was an active participant in her church activities; that she had been moderately under the influence of alcohol during the commission of the crime; that the deceased had assaulted her on several occasions in the past; and that there had been a measure of provocation before the commission of the crime, the cumulative effect of these circumstances could be characterised as substantial and compelling, which would render the imposition of the minimum sentence unjust. An appropriate sentence in the circumstances would be one of 12 years' imprisonment.

S v SAYED AND OTHERS 2018 (1) SACR 185 (SCA)

Plea — Autrefois acquit — When available — There must have been judgment on merits of case — Conviction having — been set aside on irregular conduct of magistrate — Plea of autrefois acquit not available.

Appeal — Condonation — Failure to comply with court rules governing timeous noting of appeal and filing of record — Hopelessly deficient application for condonation not explaining long periods of delay, attorney's abdicating responsibility to administrative assistant who lacked legal knowledge — Such flagrant breach of rules not requiring examination of prospects of success — Condonation refused.

The appellants were convicted in a regional court of murder, attempted murder and kidnapping. Their case was referred to the High Court for sentencing, but that court, finding that the magistrate's conduct of the trial was such that the proceedings were rendered irregular and not in accordance with justice in terms of the Constitution, set aside the convictions whilst noting that it was not giving judgment on the merits of the case. The appellants were then charged again in the regional court on the same counts, to which they raised the plea of *autrefois acquit* and applied for a permanent stay of prosecution. The court dismissed the special plea on the grounds that they had not been acquitted on the merits of the case against them and refused a stay of prosecution. The High Court dismissed their appeals against those decisions.

In a further appeal and application for condonation for the late filing of the notice of appeal and record, the appeal having been filed more than two years late,
Held, that the applications for condonation were hopelessly deficient, there being no detailed account of the causes of delay and the long periods of time during which nothing was done in preparation of the appeal. It was settled law that an appellant had to apply for condonation without delay whenever he realised that he had not complied with a rule of the court. The attorney in the present case had done nothing in the preparation of the appeal nor furnished any explanation for the causes of the delay and had abdicated that responsibility to an administrative assistant in his employ who clearly had no knowledge of the law.
Held, further, in cases of flagrant breaches of the rules, especially in the absence of an acceptable explanation, condonation could be refused regardless of the merits of the appeal, even where the blame lay solely with the attorney. Although the present case was one where condonation could justifiably be refused irrespective of the merits of the appeal, the court nonetheless decided to assess the prospects of success.
Held, that, in any event, the appeal, being based on the purported application of the *autrefois acquit* principle, could not succeed, as there had clearly been no judgment by the High Court on the merits of the case when it set aside the convictions. Appeal dismissed.

S v CARNEIRO 2018 (1) SACR 197 (SCA)

Appeal — Leave to appeal — Application for — From decision of two judges in appeal from lower court — Application brought before commencement of Superior Courts Act 10 of 2013 — Procedure governed by s 20 of Supreme Court Act 59 of 1959 — Act 10 of 2013 creating higher threshold for appeals and therefore affected existing rights, rendering it prospective in its application.

The appellant applied for leave to appeal from a decision of the High Court in an appeal to it from a conviction in a regional court for murder. The application was brought when the provisions of the Supreme Court Act 59 of 1959 (the old Act) were still applicable, before the coming into effect of the Superior Courts Act 10 of 2013 (the new Act). The court refused leave to appeal, applying the provisions of the latter Act. In a further appeal,
Held, that, when the new Act was promulgated in August 2013, the application for leave to appeal was still pending. Although the conviction, sentence and appeal were decided prior to August 2013, his legal redress from the court had not yet been finalised. The court below therefore ought to have disposed of the application in terms of s 20 of the old Act. (See [5].)
Held, further, that the provisions of the new Act carried a higher threshold for applications for leave to appeal. In terms of s 17(1), not only did an appellant have to establish reasonable prospects of success of the appeal as in the old Act, but now also some other compelling reason why his or her appeal should be heard, including conflicting judgments on the matter under consideration. The new Act, therefore, not only regulated procedural issues, but existing rights as well. That being the case, its operation could not be retrospective, but prospective. (See [7].) Appeal upheld.

S v LERUMO AND OTHERS 2018 (1) SACR 202 (NWM)

Trial— Accused — Failure to appear in court — Issue of warrant of arrest — Practice of staying execution of such warrants not in accordance with prescripts of s 67 of Criminal Procedure Act 51 of 1977 and must be done away with.

This matter came on special review at the request of the senior magistrate after another magistrate had authorised a warrant of arrest with immediate execution for an accused who did not appear on a date to which the matter had been remanded, the court having been told that he was attending an initiation school. The magistrate's approach appeared to be at odds with an established practice whereby warrants of arrest were held over where persons were unable to attend court proceedings due to illness, hospitalisation and other unforeseen and compelling circumstances.

Held

The practice of issuing warrants of arrest for accused persons and staying the execution of such warrants was not in accordance with the prescripts of s 67 of the Criminal Procedure Act 51 of 1977 and should be done away with, unless the legislature amends that section. Until then the practice had to be stopped.

S v MATITWANE 2018 (1) SACR 209 (NWM)

Bail — Withdrawal of — Bail withdrawn mero motu and without accused having opportunity to oppose withdrawal — Withdrawal grossly irregular.

The applicant applied for an order reviewing and setting aside a decision made by the magistrate presiding in his trial to withdraw his bail. At the time the order was made the applicant had not yet paid the bail and the trial was under way, but its passage had become interrupted through a misunderstanding between the applicant and his legal representative over his plea. The legal representative then withdrew and the applicant attempted to conduct his own defence by cross-examining a witness. When he complained that he was unable to do so and demanded a postponement so that he could get substituted legal representation, the magistrate, taking the view that the applicant was merely attempting to delay the proceedings, mero motu cancelled his bail because she thought he might pay it and disappear.

Held

The cancellation of the bail of the applicant did not comply with the provisions of s 68(1) of the CPA: there was no application before the court and no evidence under oath which justified its cancellation. The magistrate had acted mero motu, without applying the *audi alteram partem* principle and without being authorised by any legislation to take the step in those circumstances. A magistrates' court was a creature of statute and, in the absence of an enabling statute, the actions of the presiding regional magistrate were grossly irregular.

S v MOFOMME 2018 (1) SACR 213 (GP)

Corruption — Sentence — Nature of offence called for retributive and deterrent aspects of punishment to be brought to fore — Minor official at magistrates' court offering to improperly obtain bail for accused persons for reward — Sentence of eight years' imprisonment for first offender upheld on appeal.

The appellant was convicted in a regional court on counts of corruption and fraud and was sentenced to an effective sentence of eight years' imprisonment. He appealed against his sentence. The offences related to his attempts, as an official of the Department of Justice, to improperly secure bail for accused persons for reward. He was a 32-year-old first offender with three minor children and appeared to have a relatively inferior position.
Held, that, while it was true that the amount involved was not a large amount (R300), it had to be noted that this was the kind of offence that silently eroded the moral fibre of the nation. Like a cancer, its effect might not be perceived until it had totally destroyed the substratum of society. It was the kind of offence that called for the retributive and deterrent aspect of punishment to be brought to bear in sending the message to like-minded persons that the game was simply not worth the candle to travel down the corruption road, no matter how large or minimal the ill-gotten gains. The appeal was dismissed.

PHAAHLA v MINISTER OF JUSTICE AND CORRECTIONAL SERVICES AND ANOTHER 2018 (1) SACR 218 (GP)

Prisoner — Parole — Eligibility of prisoner for placement on — Provisions of s 73(6)(b)(iv) of Correctional Services Act 111 of 1998, in adopting date of sentencing and not commission of offence as determinative when more severe regime came into operation, inconsistent with provisions of s 9 of Constitution.

The applicant was convicted on 25 September 2004 and was sentenced to life imprisonment on 5 October 2004, four days after s 73(6)*(b)*(iv) of the Correctional Services Act 111 of 1998 (the Act) came into operation. That section provided that a person sentenced to life imprisonment could not be placed on parole before he or she had served 25 years of their sentence. If the applicant had been sentenced five days earlier, he would have been permitted to be placed on parole after he had served 20 years of his sentence, in terms of s 136(3)*(h)* of the Act. He contended that section 35(3)*(n)* of the Constitution (the fair-punishment provision) was of application to the parole regime in the Act that rendered him subject to the harsher requirement of eligibility for parole; he was therefore entitled to the benefit of the least severe of the possible prescribed punishments if the prescribed punishment for the offence had been changed between the time that the offence was committed and the time of sentencing.
Held, that it might well be that courts, in determining an appropriate sentence, had regard to when it was that a person would become eligible for parole, but this did not render the statutory regime of parole a 'prescribed punishment' within the meaning of the language in s 35(3)*(n)* of the Constitution. Parole was not a prescribed punishment but a prescribed regime under which the duration of punishments could be attenuated.
Held, accordingly, that s 35(3)*(n)* did not engage any rights of the applicant that permitted him to impugn the relevant provisions of the Act that were of application to him in respect of his eligibility for parole. (See [26].)
Held, however, that the adoption of the date of sentencing in the Act as the relevant point for the application of the new parole regime, without regard to what provision the law allowed for parole as at the date of commission of the offence, gave rise to arbitrary results illustrated by the present case. The harsher parole regime applied to

the appellant required him to suffer a burden that others, who committed similar offences at the same time, did not have to bear. Section 73(6)*(b)*(iv) therefore infringed the applicant's rights in terms of ss 9(1) and 9(3) of the Constitution, in that it unfairly placed him in a position where he suffered a harsher regime of parole than he would legitimately have expected at the time that he committed the offence. (See [45] – [47].)
The court declared ss 136(1) and 73(6)*(b)*(iv) of the Act inconsistent with s 9 of the Constitution and that the applicant was entitled to be considered for parole in terms of the Correctional Services Act 8 of 1959.

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Diener NO v Minister of Justice and others (South African Restructuring and Insolvency Association (SARIPA) and others as amici curiae) [2018] 1 All SA 317 (SCA)

Corporate and Commercial – Company law – Business rescue – Business rescue practitioner – Claim for remuneration – Ranking of claim in insolvency proceedings – Whether, when business rescue converted to liquidation, business rescue practitioner's claim for remuneration and expenses enjoys a "super-preference" over all creditors, secured or unsecured – Chapter 6 of the Companies Act 71 of 2008 – Business rescue practitioner's claim for remuneration ranked after the costs of liquidation but before those of post-commencement claims for wages by employees and secured and unsecured post-commencement finance, and was payable from the free residue of the insolvent estate.

The appellant was appointed as business rescue practitioner to oversee the business rescue of a close corporation ("JD Bester"). He applied to the High Court for an order reviewing and setting aside the first and final liquidation, distribution and contribution account in respect of JD Bester. The third respondent ("Murray") was one of the joint liquidators of JD Bester. He opposed the relief sought in the High Court and also opposed the appeal.

On 13 June 2012, the members of JD Bester passed a resolution placing it voluntarily in business rescue, in terms of section 129(1) of the Companies Act 71 of 2008. The appellant was subsequently appointed as business rescue practitioner. In August 2012, he decided that JD Bester could not be rescued and instructed attorneys to bring an application in terms of section 141(2)(a), to convert the business rescue proceedings into liquidation proceedings. The application succeeded but the joint liquidators could not agree on how the fees and expenses of the appellant and the attorneys should be dealt with. Murray was of the view that the appellant had failed to prove a claim in terms of sec-tion 44 of the Insolvency Act 24 of 1936 and that the attorneys were an unsecured creditor who, ultimately, was required to make a contribution in terms of section 106 of the Insolvency Act. The Master upheld the position adopted by Murray. The appellant objected to the liquidation, distribution and contribution account that had been finalised on the basis of the Master's decision in favour of Murray but his objection did not succeed and the Master confirmed the liquidation, distribution and contribution account. The appellant applied to the High Court for the review of the Master's decision to accept the first and final liquidation, distribution and contribution account. The dismissal of his application led to the present appeal.

Held – The issues to be decided were the order of preference of the business rescue practitioner's claim for remuneration and expenses on the liquidation of JD Bester; a determination of the date of liquidation, when business rescue proceedings are converted into liquidation proceedings; and whether the business rescue practitioner is required to prove his claim in terms of section 44 of the Insolvency Act, and the effect of the appellant not having proved his claim in this case.

Having regard to Chapter 6 of the Companies Act, the Court held that a business rescue practitioner's claim for remuneration ranked after the costs of liquidation but before those of post-commencement claims for wages by employees and secured and unsecured post-commencement finance, and was payable from the free residue of the insolvent estate. On the second question, the Court held that the effective date of liquidation was the date on which an application for liquidation was filed. Finally, any creditor who wishes to share in the distribution of an insolvent estate is required to prove his claim.

The appeal was dismissed.

Director of Public Prosecutions, Gauteng v Pistorius [2018] 1 All SA 336 (SCA)

Criminal law and procedure – Murder – Sentence – Appeal against sentence arising from conviction of murder dolus eventualis – Court held that the trial court over-emphasised the personal circumstances of the respondent, and misdirected itself in its assessment of an appropriate sentence – Court found no substantial and compelling circumstances to justify the departure from the prescribed minimum sentence in terms of section 51(3) of the Criminal Law Amendment Act 105 of 1997 – Sentence was increased to 13 years and 5 months' imprisonment.

The respondent had been charged with murder and three counts of contravening the Firearms Control Act 60 of 2000. He was convicted of culpable homicide and contravention of section 120(3)(b) of the Firearms Control Act. He was sentenced to an effective term of 5 years' imprisonment. He applied for leave to appeal against the sentence imposed on the culpable homicide count, and also applied for reservations of three questions of law in terms of section 319 of the Criminal Procedure Act 51 of 1977 relating to the conviction of culpable homicide. The three questions of law reserved were whether the principles of *dolus eventualis* were correctly applied to the accepted facts and the conduct of the accused, including error *in objecto*; whether the court correctly conceived and applied the legal principles pertaining to circumstantial evidence and/or pertaining to multiple defences by an accused; and whether the court was correct in its construction and reliance on an alternative version of the accused and that this alternative version was reasonably possibly true.

The court heard the appeal on the reservation of the questions of law and delivered its judgment. The first two reserved questions of law were answered in favour of the appellant, which resulted in the conviction and sentence on the culpable homicide count being set aside and replaced with a conviction of murder on the basis of *dolus eventualis*. The court referred the case back to the court *a quo* to consider afresh an appropriate sentence. The court *a quo* sentenced the respondent to 6 years' imprisonment. The appellant lodged an application for leave to appeal against that sentence.

Held – The offence which the respondent was convicted of fell within the purview of section 51(2)(a) of the Criminal Law Amendment Act 105 of 1997. That section provides that when an accused, who is a first offender, is convicted of murder that is not planned or premeditated, he shall be sentenced to imprisonment for a period of not less than 15 years, unless there exist substantial and compelling circumstances as contemplated by section 51(3) justifying the imposition of a sentence lesser than the prescribed minimum sentence.

The Court found it difficult on the evidence to accept that the respondent was genuinely remorseful. It held that the trial court over-emphasised the personal circumstances of the respondent, and misdirected itself in its assessment of an appropriate sentence. Finding no substantial and compelling circumstances to justify the departure from the prescribed minimum sentence, the Court imposed such sentence, but adapted it to take account of section 282 of the Criminal Procedure Act and the length of incarceration and of correctional supervision of the respondent. A sentence of 13 years and five months was thus imposed.

Drake Flemmer & Orsmond Inc and another v Gajjar NO [2018] 1 All SA 344 (SCA)

Corporate and Commercial – Contract – Breach – Damages claim – Breach of mandate by first attorneys in under-settling RAF claim – Breach by second attorneys in allowing claim against first attorneys to prescribe – Damages to be assessed at notional trial date of RAF claim.

On appeal in this matter, the question related to the date at which damages should be assessed in an action against attorneys (the "second appellant") for professional negligence in the conduct of a claim of a client (the "respondent") against the Road Accident Fund ("RAF"), where the claim was settled at substantially below its true value.

Held – The correct approach in the present case would have been for the respondent to prove the nominal value of his damages as at the notional trial date of 1 December 2002. That would have been the value of the claim against the first appellant, which the second appellant had allowed to prescribe on 21 December 2002. Where an attorney's negligence results in the loss by a client of a claim which, but for such negligence, would have been contested, the court trying the claim against the attorney must assess the amount the client would probably have recovered at the time of the notional trial against the original debtor. Where the original claim is one for personal injuries, the evidence available and the law applicable at the notional trial date would determine the recoverable amount. The nominal amount which the client would have recovered against the original debtor represents the client's capital damages against the negligent attorney. A similar approach applies where, as in the present case, a second attorney has allowed the claim against the first attorney to prescribe. Generally in such a case the client's claim for damages against the second attorney is determined by the amount the client would have obtained against the first attorney; and that amount in turn is to be ascertained as described above. Damages are to be assessed at the notional trial date of the RAF claim. The respondent approached the matter differently, valuing his claim as at the date of the trial against the second appellant rather than as at the date of the notional trial against the RAF.

The appeal was dismissed.

Maharaj and others v Mandag Centre of Investigative Journalism NPC and others [2018] 1 All SA 369 (SCA)

Criminal procedure – Criminal investigation – Refusal by National Director of Public Prosecutions to grant permission to publish record of investigation – Review – National Prosecuting Authority Act 32 of 1998 – Whether discretion in terms of section 41(6) properly exercised by the National Director of Public Prosecutions in refusing to grant permission to publish record of investigation in terms of section 28 – Court held that the National Director of Public Prosecutions must exercise a proper discretion having regard to the circumstances of each case and he ought not to have refused permission without a proper consideration of the record at the time of making his decision.

The first appellant was the then spokesperson for the President of the Republic of South Africa and former Minister of Transport. The second appellant was his wife.

In November 2011, a national weekly newspaper (the "M&G") ran a photograph of the first appellant on its front page. Alongside the photograph were the words "Censored" and a statement that the newspaper could not publish the story due to threat of prosecution. Readers were informed by the editor-in-chief that the M&G had been forced to suppress a story about the Presidential Spokesperson following a threat of criminal prosecution under the National Prosecuting Authority Act 32 of 1998.

Held – Section 41(6) of the Act, upon which the matter turns, provides that no person shall without the permission of the National Director or a person authorised in writing by the National Director disclose to any other person the record of any evidence given at an investigation as contemplated in section 28(1). Permission was refused to the M&G by the National Prosecuting Authority.

Section 41(6)(c) of the Act does not contain an absolute ban on publication. Instead, publication depends on permission first having been sought and obtained from the NDPP. The purpose of the limitation is obviously to protect the integrity of the criminal justice system. There is no denying that section 41(6) constitutes a limitation on the right to freedom of expression contained in section 16 of the Constitution. In the present matter, it limits freedom of the media as also the correlative right of the public to receive and impart information. Thus, utmost care must be taken to ensure that in exercising that discretion, the National Director of Public Prosecutions strikes the appropriate balance, in each case, between securing the integrity of the criminal justice system and upholding freedom of expression. The National Director of Public Prosecutions must exercise a proper discretion having regard to the circumstances of each case. The National Director of Public Prosecutions ought not to have refused permission without a proper consideration of the record at the time of making his decision. The consequence of the failure rendered the decision irrational. The decision, therefore, had to be set aside.

Minister of Rural Development and Land Reform v Normandien Farms (Pty) Ltd and others; Mathimbane and others v Normandien Farms (Pty) Ltd and others [2018] 1 All SA 390 (SCA)

Civil procedure – Contempt of court – Occupants failed to establish beyond reasonable doubt that respondent was in contempt of appellate process – Contempt application, including related postponement application, dismissed.

Environmental law – First respondent had standing to seek removal of occupants' livestock on land overgrazed in violation of Conservation of Agricultural Resources Act 43 of 1983 ("CARA") – Labour tenants not exempt from CARA – Removal of animals in terms of CARA not an eviction for purposes of Land Reform (Labour Tenants) Act 3 of 1996.

Land – Land reform – Labour tenants – Removal of livestock – Over-grazing – Appeal – Whether Minister has power under Land Reform: Provision of Land and Assistance Act 126 of 1993 to make land available solely for purposes of grazing – Court a quo erred in compelling Minister to exercise permissive powers in favour of occupants.

The first respondent ("Normandien") instituted proceedings in the Land Claims Court ("LCC") for the removal of livestock from its farm. The LCC gave judgment in favour of Normandien, leading to the two appeals before the present Court. The first appeal was by the Minister of Rural Development and Land Reform and the second appeal was by a group of labour tenants occupying a part of Normandien's farm. The occupants had lived on the farm for many years. Members of their families were buried there. They grazed livestock on the farm. In March 2013, they instituted action in the LCC alleging that they were labour tenants as defined in the Land Reform (Labour Tenants) Act 3 of 1996 and that they had duly submitted applications to the Director-General of the Department of Rural Development and Land Reform ("Land Department") for the acquisition of land as contemplated in section 16 of the Act. As against Normandien they sought orders declaring in terms of section 33(2A) that they were labour tenants and awarding a part of the farm to them. As against the Director-General they sought an order that moneys be made available to compensate Normandien for the part of the farm to be awarded to them. In December 2013, while the action was pending, Normandien launched the application giving rise to the present appeals (the removal application). Normandien sought orders that the livestock be removed from the farm and that the Land and Agriculture Ministers and/or the Regional Commissioner facilitate their removal to alternative land. This relief was claimed on the basis that the farm had been severely overgrazed and that the continued presence of the livestock on the farm contravened the Conservation of Agricultural Resources Act 43 of 1983.

The LCC found that by virtue of the Land Reform Provision of Land and Assistance Act 126 of 1993, the Minister was under an obligation to make alternative grazing land available to the labour tenants. The court also directed the labour tenants to remove their livestock from Normandien's farm for a period of five years to enable the grazing veld to recover.

Held – An application by the occupiers to hold Normandien in contempt was an abuse of the court's process. The Court was of the opinion that the contempt application was a stratagem to delay the finalisation of the appeal so as to buy time.

The occupants' heads of argument were filed out of time and condonation was sought in that regard. While dissatisfied with the explanation for the delay, the Court, in the interests of justice, condoned the failure to file their heads of argument timeously.

The dismissal of the counter-application by the labour tenants for a declaration that the relief sought by Normandien was subversive of rights acquired by the labour tenants in terms of an order given in other litigation between the same parties was confirmed as being correct. The purported order on which the labour tenants relied, being a purported amendment of an earlier order, was a nullity because the judge had been *functus officio*.

Although that finding should be the end of the case, the Court was obliged to consider whether the order for removal of the livestock constituted an eviction. It was held that Normandien was not seeking to evict the occupants within the meaning of the Land Reform (Labour Tenants) Act.

The appeal by the Minister succeeded and the appeal by the occupiers was dismissed.

Pan African Mineral Development Company (Pty) Ltd and others v Aquila Steel (S Africa) (Pty) Ltd [2018] 1 All SA 414 (SCA)

Mining, Minerals and Energy – Prospecting rights – Granting rights to two different entities in respect of same land and minerals – Mineral and Petroleum Resources Development Act 28 of 2002 – Section 16 read with item 8 of Schedule 2 – Once the holder of an unused old order right submits an application within the one year exclusivity period, both the unused old order right and the exclusivity which it confers remain extant until the application is either granted or refused and precludes the acceptance and processing of the later application.

In April 2005, the second appellant ("ZIZA") submitted an application in terms of section 16 of the Mineral and Petroleum Resources Development Act 28 of 2002 to the sixth appellant ("the RM") for a prospecting right in respect some of its properties. The application recorded that ZIZA was in the process of ceding its rights to the first appellant ("PAMDC"). In August 2005, the RM confirmed in writing that ZIZA's application for a prospecting right had been accepted.

However, in May 2006 the RM accepted a prospecting right application in respect of certain overlapping properties from the respondent ("Aquila") and in October of that year the fifth appellant, the Deputy Director General (the "DDG"): Mineral Regulation of the DMR issued a letter of grant to Aquila.

The Department of Mineral Resources (the "DMR") subsequently prepared an internal memorandum, which noted the conflict between the ZIZA and Aquila applications. That notwithstanding, the Aquila prospecting right was notarially executed and registered. Despite that, a prospecting right over the properties was granted to ZIZA. In October 2013, Aquila launched an appeal against the decision of the DMR to grant ZIZA a prospecting right. Aquila's appeal was dismissed and PAMDC's cross appeal in which ZIZA and PAMDC challenged the acceptance and grant of Aquila's application for a prospecting right was upheld. In terms of the Promotion of Administrative Justice Act 3 of 2000, Aquila applied for the review and setting aside of the acceptance and grant of ZIZA's prospecting right application; the execution of a prospecting right in favour of PAMDC; the Minister's refusal of its internal appeal and his decision to uphold the ZIZA and PAMDC appeal; and the Minister's refusal of its mining right application. It further sought to substitute the Minister's decisions on the internal appeals, as well as his decision to refuse the Aquila mining right application, with a decision upholding that appeal and the granting of a mining right. The High Court upheld the review and granted the substitution sought. It agreed with Aquila that the ZIZA prospecting right had lapsed in November 2010 when ZIZA was deregistered, but declined to grant declaratory relief to that effect. In the present proceedings, the Court was faced with appeals and a cross-appeal against the High Court's orders. ZIZA and PAMDC appealed against certain aspects of the orders, whilst the Minister, the DG, and the RM appealed the whole of the judgment and order. Aquila conditionally cross-appealed the refusal to grant it declaratory relief that ZIZA's prospecting right lapsed with effect from 9 November 2010, upon deregistration.

Held – The majority of the court held that the RM is precluded from accepting or doing anything with a later application until an existing application has been decided. The

Court reasoned that once the holder of an unused old order right submits an application within the one year exclusivity period, both the unused old order right and the exclusivity which it confers remain extant until the application is either granted and dealt with or refused. Where the application is made but neither granted nor refused, the unused old order right and its exclusivity period endure and that precludes the acceptance and processing of the later application.

The conclusions reached by the Minister in the internal appeal could not be faulted and the High Court accordingly erred in setting his decisions aside and granting Aquila substitutionary relief. Consequently, the appeal had to succeed.

Roazar CC v The Falls Supermarket CC [2018] 1 All SA 438 (SCA)

Corporate and Commercial – Contract – Lease agreement – Renewal – Duty to negotiate in good faith – Whether contract can be terminated without entering into negotiations – Appellant not obliged to renew lease agreement – Not competent for court to import term not intended by parties simply on the basis of ubuntu.

In the court below, the appellant ("Roazar") sought an order evicting the respondent ("The Falls") from premises in a shopping centre. The Falls leased a part of the centre and conducted a supermarket from the premises. There were three separate but linked lease agreements that regulate the relationship between the parties. The Falls alleged that the reason why the parties entered into three agreements was to avoid income tax whilst Roazar alleged that it was for its internal book-keeping purposes.

In February 2016, The Falls wrote a letter to Roazar stating that it wished to renew the lease for a further period of five years. At the end of March 2016, Roazar's attorneys responded and said that the lease had terminated through the effluxion of time on 29 February 2016. It alleged that in terms of the agreement, The Falls was required to give one month's written notice of its intention to exercise the right of renewal, which it failed to do, as the letter sent in February did not constitute timeous notice. It further alleged that The Falls had breached the lease agreement by its failure to pay full rental. It then gave The Falls notice to vacate the premises on or before 30 April 2016, failing which it would proceed with an application for eviction. In May 2016, Roazar filed the application for eviction in the Gauteng Local Division, Johannesburg and also instituted a separate action claiming certain amounts for alleged arrear rental. The Falls opposed the eviction application denying that it owed any arrear rental and alleging that the agreements were sham agreements aimed at avoiding tax.

Although one of the grounds cited by Roazar for the eviction was the alleged failure by The Falls to pay arrear rentals, the eviction dispute could be disposed of by determining whether Roazar was entitled to terminate the contract by invoking the terms of the main agreement.

Held – The first issue was whether The Falls exercised its pre-emptive right of renewal within the time period provided in the agreement. A sensible interpretation of the agreement was that The Falls had to notify Roazar at least one month before the expiry of the current lease period that it wished to exercise its right of renewal. It did not have to do so in writing. In that event the lease agreement would continue on a month to month basis, subject to one month's notice by either party, until an agreement was reached or negotiations failed and notice was given by one of the parties. If The Falls elected not to exercise its right to renew the lease at least one month before the expiry

of the lease period, the lease would terminate on 29 February 2016. If an agreement was reached to renew the lease, that agreement had to be in writing.

Roazar chose to invoke the terms of the agreement and terminated the contract by giving one month's notice. That should have been the end of the matter, but The Falls contended that the contract could not be terminated until good faith negotiations had taken place. For that reason it contended that the notice of termination and the application for eviction were premature. It contended further that until the good faith negotiations had been undertaken, the existing lease agreement should be allowed to continue. The Court pointed out that the parties consciously bound themselves to a contract that provided that each party could terminate it on one month's notice in the event that there was no agreement on the renewal terms. There was no obligation on Roazar to renew the agreement. It was not competent for the court to import a term not intended by parties simply on the basis of the principle of "*ubuntu*".

The appeal was upheld with costs.

CDH Invest NV v Petrotank South Africa (Pty) Ltd and another [2018] 1 All SA 450 (GJ)

Corporate and Commercial – Company law – Calling of shareholders' meeting – Fiduciary duties of directors – Companies Act 71 of 2008 – Duty to act bona fide and in the best interests of the company is the fundamental duty which qualifies the exercise of any powers which the directors have and directors have a duty to exercise powers for proper purposes.

The main application in this matter was brought by the majority shareholder in a private company, and the counter-application was by the minority shareholder.

The majority shareholder sought an order in terms of section 61(12) of the Companies Act 71 of 2008 (the "Act") directing the company and the board to convene a shareholders' meeting in terms of section 61(3) for the purpose of considering and passing five resolutions, *viz* the removal of a director; the election of a substitute director; instructing the board to demand that the minority shareholder pays the company R1m; instructing the board to sue the minority shareholder for such money; and instructing the board to consider a pro-rata rights offer of 98 835 ordinary no par value shares.

The minority shareholder consented to the first two resolutions, resulting in a consent order being granted in respect thereof, but disputed the last three. In turn, it applied for an order: setting aside the demand by the applicant to convene the shareholders' meeting; setting aside the board resolution amending the memorandum of incorporation ("MOI") by increasing the authorised shares from 1 000 to 1 000 000 ordinary no par value shares; interdicting the applicant from calling a shareholders' meeting to vote on certain resolutions; and directing the board to correct a certain paragraph of its MOI by deleting 1 000 and substituting for it 100 000.

Held – Important facts in this dispute were that the two shareholders had clearly fallen out, were involved in other litigation against each other, and did not trust each other. The applicant effectively controlled the board and the general meeting and felt that the second respondent made promises that had not materialised. The applicant believed that it had put up substantially greater capital than the second respondent and proposed that the general meeting meet to decide whether or not to sue the second respondent for its capital contribution.

Section 38(1) of the Act gives power to directors to issue shares. The exercise of the power to issue shares is constrained by section 76(3). The duty to act *bona fide* and in the best interests of the company is the fundamental duty which qualifies the exercise of any powers which the directors have. Directors have a duty to exercise powers for proper purposes. The tenets of the parties' agreement in their pre-corporation founding consensus, whether embodied in a written agreement or not, is a significant consideration in judging fair dealing and probity; and the yardstick, for measuring the exercise of a power against the purpose for which it was given in the first place, is objective.

Applying the above to the facts of this case, the Court found that the main application had to fail, and the counter-application should succeed, to the extent that relief setting aside the resolution to amend the MOI by increasing the authorised shares and relief flowing from that consequence, were concerned.

Corruption Watch (RF) NPC and another v President of the Republic of South Africa and others and a related matter [2018] 1 All SA 471 (GP)

Constitutional law – National Director of Public Prosecutions – Appointment – Vacating of office – National Prosecuting Authority Act 32 of 1998 – Whether the setting aside of the settlement agreement left the office of National Director of Public Prosecutions vacant and whether a request as envisaged in the National Prosecuting Authority Act was necessary as a precondition to the NDPP lawfully vacating office – Having regard to the conduct of the President and NDPP, it was not just and equitable, in the context of vindicating the Constitution and the independence of the prosecutorial authority, to reinstate him – Court declared section 12(4) and 12(6) of the National Prosecuting Authority Act unconstitutional and invalid.

Before the court were two parallel applications for orders declaring invalid and setting aside a settlement agreement between the President of the country, Mr Zuma, the Minister of Justice and Correctional Services, and the predecessor to the current National Director of Public Prosecutions ("NDPP"), Mr Nxasana. There was also a challenge to the constitutionality of two provisions of the National Prosecuting Authority Act 32 of 1998. In terms of the agreement, the parties agreed that Nxasana would relinquish his post as NDPP as from 1 June 2015 for R17 357 233. It was common cause that the amount of R17,3 million far exceeded what Nxasana's financial entitlement would have been had his office been lawfully vacated in terms of section 12(8)(a)(ii) of the Act. Therefore the parties all accepted that the agreement should be declared invalid in terms of section 172(1)(a) of the Constitution. The central issue was what followed upon such a declaration.

The applicants sought a setting aside of the settlement agreement, including a setting aside of Nxasana's vacating of his office; his reinstatement as NDPP, alternatively, a declaration that the office is vacant and directing the Deputy President within 60 days to appoint a permanent NDPP on the basis that the President himself was declared "*unable*" in terms of section 90(1) of the Constitution to act for his conflict of interest; and a declaration of unconstitutionality.

The respondents did not agree to an order setting aside Nxasana's vacating of his office, which would have implied his reinstatement. The area of dispute concerning whether the President was conflicted and thus unable to appoint, suspend or remove a NDPP concerned the fact that there were multiple criminal charges pending against the incumbent President.

Held – The first question was whether the setting aside of the settlement agreement left the office of National Director of Public Prosecutions vacant. Related thereto was the question of whether a request as envisaged in the National Prosecuting Authority Act was necessary as a precondition to Nxasana lawfully vacating office. The request had to emanate from the office-holder. On the facts there was no request at all, rendering the settlement agreement invalid. The next question was whether that conclusion resulted in the office being vacant. Having regard to the conduct of the President and Nxasana, it was not just and equitable, in the context of vindicating the Constitution and the independence of the prosecutorial authority, to reinstate Nxasana. It was also not just and equitable to leave the current incumbent (Adv Abrahams) in office. The Court decided that it would be would be just and equitable if the position were declared vacant for a short period, for it to be filled by appropriate appointment within that period.

The Court held further that the President would be clearly conflicted in having to appoint an NDPP, given the background of the many criminal charges against him.

Dealing finally with the constitutional challenge raised by the applicant in the second case, the Court declared section 12(4) and 12(6) of the National Prosecuting Authority Act unconstitutional and invalid.

Groep v Golden Arrow Bus Services (Pty) Ltd and a related matter [2018] 1 All SA 508 (WCC)

Civil procedure – Claim for damages – Special plea – Prescription – Prescription Act 68 of 1969 – Whether the defendant had undertaken to abandon the special plea of prescription – Court examined the defendant's offer to settle and its reliance on "without prejudice" negotiations – Court was not persuaded that the letter relied on by the plaintiff was admissible in evidence against the defendant, and the conclusion was that the special plea of prescription was not abandoned by the defendant.

Whilst attempting to board a bus operated by the defendant ("Golden Arrow"), the plaintiff was injured when the bus pulled away before he had fully embarked. He suffered extensive orthopaedic injuries and he sought to claim damages therefor. The particulars of claim stated that the plaintiff had been conveyed as a fare-paying passenger on a Golden Arrow bus on 2 September 2002, that his statutory claim against the Road Accident Fund ("the RAF") was limited to R25 000, that he had received that amount from the RAF and that Golden Arrow was therefore liable to the plaintiff for damages in the sum of R855 000. The claim comprised general damages in the sum of R500 000 with the balance claimed in respect of special damages (past and future medical expenses, and past and future loss of income).

Golden Arrow defended the claim and raised a special plea of prescription. It said that by no later than 2 September 2002, the plaintiff was aware of both the identity of the debtor which had caused him to suffer damages and the facts from which that debt arose. It alleged that, in the circumstances, the plaintiff's debt had prescribed in terms of the Prescription Act 68 of 1969 by no later than 3 September 2005.

The plaintiff filed a replication to the plea, stating that he only acquired knowledge of the identity of his debtor and facts giving rise to his claim against Golden Arrow on 20 June 2006.

Held – The question was whether Golden Arrow had undertaken to abandon the special plea of prescription. The facts showed that Golden Arrow's undertaking not to

rely on the special plea of prescription came at a relatively early stage of negotiations, all of which were classified throughout by the parties as being "without prejudice". That formed the basis of Golden Arrow's offer to settle. Consequently, the Court was not persuaded that the letter relied on by the plaintiff was admissible in evidence against Golden Arrow, and the conclusion was that the special plea of prescription has not been abandoned by Golden Arrow.

HL v MEC for Health of the Free State Provincial Government [2018] 1 All SA 522 (FB)

Civil procedure – Action against State – Service of prior notice – Non-compliance – Condonation – Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 ("Act") – Before a creditor can institute an action to recover a debt from an organ of State, section 3(2)(a) of the Act requires such creditor to serve on such organ of State a notice of its intention to do so within six months from the date on which the debt became due – A court's discretion to grant condonation is not unfettered and section 3(4)(b) permits the court to do so only once it is satisfied that the applicant has established that the debt has not been extinguished by prescription; good cause exists for the failure by the creditor; and the organ of State was not unreasonably prejudiced by the failure.

In her representative capacity as the mother and natural guardian of her minor son, the applicant had instituted action against the respondent. The applicant alleges that her son, who suffered from cerebral palsy, suffered a hypoxic-ischemic insult during birth which resulted in permanent severe brain damage, because of her alleged prolonged labour, and as a result of the alleged negligence of the respondent's employees.

In its plea, the respondent had denied that the plaintiff had complied with the requirements of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002. Despite the requirement for condonation to be sought as soon as one becomes aware of the need for it, the present application was filed more than two years late – and only a month before the trial was due to start.

Before the trial could proceed, two issues had to be resolved. The first was whether an agreement was reached that the respondent would not oppose the condonation application, and if so, whether the respondent was entitled to resile therefrom, and accordingly whether the condonation application should be heard on an unopposed basis. If the court found that the respondent was entitled to oppose the application, the second question was whether the applicant had made out a case for condonation.

Held – The letter relied upon by the applicant did not create an agreement from which the respondent could not resile and, accordingly, the respondent had the right to oppose the application and such opposition was not unreasonable.

In respect of the condonation application, the Court held that before a creditor can institute an action to recover a debt from an organ of State, section 3(2)(a) of the Institution of Legal Proceedings against Certain Organs of State Act requires such creditor to serve on such organ of State a notice of its intention to do so within six months from the date on which the debt became due. Section 3(4)(a) of the Act gives a creditor the right to apply to court to have its non-compliance with section 3(2)(a) condoned where a respondent relies on such non-compliance. The court's

discretion to grant condonation is not unfettered. Section 3(4)(b) permits the court to do so only once it is satisfied that the applicant has established that the debt has not been extinguished by prescription; good cause exists for the failure by the creditor; and the organ of State was not unreasonably prejudiced by the failure. In dispute were the second and third of those requirements. In view of all of the factors evaluated by the Court and based on the facts, the Court found that it would be in the interests of justice to find that good cause for the applicant's delay did exist, so that the second leg of the statutory requirement was satisfied.

The Court could also not find that the prejudice suffered by the respondent was unreasonable to such an extent that, in the absence of evidence to the contrary, the applicant and the minor child should be penalised for that by depriving them of the opportunity to state their case in court. It was considered fair and in the interest of justice for the court to exercise its discretion to grant condonation for the applicant's non-compliance.

Link and others v Director-General: Department of Home Affairs and others [2018] 1 All SA 542 (WCC)

Immigration – Applications for permanent residence – Rejection of – Review – Immigration Act 13 of 2002 – Section 27(e) – Director-General may subject to any prescribed requirements, issue a permanent residence permit to a foreigner of good and sound character who intends to retire in South Africa, provided that such foreigner proves to the satisfaction of the Director-General that he has the right to a pension or an irrevocable annuity or retirement account which will give him a prescribed minimum payment for the rest of his life; or has a minimum prescribed net worth – Departmental website purported to contain a requirement (for a certificate by a chartered accountant to accompany an application) for a section 27(e) application which was not prescribed by the Act or the regulations – Court held that to the extent that the DG might have placed reliance, in rejecting the applications, on the absence of a certificate by a chartered accountant, such reliance was misplaced.

On behalf of the first respondent, the second respondent rejected the permanent residence applications of the first and third applicants. The applicants sought the review and setting aside of that decision, and an order compelling the first respondent (the "DG") to issue them with permanent residence permits subject to the provisions of section 25(3) and (4) as well as section 28 of the Immigration Act 13 of 2002. The applicants also sought an order exempting them from having to first exhaust their internal remedies contained in section 8(6) of the Act.

Held – Sections 25 to 27 of the Act deal with permanent residence permits. Section 27(e) relates to retired foreigners. As German citizens, the applicants were foreigners.

In terms of section 27(e), the DG may, subject to any prescribed requirements, issue a permanent residence permit to a foreigner of good and sound character who intends to retire in South Africa, provided that such foreigner proves to the satisfaction of the Director-General that he has the right to a pension or an irrevocable annuity or retirement account which will give him a prescribed minimum payment for the rest of his life; or has a minimum prescribed net worth. The degree or nature of the proof required for purposes of section 27(e) is not prescribed in the body of either the Act or the Regulations made thereunder. Regulation 23(1), however, stipulates that an application for a permanent residence permit contemplated in section 25(2) of the Act shall be made on Form 18. Regulation 23(2) to (7) sets out the documents that are to

accompany such an application. The Court found that the departmental website purported to contain a requirement (for a certificate by a chartered accountant to accompany an application) for a section 27(e) application which was not prescribed by the Act or the regulations, and in turn, Form 18. Accordingly, and to the extent that the DG might have placed reliance, in rejecting the applications, on the absence of a certificate by a chartered accountant, such reliance was misplaced.

In terms of section 7(2)(c) of the Promotion of Administrative Justice Act 3 of 2000, an affected person must exhaust his available internal remedies prior to judicial review of an administrative action, unless exceptional circumstances are found to exist. A remedy under section 8(6) of the Act was clearly technically available, but was in substance no remedy at all. The applicants therefore met the threshold of "exceptional circumstances" and were entitled to exemption under section 7(2)(c).

The application was, accordingly, successful.

Lombard Insurance Company Ltd v Schoeman and others [2018] 1 All SA 554 (GJ)

Corporate and Commercial – Counter indemnity – Demand guarantee – Suretyship undertakings – Claim for payment – Whether there was compliance with the terms of the guarantee under circumstances where the beneficiary's demands for payment were made to the guarantor at its address, rather than at the address of the beneficiary as stated in the guarantee – Purpose of a demand is to inform the recipient (in this instance, the guarantor) that payment is being requested and it is actioned by delivery in one or other manner, be it by hand, mail, fax or email, and is designed to inform the recipient that it is required to meet its obligations – Court rejected the notion that it was an essential requirement for the guarantor to attend at the beneficiary's premises to receive the latter's demand.

The respondents were sued in their capacities as sureties and co-principal debtors for and on behalf of a company in liquidation ("Golden Sun"). The first respondent was a director of Golden Sun whilst the second respondent was an employee of Golden Sun. The third and fourth respondents were cited in their nominal capacity as joint trustees of a trust.

The applicant instituted three claims against the respondents for payment of amounts owed to the applicant by Golden Sun. The first two claims were based on a counter indemnity executed by Golden Sun in favour of the applicant and suretyship agreements concluded in favour of the applicant by the first and the second respondents and the third and fourth respondents. The third claim was based on the outstanding premium payable under a facility agreement concluded with Golden Sun, as read together with the counter indemnity and suretyships. The counter indemnity was executed in favour of the applicant against a demand guarantee issued by the applicant in favour of a third party ("Sasol") at the request of Golden Sun. In terms of the suretyship agreements read with the counter indemnity, the respondents undertook to indemnify the applicant in the event that it paid a claim based on the guarantee provided by it. In the first two claims, the applicant sought payment of two amounts it paid to Sasol pursuant to two separate demands for payment having been made by Sasol in terms of the Sasol guarantee, together with interest. In the third claim payment of the outstanding amount owed by Golden Sun in respect of the premium payable under the facility was sought.

The main defence was that no valid claim had been made by Sasol under the Sasol guarantee in that Sasol's demands thereunder failed to comply with the terms of the guarantee. Further disputes related, *inter alia*, to whether or not the applicant ought to have proceeded by way of action for the recovery of monies rather than by way of motion proceedings.

Held – The issue to be determined was whether there was compliance with the terms of the guarantee under circumstances where the beneficiary's demands for payment were made to the guarantor at its address, rather than at the address of the beneficiary as stated in the Sasol guarantee. The purpose of a demand is to inform the recipient (in this instance, the guarantor) that payment is being requested. It is actioned by delivery in one or other manner, be it by hand, mail, fax or email, and is designed to inform the recipient that it is required to meet its obligations. For the recipient to know that such a call is being made, the demand has to be received by it. The Court rejected the notion that it was an essential requirement for the guarantor to attend at the beneficiary's premises to receive the latter's demand. There was, therefore, sufficient compliance with the terms of the Sasol guarantee.

The Court turned to the respondents' defence in the third claim, and again, found for the applicant.

The respondents were directed to pay the applicant the amounts set out in the order.

President of the Republic of South Africa v Office of the Public Protector and another (Economic Freedom Fighters and others as Intervening Parties) [2018] 1 All SA 576 (GP)

Civil procedure – Costs – President of country – Personal liability for costs – Whether the President conducted the litigation in a manner unbecoming of a reasonable litigant and whether he was vindicating his personal interests in doing so – President's persistence with the litigation; in the face of the finality of the investigation and report, as well as his own unequivocal statement regarding that finality, clearly amounted to objectionable conduct by a litigant and to clear abuse of the judicial process – Court held that a simple punitive costs order was not appropriate because that would make the tax payer liable for the costs and as a result ordered that the President personally pay the costs.

The President of the Republic of South Africa, President JG Zuma (the "President"), represented by the State Attorney, had launched an urgent application the day before the release of a report by the Public Protector on what has become known as State capture, seeking to interdict the Public Protector from finalising and releasing that report. The President sought to prevent the finalisation and release of the report through the interdict, until such time as he had been afforded a reasonable opportunity to provide input into the investigation carried out by the Public Protector. He initiated two further interlocutory applications. When the stage was set for the President's application to be heard, he withdrew it and tendered costs on the attorney and client scale as well as the costs occasioned by the employment of two Counsel where applicable. Argument was then advanced by all the intervening parties, that the President be ordered to pay all the legal costs occasioned by his application personally. The basis for the order sought against the President was firstly that the application launched by him had nothing to do with his official responsibilities as President and Member of the National Executive, but was aimed at protecting his

personal interests. The other basis advanced for the personal costs order sought against the President was that he conducted the litigation in an unreasonable and reprehensible manner that would justify the present Court mulcting him, personally, in a punitive costs order, as a mark of its displeasure.

Held – The two questions before the Court were whether the President conducted the litigation in a manner unbecoming of a reasonable litigant and whether he was vindicating his personal interests in doing so.

The evidence satisfied the Court that the President had proceeded with the application despite knowing that the report had been finalised and signed by the Public Protector. The President's persistence with the litigation; in the face of the finality of the investigation and report, as well as his own unequivocal statement regarding that finality, clearly amounted to objectionable conduct by a litigant and a clear abuse of the judicial process. An abuse of the judicial process is evinced when a party conducts litigation in an unreasonable manner to the prejudice of those who are naturally forced to defend their interests. It is such conduct that has been viewed by courts as a justifiable basis to mulct the culpable litigant with a punitive costs order.

The Court held that a simple punitive costs order was not appropriate in this case because that would make the tax payer liable for the costs. As a result, the President was ordered to personally pay the costs referred to in the Court's order.

Saharawi Arab Democratic Republic and another v Owner and Charterers of the MV "NM Cherry Blossom" and others [2018] 1 All SA 593 (ECP)

International law – Ownership of cargo on board ship – Application for interdict – Whether proposed vindicatory action was non-justiciable by a domestic South African court – Reliance on act of State doctrine which is a common law ground of non-justiciability and, the principle of State immunity – No basis found on which it could be contended that the dispute was non-justiciable before the present Court.

Western Sahara lies on the north-western coast of Africa. It is bordered by Morocco to the north, Algeria to the north-east and Mauritania to the east and south. It was a Spanish colony until 1976 when Spain, in effect, abandoned Western Sahara and offered it to Morocco and Mauritania. That was relevant to the present case and the court's determination of the international law that applied in respect of the right to self-determination of the people of Western Sahara, the position of Morocco in respect of Western Sahara and the position in respect of its natural resources and their exploitation.

On 1 May 2017, a vessel (the "NM Cherry Blossom") entered the port of Coega, South Africa with a cargo of phosphate on board. The vessel was on its way to New Zealand to deliver the cargo. On that day, the applicants brought an *ex parte* application, and obtained a rule *nisi* calling on the first to fifth respondents to show cause why a final order should not be granted, interdicting them from taking the cargo of phosphate from the jurisdiction of the court in question pending the determination of the applicants' action for, *inter alia*, delivery of the cargo, unless suitable security was furnished to the applicants. The sheriff was directed and authorised to attach the cargo pending the determination of the action and to remove the ship's registration documents and trading certificates.

The applicants were the Saharawi Arab Democratic Republic (the "SADR") and the Polisario Front (the "PF"). The latter was a national liberation movement. It was

established in 1973 with the aims of ending Spanish colonial rule of Western Sahara. In February 1976, the PF proclaimed the SADR as a sovereign State.

Only the fourth respondent ("OCP") and the fifth respondent ("Phosboucraa") opposed the confirmation of the rule *nisi*. Both were Moroccan companies. OCP mined phosphate in three areas of Morocco and enjoyed a monopoly over phosphate reserves in that country. Phosboucraa operated a phosphate mine at Boucraa in Western Sahara. The phosphate that was the subject of this case was mined by Phosboucraa from its Boucraa mine.

The essence of the applicants' case was that the phosphate aboard the MV NM Cherry Blossom was part of the national resources of Western Sahara and belonged to its people, and that OCP and Phosboucraa misappropriated the phosphate and sold it, having no right to do so. The applicants intended to institute a vindicatory action in respect of the cargo and the purpose of the proceedings was to ensure that it remained within the jurisdiction of this Court (except if suitable security was furnished) until the vindicatory action was finalised. They, therefore, claimed an entitlement to an interim interdict pending the final determination of their right of ownership of the cargo.

Held – The case concerned the ownership of the cargo aboard the MV NM Cherry Blossom, albeit that, the central enquiry was whether the SADR and the PF had established a *prima facie* right to the cargo.

Section 232 of our Constitution provides that customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament. The Court confirmed that Morocco has no claim to sovereignty over Western Sahara. Its claim to sovereignty as a result of its occupation of the territory was incompatible with the status of Western Sahara as a non-self-governing territory. The Court referred to the right of peoples of non-self-governing territories to sovereignty over the natural resources of their territories, and pointed out that OCP and Phosboucraa did not claim to have mined the phosphate in Western Sahara with the consent of the people of the territory.

Turning to whether the requirements for an interim interdict had been established, the Court stated that an applicant for an interim interdict is, generally speaking, required to establish four elements, *viz* a *prima facie* right, which may even be open to some doubt; an apprehension of irreparable harm if the interdict is not granted; a balance of convenience in favour of the grant of the interdict; and the absence of any other satisfactory remedy.

The SADR and the PF had established on a *prima facie* basis that sovereignty over the cargo of phosphate was vested in the people of Western Sahara. In other words, the people of Western Sahara owned the cargo. In considering the balance of convenience, the Court acknowledged that the granting of the interdict would cause great inconvenience to the respondents. However, that could be allayed to an extent by the furnishing of security.

OCP and Phosboucraa based their opposition to the confirmation of the rule *nisi* upon two separate but interrelated grounds. On the basis of each of the grounds it was contended that the applicants' proposed vindicatory action was non-justiciable by a domestic South African court. The two grounds pleaded were, first, the act of State doctrine which is a common law ground of non-justiciability and, secondly, the principle of State immunity. Those were distinct grounds upon which the

justiciability of a suit is to be determined. In essence, a claim to State immunity, if successful, has the effect that a domestic court does not have jurisdiction to adjudicate the matter before it, whereas reliance upon the act of State doctrine concerns the justiciability of the suit before the domestic forum notwithstanding its jurisdiction to adjudicate on the matter before it.

The Court first dealt with the claim to State immunity. The phosphate cargo at issue in this matter was mined at a mine situated in Western Sahara and outside of the international borders of Morocco. The SADR claimed sovereignty over the territory where the mine was situated and in respect of which the Saharawi people, represented by the PF, claimed a right of self-determination. Morocco exercised *de facto* administrative control over that portion of the territory of Western Sahara in which the mine was situated, and Moroccan law was applied there by Morocco. OCP and Phosboucraa were corporate bodies with separate legal existence from the state of Morocco. They operated the mine in accordance with Moroccan law, having been granted rights to do so in accordance with Moroccan law. Both claimed that the exploitation of the mineral accorded with the UN framework governing the exploitation of resources in a non-self-governing territory.

State immunity is a rule of international law which serves to preclude a State or its representatives from being sued or prosecuted in foreign courts. It, accordingly, precludes a domestic court from exercising adjudicative and enforcement jurisdiction in matters in which a foreign State is a party. In this matter the SADR and the PF sought by way of a vindicatory action, to assert title to property as against OCP and Phosboucraa. The latter in turn asserted title on the basis that the phosphate was lawfully mined in accordance with Moroccan law which applied and by reason of their compliance with the United Nations framework which regulated the exploitation of minerals in non-self-governing territories. A finding on the issues by a South African court applying South African law, which included customary international law by virtue of section 232 of the Constitution, cannot in any legal sense affect the rights of Morocco at international law. While the interests of Morocco might be affected, such effect fell within the realm of political or moral interests and could not have legal effect. Therefore, the claim to State immunity could not be upheld.

Unlike State immunity, which is a rule of public international law, the doctrine of a foreign act of State is a municipal law rule which derives from common law principles as developed in Anglo-American courts. It is founded upon the principle of mutual respect for equality of sovereign States. On this point, the Court found that there was no public international law principle which obliges a domestic court to refrain to adjudicate a matter involving a foreign act of State in respect of the subject matter over which the court otherwise has jurisdiction.

There was, therefore, no basis on which it could be contended that the dispute was non-justiciable before the present Court.

Consequently, the claim as to non-justiciability on the basis of an act of a foreign State was to be determined by the forum hearing the vindicatory action in due course. The relief sought by the applicants was, accordingly, granted.

END-FOR NOW