LEGAL NOTES VOL 4/2017

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INDEX[1]

Company — Shares and shareholders — Shareholders — Proceedings by and against — Action for damages by shareholder against directors of, and fellow shareholders in, company — Arising from breach of investment agreement entered between parties — Whether claims excluded by rule in Foss v Harbottle — Claims arising from breaches of obligations separate and distinct from any claim company might have — Others in respect of payments contrary to statute — Rule not applying in circumstances.

Constitutional law — Legislation — Validity — Companies Act 71 of 2008, s 162(5)(c) read with s 162(6)(b)(ii) — Court obliged to declare director delinquent if requirements met — Provision neither retrospective not irrational but legitimate response to problem of delinquency of directors — Not constitutional.

Grancy Property Ltd (Grancy) was a party to a joint venture. In this matter it instituted an action against other parties to the arrangement, claiming damages arising out of their breach of the investment agreement regulating the terms of their relationship. It also sought inter alia an order declaring, in terms of s 162(5)*(c)* of the Companies Act 71 of 2008 (the Act), the directors of the venture, Mr Gihwala and Mr Manala, delinquent. The background was the following.
Spearhead Property Holdings Ltd (Spearhead), a JSE-listed property loan stock company, wished to engage in a BEE transaction. To that end, it was willing to make available 3,5 million linked units, at a reduced price, to a special purpose vehicle

[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!**

(SPV), the shares in which would mainly be held by black shareholders. Ngatana Property Investments (Pty) Ltd (Ngatana) was the SPV incorporated for that purpose. Gihwala and Manala were presented with an opportunity to invest in a stake in Ngatana, which contribution would enable the latter to acquire the Spearhead units. They proposed to take up the offer through the company Seena Marena Investments (Pty) Ltd (SMI), of which they were joint shareholders (Gihwala through the Dines Gihwala Family Trust (the Trust)). Further funding was however required for SMI to afford the 58% stake in Ngatana. So they approached Mr Mawjiwith the view of securing the involvement of his company, Grancy Property Ltd (Grancy). An investment agreement (the agreement) was reached between Gihwala, Manala, the Trust, SMI and Grancy. Gihwala, through the Trust, Manala and Grancy would invest indirectly in the Spearhead linked units. Each would make their investment contribution by way of subscription for a third of the shares in, and the making of loans to, SMI.Further, each would fund one-half of Manala's share in SMI. SMI, using these funds, would then subscribe for 58% of the shares in Ngatana, as well as lend money to Ngatana sufficient to enable the latter to take up the Spearhead units. The investment would be managed by Gihwala and Manala, who would be directors of SMI, and SMI's nominees as directors of Ngatana.
For Grancy, problems subsequently arose. It claimed inter alia that Gihwala, the Trust, Manala and SMI persistently breached the agreement, which caused it significant damages. This led to its instituting consolidated claims for wide-ranging relief against them in the High Court, where it was largely successful. The High Court gave judgment against Gihwala and Manala for payment to Grancy of certain amounts based on breach of the agreement.Furthermore, in terms of s 162(5)*(c)* of the Act, the court declared Gihwala and Manala to be delinquent directors. Gihwala, Grancy and the Trust appealed to the Supreme Court of Appeal (the SCA) against the orders granted. Grancy, although largely successful, cross-appealed against the High Court's refusal to allow certain of its monetary claims.

Investment agreement and its breach

The SCA ascertained the material terms — express and tacit — of the investment agreement, which were disputed. They included the following (see [58]):

- In their management of the investment, Gihwala, Manala, the Trust and SMI owed Grancy a fiduciary duty to exercise good faith and account fully to their stewardship of Grancy's investment (see [49], [58] and [61]).
- Unless otherwise agreed, the investment by Ngatana would be restrictedto the 3,5 million Spearhead units, and SMI's investment to the 58% shares of Ngatana.
- The directors would ensure that the net income accruing to Ngatana would be distributed to shareholders, first by repaying shareholder loans and then by way of dividends. The net income accruing to SMI would be dealt with similarly.
- As regards allocation of benefits, each shareholder would be treated equally.

The SCA found that Manala, Gihwala, the Trust and SMI beached the agreement in numerous aspects:

- They persistently refused to recognise Grancy's one-third shareholding inSMI (see [63]).
- Despite repeated requests, they failed to provide proper accounting relating to the investment (see [63]).
- Without consulting Grancy, Ngatana acquired further investments, whereby the risk facing Grancy was increased; this constituted a fundamental breach of the principles of trust and good faith on which theagreement rested, as well as a tacit term of the contract (see [64]).

- Various impermissible payments were made by SMI, designed to benefit Gihwala and Manala, but to the prejudice of Grancy (see [65], [67], [69], [70] and [71]).
- When Ngatana repaid the loan made by SMI, Gihwala and Manala ensured that Grancy was not repaid the money it lent to SMI, but instead invested those funds in another entity without informing Grancy (see [66]).
- When Ngatana paid a dividend to SMI, Gihwala ensured that it was, at first, paid only to the Trust and Manala, and not to Grancy (see [68]).

Monetary claims

Grancy claimed that these breaches led directly to the unlawful diverting of funds in SMI or Ngatana, funds that would otherwise have flowed through to SMI's shareholders by way of dividends. Grancy's claim for damages amounted toroughly a third of those diverted funds, representing its one-third shareholding in SMI. (See [73].)

The SCA upheld Grancy's claim for the repayment of its loans made to SMI, and awarded an amount equalling roughly a third of the payments it found to have been impermissibly made by SMI and Ngatana. It also ordered the payment to Grancy of the lost interest arising from the late payment of itsshare of declared dividends. Manala, Gihwala and the Trust were found to be jointly and severally liable for the monetary claims, each of them being a party to the investment agreement, and as such each owing a fiduciary duty to Grancy. (See [75] – [106].)

The defence was raised that the monetary claims were in truth claims by SMI against its directors Gihwala and Manala, and therefore could not bepursued by Grancy in its own right in accordance with the principle of company law established in *Foss v Harbottle* (see [31]). The SCA rejected this argument, holding that the monetary claims were unaffected by the rule — Grancy's claims arose from breaches of obligations separate and distinct from any claim SMI might have had. They arose from obligations owed to Grancy by Gihwala, Manala and the Trust under the investmentagreement entered between them. And certain of the claims were in respect of payments made contrary to statute. In such circumstances, too, the rule did not apply. (See [110], [111], [115] and [116].)

Delinquency declarations

The SCA ruled that the delinquency order against the two directors was entirely justified, finding that their conduct fell within the scope of s 162(5)*(c)* of the Act (see [134] – [139]):

- The directors failed to uphold their obligation to ensure that the share register of the company properly reflected the persons entitled to be registered as shareholders.
- They failed to ensure that SMI kept proper accounting records.
- They acted with gross negligence in authorising loans in breach ofs 226 of the old Companies Act, which caused loss to SMI.
- In allowing SMI to consistently breach the investment agreement to which it was party, to the detriment of Grancy and to their own benefit, they breached the fiduciary duty they owed to SMI to ensure it complied with its obligations under the investment agreement.
- In seeking their own personal benefit to the exclusion of Grancy, theygrossly abused their positions as directors.
- Their actions constituted wilful misconduct, because they were intentional and with the knowledge of the obligations owed to Grancy under the investment agreement.

The directors challenged the constitutionality of s 162(5)*(c)* on two grounds:
(1) They argued that it was unconstitutional because it was retrospective in its operation. Events relied upon to justify the order occurred before the commencement of the Act on 1 May 2011, by which date Mr Gihwala had resigned as director of SMI, and Mr Manala would soon thereafter.
(2) Section 162(5)*(c)* read with s 162(6)*(b)*(ii) did not give a court discretion to refuse to make a delinquency order if the requirements of s 162(5)*(c)* were satisfied, or to moderate the period of such order to aperiod of less than seven years. This lack of flexibility, they argued, had the potential to infringe the constitutional rights to dignity, the right to choose a trade, occupation or profession and the right of access to courts. (See [140] – [141].)
The SCA rejected (1) by drawing attention to the principle of law that a statute is not retrospective merely because a part of the requisites for its action was drawn from time antecedent to its passing. (See [141].)
The SCA also rejected (2). Noting that the argument here was essentially an attack on the legislative decision that a delinquency order in particular terms had to follow from conduct of the type specified, the SCA stressed that such an attack could only be pursued by attacking the rationality of the decision. This was not done. The court held that s 162(5)*(c)*, read with s 162(6)*(b)*(ii), was rational. Its purpose was to protect the investing public against the type of conduct that leads to an order of delinquency, and to protect those who deal with companies against the harm caused by the misconduct of delinquent directors. Section 162 was an appropriate and proportionate means to achieve such a purpose. The court noted that, while the exclusion was for a minimum of seven years (s 162(6)*(b)*(ii)), a court did in fact have the power, in appropriate circumstances, to relax that after three years, and instead place the person under probation (s 162(11)*(a)*). (See [142] – [145] and [150].)
Finally, the SCA dismissed the directors' arguments that the provisions infringed their rights to dignity, to choose a trade, occupation or profession, and to access to courts.

COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE v MARULA PLATINUM MINES LTD 2017 (2) SA 398 (SCA)

Revenue — Income tax — Deductions — Expenditure incurred in production of income — Trading stock — Expenses relating to mining mineral-bearing ore and processing it into mineral-bearing concentrate — Whether such expenses incurred in acquisition of trading stock or in mining operation — Mining of ore and its processing formed part of manufacturing process, bringing it within definition of trading stock — Income Tax Act 58 of 1962,s 1 sv 'trading stock' and 'mining operation'.
Revenue — Income tax — Deductions — Expenditure incurred in production of income — Trading stock — Recoupment of expenses claimed as deductions — Meaning of 'any amount which would otherwise be deducted' in Income Tax Act 58 of 1962, s 23F(2).

The taxpayer mined mineral-bearing ore, not for sale but for processing it into a mineral-bearing concentrate which it then on-sold to a subsidiary. The payment provisions of the agreement between the taxpayer and its subsidiary resulted in the full consideration for the concentrate not always accruing to the taxpayer during the same year of assessment that s 11*(a)* deductions for related expenses were

claimed. The Commissioner took the view that the ore and concentrate constituted trading stock (as defined in s 1) so that expenses claimed related to the taxpayer's acquisition of trading stock; and that the mismatch between the deduction of such expenses and the income from its disposal rendered s 23F(2) applicable. This subsection provides that 'any amount which would otherwise be deducted' in respect of the acquisition of trading stock 'must, to the extent that it exceeds the amount received or accrued from the disposal of that trading stock be disregarded during that year of assessment'. Having invoked s 23F(2), the Commissioner accordingly recouped a percentage of the s 11*(a)* deductions claimed by the taxpayer in respect ofeach of the years of assessment.

The central issue in this case — the Commissioner's appeal and the taxpayer's cross-appeal against a tax court decision — was whether the extraction of the mineral-bearing ore from the land and its processing into a mineral-bearing concentrate, amounted to a manufacturing process with the result that the ore and concentrate constituted 'trading stock' as defined, or whether (as the taxpayer contended) these processes fell under 'mining operations' and 'mining' as defined. Only in the former case would s 23F(2) apply. (The s 1 definition of 'trading stock' is at [13] and that of 'mining operations' and ‘mining' at [29].)

A further issue was the proper interpretation of s 23F(2), the taxpayer having submitted that the phrase 'any amount which would otherwise be deducted' in s 23F(2) excluded deductions claimed under s 11*(a)*, and therefore that the expenses incurred to extract the ore and produce the concentrate could not be recouped.

Held

The finding of the tax court that the ore did not constitute trading stock as it had in itself no saleable or realisable value, could not be sustained. It was not a prerequisite for qualification as 'trading stock' that what the taxpayer acquired must be immediately saleable or realisable. For it to constitute 'trading stock' as defined in s 1, it sufficed that the ore was intended to be used for the purpose of manufacturing the concentrate. (Paragraphs [18] and [19] at 405B – E.)

Not only was the mineral-bearing ore extracted by the taxpayer for the purpose of manufacturing the concentrate, but the concentrate itself was derived by a process of manufacturing, as envisaged in the first part of the definition of 'trading stock' in s 1. The concentrate also qualified as trading stock in terms of the second part of the definition in s 1, as the proceeds from its disposal formed part of the taxpayer's gross income. It followed that the taxpayer's activities constituted the disposal of trading stock, and as a result the Commissioner was entitled to invoke s 23F(2). (Paragraph [25] at 406G – H.)

The submission that the processes constituted mining failed to take proper account of the fact that the taxpayer extracted the ore for the purpose of utilising it to render an end product in the form of a concentrate. The ore was not intended to be disposed of in its original state, and was subjected to an intricate process which rendered an end product that was not only significantly different from the raw ore, but was a highly valuable commodity saleable on the open market. Seen in this context, the processes utilised by the taxpayer to derive the concentrate from the raw ore did not constitute the 'mining' of the concentrate, but its manufacture. (Paragraph [29] at 407F – H.)

On the plain wording of s 23F(2), read within its context, it was clear that 'any amount which would otherwise be deducted' referred to s 11*(a)* expenses that would be deductible had the full income of the disposal of the trading stock accrued to the taxpayer during that year of assessment.

AG v DG 2017 (2) SA 409 (GJ)

Marriage — Divorce — Maintenance — Contempt of court — Mala fide failure to comply with interim maintenance order — Concealment of assets and artificial decrease in salary to defeat court order — Warrant of arrest issued.

The applicant, complaining that the respondent — whom she was divorcing — was ignoring an interim maintenance order made on 13 August 2015, brought an urgent application for an order instructing him to pay arrear maintenance of R30 000. She also asked the court to hold him in contempt and have him arrested if he failed to pay up.
The respondent, a multimillionaire and the controlling mind behind several companies, claimed to be unemployed. He was a serial defaulter on maintenance payments (he was over R300 000 in arrears) and had several court orders (and a finding of contempt) against him, but he frustrated their execution by contrived challenges to attachments and by switching funds out of the affected accounts. The applicant, meanwhile, was forced to finance the maintenance shortfall by borrowing and by depleting her capital and savings. She also had to obtain a bond of R600 000 to cover her legal fees.
The respondent acknowledged that he was aware of the order of 13 August 2015and that he failed to comply with it, but disputed that his non-compliance was wilful and mala fide.
Held
The court cannot expect the applicant to deplete her own financial resources and hope to recover in due course where the respondent was already over R300 000 behind with his maintenance, even on the assumption that only half that was for his children (see [6]). Although applicants in urgent applications had to show that they would not obtain substantial redress in the ordinary course, a failure to pay child maintenance pending a contested court case could not be seen as a simple debtor/creditor-type situation (see [8]). The usual remedy of a warrant of execution was not appropriate because of the respondent's habit of challenging the attachments made pursuant to the warrants and then shifting funds from the accounts in question (see [14]). He was concealing his assets and had engineered a decrease in salary purely to frustrate the court order, establishing mala fides (see [28] – [29]). The court would not tolerate the respondent's behaviour when exercising its responsibilities as the upper guardian of children. Respondent held in contempt and a warrant of arrest committing him to imprisonment for a period of five days, failing payment, issued.

AHMED AND OTHERS v MINISTER OF HOME AFFAIRS AND ANOTHER 2017 (2) SA 417 (WCC)

Immigration — Refugee — Asylum seeker — Whether asylum seeker may apply for visa under Immigration Act — Refugees Act 130 of 1998, s 27(c)*; Immigration Act 13 of 2002, s 27*(d).

Mr and Mrs Fahme and their four minor children were in South Africa. He was the holder of a general work visa and she of an asylum-seeker's permit. When she

attempted to apply for a visitor's visa, her application was refused on the basis of the first respondent's (the Department's) Directive 21, which barred holders of asylum-seeker permits from applying for visas or permits under the Immigration Act 13 of 2002 (see [8] – [9]).
Mr Swinda and Mr Ahmed were asylum seekers whose applications for asylum had been refused, and who had appealed to the Refugee Appeal Board. Pending the appeals, both had applied for critical-skills visas, and both applications had been refused, apparently on the basis that pending the appeals, both were still regarded as asylum seekers, and so precluded from applying for the visas (see [11]).
Directive 21's basis was s 27*(c)* of the Refugees Act 130 of 1998, which provides that 'A refugee is entitled to apply for an immigration permit . . . after five years' continuous residence in the Republic from the date on which he . . . was granted asylum . . . .' The Department interpreted this to mean that asylum seekers could not apply for visas or permits under the Immigration Act (see [9], [40]).
Mrs Fahme, Mssrs Swinda and Ahmed, and the first applicant, an immigration attorney, applied to set aside the directive.
Held, that it should be set aside: the Department had misinterpreted the Refugees and Immigration Acts; and the directive infringed Mrs Fahme's constitutional right to dignity (see [43] – [44], [49] – [50], [63], [67] – [68],[72]).
Ordered, that the directive be set aside; that second respondent (the Director-General) allow Mrs Fahme to apply for a visitor's visa, and consider Mssrs Swinda and Ahmed's appeals of the refusal of their applications for critical-skills visas (see [72]).

DE FREITAS v JONOPRO (PTY) LTD AND OTHERS 2017 (2) SA 450 (GJ)

Competition — Unlawful competition — Passing-off — Actionable non-disclosure — Joint business run by A and from different premises terminated by agreement — A agreeing to change name of his business —deliberately concealing that he would open competing establishment near A once A effected name change — A effectively having destroyed his own goodwill and passed it on to— B's conduct constituting actionable non-disclosure.

Estoppel — Res judicata — Issue estoppel — Operation — Successive applications for interim relief — Scope of first order — Possibility not considered in first application having materialised — Defence of res judicata would fail provided earlier court's decision did not intend to refuse relief sought —Considerations of fairness and equity may militate against application of issue estoppel.

A and B, close friends for 20 years, ran an adult-entertainment business called Cheeky Tiger from two premises located at some distance from one another. They fell out and decided to part ways. In January 2015 got A to agree to change the name of his business to Manhattan Nights without disclosing that he intended opening a competing business using the Cheeky Tiger get-up (but not the name) near Manhattan Nights.
In December 2015 A obtained an interim interdict (the first judgment) prohibiting from running the competing business, contending that the only reason had chosen to open it so close by was to exploit the goodwill he (A) had built up under the Cheeky Tiger brand. The order prohibited 'from commencing and/or trading business under

the name and style of Cheeky Tiger' near A's business. Sometime afterwards began trading near A's business, replicating the Cheeky Tiger brand in all but name.
On 9 March 2016, A approached the present court for (i) an order declaring to be in contempt of the December 2015 order; and (ii) an interim interdict prohibiting from conducting a competing business. A argued that it wanted the interdict as an alternative to the contempt proceedings in case the first order did not cover B's passing-off of his get-up argued that the decision in the first order had dealt with passing-off and that the matter was res judicata.

Held

As to contempt of court

Since the first order did not specifically prohibit passing-off, A was unable to show that had deliberately breached it. The essential requirement of mala fide breach being absent, a finding of contempt could not be made (see [23] – [27]).

As to res judicata and issue estoppel

The decision in the first order purported to deal with mark and get-up, but the order dealt only with the name, and it was therefore evident that the court did not consider the possibility that might use the get-up without the name. However, that situation had materialised, and if A were able to make out a case of passing-off of the get-up, he should get his remedy, provided the earlier judgment did not intend to refuse such relief (see [31]). Since the earlier judgment expressly stated that there had been a passing-off of at least part of A's get-up, the issue of res judicata did not arise (see [32]). And even if the requirements of issue estoppel were met, the court could refuse to apply it in the interests of equity and fairness (see [35]).

As to passing-off

Quite apart from issue estoppel, A had established a prima facie right that entitled him to interim relief (see [43]). This was because B's non-disclosure of his plan to capture A's goodwill without compensation was, inthe light of the business relationship between the parties, prima facie actionable (see [45] – [51]). Effectively A would unwittingly destroy the goodwill he had built up and pass it on to B's new business (see [46]). B's actionable non-disclosure would render A's January 2015 agreement to change the name of his establishment null and void ab initio (see [50] – [51]). The court would issue an interim interdict prohibiting from using a get-up that would lead A's clients to believe that B's business was associated with it.

MEC FOR CO-OPERATIVE GOVERNANCE AND OTHERS v MOGALAKWENA MUNICIPALITY AND ANOTHER 2017 (2) SA 464 (GP)

Appeal — Execution — Order for execution pending appeal — Appeal against — To which court — Meaning of expression 'next highest court of appeal' — If court making execution order consisting of one judge, then appeal lying to full court; if consisting of more than one judge, then appeal lying to Supreme Court of Appeal — Superior Courts Act 10 of 2013, s 18(1) and s 18(4).

Court — High Court — Full bench and full court — Division consisting of two judges is 'full bench' and court consisting of three judges is 'full court' —Superior Courts Act 10 of 2013, s 1 sv 'full court' and 'division'.

While the terms 'full bench' and 'full court' are often used interchangeably, it is clear from the definitions of 'full court' and 'division' in s 1 of the Superior Courts Act 10 of

2013 that a court of a division consisting of two judges is a 'full bench' and a court consisting of three judges a 'full court' (see [21]).
On 1 April 2016 a single judge in the Gauteng Division of the High Court (the court a quo) granted the second respondent, Mr Kekana, an order (the main order) reinstating him as municipal manager of the first-respondent municipality.
Leave to appeal to the Supreme Court of Appeal having been granted, the High Court on 8 July 2016 granted Mr Kekana a further order (the enforcement order) for the execution of the main order (that is, his reinstatement) pending the outcome of the appeal. The second order was made under s 18(1) of the Superior Courts Act, which provides that the court may 'in exceptional circumstances' make an order deviating from the norm, which is suspension pending appeal. Section 18(1) requires that the following preconditions be met before an order appealed against may be put into operation pending appeal: first, exceptional circumstances had to exist; and, second, proof by the applicant on a balance of probabilities, (i) that the applicant would suffer irreparable harm if the order were not put into operation; and, in addition, (ii) that the other party would not suffer irreparable harm if the order were put into operation (see [24]). Mr Kekana argued that in his case the exceptional circumstances were that his contract as municipal manager would expire on 3 August 2017 and that it was highly unlikely that the appeal in the main application would be finalised before then.
On the same day the second and further appellants launched an urgent appeal — to the Supreme Court of Appeal (SCA) — against the enforcement order. This was in terms of s 18(4)(ii), which provides that a party aggrieved by a s 18(1) order had an 'automatic right of appeal to the next highest court'. The effect of the appeal was that the enforcement order was itself suspended under s 18(4)(iv).
Mr Kekana argued that the notice of appeal against the enforcement order was defective because the 'next highest court' referred to the full court of the Gauteng Division, not the SCA. The SCA directed that the matter be dealt with by the present full court.
Held
The context of s 18(4) dictates that the appeal had to follow the default route, that is, from single judge to full court of the same division, which was the 'next highest court' (see [16]). It would logically follow that in the event of an order in terms of s 18(1), to put into operation the decision of a court constituted of more than one judge, an automatic right of appeal lay to the SCA, being the 'next highest court' (see [18]). Finally, where a court decided in favour of interim enforcement pending an appeal, an aggrieved party had a further and final opportunity by way of appeal to challenge interim enforcement of the order and retain the default position of suspension of the order pending an appeal (see [19]).
The court a quo erred in its granting of the order in terms of s 18(1). It conflated the requirements for exceptional circumstances with those of irreparable harm (see [28]). And any harm suffered by Mr Kekana would in any event be remediable by a claim for damages (see [29]). Nor did Mr Kekana show that the appellants would not suffer irreparable harm (see [31] – [32]). Hence the appeal should succeed and the order of the court a quo be replaced with an order dismissing the application (see [33]).

NEDBANK LTD v JONES AND OTHERS 2017 (2) SA 473 (WCC)

Credit agreement — Consumer credit agreement — Debt rearrangement — Order — Interest rate fixed at level that would make debt impossible to settle — Order ultra

vires and invalid — However, court declining review because of prejudice to debtor — Instead issuing declaratory order that magistrates' court may not vary contractually agreed interest rate and that rearrangement order containing such proviso invalid — National Credit Act, s 86(7)(c) *and s 87(1)*(a)(ii).

The Joneses (the first and second respondents) were unable to pay their creditors (the sixth to fifteenth respondents) and approached a debt counsellor (the third respondent), who applied for debt review under s 86(7)*(c)* of the National Credit Act 34 of 2005 (the NCA). The magistrate hearing the application (the fourth respondent) on 8 June 2010 made an order (proposed by the debt counsellor) restructuring the Joneses' debt in terms of a home-loan agreement with Nedbank Ltd (the applicant). The proposal was made under s 86(7)*(e)*(ii) and the order under s 87(1). The order dropped the monthly instalment from R10 500 to R4000 and capped the initially variable interest rate of 10,9 % at 8,9 %. The repayment period (initially 336 months) was left open-ended 'till debt settled'.
Displeased, Nedbank applied for the rescission of the magistrate's order and declaratory relief. It argued that the order was void ab initio because the magistrate was not empowered to vary the agreed interest rate nor order that it be fixed indefinitely. Nedbank contended this sort of order was threatening the liquidity of the banking system and its effect in this case was that the Joneses' debt would never be repaid. Besides the validity of the magistrate's order the principal issue confronting the court was the appropriate order to make in the light of Nedbank's five-year delay in bringing the present application.
Held
The reasoning in *Nedbank Ltd v Norris and Others* 2016 (3) SA 568 (ECP) was on point and would be adopted (see [17] – [18], [31]). The magistrate had, by fixing the interest rate at a level which rendered the debt incapable of ever being settled, exceeded his powers under s 37. The order was ultra vires the NCA and invalid (see [18]). A review at this stage would create a commercial nightmare for both parties — particularly the Joneses — and should not be granted (see [20] – [23]).
But the persistent misinterpretation of ss 86 and 87 by debt counsellors and magistrates warranted a declaratory pronouncement on the correct position (see [28] – [32]). An appropriate order would declare —

- that a magistrates' court hearing a matter in terms of s 87(1) did not enjoy jurisdiction to vary (by reduction or otherwise) a contractually agreed interest rate determined by a credit agreement, and that any order containing such a provision is null and void; and
- that a rearrangement proposal in terms of s 86(7)*(c)* contemplating a monthly instalment lower than the monthly interest accruing on the outstanding balance was ultra vires the NCA.

HOTZ AND OTHERS v UNIVERSITY OF CAPE TOWN 2017 (2) SA 485 (SCA)

— Human rights — Right to freedom of expression — Exclusions — Hate speech — What constitutes — T-shirt bearing slogan 'Kill all whites' in context of student protests — Advocacy of hatred based on race alone, and constituting incitement to harm white people — Not amounting to speech protected by Bill of Rights — Constitution, s 16.

Constitutional law — Human rights — Right to freedom of expression — Exclusions — Hate speech — What constitutes — Slogan 'Fuck white people' in context of student protests — Speech protected by Bill of Rights — Constitution, s 16.

Interdict — Final interdict — Requirements — Absence of other adequate or satisfactory remedy — Alternative remedy must be legal remedy.

Interdict — Final interdict — Requirements — Once three requirements for grant of interdict established, scope, if any, for refusing relief limited — No general discretion to refuse relief.

In the High Court the respondent, the University of Cape Town (UCT),successfully obtained a final interdict against the five appellants — students and ex-students — on the grounds of their unlawful conduct during student protests that took place on the university premises. Those protests had begun with the construction by protesters of a shack in the middle of a road that served as a major route for vehicles through the university, causing significant obstruction to traffic, as well as pedestrians. The protests lasted three days before the university instituted urgent proceedings in the High Court to halt them. They were marked by various instances of violence and threats of violence, vandalism, the starting of fires, arson attacks and the displaying of various abusive slogans — the message 'Fuck white people' was painted on a war memorial, and a T-shirt bearing the slogan 'Kill all whites' was seen being worn by one of the appellants. The final order inter alia barred the appellants from entering the university campus, unless they had the university's consent to be there for academic purposes or to occupy student houses that had been allocated to them. It also interdicted them from further interfering in the university's day-to-day running by committing various unlawful acts or inciting others to do so. The appellants appealed to the Supreme Court of Appeal against the order. The principal question to be decided was whether UCT had met the three requirements for the granting of a final interdict, namely a clear right; an injury actually or reasonably apprehended; and the absence of similar protection by another ordinary remedy.
Held, that once an applicant had established the three requirements for the grant of an interdict, the scope, if any, for refusing relief was limited. There was no general discretion to refuse relief. (Paragraph [29] at 496H – 497A/B.)
Held, that the five appellants had been involved in the erection of the shack; had damaged or defaced university property; and had participated in, or encouraged others to engage in, unlawful conduct, including the blocking of traffic, and, with respect to some of them, the starting of fires and the use of threatening language in a public place. Certain of them had committed acts of violence and incitement to violence. Such conduct had the effect of interfering with UCT's acknowledged rights, which included the right to control and manage access to, and unlawful conduct on, its property; to ensure that its staff was able to carry out their work in the interests of the students; to ensure the safety of its students, staff and other members of the public who were legitimately on its property; and to protect UCT's property. Furthermore, UCT had a reasonable apprehension that, unless an interdict was granted, the students would continue breaching its rights. Hence, the first two requirements for the granting of a final interdict had been met. (Paragraphs [30] and [70] at 497C –and 511H – 512A.)
Held, that the alternative remedy had to be a *legal* remedy, that is, a remedy that a court may grant and, if need be, enforce, either by the process of execution or by way of proceedings for contempt of court. The fact that one of the parties, or even

the judge, might think that the problem would be better resolved, or could ultimately only be resolved, by extra-curial means, was not a justification for refusing to grant an interdict. The suggestion by counsel for the appellants that the court should rather order the parties to enter into constructive engagement to resolve their issues, as such, stood to be rejected. Furthermore, other suggested alternatives of criminal charges, the implementation of internal disciplinary action, or mediation, were, given the circumstances of the case, also not proper or effective alternatives to an interdict. (Paragraphs [36] – [39] and [76] – [78] at 499D – 501B and 513D – J.)
Held, that a court should not be hasty to conclude that, because language is angry in tone or conveys hostility, it is therefore to be characterised as hate speech, even if it had overtones of race or ethnicity. The slogan 'Fuck white people' fell within the protection of speech afforded by s 16(1) of the Constitution. However, the slogan appearing on an appellant's T-shirt — 'Kill all whites' — a message unequivocal in meaning — fell into the category of advocacy of hatred based on race alone, and constituted incitement to harm whites. It was as such not speech protected by s 16(1) of the Constitution, as was argued by the appellants. (Paragraph [67] – [69] at 510E – 511H.)
Held, that UCT had met the requirements for the granting of a final interdict. However, the order granted by the court a quo was too broad in scope and had to be accordingly limited. In its effectively excluding the appellants from the university campus, unless they had the consent of the vice-chancellor or his delegate to be there, the order had infringed the appellants' right of freedom of movement.

RESIDENTS OF SETJWETLA INFORMAL SETTLEMENT v JOHANNESBURG CITY 2017 (2) SA 516 (GJ)

Spoliation — Mandament van spolie — Prohibition on self-help — Local authority dispossessed of its land by unlawful shack-building — Municipality, though unlawfully dispossessed, may not demolish shacks without court order — Unlawful self-help by municipality not countenanced — Interdict granted.

The applicants built shacks on the respondent city's land. Claiming illegal land invasion, the city demolished the shacks without a court order. The applicants claimed that they had been living in the shacks when they were demolished, and were entitled to protection under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE). The city claimed that the shacks were half-built and unoccupied when demolished. Given the dispute over the facts, the court enquired whether even on the city's version a court order was nonetheless needed. The court issued a rule nisi calling upon the city to show cause why an interdict should not be confirmed. On the return day —
Held
While the applicants had, in beginning construction, unlawfully acquired possession of the city's land sufficient to constitute spoliation, the subsequent demolition constituted unlawful self-help by the city (PIE was not applicable because the shacks were not yet completed or occupied) (see [13] – [14]). Local authorities should not be permitted, without court sanction, to move in with heavy equipment whenever people moved onto their land (see [19]). The rule nisi would be confirmed.

FLUXMANS INC v LEVENSON 2017 (2) SA 520 (SCA)

Prescription — Extinctive prescription — Commencement — Knowledge of debt — Debt due when creditor has 'knowledge of . . . facts from which . . . debt arises' — Whether agreement's invalidity was fact that had to be known for debt to become due — Prescription Act 68 of 1969, s 12(3).

In 2006 respondent and appellant attorneys concluded a contingency fees agreement for the prosecution of respondent's delictual claim. In 2008, when the claim was settled, appellant paid respondent the settlement amount, from which it deducted its contingency fee. In 2014 respondent learnt that the agreement was invalid, and instituted proceedings against appellant for recovery of a part of the fee. Appellant met the claim with a special plea of prescription; it was dismissed by the High Court; and appellant appealed to the Supreme Court of Appeal (see [30]).
The law concerned was s 12(1) of the Prescription Act 68 of 1969 —
'. . . prescription shall commence to run as soon as the debt is due';
and s 12(3):
'A debt shall not be deemed to be due until the creditor has knowledge . . . of the facts from which the debt arises . . . .'
The issue was whether the agreement's invalidity was a fact that had to be known for the debt to become due. *Held*, that it was not such a fact (see [42]).
Accordingly the debt had become due in 2008 when appellant deducted its fee, and had prescribed by the time respondent learnt of the invalidity in 2014, and instituted proceedings. Appeal upheld.

RM v BM 2017 (2) SA 538 (ECG)

Marriage — Divorce — Proprietary rights — Antenuptial contract — Clause listing estate's assets for purpose of calculating accrual — Later clause excluding those assets — Effect on validity of contract.

In this action for divorce, the plaintiff wife put in issue the validity of the antenuptial contract. Its clauses one and two excluded community of property, and of profit and loss; clause three made the marriage subject to accrual; clause four listed inter alia the assets comprising the husband's estate for calculating accrual; and clause five appeared to exclude those assets from his estate (see [8]).
Held, that clauses four and five were irreconcilably contradictory, and rendered the antenuptial contract void for vagueness (see [13]).
Ordered, that the contract was void, and the parties were married in community of property.

LEWIS GROUP LTD v WOOLLAM AND OTHERS 2017 (2) SA 547 (WCC)

Company — Shares and shareholders — Shareholders — Derivative action — Use of derivative action to obtain order declaring director delinquent — Two remedies distinct — Use of derivative action in delinquency proceedings, while not expressly forbidden, would be vexatious in absence of standing to proceed derivatively — Companies Act 71 of 2008, s 162 and s 165.

Company — Directors and officers — Directors — Declaration of delinquency — Through derivative action — Whether vexatious — Companies Act 71 of 2008, s 162 and s 165.

Company — Directors and officers — Directors — Declaration of delinquency — Serious misconduct entailing dishonesty, wilful misconduct or gross negligence required — Companies Act 71 of 2008, s 162(5)(c).

Woollam, a shareholder in the applicant company (the Lewis Group), wanted to use the derivative action in s 165 of the 2005 Companies Act — a codification of the common-law derivative action — to compel the Lewis Group to have four of its directors (the second to fifth respondents) declared delinquent under s 162 of the Act. The declaration would bar them, during its validity, from being directors of *any* company. Woollam listed six complaints for which he wanted the directors declared delinquent, including the selling of employment insurance to pensioners and self-employed people, and the charging of compulsory warranties and delivery fees.

To begin the s 165 action, Woollam served a demand on the Lewis Group (under s 165(2)) to commence s 162 proceedings against the directors. The Lewis Group argued that this amounted to vexatious litigation since s 162 proceedings were available to Woollam personally, and asked the court to set aside Woollam's demand.

Held

For a company or its shareholders to obtain a declaration of delinquency in respect of a director they must show serious wrongdoing in the form of dishonesty, wilful misconduct or gross negligence. Establishing 'ordinary' negligence, poor business decision-making, or misguided reliance on incorrect professional advice would not be enough (see [18]). In considering the preliminary question of whether Woollam would be allowed to proceed derivatively when he had standing to proceed personally for the same relief, it had to be kept in mind that s 162 and s 165 had distinct objects: the former was for the protection of the public interest, and the latter for the protection of the legal interests of a specific company. Section 162 did not engage the legal interests of the company in the sense intended in s 165(2).

It was not within the scheme of the Act that shareholders should *ordinarily* seek to proceed derivatively to obtain the remedy in s 162. The rationale for derivative proceedings, whether under the common law or s 165, was to afford a means, in the interests of justice, for redress to be obtained where the proper (corporate) plaintiff declined to seek it. This rationale was absent where the person, who would otherwise suffer an injustice by reason of the proper plaintiff's failure to act, had personal standing to seek the indicated relief (see [49]).

While ss 162 and 165 did not expressly *exclude* the use of the derivative action procedure in s 162 proceedings, there was nothing in Woollam's complaints or the contents of his demand that would give him standing to proceed derivatively for relief that he was able to claim personally, and in the circumstances his resort to s 165 was indeed vexatious (see [50], [52]).

Since none of Woollam's complaints fell within the ambit of s 162(5)*(c)* (dishonest or grossly negligent conduct), there was in any event no merit in his demand to have the directors declared delinquent at the instance of Lewis (see [53], [58] – [83]).

As to the burden of proof: The assertions in a s 165(2) demand had to show that the company had a cognisable claim to declarations of delinquency against the directors (see [53]). To assess this, the court would look at the content of Woollam's demand

in the context of the evidence adduced in the s 165(3) proceedings, but he was not required to show that the claim enjoyed good prospects of success (see [53]). The company had the onus of showing on a balance of probabilities that the demand was frivolous, vexatious or without merit, but there was no inherent probability in favour of either side.

LUCKY STAR LTD v LUCKY BRANDS (PTY) LTD AND OTHERS 2017 (2) SA 588 (SCA)

Intellectual property — Trademark — Infringement — Use of confusingly similar mark — *LUCKY STAR* and *LUCKY FISH* in respect of selling and marketing of fish — Average consumer would not be confused or deceived —Trade Marks Act 194 of 1993, s 34(1)(a).

Intellectual property — Trademark — Infringement — Test — Comparison of marks — Principle that enquiry to be confined to marks themselves — No regard to be had to other features of get-up or other indications of origin — Trade Marks Act 194 of 1993, s 34(1)(a).

The appellant, Lucky Star Ltd, sold canned fish under the registered trademark Lucky Star. The respondents operated several restaurants in Cape Town, where they sold cooked fish and chips, under the trademarks Lucky Fish, Lucky Fish and Chips, and Lucky Fish & Chips. The appellant instituted an application against the respondents in the High Court, interdicting them from infringing their Lucky Star trademark. The appellant relied on s 34(1)*(a)*,*(b)* and *(c)* of the Trade Marks Act 194 of 1993. Relief was also sought in terms of s 11(2)*(b)*(i) and (iii) and s 11(2)*(c)*(i) of the Companies Act 71 of 2008 declaring that the company name of the first respondent, Lucky Brands (Pty) Ltd, was confusingly similar to the appellant's registered trademarks, Lucky Star and Oceana Brands, and company names, Lucky Star Ltd and Lucky Star Foods. The court a quo rejected the application. This is an appeal against that decision.
The court focused on whether the appellant should succeed in its s 34(1)*(a)* claim, and particularly on whether the appellant had met the requirement that a substantial number of persons would probably be deceived into believing, or confused as to whether, there was a material connection in the course of trade between the respondents' goods and services and the appellant's trademark. In finding that the appellant had failed to meet this test, the court reiterated the applicable principles of law, in particular as to how the two marks should be compared. (The appellant was also unsuccessful in its other claims, which were briefly dealt with — see [11] – [17].)
Held, that in comparing the registration with the respondents' actual use in order to determine the likelihood of confusion or deception, the enquiry was confined to the marks themselves. No regard should be had to other features of the get-up or other indications of origin, extraneous to the mark itself, of the goods marketed by the appellant and respondents, respectively. The court a quo had erred to the extent it was influenced by a comparison of the get-up of the appellant's canned-pilchards product with the respondents' trademark. What was required was a comparison of the appellants' registered trademark 'Lucky Star' with the trademark of the respondents' 'Lucky Fish' or 'Lucky Fish and Chips' (see [7]).
Held, that in determining the similarity of the marks, a court had to compare the actual use by the respondent of its mark and the notional use to which the appellant's registered mark might be put — all possible fair and normal application of

the mark within the ambit of the monopoly created by the terms of the registration. As such, the court a quo erred in considering the appellant's historical and current business operations (see [8] – [9]).
Held, that, when the marks were compared side by side, and the main or dominant features of the marks were considered, namely the words 'Star' and 'Fish', there was no likelihood of deception or confusion. The overall impression created was that the marks did not resemble each other closely and the average customer would not be confused or deceived into believing that the respondents' restaurants bearing the Lucky Fish mark were in any way associated with the appellant.

MINISTER OF HOME AFFAIRS AND ANOTHER v PUBLIC PROTECTOR AND ANOTHER 2017 (2) SA 597 (GP)

Administrative law — Administrative action — What constitutes — Actions and decisions of Public Protector — Amounting to administrative action.

Constitutional law — Chapter 9 institutions — Public Protector — Powers — To investigate unfair-labour complaints of employee of state — Falling under extremely wide powers granted to Public Protector — Constitution, s 182(1); Public Protector Act 23 of 1994, s 6.

The Minister of Home Affairs and the Director-General of the Department of Home Affairs sought the review and setting-aside of a final report produced by the Public Protector. The report addressed the propriety of an investigation (and actions consequent to) undertaken by the Department of Home Affairs into alleged misconduct by an employee while acting as a diplomatic official attached to the South African Embassy in Cuba. Important legal issues arising in the review included the following: (1) Did the decisions of the Public Protector amount to administrative action as intended by the provisions of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), as was argued by the applicants? (2) Did the Public Protector have the necessary jurisdiction to investigate, as she did, unfair-labour complaints, in terms of her powers in terms of the Public Protector Act 23 of 1994 and the Constitution, or did they have to be dealt with in terms of the Labour Relations Act 66 of 1995? The argument here was that by undertaking the investigation the Public Protector acted ultra vires her powers in terms of the legislation regulating her office, and her conduct hence breached the principle of legality.
As to (1), *held*, that the Public Protector, performing her functions in terms of the Constitution and the Public Protector Act, could properly be described as an organ of state, or if not, at least a juristic person when exercising a public power or performing a public function in terms of an empowering provision. Her decisions and actions had direct, external legal effect, and the potential to adversely affect the rights of any person. Hence the actions of the Public Protector amounted to administrative action as defined in s 1 of PAJA, and could therefore be challenged thereunder.
As to (2), *held*, that the powers of the Public Protector were extremely wide. In terms of s 182(1) of the Constitution, the Public Protector was competent to investigate any conduct in state affairs or in the public administration in any sphere of government. Section 6 of the Public Protector Act extended the Public Protector's powers to encompass the investigation, on her own initiative, of any alleged maladministration in connection with the affairs of government at any level, as well any alleged abuse or unjustifiable exercise of power or unfair, capricious, discourteous or other improper conduct or undue delay by a person performing a public function.

Therefore, there was no merit to the argument that the Public Protector acted beyond the scope of her powers.As to the findings and the recommendations of the Public Protector, *held*, that the outcome of the Public Protector's investigation was rationally justifiable and her decisions and the remedial action taken fell within the bounds of reasonableness (see [68]). Application refused.

DEPARTMENT OF TRANSPORT AND OTHERS v TASIMA (PTY) LTD 2017 (2) SA 622 (CC)

Administrative law — Administrative action — Decision of functionary — Collateral challenge to validity of decision — Whether available to state functionaries against validity of their own decisions — State functionaries entitled to challenge exercises of public power, including their own, in appropriate circumstances.

Contempt of court — Disobedience of court order — Where invalid order giving rise to contempt order — Duty to obey court orders subsequently found to be invalid — Effect on contempt order of setting aside disobeyed invalid order — Constitution, s 165(5).

Review — Application — — Delay in bringing application — Condonation — Whether constitutional injunction that courts must declare unconstitutional conduct invalid, having effect that courts must always condone delay in bringing application for review of clearly unconstitutional conduct — Constitution ss 172(1) and 237.

Tasima (Pty) Ltd (Tasima) successfully tendered for the provision of services to the Department of Transport (the DoT) relating to the electronic National Traffic Information System (eNaTIS). They subsequently entered into an agreement for a fixed period of five years at the end of which Tasima would transfer the operation of eNaTis to the DoT in accordance with a specified transfer-management plan. Such transfer did however not happen after expiry of the fixed period; instead some time thereafter the parties agreed that Tasima would continue providing the services it rendered under the expired contract on a month-to-month basis. This arrangement was eventually substituted by an extension of the expired agreement for a further five years (commencing 1 May 2010), agreed to by the then Director-General of the DoT (the DG) at the request of Tasima.

The auditor-general however declared the extension irregular for not following the prescribed procurement process, and so the DG initiated negotiations with Tasima relating to the termination of the extension and transfer ofeNaTIS to the Department. When these negotiations failed (around June 2012) the DoT stopped all payments relating to eNaTIS. In response Tasima obtained a High Court order enforcing the extension agreement pending arbitration of a dispute regarding the validity of the extension. Tasima invoked this order on a number of occasions in contempt proceedings against the DoT and the Road Traffic Management Corporation (the Corporation) when payment in terms of the impugned agreement was not made. When, close to the expiry of the extension period, the DoT took certain preparatory steps for the transfer of the eNaTIS system to itself, Tasima again instituted contempt proceedings (in March 2015). This on the basis that taking such steps prior to the transfer-management plan being implemented was in contempt of court orders enforcing the agreement.

Tasima also asked the court to interdict the relevant state respondents from taking any preparatory steps prior the transfer-management plan being implemented. The DoT's defence was founded principally on its counter-application, a

collateral/reactive challenge of the DG's extension of the agreement. It consisted of a delayed review for which condonation was requested, and a 'classical' collateral challenge which it submitted was not time-barred.
The High Court condoned the nearly five-year delay in bringing the review application, upheld the collateral/reactive challenge and dismissed Tasima's application. The Supreme Court of Appeal (the SCA) however upheld Tasima's appeal against the High Court decision, mainly on the basis that it was not competent for a state organ to raise a collateral challenge against its own administrative action.
This case, the appeal against the SCA's decision, concerned the Constitutional Court's determination of the following issues:
• **Whether the applicants, as organs of state, may raise collateral/reactive challenges.**
Held, by the majority — the second and fourth judgments — that it was both alogical and pragmatic consequence of the developments in our jurisprudence to allow state organs to challenge the lawfulness of exercises of public power by way of reactive challenges in appropriate circumstances.
Held, by the minority — the first and third judgments — that, without expressing a final opinion on the issue, there was no justification in logic or principle to deny an organ of state the right to challenge the validity of administrative action when it was faced with coercive action based on a constitutionally invalid act. (Paragraphs [86] and [138] – [140] at 646D –and 658A – 659B.)
• **Whether, in light of the peremptory terms of s 172(1) of the Constitution (that courts must declare conduct inconsistent with the Constitution invalid), a court may decline to condone a delay in bringing a review of administrative action that was clearly unconstitutional.**
Held, by the majority, that s 237 of the Constitution (that '(a)ll constitutional obligations must be performed diligently and without delay') raised the timely performance of constitutional obligations themselves to a constitutional concern that was not automatically subordinated by s 172(1); courts should not substitute a factual, multifactorial, and context-sensitive framework for a strict rule that a delay can never prevent a court from deciding the matter.
Held, further, that, although the delay was unreasonable, the court would exercise its discretion to overlook it and nevertheless entertain the application; and that the reactive challenge should succeed. (Paragraphs [159] – [171] at 664A – 666F.)
Held, by the minority, that the Promotion of Administrative Justice Act 3 of 2000(PAJA) could not be invoked as justification for a court not to comply with s 172(1)*(a)* of the Constitution; this because the Constitution, and not PAJA, was the supreme law from which PAJA itself derived its validity.
• **The duty to obey court orders subsequently found to be unlawful (the DoT arguing that because there was contractually no valid basis for the purported extension, the orders giving effect thereto were invalid and of no consequence).**
Held, by the majority, that under s 165(5) of the Constitution a court order is binding until set aside, irrespective of whether it was valid; judicial orders wrongly issued were not nullities but existed in fact and may have legal consequences; whether an order was enforceable depended on whether the judge had the authority to make the decision at the time that he made it.
Held, further, that was the case here — the extension was successfully challenged only after the enforcement order was made, and so the outcome of the review had

no effect on the enforcement order's validity; the DoT and the Corporation were thus obliged to have complied with the enforcement orders until their counter-application succeeded and the various findings of the SCA regarding their contempt for these must stand. (Paragraphs [198] – [199] at 674D – 675A.)
Held, by the minority, that where (as here) the validity of the source of the right the applicants sought to preserve was impugned on the basis that it was an illegal source, it was inappropriate for a court to grant an order preserving an illegally obtained right; in law conduct or a decision taken in contravention of a statutory prohibition was invalid from the outset.

SACR APRIL 2017

S v PHILLIPS 2017 (1) SACR 373 (SCA)

Corruption — Sentence — Section 26(1)(a)(ii) of Prevention and Combating of Corrupt Activities Act 12 of 2004 — Provision not limiting court's sentencing discretion by prescribing fine as first option.
Corruption — Sentence — Police officer demanding money from complainant to avoid arrest on false charge — First offender with prospects of rehabilitation sentenced to four years' imprisonment.

The appellant was a 35-year-old constable in the South African Police Service who had been convicted in a regional court of soliciting and accepting a bribe in contravention of s 4(1)*(a)*(i)*(aa)* of the Prevention and Combating of Corrupt Activities Act 12 of 2004 (the Act). He was a first offender who was married with three children and had nine years' flawless service. The offence involved the manufacture of a charge of drinking in public against a university student whom he arrested but later released after soliciting a bribe of R900. He was sentenced to seven years' imprisonment of which two years were suspended. An appeal to the High Court against the sentence was dismissed. In the present appeal it was contended that s 26(1)*(a)*(ii) of the Act limited the trial court's sentencing discretion by prescribing as a first option a fine, and, as a second, imprisonment, and the trial court ought therefore to have first considered imposing a fine rather than direct imprisonment.
The court rejected the appellant's contention and held that, having regard to the legislative history, context and purpose of the Act, the legislature had not intended to restrict the sentencing discretion of the trial court but rather made it clear that public officers who were convicted of corruption could be dealt with harshly. Section 26(1)*(a)*(ii) clearly left it in the hands of the sentencing court to impose either a fine or a period of imprisonment. As to a proper sentence, the court held that the trial court had placed undue emphasis on deterrence and failed to give due consideration to the appellant having prospects of rehabilitation and becoming a useful member of society. In the circumstances an appropriate sentence would be one of four years' imprisonment, which would serve as an adequate deterrent to other police officers who might be tempted to supplement their income with corrupt activities.

S v LONGANO 2017 (1) SACR 380 (KZP)

Trial — Irregularity in — Appearance of bias — What constitutes — Presiding judge provided with psychologist's report not handed in during proceedings in which psychologist did not testify — Perception inevitable that court would be unable to

disabuse its mind of contents and integrity accordingly compromised — Irregularity committed.
Trial — Irregularity in — What constitutes — Recusal application — Failure to give reasons for dismissing application for recusal amounting to irregularity.
Trial — Irregularity in — What constitutes — Calling of witness by court in terms of s 186 of Criminal Procedure Act 51 of 1977 — Court calling witness not essential for determination of case without inviting submissions from parties before doing so — Irregularity committed.

In an appeal against a conviction in the High Court for murder and a sentence of 15 years' imprisonment, the appellant raised a number of irregularities allegedly committed by the trial judge, that in his opinion were so gross that they vitiated the entire trial. He contended that the trial judge improperly failed to recuse herself when in possession of evidentiary material (a psychologist's report obtained at the instigation of the state into his mental condition) not admitted during the proceedings; she then, after dismissing a recusal application, called the psychologist in terms of s 186 of the Criminal Procedure Act 51 of 1977 without inviting submissions from the parties; and failed to give reasons for not recusing herself.
Held, that the integrity of the court was compromised when the state furnished the report to the trial judge, which should not have been given to her if the witness were not going to testify. Once the information was given to the judge, there had to be an apprehension that the court would not be able to disabuse its mind of the report.
Held, further, that the appellant was entitled to be given reasons for the dismissal of the recusal application, and the failure to provide such reasons was irregular, particularly since the judge had previously stated that reasons would be provided. (Paragraph [19] at 391*b*–*c*.)
Held, further, that the state had conceded that the evidence of the psychologist was not necessary and, given the circumstances, it was difficult to determine why the trial judge had called him to give evidence and deemed him an important witness. (Paragraph [29] at 394*b*–*d*.)
Held, further, that the irregularities in the presiding judge not recusing herself, calling a witness not essential for the just decision of the case, and not giving reasons for any of her rulings, cumulatively constituted gross irregularities that resulted in a failure of justice. The conviction and sentence had to be set aside.

S v NJIVA AND ANOTHER 2017 (1) SACR 395 (ECM)

Review — Queries by reviewing judge — Queries and responses always to be couched in civil and respectful language.

In a review of the conviction and sentence of the two accused, the reviewing judge posed certain questions to the magistrate concerning the admissibility of statements, made verbally to a police officer, that they had stolen the goats that were the subject of the charge of stock theft against them. In his response the magistrate disputed that they amounted to a confession.
The court held on review that the statements clearly amounted to a confession and were inadmissible. The magistrate committed a further serious irregularity in questioning an accused on a previous conviction for stock theft before conviction. The convictions and sentences accordingly had to be set aside. (Paragraphs [25], [28] and [38] at 399*j*, 400*c*–*d* and 401*f*.)

As to the magistrate's response to the reviewing judge's queries, the court remarked that the queries of judges and responses of magistrates should always be couched in civil and respectful language. Issues should be discussed and addressed, never the persons: the exchanges should bead rem, never ad hominem. The queries raised in the instant matter were couched in respectful and moderate terms. Many of the responses by the magistrate, however, did not address the merits of the issues but rather cast aspersions on the integrity, and intellectual and judicial capacity of the judge. The intemperate, uncivil and disrespectful language used by the magistrate was not only totally unacceptable, but called for strong censure. Under our Constitution, the judiciary and magistracy constitute one undivided judiciary under the administrative management of the office of the Chief Justice. The court pointed out that it would be a sad day in our democracy if these two arms of the judiciary were allowed to continue to address each other in the terms used by the magistrate in this case.

ARENDSE v MAGISTRATE, WYNBERG AND OTHERS 2017 (1) SACR 403 (WCC)

Sentence — Imprisonment — Delay of eight years in implementing sentence after failure of appeal to Supreme Court of Appeal — Applicant seeking order that he be deemed to have served term of imprisonment — Blame for not informing him that he had to undergo his term of imprisonment not only attributable to state, applicant partly to blame for doing nothing — Application dismissed.

The applicant's sentence, imposed in March 2003, of an effective three years' imprisonment for dealing in dagga, was upheld on appeal to the Supreme Court of Appeal (the SCA) in September 2006. He was on bail at the time, having spent 14 months in prison pending the outcome of a review to determine whether he should be sentenced by the district magistrate or the regional-court magistrate. It took the authorities until January 2015 to issue a notice of surrender to the applicant to commence serving his sentence. When he was eventually brought before the court, he opposed the issue of a warrant for his arrest in terms of s 299 of the Criminal Procedure Act 51 of 1977, indicating his intention to approach the High Court for an order that he be deemed to have served his sentence of imprisonment because of the lengthy delay by the state in seeking his incarceration. He contended that, after the refusal of his appeal by the SCA, he had instructed his attorneys to take the matter on appeal to the Constitutional Court, but that they had failed to do so. The magistrate then suspended the outcome of the application before her and postponed the matter pending the decision of the High Court in the present proceedings. The applicant contended that the present court had jurisdiction in terms of s 169(1)*(a)* of the Constitution read with s 172(1)*(b)*.
Held, that s 169(1)*(a)* of the Constitution read with s 172(1)*(b)* bestowed wide powers on the High Court to determine constitutional matters which were not in the sole province of the Constitutional Court, and the present application appeared to fall within such parameters, especially as the applicant expressly disavowed any direct challenge against the sentence which he sought to avoid serving. In these circumstances the court had jurisdiction to determine the matter. (Paragraph [26] at 409*c*–*e*.)

Held, further, that what was at issue was whether any delay between the dismissal of the applicant's appeal by the SCA and his being called upon to surrender himself to undergo imprisonment involved an infringement of his constitutional rights.
Held, further, that the applicant's allegation, that the blame for the delay lay at the door of the state, was highly problematic, both conceptually and from a factual point of view, since he had condoned the delay in finalising the matter and studiously ignored the fact that service upon him of a notice to surrender himself and serve his sentence was long overdue. In such a situation, the circumstances would have to be quite exceptional before such a person could validly claim, when the wheels of justice finally caught up with him, that his constitutional rights would be infringed by having to serve his sentence. (Paragraphs [34] and [50] at 410*i*–411*b* and 415*i*–416*a*.)
Held, further, that it was inconceivable that the applicant, a correctional-services official with nearly three decades of experience, during which he would frequently have been exposed to the workings of the criminal-justice system insofar as it related to the processing of appeals and the serving of custodial sentences, could have honestly believed that his appeal was pending before the Constitutional Court for a period in excess of seven or eight years. In the circumstances he had failed to prove any infringement of his right to a speedy trial.

S v TSHOGA 2017 (1) SACR 420 (SCA)

Rape — Sentence — Life imprisonment — Minimum sentence in terms of Criminal Law Amendment Act 105 of 1997 — Appellant not informed of possibility of life imprisonment — Charge-sheet stating that appellant raped 10-year-old girl without mentioning applicability of Act — Legally represented appellant not raising prejudice in five separate proceedings — No prejudice suffered and sentence of life imprisonment upheld.

The appellant was convicted in a magistrates' court of raping a young girl. The charge-sheet stated merely that he had raped the 10-year-old complainant, no mention being made of the provisions of the Criminal Law Amendment Act 105 of 1997 (the Act). After conviction, the magistrate, without any input from the prosecutor or the appellant's legal representative, transferred the matter to the High Court on the basis that the sentence to be imposed exceeded the magistrates' court jurisdiction. The High Court imposed a sentence of life imprisonment in terms of s 51(3) of the Act after finding that there were no compelling or substantial circumstances justifying a lighter term. An appeal against this sentence was dismissed by the full court. In the present appeal the point was raised for the first time that the failure by the state to mention in the charge-sheet that the provisions of the Act were applicable, and that the appellant faced a potential sentence of life imprisonment, rendered his trial unfair.
The majority of the court (per Schoeman AJA, Dambuza JA and Nicholls AJA concurring) held that the appellant had had opportunities in five separate proceedings to raise the complaint of possible prejudice, but had failed to do so. He had not been ambushed, as the charge-sheet set out that he was charged with the rape of a 10-year-old girl, which brought the offence within the ambit of s 51(1) of the Act. He had effective legal representation throughout the trial and his counsel could not point to any prejudice he had suffered due to the failure to mention the statutory

provisions in the charge-sheet (Paragraphs [23]–[25] at 428*g*–429*d*.) Appeal dismissed.
Bosielo JA, Tshiqi JA concurring, disagreed with the majority and found that it would be grossly unfair to an accused person not to be told at all, either through the charge-sheet or during pre-proceedings or at the trial, of the applicability of the minimum-sentence legislation. To inform him about such a patently serious matter at the end of a trial, as happened in the instant case, defeated the very purpose envisaged by s 35(3) of the Constitution. Such was a trial by ambush, which was neither desirable nor permissible in a constitutional democracy underpinned by a Bill of Rights. In terms of the charge-sheet to which the appellant pleaded, he was due to be sentenced to imprisonment not exceeding 10 years, but was sentenced to life imprisonment. This was undoubtedly offensive to any notion of fairness and justice and in such circumstances caused him grave prejudice.
A sentence of 10 years' imprisonment, the maximum permissible in terms of s 9 of the Magistrates' Courts Act 32 of 1944, would have been imposed.

DW v MINISTER OF POLICE AND ANOTHER 2017 (1) SACR 441 (GP)

Damages — Victims of crime — Prosecuting and investigating officials failing to ensure that dangerous criminal kept behind bars — Plaintiff viciously attacked and raped — Entitled to be compensated at higher level because of seriousness of consequences for her of attack.

The plaintiff claimed damages against the defendants under various heads of special damages, as well as general damages for pain and suffering, disfigurement, psychological and mental injury, emotional shock, loss of the amenities of life and contumelia. The claim arose from an incident in which the 22-year-old plaintiff, a third-year quantity-surveying student, was viciously attacked and raped by an intruder who had multiple previous convictions, including a number of convictions of rape, and was out on bail at the time of the incident. She based her claim on the failure of the relevant prosecutors and investigating officers to ensure that her assailant was kept behind bars, since he posed a clear threat to the community. The special damages having been agreed upon, the court was required to consider the question of general damages.
Held, that, where the plaintiff was the victim of the most horrific attack in which she sustained more than 20 serious stab wounds, some of them life-threatening, and had spent a considerable period in the intensive-care unit; where she was disfigured for life and the psychological and cognitive consequences were of a serious and permanent nature; and she could no longer compete in the open labour market, the award for pain and suffering in particular had to be at a higher level than in previous cases considered by the courts.
Held, further, that an amount of R750 000 in respect of pain and suffering, disfigurement, psychological and mental injury, emotional shock and the loss of the amenities of life would be appropriate. In respect of contumelia an amount of R350 000 would be appropriate.

PATEL v NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS 2017 (1) SACR 456 (SCA)

Extradition — Offence for which extradition sought — Double-criminality requirement — Date at which to be determined — Required to be offence in South Africa at time of extradition request.

The applicant, a US citizen, sought to avoid his extradition to the US on charges of 'structuring', a statutory offence committed by attempting to evade anti-money-laundering legislation by making numerous smaller deposits of cash into bank accounts, rather than large deposits which would require reporting to the authorities. In resisting the attempt he relied inter alia on the requirement for extradition of double criminality, ie that the offence had to be one in both the requesting country and the receiving country. Since the alleged offences were perpetrated in the US between 2005 and 2007, and the corresponding legislation in South Africa (s 28 read with s 64 and s 68 of the Financial Intelligence Centre Act 38 of 2001) only came into operation in South Africa in 2010, he contended that the requirement had not been met since the offences should have been in existence in both countries at the time when they were committed.
Held, that neither the Extradition Act 67 of 1962 (the Act) nor the relevant treaty between South Africa and the US expressly stated that the relevant offence had to be extraditable at the conduct date or the request date. Properly construed, however, s 3(1) of the Act and art 2.1 of the treaty provided that the conduct that took place in the requesting state had to be punishable under the laws of South Africa at the request date. The court accordingly held that the application for special leave to appeal, against the High Court's upholding of the magistrate's order in terms of s 10(1) of the Act, had to be dismissed.

S v QHAYISO 2017 (1) SACR 470 (ECB)

Evidence — Adequacy of proof — Accused — Court accepting that accused's innocent explanation reasonably possibly true — Effect — There must, at same time, have been reasonable possibility that evidence implicating him false.
Trial — Presiding officer — Duties of — Inexperienced prosecutor — Duty of guidance.

The accused was charged in the magistrates' court with two counts of assault with the intention to cause grievous bodily harm, arising from an incident in which he was alleged to have assaulted the complainants who had robbed him the previous day of his cellphone. The magistrate found the second complainant's evidence unreliable and acquitted the accused on this count, but on the first count, although accepting that the accused had acted in self-defence, convicted him on the basis that he had exceeded the bounds thereof. On review,
Held, that the magistrate was not entitled to reject the accused's defence that he had exceeded the bounds of self-defence, as that was never the case of the prosecution in the first place. The finding was also at odds with the court's acceptance that there was a reasonable possibility that his innocent explanation was true, since this meant that there must, at the same time, have been a reasonable possibility that the evidence which implicated him might be false. The magistrate had accordingly wrongly convicted the accused after invoking a wrong test and the proceedings had to be set aside. (Paragraphs [17] and [30] at 475*b–c* and 482*f–g*.)
The record indicated that the magistrate had (i) in effect cross-examined the accused after he was cross-examined by the state; (ii) refused to allow him to show the scar

from his stab wound to the court; (iii) neglected to allow the prosecutor or the accused's attorney to question the accused in respect of the magistrate's questions to the accused; and (iv) allowed the state to reopen its case without a formal application in order to allow a state witness to show his scar. In her explanation the magistrate blamed the latter on the inexperience of the prosecutor.
Held, further that the magistrate's questions were hardly questions to get clarity on unclear issues, but constituted cross-examination, resulting in the magistrate descending into the arena. Her attempt to shift blame for an oversight on her part to the prosecutor, in respect of the reopening of the state case, was inappropriate. It remained the duty of magistrates to ensure that proper procedures were followed at all stages in a trial, and there was a duty on the magistrate in question to guide the inexperienced prosecutor where there were indications of his floundering.

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS v SCHOLTZ AND OTHERS 2017 (1) SACR 483 (NCK)

Prevention of crime — Confiscation order in terms of Prevention of Organised Crime Act 121 of 1998 — Benefits of crime that may be confiscated — Not restricted to net amount of proceeds but includes value of appreciation of assets so acquired.

The applicant applied for a confiscation order in terms of s 18 of POCA, following upon a conviction of the defendants on various counts of corruption and money-laundering relating to lease agreements between certain government departments and the Trifecta group of companies (Trifecta GOC), the second to seventh defendants, over a two-year period. It was proved to the satisfaction of the court that the tenders for the lease of the buildings were tainted by corruption on the part of government officials and the eighth defendant. The confiscation order sought by the applicant was not only in respect of the aggregate amount of the leases, but also the increase in the capital value of the leased buildings, on the basis that this was also a benefit as contemplated by s 18(1). The first defendant and the Trifecta GOC ,in opposing the application, contended that the state had received full value for its money and was therefore not entitled to any confiscation order. They also contended that the immovable property increased in value not because of the crimes committed, but rather because of normal market-related factors.
Held, that there was no doubt that the corrupt relationship between the first defendant and the Trifecta GOC and the government officials or persons in positions of influence was the *sine qua non* for the acquisition of the various leases and the proceeds of the unlawful activity, being the rental paid by the state to the Trifecta GOC. The argument that the state departments received full value for the rental amounts they paid ignored the fact that the leases had been corruptly concluded. (Paragraphs [23]–[25] at 492*c*–494*f*.)
Held, further, that a benefit as envisaged by s 18 of POCA was not limited to the net amount of the proceeds, but included the value of the appreciation of the assets that were acquired with the criminal proceeds. The applicant had established on a balance of probabilities that the value of the capital gain, less the capital-gains tax plus the CPI on the capital gain, was a benefit as contemplated by s 18 of POCA, and the application accordingly had to be granted.

ALL SA LAW REPORTS APRIL 2017

Kaknis v Absa Bank Ltd, Kaknis v MAN Financial Services SA (Pty) Ltd [2017] 2 All SA 1 (SCA)

Interpretation of statutes – Section 126B(1)(b)(ii) of the National Credit Act 34 of 2005 – Retrospective application – No statute is to be construed as having retrospective operation unless clearly intended by the Legislature – Court finding the section not to have retrospective operation.

Between March 2006 and March 2008, the appellant concluded ten instalment sale agreements with the first respondent ("Absa") in terms of which Absa sold and delivered to the appellant various movable assets comprising, *inter alia*, motor vehicles and trailers. The appellant also concluded an instalment sale agreement with the second respondent ("MFS"), in terms of which it sold and delivered to the appellant a truck. At first the appellant honoured the transactions by paying regularly. However, after a few years of compliance he got into financial difficulties, resulting in his failure to pay. He approached a debt counsellor to apply for a debt review as contemplated in section 86 of the National Credit Act 34 of 2005. In terms of an order of court, his debts were rearranged. The appellant complied with the restructured obligations, until 8 July 2011. He was then unable to pay his debts any longer.

Although the respondents' claims had prescribed on 8 July 2014 in terms of section 11(d) of the Prescription Act 68 of 1969 due to the fact that more than three years had lapsed since the last payment was made by the appellant in reduction of his indebtedness, in October 2014, the appellant concluded an acknowledgement of debt in favour of the respondents. Once again, he failed to pay in terms of the acknowledgement of debt, and he also did not surrender any of the assets as was agreed in the agreements. On 30 April 2015, the respondents issued summons against the appellant claiming confirmation of the cancellation of the sale agreements, return of the assets and leave to prove damages later. The appellant entered an appearance to defend but did not deliver a plea. Subsequently, the respondents brought separate applications for summary judgment, alleging that the appellant lacked a *bona fide* defence. The appellant opposed both applications. He averred that the claims had become prescribed. He also contended that by virtue of the provisions of section 126B(1)(b) of the National Credit Act, the respondents were precluded from continuing the collection of the debt by relying on the acknowledgement of debt which the respondents alleged revived the prescribed debt. The appellant further stated that he had not been aware that the respondents' claims against him had become prescribed, and that if he had been aware of the defence of prescription he would not have concluded the acknowledgment of debt.

The court *a quo* granted the respondents' applications and concluded that the claims had not prescribed. The Court reasoned that the Legislature would have expressly stipulated that the provisions of section 126B of the National Credit Act apply retrospectively, if it intended it to be applied retrospectively.

Held – The majority judgment held that the appellant stated that all of the debts had become prescribed before the agreement was entered into. He said that he was unaware at the time that he could rely on prescription and that had he been aware thereof, he would not have entered into the agreement. Those averments had to be

accepted for purposes of summary judgment and Counsel for the respondents argued the matter on that basis. Thus, the appellant's case was that the agreement constituted the reactivation of debts under credit agreements to which the National Credit Act applied, which debts had been extinguished by prescription and that he would reasonably have raised the defence of prescription at the time of the agreement had he been aware of that defence. It followed that the appellant's case was fully dependent on the proposition that section 126B(1)(b) retrospectively invalidated the agreement and destroyed the rights of the respondents.

The Court referred to case law which confirmed the established principle that no statute is to be construed as having retrospective operation unless clearly intended by the Legislature. The Legislature must be taken to have been aware that retrospective application of section 126B(1)(b) would nullify agreements that had validly been entered into and would take away existing rights. There was no indication in section 126B(1)(b) of any intention to do so. Although the main objective of the National Credit Act is to protect consumers, that protection must be balanced against the rights of credit providers. The majority concluded that section 126B(1)(b) has no retrospective operation and provided no defence to the appellant. As no further defence had been put forward, the court *a quo* correctly granted summary judgment.

The appeal was dismissed.

Macassar Land Claims Committee v Maccsand CC and another
[2017] 2 All SA 17 (SCA)

Property – Land – Restitution of land rights claim – Claim in respect of land over which third party held mining rights – Success of claim requiring acquisition or expropriation of land – Power to order expropriation may only be exercised when necessary in order to restore the right in land that is the subject of the claim for restitution of that right.

Words and phrases – Section 1 of the Restitution of Land Rights Act 22 of 1994 – Land claims – "claim" – Any claim for restitution of a right in land lodged with the Commission in terms of the Act; or any application lodged with the registrar of the court in terms of Chapter IIIA for the purpose of claiming restitution of a right in land.

Words and phrases – Section 1 of the Restitution of Land Rights Act 22 of 1994 – Land claims – "restoration of a right in land" – The return of a right in land or a portion of land dispossessed after 19 June 1913 as a result of past racially discriminatory laws or practices.

Words and phrases – Section 1 of the Restitution of Land Rights Act 22 of 1994 – Land claims – "right in land" – Any right in land whether registered or unregistered, and may include the interest of a labour tenant and sharecropper, a customary law interest, the interest of a beneficiary under a trust arrangement and beneficial occupation for a continuous period of not less than 10 years prior to the dispossession in question.

The appellant was a voluntary association representing members of a community which it claimed enjoyed rights of commonage over a farm (Zandvliet), which rights were reflected in the title deed of the farm. As a result of the declaration of a Coloured township incorporating the farm in terms of the Group Areas Act 41 of 1950, the references in the title deeds to the land being or including commonage were deleted.

As a result the appellant claimed that the community was dispossessed of their rights in the commonage in terms of a piece of racially discriminatory legislation. It therefore launched an application in the Land Claims Court ("LCC"), in terms of the provisions of the Restitution of Land Rights Act 22 of 1994 (the "Act"), seeking restitution of a right in land in respect of the commonage.

The first respondent ("Maccsand") held a mining right granted in terms of the Minerals and Petroleum Resources Development Act 28 of 2002, that entitled it to engage in sand mining operations on one of the erven in respect of which the appellant advanced its claim.

In response to the restitution claim, the Department of Mineral and Energy delivered a special plea in which it contended that the LCC had no power to grant the relief claimed in respect of Maccsand's mining rights. The court held that it did not have jurisdiction to acquire the erven as stated nor to expropriate the mining right as exercised by Maccsand.

Held – On appeal, it was held that the outcome of the case depended upon a proper construction of the powers vested in the LCC. One of its functions in terms of section 22(1)(a) of the Act is to determine any right to restitution of any right in land in accordance with the Act. In terms of section 2(1)(d) of the Act a person is entitled to restitution of a right in land (as defined) if it is a community or part of a community dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices. The Committee claims that the Group Areas Act dispossessed the community it represents of its commonage rights.

The definition of a "right in land" encompasses everything from full ownership of land to unregistered rights such as the interest of a labour tenant or sharecropper, or even continuous residence for a period of not less than ten years prior to the dispossession. The expression must be given a broad meaning in accordance with the remedial purpose of the Act. It was wide enough to encompass the commonage rights that are in issue in this case. The scope of the entitlement to restitution must be based on the Act. The LCC is a creature of statute having only the powers conferred by the Act. It has no inherent jurisdiction to redress perceived grievances in regard to the dispossession of a right of land, save in the manner contemplated by the Act. Restitution of a right in land must either take the form of the restoration of the right in land of which the claimant was dispossessed or equitable redress. The Act may not be used to obtain more than was taken away by the act of dispossession.

The appellant relied on section 35(1)(a) of the Act for its claim that the LCC had the power to order the expropriation of Maccsand's mining right. The section provides that the court may order restoration of a portion of land or any right in land, "or award any land, a portion of or a right in land to the claimant in full or in partial settlement of the claim and, where necessary, the prior acquisition or expropriation of the land, portion of land or right in land". The appellant submitted that what was being sought in this case was restitution of land, specifically the properties mentioned in the order. As they were not in the ownership of the State they could only be restored if they were first acquired. Their acquisition or expropriation was therefore necessary in order to give effect to the order for restitution. The Act provides for the restitution of a right in land, not the restitution of land *simpliciter*. When a claim for restitution of a right in land is upheld, the LCC can order its restoration, and restoration means the return of the right of which the claimant was dispossessed. An order for the acquisition or expropriation

of land in terms of section 35(1)(a) may only be made by the LCC where that is necessary in order to implement an order for the restitution of land. Maccsand submitted that they was fatal to the claim for an order compelling the acquisition or expropriation of Maccsand's mining right, as the community had never held or exercised a mining right in respect of the land and was not asking to have a mining right, as a right in land, restored to them. As the power to order expropriation may only be exercised when necessary in order to restore the right in land that is the subject of the claim for restitution of that right, it was said to be simply unavailable in this situation.

As the appellant's claim for restitution was a claim in respect of the right in land constituted by the commonage rights that the community had previously enjoyed over various erven of the farm, the above argument was correct. The restitution being sought was not restitution of ownership of land. The appellant's contention that its claim was a claim for the restitution of land founded on the dispossession of its commonage rights was held to be incorrect. There could therefore never be a right to an order that the Minister acquire or expropriate Maccsand's mining right and no basis for the further prayer that the mining right be expunged.

An attempt by the appellant to rely on section 35(4) of the Act to meet the point that its claim was one for restitution of the right in land constituted by the community's rights of commonage, was also rejected by the Court. It could not be said that section 35(4) empowers the LCC, when restitution is sought of a particular right in land, to adjust the right so as to alter its essential nature and restore something different from that which was taken away. Thus, a claim for restitution arising from dispossession of a right in land other than ownership cannot give rise to a claim for restitution of land.

Finally, the Court pointed out that the provisions of the Minerals and Petroleum Resources Development Act 28 of 2002 made it clear that even if the appellant was entitled to receive title to the disputed erven in satisfaction of its claim for restitution of the commonage rights of which the community was dispossessed, that would not afford it any right in relation to the mining of sand on the land. Nor would it entitle it to interfere with the right that Maccsand had to mine the land in terms of a mining right under the Minerals and Petroleum Resources Development Act.

The appeal accordingly failed, except for certain amendments to the LCC order.

Minister of Rural Development and Land Reform v Phillips [2017] 2 All SA 33 (SCA)

Land – Land restitution claim – Dispossession of land rights – Restitution of Land Rights Act 22 of 1994 – Award of financial compensation – Discretion exercised by Land Claims Court is a wide one, and interference on appeal is circumscribed – Court looked at the principles applicable to the determination of redress – No reasonable prospect of another court finding the Land Claims Court had erred in its determination.

In terms of an order handed down by the Land Claims Court, the applicants were to pay the respondent R14 785 000 under the Restitution of Land Rights Act 22 of 1994 pursuant to his having been dispossessed of certain farming properties under a past racial law, and in respect of which dispossession he had not received just and equitable compensation. The applicants obtained leave to appeal to the present Court, but allowed their appeal to lapse by failing to file the record timeously. Consequently, in January 2016, the applicants launched the present application seeking an order

condoning their failure to lodge the appeal record timeously and re-instating their appeal. The explanation for the default was a professed difficulty in obtaining a record from the company charged with its transcription.

The respondent's case was that he had been dispossessed of his rights in land as a result of a past racial law, namely, the Development Trust and Land Act 18 of 1936. He alleged that in 1977, he had sold the properties under duress to the South African Development Trust for R475 000, a sum which he contended did not constitute just and equitable compensation as envisaged in section 2 of the Restitution of Land Rights Act. At the trial of the matter, the sole issue initially was whether the respondent had received just and equitable compensation at the time of his dispossession. However, the second applicant delivered a notice of amendment seeking to withdraw certain admissions – in particular, the admission that the respondent had been dispossessed. The trial then proceeded solely on the question of whether there had been a dispossession of his rights in land when the respondent sold the properties in 1977. The Land Claims Court held in favour of the respondent, and dismissed an application for leave to appeal against that order. Accordingly, only the issue of compensation remained to be determined. The matter returned to the court *a quo*, for it to determine what compensation the respondent should be paid as equitable redress. In determining what redress would be appropriate, the court *a quo* took as its starting point an assessment of the financial loss suffered by the respondent at the time of the dispossession. Consequently the primary issue between the parties in the court *a quo* was the value of the subject properties in 1977, and whether the respondent had been under-compensated when he sold them.

Held – The matter could be resolved without a determination being made on the issue of the alleged problem with the transcribers. Instead, the merits of the appeal would be determinative of the dispute.

The applicants' argument that the court *a quo* had misdirected itself by approaching the matter on the basis that it was bound to compensate the respondent, and in deciding that any amount at all should be paid to the respondent considering that he had been able to procure another farm with what he had been paid for the subject properties, was rejected by the present Court. It was held that the court *a quo* was fully aware that although the land values were an important factor, it was not the sole criterion relevant to what was appropriate redress. Secondly, what a dispossessed person does with whatever compensation is received from the dispossession has little to do with whether that compensation was adequate or not. The matter, therefore, had to proceed on the basis that there was a dispossession. The sole issue was thus the amount of financial compensation to be paid as redress, and it was not open to the applicants to argue that no redress should be paid despite there having been a dispossession.

The Land Claims Court has a strict and true discretion and enjoys wide adjudicative remedial powers. Consequently, the power of an appellate court to interfere with the exercise of discretion by a Land Claims Court is not without restraint but is limited by whether the discretion invested in that court had not been judicially exercised or had been influenced by wrong principles or a misdirection of the facts or was one that could not reasonably have been made. The Court found no grounds upon which to interfere with the Land Claims Court's exercise of its discretion. The Court also refused the applicants' request to revisit the punitive award of costs made against them. The Court pointed out that in awarding costs, the court below again exercised a judicial

discretion, interference with which could only be justified in instances where it is found that the court of first instance did not act judicially, or acted upon a wrong principle, or was influenced by wrong principles or a misdirection of the facts, or reached a decision which could not reasonably have been made by a court properly directing itself to all the relevant facts and principles. There was no basis for interfering with the costs order.

The application for condonation of the late filing of the record of the proceedings in the court *a quo* and reinstatement and the appeal was dismissed and the appeal was struck from the roll.

Coastal Links Langebaan and others v Minister of Agriculture, Forestry and Fisheries and others
[2017] 2 All SA 46 (WCC)

Administrative law – Fishing permits – Conditions imposed on permits – Rationality of decision – Assessing rationality is not to be equated with testing for the "reasonableness, fairness or appropriateness" of a decision – Test is less stringent and all that is required is a rational connection between the power which was exercised and the decision which was made.

Fisheries, Fishing and Sealing – Marine protected area – Fishing permits – Conditions imposed on permits – Rationality – Although the imposition of the condition restricting the applicants from fishing in Zone B, was based on conservation and ecological imperatives, the respondents allowed other rights-holders living close to the zone to exercise commercial net-fishing rights in Zone B – Court found the decision not to be rationally connected to its stated purpose, and on that ground alone the imposition of the restrictive conditions fell to be set aside.

In terms of the Sea Fisheries Act 58 of 1973, the Langebaan lagoon situated on the West Coast of South Africa was proclaimed a marine reserve. In 2000, it was proclaimed a "marine protected area" ("MPA") in terms of the Marine Living Resources Act 18 of 1998.

The lagoon was an important breeding site and refuge for more than 30 species of bony fish and sharks. Amongst the fish which spawned in the lagoon was the southern mullet or "harder" as more commonly known.

The first applicant was a nation-wide voluntary association which assisted "small-scale" fishers, such as the applicants, to secure their livelihoods and protect their rights. The second to fourteenth applicants described themselves as "small-scale" net-fishers and had been given rights to fish on the lagoon. The rights were not unlimited. A condition of the fishing permits and exemptions which were granted to the applicants was that they could fish only in a certain demarcated section of the lagoon known as Zone A, and not in Zones B and C. Zone B was a *restricted* zone where the right to fish could only be obtained on the issue of the necessary permit and where boating under motor power was generally not allowed. Zone C was an "exclusion" zone and sanctuary where no access whatsoever was allowed either on foot or by boat. The applicants contended that the imposition of the condition in their permits and exemptions which restricted them from fishing in Zone B of the lagoon was arbitrary and irrational. They alleged that the scientific evidence available did not indicate that net-fishing in Zone B would have an unacceptable ecological impact and there was no

scientific basis for the current zoning and boundaries between the various zones. They sought an order setting aside the decisions in terms of which the restrictive conditions were imposed in their permits and exemptions, and a declaratory order granting them the temporary right to fish in Zone B of the lagoon.

Held – The question for determination was whether the conditions which were imposed on the net-fishers' permits and exemptions in respect of Zone B were imposed rationally. The applicants challenged the science behind the decisions, and the Court found that it could not be said that the reliance by the respondents on the relevant studies was unreasonable to the point where no other reasonable decision-maker would have relied on such studies or would have arrived at the same decision as they did, based on such studies. It could therefore not be found that the imposition of the restrictive condition in the permits and interim relief exemptions, was wrong.

The Court then turned to the issue of rationality. Assessing rationality is not to be equated with testing for the "reasonableness, fairness or appropriateness" of a decision. The test is less stringent. All that is required is a rational connection between the power which was exercised and the decision which was made.

Although the imposition of the condition restricting the applicants from fishing in Zone B, was based on conservation and ecological imperatives, the respondents allowed other rights-holders living close to the zone to exercise commercial net-fishing rights in Zone B. The Court found the decision therefore not to be rationally connected to its stated purpose, and on that ground alone the imposition of the restrictive conditions fell to be set aside.

Comair Ltd v South African Airways (Pty) Ltd [2017] 2 All SA 78 (GJ)

Competition law – Anti-competitive conduct – Claim for damages – Section 65(6) of the Competition Act 89 of 1998 – A person found to have engaged in prohibited anti-competitive conduct is liable for damages to any person harmed by that conduct – Methodology used to calculate damages – Damages equal lost revenues less avoided costs.

Words and phrases – "exclusionary act" – Competition Act 89 of 1998 – An act that impedes or prevents a firm entering into, or expanding within, a market.

Words and phrases – "market power" – Competition Act 89 of 1998 – Power of a firm to control prices, or to exclude competition, or to behave to an appreciable extent independently of its competitors, customers or suppliers.

The parties herein were competing domestic airline businesses in South Africa. They made use of the services of travel agents in order to sell domestic airline tickets, for which they paid by way of commissions. During 2000 to 2005, the defendant ("SAA") concluded and implemented so-called "override incentive schemes" with travel agents, in terms of which considerable sums of money were paid to travel agents to book passengers on SAA rather than on rival airlines such as the plaintiff ("Comair") and another competitor ("Nationwide"). That led to substantial foreclosure of the rivals in the market for scheduled domestic airline travel, causing such airlines to suffer loss of profit and consumers to be harmed.

Nationwide initiated a complaint to the Competition Tribunal, and in July 2005, the Tribunal handed down a decision and order in which it declared that SAA's override scheme constituted a prohibited practice in contravention of section 8(d)(i) of the

Competition Act 89 of 1998. A second hearing before the Tribunal, initiated by Comair, covered SAA's incentive schemes in place between June 2001 and March 2005. Again, the Tribunal declared that SAA's override agreement constituted prohibited practices in contravention of sec-tion 8(d)(i) of the Act. An appeal to the Competition Appeal Court by SAA was dismissed.

The present action by Comair, was a consolidated damages action to determine whether the SAA incentive schemes, which were found to have had an anti-competitive exclusionary effect on rival airlines by the Competition Tribunal, caused Comair a loss of profits as it alleged and, if so, the quantum of that loss. The two actions by Comair were brought in terms of section 65(6) of the Competition Act, which creates liability for a person found to have engaged in prohibited anti-competitive conduct for damages to any person harmed by that conduct.

SAA denied that the loss of Comair's market share was caused by its anti-competitive conduct. It argued that any damages that Comair might have suffered would be negligible because there were other changes in the market taking place during the infringement period that might have had a negative impact on Comair's market share.

Held – In terms of section 8(d)(i) of the Competition Act, it is prohibited for a dominant firm to require or induce a supplier or customer not to deal with a competitor, unless such firm can show technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effect of its act. Sec-tion 8(c) prohibits a dominant firm to engage in an exclusionary act, other than an act listed in subsection (d), if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive gain.

In terms of section 65(7), the Court was bound by the findings of the competition authorities that SAA's infringing schemes induced travel agents, that would otherwise have booked passengers on domestic Comair flights, to book such passengers on domestic SAA flights, causing Comair to suffer loss of profits in respect of tickets that would otherwise have been sold on domestic Comair flights to such passengers. The only issue that was truly before the Court was the assessment of the amount and awarding of damages suffered by Comair as a result of SAA's prohibited practices.

There was broad agreement between the experts on the methodology to be used to calculate Comair's damages. If SAA's infringing schemes had an adverse effect on Comair's profits, damages had to equal the revenues that Comair lost as a result of this schemes, adjusted for the costs that Comair might have avoided because of reduced passenger numbers. In other words, in order to put Comair back into the financial position it would have been in but for SAA's infringing schemes, a comparison of the position that Comair was currently in (the "actual scenario") had to be made with the hypothetical position that Comair would have been in but for the anti-competitive agreements (the "counterfactual scenario"). Experts agreed that damages equal lost revenues less avoided costs. Lost revenues were equal to Comair's counterfactual revenues minus its actual revenue and avoided costs were equal to the difference between the costs that would have been incurred but for SAA's conduct and actual costs.

In determining the period during which damages were sustained by Comair, the Court took into account the lingering effect of the anti-competitive conduct of SAA. It

accepted that Comair continued to suffer damages due to the infringing schemes after they ceased.

Applying the approach set out above, and taking into account all relevant factors, the Court awarded Comair damages in the sum of R104,2 million in the first action and R450 million in the second.

Democratic Alliance v Minister of International Relations and Co-operation and others (Council for the Advancement of the South African Constitution as Intervening Party)
[2017] 2 All SA 123 (GP)

Administrative justice – International treaty – Rome Statute of the International Criminal Court – Notice of withdrawal in terms of article 127(1) – Whether the power of the national executive to negotiate and sign an international treaty includes the power to withdraw from such treaty without prior parliamentary approval – Whether parliamentary approval may be sought after notice of withdrawal had been delivered to the United Nations.

Constitutional law – National Executive – Powers of – Section 231 of the Constitution of the Republic of South Africa – Whether the national executive's power to conclude international treaties, included the power to give notice of withdrawal from international treaties without parliamentary approval – Court finding that section 231(2) and (4) of the Constitution enjoins the national executive to engage parliament.

At the heart of the present dispute was the withdrawal of South Africa from the Rome Statute of the International Criminal Court (the "ICC"). The primary question was whether the national executive's power to conclude international treaties, included the power to give notice of withdrawal from international treaties without parliamentary approval. Related to that was an ancillary question of whether it is constitutionally permissible for the national executive to deliver a notice of withdrawal from an international treaty without first repealing the domestic law giving effect to such treaty.

In October 2016, the national executive took a decision to withdraw from the Rome Statute. Pursuant thereto and on the same day, the Minister of International Relations signed a notice of withdrawal to give effect to that decision and deposited it with the Secretary-General of the United Nations. That triggered the process for South Africa's withdrawal. In terms of article 127(1) of the Rome Statute, the withdrawal of a party state from the Rome Statute takes effect 12 months after the depositing of a notice to that effect. Thus, South Africa would cease to be state party to the statute in October 2017. On 20 and 21 October 2016 respectively, the Minister of Justice wrote identical letters to both the Speaker of the National Assembly (the "fourth respondent") and the Chairperson of the National Council of Provinces (the "fifth respondent") advising them of cabinet's decision to withdraw from the Rome Statute, and the reasons therefor. The Minister declared his intention to table in parliament, a bill repealing the Implementation of the Rome of Statute of the International Criminal Court Act 27 of 2002 (the "Implementation Act") which was the domestic law giving effect to the Rome Statute in South Africa.

That led to the applicant bringing the present application seeking orders declaring unconstitutional and invalid the notice of withdrawal and the underlying cabinet decision to withdraw from the Rome Statute and to deliver the notice to the Secretary-General of the United Nations, initiating the withdrawal. Consequentially, the applicant sought an order that the first, second and third respondents be directed to revoke the notice of withdrawal and to take reasonable steps to terminate the process of withdrawal under article 127(1) of the Rome Statute.

Held – The first of four preliminary issues before the Court related to urgency and ripeness of the matter. Before the Court, the government respondents did not seriously press for a finding that the matter was not urgent. Instead, they argued that the application was not ripe for judicial intervention. Whether the matter was ripe depended on the constitutionality of the notice of withdrawal. If the notice of withdrawal was unconstitutional, that would be the end of the matter, as the court had to declare it unlawful, as enjoined by section 172 of the Constitution. The applicant's contention was that the executive had already breached the separation of powers, and thus acted unconstitutionally, by deciding and giving notice of withdrawal in the manner it had. On that basis alone, this Court was entitled, and constitutionally enjoined, to enquire into the conduct of the executive to determine whether it is constitutionally compliant. It was therefore entitled to consider the application.

A second point related to the application by the Council for the Advancement of the South African Constitution ("CASAC") for leave to intervene. Rule 12 of the Uniform Rules of Court makes provision for intervention in proceedings. The test for the intervention of parties in constitutional matters is that an application to intervene would succeed only if the applicant had a direct and substantial interest in the subject matter of the litigation, which in that case was the validity or otherwise of the statute and if, in addition, it was in the interests of justice for the application to be granted. CASAC not only had a direct and substantial interest in the subject of the present application, but overall, it was in the interests of justice to grant leave to it to intervene as the second applicant. Accordingly, such leave was granted.

The sixth and ninth respondents applied for condonation for the late filing of their respective responding affidavits. There being no prejudice caused to other parties, the Court granted the applications.

In the last preliminary point, the Court confirmed the applicant's joining of the supporting respondents in the matter. The government respondents' argument of misjoinder was found to have no merit.

On the merits, the first question was whether the national executive was entitled to decide on the withdrawal and execute its decision without the involvement of the Legislature and thereafter seek legislative approval, as it sought to do. Secondly, the question was whether it could execute its decision without the repeal of the Implementation Act. The point of departure was section 231 of the Constitution and the proper construction to be placed on it. The section governs the manner in which international agreements are concluded, made binding on South Africa, and domesticated into our national law. In terms thereof, the power to conduct international relations and to conclude treaties has been constitutionally conferred upon the national executive in terms of section 231(1). But that power is fettered by section 231(2) and (4), which enjoins the national executive to engage parliament. The section therefore clearly delineates the powers between the national executive and

parliament. The only power the national executive has to bind the country to international agreements without parliamentary involvement is in section 231(3), with which the present case was not concerned. Any other international agreement must be approved by parliament in terms of section 231(2) to be binding on the country. Thus, once parliament approves the agreement, internationally the country becomes bound by that agreement. Domestically, the process is completed by parliament enacting such international agreement as national law in terms of section 231(4). The applicant, CASAC and the supporting respondents argued that since in terms of section 231(2) it is parliament which must approve an international agreement before it may bind South Africa, it followed that it must be parliament which decides whether an international agreement ceases to bind the country before the executive may deliver a notice of withdrawal. A notice of withdrawal, on a proper construction of section 231, is the equivalent of ratification, which requires prior parliamentary approval in terms of section 231(2). The need for the participation of parliament in the consideration of the conclusion of treaties and by analogy, the question whether to withdraw from the Rome Statute is part of our law and cannot be construed to be inconsistent with international law. In international law, a notice of withdrawal from an international agreement does not require parliamentary approval. However, the question of which between the national executive and parliament has to decide on withdrawal must be settled according to domestic law. It is a domestic issue in which international law does not and cannot prescribe. The Court concluded that it must be parliament which has the power to decide whether an international agreement ceases to bind the country. The conclusion was that, on a textual construction of section 231(2), South Africa can withdraw from the Rome Statute only on approval of parliament and after the repeal of the Implementation Act. Thus, the national executive's decision to deliver the notice of withdrawal without obtaining prior parliamentary approval violated section 231(2) of the Constitution, and breached the separation of powers doctrine enshrined in that section. The Court also held that the delivery of the notice of withdrawal was procedurally irrational. Those were process-based grounds, as they related to the procedure by which the notice of withdrawal was prepared and handled.

The Court then considered whether it should consider the substantive grounds of challenge, ie whether it is at all constitutionally permissible for South Africa to withdraw from the Rome Statute. It answered the question in the negative.

As the Court had refrained from expressing a view on the substantive policy decision by the national executive to withdraw from the Rome Statute, it would be inappropriate to declare that decision unconstitutional as a stand-alone decision. There was nothing patently unconstitutional, at the present stage, about the national executive's policy decision to withdraw from the Rome Statute, because it was within its powers and competence to make such a decision. What was unconstitutional and invalid, was the implementation of that decision (the delivery of the notice of withdrawal) without prior parliamentary approval. As a result, a declaration of invalidity of the notice of withdrawal, coupled with an order for the withdrawal of such notice, sufficed as an effective, just and equitable remedy.

Encarnaçäo NO and another v Commissioner for the South African Revenue Services
[2017] 2 All SA 153 (GP)

Taxation – Customs duty – Rebate – Theft of imported cigarettes stolen while being stored in registered bonded warehouse of clearance agent amounting to a situation of vis major which entitled importer to a full rebate of excise duty on the stolen cigarettes in terms of Rebate item 412.09 in Schedule 4 to the Customs and Excise Act 91 of 1964.

The applicants were the trustees in a trust which was an importer of cigarettes. The trust was also a licensee of a customs bonded warehouse in terms of sec-tion 18 of the Customs and Excise Act 91 of 1964.

In May 2009, the trust engaged a clearing agent ("All Trans") in terms of section 64B of the Act, to attend to the necessary entries in terms of the Act in respect of the importation of cigarettes by the trust. In June 2009, All Trans made clearance, on behalf of the trust, of two consignments of cigarettes which had been imported by air from Harare, Zimbabwe to OR Tambo International Airport. The consignments represented 200 cases of Remington Gold cigarettes, forming the subject of the present dispute. The consignments were landed under the purpose code of WH ("warehousing"). This purpose code indicates that the cigarettes were imported for storage in a bonded warehouse and that the payment of duty and VAT was deferred until the cigarettes were removed from the mentioned warehouse for home consumption. They were stored in the All Trans warehouse and not that of the trust. The All Trans warehouse was also a registered bonded warehouse.

The event which triggered the dispute, and subsequent litigation, was an alleged armed robbery, in August 2009, at the All Trans warehouse during the course of which the relevant consignment of cigarettes imported by the trust was stolen. The trust contended that that amounted to a situation of *vis major* which entitled it to a full rebate of excise duty on the stolen cigarettes in terms of the rebate item. Determinations made by the respondent's duly authorised representative to the effect that the cigarettes did not qualify for a full rebate of customs duty in terms of Rebate item 412.09 in Schedule 4 to the Act formed the focus of the present appeal.

Held – The Rebate item provided that goods proved to have been lost in circumstances of *vis major* or in such other circumstances as the Commissioner deems exceptional while such goods are in any customs and excise warehouse, are liable to a rebate provided that (i) no compensation in respect of the customs duty on such goods has been paid or is due to the owner by any other person; (ii) such loss, destruction or damage was not due to any negligence or fraud on the part of the person liable for the duty; and (iii) such goods did not enter into consumption. The applicants argued that the duty to comply with provisos (i), (ii) and (iii) mentioned in the Rebate item did not apply when the goods were lost, destroyed or damaged in circumstances of *vis major*, but only applied only when the goods were lost, destroyed or damaged "in such other circumstances as the Commissioner deems exceptional". The Court rejected that argument, finding no basis for such an interpretation.

Vis major, or superior force, is some force, power or agency which cannot be resisted or controlled by the ordinary individual. It refers not only to acts of nature or acts of God, but also to acts of man. It appeared from the parties' submissions that the respondent recognised that an armed robbery could be regarded as *vis major* for purposes of the Rebate item – a view shared by the Court. Having regard to the nature of the robbery, the Court found that the circumstances that prevailed were those of *vis major* as described and recognised by the relevant authorities. There was no evidence

whatsoever that they were able to prevent the robbery or that there was any negligence on their part, let alone on the part of the employer or the applicants. It was therefore confirmed that the cigarettes were stolen, and never retrieved, during an armed robbery under circumstances of *vis major*.

The final issue for consideration was whether evidence pleaded by the applicants only in the replying affidavit and not in the founding affidavit ought to be allowed or whether it ought to be disregarded. The Court held that the evidence in question should be allowed as the applicants were not seeking to introduce a new cause of action, and were essentially repeating evidence already disclosed before the application was launched and appearing from annexures to the founding affidavit.

The application was upheld with costs.

Ex parte HPP and others; *Ex parte* DME and others [2017] 2 All SA 171 (GP)

Children – Pregnancy and birth – Surrogate motherhood agreements – Surrogacy facilitation agreement – Payment for surrogacy-related services – Lawfulness – Commercial surrogacy is unlawful in South Africa and payments are limited to those specifically provided for in section 301 of the Children's Act 38 of 2005.

Two applications were brought before the court for confirmation of surrogate motherhood agreements. Each application involved couples who approached a so-called surrogacy co-ordinator (Ms Strydom) who then introduced them to a potential surrogate mother. She charged them a fee of R5 000 for her services, although the fee was said not to include the introduction to the surrogate. The question which arose was whether the payment contravened section 301 of the Children's Act 38 of 2005. Ms Strydom was joined as a party to the proceedings and was called upon to show cause why the agreements should not be declared unlawful and unenforceable.

In her affidavit, Ms Strydom stated that she did not charge an introduction fee, and that the fee charged was for her services in arranging appointments with a clinical psychologist, arranging medical appointments, monitoring the surrogacy process, offering the surrogate emotional support and consulting with the parties regarding expenses. She stated that having acted as a surrogate mother six times, she was uniquely qualified to assist people in the process. She also stated that she explained complicated medical processes, debriefed the surrogate mother after invasive medical procedures and prepared her emotionally for the procedure.

Held – The services rendered by Ms Strydom appeared to encroach on the professional fields of legal representatives, psychologists and medical practitioners, when in fact her only qualification was her personal experience as a surrogate mother.

Commercial surrogacy is unlawful in South Africa and payments are limited to those specifically provided for in the Children's Act. Section 301 provides for two distinct categories of expenses. The first consists of costs directly related to the artificial fertilisation and pregnancy, the birth of the child, and confirmation of the motherhood agreement. The second deals with *bona fide* legal and medical expenses. The costs on the first category had to be related to the processes in question. That could not be said of Ms Strydom's services. And clearly her services did not fall with the second category.

As far as Ms Strydom's right to exercise her chosen profession was concerned, the Court held that such right was not limited. What was limited was her right to ask for payment of expenses which fell foul of section 301 – which limitation was in the public interest and therefore justified. The Court, accordingly, ruled the agreements between Ms Strydom and the commissioning parents to be unlawful and unenforceable.

It then had to be decided whether the surrogate motherhood agreements could be confirmed where the surrogacy facilitation agreements had been declared invalid. The Court found that the fact that a collateral unlawful agreement had been entered into did taint the surrogate motherhood agreements even though the relevant requirements of the Children's Act had been complied with. Should courts declare surrogacy agreements valid despite the fact that they are tainted by unlawful surrogacy facilitation agreements, the whole purpose of section 301 might be tainted. However, the Court accepted that the parties in the present case had all acted with *bona fides*, and were unaware of the unlawfulness of the facilitation agreements. The surrogate motherhood agreements were, therefore, confirmed.

Harilal v Rajman and others [2017] 2 All SA 188 (KZD)

Civil procedure – Motion proceedings – Disputes of fact – Relief should only be granted in motion proceedings when the facts set out in the applicant's affidavit are admitted and in their totality those put up by the respondents permit the grant of such an order – A litigant who anticipates or knows that there is likely to be a dispute of fact and who nonetheless proceeds by way of motion proceedings runs the real risk that a court, in the exercise of its discretion, may dismiss the application with costs.

Company law – Application for order directing directors to purchase fellow director's shares – No evidence advanced in support of relief sought.

Company law – Application for winding up of company – Just and equitable principle – Applicant not alleging that the business of the company was carried out or conducted in a manner that was oppressive or unfairly prejudicial or that it unfairly disregarded her interests, or that the powers of the directors were being exercised in a manner that was oppressive or unfairly prejudicial or unfairly disregarded her interests – Court could not find that it was just and equitable to wind up the company.

In terms of section 163 of the Companies 71 of 2008, the applicant sought an order directing the first to fourth respondents to purchase her shareholding and loan account in the fifth respondent. She had obtained her shareholding in the fifth respondent from her husband, who transferred his shareholding to her. When her husband resigned as director, the applicant was appointed in his place. There was no evidence that she had ever performed any duties as director. In fact, her husband's resignation and his transfer of his shareholding to her was due to the fact that after he was convicted of tax evasion, her husband was no longer allowed to act as director. However, he continued to work for the fifth respondent but was then styled as its marketing manager. He attended the shareholders meeting on behalf of the applicant in terms of a proxy. Later, according to the respondents, he signed an agreement to transfer his shares to the first to fourth respondents. The respondents therefore took the stance in the papers that the applicant did not have the requisite *locus standi* to bring the application because she was not at that stage a shareholder.

The shareholders agreement contained an elaborate procedure for the disposition of the respective shareholding.

Held – The first issue for determination by the Court was whether the applicant had the necessary *locus standi to* bring the application. That in turn depended on the validity of the transfer of shares made by her husband. Despite the dispute of fact relating to the applicant's *locus standi*, the Court assumed that she had the necessary *locus standi* without deciding the issue, given the conclusion to which it arrived.

The applicant bore the onus of proving that the respondents had repudiated the shareholders agreement as alleged by her. The Court had to look at the nature of the shareholders agreement, the claim made by the applicant and of course whether the respondents intended to cancel the shareholders agreement and the import of the shareholders agreement. Shareholders who have struck a bargain to use the procedures provided in a shareholders agreement should as a rule be encouraged to comply with such procedures. The applicant's explanation for her not complying with the shareholder agreement was that the fifth respondent's auditor had aligned himself with the respondents in determining the price of the shares. The Court held that if that were the case, the applicant would be entitled to thereafter refer that issue to arbitration in terms of the agreement. It was therefore held that it would be improper to permit the applicant to simply brush the shareholder agreement aside by vague and general statements that the agreement had been repudiated and that its auditor was biased without putting up any evidence to that effect.

The Court then turned to consider the alternative relief sought, in the form of an application for winding up of the fifth respondent based on the just and equitable principle. In order to succeed under section 163 of the Companies Act, the applicant had to allege and prove that an act or omission of the company or a shareholder had resulted in oppression or unfair prejudice or that it had unfairly disregarded her interests. The applicant had not alleged that the business of the fifth respondent was carried out or conducted in a manner that was oppressive or unfairly prejudicial or that it unfairly disregarded her interests. She had not relied on a claim that the powers of the directors were being exercised in a manner that was oppressive or unfairly prejudicial or unfairly disregarded her interests. The Court could consequently not find that it was just and equitable to wind up the fifth respondent.

There were several disputes of fact which could not be resolved on the papers. However, the applicant for the main put up bare denials without seeking to deal with any of the serious allegations directed against her husband and herself. She was content to suggest that the disputes should simply be referred to oral evidence. That was not the proper approach. Relief should only be granted in motion proceedings when the facts set out in the applicant's affidavit are admitted and in their totality those put up by the respondents permit the grant of such an order. A litigant who therefore anticipates or knows that there is likely to be a dispute of fact and who nonetheless proceeds by way of motion proceedings runs the real risk that a court, in the exercise of its discretion, particularly if there is suspicion about that party's version, may dismiss the application with costs. The Court held that this was not a proper case to refer to trial for the hearing of oral evidence. The application was, accordingly, dismissed with costs.

Huyser v Quicksure (Pty) Ltd and another [2017] 2 All SA 209 (GP)

Joinder application – Prescription – Whether service of joinder application interrupted the running of prescription as provided for in section 15(1) of the Prescription Act 68 of 1969 – Court finding that the proceedings against the party sought to be joined, begun under the joinder process, were instituted as a step in the enforcement of the claim for payment of the debt which would have led to interruption of prescription.

In December 2012, the applicant, as plaintiff, instituted action against the first respondent on the basis that the latter had refused to make any payments to the plaintiff in respect of the loss of plaintiff's motor vehicle despite having been the insurer of the vehicle. The first respondent denied having entered into the alleged agreement or undertook to insure the applicant's vehicle. As a result of that plea, the applicant launched the present application to join the second respondent as a defendant to the action on the grounds that the second respondent had a direct and substantial interest in the subject matter of the action and the determination of the dispute involved substantially the same question of law and fact as against the first respondent. The applicant referred to the first respondent's averment in the plea that it had merely acted as insurance administrator on behalf of the second respondent.

In the second respondent's answering affidavit, it was stated that the applicant's claim against the second respondent had already prescribed and that it would serve no purpose to join the second respondent as second defendant in the action.

The applicant pointed out that the only issue in dispute was whether the claim against the second respondent had prescribed. He confirmed that the first time he became aware of the legal nexus between him and the second respondent was when the plea was received on 20 March 2013. Until that date, he had never dealt with the second respondent's officials or received any correspondence carrying the name or logo of that party or indicating its connection with the applicant as the insurer.

Held – Section 12(3) of the Prescription Act 68 of 1969 provides that "A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care."

During the hearing, the second respondent accepted that the applicant did not have knowledge of the identity of the second respondent as a debtor until receipt of the latter's plea on 20 March 2013. Its argument was then that prescription started running on 20 March 2013 when the plea was received. Three years later, on 19 March 2016, the claim became prescribed as intended by the provisions of section 11(d) of the Act, because the matter only came before the court on 25 July 2016, after the three year period had expired. It was contended that the fact that the joinder application was served in November 2013 already, did not assist the applicant, because service of the joinder application did not interrupt the running of prescription as provided for in section 15(1) of the Act. The question therefore, was whether the joinder application interrupted prescription of the applicant's claim against the second respondent.

The Court studied case authority on the question before turning to the facts of the present case. It pointed out that the joinder application was served on the second respondent only months after the commencement of the running of the three year prescription period in March 2013. If a joinder is granted and the trial then takes its course, final judgment can be expected. The claim would then be prosecuted against

the second respondent “under the process in question” as intended by the provisions of the subsections mentioned. At the very least, the proceedings against the second defendant, begun under this process, were instituted as a step in the enforcement of the claim for payment of the debt which would have led to interruption of prescription. To reject that approach, would be to argue that a fresh summons issued and served on the second defendant at the time when the joinder application was issued and served, would serve to interrupt prescription but the joinder application, which is the preferred procedure, would not.

The joinder application was granted.

K2012150042 (South Africa) (Pty) Ltd v Zitonix (Pty) Ltd [2017] 2 All SA 232 (WCC)

Jurisdiction – Exercise of territorial jurisdiction by provincial or local division of the High Court – Section 21(1) of the Superior Courts Act 10 of 2013 provides that a Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance.

Competition – Raising of competition issue in civil litigation – A civil court does not have jurisdiction to determine whether conduct contravenes the Competition Act 89 of 1998, but it does have the power to determine whether such an issue raised in the course of civil proceedings should be referred to the Tribunal in terms of section 65(2) – A party seeking a referral must clearly set out what the prohibited conduct is for the court, and for the opposing party, to appreciate whether a case for referral has been properly made.

Contract – Alleged error – Claim for rectification – Where a party attempts to enforce a contract affected by common mistake, the other party may rely on the mistake as a defence without counterclaiming for rectification, if it proves such facts as would entitle it to rectification – Rectification is a remedy which is available where there has been a common, and not a unilateral mistake, where the court is asked to rectify the agreement to bring it in line with the parties’ true intention.

Words and phrases – “exclusionary act” – Section 8(c) of the Competition Act 89 of 1998 – Section 8(c) of the Competition Act prohibits a dominant firm from engaging in an exclusionary act if the anti-competitive effect of that act outweighs its technological, efficiency or pro-competitive gain – An “exclusionary act” is defined in the Competition Act as an act that impedes or prevents a firm from entering into, or expanding within, a market.

In February 2016, the respondent concluded five lease agreements with the applicant, in terms of which it leased certain commercial premises in a shopping centre from the applicant. The respondent was part of a group (“the Platinum Group”). When several companies in the Platinum Group experienced significant financial difficulties, most of the retail leases held by entities in the Platinum Group were terminated. The respondent fell into arrears several times during the existence of the leases, until eventually, on 25 August 2016, the applicant sent letters of cancellation to the respondent in respect of three of the five premises. Less than a week later, the

applicant sent further cancellation letters to the respondent in respect of all five premises based on a new ground for cancellation, provided for in the lease agreement (in clause 16.1(e)), *viz* sequestration of the lessee. It was common cause that the estate of the sole director (Joubert) of the Platinum Group was placed under final sequestration on 22 August 2016.

In the present proceedings, the applicant sought confirmation of the cancellation of the five agreements, and an order directing the respondent to vacate the leased premises.

The respondent contended that the present Court did not have concurrent jurisdiction, together with the *forum rei sitae,* to entertain the application. The further defences were that the deponent to the founding affidavit was not authorised to depose thereto; a lack of detail in the breach letters rendering the application fatally defective; Joubert was unaware of clause 16.1(e) with the result that the agreement falls to rectified by the striking out of such clause; and, that the applicant had engaged in anti-competitive conduct, which issue required a referral to the Competition Tribunal.

Held – In respect of the jurisdictional point that the general, common law principles in respect of which a provincial or local division of the High Court will exercise territorial jurisdiction, in the absence of any jurisdictional limitations imposed by statute or the common law, are the doctrine of effectiveness and submission, and *actor sequitur forum rei.* Section 21(1) of the Superior Courts Act 10 of 2013 provides that a Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance. The respondent has its registered office in the Western Cape, and for the purposes of jurisdiction is therefore regarded as having its domicile in the Western Cape. The lease agreements were entered into in the Western Cape. Any order granted by the present Court directing the respondent to vacate the property, failing which it would be evicted, could be enforced by the Sheriff for the KwaZulu-Natal High Court, ensuring that should the application succeed, the order could be executed in Natal. Therefore, the present Court had concurrent jurisdiction with the KwaZulu-Natal High Court, and there was no merit to the respondent's contention that the *forum rei sitae* had exclusive jurisdiction to determine the contractual remedy sought by the applicant.

The second defence relied upon by the respondent was the alleged lack of authority of the deponent to the founding affidavit on behalf of the applicant. The deponent was a legal advisor in the employ of the previous property managers of the shopping centre. As proof of his authority to act for the applicant, he annexed a power of attorney in terms of which such authority was delegated to him. The Court held that in the absence of a proper challenge to the authority of the applicant's attorney to institute the proceedings, through the mechanism provided by rule 7 of the Uniform Rules of Court, it had to be accepted that the applicant's attorney was properly authorised. The proceedings were properly brought and there was no merit to the respondent's objection to the authority of the deponent to the founding affidavit.

The respondent contended further that the breach notices issued by the applicant were defective because they were stated in broad terms. There was no merit to that point. It was always open to the respondent to request details of how the amounts claimed were made up.

The Court also rejected the respondent's claim for rectification of the agreements. Where a party attempts to enforce a contract affected by common mistake, the other

party may rely on the mistake as a defence without counterclaiming for rectification, if it proves such facts as would entitle it to rectification.

Rectification is a remedy which is available where there has been a common, and not a unilateral mistake, where the court is asked to rectify the agreement to bring it in line with the parties' true intention. That was not the case in this instance.

In support of the contention that the applicant had engaged in anti-competitive conduct, the respondent focused on the steps taken by the applicant to terminate the lease agreements and to require the respondent to vacate the leased premises, and not any allegation of the conclusion of a new lease with a competing retailer. A civil court does not have jurisdiction to determine whether conduct contravenes the Competition Act 89 of 1998, but it does have the power to determine whether such an issue raised in the course of civil proceedings should be referred to the Tribunal in terms of section 65(2). A party seeking a referral must clearly set out what the prohibited conduct is for the court, and for the opposing party, to appreciate whether a case for referral has been properly made. The respondent failed to aver facts to support the elements of its complaint, to enable the court to determine whether the applicant's conduct was prohibited in terms of the Competition Act. Specifically, the respondent's failure to set out any facts to support the allegation that the applicant was dominant in a relevant market was fatal to its claim for a referral under section 65(2) of the Competition Act. The respondent also relied on section 8(c) of the Competition Act, which prohibits a dominant firm from engaging in an exclusionary act if the anti-competitive effect of that act outweighs its technological, efficiency or pro-competitive gain. The requirement of an exclusionary act is separate from the requirement of an anti-competitive effect. The Court found that the respondent had failed to make averments to sustain a single element of the exclusion complaint. It was held that the Court was in a position to finally determine the application without resolution of the competition issue raised and without recourse to the Competition Tribunal.

It was concluded that the lease agreements had been validly cancelled and that the applicant was therefore entitled to an order directing the respondent to vacate the leased premises.

Mahapa v Honourable Minister of Higher Education and another [2017] 2 All SA 254 (GJ)

Education – Right to education – Further education – Whether Minister has duty to secure funds for an individual to pursue further education – While basic education is immediately realisable, further education has an internal limitation in that it has to be progressively realised within available resources subject to reasonable legislative measures.

The applicant, a prison inmate, was studying for a law degree. On the grounds that he had no money to fund his studies, he applied to the second respondent for a bursary. He sought to have the first respondent (the "Minister") protect his right to education. He averred that since he could not afford university fees, due to poor family background, the first respondent, acting on behalf of government, was obliged to secure funds for him to further his education. He relied on section 29(1)(b) of the Constitution in that regard.

On the other hand, the first respondent argued, on the strength of section 36(1) of the Constitution, that the first respondent had no obligation to provide funds to the applicant to further his education.

Held – Education is an instrument for development. Section 29 of the Constitution provides that everyone has the right to basic education, including adult education, and to further education, which the State, through reasonable measures, must make progressively available and accessible. While basic education is immediately realisable, further education has an internal limitation in that it has to be progressively realised within available resources subject to reasonable legislative measures. It could therefore not be found that the first respondent had any obligation, arising from section 29(1)(b), to protect the applicant's right to further his education, by providing him with funds.

The application was dismissed.

Pentree Ltd v Nelson Mandela Bay Municipality [2017] 2 All SA 260 (ECP)

Evidence – Hearsay evidence – What constitutes – Section 3(4) of the Law of Evidence Amendment Act 45 of 1988 – Whether a party in expropriation proceedings may, through a valuer called as an expert witness, adduce evidence of statements made to the valuer by other persons in respect of matters which have influenced her valuation of the land, in circumstances where such other persons are not called as witnesses.

Words and phrases – "hearsay evidence" – Section 3(4) of the Law of Evidence Amendment Act 45 of 1988 – Hearsay evidence defined as being "evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence".

The plaintiff claimed compensation in terms of section 12(1) and (2) of the Expropriation Act 63 of 1975 in respect of a property expropriated by the defendant. The property was undeveloped agricultural land, which the plaintiff contended offered an above average potential for short term urban development. It, accordingly, appointed a team of consultants who embarked upon a comprehensive process to acquire all administrative approvals necessary to undertake a large scale mixed used development.

In the present proceedings, a valuer was called as an expert witness to testify in respect of the market value of the subject property at the time of the expropriation. The defendant objected to the plaintiff adducing evidence through that witness. The witness had based her assessment of the property value on information provided to her by a local valuer. The defendant objected to that evidence, arguing that it constituted hearsay evidence, and as no application had been brought in terms of the provisions of section 3 of the Law of Evidence Amendment Act 45 of 1988, it was inadmissible. The plaintiff argued, however, that the evidence in question was not hearsay evidence at all and, if the court should find that it was, then it should be admitted in terms of section 3 of the Act.

Held – The question for determination was whether a party in expropriation proceedings may, through a valuer called as an expert witness, adduce evidence of statements made to the valuer by other persons in respect of matters which have influenced her valuation of the land, in circumstances where such other persons are not called as witnesses.

Section 3(4) of the Law of Evidence Amendment Act defines hearsay evidence as being "evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence".

At common law, if the evidence of a statement by a non-witness is tendered for a purpose other than its testimonial value then the truth or otherwise is irrelevant and it is not dependent for its reception on the credibility of the asserter. It is not hearsay. The position under the Law of Evidence Amendment Act was found by the Court to be much the same. If it is not tendered for its testimonial value its probative value is not dependant on the credibility of any person other than the person giving such evidence. It is therefore not hearsay as defined in the Act. The purpose for which the evidence is tendered may still determine whether it is hearsay or not within the statutory definition.

In an expropriation matter, where the issue concerns the determination of the quantum of compensation payable there is no *lis* between the parties and therefore no onus upon the plaintiff, and the function of the court is that of a "super valuer". As such, the Court must place itself in the shoes of the notional informed seller and buyer. On that basis it must have regard to everything which such a seller and buyer would have experienced in the open market and all the information which would have been at their disposal. The Court cannot itself go into the market to gather information, but it is part of the function of an expert valuer to do so and to found his opinion thereon.

In order to fix compensation in terms of section 12(1) of the Act, with regard to section 25 of the Constitution, the primary task of the court in the first instance is to determine the market value of the property.

The Court was of the view that the impugned evidence in this case did not, in fact, constitute hearsay evidence. To the extent that it might have erred in that conclusion, it went on to consider the provisions of section 3(1) of the Law of Evidence Amendment Act. The section clothes a court with a discretion to allow hearsay evidence if it is of the opinion that such evidence should be admitted in the interests of justice. A factor which weighed heavily was the fact that such evidence had, prior to the promulgation of the Law of Evidence Amendment Act, been consistently admitted in matters relating to expropriation because it was considered to be material to arriving at a just conclusion as to the reasonable compensation payable under the Act. The Court, therefore, held that the evidence should also be admitted because the interests of justice required it.

Shanduka Resources (Pty) Ltd v Western Cape Nickel Mining (Pty) Ltd and others
[2017] 2 All SA 279 (WCC)

Mining and minerals – Prospecting rights – First-in-time applicants – Competing applicants – Manner in which applications should be determined in terms of section 16 of the Mineral and Petroleum Resources Development Act 28 of 2002.

The appellant ("Shanduka") and the first respondent ("WC Nickel") were vying for recognition as the first-in-time applicant for prospecting rights in respect of nickel ore and various other minerals over certain land. Both companies had been advised by the second respondent ("the regional manager") that their respective applications could not be accepted because the rights were already held by the fifth respondent ("Hondekloof"). The regional manager was charged in terms of section 16 of the Mineral and Petroleum Resources Development Act 28 of 2002 (the "Act") with deciding whether or not to accept the applications. Acceptance of an application for prospecting rights was the first step towards getting it ultimately referred to the minister, who would determine whether or not to grant it. It was common ground in argument that the regional manager's decisions in terms of section 16 of the Act constituted administrative action within the meaning of the term in the Promotion of Administrative Justice Act 3 of 2000.

In September 2013, Shanduka obtained an order reviewing and setting aside the refusal by the regional manager to receive its application for the prospecting rights. The order further directed the regional manager to accept and process Shanduka's application in terms of section 16 of the Act. The regional manager then applied for the rescission of the orders made in those proceedings. Shanduka opposed the rescission application and, in a counter-application, sought the judicial review and setting aside of the decisions in terms of which the prospecting rights ostensibly vested in Hondekloof. Shanduka's counter-application elicited an application by WC Nickel, for leave to intervene as a respondent in the main application and for certain substantive relief.

Before the matters could be heard, it was established that Hondekloof's prospecting rights had indeed lapsed. The regional manager therefore decided to withdraw the rescission application and sought to reach an agreement in that regard with Shanduka. Accordingly, by the time the matter was argued before the court *a quo*, the only matters that fell for determination by the court *a quo* were those presented in terms of WC Nickel's intervening application. The court *a quo* declared that WC Nickel was entitled to be recognised for the purposes of sections 9 and 16 of the Act as the first-in-time applicant for the prospecting rights over the land in question. It also rescinded the orders granted in Shanduka's favour in the main application. Shanduka's appeal was directed at reversing the effect of the declaration that WC Nickel had to be recognised as first-in-time applicant for the prospecting rights and at the rescission referred to above.

Held – The court *a quo* was bound to decide the matters before it on the papers in accordance with the rule that unless it were able to reject the evidence of the respondents as obviously untenable or far-fetched in respect of any fact genuinely in dispute on the papers, it was bound to decide the matter on the basis of the respondents' version of such facts.

Whether a hard copy of an application by WC Nickel had been received was in dispute between the parties. However, the Court found it unnecessary to determine what exactly was left at the regional manager's office. It was prepared to assume in WC Nickel's favour (without so deciding) that a hard copy and an electronic copy of an application by WC Nickel was left at the regional manager's office. The Act draws a distinction between the *lodging* of an application – and its consequent *receipt* by the

regional manager – and the *acceptance* thereof. Once an application has been lodged, the regional manager must decide whether or not to *accept* it. She is obliged to accept it if it complies with the qualifying criteria stipulated in section 16(2)(a)–(c), and she may not accept it if she finds that the application has not met all those criteria. The applicant must be notified of the decision. It was common cause that WC Nickel had been advised that the regional manager was unable to accept its application for prospecting rights on the land. That occurred before Shanduka even attempted to lodge its application, and, having regard to the wording of section 16(2) of the Act at the time, the issue of an entitlement to first-in-time preference was not an issue. WC Nickel's remedy in the circumstances, if it wished to persist with its application for the prospecting rights, was to challenge the regional manager's decision to not accept the application. It could have done that either by way of an internal appeal in terms of section 96 of the Act, or, if it could show exceptional circumstances justifying such a course, it could have applied directly to court for a judicial review of the regional manager's decision not to accept the application. It did neither. The court *a quo* approached the consequences of WC Nickel's failure to persist with its application for the prospecting rights to be awarded directly to it by asking the question whether WC Nickel could be said to have waived its alleged right to have its application for prospecting rights accepted. The present Court held that the characterisation of the question as one of waiver was misconceived. The true position was that WC Nickel's right to challenge the regional manager's decision to refuse to accept its application had lapsed – a result which followed as a matter of law.

The legal effect of the declarator granted by the court *a quo* was to negate the decision of the regional manager not to accept WC Nickel's application. The effect was indistinguishable from that of an order reviewing and setting aside the decision. The relief that was afforded in terms of the declarator and attendant mandatory interdict was of the character that would ordinarily have been sought by way of an application in terms of section 6(1) of the Promotion of Administrative Justice Act 3 of 2000. However, there had been no compliance with the provisions of that Act which sets a 180-day limit for the bringing of applications for judicial review. That requirement could not be side-stepped by the framing of the issue differently.

The court *a quo* erred in granting the relief in question and there was also no proper basis for its decision to accede to WC Nickel's application to rescind the orders granted in favour of Shanduka. The appeal was, therefore, upheld.

Stow v Regional Magistrate, PE NO and others; Meyer v Cooney NO and others [2017] 2 All SA 300 (ECG)

Criminal procedure – Suspended sentence – Condition of suspension – Breach of – Putting into operation of suspended sentence – Application for review – Section 297(9)(a)(ii) of the Criminal Procedure Act 51 of 1977 – Court finding magistrate to have properly considered whether or not to suspend the sentence further – Constitutionality of section 297 confirmed by court.

In applications in terms of rule 53 of the Uniform Rules of Court, the applicants sought the review and setting aside of the orders of the first respondent in each matter, that the applicants' suspended sentences be put into operation, in terms of section 297(9)(a)(ii) of the Criminal Procedure Act 51 of 1977. Both applicants further applied for an order declaring section 297(1)(b) read with section

297(1)(a)(i)(aa) unconstitutional. In both matters, the review was brought on the basis that the first respondents had failed to exercise their discretion judicially.

The applicant (Stow) in the first matter was charged with 32 counts of contravening the Value Added Tax Act 89 of 1991. Having undertaken to pay the amounts due in terms of the charges, Stow avoided a sentence of direct imprisonment, and received a suspended sentence instead. However, he was unable to fulfil his undertaking, and the first respondent put the suspended sentence into operation. It was submitted that the first respondent misdirected himself in not determining whether Stow was unable to comply with the condition of suspension through circumstances beyond his control. Had he done so, so it was submitted, he would have found that non-compliance with the condition was through circumstances beyond Stow's control. It was submitted further that the first respondent misdirected himself in not considering whether there was any other good and sufficient reason for a further suspension of the sentence.

Held – While the first respondent did not refer to the explicit wording of section 297(7), the Court was not convinced that he did not consider all the circumstances which were presented to him. He was clearly of the view that because there was no prospect of further payments by Stow, the sentence should not be further suspended. In that sense, the first respondent considered whether or not to suspend the sentence further and in, the exercise of his discretion afforded by section 297(7), decided not to do so. The Court found no misdirection committed by the first respondent, let alone a gross irregularity, which vitiated the entire proceedings. The first respondent could not be said to have misdirected himself in not imposing further conditions of suspension. The application to review and set aside the first respondent's order that the suspended sentence be put into operation could not succeed in the Stow application.

In the remaining application, the applicant ("Meyer") was charged with a contravention of section 11(1) read with section 11(2) of the Banks Act 94 of 1990 in that during the period 1999 to June 2002 he conducted the business of a bank, when such business was not a public company nor was it registered as a bank. A plea and sentence agreement was entered into, in terms of which Meyer undertook to repay investors as a condition of suspension of his sentence. However, it turned out that he was unable to fulfil the condition. In his judgment, the first respondent considered the provisions of section 297(7), namely whether the failure to pay the investors was through circumstances beyond Meyer's control and whether or not there was any other good and sufficient reason to suspend the sentence further. He was not convinced that the failure to comply with the condition of suspension was through circumstances beyond Meyer's control and was of the view that he had recklessly placed himself in the position he now found himself. He, therefore, ordered that the suspended sentence be put into operation. On review, the Court agreed with the finding that Meyer had acted recklessly and consequently that the failure to meet the condition of suspension was not through circumstances beyond his control. It could find no grounds for interfering with the exercise of the first respondent's discretion. Meyer's application to review and set aside the first respondent's decision could therefore also not succeed.

It was submitted in the constitutional challenge that insofar as the condition of suspension required the sentenced person to pay compensation, it violated a person's rights to equality, a fair trial, the freedom and security of person, dignity, and freedom from servitude. It was contended that there is no legislative requirement to determine whether an accused person has the necessary financial resources to fulfil the order of compensation, with the result that a person is sent to prison without proof of wilful

disobedience of a court order and because of his inability to pay whatever amount is outstanding. The second ground for the constitutional challenge was that there are no legislative requirements for determining when either compensation as a condition of suspension should be imposed or an order in terms of section 300 should be made. The Court rejected the notion that the different consequences flowing from compensation as a condition of suspension and compensation in terms of section 300 result in discrimination. The third basis for the constitutional challenge was that there was no provision for recognition to be taken of partial fulfilment of a condition of compensation, and a court is bound to put the whole of the suspended sentence into operation. The Court was of the view that the legislation in question sufficiently guarded against unfairness.

The applications were, accordingly, dismissed.

Wiese and another v ABSA Bank Ltd [2017] 2 All SA 322 (WCC)

Banking and Currency – Claim for repayment of loan – Default judgment – Application for rescission – Defence of reckless credit – Sections 80 to 83 of the National Credit Act 34 of 2005 – Bank properly conducting assessment in terms of section 81(2), when deciding whether applicant for credit could afford to repay loan.

Appeals – Whether Uniform Rule 49(4) in its amended form requires an appellant to specify grounds of appeal in its notice of appeal – Rule 49(4) provides that every notice of appeal and cross-appeal shall state what part of the judgment or order is appealed against; and the particular respect in which the variation of the judgment or order is sought.

The question in the present appeal was whether the National Credit Act 34 of 2005 permits a credit provider to have regard to the projected income of a separate commercial entity when assessing a consumer's ability to afford to repay a personal loan, in circumstances where the loan to be advanced to the customer is for the specific purpose of purchasing that commercial entity.

In a point *in limine*, the respondent bank raised the question of whether Uniform Rule 49(4) in its amended form nonetheless required an appellant to specify grounds of appeal in its notice of appeal.

The factual background was as follows. In September 2013, the bank issued summons against the appellants jointly and severally for payment in respect of monies loaned and advanced together with interest and costs. The bank also sought an order declaring the appellants' jointly owned immovable property specially executable, given that it served as security for the loans in the form of mortgage bonds registered over the immovable property. The appellants failed to enter appearance to defend and default judgment was granted against them. In December 2013, the appellants applied for rescission of the default judgment. It was accepted by the parties for purposes of the appeal that the appellants provided a reasonable explanation for their default. What was in issue was whether they set out a *bona fide* defence to the bank's claim which, *prima facie*, carried some prospect of success should rescission be granted and the matter referred to trial. The defence raised by the appellants was that of reckless credit as provided in sections 80 to 83 of the Act. It was contended that the bank granted the appellants reckless credit by approving fourth and fifth loans (the subject of the default judgment) during October 2008 in circumstances where it had

failed to conduct the required assessment in terms of section 81(2), alternatively where it knew that the loans would render the appellants over-indebted.

In its judgment, the court *a quo* found that there was nothing before him to support the appellants' allegation that the bank had failed in any of its duties under section 81 of the Act. It thus found that the appellants had failed to show a *bona fide* defence and dismissed the application.

Held – Rule 49(4) provides that every notice of appeal and cross-appeal shall state what part of the judgment or order is appealed against; and the particular respect in which the variation of the judgment or order is sought. The bank contended that the notice of appeal was fatally defective in that it failed to specify the finding of fact and/or ruling of law appealed against and the grounds upon which the appeal was founded. In their notice of appeal, the appellants stated that the whole of the judgment was appealed against and the particular respects in which variation of the judgment or order was sought. As a result, the point *in limine* had to fail.

The requirement of a *bona fide* defence which *prima facie* carries some prospect of success is comprised of two elements. First, the defence must be raised in good faith. Second, on the face of it, the defence must have some prospect of success at trial. In the appellants' founding affidavit, the defence of reckless credit was based squarely on the bank having failed to conduct any assessment at all in terms of section 81(2). After being confronted with the bank's version, the appellants changed tack. Being unable to deny that an assessment had in fact been conducted, they claimed that the assessment had not been detailed and that the loans granted were personal rather than business in nature. The Court rejected that submission. In any event, the Court was of the view that the defence raised has no *prima facie* prospect of success. It was incumbent on the bank, when making its section 81(2) assessment, to have regard to the reasonably estimated future revenue flow of a franchise that the first appellant intended purchasing through the vehicle of another entity with funds to be loaned by it. That was what the bank did.

The distinction which the appellants sought to draw between a personal home loan and a business loan did not assist them. It is the purpose of the loan that determines what needs to be considered in assessing whether a loan may be granted to a prospective consumer, and not the mechanism of the loan itself.

The court *a quo* was correct in dismissing the application and the appeal had to fail.