LEGAL NOTES VOL 6/2017

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BLACK SASH TRUST v MINISTER OF SOCIAL DEVELOPMENT AND OTHERS (FREEDOM UNDER LAW INTERVENING) 2017 (3) SA 335 (CC)

Social welfare — Social assistance grants — Payment — State failure — Just and equitable remedy — Judicial supervision — Constitution, s 172(1)(b)(ii).

On 3 February 2012 the South African Social Security Agency (Sassa), the government agency responsible for the payment of social grants, contracted payment services to Cash Paymaster Services (Pty) Ltd (CPS) for five years, to 31 March 2017. This required the concurrence of the first respondent, the Minister of Social Development.

In September 2013 the Constitutional Court (the court) ruled the contract invalid because an irregular tender process was followed. In remedial order the court suspended the declaration of invalidity on the premise that new five-year tender would be awarded after proper procurement process or Sassa itself would take over payment when the CPS contract ended. The court directed Sassa to initiate new tender process and file progress reports with the court. (See the *Allpay* cases referred to in [3] of the present judgment.)

In November 2015 Sassa filed progress report with the court in which it stated that it would not award new tender but would itself take over grant payments after 31 March 2017. The court withdrew its supervisory order on the strength of this commitment.

By April 2016 Sassa officials realised that they would not be able to comply with the undertaking, but neither Sassa nor the Minister informed the court of this. Nor did

[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!**

they approach the court for authorisation to regularise or ameliorate the situation. Instead, Sassa sought to enter into new contract with CPS, which it insisted was the only entity capable of delivering social grants at such short notice. On 28 February 2017 Sassa made an urgent application for an order authorising it to take steps to ensure the payment of social grants form 1 April 2017, but the next day, on the instruction of the Minister, it sought to withdraw the application. On 3 March 2017 Sassa filed ‘follow-up' report to explain how the situation had arisen, in response to which the court issued directions (see [19] of the judgment).a belated reply was filed on 14 March 2017.

In the present proceedings the Black Sash, civil society organisation, applied for direct access to the court for an order that the court exercise supervisory jurisdiction over an interim contract with CPS for the payment of social grants. It specifically asked that Sassa be directed to file continuous reports with the court on steps taken to ensure payment from 1 April 2017 and that steps be taken to protect the privacy, dignity and autonomy of grant beneficiaries.

Freedom Under Law, also civil society organisation, sought leave to intervene as applicant to ask for additional orders. Corruption Watch, another civil society organisation, sought leave to intervene as amicus, as did the South African Post Office, which stated that it was capable of taking over distribution of the grants.

Held

There was no certainty as to how grants would be paid after 31 March 2017 (see [22]). The Minister and Sassa had disregarded the court's earlier remedial order and placed the country's social assistance programme in jeopardy, and there had to be a public accounting. The present judgment was the judicial part of that accounting (see [1], [11], [14]). The matter was urgent on national scale and the Black Sash's application for direct access would be granted in the public interest (see [36]). Freedom Under Law and Corruption Watch would be allowed to join the proceedings, but not the post office (see [37] – [39], [47]).

As organs of state in relation to the contract, Sassa and CPS shared an ongoing constitutional obligation to pay grants after 31 March 2017 (see [41], [48]).The court would use its remedial power under s 172(1)*(b)*(ii) of the Constitution to enforce this obligation (see [43]). The court would also extend the contract beyond 31 March 2017, while at the same time extending the suspension of the declaration of its invalidity (see [44]).

The court would accordingly make an order (see below) extending the existing contract for 12 months from 1 April 2017. It would also extend the suspension of its declaration of invalidity for 12 months. The court would, in view of Sassa's irregular conduct and the risk it posed to grant recipients, supervise the performance of the contract (see [55] – [62]).

The order would give the Minister, with whom ultimate responsibility for the crisis resided, the opportunity to explain why she should not be personally mulcted in costs

BARRY v CLEARWATER ESTATES NPC AND OTHERS 2017 (3) SA 364 (SCA)

Company — Shares and shareholders — Voting rights — Proxy — Appointment — Validity of provisions in memorandum of incorporation imposing time limits for valid appointment — Companies Act 71 of 2008, ss 15(1), 15*(2)*(d) and58(1)(a).

Section 15(1)*(b)* of the Companies Act 71 of 2008 (the Act) provides that company's memorandum of incorporation (MOI) 'is void to the extent' that it is inconsistent with the Act; and s 15(2) *(d)* that an MOI may not include provision that in any way alters the substance or effect of an 'unalterable provision'.

A provision appointment for it to be treated as valid, is inconsistent with the unalterable provisions of s 58(1)*(a)* of the Companies Act 71 of 2008 (the Act) which allows proxy to be appointed '(a)t any time', and to that extent is void under s 15(1) of the Act. (Paragraphs [13], [18]and [23] at 367F, 369C and 370G.)

REM v VM 2017 (3) SA 371 (SCA)

Marriage — Divorce — Proprietary rights — Accrual system — Exclusion of defined assets from accrual — Meaning of 'any other asset . . . acquired . . . by virtue of his possession of the first-mentioned asset' in Matrimonial Property Act 88 of 1984, s 4(1)(b)(ii).
Marriage — Divorce — Proprietary rights — Accrual system — Assets held in trust — Piercing of trust veneer — Claim for — Spouse having standing to advance claim against other spouse as trustee — Proof required that other spouse transferred personal assets to trust with dishonest, fraudulent or improper purpose of avoiding obligation to account for accrual.

The main issues in this appeal against certain proprietary aspects of High Court's divorce order, were whether (1) on proper interpretation of the exclusion clause of the antenuptial contract (ANC) between the parties, certain trust assets in which the husband (REM) had beneficial interest fell to be excluded from the accrual; and (2) if not, whether the trust veneer should be pierced so that these trust assets would form part of REM's estate for the purposes of the accrual system.
As to (1): The clause in question specifically excluded REM's beneficial interest in 'the [VIP] Trust and/or any trust conducting business in the vacation time share property market' from any accrual, and also 'any other asset acquired by such party by virtue of the possession or former possession of such asset'. The latter part of this clause was based on the wording of s 4(1)*(b)*(ii) of the Matrimonial Property Act 89 of 1984, which provides that 'an asset excluded from the accrual system . . . as well as any other asset which he acquired by virtue of his possession of the first-mentioned asset', is not taken into account in the accrual calculation. The appellant (REM) contended that his interests in two trusts — held by the High Court not to have been excluded from the accrual — were funded solely from his involvement in the timeshare industry, and that therefore they were excluded from the accrual of his estate as 'any other asset acquired by such party by virtue of the possession or former possession of such asset'.
Held, that the phrase 'as well as any other asset which he acquired by virtue of his possession of the first-mentioned asset' in s 4(1)*(b)*(ii) referred to the particular asset, its proceeds, and assets which replaced the excluded asset or were acquired with its proceeds. The clause in question only provided for the exclusion of REM's beneficial interest in the VIP Trust, together with any asset acquired by virtue of his possession, or former possession of this asset. REM did not show any nexus between the assets held by the trusts in question and the assets held by the VIP Trust at the time of the marriage. It followed that the court a quo had correctly

concluded that the assets of these two trusts were not excluded from the accrual of the appellant's estate in terms of the ANC. (Paragraphs [12] – [14] at 377A – H.)
As to (2): VM claimed that piercing the trust veneer was warranted because REM had, inter alia, transferred personal assets to these trusts, dealing with them as trust assets, and had not properly performed his fiduciary duties — all with the object of concealing these assets and thereby defeating her accrual claim. REM conceded that he had used the funds of these trusts to pay personal maintenance obligations, personal liabilities, that he had shifted money between various accounts including his personal account, and that he used trust funds to fund his business enterprises. He however contended that the trusts were established, on advice of his accountant, with the object of isolating each business so that the financial demise of one would not affect the financial viability of any of the others.
Held, that breach by trustee in the administration of trust of his or her fiduciary duties towards trust beneficiary or third party who transacted with the trust, was not the determining factor in granting the remedy of going behind validly established trust form, or 'piercing its veneer'. It was therefore not correct — as was held in *WT and Others v KT*2015 (3) SA 574 (SCA) ([2015] ZASCA 9) — that spouse, being neither beneficiary nor third party to whom the trustee would owe fiduciary duty, had no standing to challenge the management of trust by the other spouse. Claim lay against the trust or the errant trustee on the basis that the unconscionable abuse of the trust form by the trustee in his or her administration of the trust, through fraud, dishonesty or an improper purpose, prejudiced the enforcement of the obligation owed to beneficiary, third party or spouse.

VM therefore would have had to prove that the appellant transferred personal assets to these trusts and dealt with them as if they were assets of these trusts, with the fraudulent or dishonest purpose of avoiding his obligation to properly account to the respondent for the accrual of his estate and thereby evade payment of what was due to the respondent in accordance with her accrual claim. The evidence did however not support VM's contention that these trusts were established with the object of defeating any patrimonial claims of the respondent. Instead the trusts in question must be viewed as part of the appellant's overall business strategy. In addition, it was not established that the transfer of assets to these trusts was simulated with the object of cloaking them with the form and appearance of trust assets, whilst in reality retaining ownership. The trust assets in question were therefore not to be taken into account in determining the accrual of the appellant's estate. (Paragraphs [19] – [20] at 379A – 380F.)

AGRI EASTERN CAPE AND OTHERS v MEC, DEPARTMENT OF ROADS AND PUBLIC WORKS AND OTHERS 2017 (3) SA 383 (ECG)

Road — Public road — Farm road — Maintenance and repair — Province under constitutional and statutory duty to maintain and repair such roads — Structural interdict appropriate relief — Such order to include mechanism for individual farmers to effect repairs and to be refunded therefor —Constitution s 125(2)(a)*, sch 5; Eastern Cape Roads Act 3 of 2003, ss 3(1)*(a) *and* (b) and s 4.

Agri EC, voluntary association formed to advance the interest of the Eastern Cape farming community, together with number of its farmer members in their personal capacities (collectively, Agri EC), applied for the following orders: declaration that the

respondents be legally obliged to repair all roads within their jurisdiction; that they comply with such obligations; and that they file reports to the court dealing with steps taken in carrying out such obligations and the time frames for doing so. The application proceeded only against the first respondent and her director-general (collectively, the Department). The focus of the application was the socio-economic effects of the poor condition of the road network of farming communities in the Eastern Cape — the result of lack of repair and maintenance spanning more than decade — and the need for an action plan to remedy the situation. Agri EC highlighted the need for certainty on what steps individual farmers could take to repair roads themselves when the access roads to their farms were in such state of disrepair that they could not be used safely, or when operators of commercial vehicles engaged in the farms' business refused to use the road at all; and that farmers who had spent money and time in repairing roads themselves out of necessity, should be refunded when these repairs were the responsibility of the respondents.

The application was launched after meetings between Agri EC and Department officials to address this issue yielded no constructive results. The Department opposed the application but acknowledged that there was significant road maintenance backlog'. At an earlier hearing the parties agreed that the matter would proceed by way of the Department filing report setting out how it would deal with the road maintenance backlog and the related issues raised by the applicants, and that applicants would file reply. Smith J, who presided over that hearing, accordingly ordered the Department to report as agreed, including on what urgent steps individual farmers may take when the access road to their farm reached state of disrepair (see [28].) Agri EC's response took the form of proposed order, which in addition to issues addressed in the Department's report, also made provision for when individual farmers may perform 'urgent repairs' and were entitled to be refunded the related expenses (see [30]).
At the present hearing, the Department reverted to its initial stance that there was no constitutional or statutory basis for the orders sought; alternatively, it took issue with aspects of Agri EC's proposed draft order, proposing its own which did not provide for structural interdict. Regarding the statutory basis, the Department specifically referred to ss 3(1)*(a)* and *(b)* and s 4 of the Eastern Cape Roads Act 3 of 2003 (the Roads Act). The former was said to couch the MEC's road maintenance obligations in permissive terms because discharging it depended on the availability of funds; the implementation of the latter provision (dealing with the Department's entering into 'agreements with other authorities') was similarly said to be constrained by the availability of funds.
Held, as to the applicable law
A constitutional and statutory basis did exist for the interdict sought. Part of sch 5 of the Constitution provided for the functional areas of exclusive provincial legislative competence, one of which is provincial roads and traffic. In terms of s 125(2)*(a)* of the Constitution, the premier, together with the other members of the executive council, exercised executive authority by implementing provincial legislation in the province. Section 3 of the Roads Act imposed duty on the MEC to use this power. No person or authority other than the MEC had the power to repair and maintain roads, unless the MEC or his delegate concluded an agreement with that person or with an authority to take over responsibility for provincial road (s 4 of the Roads Act). The various consequences of failure to maintain and repair the farm roads, as

detailed in the Agri EC affidavits, indirectly affected fundamental rights such as basic education and access to healthcare. It was clear therefore what the constitutional and statutory obligations of the Department were, and that the performance of those obligations was deficient. In any event, the earlier order stood, and incorporated an agreement to provide reports which would provide the material for court order. The parties submitted their reports in accordance with that order, and it was not for the Department to attempt to reverse the steps which had been taken. (See [33] – [36].)
Held, as to the structural order
The Department needed the impetus of structural interdict to move forward in strategic manner. One of the circumstances in which structural interdict was warranted was where the mandatory order would be so general in its terms that it would not be possible to define with any precision what the government was required to do. That was the case here, where the obligations of the Department to repair and maintain roads were extensive.
The order ([48.7]) would provide mechanism to be implemented by the Department allowing individual farmers to perform work on roads they used for their farming activities when urgent repairs ([48.7.1.1] – [48.7.1.2]) were warranted; when they became unserviceable; or when their condition deteriorated to the extent that it made driving unsafe or caused damage to any motor vehicle ([48.7.2]); and for refunding the cost of such repairs.

IN RE AMAQAMU COMMUNITY CLAIM (LAND ACCESS MOVEMENT SOUTH AFRICA AND OTHERS AS AMICI CURIAE) 2017 (3) SA 409 (LCC)

Land — Land reform — Restitution — Statutory reopening of lodging process — Invalidation of statute by Constitutional Court — Effect — Old-order claims prioritised — Land Claims Court may not during old-order proceedings deal with new-order claims — New-order claimants may, however, be admitted as interested parties to extent that their participation would contribute to establishment or rejection of old-order claims, or in respect of any other issue court may allow in interests of justice — Restitution of Land Rights Act 22 of 1994.

The present claimants were among the many whose land restitution claims were not finalised, or even commenced, by the cut-off date — 31 December 1998 — stipulated in s 2(1)*(e)* of the Restitution of Land Rights Act 22 of 1994 (the RA). On 1 July 2014 the RA was amended by the Restitution of Land Rights Amendment Act 15 of 2014 (the AA), which reopened the window for the lodgement of land claims under the RA by extending the cut-off date from 31 December 1998 to 30 June 2019.
The AA did not ring-fence already finalised or pending claims, requiring merely that the Land Claims Commission 'give priority' to claims lodged before 31 December 1998 (old-order claims). In *Land Access Movement of South Africa and Others v Chairperson, National Council of Provinces and Others* 2016 (5) SA 635 (CC) ([2016] ZACC 22) (the *Lamosa* judgment, dated 28 July 2016), the applicants — raising the legislature's failure to consult the public and interested parties — sought and obtained an order declaring the AA invalid. The order interdicted the commission, pending the re-enactment of the AA, from 'processing' new claims instituted under the AA (new-order claims), but not their receipt or acknowledgement.

In the present case the Land Claims Court, confronted with new-order claims launched in competition with old-order claims, sought to give clarity on the effect of the *Lamosa* judgment, and in particular on whether it could deal with newly instituted claims despite the interdict preventing the commission from doing so.
Two standpoints emerged from the submissions addressed to the court. On the one hand the amici (apart from the Afrisake amicus) argued that *Lamosa* preserved new-order claims only to the extent of the recordal of their receipt by the commission. The other parties argued that *Lamosa* did not prevent the Land Claims Court (as opposed to the commission) from recognising new-order claims, and that new-order claims enjoyed the same status as old-order claims. They argued that the court could adjudicate the new-order claims by allowing the claimants to intervene as parties, by allowing them direct access, or by granting declaratory order.
Held The *Lamosa* order froze new-order claims filed between 1 July 2014 (the date of commencement of the AA) and 28 July 2016 (the date of the *Lamosa* judgment) pending the occurrence of two uncertain future events: the re-enactment of the AA or, failing that,decision by the Constitutional Court (see [45] – [48]). Until then the Land Claims Court was barred from dealing in any way with new-order claims in proceedings for the restitution of rights in land under old-order claims (see [49] – [53], [58]).
While new-order claimants had an interest in the outcome of old-order litigation, it was restricted to right to contest the merits of old-order claims (see [53] – [54]). If they decided to do so, the court could admit them as interested parties, but only to the extent that their participation would contribute to the establishment or rejection of old-order claims or in respect of any other issue the court would allow in the interests of justice.

BRIDGMAN NO v WITZENBERG MUNICIPALITY (JL AND ANOTHER INTERVENING) 2017 (3) SA 435 (WCC)

Damages — Rape — Rape of mentally disabled 18-year-old woman on premises of holiday resort owned by Municipality — As consequence suffering effects of post-traumatic stress disorder requiring therapy to be resolved — Her normal development negatively impacted — R30 780 awarded in respect of future medical costs, covering therapy for her, as well as her parents — Award of R750 000 for contumelia and general damages.

Delict — Elements — Unlawfulness or wrongfulness — Liability for omission — Municipality negligently failing to prevent rape of mentally disabled young woman at holiday resort which it owned, managed and controlled — In terms of Constitution and international treaties to which South Africa party, Municipality bound to prevent gender-based violence, and to protect mentally disabled persons from sexual abuse — In light of such duties, and fact it owned premises, its failure to prevent rape was wrongful.

Delict — Elements — Negligence — What constitutes — Municipality failing to prevent rape of mentally disabled young woman on premises of holiday resort which it owned, managed and controlled — Inadequacy of security arrangements given incidents of crime in resort and wider area — On facts of case, Municipality negligent.

Delict — Reduction and apportionment of damages — Joint wrongdoers — Apportionment of damages — Mentally disabled young woman raped while playing in play park of holiday resort owned and managed by Municipality — Whether adoptive

parents partly negligent in allowing young woman to play in park without constant supervision — Court considering duties of Municipality towards mentally disabled persons imposed by Constitution and international instruments — To attribute liability to parents in circumstances would breach her rights to dignity, to be exercised independently of her parents, security, control over her body, freedom of movement, and equality.

On 20 January 2009 Ms L, an 18-year-old woman with mild mental disability, was abducted and raped by three youths at the Pine Forest Holiday Resort in Ceres, Western Cape, where she was staying with her adoptive parents (the third parties). The resort was owned, managed and controlled by the defendant, the Witzenberg Municipality (the Municipality). The plaintiff, in his capacity as the *curator ad litem* of Ms L, instituted an action against the Municipality, claiming damages arising from injuries suffered by Msas consequence of the rape, which rape, he submitted, was caused by the negligent omissions and conduct of the Municipality. The Municipality denied that it was negligent. In the alternative it argued that, if it was negligent, the rape was caused partly through its own negligence, and partly through the negligence of Ms L's adoptive parents.

Wrongfulness or unlawfulness
The court firstly dealt with the question of whether the failure of the Municipality to prevent the rape was wrongful.
Held, that the Municipality was obliged to ensure the dignity, freedom and security of women, and to prevent gender-based violence. This arose from the duty it carried, as an organ of state, to respect, protect, promote and fulfil the rights in the Bill of Rights. Also, arising from its constitutional, as well as international, obligations (South Africa was signatory to the United Nations Convention on the Rights of Persons with Disabilities, which obliged states to protect the dignity, as well as the physical and mental integrity, of every person with mental impairment on an equal basis with others), was duty to prevent the sexual abuse of women with mental disabilities. In the light of its constitutional duties, and because it owned, managed and controlled the resort, the Municipality's failure to prevent the rape was wrongful. (Paragraphs [1] – [4] at 439C – 440F.)

Negligence and causation
The key question on the point of negligence was whether the security provided on the day in question was adequate. Pertinent facts included the following.
Both the abduction and rape occurred within the fenced boundaries of the resort, namely the play park and squash court. The resort was subject to access control, and secured by guards, who patrolled the premises. The play park and squash court were accessible to the guests, but also to day visitors to the resort on the presentation of season ticket — the three juvenile perpetrators who committed the crimes gained access to the resort via these means,although it appears that one of them used season ticket belonging to someone else. At the time security was provided by Ceres Alarms. While the previous security firm was appointed in terms of formal tender process, Ceres Alarms was appointed 'as matter of emergency' when the former performed inadequately, and on an informal, ad hoc basis, no service-level agreement following tender process was ever entered into. Hence Ceres Alarms was not obliged to deliver security of the standard set out in the specifications in the tender documents, which required, inter alia, the deployment of

four security guards per shift (in the holiday season), with two patrolling, and patrols to be conducted on an hourly basis; proper access control, and the keeping of an occurrence book. On the day in question only two security guards were on duty, one patrolling and one manning the gate. (In its quotation, on the strength of which it was appointed, Ceres Alarms said that it would provide four guards per shift.) No incident logbook appeared to have been kept. Also of relevance was the fact that on the afternoon of the incident all resort personnel, except one, were off premises at municipal meeting.

During the year in which Mswas raped, number of criminal incidents occurred at the resort — mostly break-ins and theft, but two assaults were also reported. More widely, there was problem with sexual assaults by juveniles in the Ceres area. The Municipality was made aware of all of this. The resort manager informed the Municipality that the security situation at the resort was out of control due to, among other things, defective security by Ceres Alarms, and plea was made that the problem be tackled, in particular by increased manpower. letter to the mayor from member of the public raised the concern that violent incident might occur at the resort. The Mayor acknowledged that security had to be addressed by requiring compliance with the Municipality's tender specifications. However, by the time of the rape, nothing had been done to improve the security situation at the resort.
Held, that, in the light of the many incidents of crime occurring at the resort, the broader problem of rape in the Ceres area, and the defective security at the resort, the rape of resident at the resort was reasonably foreseeable. (Paragraph [154] at 482D – H.) The Municipality should have sought to eliminate such risk.

- It should have put out tender and entered formal contract on the basis of its normal tender specifications (as it intended and acknowledged it should do), and then enforce such provisions.
- It should have properly supervised the security that was provided by Ceres Alarms, in particular it should have ensured that four security guards were on duty for the day shift as per the quotation initially provided by Ceres Alarms.
- It should have enforced its own access regulations on the day in question by refusing entry to the perpetrator in possession of an invalid season ticket.
- The resort staff should not have been evacuated from the resort without either first giving notice to the residents or closing the resort to day visitors during the duration of the meeting.

(Paragraphs [153] – [160] and [165] at 482B – 484D and 485F – 486A.) In failing to act in the above manner, the Municipality had acted negligently. Such omissions and one act (the evacuation of the staff) were the probable cause of the rape of Ms L. Around the time the offences were committed, a security vacuum existed, which created an opportunity for the perpetrators to commit the crimes. (Paragraphs [159] – [165] at 483I – 486A.)

The alternative plea: part-negligence on the part of Ms L's adoptive parents

The Municipality pleaded that Ms L's adoptive parents breached duty of care in that inter alia they failed to properly supervise her while she was playing alone in the resort when she was abducted, while they were acutely aware of her mental disability and hence vulnerability. The court rejected this argument, and the suggestion implicit in the plea that limitations be placed on her freedom.
Held, that to attribute delictual liability to Ms L's adoptive parents because they allowed her to play in the park without constant supervision, and hence exercise degree of independence, would conflict with number of constitutional principles. Both

as woman and disabled person Ms enjoyed entrenched rights to her dignity, to be exercised independently of her parents, security, control over her body, her freedom of movement, and equality before law. She may not be discriminated against on the basis of her gender, sex and disability. In turn, a duty rested upon the court to afford Ms L, both as woman and disabled person, the full and equal enjoyment of all her rights and freedoms under the Constitution. The Disability Convention — law in South Africa — protected disabled persons' right inter alia *to live independently*. In the particular circumstances of the case there were no grounds for limiting her fundamental rights. (Paragraphs [8] – [13] at 441F – 443F.)
Held, that the decision of Ms L's parents to allow her to play in the park alone was reasonable and justifiable. On the facts reasonable person in their position would not have foreseen that Ms could suffer rape at the playpark where she was allowed to play. (Paragraph [19] at 445F – G.)

Sequelae of the rape and damages to be awarded
The evidence was that Ms suffered post-traumatic stress disorder as result of the rape, some effects of which she was still suffering at the time of the trial, and which would require therapy to be resolved. Her ordinary development was adversely affected by the rape, being set back by year. The court found that an appropriate award for contumelia, shock, pain, suffering and disability in respect of Ms L's enjoyment of amenities of life would be R750 000. R30 780 was found appropriate for future medical costs, covering therapy for Ms L, and also for her parents.

DE KLERK v FERREIRA AND OTHERS 2017 (3) SA 502 (GP)

Company— Oppressive conduct — Relief — Exchange of shares — Requirements for order — 'Related person' — Who is — Valuation of interests — Companies Act 71 of 2008, s 163(2)(e).

Company — Control — Related and interrelated persons and control — De facto control to materially influence policy — Assessment of — Companies Act 71 of 2008, s 2(2)(d).

Close corporation — Members — Cessation of membership — Unfairly prejudicial conduct — Order for acquisition of member's interest — Close Corporations Act 69 of 1984, s 33 and s 49.

De Klerk and Ferreira were equal members of close corporation Plantsaam and shareholders in company Benjo. When they fell out, De Klerk sought orders under s 163(1) of the Companies Act 71 of 2008 (the Companies Act) to compel Ferreira to transfer his membership interest in Plantsaam and shares in Benjo to him against payment of fair compensation. Benjo was the registered owner of farm on which De Klerk and Ferreira conducted farming operations through Plantsaam, who rented the farm from Benjo. Ferreira controlled the daily operations and finances of both companies, and had, on the evidence, inappropriately farmed the land for his own benefit to the detriment of Plantsaam (see [64]).
Section163 provides relief to shareholders or directors subjected to oppressive or prejudicial conduct by the company or 'a related person'. Whether person is related to juristic person depends on 'control' (see s 2(1)), which is itself widely defined (see s 2(2)). ‡ Section 2(2)*(d)* provides that person who has 'the ability to materially influence the policy' of juristic person controls that juristic person.

Sections33 and 49 of the Close Corporations Act 69 of 1984 (the CC Act) ± contains similar provisions to s 163 but applicable to close corporations. The common thread in these provisions is that they give the court wide discretion to compel transfer of shares or interests in order to deal with prejudicial, unjust and inequitable conduct by one company, director, shareholder or members against others.
Ferreira submitted that since none of De Klerk's complaints related directly to Benjo, no case had been made out for an order under s 163 compelling the acquisition of Ferreira's shares in Benjo. De Klerk in turn argued that the affairs of the companies were so inextricably intertwined that any conduct of Ferreira in relation to Plantsaam that fell within the ambit of s 49 of the CC Act was necessarily also hit by s 163 of the Companies Act in relation to Benjo.
Ferreira conceded his relationship with De Klerk had broken down and sought, inter alia, an order directing De Klerk to transfer his member's interest in Plantsaam and shares in Benjo to him, against payment of fair and reasonable value.
Held
As to Plantsaam (s 36 and s 49 of the CC Act)
It was clear from the evidence that Ferreira had conducted the affairs of Plantsaam in way that was unfairly prejudicial to De Klerk as intended in s 49 of the CC Act, and that it was appropriate to make orders ending his membership of Plantsaam and for the acquisition of his interest by De Klerk under s 36 of the CC Act (see [72]).
As to Benjo (s 163 of the Companies Act)
The intertwined nature of the relationship between Plantsaam and Benjo was not sufficient for the application of s 163: the correct enquiry was whether Plantsaam was 'related person' with respect to Benjo (see [76]). Section 2(2)*(d)* extended the concept of 'control' to cases in which the minority or equal shareholders had de facto control to materially influence the policy of the company. In casu 'control' would depend ultimately on whether Ferreira had the ability to materially influence the policy of both Plantsaam and Benjo in manner comparable to person who exercised control through majority vote at board or general meeting (see [76]), [80] – [81]). Given the fact that Plantsaam's business was conducted on Benjo's land, and that the former could not have functioned without the latter, Plantsaam was indeed'related person' as contemplated in s 163(1), with the consequence that De Klerk was entitled to relief under s 163(2)*(e)* in respect of Benjo (see [83] – [86]).
As to the appropriate relief
Ferreira's counterclaim would be dismissed because it was inequitable for him to benefit from his misconduct at the expense of De Klerk and because he lacked the financial means to buy De Klerk's interests (see [94] – [95]). A transfer of Ferreira's shares and interest to De Klerk was the only practical way of resolving the deadlock and would be in the best interests of both companies (see [97]). De Klerk had to pay Ferreira R6 million for his shares and interest.

ENERGYDRIVE SYSTEMS (PTY) LTD v TIN CAN MAN (PTY) LTD AND OTHERS 2017 (3) SA 539 (GJ)

Business rescue — Disposal of property — Property over which third party has security or title interest — Rights of third party remaining intact pending full payment or provision of security by practitioner — Companies Act 71 of 2008, s 134(3)(b).

Energydrive leased equipment to Winplas (the second respondent) under lease containing reservation-of-ownership clause in favour of Energydrive. Winplas went into business rescue and Knoop, the business rescue practitioner (fourth

respondent), sold and delivered the equipment to Tin Can (the first respondent). Knoop did not pay or secure the debt due to Energydrive.
Energydrive instituted rei vindicatio for the recovery of the equipment. Tin Can, besides denying Energydrive's ownership, relied on statutory right under s 134(3) of the Companies Act 71 of 2008. That provision allows business the rescue practitioner to dispose of 'property over which another person has security or title interest' without the consent of that person if the proceeds would be sufficient to discharge his or her secured claim or title interest. Under s 134(3)*(b)* the company must 'promptly pay to that other person the sale proceeds . . . or provide security for the amount of those proceeds'.
Tin Can argued that Knoop was entitled to sell the equipment without Energydrive's consent because the proceeds of the disposal were sufficient to fully discharge Winplas' indebtedness to Energydrive.
Held
The reservation-of-ownership clause in favour of Enegydrive constituted its 'title interest' for the purposes of s 134(3) (see [16]). Knoop's obligation, under 134(3)*(b)*, to pay or secure the debt to Energydrive was not mere personal right against him, but requirement for the valid transfer of ownership. Since Knoop did not pay or secure the debt due to Energydrive, Energydrive's right of ownership was not destroyed (see [19] – [21]). The court would therefore make an order directing Tin Can to deliver equipment in question to Energydrive.

SNYDERS AND OTHERS v DE JAGER AND OTHERS 2017 (3) SA 545 (CC)

Land — Land reform — Eviction — Statutory eviction — Eviction in terms of ESTA — Land Claims Court order confirming magistrates' court eviction order on automatic review — Appeal against — Appeal lying to Supreme Court of Appeal, not to Lands Claims Court — Extension of Security of Tenure Act 62 of 1997, s 19(3)(a).

Section 19(3)*(a)* of the Extension of Security of Tenure Act 62 of 1997 (ESTA)provides that '(a)ny order for eviction by magistrate's court in terms of this Act . . . shall be subject to automatic review by the Land Claims Court, which may . . . confirm such order in whole or in part; . . .'.
In terms of s 16(1)*(c)* of the Superior Courts Act 10 of 2013, and of s 37(2) of the Restitution of Land Rights Act 22 of 1994, an appeal against Lands Claims Court order lies to Supreme Court of Appeal. The confirmation in terms s 19(3)*(a)* of magistrates' eviction order under ESTA is an order of the Land Claims Court, made under the wide powers of appeal conferred on it by ss 19(3)*(a)* – *(d)* of ESTA. An appeal against s 19(3) confirmation of magistrates' eviction order under ESTA is therefore an appeal against Land Claims Court order, not against magistrates' court order, and so lies to Supreme Court of Appeal and not to the Land Claims Court.

AB AND ANOTHER v MINISTER OF SOCIAL DEVELOPMENT 2017 (3) SA 570 (CC)

Children — Parents — Surrogacy — Requirement that where commissioning parent is single person, her gamete must be used to fertilize surrogate mother — Provision constitutionally valid — Children's Act 38 of 2005, s 294.

AB was a single woman who was unable to carry pregnancy to term, or to provide an egg to surrogate mother who could carry the pregnancy for her (see [8]). She had sought to enter into an arrangement under which the surrogate mother would be fertilized with donor egg and sperm, but had been barred from doing so by s 294 of the Children's Act 38 of 2005. It provides as precondition for valid surrogate motherhood agreement that single commissioning parent provide gamete for the conception of the child.
AB successfully challenged the constitutional validity of the section in the High Court and it referred its declaration of invalidity to the Constitutional Court for confirmation. The issues there were as follows:
(1) Whether s 294 was irrational. *Held*, that it was rational: the means (the requiring of the commissioning parents to provide gamete) was rationally connected to the end (the establishing of genetic link between them and the child); and that end was legitimate (the link ensuring the child knew its origins, which was important to its self-identity and respect) (see [283], [285], [287] – [288] and [292] – [294]).
(2) Whether s 294 limited AB's right to equality. *Held*, that it did not: the difference of treatment under the section was not based on any attribute of AB, such as her inability to donate gamete, and so did not amount to discrimination. The difference of treatment resulted from her choice to not enter into a relationship with person who could provide gamete (see [295], [298], [301] – [303] and [305]).
(3) Whether s 294 limited AB's right to make decisions concerning reproduction. *Held*, that it did not: the right protected woman's decisions regarding her own reproduction; and the decision AB wished to take regarding surrogacy and which was barred by s 294, was not decision concerning her own reproduction (see [306], [313] – [315] and [318]).
(4) Whether s 294 limited AB's rights to reproductive healthcare, or to privacy. *Held*, that it did not (see [319] and [322] – [323]).
Appeal upheld, and order of constitutional invalidity not confirmed (see [330]).

The minority judgment
The minority considered, firstly, whether s 294 limited AB's right to make decisions concerning reproduction. It concluded that it did. It reasoned as follows (see [72], [91], [94] and [97]):

- The decision did not have to involve the right-invoker's own reproduction; and negation of the decision did not have to have physical effect —psychological impact was sufficient (such impact was to be assessed objectively) (see [70], [75], [80] – [82]).
- Thus, infertility was source of psychological harm; surrogacy was means to ameliorate it; and s 294's removal of the choice of surrogacy resulted in continuing psychological harm (see [86], [90] and [93]).

The second issue was whether s 294 violated AB's right to equality. The minority held that it did (see [127]). It reasoned as follows:

- There were two differences of treatment. The first concerned and B, who both sought to use surrogacy. A, who could donate gamete, could avail herself of it; but B, who could not contribute gamete, could not do so. The second situation involved C, who sought in vitro fertilisation, and D, who sought to use surrogacy. While was not required to contribute gamete, was (see [99] – [101]).
- The High Court's conclusion was that the difference of treatment of and was arbitrary and hence that s 294 was invalid. This was an error: the situations of and

were markedly dissimilar (C carried the child, and did not), which was reason to treat them differently (see [103] – [104]).

- Both the first and second differentiations constituted discrimination. This in that the attribute on which the first was based (inability to contribute gamete), and on which the second was based (ability to carry the child), had the potential to impair dignity (see [106], [120] – [121] and [123]).
- The discrimination was unfair, and s 294 thus limited the right to equality (see [125] and [127]).

The third issue was whether the limitation of the rights was justifiable. The minority's conclusion was that it was not (see [129] and [213]). In coming to this conclusion it weighed the following factors:

- That the purpose of s 294 was to prevent avoiding of the adoption process (see [171]).
- That no reasons had been provided for why it was an important purpose; and that it had flawed basis: misunderstanding that adoption and double-donor surrogacy were similar processes (both resulting in the acquisition of genetically unrelated child). Viewed though in the light of their relational and psychological effects, the processes were actually very different (see [172] – [176], [181] and [185]).
- That the nature of the limit was to bar surrogacy entirely if gamete could not be provided, and that the limit's extent was great — 'there [was] no comparable alternative to double-donor surrogacy' (see [208] – [209]).
- That s 294 was closely related to its purpose, and there were no less restrictive means to achieve it (see [210] and [212]).

The minority would have declared s 294 invalid, but would have suspended the declaration to allow Parliament to amend the provision.

SA CRIMINAL LAW REPORTS JUNE 2017

S v RADEBE 2017 (1) SACR 619 (SCA)

Appeal — From magistrates' court — Leave to appeal — Procedure — No appeal lying directly from lower court to Supreme Court of Appeal — Such appeals to be heard in specific High Court having jurisdiction — Effect of s 309(1)*(a)* of the Criminal Procedure Act 51 of 1977 where High Court refuses application for leave to appeal from conviction or sentence in magistrates' court.

Where an accused wishes to appeal against the refusal by the High Court of an application for leave to appeal from conviction or sentence in magistrate’s court (the trial court having refused him leave to appeal), the leave to appeal granted by the Supreme Court of Appeal (the SCA) will not be against the conviction and sentence by the trial court but rather against the refusal of leave by the High Court. What this means is that the envisaged appeal will be suspended, pending the application for leave to appeal against the High Court's refusal to grant leave (see [4]).

The court commented that, notwithstanding body of judgments from the SCA, there was still some misunderstanding in various divisions of the High Court about the correct approach in such cases. Section 309(1)*(a)* of the Criminal Procedure Act 51 of 1977 made it abundantly clear that no appeal lay directly from lower court to the

SCA. Such appeals had to be heard in the specific High Court having jurisdiction (see [4]).

DEMOCRATIC ALLIANCE v MINISTER OF INTERNATIONAL RELATIONS AND COOPERATION AND OTHERS 2017 (1) SACR 623 (GP)

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

On 19 October 2016 the national executive decided to effect South Africa's withdrawal from the Rome Statute of the International Criminal Court. In pursuance, thereof that same day the Minister of International Relations and Cooperation signed notice of withdrawal and deposited it with the United Nations Secretary-General. In terms of article 127(1) of the Rome Statute the withdrawal would take effect 12 months after the date of the depositing of the notice, after which South Africa would cease to be party to the treaty. The Minister of Justice informed Parliament of the decision, as well as his intention to table bill repealing the relevant act giving effect to the Rome Statute, ie the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (the Implementation Act). Shortly thereafter, the Democratic Alliance (DA), supported by certain civil-rights NGOs who appeared as respondents or intervening parties, instituted court proceedings seeking orders declaring unconstitutional and invalid the notice of withdrawal, as well as the underlying cabinet decision to withdraw from the Rome Statute and to deliver to the United Nations the notice initiating the withdrawal. Both Ministers and the President of the Republic (known collectively as the government respondents) opposed the application.
The DA along with the supporting respondents raised constitutional challenge based on s 231 of the Constitution. According to ss (1) thereof, the 'negotiating and signing of all international agreements [was] the responsibility of the national executive'. That power was, however, fettered by ss (2), which stated that an international agreement bound the Republic only after it had been approved by resolution in both the National Assembly and the National Council of Provinces. The effect of these provisions, it was submitted, was that there had to be prior parliamentary approval, as well as the repeal of the Implementation Act, before the delivery of notice of withdrawal to the United Nations. The argument was that since in terms of s 231(2) it was Parliament that had to approve an international agreement for it to bind South Africa, it followed that it had to be Parliament which decided whether an international agreement ceased to bind the country, before the executive may deliver notice of withdrawal.
The government respondents' position was that prior parliamentary approval was not required by s 231; there was no express provision to that effect, and reading-in was not warranted. More particularly, they argued as follows. The conclusion of treaties was the responsibility of the national executive. Such acts were not required to be preceded by the approval of Parliament; such approval was only needed to make binding such agreements. Logically, the *undoing* of treaty constituted by the delivery of notice of withdrawal should also be the task of the national executive, and similarly

should not require prior approval, but rather subsequent ratification. The government respondents raised further argument that international law did not require prior parliamentary approval (reliance was placed hereon article 127 of the Rome Statute). Finally, they submitted that the requirement of parliamentary approval would in any case be met; the request to approve the notice of withdrawal and the repeal of the Implementation Act were still pending before Parliament awaiting their decision.
The DA and supporting respondents argued also that the withdrawal was procedurally irrational. (Aside from all these process-based challenges, the substantive rationality of the decision to withdraw was attacked on various grounds too. The court however declined to consider these challenges, as the decision to withdraw was policy-laden matter, residing in the heartland of the national executive.)
Held, rejecting the argument of the government respondents that the conclusion of treaty and its undoing should be similarly treated, that the delivery of notice of withdrawal, as opposed to the signature of treaty, had direct legal consequences — from an international perspective it constituted binding, unconditional and final decision of withdrawal (albeit on deferred basis) from the Rome Statute. Notice of withdrawal was rather the equivalent of ratification, which did require prior approval (see [47]).
Held, as to the submission that international law only required letter of withdrawal signed by an appropriate representative of government, that the decision-making process itself, and the need for prior parliamentary approval, was domestic issue in which international law did not and could not prescribe (see [50]).
Held, that, bearing in mind that prior parliamentary approval was required in terms of s 231(2) before instruments of ratification may be deposited with the United Nations, there was glaring difficulty in accepting that the reverse process of withdrawal should not be subject to the same parliamentary process. The necessary inference, on proper construction of s 231, was that Parliament retained the power to determine whether to remain bound to an international treaty. This was necessary to give expression to the clear separation of powers between the national executive and the legislature embodied in the section. If it was Parliament which determined whether an international agreement bound the country, it was constitutionally untenable that the national executive could unilaterally terminate such an agreement. Accordingly, on textual construction of s 231(2), South Africa could withdraw from the Rome Statute only on prior approval of Parliament and after the repeal of the Implementation Act (see [51] and [53]).
Held, that the possibility of ex post facto approval did not cure any defects in the process followed in delivering the notice of withdrawal. The important constitutional principle of the doctrine of separation of powers had already been implicated. Because the national executive had purported to exercise power it constitutionally did not have, its conduct was invalid and had no effect in law. Whatever Parliament did about the subsequent request to it by the national executive to approve the notice of withdrawal would not cure its invalidity (see [59]).
Held, that the notice of withdrawal was also procedurally irrational, because of the lack of prior consultation with Parliament, and also because of the unexplained haste apparent in the national executive's conduct in seeking approval consequent to lodging the notice of withdrawal, rather than allowing normal legislative processes to take their course (see [64] and [67]–[70]).

Held, that effective relief in the circumstances would be declaration of invalidity of the notice of withdrawal, coupled with an order for the withdrawal of the notice.

S v MD AND ANOTHER (2) 2017 (1) SACR 654 (ECB)

Rape— Sentence — Rape of child by father — Minor child — Even though accused was first offender and productive member of society, with prospects of rehabilitation, departing from prescribed minimum sentence would be for flimsy reasons.
Rape— Aiding and abetting rapist — Sentence — Mother assisting father in rape of minor child — Sentence of 10 years' imprisonment imposed.

Accused 1 and 2 were the parents of nine-year-old girl who was raped on two occasions by accused 1 (the father), with the assistance of accused 2 (the mother) on the second occasion. The matter was postponed for purposes of sentence after they were convicted. The pre-sentence reports revealed that accused 1 was43-year-old first offender who cohabited with accused 2, with whom he had two children, including the complainant. He was gainfully employed as general worker and was the sole breadwinner of the household. Accused 2 was 37 years old and the recipient of disability grant. She was also first offender and unemployed. It was contended that there were substantial and compelling circumstances justifying the imposition of lesser sentence than life imprisonment since accused 1 was productive member of society, working and supporting his family and had good prospects of rehabilitation.
Held, that were the court to uphold the contentions advanced on behalf of accused 1, the court would be departing from the prescribed minimum sentence lightly, and for flimsy reasons (see [13]).
Held, further, that in the circumstances, sentence of life imprisonment had to be imposed on accused 1 as there were no substantial or compelling circumstances present (see [12] and [16]).
Held, further, that sentence of 10 years' imprisonment would be appropriate in respect of accused 2.

MOYO AND ANOTHER v MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT AND OTHERS 2017 (1) SACR 659 (GP)

Intimidation — Contravention of s 1(1)*(b)* read with s 1(2) of Intimidation Act 72 of 1982 — Constitutionality of — Expressions or threats of instigation of violence excluded from protection of freedom of expression by s 16(2) of Constitution — Reverse onus provision in s 1(2) justified by nature of penalty sanctioned and ease with which accused could discharge onus — Provisions not unconstitutional.

The first applicants in two matters were facing trial separately in regional magistrates' courts on charges under the Intimidation Act 72 of 1982 (the Act). As the issues were the same in both cases, namely their seeking an order declaring s 1(1)*(b)* and s 1(2) unconstitutional and invalid, they were dealt with together.
In the first case, the relevant facts were that the first applicant, the chairperson of community organisation, had sought permission to march to the local metropolitan police department and requested meeting with the department to arrange authorisation for the gathering. The meeting was instead arranged at the local police station (he preferred the department office) and permission to march denied, which

infuriated him. He was also upset at the presence of members of particular political party. All this resulted in him allegedly making certain utterances to the station commander of the police station and one of her senior officers, to the effect that: he would make sure that they were removed; they would not last long at the police station; he would repeat what had happened at Marikana; and that there would be bloodshed.
The allegations against the first applicant in the second case arose from telephone calls and text messages, allegedly sent to complainant, threatening to kill her or burn her house down in order to compel her to withdraw criminal complaint.
Both applicants contended that the provisions of the Act in effect criminalised what was right under the Constitution, namely that to free speech. They contended that the provision was too wide as it covered utterances or conduct that did not offend or intend to offend — they denied their speech or conduct offended. It was inconsistent with their right to freedom of expression protected under s 16 of the Constitution and was therefore invalid. They also contended that the presumption of guilt, contained in s 1(2), amounted to reverse onus provision which was inconsistent with the right, in s 35(3)*(h)* of the Constitution, to fair trial.
Held, that expressions or acts of threats or of instigation of violence were excluded from protection as fundamental right of freedom of expression by s 16(2) of the Constitution (see [43]).
Held, further, that in deciding if the conduct complained of constituted intimidation, as defined in the Act, the court was not confined to determining whether the person perceiving the act or utterances actually feared for his safety or the safety of his property. The test was whether, objectively viewed, the words or conduct had the effect as envisaged in s 1(1) and/or might reasonably be expected to have that effect (see [49]).
Held, further, that the choice of words used in the first case, and the context within which the threat was made, could not be regarded as harmless. The threat relayed incitement to imminent violence, the extent and kind of harm that resembled large-scale violence that fell squarely within the s 16(2) exclusion (see [37]).
Held, further, as to whether the requirement that the applicants had to prove the existence of lawful reason amounted to reverse-onus provision, the legal burden imposed clearly encroached on an accused's rights against self-incrimination and the presumption of innocence. It was, however, doubtful whether the number of innocent accused persons, who might be open to the risk of conviction at the close of the prosecution's case, were of such proportion that might justify call for the revocation of the section when all the other elements of the crime would have been prima facie proven (see[75]).
Held, further, that the imposition of burden to prove facts which could only be within the accused's knowledge did not amount to an unfair limitation of the presumption of innocence or an unjustifiable reverse onus since it arose at the close of the state's case and the prosecution would not have access to such information (see [77]).
Held, further, that the removal of the section from the statutes might have far-reaching consequences in that ordinary members of the community would continue to withhold information because they were too terrified and intimidated to come forward. The preservation of the section was justified by the nature of the penalty sanctioned and the ease with which the defendant could discharge the legal burden. There was accordingly insufficient cause for its invalidation as unconstitutional. The application was dismissed.

HELEN SUZMAN FOUNDATION AND ANOTHER v MINISTER OF POLICE AND OTHERS 2017 (1) SACR 683 (GP)

Police — Directorate for Priority Crime Investigation — Head of Directorate— Appointment of — Interview panel not provided with copies of judgment in which court made findings of dishonesty and his lacking integrity — Such findings could not be ignored — Minister not having considered all factors — Appointment set aside.

The applicants applied for an order to set aside the decision of the first respondent to appoint the second respondent, Major-General Ntlemeza (Ntlemeza), as the national head of the Directorate for Priority Crimes Investigations (DPCI). They contended that by appointing him on 10 September 2015, the Minister had acted unlawfully and irrationally and had failed in his duty under the Constitution to protect the independence of the DPCI,and to uphold the rule of law in South Africa. Their complaint was that shortly after Ntlemeza was appointed as the acting head of the DPCI in December 2014, he had suspended his colleague, Major General Sibiya (Sibiya), for his alleged involvement in the illegal rendition of foreign nationals. Sibiya launched an application in the High Court challenging his suspension and on 20 February 2015, inwritten judgment, the court set aside the suspension, holding that it was arbitrary and not rationally connected to the purpose for which it was taken. Ntlemeza applied for leave to appeal against this decision and the court remarked, also inwritten judgment, that Ntlemeza had misled the court and that his conduct showed that he was biased and dishonest, lacked integrity and honour, and had made false statements under oath.
In the present application the applicants contended that, given these remarks, the Minister could not lawfully have concluded that Ntlemeza was fit and proper person to be appointed to head the DPCI.
The Minister contended that he and the interview panel had afforded Ntlemeza an opportunity to provide an explanation. They were satisfied that the remarks made by the judge in refusing leave to appeal were not findings and were made in the circumstances where Ntlemeza was not afforded an opportunity to provide an explanation. They were therefore not binding and could not disqualify him from being appointed as head of the DPCI. (It appeared that the interview panel had not been provided with copies of the judgment containing these remarks).
Held, that the purpose of the interview panel was to determine whether candidate was fit and proper, as envisaged by the provisions of s 17CA(1) of the South African Police Service Act 68 of 1995. In order to do so it had to have all the relevant documents before it, which in the present case would have included copies of the judgments in question (see [23]).
Held, further, that the Minister could not have been satisfied that Ntlemeza was fit and proper person to be appointed as the national head of the DPCI if he had not considered all the relevant factors (see [27]).
Held, further, that the judgments in question were replete with the findings of dishonesty and mala fides against Ntlemeza. These were judicial pronouncements which constituted direct evidence that he lacked the requisite honesty, integrity and conscientiousness to occupy the position of any public office,not to mention an office as important as that of the national head of the DPCI. They were definitive, and until appealed against successfully, remained against Ntlemeza (see [36]).
Held, further, that the Minister was aware of the remarks made in the judgments but had nevertheless taken the view that they could be ignored in the exercise of his

powers.He had simply brushed aside considered opinion of superior court and failed to appreciate the serious doubt on Ntlemeza's unfitness and impropriety to hold the office of the national head of the DPCI. The application was accordingly granted and the decision appointing Ntlemeza was reviewed and set aside.

BROOKS AND ANOTHER v NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS 2017 (1) SACR 701 (SCA)

Prevention of crime — Forfeiture order — Application for in terms of s 48 of Prevention of Organised Crime Act 121 of 1998 — Which property liable to forfeiture — Whether residential immovable property instrumentality of offence — Purely incidental that certain illegal diamond transactions took place at accused's family dwelling, location played no significant role — Property not instrumentality of offence.
Prevention of crime — Forfeiture order — Application for in terms of s 48 of Prevention of Organised Crime Act 121 of 1998 — Which property liable to forfeiture — Immovable property constituting family's dwelling —Considerations applicable — Interests of minor children not merely one of factors in proportionality assessment but separate and important consideration.

The two appellants were married in community of property and were the parents of two minor children. The High Court made an order in terms of s 50(1)of the Prevention of Organised Crime Act 121 of 1998 (POCA) declaring their immovable property (a farm which included their domestic dwelling) forfeit to the state on the basis that it was an instrumentality of an offence as contemplated in POCA. The order was based on the evidence that over period of year, the first appellant had facilitated illegal diamond purchases between an undercover agent and dealer. He received R58 000 by way of commission or for the use of the property in some of the transactions. Total of 78 unpolished diamonds were sold, worth some R9,6 million, for price of R6,2 million. These activities constituted offences in terms of s 20 read with s 82*(a)* of the Diamonds Act 56 of 1986.
The first appellant denied the commission of the offences whilst the second appellant claimed to have known nothing about them. The court, in making the order, excluded the second appellant's interest in the property from the forfeiture order and ordered the curator bonis to pay her one half of the net proceeds from the sale of the property, which it held, was her separate property. The court found that the property was an instrumentality of the offences of illicit diamond-dealing; that it was indispensable to the success of those transactions; and that forfeiture was not disproportionate. The appellants appealed against the order.
Held, by majority of the court (Ponnan JA, Willis JA and Zondi JA concurring), as to whether the property could be said to be an instrumentality of the offence, that it bore no necessary connection to the offences committed by the first appellant. Although some of the transactions were concluded at the property, they might just as well have occurred in multitude of other locations, as many actually did. The location and appointment of the property itself played no distinctive role in the commission of the offences and therefore could not constitute an instrumentality of the offences (see [61]).
Held, further, that although not statutory requirement, proportionality was constitutional imperative and an equitable requirement developed by our courts to curb the excesses of civil forfeiture. The proper application of proportionality analysis

weighed the forfeiture and, in particular, its effect on the owner concerned, against the purposes the forfeiture served (see [63]).
Held, further, that, noting that the criminal trial against the first appellant was ongoing and that, if convicted, the Diamonds Act prescribed fairly harsh penalties, including forfeiture, there was considerable force in the contention that, in making specific provision for forfeiture in the framing of the provisions, the legislature signified an intention that the forfeiture regime so created would suffice to meet the mischief sought to be addressed by that enactment. Ordinarily, it could be accepted that when the legislature designated set of remedies to combat specific offences, those were intended to be effective and exhaustive. This had to be so in the present case and it followed that forfeiture in terms of POCA as well might be doubly punitive (see [65]).
Held, further, that the interests of the children were separate and important consideration and could not merely be dealt with as one of several factors weighed on the proportionality scale. Whilst the interests of the parents and their children necessarily overlapped, the childrens' interest may well differ from the parents' in case such as the present. The information before the court was insufficient to consider their interests and there had been no consideration of the necessity to appoint curator to conduct an independent assessment thereof. The result of the High Court's approach was that in matter which materially impacted on their well-being, the voice of the two minor children had been silenced (see [72] and [75]).
Held, accordingly, that the forfeiture order made against the appellants was disproportionate and the appeal had to be upheld (see [83]).
The minority (per Schippers AJA, Mocumie JA concurring) found that the frequent use of the property as place to facilitate the buying and selling of unpolished diamonds not only rendered the property itself instrumental in the offence but also pointed to direct and immediate connection between the property and the numerous offences that took place there. There could be no question that the property made the commission of the offences possible or easier. Given the nature of the offences and the extent to which the property was used as an instrument thereof, forfeiture was not disproportionate. In the circumstances the appeal ought to have been dismissed.

ALL SA JUNE 2017

ASLA Construction (Pty) Ltd v Buffalo City Metropolitan Municipality (South African Civics Organisation as amicus curiae) [2017] 2 All SA 677 (SCA)

Administrative justice – Judicial review of administrative decision – Time limit for bringing of review application – Section 7 of the Promotion of Administrative Justice Act 3 of 2000 – Review application must be brought without unreasonable delay and within 180 days of impugned decision – Application in terms of section 9 for extension of statutory period – Substantive application required.

The respondent awarded contract to the appellant. The appellant instituted action against the respondent based on payment certificates issued in terms of two contracts (*viz* “the Turnkey contract” and “the Reeston contract”). The respondent opposed the relief sought on the basis that the payment certificates relied upon were predicated upon valid appointment of the engineers who issued the certificates, which in turn depended upon the validity of the contract. It was alleged that the conclusion of the Turnkey contract was unlawful but because the claim of the appellant was not based

upon this contract, but rather the Reeston contract, it was not necessary to challenge its validity. It was further alleged that the Reeston contract was unlawful and void *ab initio*, because of failure by the respondent when awarding this contract to comply with section 217 of the Constitution, as well as the procurement legislation and policies which were binding on the respondent.

Consequently, in counter-application, the respondent sought an order reviewing and setting aside the award of the Reeston contract to the appellant and declaring that any payment certificates issued in terms of this contract were void ab initio.

The court a *quo* upheld the contentions of the respondent, and declared the Reeston contract invalid, set it aside and declared the payment certificates issued in terms of the contract void *ab initio*. The appellant's action for provisional sentence was dismissed with costs.

Held – On appeal, it was held that central to the dispute before the court a *quo* was the appellant's contention that the respondent had failed to bring the application for the review and setting aside of the Reeston contract, without unreasonable delay and within 180 days of its award as required by section 7 of the Promotion of Administrative Justice Act 3 of 2000. The respondent averred that the application had indeed been brought within the period of 180 days stipulated in section 7, because the respondent (as represented by its council) only became aware of the unlawful administrative action in awarding the Reeston contract on 28 October 2015. In the alternative, it was averred that the interests of justice justified an extension of the period of 180 days. However, the contention that the time period only commenced running once the respondent became aware of the unlawful administrative action was unsustainable. Referring to case authority, the Court stated that the plain wording of section 7 does not support the interpretation that the application must be launched within 180 days after the party seeking review became aware that the administrative action in issue was tainted by irregularity.

For an extension of the 180-day period, a substantive application had to be made by the respondent when it first approached the court for relief. That was not done.

The court a *quo* granted the extension of the 180-day period based on its finding that the procurement in respect of the Reeston contract was not legal and regular, and as the award of the contract was consequently invalid and fell to be set aside, it was found to be in the interests of justice that the respondent be granted the requisite extension. The present Court highlighted a number of flaws in the High Court's reasoning. The first was that the court below had impermissibly decided the merits of the review application before considering and determining the application for condonation. In doing so, it effectively precluded any finding that the application for condonation should be refused on its merits, with the result that any unlawful award of the Reeston contract would be validated by the delay. Full and proper determination of the merits of the review application was dependent upon finding that the respondent's failure had to be condoned. It was thus impermissible for the court a *quo* to have entered into and decided the merits of the review application without having first decided the merits of the condonation application. The High Court also regarded the serious nature of the breach of section 217 of the Constitution, as a complete bar to the validation of the award of the Reeston contract to the appellant, which could have followed as a result of the delay in bringing the application for condonation. That ignored the fact that even unlawful administrative action may be rendered unassailable by delay. The erroneous

approach resulted in a failure by the court a *quo* to properly consider whether the respondent had furnished a full and reasonable explanation for the delay which covered the entire duration thereof. The requirement that an application for the review of an administrative decision should be launched without undue delay, is predicated upon a desire to avoid prejudice to those who may be affected by the impugned decision. The court a *quo* failed to properly consider the extent of the appellant's prejudice, which was far greater than the assumption it made in the face of evidence to the contrary. In any event, the court found that the evidence did not prove that the award of the Reeston contract contravened the provisions of section 217 of the Constitution.

The High Court also failed to consider various relevant factors, as set out in the appeal judgment.

Next, the appeal court considered the appellant's appeal against the court a *quo*'s dismissal of its claim for provisional sentence. Before the court a *quo*, the respondent's sole ground of opposition to the provisional sentence claim of the appellant was that the payment certificates prepared by the engineer and relied upon by the appellant, were dependent upon his valid appointment in terms of a valid underlying contract. The defence was upheld by the court a *quo* and provisional sentence refused, but the conclusion reached on appeal rendered the defence unsustainable.

The appeal succeeded with costs.

Brooks and another v National Director of Public Prosecutions
[2017] 2 All SA 690 (SCA)

Criminal procedure – Organised crime – Illicit diamond dealing – Forfeiture order – Section 50(1) of the Prevention of Organised Crime Act 121 of 1998 – Whether residential property was an "instrumentality of an offence" – Court finding relationship between the use of the property and the commission of the offences to be neither tenuous nor remote, and that involvement of the property was not merely incidental to the commission of the offences – Forfeiture order was not disproportionate in circumstances of case, and was properly granted.

Words and phrases – "instrumentality of an offence" – Prevention of Organised Crime Act 121 of 1998 – Refers to any property which is concerned in the commission or suspected commission of an offence – Definition must be restrictively construed, so the property must facilitate or make possible the commission of the offence in a real and substantial way.

The first appellant ("Brooks") was the holder of a prospecting right in terms of section 18(3) of the Mineral and Petroleum Resources Development Act 28 of 2002 (the "Mineral Resources Act"), to prospect for alluvial diamonds on a farm in the Northern Cape. He was also the holder of a mining permit issued in terms of section 27 of the Mineral Resources Act, which authorised him to mine for alluvial diamonds on the same farm, a part of the property was used as an office from where he conducted his business.

In the course of a national covert operation authorised by the respondent ("NDPP"), Brooks' involvement in illicit diamond-dealing was uncovered. The illicit transactions were largely conducted at the property owned by Brooks and his wife (the "second

appellant"). As a result, forfeiture order was made under section 50(1) of the Prevention of Organised Crime Act 121 of 1998, in terms of which the appellants' property was declared forfeit to the State on the basis that it was an instrumentality of the offence of illegal diamond-dealing. The second appellant's interest in the property was excluded from the forfeiture order, in terms of section 52(1) of the Prevention of Organised Crime Act. The High Court ordered the curator *bonis* to pay her one half of the net proceeds of the property upon its disposal.

Held – In the present appeal against the forfeiture order, before dealing with the law relating to forfeiture, the Court had to consider whether the court a *quo* should have condoned the late filing of Brooks' opposing affidavit in the forfeiture application. The reason for the delay in filing that affidavit was that Brooks relied on the advice of his former attorneys concerning the procedure that had to be followed in opposing the forfeiture application. While the opposing affidavit took the appellants' case no further, it contained Brooks' version as to why a forfeiture order should not be granted. Although it was delivered out of time, there was no prejudice to the NDPP. The Court held that given that a case should be decided on all the facts relevant to the issues in dispute, and the absence of prejudice, the opposing affidavit should have been admitted in evidence.

The process regarding forfeiture of property under the Prevention of Organised Crime Act starts when the NDPP applies for a preservation of property order in terms of section 38 of the Act. Section 48(1) provides that if a preservation of property order is in force the NDPP may apply for an order forfeiting to the State the property that is subject to a preservation order. The focus is not on the wrongdoer but on the property used to commit an offence, or property which constitutes the proceeds of crime. Forfeiture proceedings are not conviction-based. They may be instituted even when there is no prosecution. Where a forfeiture order is sought, the court undertakes a two-stage enquiry. The first is whether the property in issue was an instrumentality of an offence, more specifically, whether there is a functional relationship between the property and the crime. At this stage, the focus is on the role the property plays in the commission of the crime, not the state of mind of the owner. The second stage arises after finding that the property was an instrumentality of the offence, in which the court considers whether certain interests should be excluded from forfeiture. At this stage, the owner's state of mind comes into play. A High Court is obliged to make a forfeiture order if it finds on a balance of probabilities that the property concerned is an instrumentality of an offence or the proceeds of unlawful activities. An instrumentality of an offence refers to any property which is concerned in the commission or suspected commission of an offence. The definition must be restrictively construed, so the property must facilitate or make possible the commission of the offence in a real and substantial way. It must be instrumental in, and not merely incidental to, the commission of the offence.

Before granting a forfeiture order, a court must enquire as to whether such an order would amount to an arbitrary deprivation of property in violation of section 25(1) of the Constitution. The proportionality principle is, therefore, applicable.

In the present case, the relationship between the use of the property and the commission of the offences was neither tenuous nor remote. The involvement of the property was not merely incidental to the commission of the offences. The Court was satisfied that the court a quo was correct in holding that the NDPP had established on

a balance of probabilities that the property was an instrumentality of the offences of illicit trading in unpolished diamonds. Once it established that the property was an instrumentality of an offence, a court is obliged to embark on a proportionality enquiry. That enquiry is aimed at balancing the constitutional imperative of law enforcement and combating crime and the seriousness of the offence, against the right not to be arbitrarily deprived of property. The Court considered the rights of the innocent spouse, and the impact of the forfeiture order on the appellants' children. It found that the forfeiture order was properly made and that there were no grounds for challenging it. The appeal was dismissed.

Cathay Pacific Airways Ltd and another v HL and another [2017] 2 All SA 722 (SCA)

Civil procedure – Contempt of court – Conviction and sentence – Appeal – In absence of proper service of court order, party accused of contempt had no knowledge of order and should not have been convicted of contempt of court.

Civil procedure – Contempt of court – Whether court order issued orally only was effective – Whether there was proper notice and service to affected parties – Requirements restated by court.

The respondents were Chinese citizens who had been granted permanent South African residency status. Their three children had also received permanent residency status. In July 2014, the three children landed at OR Tambo International Airport on board a Cathay Pacific flight from Hong Kong. The eldest child was in control of his two younger siblings. On presenting themselves to the immigration authorities at the airport, the two younger children, both of whom were still minors at that time, were refused entry into the country. This refusal was based on the fact that they did not appear on the computer system of the Department of Home Affairs. Notices of refusal of entry were issued by the Department in respect of all three children in terms of section 34(8) of the Immigration Act 13 of 2002. In terms of the declaration issued under section 34(8), Cathay Pacific was instructed to transport the children back to Hong Kong on the next available flight. The respondents' attorney contacted a judge on urgent duty on the night in question, and the judge summarily issued a telephonic interdict (the "first order") interdicting Cathay Pacific from boarding the two younger children on the flight. However, the employees to whom the attorney spoke had no authority to enforce a telephonic order that the minor children should not board the aircraft, with the result that the children were flown to Hong Kong. The judge who issued the order then telephoned Cathay Pacific's airport service officer and informed her that he intended to order the return of the children from Hong Kong. Unable to authorise such a request, the officer referred the judge to the second appellant. The judge informed the second appellant that he was going to issue an order (the "second order") directing Cathay Pacific to return the children to South Africa. A draft of the second order was meant to be emailed to Cathay Pacific, but due to the misspelling of the email address, was never received. Furthermore, the second appellant was not cited as a party in the second order, nor was she cited in any other order issued by the judge.

As a result of Cathay Pacific's lack of knowledge of the second order, it did not appear in court on the relevant day. A third order was issued in its absence, directing Cathay Pacific to return all three children to OR Tambo International Airport without asking for payment.

The respondents subsequently launched an urgent application for an order holding the appellants and another airline employee in contempt of the court orders. The court hearing the application found the appellants to have acted in contempt of the court orders. The present appeal was directed at that finding.

Held – An applicant who seeks a committal order in contempt of court proceedings must establish that a court order was made; that the order had been served; non-compliance with the order; wilfulness and *mala fides*. Proof beyond reasonable doubt is required. But, once the applicant has adduced sufficient evidence to prove the first three requirements, the respondent bears an evidentiary burden in respect of the last requirement. A failure by the respondent to adduce evidence that establishes a reasonable doubt as to whether non-compliance was wilful and *mala fide*, will mean that civil contempt will have been established beyond reasonable doubt.

The Court dealt sequentially with the various orders. As far as the first order was concerned, it was pointed out that the order had never come to the knowledge of Cathay Pacific by the time the flight departed for Hong Kong. Cathay Pacific should, therefore, not have been convicted of contempt of court in respect of the first order. When the second order, directing the airline to return the children to South Africa, was made, the children were already on board the flight and in international airspace. There was no evidence adduced at all that Cathay Pacific was able to comply with the order. The children had left the shores of South Africa and were beyond the jurisdiction of South African courts. Courts cannot make orders which will have no effect, such as those to be enforced in foreign jurisdictions. There was, therefore, no basis to impute wilfulness or *mala fides* to the appellants in circumstances where they were unable to comply with the second order. The same difficulty prevailed in respect of the third order in that the children were in Hong Kong and no effect could be given to an order whose reach was beyond the jurisdiction of South African courts.

The appeal against the convictions of civil contempt of court was upheld with costs.

Minister of Home Affairs and others v Saidi and others [2017] 2 All SA 755 (SCA)

Administrative justice – Legitimate expectation – Requirements – Representation underlying the expectation must be clear, unambiguous and devoid of relevant qualification; the expectation must be reasonable; the representation must have been induced by the decision-maker; and must be one which it was competent and lawful for the decision-maker to make without which the reliance cannot be legitimate.

Immigration – Refusal of applications for asylum – Refusal to extend permits pending judicial review, after internal remedies were exhausted – Refugees Act 130 of 1998 – Section 22(3) – Court finding nothing in language of section 22(3) itself which limits the power to extend permits to the period prior to the exhaustion of the internal remedies.

The present appeal concerned persons seeking asylum while awaiting the outcome of their application for refugee status. The respondents (the “asylum seekers”) sought refugee status in South Africa, and applied for asylum. They were each issued with a permit, but had their applications for refugee status refused. They made use of internal remedies available to them but none of them succeeded. The State Attorney had agreed to the extension of the permits while the respondents prosecuted the review applications. However, when the third appellant was appointed as Refugee Reception

Officer ("RRO") she refused to extend the permits of any of the asylum seekers. They then launched individual applications to the High Court, mostly for judicial review of the decision refusing them refugee status (the "review applications"). The High Court's review and setting aside of the decision not to extend the respondents' permits led to the present appeal.

The appellants were granted leave to appeal against the judgment and order. The asylum seekers were granted leave to cross-appeal against the refusal to direct the RRO to issue, re-issue or extend the permits.

Held – The issue in the main appeal was whether section 22(3) of the Refugees Act 130 of 1998 empowers the RRO to extend permits once the internal remedies have been exhausted by an asylum seeker. In the cross-appeal, the issue was whether, if the Court found that she was so empowered, the High Court should have directed the RRO to extend the permits if an application for judicial review of the refusal of asylum was pending.

The Refugees Act specifies a procedure for applications for refugee status. An asylum seeker who is seeking recognition as a refugee must apply for asylum to the RRO. Pending the outcome of the application, the RRO is obliged to issue an asylum seeker with a permit entitling her or him to remain in South Africa. The permit must be issued in the form set out in the Regulations to the Act, which regulations require that the permit must be of limited duration and contain an expiry date. The Standing Committee for Refugee Affairs (the "Standing Committee") may determine conditions for the permit, while the RRO is empowered to extend the period reflected in the permit from time to time and to amend the conditions. The first appellant (the "Minister") may withdraw the permit on the happening of specified events – upon which the holder of the permit may be arrested and detained pending the finalisation of the application for asylum. Refugee Status Determination Officer ("RSDO") decides the application for refugee status. The options available to him once the application has been considered are as follows. He may grant asylum; reject the application as manifestly unfounded, abusive or fraudulent; or refer any question of law to the Standing Committee. Where the application is rejected, internal mechanisms are created for the decision to be reviewed or appealed (the "internal remedies").

The third appellant's refusal to extend the permits further was based on her view that the power to extend permits under section 22(3) of the Act did not endure beyond the exhaustion of the internal remedies. However, the Court found that there is nothing in the language of section 22(3) itself which limits the power to extend permits to the period prior to the exhaustion of the internal remedies. It was held that section 22(3) was capable of the interpretation that the RRO is empowered to extend permits after the internal remedies have been exhausted. The High Court was correct in its finding, and the appeal was dismissed.

In the cross-appeal, the respondents submitted that the RRO was obliged to do so pending the outcome of the application for judicial review, and that the High Court should have directed the RRO to do so. The submission was based firstly on the contention that the asylum seekers had a substantive legitimate expectation that the permits would be extended, and secondly on the contention that, if it was found that that was not the case, the High Court should have substituted its own decision for that of the RRO and directed the extension of the permits. The Court referred to case law in setting out the requirements for legitimate expectation as follows. The

representation underlying the expectation must be clear, unambiguous and devoid of relevant qualification; the expectation must be reasonable; the representation must have been induced by the decision-maker; and must be one which it was competent and lawful for the decision-maker to make without which the reliance cannot be legitimate. The Court found that the appellants' response fell short of an admission that an undertaking had been given. Even if it could be said that a representation had been made that a permit would be extended, it was not clear, unambiguous and unqualified. Any representation made fell far short of giving rise to a unilaterally enforceable legal obligation to extend the permits as contended by the respondents. The Court also found no factors which would have made a substitution order by the High Court just and equitable in this matter. The cross-appeal was also dismissed.

Mashamaite and others v Mogalakwena Local Municipality and others; Member of the Executive Council for Coghsta, Limpopo and another v Kekana and others [2017] 2 All SA 740 (SCA)

Civil procedure – Contempt of court – Requirements – An applicant in civil contempt proceedings must prove the requisites of contempt, namely, the existence of a court order; service or notice thereof; non-compliance with the terms of the order; and wilfulness and mala fides beyond reasonable doubt.

Civil procedure – Doctrine of res judicata – Res judicata is the legal doctrine that bars continued litigation for the same cause, between the same parties and where the same thing is demanded.

Civil procedure – Relief – Court granting reinstatement when such relief was neither sought nor permissible – Relief granted by court a quo was inconsistent with facts and averments contained in the papers and did not accord with the relief sought in the notice of motion.

A power struggle between the first respondent municipality, its councillors and the municipal manager led to the present litigation.

In December 2014, the previous municipal manager ("Kekana") applied for interdictory relief against numerous councillors of the municipality, with the municipality cited as co-applicant. He also sought the review and setting aside of the appointment of the acting municipal manager ("Selepe"). At the time he launched the application, Kekana was on suspension pending a disciplinary enquiry. The court a *quo* did not grant the interim relief, and the review proceeded in the ordinary course.

In the meantime, the municipality proceeded with the disciplinary enquiry. Kekana was found guilty of gross misconduct and was dismissed. He challenged his suspension, the disciplinary proceedings and his dismissal in the High Court, which dismissed the application on the ground that it did not have jurisdiction to entertain the matter ("the Hughesruling"). It was held that the Labour Court had jurisdiction over the dispute. Kekana then approached the Labour Court, seeking an order reviewing and setting aside the decision of the council to dismiss him and seeking reinstatement. While judgment in the Labour Court was pending, the review application was heard in the court a *quo*, the decision thereon being reserved. The Labour Court then dismissed the application with costs. An application for leave to appeal against such dismissal was pending before the Labour Court. On 1 April 2016, the court a *quo* granted an order declaring that the Member of the Executive Council of the Limpopo Province

responsible for the Department of Co-operative Governance Human Settlements and Traditional Affairs (the "MEC") was in contempt of an earlier order granted by another judge, reinstating Kekana as municipal manager, declaring council meetings held on 6 November and 4 December 2014 unlawful and setting aside all decisions and resolutions taken by the council at those meetings.

The appellants appealed against the above order.

Held – The appellants contended that having regard to the doctrine of *res judicata*, it was not competent for the court a *quo* to have granted the relief of reinstatement when the same relief had previously been sought by Kekana before Hughes and dismissed. *Res judicata* is the legal doctrine that bars continued litigation for the same cause, between the same parties and where the same thing is demanded. On the facts, both the definitional requirements of the *res judicata* doctrine and its justification were met. The cause of action was the same. The dispute before Hughes primarily concerned Kekana's suspension and the disciplinary proceedings against him. The parties were the same, namely, Kekana, the municipality and the MEC. The relief sought was the setting aside of his suspension and dismissal. The court a *quo* concluded that Hughes was clearly wrong and that it could as a result disregard her judgment. The present Court pointed out that firstly, the court a *quo*, consisting of a single judge, had no jurisdiction to sit as an appeal court in respect of the order of Hughes and, in effect, set it aside. Secondly, the court a *quo* was aware that Kekana had instituted proceedings in the Labour Court challenging his suspension and dismissal and that these proceedings were pending in that court. It was therefore not open to the court below to order that Kekana be reinstated. In the circumstances, the court a *quo* erred in granting a substantive order of reinstatement. Furthermore, at the time Kekana launched the application, he was on suspension. The relief of reinstatement had not been sought by Kekana or argued on his behalf in the court a *quo*. The relief granted by the court a *quo* was inconsistent with the facts and averments contained in the papers and did not accord with the relief sought in the notice of motion. Such relief was improperly granted.

The next question was whether Kekana had authority to institute proceedings on behalf of the municipality. Kekana alleged that as municipal manager, he was responsible for the safety of the employees of the municipality and for ensuring that the municipality provided services to the public and conducted its business in an orderly fashion. He relied on a resolution adopted by the council on 21 July 2014 which authorised the municipal manager to seek legal advice, approach an appropriate legal forum and do whatever may be necessary to protect the interests of the municipality. That submission ignored the fact that he was suspended from his position as the municipal manager at the time he instituted the proceedings and as a result of his suspension, was debarred from performing any duties as municipal manager.

The Court then turned to consider the correctness of the finding of contempt of court against the MEC as referred to hereinabove. It had to be determined whether the requirements for the grant of the order had been satisfied. With the advent of the Constitution, the principles of contempt must accord with constitutional dictates. One of those dictates is that the order must be served on or brought to the attention of interested persons. The failure to notify interested parties of an order granted against them violates all precepts of fairness and what can be considered just in a constitutional democracy. The evidence established that the order was not made against the current MEC, but her predecessor. The order was not served on the current

MEC. An applicant in civil contempt proceedings must prove the requisites of contempt, namely, the existence of a court order; service or notice thereof; non-compliance with the terms of the order; and wilfulness and *mala fides* beyond reasonable doubt. Once an applicant has proved the required elements of contempt, the respondent bears an evidential burden in relation to wilfulness and *mala fides*. The respondent must produce evidence that establishes a reasonable doubt as to whether the non-compliance was wilful and *mala fide*, failing which contempt will have been established beyond a reasonable doubt. In light of the explanation proffered by the MEC, her decisions could not be construed as a deliberate and intentional desire to show disrespect to the court by not complying with its order. The contempt order against her ought not to have been granted as all the requirements for the grant of this relief had not been met.

The appeal was upheld with costs.

Nelson Mandela Bay Municipality v Amber Mountain Investments 3 (Pty) Ltd [2017] 2 All SA 773 (SCA)

Local government – Property rates – Power of municipality to levy rates – Whether, following upon the sale of immovable property, a property owner is liable to pay the total rates on the property determined for the financial year or only the rates calculated until the property is transferred – Interpretation of Local Government: Municipal Property Rates Act 6 of 2004, Local Government: Municipal Systems Act 32 of 2000 and Local Government: Municipal Finance Management Act 56 of 2003 establishing that municipality not entitled to withhold property rates clearance certificate until receiving payment of property rates for entire financial year.

The respondent was the previous owner of immovable property, having sold the property to a third party. Before transfer of the property, the respondent required a rates clearance certificate, in terms of section 118 of the Local Government: Municipal Systems Act 32 of 2000 ("the Systems Act") from the appellant municipality. The municipality's financial year commenced on 1 July in a year and ended on 30 June the following year. The municipality required payment of rates until the end of its financial year, being 30 June 2010, as a condition for furnishing the certificate, and presented the respondent with an account for the sum of R2 281 014,68. The respondent paid the amount, under protest, in order to obtain the certificate. At the time of payment, the respondent's actual indebtedness to the municipality was for the sum of R1 214 482,68. Regarding the payment made under protest as an over-payment, it sought to be reimbursed. It, therefore, instituted action against the municipality.

The court a *quo* found that the respondent was only obliged to pay rates on the property until the date of transfer of the property ie 25 February 2010. It found that it would be unjust for the municipality to claim rates from the respondent when it was no longer the owner of the property. The court ordered that the municipality repay the amount of R1 066 532, including interest, to the respondent. That led to the present appeal.

Held – The original power to levy rates is regulated by national legislation in the form of the Local Government: Municipal Property Rates Act 6 of 2004 ("the Rates Act"). Of particular relevance to this dispute were sections 12 and 13(1) of the Rates Act. The appeal turned on the interpretation of various provisions of the Rates Act, the Systems Act and the Local Government: Municipal Finance Management Act 56 of 2003 ("the

Finance Act"). It was clear from the relevant provisions of the Rates Act and the Finance Act that the levying of rates is an integral part of a municipality's annual budgetary process. The approval of the budget must go hand in hand with the determination of rates, as the revenue from rates is essential to fund the budgeted expenditure. It was for that reason that the property rate is determined for each financial year. It is only once the rate is determined that a municipality can estimate its income for the financial year and prepare its budget in accordance with that projected income.

The main issue in this case was when the property rate is payable. In terms of section 13(1)(a) of the Rates Act, a rate becomes payable as from the start of a financial year. Sections 26, 27 and 28 deal with the method and time of payment of rates, the furnishing of accounts and the recovery of arrear rates from tenants and occupiers. The import of these sections is that the rate may be recovered on a monthly basis or annually, subject to an election by the owner. In respect of both payment options, it is the municipality that determines the date by which payment must be made. It is the responsibility of the municipality to produce a statement reflecting the amount due in respect of rates and the date on which the amount is payable. Section 28(1) is of particular significance. Once the municipality has determined the amount due and the date on which such amount is payable, and the owner fails to make payment on the due date, the municipality may recover the amount due from the tenant or occupier of the property. Section 28(1) does not entitle a municipality to recover the rate levied for the financial year from the tenant or occupier. In terms of section 27 of the Rates Act, payment of the rate is subject to the happening of an event, namely, the municipality's determination of the amount to be paid and the date by which payment must be made. A property owner's obligation in respect of property rates arises at the start of the financial year when the municipality determines the rate. The words "payable as from" in section 13(1)(a), had to be interpreted to mean that the rate is payable within the period of the financial year and not on 1 July as contended by the municipality.

The final question was whether a municipality can, prior to issuing a rates clearance certificate, insist on payment of all rates, fees and charges in respect of the property for the current financial year, even if such period extends beyond the date of the certificate. The Court found section 118 of the Systems Act to be clear and unambiguous. The certificate is issued in respect of municipal debts which have become due in the two years preceding the date of application for the certificate and does not apply to future municipal debts.

The Court, therefore, concluded that the relevant provisions of the Rates Act, the Finance Act and the Systems Act read together, confirmed the respondent's contention that the municipality was not entitled to withhold the property rates clearance certificate until it had received payment of the property rates for the entire financial year. Such property rates became payable (but not due) from the start of the financial year.

The appeal was dismissed with costs.

New Adventure Shelf 122 (Pty) Ltd v Commissioner of the South African Revenue Services [2017] 2 All SA 784 (SCA)

Tax – Capital gains tax – Sale of immovable property – Instalment sale agreement – Effect of cancellation of sale three years after assessment of capital gains tax but

before purchase price paid in full – Assessment of capital gains tax – Seller not entitled to have assessment reconsidered in the light of the subsequent cancellation.

In 2007, the appellant sold immovable property, resulting in it receiving a substantial gain as envisaged in the Eighth Schedule of the Income Tax Act 58 of 1962 (the "Act"). The capital gain was taken into account in the assessment of the appellant's liability for tax in respect of that year. Several years later, the sale agreement was cancelled with the purchaser having paid only a portion of what it had agreed to pay – the sale being an instalment sale agreement. The property was returned to the appellant who retained what payments had been made by the purchaser as predetermined damages for breach of contract.

As it had received much less than the agreed price at which it had sold the property, the appellant attempted to persuade the respondent, the Commissioner of the South African Revenue Services ("SARS") to withdraw its tax assessment for the 2007 tax year and to reduce its tax liability for that year. It argued that it had been taxed on a capital gain that it had not received and that all it could obtain as a result of the cancellation of the sale was an assessed capital loss, with no corresponding gain to set off against the loss. That led to the appellant seeking to have its unpaid tax liability for the 2007 year revised and reduced. SARS refused to comply and the appellant approached the High Court for the review of SARS' decision. The dismissal of the application led to the present appeal.

Held – Capital gains tax is based on the difference between the amount at which a person acquires a capital asset and the amount of the proceeds received on its subsequent disposal. Should such proceeds exceed the amount at which it was acquired, there is a capital gain; conversely, should there be less, there will be a capital loss. The aggregate of capital gains and capital losses are then taken into account to calculate a net capital gain and a percentage then applied to the net capital gain to calculate the taxable capital gain for the year of assessment. In terms of section 26A of the Act, that taxable capital gain then falls to be included in the taxable income of the person concerned. The essential starting point of the scheme is the so called "base cost" of an asset.

The appellant had not objected to the 2007 assessment for more than three years, the initial obstacle facing it lay in section 81 of the Act. Under section 81(1),taxpayer aggrieved by an assessment may object in the manner and under the terms and within the period prescribed by the Act. Section 81(2)(b) goes on to provide that the prescribed period for objections may not be extended where more than three years have lapsed from the date of the assessment whilst, as already mentioned, section 81(5) provides that should no objections be made to an assessment, it shall be final and conclusive. Consequently, the disputed assessment seemingly had become final and conclusive under sec-tion 81, and if that was so it was fatal to the relief the appellant sought. While that was SARS's answer to the appellant's claims, the appellant argued that the said provisions did not apply to capital gains.

According to the appellant, a person's capital gain is calculated with reference to the proceeds received or accrued from a disposal of an asset. The capital gain received or accrued is calculated in terms of paragraph 35(1) of the Eighth Schedule. That paragraph includes sub-paragraph 35(3), which says that the gain is to be reduced by certain amounts. One of those is that contained in paragraph 35(3)(c), namely, any reduction in those proceeds as the result of the cancellation, termination or variation

of an agreement. This is what occurred here. In almost all instances falling within this sub-paragraph, the reduction of proceeds by virtue of cancellation or the like will occur in a later year of assessment. Paragraph 25(2) requires the taxpayer, in those circumstances, to re-determine the base cost of the asset and the capital gain in the light of the change in circumstances. The appellant contended that that could only relate to the original assessment. Accordingly, so the argument went, it was the original assessment that must be re-opened and revised in the light of the redetermination of the base cost and the amount of the capital gain. It was contended further with regard to the proposed redetermination of the capital gain, that unlike normal income tax (in respect of which section 81 would clearly apply) the assessment of capital gains tax was not necessarily an annual event. It was argued that the only way that there can be a matching of capital gains arising in one tax year and capital losses arising out of the same transaction in a later tax year, is to allow such a redetermination. The Court highlighted a number of difficulties confronting the appellant's argument.

The Court confirmed that the assessment of capital gains tax is, an annual event in the sense that, if any occurrences during a tax year render the provisions of the Eighth Schedule applicable to an accrual of a taxable capital gain, the amount thereof is to be included in the taxpayer's taxable income for that year. Therefore, the fact that in a particular year there may not be any events which lead to the accrual of a taxable capital gain is no reason to find that when they do occur, and when a taxable capital gain is included in a taxpayer's taxable income, provisions relating to an assessment of tax liability such as those in section 81 should not apply. Paragraphs 3, 4 and 25 of the Eighth Schedule also did not support the appellant's argument – establishing as they did, that should any events occur which require the redetermination of a capital gain or a capital loss which accrued in a previous year, such redetermined capital gain or capital loss was to be taken into account in determining the taxpayer's capital gain or capital loss in the current year in which those events occurred.

It was concluded that the cancellation of the sale did not entitle the appellant to have his tax liability for the 2007 year re-assessed. The cancellation and its consequences were factors relevant to an assessment of any capital gain or, more likely, capital loss that accrued during that current tax year and not the year that the capital gain had initially accrued.

The court a *quo* correctly concluded that the appellant was not entitled to the relief that it sought, and the appeal was dismissed.

Orica Mining Services SA (Pty) Ltd v Elbroc Mining Products (Pty) Ltd [2017] 2 All SA 796 (SCA)

Intellectual property – Patents – Alleged infringement – Section 45 of the Patents Act 57 of 1978 – Need to ascertain nature of invention as claimed and its precise scope – Extent of protection determined by wording of claims – Purposive interpretation of patent claims showing infringement by respondent – Claims to be read in the context of the patented specification – Interpretation of "between" in claim to mean "linearly between" unjustified in context of specification as well as claims.

The present appeal arose from the dismissal of an action by the appellant ("Orica") for an interdict preventing the respondent ("Elbroc") from infringing a patent entitled "Portable Drilling Apparatus" (the "patent") held by Orica.

The parties are South African companies which conduct business as suppliers of materials and equipment used in the mining industry. Orica was granted the patent on 19 December 2001 under the Patents Act 57 of 1978, for a drill rig used to drill holes on the hanging roof (or wall) of a mine for purposes of placing roof-bolts or other securing attachments into the wall – to reinforce and stabilise the hanging wall. It was common cause that Elbroc sold roof bolter rigs that performed the same function as Orica's to the mining industry in South Africa. That led to the allegation of infringement by Orica. Before the court a *quo*, Orica contended that Elbroc had infringed claims 1, 16, 17 and 18 of the patent. Elbroc contended that one of the integers of the claims in the patent was not present in its drill rig. This was, according to Elbroc, the description of the drill carriage as located *between a* pair of telescopic props. The meaning of the word "between" in the patent claims thus became central to Orica's claim. Having considered the claims of the patent the Commissioner found that the Elbroc drill rig did not infringe the patent as its carriage equipment was not located "between" its two props. In interpreting the word "between" the judge adopted the dictionary meaning "linearly between" and found that because the carriage in Elbroc's drill rig was offset from the linear space between the props there had been no infringement of the patent.

On appeal, Orica persisted in its contention that on a proper construction the patent claims required only that the drill carriage be located in the space between the two props, even if not in the same linear plane as the props.

Held – As stated in case law, in dealing with aspects relating to patent infringements, the court's first task is to ascertain the nature of the invention as claimed and its precise scope. Accordingly the specification, and especially the claims, have to be construed.

There was nothing in claim 1 of the patent to show that Orica intended that a drill carriage located only linearly between the props was essential to its invention, or that a person skilled in the art would understand that the word "between" was intended to be used as a word of precise meaning. To interpret the word "between" as meaning linearly between the props was found by the court not to be in accordance with a purposive interpretation of the specification, as delineated by the claims. The advantage of the invention was that the telescopic props gave support not only to the hanging roof of the stope, but also to the drill located "between" them, so that it may be operated remotely. That was precisely what the respondent's drill rig sought to achieve.

The appeal was, therefore, upheld and the respondent was interdicted from infringing Orica's patent.

University of the Free State v Afriforum and another [2017] 2 All SA 808 (SCA)

Administrative justice – Decision by university to change its language policy – Application for review – Promotion of Administrative Justice Act 3 of 2000 – Whether, objectively viewed, the decision was rationally connected to the purpose for which the power was given – Courts required to be careful not to interfere with the exercise of a power simply because they disagree with the decision or consider that the power was exercised inappropriately.

Constitutional law – Decision by university to change its language policy – Application for review – Whether language policy was reasonably practicable as contemplated in section 29(2) of the Constitution – Court agreeing with university that the right to receive an education in a language of choice hinged on whether the attainment of the right was reasonably practicable, and that the latter element had to take into account constitutional norms – What is required of a decision-maker, when there is a change in circumstances, is to demonstrate that it has good reason to change the policy ie it must act rationally and not arbitrarily.

In March 2016, the appellant ("UFS") university decided to adopt a new language policy in terms of which Afrikaans and English as parallel mediums of instruction were replaced by solely English as the primary medium. The review and setting aside of the decision by the High Court on the ground that it constituted unlawful administrative action as defined in section 1 of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") led to the present appeal.

The respondents had challenged the university's decision due to their concern that the new language policy, which preferred English over Afrikaans, and the adoption of similar policies at other universities, would erode the position of Afrikaans as a language of instruction and its constitutionally protected status as an official language.

The court a *quo* and both parties approached the matter on the basis that the impugned decision constituted administrative action as defined in section 1 of PAJA.

Held – The respondents' review application was aimed at challenging the decision to adopt the policy, which the university council had the authority to decide under section 27(2) of the Higher Education Act 101 of 1997. The policy itself was not impugned, nor was it sought to be set aside. It was solely UFS' executive decision to determine its language policy that was attacked and not any of its administrative actions flowing from the adoption of the policy. The question then was whether, objectively viewed, the decision was rationally connected to the purpose for which the power was given. That is a factual enquiry and courts must be careful not to interfere with the exercise of a power simply because they disagree with the decision or consider that the power was exercised inappropriately. If, therefore, the decision-maker acts within its powers, and considers the relevant material in arriving at a decision so that there is a rational link between the power given, the material before it and the end sought to be achieved, that would meet the rationality threshold. The weight to be given to the material lies in the discretion of the decision-maker; so too does the determination of the appropriate means to be employed towards this end. However, if a decision-maker misconstrues its power, that would offend the principle of legality and render the decision reviewable.

The respondents' averment that UFS failed to take into account the requirements of section 29(2) of the Constitution and section 27(2) of the Higher Education Act was without merit, because the evidence made it clear that the university had taken both provisions into account. The court a *quo*, therefore, erred in upholding the said argument.

Before the present Court, the respondents advanced another argument. They contended that in exercising its power to adopt the new policy, UFS did so without appreciating the constitutional and statutory parameters within which the power had to be exercised. The constitutional constraint, it was contended was section 29(2) of the Constitution, which affords the right to language instruction in a language of choice where that is reasonably practicable. And the statutory limitation on the power

was section 27(2) of the Higher Education Act, which made the exercise of the power subject to the Higher Education Language Policy (LPHE) published by the Education Ministry. Properly understood, the complaint on both grounds was that UFS misconstrued its powers in formulating its new language policy. The respondents argued that in abandoning the original dual-medium language policy in order to address the problem of racial segregation, UFS had to consider all reasonable educational alternatives before departing from the original policy. Although contending that UFS ought to have employed other means, without limiting the right of Afrikaans language speakers to their language of choice, to solve the problem, the respondents did not explain what other means were available to UFS. UFS' argument was that the right to receive an education in a language of choice hinged on whether the attainment of the right was reasonably practicable, and that the latter element had to take into account constitutional norms. Explaining the reasonably practicable standard, the Court held that the legal standard is reasonableness, which of necessity involves a consideration of constitutional norms, including equity, redress, desegregation and non-racialism. The factual criterion is practicability, which is concerned with resource constraints and the feasibility of adopting a particular language policy. Consequently, even if a language policy is practical because there are no resource constraints to its implementation, it may not be reasonable to implement because it offends constitutional norms. What is required of a decision-maker, when there is a change in circumstances, is to demonstrate that it has good reason to change the policy. In other words, it must act rationally and not arbitrarily.

UFS's research showed that as the demographic and language profile of its student population had changed with ever-increasing numbers of black students opting for English-medium language instruction, and correspondingly fewer numbers of white Afrikaans students seeking Afrikaans-medium instruction, racial segregation was becoming an increasing problem. The university's assessment that it was no longer reasonably practicable to continue with the original was, therefore, one that the court should be slow to interfere with on review. The respondents' contention that UFS misconstrued its powers by failing to properly apply the reasonably practicable standard in section 29(2) was rejected as UFS was found to have been exemplary in the manner in which it approached the decision to reconsider the old policy and adopt a new policy.

The respondents' second complaint was that UFS's statutory power to adopt a language policy was constrained by the LPHE, and that UFS misconstrued its power by adopting a language policy that was in conflict with the LPHE. The Court held that UFS was under no legal obligation to apply the LPHE and was free to depart from it for good reason – which it did have in this case

Finally, the Court considered UFS's application to strike out certain damaging allegations in the respondents' papers regarding its conduct. The Court agreed that the allegations were not shown to be true and that UFS was, therefore, entitled to a striking-out order.

On the issue of costs, the first respondent relied on what has become known as the *Biowatch* principle to avoid a costs order against unsuccessful litigants who seek to vindicate constitutional rights. The Court upheld that submission except in respect of the striking-out application.

Devland Cash and Carry (Pty) Ltd v Attorneys Fidelity Fund [2017] 2 All SA 825 (WCC)

Legal practitioners – Attorneys Fidelity Fund – Irrevocable undertaking issued by attorney – Whether constituting trust funds held for and/or on behalf of beneficiary of undertaking as contemplated in section 26(a) of the Attorneys Act 53 of 1979 – Section 26(a) of the Act provides that the Attorneys Fidelity Fund shall be applied for the purpose of reimbursing persons who may suffer pecuniary loss as a result of theft committed by a practising practitioner of any money or other property entrusted by or on behalf of such person to him in the course of his practice.

Words and phrases – "entrusted" – Section 26(a) of the Attorneys Act 53 of 1979 – Attorneys Fidelity Fund shall be applied for the purpose of reimbursing persons who may suffer pecuniary loss as a result of theft committed by a practising practitioner of any money or other property entrusted by or on behalf of such person to him in the course of his practice – "entrusted" comprises two elements, firstly, to place someone else in the possession of something, and secondly, subject to a trust, which means that the person entrusted is bound to deal with it for the benefit of another.

In June 2009, the applicant was furnished with an irrevocable undertaking in terms of which R1 000 000 was placed in an attorney's trust account, to be paid to the applicant within 45 days of the issue of an invoice. The undertaking was furnished by an attorney ("Ganas") on behalf of his client who operated a company ("Coifax") in Zimbabwe.A further irrevocable undertaking was subsequently furnished, in similar terms. Acting on the strength of the undertakings, the applicant sold and delivered goods on a running account facility to Coifax at its special instance and request during the period 2 July 2009 to 12 November 2009. The applicant had insisted on the irrevocable undertaking as security to discharge the debt, due to the substantial credit risk involved in Coifax's operation in Zimbabwe during aperiod of adverse economic conditions andprevailing climate of political instability.

The founding affidavit reflected that Coifax made regular payments directly to the applicant until about 24 August 2010 whereafter they ceased. The applicant then reconciled the Coifax account, computed the outstanding amount due to be R814 962,35, and called upon Ganas' firm to effect payment of the sum owed as per the conditions of the irrevocable undertakings. No response was received. The applicant subsequently discovered that Ganas' firm ("LBG") had been suspended from practising pending an investigation into alleged impropriety. Thus apprised of the potential theft and or misappropriation of the R1 000 000, the applicant submitted a claim to the respondent in accordance with section 26 of the Attorneys Act 53 of 1979 ("the Act"). The respondent took the position that the applicant was required to provide proof showing how, when and where the R1 million was entrusted to Ganas for the issue of the irrevocable undertakings before it would consider the claim. The applicant disputed that it was required to provide such proof on the ground that it was the primary responsibility of the respondent to investigate the *modus operandi* of LBG, and that the issued irrevocable undertakings provided *prima facie* and/or sufficient proof to the applicant that it was backed by underlying trust funds, when goods were supplied on the strength of the irrevocable undertakings.

As a result of the requested proof not being provided, the applicant was notified that the respondent's Board of Control had resolved that the irrevocable undertakings did not constitute sufficient proof of entrustment.

Held – Section 26(a) of the Act provides that the Attorneys Fidelity Fund shall be applied for the purpose of reimbursing persons who may suffer pecuniary loss as a result of theft committed by a practising practitioner of any money or other property entrusted by or on behalf of such person to him in the course of his practice. For purposes of section 26(a), "entrusted" comprises two elements, firstly, to place someone else in the possession of something, and secondly, subject to a trust, which means that the person entrusted is bound to deal with it for the benefit of another.

The first issue was whether the applicant bore the onus to establish "physical entrustment", ie that LBG was in fact placed in possession of the money, notwithstanding the furnishing of the irrevocable undertaking. That in turn involved a consideration of whether the undertaking established a contractual obligation on the part of LBG to pay the applicant, independent of the underlying arrangement between the applicant and Coifax. The applicant argued that the fact of the irrevocable undertaking was, of its own, sufficient to prove physical entrustment.

Having regard to the content of the undertaking, it could not be said that LBG undertook to pay "regardless" but rather to effect payment from the monies purportedly already placed by Coifax in its trust account upon the conditions set forth therein. The physical entrustment was the express basis on which the undertaking was issued when regard was had to the plain wording thereof. It made no sense for LBG to have personally given an unconditional, independent undertaking in the circumstances. The Court also found no authority to the effect that an attorney has a fiduciary duty towards members of the public at large. There was further, no authority to the effect that, in matters such as the present, the respondent bore the onus to disprove physical entrustment, as the applicant appeared to suggest. The general approach of our courts is that it is the claimant who bears the onus to show that the requirements of section 26(a) have been met.

It was therefore concluded that it was incumbent upon the applicant to show, on a balance of probabilities, that monies were in fact paid by Coifax to LGB prior to the furnishing of the undertaking relied upon. There was no cogent evidence that such physical entrustment ever in fact took place. On that ground, the applicant's claims had to fail.

The Court went on to consider the other defences raised, lest it be wrong in the above conclusion.

The remaining questions were whether the money was "entrusted" to Ganas by the applicant; and if it was, whether the money was entrusted to Ganas "in the course of his practice as an attorney". The only role that Ganas played in the transaction between the applicant and Coifax was to irrevocably undertake to pay over money to the applicant 45 days after presentation of invoices which had purportedly been entrusted to it for the credit of Coifax. The applicant itself did not regard the undertaking furnished as the first port of call for payment, but rather that it would only call upon Ganas to pay in the event of Coifax's default. There was no evidence that Ganas (or LBG) accepted the money and issued the irrevocable undertaking in the context of any transaction in which Ganas was involved in the course of his practice as an attorney. LBG merely served as a conduit for the money. The applicant might well have claims in contract or delict against Ganas and/or LBG based on the breach of the irrevocable undertaking, but it did not have a claim against the respondent in terms of section 26(a) of the Act. The application was dismissed with costs.

Ex parte Whitfield and related matters [2017] 2 All SA 841 (ECP)

Property – Title deed restrictions – Removal or variation of – Court's jurisdiction – Impact of Spatial Planning and Land Use Management Act 16 of 2013 – Jurisdiction of the court to authorised deletion, variation or suspension of a restrictive condition arises from the fact that interested parties are vested with a common law right to waive, vary or abandon their rights coupled with the fact of the exercise of such right by the parties concerned – Court's authority not altered by Spatial Planning and Land Use Management Act.

In seven similar applications, the applicants sought the removal of restrictive conditions of title incorporated in the title deeds of their respective properties. In deciding one of the matters, the court in question raised questions regarding the exercise of the court's jurisdiction in relation to the removal of a restrictive condition of title in the light of the provisions of the Spatial Planning and Land Use Management Act 16 of 2013 which came into effect on 1 July 2015. Each of the matters was then referred to a Full Court of the division in order that the issue of jurisdiction be determined.

The court began with a consideration of the ambit of its jurisdiction to remove or vary a restrictive condition of title as it had been articulated in a long line of cases prior to the commencement of the new legislation. It then considered whether the provisions of the Spatial Planning Act had in any manner altered either the ambit of the court's authority, or defined the circumstances in which it may be exercised.

Held – It has long been settled that the High Court has no inherent jurisdiction to remove, vary or suspend a restrictive condition of title to land. The rationale lies in the nature ofrestrictive condition which, in its essence, is a form of contractual stipulation in terms of which a transferor of land regulates the exercise of the transferee's *dominium* over the property. Such conditions are in the nature of servitudes. Given the nature of the conditions of title and the rights that are thereby conferred they cannot be removed, varied or suspended except with the consent of all of the parties whose rights and interests are regulated thereby.

The authorities referred to by the Court demonstrated that the jurisdiction of the court to authorise a deletion, variation or suspension of a restrictive condition arises from the fact that interested parties are vested with a common law right to waive, vary or abandon their rights coupled with the fact of the exercise of such right by the parties concerned. The Court does no more than enquire into and establish that such common law right has been properly exercised by the parties who are entitled to exercise it. And, once it is satisfied in this regard, it issued a declarator which authorises the Registrar of Deeds to effect an appropriate endorsement of the title deeds in accordance with the provisions of the Deeds Registries Act 47 of 1937. The question which arose in relation to the present matter was whether the provisions of the Spatial Planning Act had in any manner limited the court's authority to give effect to the exercise by interested parties of their common law right to waive, or amend, or vary their rights.

The Spatial Planning Act establishes a new administrative procedure for the removal of a restrictive condition, by placing the authority in the hands of the Municipal Planning Tribunal or designated municipal official as the case may be. It further seeks to

establish criteria for the exercise of such authority which are consonant with the criteria to be applied in relation to spatial planning and land use management decisions generally. The fact that the Spatial Planning Act does not specifically address the ambit of the court's authority, was seen to militate against a finding that the court's authority is in any manner altered. If the Legislature had intended to exclude a court from issuing a declaratory to the effect that the rights conferred by a registered condition of title have been extinguished, either by bilateral consent or by unilateral waiver, it would have done so in express terms.

The Court went on to address the meaning and effect of section 47 of the Spatial Planning Act which formed the statutory framework regulating the removal of restrictive conditions. The question was whether section 47(1) precludes a court from authorising the removal of a restrictive condition unless the Municipal Planning Tribunal has consented thereto. In other words, the question was whether the consent of a Municipal Planning Tribunal must be obtained before a court will grant a declarator authorising such removal. The Court did not believe section 47(1) as requiring the consent of a municipal planning tribunal in all circumstances where a court is moved to authorise the removal of a restrictive condition. Therefore a court's power to grant an order authorising the removal or amendment of a restrictive condition of title upon proof that all interested parties have consented thereto is not affected by the provisions of the Spatial Planning Act. In each instance it would be necessary to establish that all interested parties have indeed consented thereto.

Having established the above, the Court addressed each case in turn, making appropriate orders against the above principles.

Prince v Minister of Justice and Constitutional Development and others and related matters [2017] 2 All SA 864 (WCC)

Constitutional law – Right to privacy – Infringement of – Validity of laws which prohibit the use of cannabis and the possession, purchase of and cultivation exclusively for personal consumption – Sections 4(b) and 5(b) of the Drugs and Drug Trafficking Act 140 of 1992 and section 22A(10) of the Medicines and Related Substances Control Act 101 of 1965 – Whether limitation on right to privacy, as imposed by impugned provisions, was justifiable in terms of section 36 of the Constitution of the Republic of South Africa, 1996 – Limitation should be narrowly tailored to achieve its purpose, it should be carefully focused and it should not be overbroad – Impugned legislation did not employ the least restrictive means to deal with problem and was unconstitutional.

At the heart of the present case was the validity of laws which prohibit the use of cannabis and the possession, purchase of and cultivation exclusively for personal consumption. The applicants sought a declaration that the legislative prohibition against the use of cannabis and the possession, purchase and cultivation of cannabis for personal or communal consumption was invalid. The specific impugned statutory provisions were sections 4(b) and 5(b) of the Drugs and Drug Trafficking Act 140 of 1992, section 22A(10) of the Medicines and Related Substances Control Act 101 of 1965 and section 40(1)(h) of the Criminal Procedure Act 51 of 1977 insofar as the latter referred to cannabis. The latter provision empowered a peace officer without a warrant to arrest any person who is reasonably suspected of having committed an

offence under any law and governing the making, supply, possession or conveyance of cannabis.

The respondents raised the doctrine of *res judicata* contending that the issues which emerged in the present case had previously been disposed of by the Constitutional Court in *Prince v President of the Law Society of the Cape of Good Hope and others* 2002 (3) BCLR 231 (2002 (2) SA 794) (CC).

Held – It was clear that the Constitutional Court did not consider whether any prohibition as contained in sections 4 and 5 of the Drugs and Drug Trafficking Act infringed the right to privacy. The case turned instead on a limited question, namely an application for a limited exemption for religious reasons from the provisions of a criminal law of general application. Accordingly, the doctrine of *res judicata* did not apply, in that the Constitutional Court did not decide the dispute presently before this Court.

Essentially, the critical question raised by the applicants was whether government may legitimately dictate what people eat, drink or smoke in the confines of their own homes or in properly designated places. It had to be determined whether the infringement of the right to privacy caused by the impugned legislation could be justified in terms of section 36 of the Constitution.

Section 14 of the Constitution guarantees the right to privacy. The right to make intimate decisions and to have one's personal autonomy protected is central to an individual's identity and such individual is entitled to make decisions about these concerns without undue interference from the State. There is a connection between an individual's right to privacy and the right to dignity which is protected in terms of section 10 of the Constitution. There is also a link between privacy and the right to freedom.

Any right guaranteed in Chapter 2 of the Constitution may be limited bylaw of general application, to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account a series of factors which are set out in section 36(1) of the Constitution. As the present case turned on the determination of the factors set out in section 36(1), the burden of justification rested upon the State.

The Court had to consider whether the relevant behaviour warranted constitutional protection or, expressed differently, whether what the court was dealing with was a genuine and serious violation of a constitutional right protected in Chapter 2. Once established that the infringement of a right is of so serious a nature that it is deserving of constitutional protection, a rigorous and careful process must be undertaken with respect to the justification for the impairment. The Court confirmed that the right to privacy not only passed the threshold test but was clearly deserving of constitutional protection, absent a clear justification to the contrary.

The State was required to show that there was a substantial State interest which justified the limitation. Despite the onus of proof resting on the State, the Court found the evidence advanced by the State to be unimpressive. Assuming that the respondents were correct that the objectives of prevention of abuse,a reduction in crime prevention of negative effects on driving ability, and detrimental neurological effects on driving ability, detrimental neurological effects upon the cardiovascular and respiratory systems were met by the impugned legislation, the respondents still

needed to show why a less restrictive means to achieve the purpose was not possible. The limitation should be narrowly tailored to achieve its purpose, it should be carefully focused and it should not be overbroad. The evidence, read as a whole, could not be taken to justify the use of criminal law for the personal consumption of cannabis. The present prohibition contained in the impugned legislation did not employ the least restrictive means to deal with a social and health problem for which there were a number of less restrictive options supported by a significant body of expertise. The Court, therefore, held that less restrictive means should be employed to deal with the problem.

Explaining the ambit of judicial review, the Court held that it was not for this Court to prescribe alternatives to decriminalisation of the use of cannabis for personal use and consumption. It was for the Legislature and the executive to decide on a suitable option or alternatives.

Sections 4(b) and 5(b) of the Drugs and Drug Trafficking Act and section 22A(10) of the Medicines and Related Substances Control Act were declared inconsistent with the Constitution only to the extent that they prohibited the use of cannabis by an adult in private dwellings where the possession, purchase or cultivation of cannabis for personal consumption by an adult. The declaration of invalidity was suspended for aperiod of 24 months from the date of the judgment in order to allow Parliament to correct the defects.

Readam SA (Pty) Ltd v BSB International Link CC and others [2017] 2 All SA 902 (GJ)

Civil procedure – Court order – Order for demolition of unlawful building – Non-compliance with order – Application for committal for contempt of court – Whether it is open to a party to deliberately not comply with a court order and to choose its own course of action in overcoming the problems leading to the issuing of the order against it – Avoidance of directives in court order shown to be wilful and constituting contempt of court.

The applicant (“Readam”) owned immovable property adjacent to property owned by the first respondent (“BSB”). In March 2013, BSB obtained approval from the City of Johannesburg to erect a building on its property. The approval was in violation of the local town planning scheme. Readam’s attempts to stop the construction of the building were in vain, leading it to apply for an interdict. The interdict was initially refused but the matter proceeded to the Supreme Court of Appeal (“SCA”) where it was declared that the building was unlawful. BSB was directed to partially demolish the building to bring it within the scope of the town planning scheme – only after the City had reconsidered the building plans and granted approval. Readam corresponded extensively with BSB and the City to enforce compliance with the order. When those efforts failed, it launched the present application to commit the first and second respondents for contempt of court.

It was evident in the meantime that the second respondent, as the controlling mind behind BSB, had no intention of complying with the SCA order. Instead, the contraventions of the town planning scheme were sought to be overcome by the purchase of a neighbouring erf.

Held – The critical question was whether the deliberate course of conduct by BSB and the second respondent, to correct the problems in their own way constituted a wilful defiance of the SCA order. Broken down, that question led to the questions of whether the SCA order, properly interpreted, allowed for such a course of conduct, and second, whether as a matter of principle and public policy, a litigant can be allowed to unilaterally choose not to comply with a direct order of court, thereby effectively side-stepping the authority of the court and *de facto* achieving the objective of the unlawful enterprise by way of a *fait accompli.*

For contempt of court to be proved,a wilful and *mala fide* defiance must be established beyond a reasonable doubt. No onus of proof rests on a person accused of contempt, but a burden to adduce evidence from which an inference of absence of wilfulness or *mala fides* can be deduced does rest on such a person, once proof is adduced of the existence of an order, service on the person, and non-compliance.

Generally, where non-compliance calls for an explanation that points away from defiance,a party might plead impossibility of performance, or the existence of an impediment inhibiting performance. However, BSB did neither. Instead, it admitted taking no steps towards compliance and confessed to doing so deliberately. The question was whether the conscious decision to act thus, meant that the element of wilfulness was proven.

The excuse offered by BSB for non-compliance is the assertion that it was proper to deliberately not comply because it was envisaged that through the consolidation of the erven an a rezoning application, what had been unlawful would become lawful *ex post facto*. However, as pointed out by Readam, the steps envisaged by BSB and its owner could not be accepted as definitely viable solutions. Furthermore, the strategy pursued by them was inconsistent with any fair meaning to be attributed to the SCA order, which did not make demolition optional. The order could not be read to mean that it was open to BSB to take steps that excluded a demolition.

In an attempt to avoid the consequences of its non-compliance with the court order, BSB asked the Court to allow it to apply for a variation of the SCA order. The first issue was whether it was competent to seek a variation that wholly contradicted the purpose of the order given. The second issue related to the existence of any new facts or circumstances that were unknown when the judgment was given or could not have been capable of presentation to the court at a time relevant to the giving of the order. Neither of those questions could be answered in BSB's favour.

Consequently, the first and second respondents were declared to be in contempt of the SCA order, and were directed to comply with the order as set out in the present Court's order. The second respondent was committed to incarceration for a period of 30 days, which committal was suspended on condition the orders made in this judgment were complied with.

South African Students Congress (SASCO) and another v Walter Sisulu University and others [2017] 2 All SA 921 (ELC)

Civil procedure – Interim interdictory relief – Requirements – Applicant is required to establish a prima facie right;a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is; that the balance of convenience

favours the granting of an interim interdict; and that the applicant has no other satisfactory remedy.

Civil procedure – Judicial review – Court found that the second applicant's disqualification flowed from the provisions of the Student Representative Council constitution – In absence of decision being made as alleged by applicant to disqualify him, there could be no review.

The first applicant was a student organisation and the governing body of the student representative council (the "SRC") at the Buffalo City campus of the first respondent university. The second applicant was a member of the Buffalo City SRC of the university. In 2015, he was found guilty of misconduct in contravention of the university's policy. An order of expulsion was issued, but was suspended for a year on certain conditions. One of the consequences was that he was stripped of all leadership positions that accompany his leadership role at the university.

The elections for the 2016/2017 SRC committee were scheduled to take place on 29 September 2016. The second applicant's lawyers wrote to the university, demanding that the second applicant be allowed to participate in all university activities and be given his right to be in any leadership position including in the SRC. In spite of the university's refusal to depart from its position, the first applicant, having won the SRC elections, duly deployed the second applicant for the position of president of the SRC. The university refused to permit that, and the applicants lodged an urgent application to interdict the respondents from preventing the first applicant from deploying the second applicant as the elected SRC president. In terms of the applicants' motion, it was envisaged that the interdict should operate as an interim one, pending the finalisation of an application or the review and setting aside the decision of the respondents.

Held – In order to obtain an interim or interlocutory interdict, an applicant is required to establish a *prima facie* right; a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is; that the balance of convenience favours the granting of an interim interdict; and that the applicant has no other satisfactory remedy.

The Court agreed with the respondents that the very existence of the review application established another satisfactory remedy. So too would attempts to invoke the provisions of the SRC Constitution which, *inter alia*, provided for the university disciplinary committee to state in writing that the sentence following a guilty verdict at a misconduct inquiry did not affect the member's standing in the SRC. It could also not be said that the balance of convenience favoured the granting of interim relief as the steps which would then have to be taken would disturb the functioning and smooth running of the SRC. The interim application was dismissed with costs.

The relief which the applicants sought in the main application was for the court to review and set aside the decision of the respondents, which sought to prevent the first applicant in its endeavour to deploy the second applicant as the elected president of the SRC. The applicants submitted that the crisp issue for determination was whether the fourth respondent, in her capacity as a member of the Executive Committee of the university, was entitled in terms of the university's constitution, to disqualify the second applicant from being deployed as the SRC president. The respondents denied that the fourth respondent had disqualified the second applicant. The Court found that the second applicant's disqualification flowed from the provisions of the constitution, and

that the fourth respondent had made no decision to disqualify him. There was, therefore, no decision to review.

In any event, the Court pointed out that the non-joinder of the incumbent SRC leader, who clearly had a direct and substantial interest in the matter, was on its own dispositive of the application.

The review application was dismissed with costs.

Umfolozi Sugar Planters Ltd and others v Isimangaliso Wetland Park Authority and others [2017] 2 All SA 947 (KZD)

Civil procedure – Court order – Alleged non-compliance – Contempt of court application – Requirements – Order must have been duly served on, or brought to the notice of the alleged contemnor; there must have been non-compliance with the order; and the non-compliance must have been wilful or mala fide – In absence of wilfulness and mala fides, no contempt could be found to exist.

The iSimangaliso Wetland Park (the "Park") on the KwaZulu-Natal North Coast was proclaimed as a World Heritage site in 2000 under the World Heritage Convention Act 49 of 1999. The Park was an international tourist attraction.

Also integral to the history, heritage and ecological diversity of KwaZulu-Natal North Coast was sugar cane farming.

Both sugar cane farming and the Park provided constructive and laudable contributions to the economy and heritage of KwaZulu-Natal as well as South Africa as a whole.

The present application involved the respective interests of a group of sugar cane farmers on the uMfolozi floodplain and the Park and its management authority, in respect of the breaching of the uMfolozi river mouth which impacted on the sugar cane farming in the area in proximity to the Park and the ecology in the St Lucia lake system (one of the wetlands within the Park).

The first applicant had 48 shareholders, all of whom farmed sugar cane on some 9127 hectares of land adjacent to the uMfolozi river. Amongst the services the first applicant provided to its shareholders is the maintenance of communal drainage and flood protection infrastructure to reduce the effects of periodic flooding on the uMfolozi floodplain.

The first respondent ("iSimangaliso") was an organ of State, vested with authority over the Park. The second to fifth respondents were Ministers of relevant portfolios, but no relief was sought against them.

In a part of the main application, the applicants sought urgent interdictory relief, pending the outcome of the relief sought in Part B, to the effect that iSimangaliso open or allow the applicants to open the uMfolozi Estuary to drain down current flooding levels, and to prevent backflooding, of the farmland of the second and third applicants and other shareholders of the first applicant. In Part B, they sought declaratory relief premised on its allegation that iSimangaliso had failed to develop and/or implement the statutory policies, protocols, procedures, rules and plans including the Global Environmental Facility ("GEF") project, in terms of the regulatory framework under

which iSimangaliso held authority, specific to the management of the uMfolozi mouth which had a direct impact on the neighbouring farmland.

When Partof the application was served before the court,a consent order in respect of Partwas formulated, in terms of which it was agreed that iSimangaliso would breach the uMfolozi River Mouth to the sea to drain down backflooding on the applicants' farmland whenever the Cotcane level reaches 1,2m.s.l and would effect the breach within 24 hours of being notified of the level by the first applicant. despite the agreement by the parties on the interim measures pending finalisation of Part B, the applicants brought two urgent applications in December 2015 and March 2016, alleging that iSimangaliso was in contempt of the order granted as it had flagrantly disregarded the order it had consented to. iSimangaliso denied being in contempt as alleged by UCOSP and submitted that it had acted in accordance with what was required of it by the court order, in respect of the situation prevailing at the time.

Having heard argument on the main application and the two contempt applications, the court was satisfied that the interim relief had run its course and that the interests of the parties and of justice required an order be made without further delay. It therefore issued an order in terms of which the interim relief as set out in the order taken by consent was discharged, the main application was dismissed, and all costs were reserved.

In the present judgment, the court set out its reasons, the legal principles applied and the relevant statutes considered.

Held – The applicants levelled a wide range of shortcomings on the part of iSimangaliso in connection with the management of the uMfolozi mouth. The Court found that the applicants had failed to discharge the onus of showing that iSimangaliso had failed to develop and/or implement the statutory policies, protocols, procedures, rules and plans in terms of the regulatory framework under which iSimangaliso held authority, specific to the management of the uMfolozi mouth. The Court confirmed that iSimangaliso had acted *intra vires* in implementing its management policy which included the decision not to breach the uMfolozi river mouth artificially. Nevertheless, it was still necessary for the Court to consider whether the applicants had a right to the declaratory and interim relief sought, which would also impact on the issue of costs.

When declaratory relief is sought, it is incumbent upon the applicant to demonstrate that it haslegal interest in the relief and set out the facts to sustain the legal interest asserted. The relief sought in Part A was not supported by the facts, and was thus refused.

As stated above, Part A was for declaratory relief. In an application for an interim interdict, the applicant must prove on a balance of probabilities a *prima facie* right, although open to some doubt; a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted; the balance of convenience favouring the granting of an interim interdict; and that the applicant has no other satisfactory remedy. Although the application for interim relief was brought on an urgent basis, the Court was not satisfied that the urgency was justified. Moreover, the requirements for an interim interdict were not established by the applicants.

Turning to the contempt of court applications, the Court held that the parties were not *ad idem* as to the site and the implementation of the breach of the river mouth.

Given the ambiguity and that the contextual interpretation was irreconcilable with the interpretation contended for by either party, the Court concluded that the order was unenforceable.

The requirements for establishing contempt are that the order must exist; it must have been duly served on, or brought to the notice of the alleged contemnor; there must have been non-compliance with the order; and the non-compliance must have been wilful or *mala fide*. The Court was unable to draw an inference of wilfulness and *mala fides* or conclude that iSimangaliso was in contempt of the order.

The main application and the contempt applications were dismissed, and the applicants were ordered to pay iSimangaliso's costs.

END-FOR NOW