LEGAL NOTES VOL 3/2018

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RAMUHOVHI AND OTHERS v PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS 2018 (2) SA 1 (CC)

Constitutional law — Legislation — Validity — Recognition of Customary Marriages Act 120 of 1998, s 7(1) — Confirmation of High Court order of constitutional invalidity to extent it relating to polygamous customary marriages — Interim relief differing from High Court's ordered.

Customary law — Customary marriage — Polygamous customary marriages — Proprietary consequences of pre-Recognition Act polygamous customary marriages — Constitutional invalidity of s 7(1) of Recognition Act to extent it relating to polygamous customary marriages — Applicable interim regime — Recognition of Customary Marriages Act 120 of 1998, s 7(1).

At customary law the rights of ownership and control of marital property vest in the husband. While s 6 of Recognition of Customary Marriages Act 120 of 1998 (the Act) introduces equality in status between husbands and wives in customary marriages, s 7(1) the Act provides that '(t)he proprietary consequences of customary marriages entered into before the commencement of this Act continue to be governed by customary law'. This has the effect of perpetuating the inequality between husbands and wives in the case of pre-Act polygamous customary marriages (see [35]).
In *Gumede* (see n2) the Constitutional Court held this to be 'self-evidently discriminatory on at least one listed ground: gender' (see [36]); and declared s 7(1) 'inconsistent with the Constitution and invalid to the extent that its provisions relate to monogamous customary marriages'. *Gumede* however made no finding regarding the constitutionality of s 7(1) as it relates polygamous customary marriages.

[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!**

In this case the Constitutional Court confirmed a High Court order extending the constitutional invalidity of s 7(1) to pre-Act polygamous customary marriages.

It agreed with the High Court that no justification was proffered for the limitations s 7(1) placed on the right to human dignity and the right not be discriminated against unfairly (see [9] and [43]) but disagreed as to the appropriate remedy. It suspended the order of invalidity for a period of 24 months pending legislative intervention to cure the defect; as interim relief wives in such marriages would be afforded equal management, control and ownership in respect of marital property (see [51] and order para 5). It also ordered that should Parliament fail to remedy the defect within the period of suspension, this interim relief would continue to apply after the period of suspension (see order para 6). As for the proprietary rights of wives whose pre-Act polygamous customary marriages terminated before the proposed order, or people falling under the various houses constituted by these wives, it held that retrospective effect of the declaration of invalidity should be as extensive as possible but not effect estates that have been wound up or transfers that have taken effect where the transferee was unaware of a legal challenge on the same grounds as in the present case (see [52] and order paras 7 and 8).

STATE INFORMATION TECHNOLOGY AGENCY SOC LTD v GIJIMA HOLDINGS (PTY) LTD 2018 (2) SA 23 (CC)

Administrative law — Administrative action — Review — Organs of state may not use PAJA to review their own decisions — Promotion of Administrative Justice Act 3 of 2000.

Review — Grounds — Legality — Organs of state may bring legality reviews of their own decisions.

Sita, an organ of state, contracted Gijima to provide computing services to a government department. When Sita unlawfully terminated the agreement, Gijima instituted proceedings, but the dispute was resolved, by Gijima agreeing to drop its damages claim, in return for Sita awarding it a new services contract. The agreement was duly entered, performed, and extended, before a payment dispute arose, which Gijima referred to arbitration. There, Sita's defence to Gijima's claim for payment, was that the agreement was invalid for non-compliance with s 217 of the Constitution (it requires organs of state to contract in accordance with a competitive system.) It also asserted that Gijima had failed to perform. The arbitrator's finding was that he had no jurisdiction to determine the s 217 issue.
Sita then applied to the High Court for legality review of its decision to contract. (This on the basis of its non-compliance with s 217.) The High Court dismissed the application, holding inter alia, that PAJA applied, and could not be 'circumvented' by reliance on legality review. (See paras 2, 19, 28 and 41 of the High Court's judgment. ‡
Sita then appealed to the Supreme Court of Appeal. In dismissing the appeal, it held that PAJA applied to an organ of state seeking to review its own decision. It also confirmed that when PAJA applied, a litigant could not sidestep it by resort to legality review. (See paras 15 – 16, 27, 37 – 38 and 45 of that court's judgment.
Sita then appealed to the Constitutional Court. It held as follows.

- An organ of state could not use PAJA to review its own decision. (It reasoned that the rights in s 33 of the Constitution were available only to private parties; that PAJA was enacted to give effect to those rights; and thus that PAJA was available only to private parties.)
- An organ of state could bring a legality review of its own decision (see [41]).
- The award of the contract was unlawful (it contravened s 217 of the Constitution). (See [40] – [41].)
- Sita's 22-month delay before instituting the review was inexcusable. (See [42], [47], [49] and [51].)
- Nonetheless, s 172(1)*(a)* of the Constitution compelled the declaration that the award of the agreement was invalid (see [52]).
- Despite this invalidity, it would be ordered under s 172(1)*(b)*, that Gijima would not lose its rights under the agreement. (See [54] – [55].)
- Gijima would receive its costs (see [55]).

Appeal upheld.

LONG BEACH HOME OWNERS ASSOCIATION v DEPARTMENT OF AGRICULTURE, FORESTRY AND FISHERIES AND ANOTHER 2018 (2) SA 42 (SCA)

Environmental law— Forests — When destruction of indigenous trees amounting to destruction of natural forest — National Forests Act 84 of 1998, ss 3(3)(a) and 7(4).

Appellant association applied to first respondent department for a licence to 'damage' * indigenous trees in a natural forest (s 7(4) of the National Forests Act 84 of 1998. The section allows the Minister to license the cutting, disturbing, damaging or destroying of indigenous trees in such forests.)
In coming to refuse the application, the department reasoned (1) that destruction of any part of a natural forest would constitute 'destroying' natural forest for the purposes of s 3(3)*(a)* ('natural forests must not be destroyed save in exceptional circumstances where, in the opinion of the Minister, a proposed new land use is preferable in terms of its economic, social or environmental benefits'); and (2) that no exceptional circumstances were present. (See [15.4] and [18].)
The association applied to the High Court to review the refusal; it dismissed the application; and the association appealed to the Supreme Court of Appeal.
Held, that the department's interpretation in (1) would have absurd results. Properly interpreted, whether a proposed destruction of indigenous trees would amount to 'destroying' natural forest was to be determined on the facts of a given case, and was a matter of degree. In making the determination the administrator had to compare, inter alia, the extent of the trees proposed to be destroyed, and the extent of the forest concerned. (Thus, to destroy one tree in a forest of 10 acres would not be to 'destroy' natural forest; but to destroy one acre of those trees would.) (See [15.5] – [15.6].)
Held, further, that the department had reached the conclusion in (2) that there were no exceptional circumstances, through a flawed exercise of its discretion. It had applied its policy, that a residential development did not constitute an exceptional circumstance, without considering, as it ought to have, the merits of the association's application. (See [18] and [20].)

The appeal accordingly upheld; the order of the High Court set aside; and substituted with an order setting aside the department's refusal of the licence, and remitting the association's application to it. (See [23].)

MOSTERT NO v REGISTRAR OF PENSION FUNDS AND OTHERS 2018 (2) SA 53 (SCA)

Administrative law — Administrative action — Review — Application — Delay in bringing application — Whether court may mero motu raise issue of failure of applicant to bring review within 180 days — Where apparent from papers that proceedings not instituted within period of 180 days, court entitled mero motu to raise point, as such delay unreasonable per se and court not having power to entertain review — Applicant to be given opportunity to deliver further affidavit to explain delay, or apply for condonation — Promotion of Administrative Justice Act 3 of 2000, s 7(1).

Administrative law — Administrative action — Review — Application — Delay in bringing application — Whether respondent may in argument raise issue of failure of applicant to bring review within 180 days, where not having raise point in pleadings — Respondent entitled to do so, where delay apparent from applicant's papers, and no application for condonation, because court having no power to entertain review — Promotion of Administrative Justice Act 3 of 2000, s 7(1).

Administrative law — Administrative action — Review — Application — When to be brought — From when 180-day time limit starts running — Review of promulgation of regulation — 180-day period to run from when public at large might reasonably be expected to have become aware of promulgation of regulation — Promotion of Administrative Justice Act 3 of 2000, s 7(1).

In the High Court the appellant, in his capacity as joint liquidator of the Picbel Groepvoorsorgfonds, sought the review under the Promotion of Administrative Justice Act 3 of 2000 of the making of reg 35(4) of the regulations promulgated by the Minister of Finance in terms of s 36 of the Pension Funds Act 24 of 1956. Dismissing the application, the High Court held, in acceptance of the arguments of the Minister, that it had no power to entertain the review, because the application had not been instituted within the required 180-day period prescribed in s 7(1) of PAJA and the appellant had not applied for condonation. The court granted the appellant leave to appeal to the Supreme Court of Appeal, where the Minister of Finance opposed the relief sought.

The first issue, as raised by the appellant, was whether the court a quo could mero motu have raised the question of non-compliance with s 7(1), or whether it could have allowed the Minister to raise the point in argument where he had not done so in in his pleadings.

A further issue was whether the appellant had in fact brought review proceedings within the required 180-day period. The answer depended on when the period of 180 days commenced to run.

Held, that it could not be said that the court a quo had raised the issue of non-compliance with s 7(1) mero motu, when that point was in fact first raised in the appellant's heads of argument, dealt with in the Minister's heads of argument, and raised by counsel in argument. (See [32].) In any event, the law did not prohibit the court from doing so. Where it appeared to the court on the papers that there had been a manifest delay and that the proceedings might not have been instituted within the period of 180 days, it would be entitled mero motu to raise the point as such a

delay would be unreasonable per se and the court would not have the power to entertain the review. In such circumstances the applicant should be given an opportunity to deliver a further affidavit to explain the apparent delay, or apply for an extension in terms of s 9. It would, of course, be entitled not to do so and to argue the matter on the papers as they stood. (See [33] – [35].)
Held, further, that where it appeared from the applicant's papers that there had been a delay of more than 180 days, and there was no application for an extension of the period, a respondent him- or herself was entitled to raise the point in argument that the court had no power to hear the review. This was not raising a defence: it was a submission that, on the applicant's own papers, the court had no power to entertain the review. If the court was entitled to raise the point mero motu, then there could be no reason why the respondent should not be allowed to raise it. (It was in any event dealt with by both parties in their heads of argument, and the appellant elected not to seek leave to file a further affidavit.) (See [36].)
Held, further, that where a person sought the review of the making of a particular regulation, the 180-day period started to run from when the 'public at large' — in this case a reference to those members of the public who were involved with the pension fund industry — might reasonably be expected to have become aware of the promulgation of the regulation. (See [43] – [44] and [50].) Here, the regulation in question was promulgated on 22 April 2003. The application for it to be reviewed was brought nearly 12 years later. In the absence of any evidence to the contrary, it could safely be accepted that this was well outside a period of 180 days after the date on which the public at large might reasonably have been expected to have become aware of the regulation. Accordingly, appeal dismissed with costs.

ROAD ACCIDENT FUND v MOHOHLO 2018 (2) SA 65 (SCA)

Delict — Specific forms — Loss of support — Dependant's action — Extension — De-facto adoption — Claim for loss of support by deceased's aunt — Legal convictions of community calling for recognition of duty of support.

The plaintiff sought damages against the RAF for loss of support arising from the death her nephew, Otshepeng Letshufi, as a result of injuries sustained in a motor collision. Otshepeng was the child of the plaintiff's sister. The plaintiff started caring for him in her own home from when he was an infant. She maintained him right until he became self-supporting. She treated him as her son, and he viewed her as his mother. After he entered the job market, he supported her by giving her cash and buying her groceries and clothes. Negligence having been admitted by the RAF, the only issues for determination in the appeal before the SCA were *(a)* whether Otshepeng had owed the plaintiff a legal duty of support, and *(b)* whether the plaintiff was sufficiently indigent to entitle her to rely on the duty.
As to *(a)*, the court held that the legal convictions of the community called for the recognition of a reciprocal duty of support between an aunt and her nephew where the aunt had de facto adopted the nephew and brought him up as her own child (see [14], [17], [19]). In assessing the legal conviction of the community, the court had regard to the values underlying the Constitution, in particular ubuntu (see [12] and [14]), and, as courts were required to in terms of s 211(3) of the Constitution, applicable customary law, which recognised a duty of support where there existed a de facto relationship of mother and child (see [13] – [15]).

As to *(b)*, the court held that the old-age pension the plaintiff received, in addition to her sporadic income, was not enough to cover her basic necessaries of life, such as were appropriate to her station in life following Otshepeng's successful entry into the job market. The plaintiff was as such entitled to enforce the duty of support.

STEDALL AND ANOTHER v ASPELING AND ANOTHER 2018 (2) SA 75 (SCA)

Delict — Elements — Unlawfulness or wrongfulness — Homeowners' failure to secure pool gate — Visiting child, momentarily unsupervised by its mother, falling into pool.

On a visit to the Stedalls' home with her two-and-a-half-year-old daughter C, Mrs Aspeling briefly left the child unattended. In that time C made her way to the pool, where some time later she was discovered lying face down. Ultimately C survived, but she suffered severe brain damage.
The Aspelings sued the Stedalls for their and C's damages. The High Court found the parties jointly negligent: the Stedalls, for failing to secure the pool's gates; and Mrs Aspeling, for failing to keep C under constant watch. It ordered that the damages should be apportioned.
The Stedalls, with the High Court's leave, appealed to the Supreme Court of Appeal. They disputed their liability for all of the claims.
The issues were:

- Whether the failure to secure the gates, was, in the circumstances, wrongful. (Those circumstances were of a parent bringing its child to a home on a visit; being aware there was a pool on the premises; supervising the child; but becoming momentarily distracted; and during that time the child wandering off, falling into the pool, and being injured.) *Held*, that it was not. (See [21] – [22] and [32] – [33].)
- Whether the Stedalls were negligent. *Held*, that they were not: a reasonable person in their position would know Mrs Aspeling was a careful parent who had kept C under observation on previous visits, and who was aware the pool gate might be unlatched or open. Given this, a reasonable person would assume that on this occasion she would likewise, not leave C unattended. (See [34] – [37].)

The appeal upheld; the High Court's order set aside; and substituted with an order dismissing the Aspelings' claims.

VAN DER WESTHUIZEN v BURGER 2018 (2) SA 87 (SCA)
Animals — Wild animal — Actio de feris — Defences — Provocation.

In the High Court, Burger instituted an action for damages based on the *actio de feris*. He said that while on Van der Westhuizen's farm he was pursued by a wild ostrich, and in the course of the pursuit, injured his Achilles tendon. The High Court dismissed Van der Westhuizen's defences (provocation and absence of causation), and found him liable. He appealed to the Supreme Court of Appeal, where Swain JA wrote the judgment of the court.
The issues were:

- Whether provocation should be recognised as a defence to the actio. *Held*, that it should be (see [20]).
- Whether Burger had provoked the animal into chasing him. *Held*, that he had: he had thrown a stone at it (see [19]).

- Whether the pursuit was the cause of the injury. *Held*, that it was not: Burger's flight had been interrupted by his falling to the ground, and the ostrich had at that point ceased to chase him. Burger had then gotten back to his feet, resumed running, stepped awkwardly, and injured the tendon. (See [21] and [37].)

Appeal upheld (see [22]).

In a concurring judgment Ponnan JA noted that there was uncertainty as to whether the actio was part of South African law; and endorsed the academic view, that it might be time for a statute to be passed, to govern this area.

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA v PUBLIC PROTECTOR AND OTHERS 2018 (2) SA 100 (GP)

Constitutional law— Chapter 9 institutions — Public Protector — Powers — To direct President, via remedial action, to appoint commission of enquiry into allegations of state capture — Lawfulness and rationality — Constitution, s 182.

Constitutional law— Chapter 9 institutions — Public Protector — Powers — Investigation — May direct other organs of state to conduct further investigations.

Costs — *Costs de bonis propriis*— When to be awarded — Against President — President's ill-advised and reckless litigation against Public Protector resulting in unjustifiable delay of appointment of commission of enquiry into state capture — President's conduct falling short of constitutional norms and what is expected of head of state — Court making costs order de bonis propriis against President.

President — Powers — To appoint commission of enquiry — Like all presidential powers, constrained by Constitution and principle of legality — Power to appoint commission of enquiry curtailed where in conflict with such constraints — Constitution, s 84(2)*(f)*.

President — Conduct — Involvement in 'state capture' — Public Protector's report revealing prima facie case of serious misconduct and impropriety on part of President and others implicated in alleged state capture — Constituting appropriate basis for remedial action directing President to appoint commission of enquiry — Court directing President to comply.

The President sought the review and setting aside of the remedial action of the former Public Protector (PP) which instructed him to appoint, within 30 days, a commission of inquiry, headed by a judge appointed by the Chief Justice, into the allegations of corruption outlined in her report No 6 of 2016/17, entitled *State of Capture* (the Report).

The report was the result of the PP's investigation of complaints that the President had improperly — and contrary to the Executive Members' Ethics Act 82 of 1998 (the Ethics Act) and the Executive Ethics Code (the Code) — allowed the Gupta family to be involved in the removal and appointment of cabinet ministers (including the Minister of Finance in December 2015) and directors of state-owned enterprises (including the board of Eskom). Of particular relevance were s 2.3(c) and (e) of the Code, which prohibited members of the executive from, respectively, acting in a way that was inconsistent with their position and using information received in confidence otherwise that in the discharge of their duties.

The complaints were broadly confirmed by the Report, which found that the relationship between the President and the Guptas had evolved into one of 'state

capture', with the Guptas leveraging their influence on the appointment of ministers and SOEs to get preferential treatment in state contracts, access to state-provided finance and the award of business licences. The PP noted that the President's conduct and the conflict between his duties as head of state and his private interests may have violated items 2.3*(c)* and 2.3*(e)* of the Code and s 195 of the Constitution, which required a high level of professional ethics in public administration.
The PP gave three reasons for her decision to instruct the President to establish a commission of enquiry: (1) she lacked adequate resources; (2) she had not completed the investigation and her term of office was coming to an end; and (3) she had concerns about the limited qualifications and experience of her successor, Adv Mkhwebane.
In his notice of motion the President sought an order that the matter be remitted to the PP for further investigation on the basis that the PP lacked the power to delegate her functions to a commissions of enquiry. This prompted the PP to deliver a conditional counter-application for an order directing the President to ensure that the PP was given enough funds to conduct the investigation.
The review was directed at the lawfulness and rationality of the remedial action, the primary question being whether the President's constitutional power to appoint a commission of enquiry could be limited by remedial action taken by the PP. Counsel for the President also argued that the remedial action was unlawful because the PP did not make a finding of impropriety or prejudice, which was a jurisdictional fact required for the PP to take action.
Held
The President's power (under s 84(2)*(f)* of the Constitution) to appoint a commission of enquiry was curtailed where his conduct was in conflict with his constitutional obligations and the principle of legality (see [61] – [71]). The PP's investitive powers (under s 182(1)*(c)* of the Constitution) encompassed the power to direct members of the executive, including the President, to exercise powers entrusted to them under the Constitution (see [82]). In order to fulfil their constitutional mandate PPs had power, in appropriate circumstances, to direct the President to appoint commissions of enquiry and to direct the manner of their implementation (see [85]). For these reasons the first ground of review, namely that it was unlawful for the PP to instruct the President to appoint a commission of inquiry, was without merit (see [86]).
Nor was there anything in either the Public Protector Act 23 of 1994 or the Ethics Act to prevent the PP from instructing another organ of state to conduct a further investigation (see [91]). The Public Protector Act envisaged that PPs would exercise their powers with the assistance of other relevant entities, and expressly allowed them to require other parties to 'make appropriate recommendations' after they had concluded an investigation (see [94]). Hence this ground of review also fell to be dismissed (see [95]).
The primary role of the PP was that of an investigator, not an adjudicator, and the fact that she made no firm findings on whether the evidence collected established wrongdoing by the President, the Gupta family or anyone else did not preclude her from taking remedial action (see [105] – [106]).
The PPs observations in the Report, which were supported by a considerable body of corroborative evidence, constituted a prima facie case of serious misconduct and impropriety on the part of the President, the Gupta family and others (see [107]). It constituted an appropriate basis for the PP's remedial action, and the President's

argument that it was unlawful because the Public Protector did not make findings of misconduct and impropriety fell to be rejected (see [112]).
The PP was given compelling evidence that the relationship between the President and the Gupta family had evolved into state capture, a matter of great public concern, but she lacked the capacity to conduct an investigation on the scale required (see [128] – [129], [138]). A judicial commission of inquiry was pre-eminently suited to carry out the task of investigating the allegations of state capture contained in the Report (see [140]).
Since the President was himself implicated in the allegations of state capture, his insistence that he alone select a judge to head the commission of inquiry was at odds with the legal principle of recusal (see [144], [146]). Hence the PP had to ensure that someone other than the President select the head of the commission, and the Chief Justice was a perfectly sensible and rational choice (see [147], [150]).
The PP was, in addition, plainly entitled to give directions at to the manner in which the commission of enquiry was to be implemented (see [152]).
The PP's concerns about her lack of resources, the time constraints and her successor's abilities were justified, and the reasons she gave for the taking of the remedial action satisfied the rationality test (see [161] – [167]) In the premises the President's review grounds fell to be rejected (see [168]).
The President had in addition preempted his right of review by stating in Parliament and in a press statement that he accepted the necessity of establishing the judicial commission of enquiry referred to in the remedial action (see [169] – [185]).
Since none of the grounds of review had any merit, the President was not entitled to the relief sought. The application, a clear non-starter, was recklessly pursued by the President — whose conduct fell far short of constitutional standards — and had to be dismissed with costs *de bonis propriis* (see [186] – [190]).
The court in addition declared the PP's Report to be binding and directed the President to appoint a commission of enquiry within 30 days, to be headed by a judge selected by the Chief Justice (see [191]).

SOUTH AFRICAN HUMAN RIGHTS COMMISSION v QWELANE 2018 (2) SA 149 (GJ)

Constitutional law — Human rights — Right to freedom of expression — Hate speech — Comprising speech instilling detestation, enmity, ill-will and malevolence — Statement comparing homosexuality to bestiality qualifying.

Equality legislation — Hate speech — Homosexual conduct compared to bestiality — Statement constituting invitation to join in homophobia and having no constitutional value — Amounting to hate speech.

Equality legislation — Constitutionality — Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 — Overbreadth and vagueness challenges dismissed.

On 20 July 2008 the *Sunday Sun* newspaper published an article by Mr Jon Qwelane, a popular columnist, headed 'Call Me Names — But Gay is not OK'. In it he called homosexuality 'wrong' and suggested removing from the Constitution 'those sections which give license to men marrying other men, and ditto women' before 'some idiot demands to marry an animal, and argues that this Constitution allows it'. The article was accompanied by a cartoon of a man and a goat kneeling

before a priest, captioned 'When human rights meet animal rights' and 'I pronounce you man and goat'.
The article resulted in a public outcry and complaints to the South African Human Rights Commission. The article and cartoons were said to be hate speech that contravened of s 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Equality Act). An unapologetic Qwelane argued that the statements were protected by the freedom of speech provisions of s 16 of the Constitution.
The Equality Act in s 2*(c)* states that one of its objects is to give effect to the equality provisions of s 9 of the Constitution by facilitating the 'eradication unfair discrimination, hate speech and harassment'. It prohibits 'hate speech' that is based on listed 'prohibited grounds' (s 10), 'harassment' (s 11),and 'the dissemination and publication of information that unfairly discriminates' (s 12). Sections 10 and 12 are subject to a freedom of speech proviso attached to s 12. Section 1 defines 'discrimination', 'harassment' and sets out the 'prohibited grounds' (which include 'sexual orientation').
The Commission brought the present proceedings, in a magistrates' court sitting as Equality Court, under s 10(1). Qwelane asked the High Court for a stay on the ground that s 10(1) read with s 1, 11 and 12 were overbroad, vague and unconstitutional. The two proceedings were consolidated for purposes of the present judgment. Several persons gave oral evidence to substantiate the contention that the offending statements amounted to hate speech (see [23] – [42]).
Held
As an Equality Court, the court had to determine whether the complainant (in casu the Commission) had made out a prima facie case of discrimination (in casu hate speech), whereupon the respondent (in casu Qwelane) could show either that there was actually no such discrimination or that the conduct complained of was not based on one of the prohibited grounds (see [14]). Section 16(2) of the Constitution made it clear that hate speech was excluded from the purview of constitutional protection that was otherwise given to expressive conduct: it was not an absolute right (see [18], [45]).
In applying s 10(1) of the Equality Act, the court had to strike the correct balance between freedom of speech, on the one hand, and dignity and equality, on the other (see [22]). To promote hatred was to instil detestation, enmity, ill-will and malevolence in another (see [47]). The offending statements unacceptably equated human beings to animals, suggesting that gay and lesbian people were 'other' or 'unnatural' (see [49]). They showed hatred of, and was deeply hurtful and harmful to, the LGBTI ‡ community (see [49]). They had no constitutional value and were not saved by the freedom of speech proviso in s 12 (see [52]). The Commission had made out a case, on a balance of probabilities, that Qwelane's statements were hate speech as contemplated in s 10(1) of the Equality Act (see [53]).
The challenges based on vagueness and overbreadth had to fail: the implicated provisions (ie s 1 and ss 10 – 12) indicated with reasonable certainty what was required (see [56]), and did not prohibit more speech than was justifiable, or exceed constitutional limitations (see [63] – [64]). In particular, they did not fail the limitations test just because they prohibited more speech than s 16(2) of the Constitution (see [64]).
The court dismissed the constitutional challenges, declared the offending statements to be hate speech, and ordered Qwelane to tender an unconditional apology to the LGBTI community (see [70]).

AFRIFORUM AND ANOTHER v UNIVERSITY OF THE FREE STATE 2018 (2) SA 185 (CC)

Education — University — Language policy — Historically Afrikaans university's decision to replace dual Afrikaans/English language policy with English-only policy — Valid in light of racially discriminatory effects of dual-language policy — Constitution, s 29(2).

In 2016 the historically Afrikaans University of the Free State, which had since 2003 had a dual Afrikaans/English language policy, settled on a new policy under which the use of Afrikaans would be discontinued, leaving English as the sole primary medium of instruction. The University instituted the new policy after it found that the dual-medium policy had (unintentionally) resulted in the racial segregation and tension.

Government policy on language in higher education was set out in the Ministry of Education's Higher Education Language Policy Framework of 2002 (the ministerial policy), which, while recognising the use of language as a potential instrument of discrimination, underscored the need for multilingualism. It supported the retention of Afrikaans at historically Afrikaans universities, provided it did not become a barrier to access or an instrument of discrimination. The applicable constitutional provision is s 29(2), which holds that 'everyone has the right to receive education in the official language or languages of their choice in public educational institutions where . . . reasonably practicable'.

Afriforum and the Solidarity trade union (the appellants), unhappy with the University's new language policy, succeeded in a review application to the Bloemfontein High Court. But in an appeal by the University the Supreme Court of Appeal ruled sided with the University. The appellants sought leave to appeal to the Constitutional Court.

The Constitutional Court had to determine four issues: *(a)* standing; *(b)* whether the University's determination of the language issue was administrative action; *(c)* whether the University's conduct was consistent with its obligations under s 29(2) of the Constitution; and *(d)* whether the University determined and adopted its new language policy 'subject to' the ministerial policy.

Held per Mogoeng CJ for the majority

While Afriforum had standing because it was acting in the furtherance of its members' right to have their children instructed in Afrikaans, the same could not be said of Solidarity, whose members had no such right (see [27] – [29]). The University's decision was a policy decision taken in the exercise of a public power that, while not administrative action reviewable under PAJA, * was nevertheless subject to a legality review (see [34] – [39]).

As to s 29(2) and the meaning of 'reasonably practical': It would be unreasonable to retain a language policy that in had proved to be the practical antithesis of fairness, feasibility, inclusivity and the remedial action necessary confront racism (see [46]). Constitutional values like equality, responsiveness and non-racialism, and the constitutional obligation to make education accessible to all, ought to be central to any language policy (see [48]). Since s 29(2) demanded equity, practicability and the undoing of the damage caused by racial discrimination, inequitable access or the entrenchment or fuelling of racial disharmony would justify the withdrawal or curtailment of the right to be taught in one's mother tongue (see [50]). Given that the use of Afrikaans at had unintentionally become a facilitator of ethnic or cultural

separation and racial tension, a revision of the dual language policy had become necessary (see [62]). While it might be practicable to retain Afrikaans as a major medium of instruction, it was not 'reasonably practical' when race relations were poisoned thereby (see [62]).
As to the new language policy's alleged inconsistency with the ministerial policy: Whatever language policy a university adopted, it had to take its cue from the ministerial policy, which expressly incorporated constitutional norms (see [70]). Constitutional imperatives like access, equity and inclusivity would dictate a radical departure from the preferred language option, and that was what the University was constrained to do in the present case (see [72], [75] – [76]). Since the new language policy was determined 'subject to', and consistent with, the ministerial policy and the Constitution, its adoption lawful and valid (see [79]). Leave to appeal would therefore be refused (see [81]).
Froneman Jfor the minority
The court should have set the matter down for hearing and granted leave to appeal on the ground that applicants' case had prospects of success and concerned 'unfinished business' under the Constitution (see [83], [120], [125] – [126]). The majority judgment sanctioned an approach that deprived Afrikaans speakers of the constitutional right to receive education in the language of their choice, a matter that the court had never authoritatively dealt with before (see [84]). The case raised a question of great constitutional and legal import, namely whether the exercise of one's constitutional right to choice of language in tertiary education resulted in unconstitutional discrimination, and the majority's acceptance of the University's own assessment that the continuation of the existing policy amounted to racial discrimination went too far (see [110] – [113]). The matter should have been referred back to the High Court for the ventilation of various factual issues and to allow other institutions, like the Universities of Pretoria and Stellenbosch, a say (see [114] – [116], [121]).

FISCHER v UNLAWFUL OCCUPIERS AND OTHERS 2018 (2) SA 228 (WCC)

Constitutional law — Human rights — Socioeconomic rights — Right to adequate housing — Duty of local authority to shelter evicted persons — Emergency housing — Local authority's failure to invoke available remedies and policies violating landowners' constitutional rights to property and unlawful occupiers' right to housing — Appropriate remedy — Whether ordering buy-out or expropriation of unlawfully occupied land appropriate remedy — Constitution ss 25 and 26; Housing Act 107 of 1997, s 9(3).

This judgment concerned three applications for similar relief arising from the unlawful occupation of land owned by the first applicant in each application (Fischer, Stock and Coppermoon), and a counter-application by the unlawful occupants, the first respondent in each application. The unlawful occupation arose from an informal settlement of some 60 000 people — previously evicted from elsewhere in the City of Cape Town (the city) — which had developed on an around the first applicants' respective properties. In each application eviction was only sought in the alternative. The main relief, sought against the city as the second respondent in each application, and against a number of different state respondents, * was for orders declaring that the cited respondents violated the applicants' constitutional right to property by failing to protect it (in Stock this was an alternative prayer); and for 'buy-

out relief', ie that the city or an appropriate state respondent purchase their property at a price to be determined, with funds provided by the latter where necessary. In Stock and Coppermoon further alternative relief sought included that the property be expropriated in terms of s 9(3) of the Housing Act (quoted at [13]). The relief sought in the counter-application was for a declaratory order that the state had breached their constitutional obligations by not providing alternate land to the unlawful occupiers.

Held

It was clear from the facts that the situation qualified as an emergency housing situation ([187]). The city was duty-bound to proactively plan for settlement of the occupiers, whether temporarily or permanently. All three spheres of government had the benefit of a clear policy — in the form of ch 13 of The National Housing Code as well as ch 12, 'Housing Assistance in Emergency Housing Situations of The National Housing Programmes' — that privately owned land may be acquired, and how the price for its acquisition should be determined ([14] – [18] and [186]). In terms of the latter policy the purchase of land was allowed where the municipality had no alternative land ([187]).

This was a case of a municipality failing to give effect to the constitutional rights of both the applicants and the occupiers by not invoking the remedies in the policies at their disposal ([191]). There was no real possibility of the large number of people being relocated to existing housing programmes, and it was not in dispute that the city could not provide alternative accommodation for the occupiers ([164] – [165] and [183]). The slow reaction of the city to address the occupiers' plight — destitute people who settled on the land out desperation after being evicted from elsewhere — was unreasonable. No provision was made, financially or otherwise to deal with the situation ([161] – [162] and [190]).

By failing to comply with its constitutional obligations to provide access to housing to the occupiers (s 26), the state also effectively encroached on applicants' rights to property in terms of s 25 of the Constitution, and as such breached the duty imposed by s 7(2) of the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights ([162] and [178].) The court was therefore in a position to order appropriate relief (as contemplated in s 38 of the Constitution). This it had to do bearing in mind its obligation to forge new and creative remedies so as to ensure effective relief ([160]), and that appropriate relief was case-specific ([162]).

As the eviction of the occupiers was not a viable option, the only other alternative, ie the occupiers remaining on the applicants' property, would result in the applicants' constitutional rights being infringed ([192]). As for the occupiers, it should be considered that they would be homeless if evicted. It also required consideration that the applicants had lost the use and enjoyment of their property ([175]). Reasonable action would include acquiring the applicants' properties ([169]). The state respondents had not given an acceptable reason why, instead of moving such a large number of people, they could not simply acquire the land the people were currently occupying ([166]). In considering whether buy-out or expropriation was an 'appropriate remedy', here — unlike in the *Ekurhuleni Municipality* and the *Modderklip* matters — there was enough information that there was no alternative land to accommodate all the occupiers, and that the portions of land belonging to the applicants were the only land available for the purpose of emergency housing for approximately 60 000 people ([164] – [165] and [182] – [184]).

In all three applications it would be declared that the cited state respondents — but not the Minister of Police and the provincial Minister of Community Safety, cited in Stock — infringed the applicants constitutional rights to property ([193] – [195], [196.1], [196.8] and [196.16]). The occupiers' counter-applications would also be granted ([196.6], [196.9] and [196.17]). Buy-out based on good-faith negotiations would be ordered in each application ([196.2], [196.10] and [196.18]); and in Stock and Coppermoon, that if such negotiations failed, the city report to court within two months of the order on whether expropriation of the properties in terms of s 9(3) of the Housing Act was considered, and if not, why ([196.11] and [196.19]).

UNITED MANGANESE OF KALAHARI (PTY) LTD v COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE 2018 (2) SA 275 (GP)

Minerals and petroleum — Mines — Taxation — Royalty payable by 'extractor' on 'transfer' of 'unrefined mineral resource' — Gross sales of unrefined mineral resource — What constitutes — Correct interpretation of Minera and Petroleum Resources Royalty Act 28 of 2008, s 6(3)(b).

In terms of s 6(2)*(a)* of the Mineral and Petroleum Resources Royalty Act 28 of 2008 (the Act) 'gross sales in respect of an unrefined mineral resource transferred . . . is the amount received or accrued during the year of assessment in respect of the transfer [thereof]'; in terms of s 6(3)*(b)* 'gross sales' is to be determined 'without regard to any expenditure incurred by the extractor in respect of the transport, insurance and handling [TIH expenditure] of an unrefined mineral resource after it has been brought to the condition specified [in sch 2 of the Act] or any [TIH] expenditure incurred . . . to effect [its] disposal'.

The applicant (UMK), a manganese miner, qualified as an 'extractor' of an 'unrefined mineral resource' under the Act and as such was liable for the payment of a royalty on the transfer thereof, based on its 'gross sales'. UMK deducted TIH expenditure incurred after the manganese had been brought to condition specified in sch 2, as well TIH expenditure relating to its disposal for 2010 and 2011 years of assessment. The Commissioner however insisted that the exclusion of TIH expenditure in s 6(3)*(b)* was limited to TIH expenditure invoiced to the customers as part of the purchase price. Attempts at settling the dispute having failed, UMK applied for a declaratory order regarding the correct calculation of 'gross sales' as contemplated in s 6(3)*(b).*

Held

The words used in s 6(3)*(b)* were clear and unambiguous. TIH 'expenditure incurred' post the condition specified, and TIH 'expenditure incurred' to effect the disposal of the mineral resource were excluded from gross sales — regardless of whether or not the extractor 'actually received' or was 'entitled to' recover the TIH costs from its customer. Section 6(3)*(b)* could only be understood to provide for the exclusion of all expenditure relating to TIH costs incurred by the seller of an unrefined mineral resource. (Paragraph [37].)

MVOKO v SOUTH AFRICAN BROADCASTING CORPORATION SOC LTD 2018 (2) SA 291 (SCA)

Media — Broadcasting — Television — SABC — Independent contractor — Contractor writing newspaper article alluding to third-parties' influence on SABC's broadcasting decisions — SABC suspending contractor's services — Whether contractual basis to do so — Constitutional and statutory duties of national broadcaster — Constitution, s 195; Broadcasting Act 4 of 1999, ss 3(5), 6(4), 6(8) and 10(1)(d).

Mvoko was a journalist, contracted by the SABC to provide it with television journalism services. In an article that he wrote, published in a newspaper, he alluded to interference by third parties with what the SABC chose to broadcast. The SABC then accused him of bringing it into disrepute, and, pending resolution of the matter, suspended his services (see [16]).
He then applied to the High Court for specific performance of the agreement; his application was dismissed; and he appealed to the Supreme Court of Appeal (see [17], [23].) There, the issue was whether the contractual basis for not scheduling his services was present. That was (1) his bringing the SABC into disrepute; and (2) the SABC instituting an investigation into the alleged irregularity.

Held, as to (1), that the SABC had brought itself into disrepute, in acting contrary to its Constitutional and statutory duties, inter alia, of independence and impartiality; and as to (2), that no investigation had been instituted. (See [34] – [38], [40] and [42].)
Appeal upheld, and the SABC ordered to schedule Mvoko's services (see [44]).

MINISTER OF DEFENCE AND MILITARY VETERANS AND ANOTHER v MAMASEDI 2018 (2) SA 305 (SCA)

Defence force — Member — Absence — Deemed dismissal — Enquiry by board, recommendation and decision to not reinstate by Chief of Defence Force — Review for failure of procedural fairness — Defence Act 42 of 2002, ss 59(3), 101(1) and 102.

Mr Mamasedi, a soldier, was absent from his army unit for more than 30 days, and was deemed dismissed (Defence Act 42 of 2002, s 59(3)). A board of enquiry was later convened to investigate the circumstances of his absence (s 101(1)), and it recommended to the Chief of the SANDF that he not be reinstated. The Chief accepted the recommendation and decided not to reinstate him (s 59(3)).
Mamasedi then obtained the High Court's review and setting aside of the Chief's decision; and its substitution with a decision of reinstatement.
The Minister of Defence and Chief appealed to the Supreme Court of Appeal.
Held, that:

- The board s investigation and Chief s decision, together, were an administrative action (see [15]);
- Mamasedi s right to participate in the enquiry (s 102) had been denied him, so violating his right to procedurally fair administrative action; and justifying the review and setting aside of the Chief s decision (see [19], [21] – [22]); but
- Exceptional circumstances, allowing substitution of the decision, were not present (see [27]).

Appeal upheld, to the extent that the substituted order, set aside.

MOHAMED'S LEISURE HOLDINGS (PTY) LTD v SOUTHERN SUN HOTEL INTERESTS (PTY) LTD 2018 (2) SA 314 (SCA)

Contract — Enforceability — Lease's breach clause — Clause allowing lessor, on lessee's breach, to cancel agreement and repossess property — Whether implementation of clause would be contrary to public policy — Breach owing to lessee's bank paying rental into wrong account.

Mohamed's and Southern * were lessor and lessee under a lease agreement they had entered in 2001 and renewed. It required Southern to pay the rent by the 7th of each month; failing which Mohamed's would have a right to cancel the agreement and to repossess the property (the breach clause). (See [6].)
In June 2014 Southern's bank Nedbank, by its own error, failed to pay Mohamed's the rental. On the 20th, Mohamed's wrote to Southern, giving it five days in which to pay, and warning that in the future it would give no such notice, and would terminate the agreement immediately. Southern duly paid.
In July, August and September Southern monitored its bank statements and Nedbank paid the rental on its due date.
In October, Nedbank debited Southern and on the due date transferred the rental into the wrong account. On the 20th, Mohamed's notified Southern that it had cancelled the agreement, and requested it to vacate the property. On the 21st, Southern paid the rental, as well as interest.
Thereafter Mohamed's applied to the High Court to evict Southern. It apparently accepted that Mohamed's had cancelled the agreement but refused to enforce its right of repossession (see [9]), on the ground that to do so would, in the circumstances, be manifestly unreasonable and contrary to public policy.
With the High Court's leave, Mohamed's appealed to the Supreme Court of Appeal.
The issue was whether to implement the breach clause would be so unreasonable as to be contrary to public policy (see [21]). *Held*, that it would not be (see [32]). This, on inter alia, the following grounds:

- The clause itself was not contrary to public policy;
- There had been an equality of bargaining power (Southern could have negotiated a clause, by which Mohamed s was required to give it notice to remedy a breach, before it became entitled to cancel);
- Timely performance had been possible; and
- The agreement was freely entered. (See 28 – 29.)

Appeal upheld; and Southern ordered to vacate the property

SACR MARCH 2018

S v DE BEER 2018 (1) SACR 229 (SCA)

Appeal — Powers of court on appeal — Appeal against conviction — Power to increase sentence in event of appeal against conviction failing — Court having such power.
Rape — Sentence — Life imprisonment — When appropriate — Offence amounting to what would previously have been regarded as indecent assault — Offence perpetrated on young child — Incarceration required but life imprisonment plainly disproportionate — Sentence of 15 years' imprisonment of which five years suspended, reinstated.

The appellant was convicted in a regional court of rape in contravention of s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, in that over a period of four months he had on numerous occasions inserted his finger into the private parts of an 8-year-old girl and made her touch his private parts. He was sentenced to 15 years' imprisonment of which five years were suspended.
On appeal against the conviction to the High Court, the court gave notice that in the event of the appeal against conviction failing, it would consider increasing the sentence. The appeal against conviction did fail and the court increased the sentence to one of life imprisonment.
In a further appeal, the appellant contended that the High Court lacked jurisdiction to interfere with the sentence, as the appeal was not one against sentence but only against conviction.
Held, that sentence was always a matter for the court and, when an appeal was lodged against a conviction and it appeared to the appeal court that the sentence was manifestly inappropriate, the appeal court could not be deprived of its jurisdiction to ensure that justice was done by the failure of the state to cross-appeal. In such a case, the appeal court was entitled to notify the appellant that it may consider an increase in the sentence if the conviction were to be upheld. The question of sentence then became part of the subject-matter of the appeal.

Held, as regards the sentence imposed by the High Court, that the court did not appear to have given proper consideration to the question whether a life sentence was proportionate to the crime, the appellant and the legitimate needs of society. It had focused too much on the fact that life imprisonment was the prescribed minimum sentence.
Held, that the appellant deserved a custodial sentence, but imprisonment for life would be an injustice. The disproportionality was plain. The appropriate order would be to reinstate the sentence of the regional court.

KS v AM 2018 (1) SACR 240 (GJ)

Domestic violence — Protection order — What can be ordered — Seizure of respondent's digital equipment to remove sensitive and intimate material that offended applicant's rights to privacy and dignity — Although wording of s 7(2) of Domestic Violence Act 116 of 1998 not specifically empowering court to grant such order, court obliged to fashion relief that would adequately address problem.

The appellant and the respondent had been involved in an intimate relationship until the appellant was confronted by the respondent's wife (she was unaware until then that the respondent was married). She broke off the relationship with the respondent who then began making threats of violence to her and uploaded intimate video material of her to Facebook. The appellant then sought and was granted a protection order in terms of s 7(1) of the Domestic Violence Act 116 of 1998 (the Act) in the magistrates' court. The magistrate refused to grant her an order, however, compelling the respondent to hand over to the sheriff all his digital devices so that they could be forensically examined to ascertain that all the offending material had been permanently erased, on the basis that s 7(2) of the Act did not grant authority for such seizure.
Held, that in exercising the discretion under s 7(2) of the Act, the magistrate was enjoined to fashion a relief that would adequately address the problem that the Act sought to address. In the instant case, allowing the respondent to keep the material amounted to perpetuating the objectification and violation of the sexual dignity and privacy of the appellant. The proper approach, which the court failed to appreciate, was that in interpreting its powers under s 7(2), as a matter of principle, it was required to look beyond the simple wording of the subsection. (See [58] and [60].)
The appeal was upheld, and an order granted directing the respondent to hand over to the sheriff all his digital devices.

MAHARAJ AND OTHERS v MANDAG CENTRE OF INVESTIGATIVE JOURNALISM NPC AND OTHERS 2018 (1) SACR 253 (SCA)
Prosecuting authority — National Director of Public Prosecutions — Discretion to permit or refuse disclosure of record of evidence given at investigation under s 28 of *NPA* Act — Proper exercise of — National Prosecuting Authority Act 32 of 1998, s 41(6)(c).
Fundamental rights — Right to freedom of expression — Freedom of press and other media — Prohibition on disclosure, without permission of National Director of Public Prosecutions, of record of evidence given at investigation under s 28 of *NPA* Act — Proper exercise of *NDPP*'s discretion — Discretion to be exercised on case-by-case basis, weighing up public interest against likelihood of harm — Failure to consider s 28 record rendering decision to refuse permission irrational — National Prosecuting Authority Act 32 of 1998, s 41(6)(c).

In terms of s 41(6)*(c)* of the National Prosecuting Authority Act 32 of 1998 (the NPA Act), 'no person shall without the permission of the National Director . . . disclose to any other person . . . the record of any evidence given at an investigation as contemplated in section 28(1)'. In this case the National Director of Public Prosecutions (the NDPP) refused the *Mail & Guardian* (the *M&G*), a national newspaper, permission to disclose the record of an interview conducted in 2003, in terms of s 28 of the NPA Act, by the former
Directorate of Special Operations with Mr Maharaj and his wife. This refusal frustrated the publication of an *M&G* article claiming that Mr Maharaj — a former Cabinet Minister and presidential spokesperson — and his wife had failed to disclose certain information, and provided false information, during the s 28 investigation. The NDPP notified the *M&G* of its refusal in a letter setting out its reasons which included 'compelling considerations of policy' and 'the balancing of different interests involved' (see [10]). In response, the Mandag Centre of Investigative Journalism NPC, its managing partner and the *M&G*, brought a successful High

Court application to have the NDPP's refusal set aside, the court granting the requested permission and also dismissing the Maharajs' application to have allegations referring to the s 28 record struck out of the applicants' founding affidavit. On appeal, the Supreme Court of Appeal first dealt with the Maharajs' appeal (against the dismissal of the striking-out application) and held that it was without merit (see [17 – 20]).

As to the NDPP's appeal against the rest of the High Court's order, the main issue was whether the NDPP had properly exercised her discretion to give or deny permission to disclose the s 28 record of evidence. This was against the factual background that the Maharajs' s 28 testimony was already in the public domain (see [7]), and that the NDPP conceded that she did not consider the s 28 record in arriving at her decision, but was only aware of it in 'general terms' (see [24]).

Held

Section 41(6) constituted a limitation on the right to freedom of expression contained in s 16 of the Constitution: it limited freedom of the media, as also the correlative right of the public to receive and impart information. The NDPP, in exercising its discretion, must strike the appropriate balance, in each case, between its purpose — securing the integrity of the criminal justice system — and upholding freedom of expression. The *M&G* submitted its request for permission in circumstances where it had not just a right to publish, but indeed also a duty to keep the public informed on an issue of high public interest involving a senior and high-ranking government official. On the facts of this case, no valid countervailing concern regarding the integrity of the administration of the criminal justice system was discernible. (Paragraphs [21] – [22].)

The express conferral of a discretion clearly contemplated that there would be circumstances where disclosure would be appropriate. The Act did not spell out the factors which the NDPP must consider in exercising her discretion in terms of s 41(6) of the Act. However, a consideration of the s 28 record would be the first and most obvious factor. That it was not properly considered rendered the decision irrational; it was susceptible to being set aside for this reason alone. (Paragraphs [23] – [26].)

In exercising her discretion the NDPP must weigh up public interest in the publication against the likehood of harm. This case concerned the probity of a senior public office bearer, implicating overarching constitutional values of accountability, openness and responsiveness. Our courts recognised the key role the media played in a democratic society in ensuring that members of the public were informed about issues that were in the public interest. Given the scourge of corruption, the role of the media in reporting on such activities is indubitably in the public interest. Once confronted with the possible implications of the appellants' participation in the investigation, the NDPP was obliged to consider the record carefully to ascertain whether the issues raised were genuinely of public interest, and what the extent of that interest might be. Her reliance on public interest, based only on a general awareness of the investigation, suggested a superficial consideration thereof. (Paragraphs [27] – [29].)

The very purpose of s 41(6) was to require the NDPP to exercise an appropriate discretion on a case-by-case basis — to examine each application with care and to exercise a proper discretion by balancing the competing interests at stake and weighing the relative degree of risk involved. Such an individualised enquiry was more finely attuned to reconciling the competing rights at play than was the rigid, inflexible denial which characterised the approach encountered here.

Consistent with such approach, mere conjecture or speculation that prejudice might occur would not be enough to refuse permission. (Paragraphs [32] and [39].)
The NDPP's rigid and inflexible adherence to the policy of non-disclosure meant that she had completely lost from sight that the appellants had themselves placed their evidence in the s 28 proceedings in the public domain. The fact that extensive prior publication of the allegations had taken place was an important consideration; the public-domain doctrine — that it was basic to the principle of confidentiality that information could not be protected once it lost its secrecy — was well established in our and in international case law. (Paragraphs [32] and [34] – [37].)
The factors that appeared to have weighed with the NDPP neither individually nor collectively survived scrutiny. This was a case where the administrative body should not be given a further opportunity to make a new decision, one where the court itself would make the decision. It followed that the appeals failed. (Paragraphs [40] – [41].)

S v MSIMANGO 2018 (1) SACR 276 (SCA)

General principles of liability — Common purpose — Essential for averment in charge-sheet that state relying on common purpose — Reliance on common purpose in absence of such averment inimical to notion of right to fair trial.

The appellant was convicted in a regional magistrates' court of robbery with aggravating circumstances and attempted murder. His appeal against his convictions to the High Court having been dismissed, he brought the present appeal with leave of the Supreme Court of Appeal. It appeared that the conviction for attempted murder had been based solely on the doctrine of common purpose, even though it had not been averred in the charge-sheet that he had acted in common purpose, nor had the fact that he had acted in common purpose been proved in evidence.
Held, that the approach of the regional magistrate of relying on common purpose, which was mentioned for the first time at the end of the trial, was inimical to the spirit and purport of s 35(3)*(a)* of the Constitution and was subversive of the notion of the right to a fair trial contained in that section. (See [15].) The conviction and sentence on the count of attempted murder were accordingly set aside. The appeal against the conviction on the remaining count was dismissed.

S v PHILLIPS 2018 (1) SACR 284 (WCC)

Plea — Plea bargain — Plea agreement in terms of s 105A of Criminal Procedure Act 51 of 1977 — No formal agreement having been concluded or approved by Director of Public Prosecutions — Accused attempting to rely on agreements made during negotiations — Policy considerations militating against accused being allowed to pick and choose which parts of agreement he wanted to enforce.

The applicant, who had been indicted to stand trial in the High Court on charges of murder and rape, applied for an order compelling the state to accept a plea of guilty on a charge of culpable homicide as tendered by him, and to permanently stay the charges of murder and rape.
The matter had originally been set down for trial on 2 February 2015, but was postponed to allow the applicant to make representations to the Director of Public Prosecutions (the DPP). The case was then re-enrolled for trial in June 2016, but did

not proceed because the applicant had run out of funds. It was postponed again for the same reason and then set down for 6 February 2017.
Early in February 2017 the prosecution suggested to the defence that consideration might be given to a plea-and-sentence agreement in terms of s 105A of the Criminal Procedure Act 51 of 1977, and the case was postponed to 22 May 2017 to enable the prosecution to consider the applicant's representations. On that day it was postponed to 3 August 2017 for trial. A round-table meeting with the medical experts was held in June 2017 to find common ground on the cause of death of the deceased, but that attempt failed.
On the day of the trial, the defence indicated that they were then prepared to enter a plea-and-sentence agreement and offered to draft the agreement, a proposal that was accepted by the prosecution. The matter was then postponed until 8 August 2017.
When the prosecutor read the agreement, she found that the applicant had not accepted that he had caused the death of the deceased and immediately notified his attorney that it was unacceptable. A second draft was then produced which was also unacceptable and the matter was again postponed. A meeting was then held between all the role players, but no agreement emerged and the matter was once again postponed for the trial to commence.
Before the trial could proceed, however, the applicant brought the present application on an urgent basis in which he contended that the second draft constituted a binding agreement. He alleged that there was a multi-phased process, the first of which was an agreement that he would plead guilty to culpable homicide, that the state and the defence had agreed on a non-custodial sentence, and that the charges of murder and rape would be withdrawn. He claimed that these terms having been agreed upon, a binding agreement between him and the state had therefore been concluded from which the state could not resile. The state denied that an agreement under s 105A had been concluded and contended that the DPP had not approved the plea bargain.
Held, that the purpose of the plea-bargaining process was not only to enable the state to dispose of a criminal prosecution speedily and without incurring the expense and delay of a trial, but to provide the accused person with a guarantee that the sentence bargained for would be imposed. (See [41].)
Held, further, on the basis that a pre-s 105A common-law approach was still available to an accused in the absence of a formal agreement, that the facts necessary for such an agreement were not present. In the instant case the parties had entered into discussions intended to reach a pre-bargain agreement sanctioned under s 105A expressly to avoid the imposition of a custodial sentence, and had approached their negotiations in strict compliance with the structure of the section itself, safe in the knowledge that it guaranteed the parties the opportunity to resile from the negotiations at the appropriate stage if either was dissatisfied with the outcome thereof. (See [42] – [43].)
Held, further, that there were important policy considerations militating against the approach suggested by the applicant: to permit an accused in the present circumstances, where a written agreement under the section was not concluded due to the lack of consensus, to hold the state to its initial willingness to explore a plea bargain, and so secure a partial concession by the state made during the negotiation process, was to permit the accused to choose those parts of the negotiations which were favourable to him in the absence of an adequate quid pro quo from his side. (See [47].) The application was dismissed.

S v PHAKANE 2018 (1) SACR 300 (CC)
Appeal — Record — Lost, destroyed or incomplete — Effect of on appeal — Transcript of evidence of crucial witness not on record and unclear whether conflict between police statement and evidence in court ever put to witness or clarified — No indication in judgment of this — Record not adequate for proper assessment of appeal — Proceedings set aside.

The applicant, a prisoner serving a sentence of 20 years' imprisonment for his conviction in the High Court on a charge of murdering his girlfriend, brought an application for leave to appeal against his conviction, the full court having dismissed his appeal to it. He contended that the court a quo had erred in finding that the appeal could be determined, despite the absence from the record of the transcript of the evidence of a crucial witness for the state. The court held that the issue raised by the applicant was an important one, there were reasonable prospects of success and that leave had to be granted. The court accordingly considered the written submissions provided by the parties at its request.
Held, that, in the absence of a transcript of the trial proceedings or any reconstruction of the record of the trial proceedings, a court could not know whether the witness, whose evidence was crucial, had ever explained the conflict between her evidence in court and her statement to the police. In the trial court's judgment there was no mention of whether the witness had been confronted with the conflict and this was a glaring omission on the part of the court. (See [35] – [36].)
Held, further, that in the present case the full court did not have before it a record on which it could fairly assess whether the trial court's conviction of the applicant was correct. His right of appeal was frustrated by the fact that material evidence was missing from the record. It was so compromised that his appeal could not be fairly determined, and the proper remedy was to set aside the trial proceedings in their entirety. (See [40] – [41].)
Held, per Cameron J (Mbha AJ concurring), that the proper remedy would be to convict the applicant of the offence of assault, a competent verdict on a charge of murder, as such conviction was justified by the evidence available to the court. The fact that this might close the door to the state reinstituting the murder charge was not a serious consideration; that was an unlikely prospect given the time that had elapsed since the murder. (See [57] – [58].)
Held, per Froneman J, that justice to the deceased and her family demanded that a retrial should be ordered. (See [62].)

CORRUPTION WATCH (RF) NPC AND ANOTHER v PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS 2018 (1) SACR 317 (GP)
Prosecution — National Director of Public Prosecutions — Appointment and removal from office of — Request by *NDPP* to vacate office — What constitutes such request — Required to emanate from *NDPP* and not from persuasion by payment of greater sum of money than permitted by law.
Prosecution — National Director of Public Prosecutions — Appointment and removal from office of — Effect of setting-aside of settlement agreement by means of which former *NDPP* left office on appointment of successor where President conflicted — Provisions of s 90 of National Prosecuting Authority Act 32 of 1998 applied and Deputy President to make appointment.

Prosecution — National Director of Public Prosecutions — Appointment and suspension of — Extension of term of office of *NDPP* in terms of s 12(4) of National Prosecuting Authority Act 32 of 1998 — Open-ended discretion by President to extend 10-year term unconstitutional and invalid.
Prosecution — National Director of Public Prosecutions — Appointment and suspension of — Suspension from office of *NDPP* in terms of s 12(6) of National Prosecuting Authority Act 32 of 1998 — Open-ended discretion by President to suspend *NDPP* without pay for indefinite period unconstitutional and invalid.

In two separate applications the applicants sought orders to set aside a written settlement agreement in terms of which the former National Director of Public Prosecutions (the NDPP) and the President of South Africa agreed that the NDPP would vacate his office just 21 months into his 10-year term. The agreement provided for a payment to the former NDPP of R17 million in compensation.
The applicants also sought the setting-aside of the former NDPP's vacating of his office and an order reinstating him; alternatively, a declaration that the office was vacant and directing the Deputy President to appoint a permanent NDPP on the basis that the President himself was declared 'unable' in terms of s 90(1) of the Constitution to act because of his conflict of interest.
The applicant in the second matter sought in addition an order declaring ss 12(4) and (6) of the National Prosecuting Authority Act 32 of 1998 (the NPA Act) unconstitutional.
In support of the contention that the settlement agreement was invalid, the applicants contended that ss 12(8)*(a)* and *(a)*(ii) of the NPA Act, in terms of which the President had purportedly acted in accepting a request by the former NDPP to leave office, had to be interpreted strictly, so that it fitted the constitutional imperative of prosecutorial independence. In accordance with this approach, a 'request' to leave office in terms of s 12(8)*(a)*(ii) had to be interpreted as an incentive that emanated wholly and bona fide from the office holder, and not as referring simply to a negotiated attitude of the NDPP, procured and compromised by a promise of reward. They contended that, given the evidence of the events leading up to the 'request', no such request had emanated from the former NDPP.
Held, that the reasons furnished by the President for the decision that was being reviewed did not fit the record of the decision being reviewed and the President's mere say-so could not suffice. The evidence indicated that it had never been the former NDPP's intention to resign from office, because he regarded himself as a fit and proper person for the office. (See [66].)
Held, further, on the facts, that there was no request at all: there was a negotiated agreement in terms of which the former NDPP would vacate the office if he was paid a price not permitted by the NPA Act. The settlement agreement was accordingly invalid because the former NDPP did not request to be allowed to vacate the office as required by s 12(8)*(a)* of the NPA Act, but rather because he was persuaded to vacate the office by the unlawful payment of an amount of money substantially greater than that permitted by law. (See [81] – [82].)
In respect of the issue that then arose, namely whether the court should order reinstatement of the former NDPP and that the current NDPP be requested to vacate the post,
Held, that, given the broader pattern of the President's conduct in litigation — of defending the indefensible and banking on any advantage that the passage of time may bring, together with his knowledge that he could only act within the law, as well

as the strong inference that the former NDPP also knew that he was acting without lawful foundation — it would not be just and equitable, in the context of vindicating the Constitution and the independence of the prosecutorial authority, to reinstate the former NDPP. Nor would it be just and equitable to leave the current NDPP untouched in the office because, if the vindication of the Constitution was paramount, an order which left the current NDPP position intact would not serve that objective. The President would have achieved, through unlawful means, precisely what he had wished to attain all along. (See [88] – [94].)
Held, further, that it would be just and equitable if the position were declared vacant for a short period of 60 days, for it to be filled by appropriate appointment within that period. (See [106].)
In respect of the question whether the President was conflicted and could not be permitted to appoint a successor, and that the Deputy President should therefore make the appointment in terms of s 90 of the Constitution, given the raft of criminal charges the President was facing,
Held, that the President's argument that he was not conflicted was gainsaid by the fact that he had told the Supreme Court of Appeal that he had every intention to continue to use such processes as were available to resist prosecution. It was incongruous in those circumstances that he should then be seen to be appointing the NDPP, since his conflict, both actual and perceived, was self-evident. (See [114] – [115].)
In respect of the argument by the applicant in the second matter, that the open-ended discretion in s 12(4), to extend the 10-year term of the NDPP, and the power to suspend the NDPP without pay for an indefinite period in s 12(6), raised a reasonable apprehension that the independence of the office of the NDPP could be undermined, and were unconstitutional,
Held, that these issues were not merely academic as contended for by the respondents. Both provisions were objectionable features of a unilateral presidential power, and both versions had to be declared unconstitutional and invalid. (See [123], [126] and [128].) Order is granted as prayed for.

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Basson v Hugo and others [2018] 1 All SA 621 (SCA)

Administrative law – Application for judicial review – Whether appellant was obliged to exhaust an internal remedy as contemplated in section 7(2) of the Promotion of Administrative Justice Act 3 of 2000 before launching his application to review – Appellant was required to exhaust internal remedy unless he could show exceptional circumstances to exempt him from that requirement – Where internal remedy was ineffective and inadequate, that constituted exceptional circumstances as contemplated in section 7(2)(c) of the Promotion of Administrative Justice Act, requiring the immediate intervention of the court rather than resort to the internal remedy.

In terms of the Health Professions Act 56 of 1974, the third respondent ("the Council") launched a disciplinary inquiry against the appellant, a practising cardiologist. He was charged with unprofessional conduct before a professional conduct committee (the "Committee") constituted in terms of section 15(2)(f) of the Act. The charges related to the appellant's participation in chemical and biological warfare research during his

employment with the South African Defence Force in the 1980s. He was found guilty of unprofessional conduct on four of the charges. In argument on sanction, two petitions were submitted for the removal of the appellant's name from the Register of Medical Practitioners, by registered health professionals and organisations working in the fields of human rights and law.

The first and second respondents were members of the Committee. Alleging that they were members of the organisations that supported the petition for his removal from the register, the appellant sought their recusal from the Committee. The application for recusal was refused by the Committee, and the appellant approached the court *a quo* to review and set aside the decision.

The review application was dismissed – the court finding that the review application was premature as the appellant had a duty to exhaust an internal remedy before approaching the court to review and set aside the impugned decision. It found that the appellant had not complied with such duty; that he failed to show exceptional circumstances in terms of section 7(2)(c) of the Promotion of Administrative Justice Act 3 of 2000; and that it was not in the interests of justice to exempt him from the obligation to exhaust the internal remedy. The remedy in question, the court *a quo* held, was an appeal to an *ad hoc* appeal committee established under section 10(2) of the Health Professions Act.

Held – The issue on appeal was thus whether the appellant was obliged to exhaust an internal remedy as contemplated in section 7(2) of the Promotion of Administrative Justice Act before launching his application to review.

The starting point in determining whether the appellant was obliged to exhaust the internal remedy in section 10(3) of the Health Professions Act, was section 7(2) of the Promotion of Administrative Justice Act which prevents a court from reviewing any administrative action in terms of the Act unless any internal remedy provided for in any other law has first been exhausted. A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it to be in the interests of justice.

It was common cause that the impugned decision *in casu* constituted administrative action. Therefore, an internal remedy had to be exhausted prior to judicial review, unless the appellant could show exceptional circumstances to exempt him from this requirement. What constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action in issue. Factors taken into account in deciding whether exceptional circumstances exist are whether the internal remedy is effective, available and adequate. An internal remedy is effective if it offers a prospect of success, and can be objectively implemented, taking into account relevant principles and values of administrative justice present in the Constitution and our law; and available if it can be pursued without any obstruction, whether systemic or arising from unwarranted administrative conduct.

The court *a quo*'s finding that an appeal committee was empowered to consider the merits of the recusal application presupposed that the impugned decision was merely voidable, which was somehow rendered valid as a result of a subsequent decision by the Committee on sanction, or by an appeal committee. However, the Court referred to case authority in which the notion that a refusal by a presiding officer to recuse himself from proceedings in respect of which he was reasonably suspected of bias,

rendered that decision voidable, was rejected. Instead, the consequence of a failure to recuse renders the proceedings a nullity. If a presiding officer should have recused himself, proceedings conducted after dismissal of an application for recusal must be regarded as never having taken place at all. The Court therefore confirmed that the internal remedy was ineffective and inadequate as it did not offer a prospect of success and could not redress the appellant's complaint. The court below should have found that there were exceptional circumstances as contemplated in section 7(2)(c) of the Promotion of Administrative Justice Act, which required the immediate intervention of the court rather than resort to the internal remedy.

It was held further that the appellant claimed a remedy beyond the powers of an appeal committee: it does not exercise original jurisdiction and cannot hear the matter *de novo*. An appeal committee does not have the power to set aside the proceedings before the Committee.

In the premises, the court below should have found that exceptional circumstances did exist as contemplated by section 7(2)(c) of the Promotion of Administrative Justice Act. The appeal was upheld and the matter remitted to the High Court to hear the review application.

Head of Department: Western Cape Education Department and others v MS (Women's Legal Centre as amicus curiae) [2018] 1 All SA 640 (SCA)

Education – Liability of biological parents for payment of school fees of child – Section 40(1) of the South African Schools Act 84 of 1996 holds a parent liable to pay the school fees unless or to the extent that he or she has been exempted from payment – Such liability is joint and several – Fee exemption applications are granted under the Act after the combined gross income of both the parents was provided – However exemption applications may also be processed in terms of the Act and the Regulations to enable single parents separated from their partners or divorced from a spouse to have their applications assessed in relation to their own personal circumstances and not on combined income.

In terms of an order handed down by the Western Cape Division of the High Court, Cape Town, it was declared that the respondent and her former husband from whom she was divorced, were "jointly" and not "jointly and severally" liable for the school fees of their daughter.

The child was admitted to the school in January 2011. The respondent's assertion that she made it clear at the outset that she would be applying for a fee exemption was unchallenged. The respondent received a form in terms of which she could apply for an exemption. The form required the combined annual gross income of the child's parents to be provided. However, the respondent sought to apply as an individual for a fee exemption, without factoring in her former spouse's income. The form did not provide for parents in her position, namely that of a divorced custodian parent entitled to be considered for an exemption relative to her personal circumstance, distinct from her former spouse. The school was adamant that it would only consider the application upon receipt of the particulars of the former spouse's income. That stance led to the respondent applying to the High Court for extensive relief. The principal orders sought by her based on her interpretation of the Act were a declaration that she and her former husband were jointly rather than jointly and severally liable for the child's school fees; that for purposes of claiming an exemption, a declaration that the relevant regulation be read so as to exclude the former spouse as the child's parent when determining

the combined annual gross income of parents; and, as a consequence of the above, a declaration that the respondent qualified for a fee exemption, together with the determination of the amount of exemption for which she qualified.

The appellants, in resisting the application, denied that any of the respondent's constitutional or statutory rights had been infringed. The third appellant (the "Minister") adopted the position that the legislative scheme was such that in order for a school to process an application for exemption, the income of both parents was required.

Beginning with the right to education entrenched in section 29 of the Constitution, the High Court went on to determine whether, in terms of section 40(1), the liability of divorced or separated biological parents was joint or joint and several. It concluded that to hold that section 40(1)imposes joint and several liability would impose an unnecessarily heavy burden on single parents like the respondent and was irreconcilable with the paramountcy that must be afforded to the best interests of the child. He went on to find that in terms of section 40(1), parents were jointly and not jointly and severally liable to pay school fees.

On appeal, the Court was faced with four issues. They were whether sec-tion 40(1) imposes joint or joint and several liability for the payment of school fees on each of the two living biological parents of a learner at a fee-paying public school; whether section 40(1) and the Fee Exemption Regulations Relating to the Exemption of Parents from Payment of School Fees in Public Schools unconstitutionally infringe the right of single or divorced parents to equal protection and benefits of the law in section 9(1) of the Constitution and the right to dignity in section 10of the Constitution; whether the respondent was entitled to a declaratory order that she was subjected to repeated violations of her rights in the course of the processing her various applications for exemption; and whether she was entitled to a declaratory order that the appellants failed to comply with their constitutional and statutory obligations to ensure that a fee-charging school comply with the requirements of the Act and the Regulations.

Held – Section 40(1) of the South African Schools Act 84 of 1996 holds a parent liable to pay the school fees determined in terms of section 39unless or to the extent that he or she has been exempted from payment.

Recognition has been given to the fact that there should be an equitable burden between parents within a school, and *inter se*, that non-custodian parents should not escape their legitimate responsibility for paying school fees. A contextual, purposive and literal reading of section 40(1) compelled the conclusion that parents are jointly and severally liable for school fees.

The second issue was whether section 40(1) and the fee exemption regulations were unconstitutional and infringed the rights of single, separated or divorced parents to equal protection of the law, or impinged on their dignity, because the formula used provided for exemptions based on income and the regulations required every person applying for an exemption to supply the combined annual gross income of both parents. Of significance was the fact that a child could not be refused admission to a school based on non-payment by a parent. Section 40(1)set out the default position that parents were jointly and severally liable – but did provide a safety valve in that the liability was eased by the proviso "unless or to the extent that he or she has been exempted from payment in terms of this Act". The reference to the Act included all the Regulations promulgated thereunder. It was clear from the formula provided for in the

Regulations, that where the combined gross income of both the parents was required, a parent could not be granted a total or partial exemption where he or she was unable to or did not provide the gross annual income of the other parent. The Court held however, that that should not be the end of the road as far as parents in the position of the respondent were concerned. The Regulations provided that a conditional exemption may be granted to, amongst others, a parent who does not qualify for any exemption, but supplies information indicating his or her inability to pay school fees owing to personal circumstances beyond his or her control. Conditional exemptions of that sort would overcome the practical problems of obtaining information and other co-operation from non-custodial parents.

Although the High Court held that parents in terms of section 40(1) were jointly and not jointly and severally liable, the respondent was provided no practical relief and the question of precisely how the fee-exemption regulations were to be applied was left unanswered. The court below took the view that the combined financial income still had to be provided. The order of the court below was set aside and replaced with an order which assisted the respondent in the realisation of her rights.

Mandela v Executors, Estate Late Nelson Rolihlahla Mandela and others [2018] 1 All SA 669 (SCA)

Administrative law – Administrative decision – Common law review – Delay in bringing review application – Court required to determine whether there was an unreasonable delay, and if so, whether such delay should be condoned – Potential for prejudice if impugned decision were to be set aside leading to refusal to condone delay.

In November 1997, the third respondent (the "Minister") took a decision to donate certain immovable property to the late former President of South Africa, Nelson Mandela. By then Mr Mandela's civil marriage to the appellant had been terminated by divorce. In December 2013, Mr Mandela passed away and left a will in which he bequeathed the property to the Nelson Rolihlahla Mandela Family Trust (the "Trust"). In October 2014, the appellant instituted review proceedings in which she sought an order declaring the Minister's decision to donate the property as null and void; alternatively, reviewing and setting aside the decision and ancillary relief. She also sought an order declaring as invalid the legacy set out in the will of the late Mr Mandela in respect of the property.

The High Court dismissed the review application, as well as an application for leave to appeal. However, the appellant obtained special leave to appeal from the present Court. The first respondent, the executors of the estate late NR Mandela (the "executors") and the Minister opposed the appeal – and were referred to jointly in the court's judgment as "the respondents".

The review application was dismissed on the basis that there was an unreasonable delay which resulted in severe prejudice to the respondents. The court did not extensively deal with the merits of the review but made reference thereto when considering whether to condone the appellant's unreasonable delay in launching the review proceedings and whether the appellant had reasonable prospects of success on the merits. It held that almost 17 years had gone by without the appellant doing anything to assert her rights. The delay was therefore inordinate with no acceptable explanation.

Held – As the impugned decision was taken in 1997, long before the coming into effect of the Promotion of Administrative Justice Act 3 of 2000, the administrative action and the impugned decision had to be adjudicated in terms of the common law and not the latter Act.

It is desirable and in the public interest that finality be reached within a reasonable time, in respect of judicial and administrative decisions and litigation in general. It was a long-standing rule that courts have the power, as part of their inherent jurisdiction to regulate their own proceedings, to refuse a review application if the aggrieved party has been guilty of unreasonable delay in initiating the proceedings. The rationale for the rule is two-fold: First, the failure to bring a review within a reasonable time may cause prejudice to the respondent. Second, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions. The application of the rule requires consideration of two questions. The first is whether there, was an unreasonable delay. If so, it had to be decided whether the delay should, in all the circumstances, be condoned. The reasonableness or unreasonableness of a delay is dependent on the facts and circumstances of each case. It is a matter of a factual enquiry upon which a value judgment is called for in the light of all the relevant circumstances, including any explanation that is offered for the delay. A material fact to be taken into account in making that value judgment was the nature of the challenged decision, as not all decisions have the same potential for prejudice.

The appellant's conduct was found not to be consistent with that of a reasonable person who would have taken steps to establish the outcome of her counterclaim and the fate of her claim to the property. The court agreed with the court *a quo* that there was an unreasonable delay by the appellant in instituting the review proceedings.

The next question was whether the court *a quo*, in the exercise of its discretion, correctly concluded that the unreasonable delay should not be condoned, with the result that the application for review could not be entertained. Of primary concern in this inquiry was the inherent potential for resultant prejudice to the heirs of Mr Mandela if the challenged decision was set aside. Although prepared to assume that the appellant's case on the merits had good prospects of success and that a meaningful result for the appellant would be achieved by setting aside the decision of the Minister, the Court held that the assumed prospects of success were not sufficient to swing the balance in appellant's favour in deciding whether to overlook the delay, when regard was had to the potential for severe resultant prejudice if the decision of the Minister was set aside.

On the issue of costs, the Court found that the appellant was challenging the legality of a decision of the Minister to donate what she alleged to be her property to Mr Mandela. The litigation thus implicated the constitutional principle of legality as well as her rights to property. Unsuccessful litigants who approach the court, in good faith, to assert constitutional rights, should not be discouraged to do so for fear of having costs awarded against them. The fact that a delay is found by the court to be objectively unreasonable does not mean that the litigation is frivolous or vexatious in the sense contemplated in the Constitutional Court jurisprudence. Concluding that the court *a quo* misdirected itself by ordering the appellant to pay the costs as against the Minister, the court upheld the appeal on the issue of costs. Each party was to bear its own costs. On the merits, the appeal failed.

Minister of Home Affairs v Ruta [2018] 1 All SA 682 (SCA)

Immigration – Asylum seeker's permit – Requirements – An application for asylum must be made without delay, and asylum seekers who enter the country illegally are given a reasonable opportunity but not an indefinite or unlimited period in which to apply for asylum – Where asylum-seeker had failed to apply for asylum in terms of section 21 of the Refugees Act 130 of 1998, and had also failed to apply for asylum without delay, he was not protected by the provisions of the Refugees Act.

An appeal was noted by the Minister of Home Affairs, against the High Court's ordering the immediate release of the respondent from a repatriation facility pending his deportation to Rwanda.

The respondent was an agent of the Rwandan National Security Services. In October 2014, he was approached by his superior in Rwanda who instructed him to travel to South Africa to engage with the Rwanda National Congress (the "RNC") members. The RNC was an exiled Rwandan opposition party having offices in South Africa. He did not know the exact details of his mission but after managing to infiltrate the RNC, realised that he was expected to kill a member of the RNC. Unwilling to continue with the mission, he approached the Directorate for Priority Crime Investigations (the "Hawks") and explained his predicament. The Hawks placed him in their Witness Protection Unit. He alleged that in March 2015, he was taken to a Refugee Reception Office ("RRO") to apply for asylum. The application could not be processed on that date, and further attempts to make such application were thwarted by his being moved to different locations. As the monthly allowance that the NPA was giving him whilst in its protective custody was insufficient for his sustenance, the respondent decided to seek a job. He received a job offer from a local restaurant, but the manager of the restaurant required his immigration documents. After the respondent's handler spoke to the manager, the latter asked the respondent for his identity photograph, and thereafter provided him with an asylum seeker permit.

In March 2016, the respondent was arrested and charged with the possession of a fraudulent permit, riding a motorbike without a driver's licence, and being an illegal foreigner.

The appellant denied knowledge of the respondent wishing to apply for an asylum seeker's permit. It was also denied that the respondent had been told by his handler that he could look for a job. The respondent had been discharged from the Witness Protection Programme due to his having allegedly contravened its rules.

Held – Section 21(1) of the Refugees Act 130 of 1998 provides that an application for asylum must be made in person in accordance with the prescribed procedures to a Refugee Reception Officer at any RRO. Despite the provisions of the Immigration Act 13 of 2002 and the Refugees Act, which strictly regulate the presence of a foreign national in South Africa, section 21(4) of the Refugees Act provides that notwithstanding any law to the contrary, unlawful entry into or presence within the country may be condoned where the person has applied for asylum under section 21(1). Asylum seekers who enter the country illegally are merely given a reasonable opportunity but not an indefinite or unlimited period in which to apply for asylum. *In casu*, the respondent had delayed unreasonably in applying for asylum. Section 23(1) of the Immigration Act underscores the requirement that an application for

asylum must be made without delay. It provides that an asylum transit visa, which is valid for only five days, may be issued to a person who at a port of entry claims to be an asylum seeker, to enable him to travel to the nearest RRO. In terms of section 23(2), when the asylum transit visa expires before the holder reports in person to a RRO to apply for asylum, the holder shall become an illegal foreigner and be dealt with in accordance with the Immigration Act.

The majority of the court therefore concluded that the respondent failed to apply for asylum in terms of section 21 of the Refugees Act and had also failed to apply for asylum without delay as required by the relevant regulations. He had ample opportunity to approach the RRO to apply for asylum but he failed to do so and instead stayed in the country, secured employment and relied on a fraudulent temporary asylum seeker permit. Consequently, he was neither covered nor protected by the provisions of the Refugees Act and the regulations thereunder. The appeal was, accordingly, upheld.

In a dissenting opinion, it was opined that the appeal should be dismissed. It was stated that once a refugee has evinced an intention to apply for asylum, the protective provisions of the Refugees Act and the associated regulations come into play and the asylum seeker is entitled to be afforded access to the application process stipulated in the Refugees Act.

Road Accident Appeal Tribunal and others v Gouws and another [2018] 1 All SA 701 (SCA)

Personal Injury/Delict – Road accidents – Claim for compensation from Road Accident Fund – Rejection of claim on basis that injury was not serious – Appeal – Road Accident Appeal Tribunal – Powers of – Whether it is within the Tribunal's statutory remit to finally determine the nexus between the injuries allegedly sustained, on which claim for compensation was premised, and the driving of a motor vehicle – Appeal Tribunal not having final say on question of link between the driving of a motor vehicle and the injuries allegedly sustained.

The first respondent allegedly sustained injuries as a result of being struck by a motor vehicle whilst walking in a parking area. He lodged a claim for compensation with the Road Accident Fund (the "Fund"), a statutory insurer, under section 17 of the Road Accident Fund Act 56 of 1996 (the "Act"). Section 17(1) provides that the obligation of the Fund to compensate a third party for non-pecuniary loss shall be limited to compensation for a serious injury as contemplated in subsection (1A) and shall be paid by way of a lump sum. Prior to the submission of his claim, his injuries were assessed by an orthopaedic surgeon. Despite the surgeon's report stating that the injury was serious, the Fund rejected the claim for compensation in relation to general damages on the ground that the surgeon had concluded that the injury was not serious. That led to the first respondent lodging an appeal. He was informed that the third, fourth, fifth and sixth appellants had been appointed to the first appellant (the "Tribunal") to determine the appeal. The Tribunal took the view that the first respondent's injuries were not causally connected to the collision. It's upholding of the Fund's decision led to the first respondent seeking review in the High Court.

The court had regard to the methods to determine the seriousness of an injury identified in regulation 3 of the Regulations promulgated under the Act. The court took

into account the history of the orthopaedic surgeon's assessment of the first respondent's injuries and his appeal to the Tribunal. Noting the Tribunal's conclusion that it could not find a link between the first respondent's injury and the driving of a motor vehicle, the court below concluded that there was nothing in the language of the legislation concerned which empowered the Tribunal to determine whether the injuries assessed by it were caused by or arose from the driving of a motor vehicle. It therefore reviewed and set aside the decision of the Tribunal and remitted the matter to the Tribunal for reconsideration by a different panel. That resulted in the present appeal.

On appeal, the Tribunal accepted that there was no express provision in the Act or the Regulations that conferred on it the power to determine finally whether the injuries submitted to it for assessment were caused by or arose out of the driving of a motor vehicle. However, it persisted with the position adopted in the court below, namely that it was implicit in the legislation that the Tribunal had that power. Section 17 of the Act, so it was contended, provided that the injury for which a claimant was to be compensated must be caused by or arise from the driving of a motor vehicle.

Held – It is a fundamental principle of our law that public power can only be exercised within the bounds of the law. Repositories of power can only exercise such power as has been conferred upon them by law. That is in keeping with the principle of legality. The general rule is that express powers are needed for the actions and decisions of administrators. Implied powers may, however, be ancillary to the express powers or exist either as a necessary or reasonable consequence of the express powers. Where the administrative action or decision is likely to have far reaching effects, it is less likely that a court will in the absence of express provisions find implied authorisation for it. In the present case, the Tribunal, an appellate body, purported to have the power to decide finally upon the question of causation. The effect of what was suggested on behalf of the Tribunal was that the jurisdiction of the court was ousted. Noting that the power given to the Tribunal in terms of the legislation is narrowly circumscribed, and is not of a broad discretionary nature, which would allow for further powers to be implied, the court held that the Tribunal could not have the final say in relation to causation. Moreover, the power contended for was not a necessary or reasonable consequence of the express powers of the Tribunal or of the Fund. If the contentions on behalf of the Tribunal were upheld, it would be oppressive in relation to claimants and would deny them access to courts on an issue traditionally reserved for adjudication by them.

The appeal was dismissed with costs.

Volkswagen South Africa (Pty) Ltd v Commissioner for the South African Revenue Service [2018] 1 All SA 716 (SCA)

Tax – Income Tax – Rebate paid to motor manufacturers to encourage rationalisation of vehicle models – Whether of capital or revenue nature – Where benefit derived from rebate amounted to a benefit received by the appellant in respect of capital expenditure, it was clearly to be regarded as a receipt of a capital nature.

The appellant was a vehicle manufacturer. From around 1995, the government embarked on a motor industry development programme. The success of the programme led to it being extended, with one of the objectives being to rationalise the number of vehicle models being produced. That would entail substantial capital expenditure, and to incentivise automotive manufacturers to embark on the expensive capital programme, an allowance ("the PAA") was introduced for such manufacturers.

The form in which the benefit was provided to participating manufacturers was by way of the issue of PAA certificates as envisaged in a rebate item contained in a schedule to the Customs and Excise Act 91 of 1964, providing for a rebate on customs duty on certain categories of completely built-up imported light motor vehicles. Flowing from their participation in the PAA scheme and the rationalisation of the motor vehicles they were producing, manufacturers were reimbursed to an amount of 20% of their capital expenditure incurred in the rationalisation process by, effectively, paying less import duty than would have been the case had they not participated in the scheme. That was an investment incentive, not a trading incentive.

The appellant applied in the prescribed manner, supported by the necessary business plan, to participate in the PAA scheme. In order to do so, it invested heavily in qualifying assets in three different capital projects. Its investment led to it receiving PAA certificates. In its income tax returns for the years of assessment 2008–2010, the appellant reflected the PAA certificates it had received as being accruals of a capital nature. The respondent ("the Commissioner") refused to accept that the amounts were of a capital nature, and assessed the appellant to tax on the basis that they were income. The appellant's objection to such assessment was overruled, which led to an appeal in the Tax Court whose judgment was the subject of the appeal to this Court.

Held – The fundamental question was whether the PAA certificates were receipts or accruals of a capital nature or whether they were revenue. There is no simple definitive test which can be applied to determine what is capital or revenue.

Having regard to the South African Revenue Services Interpretation Note 59 of 10 December 2010, the Court noted that SARS regards the purpose of a government grant of cardinal importance. That was supported by case law.

The Court found it to be clear that PAA certificates were issued in order to compensate manufacturers for at least a portion of their capital outlay incurred in respect of the plant and machinery required for rationalisation. It was in that way that they were encouraged to go along with the rationalisation scheme. The court *a quo* actually stated that the grant was made due to capital expenditure. However, it failed to regard it as an accrual of a capital nature as envisaged in the Interpretation Note. The benefit derived from the PAA amounted to a benefit received by the appellant in respect of capital expenditure. The respondent's contention that the PAA scheme was not directly intended to support capital expenditure but merely to allow the appellant to reduce the cost to it of imported vehicles and thereby increases revenue was rejected.

The appeal was upheld and the order of the court below was set aside and replaced with one directing that the appellant's income tax for the relevant years was to be assessed on the basis that its PAA certificates were receipts of a capital nature.

Apleni v President of the Republic of South Africa and another [2018] 1 All SA 728 (GP)

Civil procedure – Urgency – Where allegations are made relating to abuse of power by a Minister or other public officials, which may impact upon the rule of law and may have a detrimental impact upon the public purse, the relevant relief sought should normally be urgently considered.

Constitutional law – Director-General of national department – Suspension of – Minister's authority to suspend – Power to suspend head of national department resided with the President of the country and for Minister to exercise such power, there had to have been a lawful delegation by the President – Delegation ostensibly made by President had been done in terms of a provision of the Public Service Act 103 of 1994 which had since been repealed by the Public Service Amendment Act 30 of 2007 – Delegation, being executive action, had to comply with the provisions of section 101(1)(a) of the Constitution, which it did not – Minister having no lawful authority to suspend Director-General.

The applicant was the Director-General of the Department of Home Affairs. In September 2017, he was placed on "precautionary suspension" by the second respondent ("the Minister"). In the present urgent application, the applicant sought a declaratory order that the Minister lacked authority to suspend him, and that the suspension was unconstitutional, invalid and of no force and effect. As a secondary line of argument, the applicant contended that even if the Minister had the power to suspend him, the reasons for such suspension were irrational, as the Minister did not have justifiable reason to believe, *prima facie* at least, that he had engaged in the serious misconduct alleged. It was also contended that the process followed by the Minister in putting into effect the precautionary suspension was procedurally unfair.

Held – The Court accepted that the application was urgent. Where allegations are made relating to abuse of power by a Minister or other public officials, which may impact upon the rule of law and may have a detrimental impact upon the public purse, the relevant relief sought should normally be urgently considered.

Regarding the precautionary suspension, the applicant averred that the Minister had exercised a power reserved for the President and which had not been delegated to her. It was stated that the only way in which the Minister would have been empowered to suspend the applicant and exercise the power she purported to exercise, was if she had a proper and lawful delegation from the President, which had not occurred. The precautionary suspension was therefore alleged to be unlawful and the Minister was said to have acted *ultra vires.* The delegation ostensibly made by a former President had been done in terms of a provision of the Public Service Act 103 of 1994 which had since been repealed by the Public Service Amendment Act 30 of 2007. Section 12 of the 2007 amending Act deals with the appointment of Heads of Department and career incidents and states that such, in the case of a head of a national department, shall be dealt with by the President.

Rejecting the respondents' contention that the former President's purported delegation was akin to an administrative decision, the Court found that the delegation, relating as it did to policy matters, was an executive act. Accordingly, it had to comply with the provisions of section 101(1)(a) of the Constitution. The evidence established that it did not – being unsigned by the President or by a Cabinet member as envisaged in the section.

The upshot of the above was that the Minister had no lawful authority to suspend the applicant. The suspension of the applicant by the second respondent was declared unconstitutional, and of no force or effect. The precautionary suspension was thus set aside.

Heath v President of the Republic of South Africa and another [2018] 1 All SA 740 (WCC)

Legal Practice – Judges – Application by former judge to undo resignation – Legality challenge – Undue delay in bringing of application for common law review – Once the defence of undue delay is raised, it is incumbent upon an applicant for review to persuade the court that the application has been brought within a reasonable time of the impugned decision having been made – Court must decide if delay was unreasonable, and if so, whether condonation should be granted.

In May 2001, the applicant tendered his resignation as a High Court judge, and proceeded to pursue a career in the private sector. In August 2016, he launched the present application to effectively undo his resignation as a judge more than 15 year before. In that regard he relied on the common law and not the judicial review provisions of the Promotion of Administrative Justice Act 3 of 2000.

The resignation of the applicant as judge came about in the following circumstances. In 1997, the applicant had been appointed as head of the Special Investigations Unit ("the SIU") established under the Special Investigation Units and Tribunals Act 74 of 1996. In March 1999, the SIU was mandated to investigate the affairs of certain personal injury lawyers who were accused of fleecing the public purse in making extravagant claims against the Road Accident Fund. A group of such lawyers formed a voluntary association known as the South African Association of Personal Injury Lawyers ("SAAPIL"), which approached first the High Court in Pretoria, and ultimately the Constitutional Court, for relief which attacked the very heart of the SIU. It was claimed that the position of a sitting judge as the head of the SIU was inconsistent with the Constitution, in particular because it undermined the independence of the judiciary and encroached upon the separation of powers principle. That argument was upheld by the Constitutional Court. The Constitutional Court held that the SIU could not be headed by a judge and gave the Legislature a year to amend the SIU Act, but until that time, the applicant could continue in his position as head of the SIU. Thereafter, he could no longer serve as head of the SIU and remain a sitting judge. The applicant decided to explore relinquishing his judicial office in order that he could continue holding his position as Head of the SIU. His request for discharge was refused by the then President, and he therefore tendered his resignation.

Held – Judges hold office under the Judges' Remuneration and Conditions of Employment Act 47 of 2001 and their removal from office is strictly controlled by that statute. When they reach what would generally be regarded as the age of retirement, they are entitled to be discharged from active service without more in terms of section 3(2) of the current Judges' Remuneration and Conditions of Employment Act. The applicant stated that central to his request for discharge was the *SAAPIL* judgment (*SA Association of Personal Injury Lawyers v Heath and others* 2001 (1) BCLR 77 (2001 (1) SA 883) (CC)). The thrust of the case in the founding affidavit was that his independence and integrity as a judge were compromised by the judgment in *SAAPIL* and that that precluded him from returning to the bench. As the respondents suggested that the applicant had taken the matter unnecessarily personally and that there was nothing which precluded his return to the bench in 2001, it was necessary to consider precisely what the Constitutional Court had held.

The Constitutional Court was cautious not to cast any aspersions on the applicant which suggested that his conduct as Head of the SIU was anything but *bona fide* and

exemplary. Instead, the judgment sought to stress the incompatibility of the position of the head of the SIU with judicial independence. It could therefore not be said that the applicant's standing as a judge was in any way compromised by the work he performed as head of the SIU.

It was argued for the applicant that the decision of the President to refuse to grant a discharge from judicial office in terms of section 3(1)(d) of the Judges' Remuneration and Conditions of Employment Act 88 of 1989 failed to meet the constitutional principle of legality. It was argued that the President exercised his discretion in an unreasonable and irrational manner and that it fell to be reviewed on that ground alone. The argument was that, although the applicant's appointment as a judge was terminated by his own act of resignation, he was left with little choice to do so after the President had refused to grant him a discharge. The present application therefore had to be determined as a legality challenge – to be instituted in terms of rule 53 of the Uniform Rules of Court and the common law principles relevant thereto.

The respondents raised the objection of undue delay in the bringing of the application. The common law delay rule applied. In terms thereof, once the defence of undue delay is raised, it is incumbent upon an applicant for review to persuade the court that the application has been brought within a reasonable time of the impugned decision having been made. The court is then obliged to adopt a two-phase approach. If it finds that the delay is reasonable, that is the end of the enquiry and the review proceeds. But if it finds that the delay is not reasonable, it will be required to determine whether the delay should be condoned. The Court was not required to undertake the first part of the inquiry, as the applicant brought an application for condonation of the delay – thereby acknowledging that the application for review was late.

Having regard to the explanation put up in the founding affidavit in relation to the question of delay, the Court was unable to find any proper explanation for the failure to lodge the review application within a reasonable time after May 2001, nor was there any feasible explanation as to why the applicant delayed for such an extended period of time thereafter. There was no basis for the Court to consider condoning the filing of the application more than 15 years after the event. The application for condonation and for the relief sought in the notice of motion was dismissed.

Maharaj v Gold Circle (Pty) Ltd [2018] 1 All SA 760 (KZP)

Constitutional and Administrative law – Section 9 of Constitution – Right to equality and prohibition against unfair discrimination – Equality Courts established in terms of Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 – Proceedings in such courts intended to be less formal than in traditional courts – Conduct of presiding officer in refusing to allow appellant to place his case before the court and in proceeding to dismiss the case on the basis of res judicata rendering proceedings unfair.

The appellant was a South African and a member of the local Indian population. He was a racehorse trainer by profession.

In 1989, when he first applied to the Jockey Club of South Africa to be admitted as a horse trainer, his application was turned down on the basis of his skin colour. That prompted the appellant to leave the country for Australia where he was allowed to work in the horse racing industry. After the advent of democracy in South Africa in 1994, he returned to the country, and once again applied for a licence to the National

Horseracing Authority of Southern Africa ("NHA"), the authority in charge of horseracing in the country. His licence was granted only after resistance to his application was overcome, and the head executive steward of the NHA at the time intervened. Despite being issued with a licence, the appellant experienced undue hardship in the horseracing establishment. His training establishment was situated outside a training centre managed by the respondent. The latter initially refused to lease him boxes to house his horses, but subsequently allowed the appellant to lease 14 boxes at the centre. In 2002, the appellant's trainer's licence was suspended for five years by the NHA arising out of two incidents of assault which he committed at work against a White person. The altercations in question involved the issue of race. The appellant was escorted off the premises and was forced to make arrangements for the transfer of the horses he was training to other trainers. That arrangement went on for about three months during which he was charged a rental of R11 000 for the leasing of the stabling boxes from the respondent. Upon expiry of his suspension in 2007, the appellant once again applied for stabling facilities from the respondent. The latter refused the request, providing no reasons for the decision. The appellant was convinced that he was being racially discriminated against by the respondent. He held this view because other trainers of the White group, who were also involved in acts of assault or other unlawful conduct, continued to be accorded the privilege of holding stabling facilities with the respondent. Those facilities, according to the appellant, were never withdrawn or denied to such members, even after they were found guilty of unlawful behaviour.

As a result of the above, the appellant lodged a complaint with the Equality Court ("the 2008 case"). His complaint was dismissed, as was an appeal against that finding to the High Court.

In January 2016, the appellant again applied in writing to the respondent for stabling facilities, but was refused. He then lodged a complaint of unfair discrimination based on race in the Equality Court, Durban (the "2016 case"). The respondent filed a statement in which it raised a plea of *res judicata*. The Equality Court dealt with the matter solely on that plea – in the form of issue *estoppel*. Without hearing any evidence on the substantive grounds raised by the appellant in his affidavit, the court ruled that the matter was indeed *res judicata*. In the present appeal against that decision, the appellant sought the setting aside of the decision of the Equality Court with costs and remitting the matter to that court for the leading of evidence before a different presiding officer.

Held – Section 9 of the Constitution deals with the issue of equality, and prohibits unfair discrimination. The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 was enacted to give effect to the constitutional imperatives in section 9 of the Constitution. Section 16 establishes Equality Courts. Setting out the broad framework and objectives of the Equality Act, the Court pointed out that the proceedings in the Equality Court are less formal and provide for convenient and easy access in order to correct an act of discrimination and to seek redress in respect thereof. Also relevant to the present dispute was the KwaZulu-Natal Gaming and Betting Act 8 of 2010, which provides for the regulation of gaming, horse racing and betting in the province, and also provides for the establishment of a Gaming and Betting Board.

The respondent held a licence to conduct horseracing, a sporting event or other event or contingency in terms of the KwaZulu-Natal Gaming and Betting Act. The

terms and conditions of its licence were set out in various schedules. In terms of its licence conditions, it was obliged to adhere to the transformation goals set out in the legislation.

Turning to the proceedings before the Equality Court in the 2016 case, the Court stated that the proceedings were not fair – largely due to the manner in which the magistrate conducted himself at the time. The magistrate was simply not prepared to allow the appellant to place his case before the court, adopted a bombastic and belligerent attitude; and was extremely impatient to the point of being rude. The appellant's attempts to explain that the 2016 case was based entirely on new evidence which was relevant and material to the issue before the court were brushed aside, and the magistrate proceeded to dismiss the complaint on the plea of *res judicata*. The magistrate's attitude rendered the proceedings unfair from the start and on that basis alone, the matter was to be remitted to start afresh before a different judicial officer.

The five grounds relied on by the appellant in the 2016 complaint were found to be relevant and the Court ruled that he should be allowed to lead whatever relevant evidence he wished to in that regard. It was confirmed that the 2016 complaint was based largely on a new cause of action which required adjudication by the Equality Court. The matter was remitted to the Equality Court to commence *de novo* before a different presiding officer. The respondent was ordered to pay the appellant's costs of appeal, such costs to include the costs of Counsel.

Ntuli and another v S [2018] 1 All SA 780 (GJ)

Criminal law and procedure – Doctrine of common purpose – Failure to state in charge sheet that State would rely on doctrine of common purpose not fatal.

Criminal law and procedure – Presiding judge – Application for recusal – Allegation of bias and judge's prior dealing with appeal not leading to reasonable apprehension of prejudice, with result that recusal application was refused.

Criminal law and procedure – Unlawful possession of firearms – Section 3(1) of the Firearms Control Act 60 of 2000 provides that no person may possess a firearm without holding a licence for it – Term "possess" for the purposes of section 3(1) can include joint possession of a weapon by one of the perpetrators of a crime on behalf of another.

The appellants were convicted on one count of robbery with aggravating circumstances arising from a housebreak; four counts of the unlawful possession of firearms; and three counts of attempted murder. The first appellant was sentenced to an effective twenty years' imprisonment, while the second appellant was sentenced to an effective twenty five years' imprisonment. They obtained special leave to appeal to the Full Court against the whole of the convictions and the sentences imposed.

The convictions arose from a house robbery in which the complainant was held up and robbed as he entered his home.

The second appellant brought an application for the recusal of the judge (Monama J) hearing the appeal on the grounds that the judge had presided in the appeal of the second appellant's co-accused, and that at that hearing the second appellant's appeal was struck from the roll after an ill-tempered attitude adopted by the judges.

Held – The second appellant had perceived Monama J to have been biased by refusing to hear his appeal at the time it was enrolled together with that of the co-

accused. It emerged that the second appellant's Counsel had not advised him of the true reasons for his appeal being struck from the roll. The present Court explained that the striking of the second appellant's appeal from the roll was done in his own best interests. Furthermore, the court's robust dealing with the second appellant's advocate was due to the advocate's unacceptable manner in addressing members of the court. The allegation of bias was therefore unfounded. The next question was whether a judge who presided in an appeal of one accused ought to sit in a later appeal brought by a co-accused. Monama J was one of the presiding judges at the previous set down of the second appellant's and his co-accused's appeal. There was nothing in the judgment with which Monama J concurred, when upholding the co-accused's appeal to create any inference in respect of the court's attitude towards the merits of the case *vis a vis* the second appellant. It was for those reasons that the application for recusal was dismissed.

In his grounds of appeal, the first appellant submitted that the trial court could not have found that the State had proved its case beyond a reasonable doubt because the complainant was unable to identify him. He also submitted that the only identification was by a police officer who came on the scene just after three suspects were observed exiting the house but he could not identify any of them by their facial characteristics. However, the first appellant was found hiding among the shrubs inside the complainant's property, and right next to where he was found the police retrieved a firearm and a set of keys for the motor car the robbers had been driving. The car was still on the premises near to where the first appellant had concealed himself. He could only have been on the complainant's property because he was one of the robbers. No other inference was possible and the first appellant's version was not reasonably possibly true.

The Court also found no merit in the grounds of appeal advanced by the second appellant.

The convictions on the charge of attempted murder were based on the fact that at least two of the robbers had fired at the policemen while in the process of fleeing the complainant's house. The magistrate found that the robbers fired the shots in order to avoid arrest. Although the magistrate did not expressly make a finding as to which accused had fired the shots, it was evident that he relied on common purpose to cover the situation of any accused who had not personally fired at the police. The application of the doctrine of common purpose was justified on the facts. An aspect that had to be addressed was that the charge sheet did not state that the prosecution would rely on the doctrine of common purpose, nor did it appear that the prosecution mentioned it by the time the appellants were asked to plead. Nevertheless, it was evident from the charge sheet that the State was relying on common purpose, and Counsel certainly understood that the case his clients had to meet was one based on common purpose. Moreover a failure to allege common purpose cannot *per se* be fatal. Accordingly, while the grounds for culpability differed, both appellants were correctly convicted of the attempted murder charges.

On the counts of unlawful possession of firearms, the appellants were each found with different firearms traceable to the robbery. The magistrate found that each appellant had the common purpose to possess the four firearms. Section 3(1) of the Firearms Control Act 60 of 2000provides that no person may possess a firearm without holding a licence for it. The term "possess" for the purposes of section 3(1) can include joint possession of a weapon by one of the perpetrators of a crime on behalf of another.

The Court found that the Act contemplates the situation of more than one person deciding to rob another of a firearm. It cannot just be the person who physically holds the firearm for the benefit of the group of robbers who is culpable if it is the robbers' intention that he holds for their benefit as well.

In their appeal against sentence, the appellants argued that the magistrate should have found substantial and compelling circumstances present and that the sentences imposed induced a sense of shock and were startlingly inappropriate. The second appellant contended that the sentences should not have run concurrently. The Court found that the court below considered all relevant factors, and did not err in finding that substantial and compelling reasons were absent, with the result that the prescribed minimum sentence had to be imposed. The magistrate also could not be faulted for treating the attempted murder convictions in relation to police officers who were engaged in their duty, as justifying concurrent sentences.

The appeal was thus dismissed.

President of the Republic of South Africa v Office of the Public Protector and others [2018] 1 All SA 800 (GP)

Constitutional and Administrative law – Conduct of President of country – Public Protector's powers – Public Protector Act 23 of 1994 and the Executive Members' Ethics Act 82 of 1998 – Requirement of remedial action – Appointment of commission of inquiry – Application for review – Public Protector must, if she is to properly fulfil her constitutional mandate, have the power, in appropriate circumstances, to direct the President to appoint a commission of inquiry and to direct the manner of its implementation.

In November 2016, the Public Protector issued a report pursuant to an investigation into complaints of alleged improper and unethical conduct by the President of South Africa, certain State functionaries and a certain family ("the Gupta family") relating to the appointment of Cabinet Ministers and Directors of State-owned entities, which possibly resulted in the improper and corrupt award of State contracts and other benefits to businesses of the Gupta family. The report contained a recommendation that the President appoint a commission of inquiry into the matter as remedial action.

In the present application, the President sought to review and set aside the remedial action required of him. He did not place in issue or offer any direct challenge to the content of the report.

The Court set out the most important observations made by the Public Protector in the report, before setting out the remedial action required.

Held – The review application was essentially directed at the lawfulness and rationality of the remedial action. The primary question raised was whether the President's constitutional power to appoint a commission of inquiry can permissibly be limited by remedial action taken by the Public Protector.

The power to appoint a commission of inquiry vests in the President alone and only he can exercise that power. The question was whether there are any constraints to the exercise of that power. Under our constitutional order, the exercise of all public power is subject to the provisions of the Constitution which is the supreme law. The principle of legality, being an incident of the rule of law, dictates that those who

exercise public power, including the President, must comply with the law. Even though the Constitution vests in the President the power to appoint a commission of inquiry, that power is not an untrammelled one. It must be exercised within the constraints that the Constitution imposes. The President's power to appoint a commission of inquiry will necessarily be curtailed where his ability to conduct himself without constraint brings him into conflict with his obligations under the Constitution.

The investigative powers conferred on the Public Protector are of the widest ambit. The Public Protector must, if she is to properly fulfil her constitutional mandate, have the power, in appropriate circumstances, to direct the President to appoint a commission of inquiry and to direct the manner of its implementation. Any contrary interpretation would be inconsistent with the Constitution. Consequently, the primary ground of review that it is unlawful for the Public Protector to instruct the President to appoint a commission of inquiry no matter how compelling the circumstances may be, was without merit.

The President's argument that the remedial action constituted an unlawful delegation of the Public Protector's powers under the Constitution was also rejected. There is nothing in either the Public Protector Act 23 of 1994 or the Executive Members' Ethics Act 82 of 1998 that prohibits the Public Protector from instructing another organ of State to conduct a further investigation.

Further arguments by the President relating to inconsistency of the remedial action with the Executive Members' Ethics Act, the lawfulness of the remedial action and the appropriateness of the remedial action were also held to be unsustainable.

None of the grounds of review having any merit, the President was not entitled to the relief that he sought. The remedial action taken by the Public Protector was lawful, appropriate, reasonable and rational. The application was dismissed with costs. The costs of the application were to be paid by the President, in his personal capacity, on the scale as between attorney and client, including the costs consequent upon the employment of two Counsel.

Randell v S [2018] 1 All SA 845 (ECG)

Criminal law and procedure – Fraud – Conviction and sentence – Appeal – Alleged irregularity and misdirection – Section 322(1)(c) of the Criminal Procedure Act 51 of 1977 sets out the powers of a court of appeal – Court of appeal may make such other order as justice may require provided that "notwithstanding that the court of appeal is of the opinion that any point raised might be decided in favour of the accused, no conviction or sentence shall be set aside or altered by reason of any irregularity or defect in the record or proceedings, unless it appears to the court of appeal that a failure of justice has in fact resulted from such irregularity or defect".

On being convicted on a charge of fraud, the appellant was sentenced to an effective term of four years' imprisonment. The present appeal was based on certain alleged irregularities and misdirections committed by the court *a quo.*

Held – At issue was whether the irregularities and misdirections, if any, resulted in a failure of justice which vitiated the proceedings. But for the irregularities and misdirections contended for by the appellant, it is not contested that the State proved beyond reasonable doubt that his actions amounted to fraud.

Section 322(1)(c) of the Criminal Procedure Act 51 of 1977 sets out the powers of a court of appeal. In the case of an appeal against a conviction or on any question of law reserved, the court of appeal may make such other order as justice may require – provided that "notwithstanding that the court of appeal is of the opinion that any point raised might be decided in favour of the accused, no conviction or sentence shall be set aside or altered by reason of any irregularity or defect in the record or proceedings, unless it appears to the court of appeal that a failure of justice has in fact resulted from such irregularity or defect".

The ground of appeal was premised on the provisions of section 35(3)(a) of the Constitution. The appellant contended that the extensive reference by the magistrate in his judgment to a certain judgment, without prior notice to the appellant that considerable reliance would be placed thereon, went to the core of what constitutes a fair trial. It was stated that the appellant did not receive a fair trial because he was not forewarned that the findings in the judgment referred to could be used against him resulting in the *audi alteram partem* rule not being adhered to. It was also argued that the trial court, in applying the judgment referred to, displayed bias against the appellant, and committed the same mistake as the court in the case in question.

The credibility findings and/or characterisation of the appellant as dishonest by the court *a quo* before reference to the judgment referred to by the appellant, dispelled the argument that the magistrate relied on the judgment in its findings. Even if the references to the other judgment were to be excised from the judgment, the conviction of the appellant would remain correct.

The appeal was dismissed.

S v Sishuba [2018] 1 All SA 866 (ECLD, Mossel Bay)

Criminal law and procedure – Murder – Robbery with aggravating circumstances – Assessment of evidence – Inferences to be draw from common cause facts – Only reasonable inference that the court could draw from the surrounding facts and circumstances, was that the accused had prior knowledge of the incident and that he formed an association with an accomplice to commit the offences.

Criminal law and procedure – Robbery – Electronic transfer of money from victim's account by victim, under threat of harm – Crime of robbery can be committed by the theft of an incorporeal thing through violence or force.

In June 2016, an elderly couple were attacked, robbed and killed in their home. It was common cause that a worker ("Steven") employed by the male deceased in his business was involved in the murder and robbery, and later fled to Lesotho.

The accused was arrested by the police after a palm print of his was found at the scene of the crime. He was charged with two counts of robbery with aggravating circumstances and two counts of murder. Pleading not guilty to all the charges, he alleged that Steven had asked him to accompany him to his employer's home because the employer needed extra help. He stated that when they were at the employer's property, Steven attacked the employer. He alleged further that Steven had instructed him, under threat of violence, to help hit the deceased. The accused denied that he, himself, murdered or robbed the deceased or was involved with Steven in the murder and robbery of the deceased – or that he voluntarily took part in the attack on the first

deceased. He further denied that he attacked or was present or assisted in the murder of the second deceased (the wife of the first deceased).

Held – The only portion of the accused's version which could be accepted was that he had been on the scene where the first deceased was attacked. His version as to what really and truly happened on the scene was untruthful. In his initial statement to the police, he created the impression that he did not have any knowledge about this incident. He only told the police about how he accompanied Steven to the bus station and how Steven had left the keys of his house in his possession. However, he clearly knew what had happened to both deceased persons and that Steven was responsible for what happened. It was only at a later stage, when it emerged that a palm print of his was found at the scene and when he was required to give an explanation as to how his palm print could have been found on the scene, that he told the police that he himself was present at the scene when the first deceased was attacked. He gave different versions as to what really happened at the scene with regard to his involvement. He tried to mislead not only the investigating officer, but also the court by disavowing the various versions he gave to the police as well as the version that was given to the court in his explanation of plea. He was a poor witness who failed to take the court into his confidence. He was extremely evasive and argumentative during cross-examination when confronted with these different versions. Although at first denying that he was involved in the assault of the first deceased, in court during his explanation of plea, he admitted that he had assaulted the first deceased, albeit under duress from Steven.

The conduct of the accused after the incident was not consistent with that of an innocent bystander who was merely at the wrong place and at the wrong time. The only reasonable inference that the Court could draw from the surrounding facts and circumstances, was that the accused had prior knowledge of the incident and that he formed an association with Steven to commit the offences. The Court set out the various bits of evidence pointing to two people perpetrating the attack on each of the deceased.

The accused's version was rejected as not reasonably possibly true. The Court found that he had formed a common purpose with Steven to murder both the deceased and rob them of their possessions.

In the course of the crime, the second deceased was forced to electronically transfer from her bank account an amount of R14 000 to the robbers. The question raised was whether that constituted the crime of robbery. The Court confirmed that the crime of robbery can be committed by the theft of an incorporeal thing through violence or force. Even though there was no physical handling of the money, the accused and Steven got the deceased through violent means, to transfer the money.

The accused was convicted on all four charges.

END-FOR NOW