LEGAL NOTES VOL 4/2018

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INDEX[1]

SOUTH AFRICAN LAW REPORTS APRIL 2018

SA CRIMINAL LAW REPORTS APRIL 2018

ALL SOUTH AFRICAN LAW REPORTS APRIL 2018

SA LAW REPORTS APRIL 2018

DLADLA AND OTHERS v CITY OF JOHANNESBURG AND ANOTHER 2018 (2) SA 327 (CC)

Local authority — Powers and duties — To shelter evicted persons — Rules of shelter — Separation of sexes, including heterosexual partners — Lockout between 08h00 and 17h30 — Entry between 17h30 and 20h00 — Entry barred thereafter — Constitution, ss 10, 12, 14 and 26.

On 30 November 2017 the Constitutional Court handed down judgment in an application for leave to appeal against an order of the Supreme Court of Appeal. The applicants had been evicted from a building in which they resided pursuant to the order of the Court in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* (*Blue Moonlight*). The eviction was subject to the condition that the City of Johannesburg provide them with temporary alternative accommodation in a location as near as feasibly possible to the building in which they had lived. It is the rules of the alternative accommodation provided by the City in terms of the *Blue Moonlight* order that form the subject matter of the present case.

The City provided temporary accommodation at the Ekuthuleni Shelter. The Shelter is run by Metropolitan Evangelical Services (MES), with whom the City had concluded a contract to provide the temporary accommodation. Upon arrival at the Shelter, the applicants were told that, in exchange for living there, they had to comply with certain rules. The first rule required residents to live in separate dormitories based on sex (the family separation rule). This prevented heterosexual couples from staying together and separated children over the age of 16 from their caregivers of the opposite sex. The second rule prohibited residents from being inside the Shelter from 8h00 to 17h30 every day and required the gates of the Shelter to be locked again at

[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!**

20h00 (the lockout rule). Any occupant who had not returned by 20h00 was locked out and had to find accommodation elsewhere for the rest of the night.

The applicants approached the High Court, Gauteng Local Division, Johannesburg (High Court), seeking an order declaring the family separation and lockout rules to be an unjustified infringement of their constitutional rights to dignity, freedom and security of the person, privacy and access to adequate housing. The High Court granted the order and held that the rules constitute an unjustified infringement of the applicants' constitutional rights to dignity, freedom and security of the person, and privacy. The respondents were interdicted and restrained from enforcing the rules against the applicants for the duration of their stay in the Shelter.

The City and MES appealed. The Supreme Court of Appeal concluded that the Shelter rules did not unlawfully limit the residents' rights. It held that the lockout rule was not dissimilar from those at other institutional buildings as it was designed to ensure the safety and protection of the occupants. It also held that rules of this nature are intended to "discourage an attitude of dependence" since costs had to be taken into account. In relation to the family separation rule, it held that there is no absolute right for partners to sleep together and that the applicants' rights "must yield, albeit temporarily" to the practical demands of the shelter. In the result, the Court upheld the appeal by the City and set aside the order of the High Court.

The applicants approached the Constitutional Court for leave to appeal, seeking an order reinstating the High Court's order that the family separation and lockout rules are unconstitutional and must be struck down.

The City contended that the High Court erred in assuming that the Shelter constituted a "home". It also denied that that the family separation and lockout rules infringed the applicants' rights of dignity, freedom and security of the person, and privacy. According to the City, the Shelter was not a permanent home but temporary accommodation; therefore, the applicants could not claim to have the same rights as they would have in their home. Therefore, there is no infringement of the rights in question, because the applicants do not enjoy the rights in the first place. The City contended that the applicants are entitled only to those rights that are consistent with temporary accommodation in an institution like the Shelter and with the terms and purpose of the order granted in *Blue Moonlight*.

The first *amicus curiae*, the Centre for Applied Legal Studies, submitted that the rules disproportionally affected women. It argued that women's access to adequate housing is critical to their enjoyment of other human rights and a gendered perspective must be adopted in order to give effect to women's right to adequate housing.

The second *amicus curiae*, the Centre for Child Law, submitted that the duty imposed by the order in *Blue Moonlight* was that the applicants should be given a home akin to permanent housing. It argued that any accommodation provided short of a home fails to take into account the rights of children enshrined in section 28 of the Constitution, which are paramount in any matter in which they are concerned.

In the first judgment, Mhlantla J, (Mogoeng CJ, Nkabinde ADCJ, Jafta J, Mojapelo AJ, Pretorius AJ and Zondo J concurring) rejected the City's argument that, because the

Shelter could not be characterised as a home in the non-legal sense of the term, the applicants were therefore deprived of their fundamental constitutional rights to dignity, freedom and security of the person, and privacy. She held that the Constitution confers these rights on everyone, regardless of where they are at a given time, and can only be limited in terms of section 36 of the Constitution.

Mhlantla J considered that the family separation and lockout rules constituted an infringement of the rights to dignity, freedom and security of the person, and privacy. She took the view that the right to dignity includes the right to family life and marriage and consequently found that the family separation rule disrupted the family unit and the intimate relationships that heterosexual couples had. She held that the lockout rule was coercive and demeaning – because it dramatically reduced the applicants' control over their lives – and violated the right of freedom and security of the person because it restricted the applicants' movements and often left them unsafe at night. Finally, she held that the lock-out rule violated the right to privacy as it forced the applicants to sleep on the streets.

Mhlantla J accordingly found that the family separation and lockout rules infringed sections 10, 12 and 14 of the Constitution. She held that this infringement could not be justified. Section 36 of the Constitution permits the limitation of rights only to the extent that such limitation is imposed by law of general application and is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. In the present case, she considered that the rules were not "law of general application" because they were agreed by the City and MES in a private contract that only bound them. Therefore, the rules violate sections 10, 12 and 14 of the Constitution.

In the result, leave to appeal was granted and the appeal was upheld. The order of the Supreme Court of Appeal was set aside and replaced with an order stating that the rules infringe the applicants' rights to dignity, freedom and security of the person, and privacy in sections 10, 12 and 14 of the Constitution.

Concurring in the order, Cameron J (Froneman J and Khampepe J concurring) held that the rules the Shelter imposed on the residents in providing them with temporary accommodation were measures under section 26(2). He reasoned that the provision of temporary accommodation under order in *Blue Moonlight* and the rules imposed by the Shelter in fulfilling that order cannot be separated. Because the rules were sourced in the *Blue Moonlight* order, the temporary housing at issue – even though afforded in response to a court order – remained a section 26 measure to achieve the progressive realisation of the right of access to adequate housing. This meant that section 26(2)'s standard of reasonableness applied in adjudging the constitutional acceptability of the rules.

In addition, Cameron J concluded that the absence of a "law of general application" does not preclude determining whether the rules are reasonable. Moreover, the *Blue Moonlight* order was a "law of general application". The reasonableness criteria in section 36(1) and section 26(2) entail the same interpretive process, and the Shelter's rules were unreasonable.

Consequently, in addition to unreasonably limiting the residents' rights to dignity, freedom and security of the person, and privacy under sections 10, 12 and 14 of the Constitution, the Shelter's rules also unreasonably limited the residents' right of access to adequate housing under section 26.

In a separate concurring judgment, Jafta J (Mojapelo J concurring) held that the application of the impugned rules on the applicants constituted an unjustifiable violation of the rights guaranteed by sections 10, 12 and 14 of the Constitution. He disagreed with Cameron J that those rules amounted to a measure contemplated in section 26(2) of the Constitution and that their application to the applicants violated the provisions of this section. He held that section 26(2) does not find application in this case as the occupation of the Shelter did not flow from a measure taken by the City within its available resources to make the applicants right of access to adequate housing progressively realisable. The City instead had afforded them accommodation at the Shelter in compliance with the order in *Blue Moonlight*. The City therefore had no right to impose the impugned rules on the applicants in complying with the order as that order did not empower it to violate the applicants' fundamental rights. In complying with the *Blue Moonlight* order, the City committed a monumental irregularity which should not be condoned. The order did not come with conditions; therefore, it was not up to the City to impose any conditions. In these circumstances the conduct of the City seriously undermined not only the court order but also the Constitution.

In a fourth judgment, Madlanga J concurred in the judgment of Cameron J, save for one aspect. He held that the meaning of "law of general application" is best left for determination on another day. However, he agreed that the Shelter's rules did not meet the "reasonableness" criterion elucidated in this Court's jurisprudence and considered that this is sufficient to justify a holding that the Shelter's rules are constitutionally invalid.

PUBLIC SERVANTS ASSOCIATION OBO UBOGU v HEAD, DEPARTMENT OF HEALTH, GAUTENG AND OTHERS 2018 (2) SA 365 (CC)

Constitutional law — Courts — Jurisdiction — Labour Court having jurisdiction to declare legislation unconstitutional.

Constitutional law — Legislation — Validity — Public Service Act 103 of 1994, s 38(2)*(b)*(ii) — Authorising unilateral deductions by state employer to recover moneys wrongly paid to its employees directly from their salaries or wages — Amounting to unlawful limitation of right of access to courts —Offending rule of law by promoting self-help — Labour Court's declaration of constitutional invalidity confirmed — Constitution, ss 1*(c)* and 34.

Section 38(2)*(b)*(i) of the Public Service Act 103 of 1994 (quoted at n3) permits the state, as an employer, to recover moneys wrongly paid to its employees directly from their salaries or wages. The Labour Court held that to the extent that the provision permitted this without any requirement of legal proceedings or agreement between the parties, it amounted to untrammeled self-help as prohibited by s 1*(c)* of the Constitution, violating the principle of legality. It then invoked an interpretative remedial mechanism to correct the defect by ordering the section to be read, in a manner consistent with the Constitution, as requiring either consent or legal process (see [14] – [16]).

In this application to the Constitutional Court for confirmation of the Labour Court's order of constitutional invalidity in terms of s 167(5) of the Constitution (consolidated with an appeal against the order), the issues were (1) whether the Labour Court had jurisdiction to declare as unconstitutional legislation in respect of which it did not expressly have jurisdiction; (2) whether the Labour Court's interpretation saved the impugned provision from invalidity so that the matter was not properly before the court as a confirmation application; (3) whether the declaration of constitutional invalidity should be confirmed or whether, as contended by one of the state respondents, the deductions in terms of s 38(2)*(b)*(i) regulated set-off under the common law and so did not amount to self-help; and (4) an appropriate remedy.
Held, as to (1): In terms of s 157(2) of the Labour Relations Act 66 of 1995 (the LRA), the Labour Court had concurrent jurisdiction with the High Court to decide constitutional issues. Given that the High Court's jurisdiction included the ability to declare legislation constitutionally invalid, surely in terms of s 157(2) the Labour Court had the same jurisdiction as the High Court to make an order concerning the constitutional validity of an Act of Parliament.
Held, as to (2): The Labour Court did, in substance, declare s 38(2)*(b)*(i) unconstitutional. The order was competent and the confirmation proceedings were thus properly before this court (see [58]).
Held, as to (3): The impugned provision imposed strict liability, attenuating the employee's procedural rights to fair legal redress (s 34), and offended the rule of law in that it permitted self-help (s 1*(c)*). On these bases it did not pass constitutional muster. The impugned provision was not comparable to set-off under the common law: the doctrine of set-off did not operate ex lege and there were no mutual debts. (See [59] – [68] and [71].)
Held, as to (4): The appropriate remedy should obviate self-help and arbitrary salary deductions by the state. Reading-in will not be appropriate here: it was just and equitable to declare s 38(2)*(b)*(i) of the Act unconstitutional.

DIENER NO v MINISTER OF JUSTICE AND OTHERS 2018 (2) SA 399 (SCA)

Company — Business rescue — Practitioner — Rescue converted to liquidation — Whether practitioner 'creditor' under Insolvency Act — Ranking of practitioner's claim for remuneration and expenses — Date of liquidation — Insolvency Act 24 of 1936, s 44; Companies Act 71 of 2008, s 135(4).

Mr Diener, a business rescue practitioner, concluded that a corporation could not be rescued and obtained an order terminating its business rescue and putting it into liquidation. He later submitted a claim for his remuneration and expenses to the liquidators, but it was excluded from the liquidation and distribution account because he had not proved it.
He applied to review the Master's confirmation of the account, had his application dismissed, and was granted leave to appeal to the Supreme Court of Appeal.
The issues were:
(1) The ranking of a business rescue practitioner's claim for remuneration and expenses in a liquidation. *Held*, that it was a claim against the free residue, ranking after the costs of liquidation, but before the claims of employees and lenders arising during the rescue, and the claims of other unsecured creditors. (See [49] and s 135(4) of the Companies Act 71 of 2008.)

(2) Whether the date of liquidation was the day the members filed their resolution with the CIPC to begin business rescue; or the day the practitioner applied to the High Court to convert the business rescue to a liquidation. Held, that it was the latter.
(3) Whether the practitioner was a 'creditor' in s 44 of the Insolvency Act 24 of 1936, and so required to prove his claim for remuneration and expenses. *Held*, that he was.
Appeal dismissed.

HEAD OF DEPARTMENT, WESTERN CAPE EDUCATION DEPARTMENT AND OTHERS v MS 2018 (2) SA 418 (SCA)

Education — School — Public school — Fees — Liability — Divorced or separated parents — Joint, or joint and several liability — Fee exemptions — Obligation to supply income-information of both parents — Whether infringing constitutional rights of separated or divorced parent — South African Schools Act 84 of 1996, s 40(1); Regulations Relating to the Exemption of Parents from the Payment of School Fees in Public Schools, reg 6(2).

Ms S was divorced from her spouse Mr G. She was the custodian parent of their daughter, who (at the time the present dispute arose in 2013) was a grade 10 learner at Fish Hoek High School — a public fee-paying school. In respect of the 2011 – 2013 academic years, Ms S applied to the school governing body for partial exemption from the payment of school fees for her daughter. The school refused the applications on the grounds that Ms S had failed to provide information regarding the financial position of her ex-spouse — who himself had not provided the information to the school despite its request. Without such information, the school explained, the application could not be considered, because the determination of an application for exemption — by applying the formula contained in reg 6(2) of the Regulations Relating to the Exemption of Parents from the Payment of School Fees in Public Schools (the Regulations) — was based on the combined income of *both biological parents*.
Ms S's position was that divorced custodian parents like herself were entitled to be considered for an exemption relative to their personal circumstances, distinct from their former spouses, and that it was unreasonable for her to be asked to supply the information of her ex-spouse where he refused to cooperate. Ms S appealed to the Head of Department, Western Cape Education Department (HOD), in respect of each refusal. Only in respect of the 2012 year was she successful; her 2011 and 2013 appeals were rejected on the grounds that they had purportedly been received outside the prescribed 30-day period. (The school eventually instituted summons against Ms S and Mr G jointly and severally for the full fees outstanding.)
Ms S approached the High Court. She applied for the review and setting-aside of the 2013 appeal decision. (This relief was ultimately conceded when it became apparent that the exemption application was not in fact out of time.) Most importantly, she also sought the following: *(a)* She applied for a declaration that s 40(1) of the South African Schools Act 84 of 1996 (the Act) — which provided that a parent was liable to pay public school fees unless he or she qualified for an exemption — had to be interpreted in a manner such that divorced or separated biological parents were *jointly*, rather than *jointly and severally*, liable for the payment of the school fees of their children attending fee-paying state schools. In support of such relief, Ms

S relied on the principle that an interpretation favouring constitutional compliance should be preferred to one that did not. An interpretation that imposed joint and several liability resulted in discrimination against single custodian parents who were separated or divorced from their partners and, in its having the effect of treating divorced or separated parents as a 'household unit', violated an individual parent's right to dignity. In the alternative, an order was sought declaring s 40(1) unconstitutional. *(b)* Ms S sought a declaration that reg 6(2) was unconstitutional. The argument was that the formula that was applied to determine qualification for an exemption from the payment of school fees, infringed the rights of single or divorced parents to equal protection and benefit of the law in terms of s 9(1) of the Constitution, and to dignity in terms of s 10, because it required them to supply the income of their ex-spouses with whom they no longer shared a family unit. *(c)* Further, a declaration was sought to the effect that the school and governing body, as well as the Minister of Basic Education and the HOD, in the manner they had processed her exemption applications, had repeatedly infringed her constitutional and statutory rights.

Reference here was made to repeated threats by the school of legal action against her should she fail to pay school fees, the school's adoption of an aggressive bullying tone in communications with her, and the school's description of her along with her ex-spouse as a family unit. *(d)* Finally, Ms S sought a declaration that the HOD and Minister had failed to comply with their constitutional and statutory obligations to ensure that fee-charging schools in the Western Cape comply with the requirements of the Act and the Regulations in numerous respects.

The High Court ruled that the liability imposed by s 40(1) of the Act was joint, rather than joint and several; to hold otherwise, it held, would be irreconcilable with the constitutional principle of the paramountcy of the best interests of the child. The court, however, refused the rest of the relief. The HOD, MEC for Education in the Western Cape Provincial Government and the Minister appealed to the SCA against the ruling in respect of *(a)*. Ms S cross-appealed in respect of the dismissal of her further orders.

Held, that the Act and other relevant legislation reflected concern on the part of government that there was an equitable distribution of financial burdens relative to means between parents within a fee-paying school and inter se; and that fee exemptions with respect to fee-paying schools were provided on criteria that ensured that those who were the most economically disadvantaged were protected. In light of such concerns, as well as the principle established in case law that non-custodian parents should not escape their legitimate responsibility for paying school fees, a contextual, purposive and literal reading of s 40(1) of the Act compelled the conclusion that parents were jointly and severally liable for school fees.

Held, that s 40(1) of the Act and the fee-exemption regulations were not unconstitutional. It was correct that in terms of those provisions, and the applicable formula, a parent could not be provided an exemption if he/she failed to supply the gross annual income of the other parent (see [69]). However, any difficulties faced by single or divorced parents in obtaining information and co-operation from non-custodian parents was alleviated by the provision in reg 1, read with reg 6(7), for granting of a 'conditional exemption' to, among others, a parent who did not qualify for any exemption but supplied information indicating his or her inability to pay school fees owing to personal circumstances beyond his or her control.

In terms hereof, a public school governing body may grant such a conditional exemption to a parent: who gave particulars of his/her gross annual income but not

that of the other parent in light of the latter's refusal or failure to provide such particulars; and if, having regard solely to the applicant parent's gross income, he/she would qualify for an exemption in terms of the Regulations were he/she the only parent of the learner concerned.
In this manner, parents in the position of Ms S, especially women, were not treated prejudicially, were able in their own right to claim exemptions based on their own financial circumstances and were not burdened with the responsibility of obtaining financial information from the other parent. The balance that was struck was that the funding structure for public fee-paying schools was preserved on the basis that parents paid relative to their means and that exemptions were granted on a fair, equitable and predictable basis.
Held, that the school and governing body had repeatedly violated Ms S's constitutional rights in the manner in which they had processed her exemption applications. (See [78] – [79].)
Held, that the granting of the further declaratory orders sought was not warranted (see [78] – [79]). Accordingly, the appeal and cross-appeal succeeded to the extent reflected in the substituted orders.

MINISTER OF HOME AFFAIRS v RUTA 2018 (2) SA 450 (SCA)

Immigration — Refugee — Asylum seeker — Whether individual precluded accessing protections of Act and Regulations — Behaviour inconsistent with that of asylum seeker — Delay in applying for asylum — Refugees Act 130 of 1998; Refugee Regulations, 2000, reg 2.

Sequentially, Mr Ruta, a Rwandan, entered South Africa unlawfully (December 2014); withdrew from a plan to commit a murder (February 2015); entered the Witness Protection Programme (March 2015); procured false asylum seeker permits and employment; and was discharged from the Programme (December 2015).
He was later arrested for driving without a licence (March 2016); was convicted of that offence, and an offence relating to possession of a fraudulent permit (July 2016); and was imprisoned.
From prison, he asked (September 2016) that on completion of his prison sentence he be given an opportunity to apply for asylum, but it seems he was detained at Lindela pending deportation.
While he was there his lawyers obtained a High Court order, apparently late- 2016 (the application for leave to appeal was heard on 5 December 2016) that he be released, and given time to make the asylum application.
The Minister of Home Affairs appealed the order to the Supreme Court of Appeal (see [33] and [36]). It reversed it, holding that Ruta was not protected by the Refugees Act 130 of 1998 or its regulations. This, on account of —

- his unreasonable delay in applying for asylum (individuals entering South Africa illegally were afforded only a reasonable opportunity to do so) (see [27] and [33]); and
- the inconsistency of his behaviour with that of an asylum seeker (the absence of evidence that he intended to apply for asylum in the year from his entry to his arrest; the procurement of false permits) (see [32]).

Mocumie JA would have dismissed the appeal. In his view, neither Ruta's delay, nor his offences in South Africa, precluded his accessing the asylum seeker process.

STIRLING v FAIRGROVE (PTY) LTD AND OTHERS 2018 (2) SA 469 (GJ)

Land — Transfer — Deeds Office — Irregularities — Delictual liability — Failure by deeds office to (i) detect obvious irregularities in deed of transfer and (ii) authenticate credentials of conveyancer, facilitating fraudulent land transfer — Deeds office grossly negligent — Volume of work not justifying inadequate examination of deeds — Transfer void — Innocent purchaser entitled to damages in delict.

In 2015 the applicant, Stirling, found out that her immovable property had been sold and transferred, without her knowledge, to the third respondent, one Alvares, who shortly thereafter sold it on to the first respondent, Fairgrove. Alvares allegedly paid R2,79 million (this was never proved) and Fairgrove paid R3,65 million. The second respondent was the registrar of deeds. Stirling sought a declaratory order that she was still the owner and the expungement of the two deeds of transfer. The respondents admitted that the first transfer was tainted by fraud and did not oppose Stirling's application. Fairgrove made a counter-application for damages against the registrar and Alvares to recoup the purchase price and transfer duty it had paid. Alvares, claiming that he was the victim of a fraud perpetrated by estate agents, Phungula-Nkosi Properties, who sold the property to him, in a separate application claimed damages from them and the individual estate agent concerned. Alvares contended that the registrar was also to blame for allowing the fraud to take place. The applications were consolidated for the purposes of the present judgment. The registrar argued that she was understaffed and unable to put in place additional measures to prevent fraud, and that the processes followed in the present case were reasonable.

The following appeared from the documents:

- Stirling's signatures on the deed of sale, the power of attorney to pass transfer, and several other documents, were forged;
- there were several obvious errors on the deed of transfer and the power of attorney;
- the 'conveyancer' who attended to the transfer to Alvares, one Kekana, was not registered with the Law Society as either a conveyancer or an attorney;
- Kekana was not the person authorised to act under the power of attorney, and no substitution took place;
- the clearance certificate that was filed as part of the documents to execute the deed showed Alvares as the owner of the property before the property was transferred to him;
- the registrar is by regulation required to keep a register of conveyancers to verify that those who sign preparation certificates, and appear at the deeds office to execute deeds, are indeed conveyancers.

Held

The transfer from Stirling to Alvares was tainted by fraud and the resulting registration of ownership in the name of Alvares stood to be cancelled (see [29], [34] – [37]). As to the merits of Fairgrove's counter-application against the registrar and Alvares: the registrar and her officials, who played a critical role ensuring security of title in the Republic, were responsible for ensuring that the legal requirements for registration were met (see [39], [42]). They had to thoroughly examine all deeds presented to them, acting with acceptable and reasonable care, failing which they would be liable in damages (see [46] – [48]). While the relationship between registrar and conveyancer was based on trust, this trust was premised on the fact that the conveyancer was indeed registered as such (see [53]). The applicable regulations and registrar's circulars imposed strict formalities and procedures in respect of the

content and execution of powers of attorney (see [60]). Substitutions of conveyancers were also strictly regulated (see [63] – [65]).
The deficiencies in the transfer to Alvares were such that the registrar should have identified them and rejected the deed. By failing to do so she negligently failed to discharge her statutory duty (see [69]). She was obliged to check the register of conveyancers to verify that those who appeared before her as conveyancers were indeed conveyancers, and the volume of work did not excuse inadequate monitoring (see [76] – [77]). The failure of the registrar's staff to ensure that Mr Kekana's name was on the register of conveyancers or to properly examine the deed itself — apparent from their failure to notice the obvious errors on it — constituted gross negligence (see [78] – [81]). The fraudulent transfer to Alvares was a direct consequence of the registrar's negligence, and she ought reasonably to have foreseen the ensuing losses (see [87]). Hence Fairgrove succeeded in proving its damages in the amount of the purchase price paid to Alvares (see [88]). For his part Alvares signally failed to make out a prima facie case worthy of rebuttal against Phungula-Nkosi estate agents (see [97]).
Stirling would be declared the rightful owner and the registrar directed to cancel the two deeds of transfer. The counterclaim would succeed, and the registrar and Alvares be directed to pay Fairgrove the R3,65 million together with the transfer duty paid by it (see [99]). The Public Prosecutor would be directed to investigate whether criminal acts were committed in respect of the transfer to Alvares (see [99]).

MS *MARE* TRAVELLER
TEBTALE MARINE INC v MS *MARE* TRAVELLER SCHIFFAHRTS GMBH & CO KG 2018 (2) SA 490 (WCC)

Shipping — Admiralty law — Maritime claim — Enforcement — Action in rem against associated ship — Ship sold after issuance of writ in rem but before arrest — View that security accruing upon actual arrest rather than issuance of writ preferable — Bona fide sale before arrest therefore destructive of action in rem against associated ship — Admiralty Jurisdiction Regulation Act 105 of 1983, s 1(2)*(a)*, s 3(4)*(b)* and s 3(7)*(a)*(i).
Shipping — Admiralty law — Admiralty practice — Writ in rem — Bona fide sale of res (ship) after issuance of writ but before arrest — 'Protective writ' issued to preserve right of action against associated ship outside jurisdiction of court — Sale destructive of action in rem — Reference to ship struck from writ — Admiralty Jurisdiction Regulation Act 105 of 1983, s 1(2)*(a)*, s 3(4)*(b)* and s 3(7)*(a)*(i).

The issue in the present case was whether a ship sold and transferred after issuance of summons can be arrested for the debt of a previous owner.
During 2016 Hanjin Shipping, a prominent South Korean shipping line, fell into bankruptcy. Certain creditors, which included the respondent, sought to recoup their losses by issuing 'protective writs' (summonses) out of various South African courts against more than 70 Hanjin Shipping beneficially owned ships to facilitate their arrest in rem, as associated ships, when they called at local ports. The applicant purchased one of them, *Mount Meru*, from a third party in February 2017. When the applicant became aware of the writ, which was obtained in September 2016, it applied to have *Mount Meru* struck from it. The parties agreed that when the writ was

issued, *Mount Meru* was indeed an associated ship of *Mare Traveller*, the ship in respect of which the respondent's claim arose. But they disagreed on whether the passing of ownership to the applicant was destructive of the action in rem, the applicant arguing that it was, the respondent that it was not. The disagreement stemmed from their divergent views on the relevant time of ownership, the applicant arguing that it was the date of arrest (proposition A), and the respondent that it was the date of issuance of the writ (proposition B). In England the leading case on the matter, The Monica S [1967] 2 Lloyd's Rep 113 ([1967] 3 All ER 740 (PDA)), favoured proposition B by holding that the action in rem survived the passing of ownership, so that the ship could still be arrested (this is also the position in several Commonwealth jurisdictions). According to proposition A, however, the ship could no longer be arrested if it was sold prior to its actual arrest.

In South Africa admiralty actions in rem are governed by provisions of the Admiralty Jurisdiction Regulation Act 105 of 1983. Relevant to the issue are:

- s 1(2)*(a)*, which provides that 'an admiralty action shall . . . commence (i) by the service of any process by which that action is instituted; . . . (iii) by the issue of any process for the institution of an action in rem';
- s 3(4)*(b)*, which requires the claimant to establish that the owner of the ship 'would be liable to the claimant in an action in personam'; and
- s 3(7)*(a)*(i), which provides that 'an associated ship means a ship, other than the ship in respect of which the maritime claim arose . . . owned, *at the time when the action is commenced*, by the person who was the owner of the ship concerned at the time when the maritime claim arose' (the applicant contended that this was the time of arrest (see proposition A above), the respondent that it was the time of issue of process (see proposition B above).

Held

The matter, which would be decided on the basis that the sale and transfer of *Mount Meru* to the applicant were bona fide and not fraudulent, was essentially one of statutory interpretation (see [24], [71]). Since it was inconceivable that the legislature would have given greater rights against the associated ship than against the 'ship concerned', whichever proposition (A or B) was correct would operate in respect of both s 3(4)*(b)* and s 3(7)*(a)*(i) (see [5], [72]).

On analysis, proposition B (the *Monica S* principle) was inapplicable in South Africa: it was contrary to s 25 of the Constitution and the abovementioned provisions of the Admiralty Act, which favoured proposition A. Since the mere issuance of the protective writ, without an actual arrest, was therefore insufficient to protect the respondent against the change in ownership of the *Mount Meru*, the applicant was entitled to an order striking *Mount Meru* from the summons.

KUMAH AND OTHERS v MINISTER OF HOME AFFAIRS AND OTHERS 2018 (2) SA 510 (GJ)

Immigration — Refugee — Asylum seeker — Time Act affords illegal foreigner to apply for asylum — Reasonable opportunity only — Refugees Act 130 of 1998.

Immigration— Refugee — Asylum seeker — Detained illegal foreigners alleging they were asylum seekers — Asking court for release in order to apply for asylum — Whether supplying sufficient evidence of factors qualifying person as refugee, to satisfy court that Act applied to them — Refugees Act 130 of 1998, s 3.

Applicants 1 – 3 and 5 may or may not have entered South Africa illegally, but had become illegal foreigners and had been arrested and detained at the Lindela facility pending their deportation. They had, respectively, been in the country for 9, 8, 4 and 4 months before their arrests and detention; but had not applied for asylum in that time. (See [36] – [37].)
They now asserted they were asylum seekers and asked the High Court for their release so that they could make asylum applications.
The issues were:

- Whether applicants 1 – 3 and 5 had provided sufficient evidence of the factors in s 3 of the Refugees Act 130 of 1998, for the court to conclude that the Act applied to them. (Section 3 contains the factors qualifying a person for refugee status.) *Held*, that they had not. (See [17] – [19], [29] and [31].)
- Whether s 21(5) justified the applicants not providing details of the factors in s 3. (Section 21(5) creates an obligation to ensure the confidentiality of information in asylum applications.) *Held*, that it did not. Section 21(5)'s operation was confined to asylum applications, and the present applications were for interdicts. (See [27] – [28].)
- The length of time the Act gives an illegal foreigner to apply for asylum. *Held*, that it gives only a reasonable opportunity to do so. (See [33], [36] and [38].)

Applications dismissed (see [59]).

SOUTH AFRICAN PROPERTY OWNERS ASSOCIATION v MINISTER OF TRADE AND INDUSTRY AND OTHERS 2018 (2) SA 523 (GP)

Company — Business rescue — Post-commencement finance — Rental and other amounts payable iro occupation of immovable property by company under business rescue — Not constituting 'financing' or 'costs of business recue proceedings' — Companies Act 71 of 2008, ss 135(2) and 135(3).

Under the heading 'Post-commencement finance', s 135(2) of the Companies Act 71 of 2008 provides that a company under business rescue may 'obtain financing . . . secured to the lender by utilising any asset of the company to the extent that it is not otherwise encumbered . . . in the order of preference set out in subsection (3)*(b)*'; and s 135(3) creates a preference for 'other costs arising out of the costs of the business rescue proceedings'. (Sections 135(2) and 135(3) are quoted in [21].)
The applicant sought a declaratory order that rental (and other amounts such as a share of rates, taxes and public utility charges), payable in respect of the occupation of immovable property by a company under business rescue, constituted either 'financing' as contemplated in s 135(2) or 'costs of the business rescue proceedings' as contemplated in s 135(3) of the Companies Act 71 of 2008.
Held
The 'financing' contemplated s 135(2) of the Act related to the obtaining of financing in order to assist in managing the company out of its financial distress, hence the provision that any asset of the company may be utilised to secure that financing to the extent that the asset is not otherwise encumbered. It did not lean to an interpretation that encompassed existing obligations (other than obligations to company employees, under s 135(1) of the Act).
Section 135(3) of the Act provided for two categories of costs: those in s 143 of the Act; and the other, costs incurred due to the business rescue proceedings. The costs

contemplated by the applicant were costs incidental to a lease agreement; it did not, by any interpretation, constitute costs arising out of the business rescue proceedings. To hold that such costs constituted post-commencement financing would elevate an obligation incurred prior to commencement of business rescue proceedings to a preference over other creditors not provided or contemplated by the provisions of s 135 of the Act. It followed that the application would be dismissed.

OOSTHUIZEN v CASTRO AND ANOTHER 2018 (2) SA 529 (FB)

Financial institution — Financial services providers — Duty to insured — Duty to exercise reasonable skill and care — Breach — Negligent failure to properly consider risk profile of investment.

Insurance — Liability of insurer — Liability exclusion clause — Of insurer's liability to indemnify financial services provider against certain claims arising from investment advice — Interpretation of proviso that such exclusion not applying where loss solely result of insured's negligence in failing to effect transaction in accordance with specific instructions — Not meaning that policy only indemnifying insured against claims arising from negligent investment advice contemplated in proviso.

The defendant, Mr Castro, a duly registered financial services provider (FSP),had advised his client, the plaintiff, Mrs Oosthuizen, to invest R2 million in a property-syndication scheme which subsequently failed and resulted in a total loss of her investment. This case concerned (1) her action for damages against Mr Castro; and (2) the liability of Mr Castro's professional indemnity insurer who, as third party under Uniform Rule 13, defended his claim for indemnity under the policy on the basis that the consequences of his actions fell within the parameters of an exclusion clause in their insurance contract.

Mr Castro had advised Mrs Oosthuizen in terms of a written agreement. Her claim was based on breach of his contractual duties in terms thereof, inter alia in that he knew that she required a safe investment but advised her to invest in the scheme when he ought to have known, by taking reasonable care, that it was a very high-risk investment. Mr Castro denied any breach of contract but nevertheless did not challenge Mrs Oosthuizen's version that she required a low-risk investment (see [11] and [20]). The court accepted expert evidence that investment in property-syndication schemes was inherently risky (see [54] – [57]). It was also common cause that the one in which Mrs Oosthuizen invested had been the subject of negative articles by reputable journalists in the financial media, and that Mr Castro, while he discussed one such article with Mrs Oosthuizen, nevertheless dismissed any concerns it raised about risk (see [21] – [22]).

As for the insurer's defence, the exemption clause relied on provided that one of the instances in which the insurer would not indemnify the insured would be 'in respect of any third party claim arising from or contributed to by depreciation (or failure to appreciate) in value of any investments . . . or as a result of any actual or alleged representation, guarantee or warranty provided by or on behalf of the Insured as to the performance of any such investments'. A further clause contained the proviso that 'this (e)xclusion shall not apply to any loss due solely to negligence on the part of the Insured or Employee of the Insured in failing to effect a specific investment transaction in accordance with the specific prior instructions of a client of the Insured'. The insurer argued that the exemption was triggered, firstly because Mrs

Oosthuizen's claim against Mr Castro was contributed to by depreciation in value of the investment; and, secondly, that the investment had been made on the strength of defendant's representations as to the performance of the investment. It was argued that the proviso meant that insurer was only liable for the insured's negligence if the loss was solely as a result of the negligence of the insured 'in failing to effect a specific investment transaction in accordance with the specific prior instructions of the insured's client'. (See [63] – [64] and [66].)

Held as to (1)

When the totality of the evidence was considered (see [50] – [56]), Mr Castro ought to have seen and heeded the warning signs and advised Mrs Oosthuizen differently. He acted contrary to the provisions of s 16 of the FAIS Act, and the Code of Conduct (published in accordance with the provisions of s 15 of the FAIS Act), and what the law expected of FSPs. In advising her as he did, he failed to exercise the degree of skill, care and diligence which one was entitled to expect from a FSP. His advice was therefore negligent, even dishonest, and he was accordingly liable for her damages.

Held as to (2)

The insurer placed too much emphasis on the wording of the exclusion clause, disregarding the purpose of the insurance contract entered into between defendant and the insurer — to permit the insured to recover for negligence (see [72]). The policy must be considered as a whole and contextually, ie the circumstances giving rise to its existence. The first paragraph of the policy, under the heading 'Insured Events', provided that the insurer undertook 'to indemnify defendant against losses arising out of any legal liability arising from claims first made against the defendant and reported during the period of insurance for breach of duty in connection with his business by reason of any negligent act, error, or omission, committed in the conduct of the defendant's business'. The context was clear: defendant needed indemnity to safeguard him against losses in the event of a breach of duty by reason of any negligent act, error or omission. That he received such cover was apparent from the aforementioned clause. However, in the exclusion clause not a word was said about negligence, error or omission, save insofar as the proviso stipulated that the insured will be covered if a specific investment instruction of a client was not carried out due to the insured's negligence. It was highly unlikely that such an event may occur, but in any case, it could not be argued that the insurer should not be held liable for the insured's negligence, error or omission on the strength of this proviso. Exclusion clauses must be interpreted restrictively, so that they made business sense for both insurer and insured. It could not be applicable where the insured advised a client to invest in a scheme that was a hopeless 'investment' from the outset, contrary to legislation and probably in a fraudulent and unlawful scheme. What occurred in the present case was not what the two legs of the exclusion contemplated: the claim was not based on her investment appreciating less than expected, or depreciating — the investment was worthless from beginning to end — and neither did she rely on any representation that did not materialise. It would therefore be ordered that the insurer shall indemnify Mr Castro against his liability to Mrs Oosthuizen.

PROPSHAFT MASTER (PTY) LTD AND OTHERS v EKURHULENI METROPOLITAN MUNICIPALITY AND OTHERS 2018 (2) SA 555 (GJ)

Local authority — Powers and duties — Local municipality — Flooding in built-up areas — Nature of obligations imposed — Failure to do anything amounting to breach

of right to environment not detrimental to person's health and wellbeing — Appropriate relief for failure to perform — Constitution, s 24.

Constitutional law — Human rights — Right to an environment not detrimental to person's health and wellbeing — Person's sense of environmental security in relation to potential risks and dangers of environmental disaster falling within scope of protection — Constitution, s 24.

The applicants were private companies owning land adjacent to a portion of the Eastleigh Spruit (the river), which flowed through the suburb of Edenvale in Johannesburg. Floods amounting to an environmental disaster greatly impacted that portion of the river: aside from causing significant damage to those properties alongside it, they caused the walls of the riverbed to collapse, and, since their occurrence, culverts of a bridge beneath which the river passed became blocked with rubble and debris. The applicants feared that, in its current state, the river was at a great risk of further flooding, even due to the slightest rain, and the bridge of collapse, all posing a great danger to their staff and property. However, since the disaster, the relevant local authority — Ekurhuleni Metropolitan Municipality (the EMM) — had done virtually nothing to rehabilitate the river and clean the bridge. This despite the applicants' repeated appeals; a court order arising from an application brought by similarly placed landowners directing them to do so; and the EMM's own council reports highlighting the need for action. Consequently, the applicants in urgent proceeding in the High Court sought (pending final relief on similar terms) an interim structural interdict against the EMM to take all reasonable steps to remediate the relevant portion of the river and to clean the bridge; and to provide feedback on the steps taken to accomplish this. The applicants also sought leave, in case of the EMM's non-compliance, to themselves take all reasonable steps to clear the culverts beneath the bridge and for the costs thereof to be paid by the EMM. The applicants founded the relief they claimed on their right, in terms of s 24 of the Constitution, to an environment not harmful to their health and wellbeing, and to have the environment protected.

Held, that a person's sense of environmental security in relation to the potential risks and dangers of environmental disaster fell within the scope of protection provided by s 24 of the Constitution (see [8.4]).

Held, that the EMM, as a local authority, was obliged to take reasonable steps to rehabilitate the river and clear the culverts of debris subsequent to the flooding. This was so in the light of its various constitutional and statutory powers and duties, which included, inter alia, the following: the duty in terms of s 152 of the Constitution to oversee the provision of services to communities in a sustainable manner; its executive authority, in terms of s 156 of the Constitution, over matters such as stormwater management systems in built-up areas; its duty in terms of the National Environmental Management Act 107 of 1998 to prevent environmental degradation and to take reasonable steps to remedy the effects of pollution or degradation; its obligations in terms of the Disaster Management Act 57 of 2002 to prevent or reduce the risk of further disasters and to mitigate the severity or consequence of disasters which had already happened; and the authority and duty in terms of the Municipal Systems Act to promote a safe and healthy environment in its municipality. Given the above, and its inaction, the EMM breached the applicants' s 24 constitutional rights. (See [8.5]), [9.2], [9.3] and [11].)

Held, that, to the extent that the applicants sought leave to effect the necessary rehabilitation themselves in the event of the EMM failing to do so, and then to claim

the costs thereof from the EMM, such relief had to be refused. To grant such carte blanche to the applicants went far beyond what was currently necessary to protect the applicants' constitutional rights. (See [10.4].)
Held, that the applicants had satisfied the requirements for the granting of an interim interdict. Appropriate relief in the circumstances would be to grant a structural interdict, ordering the EMM to take reasonable steps to rehabilitate the river and to clean the bridge. A suitable reporting mechanism would be to order the EMM to provide the applicants with comprehensive feedback within seven days of the granting of this order, and thereafter once a month.

ECONOMIC FREEDOM FIGHTERS AND OTHERS v SPEAKER OF THE NATIONAL ASSEMBLY AND ANOTHER 2018 (2) SA 571 (CC)

Constitutional law — Parliament — Motion for removal of President of Republic — National Assembly obliged to make rules specifically tailored for s 89(1) impeachment process — Ad hoc committee inappropriate as mechanism for removal of President — Constitution, s 89(1).

Constitutional law — Parliament — Obligations — National Assembly's obligation to scrutinise and oversee executive action and to hold it accountable — Constitutional Court finding that President Zuma had violated constitutional obligations by failing to implement Public Protector's remedial action against him — Parliament obliged to determine whether grounds for impeachment existed in terms of s 89(1)*(a)* or *(b)* of Constitution — Failure to do so in breach of ss 89(1) and 42(3) — Constitution, ss 42(3) and 89(1).

In previous proceedings in the Constitutional Court, it was held that President Jacob Zuma had violated his constitutional obligations by substantially disregarding remedial action against him by the Public Protector (contained in her report on the security upgrade of the President's private residence). It was further held that the National Assembly (the NA), in later absolving the President from compliance, had failed to hold the President to account, in breach of its constitutional obligations. Subsequent to the handing-down of that judgment, steps taken to address the conduct of the President included the following: the DA moved a motion for the removal of the President in terms of s 89 of the Constitution, which was deliberated upon but was ultimately unsuccessful; the President participated in question-and-answer sessions in the NA; and motions of no confidence in the President were moved in Parliament, deliberated upon, but defeated. The applicants — the political parties EFF, UDM, COPE and the DA (an intervening party) — were dissatisfied with the action taken, and in the present matter again approached the Constitutional Court.
The majority per Jafta J determined that the essence of the applicants' case (see [130] – [131] and [154] – [157]) was that the NA had failed to hold the President to account in terms of s 89 of the Constitution. That section provided that the NA may remove (or impeach) the President from office only if certain grounds were present, including a 'serious violation' of the Constitution or the law and 'serious misconduct'. The applicants argued as follows: The NA had, in terms of s 42(3) of the Constitution, an obligation to scrutinise the violation of the Constitution by the President and to hold him accountable. The NA violated such an obligation in two ways. Firstly, it failed to put in place effective mechanisms to investigate President

Zuma's conduct to determine whether it amounted to an impeachable offence in terms of s 89(1) of the Constitution. Secondly, it failed to hold the President to account by launching an impeachment investigation in terms of s 89.
The Speaker asserted that there were already mechanisms in the NA's Rules and Orders available, of which the NA failed to make use, in terms of which impeachment could be dealt with, and which fulfilled the oversight function in s 89(1). One such mechanism was the ad hoc committee, provided for in rule 253: any member of Parliament who tabled a motion in terms of s 89(1) was entitled to also request, if necessary, the matter to be referred to an ad hoc committee for investigation into whether a ground for impeachment in terms of s 89 had been established. A key question then to be determined was whether s 89 required its own special procedure, or whether the other available mechanisms, including the provision for an ad hoc committee, were sufficient.

Held

The power to remove the President from office was available to the NA only if one of the listed grounds in s 89 of the Constitution was established. Since the determination of these matters fell within the exclusive jurisdiction of the NA, it alone was entitled to determine them. This meant that there had to be an institutional predetermination of, inter alia, what constituted a serious violation of the Constitution or serious misconduct.
For the impeachment process to commence, the NA had to have determined the existence of at least one of the listed grounds, because they constituted conditions for the President's removal. A removal where none of those grounds had been established would not be an impeachment contemplated in s 89(1). Therefore, any process for removing the President from office had to be preceded by a preliminary inquiry during which the NA determined that a listed ground existed. The form of the inquiry was up to them. Since the power to remove was institutional, the NA had to decide and facilitate the steps to be taken and the processes to be followed, at the preliminary stage, but also at the stage of actual impeachment. Without rules defining the entire process, it was impossible to implement s 89. (See [176] – [182].)
The ad hoc committee mechanism did not constitute a mechanism contemplated in s 89(1), given that it was unsuitable for the purpose of deciding impeachment. This was so, for, amongst others, the following reasons: the lack of a definition of 'serious' meant that each member of the committee might interpret the term differently; the process had no procedure set out for the committee to follow in doing its work; and because, generally speaking, parties were entitled to be represented in the committee in substantially the same proportion in which they were represented in the NA, there was the risk that the ruling party might use its majority representation to prevent an impeachment complaint from even reaching the NA. (See [188] – [194].)
In conclusion, s 89(1) implicitly imposed an obligation on the NA to make rules specifically tailored for an impeachment process contemplated in that section. The NA, in breach of that section, had failed to do so. (See [196].)
While it was not true that the NA had done nothing to hold the President to account, it had not taken the appropriate action — a motion for the removal of the President *in compliance* with s 89(1), which necessarily involved an antecedent determination by the NA as to the existence of a listed ground.
As such, the NA had failed to hold the President to account following the court's judgment in *EFF 1*, in breach of s 89(1), as well as s 42(3). (See [199] – [208].)
A just and equitable order in terms of s 172(1)*(b)* would be to order the NA to fulfil its constitutional obligations, without delay: to make rules regulating the removal of the

President in terms of s 89(1); and to make a determination whether the President had breached s 89(1) of the Constitution.

Dissenting judgments

Zondo DCJ, writing for the minority, held that the NA had put in place sufficient mechanisms to hold President Jacob Zuma accountable for failing to implement the Public Protector's remedial action (see [43], [52] and [66]). These included: question-and-answer sessions in the NA; the right of a member of the NA to move a motion of no confidence in the President; and the establishment of an ad hoc committee which, as most of the applicants had admitted, could, where an inquiry was necessary, be effectively used for a s 89 impeachment procedure (see [35] and [39]). Zondo DCJ further held that the NA had not sat idle, but that through its actions subsequent to the Constitutional Court judgment in *EFF 1*, it had held the President to account (see [88], [89], [92] and [93]). (Zondo DCJ disagreed with the majority's understanding of the applicants' claim, ie that the NA had failed to use *the s 89 procedure* to hold the President accountable; rather, their case was that the NA had failed to do *anything* to hold the President accountable for his conduct, which was incorrect (see [87]).)

Mogoeng CJ, concurring with the minority, described the majority judgment as 'a textbook case of judicial overreach — a constitutionally impermissible intrusion by the judiciary into the exclusive domain of Parliament' (see [223]). He held that it was at odds with the dictates of the separation of powers and context-sensitive realities to prescribe, as the majority did, to the NA to *always* first hold an inquiry to determine the existence of a ground of impeachment; and to direct them to create rules to regulate the entire process (see [224]). While there may be circumstances where an inquiry would be necessary, there were others where it would be an absurdity and wasteful to insist on it, that is, where, as here, the information or evidence necessary to make a decision was well established, well known or readily available (see [225], [239], [265] and [268]). A fact-finding procedure akin to motion proceedings would be practicable and appropriate in such circumstances (see [226], [228], [231] and [257]). A discretion available to the NA to decide which course was appropriate was required, and was a natural consequence of a realistic and practical application of s 89.

Further, a suitable mechanism was already available to the NA should they decide that an inquiry was appropriate prior to impeachment voting: the ad hoc committee, a process that had been previously used, and which most applicants deemed flexible and wide enough to accommodate the impeachment process (see [256]). For the court to impose its own preference in such circumstances would be to infringe the NA's constitutionally guaranteed functional independence to determine its own procedures or processes, and in breach of the principle of separation of powers (see [239], [247], [254] – [255] and [270]).

Concurring judgment

Froneman J, concurring with the majority, in response to Mogoeng CJ's criticisms pointed out that the majority judgment did nothing more than to interpret s 89(1) and direct the NA to act in accordance with the Constitution. To the extent that it directed it to create rules, that was a power the NA already had, and nowhere did the judgment prescribe the content of such rules. (See [284] – [285].)

S v RM 2018 (1) SACR 357 (GP)

Evidence — Witness — Cross-examination — Rule requiring accused to put version to prosecution witness — Not requiring whole of accused's version to be put to such witness, only material parts thereof.
Evidence — Expert witness — Duty of — Witness to present evidence that was independent product of expert, uninfluenced as to form and content by exigencies of litigation — Expert not hired gun.
General principles of liability — Criminal capacity — Sane automatism — What constitutes — Hallmark of definition of automatism was absence of evidence of premeditation — Conduct of accused indicative of voluntary goal-directed behaviour and accordingly criminally liable.

The accused stood trial in the High Court on, inter alia, two counts of murder, the deceased being her two sons aged 6 and 2, respectively. She admitted shooting her sons but claimed that she had been acting in a state of sane automatism, caused by the taking of a combination of different types of prescription and over-the-counter medication, together with a glass of wine and a popular energy drink, as well as her feelings at the time of melancholia and suicide.
During the course of the cross-examination of the first state witness, counsel for the accused insisted on putting the whole version of the accused's defence to said witness, even matters of which he would have had no knowledge at all.
The court held that there was indeed a rule that required an accused to put his or her version to prosecution witnesses. The rationale was that, if it were intended to argue that the evidence of the witness was to be rejected, he ought to be cross-examined to afford him an opportunity of answering points supposedly unfavourable to him. It did not demand, or even imply, however, that a version had to be put to a witness who in the nature of things was unable to comment thereon, because it was obviously outside his field of knowledge. Any mechanical application of the rule ought not result in an absurdity. (See [6].)
The major points of contention between the state and defence were in relation to the differing opinions of the respective expert witnesses. As to expert witnesses in general, the court remarked that expert evidence presented to the court should be, and should be seen to be, the independent product of the expert, uninfluenced as to form and content by the exigencies of litigation. They should provide independent assistance to the court by way of objective, unbiased opinion in relation to matters within their expertise. They should never assume the role of advocate and should make it clear when a particular question or issue fell outside such expertise. An expert was not a hired gun who dispensed expertise for the purposes of a particular case. They did not give evidence which went beyond the logic which was dictated by the scientific knowledge which that expert claimed to possess. The expert witness called by the defence fell short of this standard.
As to the merits of the case, the court held that it was a hallmark of the definition of sane automatism that there should be no evidence of premeditation, as there was in the present case. After the event the accused had explained what had happened, what she had done, and even why. She explained where her vehicle could be found, how she had tried to kill herself, and was then mainly concerned with the fact that her husband would kill her. There was no explanation why she had shot the eldest son twice if she was in a state of sane automatism. If there had been automatism at

the time of the shooting, she would not have known the details of her incident nor would she have known that there were not enough bullets to shoot herself. Her actions were indicative of voluntary goal-directed behaviour and not automatic behaviour at all. In the circumstances, the state had proved the necessary intent for murder and she had to be convicted of both counts.

COOPER v DISTRICT MAGISTRATE, CAPE TOWN 2018 (1) SACR 369 (WCC)

Trial — Accused — Failure to appear in court — Enquiry in terms of s 170 of Criminal Procedure Act 51 of 1977 — Procedure at — Magistrate conducting summary enquiry without informing accused of nature of proceedings, charge or his rights — Furthermore, ignoring fact that accused was represented and not involving legal representative at all — Proceedings not in accordance with justice and set aside.
Trial — Accused — Failure to appear in court — Enquiry in terms of s 170 of Criminal Procedure Act 51 of 1977 — Magistrate convicting accused of contravention of s 55 of Act instead of s 170(1) where accused out on warning.

The applicant was summoned to appear in court and duly appeared. The case was then postponed on more than one occasion, and he was warned to appear in court on 1 March 2017. On that day, suffering from chest pain, the applicant went for a consultation with a medical practitioner instead of appearing in court. His attorney appeared in court and explained his absence. It was not clear whether a warrant of arrest was authorised to be held over as the inscriptions on the record were inconsistent, the final endorsement indicating that the warrant of arrest was to be held over. When the appellant appeared in court on the next occasion, although once again represented by his attorney, he was instead told by the presiding officer to enter the witness box. The magistrate then held a warrant enquiry and sentenced him to a fine of R3000 for his failure to appear in court in contravention of s 55 of the Criminal Procedure Act 51 of 1977 (the CPA). This conviction was entered, despite the applicant not having been informed of the charge, the nature of the proceedings or his rights. In an application for the review of this conviction and sentence,
Held, that the manner in which the enquiry into the applicant's failure to attend court was conducted amounted to a substantial injustice since it infringed his constitutionally entrenched rights to a fair trial. His right to access to justice was curtailed when his legal representative was ignored, and his presence not even acknowledged during the enquiry. The court had furthermore erred in finding him guilty of contravening s 55 of the CPA instead of s 170(1), as he was on a warning to appear in court and at that stage had not been summoned to appear. The proceedings were not in accordance with justice and therefore had to be set aside.

S v AF 2018 (1) SACR 377 (WCC)

Evidence — Witness — Cross-examination — Of accused — On basis of alleged fabricated claim by complainant — Questions requiring witness to express opinion about subjective state of mind of another person permissible when issue raised in evidence-in-chief.

In an appeal from convictions of sexual offences committed against a minor, the appellant's counsel took issue with the cross-examination of the accused. It was suggested that the extensive questioning by the prosecutor in the court a quo about the basis for a fabricated claim by the complainant required him to express an opinion about the subjective state of mind of another person, and that questions directed at eliciting this type of evidence were impermissible.
Held, that the appellant had been asked in his evidence in chief to express a view as to why the complainant and her mother had made the damaging claims against him, and had initially offered a garbled explanation to the effect that the complainant's mother had probably wanted to save face amongst their friends and family when their affair had been exposed. That assertion rendered cross-examination on the point permissible.

S v PHIKA 2018 (1) SACR 392 (GJ)

Plea — Guilty — Informal plea bargain between state and accused — Magistrate not accepting plea of guilty to offence of culpable homicide and insisting that prosecutor change charge to one of murder — Matter then proceeding before same presiding officer — Proceedings improper but not set aside in circumstances where further delay prejudicial to accused.

After a night of heavy drinking, an argument developed between the appellant and the deceased, her husband of some 18 years. She claimed that the deceased had hit her in the face with a clenched fist and that she had then chased one of the deceased's drinking companions away with a knife in her hand. The deceased approached her with a brick in his hand whereupon she retaliated and stabbed in his direction with the knife. She had intended to scare him, but the blow was a fatal one. The state decided to charge her with culpable homicide.
The state and defence entered into an informal plea bargain on the basis of the facts set out above, but the magistrate refused to accept a plea of guilty to culpable homicide and insisted that the appellant be charged with the more serious offence of murder. She pleaded not guilty to that offence and did not testify. She was convicted on the count of murder and sentenced to 10 years' imprisonment.
In an appeal against the conviction it was contended that the trial was unfair because, in terms of s 105A(6)*(c)* of the Criminal Procedure Act 51 of 1977, if the court was unhappy with the plea agreement, it had to record a plea of not guilty and the trial then had to start de novo before another presiding officer.
Held, that there were no facts justifying the intervention of the magistrate when he insisted that the prosecutor prefer a more serious charge against the appellant. Her trial was sufficiently compromised to vitiate the proceedings; the facts called out for the matter to be heard before another presiding officer. In circumstances where she had been in custody for many years, and any further delay would be prejudicial to her, the preferable course would be for the court to proceed to consider the merits. (See [17] and [19].)
Held, further, that in the light of the poor nature of the evidence led by the state, the finding of murder could not stand, and it had to be set aside and replaced with a conviction of culpable homicide. The sentence was reduced to a sentence of five years' imprisonment.

S v SISHUBA 2018 (1) SACR 402 (WCC)

Robbery — What constitutes — Forced transfer of money by electronic means — Such conduct could be subject of crime of robbery.

The accused stood trial in the circuit court on two counts of murder and two counts of robbery with aggravating circumstances. The crimes were perpetrated on the elderly employers of his friend who had also participated in the crimes, but had escaped to Lesotho. One of the counts of robbery involved the forced transfer of money in a bank account belonging to the victims, to another account in Lesotho. The transfer was done by electronic means during the course of the robbery. The court raised the question whether such an electronic transfer of money could constitute the offence of robbery.
Held, that, if the crime of theft, which was an essential element of the crime of robbery, could be committed in such a manner, then, as a general proposition, where money in an incorporeal form was stolen through the use of violence or threat of violence, the crime of robbery could similarly be committed. On the facts of the present matter, the crime of robbery with aggravating circumstances in respect of this count had accordingly been proved. (See [93] – [95].) The accused was convicted on all four counts.

S v MASENYA 2018 (1) SACR 407 (GP)
Rape — Sentence — Life imprisonment — Prescribed minimum sentence in terms of Criminal Law Amendment Act 105 of 1997 — When applicable — Conviction at same time and in same proceedings for multiple offences of rape — Intention of legislature in enacting item *(a)*(iii) of part I of sch 2 to Act was that convictions had to have occurred before proceedings and convictions in trial thereafter — Sentences of life imprisonment on each count set aside and replaced with 10 years.

The appellant was convicted in a regional magistrates' court of 11 counts of rape committed between May 2008 and September 2011. The magistrate took the view that, once an accused was convicted in the same trial and on the same day of multiple counts of rape, he fell within the ambit of item *(a)*(iii) of part I of sch 2 to the Criminal Law Amendment Act 105 of 1997, and a sentence of life imprisonment was obligatory.
Held, that this approach was not justified, by a proper interpretive exercise, and was clearly wrong. The intention of the legislature, as it appeared from the express wording of the provision, was that such convictions had to have occurred before the proceedings and convictions in a particular trial thereafter. (See [10].) The sentences of life imprisonment on all of the counts, except count 8 (which involved the rape of a minor), were set aside and replaced with a sentence of 10 years' imprisonment on each count.

S v STEYN 2018 (1) SACR 410 (KZP)

Evidence — Witness — Calling by court — Section 186 of Criminal Procedure Act 51 of 1977 — When appropriate — Defence alleging that statement tampered with and calling expert handwriting analyst whose evidence was inconclusive — Court only calling witness in terms of provision because defence expert had not examined

original document, not knowing at time that witness would refute defence evidence — Nothing improper in court's conduct.

The appellant stood trial in a magistrates' court on a charge of contravening s 65(2) of the National Road Traffic Act 93 of 1996, in that he had driven a motor vehicle whilst the concentration of alcohol in his blood was 0,10 grams per hundred millilitres. The state relied on a certificate issued under ss 212(4)*(a)* and (8)*(a)*of the Criminal Procedure Act 51 of 1977 (the CPA) relating to the analysis of the sample of blood taken from the appellant.
The appellant disputed that the sample tested was taken from him and contended that certain handwritten parts of the statement of the nurse who had taken the blood sample were not in her handwriting, but had been inserted by another person. The nurse denied these allegations in cross-examination.
After the close of the state's case, the defence called an expert handwriting analyst who testified that there had been 'disturbance or interference' to the surface of the paper that could have been caused by water or an eraser. He had, however, not done his test on the original of the paper but a scanned copy. The defence then closed its case and the matter was remanded for argument.
The parties subsequently presented argument and the matter was then again postponed for judgment, but on resumption of the case the court called an expert witness in terms of s 186 of the CPA, who had examined the original statement and a carbon copy thereof. After hearing this evidence, the court convicted the appellant.
On appeal the appellant contended that the court's witness had been procured solely for the purposes of rebutting the expert, and for curing the defects in the state's case in order that the magistrate might convict the appellant.
Held, that the magistrate only had the inconclusive evidence of the expert witness before her to substantiate the appellant's version, and was of the view that the reason why the defence's expert witness could not come to any definitive conclusion was because he had examined a scanned copy of the statement and not the original. She therefore decided that the 'best evidence rule' should be applied and that the original document ought to be examined by an expert. She would not have known at the time what the evidence of the court's witness would be. It therefore could not be said that the magistrate's decision to have the original statement examined was done to impeach the testimony of the defence witness, or that the decision to call the witness was improper in those circumstances. (See [30] – [31].) The appeal was dismissed.

S v WANG AND ANOTHER 2018 (1) SACR 426 (NWM)
Corruption-sentence — Offering incentives to employee of mining company to persuade employer to purchase machinery from foreign manufacturer — Representatives of manufacturer sentenced to 10 and five years' imprisonment, respectively — Sentences confirmed on appeal.

The appellants, two Chinese nationals, appealed against the sentences imposed on them in a regional magistrates' court for two counts of corruption. The first appellant was sentenced to 10 years' imprisonment on the first count and to five years' imprisonment on the second count; and the second appellant, the interpreter for the first appellant, was sentenced to five years' imprisonment on each count. The sentences were ordered to run concurrently.

They pleaded guilty and, in a statement handed into court in terms of s 112 of the Criminal Procedure Act 51 of 1977, admitted that, after they had exhibited their employer's mining machinery at a trade fair in Johannesburg, they invited the employee of a mining company and his family to dinner at a restaurant where they handed out gifts to them to the value of R70 000. They also offered the employee 5% commission on the sale of goods to his employer and later increased this to 10%. In addition, they gave him a credit card (in the name of another person) for his personal use and to cover his expenses in securing business for the Chinese principal.
The appellants were arrested after a further meeting with their putative partner that had been arranged in cooperation with the police. It was contended, inter alia, on their behalf, that the credit card could never have been used by the employee as it had a different person's name on it. It was merely a clumsy arrangement that could not contribute anything material to the recipient. It was also contended that the court a quo had erred in describing the appellants as 'filthy rich' when they were merely employees of the Chinese company.
Held, that a thorough analysis of the record of proceedings revealed that there had been no misdirection on the part of the trial court. The fact that it did not specifically mention in the judgment that it took into consideration the factors referred to by counsel did not necessarily mean that the court had overlooked those facts. (See [24] – [26].)
Held, further, that the sentences imposed were neither grossly nor shockingly inappropriate in the circumstances. (See [38].) The appeals were dismissed.

FREEDOM UNDER LAW (RF) NPC v NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS AND OTHERS 2018 (1) SACR 436 (GP)

Prosecution — National Director of Public Prosecutions — Conduct of — Inquiry into and suspension of Acting *NDPP* and Special Director of Public Prosecutions — Adverse comments by courts having led to their being struck from roll of advocates — Essential for State President to act swiftly and decisively in terms of s 12(6)*(a)* of the National Prosecuting Authority Act 32 of 1998 to hold inquiry and suspend officials.
Prosecution — National Director of Public Prosecutions — Withdrawal of charge by — Review of such decision — Decision to withdraw charge based on material error of law — Decision to withdraw had to be set aside.

The applicant took on review a decision by the National Director of Public Prosecutions (the NDPP) (Mr Abrahams), alternatively by the second respondent, the regional head of the Specialised Commercial Crimes Unit, not to prosecute the third respondent, a Deputy NDPP (Ms Jiba), on charges of perjury and fraud. The applicant also sought an order reviewing and setting aside the decision by the fifth respondent (the State President) not to suspend Ms Jiba, and the sixth respondent, a Special Director of Public Prosecutions, and an order compelling the State President to suspend them and institute an enquiry into their conduct.
The applicant alleged that Ms Jiba and the sixth respondent took decisions in several high-profile cases that attracted negative and scathing judicial comment. These comments, the applicant alleged, raised serious questions of impropriety and their fitness to hold office as officials in the National Prosecuting Authority (the NPA). It contended that, despite the State President being aware of these comments, he

failed to suspend the two officials and institute enquiries into their fitness to hold office, as provided for by s 12(6)*(a)* of the National Prosecuting Authority Act 32 of 1998 (the NPA Act). In one of those cases, the court found that Ms Jiba's conduct in exercising her powers to issue authorisations in terms of the Prevention of Organised Crime Act 121 of 1998 (POCA) against a major general in the South African Police Service, and the manner in which she conducted her defence of the review application, was unsatisfactory and not befitting of her office.
A new NDPP was appointed in October 2013 who attempted to persuade the State President to institute an enquiry into Ms Jiba's conduct, but the State President declined to do so. The NDPP then himself preferred charges of perjury against her. That prosecution was entrusted to one Mr Hofmeyr. Later, when Mr Abrahams was appointed NDPP, he relieved Hofmeyr of the oversight of the case and requested the second respondent to review it and provide him with an opinion on it. The prosecuting team recommended a prosecution, but the second respondent recommended the withdrawal of the charges on the basis that what Ms Jiba had done was protected under the provisions of s 78 of POCA. Mr Abrahams then withdrew the charges against Ms Jiba.

In the present proceedings, all members of the court agreed that s 78 of POCA did not find application in the case. When Ms Jiba made the statements in her affidavit in opposing the review application brought by the major general, she was acting as the NDPP and her statements in the affidavit had nothing to do with the application of POCA. The majority of the court also held that the reasons advanced for the withdrawal were based on a material error of law which fell short of the legality expected in a rational decision.
It held, furthermore, that the defence, that the applicant had not exhausted its internal remedies by seeking a review of a decision to prosecute, had no merit. The NPA derived its power from s 179 of the Constitution and the NPA Act, and its mandate was to institute criminal proceedings on behalf of the state. Once the decision had been made to prosecute, the NPA could review that decision in the manner prescribed by s 179(5)*(d)* of the Constitution. The exercise of that power had to not be manifestly at odds with the purpose for which the power was conferred. The court concluded that the means selected to withdraw the charges against Ms Jiba were not rationally related to the NPA's objectives, and the decision was irrational and had to be set aside. (See [60] – [61].)
The consequence of the setting-aside of that decision was that the charges and proceedings were automatically reinstated, and it was for the executive authorities to deal with them. (See [62].)
In respect of the State President's failure to suspend and institute enquiries against Ms Jiba and the sixth respondent, the respondents contended that the decision of the Gauteng Division, Pretoria, to strike them from the roll of advocates, was on appeal to the Supreme Court of Appeal and, until that matter was finalised, it was appropriate for the State President not to take any action in terms of s 12(6)*(a)* of the NPA Act.
The majority of the court held that this was not an excuse for the State President not to act for at least a period of more than a year, even after he had been requested to institute such an enquiry by the NDPP. The adverse findings and comments made by the courts against them had a direct effect on and eroded the public confidence in the NPA as a law-enforcement agency. It was therefore essential for the President to act decisively and swiftly when the situation called for such action. The continued

presence of such high-profile public officers in their positions in the circumstances, even for one day longer, ought not be countenanced. The President's failure to act in the circumstances constituted a dereliction of his constitutional and statutory duties in terms of s 179 of the Constitution read with s 12(6)*(a)* of the NPA Act, and his failure to act had to be reviewed and set aside. (See [94] – [95].)
It held, furthermore, that there was no doubt that the appeal process might have an impact on the remedy sought, and to order the President to suspend and hold enquiries might result in an exercise running parallel with the appeal process. That could be a waste of resources if the appeal process failed. Therefore, the order had to be stayed.

Held, per Wright J, that, although the decision by the State President not to institute enquiries against Ms Jiba and the sixth respondent was reviewable on the basis of irrationality, this did not mean that the officials should be suspended. The question of a possible suspension arose only if an enquiry was instituted by the President: it would be inappropriate for the court to consider this question because it was for the President to decide whether such enquiries should be held and, if so, whether suspensions should take place pending the enquiries. In the instant case more than two years had passed since the impugned decisions were taken and water may have flowed under the bridge since the last affidavits were filed. There might be facts or circumstances relevant to the rationality or otherwise of such a decision, unknown to the court at the date of hearing.

All SA LAW REPORTS APRIL 2018

ABSA Bank Ltd and related matters v Public Protector and others [2018] 2 All SA 1 (GP)

Administrative law – Public Protector – Report by Public Protector – Review – Argument that the review application was outside of the 180-day period prescribed by the Promotion of Administrative Justice Act 3 of 2000 – Court rejected that argument as the decision to investigate was not under attack, but the conclusions, findings and remedial action, consequent upon her investigation, was the subject-matter of the review applications.

Administrative law – Public Protector – Report by Public Protector – Review – Court held that the decision on remedial action constituted administrative action, both according to the provisions of the Promotion of Administrative Justice Act 3 of 2000 and the principle of legality.

Three applications by separate entities were brought against the Public Protector, for the review of a report issued on 19 June 2017. In the report, the Public Protector concluded that the South African Government had improperly failed to implement a report (the “CIEX report”) which dealt with alleged stolen State funds, after commissioning and paying for the report. It was held that the government and the Reserve Bank had improperly failed to recover R3,2 billion from Bankorp Limited/ABSA, and that the South African public was prejudiced. As a result of those conclusions, the Public Protector prescribed certain remedial actions. That led to the South African Reserve Bank, the Minister of Finance and the Treasury, and ABSA,

respectively, instituting review proceedings, challenging the report. The applications were consolidated before the present Court.

The Reserve Bank instituted the review in terms of Uniform Rule 53 of the Uniform Rules of Court. It requested the court to review and set aside the whole of paragraphs 7.1.1, 7.1.1.1 and 7.1.2 of the report. ABSA's application was to review and set aside the remedial action in paragraphs 7.1.1, 7.1.1.1 and 7.1.2, as well as paragraph 8.1, which imposed the obligation on the second respondent ("SIU") and the fourth respondent the South African Reserve Bank. The application was brought in terms of the Promotion of Administrative Justice Act 3 of 2000, alternatively the principle of legality. The Minister and Treasury's review application was also based on the Promotion of Administrative Justice Act, alternatively the principle of legality.

The review applications were based on the contentions that the Public Protector was not authorised either by the Public Protector Act 23 of 1994or any other law and therefore acted contrary to section 6(2)(a)(i) of the Promotion of Administrative Justice Act. Various other contraventions of the latter Act were alleged.

The Public Protector raised two points *in limine*. The first was that the remedial action was not administrative action. The second point was that there was an unreasonable delay in bringing the review applications without a proper explanation for the delay.

Held – The Public Protector's assertion that the remedial action in the report was not administrative action as it did not have a direct external legal effect on the applicants' rights was rejected. The Court rejected the Public Protector's averment that she had merely made recommendations and not findings. She did not stop at requiring the SIU to investigate the matter, but went further by informing the SIU that ABSA was guilty. That violated the principle of legality. The Court held that the decision on remedial action constituted administrative action, both according to the provisions of the Promotion of Administrative Justice Act and the principle of legality, and therefore the first point *in limine* was dismissed.

According to the Public Protector the review application was out of time as it should have been brought in 2012 when the parties became aware that she was investigating the matter. According to her, the review application was outside of the 180-day period prescribed by the Promotion of Administrative Justice Act. The Court rejected that argument as the decision to investigate was not under attack, but the conclusions, findings and remedial action, consequent upon her investigation, which was the subject-matter of the review applications. It was held that the proceedings were instituted without any unreasonable delay and before the expiry of 180 days.

The grounds of review relating, *inter alia*, to the lawfulness of the remedial action, the fact that the Public Protector had acted *ultra vires*, and procedural unfairness, were upheld.

The Court therefore issued an order dismissing the Public Protector's preliminary points and setting aside the remedial action impugned in all three applications.

City of Cape Town and another v Da Cruz and another [2018] 2 All SA 36 (WCC)

Property – Building plans – Approval of – Section 7(1) of the National Building Regulations and Building Standards Act 103 of 1977 – If a local authority, having considered a recommendation by the Building Control Officer, is satisfied that an application for the approval of building plans complies with the requirements of

the National Building Regulations and Building Standards Act and any other applicable law it shall grant its approval in respect thereof – Section 7(1)(b) provides that if it is not so satisfied, or if it is satisfied that the building to which the application relates is to be erected in such a manner or will be of such nature or appearance that it will probably or in fact be "unsightly or objectionable", or will derogate from the value of adjoining or neighbouring properties, it shall refuse to grant its approval – Decision-maker who has to consider an application for the approval of building plans has to be satisfied, not only that the plans complied with the necessary legal requirements, but also that none of the disqualifying factors set out in section 7(1)(b)(ii) would be triggered by the erection of the building concerned.

The first respondent owned a unit in a sectional title scheme (the "Four Seasons") in which the second respondent was the body corporate. A trust, represented herein by the second appellants, owned property adjoining that on which the sectional title scheme was situated. The trust's intention was to redevelop its property into an upmarket hotel complex.

The properties were located within the geographic area of the first appellant (the "City"). In terms of the City's zoning scheme, the area in which the buildings were situated was zoned for mixed use, thereby permitting both commercial and residential buildings to be erected. That zoning allowed for so-called 100% coverage ie property owners had the right to build over their entire erf, and unlike areas which were zoned residential there was no stipulation in respect of any setback, in terms of which building works could not extend up to a common boundary and could only go up to a set building line. Despite the lack of legal impediment, in practice, habitable spaces with windows or balconies were not usually constructed along common boundaries. However, the developers of the Four Seasons building did not follow that convention. The first seven floors were for use as parking, and from the eighth floor upwards, apartments were to face towards the common boundary with the erf owned by the trust. Building regulations required that the apartments be stepped back a distance of approximately 3m from the common boundary. The building plans submitted by the developers made provision for the erection of balconies for the eighth floor apartments (over the roof of the garage level underneath), which extended over the 3m setback up to the common boundary. The plans were approved by the City's planning department.

In October 2017, the trust delivered its plans for its hotel development to the City. The plans, if implemented, would result in the top three storeys of the hotel virtually abutting as a blank and solid wall, against the apartments on the 8th to 10th storeys of the Four Seasons building, along the common boundary. The affected owners of units in the Four Seasons building, on discovering that, lodged an objection with the City, and when that failed, they launched an application for an interdict preventing any further building work pending the outcome of an application for review of the approval of the building plans. The interdict was granted, and the review was eventually conceded by the City and the trust, and by agreement between the parties an order was taken in August 2013, whereby the City's approval of the plans was set aside. In October 2014, the Four Seasons body corporate launched an application for an order directing that the partially constructed building works on the trust's property be demolished. In response, the trust indicated that a new application for approval of building plans had

been submitted to the City. The City's approval of the plans led to another application for review being brought by the respondents. The review court set aside the approval of the plans by the City, resulting in the present appeal.

Held – The matter concerned the application of section 7(1) of the National Building Regulations and Building Standards Act 103 of 1977, which regulates the conditions under which a local authority shall either grant or refuse approval in respect of building plans, which the Act requires must be submitted to, and approved by it, before any building may be erected.

Section 7(1) has two parts. Section 7(1)(a) provides that if a local authority, having considered a recommendation by the Building Control Officer, is satisfied that an application for the approval of building plans complies with the requirements of the National Building Regulations and Building Standards Act and any other applicable law it shall grant its approval in respect thereof. Section 7(1)(b) provides that if it is not so satisfied, or if it is satisfied that the building to which the application relates is to be erected in such a manner or will be of such nature or appearance that it will probably or in fact be "unsightly or objectionable", or will derogate from the value of adjoining or neighbouring properties, it shall refuse to grant its approval. The court approved the test applied in the case of *Walele v City of Cape Town and others* 2008 (11) BCLR 1067(2008 (6) SA 129) (CC), where it was stated that the provisions of section 7 had to be construed not in a literal but in a purposive manner, which took account not only of a landowner's rights of ownership, but also the rights of owners of neighbouring properties which might be adversely affected by the erection of buildings in terms of plans which had been authorised. The decision-maker who has to consider an application for the approval of building plans has to be satisfied, not only that the plans complied with the necessary legal requirements, but also that none of the disqualifying factors set out in section 7(1)(b)(ii) would be triggered by the erection of the building concerned. The City's Building Control Officer in this matter was found to have applied the wrong test. He failed to set out and evaluate the possible effect which the construction on the trust's property would have on the owners of units in the Four Seasons building, from their perspective.

The ensuing decision, taken by the Head: Building Development Management, was shown to have been flawed. Although he insisted that he had in fact applied the correct test in evaluation of the application, that was not borne out by the evidence. The Court pointed to numerous indications that both the Head: Building Development Management and the Building Control Officer were under a misapprehension as to the test which was to apply, and that they in fact wrongly adopted the interpretation espoused in the case of *True Motives 84* (*Pty*) *Ltd v Madhi and another* (*Ethekwini Municipality as amicus curiae*) [2009] 2 All SA 548 (2009 (4) SA 153) (SCA), instead of that in the *Walele* case.

The court *a quo* upheld the challenge to the second approval of the building plans on the grounds that the decision was materially influenced by an error of law, and that it was taken because relevant considerations were not taken into account. On appeal, it was held that the court *a quo* could not be faulted in regard to its findings that both the principal functionaries who were responsible for determining the outcome of the application laboured under a mistaken apprehension as to the relevant legal principles and erred in numerous respects in regard to their application thereof. The respondents' grounds of review were confirmed as being sound.

Finally, the appellants argued that it is not in every instance of potential disfigurement, unsightliness or objectionableness that there will necessarily be a derogation of value, and the subsections of section 7(1)(b) must not be read as if that is so. The Court agreed that there may well be instances where a building is objectionable or unsightly, or disfigures an area, but does not necessarily result in derogation of value to a building which adjoins it. However, that did not mean that what the court below did was to wrongly conflate or extend the test for derogation of value to the disqualifying factors referred to in subsections (bbb) and (ccc). Whether or not a proposed building will disfigure an area, be unsightly or objectionable, or derogate from the value of adjoining properties requires a judgment call that can only properly be made if it has regard for the area concerned and the neighbouring buildings in it.

Finding no merit in any of the appellants' assertions, the Court dismissed the appeal.

City of Cape Town v Really Useful Investments 219 (Pty Ltd [2018] 2 All SA 65 (WCC)

> Environment – Dumping of landfill on property – Interference with floodplain – Contravention of Stormwater Management By-Law of 2005 – City authorised in terms of section 10(1) and 10(3) of the Stormwater By-law to enter upon the property and to undertake the necessary work to remove the soil, general rubble and fill placed on the land.
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> Words and phrases – "floodplain" – Stormwater Management By-Law of 2005 – Means the land adjoining a watercourse which, in the opinion of the Council, is susceptible to inundation by floods up to the one hundred year recurrence interval.
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> Words and phrases – "stormwater" – Stormwater Management By-Law of 2005 – Means water resulting from natural precipitation and/or the accumulation thereof and includes groundwater and spring water ordinarily conveyed by the stormwater system, as well as sea water within estuaries, but excludes water in a drinking water or waste water reticulation system.
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> Words and phrases – "stormwater system" – Stormwater Management By-Law of 2005 – Means both the constructed and natural facilities, including pipes, culverts, watercourses and their associated floodplains, whether over or under public or privately owned land, used or required for the management, collection, conveyance, temporary storage, control, monitoring, treatment, use and disposal of stormwater.
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> Words and phrases – "watercourse" – Stormwater Management By-Law of 2005 – Means a river, spring, stream, channel or canal in which water flows regularly or intermittently, and a vlei, wetland, dam or lake into which or from which water flows, and includes, where relevant, the bed and the banks of such watercourse.

The respondent owned land in Hout Bay, which it was allowed to develop commercially as a secure residential estate on the beach. Between the land and the Disa River was an undeveloped area which, when the river was in spate, was likely to be flooded. Over the years parts of the property were levelled to create platforms on which dwellings were located. In the process of further developing the property, the respondent attempted to create additional platforms on which to build more dwelling units. That included developing the property eastwards towards the river. To that end,

in March 2011, it began dumping fill material in an area adjacent to the river, believing that it was entitled to do so by virtue of the Western Cape Regional Services Council ("RSC") planning approval. The applicant (the "City") was the lawful successor to the RSC, and the local authority having jurisdiction over the area. Upon being alerted thereto, it took the view that the dumping by the respondent was unlawful in that it encroached upon the floodplain of the river, and it issued a compliance notice in terms of section 10 of its Stormwater Management By-Law of 2005 (the "By-law"). In May 2011, it issued a directive ("the ECA directive") in terms of section 31A of the Environment Conservation Act 73 of 1989. Although certain remedial steps were purportedly taken by the respondent, the City contended that those were insufficient and it commenced the present proceedings to procure orders compelling the respondent to comply with both the notice and the ECA directive.

Opposing the application, the respondent contended that it did not have to comply with the stormwater notice because it was invalid; that the notice could be ignored because it had in any event been replaced by the ECA directive; and that it had complied fully with the ECA directive, as it claimed it fell to be interpreted.

The City's case was that, not only did the allegedly proscribed activity contravene section 5 of the By-law, it also constituted a breach of the Environment Conservation Act in that, in the ECA directive of 10 May 2011, the infilling of the floodplain resulted in (or had the potential to result in) the environment being seriously damaged, endangered or detrimentally affected, hence the entitlement to issue the directive.

Held – The Disa River was a watercourse which, together with its adjacent floodplain which encroached on the property, comprised a stormwater system which enjoyed the flood risk protection contemplated in section 5 of the By-law. It being common cause that with effect from March 2011, the respondent had deposited fill within the 1:100 year floodplain, that activity, *prima facie*, fell foul of the prohibitions contained in section 5(a) and (c) of the By-law. Its conduct resulted in the displacement of water by virtue of the placing of a physical obstruction in the river.

An expert opinion was placed before the Court that the flood levels under discussion had increased due to the dumping. That had to mean that the extent of flooding (whenever it might occur) had become greater and the risk to properties within the floodplain of the river had increased. In the result, and in the absence of the requisite consent from the City, the aforesaid activity on the part of the respondent fell squarely within the prohibitions of the By-law. The Court declared such conduct unlawful, and further declared that the applicant was authorised in terms of section 10(1) and 10(3) of the Stormwater By-law to enter upon the property and to undertake the necessary work to remove the soil, general rubble and fill placed on the land after March 2011. The respondent was directed to comply with the ECA directive within 45 days of the making of the court's order.

Commissioner for the South African Revenue Service v Short and another [2018] 2 All SA 100 (WCC)

Tax – Sale of immovable property – Transfer duty – Calculation of – Contention that one of the two purchasers had acquired a right of habitation in the property, thereby rendering the sale made up of two separate transactions – For transfer duty purposes, an objective determination had to be made whether one or two transactions were in fact involved – Terms of sale agreement pointing to there

having been only a single indivisible transaction contemplated by the contracting parties.

The respondents had purchased an apartment in a sectional title development for a purchase price of R4,2 million. Pursuant to the terms of the sale agreement, and against payment of the purchase price, ownership of the apartment and its stipulated associated amenities was transferred to the first respondent subject to a right of *habitatio* registered in favour of the second respondent. Transfer duty, as set forth in section 2 of the Transfer Duty Act 40 of 1949, became payable by the respondents within six months of the conclusion of the agreement. In terms of section 14, the parties to any transaction by which property is acquired are required to furnish declarations in the prescribed form to the appellant (the "Commissioner") for transfer duty purposes. The respondents completed separate transfer duty declarations, thereby implying that two transactions had been entailed. The first respondent declared that she had acquired the bare *dominium* of the property for a consideration of R2 869 103,40, and the second respondent separately declared that he had acquired the right of *habitatio* for a consideration of R1 330 896,60. No mention of any consideration in the aforesaid amounts was made in the deed of alienation, but added together they made up the sum of R4,2 million that was stipulated in the contract as the purchase price. The seller, on the other hand, made a single transfer duty declaration, indicating that transfer duty was payable on R4,2 million "being total consideration". The implication thereof was that the seller considered that its disposal of the property had involved a single transaction.

Treated as separate transactions in accordance with the respondents' transfer duty declarations, the total amount of duty payable would be R225 998,49. The Commissioner determined, however, that the transfer duty fell to be calculated in the amount of R281 000 with reference to the agreed consideration of R4,2 million in respect of a single transaction. The respondents paid the transfer duty in the amount assessed by the Commissioner under protest. They then appealed to the Tax Board against the Commissioner's determination. The appeal was upheld and thereafter, on rehearing in terms of section 115 of the Tax Administration Act 28 of 2011, the appeal was also upheld by the Tax Court. That led to the present appeal by the Commissioner.

Held – The appeal turned on whether there was one transaction, as contended by the Commissioner, or two transactions, as contended by the respondents. In order for the respondents' contention to prevail, the reservation of a right of *habitatio* to the second respondent would have to be an acquisition that was independent of, and not integral to, the transfer of title of the property from the seller to the first respondent. For transfer duty purposes an objective determination had to be made whether one or two transactions were in fact involved. That turned on the proper construction of the parties' contract. It was necessary to examine the agreement to determine whether it established that the rights of the respondents to acquire property thereunder involved an integral transaction. Central to the exercise of interpreting a written contract is construing the language used in the deed with appropriate regard to the particular context. Within the limits of the language used by the parties read in its context, it was also necessary to approach the construction of the contract with sensible regard to the business or practical result the parties apparently sought to achieve thereby.

The Court found that there were numerous salient pointers in the deed of agreement, to there having been only a single indivisible transaction contemplated by the contracting parties. Furthermore, the ordinary import of the language of the contract, when read as a whole, went against the meaning contended for by the respondents.

In upholding the respondents' appeal, the Tax Court was distracted by the fact that each of the purchasers stood to acquire separate and distinctive rights in the property under the agreement. In that regard, it erred. The Tax Court also gave no consideration to the effect of the respondents having undertaken joint and several liability for the whole purchase price.

The appeal was, accordingly, upheld.

Economic Freedom Fighters and others v Speaker of the National Assembly and others [2018] 2 All SA 116 (WCC)

> Constitutional and Administrative Law – Parliament – Disruption of proceedings – Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004 – Sanction against disruptive members – Lawfulness – Court confirmed the National Assembly's entitlement to enforce its rules and to protect the orderly conduct of proceedings in Parliament.

On 21 August 2014, the President of the country appeared in Parliament to answer questions in terms of his constitutional responsibility to account to Parliament. His appearance was met with chanting by the applicants, demanding that he repay money referred to in a report by the Public Protector. As a result of the applicants' conduct, the proceedings descended into chaos. The Speaker of the National Assembly suspended the proceedings, and referred the incident to the Powers and Privileges Committee in terms of rule 194 of the Rules of Parliament, for investigation into whether the conduct of the applicants constituted contempt in terms of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004.

Defending their conduct, the applicants claimed to be fulfilling their constitutional duty to ensure that the National Assembly complied with its duties. They accused the National Assembly of failing to hold the President accountable in relation to the flagrant breaches of the Constitution referred to in the Public Protector's report.

A two-pronged application was brought by the applicants. In Part A, they sought urgent interim relief interdicting the Speaker or anyone acting under her authority from implementing Parliament's decision to impose a sanction of suspension without remuneration on the applicants. The relief in Part A, which was sought pending the outcome of the application in Part B, was granted. In Part B, the applicants sought a declaratory order that the decision taken by the National Assembly on 27 November 2014 to adopt the report of the Powers and Privileges Committee suspending the applicants without remuneration was constitutionally invalid and unlawful and is of no force or effect; the review and setting aside of the disciplinary proceedings against the second to twenty first applicants; and the review and setting aside of the report of the Committee. Declaratory orders confirming that the National Assembly and the Speaker had failed to carry out their duties were also sought.

Held – The case was not concerned with the merits of the Public Protector's report, but with the manner in which the second and further applicants conducted themselves in the National Assembly on 21 August 2014 and the consequences thereof.

The applicants' submissions were that the disciplinary proceedings against them should be set aside due to procedural unfairness and unreasonableness. They averred that the composition of the Committee rendered the disciplinary proceedings unreasonable and procedurally unfair in that the Committee could have been reconstituted to ensure political balance and fairness. It was also averred that the failure to take the written representations into account constituted a material irregularity that tainted the entire process. Another complaint was that certain witnesses were not called to give evidence. None of those arguments were sustainable. The Court confirmed the National Assembly's entitlement to enforce its rules and to protect the orderly conduct of proceedings in Parliament.

In a minority judgment, the point of departure was on the question of the lawfulness of the penalties imposed on those members categorised in the judgment as groups A and B all of whom were subjected to the penalty of suspension from the House in terms of section 12(5)(g) of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act. The minority judge found that there was no satisfactory proof that the Committee and the National Assembly applied their minds to the question of whether a lesser penalty than suspension would suffice.

Governing Body, Hoërskool Overvaal and another v Head of Department of Education Gauteng Province and others [2018] 2 All SA 157 (GP)

Administrative law – Principle of legality – An administrator exercising certain powers, must do so only within the ambit of the powers vested in him or lawfully conferred upon him – In ignoring the general norms and standards pertaining to language policy in terms of section 6 of the South African Schools Act 84 of 1996, the District Director acted in conflict with the constitutional principle of legality and the resultant decision was unlawful.

Education – Public schools – Instruction by District Director to Afrikaans-medium public school to admit 55 English-speaking learners – Application for review – Capacity of a school to accommodate a learner, relative to the capacity of other schools in the district, is a factor to be taken into account by the District Director in placing a learner at a particular school.

The second applicant was an Afrikaans-medium public school, with the first respondent being its governing body. The first four respondents were the relevant provincial and national government officials. The parties were embroiled in a dispute arising from the second respondent's instructing the school to admit 55 English-speaking Grade 8 learners for the 2018 school year.

The school was located in a district in which there were five other high schools in relatively close proximity to each other. The applicants alleged that the school was operating beyond its capacity, while the respondents contended that the school had not yet reached full capacity and could accommodate more learners in 2018. One of the main areas of dispute related to the number of learners per class which ought to

be accommodated. There were currently 36 learners per class, but the respondents contended that there should be 40.

Held – In terms of the regulations relating to the admission of learners to public schools (the "Admission Regulations") as promulgated under the Gauteng Schools Education Act 6 of 1995, the second respondent, in placing a learner at a particular school, had to consider the proximity of the school from the learner's home, and the capacity of the school to accommodate the learner, relative to the capacity of other schools in the district. Of all the high schools in the area in this case, only the second applicant and one other were single-medium Afrikaans schools.

The language policy of a school may be determined by the school's governing body. The latter may also determine the school's admission policy.

Relevant to the dispute regarding capacity, was evidence that neighbouring English-medium schools (the sixth and seventh respondents) had capacity to accommodate more than 55 Grade 8 English-speaking learners for 2018. In addressing the subject of capacity, the court had regard to the Admissions Regulations referred to above. Regulation 5(8) provides that notwithstanding the school's admission policy, where a learner has not been placed at any school within 30 days after the end of the admission period, the District Director may place such learner at any school which has not been declared full and in respect of which there are no remaining unplaced learners on a waiting list. It was found that the first respondent, who was the only official authorised to determine the objective entry level learner enrolment capacity, never determined such capacity. The Court was of the view that the second applicant had reached its capacity and ought to be declared full. The first and second respondents had also not considered the capacity of the school relative to other schools in the district.

In arriving at its decision, the Court looked at the issues of language policy and legality. The applicants' review application was based on the review grounds set out in section 6 of the Promotion of Administrative Justice Act 3 of 2000, as well as the principle of legality. In terms of that principle, an administrator exercising certain powers must do so only within the ambit of the powers vested in him or lawfully conferred upon him. The second respondent's decision, in forcing the single-medium Afrikaans school to place the 55 English-speaking learners at short notice and in the face of compelling evidence that the school was full to capacity, was found to have ignored the general norms and standards pertaining to language policy in terms of section 6 of the South African Schools Act 84 of 1996. As a result, the Court held that the second respondent's decision offended against the principle of legality. There was no authority on which the second respondent could justify having overridden the school's language policy. In doing so, she had therefore exceeded her powers.

The Court's conclusions were therefore as follows. On the overwhelming weight of the evidence and for the reasons mentioned in the judgment, it was found on the probabilities that the school had no capacity to receive the 55 learners in question. By contrast, the sixth and seventh respondents had sufficient capacity to accommodate those learners. As the relevant respondents had acted in conflict with the constitutional principle of legality, the impugned instruction was unlawful and fell to be set aside. The second respondent's conduct also fell within the ambit of several grounds of review in section 6 of the Promotion of Administrative Justice Act.

The manner in which the respondents chose to litigate this matter resulted in the Court making a punitive costs order against them.

Mlungwana and others v S and another [2018] 2 All SA 183 (WCC)

> Criminal law and procedure – Conviction of contravening section 12(1)(a) of the Regulation of Gatherings Act 205 of 1993 for unlawfully and intentionally convened a gathering in protest against poor service delivery – Appeal against conviction and application for order of constitutional invalidity of section 12(1)(a) – Criminal sanctions envisaged in section 12(1)(a) constituting an unjustifiable limitation on the exercise of rights conferred by section 17 of the Constitution.
>
> Words and phrases – "demonstration" – Regulation of Gatherings Act 205 of 1993 – Includes any demonstration by one or more persons, but not more than 15 persons, for or against any person, cause, action or failure to take action.
>
> Words and phrases – "gathering" – Regulation of Gatherings Act 205 of 1993 – Refers to any assembly, concourse or procession of more than 15 persons in or on any public road or space at which the principles, policy, actions or failure to act of any government, political party or political organisation, whether or not that party or organisation is registered in terms of any applicable law, are discussed, attacked, criticised, promoted or propagated; or held to form pressure groups, to hand over petitions to any person, or to mobilise or demonstrate support for or opposition to the views, principles, policy, actions or omissions of any person or body of persons or institution, including any government, administration or governmental institution.

The appellants were charged with contravening section 12(1)(a) of the Regulation of Gatherings Act 205 of 1993, in that they had unlawfully and intentionally convened a gathering in protest against poor sanitation services without giving the relevant municipal authority any notice that such gathering would take place. In the alternative, they were charged with attending a gathering for which no notice had been given. They pleaded not guilty to charges, but after evidence was led, they were convicted on the main count. The sentence imposed was that of a caution and discharge. With the requisite leave of the trial court, they now appealed against the conviction.

In their plea explanation, the appellants stated that section 12(1)(a) was not applicable to them as the provision criminalises attending or a gathering where such gathering is in contravention of the Act, and that section 12(1)(e) does not prohibit attending a gathering for which no notice has not been given, and attending or convening such a gathering does not contravene the Act in any respect other than the fact that it constitutes an offence in terms of section 12(1)(a). It was contended that the criminalisation of convening a gathering without giving notice was unconstitutional and invalid.

Consequently, the applicants sought the upholding of their appeal and the setting aside of their convictions, as well as a declaration that section 12(1)(a) was unconstitutional.

Held – In terms of rule 16A, any person raising a constitutional issue in an application or action shall give notice thereof to the Registrar at the time of filing the relevant affidavit or pleading, setting out a clear and succinct description of the constitutional issue concerned. The main issue raised by the appellants in terms rule 16 was

that section 12(1)(a) violated the right to freedom of assembly in section 17 of the Constitution, and was therefore unconstitutional and invalid, to the extent that it criminalised the convening of a gathering solely on the basis that the gathering consists of 15 or more people; and no prior notice was given. The further contention was that the criminalisation of a gathering of more than 15 people merely because no notice was given violated section 17 because it made it a crime to convene a peaceful, unarmed gathering merely because the gathering is attended by 15 or more people and prior notice was not given; and it deterred people from exercising their fundamental constitutional right to assemble peacefully and unarmed.

The Regulation of Gatherings Act draws a distinction between "gatherings" and "demonstrations." The primary difference between the two is the number of people involved. A demonstration consists of 1–15 people and a gathering consists of more than 15 people. The appellants did not challenge the notice process envisaged in section 3 of the Act, conceding that it served a legitimate purpose. They also did not challenge the definition of a "gathering" or "demonstration". Instead, they contended that by the criminalisation of the conduct that was protected by section 17of the Constitution, the provision effectively limited the right to peaceful and unarmed assembly.

Section 17 of the Constitution protects peaceful and unarmed demonstrations. It guarantees the right of free assembly, to hold demonstrations, to picket and the right to present petitions. The Court accepted that criminal sanctions envisaged in section 12(1)(a) constituted a limitation to the exercise of section 17 rights. It then had to determine whether that limitation was constitutionally justifiable in terms of the provisions of section 36 of the Constitution. The Court undertook that determination by having regard to the established factors of the nature and importance of the right in question; the importance of the purpose of the limitation; the nature and extent of the limitation; international jurisprudence on the subject; and the balance between the limitation, the purpose and the existence of less restrictive means. It concluded that the limitation was not reasonable and justifiable in an open and democratic society, based on the values of freedom, dignity and equality. In the premises appellants' appeal against conviction was upheld and the convictions were set aside, and section 12(1)(a) was declared unconstitutional.

Mngomezulu and another v Van den Heever NO and others [2018] 2 All SA 221 (GJ)

> Administration of estates – Administration of Estates Act 66 of 1965 – Curator bonis appointed in respect of property made subject to provisional restraint order granted in terms of Prevention of Organised Crime Act 121 of 1998 – Court confirming duty to account in respect of administration of property when the restraint order fell to be discharged.

The first applicant was arrested on various criminal charges during July 2004. On 17 September 2004, the third respondent ("NDPP") brought an *ex parte* application for a restraint order against the applicants, who were married to each other. The court granted a provisional restraint order and appointed the first respondent ("the curator") as *curator bonis*. The restraint order was made final on 21 January 2005 and pursuant thereto letters of curatorship were issued.

Although the first applicant was acquitted of all charges against him in July 2012, the restraint order and the curatorship remained in operation, and had done for more than 13 years. For the period that the restraint order had been in force, the property had been under the control of the curator, and the applicants and the various companies and close corporations had not been able to deal with it. The curator had, as yet, made no formal accounting as to his administration of the property.

While the applicants sought orders rescinding the restraint order – to which they were entitled in light of the acquittal, they contended that those orders should be granted subject to compliance with certain conditions. Central to the proposed conditions was the recognition of the common law obligation to account fully to the applicants and the discharge of the curator only once the accounting procedure contended for and any statement and debatement process which may follow has been finalised. The curator and the State opposed the application on the basis that the restraint order should be rescinded and that the curator should be unconditionally discharged with immediate effect, with only the obligation to account to the Master on the limited basis provided for in the Administration of Estates Act 66 of 1965. The curator argued that the applicants were entitled only to an accounting in terms of the Prevention of Organised Crime Act 121 of 1998 and not under the common law.

Held – The curator's contention that he was obliged only to account under the Prevention of Organised Crime Act, arose as a result of a failure to appreciate that his obligation as curator is both statutory, in relation to his function within the Act and fiduciary *vis-à-vis* the applicants. That failure also underpinned the contentions of the State.

As the curator is in total control of the property, and stands in a fiduciary relationship towards the applicants in relation to the restrained property, he is therefore in the ordinary course, under a duty at the end of his period of office to render an account to them in the manner required by the common law. The purpose of the Prevention of Organised Crime Act is to provide a civil remedy for the preservation, seizure and forfeiture to the State, of property which is derived from or concerned with the carrying out of unlawful activities. The accounting prescribed is devised to meet that purpose. It is primarily, if not entirely, fashioned to serve the interests and purposes of the State. It does not describe nor facilitate the fiduciary obligations and duties owed to an owner in relation to the administration of his property. The Court confirmed that the curator was obliged to account to the applicants under the common law, which obligation went beyond the requirements of the accounting prescribed under the Act.

The Court then turned to the dispute in relation to whether the curator should be immediately discharged (as the respondents suggested) or not. The appointment of the curator occurred in terms of the Prevention of Organised Crime Act and thus his fiduciary relationship to the applicants arose from such statutory appointment. Section 28(3)(b) states that a court "shall rescind the order and discharge the *curator bonis* concerned if the relevant restraint order is rescinded". The Court rejected the submission on behalf of the curator to the effect that section 28(3)(b) does not permit of the interpretation contended for by the applicants – namely that the curator need not be discharged immediately on rescission of the restraint order and that he can and should remain in office until the accounting and debatement process is at an end. There is no time limit prescribed for the discharge of the curator and, as set out above, the office created by the Act envisages court oversight as a central ingredient of the office.

The orders of restraint and surrender of property were rescinded, and the first respondent was ordered to render a full and proper account to the applicants, within 30 days of the date of the grant of the order in respect of the curator's curatorship of all the property which had at any time been subject to the curator's curatorship under the restraint orders.

Moshoeshoe and another v Firstrand Bank Ltd and others [2018] 2 All SA 236 (GJ)

> Civil procedure – Loan agreement – National Credit Act 34 of 2005 – Rescission application – Common law grounds – Good cause – Applicants required to provide a reasonable explanation of their default, show that the application was bona fide, and show that they had a bona fide case which prima facie would succeed in setting aside the order of the Registrar.

In 2006, the applicants concluded a loan agreement with the first respondent bank in order to purchase a home. The property was pledged as security for the loan, but the address was incorrectly recorded in the loan agreement. Although the applicants alerted the conveyancing attorney appointed by the bank, he advised them that the error was of no consequence since the property was correctly described on the title deed issued by the Registrar of Deeds. The applicants also wrote to the bank and informed it that the address on the contract was incorrectly recorded and the bank made sure that its records had the correct address.

Despite the conveyancing attorney's assurance that the error was of no material importance, it actually had a serious practical consequence for the applicants. Unable to honour all their obligations in terms of the loan agreement, the applicants successfully applied to have themselves declared over indebted in terms of the National Credit Act 34 of 2005 ("the Act"). In June 2010, an attorney of the bank issued notice in terms of section 129 of the Act, which notice came to the attention of the first applicant. He contacted the firm of attorneys and told an employee there that he was under debt review. That did not deter the bank from issuing a summons against the applicants. However, the summons identified the wrongly recorded address, and therefore did not come to the attention of the applicants. In consequence, they failed to note their opposition to the action and the bank obtained default judgment against them. The notice prescribed by section 86(10) of the NCA had also been sent per registered post to the wrong address and did not come to the attention of the applicants.

The ensuing writ of execution, unlike the summons and the section 86(10) notice, was correctly served on the applicants at their actual address. Despite that, the incorrect address was reflected on one of the two copies of the writ served on the applicants, and the notice advertising the sale in execution which was placed in the newspaper described the incorrect property.

On 11 November 2010, the applicants sought to have the order issued by the Registrar rescinded. The attorney instructed by them in that regard informed them that the application had been launched and that it would automatically stay the execution process. Nevertheless, the bank continued with the process of executing on the order of the Registrar. The bank's attorneys had been made aware of the fact that the summons did not come to the attention of the applicants. By virtue of that knowledge, they also must have known that they sent the section 86 notice to the incorrect address.

The sale in execution took place even though a rescission application was supposedly pending. The property was sold to the second and third respondents, and was then registered in the name of the fourth respondent. The first applicant's informing the bank that judgment was taken against him and the second applicant without summons being served upon them was to no avail. The bank refused to cancel the sale of the property.

The second, third and fourth respondents brought an application for the eviction of the applicants from the property. The application succeeded and the applicants brought another application to have the order rescinded, as well as to have the order of the sale of their home in execution set aside. As their application was outside the time periods allowed for the launching of a rescission application, they asked that the late filing be condoned.

In the rescission application, neither the bank nor the second to fourth respondents challenged the factual averments made by the applicants. In addition to opposing the rescission application, the second to fourth respondents brought a counter-application for an order enforcing the eviction order. The applicants failed to make an appearance when the matter was called and the court issued a default judgment which dismissed the rescission application of the applicants with costs, postponed the counter-application of the second to fourth respondent and reserved the costs of the counter-application. In September 2014, the applicants and their family were evicted from the property at the instance of the fourth respondent.

On discovering the existence of the default judgment which dismissed the rescission application, the applicants applied for rescission of that order and condonation only the bank opposed the application. It raised two points of law, which were argued in the alternative. Those were that the matter had been finalised (*res judicata*); and that the matter was still pending (*lis pendens*).

Held – While the court in question had issued a default order which dismissed the applicants' rescission application, the order was made without going into the merits of the dispute and without making any findings on the merits. Accordingly, it was not complete and was susceptible to being revisited by the present Court. The only avenue open to the applicants was to have the order rescinded. The *res judicata* point taken by the bank therefore had no merit and was dismissed.

The bank's contention that since the applicants had brought more than one rescission application this particular one was *lis pendens* was also not sustainable. The three applications referred to concern the rescission of a different order (issued by the Registrar). But none of those applications were the subject of the present application.

That left the question of whether the order should in fact be rescinded. As the applicants relied on the common law, it was necessary to consider whether they had shown good cause for the rescission. To succeed on that basis, they had to at least provide a reasonable explanation of their default, show that the application was *bona fide*, and show that they had a *bona fide* case which *prima facie* would succeed in setting aside the order of the Registrar.

The Court was satisfied that the application was *bona fide*. The applicants had suffered greatly as a result of the order of the Registrar and they had done everything that could be expected of them. The order granted by the Registrar had been issued

without them ever being given an opportunity to present their case as they were never served with the summons. Moreover, the execution process took place without any judicial oversight. The Constitutional Court has pronounced that the Registrar does not have to power to issue an order declaring a person's home to be executable. The applicant had lost their primary residence, which *prima facie* appeared to have occurred through unlawful means or to have occurred in unfair and unjust circumstances. The non-compliance with rules of court was therefore condoned. The judgment and order in question was rescinded and set aside.

Ndinga v Cape Law Society [2018] 2 All SA 250 (ECM)

> Legal Practice – Attorneys – Application for admission – Attorneys Act 53 of 1979 – Issue for determination was whether the contract of articles of clerkship relied upon by the applicant was valid or whether it was void by virtue of the circumstances in which her principal was practising when the contract was entered into – Distinction drawn between a person who purports to act as a practitioner and a practitioner who practises without being in possession of a fidelity fund certificate – Nowhere in the Act is there a provision for the automatic suspension or invalidation in any way of the practise of an attorney where such practise is conducted without a fidelity fund certificate.

Having entered into a contract of articles of clerkship with an attorney and completed the requisite period of articles, the applicant sought to be admitted as an attorney of the court. Her application was opposed by the Law Society on the ground that the attorney with whom the contract had been entered was not practising the profession of attorney on the date on which he concluded a contract of articles with the applicant because he was not in possession of a fidelity fund certificate on that date, and was thus not entitled in law so to practise.

Held – The issue for determination was whether the contract of articles of clerkship relied upon by the applicant was valid or whether it was void by virtue of the circumstances in which her principal was practising when the contract was entered into.

The Attorneys Act 53 of 1979 regulates the requirements for practise as an attorney. The question to be addressed related to the effect of non-compliance by an attorney with one or more of the relevant rules of the respondent which has the effect of denying him or her qualification for the issue of a fidelity fund certificate. The distinction drawn between a person who purports to act as a practitioner and a practitioner who practises without being in possession of a fidelity fund certificate was regarded by the court as significant. The distinction recognises that although it constitutes an offence, the practise by a practitioner of his profession without a fidelity fund certificate does not have the effect of invalidating that practise and reducing the attorney to the status of one who purports to act as a practitioner. Nowhere in the Act is there a provision for the automatic suspension or invalidation in any way of the practise of an attorney where such practise is conducted without a fidelity fund certificate.

The Court noted the manner in which the Law Society had handled the applicant's case. The applicant had followed all the steps required of her for her admission to the profession. Her registration of her articles of clerkship was not objected to by the respondent, and objections were only raised after she had completed her period of clerkship. The Court granted an order admitting the applicant as an attorney of the

court, and as a mark of the court's censure of its conduct, the respondent was directed to pay the costs of the application on an opposed basis and on the scale as between attorney and client.

Reformed Presbyterian Church in Southern Africa v Minister of Police and another [2018] 2 All SA 260 (ECM)

Administrative law – Doctrine of separation of powers – Courts must be slow to intervene in the exercise and performance of powers and functions by the police in relation to the investigation of crime.

Administrative law – Principle of legality – Exercise of power by the State must be done rationally and lawfully – To pass the test for rationality, there must be a rational connection between the impugned decision and the purpose of such decision.

Administrative law – Right to just administrative action – What constitutes "administrative action" – There must be a decision of an administrative nature; by an organ of State or a natural or juristic person; exercising a public power or performing a public function; in terms of any legislation or an empowering provision; that adversely affects rights; that has a direct, external legal effect; and that does not fall under any of the exclusions.

Civil procedure – Motion proceedings – Disputes of fact – A final order may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order.

The departure of several members of the applicant church for another church ("UPC") resulted in tension between the two congregations. The tension culminated in the disruption of the applicant's church services. On 19 November 2014, the applicant obtained interim relief in the Libode Magistrates' Court against its erstwhile members, which order was made final on 22 January 2015. However, the individuals who were the subject of that order were unmoved by it, and when they caused a stand-off between themselves and the applicant's members at the applicant's premises, the police were called to assist the applicant. Pursuant thereto, members of the applicant went to the Libode Police Station to lay charges of contempt of court and malicious injury to property. That met with no success, and the applicant had to instruct its attorneys to intervene, whereupon they lodged a complaint with both the National and Provincial Police Commissioners. As a result, the first respondent's legal services division informed the applicant that its members could indeed lay charges. That was as far as the matter went. Repeated enquiries by the applicant as to progress revealed that the charges were not being actively prosecuted by the police. The applicant managed to get hold of a copy of the police docket, and discovered that the police officer who was instructed to take a number of steps in the case had not done most of them. The applicant noted that the last entry in the docket stated that the criminal case would be taken further only after a civil case in the matter was completed.

As a result of the above, the applicant maintained that the second respondent or officials under his control closed the investigation and disposed of the docket on 11 March 2015 without any basis upon which to do so. Their conduct was said to be

unlawful and in breach of the applicant's constitutional right of access to court and in breach of the constitutional duties imposed on the police.

In the present application, the applicant sought an order declaring unlawful the respondents' disposal of the police docket and the subsequent filing thereof in the police archives; as well as the discontinuation (alternatively delay) of the investigation into criminal charges made by the applicant. A further order was sought directing the respondents to conduct thorough investigations into the charges and to update the applicant of progress.

Opposing the application, the first respondent averred that the relief sought was incompetent and inappropriate and infringed upon the doctrine of the separation of powers. It was also stated that the applicant had failed to join the National Prosecuting Authority ("NPA") despite the instruction to await the outcome of the civil proceedings having been given by the public prosecutor, and had failed to make out a case in terms of the provisions of the Promotion of Administrative Justice Act 3 of 2000.

Held – The first determination to be made was purely factual – involving whether the second respondent's officials discontinued investigations and disposed of the docket. While the applicant alleged that to be the case, the respondents denied it. In proceedings on notice of motion, where disputes of fact have arisen in the affidavits, a final order may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The Court found no evidence that the second respondent's officials disposed of the docket, as contended by the applicant. On the contrary, it was common cause that the remarks entered on the cover of the docket were to the effect that it was to be filed. There was nothing to indicate that the investigations were discontinued and that the docket was disposed of.

The next question was whether the filing of the docket was unlawful and liable to be set aside. In that regard, the applicant framed its application within the context of the right to just administrative action, as envisaged under sec-tion 33(1) of the Constitution and the provisions of the Promotion of Administrative Justice Act. The underlying premise was that the filing of the docket qualified as administrative action. The Court referred to seven elements in defining what constitutes administrative action. Those are that there must be: (a) a decision of an administrative nature; (b) by an organ of State or a natural or juristic person; (c) exercising a public power or performing a public function; (d) in terms of any legislation or an empowering provision; (e) that adversely affects rights; (f) that has a direct, external legal effect; and (g) that does not fall under any of the listed exclusions. Whether the filing of the police docket included the fifth and sixth elements was placed in doubt by the court. While the filing of the docket could be seen to adversely affect rights, it did not constitute a direct, external legal effect. The decision to file the docket pending the finalisation of civil proceedings, therefore did not constitute administrative action.

In argument, Counsel for the applicant raised the principle of legality that is available to a litigant who wishes to enforce the constitutional right to just administrative action where this cannot be achieved under the Promotion of Administrative Justice Act. The principle rests on the requirement that the exercise of power by the State must be done rationally and lawfully. To pass the test for rationality in the present case, there had to be a rational connection between the decision to file the docket and the purpose of such decision. Here, the purpose was clearly the effective use of police resources,

pending the finalisation of civil proceedings, and ultimately the successful prosecution of the perpetrators where the outcome of the civil proceedings warranted the continuation of the investigation. Finding an obvious connection between the second respondent's decision to suspend the investigation and the objective of such decision, the Court was satisfied that the connection was rational. With regard to lawfulness, the decision had to be authorised by an empowering provision. Section 205(3) of the Constitution authorises the police services to prevent, combat and investigate crime. The decision was therefore also lawful.

For the complaint about delay in investigation of the matter to be upheld, the applicant was required to have reported the matter to the provincial executive, as envisaged under section 206(5) and (6) of the Constitution. It made no attempt to take such steps. Without a complaint about any delay in the investigations having been brought to the attention of the provincial executive, any judicial pronouncement on the matter would be premature.

The final issue concerned the authority of the court to direct the respondents to carry out thorough investigations and to inform the applicant on progress and the outcome of such investigations within 30 days. That brought into play questions pertaining to the doctrine of the separation of powers. Courts must be slow to intervene in the exercise and performance of powers and functions by the police in relation to the investigation of crime, especially where the officials involved possess the experience and expertise to make a better decision than a court on how to conduct such an investigation. To the extent that the applicant was not satisfied that a sufficiently thorough investigation had been carried out, the remedies under section 206(5) and (6) of the Constitution, read with the Independent Police Investigative Directorate Act 1 of 2011, first had to be exhausted. While the applicant was entitled to progress updates, it was required to use those remedies in that regard too.

The application was dismissed and the applicant was ordered to pay the first respondent's costs.

South African Bank of Athens Ltd v Zennies Fresh Fruit CC and a related matter [2018] 2 All SA 276 (WCC)

> Company law – Business rescue proceedings – Companies Act 71 of 2008 – Termination of business rescue proceedings – Although no evidence existed to suggest that the business rescue plan was not approved, if business rescue proceedings have not ended within three months after the start of those proceedings, or such longer time as the court, on application by the practitioner may allow, the practitioner must prepare a progress report of the business rescue proceedings and update it at the end of each subsequent month and deliver it to each affected person until the end of the proceedings – Where an extraordinarily long period of time had passed since the business rescue proceedings were initiated, court making order terminating business rescue proceedings.

Two applications were consolidated in this Court as they both related to a common respondent ("Zennies"). Each of the applicants ("Business Partners" and a bank) sought a declaratory order that the business rescue proceedings in respect of Zennies had ended or lapsed in terms of section 132(2)(c)(i) of the Companies Act 71 of 2008 ("the Act"). Zennies on the other hand denied that the business rescue proceedings had been terminated and averred that the applicants were not entitled to

proceed against it in terms of section 133 of the Act, which section places a general moratorium on legal proceedings against a company in those circumstances.

On 30 January 2017, the sole member of Zennies signed a resolution to place it under voluntary business rescue proceedings in terms of section 129(1) of the Companies Act. The business rescue proceedings commenced on 1 February 2017. On 3 February 2017, a certain person ("Schneider") was appointed as the business rescue practitioner for Zennies. On 17 February 2017, the first creditors' meeting for the general body of creditors of Zennies took place in terms of section 151 of the Act. There were two creditors present, namely Business Partners and the bank. On 9 March 2017, a business rescue plan ("the plan") was published by Schneider.

The events at the second meeting of creditors was at the centre of the present dispute. According to the supplementary affidavit of Business Partners, Schneider had prepared and published the plan prior to the meeting, and the plan was to be tabled for discussion and voting at the second creditors meeting. On the ground that Schneider had been unable to confirm certain information at the time of compiling the plan, it was suggested that the second meeting and the voting on the plan be adjourned until the relevant information and facts were more firmly established. Business Partners claimed that in terms of section 153(3)(a)(ii) of the Act, Schneider was required to prepare and publish a new or revised plan within ten business days from the date of the second creditors' meeting, that period so it was stated, having lapsed on 6 April 2017 and neither it nor the bank had agreed to extend the time period for him to prepare and publish a new or revised plan. It therefore sought a declaratory order that the business rescue of Zennies had ended and/or lapsed in terms of section 132(2)(c)(i) of the Act.

On 3 May 2017, the bank brought a liquidation application against Zennies. The founding affidavit addressed only the requirements necessary to seek a winding up order, and did not deal with the business rescue of Zennies, nor did it ask for the termination of the business rescue on the basis of what had purportedly transpired at the second meeting. In its replying affidavit, the bank averred that Zennies was no longer under business rescue, the contention being that there was no agreement to extend the time periods in reply to the allegation that all parties present agreed to extend the time periods in order to file an amended business rescue plan.

Zennies, on the other hand, contended that as a result of the lack of information available to Schneider at the second meeting and the creditors' position at the time, the plan was not accepted, and the meeting was adjourned on the basis that Schneider would amend the plan and address the concerns raised by the creditors. It argued that on Schneider's version, all of the parties present at the second meeting agreed to extend the time periods to file an amended business rescue plan and that the plan was neither accepted nor rejected. Its contention was that it remained under business rescue and that, without the consent of Schneider or the leave of the court, the moratorium against any proceedings being instituted against it remained in place.

Held – In deciding whether the business rescue proceedings had terminated or whether Zennies was still under business rescue, the Court had to determine whether it was agreed to amend the plan as contemplated in section 152(1)(d)(ii) without rejection of the plan; whether if the plan was rejected, a further step was taken within the ambit of section 132(2)(a)(ii) thereby preventing the termination of the business rescue proceedings; and whether, if a further step within the contemplation of section

132(2)(a)(ii) was taken, the business rescue still automatically terminates if the business rescue practitioner fails in any of his other statutory obligations.

The crisp question was whether the fact that no vote was taken to approve the plan at the second meeting justified a conclusion that the plan was rejected as envisaged by section 152(3)(a) of the Act. The latter section provides that if a proposed business rescue plan is not approved on a preliminary basis, as contemplated in subsection (2), the plan is rejected, and may be considered further only in terms of section 153. Section 153of the Act only kicks in when a business rescue plan has not been approved and subsequently rejected. Section 153 provides for remedies in the event that a business rescue plan has not been adopted. Those include seeking a vote of approval by the practitioner from the holders of voting interests to prepare and publish a revised plan or apply to court to set aside the result of the vote. In terms of section 153(5), if no person takes any action contemplated in subsection (1), the practitioner "must promptly file a notice of the termination of the business rescue proceedings."

In this case, the business rescue practitioner had not filed a notice of termination of the business rescue proceedings in either of the applications. In the event that a practitioner is directed to adjourn the meeting in order to revise the plan for further consideration, one of two things can occur in terms of section 152(1)(e). First, the practitioner would have to call for a vote for preliminary approval of the proposed plan, as amended if applicable unless the meeting has first been adjourned in accordance with paragraphs (d)(ii).

The Court found no evidence to suggest that the business rescue plan was not approved.

That however, was not the end of the inquiry. Although the Act does not directly specify the length a company can be under business rescue, section 132(3) provides a guide under which the Legislature envisaged companies to remain under business rescue. That section provides that if a company's business rescue proceedings have not ended within three months after the start of those proceedings, or such longer time as the court, on application by the practitioner may allow, the practitioner must prepare a progress report of the business rescue proceedings and update it at the end of each subsequent month and deliver it to each affected person until the end of the proceedings. No such application was brought by Schneider to extend the business rescue. There had been an extraordinary long period of time since the business rescue proceedings were initiated. The mechanisms of business rescue proceedings were not designed to protect a company indefinitely to the detriment of the rights of its creditors. The delay in the finalisation of the business rescue proceedings were found to be unreasonable in the circumstances and the court made an order terminating the proceedings. The relief sought in each of the applications against Zennies was then granted.

Stirling v Fairgrove (Pty) Ltd and others; Alvares v Phungula-Nkosi Properties and another [2018] 2 All SA 290 (GJ)

> Property – Deeds Registries Act 47 of 1937 – Fraudulent sale – Passing of transfer – Duties of Registrar of Deeds – Negligence – Issue for determination was whether the transfer was tainted with fraud, and whether the Registrar of Deeds failed in her statutory duty by negligently failing to reject the first deed of transfer – One of the duties imposed on the Registrar by the Deeds Registries Act 47 of 1937 is to thoroughly examine all deeds presented to the Registrar –

Court held that the Registrar had failed to discharge the statutory duty in a reasonable and acceptable manner.

The main application in this matter was for a declaratory order that the applicant ("Stirling") was still the owner of certain immovable property, and for the expungement of two deeds of transfer in terms of which the property was transferred to the third respondent ("Alvares") who in turn transferred it to the first respondent ("Fairgrove").

While the main application was unopposed, Fairgrove brought a counter-application for damages caused by payment of two amounts to Alvares and the Revenue Services ("SARS"). SARS was paid transfer duty for the property, ownership of which had been obtained through fraud. Ancillary orders were also sought, including that the Public Protector investigate the circumstances under which the property was transferred to Alvares, to ascertain whether any criminal acts had been committed by Alvares or any others.

Finally, Alvares instituted action against the alleged estate agent.

The court's judgment therefore dealt with three applications.

The background facts were as follows. Stirling had owned the property since 1972. In 2014, the property was broken into and vandalised while she and her husband were on holiday, and they had to vacate the property as it was no longer habitable. They subsequently discovered that the gate padlock had been replaced with another and that the property was on sale. Despite Stirling not having given any agent a mandate to sell the property, she then discovered that it had been sold to Alvares and then to Fairgrove. Stirling's signature had been forged on the relevant documents.

Held – The issue for determination was whether the transfer from Stirling was tainted with fraud, and whether the Registrar of Deeds failed in her statutory duty by negligently failing to reject the first deed of transfer in favour of Alvares. The Court also had to decide whether Alvares had made a case against the estate agent.

The requirements for transfer are delivery effected by registration of transfer in the Deeds Office, and the existence of a real agreement, the elements of which are intention on the part of the transferor to transfer the property, and intention on the part of the transferee to acquire ownership of the property. If the agreement is tainted by fraud, ownership will not pass despite registration in the Deeds Registry Office.

One of the duties imposed on the Registrar by the Deeds Registries Act 47 of 1937 is to thoroughly examine all deeds presented to the Registrar. The deficiencies in the transfer of the property to Alvares were significant and should have been identified by the Registrar, and the deed rejected. The Court held that the Registrar had failed to discharge the statutory duty in a reasonable and acceptable manner.

The applications by Stirling and Fairgrove succeeded and that of Alvares was dismissed.

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