LEGAL NOTES VOL 5/2018[1]

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Land — Land reform — Claim for restitution of right in land — Evidence — Court may admit any relevant evidence, even if inadmissible in other court — While court's approach to evidence to take account of distinctive nature of land claims, ordinary standard of proof applying — Restitution of Land Rights Act 22 of 1994, s 30(1) and (2).

The issue in the present case was whether the first respondent (the Community) was dispossessed of the old Salem Commonage (the Commonage) — now consisting of several white-owned farms — in terms of racially discriminatory practices in order to found a claim under the Restitution of Land Rights Act 22 of 1994 (the Act).

The Act, which defined a 'community' as 'any group of persons whose rights in land are derived from shared rules determining access to land held in common by such group', has 19 June 1913 as its cut-off date: dispossession before this date would not found a claim. The present applicants (the landowners) were the current owners of the disputed land. The question, thus, was whether the Community was dispossessed of rights in the Commonage after 1913.

[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!**

The Cape colonial government had in 1836 and 1847 allocated the Commonage, via two deeds of grant, to the landowners' predecessors, the Salem Party of 1820 Settlers. The original Xhosa inhabitants of the area were expelled in 1812, but returned during the 1860s, some of them settling on the Commonage. By 1877 official records showed that 130 black people were living on the Commonage. In 1940, when the tally was 450, the Supreme Court, Grahamstown, made an order subdividing the Commonage among the settlers.

The Community argued that the court's order had dispossessed the black inhabitants — their ancestors — of their rights in the land. In the result, it argued, it had a valid claim under the Act. The landowners argued that the Settlers' formal ownership and factual control of the Commonage precluded the acquisition of indigenous rights by the Community.

The claim was heard by the Land Claims Court, which upheld it. The land-owners appealed to the Supreme Court of Appeal. In a 4 – 1 split judgment, the SCA also ruled in favour of the Community. The landowners applied for leave to appeal to the Constitutional Court. While both sides relied on expert testimony from historians, the Community's case was partially built on oral history.

Held

The Act was not a victor's charter: it balanced claimants' entitlements with those of the presently possessed (see [73]). It defined a 'right in land', which may be registered or unregistered, with encompassing amplitude: title, on its own, while significant, was neither indefeasibly primary nor exclusionary (see [123]). The Act also specifically recognised beneficial occupation and customary interest as rights in land (see [148]).

In assessing evidence in restitution cases, courts were bound by the Act, which required the admission of all relevant evidence, even if it was not admissible in others courts of law (see [70]). Courts should lean toward granting rights in land where it would be just and equitable (see [72]). While a court's approach to the evidence had to take account of the distinctive nature of land claims — which often depended on hearsay evidence — the ordinary civil standard of proof applied (see [99]).

By 1941 the social and functional arrangements of the several hundred black persons living on the Commonage for over 60 years would inevitably have established common rules of behaviour, including ones regulating access to the land (see [115]). While the historical record showed that the Salem Party had acquired rights over the Commonage, they were in some respects dubious, and never so immaculate as to exclude the acquisition of rights by others under the Act (see [129] – [139]). The uncertain lineage of the grants; the amorphous nature of the beneficiaries; the size of the Commonage; the lack of sustained, effective control over it by the landowners; and its decades-long use by the black community in accordance with custom, all indicated that the latter had established actionable rights over the Commonage (see [140] – [149]).

Hence both the Settlers and the Community had exercised rights of usage over the Commonage. Neither had exclusive occupation, and though the Settlers had registered title, the Community had acquired parallel rights. (See [169].)

The order of 1940, which was made without consulting the black inhabitants of the Commonage, constituted actionable dispossession of their rights. Appeal dismissed

BASSON v HUGO AND OTHERS 2018 (3) SA 46 (SCA)

Administrative law — Administrative action — Review — Duty to exhaust internal remedy before instituting proceedings for judicial review — Exceptional circumstances exempting from duty — Ineffective internal remedy — Doctor asking members of professional conduct committee to recuse themselves for bias but they refusing — Whether doctor obliged to appeal refusal to appellate committee before instituting review thereof — Health Professions Act 56 of 1974, s 10(3); Promotion of Administrative Justice Act 3 of 2000, s 7(2).

Dr Basson asked the members of the professional conduct committee sitting on his disciplinary inquiry to recuse themselves for bias or a reasonable apprehension thereof. They refused, and he applied to the High Court to review the refusal and for setting-aside of the proceedings.
The High Court declined to hear the review because of his failure to exhaust an internal remedy (appeal to an appellate committee); and he then appealed to the Supreme Court of Appeal. (See [8]; s 7(2)*(a)* of the Promotion of Administrative Justice Act 3 of 2000; and s 10(3) of the Health Professions Act 56 of 1974.)
The issue was whether there were exceptional circumstances exempting him from exhausting the internal remedy. (Such exceptional circumstances are an inadequate, ineffective or unavailable internal remedy.) (See [11] – [12].)
Held, per Shongwe AP, that there were (see [28]):

- The appellate committee lacked the power to grant the relief asked for — setting-aside of the conduct committee's proceedings (see [21] and [61]); and
- if the proceedings were null (owing to bias or a reasonable apprehension thereof), they would be unappealable (see [18] – [19]).

Appeal upheld; the High Court's order set aside; and the matter returned to the High Court to decide the review (see [29]).
Swain JA concurred. The internal remedy was ineffective because:

- Absent immediate judicial consideration of the bias claim, a penalty might be imposed which might cause irreparable harm, where both penalty and finding of guilt could be null for bias (see [55] – [56]); and because
- the appellate committee could not grant the relief sought on the claim of bias.

Extracts from the judgment:
[26] The rule against bias is thus firmly anchored to public confidence in the legal system, and extends to non-judicial decision-makers such as tribunals. And the rule reflects the fundamental principle of our Constitution that courts and tribunals must not only be independent and impartial, but must be seen to be such; and the requirement of impartiality is also implicit, if not explicit, in s 34 of the Constitution (*Bernert v Absa Bank Ltd* 2011 (3) SA 92 (CC) (2011 (4) BCLR 329; [2010] ZACC 28) paras 28 and 31).
[27] The determination of what constitutes 'exceptional circumstances' within the meaning of s 7(2)*(c)* of PAJA, is necessarily informed by the nature of the complaint for which judicial relief is sought (*Koyabe* supra para 39). In the present case the complaint is actual or a reasonable apprehension of bias, raised directly and promptly at first instance, ie before the Committee. The rule against bias is entrenched in the Constitution, which places a high premium on the substantive enjoyment of rights (*Koyabe* supra para 44). Section 38 of the Constitution gives the appellant the right to approach a competent court if a right in the Bill of Rights (s 34) has been infringed or threatened, and the court may grant appropriate relief. In ruling against the appellant,

the Committee has set out its position and there is a proper record of the proceedings before it. If the relevant members of the Committee should have recused themselves, the proceedings before it would be null and void; and any appeal to an appeal committee would suffer the same fate. The pursuit of an internal remedy would therefore be futile.
[28] These factors, in my view, constitute exceptional circumstances which justify judicial intervention in the interests of justice, and which exempt the appellant from the obligation to exhaust the remedy under s 10(3) of the Act.
[29] In the result, I make the following order: The appeal is upheld and the order of the court a quo is set aside. The third respondent is ordered to pay the costs of the proceedings before the court a quo and the costs of appeal, such costs to include the costs of two counsel. The case is remitted to the Gauteng Division of the High Court, Pretoria, to decide the review application.

CRADLE CITY (PTY) LTD v LINDLEY FARM 528 (PTY) LTD 2018 (3) SA 65 (SCA)
Land — Sale — Contract — Reciprocity of obligations — Seller unable to provide vacant occupation as agreed — Purchaser refusing to pay balance of purchase price — Seller instituting action — Obligations interlinked — Exceptio non adimpleti contractus available — Purchaser electing to persist in agreement — Appropriate remedy — Judgment in favour of seller suspended until able to provide vacant occupation.

In March 2009 the respondent (the seller) sold land to the appellant (the purchaser) for R112 million. The agreement stated that the purchaser, who had already paid a non-refundable sum as deposit, would pay the balance on transfer, and the remainder in 30 monthly instalments thereafter. Though clause 4 of the agreement stipulated that the seller would provide vacant possession, both parties were aware that there was a large number of squatters on the property. They were still there when the property was transferred to purchaser on 7 May 2009. To address the issue, the parties on that same day signed an 'indemnity and undertaking' (I&U) in which the seller undertook to evict the squatters — at its own expense — by 31 August 2009, and to hold the purchaser harmless against any claims or expenses resulting from the eviction. When no eviction materialised, the purchaser refused to pay the outstanding balance. The seller instituted action, claiming the outstanding balance, and the purchaser counterclaimed for damages resulting from the unlawful occupation of the property, which supposedly rendered it completely valueless. The purchaser argued that since the parties' obligations were reciprocal, it was not obliged to pay. In response the seller argued that its obligation to provide vacant possession under clause 4 was replaced by an obligation under the I&U to take steps to lawfully evict the squatters, which it had done. The purchaser argued that the I&U had merely postponed the obligation to give vacant possession to 31 August 2009. The High Court found in favour of the seller. In an appeal to the Supreme Court of Appeal the court had to decide whether (i) the purchaser was entitled to vacant occupation; and (ii) whether it had to pay the balance of the purchase price.
Held
Considered in context, the objective of the I&U was to provide vacant occupation (see [17] – [19]). The purchaser's obligation to pay the balance of the purchase price depended on the applicability of the *exceptio non adimpleti contractus*, which would operate if the agreement were such that it contemplated an exchange of

performances (see [20] – [25] for the general principles of the *exceptio*). While the present agreement did create bilateral obligations, dismissal of the eviction application on the ground of the seller's malperformance was, in the light of the purchaser's election to persist in the agreement, not a suitable remedy (see [25]). Rather, judgment would be granted in favour of the seller, but suspended until it evicted the occupiers. Since no evidence was led regarding the market value of the property at the relevant times, the counterclaim would be dismissed.

ROAZAR CC v THE FALLS SUPERMARKET CC 2018 (3) SA 76 (SCA)

Contract — Legality — Constitutionality — Importation of constitutional principles into law of contract — Good faith and ubuntu — Duty to negotiate in good faith — In purely business transaction, not competent for court to import term obliging parties to negotiate in good faith, where such term not intended by parties.

In this matter the appellant sought to evict from its shopping premises one of its tenants, the respondent. It asserted that it had properly terminated the lease agreement on one month's notice after its expiry. In response, the respondent stated that the notice of termination and application for eviction were premature. Its argument was the following:

- In terms of clause 3.3 of the lease agreement, the respondent was entitled to renew the lease after the initial lease period; clause 3.5, 'the renewal period [was] to be negotiated and discussed at least 1 (one) calendar month prior to the expiry of the lease period', and 'the Landlord and Tenant shall endeavour to reach agreement on the monthly rental which shall apply during the renewal period'; and clause 3.7, in the above event, the lease would then 'continue on a month to month basis, subject to 1 (one) month's written notice by either party for the cancellation thereof'.
- The respondent, more than a month prior to the expiry of the lease, verbally notified the appellant that it wished to exercise its option to renew the lease.
- Once it had done so, in the light of the aforementioned provisions, the parties were obliged to enter into good-faith negotiations surrounding the v terms of renewal, and could not terminate the lease in terms of clause 3.7 until they had done so.
- Here, at the time the appellant gave notice to terminate, the appellant had not engaged the respondent in good-faith negotiations; hence the prematurity of the notice and termination.

There was some disagreement as to the correct interpretation to be accorded to the abovementioned terms. But the SCA held that they meant the following (see [11]). The respondent had to notify, in writing or verbally, the appellant at least one month before the expiry of the lease that it wished to exercise its right of renewal. In the event that it exercised such a right, the lease agreement would continue on a month-to-month basis, subject to one month's notice by either party, until an agreement was reached or negotiations failed and notice of cancellation was given by either one of the parties. The SCA held that the respondent had given timeous notice of its intention to renew the lease. The issue that formed the focus of proceedings was whether the respondent was correct in arguing that the agreement imposed upon the parties a binding duty to negotiate in good faith. What stood in the way of such a conclusion was the established principle that an agreement that the parties would negotiate to conclude another agreement was not enforceable, unless there existed a deadlock-breaking mechanism. The SCA was of the view that here there existed no such mechanism. But the respondent, relying on s 39(2) of the Constitution —

which called for the infusion of contract law with constitutional principles like ubuntu — argued that the common law should be developed to recognise the validity of an agreement to negotiate, even where there existed no deadlock-breaking mechanism.
Held
The facts in the present case demonstrated the complications of developing the common law to compel parties to negotiate in good faith. For example, it was unclear how the court should determine what period of negotiations would have been fair, and, further, what criterion should be used to determine whether the appellant had indeed negotiated in bad faith as alleged. (See [19] and [21] – [22].)
Furthermore, the appellant had unequivocally stated that it had no intention of ever leasing its property to the respondent in light of what it felt to be the latter's defamatory attacks against it. It would be against public policy to coerce a lessor to conclude an agreement with a tenant whom it did not want to have as tenant any longer. (See [24].) Against these difficulties was the clear fact that the parties consciously bound themselves to a contract that provided that each party could terminate it on one month's notice in the event there was no agreement on the renewal terms (see [23]).
It was difficult to conceive how a court, in a purely business transaction, could rely on 'ubuntu' to import a term, that was not intended by the parties, to deny the other party a right to rely on the terms of the contract to terminate (see [24]).
Accordingly, the appellant's notice of termination was in order. Appeal and application for eviction upheld.

WAYMARK INFOTECH (PTY) LTD v ROAD TRAFFIC MANAGEMENT CORPORATION 2018 (3) SA 90 (SCA)

Government procurement — Contract — For computing services, running over three years — Whether binding institution to future financial commitment —Public Finance Management Act 1 of 1999, ss 66(1), 66(3)(c) and 68.

Following a tender process, RTM and Waymark concluded an agreement for the development and installation of software. The contract, concluded 2009, was to run from 2009 for three years, and provided for payment over three years.
Some time into its execution, RTM repudiated it; Waymark sued for damages; and RTM counterclaimed that the agreement was unenforceable, because of non-compliance with s 66 of the Public Finance Management Act 1 of 1999.
Section 66(1) read with (3)*(c)* provides that only with ministerial authorisation may an institution enter a transaction binding itself to a future financial commitment (see [12]).
The High Court concluded the agreement did bind RTM to such a commitment; it was not authorised; and was thus invalid (s 68).
On appeal to the Supreme Court of Appeal, the issue was whether the agreement involved a future financial commitment (see [11] – [12]).
Held, that it did not: it was a present commitment to pay for Waymark's services, continuing over three years (see [17]).
Appeal upheld; High Court order set aside; and substituted with an order dismissing RTM's counterclaim.

WIERDA ROAD WEST PROPERTIES (PTY) LTD v SIZWE NTSALUBA GOBODO INC 2018 (3) SA 95 (SCA)

Lease — Validity — Whether lease invalidated by absence of approved building plan or occupancy certificate — National Building Regulations and Building Standards Act 103 of 1977, ss 4(1) and 14(1).

Wierda owned a building and leased it to SNG * Wierda had no approved building plan or occupancy certificate for it — non-compliance with ss 4(1) and 14(1)(a) of the National Building Regulations and Building Standards Act 103 of 1977.
Wierda later sued on the lease for rent and municipal charges. SNG's defence was absence of the plan or certificate invalidated the lease.
The High Court concluded the lease was valid but unenforceable.
The Supreme Court of Appeal held it was valid and enforceable. This as:

- Sections 4(1) and 14(1)*(a)* did not apply (see [15] – [16]); and
- even if they did, absence of the plan and certificate did not invalidate the contract. (See [20] – [21], [23] and [28].)

The High Court's order set aside, and substituted with an order that SNG pay the rental and charges

ABRINAH 7804 (PTY) LTD v KAPA KONI INVESTMENTS CC 2018 (3) SA 108 (NCK)

Land— Sale — Contract — Conditions — Suspensive condition — Condition that purchaser obtain bank loan equal to purchase price before certain date — Date passing and seller, in writing, giving purchaser another two weeks to comply — Seller then cancelling even though purchaser complied during extension period — Court finding that contract irrevocably lapsed when condition not met before initial expiry date — No subsequent 'revival' possible — No recourse to equity — Cancellation valid.

On 4 August 2015 the respondent (the purchaser) bought a property from the appellant (the seller). The sale was subject to a suspensive condition, contained in clause 4 of the agreement, that the purchaser obtain a bank loan for not less than R5 million within six months of signature. Clause 2 stipulated that the purchase price would be paid in cash or secured by a bank guarantee.
On 5 February 2016 the purchaser informed the seller that it had secured a loan of R4,5 million, but the seller at a meeting held between representatives of the parties on 10 February insisted on the full purchase price. On 15 February the seller's attorney addressed a letter to the purchaser which pointed out that the condition in clause 4 had not been fulfilled, and that 'against the above background, we now have afforded you 14 days to comply with clause 2', failing which the sale would be cancelled (the letter of 15 February). On 26 February (ie, within the 14-day period afforded by the letter of 15 February), the purchaser tendered payment of the outstanding R500 000, but on 7 March the seller cancelled the sale, claiming that it was undone by the purchaser's failure to comply with clauses 2 and 4. The purchaser argued that the cancellation was unlawful in the light of the extension offered in the letter of 15 February.
The purchaser asked the court a quo for an order validating the sale and declaring that the purported cancellation was 'wrongful'. The court found as follows. The letter of 15 February had, by granting the 14-day extension to comply with clause 2,

breathed new life into the sale. It constituted an election by the seller to waive its right to cancel. The fact that the purchaser had obtained a loan for the balance of the purchase price before the cutoff date meant that it had complied with 'the stipulated conditions'. And because the purchaser obtained financing for the full purchase price within the 14-day period, equity required that the property be transferred to it. Leave to appeal to a full bench was, however, granted.

Held

The result of the non-fulfilment of a suspensive condition was that the contract had to be regarded as if it never existed (see [30]). The failure of clause 4 meant that the sale never came into operation (see [47], [62]). The finding of the court a quo that the letter of 15 February constituted a 14-day extension of the period for the fulfilment of clause 4, was therefore wrong (see [48], [55], [80.2])). And having lapsed, the sale could not have been 'revived' by waiver in the manner suggested by the court a quo (see [65] – [66], [80.3]). A 'revived' agreement would in any event have immediately lapsed and self-destructed (see [69], [72] – [73]). Any 'new' agreement based on the letter of 15 February would have had to have been in writing and signed by both parties (see [84]). Equity played no role in circumstances such as the present, the only relevant consideration being the intention of the parties at the time of contracting, which was that the purchaser would obtain a loan for the full purchase price within the stipulated period (see [90] – [91]). Since the purchaser did not comply, the sale had failed, and the court a quo should on this basis have dismissed the application (see [98]). Appeal upheld

BROODIE NO v MAPOSA AND OTHERS 2018 (3) SA 129 (WCC)

Marriage — Proprietary rights — Community of property — Powers of spouses — Alienation of property without consent of spouse — Where other transacting party 'cannot reasonably know' spouse contracting without required consent — Other party not always under positive duty to inquire as to marital status of party contracting with — Whether other party under such duty determined by circumstances of each case — Matrimonial Property Act 88 of 1984, s 15(9)(a).

Section 15(9)*(a)* of the Matrimonial Property Act 88 of 1984 provides that when a spouse in a marriage in community of property enters into a transaction without the consent of the other spouse required under ss 15(2) or (3), and the other transacting party 'does not know and cannot reasonably know that the transaction is being entered into contrary to those provisions . . . it is deemed that the transaction concerned has been entered into with the consent required in terms of the said subsection (2) or (3)'.

The applicant, the executrix of the joint estate of herself and her late husband to whom she was married in community of property, alleged that during their marriage he had donated 75% of his membership interest in a close corporation (in which the only asset was immovable property) to the respondents — without her consent in contravention of s 15(3). This case concerned her application to have the registration of the transfer of the member's interest in the close corporation set aside on this ground. * The deceased and the third respondent had had a long-standing extramarital relationship from which two children were born, the first and second respondents.

The court accepted the third respondent's evidence that the impugned transaction was part of the deceased's undertaking to her to provide financially for her and her

children ([39]); that it amounted to a donation made without the applicant's consent, contrary to s 15(3) ([47]); and that the first leg of s 15(9)*(a)* had been met, ie that the third respondent did not know that the deceased was married to the applicant in community of property and therefore that her consent was required ([43]). This narrowed the issue down to the second leg of s 15(9)*(a)*, ie whether the third respondent ought reasonably to have known that the deceased did not have his spouse's consent when he donated the membership interest to them.

Held

The provisions of s 15(9)*(a)* afforded protection to a third party who did not know that the affected transaction was being entered into contrary to the provisions of ss 15(2) and (3), and whose ignorance in the circumstances was understandable and excusable. It did not place the third party under a duty of enquiry in every case. The object of s 15(9)*(a)* would be nugatory if an enquiry by the third party was required in every case. The third party would be called upon to require production of a marriage certificate before entering into any of the transactions covered by ss 15(2) and (3), or to make enquiries at the Department of Home Affairs. Such a requirement could not properly be imputed on a proper construction of the provision: it would stultify commerce and detract from the intended empowering effect of ss 14 and 15(1) of the Matrimonial Property Act for women married in community of property. Whether an enquiry by the third party was indicated, and if so, its nature, would be determined by the peculiar circumstances of the given case. Any representation made by the contracting spouse and the context in which it was made, were relevant considerations in determining what might reasonably be expected of the third party. Any such determination must take into account that social norms and the law do not expect of persons to regulate their dealings on the basis of suspecting illegality or fraud on the part of those with whom they transact.

In the circumstances of the present case it was not incumbent on the third respondent to have investigated the legal character of the deceased's first marriage before she accepted the donation; she did not act unreasonably by failing to challenge or interrogate the deceased's representation. In the result her position is protected by s 15(9)*(a)* of the Matrimonial Property Act — it would be deemed that the donation was made with the consent required in terms of s 15(3).

CDH INVEST NV v PETROTANK SOUTH AFRICA (PTY) LTD AND ANOTHER 2018 (3) SA 157 (GJ)

Company — Directors and officers — Director — Fiduciary duty — Ambit — Powers of directors to increase authorised shares, or to issue shares, subject to fiduciary duty to act bona fide, for proper purpose, and in best interests of company — Nature of test to be applied — Relevant considerations — Companies Act 71 of 2008, ss 36(3), 38(1) and 76(3).

Company — Shares and shareholders — Shareholders — Meetings — Application to court in terms of s 61(12) for order requiring company to convene meeting — Court intervention not simply there for asking — Unless special circumstances requiring otherwise, court having to be satisfied that calling members' meeting bona fide intended, with legitimate purpose, and in best interests of company — Companies Act, s 61(12).

The applicant and the second respondent were, respectively, the majority and minority shareholders of the first respondent company (the company). In the High Court in terms of s 61(12) of the Companies Act 71 of 2008 (the Act), the applicant sought an order directing the company to convene a shareholders' meeting — after the company had failed to so do in response to a demand in terms of s 61(3) — for the purpose of considering and passing specified resolutions, including one instructing the board to sue the second respondent for an amount R1 million allegedly owed by the latter; and another instructing the board to consider a pro rata rights offer of 98 835 authorised but unissued shares.

The second respondent disputed the applicant's relief. It brought a counter-application asking for an order interdicting the applicant from calling a shareholders' meeting to consider the abovementioned resolutions. As to the passing of a resolution relating to the rights offer, the second respondent pointed to the company's memorandum of understanding (MOU) which provided only for 100 000 authorised shares. As this amount had already been issued, it was argued, the proposed resolution offended the MOU's terms. Of particular relevance in the present matter was a prior board resolution amending the memorandum of incorporation (MOI) by increasing the number of authorised shares from 1000 to 1 000 000. The applicant relied on this as entitling the company to issue shares beyond the 100 000 originally envisaged in the MOU. The second respondent argued that this board resolution was unlawful, seeking its setting-aside, in the following circumstances: (1) The resolution for the amendment was proposed by the applicant directors with the stated objective of merely correcting an error in the MOI that placed the company in breach of the Companies Act, ie the MOI only provided for 1000 authorised shares, where it should have provided for 100 000 — the amount the shareholders had agreed to, and the MOU provided for. (2) The resolution was passed without the meeting of the shareholders or the full board of directors (in particular, the two out of the five directors who were nominees of the second respondent), despite the second respondent's having already indicated its understanding of the resolution: ie that it merely sought to increase authorised shares to 100 000, and that the reference to 1 000 000 shares had to be a mistake. (3) The resolution was in breach of the MOI and the Act.

Held

Whether the board resolution, increasing authorised shares from 1000 to 1 000 000, was lawful

The power of directors to authorise (in terms of s 36(3)) further shares or issue shares (in terms of s 38(1)) was constrained by s 76(3) of the Companies Act. Affirming a director's common-law fiduciary duties, it provided that a director had to act in good faith and for a proper purpose, and in the best interests of the company. The concept of bona fides did not have a wholly subjective content; there had to be a rational basis for a director's belief that he or she was acting in good faith. As for whether a director had acted in the best interests of a company, or for a proper purpose, the test was an objective one. (See [46] – [67].)

Considering the present facts, the tenets of the parties' agreement in their pre-incorporation founding consensus was a significant consideration in judging fair dealing and probity, and the yardstick for measuring the exercise of a power against the purpose for which it was given in the first place was objective. (See [67] and [76].)

In the manner the applicant directors had presented the resolution, they had misrepresented their true motive — to substantially increase the number of

authorised shares, to enable the company to convert debt to equity. In doing so, they had acted mala fides. Further, it had not been shown that the resolution was passed in the best interests of the company or with a proper purpose. In the circumstances, and applying the principles referred to above, the resolution had to be declared void ab initio and set aside. (It followed that there was no scope for the proposed rights offer.) (See [68] – [78].)

Whether company should be ordered to consider resolutions instructing board to sue second respondent, and whether counter-application should be granted

Beyond asserting that a demand had been made, in vain, on the board to call a shareholders' meeting, the applicant had in its founding affidavit failed to state any facts or circumstances that ought to move the court in deciding whether or not to grant the relief claimed in terms of s 61(12). However, court intervention in terms of s 61(12) was not there simply for the asking. Conferring upon the court the power in terms of s 61(12) to direct that the board call a meeting, was company-law contra-intuitive, because courts generally declined interference in the management of company affairs. It could hardly have been intended, in those circumstances, that the court should act as a mere rubber stamp of technical compliance by means of a prior statutory demand. A court would generally, unless special circumstances required otherwise, have first to be satisfied that calling a members' meeting was bona fide intended, with a legitimate purpose, and in the best interests of the company. Here the applicant had failed to put facts before the court that would justify the inference that that threshold had been met. Accordingly, the main application had to fail. (See [81] – [83].)

However, the court's disinclination to accede to the request to direct that a shareholders' meeting be called did not have the automatic corollary that the company and its board should be interdicted from convening such a meeting. In fact, the very considerations that persuaded a court to keep its distance from a company's internal management also applied against granting the interdict sought by the second respondent. (See [84].)

DE KOCK v MIDDELHOVEN 2018 (3) SA 180 (GP)

Practice — Pleadings — Amendment — Application — Form — Rule 28(4) postulating two procedures by which party might approach court for leave to amend — One, by substantive application for leave to amend, and another by simply orally applying for leave to amend on day of hearing — Choice up to discretion of applicant — Uniform Rules of Court, rule 28(4).

The present matter was an application for an amendment of particulars of claim. The background was briefly the following. Consequent to suffering complications arising from plastic surgery she had undergone, the plaintiff issued and served summons on the defendant for the payment of damages. Her claim was initially solely based on breach of contract: she asserted that the defendant had contravened a term of their oral agreement that he would perform her surgery with such professional expertise that could reasonably be expected from a professional plastic surgeon performing such an operation. The plaintiff and her attorneys later reconsidered their case and decided to introduce an alternative claim based on medical negligence. Accordingly, in terms of rule 28(1) of the Uniform Rules of Court, they served notice to amend on the defendant. The latter in response, in terms of rule 28(3), served on the plaintiff a notice of objection. Without responding to such objections, and without further

lodging an application for leave to amend in terms of rule 28(4), the applicant set down the amendment for hearing.
The issues were as follows: *(a)* Rule 28(4) provided that if an objection to a notice of amendment was timeously served, the party wishing to amend 'may', within 10 days, lodge an application for leave to amend. Did this mean that, as the defendant insisted, an amendment-seeking party served with an objection, who wished to proceed with such amendment, was obliged to formally lodge a substantive application for leave to amend? Or was it sufficient for it, as occurred here, to simply orally apply for leave from the court to amend on the day of hearing? *(b)* Did the present amendment introduce a new cause of action that had become prescribed?
Held, that rule 24(8) postulated two procedures by which a party seeking an amendment may approach a court for leave to amend. One was oral: by this method, all that the applicant had to do after receiving the notice of objection was to set such a matter down for hearing and on the date of hearing simply walk into court and orally apply for leave to amend. The other was to lodge a formal application for leave to amend as enjoined by the provisions of rule 28(4). It was left entirely to the discretion of the applicant to decide with which course to proceed. Accordingly, the present application was properly before the court. (See [17] and [18].)
Held, that the amendment had introduced a new cause of action — medical negligence — separate and distinct from the original cause of action of breach of contract. This was so despite both causes of action arising from the same conduct of the defendant. (See [23] – [27].)
Held, on the facts, that the new cause of action was extinguished by prescription. Application for amendment accordingly dismissed.

EX PARTE CJD AND OTHERS 2018 (3) SA 197 (GP)

Children — Surrogacy — Surrogate motherhood agreement — Confirmation — Application for — Information to be disclosed about family unit — Children's Act 38 of 2005, ss 292 and 295(e).

First and second applicants (C and H) were men in a 10-year relationship (see [5]). This was an application to confirm their surrogate motherhood agreement with third and fourth applicants, the surrogate mother and her partner. (Sections 292 and 295 of the Children's Act 38 of 2005.)
The court declined to confirm the agreement on the basis that it was not in the best interests of the prospective child. This, considering the 'family situation' and H's 'personal circumstances'. (See [4], [26] and s 295*(e)*.)
The 'family situation' was that there was no common household (C and H lived separately); and no explanation of how they would operate as a family unit. The underlying idea was that it was desirable for a family to have a shared 'community of life'.
The 'personal circumstances' of H were that he did not want the public to know his sexual orientation and that he was a parent in a same-sex relationship.
The court expressed the concern that this and the living arrangements were not disclosed in the applicants' affidavit (they were disclosed in a report filed by a psychologist). It stated that all information relevant to confirmation was to be set out in applicants' affidavit. (See [11] – [12].)

It directed that future applicants were to disclose in their founding affidavit: if and how they would function as a family unit; whether they were comfortable with society regarding them as a family unit; whether they were living together; and if they were not, why that would not impact on the interests of the child and their functioning as a family unit. (See [15].)
Application dismissed.

FOUR WHEEL DRIVE ACCESSORY DISTRIBUTION CC v RATTAN NO 2018 (3) SA 204 (KZD)

Contract— Enforcement — Public policy — Standard form agreement — Text too small to read.

This was an action for repair costs based on the non-performance by Mr Rattan of an alleged term in a standard form car-loan agreement (see [3]).
The agreement was printed on one page, had 25 clauses and many subclauses, and was in text so small 'the court could not read [it] easily even with the aid of a magnifying glass'. (See [25] and [27].)
The alleged term was that the car would be insured for 72 hours, whereafter Rattan had to insure it, or be liable for its damage.
The car was indeed damaged, when, after 48 hours, Rattan was shot and killed while driving it.
FW then brought the action against Rattan's estate, which the court dismissed on the following grounds (see [70]).

- FW lacked locus standi (see [23]).
- It was impossible for Rattan to insure the vehicle (see [30]).
- The standard form agreement was contrary to public policy and invalid because its print was too small to read. (See [1], [3] and [42].)

Moreover, the Consumer Protection Act 68 of 2008 (CPA) applied, and the agreement infringed the rights in ss 22, 40 and 48 (to information in plain and understandable language; not to be subject to unconscionable conduct; and against suppliers entering or administering transactions in an unfair, unreasonable or unjust manner).

KM v TM 2018 (3) SA 225 (GP)

NOTE: This case is a good example of what the court order should look like when a “receiver” is appointed to divide an estate in a divorce. Section 15 is about the powers of spouses in a marriage to buy and sell. This should be pleaded, same with the forfeiture of benefits which should be pleaded.

Marriage — Divorce — Proprietary rights — Marriage in community of property — Adjustment in terms of s 15(9)*(b) of Matrimonial Property Act — Can only be ordered by court when granting divorce — Receiver/liquidator cannot itself decide whether adjustment to be made — Adjustment must be properly ventilated in pleadings and in evidence — Matrimonial Property Act 88 of 1984, s 15(9)*(b).

Pleadings- in divorce concerning Section 15(9)*(b)* of the Matrimonial Property Act 88 of 1984 provides that, where a spouse in a marriage in community of property enters into a transaction contrary to s 15(2) or (3) of the Matrimonial Property Act 88 of

1984 (the MPA), and the joint estate suffers a loss as a result thereof, an adjustment shall be effected in favour of the other spouse upon division of the joint estate.

Section 15(9)*(b)* of the Matrimonial Property Act 88 of 1984 provides that, where a spouse in a marriage in community of property enters into a transaction contrary to s 15(2) or (3) of the Matrimonial Property Act 88 of 1984 (the MPA), and the joint estate suffers a loss as a result thereof, an adjustment shall be effected in favour of the other spouse upon division of the joint estate.
Such an adjustment can only be ordered by a court when granting a decree of divorce. While a receiver/liquidator appointed by a court must give effect to any adjustment so ordered, they cannot themselves determine whether an adjustment should be made in the first place. Furthermore, whether a party is entitled to an adjustment in terms of s 15(9)*(b)* of the MPA must be properly ventilated in the pleadings and evidence of the divorce action.

MAKAH v MAGIC VENDING (PTY) LTD 2018 (3) SA 241 (WCC)
Consumer protection — Consumer agreement — Cancellation — By supplier — 20-day notice period — Not applicable to month-to-month residential lease — Only applicable to fixed-term agreements — Consumer Protection Act 68 of 2008, s 14(2)(b)(ii).

Section 14(2)*(b)*(ii) of the Consumer Protection Act 68 of 2008 provided that a supplier could only cancel a consumer agreement once having given the consumer notice of 20 business days to rectify a material failure to comply with the agreement. These provisions, however, *did not apply to a month-to-month residential lease*; they only applied to fixed-term agreements.

MEC FOR CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS v MAPHANGA 2018 (3) SA 246 (KZP)
Court — Process — Vexatious proceedings — Common law and Act — Respective scope of application — Meaning of 'persistently. . . instituted' — Vexatious Proceedings Act 3 of 1956, s 2(1)*(b)*.

Respondent gave applicant MEC notice he intended instituting legal proceedings against her; and she then commenced this application. Thereafter, respondent launched his application.
Here, applicant sought an order that respondent not be permitted to institute legal proceedings against herself, her department or any past or present member of the public service, in any High Court or inferior court, except with leave of that court. She claimed that s 2(1)*(b)* of the Vexatious Proceedings Act 3 of 1956 or the common law entitled her to this relief.
Held, that:
- The common law could be called in aid against instituted (existing) legal proceedings; while the Act applied only to yet to be instituted (future) legal proceedings (see [14] – [15]); and that
- '*persistently. . . instituted legal proceedings*' (s 2(1)*(b)*) meant repeatedly instituted legal proceedings (see [19]). — *Order declined (the requirements of the common law and Act not having been met); but separate, interdictory relief granted.*

OLD MUTUAL FINANCE (PTY) LTD v MAKALAPETLO 2018 (3) SA 258 (LP)

Court— High Court — Jurisdiction — Review jurisdiction — High Court having no inherent power to review irregular judgments of magistrates' courts.

Magistrates' court — Powers — Court may not mero motu refer civil judgment of magistrate or clerk of court to High Court for review — Court faced with irregular judgment should instead point out irregularity to affected parties and advise them that matter reviewable by High Court — Judgment may also be rescinded at instance of judgment debtor.

A magistrate, confronted with a default judgment erroneously entered by the clerk of the Polokwane Magistrates' Court, mero motu submitted the matter to the High Court for review. She was following precedent set in the Limpopo High Court in terms of which magistrates could of their own accord send magistrates' court judgments to the High Court for review as they would criminal judgments. The matter at hand came to the attention of the Judge President of the Limpopo Division, who was of the opinion that the Uniform Rules of Court did not allow for such a procedure, and constituted a full bench to look into the correctness of the precedent. The full bench examined the following issues: (i) whether, in civil proceedings, a magistrate can mero motu send a judgment or decision to the High Court for review; and (ii) what magistrates should do when faced with a situation where a civil judgment was null and void and needed to be set aside by the High Court.

Held

High Court reviews were regulated by the rules 6(5) and 53(1) – (2) of the Uniform Rules, which, in conformity with the audi rule, required notice to the respondent (see [18]). Magistrates' mero motu submission of judgments to the High Court for review would be contrary to this procedure (see [19]). Nor did the High Court have an inherent power to conduct such reviews (see [23]).

A magistrate faced with an irregular judgment should, instead of sending it up for review, point out the irregularities to the affected parties and advise them that the matter was reviewable by the High Court under Uniform Rules 6 and 53. An alternative procedure, in the case of a judgment that was void ab origine, was an application for rescission under s 36(1)*(b)* of the Magistrates' Courts Act 32 of 1944 read with rule 49 of the Magistrates' Courts Rules. (See [17] – [21].) Since the precedent set in the Limpopo High Court was clearly wrong, the matter before the court was not subject to review and would be struck from the roll.

PHALADI v LAMARA 2018 (3) SA 265 (WCC)

Credit agreement — Consumer credit agreement — Consumer credit records — Removal of record of debt rearrangement by credit bureau or national credit register — Not judicial process — May only be effected through prescribed administrative process — National Credit Act 34 of 2005, s 71.

Consumers who have fulfilled all their obligations under credit agreements that are subject to debt rearrangement, are entitled to obtain a clearance certificate in terms of s 71 * of the National Credit Act 34 of 2005 (the NCA). The record of the debt rearrangement of consumers who succeed in obtaining such a clearance certificate will be expunged from credit bureau records; if they encounter problems their

remedy lies in an approach to the National Consumer Tribunal (the Tribunal). The process is administrative, not judicial. It is only the Tribunal that is empowered to assist them at first instance. The NCA does not afford the High Court jurisdiction to deal at first instance with matters falling within the province of the Tribunal. The role of the High Court in the legislative scheme was limited to dealing with judicial reviews of, or appeals from, the decisions of the Tribunal.

SOUTH AFRICAN BANK OF ATHENS LTD v ZENNIES FRESH FRUIT CC 2018 (3) SA 278 (WCC)

Company — Business rescue — Termination — Rejection of proposed business rescue plan — What constitutes — Adjournment of creditors' meeting without voting to approve plan on preliminary basis — Not amounting to rejection of plan — Companies Act 71 of 2008, ss 152(1)(d)(ii),152(1)*(e)*and 152(3)*(a)*.

Company — Business rescue — Termination — Failure by business rescue practitioner to apply for extension of business rescue where not ending within three months of commencement — Where, as in present case, delay unreasonable, order terminating business rescue justified — Companies Act 71 of 2008, s 132(3).

The second creditors' meeting of Zennies Fresh Fruit CC (Zennies), a close corporation under business rescue, was adjourned so that the business rescue practitioner could prepare and publish a revised business rescue plan. This without the practitioner conducting a vote on the preliminary approval of the plan as contemplated in ss 152(1)*(d)*(ii) and 152(1)*(e)*.
This case concerned two separate applications by different applicants for different relief against Zennies (the first brought after delay of some 40 days in finalising the revised plan) but heard together because both sought a declaratory order that the business rescue proceedings had ended or lapsed in terms of s 132(2)*(c)*(i) of the Companies Act 71 of 2008 (the Act).
Both applicants placed reliance on s 152(3)*(a)* of the Act for the proposition that, because the business rescue plan was not approved on a preliminary basis (at the second meeting), that meant that it was automatically rejected; and that because it was not thereafter properly considered further in terms of s 153 of Act , business rescue ended. On Zennies' version the plan was not rejected: no voting was conducted, and the meeting was adjourned in order for the business rescue practitioner to obtain more information, the parties having agreed that the plan be amended as contemplated in s 152(1)*(d)*(ii). The court encapsulated the issue raised by these contentions as whether the fact that no vote was taken to approve the plan at the creditors' meeting, justified a conclusion that the plan was rejected as envisaged by s 152(3)*(a)* of the Act (see [21]).
A further issue was the effect of the practitioner's failure to apply for an extension of the plan as contemplated in s 132(3) of the Act. This section provides that if a company's business rescue proceedings have not ended within three months after the start of those proceedings, or such longer time as the court, on application by the practitioner may allow, the practitioner must prepare a progress report of the business rescue proceedings and update it at the end of each subsequent month and deliver it to each affected person until the end of the proceedings.

Held
It was apparent from the wording of s 152(1)*(d)*(ii), by the inclusion of the word 'and' at the end of the sentence, that it had to be be read in conjunction with s 152(1)*(e)*. This meant that in the event that a practitioner were directed to adjourn the meeting in order to revise the plan for further consideration, the practitioner would have to call for a vote for preliminary approval of the proposed plan, as amended, *unless* the meeting had first been adjourned in accordance with para *(d)*(ii). There was no evidence to suggest that the plan was rejected during a vote for preliminary approval. The applicants' reliance on ss 152(3)*(a)* and 132(2)*(c)*(i) was therefore misplaced. (Paragraphs [31] – [33].)
A substantial degree of urgency was envisaged once a company decided to adopt the relevant resolution beginning business rescue proceedings. While it may be so that the main aim of business recue was to avoid liquidation proceedings, it could not mean that an extraordinary amount of time must be allowed to achieve that, at the expense of creditors' rights. The mechanisms of business rescue proceedings were not designed to protect a company indefinitely to the detriment of the rights of its creditors. Where, as here, the practitioner was not making progress (as far as the court could ascertain) in securing the specific information required to finalise the amended plan for consideration, the practitioner was under a statutory duty to file a notice of termination. The delay in the finalisation of the business rescue proceedings was unreasonable in the circumstances, and an order terminating the proceedings was justified. It was accordingly declared that the business rescue proceedings of Zennies had terminated.

SOUTH AFRICAN HUMAN RIGHTS COMMISSION v MASUKU AND ANOTHER 2018 (3) SA 291 (GJ)

Equality legislation — Hate speech — What constitutes — Anti-Zionist statements and threats — In context of present case, constituting hate speech targeting Jewish people — Not valid defence that offending statements were true or fair comment on matters of public interest — How statement perceived relevant, not intention with which made — Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, s 10(1).

This case concerned an Equality Court inquiry into a complaint of hate speech, prohibited by s 10(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Equality Act). The complaint, instituted by the South African Human Rights Commission on behalf of the South African Jewish Board of Deputies, related to four statements made by the first respondent, Mr Masuku, which the Commission had found prima facie propagated hatred and violence towards Jewish people.
Mr Masuku, a functionary of the second respondent (Cosatu), made the first of the offending statements by way of a website post, shortly before an anti-Zionist rally at the University of the Witwatersrand, where as a speaker he made the others. He denied that his statements were aimed at Jews, insisting that the only group that he made specific reference to was Zionists, and that Zionism was a political ideology which included various religious groupings. He claimed that the offending statements were based on fact, were true, constituted fair comment on matters of public interest and reflected bona fide beliefs on Zionism and the plight of Palestinians — that he

was entitled to express in the exercise of the s 16 constitutional right to freedom of expression (quoted at [23]). The Commission argued that the context in which the statements were made undoubtedly referred to members of the Jewish community, and that the impugned statements constituted hate speech within the meaning of s 10(1) of the Equality Act (quoted at [19]).

Held

The Equality Act did not define hate speech but it was clear, upon a proper contextual interpretation of the provisions of s 10(1) and the prohibited grounds in s 1 of the Equality Act, that at least two requirements for hate speech were created: the advocacy of hatred which is based on race, ethnicity, gender or religion; and speech which constituted incitement to cause harm. (Paragraphs [39] and [42].)

The evidence showed that the impugned statements were offensive and targeted the Jewish community, present or not during those utterances. Masuku's statements did not traverse the internal limitations in s 16(2)*(c)* of the Constitution; not only were they hurtful to the target group but also threatened them with harm while at the same time promoting and propagating hatred. This alone was more than sufficient to bring the statements within the purview of s 10(1) of the Equality Act. (Paragraphs [38], [48] – [53] and [55]).

Masuku's defence, that the offending statements were true and constituted fair comment on matters of public interest, was not permissible under the Equality Act. The intention of Masuku when making the impugned statements was irrelevant; it was not for him (or for the court) to dictate how they should be perceived. It was reasonably conceivable that, in the context of the present matter, a reasonable person in the Jewish community, in particular a Jewish person associated with Wits University, would probably be driven away through intimidation and fear for their security. It was irrelevant whether any actual attack became likely or ensued. When regard was had to persecution and discrimination inflicted on the Jewish community historically, it was also irrelevant whether the impugned statements, individually or cumulatively, were aimed at Zionism. The protection of their rights, especially to equality and religion, remained crucial. The impugned statements were not protected by s 16 of the Constitution, and constituted hate speech under s 10(1) of the Equality Act.

FIRSTRAND BANK LTD v COWIN NO AND OTHERS 2018 (3) SA 322 (GP)

Company — Winding-up — Creditors — Locus standi — Whether s 387(4) giving creditor F standing to bring application to resolve whether creditor N or company in liquidation owned debts — Liquidators not resolving issue and refusing to approach court to do so — Companies Act 61 of 1973, s 387(4).

FT Group Holdings (Pty) Ltd (in liquidation), a company, and Nedbank entered an agreement by which FT sold Nedbank, on an ongoing basis, its book debts. They also concluded a security cession, under which FT ceded Nedbank its other claims. Ultimately Nedbank came to cancel the sale agreement and at the same time FT was provisionally liquidated. (It was later finally liquidated.)

At the time of cancellation Nedbank had bought and paid for and taken delivery of by cession, book debts to the value of R93 million. (See [14], [17] and [21.2].)

The present application was by another creditor, FirstRand, which asserted, on its reading of the sale and security cession agreements, that on cancellation of the sale agreement, ownership of those book debts was restored to FT, and that they

became part of FT's claims covered by the security cession and held merely as security by Nedbank. (See [17] and [20] – [21].)
Nedbank contended its ownership was unaffected by cancellation of the agreement (see [18]).
Held, on an interpretation of the agreements, that Nedbank's contention was correct (see [39]).
The further issue was whether s 387(4) gave FirstRand standing to bring the application. It provides that:
'Any person aggrieved by any act or decision of the liquidator may apply to the Court . . . and thereupon the Court may make such order as it thinks just.'
The apparent 'act or decision' of the liquidators was their non-resolution of Nedbank and FirstRand's dispute, and their refusal to bring a similar application. (See [41] and [51].)
Held, that FirstRand was a 'person aggrieved' and given standing by the provision. (See [43] and [54].)

[41] It is common cause that FirstRand engaged in numerous attempts to persuade the liquidators to bring this application and that FirstRand's efforts were in vain. FirstRand went so far as to get its attorneys to draft the necessary papers to launch an application but one of the liquidators was advised not to cooperate, to avoid a possible accusation that the liquidators were preferring one creditor to the exclusion of the others.
[42] As a result, FirstRand submits that the question as to whether it has locus standi can be determined simply by asking the question, 'how else can FirstRand bring that dispute to the court for determination?' It then proffers an answer to the effect that there is no other provision and/or avenue open to FirstRand to bring the dispute between itself and Nedbank to the attention of the court other than this application.

Application upheld and declarators and other orders granted (see [57]).

NOTE: The liquidators made the correct choice, the first and second respondents are the joint liquidators of FT, and they “did not oppose the relief sought herein.” So they at least did not pay the costs!

SA CRIMINAL LAW REPORTS MAY 2018

S v NGCOBO 2018 (1) SACR 479 (SCA)

Rape — Sentence — Life imprisonment — Minimum sentence in terms of Criminal Law Amendment Act 105 of 1997 — Substantial and compelling circumstances — What constitutes — Effect of two-year period of incarceration prior to sentencing.
The appellant, who was 23 years old at the time of the commission of the offence, was convicted in a regional court of two counts of rape in terms of s 51 and s 52 of the Criminal Law Amendment Act 105 of 1997. He was sentenced to a term of life imprisonment (both counts taken together). The circumstances of the crime were that the appellant had gone to the house of the 16-year-old complainant where he raped her. He then dragged her to his own home, some 2 – 3 kilometres away,

where he raped her again. She sustained bruises to her legs and swelling of the face from the assault. His appeal to the High Court was unsuccessful but he was granted leave to appeal by the Supreme Court of Appeal.
On appeal, it was contended on his behalf that the court a quo had not taken into account the fact that he had been in custody for two years before he was sentenced.
Held, that a preconviction period of imprisonment was not, on its own, a substantial and compelling circumstance: it was merely a factor in determining whether the sentence imposed was disproportionate or unjust. (See [14].)
Held, noting that the appellant had shown no remorse, that the difference that the two years would make to the sentence of life imprisonment was so marginal that it did not render the sentence shockingly disproportionate. Nor would it be, without remorse on his part, inconsistent with his countervailing constitutional rights. The appeal was accordingly dismissed.

SIGUDO v MINISTER OF HIGHER EDUCATION AND OTHERS 2018 (1) SACR 485 (GJ)

Prisoner — Rights of — Right to education — Unlawful interference with amounting to constitutionally invalid act — Failure of prison authorities to forward examination entry form to educational authorities.

The applicant, a prisoner serving a term of imprisonment, applied for an order declaring that the Head of Education (the eighth respondent) at the prison was obliged to submit his examination entry form to the educational authorities.
The eighth respondent had declined to submit the form because the prison did not have the necessary tuition facilities for his course and suggested that the prisoner should rather apply for a transfer to a prison that did have those facilities. He purported to be acting in terms of a memorandum from the Department of Education which required that an entrant for such examination had to have an 80% attendance record, which would exclude the applicant, as he would have had no tuition at all and therefore would not be allowed to enrol for the examination.
Held, that there could be no doubt that unlawful interference with the applicant's right to education amounted to a constitutionally invalid act. (See [24].)
Held, further, that there was no evidence to support the eighth respondent's version that the correctional centre did not in fact offer the particular studies that the applicant wished to pursue. In any event, his examination entry form was based on part-time study which did not appear to be impacted upon by the memorandum from the Department of Higher Education and Training. Besides that, the decision as to whether the applicant would be allowed to sit the examination was not one for the eighth respondent to make. In the circumstances the application had to be upheld and a declaratory order made.

S v OKAH 2018 (1) SACR 492 (CC)

International co-operation to combat terrorism — Extraterritorial jurisdiction — Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004 — Exemption from definition of terrorism for acts done in furtherance of legitimate rights in accordance with principles of international humanitarian law in terms of s 1(4) of Act — What constitutes — Two double-car bombings aimed at

civilian targets in Nigeria planned and bankrolled from South Africa — Not qualifying for exemption under provision.

International co-operation to combat terrorism — Extraterritorial jurisdiction — Extent of — Extraterritorial jurisdiction granted for 'specified offences' by s 15(1) of Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004 — Not limited by phrase 'with reference to section 4, 14 . . . and 23' of definition of 'specified offence' to financing of activities in paras (a) – (b) — Interpretation that restricted definition in such manner would impair South Africa's duty under international instruments to combat terrorism.

Appeal — Special entry in terms of s 317 of Criminal Procedure Act 51 of 1977 — Grounds for — State failing to inform foreign national of right to consular access under art 7(3) of Terrorist Bombings Convention — Importance of right could not be trivialised — Special entry made.

The applicant, in the second of two applications consolidated and argued as one, one Mr Okah, raised three issues: (1) whether South African courts had jurisdiction under s 15(1) of the Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004 (the Act) to try alleged offences, beyond the financing of an offence, that occurred outside South Africa; (2) whether he qualified for exemption from liability under s 1(4) of the Act; and (3) whether the High Court had wrongly refused to make special entries on the record.
The High Court had found that Mr Okah, a Nigerian national who was a permanent resident in South Africa, had masterminded and bankrolled two double-car bombings, the first in Warri, Nigeria, in March 2010, and the second in Abuja, Nigeria, on 1 October 2010. The court convicted him of all 13 counts laid against him under the Act.
On appeal to the Supreme Court of Appeal (the SCA), that court acquitted him on four of the Warri charges on the ground that the Act established only limited jurisdiction over acts committed outside South Africa. The state applied for leave to appeal against that decision.
Mr Okah applied for leave to appeal against the High Court's refusal to exempt him from liability for the bombings on the basis of s 1(4) of the Act. Said section provided that any act committed during a struggle waged by peoples, including any action during an armed struggle in the exercise of their legitimate right to national liberation, self-determination and independence against colonialism in accordance with the principles of international law, especially international humanitarian law, would not, for any reason, be considered as a terrorist activity. He also contended that the High Court's refusal to make certain special entries on the record of the proceedings under s 317 of the Criminal Procedure Act 51 of 1977 (the CPA) rendered his trial unfair.
Mr Okah was the leader of the Movement for the Emancipation of the Niger Delta, which represented individuals who believed that the Government of Nigeria, with the connivance of international oil companies, was generating vast sums of money from oil extracted from the Niger Delta, while affording no benefit to the impoverished local inhabitants and simultaneously downgrading their environment. He had been arrested and prosecuted by the Federal Government of Nigeria on charges of treason and gunrunning, but was released after an offer of amnesty. The bombings,

which were the subject of the present case, took place after he had been released on amnesty.
Held, that the SCA's interpretation of the term 'specified offence' in s 1 of the Act and the use of the term 'with reference to' as a qualifier did not accord with the usual meaning, which was as a neutral connective phrase, and not a limiting one. (See [22].)
Held, further, that such an interpretation would impair South Africa's general duty under international conventions, protocols and United Nations Security Council resolutions to combat terrorism and the duty to bring to trial perpetrators of terrorism, wherever perpetrated. It would pull the Act's teeth, rendering futile its expressed endeavour to give bite to this duty. (See [36] – [37].)
Held, as to the reliance by Mr Okah on the s 1(4) exemption, that the evidentiary basis for reliance on the exemption had not been placed before the court. The criteria for application thereof raised many thorny factual and conceptual questions, such as whether the individuals, on behalf of whom Mr Okah acted, counted as a 'people' contemplated by the Act; whether one's own government or foreign corporations could be 'alien or foreign forces'; and could a well-grounded complaint about relentless life- and livelihood-threatening environmental degradation be the basis for a legitimate right to self-determination and national liberation? These questions could not be answered on the available evidence. (See [46] – [47].)
Held, further, that one of the cornerstones of international humanitarian law was the obligation to distinguish between combatants and civilians and between military objectives and civilian objectives. Military action could not directly target civilians, nor could it be taken with indifference to the effects on the civilian population. Furthermore, particular means and methods of warfare might be unlawful because they were, either by their very nature or use, indiscriminate. The undisputed facts established that both bombings were carried out in clear violation of international humanitarian law. The intention was deadly and cruel, namely that a crowd would be attracted to the site of the first explosion, which would then be caught in the blast zone of the second explosion, resulting in maximum injury and death. The acts plainly violated international humanitarian law and therefore Mr Okah forfeited any exemption under s 1(4). (See [49] – [52].)
The court also considered Mr Okah's application for a special entry, inter alia, on the basis of the failure by the state to inform him of his right to consular access under art 7(3) of the Terrorist Bombings Convention. It held that the importance of this right could not be trivialised, nor could the court assume that the right was waived if a person acquired permanent residence in South Africa, as Mr Okah did, where he still remained a 'national' of another state. It was not a complaint made in bad faith, nor was it frivolous or absurd. The High Court erred in refusing to make a special entry in this regard and the decision had to be reversed. The consequence of this was that s 318 of the CPA afforded Mr Okah a right of appeal against his entire conviction on the basis of the special entry which the court had to make. (See [78] – [80].)
The court further held that the failure to notify Mr Okah of his right to consular access did not result in a failure of justice. His complaint was not that the omission vitiated the entire trial, but sprang from the testimony of a Nigerian official given during the trial to the effect that had Mr Okah approached the authorities 'a different solution might have been arrived at'. This was, however, clutching at straws, as the bombings had taken place and terrible carnage had resulted. The conciliatory statement by a government official could not ameliorate Mr Okah's responsibility for the carnage he caused. In any event, a Nigerian consular representative was present in court for

most of the trial and this person could easily have been approached to afford Mr Okah any home-country assistance he may have needed or sought. This official was well acquainted with Mr Okah whom he said he regarded as a friend. The court was therefore right to conclude that failure to afford Mr Okah the necessary warning in terms of art 7 did not render the trial unfair. (See [83] – [87].)
The court accordingly granted the state leave to appeal, upheld the appeal and reinstated the decision of the High Court. Mr Okah's application for leave to appeal regarding exemption from prosecution under s 1(4) of the Act was dismissed. That part relating to the special entry was granted and the special entry made, but the appeal against his entire conviction on the basis of this and other special entries was dismissed.

S v JORDAAN AND OTHERS 2018 (1) SACR 522 (WCC)

Arms and Ammunition — Unlawful possession of firearm in contravention of s 3(1) of Firearms Control Act 60 of 2000 — Firearm of unknown calibre and make — Proof that device constituting firearm — Description of device, its use in incident and consequences of firing shot sufficient without expert evidence.

Words and phrases — 'Planned or premeditated' — Meaning of in s 51(1) read with part 1 of sch 2 to Criminal Law Amendment Act 105 of 1997.

In a trial on numerous charges, including murder and the unlawful possession of a firearm and ammunition, counsel for the second accused sought to persuade the court that the device used to shoot and attempt to kill the complainant on count 2 was not a firearm. He pointed out that the word 'firearm' was defined in terms of s 1 of the Firearms Control Act 60 of 2000 in specific terms with specific requirements and, because no expert evidence had been adduced to establish that the device used by the accused met with the requirements of the definition in the Act, the accused could not be convicted of a contravention thereof.
Held, that there was no mystique in appreciating that the destructive potential of a projectile fired from a muzzle was related to the combined effect of its mass and muzzle velocity, and that was a matter of simple physics. The firearm devices excluded from the technical definition of the word for the purposes of the Act, on the basis of their low muzzle energy, were therefore ones that posed little or no threat to people's lives and security. It was beyond reasonable doubt that the firearm involved in the present case was one with a muzzle energy materially 'exceeding 8 joules'. The serious consequences of the shooting incident demonstrated that the firearm could not have been a device of the nature that the legislature excluded from statutory regulation in terms of s 1 of the Act. It was clear furthermore that the accused was familiar with and knew how to use firearms. The weapon was accordingly a 'firearm' for the purposes of the Act. (See [98] and [105].)
The indictment relied on the provisions of s 51(1) read with part 1 of sch 2 to the Criminal Law Amendment Act 105 of 1997 in respect of one of the counts of murder, in that the murder had been 'planned or premeditated'. As to the meaning of the phrase, the court held that the evident object of the provision actually militated in favour of construing the conjunction in its frequently acknowledged possible sense of 'and/or'; in other words, an interpretation that would render any possible basis for distinction that might be found between the concepts immaterial for practical purposes. In the present matter there was no direct proof of planning or

premeditation. The evidence about the prevalence of intergang rivalry and violence in the area was such that it was reasonably possible that the shooting could have been a random act of violence perpetrated when members of one gang chanced upon a member of another gang in vulnerable circumstances. (See [128] and [130].)

S v MLUNGWANA AND OTHERS 2018 (1) SACR 538 (WCC)

Public order offences — Public gatherings and meetings — Organising gathering without giving notice — Section 12(1)*(a)* of Regulation of Gatherings Act 205 of 1993 infringing right to freedom of assembly in s 17 of Constitution in requiring notice, and provision accordingly unconstitutional.

The appellants were convicted in a magistrates' court of a contravention of s 12(1)*(a)* of the Regulation of Gatherings Act 205 of 1993 (the Act), in that they had organised a picket protest, without giving notice of the gathering, at a civic centre to highlight the lack of proper sanitation in a township. Fifteen people chained themselves together in groups of five, and to the railings at the Civic Centre. Their number increased to 16 when a bystander joined the group and they were all arrested when they refused a request by the police to leave.
They appealed against their convictions and raised a constitutional issue, contending that the limitation, imposed by a contravention of s 12(1) of the Act to the right to freedom of assembly in s 17 of the Constitution, could not be justified in terms of s 36(1) of the Constitution. They accepted that the requirement of notice in the Act served a legitimate purpose, but their concern was that the effect of the criminalisation of the actions of a person who convened a gathering without a notice was to deter people from gathering — this because, if they did so, they might face fines and imprisonment for exercising a constitutionally guaranteed right and freedom to demonstrate as envisaged in s 17 of the Constitution.
Held, that s 12(1)*(a)*, in requiring the giving of adequate notice, did limit the right to freedom of assembly and constituted a limitation to the exercise of the rights guaranteed in s 17 of the Constitution. (See [42].)
Held, further, that the nature and importance of the right of assembly could not be overemphasised. (See [48].)
Held, further, that the effect of the limitation of the right of assembly was not only to punish the conveners for failing to serve a notice of an intended gathering, but was also to deter people from exercising their right to free assembly. That much was clear from the fact that deterrence was one of the purposes of criminal punishment. (See [85].)
Held, further, that, because of the disastrous impact of a criminal conviction and the lifelong impact it had on the lives of those convicted of contravening s 12(1)*(a)*, the criminal sanction was disproportionate to the offence of merely failing to comply with the notice requirement. Furthermore, it could not be seriously contested that, in the context of South African society, those most likely to fall foul of the provision were the previously disadvantaged communities, as they, to a certain extent, remained the voiceless. (See [93].)
The court held, accordingly, that the criminalisation by s 12(1)*(a)* of the convening of a gathering without notice, deterred people from exercising their fundamental constitutional rights to assemble peacefully, and the limitation of that right was not reasonable and justifiable in an open and democratic society based on the values of

freedom, dignity and equality. The appeal had to succeed, and the provision declared unconstitutional.

S v NEL AND OTHERS 2018 (1) SACR 576 (GJ)

Bail — Application for — Procedure — Timeous ruling to be made on applicable schedule or section of Criminal Procedure Act 51 of 1977.

Bail— Refusal of — In terms of s 60(4)*(c)* of Criminal Procedure Act 51 of 1977 because of attempt to conceal or destroy evidence — Legal representative of accused having visited hospital where complainants treated and privy to their treatment information — No grounds for holding this highly irregular behaviour against accused.

Bail — Refusal of — In terms of s 60(4)*(e)* of Criminal Procedure Act 51 of 1977 because of possible disturbance of public order — Court to take cognisance of high demands set by s 60(4)*(e)* read with s 60(8A).

The three appellants had been refused bail in a magistrates' court where they appeared on charges of attempted murder; pointing a firearm; and assault with intent to do grievous bodily harm. The charges arose from an incident at a fast-food restaurant and received coverage in the local media, it being alleged to be an instance of 'white on black violence'.
The prosecutor opposed the granting of bail and contended that the provisions of s 60(11)*(b)* of the Criminal Procedure Act 51 of 1977 (the CPA) were applicable and that the application accordingly had to be dealt with in terms of sch 5 to the CPA. The magistrate called on the state to produce written confirmation in terms of s 60(11A) of the CPA or prove to the court, in some other way, that the relevant offences were such offences as were intended by the schedule. The state did not do so and instead submitted from the bar that the injuries sustained by one complainant, which resulted in bleeding from his ear and mouth, constituted a dangerous wound within the ambit of attempted murder involving the infliction of grievous bodily harm in sch 5.
The magistrate, unsure at that stage of whether sch 5 was applicable, wished to postpone the matter to consider the procedure to be adopted. After some discussion she raised the possibility of the opposition to the schedule being withdrawn as an alternative to a postponement, but qualified her proposal by stating that the appellants were not forced to do so. After an adjournment the appellants' legal representatives, though still of the view that the offence of attempted murder was not a sch 5 offence, 'abandoned' the point on the instructions of their clients. The magistrate then ruled that the application had to proceed on the basis of sch 5. The appellants contended on appeal that the magistrate's actions, in having 'coerced' the legal representatives into a corner, constituted a material irregularity.
Held, that, in the ordinary course of an application for bail, a timeous ruling had to be made on the applicable schedule or section, whether placed in dispute or not. This determined how the bail application would be conducted and, more importantly, the issue of onus. The decision by the appellants' legal representatives, to withdraw their opposition to the schedule as an alternative to a postponement of the application, was not in the interests of the administration of justice or the appellants. The magistrate's proposal was similarly not in the interests of justice. (See [7] and [9].)

Held, accordingly, that the proposal by the magistrate, leading to the acquiescence by the appellants' legal representatives, constituted a material misdirection. This did not imply, however, that the appellants were summarily entitled to be released on bail, and the court was in a position to determine the matter on the basis of the grounds of appeal. (See [11] and [17].)
The court then proceeded to determine the appeal and found, in terms of s 60(4)*(c)* of the CPA, that that there was a likelihood the accused, if released on bail, would attempt to intimidate witnesses or conceal or destroy evidence. This was because the legal representative for the first appellant had visited the hospital where the complainants had received medical attention, and was privy to their treatment information.
Held, that the blanket finding by the magistrate, that all three appellants would accordingly interfere in the state's case if released on bail, was not justified. Whilst the behaviour of the legal representative in question had to be deprecated in the strongest terms, it could not be attributed to any of the appellants. (See [21].)
In respect of the finding that there was a likelihood that the release of the accused would disturb the public order, and that there were therefore exceptional circumstances as intended by s 60(4)*(e)*,
Held, that the public outcry in incidents of such interracial assaults was understandable and the call for bail to be refused was also understandable. However, the magistrate should not have lost sight of the high-water mark of s 60(4)*(e)* read with s 60(8A) of the CPA. No objective facts of the likelihood of the eventualities envisaged by s 60(8A) had been presented to the court from which the magistrate drew her inferences. She appeared to have been influenced by the events which manifested themselves in social media, comments emanating from the Minister of Police, and protesters who had gathered, opposing the release of the accused on bail. It was apparent that the magistrate had paid lip service to the statutory provision. (See [23] – [24].) The appeal was upheld, and an appropriate order made granting bail to the appellants.

S v BLIGNAUT AND OTHERS 2018 (1) SACR 587 (ECP)
Conservation — Fishing — Abalone — Sentence — Accused, foreign nationals, working on farm where abalone processed — At time of arrest, 37 356 units of abalone on farm — Accused offering to pay for own deportation — Accused each sentenced to total of 13 years' imprisonment, totally suspended for five years.

Accused 7 and 8 were two Chinese nationals who were found guilty of eight different offences involving contraventions of the Marine Living Resources Act 18 of 1998 and the regulations made under that Act, relating to 37 356 units of abalone found in their possession. They were employed to receive, process, dry and pack the abalone on a farm. They had been promised jobs in South Africa and were in the country illegally, having left China because of poverty. Accused 7 was 32 years old and accused 8 was 53. The evidence showed that they lived in appalling conditions on the farm. Both accused sought suspended sentences and were willing to be deported, at their own cost, to China. They had been in custody for three years awaiting their trial.
Held, that the kind of offences the accused were convicted of were serious offences which needed to be visited with harsh sentences to reflect the gravity thereof. The personal circumstances, the nature of the role played by the accused in the commission of these offences, and the conditions that prevailed in the processing plant or establishment were relevant and had to influence the sentence. The

circumstances of the case were unique, but the sentences should not send a wrong message. The accused were sentenced to a total of 31 years' imprisonment, all of which was suspended for five years.

All SA [2018] Volume 2 May

Minister of Home Affairs and another v Public Protector of the Republic of South Africa [2018] 2 All SA 311 (SCA)

Administrative law – Office of Public Protector – Powers of – Challenge to report issued by Public Protector, and remedial action prescribed therein – Whether review should be based on Promotion of Administrative Justice Act 3 of 2000 or principle of legality – Exercise of powers by Public Protector not constituting administrative action and review had to be based on principle of legality – Appeal dismissed because no grounds of review were found to be sustainable.

An employee of the Department of Home Affairs was the subject of a complaint by the Cuban Deputy Minister of Foreign Affairs. The employee ("Marimi") was stationed at the South African embassy in Cuba, where he held the position of first secretary. As a result of the complaint, Marimi was recalled to South Africa. The letter informing him of his recall gave him notice that disciplinary action would be taken against him. On his return to South Africa, no disciplinary action was taken and he heard nothing further in that regard, however his cost of living allowance ("COLA") that he had been paid while in Cuba was stopped. He lodged a complaint with the Public Protector (the "respondent") against the Department, alleging maladministration on its part in relation to his transfer from Cuba to South Africa. The Public Protector produced a final report in which she found that the Department was indeed guilty of maladministration in relation to Marimi. She directed that the Department take certain remedial action to redress Marimi's grievance.

An application for review of the Public Protector's report was dismissed in the court *a quo*, leading to the present appeal.

Held – The Court would in its judgment, consider the facts; the powers and functions of the Public Protector; whether the exercise of power by the Public Protector was reviewable in terms of the Promotion of Administrative Justice Act 3 of 2000 or the principle of legality; and the individual grounds of review.

While the primary source of the Public Protector's powers is the Constitution, the Public Protector Act 23 of 1994 is the legislation that supplements her powers. The Court described the provisions of section 6 of the Public Protector Act, which sets out the matters which the Public Protector may investigate.

Review in terms of both the Promotion of Administrative Justice Act and the principle of legality stems from the rule of law. Section 33(1) and (2)of the Constitution as well as the Promotion of Administrative Justice Act gives effect to the rule of law in respect of only administrative action. The principle of legality gives effect to the rule of law in relation to all other exercises of public power. An applicant for judicial review must choose the right option and does not have a choice as to the pathway to review.

The definition of "administrative action" in the Promotion of Administrative Justice Act refers to a decision of an administrative nature, taken by an organ of State when it

exercises either a constitutional power or a public power in terms of legislation that adversely affects rights and has a direct, external legal effect. The Court held that the Office of the Public Protector is a unique institution designed to strengthen constitutional democracy. It does not fit into the institutions of public administration but stands apart from them. The decision of the Public Protector do not constitute administrative action. As a result, the Promotion of Administrative Justice Act does not apply to the review of exercises of power by the Public Protector, and the review of the decisions in issue in this case had to be addressed in terms of the principle of legality.

The appellants attacked the Public Protector's decision to entertain the complaint made by Marimi on the grounds that the complaint had not been made on oath; that the Public Protector entertained the complaint despite Marimi not having exhausted his remedies in terms of the Public Service Act or other legislation; and that directing the Department to pay Marimi's COLA was vitiated by an error of law and was unreasonable. In order to succeed with the first ground, the appellants had to establish that the Public Protector acted irregularly in taking Marimi's complaint otherwise than on oath. In terms of section 6(1) of the Public Protector Act a complaint may be reported to the Public Protector by means of a written or oral declaration under oath, or by such other means as the Public Protector may allow with a view to making her office accessible to all persons. The Public Protector has a choice as to the form of the complaint, and therefore did not act irregularly in taking Marimi's complaint otherwise than on oath.

Regarding the second ground of review, the Court pointed out that the Public Protector's investigative jurisdiction is extremely wide. She was entitled in terms of section 6(3) of the Public Protector Act, to investigate a complaint even though the complainant had not exhausted his or her remedies.

Addressing the final ground of review, the Court found the Department to have laid no basis for its contention that the directive that the COLA be paid was vitiated by an error of law and was unreasonable.

The appellants having failed to establish any ground of review, the appeal failed.

ABSA Bank Ltd v Njolomba and another and related matters [2018] 2 All SA 328 (GJ)

Consumer – Credit agreements – Home loan agreements – Default – Application for money judgment – National Credit Act 34 of 2005 – Section 129(4) – Interpretation of – Properly construed with reference to its language and purpose, section 129(4)(b) relates exclusively to the instalment sale, secured loan, and lease variety of credit agreement which are singled out for debt enforcement by sale of the movable property which is their subject matter and further resort to judgment for the balance remaining after the sale of such property – Section 129(4) does not touch on the process of general execution against other assets of the debtor after judgment and it finds no application in the case of a mortgage agreement.

Eight matters came before the court for default judgment in terms of rule 31(5). All the matters related to credit agreements subject to the National Credit Act 34 of 2005 (the "Act"). Furthermore, all related to home loans, with the indebtedness in each case secured by a mortgage bond over immovable property. Each credit agreement

contained an acceleration clause providing for all payments under the loan agreement to become immediately payable in one lump sum in the event of default. Each of the applicants sought a money judgment in respect of the accelerated debt in each instance. At the present stage, they did not seek that the properties be declared executable.

Held – In conformity with the accepted need to promote constitutional values, our law has shifted towards a measure of flexibility in the execution process where it is sought to execute against the home of a debtor. The requirement that all relevant circumstances be considered before depriving a person of his home includes the requirement that immovable property not be executed against without judicial oversight being brought to bear thereon and the recent introduction of rule 46A into the Uniform Rules which requires that the court consider alternative means of satisfying the judgment debt, other than execution against the judgment debtor's primary residence. The objective is to maintain the mortgage loan and rehabilitate the debtor if at all possible.

At the heart of the court's function in preserving the credit agreement and thus the debtor's home, is section 129(3) of the Act, which affords to the debtor rights that he did not have before the advent of the Act. In terms of the section, a debtor, even after judgment, is entitled to remedy any default by paying the arrear amounts together with default charges and reasonable costs of enforcing the credit agreement. In relation to immovable property, that right endures until the proceeds from the sale have been realised.

An applicant who has not yet been able to comply with the requirements for obtaining a declaration of executability in terms of rule 46, but who has in terms of its agreement the right to seek judgment, will generally seek to obtain judgment for the accelerated indebtedness and to postpone the declaration of executability so that the processes set out in rules 46 and 46A can be undertaken in due course if this becomes necessary. The prevailing practice manual contains a directive that expressly precludes the granting of a default judgment for a money claim where it is necessary to postpone the claim for a declaration of executability. The central reason given in the practice manual for that approach, is that if a money judgment is given and the judgment debtor's movables executed against, section 129(4)(b) of the Act will preclude the debtor from reinstating the credit agreement by paying the arrears. If that construction of section 129(4)(b) was correct, there would be compelling reasons to avoid piecemeal execution as a matter of general practice. The right to reinstate the agreement is essential to the preservation of the mortgaged property and the operation of rule 46A. If that right is lost, the process contemplated in rule 46A would be rendered nugatory.

Relying on their right to enforce their contractual rights, the applicants argued that, whilst the court is expressly given a discretion to postpone the declaration that the immovable property may be executed upon, it does not have discretion to postpone the granting of the money judgment sought by the applicants.

The meaning of section 129(4) and especially the effect of section 129(4)(b), was thus pivotal to the relief sought by the applicants.

According to the applicants, rules 46 and 46A, rather than militating against the granting of a judgment before a declaration of executability, in fact, envisage a procedure where a money judgment has already been taken. In terms of rule 46(1)(a),

a return of process against movable property, is to be a first step of execution against immovable property. It is argued thus, that this could not be in contemplation if the taking of a money judgment separately should not be entertained. Furthermore on a linguistic and sensible reading thereof, rule 46A proceeds from the assumption that a "judgment debt" already exists. Reference is pertinently made to "judgment debtor" and "judgment creditor" throughout the rule, suggesting that it is contemplated that judgment has been taken under the credit agreement before the process set out by the rule is implemented. The Court agreed that the interpretation of section 129(4)(b) posited by the practice manual was irreconcilable with rules 46 and 46A and the common law. Section 129(4)(b), on the construction provided for in the practice manual, is assumed to relate to all credit agreements and thus to a mortgage agreement. That has led to the assumption being made that section 129(4)(b) has the effect that, whenever any form of execution is levied pursuant to a judgment debt which arises from any credit agreement, no matter how paltry the recovery, it will trigger a situation where the rights afforded by 129(3) are no longer available to a debtor. That construction in the context of mortgage loans is anomalous. The purpose of section 129(3) is to allow for a reinstatement of the agreement at any time up to cancellation provided it has not in the interim become legally impossible. The purpose of section 129(4) is no more than to explain that where the subject movable has been legally repossessed and sold to a third party, the agreement can no longer be reinstated on its terms. A different position has been prescribed where immovable property is acquired under a mortgage agreement. In that case, the maintaining of the mortgage agreement will only become impossible when the immovable property has been sold and transferred to the third party purchaser. If execution takes place in respect of movable property of the judgment debtor, this will not create a situation where the mortgage agreement in respect the debtor's home cannot be reinstated.

Thus, properly construed with reference to its language and purpose, sec-tion 129(4)(b) relates exclusively to the instalment sale, secured loan, and lease variety of credit agreement which are singled out for debt enforcement by sale of the movable property which is their subject matter and further resort to judgment for the balance remaining after the sale of such property. Section 129(4) does not touch on the process of general execution against other assets of the debtor after judgment and it finds no application in the case of a mortgage agreement. Such a construction creates no tension between sections 129(4) on the one hand and the Constitution; rules 46 and 46A and the common law on the other.

Consequently, the applicants were entitled to the orders they sought in relation only to the money judgments.

Brink v S [2018] 2 All SA 347 (WCC)

Criminal law and procedure – Alcohol-related traffic offence – Mandatory suspension of the appellant's driving licence in terms of section 35(1) of National Road Traffic Act 93 of 1996 – Duty of court to inform accused of the provisions of sections 35(1), (2) and (3) before imposing sentence.

Criminal law and procedure – Alcohol-related traffic offence – Sentencing – Whether it is only convictions under an identical provision of the National Road Traffic Act 93 of 1996 which constitute previous convictions for the purposes of section 35(1)(ii) and (iii), or whether successive convictions for any of the similar offences grouped together

under subsections 35(1)(a), (aA), (b) or (c) are relevant for purposes of determining whether one is dealing with a second or third offence for purposes of section 35(1)(ii) and (iii) –Approach to be adopted in determining whether an offence is a first, second or third offence for purposes of section 35(1) is to recognise that an offence qualifies as a second or third offence for the purposes of subsection (ii) and (iii) if it is listed under the same subsection or category as the previous conviction.

The appellant was charged with contravening section 65(2)(a) of the National Road Traffic Act 93 of 1996 by driving a vehicle on a public road while the concentration of alcohol in his blood exceeded the legal limit.

In terms of a plea bargain negotiated in terms of section 105A of the Criminal Procedure Act 51 of 1977, it was agreed that the appellant would plead guilty to the charge and be sentenced to a fine of R10 000 or undergo ten months' direct imprisonment of which half was suspended for five years. The appellant disclosed in the plea agreement that he had a previous conviction for the same offence. He was convicted in keeping with the plea agreement.

Prior to sentencing the State handed in a record of the appellant's previous convictions, which showed that the appellant had been convicted in 2009 on one count of driving under the influence of liquor under section 65(1)(a) of the Act and one count of reckless and/or negligent driving under section 63 of the Act. After sentencing the appellant in terms of the plea agreement, the magistrate proceeded to deal with the question of the mandatory suspension of the appellant's driving licence in terms of section 35(1) – without having notified the appellant of such provisions.

During his evidence, the appellant referred to the suspension of his driver's licence in 2009 and then again in 2015. On the basis of that information, the magistrate formed the view that the appellant had three relevant convictions, all alcohol-related, being the 2009 conviction in terms of section 65(1), the 2015 conviction allegedly in terms of section 65(2), and the current conviction in 2017 under section 65(2). Finding no circumstances which warranted a departure from the prescribed minimum period of suspension, the magistrate ordered that the appellant's licence be suspended for a period of 10 years. On appeal,the questions raised were whether it is only convictions under an identical provision of the Act which constitute previous convictions for the purposes of section 35(1)(ii) and (iii), or whether successive convictions for any of the similar offences grouped together under subsections 35(1)(a), (aA), (b) or (c) are relevant for purposes of determining whether one is dealing with a second or third offence for purposes of section 35(1)(ii) and (iii); whether or not the magistrate ought to have taken into account the 2015 conviction which was not reflected on the charge sheet; and whether or not there were circumstances which warranted a deviation from the prescribed minimum period of suspension in this case.

Held – The magistrate failed to comply with the peremptory provisions of section 35(4) of the Act, which obliges the court convicting any person of an offence referred to in section 35(1) to inform the person of the provisions of sections 35(1), (2) and (3) before imposing sentence. The procedural rights afforded to an accused in terms of section 35(4) are an important aspect of the right to a fair trial, and due care must therefore be taken to comply strictly with the requirements of the section. As the appellant was legally represented and did in fact testify in the section 35(3) enquiry, the Court was satisfied that he could not have been prejudiced by the magistrate's failure to comply with the requirements of section 35(4).

Section 35(1) lists various offences, grouped by type in four subsections, which attract minimum licence suspensions. The Court held that the objective of section 35(1) is to ensure that courts impose harsher penalties for the serious offences listed in section 35 than those which might typically be imposed by courts exercising their general discretion under section 34. The offences referred to in section 35(1) are grouped in subsections (a), (aA), (b) and (c) according to type rather than being listed individually, suggesting that the emphasis is on the nature or type of the offence rather than the particular elements of the offence. Section 35(1)(i) to (iii) provides for progressively longer periods of suspension in the case of repeat offenders. The approach to be adopted in determining whether an offence is a first, second or third offence for purposes of section 35(1) is to recognise that an offence qualifies as a second or third offence for the purposes of subsection (ii) and (iii) if it is listed under the same subsection or category as the previous conviction.

On a correct interpretation of section 35(1), both the 2009 and the 2017 convictions were relevant since they were both alcohol-related offences referred to in section 35(1)(c).

The Court then considered whether the magistrate should have taken the 2015 conviction into account. The minimum licence suspension provisions in section 35(1) of the Act are penal in character. Proof of a second or third offence within the meaning of section 35(1) is a jurisdictional fact for the applicability of the increased minimum suspension periods in sections 35(1)(ii) and (iii). A court must thus be satisfied, beyond a reasonable doubt, that the convicted person has previously been convicted of a relevant offence before it can impose the increased penalties referred to in section 35(1)(ii) and (iii). Previous convictions are usually proved by the State's producing a SAP69 form and the person admitting the contents thereof. In this case, however, the SAP69 form produced by the State appeared to have been incomplete or out of date inasmuch as it did not include the appellant's 2015 conviction. It is insufficient for the court to rely solely on the evidence given by a convicted person regarding his previous convictions for purposes of applying the mandatory minimum suspension periods referred to in section 35(1)(ii) and (iii). The magistrate therefore erred in taking the appellant's 2015 conviction into account and in concluding that the appellant had three relevant convictions for purposes of section 35(1). The magistrate ought to have taken into account only the appellant's 2009 conviction for contravention of section 65(1) and his 2017 conviction for contravention of section 65(2)(a) of the Act, so that the applicable minimum licence suspension period would be five years, in terms of section 35(1)(ii), and not ten years.

It remained to consider whether the prescribed minimum suspension period should be applied in this case. The Court aligned itself with the view stated in case law, that section 35(3), properly construed, does not do away with the court's discretion, in imposing a licence suspension, to consider all factors relevant to the exercise of the sentencing discretion, including an accused's personal circumstances and the interests of the community.

Considering all the traditional sentencing factors, including the personal circumstances of the appellant, the Court found no reason to depart from the applicable minimum suspension period of 5 years. The five-year period was to run from the date of sentencing.

Broodie NO v Maposa and others [2018] 2 All SA 364 (WCC)

Family Law and Persons – Matrimonial property – Transfer without spousal consent – Validity – Matrimonial Property Act 88 of 1984 – Section 15 – Court held that disposition by a spouse of the member's interest in a close corporation for no consideration would be a donation or alienation without value as contemplated by section 15(3)(c) – Court considered the respondents' reliance on section 15(9)(a) which deems the transaction concerned to have been entered into with the required consent if the person to whom the disposition was made did not know and reasonably could not have known that it was effected contrary to section 15(2) or (3) – Court believed that the third respondent was unaware that the deceased was married to the applicant at the time she entered into a customary marriage with him – Respondents' reliance on section 15(9)(a) was thus upheld.

The applicant's husband died intestate in December 2016. The applicant was the executor of the joint estate of herself and the deceased, to whom she had been married in community of property in terms of section 22(6) of the Black Administration Act 38 of 1927.

The applicant sought an order that the registered transfer by the deceased, of a 25% member's interest in a close corporation (the "CC") to each of the first to third respondents be declared unlawful and void, and an order interdicting those respondents from alienating their registered interests in the CC pending the determination of the application for declaratory relief.

The third respondent was a woman with whom the deceased had a longstanding extramarital relationship until his death. The first and second respondents, who were now adults, were their offspring.

The application to have the registration of the transfer of the member's interest set aside was based on three grounds. The applicant contended that the transfer was invalid because it occurred without her consent, and thus in breach of section 15(2) and/or (3) of the Matrimonial Property Act 88 of 1984; it had been fraudulently procured by the third respondent; and the deceased had lacked the necessary mental capacity to appreciate the nature of his actions when the transfer was effected.

There were a number of preliminary issues for decision. Those included the respondents' application for striking out and the applicant's applications to introduce supplementary founding and replying affidavits, as well as the introduction of an affidavit by an assistant director in the Department of Home Affairs concerning the matrimonial property regime of the applicant's marriage to the deceased. A copy of the declaration made by the applicant and the deceased confirming that their marriage was contracted in community of property – an issue in contestation in the main application – was attached to the affidavit. The respondents also raised a point of non-joinder, contending that the applicant was a necessary party in her personal capacity.

Held – The assistant director's affidavit was important in deciding the critical dispute regarding the applicant's marriage being in community of property. The Court therefore admitted that affidavit, as well as the supplementary founding and replying affidavits. The non-joinder point was settled when the applicant indicated that she would abide by the judgment of the court in her personal capacity. In the striking-out application,

only limited parts of the applicant's replying were to be struck out on the grounds that the content was inadmissible hearsay or was scandalous, vexatious and/or irrelevant.

Turning to the claim based on lack of consent, the Court set out the provisions of section 15 of the Matrimonial Property Act. The Court held that disposition by a spouse of the member's interest in a close corporation for no consideration would be a donation or alienation without value as contemplated by section 15(3)(c). The Court accepted the applicant's allegation that she did not provide her consent to the transfer, but turned to consider the respondents' reliance on section 15(9)(a) which deems the transaction concerned to have been entered into with the required consent if the person to whom the disposition was made did not know and reasonably could not have known that it was effected contrary to section 15(2)or (3). The Court believed that the third respondent was unaware that the deceased was married to the applicant at the time she entered into a customary marriage with him. The respondents' reliance on section 15(9)(a) was thus upheld.

Chamber of Mines of South Africa v Minister of Mineral Resources and another [2018] 2 All SA 391 (GP)

Mining, Minerals & Energy – Mining right holders – Duties and obligations – Effect of Charters published by Minister – Targets set for participation or ownership by historically disadvantaged South Africans – Obligation to achieve and maintain targets.

The applicant was the Chamber of Mines of South Africa, which was a voluntary association of entities (referred to in the judgment as "the mining companies") involved in mining activities.

In August 2004, the Scorecard for the Broad based Socio-economic Empowerment Charter for the South African Mining Industry ("the Original Charter") was published. The Amendment of the Broad based Socio-economic Empowerment Charter for the South African Mining and Minerals Industry ("the 2010 Charter") was published in 2010. The parties were in dispute about the application of the two Charters to mining rights granted under the Mineral and Petroleum Resources Development Act 28 of 2002, and to holders of such rights.

Declaratory relief was sought in this application, to obtain clarity on the empowerment obligations of mining right holders.

Held – The majority of the court held that the issues to be determined were whether a mining company has a perpetual and recurring obligation to meet a 26% ownership target after the grant of a mining right; whether the Minister can use the enforcement powers in the Mineral and Petroleum Resources Development Act to compel compliance with the 26% target; how compliance with the 26% HDSA target should be calculated; and whether certain contested provisions of the 2010 Charter identified by the parties were *ultra vires* and void. "HDSA" referred to "historically disadvantaged South Africans". The Charters set target levels for HDSA participation or effective HDSA ownership at 15% as a 5-year target and 26% as a 10-year target. The principal underlying issue of dispute between the parties related to the situation where a mining company that had been granted a mining right had achieved the 26% target but the HDSA participants in the transaction had subsequently disposed of their interests, causing the mining company's HDSA participation/ownership levels to fall below 26%. The question was whether a mining rights holder was obliged, in terms of the Charters, to take steps to restore the 26% level and maintain that level indefinitely. That was

what was contended by the respondents, whereas the applicant argued against any duty of continuing compliance.

After setting out the relevant sections of the Mineral and Petroleum Resources Development Act, the Court examined the nature of a typical mining right, and the rights and obligations attached to such right. It then moved on to consider the status of the Charters. It concluded that neither Charter specified an ongoing obligation to achieve and maintain a 26% HDSA participation or ownership level. More importantly, the status of the 2010 Charter was found to be fallible as it was only the Original Charter that the Minister had been empowered to develop in terms of section 100 of the Act.

The majority of the Court therefore granted the applicant the declaratory relief sought, as set out in the order.

In a dissenting judgment, the contrary view was taken. The judge therein found the Charters not to be mere policy or guidelines, and took the view that an enduring obligation to maintain the relevant targets was intended.

De Lille v Democratic Alliance and others [2018] 2 All SA 464 (WCC)

Local Government – Executive mayor – Motion of no confidence – Whether motion of no-confidence vote should be exercised or executed by means of a secret ballot – Court confirming right of political party's caucus members to vote for or against the motion in accordance with the dictates of their own consciences – Speaker of Municipal Council, being a non-partisan person, tasked with deciding whether the no-confidence motion should be voted on by means of a secret ballot.

In Part B of the present application, the applicant ("the Mayor") would be seeking a declaration that clause 6.7 of the first respondent's ("the DA") Caucus Regulations for the City of Cape Town be declared unconstitutional and inconsistent with the Local Government: Municipal Structures Act 117 of 1998; that the Rules of Order Regulating the Conduct of Meetings of the Municipal Council of the City of Cape Town ("Rules of Order") be declared inconsistent with the above Act to the extent that it did not confer a discretion on the Speaker to rule that voting on a motion of no-confidence shall take place by secret ballot; and that clause 3.5.1.12 of the Party's Federal Constitution be declared unconstitutional and invalid for being inconsistent with the Act and the South African Constitution.

The present application was an interlocutory one brought on an urgent basis, pending the hearing of Part B. In it, the applicant sought to interdict members of the DA's caucus for the City of Cape Town from participating in the motion of no-confidence proceedings they instituted for the removal of the applicant as the City of Cape Town's Executive Mayor, other than on the basis that each member of the caucus should be free to vote for or against the motion in accordance with the dictates of his own conscience. She also sought to interdict the second respondent ("the Speaker") and the Council from proceeding with the voting on the motion unless it is by way of secret ballot, and to interdict the Federal and Provincial office bearers of the DA from influencing members of the caucus on the manner they should vote in respect of the motion.

The background facts were as follows. Whilst the DA was still busy with an investigation into conduct of the Mayor, the majority party ("the ANC") placed a motion of no-confidence on the agenda of the council, against the Mayor. A caucus meeting was held, aimed at deciding by secret ballot whether a motion of no-confidence should be instituted against the Mayor. The majority voted in favour of such a motion.

At a further caucus meeting, the DA's federal executive chairman (Mr Selfe), told caucus members that they were bound by the majority decision that the caucus had no-confidence in the Mayor, whether or not they agreed. The ANC subsequently withdrew its motion, but the DA authorised the Party caucus in Cape Town to lodge a motion of no-confidence in the Mayor. In response to a query from the applicant's attorneys, the DA stated that the federal executive would communicate its position to the caucus that its members should be allowed to vote according to their conscience and that no person would be disciplined on how they voted on this motion. The party further stated that from their perspective, there was no need for a secret ballot to be used when the motion was voted on. However when confirmation was sought on whether the caucus had committed itself to seek a free vote, the applicant was advised that Mr Selfe was of the opinion that in terms of the party's constitution, all caucus members (including those who did not vote on the day) were bound by the caucus decision. It was only after that, that the party took further legal advice and reconsidered its position – resolving then that it would afford the members of council a conscience vote on the motion.

Held – Clause 6.7 of the caucus regulations provides that all decisions made by the caucus are binding on all members of the caucus, but on issues on which the party allows a free vote, no caucus decision may derogate from that. The applicant contended that clause 6.7 was entirely inconsistent with the motion of no-confidence procedure provided in section 58 of the Local Government: Municipal Structures Act, and the principle of accountability.

The Court stated that as a member of the National Assembly of Parliament, Mr Selfe ought to have known, that not only members of the National Assembly, but also councillors in a local government, should vote with their conscience, rather than on the instructions of how their political party expects of them to vote. The applicant was accordingly justified in bringing the present application, because up until the afternoon before the application was heard, she was under the belief that members of the caucus of the City of Cape Town could not exercise their vote freely and with their conscience.

The only question for the Court to consider then was whether the motion of no-confidence vote should be exercised or executed by means of a secret ballot. The Mayor argued that, the threat of victimisation meant that it would defeat the whole purpose of having a free vote if such vote were not by means of a secret ballot. Insofar as the court was therefore requested to order that the party instruct its members of the caucus to support the vote by a secret ballot, in respect of the motion to be considered and voted on in the council meeting, the Court held that it was not convinced that it was permitted in law to issue such an order. Such an order would infringe the doctrine of separation of powers in that it would be directing a political party to exercise a specific function in the legislative sphere of local government.

Neither the Local Government: Municipal Structures Act nor the Rules of Order made provision for a vote to be held by means of a secret ballot. The Court acknowledged the reality of the fear of apprisals in the event of an open vote. The

Court was of the view that the decision on whether or not the no-confidence motion should be voted on by means of a secret ballot would not be a balanced and a fair one, if it was not taken by a non-partisan person like the Speaker, who had to exercise his or her duty in a rational and constitutionally compliant manner.

Satisfied that the Mayor had the met all the requirements for interim relief, the Court ruled that the members of the DA's caucus of the City of Cape Town should be free to vote for or against the motion, in accordance with the dictates of their own consciences, and that no member would face any adverse consequences from the party no matter how they vote on the motion. Pending the determination of Part B, the Speaker was ordered to exercise his/her discretion as to whether the motion of no-confidence should be voted on by means of a secret ballot.

L Taxpayer v Commissioner for the South African Revenue Service [2018] 2 All SA 478 (WCC)

Tax – Income tax – Disallowance of deductions – Appeal – Income Tax Act 58 of 1962 – Section 11(a) – Issue was whether there was a sufficiently close connection between the interest expense incurred by appellant on a loan facility with a bank ("the Investec loan") and the interest earned from time to time on the outstanding balance of his director's loan to his employer – Purpose of the Investec loan was to provide the appellant with an access facility and not to maintain the Bowmans loan nor did the interest expense on the Investec loan bring about the interest income on the Bowmans loan – Court held that the interest income accrued to appellant irrespective of the existence of the Investec loan.

Interest deductions claimed by the appellant taxpayer in respect of the 2010 to 2012 years of assessment were disallowed by the respondent ("SARS"). The Tax Court upheld the respondent's decision, leading to the present appeal.

Held – The central issue was whether, as the taxpayer contended, there was a sufficiently close connection between the interest expense incurred by him on a loan facility with a bank ("the Investec loan") and the interest earned from time to time on the outstanding balance of his director's loan to his employer ("the Bowmans loan") for purposes of section 11(a) of the Income Tax Act 58 of 1962.

Section 11(a) provides, *inter alia*, that in the determination of taxable income, a taxpayer is entitled to the deduction of expenditure (save for capital expenditure) actually incurred in the production of income from any trade. In his tax returns for the years in question, the taxpayer claimed as a deduction a portion of the interest expense on the Investec loan to the extent that he had to fund the Bowmans loan. SARS disallowed the deduction essentially on three grounds: First, SARS Practice Note 31 ("PN 31") requires the underlying capital to be borrowed and then lent for the interest income to qualify for purposes of section 11(a). Second, the interest on the amount owed under the Investec loan was not incurred in the production of interest income on the Bowmans loan. Third, it was stated that the Bowmans loan was not sourced from the Investec loan. The taxpayer's principal argument was that there was a direct causal link between the interest income and the interest expense, supported by his uncontested evidence that if the Bowmans loan were to be repaid to him, such repayment would in fact be appropriated to reduce the balance of the Investec loan. Consequently, the reduction in the interest accrual brought about by such repayment directly resulted (and would result) in a reduction of the interest expense. The Court found that the purpose of the Investec loan, during the relevant periods, was to provide

the appellant with an access facility and not to maintain the Bowmans loan. Nor did the interest expense on the Investec loan bring about the interest income on the Bowmans loan. That interest income accrued to him irrespective of the existence of the Investec loan. The appellant's argument was therefore unsustainable, and the appeal was dismissed.

S v Diya [2018] 2 All SA 488 (ECM)

Criminal law and procedure – Alibi defence – Onus of proof – Effect of failure to call witnesses to corroborate alibi.

Criminal law and procedure – Evidence – Cross-examination – Standard practice for a party to put to each opposing witness so much of his case or defence as it concerns that witness – If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness' testimony is accepted as correct.

Criminal law and procedure – Murder – Assessment of evidence – Confession – Admissibility of confession is provided for in section 217 of the Criminal Procedure Act 51 of 1977, which provides that evidence of any confession made by any person in relation to the commission of any offence shall, if such confession is proved to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto be admissible in evidence against such person at criminal proceedings relating to such offence.

The accused was charged with the murder of an 86-year-old woman, who was the mother of a relative ("Thembekile") of the accused. It was alleged by the State that Thembekile had entered into an agreement with the accused, to pay him R10 000 to kill his mother. The accused pleaded not guilty to the charge and elected not to tender a plea explanation.

A key witness for the State was someone who had stayed in the accused's home while looking for a job in 2016. He testified that during that time, he had seen two text messages on the accused's phone, both from Thembekile. The messages spoke of the intention for the deceased to be killed by the accused at the request of Thembekile. The witness ("Mr Khowa") did not disclose his knowledge of the messages to anyone due to his fear of reprisal.

Some time passed without any breakthrough in the case. Eventually the husband of the deceased went to the police to report that the community was threatening to kill the accused and another young man who were staying at the home of the deceased. It was reported that the accused had complained to an informer about not having been paid by Thembekile for the murder of Thembekile's mother. That caused the police to go to the house in question to speak to the accused. According to the investigating officer, the accused was emotional and made it clear that he wanted to co-operate with the police and to tell all he knew about the death of the deceased.

The State indicated their intention to have the confession admitted as part of the record and requested that there be a trial-within-a-trial to determine its admissibility. However, the accused denied that he made the statement voluntarily and said that he was told what to say by the investigating officer who took the statement. He also alleged that the statement was induced by sustained torture by the police.

Held – Mr Khowa's evidence-in-chief, under cross-examination and when compared to what he said to the police when his statement was taken did not change. His evidence was consistent throughout in most material respects and there were no contradictions even under cross-examination. His evidence was credible.

The version of the accused regarding the conduct of the police in taking his statement was not supported by the evidence. The testimony to the contrary by the investigating officer was corroborated by numerous other police officials, and it became clear to the Court that the accused was putting together a clumsy combination of lies, half-truths and fabrications.

The admissibility of confessions is provided for in section 217 of the Criminal Procedure Act 51 of 1977, which provides that evidence of any confession made by any person in relation to the commission of any offence shall, if such confession is proved to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto be admissible in evidence against such person at criminal proceedings relating to such offence. Section 35(5) of the Constitution provides that evidence obtained in a manner that violates any rights in the Bill of Rights must be excluded if the admission of the evidence would render the trial unfair or otherwise be detrimental to the administration of justice. On the facts of this case, the Court found not even the slightest objective evidence of anything having been done by the police that would have resulted in the accused making the statement in any way other than as provided for in section 217. It was thus concluded that the confession was made freely and voluntarily by the accused in his sound and sober senses and without being unduly influenced.

In the wake of that ruling, the statement of the accused was read into evidence. The accused, in his court testimony however, raised an alibi defence, alleging that he was in another location, at his home at the time of the murder. That allegation was contradicted by two witnesses who placed him at the deceased's homestead on the day of the murder. The accused attempted to cast doubt on the facts alleged by those witnesses, but in numerous instances his version was not put to the State witnesses. That led the Court to explain the law in that regard. It is standard practice for a party to put to each opposing witness so much of his case or defence as it concerns that witness. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness' testimony is accepted as correct.

Another unsatisfactory feature of the defence case was its case was closed without calling any witnesses to corroborate the alibi defence.

The Court found that the accused's evidence was riddled with outright lies and inconsistencies and was so full of inherent improbabilities as to be false.

Section 209 of the Criminal Procedure Act provides that an accused may be convicted of any offence on the single evidence of a confession by such accused that he committed the offence in question, if such confession is confirmed in a material respect or, where the confession is not so confirmed, if the offence is proved by evidence other than such confession, to have been actually committed. The Court concluded that the guilt of the accused had been proved beyond reasonable doubt and the accused was accordingly found guilty of murder as charged.

S v Miller and others [2018] 2 All SA 488 (ECM)

Criminal law and procedure – Unlawful possession or control, for commercial purposes, of abalone in contravention of regulation 39(1)(a) of the Regulations published in the Marine Living Resources Act 18 of 1998 – Conducting of unlawful enterprise through a pattern of racketeering activity in contravention of section 2(1)(e) of the Prevention of Organised Crime Act 121 of 1998 – Determination of sentence.

Judgment on sentence was handed down in this matter after the accused were convicted of several charges relating to the unlawful possession or control, for commercial purposes, of abalone in contravention of regulation 39(1)(a) of the Regulations published in the Marine Living Resources Act 18 of 1998. They were also convicted of contravening section 2(1)(e) of the Prevention of Organised Crime Act 121 of 1998 in that they conducted (or were associated with the running of) an unlawful enterprise through a pattern of racketeering activity.

After obtaining pre-sentencing reports, the Court heard argument in mitigation and aggravation of sentence.

Held – The Constitution requires a balanced approach to sentencing. The starting point is the traditional triad of relevant factors, *viz* the nature of the crime, the personal circumstances of the criminal and the interest of the community. Another relevant factor is respect for the dignity of the offender. In the present case, a further consideration was the fact that there were multiple accused convicted of a variety of offences. In such circumstances, the Court must have regard to the principle of consistency which demands, on the one hand, that similar sentences be imposed in circumstances where similarly placed offenders commit similar crimes and on the other hand that the perpetrators of more serious crimes be sentenced more severely thereby ensuring that the most blameworthy offenders receive the severest sentences.

In considering the nature of the offences, the Court stated that the sentences attached to the offences point to how seriously the offences are regarded by the Legislature. The negative impact of abalone poaching on the environment was described in detail by the court, based on the evidence of various witnesses called by the State. The extent of the poaching was such that the authorities took steps to reduce the total allowable catch ("TAC") annually and to reduce the zones in which harvesting was permitted. Nevertheless, the plunder of the marine resource continued, and the Court concluded that the large scale destruction of abalone is likely to have significant ecological consequences beyond just the extinction of the species. The Court also took cognisance of the anecdotal evidence before it of the negative impact that abalone poaching has had on the residents of the areas where the resource has been so actively poached.

While the accused did not engage in the act of removing the abalone from the sea, they were important tools in the facilitation of the crime. The offence involved dishonesty, and the accused were aware that what they were engaged in was unlawful. The evidence adduced also demonstrated that there are very good profits to be made along the value chain through the illegal poaching, processing and exporting of South African abalone. Furthermore, the clandestine exporting of the illegally harvested abalone had implications for the fiscus, as both export duties and income tax payable by the relevant companies were avoided. The negative impact of the poaching extended to fishing communities which were left with a smaller quantity of

the resource being available for lawful harvesting, and for commercial exploitation to enable families to earn a decent living.

In cases involving convictions under the Prevention of Organised Crime Act, in addition to the confiscation of assets, the Act mandates severe sentences in appropriate cases.

Examining the personal circumstances of each of the accused, the Court distinguished the first accused from the others. His moral blameworthiness was less and he was found to have been driven by need rather than mere greed. Applying the triad of factors referred to above in respect of each of the accused, the Court also stated that each accused had to be considered individually, with due regard being had for his particular involvement in the affairs of the racketeering enterprise, his moral blameworthiness and for the existence (or absence) of a criminal record.

Seaspan HoldCo I Ltd and others v MS Mare Tracer Schiffahrts GMBH & Co, KG and another [2018] 2 All SA 551 (KZD)

Shipping – Associated ships – Arrest of – Application to set aside – Issue was whether the relevant time for determining the requisite control or ownership of the vessel, as an associated ship and liable to be arrested as such, was the time of issue of the protective writs, or both at the time of the issue of the protective writs and at the time of the arrest of the ship – Action in rem is commenced by the issue of the process (summons or writ).

The respondents were German ship owning companies. Each alleged a separate claim against a South Korean container line ("Hanjin Shipping"). When an order commencing rehabilitation proceedings against Hanjin Shipping was granted, the respondents sought to protect its interests by causing *in rem* summonses (protective writs) to be issued out of the present Court citing various alleged associated ships as defendants. The vessels were alleged to be associated ships on the basis that Hanjin Shipping was deemed to be the owner in respect of the respondent's claims in terms of section 3(7)(c) of the Admiralty Jurisdiction Regulation Act 105 of 1983 and the defendant vessels were each owned by a company controlled by Hanjin Shipping at the time that the *in rem* summons were issued.

In the present application, the applicants sought the setting aside of the arrest of the cited vessels.

Held – The sole issue for determination in the present application was whether the relevant time for determining the requisite control or ownership of the vessel, as an associated ship and liable to be arrested as such, was the time of issue of the protective writs as contended for by the respondents, or both at the time of the issue of the protective writs and at the time of the arrest of the ship as contended for by the applicants.

The first issue to be determined related to when an action *in rem* commences. For an action *in rem* to commence with the arrest would imply that the issue of the summons or the writ had no legal affect whatsoever up until the arrest. That could never be the intention. Thus, the action *in rem* is commenced by the issue of the process (summons or writ). The issue of ownership of the vessels was therefore to be determined based on the respondents' contentions rather than those of the applicants.

The Court dismissed an application to strike out by the applicants, as well as the application to set aside the arrests.

Tucker v S [2018] 2 All SA 566 (WCC)

Criminal law and procedure – Extradition proceedings – Extradition Act 67 of 1962 – Bail applications in extradition proceedings – Nature of proceedings – Criminal in nature.

Two appeals were noted by the appellant in this matter. In terms of section 13(1) of the Extradition Act 67 of 1962 (the "Act"), he appealed against the decision of the magistrate to issue a committal order in respect of his surrender for extradition to the United Kingdom. The second appeal, in terms of section 13(3), was against the decision to refuse the appellant's application for bail pending the determination of the first appeal. The latter decision was the focus of the present judgment.

The appeal served before Binns-Ward J sitting as a single Judge during the recess before the commencement of the first term of the High Court for 2018. It was held that appeal proceedings in terms of the Act, whether they be the section 13(1) appeal itself or an appeal from an order made by the magistrate in respect of bail in terms of section 13(3) of the Act, are primarily of a civil rather than a criminal nature. The view was that the position was distinguishable from, and not governed by the provisions of section 65(1)(b) of the Criminal Procedure Act 51 of 1977 which, exceptionally, affords a judge of the High Court, sitting alone, jurisdiction to entertain and determine appeals against the refusal of bail by a magistrate. According to Binns-Ward J the position is instead governed by the provisions of section 14(3) of the Superior Courts Act 10 of 2013which requires appeals to be heard by two judges. The judge concluded that he did not have jurisdiction, sitting alone, to hear or decide the matter and postponed the matter for arrangements to be made for its re-enrolment for hearing by two judges.

Held – The issue raised was whether an appeal against the decision of a magistrate on a bail application in extradition proceedings constitutes proceedings of a civil or criminal nature.

The role of a magistrate in extradition matters is related to the arrest, detention and prosecution of persons accused or convicted of extraditable offences or offences included in an extradition agreement between party States. The magistrate must determine whether persons accused or convicted are liable on the basis of sufficient evidence, to surrender for prosecution. That makes the proceedings criminal in nature.

The conclusion therefore was that extradition proceedings are *sui generis* and bail applications in extradition proceedings are in essence criminal in nature. Section 65 of the Criminal Procedure Act is the applicable provision for an appeal to the High Court against a decision of the lower court and therefore may be heard by a single judge of the High Court.

Twende Africa Group (Pty) Ltd t/a Tag Marine v MFV Qavak; In re: Fisherman Fresh CC v Twende Africa Group (Pty) Ltd t/a Tag Marine [2018] 2 All SA 576 (ECP)

Shipping – Arrest of vessel – Setting aside of – Onus of proof – Admiralty Jurisdiction and Regulation Act 105 of 1983 – Section 3(4) – A party seeking to arrest a vessel in

rem is required to establish, inter alia¸ that the claim is a maritime claim as defined in the Admiralty Act; that the property to be arrested is maritime property within the meaning of section 3(5) of the Act; that the property is either situated in or is likely to be situated within the jurisdiction of the court; that the property to be arrested is the property against which the claim lies, and that the claimant has no security for its claim – A party seeking the arrest or defending an arrest in circumstances where it is sought to set it aside, is required to establish that it has a *prima facie* case on the underlying claim in respect of which the arrest is sought or was obtained – Onus is accordingly retained by the arrestor, even in an application for the setting aside of the arrest.

In an *ex parte* application brought in terms of section 3(4) of the Admiralty Jurisdiction and Regulation Act 105 of 1983, the respondent obtained a warrant of arrest in respect of a commercial fishing vessel. In the present application, the applicant, as owner of the vessel sought to have the warrant reconsidered and set aside. It sought an order that the vessel be released from its arrest and that the summons issued by the respondent be set aside as irregular and of no force and effect for want of compliance with the peremptory provisions of section 3(4) of the Admiralty Act. That section provides that a maritime claim may be enforced by an action *in rem* if the claimant has a maritime lien over the property to be arrested; or if the owner of the property to be arrested would be liable to the claimant in an action *in personam* in respect of the cause of action concerned.

Held – A party seeking to arrest a vessel *in rem* is required to establish, *inter alia*¸ that the claim is a maritime claim as defined in the Admiralty Act; that the property to be arrested is maritime property within the meaning of section 3(5) of the Act; that the property is either situated in or is likely to be situated within the jurisdiction of the court; that the property to be arrested is the property against which the claim lies, and that the claimant has no security for its claim.

A party seeking the arrest or defending an arrest in circumstances where it is sought to set it aside, is required to establish that it has a *prima facie* case on the underlying claim in respect of which the arrest is sought or was obtained. The onus is accordingly retained by the arrestor, even in an application for the setting aside of the arrest.

The essential question in relation to the respondent's claim as formulated was whether the evidence put up to establish a *prima facie* case against the applicant, founded on contract, consisted of allegations of fact which if accepted would found a cause of action. The underlying dispute related to a brokerage contract, and whether the applicant was required to deal with a third party only through the respondent. The Court found that the respondent had failed to make out a *prima facie* case for a tacit or implied term in the tacit contract alleged to have been concluded between respondent and the applicant in terms of which that was the case. The respondent had therefore not established its claim founded upon the alleged breach of a contractual term on a *prima facie* basis.

Turning to the delictual claim, the Court held that is an essential requirement to found a delictual claim that the claimant should allege (and ultimately prove) that it has suffered a loss caused by the delinquent defendant. In this case all that was alleged is that the loss was to be quantified on the basis of the reasonable and fair commission that would have been earned by the respondent. That was insufficient with the result that an essential requirement for an arrest, in terms of section 3(4) of the Admiralty Act was lacking.

The vessel was released from arrest and the respondent’s claim was set aside.

END-FOR NOW