LEGAL NOTES VOL 5/2017

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THE ASPHALT VENTURE WINDRUSH INTERCONTINENTAL SA AND ANOTHER v UACC BERGSHAV TANKERS AS 2017 (3) SA 1 (SCA)

Shipping — Ship — Crew — Wages — Protection of wages of crew held hostage by pirates — Sailor's lien for wages as basis for action in rem — Crew held hostage ashore and unable to render service to ship — Fixed-term contracts expired — No provision for continued payment of wages pending repatriation — Impossibility of performance — No lien and no action in rem.

Shipping — Admiralty law — Maritime lien — Sailor's lien for wages — Lien for wages for crew captured and abducted by pirates — Crew held hostage ashore and unable to render service to ship — Fixed-term contracts expired — No provision for continued payment of wages pending repatriation — Impossibility of performance — No lien and no action in rem.

Shipping — Admiralty law — Maritime lien — Nature — Applicable law — Court looking at claim underlying lien and applying South African law — Whether prima facie claim established — Whether claim protected by maritime lien.

The court a quo held that the wages of Indian sailors held hostage by pirates were subject to the seafarer's lien for wages enforceable by an arrest in rem.

The court upheld the deemed arrest of the hijacked ship, the Asphalt Venture, at the instance of Bergshav, cessionary of the sailors' wage claims against charterer Windrush.
Asphalt Venture was hijacked by Somali pirates off the Kenyan coast on 23 September 2010. Though a ransom was paid and the ship released on 15 April

[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!**

2011, the pirates retained seven sailors (the seven) as hostages.Their employment contracts, concluded between April and August 2010, specified that employment was governed by Indian law, and terminated after nine months. Experts on Indian law called by Bergshav argued that even though the sailors' specified periods of employment had expired by the time the pirates released the ship, the obligation to pay wages endured. Bergshav also relied on article 19.2 of the contracts, which specified that the employer would pay wages 'during repatriation for normal reasons'. Windrush, citing the expert opinion of the former chief justice of India, Judge Khare, argued that the contracts were terminated by impossibility of performance.
In an appeal to the Supreme Court of Appeal, the issue was whether there existed, at the time of the arrest, a maritime lien for wages entitling Bergshav to arrest the ship by way of an in rem arrest under s 3(4)*(a)* of the Admiralty Jurisdiction Regulation Act 105 of 1983 (the Act).

Held

The enquiry into whether there existed an enforceable claim based on a maritime lien was two-pronged. The court had to determine whether Bergshav had established (i), on a prima facie basis, the existence of the claims it sought to enforce against *Asphalt Venture*; and (ii) that those claims were, by reason of their nature, protected by a maritime lien under South African law (see [17]). The source of the obligation to pay the wages of the *Asphalt Venture*'s crew appeared from their employment contracts, and if they envisaged an ongoing obligation to pay wages until repatriation, it was irrelevant whether employment continued (see [19]).
The court a quo should not have rejected Justice Khare's opinion that the contracts were terminated by impossibility: the doctrine of frustration applied to employment contracts where supervening events rendered their performance impossible or radically different from what was undertaken when the contract was entered into (see [33]). This was what happened in the present case, when *Asphalt Venture* sailed without the seven on 15 April 2011: any obligation to repatriate them was rendered impossible (see [28], [33]).
The hallmark of a maritime lien for wages was the benefit to the ship of the crew's service, without which no maritime lien could arise (see [38]). Thus, even if the seven were entitled to recover wages, such entitlement would not have arisen from service to *Asphalt Venture* and would not have attracted a maritime lien. The absence of a maritime lien was fatal to the entitlement of Bergshav to arrest the ship (see [38]). Since the situation was far removed from the one contemplated by article 19.2, its provisions were irrelevant (see [40]). There was no obligation on Windrush to pay wages orrepatriation costs beyond 15 April 2011, and no maritime lien existed on 21 September 2012, when *Asphalt Venture* was arrested. Bergshav could not invoke the action in rem, and the deemed arrest would be set aside and an order made for the release of the security furnished by Windrush (see [42], [44]).

BASSON AND OTHERS v HANNA 2017 (3) SA 22 (SCA)

Contract — Consensus — No consensus on applicable rate of interest — Not rendering agreement null and void — Rate of interest applicable being that prescribed from time to time by notice in Gazette in terms of Prescribed Rate of Interest Act 55 of 1975.
Contract — Breach — Remedies — Specific performance — Damages in lieu of specific performance — Where subject-matter of contract having been alienated

making performance impossible — Claim for damages in lieu of specific performance competent in circumstances.

The first appellant concluded an oral agreement with the second appellant and the respondent to the effect that he would sell to each of them one-third of his member's interest in the third appellant, a close corporation (the CC), the selling price being payable in monthly instalments. Consequently, the respondent alleged, the first appellant repudiated the contract. The respondent took the view that such conduct entitled him, at his election, to claim performance *in forma specifica* entailing an order compelling the first appellant to transfer to him the share in the member's interest. The respondent launched an action claiming such performance. However, during the trial the first appellant alienated a third of his member's interest in the CC. This prompted the respondent to amend his claim so as to introduce an alternative claim for damages as a surrogate for specific performance. The High Court decided in favour of the respondent, ordering the first appellant to pay a sum of money in lieu of performance *in forma specifica*. The present case was an appeal against the High Court's decision.
Two key questions arose for consideration on appeal. *(a)* In the court a quo one of the issues in dispute was the interest rate applicable to the agreement, ie whether it was fixed or variable. In the course of its judgment the court a quo found that the parties had not reached agreement on this point. The appellants argued that the implication of such finding was that there was no consensus on a material term of the contract, and that therefore no agreement came into existence on which specific performance could be claimed. *(b)* The appellants further argued that the respondent's claim for*damages as a surrogate for specific performance* was not a competent one in law. In support of such a proposition, reliance was placed on *ISEP Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd* 1981 (4) SA 1 (A) (*Isep*). That case involved proceedings instituted by a lessor against a tenant on the basis of the latter's failure to restore the leased premises to the same condition in which it was received. The court held thatthe plaintiff was restricted to claiming either specific performance of the duty to so restore the premises, or damages for the breach; the law did not recognise a claim for the objective value of the performance *as an alternative* remedy to specific performance. The respondent in the present matter argued for the competence of the claim, and that *Isep* should not be followed, because it was against weighty authority, and was the subject ofmuch criticism, in one instance by the SCA itself.
As to *(a)*, *held* that, in general, the parties' failure to agree on the rate at which the interest payable under the agreement was to be calculated did not render the agreement invalid. If no rate had been agreed on, expressly or impliedly, and the rate was not governed by any other law, the rate of interest was that prescribed from time to time by notice in the *Gazette* by the relevant Minister in terms of the Prescribed Rate of Interest Act 55 of 1975. (Paragraph [16] at 27E.)
As to *(b)*, *held* that *Isep* was distinguishable from the present matter. Its statements were applicable only to the limited class of contracts of reinstatement under a lease and did not constitute a ratio of general application in the law of contract. Additionally, the practical difficulties serving as justification in that case for not recognising a claim for damages in lieu of specific performance did not arise in the present matter. However, to the extent that what was said in that matter could be construed as being a ratio of general application in the law of contract, it stood to be doubted. In cases such as the present, where specific performance was not

possible, and the respondent was ready to carry out his own obligation under the agreement, justice demanded damages in lieu of specific performance.
Held, that the respondent was entitled to the relief he sought. He had established that he had concluded a valid agreement with the first appellant; that the first appellant had repudiated the agreement; that he was willing to carry out his obligations under the agreement; and that he had elected to hold the first appellant to the terms of the agreement. Because of the first appellant's conduct, which rendered specific performance impossible, the respondent amended his particulars of claim so as to introduce a claim for damages in lieu of specific performance.
Partially dissenting judgment
In a partially dissenting judgment, Willis JA raised two points in qualification to the order of the majority, which he agreed with. Firstly, he held that *Isep* could not be sustained to the extent that it found there to be no exceptions to the principle that there were only two alternative remedies for an aggrieved party — specific performance, or damages for breach. Secondly, he expressed the view that it was probable that the parties did in fact reach agreement as to the calculation of the interest rate, namely by reference to the prime rate, as opposed to a flat rate of 18%. (Paragraphs [44] – [45] at33E – 34A.)

COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE v VAN DER MERWE NO AND OTHERS 2017 (3) SA 34 (SCA)

Insolvency — Property passing to trustee — Imported goods in respect of which value-added tax and duties unpaid — Trustee entitled to demand delivery of imported goods under Commissioner's custody and control despite non-payment — Customs and Excise Act 91 of 1964 not creating embargo in favour of Commissioner that unless VAT and duties were paid, trustees prevented from taking possession of imported goods — Insolvency Act 24 of 1936, s 47.

Revenue — Customs and excise — Customs duty and VAT — Non-payment of by company in liquidation — Trustee entitled to demand delivery of imported goods under Commissioner's custody and control despite non-payment — Customs and Excise Act 91 of 1964 not creating embargo in favour of Commissioner that unless VAT and duties were paid, trustees prevented from taking possession of imported goods — Insolvency Act 24 of 1936,s 47.

This case concerned an appeal to the Supreme Court of Appeal against a High Court order that the appellant (the Commissioner) clear certain imported equipment under its custody and control for release to the respondents, the trustees of the importer company which had since been placed in liquidation. The Commissioner had refused to do so because the company was unable to pay the value-added tax and duties that were payable in respect of the equipment's importation.
The parties agreed that the determinative question in the appeal would be whether, in such circumstances, a trustee could take possession of and deal with the property concerned under insolvency law, or instead was prevented from doing so by a statutory 'embargo' — said to be created by ss 20(4),38 and/or 39 of the Customs and Excise Act 91 of 1964 and s 7(1)*(b)* of the Value Added Tax Act 89 of 1991 in favour of the Commissioner — unless duty and/or value-added tax had been paid in respect thereof.
Held

Section 47 of the Insolvency Act 24 of 1936 preserved the common-law position that a trustee had to realise all the assets of an insolvent — including those subject to a lien. There was nothing in either the Customs and Excise Actor the Insolvency Act which expressly (or by necessary implication) provided that goods subject to a lien in favour of the South African Revenue Service did not fall to be dealt with under the laws of insolvency. As such, a trustee of an insolvent company was entitled to demand delivery of the insolvent company's property retained by the Commissioner.

HOHNE v SUPER STONE MINING (PTY) LTD 2017 (3) SA 45 (SCA)

Evidence — Admissibility — Duress — Admissibility, in delictual claim, of evidence obtained by threat of criminal prosecution — Suspected criminal given choice to make statement regarding allegations of theft — Told that refusal or lies would result in full criminal prosecution and adverse publicity — Electing to confess — Admitting quantum — Not contra bonos mores — Evidence admissible — Claim enforceable.

Super Stone's directors saw CCTV footage that convinced them that an employee, Hohne, was stealing diamonds from the business. They confronted Hohne with the evidence and left him with the choice of full confession or criminal prosecution. Hohne chose to cooperate, agreeing to a recorded interview. After some prevarication followed by a stern warning that lies or evasion would result in exposure and criminal prosecution, Hohne confessed. He pointed out hidden diamonds and later made a signed confession to the police. He also signed an acknowledgement of debt in which he admitted being liable to Super Stone in an amount of R5 million in respect of the losses incurred as a result of the theft. The recording of the interview, the police confession and the acknowledgment of debt together constituted the evidence in dispute in the present case, which according to Hohne was obtained by duress and inadmissible against him.
Hohne was prosecuted in a criminal trial, but the court ruled his confession inadmissible because it was not freely and voluntarily made, and acquitted him. Super Stone then instituted a damages action in delict against Hohne. The trial was divided into two parts: the first dealt with the question of the admissibility of the contested evidence and the second with the merits. The court admitted the evidence and awarded Super Stone R6 million in damages. In an appeal to the Supreme Court of Appeal the parties confined themselves to the issue of duress.
Held per Leach JA (Shongwe JA, Petse JA and Nicholls AJA concurring)
The mere fact that a suspected criminal was faced with an election whether to make a statement relating to allegations of criminality did not make any resulting statement offensive to the right to a fair trial if it were introduced into the evidence (see [47]). There was nothing unlawful or *contra bonos mores* — in the sense of an unconscionable threat of some considerable harm — in the directors' warning regarding the consequences of lying (see [48]). Nor would evidence of anything he said or did as a result render the subsequent trial unfair (see [48]). There was in any event no evidence that Hohne did in fact act under duress: there had been no threat of unlawful evil that would be inflicted on him if he did not cooperate (see [49]). Hohne failed to discharge his onus to establish duress or coercion that would render the incriminating evidence against him inadmissible or breach his right to a fair trial if admitted (see [50]). Appeal dismissed.

Willis JA filed a concurring judgment in which he dealt with the topic of the court's discretion to admit unlawfully obtained evidence (see [20] – [27])and agreed that Hohne did not prove duress (see [31] – [35]).

LOUW NO v KOCK AND ANOTHER 2017 (3) SA 62 (WCC)

Will — Divorce — Effect — Husband dying less than three months after divorce — Section providing that will to be implemented as if wife had died before divorce — This unless it appeared from will that intention to benefit her notwithstanding divorce — Whether such intention appearing from will —Wills Act 7 of 1953, s 2B.

Ms Kock and Mr Koekemoer had been married and had executed a joint will. It provided (editor's translation):

'1. Death of the first-dying We nominate the longer-lived of us as the sole and complete heir of the estate of the first-dying of us.

2. Death of the longer-lived

If the longer-lived of us dies without leaving behind a further valid will, then the longer-lived bequeaths his or her property as follows:

2.1 We bequeath to the father of the testator Johannes Magiel Koekemoer(birth date 13/08/1934) the immovable property, or if he does not outlive the longer-lived of us, then to the animal-protection society.

2.2 The residue to the animal-protection society.'

They eventually divorced, and Mr Koekemoer had died less than three months after the divorce. The master had now refused to give effect to clause 1 of the will, by reason of s 2B of the Wills Act 7 of 1953: **marriage on will**

If any person dies within three months after his marriage was dissolved by a divorce or annulment by a competent court and that person executed a will before the date of such dissolution, that will shall be implemented in the same manner as it would have been implemented if his previous spouse had died before the date of the dissolution concerned, unless it appears from the will that the testator intended to benefit his previous spouse notwithstanding the dissolution of his marriage.'

This had prompted Ms Kock to bring an action to compel him to do so. The executrix, Ms Louw, had excepted to Ms Kock's claim, and had ultimately brought the present application to dismiss it. Her assertion was that the claim was bad in law.

The matter turned on whether 'it appear[ed] from the will that the testator intended to benefit his previous spouse notwithstanding the dissolution of his marriage'.

Ms Kock said there was such an intention: the words of the will said she should inherit, and did not say she should not inherit in the event of divorce (see [20]).

Held, that there was no such intention: had there been, it would have had to havebeen expressly stated (see [24] – [25]).

Application granted, and Ms Kock's claim dismissed (see [30]).

THEMBANI v SWANEPOEL 2017 (3) SA 70 (ECM)

Equality legislation — Hate speech — Burden and standard of proof — Objective approach to intention — Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, s 10(1).

Applicant and respondent became involved in an altercation in the course of which respondent called applicant a 'kaffir'.

Applicant later claimed damages and an apology in the Equality Court and was successful. The decision went on review to the High Court.
The first issue was the burden and standard of proof in a hate-speech case (s 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000). *Held*, that the complainant bore the burden of proof, and to succeed, would have to show that the preponderance of probabilities were for his version. The respondent bore the burden to raise evidence in rebuttal (see [5]).
The second issue was whether an objective approach was to be taken to whether a word based on a prohibited ground had been communicated with intent to hurt (s 10(1)). *Held*, that it should be (see [11]).
Decision confirmed (see [15]).

TYRE CORPORATION CAPE TOWN (PTY) LTD AND OTHERS v GT LOGISTICS (PTY) LTD (ESTERHUIZEN AND ANOTHER INTERVENING) 2017 (3) SA 74 (WCC)

Business rescue — Availability — Commercial or factual insolvency no bar to business rescue — Constituting 'financial distress' for purposes of Act — Companies Act 71 of 2008, ss 128(1)(f) *and 131(4)*(a).

The applicants instituted liquidation proceedings against the respondent — GT Logistics (Pty) Ltd, a provider of logistical and transport services throughout South Africa — on the basis of outstanding trade debts owing to them. In answer the respondent's managing director and sole shareholder, Mr Esterhuizen, applied to court to have the respondent placed in business rescue. It was clear that the respondent was at least commercially insolvent and that unless the business rescue application succeeded it should be placed in provisional liquidation. The situation for the respondent was such that certain of its 'non-critical creditors', which included the applicants, had not been paid. The business plan presented by Esterhuizen proposed incorporating a compromise with creditors, whereby creditors deemed ‘on-critical' to the respondent's operations would receive 40 cents in the rand, and creditors deemed 'critical' to its operations would receive payment in full.
In order to decide whether Esterhuizen had established, as he had to in terms of s 131(4)*(a)* of the Companies Act 71 of 2008, that there was a reasonable prospect for the rescue of the respondent, the court examined his projections as to revenue, expenditure, as well as liabilities. Furthermore, the court, in the exercise of its discretion, examined the fairness of the plan.
An important issue that called for the court's consideration was whether insolvency was a bar to rescue, as was argued by the applicants, and as had been held in certain judgments. The argument was that such a conclusion followed from the definition of 'financially distressed'. * (Financial distress of a company was one of the grounds on which a court might grant business rescue in terms of s 131 of the Act.) *Held*, that the definition of 'financially distressed' created a threshold. Current or factual insolvency was not a prerequisite. But it did not follow that, because the company was already commercially or factually insolvent, and thus obviously financially distressed, it could no longer be the subject of business rescue. Such an interpretation would be inconsistent with s 5(1) read with s 7 of the Act, particularly paras 7*(d)* and *(k)*, since it would oblige the court to liquidate a company even though there might be a reasonable prospect of rescuing it. Both current commercial and factual insolvency constituted 'financial distress'. However, even were

insolvency to fall outside the definition, this would not be a bar to business rescue. In terms of s 131(4)*(a)*(iii) the court could grant a business rescue order if it were just and equitable to do so for financial reasons, ie whether or not the company was 'financially distressed'. (Paragraphs [14] – [16] at 79C – I.)
Held, that the manner in which the non-critical creditors' claims were to be compromised was fundamentally unfair and objectionable, and the business rescue had to be rejected for this reason. The different treatment meted out to critical versus non-critical creditors on the basis that the support of the former was necessary for the company's viability was not justifiable— there was no reason why the respondent's restoration to solvency should be subsidised by creditors whom Esterhuizen regarded as non-critical. The shortfall in payment to a non-critical creditor could very well be critical to its survival. (Paragraphs [37], [42], [44], [46] and [77] at 84J – 85B, 85I – 86B, 86E – F, 86H –and 92I – J.)
Held, furthermore, that reasonable grounds for a belief that the respondent could be rescued had not been established. Esterhuizens's projections, on which the plan depended, were on the face of it unreliable, contradictory and not based on reasonable grounds. (Paragraph [77] at 92I – J.)
Held, accordingly, that the business rescue had to fail and the company be placed in provisional liquidation. (Paragraph [78] at 93A – C.)

MINISTER OF JUSTICE AND ANOTHER v SA RESTRUCTURING AND INSOLVENCY PRACTITIONERS ASSOCIATION AND OTHERS 2017 (3) SA 95 (SCA)

Labour law — Employment equity — Affirmative action — Constitutionality — Affirmative-action policy for appointment of insolvency trustees and company liquidators — Inflexible race- and gender-based regime imposed — Policy unconstitutional for being arbitrary, capricious and incapable of practical application — Also no rational connection between policy and stated objectives — Declared invalid — Constitution, s 9(2).

Insolvency — Trustee — Appointment — Appointment policy — Affirmative-action policy for appointment of trustees — Strict racial and gender allocation — Policy unconstitutional — Constitution, s 9(2).

The respondents * challenged the government's policy on the appointment of insolvency practitioners (IPs), adopted in February 2014, on constitutional grounds. The policy regulates the appointment of IPs by the master of the High Court (the second appellant) with the stated aim of transforming the IP industry.
Clause 7.1 of the policy sets out a formula, based on race and gender for the appointment of IPs from the master's list of practitioners. Clause 7.3 gives the master a discretion: he or she 'may, having regard to the complexity of the matter and the suitability of the next-in-line [IP]', appoint a senior IP jointly with the next-in-line IP. The appellants conceded that the court should strike down the policy if it imposed a quota or rigid system, but argued that the discretion in clause 7.3 was sufficient to save it. The Western Cape High Court held that the policy, though well intentioned, was unconstitutional because it unlawfully fettered the master's statutory discretion to appoint IPs. The respondents argued that the policy's rigid race- and gender-based categories and ratios amounted to the imposition of quotas as opposed to numerical targets, rendering it constitutionally impermissible. In an appeal to the Supreme Court of Appeal

Held

On equality

To comply with s 9(2) of the Constitution, it was not sufficient for a remedial measure to benefit the previously disadvantaged; it must in addition not be arbitrary, capricious or display naked preference. One form of arbitrariness, caprice or naked preference was the implementation of a quota system (see [29], [32]).

Clause 7.1 embodied a strict allocation of appointments in accordance with race and gender. It required the master to make an appointment in accordance with a rigid quota. This rigidity was not ameliorated by clause 7.3, which merely allowed the master to compensate for the fact that the policy dictated the appointment of someone who might not be up to the task. That person still had to be appointed in accordance with clause 7.1. This rigid and unavoidable process was unconstitutional for being arbitrary, capricious, and incapable of practical application. Though this was sufficient for a declaration of invalidity, the court would nevertheless also make the following findings on the other challenges to the policy (see [34] – [38]).

On the fettering of the master's discretion

The parties' arguments were misconceived because they assumed that the master had an unfettered discretion that was improperly fettered by the policy, whereas in reality the master's only discretion was to make appointments in accordance with the policy. But article 7.3, by leaving it to the master to determine whether an estate was complex and to distinguish between the capabilities of different insolvency practitioners, contained a limited residual discretion sufficient to find that the master's discretion was not improperly fettered (see [44] – [45]).

On rationality

Rationality required a rational connection between the policy and it objectives that was absent in the present case. There was no proper information about the basis on which the policy was formulated, and without information on the current demographics of insolvency practitioners, it could not be asserted that the policy was rationally directed at the legitimate goal of removing the effects of past discrimination. Other rationality weaknesses resided in the definition of 'senior practitioner' and the obligatory appointment, without more ado, of the next-in-line IP (see [47] – [50]).

On legality

The minister's promulgation of the policy was contrary to the principle of legality because it deliberately disregarded the interests of the creditors of insolvent estates or liquidated companies, which was at the heart of our insolvency legislation. The promulgation made use of a power given for a specific purpose to achieve a different, though legitimate, purpose (see [53] – [66]).

NKABINDE AND ANOTHER v JUDICIAL SERVICE COMMISSION AND OTHERS 2017 (3) SA 119 (CC)

Constitutional practice — Constitutional Court — Order — Rescission — Refusal of leave to appeal — Decision to refuse leave made at conference of justices on principle that court would not grant leave to appeal where it was incapacitated because its members were disqualified from determining merits of application — Such reasoning applying equally to application for rescission, which court may summarily refuse — So ordered — Constitutional Court Rule 19(6)(b).

The applicants, justices of the Constitutional Court, asked the court to rescind its earlier refusal (hence, 'the May 2016 decision') to grant leave to appeal against a judgment of the Supreme Court of Appeal. The May 2016 decision was, in line with the court's general practice, made at a conference of justices convened to decide on applications for leave to appeal. In this case deliberations focused on the fact that so many of its members were disqualified from hearing the matter that it was rendered inquorate. This compelled the court to refuse leave to appeal, for doing otherwise would leave the matter pending indefinitely: see *Judge President Hlophe v Premier, Western Cape; Judge President Hlophe v Freedom under Law and Others* 2013 (6) SA 13 (CC) (2012 (6) BCLR 567; [2012] ZACC 4).
The applicants based their application for rescission on rule 42(1)*(a)* of the Uniform Rules of Court, arguing that the May 2016 decision was 'an order erroneously . . . granted in [their] absence'. They contended (i) that they were deprived of an opportunity to make representations; and (ii) that court members who were disqualified from hearing the merits of the application nevertheless took part in the decision to dismiss their application.
Held
The practice of dealing with applications for leave to appeal at judges' conferences was not only familiar to the applicants, but consistent with s 173 of the Constitution (inherent power of court to regulate its process) and rule 19(6)*(b)* of the Constitutional Court Rules (applications for leave to appeal may be summarily dealt with) (see [6] – [8]). No litigant had a right to be present at these conferences, and rule 42(1)*(a)* did not apply (see [20]).
While this ground alone was sufficient to dismiss the application, the contention that the May 2016 decision was wrong because they were not given a hearing in open court also fell to be rejected. Rule 19(6) of the Constitutional Court Rules made it clear that, when the court dealt with applications for leave to appeal, it could do so summarily and without oral argument or additional written submissions. Not only were the applicants familiar with this procedure, they were also aware of the disqualification of their colleagues and the *Hlophe* judgment, and should have dealt with these issues in their affidavits. In the circumstances their contention that the court denied them an opportunity to be heard had no merit (see [22] – [24]).
Likewise, the contention that the disqualified members should not have sat even for the purpose of making the May 2016 decision would be dismissed: the court stuck to what it decided in *Hlophe* (see [27]). Application for rescission dismissed (see [30]).

AIRPORTS COMPANY SOUTH AFRICA LTD v AIRPORT BOOKSHOPS (PTY) LTD t/a EXCLUSIVE BOOKS 2017 (3) SA 128 (SCA)

Lease — Termination — Lease for undetermined period — Notice of termination — Reasonable notice — What constitutes — Lease must be interpreted to determine whether notice reasonable, having regard to factual matrix and commercial sensibilities — In circumstances of present case, lessor not proving that six weeks' advance notice of termination of month-to-month lease reasonable.

The appellant (Acsa) had given the respondent (Exclusive) six weeks' advance notice of termination of a written lease agreement extending — on a month-to-month basis — their fixed-term lease agreement which was soon to expire. This was after Exclusive had failed to secure a new lease for the premises in a competitive bidding process. During the notice period Exclusive brought an application to review Acsa's

bidding process, claiming it was tainted by illegality; and after expiry of the notice period Acsa applied for Exclusive's eviction, claiming it had lawfully terminated the lease.
This case concerns Acsa's appeal against the High Court's dismissal of the latter application. The factual dispute in the eviction application centred on the interpretation of a letter recording the extension of the fixed-term lease, more particularly the meaning of the phrase 'month on month'. The version advanced in Acsa's founding affidavit was that it meant that the lease was a monthly tenancy, terminable on one month's notice, so that six weeks' notice was reasonable. Exclusive's version as per their answering affidavit — uncontested in Acsa's replying affidavit — was that reasonable notice, in the circumstances of the case, meant reasonable notice upon a valid tender process being finalised. In its replying affidavit Acsa did not controvert any aspect of Exclusive's version as set out its answering affidavit.
Held
Whether the lease was terminable on a month's notice or on reasonable notice depending on the circumstances, depended on the interpretation of the lease extension itself. (Paragraph [14] at 133H – 134B.)
When claiming eviction, a lessor must prove lawful termination of a lease. Acsa alleged a lease and a termination; it was therefore incumbent on it to prove valid termination. The common law imposed a duty on a lessor to give a lessee reasonable notice of termination of a periodic or open-ended lease, eg a month-to-month lease. Whether the notice given by Acsa to Exclusive was reasonable in the circumstances depended on the interpretation of the extension agreement, having regard to the factual matrix and commercial sensibilities.
The result of applying the *Plascon-Evans* rule to the fact that Acsa did not contest Exclusive's version in its replying affidavit, or attempted to show that Exclusive's interpretation was in any way implausible or not credible, was that Exclusive's challenge of the tender award fell to be considered on Exclusive's version alone. And what Exclusive said it contemplated wasentirely plausible and credible and made complete commercial sense of the extension agreement. In all the circumstances, Acsa did not prove that it had a right to terminate the lease with Exclusive on one month's notice.

ARGENT INDUSTRIAL INVESTMENT (PTY) LTD v EKURHULENI METROPOLITAN MUNICIPALITY 2017 (3) SA 146 (GJ)

Local authority — Levies and charges — Consumption charges for electricity and water — Prescription of obligation to pay — Where consumer invoiced with difference between estimated consumption paid and actual consumption as per meter reading taken for first time in more than three years — Obligation to pay consumption charges older than three years from date of invoice extinguished by prescription — Prescription Act 68 of 1969, s 12(3).

Prescription — Extinctive prescription — Commencement — Knowledge of debt — Local-authority consumption charges for electricity and water — Where consumer invoiced with difference between estimated consumption paid and actual consumption as per meter reading taken for first time in more than three years — Whether consumption charges older than three years from date of invoice extinguished by prescription — Prescription Act 68 of 1969, s 12(3).

During March 2015 the respondent (the Municipality) invoiced the applicant (Argent) for the difference between its actual water consumption — based on a meter reading conducted for the first time since September 2009 — and the estimated consumption charged and paid for up to that point. This case concerned Argent's application for declaratory relief, based on its contention that any obligation to pay for consumption charges incurred more than three years before March 2015 had already prescribed by the time the Municipality presented the applicant with its invoice. The Municipality relied (inter alia) on s 12(3) of the Prescription Act 68 of 1969, contending that the debt only became due (and prescription running) when the meter was read and the invoice issued, because it was only then that it became aware of the facts giving rise to the debt. (In terms of s 12(3) a debt is only due when the creditor had knowledge of the identity of the debtor and the facts giving rise to the debt, but if a creditor could have acquired that knowledge by exercising reasonable care, the creditor is deemed to have had that knowledge.)

Held

It was not so that prescription could only start running once the Municipality had read the meter and issued the invoice. The Municipality did have knowledge of the relevant facts giving rise to the debt — at all times it was aware of Argent's identity and that it was supplying water to it. And even if, as alleged, the Municipality did not have such knowledge in lieu of a meter reading, it could have acquired it by exercising reasonable care — ie by reading the meter on the property and issuing an invoice for consumption — within a period less than that which did in fact elapse. Without deciding what would be a reasonable interval to have discharged its duty to read meters and to invoice for consumption, failing to do so for any period longer than three years was undoubtedly unreasonable and amounted to the respondent not having exercised reasonable care to ascertain the applicant's indebtedness. Accordingly, to the extent that the Municipality did not have the required knowledge of the applicant's indebtedness for the period more than three years before the date of the invoice, it was deemed to have had that knowledge.

MINISTER OF JUSTICE AND OTHERS v ESTATE STRANSHAM-FORD 2017 (3) SA 152 (SCA)

Medicine — Euthanasia — Assisted suicide — High Court order that doctor could administer or prescribe lethal agent to end terminally ill man's life — Order set aside.

Medicine — Euthanasia — Assisted suicide — Legality of physician administered euthanasia and physician assisted suicide — Survey of South African and foreign law.

Mr Stransham-Ford, who had terminal cancer, applied for and obtained an order that a doctor could administer or prescribe a lethal agent to end his life; that the doctor would be exempted from criminal or disciplinary proceedings; and that the common law be developed to allow for such euthanasia or assisted suicide (see [4]). Unbeknownst though to the judge, Mr Stransham-Ford had died two hours before the granting of the order. Here, the Ministers of Justice and Health, the National Director of Public Prosecutions,and the Health Professions Council of South Africa appealed to the Supreme Court of Appeal, which set aside the order for the following reasons.

(1) Mr Stransham-Ford's cause of action died with him, and on his death there was no claim that could be passed to his estate or that could be adjudicated upon by the

court. This was not disturbed by the fact that his case raised constitutional issues (see [19] – [21]).
(2) The order was based on an inadequate consideration of, and a misunderstanding of the law, and the issues were insufficiently canvassed. So, for instance, in relation to euthanasia, there was no consideration whether the position on consent should be changed; and the cases did not suggest that assisting suicide would be unlawful in all circumstances.
(3) The factual basis for the order was not established. Thus, Stransham-Ford's prediction of the manner of his death absent assisted suicide or euthanasia was not confirmed; nor was his mental capacity or willingness to go through with either course (indeed this was disconfirmed by later evidence); and there was no evidence that there was a doctor willing to assist. There was, in addition, inadequate evidence on which to decide the constitutional issues (see [95], [97] and [100]).
Appeal upheld, and order set aside (see [104]).

KAIMOWITZ v DELAHUNT AND OTHERS 2017 (3) SA 201 (WCC)

Company — Directors and officers — Director — Powers and duties — To participate in day-to-day management of company — Director not as of right entitled to do so — Companies Act 71 of 2008, s 66(1).

The applicant was one of five directors of a company, as well as an employee thereof. Such status changed when he received communication to the effect that he would no longer be employed by the company, and, while he would remain a director, his office would be that of a 'non-executive' director. He would be entitled to exercise all his rights as a director as provided in the Companies Act 71 of 2008 (the Act), as well as the company's Memorandum of Incorporation (MOI). He could still attend all directors' meetings, but he would no longer be involved in the day-to-day management of the company's business. As a result of his consequent exclusion from the daily management of the company, as well as, he alleged, the board meetings thereof, the applicant instituted proceedings against the company and its directors. He sought an order in terms of s 163 of the Act, inter alia restraining them from preventing his taking part in the management of the company's business, and demanding his participation in 'management meetings'. The applicant argued that he was as of right entitled to participate in the company's daily management, save to the extent that the Act or the MOI provided otherwise, by virtue of s 66(1) of the Act. Such provision provided that —
'(t)he business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that this Act or the company's Memorandum of Incorporation provides otherwise'.
In acting in the manner they did, the applicant submitted, the respondents were preventing him from carrying out his lawful obligations as a director. Such conduct was unlawful, oppressive and prejudicial to him, justifying an order in terms of s 163 of the Act, it was argued.
Held, that a director was not as of right entitled to participate in the day-to-day running of the affairs of the company. The overall supervision of the management of a company resided in its board, which might well delegate such management to a managing director (as was the case here) and/or to a committee of the board (see [19], [21], [26] – [27].)

Held, accordingly, that the relief sought with regard to involvement in the daily management of the company had to be rejected. Aside from that, no case had been made out that the directors and the company had otherwise impeded his capacity to act as a director and to fulfil his responsibilities to the company (see [33]). Application dismissed.

DEMOCRATIC ALLIANCE v MINISTER OF INTERNATIONAL RELATIONS AND COOPERATION AND OTHERS 2017 (3) SA 212 (GP)

International law — International criminal law — International Criminal Court — Withdrawal from Rome Statute — Requirements — Whether parliamentary approval required prior to delivery of notice of withdrawal by national executive to United Nations — Parliament, having power to determine whether international agreement bound South Africa, must also retain power to decide whether South Africa remained bound by it — Prior parliamentary approval required — Ex post facto approval not curing invalidity — Constitution, s 231.

International law —International agreements, treaties and conventions — Withdrawal from — Whether national executive's power to conclude international treaties includes power to give notice of withdrawal from them without prior parliamentary approval — Constitution, s 231.

On 19 October 2016 the national executive decided to effect South Africa's withdrawal from the Rome Statute of the International Criminal Court. In pursuance, thereof that same day the Minister of International Relations and Cooperation signed a notice of withdrawal and deposited it with the United Nations Secretary-General. In terms of article 127(1) of the Rome Statute the withdrawal would take effect 12 months after the date of the depositing of the notice, after which South Africa would cease to be a party to the treaty. The Minister of Justice informed Parliament of the decision, as well as his intention to table a bill repealing the relevant act giving effect to the Rome Statute, ie the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (the Implementation Act). Shortly thereafter, the Democratic Alliance (DA), supported by certain civil-rights NGOs who appeared as respondents or intervening parties, instituted court proceedings seeking orders declaring unconstitutional and invalid the notice of withdrawal, as well as the underlying cabinet decision to withdraw from the Rome Statute and to deliver to the United Nations the notice initiating the withdrawal. Both Ministers and the President of the Republic (known collectively as the government respondents) opposed the application.

The DA along with the supporting respondents raised a constitutional challenge based on s 231 of the Constitution. According to ss(1) thereof, the 'negotiating and signing of all international agreements [was] the responsibility of the national executive'. That power was, however, fettered by ss (2), which stated that an international agreement bound the Republic only after it had been approved by resolution in both the National Assembly and the National Council of Provinces. The effect of these provisions, it was submitted, was that there had to be prior parliamentary approval, as well as the repeal of the Implementation Act, before the delivery of a notice of withdrawal to the United Nations. The argument was that since in terms of s 231(2) it was Parliament that had to approve an international agreement for it to bind South Africa, it followed that it had to be Parliament which decided

whether an international agreement ceased to bind the country, before the executive may deliver a notice of withdrawal.
The government respondents' position was that prior parliamentary approval was not required by s 231; there was no express provision to that effect, and a reading-in was not warranted. More particularly, they argued as follows. The conclusion of treaties was the responsibility of the national executive. Such acts were not required to be preceded by the approval of Parliament; such approval was only needed to make binding such agreements. Logically, the *undoing* of a treaty constituted by the delivery of a notice of withdrawal should also be the task of the national executive, and similarly should not require prior approval, but rather subsequent ratification. The government respondents raised a further argument that international law did not require prior parliamentary approval (reliance was placed hereon article 127 of the Rome Statute). Finally, they submitted that the requirement of parliamentary approval would in any case be met; the request to approve the notice of withdrawal and the repeal of the Implementation Act were still pending before Parliament awaiting their decision.
The DA and supporting respondents argued also that the withdrawal was procedurally irrational. (Aside from all these process-based challenges, the substantive rationality of the decision to withdraw was too attacked on various grounds. The court however declined to consider these challenges, as the decision to withdraw was a policy-laden matter, residing in the heartland of the national executive.)
Held, rejecting the argument of the government respondents that the conclusion of a treaty and its undoing should be similarly treated, that the delivery of a notice of withdrawal, as opposed to the signature of a treaty, had direct legal consequences — from an international perspective it constituted a binding, unconditional and final decision of withdrawal (albeit on a deferred basis) from the Rome Statute. A notice of withdrawal was rather the equivalent of ratification, which did require prior approval (see [47]).
Held, as to the submission that international law only required a letter of withdrawal signed by an appropriate representative of government, that the decision-making process itself, and the need for prior parliamentary approval, was a domestic issue in which international law did not and could not prescribe (see [50]).
Held, that, bearing in mind that prior parliamentary approval was required in terms of s 231(2) before instruments of ratification may be deposited with the United Nations, there was a glaring difficulty in accepting that the reverse process of withdrawal should not be subject to the same parliamentary process. The necessary inference, on a proper construction of s 231, was that Parliament retained the power to determine whether to remain bound to an international treaty. This was necessary to give expression to the clear separation of powers between the national executive and the legislature embodied in the section. If it was Parliament which determined whether an international agreement bound the country, it was constitutionally untenable that the national executive could unilaterally terminate such an agreement. Accordingly, on a textual construction of s 231(2), South Africa could withdraw from the Rome Statute only on prior approval of Parliament and after the repeal of the Implementation Act (see [51], [53]).
Held, that the possibility of ex post facto approval did not cure any defects in the process followed in delivering the notice of withdrawal. The important constitutional principle of the doctrine of separation of powers had already been implicated. Because the national executive had purported to exercise power it constitutionally

did not have, its conduct was invalid and had no effect in law. Whatever Parliament did about the subsequent request to it by the national executive to approve the notice of withdrawal would not cure its invalidity (see [59]).
Held, that the notice of withdrawal was also procedurally irrational, because of the lack of prior consultation with Parliament, and also because of the unexplained haste apparent in the national executive's conduct in seeking approval consequent to lodging the notice of withdrawal, rather than allowing normal legislative processes to take their course (see [64], [67] – [70]).
Held, that effective relief in the circumstances would be a declaration of invalidity of the notice of withdrawal, coupled with an order for the withdrawal of the notice (see [81]).

AMCU AND OTHERS v CHAMBER OF MINES OF SOUTH AFRICA AND OTHERS 2017 (3) SA 242 (CC)

Labour law — Collective agreement — Extension to non-parties — Limitation of right to strike — Constitutionality — Application of majoritarian principle — Meaning of 'workplace' — Labour Relations Act 66 of 1995, s 23(1)(d)*(iii)*.
Constitutional law — Human rights — Right to strike — Right of employer and majority unions to extend collective agreement to non-parties — Whether limitation of right to strike justified — Application of majoritarian principle — Meaning of 'workplace' — Labour Relations Act 66 of 1995, s 23(1)(d)(iii).

Facts and legal context of case
The 2013 annual wage negotiations for the mining industry resulted in a collective wage agreement (the wage agreement) between the respondentChamber (an employers' organisation) and three unions: the NUM, Solidarity and UASA. The wage agreement was subsequently extended to non-parties — including the members of the appellant union, Amcu — under s 23(1)*(d)*(iii) of the Labour Relations Act 66 of 1995. It provides that a collective agreement would bind employees who are not members of the unions party to the agreement if those unions 'have as their members themajority of employees employed by the employer in the workplace'.
Section 65 of the LRA prohibits striking by anyone bound by a collective agreement regulating the issue in dispute. So when, in January 2014, Amcu went on strike, the Chamber sought a Labour Court interdict. The issue was whether Amcu was bound by the wage agreement.
Each of the mining houses represented by the Chamber (Harmony, AngloGold and Sibanye) owned several mines. At five, Amcu held majority membership, but it did not have an overall majority at any one of the companies.Amcu argued that since each individual mine constituted a 'workplace' as defined in s 213 of the LRA, the wage agreement did not apply at the mines where it was the majority union. Amcu further argued that the limitation on the right to strike in s 23(1)*(d)* was in any event unconstitutional, and that the wage agreement should have been extended, if at all, under s 32 of theLRA — which required ministerial approval for the extension of a collective agreement concluded *in a bargaining council*. It argued that the forum in which the Chamber and the unions had negotiated was, in effect, a bargaining council, and that the use of s 23(1) illegally circumvented the safeguards in s 32.
Litigation history

The Labour Court granted the interdict sought by the Chamber. It held that the individual mines did not constitute independent workplaces, that s 23(1)*(d)*(iii) was constitutional, and that the extension of the wage agreement was valid. An appeal to the Labour Appeal Court was unsuccessful. The court found that the wage agreement was not in substance a sectoral level collective agreement requiring the use of s 32, and that the application of majoritarianism found in s 23(1)*(d)* read with s 65(1)*(a)* did not infringe the constitutional rights of freedom of association, to strike, and to bargain collectively.
In a further appeal to the Constitutional Court Amcu focused on (i) the proper definition of 'workplace'; (ii) s 23(1)*(d)*'s alleged infringement of the rightto strike; and (iii) whether s 23(1)*(d)* violated the rule of law because it gave private actors the right to arbitrarily exercise a public power.

Findings of court

As to the meaning of 'workplace'

The LRA gave 'workplace' a special meaning distinct from its ordinary, geographical, one. In the LRA's definition (see [4]), a workplace was where the employees of an employer, collectively, worked: functional organisation — not geographical location — was primary (see [24] – [29]). The lower courts' finding that each mining house operated integrally as a single workplace, and that the Amcu-majority mines were not independent operations, could not be faulted on constitutional principle, legal analysis or factual assessment,and would not be disturbed (see [37]).

As to the purported infringement of the right to strike

Orderly and productive collective bargaining required some form of majority rule, and s 23(1)*(d)* legitimately gave it enhanced power within a workplace, thereby improving employees' bargaining power. Amcu could not object to the provision on the basis that it enforced a form of majoritarianism when it itself sought to enforce a form of majoritarianism (see [44] – [45]). While it was true that the codification of majoritarianism in s 23(1)*(d)* limited the right to strike, the limitation was reasonable, given the importance of its purpose, orderly collective bargaining (see [50], [58]).

As to the purported infringement of the rule of law

Embedded in the conclusion that s 23(1)*(d)*'s limitation on the right to strike was justified, was that the provision was also rational (see [67]). Although Amcu framed its rule-of-law argument as a challenge to the constitutionality of s 23(1)*(d)*, its invocation could also be the subject of a legality challenge, provided it entailed the exercise of a public power, in which case its exercise had to comply with the principle of legality. The focus was on the nature of the power exercised (see [72] – [74]). The extension of a collective agreement under s 23(1)*(d)* had a coercive effect, binding non-parties to the agreement willy-nilly, with industry-wide effect; it was not a private matter but a clear exercise of a legislatively conferred public (not administrative) power (see [78] – [83]). An agreement concluded under s 23(1)*(d)* was therefore reviewable under the principle of legality (see [84] – [87]). But Amcu's challenge was to the rationality of s 23(1)*(d)* itself, and that would fail, for the above-mentioned reasons (see [88]).

DU PLOOY NO AND OTHERS v DE HOLLANDSCHE MOLEN SHARE BLOCK LTD AND ANOTHER 2017 (3) SA 274 (WCC)

Company — Formation and constitution — Subscribers — Whether, without more, becoming members on company's incorporation — Whether, without taking up their

subscribed-for shares, able to transfer their rights therein to third parties — Companies Act 61 of 1973, s 103(1).

Certain subscribers to first-respondent company's memorandum had, after incorporation, transferred their rights as subscribers to the third to fifth applicants (see [18]). They in turn appear to have transferred them on to the applicant trust, but the trust, though it was the holder of share certificates, appears never to have been entered as their holder in the share register (see [10], [13], [42], [58] – [59]).
Following the development of a dispute, the trust sought a declaration that it was the owner of the shares (see [2], [4], [62]).
Among the issues were (1) whether on incorporation, and without more, the subscribers had matured into members (see [17]); and (2) whether without taking up the shares, the subscribers could transfer their rights therein to the third to fifth applicants (see [29]).
Held, affirmatively as to (1) and (2) (see [24], [28], [33]).
Ordered ultimately that the share register be amended to reflect the trust as shareholder (see [57], [59], [62]).

OKOROAFOR v MINISTER OF HOME AFFAIRS AND ANOTHER 2017 (3) SA 290 (ECP)
Immigration — Refugee — Qualification for status — Exclusion — Individuals who have 'committed a crime' — Scope of 'crime' — Who may decide 'there is reason to believe' individual has committed crime — Refugees Act 130 of 1998, s 4(1)(b).

Applicant was convicted of two offences under the Immigration Act 13 of 2002, and was sentenced to a fine or imprisonment, and to imprisonment which was suspended. He was subsequently arrested and detained pending deportation as an illegal foreigner. He then indicated an intention to apply for asylum, and asked to be released and issued with a permit to enable him to approach a refugee reception office in order to do so. However the immigration officers refused, apparently on the basis that he did not qualify as a refugee under s 4(1)*(b)* of the Refugees Act 130 of 1998. It provides that:
'(1) A person does not qualify for refugee status for the purposes of this Act if there is reason to believe that he or she —
. . .
(b) has committed a crime which is not of a political nature and which, if committed in the Republic, would be punishable by imprisonment; . . . .'
He then applied for a declaration that his detention was unlawful; for a direction that second respondent issue him a permit to approach a refugee reception office; and for certain other relief. The issues were, inter alia:
(1) Whether the 'crime' referred to in s 4(1)*(b)* was restricted to a crime committed outside South Africa, or whether it covered a crime committed either outside or inside the country. *Held*, that it was restricted to crimes committed outside South Africa (see [13], [20]).
(2) Who could decide that there was 'reason to believe' an individual did not qualify for refugee status. *Held*, that only the Minister of Home Affairs or his delegee could do so (see [23] – [26]).
Application granted (see [33]).

AQUILA STEEL (SA) LTD v MINISTER OF MINERAL RESOURCES AND OTHERS 2017 (3) SA 301 (GP)

Administrative law — Administrative action — Review — Remedies — Substitution of decision — Decision of Minister of Mineral Affairs to dismiss application for mining rights — Inordinate administrative delays and no proper reasons given for decision — Fair, just and equitable *to substitute minister's decision with court's decision granting application — Promotion of Administrative Justice Act 3 of 2000, s 8(1)*(c)*(ii)* (aa).

Minerals and petroleum — Mining and prospecting rights — Applications — Acceptance — Nature of *MPRDA*'s queuing system — Non-acceptance amounting to rejection — Applicant losing place in queue upon non-acceptance and return of non-compliant application — Mineral and Petroleum Resources Development Act 28 of 2002, s 16.

Minerals and petroleum — Mining and prospecting rights — Lapsing of upon deregistration of rights-holder company — Revival upon subsequent restoration of company's registration — Company not revested with prospecting right which lapsed due to effluxion of period such rights were granted for — Mineral and Petroleum Resources Development Act 28 of 2002, s 56(c); Companies Act 61 of 1973, s 73(6A).

Minerals and petroleum — Mining and prospecting rights — Transition to new order under *MPRDA* — Duration of old order rights-holder's preferent right to apply for prospecting and mining rights — Effect of such right on other applications — Whether such exclusive right survived until application was either granted or refused — Mineral and Petroleum Resources Development Act 28 of 2002, sch II, item 8.

The facts

The Department of Mineral Resources (the DMR) granted a prospecting right in favour of the applicant (Aquila) in October 2006 over a number of properties. Aquila, a subsidiary of an Australian resources company, discovered substantial manganese deposits and applied for mining rights in the respect of one of these properties. This application was accepted by the DMR on 22 December 2010 but not considered further. In a meeting with the DMR (during January 2011) relating to status of this application, the DMR claimed that the reason for not considering it was the existence of an earlier grant of prospecting rights, allegedly over the same property, to the fifth respondent (PAMDC).

The only success Aquila had in getting information about the alleged double grant was through two requests in terms of the Promotion of Access to Information Act 2 of 2000. On the strength of documents received in terms of these requests, Aquila launched an internal appeal (on 29 October 2013) against the grant of the prospecting right to PAMDC. The Minister only decided the appeal 20 months later, and only after Aquila obtained a mandamus directing him to do so, and then rejected it (against legal advice) without giving proper reasons (see [57] – [58] and [111]).

This case concerned Aquila's application for the review of the Minister's rejection of this internal appeal; his decision to allow PAMDC's cross-appeal against the DMR's acceptance of Aquila's application for prospecting rights and the granting thereof; and his dismissal of Aquila's mining rights application. Aquila also requested related declaratory relief, including that the court substitute the Minister's decision with its own decision upholding the internal appeal and granting the mining right application.

In this regard Aquila set out extensive grounds — including institutional bias, inordinate administrative delays — none of which were contradicted by the state respondents or the other parties (see [107] – [109]).
Although the Minister concluded in the internal appeal that the PAMDC grant was lawful, it was conceded in the review proceedings that it was erroneous. This was because it was not PAMDC that had applied for the prospecting rights concerned but the sixth respondent (ZiZa), a company incorporated in England and the holder of unused 'old order mineral rights'. PAMDC is a company that was established as a joint venture between the governments of Zimbabwe and of Zambia (ZiZa's shareholders) and the South African Government with the purpose that PAMDC would eventually hold ZiZa's mineral rights. In order to preserve these rights ZiZa had lodged a number of applications under item 8 of sch II of the Minerals and Petroleum Resources Development Act 28 of 2002 (the MPRDA) for prospecting rights over the different agglomerations of land making up its unused old-order mineral-rights holding. (Item 8(2) confers an exclusive right on holders ofany unused old order rights, to apply for a prospecting right or a mining right within the one-year period that such old order mineral rights remained in force after the MPRDA took effect.) ZiZa's applications included an application, filed on 19 April 2005, in respect of which the alleged double grant was made. (In the review proceedings the court assumed, without deciding, that there was such 'double grant' — see [37].)

The issues

The nature of the MPRDA's queuing system and the effect of non-acceptance of an application for prospecting and mining rights on such an applicant's place in the queue

The MPRDA distinguishes between the DMR's acceptance of an application for prospecting rights — which must comply with certain requirements before it may be validly accepted by the regional manager of the DMR — and the granting thereof. One of the grounds upon which the prospecting-right *grant* decision was attacked was that the ZiZa prospecting-right *acceptance* decision was irregular. This, Aquila contended, affected ZiZa's place in the queue. The 'queue' is a reference to the MPRDA's queuing system in terms of which the applicant first in the queue — a status which it achieves by submitting its application to the relevant regional manager of the DMR — has the right to have its application adjudicated first, and should such application be granted, the other applications cannot be considered in relation to the same land and the same mineral.

Held

The return of an application under s 16 was equivalent to the rejection of such an application. Such an applicant did not retain its place in the queue. It was of course open to such an unsuccessful applicant to amend or amplify its application and resubmit it, but then the application would be treated as a new application and given a place in the queue as such, rather than as a pending application enjoying first place in the queue. (See [17] – [21].)

The duration of the preferent right under item 8(2) and its effect on when other applicants may join the queue

It was not contested that ZiZa's application was non-compliant and that therefore the DMR's 'acceptance decision' was irrational. The acceptance decision was defended on the basis (inter alia) that item 8(3), properly interpreted, preserved the exclusivity that item 8(2) conferred beyond the one-year period and, regardless of any defects in the application, until the application was either granted or refused. Therefore, according to the respondents, the lodging of ZiZa's application for a prospecting right

not only precluded Aquila from joining the queue during the one-year period of exclusivity afforded by item 8(2), but also from joining the queue at all until ZiZa's application had been granted or refused.
Held
The purpose of item 8 was to enable the holder of an old order right to comply with the MPRDA by applying, within the period of exclusivity, for a prospecting or mining right in terms of the MPRDA. During this period, no other person may join the queue, but after its expiry other aspirant right holders may do so. After expiry of the exclusivity period, a holder of an old order right-holder had to be treated like any other applicant, and other applicants may lawfully join the queue for rights under the MPRDA. (See [77] – [83].)

The effect of restoration of a deregistered company on the revival of its prospecting right which had lapsed due to the effluxion of the time it was granted for

ZiZa was deregistered on 9 November 2010 and restored to the register on 14 October 2014. In terms of s 56 of the MPRDA any mining right lapses upon the deregistration of the right-holder. However, a deregistered company may be revested with such lapsed mining rights upon restoration of a company to the register (as confirmed in the *Palala* case — see [95]). Aquila contended that, at the time of restoration, any prospecting rights that Acquila may have had would have lapsed due to the expiry of the period for which they were granted.
Held
Prospecting rights did not survive the expiry of the period for which they were granted. In such a case they lapsed because they 'expired' as contemplated in s 56*(a)*. Therefore, the restoration of ZiZa to the company register did not have the effect of revesting it with its prospecting right, and also had no legal effect on the Aquila prospecting rights. (See [100] – [101].)

Substitution of the Minister's decision with that of the court

The Minister found that the existence of the ZiZa prospecting right precluded the grant of the Aquila mining right. This was the only ground upon which the Minister found that Aquila's application for a mining right should not be granted. The issue was whether to set aside this decision on appeal and remit the matter to the Minister to decide the question afresh, or whether (as Aquila requested) to substitute the decision of the court for that of the Minister to the extent of directing the Minister to grant Aquila the mining right for which it applied, and to determine, within a specified time, appropriate conditions to which the mining right should be subject. This question raised the principle of the separation of powers, and was regulated by s 8(1)*(c)*(ii)*(aa)* of the Promotion of Administrative Justice Act 3 of 2000.
Held
The court may only exercise its power to substitute its decision for that of the administrator when exceptional circumstances are present and it would be fair, just and equitable to do so. This involved a consideration of the fairness to all implicated parties. (See [105] – [106].)
Neither PAMDC nor ZiZa had ever conducted any prospecting activities on the ground over which they ostensibly obtained rights. Their purpose in this litigation was been to obstruct the exercise by Aquila of the rights which it acquired and sought to acquire, no doubt in the hope that its capacity to obstruct would drive Aquila commercially to cut PAMDC, or one or more of those associated with PAMDC, into its operation or to pay PAMDC a sum of money to stop obstructing the process. (See [110].)

While institutional bias had not been established, Aquila had established a high degree of institutional incompetence on the part of the government respondents, and a lack of energy in resolving the issues which arose from that very incompetence. The Minister made no attempt to give proper reasons for the conclusions to which he had come. The absence of any suggestion from the respondents in the papers in these proceedings that there was any issue of substance which might be raised to deny Aquila the grant of the mining right it seeks, leads to the conclusion that this court was in as good a position as the Minister to make the decision. Delaying the grant of Aquila's mining right any longer than was necessary would not advance the declared aim in the preamble to the MPRDA to build an internationally competitive administration and regulatory regime. Regard being had to these considerations, Aquila had established its case for substitution. (See [111] – [114].)

SA CRIMINAL LAW REPORTS MAY 2017

S v JOUBERT 2017 (1) SACR 497 (SCA)

Appeal — Against sentence — Powers of court on appeal — Increase of sentence — Court erroneously granting appellant leave to appeal against both conviction and sentence when appellant only sought such against conviction — State, without cross-appealing, seeking increase of sentence on appeal — Court increasing sentence without giving notification to appellant of its intention to do so — Substantial miscarriage of justice occurring — Increased sentence set aside.

After having been convicted in a regional magistrates' court on 20 counts of fraud relating to false VAT claims made to the South African Revenue Service, and having been sentenced to seven years' imprisonment which was wholly suspended for five years, the appellant appealed to the High Court against his conviction. The latter court, however, granted him leave to appeal against both the conviction and the sentence. The state then seized the opportunity to give notice to the appellant and his attorney of its intention to seek an increase of sentence on appeal. The appellant opposed the state's application, contending, inter alia, that the state had failed to follow the proper procedural requirements contained in s 310(A)(1) of the Criminal Procedure Act 51 of 1977. * When the matter was heard the appellant was not present and the court adopted the position that, even though the state's application was perhaps procedurally incorrect, it was still open to the court to mero motu raise the possibility of an increase in sentence. Counsel for the appellant informed the court that although the appellant had been made aware of the state's request for an increase in the sentence she had not informed him of the court's intention to do so as she had only just heard of such intention herself. The court nonetheless increased the sentence by suspending only four years of the term imposed.
On appeal counsel for the state contended that its application to increase the sentence had cured the court's failure to furnish prior notice to the appellant of its intention to increase the sentence. Furthermore, there had been no prejudice to the appellant, who had been afforded an opportunity to make submissions on sentence.
Held, that the procedure adopted by the state was fatally irregular as it had to obtain leave to cross-appeal if it sought to appeal against sentence imposed by a lower court where an accused lodged an appeal against conviction and/or sentence. That being the case, it was inconceivable that one fatal irregularity could be called in aid to cure another irregularity. (Paragraph [7] at 506*g*.)

Held, further, that the appellant had been materially prejudiced and that such prejudice went further than a mere lack of adequate opportunity to prepare properly. There had been no reason at all for the appellant and his advisors to prepare for a possible increase of sentence by the court a quo, since no such intent had been foreshadowed in a prior notice, as was required. He had furthermore been denied the option of withdrawing the appeal with the leave of the appellate court. (Paragraphs [9]–[10] at 507*a*–*e*.)
The court held in the circumstances that there had been a substantial miscarriage of justice and the appeal had to be upheld. The matter was then remitted to the High Court for consideration of the appeal against sentence only.

S v SETSHEDI 2017 (1) SACR 504 (GP)

Sentence — Prescribed minimum sentences — Imposition of in terms of Criminal Law Amendment Act 105 of 1997 — Charge-sheet not reflecting applicability of Act — Effect of on sentence on appeal set out.

In an appeal against convictions and sentences for murder and the illegal possession of a firearm and ammunition the court was required — after dismissing the appeal against the convictions (except in relation to two counts in respect of which there had been a duplication of convictions) — to determine the effect of a failure to mention in the charge-sheet the applicability of the provisions of s 51 of the Criminal Law Amendment Act 105 of 1997. (The Act was mentioned for the first time when counsel for the appellant addressed the court on sentence.)
Held, that it was settled law that the failure to warn the accused or mention the applicability of the minimum-sentence regime was a fatal irregularity resulting in an unfair trial in respect of sentence, and the appellate court had to consider sentence afresh. This meant that the court had to disabuse itself of what the trial court had said in respect thereof and impose a sentence which it thought was suitable. In the circumstances, it was inappropriate to apply the approach that an appellate court ought to be slow to interfere with the sentence unless it was shockingly inappropriate or induced a sense of shock. (Paragraph [61] at 514*c*–517*a*.)
The court accordingly applied these principles and proceeded to sentence the appellant afresh and reduce the sentence.

S v SMITH 2017 (1) SACR 520 (WCC)

Sentence — Conspiracy — Prescribed sentence for principal offence not starting point for assessing appropriate sentence for conspiracy to commit offence.
Sentence — Factors to be taken into account — Remorse — Expression of remorse not essential requirement for court to exercise mercy.
Murder — Conspiracy to commit murder — Sentence — Appellant convicted of conspiracy to murder his business partner — Appellant's co-conspirator, his ex-girlfriend, having been sentenced in plea-and-sentence agreement with state to wholly suspended sentence for same offence — In appellant's appeal, court holding that latter sentence inappropriately lenient and imposing sentence of seven years' imprisonment of which three years suspended.

The appellant appealed against his conviction and sentence in the magistrates' court for conspiracy to murder. He was sentenced to nine years' imprisonment of which two years were suspended. His conviction was based largely on the evidence of his former girlfriend who had entered into a plea-and-sentence agreement with the state and was sentenced for same to a wholly suspended sentence of two years' imprisonment. The testimony revealed that the appellant and the complainant were the joint owners of a security business but that the appellant had misappropriated some of the business' income for his own account. The complainant confronted him and after some time the appellant agreed to repay him. The appellant and his girlfriend nonetheless devised a plan to kill the complainant. In an authorised police-sting operation the girlfriend was arrested after handing over money to the person who pretended to be the assassin. The court, after analysing the evidence on the merits, upheld the conviction and then considered the appeal against sentence.
Held, that the magistrate's opinion that the prescribed sentence for murder was a starting point in assessing an appropriate sentence for conspiracy to murder was incorrect. The fact that the permissible sentencing range for conspiracy to commit a crime was determined by the permissible sentencing range for the crime itself did not mean that the starting point was the sentence which would have been imposed if the crime had been successfully committed. (Paragraph [101] at 528*h*–*i*.)
Held, further, that the magistrate had also erred in finding that remorse was the 'flipside of the coin of mercy' and that she could not give consideration to the element of mercy where the appellant had not expressed remorse. (Paragraph [107] at 530*b*–*c*.)
Held, further, that there was an enormous difference between the sentence imposed on the appellant's co-conspirator and the sentence imposed by the court a quo on the appellant in circumstances where there was not a large gulf between their respective culpability. A wholly suspended sentence for the appellant's girlfriend was, however, inappropriately lenient. (Paragraph [110] at 530*j*–531*b*.)
The court took into consideration the appellant's clean record, his personal circumstances, and the lengthy delay in the completion of the trial, and came to the conclusion that an appropriate sentence would be one of seven years' imprisonment of which three years should be suspended on appropriate conditions. (Paragraph [113] at 531*g*.)

S v AMERIKA 2017 (1) SACR 532 (WCC)

Rape — Sentence — Rape of partner in situation of spousal abuse — Fact that complainant did not wish to pursue prosecution not constituting substantive and compelling circumstance or mitigation justifying sentence less than prescribed minimum sentence — Should be considered aggravating factor.

The 23-year-old accused was convicted in the High Court of two counts of kidnapping, four counts of rape, and one count of murder. The complainant on the first set of counts (one count of kidnapping and two counts of rape) was the accused's occasional partner in what appeared to be a highly abusive relationship. The accused was also convicted of kidnapping the deceased, the first complainant's young stepsister, who was under the age of16. Before killing her, he raped her twice. In considering whether the complainant's reluctance to pursue the criminal charges against the accused (because of their relationship) could be regarded as a mitigatory factor or a substantial and compelling circumstance justifying deviation from the

prescribed minimum sentence, the court held that it could not. This would send out the wrong message and be contrary to the values of the Constitution. It would furthermore undermine the dignity and humanity of abused women and send out a message that men who raped their partners might escape the full might of the law. Rape committed in the context of an abusive relationship should be regarded as an aggravating factor in the consideration of an appropriate sentence. (Paragraph [22] at 539*h–j*.)
As to the murder of the deceased, it appeared that the accused had inflicted serious and grievous injuries on her, especially to her private parts. He had smothered her and strangled her so that she could not scream for assistance. He hid her body so that it would not be found by anyone searching the premises. He had done this knowing full well that her family were in anguish and trying to find her. His conduct was nothing other than inhumane and barbaric.
The court held that there were no substantive and compelling circumstances and that the prescribed sentence of life imprisonment had to be imposed. In respect of each of the four rape offences, as well as the conviction on the count of murder, the court imposed sentences of life imprisonment, and each of the kidnapping charges attracted a sentence of three years' imprisonment. The sentences in respect of each complainant were ordered to run concurrently. (Paragraph [24] at 540*c–e*.)

S v SETLHOLO 2017 (1) SACR 544 (NCK)

Corruption — Sentence — Police officer soliciting bribe from person who had been lured into fake illicit diamond transaction — Fact that perpetrator a police officer an aggravating factor — Sentence of 10 years' imprisonment confirmed on appeal.

The appellant, a 23-year-old police officer, appealed against his sentence of 10 years' imprisonment imposed for corruption and fraud, his appeal against the convictions previously having been dismissed. The convictions came about as a result of his participation in a misrepresentation to a complainant who was the potential client in an illicit diamond sale. The appellant and his cohorts pretended to the complainant at the crucial moment that they were part of a police trap and that he would be arrested and charged for the offence, but could avoid this by paying them R50 000. The appellant accompanied the complainant to an ATM where the latter drew R10 000. An arrangement was made that he would later pay a further R40 000 and be provided with the police docket. The complainant, however, approached the police and the appellant was arrested when he received the rest of the money. It was contended for the appellant that the sentence of 10 years' imprisonment for a youthful offender such as him was excessive.
Held, that the appellant had been fortunate in that the trial magistrate had not taken into account the minimum-sentencing regime, which required a minimum sentence of 15 years' imprisonment if no substantial and compelling circumstances were found to exist, as there was no reference in the charge-sheet to the applicability of that sentencing regime, nor was any mention made of it at the commencement of the trial. (Paragraph [13] at 550*b–e*.)
Held, further, that the fact that the appellant was a police offiicer was an aggravating factor as he was supposed to be vigilant and protect the community against crime. There could be no doubt that the corrupt and fraudulent activities in the present case had been carefully planned.

The appellant had played a significant role in the execution of the bogus police operation and had had ample opportunity to reconsider his actions. He was a gainfully employed public servant and there had been no need for him to engage in any fraudulent and corrupt activities. The sentence was furthermore not out of kilter with the sentence that the court itself would have imposed and there were accordingly no grounds for the court to interfere with the sentence on appeal. The appeal was dismissed.

S v BRUINTJIES 2017 (1) SACR 553 (WCC)

Child — Sentence — Imprisonment — Long-term imprisonment — Whether appropriate — Sixteen-year-old appellant embarked on shooting spree in tavern to which he had been refused entry — Convicted of murder, two counts of attempted murder and firearm offences — Appellant 18 years old at time of sentencing and sentenced to 19 years' imprisonment — Such lengthy sentence not leaving appellant with much hope of different life outside of crime — Sentence reduced to 13 years' imprisonment.

The appellant was 16 years old when he committed the offences of murder, two counts of attempted murder and one count each of the possession of a firearm and ammunition. According to the evidence, he had been refused entry to a tavern on account of his age, but nonetheless proceeded to enter the tavern where he embarked on a shooting spree, killing the deceased and injuring two others. By the time he was sentenced he was already 18 years old and the court sentenced him to an effective 19 years' imprisonment: 10 years for murder; three years for each of the two counts of attempted murder; 10 years for the unlawful possession of a firearm; and three years for the unlawful possession of ammunition. The sentence for the murder was ordered to run concurrently with the other sentences imposed. He appealed against his conviction and sentence but the court dismissed his appeal against the conviction. The state conceded that the 19-year term of imprisonment was too harsh and warranted interference by the court.
Held, that an effective sentence of 19 years' imprisonment for a first offender, who was 16 years old at the time of the commission of the offences, was startlingly inappropriate. It appeared furthermore that the court a quo did not have regard to the requirement, imposed by s 77(5) of the Child Justice Act 75 of 2008, that the term of imprisonment imposed was to be antedated by the number of days the child had spent in prison or a child and youth centre prior to being sentenced. (Paragraph [27] at 558*j*–559*a*.)
Held, further, that the lengthy term of imprisonment imposed visited a punishment on the appellant so long that it did little to allow him to keep the hope of a different life, outside of a world of crime, alive. (Paragraph [30] at 559*e*–*g*.)
Held, further, that the state had not proved that the firearm used by the appellant was a semi-automatic pistol as alleged in the charge-sheet and accordingly, the sentence of 10 years' imprisonment imposed on that count was unduly harsh. (Paragraph [31] at 559*g*–*h*.) The court accordingly reduced the sentence to an effective term of 13 years' imprisonment.

S v MARINGA 2017 (1) SACR 561 (NCK)

Appeal — Special entry in terms of s 317(2) of Criminal Procedure Act 51 of1977 — Prisoner discovering many years after conviction that defended by attorney without right of appearance — Requirements of s 317 met and condonation granted for lateness of application.

The applicant was serving a sentence of life imprisonment imposed for murder, robbery and the unlawful possession of firearms and ammunition. He discovered, only when making enquiries about being released on parole, that the attorney who had represented him at his trial in 2004 did not at the time have the right of appearance in terms of the Right of Appearance in Courts Act 62 of 1995. He accordingly brought the present application in which he sought the noting of a special entry in terms of s 317(2) of the Criminal Procedure Act 51 of 1977, and at the same time sought condonation for bringing the application out of time.
Held, that the right to legal representation was one of the most sacrosanct rights in our Bill of Rights. The applicant's application satisfied the requirements of s 317 in that it was made in good faith, was not frivolous or absurd, and would not amount to an abuse of the process of the court. Notwithstanding the inordinate delay in bringing the application, condonation had to be granted for the late filing thereof. (Paragraphs [9] and [12] at 563*g*–*i* and 564*d*.)

S v RASENA 2017 (1) SACR 565 (ECG)
Arms and ammunition — Declaration of unfitness to possess firearm in terms of s 103(2)(a) of Firearms Control Act 60 of 2000 — Enquiry — Nature of — Enquiry performed in perfunctory fashion — Consideration of all relevant factors required for proper enquiry.

Having found the accused guilty of contravening a protection order in terms of s 17*(a)* of the Domestic Violence Act 116 of 1998 and assault, the magistrate then considered the application by the prosecutor in terms of s 103 of the Firearms Control Act 60 of 2000 that the accused be declared unfit to possess a firearm. The magistrate considered the J88 form which showed the injuries sustained by the complainant (relating to the assault charge) and then stated that he was making no order, which meant that the accused was automatically declared unfit to possess a firearm. On review,
Held, that the record made it abundantly clear that the debate during oral submissions on behalf of the state and the accused related to the accused's fitness or otherwise to possess a firearm following his conviction on the domestic violence charge, and not on the assault charge. Nothing precluded a court, however, from holding one enquiry in relation to two separate offences in respect of which the section applied where the offences were committed at the same time and place. (Paragraphs [13]–[14] at 569*f*–*h*.)
Held, further, that the enquiry conducted by the magistrate into the accused's unfitness to possess a firearm had been embarked on in a perfunctory fashion. In approaching its task a court should have regard to any factor that bears on the issue and if there is reason to believe that all material facts bearing on that decision are not before it, the court should cause those facts to be discovered and placed before it. (Paragraph [16] at 570*f*–*h*.)

The matter was remitted to the magistrate to conduct a proper enquiry in terms of the provisions of s 103 of the Firearms Control Act.

S v MASANGO 2017 (1) SACR 571 (GP)

Sentence — Evidence on sentence — Insufficient evidence placed before court — Duties of court in terms of s 274(1) of Criminal Procedure Act 51 of 1977.

The appellant was convicted in a circuit court of murder, kidnapping and crimen injuria and was sentenced to life imprisonment. He was granted leave by the Supreme Court of Appeal to appeal to the full court on sentence. He contended on appeal, inter alia, that the High Court had misdirected itself by not invoking the provisions of s 274(1) of the Criminal Procedure Act 51 of 1977 (the CPA) as it had not received evidence as to the proper sentence to be imposed.
Held, that all the court had was that he was unmarried, received a social grant, and the proven facts of the case, namely that he had dragged the deceased behind the car with a rope tied around his neck. There were no facts or evidence before the court relating to the appellant's personal circumstances or why he was even receiving a social grant. The High Court had accordingly misdirected itself by considering the sentence without any evidence placed on record in terms of s 274(1) of the CPA and the court, in the circumstances, had no option but to set the sentences aside.
Held, further, that the court could not deal with the sentences afresh due to the lack of evidence on mitigation — it was trite that the appeal court was confined to the facts placed on record. The matter accordingly had to be remitted to the High Court to consider the appellant's sentences afresh after hearing evidence and/or obtaining facts in mitigation as envisaged by s 274(1) of the CPA. (Paragraph [18] at 575*c*.)

S v BAKANE AND OTHERS 2017 (1) SACR 576 (GP)

Evidence — Confession — Admissibility — Undue influence — Slapping and rough handling by police amounting to assault but not torture — No automatic exclusion — Trial judge aware of accused's constitutional rights and evidence examined in detail — Confessions and pointings-out properly admitted.

The four appellants were convicted in the High Court of murder and robbery with aggravating circumstances, and were sentenced to various terms of imprisonment. Their convictions were based on incriminating written warning statements and pointing-out reports which were ruled admissible as confessions or admissions after a trial-within-a-trial was held to determine such. They contended that they had been assaulted and threatened by the police to sign said statements and make the pointings-out and, since these were violations of their constitutional rights, the material produced ought to have been excluded. The main difficulty in the case, in the opinion of the majority of the court, was the remark by the court a quo, regarding the admissibility of this evidence, that: 'We [the judge and single assessor] accept that some slapping and rough handling took place. The slapping could be classified as assault but not torture. Then exercise my discretion to accept the somewhat tainted evidence insofar as the assaults were concerned in the interests of justice and for fear that the administration of justice would otherwise be brought into disrepute.'

The majority of the court (per Prellerand Khumaloin separate judgments) held that the statement had to be seen in the context of the fact that a fifth accused was discharged because all of his statements were disallowed since his constitutional rights had not been adequately explained and respected by the police. This discharge took place despite a later remark by the court that the fifth accused was clearly also guilty of the same crimes as his co-accused. In the circumstances, it was clear that the court was well aware of the constitutional rights of all five accused and the discretionary nature of the exclusionary rule contained in s 35(5) of the Constitution (see [4] and [21]). The court had furthermore considered every detail of the relevant evidence very carefully and had come to the conclusion that it should be admitted. There was nothing wrong with the conviction and it had to stand (see [6]). The court also dismissed the appeal against sentence.
The minority (per Manamela AJ) found that although not every degree of influence would afford sufficient grounds for exclusion, once influence was considered to be undue the relevant threshold was reached for exclusion.That was not advocating for automatic exclusion of unconstitutionally obtained evidence. By admitting the confessions found to have been made by the appellants, the trial itself was rendered unfair and the administration of justice was brought into disrepute. The trial court ought to have excluded the statement based on its findings of the slapping and gloving. Besides, our courts had applied international conventions on confessions which held that torture could also be psychological, let alone slapping or gloving (see [67]). In the opinion of the judge, in these circumstances, the appeal against conviction ought to have been upheld.

All SA [2017] Volume 2 May 2017

Commissioner, South African Revenue Service v Van der Merwe NO and others [2017] 2 All SA 335 (SCA)

Taxation – Property under control of Commissioner of Revenue Services – Property belonging to company under liquidation – Claim by liquidators for release of property – Whether sections 20(4), 38 and/or 39 of the Customs and Excise Act 91 of 1964 or section 7(1)(b) of the Value Added Tax Act 89 of 1991 constitute an embargo in favour of the Commissioner preventing the liquidator of a company unable to pay its debts from taking possession of the company's property under the control of the Commissioner, and dealing with such property as provided for in the law relating to insolvency, unless duty and/or value added tax has been paid on such property – Court confirming that Customs and Excise and Value Added Tax Acts do not preclude the Commissioner from releasing goods to the liquidators without the liquidators first having to pay duty and VAT thereon.

The first to fifth respondents were the liquidators of the sixth respondent. The latter company was placed under winding-up because it was unable to pay its debts.

Prior to its winding-up the company concluded instalment sale agreements in terms of which it purchased 23 items of heavy duty earthmoving equipment for use in its operations in the Democratic Republic of the Congo ("DRC"). Fourteen of the items were subject to credit sale agreements concluded between the company and three banks, and were therefore subject to the usual reservation of ownership. Those items became the property of the company by virtue of the provisions of section

84(1) of the Insolvency Act 24 of 1936 and the banks obtained a hypothec over the equipment to secure any outstanding indebtedness. When the company's operations in the DRC were complete the equipment was returned to South Africa. In the ordinary course, when the equipment was returned from the DRC, customs duty would have been payable in terms of section 39(1) of the Customs and Excise Act 91 of 1964 and VAT would have been payable in terms of section 7(1)(b) of the Value Added Tax Act 89 of 1991. In March and June 2014, the equipment arrived in the country and was entered into the warehouse of the eighth respondent, acting as UTI's sub-agent, with deferment of customs duty and VAT pursuant to section 20(1)(a) of the Customs Act and section 13(6) of the Value Added Tax Act. The goods remained in the warehouse under the control of UTI, attracting freight and storage fees. The release of the equipment could not be secured by the liquidators unless duty and VAT was paid. They therefore instituted proceedings in the court *a quo* for an order directing that the equipment be released to them without payment of duty and VAT, contending that they were obliged, in terms of section 391 of the Companies Act 61 of 1973, and section 61, read with section 83(3) of the Insolvency Act, to take possession of the equipment. The appellant ("the Commissioner") and UTI opposed the application contending that the equipment could only be released to the liquidators after compliance with sections 20(4), 38, 39, 47A, 19(1), 19(6), 19(7), 19(9), 20(4), 107(2)(a)(i), 114(aC) and 114(1)(b)(i) of the Customs and Excise Act. The Commissioner claimed that the sections precluded him from releasing the equipment (and the court from making an order that he do so) until the customs duty and VAT in respect of the equipment was paid in full.

The court *a quo* ordered that the equipment be released to the liquidators to be dealt with in terms of the laws of insolvency.

In the ensuing appeal, the Commissioner and the liquidators were in agreement on the question which would be determinative of the appeal. That question was whether sections 20(4), 38 and/or 39 of the Customs and Excise Act or section 7(1)(b) of the Value Added Tax Act constituted an embargo in favour of the Commissioner preventing the liquidator of a company which was unable to pay its debts from taking possession of the company's property under the control of the Commissioner, and dealing with such property as provided for in the law relating to insolvency, unless duty and/or value added tax has been paid on such property.

The Commissioner's argument on appeal was that the court below had erred in approaching the matter as if the Commissioner was simply a creditor of the company and by determining whether, *qua* creditor, the Commissioner was entitled to be treated otherwise than in terms of the Insolvency Act. It was argued on behalf of the Commissioner that while the Customs Act is primarily a fiscal measure, it is also a means of promoting the State's economic and other interests.

Held – The court *a quo* considered the scope and purpose of provisions relating to the winding-up of companies unable to pay their debts in terms of the Companies Act, the Insolvency Act, the Customs and Excise Act and the Value Added Tax Act and correctly concluded that the ranking of claims within the Insolvency Act does not countenance any creditor being granted a preference such as that contended for by SARS. The answer to the question of whether there is an embargo as contended for by the Commissioner, which prevented the liquidators from taking possession of the equipment in order to deal with it according to the laws of insolvency without first having to pay duty and VAT thereon, was to be found in sections

20(4)(a), 38, 39 and 114 of the Customs and Excise Act. All those provisions addressed the ordinary situation where goods are brought into the country and attract a liability to pay customs duty. They are directed at the obligation of the importer and others liable to pay duty, and do not address the special situation of insolvency. The Court explained that when one looks at the liability to pay customs duty in the ordinary course, one looks to the provisions of the Customs and Excise Act alone. When insolvency intervenes one turns to the Insolvency Act. In circumstances of insolvency our common law provides that a trustee has to realise all the assets of an insolvent including those subject to a lien and as such the trustee is entitled to demand delivery thereof.

There is nothing in either the Customs and Excise Act or the Insolvency Act which expressly (or by necessary implication) provides that goods subject to a lien in favour of SARS do not fall to be dealt with under the laws of insolvency. The Court agreed with the court *a quo*'s finding that section 114 of the Customs Act was not intended to create an embargo against clearance unless duty and VAT were first paid in full, but served to provide the Commissioner with additional security. The court *a quo*'s interpretation protected the legitimate property expectations of all creditors to share in the proceeds of a speedy realisation of assets. The judge was mindful of the fact that some ambiguity might arise when the provisions of the 1973 Companies Act and the Insolvency Act were considered together with the Customs and Excise Act.

Concluding that properly construed, the Customs and Excise and Value Added Tax Acts do not preclude the Commissioner from releasing the equipment to the liquidators without the liquidators first having to pay duty and VAT thereon, the Court dismissed the appeal with costs.

Herbal Zone (Pty) Ltd and others v Infitech Technologies (Pty) Ltd and others [2017] 2 All SA 347 (SCA)

Delict – Defamation – Claim for interdict against future publication of defamatory matter – Where accusation of distribution of counterfeit goods was found to be justified, entitlement to interdict granted was not established.

Intellectual property – Passing off – Passing off occurs when one entity represents, whether or not deliberately or intentionally, that its business, goods or services are those of another entity, or are associated therewith, and is established when there is a reasonable likelihood that members of the public in the marketplace looking for that type of business, goods or services may be confused into believing that the business, goods or services of one business are those of another – Proof of passing off requires proof of reputation, misrepresentation and damage.

The second appellant was the sole shareholder of the first appellant ("Herbal Zone"). He became involved with a Malaysian company ("Herbal Zone International") which manufactured capsules containing a root extract believed to have aphrodisiacal properties that enhanced male sexual performance. He called the product in capsule form "Phyto Andro". From 2009 until 2014 the first respondent ("Infitech"), was the sole distributor of Phyto Andro in South Africa in terms of a distribution agreement concluded with Herbal Zone. Before the termination of that sole distributorship, the third and fourth respondents, who were shareholders of Infitech, formed the second respondent ("Herbs Oils"). Since 2014, Herbs Oils distributed a product in South Africa, also under the name "Phyto Andro for Him", in competition with the product

imported by Herbal Zone. Although neither Herbal Zone nor Herbs Oils had secured registration of “Phyto Andro” as a trademark, the packaging that each uses for its own product includes after the words “Phyto Andro” the standard symbol ® used to indicate such registration.

The appellants responded to the respondents’ actions by publishing an advertisement stating that the product sold by Infitech was a counterfeit product. Herbal Zone also instigated a search and seizure operation by the police at the premises of Infitech and Herbs Oils.

Eventually, the respondents launched proceedings in the High Court seeking a number of interdicts against the appellants. The latter counter-applied for an interdict restraining the respondents from marketing, selling, advertising, promoting or presenting consumable herbal capsules using trademarks, labels or names including the words Phyto Andro or packaging confusingly similar to that being used by Herbal Zone and its distributors. They contended that Infitech and its associates were passing off their product as that of Herbal Zone. Some of the interdicts sought by Infitech were granted on the basis that the statements made about Infitech and Herbs Oils in the advertisements and circular were defamatory. The counter-application was dismissed on the basis that Herbal Zone failed to discharge the onus of proving that the reputation and goodwill attaching to Phyto Andro, as marketed in South Africa, vested in Herbal Zone, as opposed to Herbal Zone International, which was not a party to the application.

On appeal against that decision, the primary issue was the passing off claim, and the defamation claim was the secondary issue.

Held – Passing off occurs when one entity represents, whether or not deliberately or intentionally, that its business, goods or services are those of another entity, or are associated therewith. It is established when there is a reasonable likelihood that members of the public in the marketplace looking for that type of business, goods or services may be confused into believing that the business, goods or services of one business are those of another. Proof of passing off requires proof of reputation, misrepresentation and damage.

The packaging of Herbs Oils’ product used the same name, Phyto Andro, to describe the product and the packaging was very similar. The name Phyto Andro was not descriptive of the product, but was an invented mark attached to it. In calling their product Phyto Andro, there was plainly a representation to the public by the respondents that when they bought Herbs Oils’ product it was the product that enjoyed a reputation in South Africa under that name. The crucial question then was whether Herbal Zone enjoyed the reputation attaching to Phyto Andro in South Africa.

The Court dispensed summarily with Herbs Oils’ claim that the reputation in the Phyto Andro mark vested in it. Infitech’s role in regard to the product sold under that mark was that of a distributor. It acquired that role in terms of a distribution agreement that said that Herbal Zone was the owner of all rights, title, trademarks and logos in respect of the product. Turning to Herbal Zone’s claim that proprietorship in the mark and the reputation attaching to it vested in it, the difficulty it faced lay in the confusion on the papers between it and Herbal Zone International and their respective roles in the manufacture of Phyto Andro and its marketing in

South Africa. The Court agreed with the High Court's finding that Herbal Zone failed to show that the reputation in the mark vested in it and not Herbal Zone International. The appeal against the finding on the issue of passing off, accordingly, failed.

That left the defamation claim to be addressed by the Court. The argument on defamation was that in the appellants' advertisements Infitech and Herbs Oils had been accused of selling counterfeit products and it was alleged that such conduct on their part was illegal. The Court set out the proper approach to an application for an interdict to prevent the publication of defamatory matter. Such an interdict is directed at preventing the party interdicted from making statements in the future. If granted, it impinges upon that party's constitutionally protected right to freedom of speech. For that reason such an interdict is only infrequently granted, leaving the party claiming that they will be injured by such speech to their remedy of a claim for damages in due course. Although a corporate entity such as Herbs Oils was entitled to claim damages based on defamation, no attempt was made to show that Herbs Oils had suffered loss as a result of the publication of the advertisements and circular, much less that it would suffer irreparable harm in the future by further publications of such material. Nor did it allege that damages would not be an adequate remedy for any such publication. On the other hand, Herbal Zone produced evidence that it had over a lengthy period, first introduced and then caused to be distributed in South Africa, the product Phyto Andro for Him. That entitled it to describe its own product as the genuine or original product and to decry the product of others who were marketing competing products of a different manufacture and source as counterfeit, that is, not the genuine article. Even if the reputation in Phyto Andro did not vest in it, the fact that it was importing it into this country and distributing it here entitled it to level the charge of counterfeit against Herbs Oils products. In those circumstances, the application for an interdict should not have been granted and the appeal against it was upheld.

Mills v Mills [2017] 2 All SA 364 (SCA)

Marriage – Divorce – Matrimonial Property Act 88 of 1984 – Marriage out of community of property with accrual – Antenuptial contract – Exclusion of defined assets from accrual – Proof of assets "acquired by such party by virtue of the possession or former possession of such asset" – Particular asset, its proceeds and assets which replace the excluded asset, or acquired with its proceeds excluded.

Trusts – Trust Property Control Act 57 of 1988 – Whether trusts were alter ego of the appellant, and whether piercing of veil was justified – Respondent unable to prove that appellant transferred personal assets to the trusts and dealt with them as if they were assets of the trusts with the fraudulent or dishonest purpose of avoiding his obligation to properly account to the respondent – Assets of trusts not to be taken into account in determining the accrual of the appellant's estate.

The appellant and respondent having been divorced, the respondent approached the High Court, advancing a number of proprietary claims based upon the terms of an antenuptial contract ("ANC") concluded between the parties. The ANC provided for a marriage out of community of property with the accrual system in terms of the Matrimonial Property Act 88 of 1984 (the "Act"). Central to a resolution of the issues between the parties was the interpretation of certain provisions in the ANC, as well as a determination of whether certain trust assets formed part of the accrual of the appellant's estate.

The High Court upheld most of the respondent's claims, leading to the present appeal.

Held – The Court would deal with each of the claims as dealt with in the High Court.

The first claim ("Claim A") was for the provision by the appellant of fixed property to the value of R300 000 escalated at the rate of 10% per annum based on a provision in the ANC that in the event of an extramarital affair of the appellant being the cause of a divorce, he would be obliged to furnish that asset to the respondent. Although the appellant initially disputed the issue, he conceded during cross-examination that his extramarital affair had destroyed the trust in the marriage. That confirmed that his conduct was the cause of the divorce.

In Claims B, E and F the respondent had sought orders declaring that the assets held by three trusts were the assets of the appellant, and had to be taken into account when determining the extent of the accrual of the appellant's estate for the purposes of the respondent's accrual claim, because they were not excluded from the accrual in terms of the ANC. In the alternative, it was alleged that the trusts were simply the alter ego of the appellant and the assets of the trusts were in reality the assets of the appellant. The High Court's upheld those submissions. The respondent alleged that the appellant established the trusts to conceal his assets with the purpose of defeating the patrimonial claims of the respondent. It was also alleged that the appellant transferred personal assets to these trusts and in registering these assets in the trusts, did not intend to transfer ownership. In establishing the trusts, the object was to isolate each of the appellant's separate business so that the financial demise of one, would not affect the financial viability of any of the others. That was obviously a legitimate business activity. The contention that the trusts were established with the object of defeating any patrimonial claims of the respondent was not supported.

In a previous case, the Court had held that a spouse has no standing to challenge the management of the trust by her husband in such circumstances, either as a beneficiary of the trust or as third party who transacted with the trust. The present Court disagreed with that conclusion which confined standing to advance such a claim to those to whom a fiduciary responsibility is owed by the trustee. There was no basis for a distinction to be drawn between legal standing to advance a claim to pierce the veil of a trust, by a third party who transacts with the trust on the one hand, and a spouse who seeks to advance a patrimonial claim, on the other. However, the respondent had to prove that the appellant transferred personal assets to the trusts and dealt with them as if they were assets of the trusts with the fraudulent or dishonest purpose of avoiding his obligation to properly account to the respondent. The evidence did not support such a conclusion. The assets of the trusts were, accordingly, not to be taken into account in determining the accrual of the appellant's estate.

The above conclusion rendered it necessary to recalculate the amount payable to the respondent in Claim D.

The appeal was otherwise upheld.

Mpumalanga Tourism & Parks Agency and another v Barberton Mines (Pty) Ltd and others [2017] 2 All SA 376 (SCA)

Interpretation of statutes – Doctrine of vagueness – Doctrine of vagueness does not require absolute certainty of laws, but reasonable certainty.

Mining and minerals – Environmental law – Grant of a prospecting right in terms of section 17(1) of the Mineral and Petroleum Resources Development Act 28 of 2002 – Whether area in respect of which right was granted constituted part of a nature reserve or protected environment – Section 12 of the National Environmental Management: Protected Areas Act 57 of 2003 – A protected area which immediately before section 12 took effect was reserved or protected in terms of provincial legislation for any purpose for which an area could in terms of this Act be declared as a nature reserve or protected environment, must be regarded to be a nature reserve or protected environment for the purpose of the Act.

In October 2006, the first respondent ("Barberton Mines") was granted a prospecting right in terms of section 17(1) of the Mineral and Petroleum Resources Development Act 28 of 2002 to conduct prospecting operations for gold and silver on certain properties in the Barberton district. When Barberton Mines sought to commence with the prospecting work it encountered resistance from the first appellant, the Mpumalanga Tourism and Parks Association (the "MTPA") and several members of the second appellant ("MOA"), who asserted that the prospecting area constituted part of a nature reserve or protected area.

Barberton Mines lodged an application with the High Court, seeking a declaration that it was entitled to conduct the prospecting activities referred to in section 5(3) of the Mineral and Petroleum Resources Development Act 28 of 2002 in accordance with its prospecting right.

The MTPA and MOA launched a counter-application seeking the review and setting aside of the dismissal of an internal appeal which they had noted against the decision to grant the prospecting right. It also sought condonation of the delay in seeking review.

The High Court found in favour of Barberton Mines that the prospecting area did not constitute part of a nature reserve or protected environment. It declined to enter into the merits of the counter-application because it was of the view that the application was out of time and condonation could not be granted.

The MTPA and MOA appealed against that ruling.

Held – The prospecting area fell on land that the provincial government had been actively trying to conserve for more than thirty years. On the question of whether the alleged Barberton Nature Reserve constituted a "nature reserve" for the purposes of the National Environmental Management: Protected Areas Act 57 of 2003, the High Court held that the alleged reserve had never been declared or designated as such in terms of provincial legislation or the latter Act. The present Court found the High Court's view to be too narrow.

A useful starting point was said to be section 24 of the Constitution which affords everyone the right to an environment that is not harmful to their health or well-being. One of the objects of the Mineral and Petroleum Resources Development Act was to give effect to section 24 of the Constitution by ensuring that mineral and petroleum resources were developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development. The granting of prospecting rights under the MPRDA is thus made subject to environmental protections and

constraints. The National Environmental Management: Protected Areas Act was binding on all organs of State and trumped other legislation in the event of a conflict concerning the management or development of protected areas. Section 12 of that Act is a deeming provision providing that a protected area which immediately before the section took effect "was reserved or protected in terms of provincial legislation for any purpose for which an area could in terms of this Act be declared as a nature reserve or protected environment, must be regarded to be a nature reserve or protected environment for the purpose of this Act. In terms of section 12, a protected area that was reserved or protected in terms of provincial legislation was entitled to be regarded as a nature reserve or protected environment for the purposes of NEMPAA. The effect of the provision was thus to extend the protection afforded to a nature reserve by NEMPAA, to a protected area reserved in terms of provincial legislation as well. The provincial legislation in question in this case was Proclamation Number 12 of 1996. The High Court took the view that because the description of the area therein was vague, it had to be regarded as void. The present Court held that the doctrine of vagueness does not require absolute certainty of laws. Reasonable certainty is what is required. Since the 1996 Proclamation was a designation of an area already as a matter of fact reserved, its validity and effectiveness did not require a detailed description of the area concerned, as the High Court found. To achieve its purpose, the 1996 Proclamation could simply indicate the designated area by name, as it had. Therefore, the area was indicated with sufficient certainty to meet the challenge that the 1996 Proclamation was void for vagueness. And, as the 1996 Proclamation met the requirements of section 12 of the National Environmental Management: Protected Areas Act, it followed that the prospecting area fell to be protected against prospecting under section 48(1) of that Act.

The appeal was, accordingly, upheld.

Westminster Tobacco Co (Cape Town and London) (Pty) Ltd v Philip Morris Products SA and others [2017] 2 All SA 389 (SCA)

Intellectual property law – Trade marks – Appeal against granting of application for expungement – Expungement application based on non-use – Section 27(1)(b) of the Trade Marks Act 194 of 1993 – Test for bona fide use of trade mark – Use must be in the course of trade and for the purpose of establishing, creating or promoting trade in the goods to which the mark is attached, and the use does not have to be extensive, but it must be genuine.

The appellant ("Westminster") and the first respondent ("Philip Morris") were each major international manufacturers and suppliers of cigarettes and tobacco related products. The dispute between the parties arose because the group of companies ("PMI") to which Philip Morris belonged used the trade mark PARLIAMENT internationally in respect of one of its premier brands of cigarettes, but was unable to do so in South Africa. When it had applied in 2006, for registration of the trade mark PARLIAMENT, it could not obtain registration because Westminster was registered as the proprietor of two marks in that regard. As a result, Philip Morris successfully brought an application in terms of section 27(1)(b) of the Trade Marks Act 194 of 1993 (the "Act") for the rectification of the register by the removal of Westminster's two marks on the grounds of non-use. That led to the present appeal.

Held – In terms of section 27(1)(b), the marks were liable to be removed from the register if, for a continuous period of five years prior to and expiring on 22 July 2008, there was no *bona fide* use thereof in relation to the goods or services in respect of which they were registered. The onus of proof of *bona fide* use rested upon Westminster in terms of section 27(3) of the Act.

The Court explained the concept of *bona fide* use of a trade mark. The use must be in relation to goods of the type in respect of which the mark is registered. The use must be use as a trade mark, for the commercial purposes that trade mark registration exists to protect. It must be use in the course of trade and for the purpose of establishing, creating or promoting trade in the goods to which the mark is attached. The use does not have to be extensive, but it must be genuine. Whether use of the mark is *bona fide* is a question to be determined on the facts of the particular case. Having regard to the evidence adduced by Westminster, the Court rejected Philip Morris' contention that the sole purpose of launching PARLIAMENT cigarettes was to protect the trade marks. Instead, the Court was satisfied that the marks were being used by Westminster on a product that was to be placed in the market for a very specific purpose, targeted at a very specific sector of the market and in a way that would not be detrimental to their existing brands. It therefore could not be said that there was no genuine commercial purpose in launching the PARLIAMENT brand.

The finding that Westminster's use of the marks was *bona fide*, led to the upholding of the appeal, and the dismissal of the expungement application.

Agri Eastern Cape and others v MEC for the Department of Roads and Public Works and others [2017] 2 All SA 406 (ECG)

Civil procedure – Structural interdict – Circumstances where warranted – A structural interdict is warranted where it is necessary to secure compliance with a court order; where the consequences of even a good-faith failure to comply with a court order are so serious that the court should be at pains to ensure effective compliance; and where the mandatory order is so general in its terms that it is not possible to define with any precision what the government is required to do.

n the present application for a structural interdict, the first applicant ("Agri EC") represented the interest of the farming community in the Eastern Cape province, and the remaining applicants were its members. The matter proceeded only against the first and second respondents (the "MEC" and the "DG").

The focus of the application was the poor condition and lack of maintenance and repair of the road network of the farming communities in the Eastern Cape and the need for a plan of action to remedy the situation. Essentially, the applicants sought an order declaring the respondents legally obliged to repair all roads within their jurisdiction and an order that they comply with that obligation. The founding affidavit was deposed to by the President of Agri EC ("Pringle"). According to Pringle, the failure to repair and maintain the road network of farming communities in the Eastern Cape had prevailed for more than 10 years. Pringle annexed to his affidavit letters from a number of agricultural associations in the Eastern Cape setting out the problems they experienced as a result of the poor condition of gravel roads. The answering affidavit was deposed to by the Acting Engineering Specialist: Roads

Planning employed by the Department of Roads and Public Works. He was responsible for the planning and needs assessment of the provincial roads network in the Eastern Cape. He stated that the Department had a clear implementation strategy regarding the maintenance of roads, although there was a significant backlog. He expressed the view that a court order instructing the Department to repair the roads would amount to an instruction by the judiciary to the executive branch of government to prioritise road repairs and maintenance above other pressing social priorities. Secondly, it was alleged that the order would not be capable of being enforced because of insufficient funds. Thirdly, it was stated that the applicants had no legal basis for such an order because they had not asserted any right which had been breached.

In terms of an interim order granted in the matter, the first and second respondents were ordered to file a report with the court setting out what steps they would take to repair and maintain roads, the time-frames and how the work would be done. That led to Agri EC submitting a draft order to the court, which draft order drew largely on the material contained in the respondents' report. That in turn caused the respondents to revert to the previously held negative response to the applicants' submissions.

Held – Roads and road traffic fell within the exclusive legislative competence of the province. No person or authority other than the MEC had the power to repair and maintain roads, unless the MEC or his delegate concluded an agreement with that person or authority to take over responsibility for a provincial road. Setting out the constitutional and statutory obligations of the respondents, the Court found that their performance of those obligations was deficient.

The Court referred to the authorities identifying three sets of circumstances where a structural interdict is warranted. The first is where it is necessary to secure compliance with a court order. The second is where the consequences of even a good-faith failure to comply with a court order are so serious that the court should be at pains to ensure effective compliance. The third is where the mandatory order is so general in its terms that it is not possible to define with any precision what the government is required to do.

In objecting to the applicants' draft order, the respondents complained that the proposed order was indefinite and did not allow the Department to change its maintenance strategy and the mechanism to deliver that strategy. The Court found that to be a negative approach. The respondents needed the impetus of a structural interdict to move forward in a strategic manner. The applicants' draft order was, on the other hand, appropriate. The Court merely rearranged the sequence of the paragraphs and the formulation of the orders.

Amardien and others v Registrar of Deeds and others [2017] 2 All SA 431 (WCC)

Civil procedure – Consumer protection – Requirement of notice in terms of section 129 of the National Credit Act 34 of 2005 before the credit agreement is cancelled – In the absence of a contrary indication, it might be accepted that a notice sent by registered post by a credit provider in terms of section 129 had been delivered if it appeared from a post office track and trace report that it had been

received at the local post office of the consumer and that notification had been given by the post office to the addressee that the item was available for collection – Court finding no authority in support of argument that particulars of arrears is an essential ingredient of a notice of default in terms of section 129.

Contract – Sale of property in instalment sale agreement – Section 26(1)(b) of the Alienation of Land Act 68 of 1981 provides that no person shall receive any consideration by virtue of a deed of alienation in respect of a sale of land on instalments until the recording of the contract has been effected – Although instalments might not become payable until the contracts are recorded, that did not prevent them falling due in accordance with the terms of the contracts, and for the accrued amounts outstanding under the contracts to become immediately due and payable upon the recording of the contracts.

The applicants were purchasers of immovable property in terms of contracts of sale of land on instalments. They applied for orders declaring the action of the fifth respondent, as seller, in having cancelled the contracts to have been unlawful; setting aside the cancellation by the first respondent (the "Registrar of Deeds") of the recording of those contracts; and declaring the subsequent sale of the properties by the fifth respondent to the second to fourth respondents as trustees of a trust to have been unlawful, and void. It was accepted by the court that if the applicants succeeded in obtaining the first of the aforementioned orders, the cancellation of the recording of the contracts would fall to be set aside.

Held – Three matters arose for determination. The first was whether the applicants had been in breach of their payment obligations under the contract, as maintained by the fifth respondent; the second was whether the applicants were given notice in terms of section 129 of the National Credit Act 34 of 2005 before the contracts were cancelled; and the third was whether, assuming notice in terms of the National Credit Act had been given to them, the extent of the applicants' respective arrears had been indicated. The applicants alleged that the extent of their alleged arrears was omitted from the letters addressed to them in terms of section 129, with the result that the notices had been legally ineffectual for want of compliance with the requirements of section 129 of the National Credit Act and/or section 19 of the Alienation of Land Act 68 of 1981.

Sales of land on instalments are regulated in terms of Chapter II of the Alienation of Land Act. The Act makes provision, in section 20, for the recording of instalment sale contracts. Recording of contracts is effected by Registrar of Deeds at the instance of the seller, provided that if the seller does not do so within the statutorily stipulated period, the purchaser may either cancel the contract within 14 days of the expiry of the period, or at any time thereafter itself apply to the Registrar to have the contract recorded. The purpose of recording the contract is to afford certain protections to the purchaser. Section 26(1)(b) of the Alienation of Land Act provides that no person shall receive any consideration by virtue of a deed of alienation in respect of a sale of land on instalments until the recording of the contract has been effected. The contemplated consideration refers to the purchase price and interest thereon, excluding rent or occupational interest.

The contracts in question were entered into on various dates in or about 2000 but were recorded only in April 2014. Despite the provisions of section 26 of the Act, the

applicants made certain payments towards the purchase prices. Although the terms of the contracts contemplated that the properties would have been paid for and transferred within four years, that did not happen because of the suspension by the applicants of their payments. The applicants asserted, however, that they were not in breach of the agreements because, by virtue of the provisions in the Act, no consideration had become payable until the recordal of the contracts in April 2014. The fifth respondent, on the other hand contended that whereas the instalments might not have become payable until the contracts had been recorded, that did not prevent them falling due in accordance with the terms of the contracts. The seller's contention was thus that the accrued amounts outstanding under the contracts became immediately due and payable upon the recording of the contracts. The Court found the seller's contention to be well-founded. The provisions of sections 20 and 26 of the Act were not directed at affecting the terms of the agreements. Inasmuch as the applicants were each in arrears in terms of the contracts when the contracts were eventually recorded, they thereupon fell to be regarded as in breach of the contracts for the purposes of section 19 of the Alienation of Land Act, or in default for the purposes of section 129 of the National Credit Act. The contracts were therefore amenable to cancellation by the fifth respondent, subject only to any statutory provisions to which the exercise of the right of cancellation was subject.

Section 19 of the Alienation of Land Act provides that a seller in terms of a contract of sale of land on instalments is not entitled to enforce an acceleration of payment clause under the contract or to terminate the contract or institute an action for damages by reason of any breach of the contract unless the purchaser has been given notice of the breach and has failed, notwithstanding demand, to remedy the breach within a period to be afforded of not less than 30 days of the said notice. Sections 129 and 130 of the National Credit Act also require the seller in a sale of land on instalments to give the purchaser notice of any default in terms of the contract and an opportunity to remedy it before any enforcement measures can be taken. Enforcement measures for the purposes of section 129 include cancelling the contract by reason of the consumer's default. As section 129 of the National Credit Act and section 19 of the Alienation of Land Act inconsistently provided for notice to be given before cancellation for breach of contract could be effected, the effect of section 172(1) of the National Credit Act was that section 129 of that Act eclipsed section 19 of the Alienation of Land Act. Thus, it was only the question of compliance with section 129 that had to be considered.

The Court referred to case law stating that, in the absence of a contrary indication, it might be accepted that a notice sent by registered post by a credit provider in terms of section 129 had been delivered if it appeared from a post office track and trace report that it had been received at the local post office of the consumer and that notification had been given by the post office to the addressee that the item was available for collection. It was not incumbent on the credit provider to establish that the notice had come to the subjective attention of the consumer. Having regard to the evidence, the Court held that the applicants' averments were insufficient to displace the *prima facie* effect of the fifth respondent's evidence, supported by the track and trace reports, that notices in terms of section 129 were given to the applicants and that there was a reasonable opportunity afforded for such notices to come to their subjective attention. In respect of the second attack on the sections 129 notices, the Court found no authority in support of the argument that particulars

of the arrears was an essential ingredient of a notice of default in terms of section 129. It was concluded that it was not essential that the section 129 notices set out the amounts in which the applicants were in arrears.

Apart from the first applicant's application, the applications were dismissed. The first applicant's application was postponed for the hearing of oral evidence solely on the issue of whether the notice in terms of section 129 of the National Credit Act had been correctly addressed to him.

Bangani v Minister of Rural Development and Land Reform and another [2017] 2 All SA 453 (ECM)

Civil procedure – Jurisdiction – Land restitution agreement – Enforcement of – Whether High Court has jurisdiction to determine claim – Where claim fell within the exclusive jurisdiction of the Land Claims Court as provided in section 22 of the Restitution of Land Rights Act 22 of 1994, High Court lacking jurisdiction to entertain claim.

In terms of an agreement entered into in April 2009 between a local community, a local municipality and the respondents, the agreement provided *inter alia* for the payment by the second respondent of the amount of R88,167,26 to 907 households as compensation for the loss of the rights which the community had in land. According to the agreement, the land, which now vested in the municipality, was used prior to 1935 by members of the community to graze their cattle. The community was effectively dispossessed of their grazing rights by the introduction of legislation in the apartheid era aimed at regulating the use of the land. The agreement also provides for what is described as a project fund made up of "restitution settlement grants". The appellant sued the respondents for payment of the two amounts referred to above. In their plea, the respondents raised an objection to the appellant's *locus standi* to sue on the agreement. The objection was premised on the provisions of section 2(3)(b) of the Restitution of Land Rights Act 22 of 1994, in terms of which a natural person who has died after the lodgement of a claim as envisaged in the RLRA without leaving a will, may be substituted by a direct descendant. It was pleaded that the appellant was the wife of the son of the claimant and not a direct descendant as envisaged in the section, with the consequence that she was consequently not, and could not be a party to the agreement which she sought to enforce. At the trial, the respondents in *limine* raised another objection. It was contended that the court lacked jurisdiction to determine the dispute. The basis of the objection was that the dispute raised fell within the exclusive jurisdiction of the Land Claims Court as provided in section 22 of the Act. The court narrowly focused on the jurisdiction question and made no findings with regard to the issue of *locus standi* or the merits of the appellant's claim. It found that the appellant's claim was founded on an agreement as envisaged in section 22(1)(cE) of the Act, that her claim for payment amounted to the enforcement of an agreement as envisaged in paragraph (cE), and that it consequently lacked jurisdiction to entertain the appellant's claim. The dismissal of the application on that basis led to the present appeal.

Held – The issue for determination was whether the High Court had jurisdiction to determine the appellant's claim.

Although the Land Claims Court has all the powers of a High Court having jurisdiction in civil proceedings at the place where the land in question is situated, it

does not possess general or inherent jurisdiction. Unlike the High Court that derives its judicial authority from the Constitution, the Land Claims Court gets its authority from a statute and its powers are circumscribed. The powers which it does possess are, however, to the exclusion of the High Court. The High Court thus correctly found that it lacked material jurisdiction in respect of those matters which the Legislature in section 22(1) of the Act assigned to the exclusive jurisdiction of the Land Claims Court. The question then was whether the appellant's claim amounted to the determination of a matter as contemplated in section 22(1). Relevant for present purposes was the power of the Land Claims Court in paragraph (cE) "to determine any matter including the validity, enforceability, interpretation or implementation of an agreement contemplated in section 14(3), unless the agreement provides otherwise." The first aspect to that question was whether the appellant's claim was a matter that included the "enforceability" or "implementation" of an agreement. The second aspect was whether the agreement on which the appellant's claim was founded was an agreement as "contemplated in section 14(3)" of the Act. The Court held that as a claim for specific performance of the terms of a written contract, the appellant's claim was a matter that fell squarely within what was contemplated by the Legislature in paragraph (cE).

Turning to the second question, the Court explained the provisions of section 14(3) as follows. Where parties who have an interest in a claim have reached agreement in respect of the claim, and have entered into a written agreement, the agreement will only be effective from the date on which the Regional Commissioner has certified that he is satisfied with the agreement, and the agreement ought not to be referred to the Land Claims Court. In the present matter, the contract on which the appellant relied for her claim was entered into in terms of section 42D of the Act. The fact that the agreement was concluded in terms of section 42D did not take it outside the provisions of the Act. In other words, it did not operate to give the agreement any status different from an agreement as contemplated in section 14(3). Neither section 14(3), nor section 42D state that to be the position, and there is no obvious reason why a section 42D agreement should not also be subject to certification by the Regional Commissioner. Both sections deal with agreements reached in relation to a claim as envisaged in the Act, and section 14(3) is not limited to an agreement entered into between the parties to a land claims dispute.

Accordingly, the legal premise on which the Court found that it lacked jurisdiction was correct. The appellant did not take issue with that, but argued that the court below was not placed to make the finding it did as it had no, or insufficient evidence before it to find as a fact that the Commissioner had issued a certificate as contemplated in section 14(3). The appellant's argument was premised on the observation of the court in its judgment that the Commissioner's certificate was not placed before it. However, what the appellant's argument missed was that the judgment stated that it was not necessary for the production of the certificate by reason of the fact that the terms of the agreement itself made reference to the Commissioner certifying the agreement in terms of section 14(3). The effect was that the Commissioner's certificate had been incorporated into the agreement, and the agreement took effect from the date of the signing thereof.

The court below was correct in finding that the Commissioner had issued a certificate as contemplated in section 14(3) of the Act, and it correctly upheld the respondents' objection to its jurisdiction.

The appeal was dismissed.

Congress of Traditional Leaders of South Africa v Speaker of the National Assembly and others [2017] 2 All SA 463 (WCC)

Constitutional law – Traditional leadership – Sections 211 and 212 of the Constitution of the Republic of South Africa, 1996 – Judicial immunity – Claim for extension of principle of judicial immunity applying to other members of the judiciary, ie magistrates and judges, to members of the judiciary presiding in traditional courts – Claim having no foundation where traditional leader's criminal conduct was not committed in leader's capacity as King or judicial officer when the offences were committed.

The applicant in this matter operated as a voluntary organisation which aimed to protect, reinstate and promote the institution of traditional leadership. It brought proceedings before the court as a result of the fear and anxiety caused to traditional leaders of South Africa and their communities by the arrest, criminal charges, trial, conviction and sentencing of King Dalindyebo of the AbaThembu nation. In the eyes of traditional leaders, the whole criminal trial resulting in the conviction and sentence of the King meant that traditional leaders did not enjoy immunity from civil and criminal liability for applying customary law in the traditional courts. According to the applicant, the Constitution requires that Parliament specifically grant protection to traditional leaders in legislation, so as to ensure the independence of traditional leaders and their courts. The principle of judicial immunity that applies to other members of the judiciary, ie magistrates and judges, must apply with equal force and effect to members of the judiciary presiding in traditional courts. The prosecution and conviction of the King for carrying out his traditional leadership role meant that traditional leaders did not enjoy the same judicial immunity that magistrates and judges enjoyed. That was unfair discrimination and a violation of section 9(1) of the Constitution. Central to applicant's submissions was that Parliament had failed to comply with its obligations in terms of section 212(2) of the Constitution by not granting traditional leaders judicial immunity from criminal and civil liability for the decisions taken during their performance of judicial functions in traditional courts.

The first and second respondents opposed the granting of the relief sought by applicant on the basis that the applicant sought to undo and reverse the findings of the High Court, Supreme Court of Appeal and the Constitutional Court on the conviction and sentencing of the King. They argued further that on a proper reading and construction of sections 211 and 212 of the Constitution, there is no obligation imposed on Parliament to pass the particular legislation so advocated by applicant.

Held – The issues were reduced to that of judicial immunity; the failure of Parliament to comply with its obligations in terms of sections 211 and 212 of the Constitution to pass legislation; and the review and setting aside of the fifth respondent's decision to prosecute the King.

Judicial immunity is a form of protection afforded to judicial officers by public policy in the performance of their duties. It protects the judiciary against legal action brought against them for judicial actions, regardless of their incompetency, negligent conduct or in violation of the status. Judicial immunity does not protect judges from decisions made while off the bench. While the judiciary may be immune from legal action involving their conduct or actions, they may still be subject to criminal prosecutions.

In order for the judicial immunity discussion to be alive, the King should have acted as a King or judicial officer when these offences were committed. That was not the case. The claim by the applicant for judicial immunity to extend to traditional leaders therefore had no factual foundation.

It was also the applicant's argument that in order to ensure that the integrity of traditional leaders and traditional courts are preserved, Parliament has a constitutional obligation to pass laws which give effect to the spirit and purport of traditional leaders and the courts they preside over. The Court agreed with the first and second respondents that there is no obligation imposed on Parliament by section 212(1) of the Constitution to pass any legislation as envisaged by the applicant. The Traditional Leadership Act has already been passed by Parliament in fulfilment of its duty to recognise the institution, status, role and functions of traditional leadership according to customary law.

Finally, the applicant contended that the decision of the fifth respondent to prosecute the King for exercising his civil and criminal jurisdiction violated section 211(1) of the Constitution in that it violated the principle of judicial immunity extended to traditional leaders when they exercise their judicial power; it violated section 10 of the Constitution which guarantees the right to dignity; and that the decision to prosecute the King should be set aside on the ground that the actions of the King were not offences in terms of the Criminal Procedure Act 51 of 1977 read with the Transkei Penal Code. The Court held that the matter involving the prosecution of the King was *res judicata*. The King had exhausted all legal avenues and his leave to appeal to the Constitutional Court was refused. Even if the applicant's claim were constitutionally legitimate, the present Court did not have jurisdiction to review and set aside the decision of a court of equal status sitting in another province. Likewise, it did not have jurisdiction to overturn the decision of the Supreme Court of Appeal. The prayer was impermissible and had to fail.

The application was thus dismissed.

In the dissenting judgment, the first question discussed was whether Parliament may be compelled to pass legislation specifically dealing with the status of traditional leaders and their right to judicial immunity from civil and criminal liability for acts committed by them in traditional courts. Sections 211 and 212 of the Constitution impose a mandatory duty on Parliament to enact specific legislation dealing with the administration of justice. The Traditional Leadership and Governance Framework Act 41 of 2003 was passed in furtherance of that duty but did not address everything necessary for the institution, status and role of traditional leadership. The Judge was therefore of the view that Parliament had failed in its duty to enact specific legislation in this regard.

On the question of the status of traditional courts, it was held that such courts must enjoy the constitutional attributes of independence.

Judicial immunity is central to judicial independence. The threat of prosecuting traditional leaders for their judicial decisions is a violation of the Constitution. The dissenting judgment stopped short of deciding whether the actions of King Dalindyebo would have been covered by the immunity sought, but held that because there are forms of punishment in customary law which are not consonant with the

Constitution, to leave customary law untouched by legislative intervention would place it in constant conflict with the Constitution.

The judgment ended with a declaratory order regarding the mandatory obligation on Parliament to pass legislation as referred to above.

Earthlife Africa Johannesburg v Minister of Environmental Affairs and others [2017] 2 All SA 519 (GP)

Environmental conservation – Section 24 of the National Environmental Management Act 107 of 1998 – Any activities specified by the Minister of Environmental Affairs require environmental authorisation before they may be commenced with – Construction of coal-fired power station – Department of Environmental Affairs obliged to fully assess climate change impacts of a proposed coal-fired power station before environmental authorisation could be granted – Section 24O(1)(b) of the National Environmental Management Act expressly requires, as a peremptory requirement, the competent authority considering an application for an environmental authorisation to take into account all relevant factors.

The fifth respondent ("Thabametsi") had decided to build a 1200MW coal-fired power station, which was to be in operation until at least 2061. The applicant ("Earthlife") was an organisation whose aim was to raise environmental issues.

A party seeking to construct a new coal-fired power station requires, amongst other things, an environmental authorisation to be granted by the relevant decision-makers in the Department of Environmental Affairs ("the DEA"). Section 24 of the National Environmental Management Act 107 of 1998 provides that any activities which are specified by the Minister of Environmental Affairs must obtain an environmental authorisation before they may commence. The construction of a coal-fired power station is one such listed activity and the third respondent ("the Chief Director") is designated as the competent authority to decide on environmental authorisations for such power stations. In February 2015, the Chief Director granted Thabametsi an environmental authorisation for the proposed power station. Earthlife unsuccessfully appealed to the first respondent ("the Minister") against the grant of authorisation.

In the present application, Earthlife sought to review, in terms of the Promotion of Administrative Justice Act 3 of 2000, both the decision to grant the environmental authorisation and the appeal decision of the Minister. It maintained that the Chief Director was obliged to consider the climate change impacts of the proposed power station before granting authorisation and that he failed to do so. The grounds of review were that there was material non-compliance with the mandatory preconditions of section 24O(1) of the National Environmental Management Act which requires the consideration of all relevant factors in reaching a decision on environmental authorisation, including the climate change impact of the proposed coal-fired station; that the absence of a climate change impact assessment rendered both the impugned decisions irrational and unreasonable; and that the Minister committed material errors of law in reaching her decision.

Held – Section 24(1) of the National Environmental Management Act requires that the environmental impacts of a listed activity must be considered, investigated, assessed and reported on to the competent authority tasked with making a decision on environmental authorisation. Therefore, once an application for environmental

authorisation has been made, an environmental impact assessment process must be undertaken. Section 24O(1) obliges competent authorities to take account of all relevant factors in deciding on an application for environmental authorisation, including any pollution, environmental impacts or environmental degradation likely to be caused. Recognising that the climate change impacts of the proposed development were not comprehensively assessed, the Minister, in the appeal decision, imposed a further condition. Despite finding that a fuller assessment was required, the environmental authorisation was upheld, subject to the added condition.

It was not disputed that decisions granting environmental authorisation constituted administrative action in terms of the Promotion of Administrative Justice Act.

Although the appeal to the Minister was an appeal in the wide sense, of being a rehearing of, and fresh determination of the merits of the matter, it was still necessary to review the decision of the Chief Director. Irregularities committed by the Chief Director were relevant to the extent that they had not been overtaken by or cured in the appeal proceedings.

The first ground of review invited determination of whether the DEA is obliged to fully assess the climate change impacts of a proposed coal-fired power station before environmental authorisation is granted. Whether the administrative action of the Chief Director was tainted by irregularity depends partly on whether climate change impacts had to be considered in granting Thabametsi environmental authorisation. Section 24O(1)(b) of the National Environmental Management Act expressly requires the competent authority considering an application for an environmental authorisation to take into account all relevant factors. That is a peremptory requirement. The Environmental Impact Assessment Regulations also require that the environmental impact assessment report to contain all information that is necessary for the competent authority to consider the application and to reach a decision including an assessment of each identified potentially significant impact.

The National Environmental Management Act, like all legislation, must be interpreted purposively and in a manner that is consistent with the Constitution, paying due regard to the text and context of the legislation. Section 2 of the Act sets out binding directive principles that must inform all decisions taken under the Act, including decisions on environmental authorisations. Section 39(2) of the Constitution requires legislation to be interpreted in a manner that promotes the spirit and objects of the Bill of Rights. Section 24 of the Bill of Rights entrenches environmental rights, and recognises the interrelationship between the environment and development. Environmental considerations are balanced with socio-economic considerations through the ideal of sustainable development. Climate change poses a substantial risk to sustainable development in South Africa.

The DEA and Thabametsi argued that there is no provision in our domestic legislation, regulations or policies that expressly stipulates that a climate change impact assessment must be conducted before the grant of an environmental authorisation. However, the Court found that to be a mischaracterisation of Earthlife's real case. In argument, Earthlife, retreated from the position that the absence of a climate change impact assessment constituted material non-compliance with the mandatory requirements of section 24O(1), and confined its criticism of the Chief Director's decision to the assertion that in granting the

environmental authorisation without having sight of a climate change impact assessment report, he overlooked relevant considerations. The decision, accordingly, fell to be reviewed and set aside in terms of section 6(2)(e)(iii) of Promotion of Administrative Justice Act 3 of 2000. The absence of express provision in the statute requiring a climate change impact assessment does not mean that there is no legal duty to consider climate change as a relevant consideration and does not answer the interpretative question of whether such a duty exists in administrative law. The climate change impacts were undoubtedly a relevant consideration as contemplated by section 24O. The Court concluded that the legislative and policy scheme and framework overwhelmingly supported the conclusion that an assessment of climate change impacts and mitigating measures would be relevant factors in the environmental authorisation process, and that consideration of such would best be accomplished by means of a professionally researched climate change impact report.

It then had to be established whether the Chief Director did in fact consider or ignore the relevant climate change impacts. It was clear that he had not taken the key factor into account, rendering his decision reviewable in terms of section 6(2)(e)(iii) and (2)(f)(ii) of the Promotion of Administrative Justice Act.

Turning to the review of the Minister's decision, the Court found that the Minister did find that the Chief Director had not sufficiently considered relevant considerations and sought to remedy the irregularity or defect. The Minister appreciated that climate change impacts were relevant and had not been sufficiently assessed, necessitating an investigation of those impacts. She correctly found that a climate change impact assessment needed to be conducted. Instead of upholding the environmental authorisation, a more appropriate course of action would have been to adjourn the appeal and direct Thabametsi to undertake a climate change impact assessment for consideration in the appeal process and thereafter to substitute the Chief Director's decision with the Minister's own. It was then important to establish whether the Minister had the power to withdraw or revoke the authorisation on receiving an unfavourable climate change impact report. Earthlife contended that the Minister was *functus officio* and could not withdraw the authorisation. Once the Minister made the decision to uphold the environmental authorisation, despite the absence of a climate change impact assessment, her decision was final and vested significant rights in Thabametsi. Accepting that the Minister and other officials had no power to withdraw the environmental authorisation if the climate change impact assessment warranted that outcome, the Minister's belief that other remedial powers might achieve a similar result was mistaken and to the extent that she took her decision on such mistaken belief, her decision was based on a material error of law. Section 6(2)(d) of the Promotion of Administrative Justice Act permits judicial review where the action was materially influenced by an error of law affecting the ultimate outcome. The Minister's appeal decision was reviewable on that ground.

In deciding on a remedy, the Court held that the most proportional remedy was not to set aside the authorisation, but rather to set aside the Minister's ruling on the fourth ground of appeal and to remit the matter of climate change impacts to her for reconsideration on the basis of the new evidence in the climate change report. The appeal process had to be reconstituted, not the initial authorisation process. Although none of the parties pleaded for such a remedy, the discretion bestowed upon courts by section 8 of the Promotion of Administrative Justice Act to do what is

just and equitable, and proportional, permitted the court to grant such relief. The Court also prescribed what the first respondent was to consider.

***Ex parte* Pretorius (Franklin as Intervening Party) [2017] 2 All SA 558 (WCC)**

Civil procedure – Motion proceedings – Dispute of fact – Election of party to proceed by way of application in circumstances in which he should have realised that a serious dispute of fact incapable of resolution was bound to develop on the papers resulting in dismissal of application.

Succession – Wills – Section 4A(1) of the Wills Act 7 of 1953 disqualifies any person who attests and signs a will as a witness at the time of execution of the will, and the spouse of such person at the time of execution, from receiving a benefit under the will – Section 4A(2) allows a court to declare such person competent to receive a benefit from a will if the court is satisfied that that person or his spouse did not defraud or unduly influence the testator in the execution of the will.

Fines 4 U (Pty) Ltd and another v Amos and others [2017] 2 All SA 571 (GP)

Administrative justice – Road traffic offences – Road Traffic Infringement Agency – Powers and duties – Rejection of representations made on behalf of infringers – Review – Grounds of review based on section 6 of the Promotion of Administrative Justice Act 3 of 2000 and the principle of legality.

Words and phrases – "representations officer" – A person contracted by the Road Traffic Infringement Agency in terms of section 5 or appointed by the Registrar in terms of section 10 of the Administrative Adjudication of Road Traffic Offences Act 46 of 1998 to consider representations submitted by any person who, after having committed a minor infringement, elects to make a representation.

In an *ex parte* application, the applicant sought an order declaring him competent in terms of section 4A(2)(a) of the Wills Act 7 of 1953 to receive benefits bequeathed to him in a will. The testator ("the deceased") had died without offspring. In her last will, she nominated the applicant, failing which his daughter, as the executor of her estate. She also bequeathed to the applicant her immovable property, the household contents thereof and a motor vehicle. The applicant and his daughter had signed the will as witnesses.

After service of the application, the sister of the deceased sought leave to intervene, which leave was granted. The intervening party ("Ms Franklin") questioned the *bona fides* of the applicant in bringing the application on an *ex parte* basis. She also accused him of being dishonest in relation to a number of the facts he put up in his founding affidavit. Ms Franklin also opposed the application on the basis that a number of disputes of fact had arisen on the papers and that on an application of the rule in *Plascon-Evans Paints Ltd v Van Riebeck Paints* (*Pty*) *Ltd* [1984] 2 All SA 366 ([1984] ZASCA 51; 1984 (3) SA 623) (A), the relief sought could not be granted. The disputes included the circumstances under which the will was drafted; the circumstances surrounding the execution of the will; the nature and extent of the relationship between the applicant and the deceased; the existence of undue influence on the deceased in the execution of the will; and the mental capacity of the deceased at the time of the execution of the will.

Held – Section 4A(1) of the Wills Act disqualifies any person who attests and signs a will as a witness at the time of execution of the will, and the spouse of such person at the time of execution, from receiving a benefit under the will. However, section

4A(2) allows a court to declare such person competent to receive a benefit from a will if the court is satisfied that that person or his spouse did not defraud or unduly influence the testator in the execution of the will.

For the applicant to obtain a declaration that he was competent to receive a benefit under the deceased's will in spite of his signature of the document as a witness, the Court had to be satisfied in terms of section 4A(2)(a) that he did not defraud or unduly influence the testator in the execution of the will.

The intervening party disputed the facts surrounding the signature of the will by the deceased and put up facts to support her contention that the deceased was unduly influenced in signing it. Those assertions were not bald or hollow denials. The version put up by Ms Franklin did not constitute one which was on the face of it either fanciful and untenable. The allegations of undue influence were not so beyond possibility that the notion could be dismissed. The dispute was a deeply contested matter in which the factual disputes raised could not be resolved in favour of the applicant on affidavit in motion proceedings. The applicant had elected to proceed by way of application in circumstances in which he should have realised that his benefit under the will was to be contested and that a serious dispute of fact incapable of resolution was bound to develop on the papers. He did not seek the referral of the matter to oral evidence, even when the disputes of fact become patently clear to him after the opposing papers had been filed and he had been given an opportunity in the agreed court-ordered timetable to do so. Moreover, the applicant's failure to make full disclosure of all relevant facts in his founding affidavit, including but not limited to disclosing the circumstances surrounding the preparation and signature of the will and the deceased's mental and physical state at the time of her signature of it, when the application was launched *ex parte* and both good faith and full disclosure was required, justified the dismissal of the application.

The application was dismissed with costs.

Mineral Sands Resources (Pty) Ltd v Magistrate for the District of Vredendal, Kroutz NO and others [2017] 2 All SA 599 (WCC)

Criminal procedure – Application for a search warrant – Section 21 of the Criminal Procedure Act 51 of 1977 – Issue of non-disclosure – An investigator who applies ex parte to a judicial officer for a search warrant is under a duty of good faith to disclose any material fact of which he or she is aware that might influence the judicial officer in coming to a decision – An applicant for a search warrant must establish, by evidence under oath the existence of a reasonable suspicion that an offence has been committed; and the existence of reasonable grounds for believing that things connected with the offence may be found on the premises to be searched.

Environmental conservation – Environmental authorisation for mining activity – National Environmental Management Act 107 of 1998 – Alleged contraventions – Whether national, water, provincial and mining inspectors had concurrent jurisdiction to monitor compliance with, and enforce, the provisions of the National Environmental Management Act insofar as they related to mining or whether only mining inspectors might do so – Although the mandates of national inspectors, water inspectors and provincial inspectors may overlap, efficient administration is generally better served by non-overlapping mandates.

A search warrant issued by the first respondent authorised a search of the applicant's sand mine. The validity of that warrant was at issue in this case. Also in

focus was government's One Environmental System agreement, an arrangement intended to establish a single environmental system for assessing the environmental aspects of activities, including mining activities, and the powers of the various kinds of inspectors appointed to monitor and enforce compliance with environmental legislation.

In 2007, the applicant successfully applied to the Department of Mineral Resources ("DMR") for a mining right to mine heavy mineral sands on a 12-km stretch of beach.

The National Environmental Management Act 107 of 1998 ("NEMA") requires a person to have an environmental authorisation as contemplated in section 24 if the person intends to commence an activity identified in a Listing Notice. Various listing notices were promulgated in terms of section 24(2) and section 24D, identifying activities requiring environmental authorisation and identifying the competent authority to grant the authorisation. The Listing Notices identify the competent authority for granting the environmental authorisation. Prior to 8 December 2014, when the One Environmental System came into effect, the competent authority for granting environmental authorisations in the Western Cape was the Department of Environmental Affairs & Development Planning, Western Cape Government ("DPWC") unless the activity was of a kind described in section 24C(2), in which case the competent authority was the Environment Minister. While mining *per se* was not a listed activity, a company intending to embark on mining would typically have had to perform activities which were listed activities and would thus have needed environmental authorisation for those activities in terms of section 24. In terms of section 24N, the competent authority can require an applicant to submit an environmental management programme ("EMP") as a precondition for the consideration of an application for an environmental authorisation. Prior to 8 December 2014, section 23(5) of the Mineral and Petroleum Resources Development Act 28 of 2002 provided that a mining right came into effect on the date on which the applicant's environmental management programme ("EMP" or "Mining EMP") was approved. Before 8 December 2014, therefore, the Mining Minister's decision to approve an applicant's Mining EMP and to grant the mining licence effectively constituted the environmental authorisation to conduct the mining activity. At the same time, the applicant would typically have needed to obtain from the MEC or Environment Minister a NEMA environmental authorisation preceded by the approval of a NEMA EMP. The applicant's Mining EMP was approved on 14 April 2015. The applicant's attitude was, in short, that the approval of 14 April 2015 was the only approval it needed to conduct the activities set out in the amended Mining EMP. It contended that the amended Mining EMP was deemed to be an amended NEMA EMP. It disputed being under any obligation to seek an amendment of its existing NEMA environmental authorisation or any additional NEMA environmental authorisation.

Section 31D(3) provides that a person designated as an environmental management inspector or environmental mineral resource inspector may exercise any of the powers given to environmental management inspectors in the Act that are necessary for the inspector's mandate. A mining inspector, like a national, water or provincial inspector, thus ordinarily has the functions and general powers set out in sections 31G and 31H, including the power in section 31H(5) to be treated as a peace officer or police official for purposes of Chapter 2 of the Criminal Procedure Act 51 of 1977. A contentious issue in the present case was whether national, water,

provincial and mining inspectors had concurrent jurisdiction to monitor compliance with, and enforce, the provisions of the National Environmental Management Act insofar as they related to mining or whether only mining inspectors might do so.

The DPWC had received numerous complaints about the applicant's activities, particularly after the collapse of a sea cliff in the mining area. It brought the issues to the attention of the DMR. That in turn led to an official in the second respondent's department (the "DEA") advising the applicant of the intention to conduct an inspection. The applicant raised the question of the legislative authority to conduct such an inspection. It contended that the One Environmental System agreement clothed the DMR with exclusive compliance powers. Eventually, in September 2016, a large contingent of officials arrived at the applicant's mine to execute a search warrant issued by the first respondent in terms of section 21 of the Criminal Procedure Act.

That led to the present application to review.

Held – An applicant for a search warrant must establish, by evidence under oath the existence of a reasonable suspicion that an offence has been committed; and the existence of reasonable grounds for believing that things connected with the offence may be found on the premises to be searched.

The applicant contended that the national inspector who applied for the warrant did not have the mandate to investigate any of the suspected contraventions apart from a charge of dumping. It argued that save in the circumstances set out in section 31D(4)–(9) of NEMA, the investigation of the other four suspected contraventions was exclusively the domain of mining inspectors. Although the mandates of national inspectors, water inspectors and provincial inspectors may overlap, efficient administration is generally better served by non-overlapping mandates. That would be achieved by interpreting section 31D so as to give mining inspectors exclusive jurisdiction to monitor and enforce environmental legislation relating to mining except where one or other of the circumstances set out in sections 31D(4)–(9) applies. The Court held that it was necessary to imply, in section 31D(1), a qualification that inspectors appointed under that provision may not exercise the powers contemplated in section 31D(2A) unless so designated pursuant to section 31D(4) or section 31D(8)(b). It was concluded that the national inspector in this case did not have the authority to apply for the warrant in respect of any but the dumping charge.

The next issue raised by the applicant was that of non-disclosure. An investigator who applies *ex parte* to a judicial officer for a search warrant is under a duty of good faith to disclose any material fact of which he or she is aware that might influence the judicial officer in coming to a decision. In this case, the mandate issue which was in dispute as well as certain other matters, was not disclosed in the application or the warrant. However, the Court exercised its discretion against setting aside the warrant on the grounds of non-disclosure.

The Court set out the grounds upon which the warrant was found invalid, and the charges to which such invalidity related. It then issued a preservation order in respect of the items seized in terms of the warrant.

Naidu v Minister of Correctional Services [2017] 2 All SA 651 (WCC)

Delict – Claim for damages – Attack by person released on parole – Negligence of Minister of Correctional Services – Test for negligence is that for purposes of liability culpa arises if a diligens paterfamilias in the position of the defendant would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; would take reasonable steps to guard against such occurrence; and the defendant failed to take such steps.

The plaintiff sued the defendant, the Minister of Correctional Services, after she was attacked in her home by a person who was at the time on parole. She claimed that the attack was a direct result of the negligent release of the perpetrator ("Michaels") on parole.

The present judgment dealt only with the merits and required a determination as to the liability of the defendant on the grounds of negligence, as alleged.

According to the plaintiff, the defendant failed to act with reasonable care and diligence in determining whether Michaels should become the subject of community corrections; failed to take into account adequately Michaels' previous convictions and that he had previously violated his parole conditions; and failed to have proper regard to the reports of the Case Management Committee which was tasked with assessing Michaels. It was averred that the defendant as custodian and guardian of all sentenced prisoners, had a legal duty to prevent harm from being caused to members of the public by sentenced prisoners within her custody, and subject to community corrections.

Held – The issue for determination was whether the defendant, acting through the Correctional Supervision and Parole Board ("the Board"), was negligent in releasing Michaels on parole.

The release of a sentenced prisoner on parole appears under the section on Community Corrections at Chapter VI of the Correctional Services Act 111 of 1998. Section 42 provides for the establishment of a Case Management Committee ("CMC") at a Correction Facility. The function of a CMC is to report to the parole Board regarding the possible placement of an offender on parole. Section 42(2) sets out the mandatory duties of the committee and specifies what reports must be placed before the Parole Board for the purposes of parole hearings. It was common cause that the Case Management Committee did not comply with their mandatory duty to place various crucial reports before the Board hearing Michaels' parole application. There was also no evidence as to his sentence plan. Therefore, both the Case Management Committee and the Parole Board failed to comply with their obligations under the Act. the Court pointed out that such decisions taken by Parole Boards without all the prescribed information being available, have been described as arbitrary and capricious and have been set aside for that reason alone.

The test for negligence is that for purposes of liability *culpa* arises if a *diligens paterfamilias* in the position of the defendant would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; would take reasonable steps to guard against such occurrence; and the defendant failed to take such steps.

The Court held that a reasonable person in the position of the Board appraised with the facts which it had at its disposal, would have foreseen, in the absence of any clear evidence of rehabilitation, the reasonable possibility of his conduct, if released

on parole, injuring another. There was no clear evidence before the Board enabling a decision that Michaels had been rehabilitated and could be granted parole. Given the absence of evidence that Michaels had been rehabilitated, the Board ought in the circumstances to have taken reasonable steps to guard against the foreseeable harm of Michaels' release on parole, by refusing his parole application. But for Michaels' release on parole, the plaintiff would not have been attacked by him. The plaintiff's claim was consequently upheld on the merits.

Roazar CC v The Falls Supermarket CC [2017] 2 All SA 665 (GJ)

Contract – Lease agreement – Option to renew – Whether entitlement to renew was circumscribed by the performance of the payment obligations in the additional agreements – Where additional agreements found to be unlawful, non-performance under those agreements posing no bar to the exercise by lessee of its entitlement to renew the main lease agreement.

Contract – Whether an agreement entailing an obligation to negotiate in good faith is enforceable – Whether common law should be developed – Such order unnecessary in face of precedent in which parties were ordered to negotiate in good faith.

The respondent ("Falls Supermarket") was a supermarket which leased the premises on which it operated from the respondent ("Roazar"). Apart from the lease agreement, two other agreements between the parties were relevant to the case. In terms of those agreements, additional monies were agreed to be paid in cash by the Falls Supermarket to the individual members of Roazar. The agreements provided for cash and off-the-record payments (sometimes known as "kickbacks") to the individual members of Roazar. The Falls Supermarket explained the additional agreements by averring that, when a previous lease agreement came up for renewal in 2011, the members of Roazar demanded that the Falls Supermarket agree to pay each of them R65 000 per month in cash in order to renew the lease agreement. Faced with losing the premises, their investment in the premises, and the goodwill of the business, the then members of the Falls Supermarket acceded and paid the amounts monthly. Falls Supermarket accordingly averred that the two additional agreements were not real lease agreements, and were sham agreements.

At some point, the Falls Supermarket took legal advice and was told that the cash payments constituted an unlawful scheme to avoid taxation and such scheme was possibly in fraud of creditors and that the Falls Supermarket was possibly at risk of liability if it knowingly abetted the scheme. It, therefore, resolved to no longer make such illegal payments. It continued to pay the rentals due in terms of the main lease agreement.

On 23 May 2011, Roazar and the Falls Supermarket entered into the latest in a series of lease agreements. Roazar contended that the agreement expired on 29 February 2016. The terms of the agreement were valid through end February 2016. As early as 2014, according to the Falls Supermarket, it notified Roazar that it wished to exercise the right of renewal that it claimed it had in the main lease agreement. It averred that the only real obstacle to a renewal was a demand by Roazar for the payment of kick-backs in arrears since 2012.

Roazar sought the eviction of Falls Supermarket from the premises. The defence to the eviction was predicated on interpreting the main lease agreement as allowing for a right to renew to be exercised, other than in writing.

Held – As Roazar sought final relief its application for eviction, the *Plascon-Evans* rule applied. Thus, Roazar could only succeed if the facts averred by the Falls Supermarket together with the facts averred by Roazar which were admitted by the Falls Supermarket entitled it to the relief it sought.

The first issue was whether the main lease agreement properly interpreted provided for renewal. In engaging in the exercise of interpretation of an agreement, a court is to recognise the meaning of the words and language of the agreement, its context, and to give commercial sense to the contract. While both parties agreed that clause 3.3 in the main lease agreement granted the lessee an option to renew, Roazar contended that the entitlement to renew was circumscribed by the performance of the payment obligations in the additional agreements. The Court stated that the issue was the true nature of the main lease agreement, and insofar as relevant to the renewal of the lease, the additional agreements. It accepted the Falls Supermarket's assertion that the additional agreements constituted a fraud on the fiscus by hiding monies from the tax commissioner. The true nature of these additional agreements was thus illegal. Therefore, non-performance under the additional agreements was no bar to the exercise by the Falls Supermarket of its entitlement to renew the main lease agreement.

The main issue was the form in which the option to renew had to be exercised. Roazar contended that the exercise of the option to renew needed to be in writing and done one month before the expiry of the lease, while Falls Supermarket's argued that such exercise was not required to be done in writing. The Court agreed that best interpreted, the main lease agreement did not require the exercise of the right to renew to be in writing.

The above conclusions by the Court led to a further issue being raised, *viz* whether an agreement entailing an obligation to negotiate in good faith is enforceable. On the Falls Supermarket's version, Roazar had refused to enter into any negotiations with the Falls Supermarket or at least into any negotiations that did not commence with the paying of arrears of kick-backs. Assuming the enforceability of an obligation to negotiate, that could not be considered good faith negotiation. If the obligation to negotiate was enforceable, the Falls Supermarket was a lawful occupier and the eviction application was premature. The pleadings on behalf of Falls Supermarket engaged the obligation of the court to, in an appropriate case, consider the potential to develop the common law through section 39(2) of the Constitution. It has been held in case law, that the position in our common law is that an agreement to negotiate in good faith is enforceable if it provides for a deadlock-breaking mechanism in the event of the negotiating parties not reaching consensus. But in the more recent case of *South African Broadcasting Corporation Soc Limited v Via Vollenhoven and Appollis Independent CC and others* (*Freedom of Expression Institute as amicus curiae*) [2016] JOL 36716 ([2016] ZAGPJHC 228) (GJ), the court ordered parties to negotiate in good faith. That decision was binding upon the present Court. Consequently, the application was dismissed with costs.

END-FOR NOW