LEGAL NOTES VOL 6/2018[1]

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LONI v MEC FOR HEALTH, EASTERN CAPE (BHISHO) 2018 (3) SA 335 (CC)

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Medicine — Negligence — Claim — Prescription — Commencement — Discovery of harm — Deemed discovery — Objective assessment — Sufficiency of information at claimant's disposal — Whether claimant should have realised that treatment substandard — Prescription Act 68 of 1969, s 12(3).

In August 1999 the applicant went to the provincial hospital in Bhisho with a gunshot wound. He was operated on and, upon discharge, handed his medical file. Already the wound was visibly infected, oozing pus. When the fixtures were removed in 2001, a doctor informed him his leg was fine and just needed exercise. But the applicant experienced constant pain and later developed a limp. In 2008 he obtained medical insurance and was able to approach doctors in private practice. They told him he was disabled. In November 2011 an orthopaedic surgeon, Dr O, informed him that his condition was attributable to medical negligence. Dr O established that the applicant had developed chronic osteitis (inflammation of the bone) and advanced degeneration of the hip joint, which, he testified at the trial, could have been prevented by the application of standard medical care (see [10]). The applicant instituted an action for damages against the MEC in charge of the hospital. Summons was served on 20 June 2012. The action was met with a special plea of prescription. The applicant denied prescription on the ground that he only realised he had a claim when Dr O told him that hospital staff had been negligent.
Section 12(3) of the Prescription Act 68 of 1969 provides that a debt shall not be deemed 'due' — and prescription shall not start running — until the creditor has

[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!**

knowledge of the identity of the debtor and 'the facts from which the debt arose', and that such knowledge shall be assumed if it could have been acquired by the exercise of reasonable care. The issue was when the applicant acquired, or should have acquired, the knowledge necessary to set prescription in motion. In *Links v Department of Health, Northern Province* 2016 (4) SA 414 (CC) the Constitutional Court held that the 'facts from which the debts arose' were those that would cause a reasonable plaintiff to suspect that something had gone wrong and to seek further advice (see [23], [27]).

The High Court found that the applicant had acquired the knowledge needed to institute proceedings long before he met Dr O. It found that it was unreasonable for him to have waited seven years before instituting a claim and upheld the special plea. On appeal a full court agreed. It found that the applicant had reasonable grounds for suspecting fault and should have sought further advice. It therefore dismissed the appeal. An application for leave to appeal to the Supreme Court of Appeal having been denied, the applicant approached the Constitutional Court, arguing that both courts below had erred in finding that he had acted unreasonably.

The Chief Justice directed the parties to file written submissions, firstly, on whether this court's decision in *Links* would find application in this case and, secondly, on whether leave to appeal should be granted, and the remedy the court ought to grant.

Held

Objective assessment — appropriately applied by both courts below — established that a reasonable person in the position of the applicant would have realised that the treatment and care given at the hospital were substandard and were not in accordance with what he could have expected from medical personnel acting carefully, reasonably and professionally. By December 2000 it should have been apparent to the applicant, on a reasonable assessment, that his pain and suffering were a direct result of the sub-standard care which he had been given (see [33]). He should have suspected fault on the part of the hospital staff. His personal experience and the medical records at his disposal meant that all the necessary facts giving rise to his claim were present since his discharge in 2001. He should have acted then instead of waiting more than seven years to do so. The fact that he was not aware that he was disabled or had developed osteitis was irrelevant (see [34] – [35]). Sadly for the applicant, *Links* did not assist him (see [38]). The application for leave to appeal would accordingly fail.

BROMPTON COURT BODY CORPORATE SS119/2006 v KHUMALO 2018 (3) SA 347 (SCA)

Arbitration — Award — Whether creates new debt — Right to make award order of court — Whether 'debt' in Prescription Act — Arbitration Act 42 of 1965, s 31; Prescription Act 68 of 1969.

In an arbitration, the arbitrator awarded Brompton * a monetary sum, comprised, inter alia, of unpaid levies.

Brompton then applied to the High Court to make the award an order, and Ms Khumalo raised prescription. The court upheld the defence and dismissed the application.

On appeal to the Supreme Court of Appeal, *held*, that:

- An arbitration award does not create a new debt: it merely affirms the existing debt that was in dispute (see [5], [6]); and that

- The right to make an award an order of court is not a 'debt' in the Prescription Act. (See [5], [11]; the Arbitration Act 42 of 1965, s 31; and the Prescription Act 68 of 1969.)

The appeal upheld, on grounds of an error of law by the High Court and Khumalo's failure to prove prescription. The High Court's order set aside, and substituted with an order granting the application.

DRAKE FLEMMER & ORSMOND INC AND ANOTHERV GAJJAR 2018 (3) SA 353 (SCA)

Attorney — Negligence — Liability to client — Damages — Negligent under-settlement of personal injury claim — Time at which damages assessed — Claim settled without proper investigation — Damages to be assessed at notional date of claim — Court may shield plaintiff against corroding effect of inflation by using s 2A(5) of Prescribed Rate of Interest Act 55 of 1975.

Interest — A tempore morae — Mora interest on unliquidated debt — Court's discretion under s 2A(5) of Prescribed Rate of Interest Act 55 of 1975 — May be used to neutralise effect of inflation.

The principal issue in the present case was how to account for the effects of inflation and trial delay on the value of a claim. The plaintiff was badly served by two law firms in succession: the first firm, DFO, under-settled a Road Accident Fund (RAF) claim instituted by the plaintiff; and the second firm, LRI, allowed his resultant claim for damages against DFO to prescribe. * The only claim still in issue was the one against LRI, and the question was the time at which the plaintiff's damages had to be assessed.

The plaintiff, acting on DFO's (bad) advice, had accepted the RAF's offer of settlement on 21 December 1999, which meant that his right to recover was extinguished by prescription three years later, on 21 December 2002. To prove the amount he would have been awarded had his claim been properly conducted, he had it actuarially valued as at 1 December 2015. The court a quo, while accepting the valuation, reduced it by 43,69% to account for the plaintiff's seven-year delay — from September 2006 to September 2016 — in suing LRI (which meant an effective valuation date of September 2009). The court then subtracted from the reduced sum the actual settlement amount, and awarded the plaintiff the difference.

DFO and LRI appealed to the Supreme Court of Appeal, contending that the plaintiff's claim should have been valued at the date of settlement — 21 December 1999 — or at the date of a notional trial against the RAF, and that the claim should have been dismissed for this reason. The plaintiff cross-appealed against the reduction of 43,69%.

Section 2A of the Prescribed Rate of Interest Act 55 of 1975 allows the award of pre-judgment interest. It provides that interest at the prescribed rate runs on an unliquidated debt from the date on which payment was claimed unless the court in the interests of justice determines a different date or rate: see s 2A(5).

Held

The applicable law could be summarised as follows: Where an attorney's negligence resulted in the loss by a client of a claim which, but for such negligence, would have been contested, the court trying the claim against the attorney had to assess the amount the client would probably have recovered at the time of the notional trial

against the original debtor. If the original claim was for personal injuries, the evidence available and the law applicable at the notional trial date would determine the recoverable amount. The nominal sum the client would have recovered from the original debtor was the client's capital damages against the negligent attorney. If justice required that the client be compensated for the decrease in the buying power of money in the period between the notional trial date and the date of demand or summons against the attorney, the remedy was in s 2A(5). If s 2A(5) were invoked, the court would not necessarily apply the prescribed rate but might choose instead to adopt a rate which would neutralise the effect of inflation.

A similar approach applied where — as in the present case — a second attorney allowed the claim against the first attorney to prescribe. In such a case the client's claim for damages against the second attorney was determined by the amount the client would have obtained against the first attorney, and that amount in turn had to be ascertained in the way summarised in the preceding paragraph.

Since the complaint against DFO was that it under-settled the claim without proper investigation, the court a quo correctly rejected the date of settlement (21 December 1999) as the appropriate assessment date (see [41]). But the 43,69% reduction was unsound in law and unjustified by the facts (see [52]). There was no legal principle that entitled a court to reduce a claimant's damages because of delay in bringing a case to trial, and in any event the delay here was attributable to LRI, not the plaintiff (see [53] – [54]). The correct approach would have been for the plaintiff to prove the nominal value of his damages as at the notional trial date of the RAF claim, namely 1 December 2002. This would have been the value of the claim against DFO which LRI allowed to prescribe (see [68]). Section 2A(5) would then have been used to shield the plaintiff from the corroding effect of the delay by allowing interest to run from the day his claim against DFO prescribed (21 December 2002).

Since the court a quo's assessment of damages as at December 2015 was, however, correct as at that date, it could be used as a fair guide to the damages the plaintiff would have been awarded in December 2002 by adjusting for the time value of money. This meant that the damages claims — valued as at December 2015 — had to be reduced while the settlement — of December 1999 — had to be grossed up (see [69] – [71], [78]). Since the plaintiff succeeded in defending the full amount awarded by the court a quo prior to the unwarranted reduction of 43,69%, his cross-appeal had to succeed (see [82]). And since the court's 2015 assessment did not exceed the capital value of the plaintiff's claim as at the notional trial date, plus fair interest under s 2A(5), the appeal had to fail.

MINISTER OF HOME AFFAIRS AND ANOTHER v PUBLIC PROTECTOR 2018 (3) SA 380 (SCA)

Constitutional law — Chapter 9 institutions — Public Protector — Decisions of — Whether administrative action.

Mr Marimi, an employee of the Department of Home Affairs, was first secretary at the South African embassy in Cuba. There, he came to the attention of the Cuban government, which complained to the ambassador about his behaviour. This caused the Department to recall him; to warn it would institute disciplinary proceedings; and

to stop his cost of living allowance. Ultimately, Marimi complained to the Public Protector about the recall, the non-institution of the proceedings, and the withdrawal of the allowance. The Public Protector investigated, found maladministration in each instance, and recommended remedial action, including payment of the allowance. Dissatisfied, the Minister and Director-General sought review in the High Court. It dismissed the application, but granted leave to appeal to the Supreme Court of Appeal. It considered:

- Whether decisions of the Public Protector were administrative action. *Held*, that they were not, and so not subject to review under the Promotion of Administrative Justice Act 3 of 2000. But they could be reviewed under the principle of legality (see [37]).
- Whether the investigation could be reviewed, owing to the Public Protector's not receiving the complaint on oath. *Held*, that she had the discretion not to. (See [39] and [42], and s 6(1)*(b)* of the Public Protector Act 23 of 1994.)
- Whether it could be reviewed for absence of jurisdiction: the Minister asserted the Protector had no jurisdiction in labour matters. *Held*, that the Protector had such jurisdiction (see [44]).
- Whether the remedial action was based on an error of law or fact or was unreasonable. *Held*, that it was not. (See [48] and [51] – [54].)

Appeal dismissed.

MOBILE TELEPHONE NETWORKS (PTY) LTD AND ANOTHER v SPILHAUS PROPERTY HOLDINGS (PTY) LTD AND OTHERS 2018 (3) SA 396 (SCA)

Sectional title — Common property — Unit owner — Whether having standing to apply for removal of base station from common property — Sectional Titles Act 95 of 1986, s 41.

In this case, owners of units in a sectional title scheme obtained an order that a cellular communications base station be removed from the common property. (See [8] and [10].)

On appeal, the Supreme Court of Appeal held that the matter fell within s 41 of the Act, and that the owners ought to have followed the procedure in that section. That is, they ought to have given the body corporate notice to institute the proceedings; and failing it doing so, have applied to the High Court for the appointment of a curator ad litem to institute the proceedings on its behalf.

Appeal upheld; the order of the High Court set aside; and substituted with an order dismissing the owners' application.

OCEAN ECHO PROPERTIES 327 CC AND ANOTHER v OLD MUTUAL LIFE ASSURANCE COMPANY (SOUTH AFRICA) LTD 2018 (3) SA 405 (SCA)

Practice — Pleadings — Exception — If upheld, then ordinarily leave to be granted to amend pleading.

Old Mutual issued summons for rental; Ocean (the tenant) and Mr Giannaros (Ocean's surety) pleaded; and Old Mutual excepted to the plea. The High Court upheld the exception, struck out the plea, and granted judgment. Ocean and Giannaros appealed to the full court; it dismissed the appeal; and they appealed to the Supreme Court of Appeal. It upheld the appeal:

• When an exception to a pleading was upheld, ordinarily, a court ought to grant leave to amend the pleading. This, unless there was good reason why it was unamendable. Here, there was none. (See [8].)

• The plea disclosed a defence: a tacit agreement terminating the written lease sued on. The tacit agreement was evidenced, inter alia, by Ocean vacating the premises; and the rental sued for was from after that time. The full court's order set aside, and substituted with an order: setting aside the High Court's order, and replacing it with an order dismissing Old Mutual's exception.

ROAD ACCIDENT APPEAL TRIBUNAL AND OTHERS v GOUWS AND ANOTHER 2018 (3) SA 413 (SCA)

Motor vehicle accident — Compensation — Claim against Road Accident Fund — Road Accident Appeal Tribunal — Jurisdiction — To determine nexus between injuries sustained and driving of motor vehicle — Tribunal not having such power — Purpose of Tribunal being limited to whether 'serious injury' sustained for purposes of reg 3(1)(b*) — Road Accident Fund Act 56 of 1996, s 17(1A); Road Accident Fund Regulations, 2008, regs 3(1)*(b) and 3(11);

Administrative law — Statutory powers — Exercise — Legality — Implied powers — General principle providing that express powers needed for actions and decisions of administrators — But powers may be implied where ancillary to or exist either as necessary or reasonable consequence of express powers — Court would be more inclined to find implied power where express power was of broad, discretionary nature — Less inclined to do so where power narrow and closely circumscribed.

In terms of s 17(1) of the Road Accident Fund Act 56 of 1996, the obligation of the Road Accident Fund to compensate a third party for non-pecuniary loss was limited to compensation for a 'serious injury'. An assessment of whether an injury was serious had to be carried out by a medical practitioner (see s 17(1A) of the Act, read with reg 3(1)*(b)* of the Road Accident Fund Regulations, 2008). Where the third party contested the RAF's rejection of the medical practitioner's report, or where either the third party or the RAF contested the practitioner's assessment, the 'dispute' would be referred to the Road Accident Appeal Tribunal (the Tribunal) for consideration. The Tribunal's findings were final and binding (see reg 3(13)). The present matter in the SCA concerned the ambit of the powers of the Tribunal, namely: Did it fall within its statutory remit to finally determine the nexus between the injuries allegedly sustained, on which a claim for compensation was premised, and the driving of a motor vehicle? The court a quo had rejected the argument of the Tribunal that it had such powers, finding that its role was limited to determining whether a claimant had a 'serious injury'. In argument before the SCA, the Tribunal as appellant acknowledged that there was no express provision in the Act or the Regulations that conferred on it the power in question however, given the object of the legislation — to ensure that deserving and qualifying injuries were compensated — it was implicit that it had such a power. The SCA, in adjudicating the issue, considered the legislation in question against policy considerations and the legal principles concerned, namely (see [27]): Generally, express powers were needed for the action and decisions of administrators. Powers might, however, be implied where they were ancillary to or existed either as a necessary or reasonable consequence of the express powers. A court would be more inclined to find an implied power where the express power was of a broad, discretionary nature, and less inclined to do so where it was narrow and closely circumscribed.

Held, that the effect of what was suggested on behalf of the Tribunal was that the jurisdiction of the court was ousted with respect to the determination of causation between the driving of the motor vehicle and the third party's injuries. The only challenge to a decision by the Tribunal in relation to causation on the suggested basis would therefore be in the form of a review, which would not be time- or cost-efficient. (See [35].)
Held, further, that the powers granted to the Tribunal (in terms of reg 3(11)) were clearly directed at a determination of whether the third party's injuries were serious for the purposes of reg 3(1)*(b)*. (See [12] – [13].)
Held, further, that applicable legal principles did not support a finding that a power of the Tribunal to determine causation could be implied from the Act and the Regulations: Firstly, the powers given to the Tribunal in terms of the legislation were narrowly circumscribed. Secondly, the power contended for was not a necessary or reasonable consequence of the express powers of the Tribunal. On the contrary, if the contentions on behalf of the Tribunal were upheld, it would be oppressive in relation to claimants and would deny them access to courts on an issue traditionally reserved for adjudication by them. (See [36] – [37].)
Held, accordingly, that principle and policy compelled a conclusion that the Tribunal did not have the power to finally decide whether there was a link between the alleged injury and the driving of a motor vehicle. Appeal dismissed.

UNIVERSITY OF THE FREE STATE v AFRIFORUM AND ANOTHER 2018 (3) SA 428 (SCA)

Appeal — Execution — Application to execute pending appeal — Test — Requirements more onerous than those of common law — Higher threshold set, namely, in addition to presence of exceptional circumstances, proof on balance of probabilities that applicant will suffer irreparable harm if order not granted, and conversely that respondent will not, if the order granted — Extraordinary deviation requiring 'truly exceptional' circumstances — Whether exceptional circumstances present depending on facts of case — Prospects of success also a relevant consideration — Superior Courts Act 10 of 2013, s 18.

Section 18(1) of the Superior Courts Act 10 of 2013 provides that, 'subject to[ss (3)], and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal'. Subsection (3) provides that a court 'may only order otherwise [as contemplated above], if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders'.
Section 18 replaced Uniform Rule of Court 49(11), promulgated under the previous Supreme Court Act 59 of 1959. That rule — effectively adopting the common-law position — provided: 'Where an appeal has been noted or an application for leave to appeal against . . . an order of a court has been made, the operation and execution of the order in question shall be suspended, pending the decision of such appeal . . . , unless the court which gave such order, on the application of a party, otherwise directs.' Such court possessed a wide general discretion whether to grant leave to execute. That decision required a consideration of the prospects of success on

appeal; a weighing-up of the potentiality of irreparable harm or prejudice being sustained by the respective parties; and, where there was a potentiality of harm or prejudice to both of the parties, a weighing-up of the balance of hardship or convenience, as the case may be, was required.
Comparing the present position with the previous one, what is immediately discernible is that the legislature has proceeded from the well-established premise of the common law that the granting of relief of this nature constitutes an extraordinary deviation from the norm that, pending an appeal, a judgment and its attendant orders are suspended. (See [9].)
It is further apparent that the requirements introduced by ss 18(1) and (3) are more onerous than those of the common law. Apart from the requirement of 'exceptional circumstances' in s 18(1), s 18(3) requires the applicant 'in addition' to prove on a balance of probabilities that he or she 'will' suffer irreparable harm if the order is not made, and that the other party 'will not' suffer irreparable harm if the order is made. Compared to the position in common law, s 18(3) has hence introduced a higher threshold, namely proof on a balance of probabilities that the applicant will suffer irreparable harm if the order is not granted, and conversely that the respondent will not if the order is granted. (See [10].)
Whether or not 'exceptional circumstances' for the purposes of s 18(1) are present must necessarily depend on the peculiar facts of each case. In evaluating the circumstances, a court should bear in mind that what is sought is an extraordinary deviation from the norm, which, in turn, requires the existence of truly exceptional circumstances to justify the deviation. (See [13].)
Finally, prospects of success in the appeal remain a relevant consideration in deciding whether or not to grant the exceptional relief.

UYS NO AND ANOTHER v MSIZA AND OTHERS 2018 (3) SA 440 (SCA)

Land — Land reform — Award of land to labour tenant — Compensation of owner — Calculation — Land subject to labour tenant claim negatively impacting developmental potential — Whether Pointe Gourde *principle requiring one to ignore such impediment in calculating compensation — circumstances where owner aware of impediment at time of purchasing,* Pointe Gourde principle not of application in calculating compensation.

Land — Land reform — Proceedings in Land Claims Court — Costs — Exceptional circumstances justifying costs order — Extreme dilatory conduct on part of state in negotiating compensation due to owner pursuant to successful labour tenant claim — Despite having arrived at appropriate amount for compensation, state failing to tender such amount — Conduct of state necessitating parties to approach court.

Mr Msiza was awarded a portion of land owned by the Dee Cee Trust (the Trust) pursuant to his successful claim as a labour tenant under s 23(1) of the Land Reform (Labour Tenants) Act 3 of 1996 (the Act). Subsequent negotiations on the amount of compensation to be paid to the Trust failed. Mr Msiza approached the Land Claims Court (the LCC) for a determination in terms of s 23(2) of the Act. The LCC's decision as to the amount payable by the Director-General for the Department of Rural Development and Land Reform, and the Minister for the Department, formed the subject of this appeal brought by the Trust (represented by its trustees).

In terms of s 23 of the Act, read with s 25(3) of the Constitution, owners of land are entitled to 'just and equitable [compensation], reflecting an equitable balance between the public interest and the interests of those affected', having regard to relevant circumstances, which include the market value of the property, the current use of the property, the history of the property, and the purpose of the expropriation. In arriving at an appropriate amount as compensation, the approach the LCC adopted (in line with the two-stage procedure advocated in case law) was to use market value as a starting point, and to then adjust it upwards or downwards to strike an equitable balance between public and private interests. The parties disagreed how the market value was to be calculated.
The state argued that it should be determined on the basis of the property's present use — agricultural — giving a value of R1,8 million. The appellants argued that market value had rather to be determined based on the property's future residential developmental potential, giving a value of R4,36 million. The state, in support of its stance, relied on its expert, who found agricultural use to be the 'highest and best use' for the subject property, given, inter alia, the property's historical and current use, its characteristics and its lawful use, as well as the fact that the property was subject to a successful labour tenant land claim by Mr Msiza.

The LCC decided in favour of the state, placing the market value at 1,8 million based on present agricultural usage. The LCC then adjusted this value downwards to R1,5 million for the following reasons: there was a 'disproportionate chasm' between the amount paid by the Trust and the market value it sought to claim; the Trust had made no significant investment in the land; the use of the land had not changed since it was acquired; when the land was acquired there was a land claim and the Msiza family were residing on the land; the land had been subsequently awarded to the Msiza family in 2004; the fiscus should not be saddled with extravagant claims for financial compensation when the object of expropriation was land reform; and the Msiza family had lived and worked on the farm since 1936 as labour tenants and had to receive compensation.

The appellants on appeal submitted that the LCC had misdirected itself, firstly in calculating market value based on the present agricultural use of the property instead of its developmental potential, and secondly in then adjusting downwards the figure it arrived at. They argued that application of the *Pointe Gourde*principle required the impediment to the residential development constituted by the Msiza claim to be ignored in determining value. The true market value of the land would then be R4,36 million.
Held, that one could not fault the conclusion of the state's expert in relation to the compensation to be paid (see [16]).
Held, that, in the present matter, the *Pointe Gourde* principle did not require that the existence of the Msiza claim be ignored in determining market value. At the time the Trust purchased the subject property, it was aware that Mr Msiza had already lodged a claim under the Act, and of the presence of him and his family on the land. In other words, there was a known impediment to the property's development potential when it was purchased which had a direct bearing on the price that the Trust as buyer would have been willing to pay. In such circumstances the *Pointe Gourde* principle had no application in determining the compensation due to the Trust for the subsequent acquisition of its property. (See [19] – [21].) On this basis the market

value of the land was therefore R1,8 million and not R4,36 million, which would have been the market value with its developmental potential. (See [21].)
Held, however, there were no facts justifying the deduction of the amount of R300 000; the LCC had arbitrarily decided on this figure with no rational basis. (See [27].) There was no 'disproportionate chasm' between the price paid by the Trust when it bought the land and the market value at the time of the determination. The difference simply reflected the increase in value over the period of Trust ownership. (See [24].) Further, there was no justification for labelling the Trust's claim as extravagant, and there existed no evidence that the fiscus was unable to pay R1,8 million for the land. (See [26].) As to the other reasons provided by the LCC for making a further deduction, they had all in fact already been taken into account in determining market value. (See [25].) Accordingly, a just and equitable determination for the land was R1,8 million. (See [28].)

Held, that exceptional circumstances existed justifying a departure from the general approach of the LCC to decline to make an order as to costs. In negotiating suitable compensation, the Minister had exhibited extreme dilatory conduct, such that Mr Msiza had been obliged to bring the present proceedings to move the matter forward. Further, despite having accepted during negotiations that R1,8 million was an appropriate determination, it had not tendered such amount, thereby compelling the Trust to go to trial. An appropriate order would be for the Minister to pay 70% of the Trust's costs, and all of Mr Msiza's costs.

BODY CORPORATE SANTA FE SECTIONAL TITLE SCHEME NO 61/1994 v BASSONIA FOUR ZERO SEVEN CC 2018 (3) SA 451 (GJ)

Winding-up — Application — Of close corporation on basis of inability to pay its debts — Effect of repeal of s 68(c) *of Close Corporations Act which provided inability to pay debts as basis for winding-up — Close Corporations Act 69 of 1984, s 69; Companies Act 71 of 2008, ss 344*(f) and 345.

The repeal of s 68*(c)* of the Close Corporations Act 69 of 1984, which provided for the winding-up by order of court of a close corporation unable to pay its debt, does not mean that this ground is no longer available.
A purposive interpretation of the deliberate retention of s 69 (which describes the circumstances under which a corporation is deemed unable to pay its debts) must be understood as a reference to s 344*(f)* of the Companies Act 1973, ie that one of the circumstances in which a company (also a close corporation) may be wound up was if it were deemed unable to pay its debts as contemplated in s 345. Therefore, when an applicant for winding-up of a close corporation has proven that a debtor is unable to pay its debts within the meaning of s 69, s 344*(f)* of the Companies Act will be applicable.

CAPE TOWN CITY AND ANOTHER v DA CRUZ AND ANOTHER 2018 (3) SA 462 (WCC)

Local authority — Buildings — Building plans — Approval — Presence of statutory disqualifying factors — Test reaffirmed and explained — National Building Regulations and Building Standards Act 103 of 1977, s 7(1)(b)(ii).

Local authority — Buildings — Building plans — Approval — Need to strike balance between rights of owners of subject property for which building plan approval sought, and rights of owners of neighbouring properties — Contextual assessment in terms of s 7(1) of Building Act requiring decision-maker to evaluate likely effect of proposed building on neighbouring properties, on their present and reasonably foreseeable future development — National Building Regulations and Building Standards Act 103 of 1977, s 7(1)(b)(ii).

Local authority — Buildings — Building plans — Approval — Obligation of local authority to have regard to recommendations of building control officer — National Building Regulations and Building Standards Act 103 of 1977, s 7(1).

This was an appeal before the full bench of the Western Cape High Court against the decision of a single judge of the same division to set aside on review the City of Cape Town's approval of buildings plans submitted by the Simcha Trust (the Trust), in respect of planned renovations to a building (the 'Oracle') situated on an erf it owned in central Cape Town. The applicants for review (the respondents on appeal) were the body corporate of, as well as an owner of one of the residential units in, the Four Seasons building, which was located on an immediately adjoining erf. At the time of the submission of the original plans, both buildings extended right up to the common boundary dividing them, as was permitted in terms of the applicable zoning regulations. The Oracle stood four storeys high, and Four Seasons 17 storeys. Four Seasons' eighth and higher floors, which rose above the height of the Oracle, comprised residential units. They faced the common boundary, but were set back from it. The eighth-storey apartments were further provided with balconies. The building plans proposed the construction of an additional four storeys, which, if implemented, would result in the top three storeys of the Oracle building eventually abutting, as a blank and solid wall, against the apartments on the eighth to tenth storeys of the Four Seasons building, along the common boundary. It was the applicants' view that such a construction would trigger the disqualifying factors set out in s 7(1)*(b)*(ii) of the National Building Regulations and Building Standards Act 103 of 1997, ie it would be 'unsightly or objectionable', it would 'disfigure' the surrounding areas, and it would 'derogate from the value of adjoining or neighbouring properties'; accordingly, the plans had to be rejected by the City. However, the City approved the building plans on the recommendation of the building control officer. The applicants successfully applied to the High Court to have them set aside. The Trust resubmitted plans to the City, which approved them. In the court a quo, in terms of the Promotion of Administrative Justice Act 3 of 2000, the applicants sought an order to once again set the plans aside.

The High Court (a quo) held the following. In terms of s 7(1) of the Building Act, properly interpreted, when considering whether to approve building plans, a local authority had to consider, first, whether the proposed building complied with relevant planning, building and zoning legislation, and, next, whether the disqualifying factors set out in s 7(1)*(b)*(ii) were triggered. The second part of the test — the contextual assessment — required the City to take appropriately into account the effect of the development on the existing, and foreseeable future development of, neighbouring properties. The City had not, however, expressly concerned itself with the obligatory contextual assessment, wrongly concluding that there could be no question of the disqualifying factors being triggered where, as here, the planned structure would be fully within the parameters of the applicable zoning scheme. The City had to ask itself whether the reasonable and informed notional purchaser of an

apartment in the Four Seasons complex would have contemplated that the local authority would approve plans like the ones under consideration; it did not do so. The above failings rendered the City's decision to approve the plans reviewable on the basis of s 6(2)*(d)* (materially influenced by an error of law) and s 6(2)*(e)*(iii) (relevant consideration not considered) of PAJA.
In the present matter the full bench dismissed the Trust's appeal, holding that the approval by the City of the Trust's building plans was indeed reviewable, principally on the basis of a misunderstanding of applicable law on the part of both the building control officer and the City.
Held, that the definitive interpretation to be afforded to s 7(1) of the Building Act was that set out in *Walele v City of Cape Town and Others* 2008 (6) SA 129 (CC) (2008 (11) BCLR 1067; [2008] ZACC 11). On such interpretation, the relevant decision-maker who had to consider an application for the approval of building plans had a *positive duty* to satisfy him- or herself not only that the plans were legally compliant, but also that the building which was to be erected in terms thereof would *not* (actually or probably) disfigure the area or be unsightly or objectionable or derogate from the value of neighbouring properties. According to such an interpretation, in the case of doubt an application for the approval of building plans would therefore have to *fail*. (See [25] – [26].) However, the building control officer and the City, as was apparent from their report and memo, respectively, understood their duty to be one of assessing whether or not there were sufficient grounds for them to conclude, on a balance of probabilities, that any of the potentially disqualifying factors *would* eventuate (see [32] and [58]). In doing so, they applied the test as set out in *True Motives SA (Pty) Ltd v Mahdi and Another* 2009 (4) SA 153 (SCA) (2009 (7) BCLR 712; [2009] 2 All SA 548; [2009] ZASCA 4), later confirmed by the Constitutional Court to be wrong (see [27]). The proper approach which should have been adopted by them was to determine whether they were positively satisfied, on a balance of probabilities, that any of such factors *would not* eventuate.
Held, that the decision-making of both the building control officer and the City was predicated on the invalid assumption that, simply because the Trust was entitled to build up to the common boundary, the owners of neighbouring properties were obliged to tolerate whatever the Trust wanted to build in fulfilment of this right. Their fundamental premise — that an owner's development rights in terms of zoning, building and planning legislation reigned absolute and supreme over the rights of adjoining affected owners, irrespective of the effect of what was to be built — was not supported in common law and in terms of s 7(1)*(b)* jurisprudence, in terms of which local authorities were directed to refuse an application for the approval of building plans where it would result in an unsightly, objectionable or dangerous structure, or one which impermissibly diminished the market value of an adjoining property.
Held, that both the building control officer and the City failed to perform the statutorily prescribed contextual assessment in terms of s 7(1) of the building plans. Such an assessment required the relevant decision-makers to have regard to what existed, and what might reasonably be anticipated was likely to be put up in the future, on neighbouring properties. They could not simply look at the building plans, on a one-sided basis, from the point of view of the development rights of the applicant submitting the plans. (This approach was demanded in the light of the constitutional injunction that local authorities had to strike a balance between the rights of the

owner of the subject property for which building plan approval was sought, and the rights of the owners of neighbouring properties.)

Held, that the City, in deciding whether to approve the building plans, did not have regard to the views and recommendations of the building control officer with respect to whether the disqualifying factors set out in s 7(1)*(b)*(ii) had been triggered; it only considered the building control officer's views in respect of the issue of compliance in terms of s 7(1)*(a)*. The City was, however, obliged to have regard to all the recommendations of the building control officer in arriving at its decision, and not just some of them. (See [56] – [57] and [72].)
Accordingly, the review was rightly granted (see [73]) on the basis of a material error of law and a failure to take into account relevant considerations, but could also have been granted on the grounds that the decision was not rationally connected to the information which was before the decision-makers (in terms of s 6(2)*(f)*(ii)*(cc)* of PAJA). Appeal dismissed with costs.

COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE v SHORT AND ANOTHER 2018 (3) SA 492 (WCC)

Revenue — Transfer duty — Amount of — Acquisition of bare dominium by one purchaser and right of habitatio by another, under same agreement — Whether constituting single transaction for transfer duty purposes — Transfer Duty Act 40 of 1949, s 2(1).

Section 2(1) of the Transfer Duty Act 40 of 1949 imposes transfer duty 'on the value of property . . . acquired by way of a transaction . . .'. Here the seller sold the bare dominium in a sectional title unit to the first respondent, and a right of habitatio in respect thereof to the second respondent — in the same deed of sale and for one global amount. The Commissioner assessed it as a single transaction for transfer duty purposes. The respondents, who contended that two separate transactions were involved, paid transfer duty under protest and thereafter successfully appealed to the tax court. This case concerned the Commissioner's appeal to the High Court against the tax court's decision.
Held
The tax court erred in being distracted by the fact that each of the purchasers stood to acquire separate and distinctive rights in the property under the agreement. The fact that separately registrable rights were to be acquired by the purchasers was not determinative but begged the question whether the acquisitions were in terms of a single integral (or unitary) transaction or two transactions. In order for the respondents' contention to prevail, the reservation of a right of habitatio to the second respondent would have had to be an acquisition that was independent of, and not integral to, the transfer of title of the property from the seller to the first respondent. For transfer duty purposes, an objective determination had to be made whether one or two transactions were in fact involved, and that turned on the proper construction of the parties' contract. (See [11], [12] and [19].)
There were a number of salient pointers in the deed of sale to the contracting parties having contemplated a single indivisible transaction, such as the respondents' acceptance of joint and several liability for the whole purchase price (see [17]). The ordinary import of the language of the contract, when it is read as a whole, and any

commercial sense as between themselves and the seller, went against the meaning contended for by the respondents (see [18]). The appeal had to succeed.

LR v PR 2018 (3) SA 507 (WCC)

Marriage — Divorce — Proprietary rights — 'Clean break' principle, as generally applied to spousal maintenance, should be extended also to proprietary consequences of divorce.

The 'clean break' principle — premised on the idea that divorced spouses should become economically independent of each other as soon as possible — should be extended from the realm of spousal maintenance to the proprietary consequences of divorce (see [14]).
See par [20]: “I am alive to the fact that applicant has waited for a considerable period in order for respondent to comply with the terms of the final divorce order and that she is desirous to bring this matter to a close. On a conspectus of the evidence, it is my view that respondent should be given a reasonable amount of time in order to take transfer of the property.While applicant is desirous for this to happen within 30 days and respondent has requested a period of 90 days, I am of the view that a period of 60 days should be sufficient time for the transfer of the property to be finalised. Should respondent require more time, he will be at liberty to approach the court for a further indulgence.”

MINISTER OF FINANCE v OAKBAY INVESTMENTS (PTY) LTD AND OTHERS 2018 (3) SA 515 (GP)

Banking — Relationship between banker and client — Minister of Finance's power or obligation to intervene in banker-client relationship — Client's account closed by bank — Minister not empowered to intervene in private bank-client dispute — Effect of account closure on client, bank or national economy irrelevant — Declaratory relief unnecessary.

Four banks involved in this matter as respondents terminated their relationships with companies in the so-called Oakbay group (the group) and closed their accounts. The group did not challenge the legality of the closures but approached the Minister of Finance, Mr Gordhan, for assistance. The minister replied that there was no legal basis for him to intervene in the dispute between the banks and the group. He then launched an application in which he sought declaratory relief to the effect that he was neither empowered nor obliged to intervene in the relationship between the group and their banks (one of the banks sought similar, though broader, relief in a parallel application). The minister relied on s 21(1)*(c)* of the Superior Courts Act 10 of 2013, which provides that a High Court may, 'in its discretion, enquire into and determine any existing, future, or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination'. In a second application various members of the group, relying on s 40(1)*(e)* of the Financial Intelligence Centre Act 38 of 2001, sought to compel the director of the Financial Intelligence Centre (FIC) to disclose information regarding certain reports made by the banks to the FIC.
The court also had to deal with various interlocutory matters, one of which related to the position of the interested party, President Zuma. Standard Bank anticipated that

the President might be interested in the proceedings and brought the application to his attention, but did not join him as a party. The state attorney objected to the irregular procedure followed by Standard Bank to bring the President before the court, briefed counsel to appear on behalf of the President, and sought the striking-off of Standard Bank's application due to non-joinder of the President. In addition, the fourteenth respondent (Sahara Computers) issued a rule 7 notice calling on the minister to satisfy the court that the state attorney was properly authorised to act for him in the application for declaratory relief. There were also applications to strike out material from Mr Gordhan's founding and replying affidavits and from the group's answering affidavits.

Held

As to the interlocutory matters: There was no legal basis for the court to hear the President's counsel in the circumstances outlined above (see [21]). Since the minister's application was brought in his official capacity as minister, the state attorney was acting within the scope of his duties, and any suggestion that he acted mero motu was misconceived (see [27]). Sahara Computers' notice flew in the face of rule 7(5) and was clearly vexatious (see [27], [30]). All applications to strike out would be granted (see [41]). This led to the withdrawal of the second application.

As to the first application: The exercise of the court's discretion under s 21(1)*(c)* (quoted above) involved a two-legged enquiry: the court first had to establish that the applicant had an interest in an existing, future or contingent right or obligation, and if it did, then whether the case was a proper one for the exercise of its discretion (see [52]). In casu the first leg related to whether the minister was obliged by law to intervene in the dispute between the Oakbay group and the banks, the answer to which resided in the principle of legality (see [53] – [54]). There was no statute, including the Constitution, that empowered a member of the national executive like the minister to intervene in a private bank-client dispute (see [55]). As to the second leg of the enquiry, factors such as lack of controversy or utility militated against the granting of declaratory relief (see [60] – [64], [71]). The dispute between the Oakbay group and the banks was private, regardless of the implications it held for the Oakbay group, the banks or the South African economy (see [69]). The absence of uncertainty regarding the legal question to be answered by way of declaratory relief did not detract from the fact that declaratory relief was a discretionary remedy: the court was not obliged to grant it, particularly because there was no uncertainty on the relevant legal question (see [77]). It was not appropriate for the minister to draw the judiciary into the exercise of executive functions as evinced by this application (see [82]). This application was clearly unnecessary in the circumstances of this case (see [83]). In the premises, it would be dismissed (see [84]).

As to the parallel application: It would also be dismissed: its notice of motion was defective for failure to comply with rules 6(2) and (5) (see [87]). It was unclear who the respondents were and, worse, the President and the members of the national executive, who were necessary parties, were not joined (see [89] – [94]). That was fatal to the application (see [95] – 96]).

NONDABULA v COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE AND ANOTHER 2018 (3) SA 541 (ECM)

Revenue — Income tax — Assessments — Additional assessments — Notice of assessment — Required information not stated — Non-compliance unlawful and unconstitutional — Constitution, s 195; Tax Administration Act 28 of 2011, s 96(2)(a).

The respondent (Sars), in failing to provide the taxpayer with all the information it was required to provide in terms s 96 of the Tax Administration Act 28 of 2011, acted unlawfully and unconstitutionally.
Unlawfully, because the principle of legality required Sars to exercise its public power within the four corners of the empowering statutory provisions of the Tax Administration Act 28 of 2011 (see [11] – [12]). And unconstitutionally, because Sars failed to observe the obligations s 195 of the Constitution placed on it as an organ of state exercising a public power — to promote constitutional values, more specifically accountability and transparency (see [24] – [27].

ROAD ACCIDENT FUND v CHIN 2018 (3) SA 547 (WCC)

Motor vehicle accident — Compensation — Claim against Road Accident Fund — Medical examination of claimant — Objection to — Whether reasonable, material and substantial — Alleged bias of doctor to be objectively established — Measures to prevent misconduct by doctor, such as audio recording, may be put in place — Uniform Rules of Court, rule 36(2).
Motor vehicle accident — Compensation — Claim against Road Accident Fund — Medical examination by RAF doctor — Objection to — Practice of attorneys raising such objections on behalf of clients decried — Indication that plaintiff supportive of such objection required — Uniform Rules of Court, rule 36(2).

In this interlocutory application the defendant (the RAF) sought, as applicant, an order directing the plaintiff (Ms Chin) to submit to a medical examination by Dr M. The RAF had filed a notice to this effect under Uniform Rule 36(2). It informed her that she could have her own doctor and lawyer present at the examination. In response Ms Chin's attorneys filed a notice under rule 36(3) in which they objected to the examination on the ground that Dr M was biased against plaintiffs, lacked empathy for them, and had prejudged Ms Chin's condition. In support of these contentions Ms Chin's counsel sought to introduce two affidavits deposed to by other claimants against the RAF who had been examined by Dr M pursuant to rule 36 notices. Counsel for the RAF argued that this, being similar fact evidence, was inadmissible. He also argued that Ms Chin could only object to examination by Dr M on two grounds, namely that he was not suitably qualified or that Ms Chin had had a prior unpleasant experience with him.
Held
There was no closed list of objections that might be raised against a medical examination under rule 36 (see [16] – [18]. But objections had to be reasonable, material and substantial (see [18]). This would be determined by having regard to the facts or averments on which they were based (see [24]).
The present objections were, in the first place, not reasonable: the two affidavits sought to be introduced by Ms Chin's counsel were highly prejudicial to Dr M and

insufficiently relevant to be admitted as similar fact evidence (see [36] – [37]). As to their materiality and substantiality, this had to be measured against the objections raised (see [38]). While it was possible that bias might serve to exclude a doctor from examining the plaintiff under rule 36(2), a strong enough case for this was not made in the present matter (see [40]). Given that the prerogative to elect one's own expert was part of the right to fair trial, an apprehension of bias would have to be objectively established (see [41]). Given that Ms Chin would at the trial be able to interrogate Dr M's opinion and report, she failed to establish prejudice (see [42]). The trial court could also reject Dr M's evidence if it were found to be biased or inaccurate (see [43]). All in all, Ms Chin failed to show a reasonable apprehension of bias (see [45] – [46]).

As to Ms Chin's fears regarding Dr M's conduct during the examination, their relationship, being fleeting and conducted in an adversarial context, could not be equated with the ordinary doctor – patient relationship. While unprofessional conduct would not be tolerated, an examinee could not expect the same bedside manner and empathy as in an ordinary doctor-patient relationship (see [48]).
The presence, at the examination, of Ms Chin's own doctor and lawyer, and the making of an audio recording of it, would address all her grounds of objection (see [54]). Concerns regarding Dr M's credibility as witness would be for the trial court to assess (see [58]).

The practice of attorneys raising this sort of objection on behalf of their clients had to be discouraged: at the very least there should be some indication, for example, by confirmatory affidavit, that the plaintiff was in agreement with and supported the objections raised on his or her behalf (see [59]).

Ms Chin would be ordered to submit to a medical examination by Dr M at his rooms. In addition to having her own medical practitioner and legal representative present, she would also be allowed to audially record the examination.

TRUWORTHS LTD AND OTHERS v MINISTER OF TRADE AND INDUSTRY AND ANOTHER 2018 (3) SA 558 (WCC)

Constitutional law — Legislation — Validity — National Credit Act 34 of 2005, reg 23A(4) of National Credit Regulations, 2006 — Affordability assessment — Self-employed and informally employed consumers — Required to provide three months' bank statements or latest financial statements — Self- employed and informally employed consumers without bank accounts likely poor, and not in position to provide financial statements — Effectively excluded from credit — Unfair discrimination against — Subregulation reviewed and set aside.

Credit agreement — Consumer credit agreement — Reckless credit — Affordability assessment — Self-employed and informally employed consumers — Regulation 23A(4) requiring them to provide three months' bank statements or latest financial statements — Self-employed and informally employed consumers without bank accounts likely poor, and not in position to provide financial statements — Effectively excluded from credit — Unfair discrimination against — Subregulation reviewed and set aside.

In terms of s 81 of the National Credit Act 34 of 2005 (the NCA), a credit provider may not enter into a credit agreement without first assessing the proposed consumer's existing financial means, prospects and obligations. Regulation 23A (recently introduced by GN R202 of 13 March 2015) of the National Credit Regulations, 2006, sets out the criteria for this 'affordability assessment' a credit provider must conduct. In particular, subreg (4) (see full regulation quoted at [36]) requires a credit provider to validate the consumer's gross income by obtaining various formal documents from them, and in this regard distinguishes between three categories of consumer: *(a)* those that receive a salary from an employer; *(b)* those that do not receive a salary as contemplated in *(a)*; and *(c) those that are self-employed, informally employed or employed in a way through which they do not receive a payslip or proof of income as contemplated in* (a) *or*(b). In respect of this third category of persons, the regulation requires the provision of *three months' bank statements or the latest financial statements*. The High Court * determined that, in so requiring, reg 23A(4) was reviewable and had to be set aside.

Held, that reg 23A(4) unfairly discriminated (in breach of s 14(2) and (3) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000) against those persons contemplated in category *(c)* — the informally and self-employed — who were not in possession of a bank account. Such persons were most likely poor and less privileged, and would not be able to provide financial statements to a credit provider. They were therefore effectively excluded from obtaining credit. (See [45] – [48] and [53].)

Held, further, that reg 23A(4) frustrated the NCA's aim of promoting the development of a credit market that was accessible to all South Africans, and in particular to those who had historically been unable to access credit under sustainable market conditions. As such, it was neither reasonable nor rationally connected to the purpose which it was intended to serve. (See [52].)

Held, further, that the fact that the wording of reg 23A(4) was taken virtually verbatim from one of the many comments received from the public prior to the regulation's promulgation, suggested that it was arbitrarily inserted into the National Credit Regulations, 2006. (See [54].)

Held, accordingly, that reg 23A(4) fell to be set aside on the basis that it failed the test of legality.

TS v TS 2018 (3) SA 572 (GJ)

Divorce — Maintenance — Pendente lite — Inadequate financial disclosure in rule 43 proceedings — Court's power to case-manage and order production of information and documents — Uniform Rules of Court, rule 43(5).

The parties were in divorce proceedings in which rule 35 discovery had occurred. Here, the wife brought an application under rule 43. She sought, in respect of the children: an order that they reside with her; contributions to their accommodation and transport costs; and maintenance. (See [48] and [68] – [70].)

For herself, she sought maintenance, and a contribution to her legal costs. Both she, and her husband, alleged financial non-disclosure on the other's part, and that the rule 35 discovery had been inadequate. This where both her, and in particular her husband's financial affairs, were of some complexity. (See [77] and [90].)
The court considered inter alia:
- The impact of insufficient information disclosure in rule 43 proceedings (see [12], [15], [18] – [19], [22], [25]);
- possible solutions (see [34], [37] – [38], [42] – [44] (England), [46] (Australia)); and
- the bearing of the Children's Act 38 of 2005 on the issue (see [60] – [62], [65] – [66]).

Held, that rule 43(5) gave a court the power to manage and order disclosure of information and documents. (See [37], [66] and [89].)
Here, given unresolved questions as to the parties' incomes and assets, an order of such disclosure was justified. (See [87] – [88].)
Ordered, accordingly, that each party disclose in an affidavit specified financial information; and provide specified financial documents (see [90]).

MINISTER OF ENVIRONMENTAL AFFAIRS v RECYCLING AND ECONOMIC DEVELOPMENT INITIATIVE OF SOUTH AFRICA NPC 2018 (3) SA 604 (WCC)

Company — Winding-up — Application — Locus standi — Extended standing to apply for remedies under s 157 of Companies Act, 2008 — Whether extending standing to applicant for liquidation of solvent company not otherwise having standing — Companies Act 71 of 2008, ss 88(1) and 157(1)(d).

Under s 81 of the Companies Act 71 of 2008 a court may order the winding-up of a solvent company on application of a number of specified applicants: the company, its directors, its shareholders, its creditors and its business rescue practitioner if the company is in business rescue. Section 157, however, provides for 'extended standing to apply for remedies', and more specifically s 157(1)*(d)*, that '(w)hen in terms of this Act, an application can be made to . . . a court . . . the right to make the application . . . may be exercised by a person acting in the public interest, with leave of the court'.

Here the Minister of Environmental Affairs applied, on an ex parte basis, for the provisional winding-up of the Recycling and Economic Development Initiative of South Africa (Redisa), a solvent non-profit company, and in a separate application also of Kusaga Taka Consulting (Pty) Ltd (KT), also a solvent company, both on the ground in ss 81(1)*(c)*(ii) and 81(1)*(d)*(iii) that it was 'just and equitable for the company to be wound up'. Not being one of the applicants specified in s 81, the Minister in both applications also applied for leave in terms of s 157(1)(d) to bring the applications, which were granted, as were the provisional liquidation orders the Minister had sought.

The applications were consolidated on the anticipated return date of the provisional orders. Redisa and KT raised a number of points in limine against the winding-up order being made final, including that the Minister had no locus standi to bring the application. This, they contended, was because s 157(1) was listed under ch 7 of the Companies Act which dealt with remedies and enforcement and so did not extend to

other applications that may be brought in terms of the Companies Act (more specifically to applications under s 81(1)) but instead was restricted to alternative procedures for addressing complaints or securing rights contained in s 156; nor did it extend to other categories of person authorised to apply for the winding-up of a solvent company under part G of ch 2.

Held
Section 157(1) clearly stated when in terms of this Act application can be made to a court. It would be absurd and nonsensical to exclude an application which could be made in terms of s 81(1) of the Act. On a plain reading of s 156, it did not only deal with alternative procedures for addressing complaints or dispute resolution or securing rights; while it made provision for alternative procedures for addressing complaints or securing rights to a person referred to in s 157, it also granted such a person the right to apply for appropriate relief to the division of the High Court having jurisdiction over the matter. The wording of s 157 also did not restrict the remedies available to the applicants contemplated in s 157(1)*(a) – (d)* to only those remedies in terms of ch 7. The title of s 157 ('Extended standing to apply for remedies') clearly intended to extend locus standi to the categories of people referred to in ss (1)*(a) – (d)*. Accordingly, the Minister in terms of the provisions of s 157(1)*(d)* could bring this application for the winding-up of Redisa and KT in the 'public interests'.

SA CRIMINAL LAW REPORTS JUNE 2018

S v PHETOE 2018 (1) SACR 593 (SCA)

Rape — Accomplice to — What constitutes — Mere presence during rape and appearing to approve thereof not sufficient to constitute liability as accomplice.
The appellant was convicted in the High Court of, inter alia, being an accomplice to rape. The evidence on which the conviction was based was that he, together with other men, had broken into the complainant's home at night. He was present when the other men raped the complainant and her sister. When the complainant asked the appellant why they were doing that to them, he just laughed.
Held, that, for a conviction of being an accomplice to the crime of rape, the accused had to have done something to facilitate, assist or encourage the commission of the rape. In the present case, the complainant's evidence did not disclose any assistance rendered by the appellant and his conduct accordingly did not amount to the aforesaid facilitation, assistance or encouragement. The fact that he laughed might be conduct that showed his approval of what was happening, but that was not enough to establish his liability as an accomplice. (See [15].) The appeal was upheld and the conviction of being an accomplice to rape was set aside.

MNGOMEZULU AND ANOTHER v VAN DEN HEEVER NO AND OTHERS 2018 (1) SACR 601 (GJ)

Prevention of crime — Restraint order in terms of Prevention of Organised Crime Act 121 of 1998 — Rescission of — Duties of curator — Curator obliged to account to owner of property in terms of common law, over and above statutory duties to account under *POCA* — Curator not needing to be discharged as soon as restraint order rescinded.

Property belonging to the applicants, worth some R11,5 million in 2004, was taken into possession by the first respondent, acting as a curator bonis, after it had been subjected to a restraint order in terms of s 26 of the Prevention of Organised Crime Act 121 of 1998 (POCA). By January 2013, six months after the first applicant was acquitted of all charges against him, the value of the property had decreased to R3 million.

In the present application, the applicants sought the rescission of the restraint order and an order compelling the curator to fully and completely account to them for the property during his curatorship. They contended furthermore that the curator should not be discharged until the accounting had been satisfactorily performed.
The respondents opposed the application and contended that the only accounting required by POCA was an account to the Master of the High Court.

Held, that the curator's contention that he was obliged only to account under POCA arose from a failure to appreciate that his obligation as curator was both statutory, in relation to his function under POCA, and fiduciary vis-à-vis the applicants. That the curator stood in a fiduciary relationship towards the applicants in relation to the restrained property was clear, and it followed therefore, in the ordinary course, that he was under a duty at the end of his period of office to render an account to them in the manner required by the common law. (See [16] – [18].)

Held, further, that there was no time limit prescribed for the discharge of the curator, and the office created by POCA envisaged court oversight as a central ingredient thereof. In any event, even if there were any uncertainty in this regard as to the reading of s 28(3)*(b)*, given that POCA authorised a serious erosion of the rights contained in the Bill of Rights, it had to be applied in accordance with the rights and values protected by the Constitution. (See [40] – [41].) An order was granted as sought by the applicants.

S v TUCKER 2018 (1) SACR 616 (WCC)
Bail— Appeal against refusal of — In extradition proceedings — Procedure — Governed by provisions of s 65 of the Criminal Procedure Act 51 of 1977 and may be heard by a single judge.

In previous proceedings in this matter the court held that appeal proceedings in terms of the Extradition Act 67 of 1962 (the Act) — whether they were a s 13(1) appeal itself or an appeal from an order made by the magistrate in respect of bail in terms of s 13(3) of the Act — were primarily of a civil rather than a criminal nature and the position was governed by the provisions of s 14(3) of the Superior Courts Act 10 of 2013. The judge in that matter accordingly concluded he did not have jurisdiction sitting alone to hear the matter and postponed it for re-enrolment for hearing by two judges.
In the present matter the court noted that it was not sitting as a court of appeal on the previous decision, but as a court of first instance following that court's ruling.
Held, that extradition proceedings were sui generis. Bail applications in such proceedings were in essence criminal in nature and inherently urgent in nature. Section 65 of the CPA was the applicable provision for an appeal to the High Court

against a decision of the lower court and it could therefore be heard by a single judge of the High Court.

S v THAKELI AND ANOTHER 2018 (1) SACR 621 (SCA)

Indictment and charge — Amendment of — By presiding officer without giving accused opportunity to address court on amendment — Failure constituting fundamental irregularity destroying validity of amendment.

The appellants were indicted in a regional court on a charge of murder subject to the provisions of s 51(2) of the Criminal Law Amendment Act 105 of 1997. After they had pleaded and testified in their defence, the court amended the charge by deleting the reference to s 51(2), without giving them an opportunity to address the court in respect of the amendment, and then convicted them of murder under s 51(1). They were sentenced to 28 years' imprisonment each. On appeal,
Held, that the failure to afford the appellants a full and proper opportunity to address the issue of the amendment to the indictment constituted a fundamental irregularity that infringed their fair-trial rights, and destroyed the validity of the amendment. It was not possible to say with certainty that they suffered no prejudice as a result of the amendment, and that they should have been sentenced in terms of s 51(2). (See [7].) The appeal against sentence was upheld and the sentences were altered to sentences of 15 years' imprisonment.

S v MAKHALIMA 2018 (1) SACR 625 (ECG)

Theft — Proof of — Shopper forgetting to pay for item put into personal bag — Accused distracted by telephone call from spouse whilst at paypoint and putting item into said bag in order to distract child — Accused's version reasonable and ought to have been given benefit of doubt.

The appellant was convicted in a magistrates' court of theft. It was alleged that he had stolen a bottle of energy supplement from a shop where he had made some purchases. In his defence, the appellant testified that he went to the shop accompanied by his young child whom he put into a shopping trolley that was constructed to look like a vehicle. His child was in a separate compartment that gave him the illusion of driving the trolley. He selected the supplement from the shelf and put it into the trolley, at which point his child became excitable and wanted to taste it. In order to distract the child, he put the supplement into a green bag, which also contained his wallet and his car keys, and gave his child some chips instead. When he got to the paypoint he put his items on the counter, including the green bag, but was distracted by a telephone call from his wife. He paid for the other items but not the supplement, and was apprehended as he attempted to leave the shop.
The magistrate was of the view that he could not have forgotten about the supplement and should have taken other steps to distract his child, rather than put the supplement into his bag. She also reasoned that because he was holding the bag he should have felt the weight of the supplement.

Held, that the magistrate had resorted to speculative reasoning in rejecting the appellant's evidence. It was not improbable that a parent would be distracted by a child and forget to pay for an item. There was no evidence, on behalf of the state, of the manner in which the appellant put the supplement into the bag, or what the child was doing when he did so. His version was also supported by evidence of the state that, when confronted outside the shop, he immediately said the supplement was in the bag and that he had forgotten to pay for it. This was a case where there was a reasonable doubt about the guilt of the accused, and the appellant should have had the benefit of that doubt.

S v DYIDI 2018 (1) SACR 630 (WCC)

Review — In what cases — Part-heard matter in which magistrate had resigned — Magistrate having duty to finalise case — Resignation of magistrate not justifiable reason for invoking s 304 of Criminal Procedure Act 51 of 1977.

The present matter was sent on special review because the presiding magistrate had subsequently resigned, and was no longer available to hear the matter. At the stage when the magistrate's resignation took effect, the accused had already pleaded, and the magistrate had noted the accused's plea explanation in terms of s 115 of the Criminal Procedure Act 51 of 1977 (the CPA).

Held, that the fact, that the magistrate had resigned and was no longer available to finalise his part-heard matters, was not a justifiable reason for invoking s 304 of the CPA. The provision was not enacted for situations such as the present one. The original magistrate had a duty to finalise the case and could not shirk that duty merely because he had resigned. (See [10] – [12].) The application for special review was dismissed and the matter was remitted back to the magistrates' court for the original magistrate to finalise the trial.

S v LUZIPHO 2018 (1) SACR 635 (ECG)

Trial — Judgment — Reasons for — Terse judgment — Despite being terse, reasons could be discerned from judgment.
Fraud — Sentence — Government official — Clerk in Department of Home Affairs creating fictitious entries in births-and-deaths register to defraud insurance companies — Accused convicted of 22 counts — In view of severity of offences, sentence of eight years' imprisonment appropriate.

The appellant, a senior registration clerk in the Department of Home Affairs, was convicted on her plea of guilty in a regional magistrates' court of four counts of fraud and statutory offences relating to the registration of births and deaths of a fictitious person, and the claiming of insurance benefits. She was sentenced to eight years' imprisonment on those counts. She pleaded not guilty to another 18 counts of the same offences in which the identical modus operandi was applied.
The appellant and her co-perpetrators used the user-identity of her fellow employee to gain access to the computer system of the Department to register fictitious births. A fictitious identity number for the 'mother' and 'father' was utilised to process the registration of a birth, thereby creating a 'child'. They thereafter, personally or

through an agent, took out policies with various insurance companies to cover the life of the fictitious child; processed and registered the 'death' of the child; and submitted claims against insurance companies by supplying false police reports or mortuary references and a notification of death. They were then paid the benefits of the insurance policies.

On appeal against these convictions and the sentence of eight years' imprisonment imposed on the four counts, the appellant contended that the court, whose judgment was alleged to be not only terse but also 'laconic and exceptionally unhelpful', had erred in accepting the evidence of her co-perpetrator.

Held, that our courts had on several occasions addressed the fundamental importance of a trial court furnishing reasons for its decisions. The failure to set out the findings of fact and to furnish reasons for its judgment placed an appeal or reviewing court at a disadvantage in adjudicating the matter. The present matter, however, was not one where the magistrate furnished no reasons: although terse, it was not unhelpful, and the important elements of the magistrate's reasoning could be gleaned from the judgment. (See [9] – [13].)

Held, further, that there was no basis to conclude that the magistrate had erred in finding that the appellant was guilty on the other 18 counts, and the appeal against the conviction had to be dismissed. (See [28].)

Held, in respect of the sentence, that the magistrate's judgment on sentence was a carefully considered one and the sentences had been structured in such a manner as would mitigate the cumulative effect and result in an effective period of imprisonment of eight years. Given the very serious nature of the crimes, this was an eminently reasonable sentence, and the appeal against the sentence also had to be dismissed.

S v KLAAS 2018 (1) SACR 643 (CC)

Drugs — Mandrax — Dealing in in contravention of s 5(b) of Drugs and Drug Trafficking Act 140 of 1992 — Sentence — Application of minimum-sentence provisions of Criminal Law Amendment Act 105 of 1997 — Proof required that drugs worth more than R50 000 were involved — Estimate by police officer insufficient.

The applicant, a retired pharmacologist, was convicted in a regional magistrates' court of a contravention of s 5*(b)* of the Drugs and Drug Trafficking Act 140 of 1992, in that he had dealt in dangerous dependence-producing drugs, namely 2920 methaqualone tablets that he had manufactured. A police officer gave evidence at the trial that he estimated the value of the drugs, the chemicals and equipment to be about R18 million. There was no other evidence of the value of the drugs. Although the provisions of the minimum-sentence legislation had been brought to the attention of the applicant when he tendered his plea, there was no further mention of the provisions of the Criminal Law Amendment Act 105 of 1997 (the Act) until the magistrate mentioned this in his judgment on sentence. He concluded that there were no substantial and compelling circumstances and accordingly sentenced the applicant to 15 years' imprisonment in terms of s 51(2) of the Act.

In an application for leave to appeal against the conviction and sentence, the court, after considering the evidence on which the conviction was based, dismissed the appeal against conviction and then considered whether the minimum-sentence legislation had been correctly applied.

Held, that in order for the minimum sentence set out in part II of sch 2 to the Act to apply, the state would have had to prove that the value of the drugs was greater than R50 000. An estimate of the value was not sufficient. Therefore, the jurisdictional fact entitling the trial court to impose the minimum sentence was absent. This had resulted in an irregularity and the court was thus entitled to consider the sentence afresh. (See [35].)

Held, further, that our courts had deemed sentences of imprisonment of 10 years or longer to be appropriate for convictions relating to the manufacture of and dealing in dangerous drugs. The applicant's personal circumstances paled into relative insignificance when regard was had to the seriousness of the offences and the need to protect the public. Even without evidence of the precise value of the drugs seized, the quantity of tablets had the potential to affect the lives of many people. An appropriate sentence to be imposed in the circumstances of the case was 12 years' imprisonment.

S v MOYO 2018 (1) SACR 658 (GJ)

Trial — Assessors — Failure to appoint in violation of s 93ter(1) of Magistrates' Courts Act 32 of 1944 — Explanation that assessors not appointed due to 'lack of resources' — Court's concern at this brought to attention of Minister of Justice. **Review** — In what cases — Leave to appeal against conviction in regional magistrates' court refused, but granted in respect of sentence — Discovery at hearing of appeal that no assessors appointed in violation of s 93ter(1) of Magistrates' Courts Act 32 of 1944 — Fatal irregularity that could be corrected on review — Court accordingly setting aside proceedings.

The appellant was convicted in a regional magistrates' court of murder and intimidation and was sentenced to 23 years' imprisonment. He was refused leave to appeal, but on petition to the Judge President he was granted leave to appeal against his sentence. When the matter was heard, counsel for the appellant contended that, in respect of the count of murder, the court a quo was not properly constituted in terms of s 93*ter*(1) of the Magistrates' Courts Act 32 of 1944. This was because the regional magistrate had not informed the appellant before the commencement of the trial that it was a requirement of the law that he had to be assisted by two assessors, unless the accused requested that the trial proceed without assessors. It was contended that this amounted to a failure of justice and the conviction and sentence had to be set aside. Seeing as the matter had come before the court on appeal only against sentence, the court had to decide whether it could determine the appeal against the conviction where leave had not been granted beforehand.

Held, that the fact that the appellant in the present matter had noted an appeal should not preclude him from being able to approach the court to review the

proceedings, and accordingly review proceedings were available, despite leave to appeal against the conviction having been refused. (See [27].)
The court accordingly made an order setting aside the proceedings in the regional magistrates' court as not being in accordance with justice. The court also noted that the regional magistrate had, in explanation, commented on the failure to appoint assessors as being because of a 'lack of resources'. The court was greatly concerned about this state of affairs and ordered that a copy of the judgment be referred to the Minister of Justice.

S v WITBOOI AND OTHERS 2018 (1) SACR 670 (ECG)

Theft — Proof of — Doctrine of recent possession — Nature of objects stolen relative to time lapse from theft important.

Evidence — Admissibility — Pointing-out — Pointing out in circumstances which would not have aided investigation of crime other than to obtain self-incriminating evidence — Tantamount to confession in guise of pointing-out.

In an appeal against convictions in a regional magistrates' court for attempted murder and robbery with aggravating circumstances, it appeared that the convictions were based on the doctrine of recent possession; and, in the case of the third appellant, on the basis of certain pointings-out that he had made.
The first appellant was found in possession of a rifle 15 days after it had been taken from the victims of the robbery. The second appellant was found in possession of a briefcase, a revolver and pepper spray 16 days after they had been taken in the same robbery. Although the third appellant admitted that the contents of the pointing-out document had been correctly recorded, he testified that he had been assaulted and threatened with assault if he did not do the pointing-out. In his warning statement he had indicated that he was prepared to point out what he knew about the incident.

Held, as to the discovery of the rifle in the possession of the first appellant, that there were contradictions between the state witnesses as to the circumstances in which the rifle was found in a shack belonging to the first appellant. Although there was a great deal of suspicion concerning the first appellant's involvement in the crime, that suspicion was insufficient to find that the state had proved his guilt beyond a reasonable doubt, and his appeal had to succeed. (See [41] – [42].) The appeal against the conviction was accordingly upheld.

Held, further, that, in the case of the revolver found in the possession of the second appellant, it was an item which could quickly be disposed of and the lapse of time between the crime, and the finding was not very short. However, the briefcase, which was described as being exceptional, was not something which would lend itself to quick disposal, and the lapse of time was therefore short. The appellant's possession of the articles indicated that he must have acquired all of them at the same time and place, and his possession of them at different times and places suggested an intention to keep them for his own use. Furthermore, his explanation that he had picked them up on a railway line was grossly improbable. The magistrate had not erred in drawing the inference that he was one of the perpetrators of the crime. (See [44] – [45].) The appeal was dismissed in respect of the conviction.

Held, further, that the circumstances of the pointing-out suggested a willingness to provide information rather than do a pointing-out. By that time the police knew the details of the crimes and the first and second appellants were already implicated. A pointing-out would not have aided the investigation of the crimes, other than to obtain self-incriminating evidence from the third appellant. In the circumstances, the suggestion of a pointing-out did not make sense and was tantamount to a confession in the guise of a pointing-out. It was furthermore not proved that the pointing-out and subsequent confession were voluntary. The appeal against his conviction therefore had to succeed.

S v HORN 2018 (1) SACR 685 (WCC)

Arms and ammunition — Declaration of unfitness to possess firearm in terms of s 103(1) of Firearms Control Act 60 of 2000 — Magistrate failing to hold inquiry into unfitness of accused on conviction of housebreaking with intent to steal and theft — Magistrate since having resigned — Court ordering on review that accused not unfit to possess firearm.

The accused was convicted in a magistrates' court by an acting magistrate, an advocate who was appointed on a contract basis for six months. It appeared on review that the magistrate had committed a number of misdirections, inter alia, she had imposed an incompetent sentence; had failed to get the accused to sign his previous-convictions form, indicating that he admitted the previous convictions; had imposed a fine (wholly suspended) on an accused who was unemployed; had failed to conduct an inquiry required by s 103 of the Firearms Control Act 60 of 2000; referred the accused to the Department of Social Development after sentence was handed down; and had 'discharged' a co-accused against whom the charges had been withdrawn by the state.

The court held that the proceedings, as far as the sentence was concerned, were not in accordance with justice and had to be set aside and corrected. Because no inquiry was held in terms of s 103 of the Firearms Control Act 60 of 2000 it would be prejudicial to the accused to make an order that he be disqualified from possessing a firearm. In the light of the fact that he was not given an opportunity to address the court in this regard, it was appropriate in the circumstances to order that he not be declared unfit to possess a firearm. The court substituted the sentence with a competent sentence and ordered that the charges against the other accused be withdrawn by the state.

VAWDA AND ANOTHER v CHAIRMAN OF APPEAL BOARD AND ANOTHER 2018 (1) SACR 695 (GP)

Arms and ammunition — Declaration of unfitness to possess firearm in terms of s 102 of Firearms Control Act 60 of 2000 — Review of decision of Chairman of Appeal Board — Applicants in shooting incident — Decision made taking into account irrelevant considerations and ignoring relevant considerations — Evidence and findings not rationally connected — Decision set aside and remitted to Appeal Board for reconsideration.

The applicants were declared unfit to possess firearms in terms of s 102 of the Firearms Control Act 60 of 2000 for a period of four years. They appealed to the first respondent, seeking the setting-aside of the declaration. The first respondent wrote to the applicants, indicating that the appeal was refused and the declaration of unfitness to possess firearms was confirmed, and provided reasons for the refusal. In the present application the applicants applied for the review of the latter decision, ostensibly in terms of s 6(1) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). They contended that, in determining the appeal, the first respondent had taken into account irrelevant considerations and ignored relevant considerations; had acted arbitrarily or capriciously; and that the decision was not rationally connected to the purpose for which it had been taken or the information which was before the first respondent.

It appeared that the declaration of unfitness had come about as a consequence of an incident which occurred at night when the applicants noticed a vehicle driving very slowly with the occupants looking into houses and vehicles. The applicants blocked the road with their vehicle and, according to them, two of the occupants of the vehicle got out of the vehicle, pointed firearms at them and fired shots at them. They took cover behind another vehicle and fired back. The police later searched the scene and recovered the empty shell casings of the shots fired by the applicants, but found no other shots.

Held, that the failure by the first respondent, to appreciate that the fact that there were no casings in respect of the alleged shots fired at the applicants was not significant because it was possible that the alleged shots could have been fired from a revolver; that the first respondent had made a credibility finding against the applicants without any basis; and that the evidence and the finding of untruthfulness were not rationally connected. The decision by the first respondent accordingly had to be set aside and the matter remitted to him for reconsideration in terms of s 8(1)*(c)*(i) of PAJA.

DAVID v REGIONAL COURT MAGISTRATE AND OTHERS 2018 (1) SACR 702 (ECB)

Trial — Presiding officer — Unavailability of to continue with trial — After plea of not guilty but no evidence adduced — Purpose of s 118 of *CPA* to cater for situations where judicial officer becomes unavailable after plea, but before evidence — Permissible that trial continue before judicial officer who is available.

The applicant, together with 10 other accused, appeared before the first respondent in a regional magistrates' court on charges of fraud. They all pleaded not guilty and no evidence was adduced. After several postponements they appeared again some 18 months later and, because the first respondent was not available, the parties agreed that the matter could proceed before the second respondent, an acting regional court magistrate. The state then called a witness whose evidence was led before the matter was postponed again. When the matter resumed, the legal representative for the first three accused withdrew and the matter had to be postponed again. Shortly before the trial was due to resume, the applicant, now advised by a new legal representative, relying on the provisions of s 118 of the CPA, launched the present proceedings in which he sought an order that the decision of the first respondent 'to recuse herself', and the appointment of the second respondent to preside in the matter, be set aside.

After remarking that there was a singular lack of evidence produced in the applicant's papers, including no evidence that the first respondent had recused herself,
Held, that, although it was true that once an accused pleaded not guilty he was entitled to a verdict before that judicial officer before whom he had pleaded, the purpose of s 118 of the CPA was to cater for situations where the judicial officer became unavailable after the plea but before evidence had been led. In such a case it was permissible that the trial could continue before a judicial officer who was available. No irregularity had been committed by continuing the matter before the second respondent. (See [19] – [23].) The application was dismissed.

ALL SOUTH AFRICAN LAW REPORTS JUNE 2018

De Klerk v Minister of Police [2018] 2 All SA 597 (SCA)

Personal Injury/Delict – Unlawful arrest and detention – Whether the Minister of Police is liable for the further detention after the suspect has been remanded to custody by the court is fact-based – Claim for damages – Arrest without warrant – What is required is that the arrestor must be a peace officer, who entertains a suspicion that the suspect committed an offence referred to in Schedule 1 to the Criminal Procedure Act 51 of 1977 and that the suspicion must rest on reasonable grounds – Detention after first appearance in court found not to be attributable to respondent.

Arrested on a charge of assault with intent to do grievous bodily harm, the appellant was detained for a week and then released after the complainant withdrew the complaint. The charge arose from a scuffle between the appellant and the complainant when the appellant went to the complainant's office to demand payment of money owed to him. The complainant sustained injury and laid a charge against the appellant, who was asked to report to the police station as a result. Once there, he was arrested on a charge of assault with intent to do grievous bodily harm and was taken to the Magistrate's Court for his first appearance on the day of his arrest. The appellant's version was that he was never given an opportunity to make a statement in response to the allegations against him. In court, he was remanded in custody to the Johannesburg prison.

Some time after being released from detention, the appellant instituted action against the respondent, claiming damages for unlawful arrest and detention and malicious prosecution. The High Court stated that the primary basis upon which it was alleged that the arrest was unlawful was because it took place without a warrant, but found that the police had acted reasonably. It dismissed the claim with costs and the subsequent application for leave to appeal was also unsuccessful. The present appeal was with leave of the Supreme Court of Appeal.

The appellant contended that the court *a quo* erred in not considering that there were no objective facts in evidence underpinning any reasonable suspicion that an offence referred to in Schedule 1 of the Criminal Procedure Act 51 of 1977 (the "Act") had been committed. He contended further that the absence of a warrant made the arrest unlawful because assault with intent to do grievous bodily harm is not one of the offences referred to in Schedule 1. The court *a quo* held that the police were entitled to arrest without a warrant for any offence, except the offence of escaping from lawful custody. However, it raised the issue *mero motu* and overlooked the fact that the

respondent did not plead nor canvas that in evidence. The parties were also not asked to address the court on the matter, and the appellant also took issue with that on appeal.

Held – It was common cause that at the time of the appellant's arrest, the police were acting within the course and scope of their employment with the respondent. Consequently, the respondent was vicariously liable for their wrongful acts. It was also common cause that the respondent bore the onus to prove the lawfulness of the arrest.

Schedule 1 of the Criminal Procedure Act does not include assault with intent to do grievous bodily harm. It lists an offence of "assault when a dangerous wound is inflicted". Therefore one of the jurisdictional facts was absent in this case. It could not be said that the arresting officer entertained a reasonable suspicion that the listed offence had been committed. What is required is that the arrestor must be a peace officer, who entertains a suspicion that the suspect committed an offence referred to in Schedule 1 and that the suspicion must rest on reasonable grounds. It could not be said that the arresting officer entertained a suspicion based on reasonable grounds in this instance. The arresting officer failed to investigate the circumstances of the assault, whether the wound was inflicted intentionally or whether it came about accidentally during the scuffle. The nature and seriousness of the wound was never investigated. The arresting officer wrongly assumed that the assault was committed with intent to do grievous bodily harm and that the offence is listed in Schedule 1. Arrest without a warrant in the circumstances was unlawful.

Although in his claim relating to unlawful detention, the appellant referred to his detention for eight days, the Court viewed it differently. The police had taken the appellant to court within two hours of his arrest. It was therefore held that the appellant was unlawfully detained for not more than two hours. What happened in court and thereafter could not be attributed to the respondent. The arresting officer plays a limited role in what transpires after the first appearance in court.

Upholding the appeal, the Court awarded the appellant R30 000 as compensation.

In a minority ruling, it was stated that the period of detention after the appellant's appearance in court should be taken into consideration in awarding damages, based on the principles of legal causation. The view expressed was that the arresting officer's actions put into action the ensuing events, and therefore the entire period of detention should be relevant.

Fesi v Ndabeni Communal Property Trust [2018] 2 All SA 617 (SCA)

Wills, Trusts & Estates – Whether persons elected as trustees of a trust established to administer and develop property received as a result of a land restitution claim properly appointed in terms of the trust deed – Validity of election – Concerns about validity of election leading Master of High Court to refuse to issue letters of authority to trustees – Appeal against order directing Master to issue letters of authority – Provisions of Trust Property Control Act 57 of 1988 and Master's supervisory role discussed in court's judgment.

In 1997, a land claim was lodged with the Land Claims Commission in terms of the Restitution of Land Rights Act 22 of 1994. In terms of the claim, the Ndabeni

Community (the “community”) sought restoration of land that had previously been occupied by the community before they were forcefully removed between 1927 and 1936 under apartheid legislation. In 1942, the land in question was transferred in its entirety to the City Council of Cape Town, which subsequently subdivided it and sold off various portions. When the community lodged its land claim, it was no longer feasible for government to restore the land from which the community had been removed. In October 2001, the government settled the community’s land claim and concluded a settlement agreement with a trust established to administer and develop the land. The trust was created to serve the interests of the claimant community and in contemplation of a successful land claim. It was subsequently essential to and required by the settlement agreement. The settlement agreement gave the trust the right to take transfer of state land in Maitland, Cape Town of approximately 54,8 hectares (the “property”) for the benefit of the community. The trust became the registered owner of the property in 2004. The community members dispossessed of their land and/or their descendants have since then not reaped any benefits from the transfer of the property.

The trust deed set out the trust’s main objective as being to hold property in common for the benefit of its members. Membership of the trust and the appointment of trustees was also regulated in the deed. The trust had to establish and maintain a register of members.

The respondents were appointed trustees in August 2015, after the failure of the prior board to convene an annual general meeting to enable a new board of trustees to be elected. In terms of the trust deed, there at all times had to be not less than six trustees in office. The primary issue in this dispute was whether the six respondents were entitled to assume office as trustees of the trust, having been elected to that office at a meeting convened for that purpose. That led to the central question of whether the respondents were properly elected in terms of the trust deed by persons entitled to vote. The legality of the election was called into question by a number of persons. The second appellant (the “Master”) allowed a period of time for a court challenge to be launched. When that was not forthcoming, the Master, on 12 August 2015, issued letters of authority to the respondents. Within days of the issue of the letters of authority by the Master, the respondents concluded the first of a series of written agreements, which involved a property developer (“Abacus”). Compositely, the agreements provided for the sale of the property to a joint venture company (“Devco”) in which Abacus and the trust would respectively hold 74% and 26% of the issued shares. In addition, in terms of a commission agreement, the trustees agreed to pay an amount of R4 million to a Swedish citizen, as commission for assisting by facilitating the sale agreement. The trust accepted Devco’s offer for the land without obtaining independent valuations and despite previously having obtained a substantially better offer. The transfer of the property to Devco did not proceed due to challenges to the legality of the conclusion of the agreements disposing of the property, not only by the first appellant and the Master, but also by the Western Cape Regional Land Claims Commissioner and the Minister of Rural Development and Land Reform. The Minister and the Commissioner disagreed with the process followed by the respondents in completing and verifying a membership register. They took the view that the trust deed and the settlement agreement had not been followed. Furthermore, they alleged that persons who attended meetings at material times in relation to the business conducted by the respondents, were not all verified members and that there were many persons entitled to be members who were not on the list used by the respondents.

In October 2016, the first appellant caused a summons to be issued in terms of which she contested the validity of the appointment of the respondents. She made serious allegations concerning the manner in which the respondents conducted the affairs of the trust and about the disposal of the property. She alleged that they had acted illegally and adverse to the interests of the community. The issues raised in the summons were similar to the ones raised in the present litigation. Faced with the summons and having regard to the complaints received from interested parties concerning the actions of the respondents, the Master took the view that the dispute should be adjudicated by a court of law and declined to issue the letters of authority. The respondents then decided to launch the application in the court below seeking an order directing the Master to issue letters of authority authorising the respondents to act as trustees of the trust. The present appeal was against the High Court's issuing of such order.

On appeal, the appellants argued that the respondents were not entitled to approach the court for an order compelling the Master to issue letters of authority. They contended that the proper procedure would have been for the respondents to launch an application in terms of section 23 of the Trust Property Control Act 57 of 1988 and in accordance with rule 53 of the Uniform Rules, to review and set aside the decision by the Master to not issue the letters of authority.

Held – The respondents were entitled to approach the court for relief in terms of section 23 of the Trust Property Control Act on the basis that they had. The essential question was whether relevant and sufficient facts were before the court enabling it to adjudicate the claim for relief. The present Court confirmed that the necessary facts were before the court below to enable the respondents' claim for relief and the grounds of opposition, with reference to the relevant statutory provisions, to be adjudicated.

For proper accession to the office of trustee, there must be appointment in a lawful manner; proper qualification on the part of the trustee; acceptance of the office; and written authorisation by the Master. The facts showed that the respondents could not be regarded as having been validly elected in accordance with the trust deed. A letter of authorisation from the Master could only follow upon appointment in accordance with the trust deed. The Master rightly had concerns about the election of the respondents and the court below erred in being too readily dismissive of the Master's concerns.

The fact that the respondents were not properly elected on its own disentitled them to the relief sought and granted in the High Court. The Master's refusal to issue letters of authority was clearly justified. The appeal was, accordingly, upheld with costs.

Overstrand Municipality v Water and Sanitation Services South Africa (Pty) Ltd [2018] 2 All SA 644 (SCA)

Administrative law – Award of tender – Tender evaluation and adjudication – Whether regulation dealing with minimum staffing of water works endures despite repeal of a number of statutes regulating the provision of water to the public – Upholding of review application based on section 6(2)(b) of the Promotion of Administrative Justice Act 3 of 2000 – Section 6(2)(b) providing that the court has the power to judicially review administrative action if a mandatory and material procedure or condition prescribed by an empowering provision was not complied with.

In August 2014, the appellant municipality invited bids for pre-qualification for the award of a tender in relation to bulk water service delivery and treatment. Four entities, including the respondent, were short-listed. They were required to then submit bids in response to a Request for Proposal ("RFP") issued by the municipality.

One of the requirements in the RFP placed an obligation on the successful bidder to provide sufficient staff, with sufficient experience and qualifications to meet or exceed all the requirements of the contract. That was an essential requirement, flowing from regulation 2834 promulgated in terms of the Water Act 54 of 1956. In March 2015, after evaluating the bids, the municipality advised the respondent that another entity ("Veolia") was the preferred bidder. The respondent requested the evaluative and adjudicative material on which the award of the tender had been based, and on receiving such information, it instituted action against the appellant. It stated that the information received revealed that Veolia had not supplied its full costing of the necessary personnel to ensure regulatory compliance, and that there was no comparable pricing on which the competing bids could be evaluated. It contended further that whilst Veolia submitted the lowest price, a further amount of approximately R4 million had to be added to Veolia's price for the filling of posts to meet the minimum regulatory requirements. As a result, the respondent applied for the review of the award of the tender and the setting aside of the ensuing contract.

The court below confirmed that in its evaluation of the bids and the award of the tender, the municipality had engaged in administrative action as contemplated in the Promotion of Administrative Justice Act 3 of 2000. It found further that the municipality had deviated from the regulatory framework that specified skills thresholds and that Veolia's bid was not in compliance with the RFP. The award of the tender was thus held to be procedurally unfair as Veolia's bid did not qualify as an acceptable tender. The municipality appealed against that finding.

Held – The appeal turned on the primary question of whether the bid by Veolia complied in all respects with the specifications of the tender in the RFP.

The primary challenge by the respondent was based on section 6(2)(b) of the Promotion of Administrative Justice Act. Section 6(2)(b) provides that the court has the power to judicially review administrative action if a mandatory and material procedure or condition prescribed by an empowering provision was not complied with. Procurement of goods and services by an organ of State must be carried out in terms of the principles set out in section 217(1) of the Constitution.

As stated above, the RFP specified the minimum staffing requirements for the operation of the various classes of the works. The staffing requirements were set out in mandatory terms to ensure compliance with regulation 2834. The purpose of regulation 2834, in relation to water works, in line with the empowering statutes, was aimed at assurance of water supply at the right quality and quantity as well as operations optimisation and asset preservation. Veolia's bid did not meet the requirement, and the municipality was not empowered to condone the non-compliance.

The appeal was dismissed with costs.

Palabora Copper (Pty) Ltd v Motlokwa Transport & Construction (Pty) Ltd [2018] 2 All SA 660 (SCA)

Arbitration – Application to set aside – Section 33(1)(b) of the Arbitration Act 42 of 1965 states that "where an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; . . . the court may, on the application of any party to the reference after due notice to the other party or parties, make an order setting the award aside" – Severability of award – Court taking view that there is no reason why an arbitration that has been properly conducted on certain issues and has properly determined those issues, should be set aside in its entirety, because of an irregularity in relation to a wholly separate issue.

At the conclusion of a tender process for the removal of waste from its mine and smelter, the appellant informed the respondent that its tender bid had been successful.

Relations between the parties subsequently soured, and in February 2015, the appellant launched proceedings in the High Court against the respondent, seeking a declaratory order that no valid and binding contract had been concluded, alternatively declaring that any contract that had been concluded had been duly cancelled. The respondent pleaded to the claim and pursued a counterclaim on the basis that a binding contract had been concluded between the parties. It asked for specific performance, alternatively damages.

The parties agreed to refer the dispute to arbitration. The arbitrator held that a valid and binding contract had been concluded by way of the letter of 23 December 2015; that the pleaded defences of lack of consensus between the parties and that any contract was invalid by virtue of *iustus error* were unsound and fell to be dismissed; and, that the contract had not been lawfully cancelled. The appellant's claim was thus dismissed and the respondent's counterclaim was upheld. The respondent then applied for the arbitration award to be made an order of court in terms section 31(1) of the Arbitration Act 42 of 1965. The application was opposed and a counter-application brought under section 33(1)(b) of the Act to set the award aside.

Held – Section 33(1)(b) states that "where an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; . . . the court may, on the application of any party to the reference after due notice to the other party or parties, make an order setting the award aside." Where an arbitrator for some reason misconceives the nature of the enquiry in the arbitration proceedings with the result that a party is denied a fair hearing or a fair trial of the issues, that constitutes a gross irregularity. The party alleging the gross irregularity must establish it. Where an arbitrator engages in the correct enquiry, but errs either on the facts or the law, that is not an irregularity and is not a basis for setting aside an award. If parties choose arbitration, courts endeavour to uphold their choice and do not lightly disturb it.

The appellant stated that after the award of the tender to the respondent, the latter failed to sign a draft contract as provided for in the Notice of Contract Award and that such failure meant that there was no binding agreement. It alleged further that there was no consensus between it and the respondent, because the request for proposals did not include a provision for the contractor's monthly overheads, whereas the respondent's tender did. Thus, the primary issue before the arbitrator was whether a

contract had been concluded between the parties. That involved two questions. The first was whether the letter containing the Notice of Contract Award gave rise to a contract or whether it was merely a preliminary indication of matters and of no force or effect, unless the parties duly executed the written agreement containing the terms and conditions. The second related to consensus as referred to above. The arbitrator made a preliminary ruling that a valid contract did come into being before hearing argument on the issues of lack of consensus, mutual mistake, *iustus error* and cancellation. When the argument ended, the arbitrator indicated that he rejected all of appellant's contentions on those issues. The appellant argued that it became impossible for the arbitrator to consider the argument of absence of consensus properly once he had made his initial ruling that the issue of the Notice of Contract Award and its acceptance resulted in the conclusion of a contract. It contended that the outcome of the argument on that point was therefore foreordained. The Court disagreed. Leading up to the preliminary ruling, the parties argued only the question of whether the issue and acceptance of the Notice of Contract Award was insufficient on its own to give rise to a contract and whether the signature of the contemplated written agreement containing the terms and conditions was a pre-requisite to the conclusion of a binding contract. The arbitrator merely got that issue out of the way with his preliminary ruling, and then left it open to the appellant to argue the remaining points that had not been considered. He did not prevent argument on the point of lack of consensus.

Turning to the respondent's counterclaim, the Court stated that the onus of proof in regard to damages rested squarely on the respondent. It was obliged on the pleadings to prove that it would have suffered damages in consequence of the repudiation or unlawful cancellation of the contract and to prove the quantum of those damages. The parties had concluded an agreement in regard to quantification of respondent's claim. That did not materially alter the issue of onus. However, the respondent saw the agreement as the end of the matter and brought no evidence to show that it could or would have fulfilled the contract, had it been permitted to do so. The arbitrator seemed to agree that because quantum had been agreed this meant that it was agreed that the respondent had suffered damages. As a result, the appellant did not have a fair trial of the issues it sought to raise in respect of the counterclaim.

It then had to be decided what exactly needed to be set aside. While section 33(1)(b) provides that if arbitrators commit a gross irregularity or exceed their powers the court may make an order setting the award aside, it says nothing about the situation where the irregularity or excess of powers affects only a discrete part of the award. The Court took the view that there is no reason why an arbitration that has been properly conducted on certain issues and has properly determined those issues, should be set aside in its entirety, because of an irregularity in relation to a wholly separate issue. As the gross irregularity occurred in relation to the counterclaim alone, it was the award in respect of the latter alone that fell to be set aside.

AN obo EN v Member of the Executive Council for Health, EC [2018] 2 All SA 678 (ECM)

Personal Injury/Delict – Medical negligence – Whether or not sub-optimal care by medical staff at hospital caused or causally contributed to child being born with brain defects – Assessment of expert opinions – Absence of causal connection between the sub-standard care and the injury that ensued leading to dismissal of claim.

Alleging negligence by doctors and nurses at a hospital falling under the control of the defendant, which negligence was said to have manifested in a variety of ways as listed in the particulars of claim, the plaintiff sued the defendant for damages. The plaintiff's child was born with severe brain defects and was diagnosed with hypoxic ischaemic encephalopathy ("HIE").

Whilst admitting that the staff was bound to employ the skill and care as could reasonably be expected of staff in similar circumstances, the defendant nevertheless denied any wrongful, unlawful or negligent conduct.

Held – The issue for determination was whether or not sub-optimal care by medical staff at the hospital caused or causally contributed to the child's condition, that is, whether there was a causal connection between the failure to monitor the foetal heart rate and the HIE of an acute profound nature, hypoxic celebral palsy, developmental delay and serious brain defects suffered by the child. The matter turned on the probabilities and credibility did not play a role since all the experts were equally credible.

The defendant's case included an allegation that the baby was being monitored and that a nurse had taken a reading at 6h00 on the morning in question, showing that all was normal. However, the defendant failed to adduce the evidence of that nurse. The Court was therefore unable to accept her recordings, especially since it was specifically placed in issue and questioned by the plaintiff's expert. The defendant accordingly could not rely on this as confirmation that at 6h00, the foetal heart rate was normal and that there was no cause for concern at that time.

The main expert witness for the defendant was unfazed by the exclusion of the above evidence. He stated that although that was what he relied on, the exclusion of that evidence would not change his opinion since it was still an acute profound event that would have occurred in the last half an hour prior to delivery and therefore even with no monitoring, the outcome would have been the same. The Court accepted that the witness had the necessary expertise necessary to express an expert opinion, and that his version that the problem was a sudden occurrence and there was no time to have acted to prevent the incident was more probable than the plaintiff's expert that there must have been forewarning and that prompt action could have resulted in the baby being delivered earlier reducing or eliminating the HIE. The plaintiff's expert's theory was unsubstantiated by any medical authority.

The plaintiff had accordingly failed to demonstrate a causal connection between the sub-standard care and the injury that ensued on a balance of probabilities. Having failed to discharge the onus resting upon her to prove her case against the defendant on a balance of probabilities, her claim was dismissed.

Chowan v Associated Motor Holdings (Pty) Ltd and others [2018] 2 All SA 720 (GJ)

Personal Injury/Delict – Actio legis Aquilia – Pure economic loss – Breach of employer's duty not to subject employee to occupational detriments on account of making a protected disclosure as contemplated in Protected Disclosures Act 26 of 2000 – Impairment of dignity – Utterances made by chief executive officer of employer about plaintiff's race and gender in the context of her suitability for a position amounting to actionable injury to dignity.

Words and phrases – “disclosure” – Section 1 of the Protected Disclosures Act 26 of 2000 – Refers to any disclosure of information regarding any conduct of an employer, or an employee of that employer, made by any employee who has reason to believe that the information concerned shows or tends to show, inter alia, unfair discrimination as contemplated in the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

Words and phrases – “discrimination” – Section 1 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 – Includes any act or omission including a policy, law, rule, practice, conditional situation which directly or indirectly imposes burdens, obligations, or disadvantage on; or any person or one or more of the prohibited grounds.

Words and phrases – “occupational detriment” – Section 1 of the Protected Disclosures Act 26 of 2000 – Includes being subjected to any disciplinary action; being dismissed, suspended, demoted, harassed or intimidated.

Words and phrases – “protected disclosure” – Section 1 of the Protected Disclosures Act 26 of 2000 – A disclosure made to a legal adviser in accordance with section 5; an employer in accordance with section 6; a member of Cabinet or of the Executive Council of a province in accordance with section 7; a person or body in accordance with section 8; or any other person or body in accordance with section 9.

The plaintiff was employed by the first defendant (“AMH”) as group financial manager. She was dismissed with immediate effect at the end of September 2015.

In the present action, the plaintiff sued the defendants in delict under the *actio legis Aquilia* for pure economic loss that she allegedly suffered through the wrongful and intentional acts of the defendants. In the alternative, she claimed payment of damages in contract from AMH as a result of its alleged repudiation of the employment contract that was concluded between her and AMH. Furthermore, she sued the second and third defendants for payment of damages under the *actio iniuriarum* as a result of alleged injuries to her reputation (*fama)* and to her sense of self-worth (*dignitas*).

The second defendant was the chief executive officer (“CEO”) of AMH. The plaintiff was a chartered accountant who, when she was head-hunted for the position of group financial manager at AMH, already had extensive experience as a chartered accountant and in the corporate world. On being recruited for the position of group financial manager at AMH, she sought an assurance that opportunities would be available to her for career progression. She only accepted the position on obtaining such assurance. On assuming employment, she was told by the chief financial officer (“CFO”) at the time that he intended grooming her to take over the position from him when he left. In 2014, the plaintiff became aware that the position of CFO at AMH had been advertised and she was interviewed for the position. After a meeting with the CEO, she was told that she would not be appointed to the position, but that the CEO promised her career progression in a year’s time. Her subsequent resignation led to a further promise by the CEO along the same lines, and the plaintiff consequently withdrew her resignation. However, the situation steadily deteriorated. The new CFO assumed employment in January 2015, and later told the plaintiff that the CEO had asked him to let her know that she would never be CFO. The plaintiff was very upset by that and a meeting of the relevant parties was held to resolve the issue. At the meeting, the CEO told the plaintiff that she should leave if she wished, and mentioned

that she was "a female, employment equity" person. The plaintiff considered the mention of her race and gender totally unprofessional and unacceptable and lodged a grievance. At the end of that process, her complaint was found to be without foundation but a further investigation was to be conducted. During that time, the plaintiff was suspended. At the end of the investigation, it was found that the grievance was without merit. However, the plaintiff's actions were said to constitute misconduct and an abuse of the grievance procedure, and it was decided to institute disciplinary action against her. That led to the plaintiff's dismissal.

Held – The witnesses for the defendants were found to be unsatisfactory in various respects. By contrast, the plaintiff was found by the Court to be singularly impressive, and a credible witness whose evidence was reliable.

The provisions of the Protected Disclosures Act 26 of 2000 were central to the plaintiff's *aquilian* claim and her alternative contractual claim. Section 3 provides that no employee may be subjected to any occupational detriment by his or her employer on account, or partly on account, of having made a protected disclosure. The Court found that section 6 was applicable in this case. The requirements for protection of a disclosure to an employer in terms of section 6, read with the definition of disclosure in section 1, are that it must be information that the employee has reason to believe shows or tends to show the commission of a listed impropriety, the disclosure must be made in good faith and substantially in accordance with any prescribed or authorised procedure for the reporting of the impropriety, or to the employer where there is no such procedure. The procedure followed by the plaintiff was an authorised procedure within the meaning of section 6(1)(a). The plaintiff also satisfied the requirement of "reason to believe that the information concerned shows or tends to show" unfair discrimination as contemplated in the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. The disclosure made by her, therefore, was a protected disclosure and the occupational detriments – being suspended, subjected to disciplinary action and ultimately dismissed – to which she had been subjected by AMH, on account of having made the protected disclosure, were in violation of the provisions of section 3 of the Protected Disclosures Act and unlawful.

Turning to the plaintiff's Aquilian claim, the Court did not regard the availability of other remedies as a bar to extending the *aquilian* action to import wrongfulness and fashion a remedy in delict for the plaintiff. The Court pointed to the numerous public policy reasons in favour of imposing delictual liability in the case. AMH was therefore held liable for payment of the delictual damages proven by the plaintiff. That rendered it unnecessary to consider the plaintiff's contractual claim.

The plaintiff's *iniuria* claim related to the utterances made by the CEO about the plaintiff's race and gender in the context of her suitability for the CFO position. The plaintiff alleged that she felt humiliated, degraded and objectified in terms of being a female empowerment equity candidate – without recognition for the fact that she was a professional qualified chartered accountant with extensive experience and achievements. The Court accepted that she had established the common law requirements for her dignity claim to succeed.

The plaintiff succeeded against AMH as far as its liability for her *aquilian* damages was concerned and against the second and third defendants as far as their liability for her damages as a result of the impairment of her dignity were concerned. There was no reason why the general rule that costs follow the result should not apply. The

question, however, is what a fair and just apportionment of their liability for plaintiff's costs should be, a matter that had not been addressed in argument. The costs order made, therefore, was made on the understanding that it was open to the parties to apply, within a reasonable time, to be heard on the question of costs and for a variation of the costs order.

CTP Limited and others v Director General, Department of Basic Education and others [2018] 2 All SA 745 (GP)

Administrative law – Procurement – Legal validity of tender process – Award of tender – Application for judicial review – Procedural fairness and reasonableness of administrative action in awarding the tender – Reviewing court required to consider whether the evidence establishes the factual existence of any irregularities and if such exist, whether they are material enough to conclude that any of the grounds of review provided in the Promotion of Administrative Justice Act 3 of 2000 exist – Materiality of irregularities is determined primarily by assessing whether the purposes of the tender requirements have been substantially achieved.

The award of a tender for the printing and distribution of workbooks provided by the Department of Basic Education in public schools as an ongoing project was at the centre of the present dispute. The legal validity of the award of the tender to the third and fourth respondents was brought into question by the applicants.

During the course of the contract, the third and fourth respondents formed a consortium with the fifth respondent so as to tender the required services. The contract was awarded to them thrice, extending from 2010 to 2016. In 2015, the National Treasury invited bids to tender to print, package and distribute the workbooks from 2017 to 2020. The special conditions of contract in the tender documents set out the process for the evaluation, scoring and awarding of the contract. One of the clauses (clause 2.2) of the special conditions of contract provided for the evaluation of bids against four weighted functionality criteria.

In December 2015, the National Treasury distributed a notice to bidders to supplement clause 2.2 of the special conditions of contract by including a functionality scorecard. The scorecard was not intended to amend or replace clause 2.2 of the special conditions of contract, but to complement it. However, the introduction of the scorecard caused some confusion and contributed significantly to the present dispute regarding the fairness of the process. The first tender was cancelled due to certain deficiencies, and the process started afresh. The consortium's bid was chosen over that of the applicants, because of perceived weaknesses in delivery and operational strategy on the part of the applicants. The applicants therefore sought judicial review of the first respondent's award of the new tender in March 2017 to the consortium. The grounds of review were manifold but in the final analysis focused on the procedural fairness and reasonableness of the administrative action in awarding the tender.

Held – Section 217 of the Constitution regulates procurement in the public sector. The Preferential Procurement Policy Framework Act 5 of 2000was enacted to give effect to section 217 and together with its Regulations, provides that organs of State must determine their preferential procurement policy based on a points system. Furthermore, the Public Finance Management Act 1 of 1999 and the Treasury Regulations require the development and implementation of an effective supply chain management system for the acquisition of goods and services – to ensure that the

tender is conducted in a fair, transparent, equitable, competitive and cost effective manner.

Having regard to case law, the Court stated that a reviewing court must consider whether the evidence establishes the factual existence of any irregularities and if such exist, whether they are material enough to conclude that any of the grounds of review provided in the Promotion of Administrative Justice Act 3 of 2000 exist. The materiality of irregularities is determined primarily by assessing whether the purposes of the tender requirements have been substantially achieved. Once a ground of review under the Promotion of Administrative Justice Act has been established, section 172(1)(a) of the Constitution requires that the decision be declared unlawful and a just and equitable order be made.

Examining each of the grounds of review, the Court found no merit in any of the contentions advanced by the applicants. No reviewable irregularities were found to have occurred and the application was dismissed with costs.

Export Development Canada and another v Westdawn Investments (Pty) Ltd and others [2018] 2 All SA 783 (GJ)

Civil procedure – Interim interdict – Requirements – Requirements for an interim interdict are a prima facie right on the part of an applicant; a well-grounded apprehension of irreparable harm if interim relief is not granted; the balance of convenience favouring the granting of interim relief; and the absence of any other ordinary remedy to give adequate redress to the applicant.

Civil procedure – Jurisdiction – Section 21(1) of the Superior Courts Act 10 of 2013 provides that the court has jurisdiction over all persons residing or being in its area of jurisdiction – Court's jurisdiction not decided by doctrine of forum conveniens which does not reflect our law and may not be excluded by agreement.

Civil procedure – Urgent application – Requirements for urgency – Question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in an application in due course.

An aircraft owned by the second respondent ("Stoneriver") was leased to the first respondent ("Westdawn") in terms of an aircraft lease agreement. Westdawn was part of a group of companies ("the Gupta group of companies"). The first applicant ("EDC") provided Stoneriver with the funding to purchase the aircraft. The funding arrangements were regulated by a facility agreement concluded between EDC, Stoneriver and the second respondent ("Oakbay"), which was also part of the Gupta group of companies. Stoneriver was required, under the facility agreement, to make quarterly repayments of the loan amount to EDC using the rental it received from Westdawn. Oakbay was the corporate guarantor for the repayment of the loan under the facility agreement and the third and fourth respondents were the personal guarantors. Oakbay was one of the main operating companies in the Gupta group, and controlled Westdawn, which was controlled by the third and fourth respondents (Mr Atul Gupta and Mrs Chetali Gupta).

To manage and secure the applicants' rights arising from the transaction, the facility and lease agreements contained numerous rights of security and triggers which would constitute events of default, entitling the applicants to terminate the leasing arrangement and take possession of the aircraft. The applicants alleged that more

than a dozen events of default had come to their attention between October 2017 and December 2017, as a result of which Westdawn, Oakbay and the third and fourth respondents were in breach of the lease agreement and the facility agreement. The applicants accordingly accepted the repudiation, terminated the lease agreement and instructed Westdawn to redeliver the aircraft to Stoneriver. Instead of complying, Westdawn launched an action in the English courts challenging the lawfulness of the cancellation of the two agreements. Pending the final determination of the English proceedings, the applicants sought an interim interdict to have the aircraft grounded and returned to a safe location to be stored.

Held – Together with the merits, the Court had to address the issue of urgency, as the applicants had brought the application as an urgent one. The purpose of urgent proceedings is to enable a court to come to the assistance of a litigant in circumstances where the litigant will be unable to obtain relief in the ordinary course. The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in an application in due course. The third and fourth respondents relied on that omission, contending that the applicants' failure to make such allegation in their founding papers indicated that they could get substantial redress in another court. However, the Court was satisfied that unless the application was enrolled for hearing in the urgent court, the applicants would be unable to obtain substantial redress in an application in due course in a court either in the country or outside. In arriving at that conclusion, the Court took into account the risk of damage to the aircraft; a risk of forfeiture of the aircraft under the Prevention of Organised Crime Act 121 of 1998 (a suspicion existing that the aircraft could be used for unlawful purposes); and reputational harm likely to be suffered by the applicants by virtue of being associated with the third and fourth respondents through their continued use of the aircraft. The Court also rejected a submission that the urgency was self-created.

The jurisdiction of the court was also placed in dispute. The third and fourth respondents did not submit to the jurisdiction of the court, contending that their entitlement not to do so arose from both the facility and the lease agreements which accorded exclusive jurisdiction to the Court of England and Wales. That contention was rejected by the court as section 21(1) of the Superior Courts Act 10 of 2013 provides that the present Court has jurisdiction over "all persons residing or being in . . . its area of jurisdiction." Westdawn and Oakbay were companies incorporated in South Africa, and the aircraft was registered in South Africa. The Court therefore had jurisdiction in the application. A request by the third and fourth respondents for the court to decline to exercise jurisdiction as it was not the *forum conveniens* was unsuccessful as the doctrine of *forum conveniens* does not reflect our law. Furthermore, the facility and lease agreements did not exclude the court's jurisdiction as contended by the third and fourth respondents. In any event, the Court would not be bound by a contractual provision that purported to exclude its jurisdiction as parties to a contract cannot exclude the jurisdiction of a court by agreement.

The requirements for an interim interdict are a *prima facie* right on the part of an applicant; a well-grounded apprehension of irreparable harm if interim relief is not granted; the balance of convenience favouring the granting of interim relief; and the absence of any other ordinary remedy to give adequate redress to the applicant. The applicants were found to have comfortably met the test for those requirements. An order granting the interim relief sought was thus granted.

Law Society of South Africa and others v President of the Republic of South Africa and others (Southern African Litigation Centre and another as amici curiae) [2018] 2 All SA 806 (GP)

Constitutional law – Government of South Africa – International law obligations – Southern African Development Community Tribunal – Lawfulness of South Africa's participation in suspending the Southern African Development Community Tribunal – Court finding decision of South African President to be unlawful, irrational and unconstitutional.

In May 2011, the President of South Africa took a decision to support a resolution suspending the operation of the Southern African Development Community ("SADC") Tribunal and to sign the subsequent Protocol in 2014. On 18 August 2014, the President signed the relevant Protocol which limited the Tribunal's jurisdiction to inter-State disputes to the exclusion, henceforth, of private parties.

Application was made in the present proceedings, for declaratory relief relating to the above two decisions.

The purpose for the establishment of SADC in terms of the Southern African Development Community ("Treaty") was to achieve certain regional developmental goals. Member States bound themselves to act in accordance with the human rights, democratic and rule of law principles. The Tribunal was established to ensure adherence to and the proper interpretation of the Treaty as well as the adjudication of such disputes as may be referred to it. The composition, powers, functions, procedures and other related matters were subsequently provided for in a Protocol pertaining to the Tribunal ("Tribunal Protocol"), the coming into effect of which depended on its ratification by two-thirds of the Member States. When the requisite number of ratifications was not obtained, the Treaty was amended so that the ratification requirement was removed. Having approved the Treaty in 1995, South Africa was bound by the amended version of the Treaty which incorporated the Tribunal Protocol ("Amended Treaty").

In terms of the Protocol (the "First Protocol") passed by the SADC in 2000, the ability of individuals to have access to the Tribunal was not restricted. In the meeting of Heads of State and government in August 2010, the subject of Zimbabwe's failure to comply with the decisions of the Tribunal was discussed. A controversial decision was subsequently taken to suspend the appointment of members of the Tribunal. The effect was that the Tribunal could not function and was in effect suspended. The South African government sought no parliamentary approval prior to its participation and endorsement of the decision – despite knowing that the appointment of members to the Tribunal was mandatory.

The review by SADC of the functioning of the Tribunal resulted in the conclusion of a new Protocol on the Tribunal, which was signed on 18 August 2014. The first respondent was signatory to that Protocol on behalf of South Africa. The Second Protocol was a significant departure from the First Protocol. Only member States and not individuals could thenceforth lodge disputes before the Tribunal. The first applicant contended that it was unlawful for the South African government to sign the Protocol as it infringed against our Constitution.

Seeking a declaration that the respondent's participation in suspending the SADC Tribunal and his subsequent signing of the 2014 Protocol on the SADC Tribunal was unconstitutional, the first applicant argued that the President's impugned conduct violated section 34 of the Constitution for failing to facilitate any prior consultation, and refusing to furnish any information or reasons despite repeated requests; and was inconsistent with the duties of SADC member states under the SADC Treaty itself. The remaining applicants ("the Tembani applicants") submitted that the South African President's signature was contrary to the SADC Treaty and was irrational, arbitrary and *mala fide* in that it could not rationally be related to a legitimate government purpose authorised by section 231(1) of the Constitution and the Treaty.

The respondents contended that the challenge to the President's signature of the 2014 Protocol was premature, as the signature did not bind South Africa, as it was required that the Protocol be placed before Parliament for approval, and no decision had been taken to do that. It was also said that the decision was neither unlawful, irrational nor taken in bad faith.

Held – There is an international law obligation on South Africa to ensure that its citizens have access to the Tribunal and that its decisions are enforced. Any act which detracted from the SADC's Tribunal's exercise of its human rights jurisdiction, at the instance of individuals, was inconsistent with the SADC Treaty itself, and violated the rule of law. The President's signature of the 2014 Protocol was such an act. The Tembani applicants had vested interests in SADC Tribunal awards and the enforcement of those awards was specifically provided for in the Treaty itself and the 2000 Protocol. All those vested rights had been interfered with retrospectively with the participation of the President.

The first applicant contended that the President's actions relating to the 2011 suspension and the 2014 Protocol were in clear conflict with the terms of the Treaty itself, the terms of the First Protocol and the provisions of section 231(4) and (5) of the South African Constitution as the actions were taken without approval of Parliament. The Court found that submission to be cogent and held the President's signature to the 2014 Protocol to be unlawful in the sense of being unconstitutional and therefore liable to be set aside.

If the President's signature to the 2014 Protocol cannot rationally be related to a legitimate Government purpose authorised by section 231(1) of the Constitution, then it followed that the President acted irrationally. Amending the Treaty without terminating the First Protocol was unlawful. The Executive has no authority to participate in a decision in conflict with South Africa's binding obligations. If it was the intention to withdraw from South Africa's obligations under both the Treaty and the Protocol, consent of Parliament had to be obtained first. Failure to do so, in the present context, was unlawful and irrational.

Granting the declarator that the President's participation in suspending the SADC Tribunal and his subsequent signing of the 2014 Protocol on the SADC Tribunal was unlawful, irrational and thus, unconstitutional, the Court referred the order to the Constitutional Court for confirmation.

Lurhani and another v Premier of the Eastern Cape Provincial Government and others [2018] 2 All SA 836 (ECM)

Local Government – Traditional leadership – Claim for the position of senior traditional leadership of traditional community – Committee of the Commission on Traditional Leadership Disputes and Claims making recommendation to Premier based on interpretation of Mpondo customary law – Interpretation that an adulterine child from a married woman cannot inherit from or succeed the natural father shown to be incorrect.

The applicants sought the review and setting aside of a decision of the first respondent ("the Premier"). After receiving recommendations from the Committee of the Commission on Traditional Leadership Disputes and Claims (the "Committee"), the Premier dismissed the first applicant's claim for the position of senior traditional leadership of Mbalisweni Traditional Community in the district of Libode. The decision to dismiss the claim was based on the interpretation of Mpondo customary law as not permitting the offspring of an adulterous relationship to succeed his biological father. Amongst the various grounds of review, the applicants alleged non-compliance with some of the provisions of the Traditional Leadership and Governance Framework Act 41 of 2003. It was also submitted that the Committee and therefore the Premier erred in their interpretation of Mpondo customary law of succession of illegitimate children.

Held – The Traditional Leadership and Governance Framework Act contains provisions which makes it clear that members of the Royal Family play a very significant role in the determination of who the rightful person is to fill a position of traditional leadership. While a number of people gave oral testimony to the Committee, none of them were required to state if and to what extent they were related to the royal family. The Court found the Committee's statement that the first applicant's claim was rejected by the family of his father to be unsupported by the evidence. The Committee was found to have made a serious error and in that regard misled the Premier, who was entitled to accept the Committee's findings. More importantly, the Committee misinterpreted and misrepresented the evidence of a witness regarding the existence of a general rule that adulterine children do not inherit. The first respondent then adopted the recommendations of the Committee without having ensured that the record of the proceedings were furnished to her. Had she sought the record of proceedings, the misrepresentation of the evidence of the witness should have been picked up. Consequently, the respondent did not place herself in a position of being able to make an informed decision.

In concluding that an adulterine child from a married woman cannot inherit from or succeed the natural father, the Premier said nothing about the evidence presented to the contrary. Although acknowledging the possibility that Mpondo customary law might have been incorrectly interpreted by the Committee, the Premier failed to use readily available information that had been recorded during the hearings in the form of all the submissions that had been made. Instead, she decided the matter in the absence of that information.

Historical evidence showing that an adulterine child had been allowed to ascend to positions of traditional leadership in the past was undisputed by the respondents. The Court found that the Mpondos have been recognising the place of an illegitimate child in his or her father's family long before the advent of the constitutional dispensation. It

was therefore unlikely that, under the constitutional dispensation founded on a Bill of Rights, the rights of illegitimate children to succeed, subject to the decision of the Royal Family to correctly determine who the rightful successor should be, can be negated.

The Court was satisfied that the Committee misinterpreted Mpondo customary law and therefore the Premier should have rejected the recommendations of the Committee and found that according to Mpondo customary law, a child born of an adulterous relationship can succeed as an heir to his father and can ascend to a position of traditional leadership if the royal family so determines.

Macia and others v Road Accident Fund [2018] 2 All SA 862 (MCC, Mbombela)

Courts – Litigation – Norms and standards regulating litigation – Court critical of practice of allowing litigation to drag on to the benefit of practitioners and the detriment of their clients – Discouragement of trend of seeking to settle and asking for stand-downs or postponements on the date or week of trial – Court issuing punitive costs orders.

Seventeen cases were dealt with by the court in this judgment, in which the court highlighted the norms and standards in litigation in our courts.

Held – Such norms and standards are to be strived for by judicial officers in charge of proceedings as well as practitioners and litigants. The practice of allowing litigation to drag on to the benefit of practitioners and the detriment of their clients had to be stopped.

In terms of section 165(6) of the Constitution and section 8(2) of the Superior Courts Act 10 of 2013, the Chief Justice exercises responsibility for the establishment and monitoring of norms and standards for the exercise of judicial functions of all courts. To that end the norms and standards was issued by the Chief Justice under circular 1 of 2014.

Section 34 of the Constitution guarantees the right to have any dispute that can be decided by the application of the law decided in a fair public hearing. Therefore, any delay in finalisation of cases, resulting in unnecessary litigation costs violates that right. Section 173 of the Constitution gives the power to the higher courts to protect and regulate their own processes. One way of doing that is to ensure that matters enrolled for the resolution of disputes in our courts do not take months and years to be finalised. The norms and standards require judicial officers in any High Court to finalise civil cases within one year from the date of issue of summons, and within nine months in the magistracy. Judicial officers must take steps to manage cases against that backdrop as set out by the court in its judgment.

In each of the seventeen cases dealt with in this judgment, it was directed that in the event of settlement, draft orders be filed by a certain date and that the case be moved from the trial roll to the settlement roll. The aim was to avoid unnecessary court days or appearances. The Court turned to consider each case, hoping in doing so, to discourage the trend of seeking to settle and asking for stand-downs or postponements on the date or week of trial. Highlighting how directives issued at pre-trial conferences were not adhered to and last-minute requests for stand-downs or postponements were regularly sought, the Court showed its displeasure by making punitive costs orders against the practitioners in each case.

The court made the following orders : “Consequently, I hereby make an order in all the 18 matters as follows: In Marcia Ercilia case 122.1Costs occasioned by the postponement to be by the defendant on an attorney and client scale.

122.2 The defendant’s attorneys are hereby ordered to forfeit any day fee or disbursement chargeable against the defendant insofar as such a fee or disbursement was directly related to and occasioned by the postponement herein.

In Cassandra Butler case 122.3 No order as to costs occasioned by the postponement is made against any of the litigating parties. 122.4 It is hereby ordered that the parties’ legal representatives including Counsel if any, shall not be entitled to recover any appearance day fee, cost and or disbursements from any of their respective clients (litigating parties) insofar as such a fee, costs and or disbursement is directly related to and or occasioned by the postponement.

In Zelda Carlamarie Eberson case 122.5 I hereby hand down the reasons for the order in terms of which the costs occasioned by the postponement was not to be recovered from the litigating parties by their respective legal representatives.

In HH Selowe case 122.6 The defendant to pay costs of the action on a party and party, except those costs occasioned by the late settlement which costs shall be on an attorney and client scale. 122.7 The defendant’s attorney is hereby disentitled to levy or debit any fee against the defendant (client) insofar as such a fee is connected to and occasioned by the late settlement including forfeiture of day’s fee for 27 November 2017.

In GH Mabunda case 122.8 The defendant to pay costs of action on a party and party scale. 122.9 The defendant’s attorneys are hereby ordered to forfeit entitlement to charge any fee, costs and or disbursement against the defendant (client) including appearance day fee on date of trial insofar as such a fee, costs and or disbursement is connected to and or was occasioned by the late settlement.

In NS Maphalu obo minor 122.10 No order as to costs occasioned by the postponement is made against any of the litigating parties and the parties, legal representatives are hereby ordered not to recover any fee, costs and or disbursement including appearance day fee on the date of trial, insofar as such fee, costs and or disbursement is connected to or was occasioned by the postponement herein.

[These are just a few examples]

END-FOR NOW