LEGAL NOTES VOL 3/2017

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MEDIA 24 BOOKS (PTY) LTD v OXFORD UNIVERSITY PRESS SOUTHERN AFRICA (PTY) LTD 2017 (2) SA 1 (SCA)

Intellectual property — Copyright — Infringement — What constitutes — Copying — Proof — Caution — To establish breach of copyright all evidence had to be examined, not only that which pointed in direction of copying.

Intellectual property — Copyright — Infringement — What constitutes — Copying — Proof — Approach to be adopted.

Intellectual property — Copyright — Infringement — What constitutes — Dictionary — Correspondences between example sentences in bilingual dictionaries directed at learners — Whether there had been substantial copying — Compilers of respondent dictionary providing evidence on affidavit of methods to compose example sentences, and denying copying — Respondent's experts offering explanation that similarities inevitable in work of this type — In absence of opportunity to test respondent's evidence in a trial, onus of proving copying not discharged on basis of correspondences alone.

Media 24 brought an application in the court a quo against Oxford University Press (OUP) in which it alleged that the Afrikaans – English/English – Afrikaans dictionary published by OUP (the *Oxford Woordeboek*) was substantially copied from Media 24's own Afrikaans – English/English – Afrikaans dictionary, which had been published earlier (the *Aanleerderswoordeboek*).Both dictionaries were aimed at schoolchildren aged ten to sixteen, were small in size, and straightforward in complexity. The dictionaries, in respect of each word entry, provided short, simple sentences illustrating the use of the word in context — 'example sentences'. Media 24's allegation of breach of copyright was based squarely on the numerous

[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!**

'correspondences' between the example sentences appearing in the two dictionaries. The extent of such correspondences, Media 24 insisted, could only have occurred as a result of repeated references to their own work. The court a quo decided against Media 24, which then appealed to the Supreme Court of Appeal.
The compilers of the *Oxford Woordeboek* attested in affidavits on behalf of OUP as to the methods they used in compiling their dictionary and denied copying from the *Aanleerderswoordeboek*. As to the similarities between the dictionaries' example sentences, OUP provided what it viewed as the most likely explanation for this, through affidavits attested to by its expert witnesses: The type of dictionary here — small in size, aimed at meeting the needs of learners with a relatively low level of language proficiency — had by its very nature a limited range of words and meanings, and the necessarily simple illustration of meanings by way of example sentences would call upon well-known common concepts. The resulting texts were as such likely to show strong similarity. OUP's experts also set out possible scenarios in which copying could have taken place and why each was improbable, ie the case of a single 'rogue' compiler copying the Media 24's dictionary of his own will; the case where all the compilers agree amongst each other to copy; or the instance in which each compiler independently and of his own volition decides to rely on Media 24's work. Media 24's response to OUP's evidence was simply to insist that the correspondences were so blatant, and the possibility of their having occurred in the ordinary course of compilation of a dictionary of this type so far-fetched, that the evidence could be rejected on the papers. Media 24 failed to provide a clear indication as to how the alleged copying occurred.
Held, that establishing substantial similarity between the original and the alleged infringing work, together with proof of the possibility of access by the alleged infringer to the original work, sufficed to raise a prima facie case of copying. It was then for the alleged infringer to show how its work was produced without copying. A bare denial of having copied was unlikely to displace the inference arising from proof of similarity and access to the original. An explanation of the process adopted in producing the alleged infringing copy that plausibly explained the reasons for the similarity between them would usually be called for. But the onus was not thereby shifted to the alleged infringer. It was always for the claimant to establish copying on the ordinary standard of proof, namely a balance of probabilities. In the present matter Media 24 established that OUP had access to the *Aanleerderswoordeboek* and that there were sufficiently substantial similarities between the example sentences to raise a prima facie case of copying, calling for an explanation from OUP of how they arose.
Held, that Media 24 adopted an incorrect approach in insisting that the correspondences were so extensive as to rebut any evidence or any probability pointing towards an explanation that excluded copying. It fell into the trap of being misled by 'similarity by excision'. In order to establish breach of copyright all evidence had to be examined, not only that which pointed in the direction of copying. In order to deal with the contention that the correspondences alone sufficed to carry the day in favour of copying, the court had to look at the evidence on behalf of OUP that its dictionary was compiled without copying. Only then could the merits of the argument that OUP's evidence had to be rejected, based on the correspondences alone, be assessed. (Paragraphs [30] – [40] at 16B – 19F.)
Held, given its approaching the court on motion, that Media 24's argument that the correspondences alone were inexplicable unless copying had occurred required not only that the compilers of the *Oxford Woordeboek* be disbelieved, but also that

OUP's explanation for the existence of the correspondences be excluded as even possibly credible. (Paragraph [46] at 21B – E.)
Held, that, in the face of all the evidence directed at showing that copying had not occurred (see [37], [41] – [45]), and what was a plausible explanation offered by OUP for the similarities between the example sentences (see [46], [47] and [49]), the fact of the correspondences alone — and without the advantages of a trial in which OUP's witnesses could be tested — was not sufficient to permit the court to reject as far-fetched OUP's evidence and its explanation for the correspondences. In other words, a positive conclusion that copying occurred could not be made on the basis of the correspondences alone. Appeal dismissed with costs.

G4S CASH SOLUTIONS (SA) (PTY) LTD v ZANDSPRUIT CASH & CARRY (PTY) LTD AND ANOTHER 2017 (2) SA 24 (SCA)

Contract — Interpretation — Evidence — Court cautioning against production of contract only — Party bearing onus to keep in mind that linguistic interpretation of contract, without evidence regarding factual matrix in which contract concluded and subsequent conduct of parties, might not suffice to discharge it.
Contract — Terms and conditions — Time-limitation clause — Services contract restricting damages claims by consumer — May be interpreted to exclude delictual claims.
Prescription — Time-limitation clause — Services contract time-barring action for damages by consumer — Clause may be interpreted to exclude delictual claims.
Security industry — Contract for provision of security — Interpretation — Contract for collection and storage of money — Time-limitation clause providing deadlines for notification of loss and submission of claim against security service provider — Intended to apply to loss or damage arising from provision of contracted services, not delictual claims otherwise arising.

G4S, a security firm, and Zandspruit, a supermarket, concluded a written contract under which G4S would collect money from Zandspruit and then store it. Clause 9.1 provided that G4S would not be liable for any damages suffered by Zandspruit in connection with the provision of security services unless they resulted from gross negligence or theft by G4S employees. Clause 9.9 provided that Zandspruit would immediately notify G4S if it discovered a loss; that the notification had to be confirmed in writing within 24 hours; and that G4S would not be liable for any claim unless written notice of the claim was given within three months and summons issued and served within 12 months from the date of the event giving rise to such claim.
In April 2010 and March 2011 thieves pretending to be G4S employees stoleR265 000 and R672 000 from Zandspruit. In June 2012 — more than 12 months later — Zandspruit, relying on breach of duty of care, instituted action against G4S. Zandspruit alleged that G4S had negligently failed to put in place the security procedures necessary to avoid its loss (see [7]). It was common cause that this was a delictual claim for the loss suffered by Zandspruit as a consequence of the theft, caused by the alleged negligent or reckless conduct of G4S (see [11]).
G4S raised a special plea — separately adjudicated in the Johannesburg High Court — in which it defended the action on the ground that the claims were time-barred by virtue of clause 9.9. Zandspruit argued that since the claims were based not on the agreement but on delict, they were not affected by the time limitation in clause 9.9.

No evidence was led apart from the agreement itself. The High Court held that clause 9.9 did not apply to delictual claims and that Zandspruit's claim was not time-barred, and a full bench agreed on appeal. In a further appeal to the Supreme Court of Appeal —

Held

A party bearing an onus in a dispute over the interpretation of a contract should keep in mind that a bare linguistic interpretation of the contract, without evidence about the factual matrix in which the contract was concluded or the subsequent conduct of the parties, might not suffice to discharge it (see [12] – [13]). Since neither party led evidence at the trial, the court had only the agreement itself to determine whether the parties intended including delictual claims within the ambit of clause 9.9 (see [13]). Turning to the wording of the agreement, clause 9.1 clearly intended to convey that the loss or damage in respect of which G4S wished to restrict liability was a loss or damage suffered by Zandspruit *pursuant to or during the provision of services* by G4S (see [14]). And this construction was fortified by the wording of other clauses in the agreement, all of which indicated that the parties did not intend that clause 9.9 should cover delictual claims which, like those in in Zandspruit's particulars, did not arise in connection with the provision of services by G4S (see [15] – [16]). Since it would have been easy for G4S to have drafted the agreement so that the time limitation in clause 9.9 included such claims, its failure to do so justified the inference that the parties did not intend it to encompass Zandspruit's claims (see [16], [23]). For these reasons G4S had failed to discharge the onus of proving its special defence (see [24]). Appeal dismissed (see [26]).

The court was at pains to point out it was *not* asked to deal with the *competence* of a delictual claim in the circumstances of the case (which was questionable in view of the contractual relationship between the parties), but with whether such a claim — good, bad or indifferent — was *time-barred by clause 9.9*.

MBELE v ROAD ACCIDENT FUND 2017 (2) SA 34 (SCA)

Prescription — Extinctive prescription — Road Accident claim — Claim including claim for future medical expenses — Claim lodged within three-year period specified in s 23(1) of Road Accident Fund Act 56 of 1996 — Five-year period stipulated in s 23(3) thereafter applicable to entire claim, including claims covered by s 17(4)(a) undertaking in respect of future medical expenses — Cause of action complete, and five-year prescription period in s 23(3) beginning to run, once all medical costs covered by undertaking incurred — Prescription Act 68 of 1969 irrelevant.

The appellant, Mr Mbele, was injured in a car accident on 7 July 2006.He instituted proceedings against the Road Accident Fund under s 17(1) of the Road Accident Fund Act 56 of 1996. The summons was lodged within three years as required by s 23(1). The claim was subsequently settled and made an order of court in April 2009. Prior to the conclusion of the settlement, on 23 October 2008, the RAF had issued an undertaking (the undertaking) under s 17(4)*(a)*(i) to compensate Mr Mbele for future medical expenses, after they were incurred and upon proof.

Section 23(3) since 2005 provided that 'no claim which has been lodged in terms of *section 17(4)(a) or* 24 shall prescribe before the expiry of a period of five years from the date on which the cause of action arose' [own emphasis]. Before the 2005 amendment s 23(3) did not mention s 17(4)*(a)*.

In October 2010 Mr Mbele demanded payment of medical expenses already incurred (the expenses claim), but the RAF refused to pay. On 9 April 2013 Mr Mbele issued summons, to which the RAF responded with a special plea of prescription. The RAF contended that the expenses claim, being a new cause of action in contract, had prescribed under s 11*(d)* of the Prescription Act 68 of 1969 since more than three years had passed since the expenses were originally incurred, which was around June 2009. Mr Mbele's positionwas that prescription was not applicable to claims lodged in terms of the undertaking. He argued that the undertaking did not create a new and independent contractual obligation based on a different cause of action, and that for the purposes of prescription, the provisions of the RAF Act as it appeared prior to its amendment were applicable.
The High Court hearing the special plea agreed with the RAF and upheld it. On appeal to the Supreme Court of Appeal the RAF submitted that since s 23(3) of the RAF Act did not before its amendment specify undertakings and was limited to s 17(1) claims, the applicable prescription period was provided for in s 11*(d)* of the Prescription Act.
Held
Although the claim for future medical expenses was an integral part of a third-party claim, the effect of the RAF's election to furnish a s 17(4)*(a)* undertaking was that payment of these costs only fell due after they were incurred (see [20]). The subsequent amendment of s 23(3) to include a reference to s 17(4)*(a)* confirmed the position that prescription in respect of claims for payment of medical expenses, covered by the terms of anundertaking, only intervened five years from the date on which the cause of action arose (see [21]). Since in Mr Mbele's case, hospital and medical expenses were incurred in June 2009 and summons issued on 9 April 2013, within the five-year period specified by s 23(3), his claim did not prescribe. The Prescription Act was not relevant.

MONYETLA PROPERTY HOLDINGS (PTY) LTD v IMM GRADUATE SCHOOL OF MARKETING (PTY) LTD AND ANOTHER 2017 (2) SA 42 (SCA)

Lease — Cancellation — Action for damages by landlord due to breach by tenant — Prescription of claim — Tenant remaining in occupation and continuing to pay rental under clause in lease that obliged it to do so if cancellation disputed — Landlord's claim arising on cancellation and prescription running from that date — Landlord's claim having prescribed despite tenant's continued occupation of premises.

Prescription — Extinctive prescription — Commencement — When debt due — Landlord suing for moneys due under cancelled lease — Tenant remaining in occupation of premises until leave to appeal refused — Landlord instituting claim for damages more than three years after date of cancellation of lease — On date of cancellation, everything having happened which would entitle lessor to institute action and to obtain judgment — Debt due on date of cancellation — Claim prescribed — Prescription Act 68 of 1969,s 11 and s 12.

Arising out of the breach of an agreement of lease between the appellant, M, as landlord and the first respondent, I, as tenant (the second respondent having bound himself as surety and co-principal debtor for the obligations of I), M exercised its right under the lease to cancel it, which happened on 6 March 2009.disputed the validity of the cancellation and refused to vacate the premises. M instituted eviction proceedings in a High Court in October 2009. M also sought payment by both

respondents not only of the sum of R2,06 million due at date of cancellation of the lease but also of a further amount of R750 000 due under the lease in respect of I's occupation of the leased premises from April 2009 to September 2009. I's defence to the claim was that the lease had been unlawfully cancelled, but the High Court concluded otherwise and granted M the relief it had sought, remained in occupation of the leased premises while it unsuccessfully sought leave to appeal to the Supreme Court of Appeal (the SCA) and the Constitutional Court. vacated the premises on 30 April 2010. In April 2010M instituted further motion proceedings in the High Court in which it claimed further amounts due in terms of the lease relating to the period October 2009 to April 2010. The respondents eventually conceded liability on this claim and entered into a written settlement of the dispute in September 2010 and this settlement was made an order of court. On 16 March 2012, M instituted an action in the High Court in which it claimed damages from the respondents allegedly suffered due to I's breach of the lease and its resultant cancellation. The respondents raised two special pleas to this claim: first, that the claim had prescribed, and second, relying on the so-called 'once and for all' principle, that M was precluded from recovering its alleged damages because the loss ought to have been claimed in previous proceedings between the parties. The High Court upheld both special pleas and dismissed M's claim. In an appeal to the SCA the respondents abandoned any reliance on the second special plea based on the 'once and for all' rule. As to the special pleas based on prescription, it was the respondents' contention that M's claim had arisen on the date of cancellation of the agreement on 6 March 2009, that the summons in the present action had been served more than three years later on 19 March 2012, and that the claim for damages flowing from that breach had therefore prescribed under s 11 of the Prescription Act 68 of 1969.M contended, however, that the damages claimed in the present action related to the period after had vacated the premises; at the earliest those damages only became 'due' as contemplated in s 12 of the Prescription Act on 30 April 2010 when vacated the premises as, until then, was bound to pay for its occupation in terms of the lease; consequently all the facta probanda necessary for a complete cause of action were not present until the property had been vacated; therefore no damages for breach of the lease were due before 30 April 2010, and as action had been instituted within three years of that date, the claim had not prescribed.

Held

M's claim was founded on a breach of the lease, and the general rule was that where one party breached a contract, the other could claim damages to place it in the position it would have been had the contract been properly performed (see [16]). A lease, once cancelled, came to an end, and there was nothing thereafter that would prevent the landlord from immediately instituting action to place itself in the position it would have been had the lease not been cancelled (see [17]). The landlord's damages amounted tothe diminution of its estate caused by the breach and cancellation, and such loss would have been suffered whether the tenant vacated or remained in occupation, and constituted a debt 'immediately claimable' (see [17]). The fact that remained in occupation did not mean that the loss claimed by M was not suffered on cancellation, even though it related to the period after eventually vacated (see [18]). To hold otherwise would confuse the right to claim loss that has been suffered with what was required to prove the amount thereof (see [18]).

The damages that were the subject of the present claim were due and payable as at the date of cancellation. On that date everything had happened which would have

entitled M to institute action and to obtain judgment in respect of the period for which the damages presently being claimed were calculated. The debt sued upon was therefore due (see [19]). Since action was instituted more than three years after the debt sued upon had become due, the special plea of prescription was correctly upheld in the court a quo. Appeal dismissed.

BOTHA v ROAD ACCIDENT FUND 2017 (2) SA 50 (SCA)

Practice — Judgments and orders — Rescission — Grounds — Mistake — Parties settling claim for damages on strength of erroneous representation of fact by plaintiff's attorney — Settlement made order of court — Plaintiff, relying on his attorney's mistake, seeking rescission of order — Defendant's acceptance of plaintiff's misrepresentation reasonable — Plaintiff not entitled to rely on it to invalidate order incorporating settlement.
Contract — Consensus — Mistake — Unilateral error — Mistake of fact by A misleading B, resulting in conclusion of contract — B's acceptance of A's misrepresentation reasonable — A not entitled to rely on own mistake to avoid contract.

Mr Botha and his wife were seriously injured in a motorcycle accident. They instituted separate High Court damages actions against the Road Accident Fund (the RAF), which defended both claims. The cases came to trial in the Gauteng Division, Pretoria, on the same date. The RAF conceded liability for any damages Mr Botha and his wife were able to prove. Mr Botha and the RAF then entered into negotiations in regard to Mr Botha's claim. The RAF agreed to pay him R1,2 million * for his past medical expenses and general damages, and provided him with an undertaking in respect of his future medical and hospital expenses. The agreement was embodied in the order of the High Court. Later, Mr Botha's attorneys realised that the R237 000 the RAF had paid for his past medical expenses was just a portion of his actual expenses, which in fact totalled R784 000. The attorneys discovered that source documents relating to certain expenses incurred in respect of Mr Botha's hospital and medical expenses had been put in his wife's file and were not presented to the RAF when the settlement was negotiated. Relying on rule 42(1)*(c)*, Mr Botha's attorneys argued that the court order had to be rescinded or varied because it embodied a settlement that was voided by 'a mistake common to the parties'. The application was opposed by the RAF on the ground that the attorneys had misrepresented the facts on which the settlement was rendered. The High Court dismissed the application. In an appeal to the Supreme Court of Appeal —

Held

To get relief under rule 42(1)*(c)*, Mr Botha had to show that the settlement was concluded as a result of a 'common mistake' (between him and the RAF) as to the correct facts (see [8]). The present error, however, was best described as a 'unilateral mistake' because it was made by Mr Botha's attorney who, through his misrepresentation, induced the RAF to contract on the terms it did. And this difference was fatal to Mr Botha's claim (see [9]). Under the reliance theory, if there is a material mistake by one party to a contract and therefore no actual consensus, the contract will be valid if the other party reasonably relied on the impression that there was consensus (see [10]). Here it was not suggested that a reasonable man would not have accepted the facts presented to the RAF, or that a reasonable man

would have realised that there was a real possibility of a mistake in the amount of expenses Mr Botha's attorneys requested to be paid (see [11]). Mr Botha's misrepresentation misled the RAF, and he could not rely on his own mistake to avoid a contract which was solely his fault (see [11]). While the court had a discretion whether or not to grant an application for rescission under rule 42(1), where, as in the present case, the court's order recorded the terms of a valid settlement agreement, there was no room for the court to do so. Appeal dismissed.

STANDARD BANK OF SOUTH AFRICA LTD v GAS 2 LIQUIDS (PTY) LTD 2017 (2) SA 56 (GJ)

Company — Business rescue — Liquidation proceedings already initiated — Provisional liquidator appointed — Business rescue application will not suspend liquidation proceedings unless notice of application served on provisional liquidator — Companies Act 71 of 2008, s 131(6).

The applicant (the Bank) in October 2015 obtained an order placing the respondent (G) in provisional liquidation. A provisional liquidator was appointed. On the return date of the provisional order — 29 February 2016 — the Bank sought a final liquidation order. But at the end of argument presented an application by a third party asking that be placed under supervision and for business rescue proceedings to commence, argued that under s 131(6) of the Companies Act 71 of 2008, the business rescue application, which had been lodged in court but not served on the provisional liquidator or G, suspended the liquidation proceedings. The question was whether the mere issue out of court of the business rescue application was sufficient to suspend the liquidation proceedings. This involved assessing the meaning of the word 'made' in s 136(6). argued that the application was 'made' when the application was lodged with the court while the Bank's view was that the application had to be served on all affected persons, including the provisional liquidator, for it to have been 'made'.
Section 131 is headed 'Court order to begin business rescue proceedings'. Section 131(6) provides that —
'(i)f liquidation proceedings have already been commenced by or against the company at the time an application is made in terms of subsection (1), the application will suspend those liquidation proceedings until the court has adjudicated upon the application; or the business rescue proceedings end, if the court makes the order applied for'. [Emphasis added.]
Held
The business rescue application was likely brought to avoid an (inevitable) liquidation (see [5]). Absent service of the application on the provisional liquidator, he or she would not officially know of the suspension of his or her duties and powers, and would carry them out in ignorance (see [23] – [24]). He or she would be acting without authority (and perhaps unlawfully) in a multiplicity of respects, a consequence which the legislature could not have intended (see [25]). There had to be service and notification as intended in s 131 before a business rescue application could be said to have been ‘made', and the liquidation proceedings suspended (see [26]). In the light of the above the launch of the business rescue application on 29 February 2016 did not suspend the liquidation proceedings.

STATE INFORMATION TECHNOLOGY AGENCY SOC LTD v GIJIMA HOLDINGS (PTY) LTD 2017 (2) SA 63 (SCA)

Review — Grounds — Legality — Legality review not available when Act applies — Promotion of Administrative Justice Act 3 of 2000.

Administrative law — Administrative action — Review — 'Any person' — Includes state — Promotion of Administrative Justice Act 3 of 2000, s 6(1).

Sita, * a state entity, and Gijima, a listed company, were the parties to an agreement under which Gijima provided information-technology services to a government department. When Sita unlawfully terminated the agreement, Gijima instituted proceedings, but after negotiations, they agreed toa settlement proposed by Sita: Gijima would abandon its claim, and in return, Sita would award it a services agreement in respect of another department. That agreement was duly negotiated and concluded. Significantly, in the negotiations preceding the settlement, and again in those toward the new services agreement, Gijima had raised the concern that a failure to follow a competitive procurement process would render the services agreement invalid. But Sita in each instance reassured it, and indeed warranted that all procurement requirements had been complied with.

Time went by, and the services agreement was performed, until eventually a payment dispute arose, which was referred to arbitration. There, in response to Gijima's claim for payment, Sita pleaded that the agreement was invalid and unenforceable, for want of compliance with s 217 of the Constitution (it requires organs of state to contract in accordance with a competitive system). The arbitrator ruled that he had no jurisdiction to determine the issue.

This caused Sita to apply for a declaration of invalidity, on the same basis. The application was dismissed on the ground that Sita ought to have proceeded under the Promotion of Administrative Justice Act 3 of 2000 (PAJA), rather than relying directly on the constitutional principle of legality.

Sita appealed to the Supreme Court of Appeal. There the issues were as follows.

(1) Whether PAJA applied to an organ of state seeking to set aside its own decision. *Held*, that it did: there was authority that a state entity's decision to award a contract for services was administrative action; the Act's language did not exclude the state and was wide enough to include it; and there was nothing about the government that justified excluding it from the Act's reach (see [15] – [16]).

(2) Whether the decision to award the contract was administrative action. Specifically, whether it satisfied administrative action's requirements that it adversely affect the rights of a person, and have a direct, external legal effect. *Held*, that it was administrative action. This in that it was final and affected another person's rights adversely (it entailed Gijima forgoing its damages claim under the unlawfully terminated agreement) (see [17], [19] – [20]).

(3) Whether there were grounds to review the decision. *Held*, that there were: failing to follow a competitive procurement process before taking the decision meant that it displayed the flaws in ss 6(2)*(a)*(i), 6(2)*(b)* and 6(2)*(f)*(i) of PAJA (see [21]).

(4) Whether the rule that proceedings for judicial review had to be instituted within 180 days, applied to an organ of state seeking to set aside its own decision. *Held*, that it did. This was suggested by reading s 7 with s 9(1)*(b)* (see [22], [24]).

(5) Whether, given that Sita had instituted proceedings outside of 180 days, the period could be extended. *Held*, that it could not be, in that Sita had not satisfied the requirements to do so (s 9(1); see [26]).
(6) Whether, if PAJA applied, a litigant had the option to bypass it and to make a legality challenge. *Held*, in the negative, for to allow such bypass would lead to PAJA's disuse, which the drafters of s 33(3) of the Constitution could not have intended (see [27], [37] – [38]).
(7) Assuming the legality principle could be directly relied upon, whether Sita's delay in instituting the review was a bar to hearing the matter. *Held*, that it was (see [32], [40], [43]).
Appeal dismissed.
The dissenting judgment held that an organ of state seeking to set aside its own decision, ought not to be barred from doing so, only because it proceeded by way of a legality review, rather than under PAJA (see [47], [54] – [55]).
In support of this approach were: Sections 7(2) and 172(1) of the Constitution (see [55], [58]); the consideration that procedure ought not to trump legality or s 217 (see [58]);that it was contrary to the rule of law to compel compliance with a constitutionally invalid agreement (see [61]);that subsidiarity did not apply, or, if it did, was not inflexible (see [65]);authority (see [65]);the language of s 6(1) and (2) of PAJA allowed it (see [68]); and it conduced, inter alia, to dealing with corruption (see [70]).
It would have upheld the appeal (see [71]).

KENTON-ON-SEA RATEPAYERS ASSOCIATION AND OTHERS v NDLAMBE LOCAL MUNICIPALITY AND OTHERS 2017 (2) SA 86 (ECG)

Contempt of court — Disobedience of court order — What constitutes — Whether, if non-compliance with court order remedied before hearing, court may make finding of contempt — Wilful and mala fide non-compliance with court order at any time sufficient for finding of contempt.

Local authority — Powers and duties — Local municipality — Air pollution control, refuse removal, refuse dumps and sold waste disposal — Nature of obligations imposed — Appropriate relief for failure to perform — Constitution, schedule C part and sch 5 Part B.

Local authority — Officers — Responsibility for compliance with court order — Statutory provisions relating to municipalities making it clear that municipal manager designated official with responsibility for overseeing implementation of court orders against municipality.

Among the relief the applicants sought in this case were orders —
(a) that the first respondent local municipality, either alone or together with its municipal manager and executive mayor, be held in contempt for non-compliance with an interdict (made under a different case number) to implement measures improving sewage reticulation; and *(b)* compelling the respondent local and district municipalities to implement measures to deal with the collection and confinement of waste, and with air pollution emanating from burning waste at the municipal waste dumpsite, together with a structural interdict relating to interim and final steps to be taken regarding the closure of the current site and the commissioning of a new site.

The main issues raised were —

- with regard to *(a)*, which municipal official was responsible for implementing court orders; whether such official had acted mala fide and was in wilful default; and the relevance of the fact that non-compliance with the order had been remedied by the time this application was heard; and
- with regard to *(b)*, the nature of municipal obligations in respect of air pollution and solid waste disposal sites; and the appropriateness of a structural interdict in the circumstances. (See [96] and [98] for a definition and an explanation of structural interdicts/ supervisory orders.)

Held as to *(a)*

In contravention of the order, on occasion sewage was observed spilling over the top of the conservancy tank into the coastal wetlands. The explanation for this was inadequate. Statutory provisions relating to municipalities made it clear that the municipal manager was the official with responsibility for overseeing implementation of court orders against the municipality. There was more than sufficient on the affidavits in this matter to establish that the local municipality and the municipal manager received notice and had knowledge of the order, and to reach the conclusion that the failure to comply with the order was beyond a reasonable doubt wilful and mala fide.

Once a party to any proceedings had shown that there was at any given time wilful and mala fide non-compliance with a court order, a finding of contempt of court could be made, although that non-compliance was remedied.

Held as to *(b)*

Section 38 of the Constitution authorised applicants to 'approach a competent court, alleging that a right in the Bill of Rights had been infringed, and the court may grant appropriate relief'. A structural/supervisory interdict was an appropriate remedy when a breach of the Constitution was alleged and proved. (Paragraphs [18] and [95] at 92F and 114I/J – 115A.)

Here the relief was founded on the fundamental right (in s 24 of the Constitution) to an environment 'not harmful to their health or well-being and to have the environment protected . . .'. This was significant because it affected the nature of the relief that could be granted, given the principle of separation of powers. (Paragraph [16] at 91G.)

The local municipality's constitutional responsibility for managing air pollution, refuse dumps and solid waste disposal arose from its inclusion in the functional areas assigned to local government as provided for in s 156(4) of the Constitution and listed in sch 4 part and sch 5 part B, and read with ss 83 and 84 of the Local Government: Municipal Structures Act 117 of 1998 which divides this responsibility between local and district municipalities.

Also, the municipality had an obligation to provide basic services. These functions intersected directly with the socioeconomic rights of residents — the provision of waste removal and waste management at a suitable dumpsite being required on a daily basis to meet the necessities of life. This had obvious consequences for the kind of relief which may be granted. A proper case had been made out for the relief of a structural/supervisory interdict. Such an order, made against the background of the intersection between the socioeconomic rights and the particular functional areas of the municipality, was aimed at ensuring the provision of basic services within its area of jurisdiction relating to waste management, and did not infringe on the separation of powers in any objectionable way.

GENERAL COUNCIL OF THE BAR OF SOUTH AFRICA v JIBA AND OTHERS 2017 (2) SA 122 (GP)

Advocate — Misconduct — Removal from roll — On ground of unfitness for practice — Advocates in National Prosecuting Authority struck from roll for various instances of unreasonable and dishonest conduct — Admission of Advocates Act 74 of 1964, s 7(1)(d).

Advocate — Misconduct — Removal from roll — On ground of unfitness for practice — Test — Nature of enquiry set out — Admission of Advocates Act 74 of 1964,s 7(1)(d).

Prosecuting authority — National Director of Public Prosecutions — Misconduct — Sanctions — Difference between removal or suspension under s 12 of National Prosecuting Authority Act 32 of 1998 and removal from roll of advocates under s 7 of Admission of Advocates Act 74 of 1964 —National Director or Deputy who is removed from roll of advocates cannot continue in that office.

Prosecuting authority — Institution of criminal proceedings — To be done in accordance with rule of law and Constitution — Failure to prosecute in face of prima facie evidence unlawful and unconstitutional — Constitution,s 179(1) and (2).

Review — Procedure — Record on review — Compliance with procedures and time frames set out in rule 53 of Uniform Rules of Court.

Nature of Uniform Rule 53

Compliance with rule 53 of the Uniform Rules of Court regarding timeframes and providing a complete record is not just a procedural process, but is a substantive requirement which serves to ensure that the substance of the decision is properly put to the fore at an early stage. Any attempt to frustrate this, should be met with displeasure by our courts (see [111] – [112]).

Facts and legal context of case

The applicant applied for an order removing the three respondent advocates from the roll, on the ground that they were no longer 'fit and proper' to practise. Its complaints arose from the respondents' conduct in three matters: the Booysen case; the spy-tapes case; and the Mdluli case. The law concerned was as follows:

- Section 7(1)*(d)* of the Admission of Advocates Act 74 of 1964, which permits a court to remove an advocate from the roll if he is not a fit and proper person to practise. The test requires the court to consider (1) whether the impugned conduct was established; (2) whether the individual is fit and proper to practise; and (3) whether, in all the circumstances, he should be removed from the roll (see [9]).
- Qualities suggesting that a person is fit and proper are: integrity; dignity; knowledge; technical skill; capacity for hard work; respect for the legal order; and a sense of fairness (see [2] – [3]).
- If an advocate is removed from the roll under s 7, then he would cease to satisfy the requirement in s 9 of the National Prosecuting Authority Act 32 of 1998, that a National (or Deputy National) Director of Public Prosecutions 'possess legal qualifications that would entitle him . . . to practise in all courts in the Republic' (see [20] – [23]).
- Failure to prosecute a case where there is prima facie evidence, will offend the law and Constitution (see [153] – [153.1]).

Findings

First respondent Jiba

The court found that the first respondent had ceased to be a fit and proper person to remain on the roll of advocates (see [138], [168] and [176.2.1]), because:

- She failed to comply with rule 53 in respect of the timeous filing of the record relating to the decision to withdraw the charges against Mdluli, and the reasons given for the delay were unreasonable and indicative of bad faith (see [110], [114.2.7]);
- she supplied an incomplete record without proper explanation (see[115] – [118]);
- she disobeyed a directive by the Deputy Judge President (see [119]);
- she failed to heed the advice of counsel briefed to defend her in her capacity as Acting National Director of Public Prosecutions, and filed affidavits contrary to that advice (see [134.5]);
- she steadfastly, and in the face of legal advice to the contrary, did everything in her power to ensure that the charges against Mdluli were permanently withdrawn, despite the prima facie evidence against him (see [135] – [135.9.5]);
- she deliberately attempted to mislead the review court by failing to disclose the fact that a prosecutor in the Mdluli case had sent her a memo asking her to review her decision to discontinue the Mdluli prosecution, deposing instead that the matter was never brought to her attention (see [136] – [136.3]).

Second respondent Mrwebi

The court found that the second respondent had ceased to be a fit and proper person to remain on the roll of advocates (see [168]), because: • He had lied about a consultative document he had prepared concerning the Mdluli prosecution (see [141] – [141.4]);

- he had deliberately failed to disclose a memorandum and consultative note setting out the reasons for discontinuing the prosecution (see [142] – [143.4.1]);
- he discontinued the prosecution of Mdluli contrary to an understandingwith the third respondent, the Director of Public Prosecutions in charge of the prosecution (see [144] – [146]);
- in his evidence in disciplinary proceedings he had turned himself into an unreliable and dishonest witness. His related answer in the present proceedings was not only a lie but was intended to mislead the court (see [151.3.3]);
- he and the first respondent had ignored solid advice by counsel that the decision to discontinue the prosecution of Mdluli would not stand in court (see [152.3.1]);
- he refused to reinstate the charges against Mdluli in the face of prima facie evidence and in contravention of the NPA Act (see [159]); and
- in an affidavit, he alleged that he had taken the decision to withdraw thecharges against Mdluli in consultation with the third respondent, which evidence was 'patently, dishonestly given' (see [163] – [164.1]).

Third respondent Mzinyathi

The court found that there was insufficient information against him to justify the relief sought (see [173] – [174]).

Order

An order was granted striking the names of the first and second respondents from the roll of advocates and dismissing the application against the third respondent.

MERAFONG CITY v ANGLOGOLD ASHANTI LTD 2017 (2) SA 211 (CC)

Administrative law — Decision of functionary — Collateral challenge to validity of decision — Circumstances in which available — Whether available to organ of state or strictly restricted to individuals whom public authority threatened with coercive action — No rigid doctrinal limitation upon availability— Available where justice required it and dependent in each case on facts — Organ of state not categorically excluded from raising collateral challenge.

Administrative law — Administrative action — Invalidity — Consequences — Government's obligations in face of invalid administrative action — Principles established in *SCA* decision of Oudekraal *and CC* decision of Kirlandexplained.

Local authority — Water — Tariff — Increase — Water for industrial use — Minister, citing its unreasonableness, upholding mines' appeal against 62% increase — Whether municipality entitled to ignore ruling on ground that it was unlawful — Municipality should have gone to court to set aside Minister's ruling once it had reached opinion that it was invalid — In failing to do so it acted in conflict with good constitutional citizenship and its duty as an organ of state to uphold and protect rule of law — However, despite inaction, not in circumstances disqualified from later resisting application to enforce ruling.

AngloGold owned mines in the jurisdiction of Merafong City (Merafong). To operate its mines, and for the domestic use of its employees, it required water. From 1958 it had acquired this directly from Rand Water. This, however, changed in 2003 when Merafong assumed the role of 'water services authority' under the Water Services Act 108 of 1997, and with it the responsibility to provide access to water to those in its jurisdiction. In 2004 Merafong informed all mines in its jurisdiction, including AngloGold, that it had appointed Rand Water as its water-services provider for the area. It further set out proposed new tariffs. These were 62% more than those charged by Rand Water. Being of the view that the change in tariffs was unreasonable, AngloGold appealed to the relevant Minister against them: the latter, in a ruling of July 2005, overturned the surcharge levied by Merafong on water for industrial purposes; in respect of water used by AngloGold for domestic purposes, Merafong, AngloGold and Rand Water were directed to negotiate a reasonable tariff. Merafong, however, continued to apply a surcharge on the industrial use of water after it had obtained a legal opinion that the Minister's decision was void in law. Negotiations to reach a compromise were unsuccessful. In April 2011 AngloGold instituted proceedings in the High Court to compel Merafong's compliance with the Minister's ruling. Merafong counter-applied, attacking the validity of the Minister's decision, and seeking declarators to the effect that the setting, adoption and implementation of tariffs fell within its exclusive area of competence as a local municipality, and that the Minister had no authority to interfere in the tariff in the manner it did.

The High Court ruled in favour of AngloGold in respect of both the application and the counter-application, and Merafong was ordered to comply with the Minister's ruling. Merafong appealed to the Supreme Court of Appeal (the SCA). Here, again, the SCA ruled in favour of AngloGold, dismissing the appeal. The SCA found to be decisive the failure of Merafong to challenge the Minister's ruling in judicial-review proceedings. Even if such ruling were indeed ultra vires, it existed in fact and had legal consequences, and Merafong could not simply ignore it; in doing so, it breached the principle of legality. The SCA further found that Merafong was, *as an*

organ of state, barred from raising a collateral challenge to the ruling. In other words, as long as an administrative decision had not been set aside, an organ of state could not raise its invalidity as a defence to proceedings against it to enforce the decision. Merafong appealed to the Constitutional Court. The key issue was whether the courts a quo were correct in enforcing the Minister's decision and disallowing Merafong's collateral challenge. In answering this the court considered the circumstances in which, and at whose instance, the collateral challenge — or reactive challenge, as the court preferred to call it (see [26] at n27) — could correctly in terms of the law be employed. In particular, was the availability of the reactive challenge strictly limited in the manner understood by the SCA, ie available only to individuals whom a public authority threatened with coercive action (and never to organs of state)?

Held, that the import of the cases * of *Oudekraal* and Kirland was that government could not simply ignore an apparently binding ruling or decision on the basis that it was invalid. The allegedly unlawful action had to be challenged by the right actor in the right proceedings. The sole power to pronounce that the decision was defective, and therefore invalid, lay with the courts. It remained legally effective until properly set aside. However, an absolute obligation was not imposed on private citizens to take the initiative to strike down invalid administrative decisions affecting them. Both decisions recognised that there might be occasions where an administrative decision or ruling should be treated as invalid even though no action had been taken to strike it down. Neither decision expressly circumscribed the circumstances in which an administrative decision could be attacked reactively as invalid. Further, they did not imply or entail that, unless they bring court proceedings to challenge an administrative decision, public authorities were obliged to accept it as valid. Neither did they impose an absolute duty of proactivity on public authorities. It all depended on the circumstances. (Paragraphs [41] – [44] at 230A – 231B.)

Held, having surveyed the pre- and post-Constitution approaches to reactive challenges (see [26] – [44]), that there was no rigid doctrinal limitation upon their viability. While reactive challenges, in the first instance, and perhaps in origin, protected private citizens from state power, good practical sense and the call of justice indicated that they could usefully be employed in a much wider range of circumstances. There was no practical, or conceptual, justification for straitjacketing them to private citizens. Categorical exclusions should be eschewed. A reactive challenge should be available where justice required it to be, dependent in each case on the facts. As to the permissibility of a reactive challenge by an organ of state, it had to depend on a variety of factors, invoked with a 'pragmatic blend of logic and experience', and it would be imprudent to pronounce any inflexible rule. (Paragraphs [25] and [55] – [56] at 222E –and 234C – H.)

Held, that Merafong itself should have gone to court to set aside the Minister's ruling once it had reached the opinion that it was invalid. In failing to do soit acted in conflict with good constitutional citizenship, as well as its duty as an organ of state to uphold and protect the rule of law, which called for action in the face of unlawfulness. However, despite this failure to take the initiative, Merafong's challenge should, for considerations springing largely out of convenience, be allowed to proceed, and Merafong's status as an organ of state did not categorically exclude it, as was incorrectly held by the SCA. But thecorrect approach was to remit Merafong's challenge to be decided afresh by the High Court. This was in acknowledgment of the distinctive character of Merafong's reactive challenge. That is, it was one in response to a decision not directed at the world at large, but one that was specific,

and known to the subject, and where a remedy was readily available. In such category of challenges the delay in addressing the decision attacked might very well be a disqualifying factor. This aspect called for scrutiny, and an explanation by Merafong. (Paragraphs [58] – [61], [65] – [72], [81] and [83] at 235A – 236B, 236G – 238C, 240F –and 241C – D.)
Appeal upheld, and matter remitted to High Court to determine, after the lodging of affidavits by Merafong and the Minister, the lawfulness of the Minister's decision, and what remedy should be granted. (Paragraph [84] at241E – H.)

Minority judgment (Jafta J, with Bosielo AJ and Zondo concurring):
It dealt principally with two issues: *(a)* Was an organ of state prohibited from raising a collateral challenge; and *(b)* was it correct to state, as did the majority in this judgment, that an invalid administrative act that existed in fact was binding and enforceable until set aside by a competent court?
The answer to the question set out in *(a)*, the minority held, was No, there being no reason in logic or principle that militated against the state raising a collateral challenge where it faced a claim that it should comply with an illegal decision. (Paragraphs [101] and [106] at 245B –and 246B.)
As to *(b)*, the minority held that such a statement was incorrect, and stemmed from a misapplication of the principles laid down in *Oudekraal* and *Kirland*.

The proposition was in direct conflict with the rule of law, which prohibited illegal or ultra vires administrative acts. The rule of law was a foundational value of the Constitution. An illegal administrative act's inconsistency with the rule of law and the Constitution, which was the supreme law, rendered it invalid and void ab initio. Such an act could thus have no legal force and effect, and could not be complied with. This was regardless of how long it remained in existence. The High Court and SCA thus erred in concluding that an illegal act was binding until set aside. The minority asserted that it would have allowed the challenge, and, further, would have upheld the appeal on the merits.

LAUBSCHER NO v DUPLAN AND OTHERS 2017 (2) SA 264 (CC)

Administration of estates — Intestate succession — 'Spouse' — Reading-in by Constitutional Court after 'spouse' of 'or partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support' — Whether on interpretation of court's judgment and consideration of Civil Union Act, reading-in still extant — Intestate Succession Act 81 of 1987,s 1(1)(a)*; Civil Union Act 17 of 2006, s 13(2)*(b). —

Mr Cornelius Laubscher and the first respondent, Mr Duplan, were permanent life partners who had undertaken reciprocal duties of support, but who had not solemnised and registered their partnership under the Civil Union Act 17 of 2006. When Mr Laubscher died he was intestate and had nodescendant or surviving parent. He did though have a brother, Dr Rasmus Laubscher, the applicant, who was the executor of his estate, and who in that capacity appears to have instituted proceedings in the High Court for a determination of whether he in his personal capacity or Mr Duplan was entitled to inherit.
The law in question was:

- Section 1(1)*(a)* of the Intestate Succession Act 81 of 1987 which provides that: 'If . . . a person . . . dies intestate . . . and is survived by a spouse, but not by a descendant, such spouse shall inherit the intestate estate . . . .'
- A reading-in after the word 'spouse' in the case of *Gory* of 'or partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support'.
- Certain provisions of the Civil Union Act, namely: Section 1, '"civil union" means the voluntary union of two persons who are both 18 years of age or older, which is solemnised and registered by way of either a marriage or a civil partnership, in accordance with the procedures prescribed in this Act, to the exclusion, while it lasts, of all others';

'"civil union partner" means a spouse in a marriage or a partner in a civil partnership, as the case may be, concluded in terms of this Act';

Section 13(2)*(b)*, '. . . any reference to . . . spouse in any other law, including the common law, includes a civil union partner'.

Dr Laubscher's contention in the High Court was that only civil union partners could inherit; while Mr Duplan asserted that *Gory* entitled him to inherit.The High Court's holding was that it was bound by *Gory*, and its order was that Mr Duplan was the intestate heir (see [5] – [6], [9]).

Dr Laubscher then applied to the Constitutional Court for leave to appeal, where the issues were as follows:

(1) Whether the *Gory* order was of interim or indefinite duration. *Held*, on interpretation of *Gory*, that the reading-in would stand until Parliament amended or repealed it (see [19], [24]).

(2) Whether, under the cessante ratione rule, ‡ the *Gory* order had ceased to exist. *Held*, that it had not, in that its reason endured. That was to allow all same-sex permanent partners to inherit intestate (ie those in civil unions, and those who were not)

(3) Whether the Civil Union Act had impliedly repealed the *Gory* order. *Held*, that it had not: the Act and the order were reconcilable; and Parliament had not intended such a repeal.

(4) Whether *Volks* was distinguishable. *Held*, that it was: it concerned a benefit under another Act; the deceased there had made a will; and it was an equality challenge, rather than an interpretation of an order as here.

Appeal dismissed (see [57]).

The concurring judgment held as follows.

- The *Gory* order was confined to remedying the unconstitutionality in s 1(1) of the Intestate Succession Act: that permanent same-sex life partners were barred from marrying. It did not address the situation of partners who, after removal of the barrier, did not get married (see [59], [63], [69], [71]).
- *Volks* was not distinguishable, and contained the principle that it was legitimate for the law to give benefits to married people that it did not give to unmarried people. The consequence of this would be that s 13(2)*(b)* of the Civil Union Act legitimately excluded unmarried people from benefiting under the Intestate Succession Act (see [74] – [76], [78]).
- But *Volks* in itself was clearly wrong in discriminating between couples with duties of support that married, and couples with such duties that did not do so (see [83], [85] – [86]).

• Absent *Volks*, unmarried same- and opposite-sex partners with reciprocal duties of support were entitled to inherit from their deceased partner's intestate estate. Mr Duplan fell within this category and thus should inherit.

JORDAAN AND ANOTHER v TSHWANE CITY AND ANOTHER, AND FOUR SIMILAR CASES 2017 (2) SA 295 (GP)

Constitutional law — Legislation — Validity — Statutory charge on property in Local Government: Municipal Systems Act 32 of 2000, s 118(3) — Declared unconstitutional to extent of it surviving transfer of ownership to owner who was not debtor of municipality with regard to debts incurred prior to transfer.

Local authority — Rates — Credit control and debt collection measures — Statutory charge on property in Local Government: Municipal Systems Act 32 of 2000, s 118(3) — Declared unconstitutional as constituting arbitrary deprivation of property — Declaration limited only to extent that such statutory charge surviving transfer of ownership to owner who was not debtor of municipality with regard to debts incurred prior to transfer — Constitution, s 25(1).

'Historical debts' are those incurred before the two-year period envisaged by s 118(1) of the Local Government: Municipal Systems Act 32 of 2000 (the Act) in respect of which a municipality must certify that all amounts such as rates and municipal service charges had been paid before the registrar of deeds may pass transfer. This case — five applications heard together, where all the applicants had taken transfer of property in respect of which historical debts were owing — concerned a municipality's entitlement to demand that all historical debts be paid before entering into service agreements with new owners. The reason advanced for such an entitlement was that historical debts, being 'a charge upon the property' as contemplated in s 118(3) of the Act, survived transfer of ownership and so was enforceable against new owners and their successors in title. * (See [8] where s 118 is set out in full.)

The main issue was the constitutionality of s 118(3), more particularly whether s 118(3) permitted arbitrary deprivation of property contrary to s 25(1).

Held, as to whether s 118(3) constituted a deprivation, that:

The section was a security provision without a time limit and therefore operated irrespective of who the present owner was. Relying on the provisions of s 118(3), a municipality would be entitled to perfect its security (subject to compliance with its own bylaws) by obtaining a court order, selling the property in execution and applying the proceeds to pay off the historical debt. This meant that s 118(3) could result in a loss of ownership for new or subsequent owners and consequently a loss of the ability to use, enjoy or exploit the property. Even in the absence of actual loss, the mere existence of such a drastic remedy constituted a severe limitation of a new owner's property rights in terms of s 25(1). Therefore, this infringement or limitation of rights constituted a deprivation for the purposes of s 25(1) of the Constitution. (Paragraphs [9] – 10] and [23] – [24] at 300D – 301A and 304C – H.)

Held, as to whether the deprivation was arbitrary, that:

A deprivation of property was arbitrary when the law concerned did not provide sufficient reason for the deprivation in question (or when it was procedurally unfair, which here it was assumed it was not). Sufficient reason would, inter alia, depend on the extent and the purpose of the deprivation. The perfection of s 118(3) security could result in the complete and permanent removal or loss of ownership — it was a

substantial deprivation. The legislative purpose of s 118(3) was to provide security for the payment of outstanding municipal charges, not to authorise expropriation. This purpose could be achieved whilst the property was still registered in the name of the current owner without extending it to new or subsequent owners who had no connection with any of the historical debts. However, as the section now read, it indiscriminately extended the purpose of deprivation far beyond what was necessary. No matter how important the legislative objective was, it could not be justified to force a property owner to pay the municipal debts of their predecessor in title, or to forfeit their ownership if they refused to do so. The new or subsequent owner was neither a debtor of the municipality with regard to historical debts, nor were they in a position to prevent the accumulation of historical debts before transfer was effected. In the absence of any such relevant relationship between the purpose of the deprivation and the person whose property was affected (ie the new or subsequent owner), no sufficient reason existed for s 118(3) to deprive new or subsequent owners (other than the current owner before transfer takes place) of their title in the property concerned. The deprivation with regard to new or subsequent owners was therefore arbitrary for purposes of s 25(1).
Held, as to whether the deprivation or limitation was reasonable and justifiable in an open and democratic society (as contemplated in s 36 of the Constitution), that the conclusions that s 118(3) constituted a deprivation, that no sufficient reason existed for such deprivation and that it was arbitrary with regard to new or subsequent owners of the property concerned, were sufficient to also conclude that this deprivation or limitation was not reasonable and justifiable in an open and democratic society. (Paragraph [44] at 310I – 311A.)
Held, as to the appropriate order, that it would be to declare s 118(3) constitutionally invalid *to the extent only* that the security provision — the 'charge upon the property' — survived transfer of ownership into the name of a new or subsequent owner who was not a debtor of the municipality with regard to debts incurred prior to transfer.

VN v MD AND ANOTHER 2017 (2) SA 328 (ECG)

Children — Custody — Parenting plan — Made order of court — Variation — Input of family advocate, social worker or psychologist required in preparing revised plan — Children's Act 38 of 2005, s 33(5).

VN and MD were the biological parents of a minor child, in respect of whom they shared parental rights and responsibilities. A parenting plan had been entered into between the parents, and that, as well as a subsequent revised version, had been made an order of court. Being dissatisfied with his rights of access in terms of the parenting plan and seeking a review thereof, MD approached the children's court. The presiding magistrate ordered that a revised plan presented by MD should be made an order of court. VN appealed to the High Court against that decision. The High Court upheld the appeal on various grounds and set aside the order granted. The court found to be completely inadequate the record of the proceedings of the magistrate placed before it, in particular as to the reasoning behind the conclusion reached. The evidence apparent from the record did not support the magistrate's finding that it would be in the interests of justice to increase access to MD in the manner sought.
Another important aspect prompting the High Court's decision was the absence of the input of a family advocate, social worker or psychologist in the preparation of the

revised parenting plan made an order of court. On this point the High Court acknowledged that s 33(5) of the Children's Act 28 of 2005 did not pertinently require those persons' input in respect of the variation of a parenting plan. However, the court added that, when regard was had to the structure of part 3 of ch 3 of the Act, it was clear that, in pursuing any agreement in respect of the exercise of parental rights and responsibilities, the parties were required, before approaching a court, to consult the family advocate, social worker or a psychologist, who was qualified to provide guidance as to the best interests of the minor child. By parity of reasoning, where the parenting plan was to be varied by virtue of the parties experiencing difficulty in exercising their rights and responsibilities, the parties were again required to engage the services of such a qualified person before seeking the intervention of a court. This was particularly so where a significant period had elapsed since the previous parenting plan had been endorsed and where the parties had failed to reach agreement.

SACR MARCH 2017

S v GUMEDE 2017 (1) SACR 253 (SCA)

Search and seizure — Search without warrant — Validity of — Claim by police that no time available to obtain warrant rejected, search consequently unlawful — Real evidence obtained in search not necessarily resulting in unfairness at trial — However, where police misled court in justifying absence of warrant and subsequent pointing-out inextricably linked to search conducted without regard to accused's rights, evidence to be excluded under s 35(5) of Constitution.
The appellant was convicted in the High Court of murder, robbery with aggravating circumstances and the unlawful possession of a firearm. The convictions were based on evidence obtained during a search without a warrant at the appellant's home in the early hours of the morning, as well as a pointing-out that he made a few hours later. The search revealed a 9 mm pistol (found under his pillow) that had been used in the shooting. The police claimed that the matter was urgent and that there had been no time to obtain the warrant. After having been questioned by the investigating officer, the appellant agreed to point out the scene of the crime. The trial court accepted that the police were justified in not waiting to obtain a warrant and that the evidence of the pointing-out was admissible, having been made freely and voluntarily. These findings were endorsed on appeal to a full bench. On further appeal,
Held, that the evidence revealed that there had been no urgency, as the police hadalready known the whereabouts of the appellant for four days before conducting the search. In these circumstances the search was illegal. Nevertheless, since the firearm was real evidence, and the police would probably have found it if they had entered the premises legally, the fact that the evidence of the firearm was unfairly obtained did not necessarily result in unfairness in the actual trial.

Held, however, that in circumstances where the police had deliberately misled the court in claiming urgency in an attempt to justify a serious rights violation, the administration of justice was brought into disrepute. In considering the second leg of the enquiry, into whether the evidence should be excluded in terms of s 35(5) of the Constitution, the evidence concerning the firearm and the pointing-out had to be analysed together, as the trial court had based the convictions on the corroboration of the former by the latter.

Held, further, that the police investigations had been conducted with haste and were almost completed within 12 hours of the appellant's arrest. Given the serious nature of the charge against the appellant, he ought to have been informed of the consequences of not remaining silent before agreeing to the pointing-out. It was clear that he must have been subjected to a considerable degree of coercion, such that his conduct was neither free nor voluntary. In these circumstances the admission of the evidence of the discovery of the firearm and the pointing-out evidence was detrimental to the administration of justice under s 35(5) and ought to have been excluded. The appeal was upheld and the convictions and sentences set aside.

S v MD AND ANOTHER 2017 (1) SACR 268 (ECB)

Sexual offences — Causing child to witness sexual act — Contravention of s 21(2)(a) of Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 — What constitutes — Mere presence of child insufficient — Perpetrator must have consciously and deliberately created circumstances conducive to child witnessing sexual act and been aware that child watching.
Rape — Aiding and abetting rapist — What constitutes — Defence of necessity — Mother of child victim alleging that she was compelled to assist her husband in raping their child — Failure to call for assistance of neighbours and mother's obvious ability to resist her husband constituting commission of offence.

The two accused, the biological father and mother respectively of the complainant, their 10-year-old daughter, were charged in the High Court as follows: count 1 (against accused 1) rape; count 2 (against accused 2) aiding and abetting accused 1 to rape the complainant; and count 3, causing the complainant to witness or be in their presence while engaging in a sexual act (contravention of s 21(2)*(a)* of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007). As to the second count, the court was required to determine whether the defence of necessity was available to the second accused in circumstances where she alleged that she had been forced to assist the first accused in committing the rape.
Held, that her inability to raise an alarm or to resist the first accused had to be rejected, as she had in the past sought assistance from her neighbours and also demonstrated the ability to resist him: she had — despite her physical disability — on a previous occasion severely assaulted him. In those circumstances, she could not have believed her life to be in imminent danger and was guilty of aiding and abetting the first accused to rape the complainant by putting a cloth into her mouth. (Paragraphs [60] – [63] at 281*b* – *f*.)
As to what constituted a contravention of s 21(2)*(a)*,
Held, that the mere presence of a child, when the perpetrators were engaged in a sexual act, did not constitute a contravention of the relevant section. Otherwise, the multitude of people who lived in abject poverty, occupying single-roomed shacks together with their children, would always run the risk of contravening the section. The persons concerned must have consciously and deliberately created circumstances conducive to a child witnessing the sexual activity being engaged in. Furthermore, such persons must have been conscious of the fact that the child was watching them engage in said activity. The circumstances in the present matter,

where the accused might have thought that the complainant was asleep, whereas she was not, did not render them guilty of the offence.

NATIONAL SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS v MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT AND OTHERS 2017 (1) SACR 284 (CC)

Animal — Cruel ill-treatment — Prosecution of — Power of *NSPCA* to institute private prosecution.

The appellant appealed against decisions in the High Court and the Supreme Court of Appeal (the SCA), that held that it did not have the right to instigate a private prosecution against persons accused of violations of animal-cruelty legislation. The SCA held that the differentiation between natural persons and juristic persons in s 7(1)*(a)* of the Criminal Procedure Act (the CPA) — in respect of the power to institute private prosecutions and the policy of limiting private prosecutions to certain kinds of case — could not be faulted, and accordingly dismissed the appellant's challenge to the constitutionality of that section. It further concluded that, read together, s 8 of the CPA and s 6(2)(e) of the Societies for the Prevention of Cruelty to Animals Act 169 of 1993 (the SPCA Act) (which permitted the NSPCA to 'institute legal proceedings connected with its functions') did not grant the applicant the right to institute a private prosecution. On appeal,
Held, that on a plain textual reading, the term 'institute legal proceedings' in s 6(2)*(e)* could include the power to privately prosecute. The language used in the provision was broad and permissive and did not distinguish between civil and criminal proceedings. There was nothing in the text itself that excluded that power. (Paragraph [36] at 298*e–f*.)
Held, further, that since the applicant was explicitly charged with upholding the statutes in the animal-protection regime and preventing animal cruelty, the term 'institute legal proceedings *connected with its functions*' had to be interpreted to encompass prosecutions of animal cruelty. Functionally, the applicant was best placed to conduct a private prosecution and give effect to preventing and enforcing the offences set out in the aforesaid regime. To understand the SPCA Act as conferring this power, was to give effect to the objects and purposes of the regime. Importantly, it gave effect to the applicant's primary purpose to protect animal welfare. To read s 6(2)*(e)* as excluding the right of private prosecution would render the regime a toothless tiger. It was declared that the applicant had the statutory power of private prosecution conferred upon it by s 6(2)*(e)* of the SPCA Act read with s 8 of the CPA.

S v HEWITT 2017 (1) SACR 309 (SCA)

Sentence — Factors to be taken into account — Celebrated status of accused — Constitution decreeing equality before law, which knew of no class distinction.
Rape — Sentence — Factors to be taken into account — Celebrated status of accused and effect of his fall from grace — Former champion tennis player and coach convicted of raping two girls entrusted to his care and of indecently assaulting another — Accused 75 years old at time of conviction — Sentence of imprisonment for six years upheld.

The appellant, a 75-year-old renowned champion tennis player and coach, was convicted of having raped two girls in the 1980s (12 and 13 years old) and of having indecently assaulted a 17-year-old girl in 1994, all of whom he coached. He was sentenced to eight years' imprisonment for each of the counts of rape and to two years' imprisonment for the indecent assault, with the sentences ordered to run concurrently. A further two years of each of the rape counts were suspended on condition that he pay a sum of R100 000 to a fund for the combating of abuse of women and children. The effective sentence was accordingly one of six years' imprisonment. He appealed against the sentence and contended that it was startlingly inappropriate. It was submitted inter alia that the incarceration of such an individual was improper because his fall from grace (and the pain of the trial) was in itself sufficient punishment, as he had 'already learnt his lesson'.
Held, that the submission overlooked the basic tenets of the Constitution which decreed equality before the law, which knew of no class distinction of offender of the proposed nature. The appellant's erstwhile celebrated status did not therefore earn him a special sentence.

Held, further, despite it being regrettable that it took so long to bring the appellant to justice, it was not an unusual phenomenon in this type of case and, despite the obvious difficulties posed by the delays, the courts had ably delivered just decisions. The sentences fitted the criminal and the crime and fairly balanced the competing interests. Although the element of rehabilitation bore little relevance because of the appellant's age, the sentences would still serve the other important purposes of sentencing, namely deterrence and retribution. The court therefore had no right to interfere and the appeal had to be dismissed.

S v MBOKAZI 2017 (1) SACR 317 (KZP)

Evidence — Witness — Oath — Admonition to speak the truth — Child explaining in own words what she understood by truth and lies — Her explanation, together with manner of testifying, indicating that requirements of ss 162 and 164 of Criminal Procedure Act 51 of 1977 met.

The appellant appealed against his conviction in a regional magistrates' court, of the rape of a 12-year-old girl and the sentence of life imprisonment imposed upon him. He contended that the complainant, who testified through an intermediary, had not been properly admonished by the trial court, in that the relevant enquiry held by the magistrate was superficial. Therefore, he argued, it could not be said whether the magistrate had established if the witness knew the difference between the truth and a lie. When the complainant was asked by the regional magistrate what it meant to tell the truth, she replied, 'Telling the truth is saying something that is straight and something that is understandable', and when she was asked what it meant to tell lies, she responded, 'It's speaking something that is not understandable. Someone . . . would not even know what you are saying.'
Held, that it was clear from the extract from the record that the magistrate had determined that the complainant understood what it meant to tell the truth. Her response basically meant that if you lied it was something that you manufactured, a figment of your imagination, and something that people would not understand, as it was not in existence or an untruth.

Held, further, that the finding that she was competent to give evidence was also reinforced by the manner in which she gave evidence. It was clear, and her answers to cross-examination questions reflected her maturity and competency. The judicial officer did not superficially carry out her duties and there was sufficient compliance with the provisions of ss 162 and 164 of the Criminal Procedure Act 51 of 1977. The complainant was a competent witness and her evidence was admissible. The appeal against the conviction had to be dismissed.

S v MABITLE 2017 (1) SACR 325 (NWM)

Murder — Sentence — Factors to be taken into account — Youthfulness and mercy — Contract killing — Sentence of life imprisonment on 20-year-old offender reduced to 25 years' imprisonment.

The appellant appealed against his sentence of life imprisonment imposed on him in the High Court for the murder of a man whose wife had contracted him to kill her husband, in return for which she promised him R50 000.He claimed to have done the deed out of poverty and the need for money to continue with his studies. At the time of the offence he was a 20-year-old first-year architecture student. He had recently lost all his belongings when he was pushed off a train. He expressed regret for the crime that he had committed, made a confession to a magistrate, and pleaded guilty. He was a first offender and had been in custody for nine months awaiting trial.
Held, that the appellant had not been warned that the provisions of the Criminal Law Amendment Act 105 of 1997 would be applicable and a reference to the Act did not appear in the indictment. The court a quo was accordingly not entitled to impose sentence in terms of that law, and the present court was at liberty to impose sentence afresh. (Paragraph [2] at 326*g–h*.)
Held, that contract killings or assassination contracts were regarded by our society as particularly heinous. However, the mitigating circumstances, and more especially the youth of the appellant and the need to secure his rehabilitation, were weighty factors that had to be considered in the context of such a crime. Moreover, the injunction to be merciful could also not be overlooked. In the circumstances a sentence of 25 years' imprisonment, as suggested by the state, would be appropriate.

S v MONYE AND ANOTHER 2017 (1) SACR 329 (SCA)

Sentence — Factors to be taken into account — Remorse — Question of fact— Accused denying role in murder until last moment before sentencing, when they performed volte-face — Not true remorse.

The two appellants appealed against their sentences of life imprisonment for murder. They were the middlemen in a contract killing. The deceased's husband wanted her killed because she sought custody of their 4-year-old son in divorce proceedings in which they were embroiled. The second appellant was offered R1 million for the killing. He in turn offered the first appellant R50 000 to find people to carry out the execution. Two hired killers were contracted to shoot the deceased immediately after she dropped her son at a crèche, which they did, shooting her twice at point-blank range. The killers entered into plea-and-sentencing agreements with the state and

were each sentenced to 18 years' imprisonment. On appeal against their sentences of life imprisonment, the appellants relied inter alia on the contention that they had shown remorse.
Held, that whether an accused had true remorse was a question of fact. In the present matter the only expression of such by the first appellant came after his trial in which he had pleaded not guilty and testified under oath. He attempted to exonerate himself by placing as much space between him and the murder as possible. Even after his conviction and before sentence his counsel had intimated to the trial judge that he was going to appeal against his conviction. It was only after the second appellant subsequently revealed the first appellant's role in the commission of the crime that he later changed his version. Even then, he failed to testify under oath and subject himself to cross-examination.
Held, further, as to the second appellant, that he agreed to change his version after he came to an agreement with the state that he would reveal the whole plot on condition that the state would ask for 20 years' imprisonment for him. He displayed no remorse in the affidavit he presented to court, and his testimony during sentencing was also devoid of any mention of remorse. (Paragraph [17] at 334*a–b*.)
Held, further, that the actions of the appellants smacked of opportunism and it was only when the writing was on the wall for both of them that they made an about-turn. This was not to benefit society or to enable the deceased’s family to have closure and not relive their trauma, but to benefit themselves. It would not be in the interests of society that they be allowed to use such a volte-face as an escape route to avoid a sentence peremptorily prescribed by the legislature. The appeals were dismissed.

S v DW 2017 (1) SACR 336 (NCK)

Child — Trial — Child under age of 18 years at commission of offence — Application of Child Justice Act 75 of 2008 — Duties of legal practitioner representing child offender — Required to make extra effort in ensuring best interests of child paramount.

The accused was convicted in a magistrates' court of housebreaking with intent to commit an offence unknown to the state. He was sentenced to a fine of R1500 or five months' imprisonment, suspended for five years on certain conditions. He was 17 years and 11 months old at the time of the commission of the offence. The provisions of the Child Justice Act 75 of 2008were not applied in respect of his trial. On special review,
Held, that the accused was deprived of a compulsory preliminary enquiry in terms of s 5(3) of the Child Justice Act after he was assessed, and the possibility of a diversion in terms of s 5(4). (Paragraph [9] at 339*g*.)
Held, further, that the accused's legal representative failed him by not establishing during consultation how old he was at the commission of the offence. It was crucial for a practitioner to go the extra mile where child offenders were involved since the best interests of the child should have been regarded as of paramount importance.
Held, further, on the facts, that although the irregularity had not brought about a failure of justice, the sentence had to be altered to one of a caution and discharge.

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS v RAMLUTCHMAN 2017 (1) SACR 343 (SCA)

Prevention of crime — Confiscation order in terms of Prevention of Organised Crime Act 121 of 1998 — Benefits of crime that may be confiscated — Although value of contract could fall within wide meaning of 'benefit', court to determine whether appropriate that whole amount be confiscated.

Prevention of crime — Confiscation order in terms of Prevention of Organised Crime Act 121 of 1998 — Enquiry under s 18(1) — Nature of— No onus on National Director of Public Prosecutions — Magistrate required to direct enquiry.

Prevention of crime — Confiscation order in terms of Prevention of Organised Crime Act 121 of 1998 — Sequestration of accused — Participation in enquiry under s 18 — Accused having locus standi where he had reversionary interest in estate.

The appellant appealed against a decision by the High Court which upheld a contention by the respondent that only the net proceeds of unlawful activities under the Prevention of Organised Crime Act 121 of 1998 (POCA) constituted a benefit that could be confiscated under s 18 of the Act, and as there was insufficient evidence to establish the exact amount of the benefit (where entire contract amount not retained), the regional magistrate had correctly refused to grant the confiscation order. On appeal it was contended for the appellant that, as the respondent's estate had been sequestrated, he had no locus standi to participate in the proceedings. As to the failure to make a confiscation order, the appellant contended that the regional magistrate was required to direct or control the enquiry under s 18(6) and make a finding, and that she had failed to do this in the instant case.

Held, that the respondent's legal disability did not divest him of his rights to deal with matters connected with his estate where the trustees, as in the present case, had expressed a reluctance to participate in the proceedings. He had a reversionary interest in the estate, and it was sufficient if he had a direct and substantial interest in the outcome of the proceedings. (Paragraphs [17]–[18] at 348*i/j*–349*d*.)

Held, further, that although the whole value of the contract in question could fall within the wide meaning of 'benefit', the court nonetheless had to determine whether it was appropriate in the circumstances that that amount could be subject to confiscation. (Paragraph [22] at 350*c*–*f*.)

Held, further, that the enquiry under s 18(1) did not impose an onus on the appellant and it had to be contrasted with an application for a forfeiture order in terms of part 3 of ch 6 of POCA. The regional magistrate had materially misdirected herself by placing an onus on the appellant and by failing to call for additional evidence in terms of s 18(6), therefore no proper enquiry had been conducted prior to the dismissal of the application.In the circumstances it would be proper if the matter were remitted to the regional court to conduct the enquiry in terms of s 18(6) of POCA.

PANAYIOTOU v THE STATE AND OTHERS 2017 (1) SACR 354 (ECP)

Fundamental rights — Right to fair trial — Right of access to information — Contents of sections and of police docket — Mere assertion of right of access to documents, without any prima facie facts to establish relevance, insufficient — In casu, stated intention to challenge conduct of investigation to establish that evidence implicating him inadmissible, by reason of manner in which it was obtained, sufficient to establish right to access to section C.

Evidence — Witness — Subpoena — Issue of subpoena duces tecum to police official in respect of documents already subject of dispute in application to compel access to police docket — Subpoenaed persons required to attend hearing of application — Rule 38(1)*(b)* not permitting party to nominate date for appearance of witness other than date of trial and procedure adopted accordingly irregular — Conduct of attorney unacceptable and to be deprecated — Uniform Rules of Court, rule 38(1)(b).

The applicant had been arraigned for trial in the High Court on seven charges relating to the murder of his wife, and the matter was set down for a pre-trial hearing on 25 August 2016. Before that date, he brought a substantive application for access to certain documents in the police docket. That application was also to be heard on 25 August 2016 but it was later postponed to 14 September to allow opposing papers to be filed. The state duly filed its answering affidavits. The applicant then issued and served a number of subpoenas duces tecum on various police officials involved in the investigation of the case against him, requiring them to attend on 14 September to give evidence and produce the documents requested, which documents were the subject of the substantive application. The Minister of Police applied to intervene to set aside the subpoenas and the court granted the application. The main thrust of the application for access to documentsin the police docket was that the applicant wanted access to the B and C sections of the docket, which contained, respectively, internal reports and memoranda, and the investigation diary.

The court held that the mere assertion of a right of access to relevant documents without any prima facie facts to establish relevance was insufficient (see [27]). In the present matter the application for access to all the documents in the section was speculative and the applicant had not established prima facie facts which pointed to the contents of that section as being relevant. The DPP's assertion that the section did not contain any material which was exculpatory, or which prima facie favoured the applicant, or was relevant to his guilt or innocence, had to be accepted in such circumstances. The section was accordingly not discoverable and the applicant was not entitled to the order that he sought (see [32]).

Different consideration applied to the section. The applicant had set out in some detail the reasons for seeking access. The correspondence pertinently referred to the fact that the applicant intended to challenge the conduct of the investigation from its outset, in order to establish that evidence allegedly implicating him was, by reason of the manner in which it was obtained, inadmissible against him at trial. In so doing he had set out, at least prima facie, an entitlement to such access on the basis that it was required to adduce and challenge evidence presented at the trial. Access to the section would be granted (see [34]).

In respect of the subpoenas issued on behalf of the applicant, the court held that the applicant, as an accused person in pending criminal proceedings, was entitled to use the machinery provided by s 179(1) of the CPA read with the rules of court, including rules 54 and 38, to issue subpoenas, as well as the machinery provided by s 35 of the Superior Courts Act (see [49] – [50]). However, it had not been explained why, having launched the application for access to the documentation, it was then decided to issue the subpoenas. This notwithstanding the existence of a dispute in relation to the production of those documents or why they were issued in relation to the hearing of the application on 14 September 2016 (see [54]). Rule 38(1)*(b)* did not permit a party seeking to compel the production of documents at trial to nominate a date for

appearance of the subpoenaed witness, other than the date of trial. The procedure adopted by the applicant, requiring the subpoenaed persons to attend the hearing of the application on 14 September was not authorised by the rules and was accordingly irregular (see [64]–[65]).
The conduct of the applicant's attorney in this regard was clearly unacceptable and had to be deprecated. Setting aside the subpoenas would, however, serve little purpose, other than to mark the court's disapproval of the conduct. In the circumstances, it would be appropriate rather to defer the obligation to comply to the date of the trial (see [69]).

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Basson and others v Hanna [2017] 1 All SA 669 (SCA)

Contract – Breach of contract – Remedies – Whether a claim for damages as a surrogate for specific performance is competent in law – Justice demanded that damages be payable in lieu of specific performance, particularly where specific performance by the appellants was not possible.

Contract – Validity – Whether failure to agree on applicable interest rate rendered contract invalid – Where no rate had been agreed on, and the rate was not governed by any other law, the rate of interest would be that prescribed in terms of the Prescribed Rate of Interest Act 55 of 1975 – Contract not rendered invalid.

In 2002, the respondent (“Hanna”), the first appellant (“Basson”) and the second appellant (“Dreyer”) concluded an oral agreement relating to the development of certain immovable property, and to the sale by Basson to Dreyer of one third of his member’s interest in the third appellant (“the CC”). The property was owned by the CC, and Basson was the sole member of the CC. Basson undertook to develop the property by building three separate houses, each with a cottage, on the property. After the building was complete, the parties took occupation of the three residential units on the property. Basson then issued to the respondent a tax invoice confirming the purchase price for the sale of a 33 and a third percent share of the member’s interest in the CC, payable in monthly instalments. In addition to paying the monthly instalments Hanna also had to pay a third of the CC’s monthly operating expenses and maintenance costs. His evidence was that in compliance with his contractual obligations, he regularly paid the monthly instalment, together with his portion of the CC’s expenses. That went on until 2007 when the relationship between the respondent, on the one hand, and Basson and Dreyer on the other, turned sour. Basson, in breach of his contractual obligations, told Hanna that he was selling the property and that he considered the agreement he and Hanna concluded to be invalid. He subsequently sold the subject matter of the contract to his brothers.

Hanna instituted action against the appellants, seeking to compel Basson to transfer a third of the member’s interest in the CC to Hanna against payment of the outstanding balance. In the alternative, he sought payment of damages in lieu of specific performance.

One of the issues that were before the court below and which remained an issue on appeal was whether the parties’ failure to reach consensus on the applicable rate of interest, rendered the agreement null and void. The second issue that was raised by

the court *a quo* at the hearing of the application for leave to appeal, was whether a claim for damages as a surrogate for specific performance is competent in law.

Basson and the CC defended the action and denied that Hanna was entitled to an order for specific performance or damages as a surrogate for performance. They contended that by failing to pay all amounts due by him in terms of the agreement timeously and in full, Hanna repudiated the agreement as a result of which Basson cancelled the agreement. In the alternative, they argued that no agreement came into being as there was no consensus between the parties regarding the rate of interest which would apply in respect of the agreement.

The court below dismissed all the appellant's arguments and awarded Hanna damages.

Held – The parties' failure to agree on the rate at which the amount payable under the agreement was to be calculated, did not render the agreement invalid. If no rate had been agreed on, expressly or impliedly, and the rate was not governed by any other law, the rate of interest would be that prescribed from time to time by notice in the Gazette by the relevant Minister in terms of the Prescribed Rate of Interest Act 55 of 1975.

On the issue of repudiation, the Court stated that viewed objectively, Basson's actions constituted conduct from which the only reasonable inference that could be drawn was that he did not regard himself bound by the agreement and that he was not prepared to perform its terms. The conclusion of the court below that he had repudiated the agreement, was therefore correct.

Specific performance is one of the remedies available for breach of contract. The Court pointed out that the principle that a party who is, *prima facie* entitled to specific performance may claim in the alternative damages as surrogate for specific performance, has been consistently followed by the courts until the majority in *ISEP Structural Engineering & Plating Ltd v Inland Exploration* [1981] 4 All SA 455 (1981 (4) SA 1) (A) introduced doubt as to the correct position. Relying on that case, the appellants submitted that the respondent's claim for damages as a surrogate for specific performance should fail because that claim was not competent in law. The Court declined to reconsider the correctness of the majority decision in *ISEP* as the case was distinguishable from the present one. The Court stated that justice demanded that damages be payable *in lieu* of specific performance in this case, as specific performance by the appellants was not possible. The respondent was ready to carry out his own obligation under the agreement and had a right to demand either literal performance, or monetary value of the performance, from Basson. A creditor's right to demand performance from the debtor cannot be at the debtor's mercy. The exercise of that right cannot depend on what the debtor chooses to do with the asset to which the creditor's right relates. To say that a claim for damages as a surrogate for specific performance is not recognised in law, would deprive the creditor of the right, where it has elected to enforce the contract, to be put as much as possible, in the position that it would have been in if the performance was made *in forma specifica*.

The appeal was dismissed with costs.

Hohne v Super Stone Mining (Pty) Ltd [2017] 1 All SA 681 (SCA)

Evidence – Theft of diamonds from employer – Confession of commission of acts of theft and quantum involved – Admissibility – Alleged duress – Onus of proof – Threat of criminal prosecution not constituting undue influence and not contra bonos mores, and evidence remained admissible.

In the trial court, the respondent ("Super Stone") succeeded as plaintiff in a delictual action for damages arising from the theft of high-value rough diamonds. The trial court awarded Super Stone R6,015 million plus interest and costs, leading to the present appeal.

Held – The case turned on two related issues: the admissibility of evidence that was video-taped and transcribed during an interview between the appellant and representatives of his employer; and documentation signed by the appellant, after that interview. In both the recording of the interview and the documentation, it was clear that the appellant had admitted having stolen diamonds from his employer as well as the value of what he had stolen. His Counsel conceded that if the evidence in question was admitted, then not only was the appellant's liability established but also the quantum of Super Stone's damages, as awarded by the trial court. The evidence in question had been ruled inadmissible in the criminal trial of the appellant, and the issue of its admissibility arose again in the civil trial.

The admissibility of evidence in a criminal trial stands on a different footing from a civil dispute and is adjudicated according to somewhat different criteria. The Criminal Procedure Act 51 of 1977 contains express provisions relating to the free and voluntary nature of written admissions and confessions before those may be admitted in evidence, and there is no equivalent provision in our law of civil procedure.

If a party wishes to avoid liability on the basis that he assented to an agreement by reason of duress, the onus is upon him who makes that allegation. In this case, Super Stone did not use any threats in order to extort an undertaking to pay an amount which it knew it could not prove. Not even a threat of the probability of arrest constitutes undue influence. The uncontested evidence of the CCTV footage alone was sufficient circumstantial evidence to justify the conclusion that the appellant did, in fact, steal the diamonds. The statement to the police, which contained the evidence of damages upon which the court *a quo* relied, was not extorted by Super Stone, but was made by the appellant when he was alone with a police official. The appellant failed to discharge the onus that rested upon him, to establish duress which could prevent the acknowledgement of debt from being enforced against him. The evidence was admissible because it was relevant and the uncontested evidence of Super Stone did not suggest a reason why it should be otherwise be excluded.

The appeal was dismissed with costs.

Rand Water Board v Big Cedar 22 (Pty) Ltd
[2017] 1 All SA 698 (SCA)

Property – Statutory power to lay pipeline across private land – Section 24(j) of Rand Water Board Statutes (Private) Act 17 of 1950 – Absence of servitude over land – Property sold to new owners – Claim for removal of pipeline and registration of servitude in respect of pipeline – Claim failing on ground that laying of pipeline was lawful – Court not empowered to order the registration of servitude in respect of pipeline.

Prior to the respondent becoming owner of certain immovable property, the appellant had laid underground pipelines over the property. The respondent was unaware of the existence of the pipelines when it acquired the property. During the course of the following year, it was informed thereof by the appellant, who suggested that a servitude be registered over the property in accordance with its standard terms and conditions. However, as the parties could not agree on the amount of any compensation payable by the appellant to the respondent, attempts to register a servitude failed.

The respondent subsequently launched an action against the appellant, advancing two claims. The first claim was described as a vindicatory claim, on the ground that the pipelines were constructed, installed and were being used by the appellant without the consent or permission of the respondent and without any servitude or other limited right being registered. It was alleged further that the appellant refused to remove the pipelines and thereby prevented the respondent from having the unhindered enjoyment of its property. On that basis an order was sought that the appellant remove the pipelines, alternatively that it register a servitude in respect of that portion of the property, or take transfer of that land against payment of the amount of R6,6 million.

The second claim was advanced on the basis that the presence of the pipelines constituted an infringement of the respondent's fundamental right to property. It was averred that the appellant was entitled either to expropriate the relevant portion of the property or expropriate a servitude in respect thereof, against the payment of compensation, but had failed to do so. The respondent accordingly alleged that its rights had been infringed, as a result of which the appellant was unjustifiably enriched and benefited at its expense. Respondent sought an order for payment of a reasonable rental, alternatively compensation, in an amount of R38 500 per month. In the alternative, it sought payment of that amount by way of constitutional damages.

The High Court upheld the first claim, on the alternative basis, but dismissed the second claim. It ordered the appellant to register a servitude over the property at its own expense on its usual terms and conditions and to pay the respondent R32 804 000 as fair, just and equitable compensation for the servitude. The main appeal against that order was met by a cross-appeal by the respondent against the court's refusal to order the removal of the pipelines and its rejection of the claim for constitutional damages.

Held – Shortly after the second pipeline had been laid on the property, the Water Services Act 108 of 1997 repealed the previous Act with effect from 31 December 1977. It contained provisions directed at the transition of various water boards, including the appellant. The key provisions were contained in section 84(4) and (6). The effect of section 84(6) was that, if laying the two pipelines was lawful when it was done, then it remained lawful after the Water Services Act came into operation, provided that it was something that could be done in terms of the 1977 Act.

It was the appellant's contention that the laying of the pipeline was lawful in terms of section 24(j) of the Act. There was no dispute that the section empowered the appellant to lay both pipelines.

Relying on section 24(j)(i) which provided that, before entering upon property for the purpose of laying a pipeline, the appellant was obliged to give the owner of the property at least seven clear days' notice of its intentions, the respondent submitted that the

evidence showed that no such notice had been given and therefore that the actions of the appellant had from the outset been unlawful. The Court did not agree that the assumed failure to comply with the said requirement rendered appellant's actions in laying the pipelines unlawful and unauthorised by section 24(j). Firstly, that case was not pleaded. The case which the appellant faced on the pleadings was that it had placed the pipelines on the property and used them for its own purposes without the consent or permission of the respondent and without any servitude or other limited real right being registered over the property. In the second claim it was said that that infringed respondent's rights to the exclusive use of its property. The appellant pleaded that it was entitled to keep, repair and maintain the pipelines and to enter upon respondent's property for such purposes and that no servitude was required to enable it to exercise its rights and obligations in that regard. There was no replication to that plea. Uniform rule 25(2) says that no replication is necessary which would be a mere joinder of issue or bare denial of allegations in the previous pleading. But if the respondent wished to attack the plea, not by challenging the existence of the power claimed by the appellant, but by contending that it had not in truth purported to act in terms of that power in constructing the pipelines, or by challenging the validity of the exercise of that power on the grounds of a failure to comply with the statutory requisites for its exercise, it needed to replicate and identify that as an issue in the litigation. Such a case would not involve a bare denial or joinder of issue. The respondent did not replicate as it needed to do. By not raising this point as it should have by way of a replication, the respondent failed to alert the appellant to the issue and prevented it from responding properly to it. Therefore, it was not open to the respondent to rely upon the relevant point in the appeal.

The substantive reason for rejecting the respondent's argument was that, on a proper interpretation of section 24(j)(i), a failure to comply with the notice provision did not render the laying of the pipeline unlawful. It was confirmed that the appellant had acted lawfully in installing the two pipelines.

The conclusion that the appellant had acted lawfully put paid to the claim for removal of the pipelines and also disposed of the cross-appeal.

The appeal was upheld with costs, and the High Court's order was replaced with one dismissing the respondent's claim.

Salem Party Club and others v Salem Community and others
[2017] 1 All SA 712 (SCA)

Land – Land claims – Claim for restitution – Section 2(1) of the Restitution of Land Rights Act 22 of 1994 – A person shall be entitled to restitution of a right in land if he was dispossessed of a right in land after 19 June 1913 as a result of past discriminatory laws or practices; or was a community or part of a community dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices; and the claim for such restitution was lodged not later than 31 December 1998 – Whether requirements for restitution were established – Majority of court satisfied that claimant community had been dispossessed of beneficial rights in land and that it was just and equitable for an order of restitution of the rights in land to be granted.

The parties herein were embroiled in a dispute over land rights in respect of a portion of land once known as the Salem Commonage. The appellants were affected landowners, appealing against the finding of the Land Claims Court (the "LCC") that a community as defined in section 1 of the Restitution of Land Rights Act 22 of 1994 (the "Act") existed, and was dispossessed of a right in land after June 1913 as a result of past racially discriminatory laws and practices in terms of section 2 of the Act.

The Commonage was part of a bigger piece of land allotted to one of several groups of between 4000–5000 British settlers by the British Colonial Government in the first half of the nineteenth century. One of the groups settled in Salem, established farms and used the Commonage for their common benefit. Some of the appellants descended directly from the original settlers while others bought their farms from the original settlers or their descendants.

The first respondent (the "Salem Community") claimed to be descendants and beneficiaries of Xhosa speaking people, who it was alleged had occupied the Commonage, but lost their rights to this land when they were dispossessed. They therefore lodged a land restitution claim in respect of the Commonage. They alleged that they had occupied the entire Commonage from the 1800s, and had acquired ownership and other rights. The LCC granted the application against the background of the racially discriminatory legislation then in existence, which formed the basis of the dispossession of the community's rights over the Commonage. It accepted the claimants' averment that the dispossession of the community's rights began in 1947 and continued until the 1980s.

The landowners countered those claims with the averment, as referred to above, that the Colonial Government had allocated the land to the settlers, and over time, the landowners individually began to employ labourers, some of whom were permitted to occupy a small portion of the Commonage with their families so long as they remained in employment. The employees, therefore, never acquired any right in land over the Commonage.

Held – In the majority judgment, it was held that the claim was brought in terms of section 2(1) of the Act which provides that a person shall be entitled to restitution of a right in land if he was dispossessed of a right in land after 19 June 1913 as a result of past discriminatory laws or practices; or was a community or part of a community dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices; and the claim for such restitution was lodged not later than 31 December 1998.

In response to the landowners' argument that no claim could validly lie in respect of the commonage because, even if occupation was proved, the land was already privately owned and held by a freehold title when the Africans settled thereon, the majority of the Court held that the commonage served as a public resource and was not capable of private ownership.

The majority also took issue with the minority judge's finding that the dispossession of the commonage community was not a result of a racially discriminatory law or practice, and with his conclusion that the claimants' land claim was invalidly lodged and that the claim had to fail for that reason alone. The Court held itself to be satisfied that the evidence showed not only that an African community inhabited the commonage from the 1870s to the 1940s when it was dispossessed of beneficial rights

deriving from such occupation, but also that it was just and equitable for an order of restitution of the rights in land to be granted. The appeal was thus dismissed.

In the dissenting judgment, it was held that the historical background established that before the 1820 settlers arrived and settled in the region, the Xhosa speaking tribes who had occupied parts of the area since about 1750, but not Salem, had been expelled in 1811 during the Fourth Frontier War. There was no documentary evidence of an independent African community of 500 people residing on the Commonage or in the location, much less of such a community exercising any authority over the land at any time. The documentary evidence pointed firmly to the contrary. The minority judge found that the Commission and the claimants advanced vague, confusing and contradictory claims regarding the nature of the rights the community was alleged to have had over the Commonage, the rules under which access to the land was determined, how and when the dispossession took place and the racially discriminatory practice or laws that resulted in the dispossession. It was held that the African community who lived on the private erven and the Commonage did so by virtue of their relationship with their employers, and whatever rights the individual members of the community might have acquired on land that belonged to the landowners, that would have been as a result of the incidence of their employment relationships with their employers and not by virtue of being members of an independent community.

Afriforum and another v Chairperson of the Council of the University of Pretoria and others [2017] 1 All SA 832 (GP)

Constitutional law – Right to education – Section 29(2) of the Constitution of the Republic of South Africa, 1996 – Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable – Exercise of the right to receive education in the language of one's choice cannot negate considerations of race and equity.

The third respondent was a university whose Senate and Council had, in June 2016, resolved to change the language policy of the university to provide for English as the main language of learning and teaching. The applicants sought to review and set aside that decision.

In seeking review of the decisions, the applicants contended that the decision paid no heed to section 29(2) of the Constitution in circumstances where it was reasonably practicable to offer tuition in Afrikaans. They also contended that the decision violated the right in section 9 of the Constitution not to be discriminated against on the basis of language, and constituted a withdrawal of extant rights of students currently seeking instruction in Afrikaans and those who might do so in the future.

The respondents disputed that there was any constitutional violation, but maintained that even if there was, the limitation was justifiable in terms of section 36(1) of the Constitution.

The Court had regard to the history of the university and its language policy over time; the legal and policy framework relevant to the determination of language policy at the institution; and the process followed by the university prior to the decision to adopt the current language policy.

Held – In terms of section 27(2) of the Higher Education Act 101 of 1997, the university was required to adopt a language policy, subject to the Higher Education

Language Policy of 2002, read with the National Language Policy Framework of 2003. The said policy framework evidenced a recognition of Afrikaans as a national resource. The policy pointed to the right of individuals to receive education in the language of their choice. While the policy was not law, the university was enjoined to have regard thereto. Section 29(2) of the Constitution also provides that everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. A significant portion of the dispute in these proceedings related to the interpretation to be given to section 29(2) and in particular to the considerations that go into determining the question of "where that education is reasonably practicable".

The claim to the right entrenched in section 29(2) must be located and adjudicated upon within the context of the education system as a whole and the resources and other means that exists within it, as opposed to the confines of any single public educational institution at any given time. The concept of reasonableness introduces a value and qualitative standard into the determination of reasonable practicability.

The Ministerial Policy Framework upon which the applicants place considerable reliance, explicitly accepted that the exercise of the right to receive education in the language of one's choice cannot negate considerations of race and equity. The evidence established that the university did take into account the constitutional rights of Afrikaans students seeking instruction in their own language. The need to take the relevant factors into account does not equate to having to positively respond to the request made. The conclusion that providing tuition in Afrikaans was not reasonably practicable was unassailable.

The Court also found no merit in the discrimination argument or the alleged withdrawal of extant rights.

The application was, accordingly, dismissed.

Agricultural Research Council v South African Stud Book and Animal Improvement Associations and others [2017] 1 All SA 850 (FB)

Agriculture and Animals – Animal breeding – Obligation of breeder's society to submit pedigree and performance data of its registered animals to national data bank – Provisions of Animal Improvement Act 62 of 1998 examined, leading to conclusion that breeder's society was obliged to submit relevant data of its registered animals to national data bank.

The plaintiff sought a declaratory order and interdictory relief against the defendants, as well as payment of an amount in excess of R90 million. The cause of action was based on, *inter alia*, unlawful conduct, transgressing of statutory enactments and infringement of its copyright. The action involved the interpretation and the application of the Animal Improvement Act 62 of 1998 (the "Act") to the affairs of the first defendant ("Stud Book"), being a registering authority and a breeders' society as defined in the Act. The critical issue was thus whether Stud Book's members were expressly or by necessary implication obliged to submit certain information to a national database (named "INTERGIS") relating to the activities regulated under the Act.

In June 2011, Stud Book notified the presidents of breeders' societies and breeders of its intention to privatise the livestock industry recording, operated until then by INTERGIS. The question for determination in the present proceedings was whether in

the absence of a manner approved by the registrar in terms of the Act, a breeders' society is obliged to submit pedigree and performance data of its registered animals to INTERGIS.

Held – The Act provided for the breeding, identification and utilisation of genetically superior animals in order to improve the production and performance of animals in the interest of the Republic. The Act defined "animal improvement" as "The scientifically based identification of genetically superior animals by means of the integrated registration and genetic information system or in a manner approved by the registrar and the discerning use thereof to improve the production or performance ability of the animal population in the interest of the Republic." The integrated registration and genetic information system referred to the computer system which has been established in co-operation with the department to integrate the pedigrees and performance data of animals. Animal breeder's societies could be registered only if their constitutions specifically provided for the continued commitment to animal improvement. Stud Book was a registering authority and an animal breeders' society or a group of animal breeders' societies in terms of section 8(7)(a)(ii) of the Act. It was thus subject to the same obligations pertaining to animal improvement by means of INTERGIS, unless a different manner had been approved by the registrar.

The plaintiff submitted that the function of the national database dictated the obligatory participation in such. The Court pointed out that the plaintiff was the organisation appointed to operate and manage INTERGIS in terms of section 15(3) of the Act, and to manage the animal improvement schemes established for the evaluation and certification of the performance of animals with the purpose of improving the genetic production potential of such animals. There was no legal justification for Stud Book's refusal to submit all pedigree and performance data, received or captured by it. The question for determination, as referred to above, was decided in plaintiff's favour.

Booysen v Jonkheer Boerewynmakery (Pty) Ltd (in business rescue) and another [2017] 1 All SA 862 (WCC)

Company law – Business rescue – Section 133(1) of the Companies Act 71 of 2008 – General moratorium on legal proceedings against a company in business rescue – Proceedings requiring either the written consent of the practitioner or the leave of this court before they could be commenced or proceeded with – While the leave of the court should ordinarily be obtained by way of a substantive application, in order to avoid unnecessary expense and formalism such application can properly be made as a part of the principal matter and can be heard in limine prior to the commencement thereof.

Words and phrases – "business rescue" – Companies Act 71 of 2008 – Defined as proceedings taken to facilitate the rehabilitation of a financially distressed company by providing for its temporary supervision and the management of its affairs, business and property, a temporary moratorium on the rights of claimants against the company (or in respect of property in its possession), and the development and implementation, if approved, of a plan to rescue the company by restructuring its business affairs, liabilities and equity in a manner that will maximise the likelihood of it continuing in existence on a solvent basis, or if this is not possible, which will result in a better return for creditors or shareholders than would otherwise result from its immediate liquidation.

The first respondent was a liquor wholesaler which in 2013, experienced financial difficulty of sufficient seriousness to lead to its directors resolving to place the company under business rescue. The second respondent was appointed as the business rescue practitioner. He duly assumed control of the company and convened a first meeting of creditors and employees on 12 September 2013, where he informed those present that he believed there was a reasonable prospect that the business rescue process would result in a better outcome than would be achieved on a winding-up, and he called on creditors to submit any claims they might have. The applicant, a manager of one of the company's branches, lodged a claim for outstanding remuneration.

The second respondent published a draft business rescue plan. The full value of the applicant's claim as an admitted preferent claim was listed in the plan. The plan was adopted at a second meeting of creditors which was held on 22 November 2013, but some 3 years later the applicant had still not been paid the major portion of his claim. Enquiries made by him to the second respondent led to his being advised that an attempt would be made to effect payment. Such payment did not materialise and the applicant launched the instant application in which he sought an order directing the respondents to pay the outstanding balance to him, together with interest.

Defending the claim, the respondents contended that the applicant's claim was grossly over-stated and that the business rescue plan was subject to a proviso in terms of which second respondent had reserved the right to amend it unilaterally, without reference to creditors, and after additional information in respect of the applicant's claim had come to his attention (the nature of which information was not disclosed), it had been so amended.

Held – The concept of business rescue is defined in the Companies Act 71 of 2008 as proceedings taken to facilitate the rehabilitation of a financially distressed company by providing for its temporary supervision and the management of its affairs, business and property, a temporary moratorium on the rights of claimants against the company (or in respect of property in its possession), and the development and implementation, if approved, of a plan to rescue the company by restructuring its business affairs, liabilities and equity in a manner that will maximise the likelihood of it continuing in existence on a solvent basis, or if this is not possible, which will result in a better return for creditors or shareholders than would otherwise result from its immediate liquidation.

Inasmuch as the proceedings in this matter concerned a claim by the applicant for payment of a sum of money (which formed part of a claim which was admitted and included in the rescue plan), they constituted an "enforcement action" within the meaning of section 133(1) of the Act, which placed a general moratorium on legal proceedings against a company in business rescue. As such, on the face of it the proceedings required either the written consent of the practitioner or the leave of the court before they could be commenced or proceeded with.

Applying the established principles of statutory interpretation, the Court held that inasmuch as the provisions of section 133(1) may limit or intrude upon the constitutional right of access to court which a litigant may ordinarily enjoy, they must be interpreted in a manner which is least restrictive of such rights. The provisions in question must be read in the context of the statutory presumption that unless a contrary intention clearly appears from the language, the Legislature did not intend unfair, unjust or unreasonable results to flow from its enactments and it is to be

presumed that the legislation was not meant to be absurd or anomalous. The Court held that when giving effect to the provisions of section 133(1) it is important to strive towards an interpretation which will allow for the speedy, cost-effective and efficient implementation of an adopted rescue plan and the timeous completion of the business rescue process as opposed to an interpretation which will prolong it or drag it out unnecessarily. One of the principal objectives which the court should have in mind is to protect and give effect to the business rescue process and to advance it, rather than to stifle or retard it. It was therefore concluded that it would be wrong to hold that in each and every matter in which leave of the court is required, such leave needs to be sought and obtained by way of a formal application, nor, would it be correct to hold that such leave must, of necessity, always be sought by way of a separate, prior application. It will in each case be a matter for the court's discretion. Applying a purposive and contextual interpretation to the language used in the provisions in question, there was nothing in section 133(1) which excludes the leave of the court being sought and obtained, in appropriate circumstances, either together with or subsequent to the launch of the principal proceedings or action in question. While the leave of the court can and should ordinarily be obtained by way of a substantive application, in order to avoid unnecessary expense and formalism such application can properly be made as a part of the principal matter and can be heard *in limine* prior to the commencement thereof, without doing violence to the provisions of the section.

The Court confirmed that the applicant was a preferent and not a concurrent creditor. It then turned to consider the purported amendment of the applicant's claim. It held that the whole scheme of the relevant statutory provisions was such that there was no room for a business rescue practitioner to reserve to himself the right to amend a business rescue plan. In doing so, he would effectively circumvent the procedure set out in the Act in terms of which the claims, which are to be discharged as per the rescue plan, derive their binding force.

In the premises, the applicant was granted leave to proceed with this application in terms of section 133(1)(b) of the Companies Act, and the first respondent was ordered to pay the applicant the amount owed to him.

Da Cruz and another v City of Cape Town and another
[2017] 1 All SA 890 (WCC)

Property – Building plan application – Approval of – Application for review – Section 7(1) of the National Building Regulations and Building Standards Act 103 of 1977 – Decision-maker must be satisfied before granting approval, that there is compliance with the necessary legal requirements, and that none of the disqualifying factors in section 7(1)(b)(ii) will be triggered by the erection of the building concerned – All that is needed for an applicant to succeed is to prove to the satisfaction of the reviewing court that the erection of the building will reduce the value of his property.

The applicants were the body corporate of a mixed-use building ("the Four Seasons building"), and an owner of one of the residential units in the building. They sought judicial review and setting aside of a decision by the municipality of the City of Cape Town to approve building plans for the remodelling and upward extension of a building ("the Oracle building") on the adjoining property owned by the second respondent. The approved building plans provided for the renovation and extension of the neighbouring building to comprise a structure consisting of eight floors above the ground floor, with

a roof terrace over part of the new top floor. The newly created sixth floor of the building would be at a level that more or less corresponded with that of the eighth floor of the applicants' building. The applicants objected to the unduly intrusive and objectionable character of the building extension.

The applicable zoning scheme permitted 100% building coverage of the property. Accordingly, 0 metre building setbacks were permissible on all its boundaries. The applicants' complaint therefore related to the confining effect on some of the apartments in the Four Seasons building of the solid wall of the Oracle building being built flush against the boundary.

The City's 2008 decision to approve the plans was reviewed and the approval of the building plans was set aside. The second respondent thereafter resubmitted the building plans for approval in substantially unaltered form. The applicants sent their written objections to the second respondent, whose response was that the existing development on the Four Seasons building could not be permitted to compromise the second respondent's ability to develop its property to the maximum extent permitted in terms of the zoning scheme.

The present application for review was founded on the allegation that the decision to approve the building plans was materially influenced by an error of law; not rationally connected to the information before the decision-maker; taken because relevant considerations were not considered; and so unreasonable that no reasonable decision-maker could have made it.

Held – Section 7(1) of the National Building Regulations and Building Standards Act 103 of 1977 was central to the present dispute. Its proper construction and application has been the subject of divided judicial opinion. However, an examination of the case law established that the issue had been settled by the Constitutional Court in the case of *Turnbull-Jackson v Hibiscus Court Municipality and others* 2014 (11) BCLR 1310 ([2014] ZACC 24; 2014 (6) SA 592) (CC). The decision-maker must be satisfied of two things before granting approval. The first is that there is compliance with the necessary legal requirements. Secondly, he must be satisfied that none of the disqualifying factors in section 7(1)(b)(ii) will be triggered by the erection of the building concerned. All that is needed for an applicant to succeed is to prove to the satisfaction of the reviewing court that the erection of the building will reduce the value of his property.

Properly discharging the duty imposed on the local authority by section 7(1) should result in a decision, whether it be to approve or refuse the application, that is demonstrably rational. If the decision-maker, when it furnishes its reasons, is not able to reason its decision plausibly, the decision is likely not to be rationally connected to the matter in hand and accordingly vulnerable to review. Section 7(1)(b)(ii) does not give the administrator the power to determine what the relevant facts are, and therefore does not give rise to matters of pure judgment. The local authority is required to have regard to the objectively relevant facts and make a reasonable judgement based thereon. If the existence of any of the disqualifying factors is established on that approach, then the principle of legality precludes approval of the building plan. A failure by the decision-maker to have appropriate regard to any relevant fact in forming the required judgement might result in the decision being reviewable in terms of section 6(2)(e)(iii) of the Promotion of Administrative Justice Act, which provides that

administrative action taken because irrelevant considerations were taken into account or relevant considerations were not considered can be set aside on review.

The notion that a property owner may develop its property to the maximum extent permitted by a zoning scheme regardless of the nature of the adverse effect on the utility of its neighbour's property is not only inconsistent with the provisions of section 7(1), it also runs counter to the precepts of the common law. The moderating principle in the regulation of neighbour relations in the common law is reasonableness.

The decision in issue in the current matter was made because of the functionaries' misdirected opinion that any conventional structure erected within the applicable land use restrictions had to be factored in by anyone purchasing a unit in the adjoining Four Seasons property irrespective of its effect on an extant building on the adjoining property. That was a mistaken view based on a misapprehension of the law. The functionaries failed to consider whether a reasonable and informed purchaser of a unit on the eighth floor of the Four Seasons building would foresee that the regulating authority, having approved balconies along the common boundary would permit the development of the adjoining erf in such a manner as to effectively destroy the utility of the balconies as such, and with the degree of overbearing intrusiveness that allowing a three storey solid wall to be built up hard against them would unavoidably occasion. Therefore, the approval of the second respondent's building plan application occurred in circumstances in which the decision-maker was materially influenced by an error of law.

The approval of the building plan application was reviewed and set aside, and the application was remitted to the first respondent for reconsideration, with certain directions issued by the Court.

Motata v Minister of Justice and Correctional Services and another [2017] 1 All SA 924 (GP)

Constitutional law – Judicial Service Commission – Powers of – Whether sections 8–10, 14–23 and 25–33 of the Judicial Service Commission Amendment Act 20 of 2008 complied with sections 177(1), 178(6) and 180(b) of the Constitution of the Republic of South Africa, 1996 – Court held that the general power of the Judicial Service Commission in section 178(6) to determine its own procedures includes the specific power in section 180(b) to determine its own procedures for dealing with complaints about judicial officers – Court confirming constitutionality of impugned provisions.

The applicant, a judge of the High Court, was involved in an accident on 6 January 2007 that resulted in his conviction for driving a motor vehicle whilst under the influence of alcohol and a sentence of 12 months' imprisonment or a fine of R20 000. He was placed on special leave from 15 January 2007 to 15 April 2007 pending his criminal prosecution. Almost ten years later the special leave was still in place.

In May 2011, the Judicial Service Commission ("JSC") received a complaint against the applicant in terms of section 14(3)(b) of the Judicial Service Commission Amendment Act 20 of 2008. The JSC referred the complaint to the Judicial Conduct Committee ("JCC") established in terms of section 8 of the Act. The JCC recommended to the JSC that the complaint be referred to the Judicial Conduct

Tribunal ("Tribunal"), established in terms of section 21(1) of the Act, for further investigation into the applicant's conduct.

In the present application, the applicant sought to have sections 8–10, 14–23 and 25–33 of the Act declared inconsistent with sections 177 and 178 of the Constitution and consequently, unconstitutional and invalid. He argued that the power to remove a judge is derived exclusively from sections 177 and 178(6) of the Constitution and not from the Act, and that section 177 of the Constitution authorised only three role-players to be involved in the removal of a judge namely the JSC, the National Assembly and the President. His attack on the Act was that Parliament arrogated unto itself the power to promulgate the Act, to determine the procedures to be followed by the JSC when deciding whether a judge is guilty of gross misconduct, is grossly incompetent or incapacitated, and thereby violated the doctrine of the separation of powers and the independence of the judiciary. The applicant also took issue with the appointment of non-JSC members to the JCC and the Tribunal, and the participation of politicians in the enquiry.

The respondents raised two points *in limine*. The first was the non-joinder of Parliament in the application, and the second was the applicant's failure to establish substantive, concrete and demonstrable evidence, as a result the respondents were unable to plead comprehensively.

Held – The impugned legislation was the product of collaboration between the Minister and the JSC. The Act was not the work of Parliament acting on its own, but was the initiative of the Minister as a member of the executive branch. It was therefore the sort of legislation for which joinder of Parliament was dispensable. The first point *in limine* was thus dismissed.

On considering the second point, the Court agreed that the order sought to declare invalid sections 15, 17 and 18 of the Act, ie provisions unrelated to his impeachment proceedings, had no factual predicate and the applicant had no standing to contest their validity. However, the same could not be said for the sections which were pertinent to the impeachment proceedings. The point was dismissed in respect of those sections.

The Court explained how the relevant statutory scheme should be approached, and clearly defined the focus of its enquiry. The application singularly called for a declarator on whether the impugned provisions of the Act complied with sections 177(1), 178(6) and 180(b) of the Constitution. The primary attack on the Act was that the said constitutional provisions do not authorise Parliament to legislate for the JSC, but that the JSC must govern itself by adopting its own procedures. The Court held that the general power of the JSC in section 178(6) to determine its own procedures includes the specific power in section 180(b) to determine its own procedures for dealing with complaints about judicial officers. The *generalia specialibus non derogant* maxim: general words and rules do not derogate from special ones, applied. A literal interpretation of section 180(b) expressly authorised the Act. Nowhere does the Constitution provide for procedures specifically dealing with complaints about judicial officers. Such an interpretation of section 180(b) did not conflict with section 178(6).

The Court, accordingly, confirmed the constitutionality of the Act and dismissed the application.

NCP Chlorchem (Pty) Ltd v National Energy Regulator and others [2017] 1 All SA 950 (GJ)

Local government – Powers and duties of municipality – Supply of electricity – Ruling by National Energy Regulator that consumer's electricity was subject to tariffs imposed by municipality despite consumer not drawing its electricity from municipality's supply main – Review application – No act of Parliament gives municipalities the exclusive right to supply electricity to consumers within their area of jurisdiction, and the national energy supplier was therefore required to contract with consumer directly for the provision of its electricity.

The applicant ("NCP") was the country's largest producer and leading supplier of liquefied packed chlorine. Its chlorine production process was such that 90% of the electricity consumed by NCP was used, not as a utility, but as a raw material. NCP stated that the supply of electricity (at a sustainable cost) was, therefore, crucial to its business.

There were only two other manufacturing installations comparable to the NCP plant in South Africa. Both of those plants consumed electricity that was purchased directly from the third respondent ("Eskom") at "wholesale" rather than "retail" prices.

At issue in this dispute was whether NCP was being supplied with electricity by the second respondent municipality ("EMM") or by Eskom. The first respondent ("NERSA") was approached to mediate the dispute, and ruled that the NCP substation received its electricity supply directly from the Eskom distribution network, but was invoiced by EMM for its electricity usage at a tariff which provides for electricity purchases from Eskom, network charges and customer service charges by EMM.

Seeking review of the ruling, NCP contended that the effect of the ruling would be to compel NCP to procure its electricity at "retail" prices from EMM, although it added no value in the process by which NCP obtained its electricity from Eskom.

Held – A ruling of NERSA, whether or not constituting administrative action, must be lawful and rational, based on the principle of legality. It was therefore subject to review.

On the issue of procedural unfairness, NERSA conceded the case of NCP that there were flaws in the procedure followed in the dispute resolution process that resulted in unfairness to the parties. Such flaws vitiated the outcome of the arbitration and had the result that it fell to be reviewed and set aside.

In the ordinary course, a procedural unfairness complaint would dispose of the review relief sought in an application, thus obviating the need to consider any other grounds of review raised. NCP, however, urged the court to consider its other grounds of review as they related to certain errors of law and fact in the NERSA decision that were relevant to the question of remedy. The primary error of law ground raised by NCP was EMM's mistaken constitutional law premise that electricity supply was the exclusive preserve of municipalities.

Where a decision is set aside on review, the ordinary consequence is that that decision is remitted to the administrator for reconsideration. Only in exceptional circumstances will a Court substitute its decision for that of an administrator. The Court considered the lack of consensus between NCP and EMM on the question of remittal

of the dispute to NERSA for reconsideration to constitute an exceptional circumstance which would justify the court substituting its decision for that of NERSA.

Before considering NCP's grounds of review, the Court had to consider EMM's application for condonation for the late filing of its answering affidavit in the application. The significant delay and the poor explanation therefor lead the Court to refuse condonation.

On the merits of the dispute, the Court pointed out that no Act of Parliament gives municipalities the exclusive right to supply electricity to consumers within their area of jurisdiction. Eskom was therefore obliged to supply NCP with electricity on application by NCP. The Court made an order setting aside the NERSA decision and substituting it with an order that NCP was entitled to contract with Eskom for the provision of its electricity.

END-FOR NOW