LEGAL NOTES VOL 7/2017

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INDEX[1]

SOUTH AFRICAN LAW REPORTS JULY 2017

SA CRIMINAL LAW REPORTS JULY 2017

ALL SOUTH AFRICAN LAW REPORTS JULY 2017

SALR JULY 2017

MACASSAR LAND CLAIMS COMMITTEE v MACCSAND CC AND ANOTHER 2017 (4) SA 1 (SCA)

Land — Land reform — Land Claims Court — Jurisdiction — Claimant seeking restitution of commonage over land — Mining right over land granted to third party under Mineral and Petroleum Resources Development Act 28 of 2002 — Whether Land Claims Court can order expropriation and expungement of mining right — *LCC* may only order acquisition or expropriation of particular land, or particular right in land, where that land, or right in land, also subject of claim for restitution — *LCC* may not grant expropriation of mining right — Restitution of Land Rights Act 22 of 1994, s 35(1)(a).

Land — Land reform — Expropriation — Claimant seeking restitution of commonage over certain land — In respect of land, mining right having been granted to third party in terms of Mineral and Petroleum Resources Development Act 28 of 2002 — Claimant also seeking expropriation and expungement of mining right — Claimant cannot demand that right be free from impact of *MPRDA* and free from rights properly granted under it — Court dismissing expropriation claim in respect of mining rights.

Land — Land reform — Restitution — Claim for restitution of right in land — Power of Land Claims Court to 'adjust the nature of right previously held by the claimant' — *LCC* may not, when restitution was sought of particular right in land, adjust right so as to alter its essential nature and restore something different from that which was taken away — Claim for restitution arising from dispossession of right in land other

[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!**

than ownership, not giving rise to claim for restitution of land — Restitution of Land Rights Act 22 of 1994, s 35(4).

The appellant in this matter was the Macassar Land Claims Committee (the Committee), representing members of the community of Sandvlei, Macassar. It claimed that descendants of its members had historically enjoyed rights of commonage over certain land, but that they had been dispossessed of such rights by intervening racially discriminatory legislation. In terms of the Restitution of Land Rights Act 22 of 1994 (the Restitution Act), the Committee brought an application in the Land Claims Court (the LCC), seeking inter alia restitution of the lost commonage rights in the land, by the restoration of the land * comprising a number of erven in Macassar, and the prior acquisition or, if necessary, expropriation, of the land.

In respect of one of the erven, Maccsand CC (Maccsand) had been granted a mining right in terms of the Mineral and Petroleum Resources Development Act 28 of 2002 (the MPRDA). It entitled Maccsand to engage in sand- mining operations. The Committee, as part of its relief, also sought the expropriation and then expungement of such right. Maccsand and the Department of Minerals and Energy as respondents successfully raised a special plea disputing the power of the LCC to grant the relief relating to the mining right. The Committee appealed to the Supreme Court of Appeal.

The basis upon which the Committee sought expropriation of the mining right was as follows: What was being sought was restitution of land, of which the erf which was the subject of the mining right was part. Because that land was not owned by the state, it could only be restored if it were first acquired. Hence its acquisition or expropriation was necessary in order to give effect to the order for restitution. However, for restoration of the land to be complete, the mining right, which imposed a burden on the rights of the owner of the land, had also to be removed; hence an order too for its expropriation and then expungement.

Held, that, in terms of s 35(1)*(a)* of the Restitution Act, the LCC could only order the acquisition or expropriation of particular land, or a particular right in land, where *that* land, or right in land, was also the subject of the claim for restitution. Here, the Committee did not seek the restitution of *the land* which it wished expropriated, as it had argued; rather it claimed restitution of *lost commonage rights in* the land. In such circumstances the LCC could not order the expropriation of *the land*, including the erf subject to the mining rights. (Paragraphs [13] – [16] at 7J – 9A.)

Held, further, that the power of the LCC in terms of s 35(4) of the Restitution Act, when ordering the restitution of a right in land, to 'adjust the nature of the right previously held by the claimant', did not allow the LCC to direct the acquisition of the land over which the commonage right existed. Adjusting a right meant that the right remained the same, but in some matter of detail was altered. But s 35(4) did not empower the LCC, when restitution was sought of a particular right in land, to adjust the right so as to alter its essential nature and restore something different from that which was taken away. It followed that a claim for restitution arising from dispossession of a right in land other than ownership could not give rise to a claim for restitution of land. (Paragraphs [18] – [20] and [22] at 9F – 10D and 10H.)

Held, that, even were the Committee entitled to receive title to the disputed land in satisfaction of its claim for restitution of the commonage rights of which the community was dispossessed, that would not afford it any right in relation to the mining of sand on the erf in question. Nor would it entitle it to interfere with the

mining right that Maccsand had obtained under the MPRDA. Since the coming into effect of the MPRDA in 2004, ownership did not carry with it the right to exploit minerals situated on or under the land in question. Such a right could only arise through the grant of a mining right in terms of the MPRDA, which grant did not require the consent of the owner. In other words, any right the community might have had to mine the land in question, assuming they had not been dispossessed of their commonage rights, would have in any case been lost through intervening legislation. *Held*, further, that, where a claimant under the Restitution Act sought restitution of a right in land, they could not claim that the right be free from the impact of current regulatory legislation enacted after the inception of democracy. Nor could they demand that it be free from the impact of the MPRDA and free from rights properly granted under it. The Restitution Act was intended to provide a means to remedy past dispossession of land occasioned by racially discriminatory measures. Once the wrong of the past was remedied, the successful claimant was restored to the right in land of which they were dispossessed, but they had to exercise it in the legal environment that now existed.

KAKNIS v ABSA BANK LTD AND ANOTHER 2017 (4) SA 17 (SCA)

Credit agreement — Consumer credit agreement — Section 126B(1)(b) of National Credit Act 34 of 2005, inserted by National Credit Amendment Act 19 of 2014 — Retrospectivity — Section having no retrospective application.

The question addressed in this matter was whether s 126B(1)*(b)* of the National Credit Act 34 of 2005 (the NCA) applied retrospectively. The provision was inserted into the NCA by the National Credit Amendment Act 19 of 2014 and came into operation with effect from 13 March 2015. It provided in relevant part as follows:

'126B Application of prescription on debt

(1)(a) . . .

(b) No person may continue the collection of, or re-activate a debt under a credit agreement to which this Act applies —

(i) which debt has been extinguished by prescription under the Prescription Act, 1969 (Act 68 of 1969); and

(ii) where the consumer raises the defence of prescription, or would reasonably have raised the defence of prescription had the consumer been aware of such a defence, in response to a demand, whether as part of legal proceedings or otherwise.'

The appellant sought to rely on this provision in opposing summary judgment proceedings instituted by the respondents against him, summons having been issued on 30 April 2015. He argued that the acknowledgment of debt he signed in October 2014, and upon which the respondents relied, operated *to reactivate* prior debts under the NCA which had been extinguished by prescription. Had he been aware of the defence of prescription, he would have raised it at the time of entering into the agreement. He argued that s 126B(1)*(b)* operated retrospectively to invalidate it. The court a quo disagreed, finding that the respondents were therefore entitled to rely on the acknowledgment of debt. This was an appeal to the Supreme Court of Appeal against that finding.

Held, agreeing with the High Court, that s 126B(1)*(b)* had no retrospective operation and provided no defence to the appellant. The presumption against retrospectivity could not be rebutted in the circumstances. The retrospective application of the

provision would have the effect of nullifying agreements that had been validly entered into and taking away existing rights, a fact of which the legislature had no doubt to be taken to have been aware. However, there was no indication in the provision, or elsewhere, of any intention of such effect. Furthermore, the fact that the provision was intended to benefit consumers in itself said nothing about retrospectivity. Although the main objective of the NCA was to protect consumers, such protection had to be balanced against the rights of credit providers.
Shongwe JA and Willis JA each delivered dissenting judgments. Shongwe JA found that, while there was no express indication thereto, the provision provided for retrospective application by necessary implication. Such a reading was called for in the light of the clear intention of the legislature in introducing s 126B, ie to protect naïve and vulnerable consumers by eradicating the injustice inherent in credit providers being able to benefit from transactions which had become prescribed. Furthermore, such an interpretation was in line with the trend set by the Constitutional Court emphasising the protection of the consumer. Similarly, Judge Willis found that a comprehensive reading of the NCA supported a finding of retrospectivity of the provision in question.

PENTREE LTD v NELSON MANDELA BAY MUNICIPALITY 2017 (4) SA 32 (ECP)

Expropriation — Compensation — Calculation — Expert valuation — Approach of court — Valuer may adduce evidence of information provided by third parties — Not hearsay — Court to decide what weight to attach to evidence — Expropriation Act 63 of 1975, s 12(1); Constitution, s 23(5).

Expropriation — Compensation — Calculation — Market value still at heart of enquiry — Constitution providing additional factors that may justify adjustment to market-based compensation — Constitution, s 23(5).

The plaintiff claimed compensation under s 12(1) and (2) of the Expropriation Act 63 of 1975 (the Expropriation Act) for land expropriated by the defendant municipality. To prove market value the plaintiff called an expert valuer, one Falck, who relied on information given to her by one Edelson, another expert valuer. The municipality objected to this evidence on the ground that it was hearsay. The plaintiff argued that it was not hearsay and that even if it were, it ought to be admitted under s 3 of the Law of Evidence Amendment Act 45 of 1988 (the Amendment Act).

Held

Market value was at the heart of an enquiry under s 12(1) of the Expropriation Act. Section 25(3) of the Constitution provided for additional factors that could, where appropriate, justify an adjustment to the market-based compensation to reflect a just and equitable result (see [39]).

In considering the quantum of compensation in expropriation cases a line of decisions established that there was no *lis* between the parties and no onus on the plaintiff, and that the court functioned as a 'super valuer' that had to place itself in the shoes of the notional informed buyer and seller. The Expropriation Act did not change this.

An expert valuer could, in the course of s 12 proceedings, adduce evidence of information provided by other persons that influenced his or her valuation. Such information was part of the general body of information available to informed buyers

and sellers in arriving at a purchase price, and was relevant and material irrespective of its truth. It was then up to the court to decide what weight to attach to it (see [31], [42], 51]).
The information provided by Edelson was freely available on the market, and the notional informed buyer would have taken in into consideration (see [43]). It was relevant and material irrespective of its truth, not hearsay, and in any event admissible under s 3 of the Amendment Act. Any prejudice to the municipality would be cured by the opportunity to cross-examine Falck (see [51], [54], [57]). Objection overruled.

BOOYSEN v JONKHEER BOEREWYNMAKERY (PTY) LTD AND ANOTHER 2017 (4) SA 51 (WCC)

Company — Business rescue — Moratorium on legal proceedings against company — Leave to institute proceedings — Whether to be obtained by way of formal and substantive application, instituted separately from and prior to main proceedings instituted against company — Or whether leave might be sought as part of main proceedings — Answer depending on particular facts of matter — Court to exercise judicial discretion — Companies Act 71 of 2008, s 133(1)(b).

Company — Business rescue — Moratorium on legal proceedings against company — Whether 'general moratorium' provisions applicable to legal proceedings with regard to business rescue plan adopted by company — Companies Act 71 of 2008, s 133(1).

Company — Business rescue — Business rescue plan — Whether business rescue practitioners may reserve for themselves right to amend business rescue plan unilaterally, after it had been adopted — Such conduct prohibited by business rescue provisions of Companies Act 71 of 2008, in terms of which control over rescue proceedings exercised by democratic majority vote of creditors and affected parties.

The applicant instituted proceedings in the High Court against a company under business rescue (the company), as well as the business rescue practitioner (the practitioner) concerned. He claimed that a business rescue plan had been adopted by the company, in terms of which it was admitted that he, an employee, had a preferent claim for outstanding remuneration against it, and that the full amount owing to him would be settled in full. When no such payment was forthcoming, he sued for such amount, essentially seeking an order to give effect to the business plan as adopted. The principle issues arising were the following: (1) In terms of s 133(1) of the Companies Act 71 of 2008, during business rescue proceedings no legal proceedings against the company may be commenced or proceeded with, except, amongst other alternatives, with the 'leave of the court'. Did such leave have to be sought and obtained by way of a formal and substantive application, instituted separately from and prior to the main application instituted against the company, as was insisted by the respondents? Or might such leave be sought as part of the main application itself, as argued by the applicant?
(2) Was the applicant correct in asserting that the 'general moratorium' provisions did not apply to legal proceedings taken in respect of a business rescue plan adopted by a company, for example, claims to set it aside, or, as here, to enforce its implementation? The basis of such a submission was that the legislature only ever intended that such provisions apply to claims arising prior to the commencement of business rescue proceedings.

(3) Could business rescue practitioners reserve for themselves the right to amend a business rescue plan (and the creditor's claim reflected therein) unilaterally, after it had been adopted? In the instant matter, the practitioner sought to rely on such a right in denying the company's liability to the applicant. The practitioner claimed that, at the time of the business plan's initial adoption, the company was mistaken as to the applicant's claim, and that the plan had subsequently been amended to reflect the true state of affairs.

In considering (1) and (2), the court provided an overview of variously conflicting case law. The court too set out the various principles of interpretation that had to guide its hand (see [38] – [53]), which included the following: the need to promote the spirit, purport and objects of the Bill of Rights in interpreting the provisions in question, which called for, inasmuch as the provisions of s 133(1) might intrude upon the constitutional right of access to court, 'a generous construction' which limited such intrusion; and, as was clear from the Act itself, the importance of striving towards an interpretation that allowed for the speedy, cost-effective and efficient implementation of an adopted rescue plan and the timeous completion of the business rescue process.

As to (1), *held* that it was not necessary that, in *each and every matter* in which leave of the court was required, such leave had to be sought and obtained by way of a formal application; or that such leave, of necessity, had always to be sought by way of a separate, prior application. What would be required would depend on the circumstances of each particular matter. It would in each case be a matter for the court's discretion, to be exercised judicially on the basis of considerations of fairness and the interests of justice. Where the facts of a particular matter dictated that, prior to commencing with certain legal proceedings, a court should impose certain terms and conditions, it would obviously be sensible and proper to approach the court for the necessary leave and guidance in this regard, *before* such proceedings were commenced. However, there might well be instances where it would be appropriate, fair and convenient to obtain the court's leave in one and the same matter, by way of an interim order, before the main application or action itself was heard, and the relief sought therein was granted. Examples would include instances where proceedings had to be launched as a matter of urgency, or where the facts and circumstances relevant to the principal application were inevitably going to have to be dealt with in any interlocutory application for leave to launch such application. The present matter was one falling into such category of cases. Such application could properly be made as a part of the principal matter and could be heard in limine prior to the commencement thereof, without doing violence to the provisions of the section.

As to (2), *held* that there was no justification in holding that such proceedings were not of the kind covered by s 133(1). It could never have been the intention of the legislature to exclude any and all legal proceedings that dealt with the adoption or implementation of a business plan, from the requirement of the consent of the business rescue practitioner or the leave of the court.

As to (3), held that the Act prohibited business rescue practitioners from reserving for themselves the right to amend a business rescue plan that had been adopted. Any other interpretation would make nonsense of the process provided for in the Act whereby control over the rescue proceedings — in particular the approval, amendment and rejection of the proposed business rescue plan — was to be exercised by democratic majority vote of the creditors and affected parties. And any other interpretation would allow the business rescue practitioner to unilaterally reduce or compromise creditors' claims to their prejudice (or even perhaps to

increase certain claims at the expense of others), thereby exposing the whole process to uncertainty and possible corruption.
Application granted.

NASH AND ANOTHER v MOSTERT AND OTHERS 2017 (4) SA 80 (GP)

Attorney — Fees — Contingency fees — Contingency fee agreement — In respect of non-litigious matters — Common law — For same reasons contingency fee agreements in respect of litigious matters prohibited by common law, so too are those in respect of non-litigious matters — Agreements contrary to public policy and invalid.

Contingency fee agreements are regulated by the Contingency Fees Act 66 of 1997 (the CFA), and in terms thereof they will be allowed if certain specified requirements are met. Legal practitioners have in the past sought to rely on agreements falling short of the CFA on the basis of their permissibility in terms of the common law. Courts have now authoritatively stated that contingency fee agreements are prohibited by the common law. In this matter reliance was placed on a contingency fee agreement in non-compliance with the CFA, in respect of *non-litigious* matters. The argument was that, to the effect that courts had previously made judicial pronouncements that common-law contingency fee agreements were not allowed, they had had in mind agreements in respect of litigious matters; and not those in respect of non-litigious matters, which were still permitted. This issue formed the focus of the present matter.
Mr Mostert had been appointed, at the instance of the Financial Services Board (FSB), in terms of s 5 of the Financial Institutions (Protection of Funds) Act 28 of 2001 as the curator to take control of, and to manage the business of, the Sable Industries Pension Fund, which had been left with no assets as a result of theft committed against it. The High Court order giving effect to the appointment set out the scope of the curator's powers. They included the powers to recover the assets illegally removed and amounts owed to the Sable Fund; to incur reasonable and necessary expenses; and to employ the services of lawyers and other professional persons and to institute, prosecute or defend proceedings on behalf of the Sable Fund. It was a term of the order that —

'(t)he curator shall be entitled to periodical remuneration *in accordance with the norms of the attorneys profession*, as agreed with the [FSB]'.

As constituted by various documents, a remuneration agreement was entered into between the FSB and the curator Mostert. The critical term provided that —

'(i)n the circumstances recovery of assets . . . shall be subject to the curators' remuneration of 16,33 % (exclusive of VAT) of such assets recovered'.

In other words, in the event of a failure to retrieve the funds lost through theft, the curator would not receive remuneration.
The interpretation of the above clauses formed the subject-matter of the present dispute. Mr Nash — who had been a member of the Sable Fund, and had been accused of being guilty of the theft — and the company Midmacor — of which Mr Nash was the primary controller, and which company had been the Sable Fund's principal employer — instituted an application in the High Court against inter alia the curator Mostert and the FSB. They argued that the remuneration agreement was invalid and void ab initio by virtue of its being a *contingency fee agreement* non-compliant with the CFA, and hence contrary to the norms of the attorneys' profession.

Various special defences were raised. It was submitted that the applicants had no standing. The court disagreed; the applicants had standing by virtue of their relationship with the Sable Fund, as well as s 5(8)*(a)* of the FIA, which provided that '(a)ny person, on good cause shown, may make application to the court to set aside or alter any decision made, or any action taken, by the curator . . . with regard to any matter arising out of, or in connection with, the control and management of the business of an institution which has been placed under curatorship'. It was further argued that the applicants had approached the court with 'unclean hands', in the sense that Mr Nash hoped through success in this case to frustrate the curator's right to compensation and ultimately his attempt to bring him to justice. While accepting the presence of an improper motive on the part of Mr Nash in bringing the case, the court felt that the importance of the issue — which involved the exercise of public power, namely a constitutional issue — demanded that the case be heard.
Moving on to the primary issue — the interpretation of the previous order and the remuneration agreement.

Held

The previous court order meant that the *character* of the curator's remuneration had to be in accordance with the norms of the attorneys' profession (the respondents had sought to argue that the order only governed the *periodicity* of the remuneration). (Paragraphs [63] – [64] at 97D – G.)
The respondents were incorrect in their assertion that there was case authority to the effect that the common law allowed contingency fee agreements in respect of *non-litigious matters*. Rather, the issue had not yet been expressly resolved.
Contingency fee agreements in respect of *non-litigious matters* were against public policy, and for broadly the same reasons that agreements in relation to litigious work were, namely: the undertaking of speculative actions for clients could give rise to conflicts of interest between the duty and the interests of legal practitioners. The remuneration agreement under consideration was hence not in accordance with the norms of the attorneys' profession and thus invalid.

DA CRUZ AND ANOTHER v CAPE TOWN CITY AND ANOTHER 2017 (4) SA 107 (WCC)

Local authority — Buildings — Building plans — Approval — Duties of decision-maker — Must consider, in addition to building's compliance with technical and regulatory restrictions and prescriptions, contextual effect of finished product — Must consider effect on existing and future development of neighbouring properties — National Building Regulations and Building Standards Act 103 of 1977, s 7(1)(b)(ii).

Local authority — Buildings — Building plans — Approval — Building plan's compliance with zoning scheme and building regulations not excluding existence of disqualifying factors set out in s 7(1)(b)(ii) of Building Act — Question of presence of disqualifying factors a substantial enquiry, discrete from enquiry into compliance with applicable planning and building laws under s 7(1)(a) — National Building Regulations and Building Standards Act 103 of 1977, s 7(1)(b)(ii).

This was an application in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) for the review and setting-aside of the City's approval of building plans for the renovation and extension of the Oracle building, owned by the second respondent, in central Cape Town. The applicants were the body corporate of, and an owner of one of the residential units in, the Four Seasons building, situated on the

erf immediately adjoining that on which the Oracle was built. The relevant background follows. At the time of the submission in 2008 of the building plans in question, both buildings extended right up to the common boundary line between the two properties, such that the Four Seasons building's first seven floors, comprising a parking garage, directly abutted the Oracle building, which stood at four storeys at the time. The Four Seasons' eighth and higher storeys, comprising residential apartments, extended above the height of the roof of the Oracle, and were set back from the common boundary, such that residents on the eighth storey were provided with balconies facing the common boundary, overlooking the Oracle building's roof. In face of opposition by the applicants the second respondent in 2008 successfully sought the City's approval of its building plans, for the renovation of the Oracle building, as well as the upward extension of the building, flush against the common boundary, above the height of the parking levels in the Four Seasons building. The impact would be that residents of the eighth-floor apartments in the Four Seasons would now, on the common-boundary-facing side, be presented with a towering solid wall; their balconies effectively being converted into small courtyards. The applicants applied to the High Court to set aside the building plans (at this stage building had already commenced). The application was granted. The present application is for the setting-aside and review of the City's approval of the second respondent's resubmitted plans.

The central allegation was that both the City and the building control officer, whose recommendation the City was required to consider before making a decision to approve the building plans or not, had failed to properly address the requirements of s 7(1)*(b)*(ii) of the National Building Regulations and Building Standards Act 103 of 1977 (the Building Act). The section reads in relevant part as follows:

'(1) If a local authority, having considered a recommendation [of the building control officer] referred to in section 6(1)*(a)* —

(a) is satisfied that the application in question complies with the requirements of this Act and any other applicable law, it shall grant its approval in respect thereof;

(b) (i) is not so satisfied; or

(ii) is satisfied that the building to which the application in question relates —

(aa) is to be erected in such manner or will be of such nature or appearance that —

(aaa) the area in which it is to be erected will probably or in fact be disfigured thereby;

(bbb) it will probably or in fact be unsightly or objectionable;

(ccc) it will probably or in fact derogate from the value of adjoining or neighbouring properties;

. . .,

such local authority shall refuse to grant its approval in respect thereof and give written reasons for such refusal . . . .'

The City and the building control officer expressed themselves satisfied that the requirements of s 7(1)*(b)*(ii) had been met. However, the applicants submitted that, in deciding whether the disqualifying factors set out in such provision had been triggered, the City had to address the reasonable expectations of notional purchasers of apartments in the Four Seasons building. The particular point was that such a purchaser would never have expected that the City, having approved balconies on the eighth floor of the Four Seasons building, would then approve the further development of the Oracle building which would effectively render those balconies useless. The failure on the part of the City to address this issue, it was

argued, resulted in the approval decision's being reviewable, on the basis of inter alia s 6(2)*(d)* (materially influenced by an error of law) and s 6(2)*(e)*(iii) (relevant consideration not considered) of PAJA. On their part the relevant functionaries appeared to suggest that there could be no question of a building plan's triggering the disqualifying factors where the planned building would be erected within the parameters of the applicable zoning scheme; that was the case here — the relevant zoning scheme permitted a building to cover 100% of the erf, ie right up to the common boundary, which was what the plans under consideration envisaged.
The High Court considered in detail the scope and purposes of s 7(1)*(b)*(ii) of the Building Act. In particular the court considered what a local authority was required by the provision to consider.
Held, that, common to planning and building legislation was the object of harmonious and co-ordinated building development. When it considered a building plan application, a local authority had to have regard not only to the compliance of the proposed building with the technical restrictions and regulatory prescriptions in respect of building development on the building plan applicant's property, but also, as required by s 7(1)*(b)*(ii) of the Building Act, to the contextual effect of the contemplated finished product. It meant that the local authority, in deciding whether the proposed new development would trigger any of the disqualifying factors, had to take appropriately into account the effect of the development on the existing, and foreseeably future, development of neighbouring properties. (Paragraphs [45] – [48] at 130F – 132A.)
Held, that the contextual assessment, involving an enquiry into the existence of any disqualifying factors in terms of s 7(1)*(b)*(ii), occurred in the second stage of a two-part enquiry. The second part was undertaken only *after* the local authority had satisfied itself that the proposal was compliant with the zoning scheme restrictions, the National Building Regulations and any other law that might be applicable to the proposed development. A positive determination of the building plan application in the first part of the enquiry should not be treated as a prognosticator of the determination of the second part, certainly not in a manner that would deprive the second part of the enquiry of its discrete and substantive import. In other words, in this case the functionaries' satisfaction that the proposed building fell within 'the set development parameters' did not provide an answer to whether the disqualifying factors set out in s 7(1)*(b)*(ii) had been triggered. Neither could it be said that the zoning provisions regulating development of the second respondent's property that permitted development up to the boundary line conferred a virtually absolute right, nor that any building erected within the parameters of the applicable zoning scheme restriction had to be tolerated by neighbours irrespective of its adverse effect on their properties.
Held, that, in considering whether an aspect of the proposed building additions would be objectionable or unsightly or give rise to a derogation from the value of some apartments in the Four Seasons building, the relevant functionaries were obliged to address the following question. Would a reasonable and informed purchaser of a unit on the eighth floor of the Four Seasons building foresee that the regulating authority, having approved balconies along the common boundary, would permit the development of the adjoining erf in such a manner as to effectively destroy the utility of the balconies as such, and with the degree of overbearing intrusiveness that allowing a three-storey solid wall to be built hard up against them would occasion. Their failure to do so meant that the approval of the second respondent's building plan occurred in circumstances in which the decision-maker was materially

influenced by an error of law (ie a misapprehension of the import and requirements of s 7(1) of the Building Act) and in which there was a resultant failure by the decision-maker to take into account a relevant consideration, in breach of the requirements of PAJA.

FRIEDRICH AND OTHERS v SMIT NO AND OTHERS 2017 (4) SA 144 (SCA)

Administration of estates — Accounts — Liquidation and distribution account — Objections — Master refusing to sustain objection — Appeal against his decision — Nature of appeal given by s 35(10) — Administration of Estates Act 66 of 1965, s 35(10).

Appellants objected to the inclusion in a liquidation and distribution account of a surviving spouse's claim for maintenance. The master declined to direct its removal, and the appellants applied to set aside his decision under s 35(10) of the Administration of Estates Act 66 of 1965. The High Court's conclusion, and the conclusion of the full court on appeal, was that the claim was justified.
On appeal to the Supreme Court of Appeal, the first issue was the nature of the appeal given by s 35(10). *Held*, that it was an appeal in the wide sense, where the court could consider the matter afresh and make any order it deemed fit (see [14]).
The second issue was whether the surviving spouse had proved she needed maintenance. *Held*, that she had not (see [17], [21]).
Appeal upheld (see [22]).

WISHART NO AND OTHERS v BHP BILLITON ENERGY COAL SOUTH AFRICA (PTY) LTD AND OTHERS 2017 (4) SA 152 (SCA)

Company — Winding-up — Claims — Late proof — Part of s 44(1) allowing court or master to give leave for late proving of claim, applying in winding-up — Insolvency Act 24 of 1936, s 44(1).

Company — Winding-up — Claims — Expungement — Whether person may bypass s 407 and approach court directly to expunge claim — Companies Act 61 of 1973, s 407.

In their particulars of claim, fourth and fifth appellants had sought the High Court's leave under s 44(1) of the Insolvency Act 24 of 1936, to prove a late claim in the winding-up of second respondent. The respondents raised an exception which was upheld.
On appeal in the Supreme Court of Appeal, the issue was whether the part of s 44(1) allowing the court or the master to give leave for the late proving of a claim, applied in windings-up. *Held*, that it did.
Upholding of the first exception reversed (see [30]).
Fourth and fifth appellants had also claimed the expungement of a claim in the liquidation and distribution account. The respondents had again successfully excepted (see [17], [19]).
The issue on appeal was whether a party could bypass s 407 of the Companies Act 61 of 1973 and approach a court directly to expunge a claim. *Held*, that it could not: the section gave the power of expungement to the master alone; and only when he had made a decision in its exercise, could a person approach a court to review it.
Appeal against the upholding of the second exception dismissed

BODY CORPORATE OF EMPIRE GARDENS v SITHOLE AND ANOTHER 2017 (4) SA 161 (SCA)

Insolvency — Compulsory sequestration — Provisional sequestration — Facta probanda — Advantage to creditors — Application by body corporate of sectional title scheme for compulsory sequestration of members in arrears with levy payments — Body corporate must prove pecuniary benefit to general body of creditors — Insolvency Act 24 of 1936, s 10(c).

The court a quo dismissed an application by the body corporate of a sectional title scheme for the compulsory sequestration of two of its members who were in arrears with levy payments. This was on the basis that such an order would only benefit the body corporate and not the general body of creditors as required by s 10(1)*(c*) of the Insolvency Act 34 of 1936.
On appeal to the Supreme Court of Appeal the body corporate argued that bodies corporate did not merely act to protect their own financial interests but had a statutory obligation to protect the interests of all the members who were prejudiced when a single member failed to pay their arrear levies. A deviation from the trite principle of concursus creditorum was therefore justified so that it would not be necessary for bodies corporate to prove actual or prospective pecuniary benefit to the general body of creditors.
Held
There was no basis for making a distinction between bodies corporate and other creditors. Accordingly, a body corporate of a sectional title scheme applying for the compulsory sequestration of its members was required to prove that the order of sequestration sought would be to the advantage of the general body of creditors, as contemplated in s 10*(c)* of the Insolvency Act 24 of 1936.

BONDEV MIDRAND (PTY) LTD v MADZHIE AND OTHERS 2017 (4) SA 166 (GP)

Constitutional law — Human rights — Socioeconomic rights — Right to adequate housing — Whether infringed by contractual repurchase clause entitling developer to claim retransfer of unimproved land if purchaser not building residential dwelling thereon within 18 months — Constitution, s 26(1).

Contract — Legality — Constitutionality — Importation of constitutional principles into law of contract — Fairness — Role of pacta sunt servanda — Public policy tending to protect party against unfair term infringing constitutionally protected interest — If so, enforcing unfair term would be against public policy.

Contract — Legality — Contracts contrary to public policy — Specific instances — Repurchase clause entitling developer to claim retransfer of unimproved land if purchaser not building residential dwelling within 18 months

Public policy tending to protect party against unfair term infringing constitutionally protected interest — Where, as in present case, contractual clause grossly unfair to purchaser intending to build residential home and infringing his or her constitutional right to adequate housing, enforcing it would be against public policy — Constitution, s 26(1).

Bondev, a property developer, sold unimproved land to one Mr Madzhie, subject to a right to claim repurchase and transfer of the property should a residential dwelling not be built on the land within 18 months. This case concerned Bondev's unopposed

application for retransfer thereof after Mr Madzhie had failed to build timeously. At the first hearing the matter was postponed so that Bondev could address the court's reservations over whether this type of repurchasing clause — where the purchaser was an ordinary retail purchaser who purchased land to build a home — was appropriate. At the next hearing the court consented to Bondev's withdrawal of their application and, for guidance should they renew their application, stated the reasons why it would not have granted the relief on the present facts. In the main these were that the repurchase clause was (1) inconsistent with Mr Madzhie's s 26(1) constitutional right to adequate housing; and (2) against public policy as the term was used in the law of contract.

Held as to (1)

For many people the purchase of land was the first step in the realisation of their right to adequate housing. Access to housing through the market mechanism fell squarely within the ambit of s 26(1), and the acquisition of land also fell within the broader concept of housing. It followed that developers must desist from preventing or impairing a person's attempts to gain access to adequate housing. Developers, considering the overall context of planning legislation and the relationship they had with the system of housing finance, were also bearers of a positive duty under s 26(1). In the present case, the purchaser was for all intents and purposes forced to build immediately. Many people simply could not afford this. In this way the developer breached both the negative aspect of s 26(1), namely the obligation not to infringe the purchaser's quest for access to adequate housing, and the positive duty.

Held as to (2)

Mr Madzhie expended considerable money in purchasing the property, and would suffer a severe financial blow if the repurchasing clause were enforced. This was unfair, if not grossly unfair. The question was whether the law of contract concerned itself with unfairness in this context at all. Where, as in this case, the purchaser's interests were constitutionally protected, public policy would tend to protect such purchasers against unfair terms, especially ones that were grossly unfair. A purblind deference to the doctrine of *pacta sunt servanda* under all circumstances could not be countenanced. The interests of a developer simply could not be allowed to crush the rights of a purchaser as a result of unthinking application of *pacta sunt servanda.* The horizontal application of s 26 was well established, and found application also in the law of contract. Our courts have repeatedly stated that the law of contract, and contractual provisions, must yield to the provisions and values of the Constitution. Courts were obliged to test the enforceability of contractual provisions against the Constitution. Also, this case involved a constitutionally protected socioeconomic right. While theplanning authorities were the primary institutions that must ensure a more class- and race-integrated built environment, that did not mean that the courts had no role to play — the contrary was true. Our courts have not hesitated to interfere with contractual provisions which they considered inimical to public policy. The present type of repurchase clause represented an instance where a court should refuse enforcement. (Paragraphs [40], [44], [48] – [49] and [51] – [54].)

BARON AND OTHERS v CLAYTILE (PTY) LTD AND ANOTHER 2017 (4) SA 180 (LCC)

Land— Land reform — Eviction — Statutory eviction — Occupiers of cottages on privately owned land — Whether just and equitable to evict under ESTA if state unable

to provide alternative accommodation — Extension of Security of Tenure Act 62 of 1997, ss 10(3) and 11(3).

The appellants were the occupiers of cottages on a farm owned by Claytile (Pty) Ltd. They had once been employed by Claytile, and had been allowed to reside in the cottages for so long as they were employed. Each had however resigned or been dismissed, but had stayed on. Ultimately Claytile had obtained an eviction order in the magistrates' court, even though the City of Cape Town was unable to provide alternative accommodation. The occupiers appealed to the Land Claims Court.
The issue was whether it was just and equitable to evict, even though the City could not provide accommodation (ss 10(3) and 11(3) of the Extension of Security of Tenure Act 62 of 1997). *Held*, that it was. The occupiers' employment and rights of residence had been lawfully terminated; they had paid no rent and had had free water and electricity for more than three years; they were employed elsewhere; and Claytile was prevented from accommodating its current employees in the dwellings.

LOEST v GENDAC AND ANOTHER 2017 (4) SA 187 (GP)

Company — Shares and shareholders — Shareholders — Appraisal rights of dissenting shareholders — Demand for payment of fair value for shares — Determination of fair value — Access to information via *PAIA*, while not specifically precluded, would add unnecessary parallel process to s 164 procedure — Companies Act 71 of 2008, s 164; Promotion of Access to Information Act 2 of 2000, s 50.

Company — Shares and shareholders — Shareholders — Appraisal rights of dissenting shareholders — Exercise of rights, while stripping him of certain rights associated with shares, not depriving him of status as shareholder — Companies Act 71 of 2008, s 164.

Section 164 of the Companies Act 71 of 2008 allows shareholders dissatisfied with proposed company resolutions to exit the company in return for fair value for their shares (the 'appraisal remedy'). The issue in the present case was whether an aggrieved shareholder, Mr Loest, could rely on the Promotion of Access to Information Act 2 of 2000 (PAIA) to exercise or protect his s 164 rights.
Mr Loest, who was unhappy with majority resolutions adopted by the respondent companies, triggered s 164 and made a request under s 50 of PAIA † for access to company records that would enable him to determine fair value for his shares. He argued that access was 'required' for him to be able to determine fair value for his shares. (Section 164 does not allow a shareholder to approach the court for access to information to determine fair value, but he or she may ask the court itself to make such a determination (see [22]).)
The companies first challenged Mr Loest's locus standi, arguing that he had been stripped of his shareholding by the exercise of his s 164 rights (s 164(9) provides that the shareholder exercising appraisal rights had 'no further rights in respect of those shares, other than to be paid their fair value'). They further argued that since s 164 itself made provision for the valuation of shares by the court, he was barred from using s 50 of PAIA for that purpose.
Held
Section 164 did not deprive Mr Loest of his status as shareholder but
merely removed other trappings and privileges associated with shareholding while

he pursued his appraisal remedy. He was still a shareholder for the purpose of receiving fair value for his shares (see [13]).
While s 164 did not inherently preclude a dissenting shareholder from pursuing outside remedies such as those under PAIA, the built-in protection s 164 afforded to dissenting shareholders meant that an applicant like Mr Loest could not make out a case under s 50 of PAIA that he 'required' the information for the exercise of his appraisal rights. Allowing a parallel process under PAIA would also add unnecessary costs and burdens for the company (see [39] – [40] and [43] – [46]). Application dismissed.

PREMIER, WESTERN CAPE v KIEWITZ 2017 (4) SA 202 (SCA)

Damages — Bodily injuries — Future medical expenses — Impermissible to tender services in lieu of monetary award.

Ms Kiewitz sued the Western Cape provincial government for damages suffered by her son Jayden, who became blind because staff at the provincial hospital at which he was born failed to detect an eye disease at birth. All damages apart from a claim in respect of Jayden's future medical expenses were settled. In its 'plea in mitigation' the province undertook to provide all future medical care required by Jayden for his sight impairment. The undertaking specified that disputes over treatment would be determined by a third party. * The province argued that failure to accept the undertaking and thus mitigate the damages would result in a concomitant reduction of the damages. The High Court dismissed the plea. In an appeal to the Supreme Court of Appeal
Held
The effect of the plea in mitigation was to deny Ms Kiewitz any monetary award for future medical treatment. It offended against both the once-and-for-all rule and the rule that compensation in bodily injury matters must comprise a monetary award. In addition, the provision regarding the settlement of disputes appeared to be an attempt to unlawfully exclude judicial oversight over future medical expenses. The plea was ill-conceived and properly dismissed by the High Court.

FIDELITY SECURITY SERVICES (PTY) LTD v MOGALE CITY LOCAL MUNICIPALITY AND OTHERS 2017 (4) SA 207 (GJ)

Appeal — Leave to appeal — Application — Effect — Suspension of decision — Whether competent to institute application for order that decision operate, on mere indication of intention to apply for leave to appeal — Superior Courts Act 10 of 2013, ss 18(1), (3) and (5).

This case concerned, inter alia, s 18(1) of the Superior Courts Act 10 of 2013, which provides that 'the operation and execution of a decision which is the subject of an application for leave to appeal . . . [are] suspended pending the decision of the application . . . .' The facts, sequentially, were that applicant obtained a decision against first respondent; first respondent indicated it intended to apply for leave to appeal; applicant instituted an application for the decision to operate pending the application for leave to appeal (ss 18(1), (3) and (5)); first respondent lodged its application for leave to appeal; and the application for the decision to operate was heard (see [7] – [8]).

The issue was whether an application for leave to appeal a decision had to be lodged, in order to institute an application for the decision to operate. *Held*, that lodgement was not required. A mere indication of intent to apply for leave to appeal was sufficient.
Application granted.

CAPE TOWN CITY v AURECON SA (PTY) LTD 2017 (4) SA 223 (CC)
Administrative law — Administrative action — Review — Application — When to be brought — From when 180-day time limit starts running — From date on which reasons for administrative action became known (or ought reasonably to have become known) to applicant — Court rejecting submission that time limit starts running only from date when party seeking review first becoming aware administrative action tainted by irregularity — Promotion of Administrative Justice Act 3 of 2000, s 7(1).

This was an application to the Constitutional Court by the City of Cape Town (the City) for leave to appeal against a judgment of the Supreme Court of Appeal (the SCA). The City had commenced proceedings in the High Court in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), seeking an order for the review and setting aside of its own decision to award a tender to the respondent company Aurecon, an engineering services provider, for the decommissioning of Athlone Power Station. The High Court granted the order. But the SCA reversed the High Court's decision on appeal; it found that the City had not launched the review proceedings within the 180-day period prescribed by s 7(1); that no case had been made out for an extension of such time period in terms of s 9(1) of PAJA; and that, in any case, the alleged procedural irregularities in the tender proceedings were in fact not irregularities at all.
The City applied to the Constitutional Court for leave to appeal the SCA's order. In deciding whether leave should be granted, the court considered the prospects of success. The court found that the application could be disposed of on the basis that the City had failed to institute review proceedings within the 180-day time limit set out in PAJA — review proceedings were instituted some 532 days after the decision to award the tender to Aurecon was made — and the City had not made out a case for condonation of its failure.
In reaching the above conclusion the court considered the City's proposition that the 180-day period only began to run once it had become aware that the administrative action — the awarding of the tender — was tainted by irregularities (on which interpretation the City argued that it had launched review proceedings timeously). Section 9(1) referred to the cut-off date as being '180 days after the date . . . on which the person concerned . . . became aware of the action and the reasons for it'. However, the City sought to argue that such reference to 'reasons' did not refer to formal reasons but merely to 'the relevant events giving rise to the particular decision and which render it susceptible to review'. The court disagreed with this contention, finding that it confused two discrete concepts: *reasons* and *irregularities* (see [41]). The court drew attention to the statute's expressly providing that the clock started to run with reference to the date on which the reasons for the administrative action became known (or ought reasonably to have become known) to an applicant (see [41]). The court also approved of the SCA's reasoning that the City's interpretation was untenable because it could lead to results potentially prejudicial to Aurecon and the public interest in the finality of administrative functions.

As to whether the interests of justice required that condonation be granted in this instance, the court held that no satisfactory explanation was provided by the City necessitating a relaxation of the rules (the City had offered no more than to ascribe the delay to bureaucratic governmental processes). In so holding, the court stressed the existence of a higher duty on the state to respect the law, to fulfil procedural requirements and to be respectful of persons' rights. Leave to appeal refused.

MOHAMED'S LEISURE HOLDINGS (PTY) LTD v SOUTHERN SUN HOTEL INTERESTS (PTY) LTD 2017 (4) SA 243 (GJ)

Contract — Enforceability — Whether implementing of lease's cancellation clause would offend constitutional values of ubuntu and fairness, and so be precluded.

Applicant landlord and respondent tenant's lease provided that if the tenant failed to pay a month's rent by its due date, the landlord could cancel the agreement and repossess the property. When the tenant's bank, owing to a technical error, failed to make a month's payment, the landlord cancelled the lease, and applied for the tenant's eviction (see [7], [13]).
The issue was whether the cancellation clause should be enforced. *Held*, that, given the prejudice that would result to the tenant, and where the blame for the default lay, to enforce the clause would offend the constitutional values of ubuntu and fairness. Application dismissed.

DEMOCRATIC ALLIANCE v PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA 2017 (4) SA 253 (GP)

Constitutional law — State President — Prerogatives — Appointment and dismissal of ministers — Review — Whether President obliged to furnish record of and reasons for decisions called for under Uniform Rule 53(1)(b) — Constitution, s 91(2).
Review — Procedure — Furnishing of record of and reasons for decision in terms of rule 53(1)(b) of Uniform Rules — Applicable mutatis mutandis to review of executive decisions — Applicant for review of President's decisions to dismiss and replace ministers therefore entitled to utilise rule 53(1)(b) to obtain reasons for and record of such decisions.

The President's decisions to dismiss and replace a minister and a deputy minister formed the subject-matter of urgent review proceedings launched by the applicant, a political party (the DA), to have the said decisions declared unconstitutional and invalid and set aside. The present case concerned the DA's application for an interlocutory order that the President furnish the record and reasons for his decision called for under Uniform Rule 53(1)*(b)* in the main review proceedings.
Rule 53(1)*(b)*, quoted in full at [6], provides that an applicant for review of a 'decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions', may call upon 'the magistrate, presiding officer, chairperson or officer, as the case may be', to within 15 days file the reasons and record sought to be reviewed with the registrar and either furnish it to the applicant or inform the applicant that it has been filed with the registrar.
It was not disputed that the impugned executive decisions were subject to judicial review of their rationality, but the President contended that rule 53(1)*(b)* could not be

used as a procedural device in such a review because the subrule did not mention, and therefore did not apply to, executive decisions. He accordingly challenged the DA's use of s 53(1)*(b)* to obtain the reasons for his decisions or the record that formed the basis of those decisions, conceding only that the DA was entitled to reasons for the decisions by virtue of the doctrine of legality.

Held

Rule 53 was promulgated at a time when executive decisions were not subject to review. Subsequently, with the enactment of the Constitution and the development of the common law since its enactment, these decisions, as the President acknowledged, were subject to review. It was so that rule 53 had not been amended to cater for this, but to decide on its applicability to a review of executive decisions it was necessary to subject it to a purposive interpretation. And the purpose of rule 53 was to facilitate applications for review. A rule 53 record was of significant value to a court — it was, as the Constitutional Court had stated, 'an invaluable tool in the review process'. There was no logical reason not to utilise the subrule in an application to review and set aside an executive decision. The judicial exercise undertaken by the court in such a review was no different from the one undertaken in review applications of an 'inferior court, a tribunal, a board or an officer performing judicial, quasi-judicial or administrative functions'. Accordingly, rule 53(1) should be applied, mutatis mutandis, to applications for reviewing and setting aside executive decisions (unless it can be shown that its application in a particular case would result in a failure of justice, which was not the case here). The consequence of utilising rule 53 in the main application was that the applicant was entitled to call for the President to furnish the reasons for his decisions as well as the relevant part of the record that formed the basis upon which the decisions were taken.

PHEPENG AND ANOTHER v ESTATE COMBRINCK AND OTHERS 2017 (4) SA 266 (FB)

Land— Sale — Contract — Conditions — Suspensive condition that purchasers obtain loan offer together with quotation and pre-agreement — Whether fulfilled where purchasers obtained and accepted loan offer but quotation and pre-agreement not obtained — Wording of clause not requiring purchasers to furnish seller with such documents — In discretion of purchasers, for whose protection suspensive condition included, to regard it as fulfilled or not — Purchasers effectively waived further documents from bank as condition precedent — Suspensive condition fulfilled.

Applicants, Mr and Mrs Phepeng, made an offer to purchase a unit in a sectional-title scheme, subject to a suspensive condition that they obtain a letter of offer, a quotation and a pre-agreement from a financial institution securing the purchase price with a mortgage bond within 30 days of the acceptance of the offer. The Phepengs obtained a letter from a financial institution in which the required loan was offered and, within the required 30-day period, duly notified the seller's agent that they would accept the offer. After expiry of the 30-day period the respondent (the seller) however took the stance that, since the Phepengs did not also furnish the required letter of offer, quotation and a pre-agreement, the suspensive condition had not been fulfilled and so the sale was void. At issue in this case — the Phepengs' application for the confirmation of a rule nisi that the property in question be transferred to them — was whether the sale had been perfected by the timeous fulfilment of the suspensive condition.

Held
The indication that they would accept the loan offer clearly reflected the Phepengs' bona fide belief that they had met the requirements set by the suspensive condition and that they had now secured their purchase. The wording of the condition did not require that the loan offer, the quotation and pre-agreement be supplied to the seller, but indeed only to the purchasers. The reason for this was that the suspensive condition was included for the protection of a purchaser who must obtain financing for his purchase. It was thus in the discretion of the purchasers to regard the condition as having been fulfilled. The purchasers also had a discretion with regard to the loan offer in that, in terms of the same clause, they could accept a lesser amount tendered by a financial institution. It would thus seem artificial to state that the purchaser could not accept the loan offer without further documentation. In fact, the contract nowhere required that the seller be party to the loan negotiations at all. The suspensive condition was for the purchasers' protection, and they clearly waived the protection of the further requirements when they indicated their acceptance of the loan offer. Thus, the suspensive condition was fulfilled by acceptance of the loan offer on 10 November 2016, with the effect that the contract became of full force, with retrospective effect, on the date on which the offer to purchase was accepted. The rule nisi would accordingly be confirmed.

NELSON MANDELA BAY MUNICIPALITY v AMBER MOUNTAIN INVESTMENTS 3 (PTY) LTD 2017 (4) SA 272 (SCA)

Local authority — Municipal service charges — When payable — Meaning of 'rates payable as from start of . . . financial year' in Local Government: Municipal Property Rates Act 6 of 2004, s 13(1)(a).

Local authority — Municipal service charges — When due and payable — Payable at start of financial year in sense that obligation to pay fixed then but only due when municipality advising payee by way of written account what portion thereof due — Local Government: Municipal Property Rates Act 6 of 2004, ss 12, 13(1)(a) and 26 – 28.

Local authority — Rates — Municipal clearance certificate — Only applying to rates due for two years preceding application — Local authority not entitled to withhold rates-clearance certificate until payment of rates for remainder of financial year after application for such certificate — Local Government: Municipal Systems Ac 32 of 2000, s 118(1).

Section 118(1) of the Local Government: Municipal Systems Act 32 of 2000 (the Systems Act) provides that registrars of deeds —

'may not register the transfer of property except on production to that registrar of deeds of a prescribed certificate . . . which certifies that all amounts that became due in connection with that property for . . . property rates and other municipal taxes, levies and duties during the two years preceding the date of application for the certificate have been fully paid'. [Emphasis added.]

In line with its policy for issuing rates-clearance certificates under s 118(1) of the Systems Act, the Nelson Mandela Bay Municipality (the municipality) required the seller of immovable property, Amber Mountain Investments 3 (Pty) Ltd (AMI) to pay 'the full amount which remains unpaid, inclusive of all instalments, for the remaining financial year'. AMI, in order to obtain the certificate, paid the full amount under

protest and thereafter instituted a successful High Court action for reimbursement of the disputed portion. In that case, as in this one — the municipality's appeal to the Supreme Court of Appeal — the municipality relied on ss 12 and 13 of the Local Government: Municipal Property Rates Act 6 of 2004 (see [7]) which it said made it plain that an owner's obligation was to pay one annual property rate and that such liability arose, and was fixed, on the first day of the municipality's financial year. Accordingly, so the argument went, once its financial year commenced, AMI became liable to pay the rates fixed for that financial year, so that the municipality was entitled to withhold the rates clearance certificate until it had received payment of rates for that financial year.

Held, as to when a property rate became due and payable

The collection of rates formed part of a municipality's budget and so must be determined before the financial year commenced. It was only once the rate was determined that a municipality could estimate its income for the financial year and could prepare its budget in accordance with that projected income. This was why s 12(1) of the Rates Act stipulated that a municipality had to levy a property rate for a financial year; and s 12(2) that the levying of rates formed part of a municipality's annual budget process.

In terms of s 13(1)*(a)* of the Rates Act, a rate became 'payable as from the start of a financial year'. The phrase 'as from' as opposed to the word 'on' was significant — 'as from' denoted the commencement of a period while the word 'on' specified a particular date. The words 'as from' must be interpreted to mean that the rate was payable within the period of the financial year and not at its commencement; and 'payable' must be interpreted narrowly to mean that the rate was fixed for the financial year, and not that it was also payable at the same time.

The Act distinguished between what was 'due' and what is 'due and payable'. In terms of s 13, the rate became payable (in the sense of the obligation to pay arising at that stage) 'as from the start of a financial year'. Section 26 empowered a municipality to determine when the rate was due. The Rates Act allowed for rates to be recovered either on a monthly basis or annually at the election of the owner (ss 26 – 28). In respect of both payment options, it was the municipality that determined and advised the payee by way of written accounts of the date on which and of the amount of rates that were due (s 27). Put differently, a portion of the debt in respect of rates became due from time to time. The municipality's argument, that the determination of an annual property rate was indicative of an intention that a single rate for the entire year was payable at the start of each financial year, therefore could not be sustained.

Held, as to whether the municipality was entitled to withhold the rates clearance certificate until it had received payment of rates for that financial year

Section s 118(1) only applied to payment of debts preceding the date of application by two years, so that insofar as the municipality's policy would include debts incurred after application was made, it was inconsistent with s 118(1) and therefore ultra vires and void. The clear intention of the legislature was to limit the period in s 118(1) to two years preceding the date of application for the certificate. Section 3 of the Rates Act empowered a municipality to make a rates policy that was 'consistent' with the Act. Insofar as the municipality's rates policy included the settlement of debts incurred after the date of application for a clearance certificate, it was inconsistent s 118(1) and therefore ultra vires and void. The appeal would therefore be dismissed with costs.

UNIVERSITY OF THE FREE STATE v AFRIFORUM AND ANOTHER 2017 (4) SA 283 (SCA)

Education — University — Language policy — Decision to adopt policy that English primary language of instruction — Whether decision administrative action — Whether decision infringing principle of legality — Constitution, 1996, s 29(2); Higher Education Act 101 of 1997, s 27(2).

The University of the Free State adopted a policy making English the primary language of instruction; a High Court set aside the decision; and the University appealed to the Supreme Court of Appeal. The issues were:
(1) Whether the decision was administrative action. *Held*, that it was not.
(2) Whether the University misconstrued its powers, so infringing the principle of legality, in concluding it was no longer 'reasonably practicable' to continue the old policy (s 29(2) of the Constitution, 1996). *Held*, that it had not.
(3) Whether the University misconstrued its powers, in adopting a language policy that differed from the Higher Education Language Policy (LPHE). *Held*, that it had not: the LPHE was merely a guideline, and a university could depart from it if this was justified.
Appeal upheld, and the High Court's decision set aside.

PRINCE v MINISTER OF JUSTICE AND OTHERS 2017 (4) SA 299 (WCC)

Criminal law — Drug offences — Dagga — Possession, purchase or cultivation for personal consumption by adult in private dwelling — Statutory prohibition of such conduct constituting unjustified limitation of right to privacy — Impugned provisions declared unconstitutional and invalid — Declaration suspended to give Parliament opportunity to correct defect — Prosecutions, falling within provisions declared unconstitutional, stayed — Constitution, ss 14 and 36(1); Drugs and Drug Trafficking Act 140 of 1992, ss4(b) and 5(b) read with part III of sch2; Medicines and Related Substances Control Act 101 of 1965, s 22A(9)(a)(i) read with sch 7.

If privacy were a continuum of rights, starting with an inviolable inner core in private and moving to the public realm where privacy is only remotely implicated, it must follow that those (adults) who wish to partake of a small quantity of cannabis in the intimacy of their home, exercise a right to autonomy which, without clear justification, does not merit interference from the outside community or the state. The same applies to the home cultivation of a cannabis plant intended to be used exclusively for personal consumption. This behaviour, absent a clear justification for impairment thereof, merits constitutional protection under the right to privacy.
The present dispute — the question of the validity of the statutory prohibitions on consumption, possession, purchase or cultivation of cannabis for personal consumption in the privacy of a home — must therefore be determined in terms of the justification for the limitation of privacy as advanced by the state respondents. This turned on whether the state discharged the burden of justification of the limitation as reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, with due regard to the factors set out in s 36(1) of the Constitution: the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose.

The nature of the right merits constitutional protection in light of the values underlying an open and democratic society based on human dignity, equality and freedom.
As to the importance of the purpose of the limitation, the state is required to show that there is a substantial state interest which justifies the limitation. The state was however not able to establish either public-health priorities or the prevention of violent criminal conduct (see [40]), as a legitimate purpose for the prohibition. Not only was the state's medical evidence contested but it offered very little further evidence of persuasion and weight to counter the serious questions raised by the Shaw report (see [47]) relating to the justification of the limitation.
The comparative law relied on by the state — a Canadian Supreme Court decision — was distinguishable because the Canadian Charter does not have the equivalent of the clearly demarcated right to privacy in s 14 of our Constitution. Instead, an analysis of comparative law shows a significant change in approach by a number of courts and legislatures — from what was previously a general prohibition against the consumption of cannabis, to decriminalisation of personal consumption — indicating that there is no longer a consensus in open and democratic societies that such limitations are justifiable.
As to the state's contention that the impugned provisions amounts to appropriate steps under South Africa's treaty obligations in the global war on drugs, and while the unqualified and wholesale legalisation of cannabis may contravene South Africa's international obligations, it does not follow that the legalisation of the 'possession, purchase or cultivation of [cannabis] for personal consumption', where such legalisation is a consequence of South Africa's 'constitutional principles and the basic concepts of its legal system', amounts to a contravention of its international obligations — on the contrary.
The state's evidence was singularly unimpressive. Arguably its most significant evidence was that of the deputy national director of public prosecutions, that the current law did not simply punish offenders by way of incarceration but that drug users, and especially juvenile offenders, have the opportunity to participate in various programmes, including diversion. This evidence — that the national director of public prosecutions considers that a policy of diversion may be a more appropriate approach to personal consumption of cannabis in South Africa — adds weight to the broader argument that the criminalisation of the use of cannabis for personal consumption is open to significant doubt. Diversion and other policy choices as opposed to the blunt use of criminal law, and in particular imprisonment, support the conclusion that the state cannot justify the prohibition as contained in the impugned legislation as it stands.
The evidence as a whole supports the argument that the legislative response to personal consumption and use is disproportionate to the social problems caused as a result thereof. Even if the state could prove that the purposes of the prohibition are met by the impugned legislation, the state would still have to show that less restrictive means to achieve those purposes do not exist. The limitation should be narrowly tailored to achieve its purpose, carefully focused and not overbroad. A significant body of expertise says that the present prohibition contained in the impugned legislation does not employ the least restrictive means to deal with a social and health problem, for which there are now a number of less restrictive options, as opposed to the blunt use of the criminal law. That is why less restrictive means must be employed to deal with the problem. This conclusion is supported by the importance of the core component of the right to privacy. The additional

resources that may be unlocked for use of policing of serious crimes also cannot be overemphasised.
It would be practical and objectively possible for legislation to distinguish the use of cannabis, and the possession, purchase or cultivation of cannabis for personal consumption, from other uses. Since the present position unjustifiably limits the right to privacy, the impugned provisions need to be amended to ensure they do not apply to those who use small quantities of cannabis for personal consumption in the privacy of a home. It is the legislature that should determine what would constitute those small quantities (see [102]).
Furthermore, it is not for courts to prescribe alternatives to decriminalisation of the use of cannabis for personal use and consumption — it is for the political branches of the state. But as private conduct is prescribed by law, it is within the competence of a court to hold that the impugned law fails to pass constitutional muster (see [110] – [112]).
Court ordering that the relevant provisions are unconstitutional to the extent that they trench upon the private use and consumption of a quantity of cannabis for personal purposes, which the legislature considers does not constitute undue harm; and invoking its powers under s 172(1)*(b)* of the Constitution to order a suspension of the declaration of invalidity for a period so as to allow Parliament to correct the defect; and staying prosecutions that fall within the provisions declared unconstitutional.

SACR JULY 2017

S v SCHOOMBEE AND ANOTHER 2017 (2) SACR 1 (CC)

Appeal — Record — Lost, destroyed or incomplete — Where adjudication of appeal on imperfect record does not prejudice appellant, conviction need not be set aside solely on basis of error or omission in record or improper reconstruction process.
The applicants were convicted in the High Court of murder and were sentenced to life imprisonment. When they attempted to appeal, they discovered that the record of their trial proceedings had been lost. The registrar, however, gave them a record that had been reconstructed by the trial judge based on his extensive notes. Despite their having not participated in the reconstruction, they chose to proceed on appeal. The full court dismissed the appeal and the Supreme Court of Appeal refused further leave to appeal. In the present proceedings, they sought direct access to challenge the sentence of the first applicant, and both conviction and sentence in respect of the second applicant, on the basis that the proceedings were fundamentally flawed as the reconstructed record that served before the full court was inadequate. They contended that this amounted to a violation of their constitutional right to a fair trial.
Held, the court did not need to decide whether the applicants' decision to proceed with the appeal on the basis of the record as reconstructed amounted to a waiver, because they had had a fair trial, including a fair appeal. Although the record of the trial was improperly and imperfectly reconstructed, it was still more than adequate to ensure that the applicants were able to exercise their constitutional right of appeal. The judge's notes were unusually full and detailed and contained a complete narrative of the evidence including the cross-examination.
Held, further, that where adjudication of an appeal on an imperfect record did not prejudice the appellants, their convictions did not need to be set aside solely on the basis of an error or omission in the record or an improper reconstruction process (see [29]).

Held, further, that this, however, did not detract from the magnitude of the lapses that had taken place in reconstructing the record. The High Court failed to ensure that the reconstruction process involved both parties, as was required of it. The loss of trial records was a widespread problem and raised serious concerns about endemic violations of the right to appeal. When reconstruction was necessary, the obligation lay not only on the appellant, but primarily on the court, to ensure that the process complied with the right to a fair trial. It was an obligation that had to be undertaken scrupulously and meticulously in the interests of criminal accused as well as their victims (see [38]). The application for leave to appeal was dismissed.

NAIDU v MINISTER OF CORRECTIONAL SERVICES 2017 (2) SACR 14 (WCC)

Prisoner— Parole — Release on — Case management committee — Role of — Committee not providing board with reports on prisoner's mental state; likelihood of relapsing into crime and risk to community; or progress with correctional plan — Decision to release taken by parole board without those reports — Negligence in decision leading to liability arising when prisoner assaulted complainant.
The plaintiff instituted action for damages against the defendant arising out of injuries she had suffered after being severely assaulted by a prisoner who had recently been released on parole. She alleged that the prison authorities had failed to act with reasonable care and diligence in taking the decision to release him, given his previous convictions (these included numerous counts of theft, multiple counts of assault and one count of murder) and previous violations of parole conditions. Before the release he was serving a sentence of nine-and-a-half years' imprisonment for theft, assault with intent to do grievous bodily harm, and contravening the Dangerous Weapons Act 71 of 1968. The sentencing magistrate had noted that he could not be released on parole without the court being informed thereof. While serving his sentence, he was found guilty of three offences in prison, including conducting himself indecently by word, act or gesture; being in possession of an unauthorised article; and being in possession of dagga. Four months after his release he assaulted the plaintiff, the second time that he had committed an offence whilst on parole.
From the evidence it appeared that the case management committee, which was required to report to the parole board on the prisoner's possible release on parole, did not provide the board with reports on his mental state; the likelihood of his relapsing into crime and the risk posed to the community; or a report regarding the assessment results and progress with his correctional sentence plan, as were required by s 42(2) of the Correctional Services Act 111 of 1998.
Held, that the reasonable person in the position of the parole board — given the prisoner's prior history, which showed him to be an habitual violent criminal who was not rehabilitated by time spent in prison, nor by early release on parole; his previous violations of parole conditions; and that he continued to commit offences in prison in his latest incarceration (his aggression was flagged on more than one occasion by officials) — would have foreseen, in the absence of any clear evidence of rehabilitation, the reasonable possibility of his conduct injuring another and causing harm of the kind that he ultimately caused the plaintiff, if released on parole .
Held, further, that in these circumstances the parole board ought to have taken reasonable steps to guard against the foreseeable harm by refusing the parole application. Failure to do so was an act of negligence, as was the failure to comply with the mandatory statutory requirements of s 42(2). The negligence was,

moreover, causally connected to the harm suffered by the plaintiff. The plaintiff's claim had to be upheld.

S v MUKUYU 2017 (2) SACR 27 (GJ)

Sentence — Prescribed minimum sentences — Criminal Law Amendment Act 140 of 1992 — Application of by state — Semble: where facts relied upon place offence within ambit of Act, state duty-bound to invoke provisions to prevent aims and objects of Act being undermined.
Drugs — Cocaine — Dealing in in contravention of s 5(b) of Drugs and Drug Trafficking Act 140 of 1992 — Sentence — Young mother of 8-year-old child bringing 3,076 kg into country — Sentence of 12 years' imprisonment imposed.
The appellant, a 36-year-old single mother of an 8-year-old child, was convicted in a regional magistrates' court of dealing in 3,076 kg of cocaine in contravention of s 5*(b)* of the Drugs and Drug Trafficking Act 140 of 1992, having brought the cocaine with her on a flight from Brazil. She was sentenced to 15 years' imprisonment. The state conducted the case against her without invoking the minimum-sentencing legislation or making any attempt to prove the value of the cocaine.
Held, that the appellant was prejudiced in her defence by the state's omissions in this regard and furthermore that there had been no investigation of the interests of her young child. These circumstances constituted an irregularity sufficiently serious to warrant the court interfering with the sentence imposed by the court a quo.

Held, further, that in the circumstances, a sentence of 12 years' imprisonment would be appropriate (see [28]).
Semble: In each case where the facts relied upon place the offence within the ambit of the Criminal Law Amendment Act 105 of 1997, the state was duty-bound to invoke the provisions of that Act. If it were left up to the state to decide on a discretionary basis whether to rely upon minimum-sentencing legislation, accused persons charged with such offences may escape their sentences because of the state's omission. This would undermine the aims and objects of the Act. Public policy considerations and the public interest required that the Act be applied and enforced where the facts and circumstances brought the offences within the ambit of the Act.

FINES4U (PTY) LTD AND ANOTHER v DEPUTY REGISTRAR, ROAD TRAFFIC INFRINGEMENT AGENCY, AND OTHERS 2017 (2) SACR 35 (GP)
Traffic offences — Adjudication of Road Traffic Offences Act 46 of 1998 — Adjudication of offences under Act — Provisions of Act regarding sending of courtesy letters and infringement notices peremptory — Failure by Road Traffic Infringement Agency to follow precepts leading to notices and penalties being set aside.
The first applicant (Fines4u (Pty) Ltd) conducted a business representing members of the public and corporate and state entities in making representations to the respondents in respect of traffic offences and facilitating the payment of fines and penalties. During such business, it made enquiries on behalf of the second applicant directed to the fourth respondent, the Road Traffic Infringement Agency (the Agency), in respect of 639 infringement notices issued against the second applicant resulting in penalties amounting to R322 000. These infringements were allegedly committed between 2008 and 2013. After Fines4u received this schedule it

made 570 representations which were all identical except that some were made at the infringement notice stage and some at the courtesy letter stage.
It was common cause that the process was never advanced beyond the infringement notice stage and the infringement notices were never served on the second applicant, as was required in terms of s 30 of the Adjudication of Road Traffic Offences Act 46 of 1998 (AARTO). Of these representations, 155 were successful and 208 were unsuccessful despite their being based on the same grounds. By the time the present application was launched, 207 had not yet been adjudicated upon. The unsuccessful representations had a fee of R200 attached to them, incurring a total penalty of R41 600 for the account of the second applicant. When Fines4u enquired about the whereabouts of the 'AARTO 09 result of representation form' it was informed that the Agency no longer sent them to persons submitting representations. When no reasons in terms of s 18(7), or the AARTO 09 forms were received, Fines4u, after calling in the assistance of an outside agency, received a scathing letter from the Agency indicating that it had instructed all representations officers to mark all representations submitted by Fines4u (under the same or similar circumstances) as unsuccessful, with immediate effect. About the failure by the Agency to comply with the provisions of the Act, it indicated that this was because of the dysfunctionality of the Post Office as it could not send registered letters.
In the present application, the applicants sought an order inter alia that the decisions in terms of which the Fines4u's representations were rejected, be reviewed and set aside. Further, that the decisions to impose additional penalties on rejection of the representations also be set aside.
Held, that the Agency, represented by its representations officers, had acted beyond the statutorily conferred powers by not following the AARTO process, which was couched in peremptory terms, and nevertheless imposed fines and penalties after adjudicating upon the representations. These were fruitless exercises amounting to wasteful expenditure. In addition, their actions amounted to irrational conduct: conflicting decisions were given in respect of identically worded representations, no reasons were given for the decisions, there was a refusal to disclose the identity of the representations officers and the actions of the first respondent (deputy registrar of the Agency) were patently biased and unreasonable. In short, they performed actions which offended the principle of legality and on this basis the review application fell to be upheld (see [40]). Application upheld.

S v MATHE 2017 (2) SACR 63 (GJ)

Trial — Assessors — Absence of — Magistrate dispensing with assessors for lack of resources — Irregularity as envisaged by s 324 of Criminal Procedure Act 51 of 1977.
In a matter where the appellant had been convicted of murder in a regional magistrates' court and sentenced to 20 years' imprisonment, it appeared on appeal that the magistrate had decided, without any enquiry into whether the appellant required an assessor, that no assessor would be appointed 'for lack of resources'.
Held, that the failure of the presiding officer to invoke the provisions of s 93*ter* of the Magistrates' Courts Act 32 of 1944 was an irregularity as envisaged by the provisions of s 324 of the Criminal Procedure Act 51 of 1977. The conviction and sentence accordingly had to be set aside and the state was authorised to institute proceedings de novo

S v HEWU AND OTHERS 2017 (2) SACR 67 (ECG)

Trial — Striking of case from roll — Magistrate taking view that accused unlawfully rearrested immediately after matter had previously been struck off roll — Magistrate ought to have undertaken enquiry in terms of s 342A of Criminal Procedure Act 51 of 1977 — Striking-off incorrect in circumstances.

This matter came before the court on special review at the request of the Senior Magistrate, Port Elizabeth, who was faced with a dilemma in that the case had been struck from the roll several times since the regional magistrate assigned to hear the matter was of the view that the re-arrest of the four accused was improper in the specific circumstances of the case. The difficulty arose when the case was first struck from the roll when it had twice been postponed for trial and the foreign-language interpreter required for the hearing was not at court. The accused had at that stage already been in custody for 10 months. Immediately upon their release, the accused were rearrested by the investigating officer on a warrant issued by a magistrate. When the case was then brought before the regional magistrate, who was not the magistrate who had originally struck the matter from the roll, she took the view that the incarceration of the accused was unjustified as the method used by the state to secure their attendance was procedurally unfair. She struck the matter from the roll for the second time. When the prosecuting authorities obtained an assurance that the interpreter would be available the following week, the matter was again set down on the roll and the accused were rearrested on the morning of the trial and brought before court. The same magistrate was again in court. She expressed her misgivings about the warrant being obtained without an appropriate affidavit and stressed that she had already made a ruling on the matter, and once again struck the matter from the roll. Faced with this impasse the senior magistrate approached the High Court for a ruling.
Held, that the misgivings the regional magistrate had regarding the rights of the accused were not misplaced but she ought to have investigated the reasons for the postponement and the prospects of finalising the matter in terms of s 342A of the Criminal Procedure Act 51 of 1977, with due regard to the purpose of s 60(11) of the Act. Had she done so she would have appreciated that the postponement required was for a very short period. She had also been given an assurance that the foreign-language interpreter would be present on the following occasion and the matter would be able to proceed to trial. She was not in the circumstances entitled to strike the matter from the roll and should rather have postponed the matter subject to any conditions she deemed appropriate (see [24]).
Held, further, that the proceedings were not in accordance with justice and the accused could be rearrested for purpose of trial. The magistrate presiding in the matter was directed to hold an enquiry in terms of s 342A of the Act in the event that a further postponement of the matter was sought by the state

MOHAN v DIRECTOR OF PUBLIC PROSECUTIONS, KWAZULU-NATAL AND OTHERS 2017 (2) SACR 76 (KZD)

Legal practitioner — Duties of — Duty to court — Necessity to disclose all relevant facts — Applicant for temporary stay of prosecution in three separate cases not revealing at hearing of application that one case already part-heard — Such

omission material — Duty of legal representative to be fully candid with the court as to the correct state of affairs.
The applicant sought confirmation of a rule nisi which had earlier been granted for a temporary stay of criminal proceedings against him in three separate cases in the regional court. The cases all involved offences in which large sums of money were paid by Sars in respect of VAT refunds to three entities in which the applicant acted as bookkeeper or tax practitioner.
In the original application, the applicant sought orders restraining the respondents from commencing with the three criminal trials pending the completion of investigations by Sars, SAPS and the Public Protector. The basis of the application was that he intended to plead not guilty to the charges against him and that he had lodged a complaint with the office of the Directorate for Priority Crime Investigation (the DPCI) judge, who had referred the matters for investigation. The criminal proceedings against him should therefore be temporarily stayed pending finalisation of said investigation. He had alleged that the kingpin of the syndicate, who produced the fraudulent invoices for tax refunds, had not been charged and that it made no sense that he alone be charged for a criminal offence when he was neither the author of the invoices nor had any knowledge as to the authenticity thereof. Despite the application having been served on the respondents and notice of opposition having been filed by the first respondent, the second respondent (the Commissioner for Sars), and the eleventh respondent (the Provincial Commissioner of SAPS), no opposing affidavits were filed by them when the matter came before court and the order was granted.
In his papers, the applicant did not mention that one of the criminal trials had already commenced and was part-heard. The respondents took the attitude that the applicant had been economical with the truth in failing to bring this to the attention of the court. The applicant responded that at the time when his founding affidavit was signed, that case had not yet commenced but that, in any event, this was not a material non-disclosure and would have had no bearing on the eventual decision by the judge to grant the temporary order.
Held, that even though the matter had been brought on notice and not ex parte, and counsel for the respondents were present at the time when the matter was called by the judge, this did not exonerate a litigant, and especially not the legal representative, from being other than fully candid with the court as to the correct state of facts at the time when the matter was argued, even if such disclosure would be adverse to one's case (see [30]).
Held, further, that the omission to mention that criminal proceedings had commenced was material. It was unfathomable that an applicant could come to court seeking the temporary stay of criminal proceedings without informing the court that those proceedings had already commenced. This was particularly relevant in the circumstances where the relief sought in the notice of motion was that the respondents be interdicted and restrained 'from commencing with the trials against the applicant'. The application had to be dismissed on this ground alone (see [32] – [33]).
Held, for the sake of completeness, that the applicant had not pointed to any miscarriage of justice that would befall him in the event of the three criminal trials proceeding (see [47]); and that to grant an order of the nature sought by the applicant, namely for a temporary stay of prosecution in all three criminal trials pending the finalisation of the relevant investigations, would infringe the doctrine of separation of powers (see [51].) The rule nisi was discharged.

STOW v REGIONAL MAGISTRATE, PORT ELIZABETH AND OTHERS 2017 (2) SACR 96 (ECG)

Sentence — Suspended sentence — Putting into operation of — Breach of conditions of suspension — Failure to pay amounts imposed as condition of suspension — Constitutionality of s 297(1)(b) read with s 297(1)*(a)*(i)(aa) of the Criminal Procedure Act 51 of 1977 — Provisions not discriminating against persons without means and not unconstitutional.

The applicants in two matters that were consolidated (the legal issues in both being identical) had appeared in regional magistrates' courts where suspended sentences were put into operation, in terms of s 297(9)*(a)*(ii) of the Criminal Procedure Act 51 of 1977 (the CPA), for the breach of conditions that required them to pay certain amounts of money.

In the first case the order was made in respect of a contravention of the Value-Added Tax Act 89 of 1991 and the sentence was suspended on condition that the applicant repay the amount of R500 000 by way of monthly payments of R10 000. In the second case the applicant was convicted of a contravention of s 11(1) of the Banks Act 94 of 1990 in that he had conducted the business of the bank which was not registered. He was ordered to repay investors who had lost money and his sentence was suspended on condition that he make monthly repayments. In both cases the applicants defaulted on their payments.

The applicants applied for an order declaring s 297(1)*(b)* read with s 297(1)*(a)*(i)*(aa)* of the CPA unconstitutional on grounds that: (1) there was no legislative requirement to determine whether an accused person had the necessary financial resources to comply with the order of compensation. A person could be sent to prison without proof of wilful disobedience of a court order and because of his inability to pay any outstanding amount. Such a person was therefore discriminated against on the basis that he was poor; (2) there were no legislative requirements for determining when compensation should be imposed as a condition of suspension or made as an order in terms of s 300 of the CPA. If a s 300-order was made there would be no threat of imprisonment (a person could not be imprisoned for a civil debt) and the difference was therefore discriminatory; and (3) there was no provision for recognition to be taken of partial fulfilment of a condition of compensation. In such circumstances, a court was bound to put the whole of the suspended sentence into operation, resulting in unfairness.

Held, in respect of the first ground, that the sentencing court had a discretion in deciding what condition of suspension to impose and was given a wide range of conditions which it could impose. There were certain requirements for the imposition of conditions, namely that the condition had to be related to the crime; it had to be clearly set out so that the accused person could understand what future conduct was prohibited or required; it had to be reasonable and not cause unfairness or injustice; and it should not violate an accused person's constitutional rights. If a court transgressed these requirements the accused had recourse to appeal or review. If the amount of compensation ordered was beyond the means of the accused, so that he did not get the intended benefit of a suspended sentence, a higher court could interfere with such condition (see [55]–[58]).

Held, in respect of the second ground, that compensation as a condition of suspension was an integral part of the sentence and was a flexible condition which could be adapted to a person's means and the length of time it would take to

make full restitution. Its imposition was subject to the safeguards mentioned in respect of the first ground whereas s 300 was a convenient means of recovering a debt without having to institute a civil action and could only be utilised if the victim or the state applied for such an order. The victim could renounce it, however, which impacted the effectiveness of the order, whereas compensation as a condition of suspension remained the prerogative of the court and served a more meaningful purpose in the shaping of a suitable sentence (see [64]).
Held, further, that there were sufficient safeguards in s 297(7) of the CPA to prevent unfairness as the court had a discretion in deciding whether to suspend the sentence further, including on further conditions. Provision was made for failure to comply with a condition for reasons beyond the accused's control, and the court could consider any other good and sufficient reason. The sentence was not automatically put into operation when a breach occurred and there had to be a hearing where the accused could be heard on why the sentence should be further suspended. The legislation therefore afforded sufficient protection of the accused's constitutional rights (see [66]–[67]).
Held, in respect of the third ground, that payment by an accused of a portion of the compensation could be considered as good and sufficient reason for suspending the sentence further, perhaps on further conditions or deletion of the condition depending on all the circumstances, including the reason for his having not paid the full amount of compensation. The lack of a provision allowing a court to reduce sentence, where there had been partial compliance with the conditions of suspension, was therefore not inconsistent with a person's right to a fair trial (see [69] and [71]).
The court examined the merits of the two applications and dismissed them on their individual circumstances.

ALL SA LAW REPORTS JULY 2017

Firstrand Bank Ltd v KJ Foods CC (in business rescue) [2017] 3 All SA 1 (SCA)

Company law – Business rescue – Companies Act 71 of 2008 – Whether a vote by a creditor against the adoption of a proposed business rescue plan should be set aside – Section 153(7) provides for a court to set aside the vote on a business rescue plan, on application, if the court is satisfied that it is reasonable and just to do so – A court must first determine whether or not the vote was inappropriate and if so, invoke the provisions of section 153(7).

Words and phrases – “inappropriate” – Section 153(7) of the Companies Act 71 of 2008 provides for a court to set aside the vote on a business rescue plan, on application, if the court is satisfied that it is reasonable and just to do so, and a court must first determine whether or not the vote was inappropriate and if so, invoke the provisions of section 153(7) – Dictionary definition of “inappropriate” referring to something being unsuitable, improper, wrong, inadvisable, misguided, undesirable, misplaced.

The respondent was a business which experienced financial distress at the end of 2012. In 2013, a resolution was taken to place it under business rescue. Two business rescue practitioners were appointed, and business rescue commenced on 17 July 2013. Following the first meeting of creditors a business rescue plan was published, but that plan was revised in the light of new claims that had not been included in the initial rescue plan. A second meeting of creditors took place on 10 October 2013 to

discuss and vote on the revised business rescue plan. That meeting was adjourned and after certain adjustments were made, a final business rescue plan was published on 21 November 2013. At the third meeting of creditors the appellant held a voting interest of 29,81% and the remainder of the creditors held a voting interest of 70,19%.

When no further amendments were made to the business rescue plan and no new proposals were made, the creditors proceeded to the voting stage. All the creditors in attendance at the meeting voted in favour of the business rescue plan except the appellant who voted against its adoption. Section 152(2) of the Companies Act 71 of 2008 requires 75% of the creditors voting interest to vote in favour of the business rescue plan for it to be adopted. The requisite 75% of the creditors voting interests was not obtained with the result that the final business rescue plan was rejected.

The business rescue practitioners regarded the vote of the appellant as inappropriate and brought an application in terms of section 153 of the Act, seeking the setting aside of the vote by the appellant. The success of that application led to the present appeal.

Held – Section 152(2) of the Companies Act states that in a vote for the proposed business rescue plan same will be approved on a preliminary basis it was supported by the holders of more than 75% of the creditors' voting interest that were voted; and the votes in support of the proposed plan included at least 50% of the independent creditors' voting interest, if any, that were voted. Section 153(7) provides for a court to set aside the vote on a business rescue plan, on application, if the court is satisfied that it is reasonable and just to do so. A court must first determine whether or not the vote was inappropriate and if so, invoke the provisions of section 153(7). The court's discretionary powers afforded by section 153(7) become applicable once the jurisdictional fact of inappropriateness has been found or established. In order to determine the meaning of the word "inappropriate" the intention of the Legislature must be determined by giving the word its ordinary grammatical meaning which the context dictates. The dictionary definition of "inappropriate" refers to something being unsuitable, improper, wrong, inadvisable, misguided, undesirable, misplaced. The Court noted section 7(k) which stipulates that the purpose of the Act is to provide for the efficient rescue and recovery of financially distressed companies in a manner that balances the rights and interests of all relevant stakeholders. The word "inappropriate" referred to an act which unduly undermined the achievement of the purpose of the Act, as stipulated in section 7(k). Any vote which unduly undermined the achievement of the rescue of a financially distressed company would be inappropriate.

The facts showed that the appellant would receive the same amount in the event of business rescue, as it would should the respondent be liquidated. Furthermore the business rescue had certain obvious advantages to other affected persons. The facts of the case satisfied the Court that it was reasonable and just that the vote on the business rescue plan should be set aside. The appeal was thus largely dismissed.

AM v S [2017] 3 All SA 23 (GJ)

Criminal law – Rape – Complainant's recanting of rape allegation – Appeal against conviction and sentence – Application to lead further evidence – Section 309B(5) and (6) of the Criminal Procedure Act 51 of 1977 – Test for acceding to such an application requires that there should be some reasonably sufficient explanation,

based on allegations which may be true, why the evidence which it is sought to lead was not led at the trial – There should also be a prima facie likelihood of the truth of the evidence, which evidence should be materially relevant to the outcome of the trial.

Having been convicted of rape and sentenced to life imprisonment, the appellant appealed against both conviction and sentence. He subsequently applied to lead further evidence as contemplated in section 309B(5) and (6) of the Criminal Procedure Act 51 of 1977.

The complainant was a person with whom the appellant had been in a 7-year relationship from which two children were born. According to the complainant, after she had terminated the relationship, the appellant had abducted her in the street, took her to his home, assaulted her and raped her twice. She was rescued by her family the following day. The appellant alleged that the sexual intercourse with the complainant was consensual, but his version was rejected and he was convicted.

In seeking to lead further evidence, the appellant stated that the complainant had since recanted her claim of rape in an affidavit made to the police.

Held – The affidavit relied upon did not present a full explanation of what had actually occurred between the complainant and the appellant. The Court set out a number of questions which should have been addressed but were not. Based on the inadequate version presented, it could not be established that the recantation was voluntary and acceptable. The appellant's application was thus flawed. As stated in case law, the test for acceding to such an application requires that there should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence which it is sought to lead was not led at the trial. There should also be a *prima facie* likelihood of the truth of the evidence, which evidence should be materially relevant to the outcome of the trial. In the present matter, the requirement of a *prima facie* likelihood of the truth of the evidence was not properly addressed in the application. Despite that, it was still incumbent on the court to scrutinise all the circumstances to determine whether the interests of justice would be thwarted if the application were to be denied.

The history of the relationship between the complainant and the appellant was such that the possibility that the rape was an exaggeration, aimed at punishing the appellant could not be ruled out. As a result, the Court found it appropriate to set aside the conviction and sentence and allow the trial to reopened for further evidence. The appellant was to remain in custody pending the conclusion of the trial, subject to his right to apply for bail to the trial court.

Belwana v Eastern Cape MEC for Education and another; Langeveldt v Eastern Cape MEC for Education and another [2017] 3 All SA 32 (ECB)

Constitutional law – Right of access to information – Section 32 of the Constitution of the Republic of South Africa, 1996 – Right to information is not absolute, and may be limited in terms of section 36 of the Constitution – Refusal is compulsory if access involves the unreasonable disclosure of a non-consenting third party's personal information, and if access would result in a breach of confidence owed to a third party in terms of an agreement – Section 45 of the Promotion of Access to Information Act 2 of 2000 permits refusal of a request for access to a record of the body if the request is manifestly frivolous or vexatious; or the work involved in processing the request would substantially and unreasonably divert the resources of the public body – Section

44(2) protects the record of a public body if the record contains evaluative material, and the disclosure of such material would breach an express or implied promise which was made to the person who supplied the material.

Two applications brought by educators employed by the respondents were consolidated by the court.

The applicants sought relief in terms of the provisions of the Promotion of Access to Information Act 2 of 2000 (the "Act"), in respect of information held by the respondents pertaining to their unsuccessful applications for certain posts within the Department of Education.

Held – Section 32 of the Constitution, which establishes, *inter alia*, the right of access to information held by the State, requires national legislation to give effect to such right. The Promotion of Access to Information Act was enacted as a result of that requirement. The right to information is not absolute, and may be limited in terms of section 36 of the Constitution. In recognition of the limitation clause in the Constitution, the Act devotes an entire chapter to grounds for refusal of access to records. Refusal is compulsory if access involves the unreasonable disclosure of a non-consenting third party's personal information, and if access would result in a breach of confidence owed to a third party in terms of an agreement. Refusal is discretionary in various circumstances as set out in the Act.

The Court then turned to consider the respective applicants.

In the case of Ms Belwana, she had applied for two head of department posts but was not shortlisted nor advised of the outcome of the process which was followed in the filling of the posts. She wrote to the relevant school governing body ("SGB") requesting reasons why she was not shortlisted and asking the school to explain to her the criteria used by its governing body in its short-listing process. Although no response was received, Ms Belwana did nothing for several months, and then approached an attorney who liaised with the department on the applicant's behalf. When that failed to bring about a result satisfactory to the applicant, she launched the application before this Court, seeking an order directing the respondents to furnish her with the information which she had originally requested from the SGB and the second respondent. The applicant was seeking an order which compelled the Department to furnish her with certain information, which relief she had failed to obtain from the Department. Section 82 of the Act states that the court may grant any order that is just and equitable, including an order requiring the information or relevant officer of the public body to take such action as the court considers necessary within a period mentioned in the order. One of the provisions on which the Department relied in opposing the application was section 45 of the Act. That section permits refusal of a request for access to a record of the body if the request is manifestly frivolous or vexatious; or the work involved in processing the request would substantially and unreasonably divert the resources of the public body. The respondents correctly pointed out that the applicant was not shortlisted for the contested posts and as such did not even make it to the interview process. She now requested to be furnished with the score-sheets, minutes and the deliberations of an interview panel presiding over a process in which she did not participate. The Court agreed that the information sought by the applicant did not relate to her. She was eliminated at the outset on the basis of what was contained in her application form. The information which she sought did not relate to her as a requester, but related to interviews from which she was excluded. It

related to meetings where she was not the subject of discussion, and opinions about and recommendations with respect to candidates who were interviewed and candidates who were shortlisted. Moreover, much of the record sought was bound to contain evaluative material about other applicants as envisaged in section 44 of the Act. Section 44(2) protects the record of a public body if the record contains evaluative material, and the disclosure of such material would breach an express or implied promise which was made to the person who supplied the material. The Court concluded that the application was manifestly frivolous and vexatious and fell to be dismissed.

The remaining case was that of Ms Langeveldt, who had applied for the vacant post of head of department of the foundation phase at the school at which she was already employed. She was shortlisted and was invited to attend an interview, which she did, on 29 April 2015. On 5 May 2015, she wrote a letter to the Department's district director expressing her concern regarding perceived irregularities committed before, during and after the interview process. She stated that the "recommendation" of the SGB was based on undue influence. In August 2015, the applicant escalated her grievance by formally referring it to the Department's bargaining council. During the grievance process, the applicant sought access to all the relevant documents relied upon by the SGB and the Department to procure the appointment of the successful candidate. Her request was refused and an internal appeal failed. That led to the application before this Court, for an order compelling the respondents to furnish the specified information. The application was opposed on the grounds that it was manifestly frivolous and vexatious in that the applicant had abandoned any previous intention she might have had to challenge the outcome of the interviews; that the information she sought contained personal information about parties and would amount to a breach of confidentiality in that the other applicants had not consented to disclosure of their personal information; and that the minutes, records of deliberations and the recommendations which she sought would compromise confidentiality. In placing strict reliance on the confidentiality clause signed by panellists, the Department had successfully resisted those aspects of the applicant's application which sought the provision of evaluative material prepared by panellists for the purpose of determining the suitability, eligibility or qualifications of the other applicants for the post, including the identities of the persons who furnished and obtained such evaluative material. The application fell to be dismissed in respect of such evaluative material, but was successful to a limited extent. The Court set out the information which the Department was required to provide to the applicant.

De Sousa and another v Technology Corporate Management (Pty) Ltd and others [2017] 3 All SA 47 (GJ)

Company law – Action by minority shareholders in company – Section 252 of the Companies Act 61 of 1973 – Providing remedy for members of a company in case of oppressive or unfairly prejudicial conduct – A member seeking relief must show that the conduct complained of is unfairly prejudicial, unjust or inequitable to that member or to some part of the members – Section 252(3) confers a wide discretion on the court to do what is considered fair and equitable in all the circumstances of the case, to put right and cure the unfair prejudice which a shareholder has suffered.

The plaintiffs, who were minority shareholders in the first defendant company ("TCM"), sought relief in terms of section 252 of the Companies Act 61 of 1973. Other

shareholders in the company were the second and third defendants and a family trust controlled by the fourth defendant.

TCM was founded in 1987 by the first plaintiff ("De Sousa") and the second defendant ("Cornelli") who then held equal status within the company and contributed substantially to the running of the business. The second plaintiff ("Diez"), third defendant ("Da Silva") and fourth defendant ("Hassim") joined the company in 1987, 1989 and 2004 respectively. A formal shareholders' agreement regulating the relationship between the shareholders, was only entered into for the first time on 29 June 2005, some eighteen years after TCM's incorporation. Simultaneously with the conclusion of the shareholders' agreement, a sale of shares agreement was entered into between Hassim and the remaining shareholders of TCM, in terms of which Hassim purchased 25,1% of the issued share capital of TCM from the remaining shareholders. Hassim subsequently was unable to pay the purchase consideration in respect of the shares acquired by him, and Cornelli attempted to assist him to pay for the shares. Those attempts gave rise to fundamental disputes between the plaintiffs and Cornelli, with the plaintiffs opposing Cornelli's proposals on the ground that they unduly favoured the trust and/or Hassim's financial position at the expense of TCM and the other shareholders. The plaintiffs asserted that because of their resistance to the attempts made to assist Hassim to pay for his shares, Cornelli repeatedly criticised, belittled, humiliated and persecuted them in the presence of other directors, shareholders and employees.

The relationship between De Sousa, Diez and Cornelli continued to deteriorate, culminating in the dismissal of De Sousa on grounds of poor work performance and the deployment of Diez to manage TCM's Namibia branch. Diez subsequently resigned.

In their particulars of claim, the plaintiffs sought an order directing TCM or Cornelli and Da Silva, each in proportion to his or its existing shareholding, to purchase the shares of the plaintiffs, and ancillary relief.

Held – The two issues for determination were whether the plaintiffs were entitled to relief under section 252 of the Companies Act and, if so, what the appropriate consideration was that should be paid for the plaintiffs' shares. The plaintiffs' case was that Cornelli, acting alone, alternatively supported by Da Silva and Hassim, had conducted himself in the manner set out in the particulars of claim and thereby brought about a state of affairs which was unfairly prejudicial and inequitable to the plaintiffs. Accordingly, the plaintiffs contended that it would be just and equitable for their shares in TCM to be purchased as set out in their particulars of claim.

Section 252 established a remedy for members of a company in case of oppressive or unfairly prejudicial conduct. A member seeking relief must show that the conduct complained of is unfairly prejudicial, unjust or inequitable to that member or to some part of the members. The test for unfair prejudice is an objective one. The question asked generally is whether a reasonable bystander observing the consequences of the conduct complained of, would regard it as having unfairly prejudiced the plaintiff's interests. The Court considered what would constitute fairness or unfairness.

The court's jurisdiction to make an order does not arise until the statutory criteria have been satisfied. The plaintiff bears the onus of satisfying the court that the particular act or omission has been committed, or that the affairs of the company are

being conducted in the manner he alleges; and that such act or omission or conduct of the company's affairs is unfairly prejudicial, unjust or inequitable to him or to some part of the members of the company. Conduct which adversely affects or is detrimental to the financial interests of a member is justiciable under the section. Thus relief may be claimed where it can be shown that the value of a member's shareholding in a company has been seriously diminished or jeopardised by reason of unfair, unjust or inequitable conduct on the part of those who have control of the company. A form of unfair prejudice of particular relevance in the instant case arises where a minority shareholder who has a right or legitimate expectation to participate in the management of the company is excluded from so doing by the majority without a reasonable offer or arrangement being made to enable the excluded shareholder to dispose of his shares. The prejudicial inequity or unfairness lies not in the legally justifiable exclusion of the affected member from the company's management, but in the effect of the exclusion on such member if a reasonable basis is not offered for a withdrawal of his or her capital. The right of a shareholder to manage the affairs of a company is usually derived from the articles of association or agreements between the shareholders, but the relationship between a company's members may give rise to a legitimate expectation to participate in the company's management. The test for determining whether conduct is unfair or not requires a balancing of all the interests involved in the light of the history and structure of the company and in terms of the policies underlying section 252 and the Act; the duties of directors; the rights and duties of a majority shareholder in relation to a minority shareholder, and the agreements or understanding outside the articles which may give rise to legitimate expectations.

Section 252(3) confers a wide discretion on the court to do what is considered fair and equitable in all the circumstances of the case, to put right and cure the unfair prejudice which a shareholder has suffered.

On an examination of the conduct of the parties and the evidence, the Court concluded that Cornelli and the remaining shareholders of TCM had failed or refused to engage in *bona fide* discussions or negotiations with the aim of permitting the plaintiffs to dispose of their shares at a fair value and without resort to litigation. The defendants had not made a fair or proper offer to purchase the plaintiffs' shares, which unfairly prejudiced the plaintiffs.

The principal complaint of the plaintiffs was that since about 2008 Cornelli and the remaining shareholders had intentionally or recklessly conducted the affairs of TCM in such a way as to diminish or jeopardise the value of the plaintiffs' shares and to reduce the dividends and other financial benefits payable to them. Furthermore, on a proper conspectus of the evidence, the Court found that the affairs of TCM had been conducted in a manner that was unfairly prejudicial, unjust and/or inequitable to the plaintiffs as members of TCM. Having proven the prejudicial conduct alleged in their particulars of claim, the plaintiffs were entitled to relief in terms of section 252.

Regarding costs, the Court held this to be a case in which costs ought to be awarded against the second to fifth defendants on a punitive scale due to their obstructive approach to the litigation, and their wrongful use of TCM's funds to resist the present proceedings.

TCM was directed to the purchase the plaintiffs' shares. The Court ordered that a referee be appointed to determine the value of the shares.

Democratic Alliance v President of the Republic of SA; In re Democratic Alliance v President of the Republic of SA and others [2017] 3 All SA 124 (GP)

Civil procedure – Application for review – Decisions by President to reshuffle Cabinet – Request for all documents relevant to making of impugned decisions – Rule 53 of the Uniform Rules of Court in terms of which the review application was brought, held to be applicable to executive decisions – Executive power conferred upon the office of the President by section 91(1) of the Constitution of the Republic of South Africa, 1996 is circumscribed by the bounds of rationality and by section 83(b) and (c) of the Constitution – Court confirming that executive decisions have to be rational and are therefore subject to judicial scrutiny.

The first respondent was the President of South Africa, who in April 2017, announced changes to the National Executive (the "Cabinet"). A key aspect of the announcement was the decisions to dismiss and replace the Minister of Finance, the second respondent, and the Deputy Minister of Finance, the third respondent. They were replaced respectively by the fourth respondent and the fifth respondent. The applicant in seeking to take the decisions on review, sought the delivery by the President, of the record of all documents and electronic records that related to the making of the decisions sought to be reviewed and set aside.

The answering affidavit filed on behalf of the President raised two points. Firstly, it was contended that the main application as well as the interlocutory one, were not urgent and, secondly, it was contended that the decisions that the applicant sought to review and set aside constituted executive decisions taken in terms of section 91 of the Constitution. Accordingly, it was argued that rule 53 in terms of which the application was brought, was not applicable.

Having heard that application on an urgent basis, the Court granted the relief sought, and now furnished reasons for its decision.

Held – The power to take the decisions is vested in the President by section 91(2) of the Constitution. The executive power conferred upon the office of the President by section 91(1) of the Constitution is circumscribed by the bounds of rationality and by section 83(b) and (c) of the Constitution. The Court confirmed that executive decisions have to be rational and are therefore subject to judicial scrutiny. Such decisions must comply with the doctrine of legality and must not be irrational or arbitrary.

The question facing the Court in this case related to the procedural devices which should be employed to test the rationality of the decisions. While the applicant maintained that it was entitled to utilise rule 53 (which is applied with rule 6), the President maintained that rule 6 should be utilised on its own. The purpose of rule 53 is to facilitate applications for review. Relying on the purposive interpretation, the Court found no logical reason not to utilise it in an application to review and set aside an executive decision. It was therefore held that the provisions of rule 53 apply *mutatis mutandis* to an application for the reviewing and setting aside of an executive order or decision. The rule was thus held applicable to the main application. The consequence thereof was that the applicant was entitled to call for the President to furnish the reasons for his decisions as well as the relevant part of record that formed the basis upon which the decisions were taken. The President's stance on that was that the applicant was not entitled to the record at all. The

President's contention was that the decisions were subject to the doctrine of legality and therefore the applicant was entitled to the reasons for the decisions, but not to the record. The Court having concluded that the relevant part of the record had to be furnished as per the provisions of rule 53(1)(b), the issue that followed was what that record should consist of. The President had offered nothing by way of a record, and the lack of co-operation led the Court to issue an order that called for a record as canvassed in the notice of motion in the main application. The Court also ruled that the applicant was entitled to an order compelling the President to furnish reasons for the decisions. The application succeeded, with costs.

Du Plessis v Independent Regulatory Board for Auditors and others [2017] 3 All SA 137 (WCC)

Administrative justice – Decisions of the disciplinary committee of Independent Regulatory Board for Auditors – Whether constituting administrative action as defined in the Promotion of Administrative Justice Act 3 of 2000 – To qualify as administrative action, decision had to be of an administrative nature within the meaning of the Promotion of Administrative Justice Act – The character of the function concerned is the determinative criterion.

Auditors – Disciplinary proceedings against – Application for review of finding of guilt – Averment that disciplinary committee's verdict was premised on findings of fact in respect of matters that had not been adumbrated in the factual allegations made in the charge sheet in support of the charge levelled and in the face of findings that some of the alleged facts that were material to the charges had been found by the committee not to have been proved – Whether conviction was misaligned with charge – Court confirming that charge was pleaded with sufficient particularity and was formulated in a manner substantially compliant with section 49(3) of the Auditing Profession Act 26 of 2005.

The applicant was an auditor who had various charges of misconduct levelled against him in terms of sections 49 and 50 of the Auditing Profession Act 26 of 2005. A hearing ensued before a disciplinary committee established by the Independent Regulatory Board for Auditors (the "Board") and the applicant was found guilty of having been party to a fraud committed against the Department of Trade and Industry ("DTI") and of having breached her duty in terms of section 45 of the Act, to report to the Board the occurrence of a reportable irregularity.

Seeking judicial review and setting aside of those decisions, the applicant contended that she was convicted on matters that the charge had not called upon her to meet. She also challenged the sanctions imposed on her, on the ground that they fell to be set aside if the attack on the convictions was to be upheld on review.

The Board opposed the application insofar as it related to the verdict on the charge of being party to a fraud against the DTI. The main grounds of opposition in that regard were that the applicant's alleged reading of the charge sheet was incompatible with the language used in it; that her alleged reading of the charge sheet was inconsistent with her own conduct and that of her legal representatives in the hearing; and that even if the applicant had been convicted on the basis of facts not specifically referred to in the charge sheet, the evidence had been before the committee and, in the peculiar circumstances of the case, there had been no prejudice to her in the

committee having taken it into account. In argument before the court, the Board submitted that the case raised the single question of whether the applicant had been afforded a fair hearing.

Both parties were in agreement that the decisions of the disciplinary committee constituted administrative action as defined in the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"), as the decisions in question were made in the exercise of a public power under the Act by a statutorily constituted body that qualified as an organ of State and had had a direct and adverse external effect on the applicant's rights.

Held – The parties' views on the nature of the decision did not mark the end of the enquiry. The Court pointed to the requirement that the decisions in issue – which were plainly adjudicative in character – had to be of an administrative nature within the meaning of PAJA. That the decision had to be of an administrative nature is the first of seven requirements for administrative action. How the statutory concept of administrative action is to be delineated with regard to the componential element introduced by the phrase "of an administrative nature" in section 1 of PAJA remains imprecise. The Court held that the application concerned a review, brought on the grounds of alleged procedural irregularity and unfairness, of disciplinary proceedings before a statutory committee exercising a public power. The statutory character of the disciplinary committee was not, by itself, enough to characterise its acts as administrative in nature. It is the character of the function concerned that is the determinative criterion. The disciplinary committee's judicial function had an administrative context in that it was derived from a regulatory statute and was directed at the execution of some of the objects of the statute. Taking into account all relevant factors, the Court was satisfied that the impugned proceedings in the current matter were of an administrative nature.

In the application for judicial review, the merits of the disciplinary committee's decision was not the focus, but the legality of the process in terms of which it was obtained was the issue. However, the basis of the review application, being procedural unfairness reflected in an alleged non-alignment between the charge and the factual findings upon which the conviction was founded, made it necessary for the Court to set out the factual allegations that formed the basis of the investigation into the applicant's conduct and the evidence adduced at the hearing. The charges brought against the applicant were the result of allegations made in a whistle-blower report by a former employee of the accounting firm in which the applicant was employed. The Court considered the contents of the whistle-blower's affidavit and the requirements of the Auditing Profession Act in respect of audit work. Essentially, the whistle-blower alleged that the applicant had conspired to assist a client to claim a grant from the DTI by misrepresenting the client's turnover.

It was the applicant's case on review that the disciplinary committee's verdict was premised on findings of fact in respect of matters that had not been adumbrated in the factual allegations made in the charge sheet in support of the charge brought against her and in the face of findings that some of the alleged facts that were material to the charges had been found by the committee not to have been proved. It was thus argued that the conviction had therefore been brought in on a charge that had been formulated in a manner materially non-compliant with the requirements of section 49(3)(a) of the Auditing Profession Act. The Court held that the issue of whether the conviction was misaligned with the charge required a determination in the first place of what it was that the applicant was accused of in terms of the second charge. While acknowledging

that the charge was poorly drafted, the Court found that it was obvious that the nature of the charge was one of fraud. A charge of fraud should state the *facta probanda*, which are the facts stated in broad terms which the prosecution will seek to establish in order to prove the essential elements of the offence. If the *facta probanda* are apparent on the face of the charge sheet, the accused has enough information to plead to the charge. He does not need to be in possession of the particulars of all the evidence (the *facta probantia*) that the prosecutor will lead to prove the commission of the alleged offence. The Court confirmed that the charge was pleaded with sufficient particularity in this case and that it was formulated in a manner substantially compliant with section 49(3).

The application for the review and setting aside of the decisions of the third respondent in respect of the charge of fraud was dismissed.

Earthlife Africa, Johannesburg and another v Minister of Energy and others [2017] 3 All SA 187 (WCC)

Civil procedure – Intergovernmental agreements – Constitutionality – Where procedures set out in section 231(2) and 231(3) of the Constitution of the Republic of South Africa, 1996 to render such agreements binding over South Africa not followed, agreements violated the provisions of the Constitution and fell to be set aside.

Civil procedure – Intergovernmental agreements – Non-joinder of foreign governments with whom agreements were signed – Minister's obligations to act constitutionally and in accordance with section 231 of the Constitution of the Republic of South Africa, 1996 are owed to the citizens of this country and not to foreign governments – None of the foreign governments that were party to the intergovernmental agreements had any direct and substantial legal interest, as a matter of South African domestic law, in the constitutionality of the Minister's actions – Joinder not necessary.

Energy – Determinations made by Minister of Energy in terms of section 34 of the Electricity Regulation Act 4 of 2006 – Procedural challenge – Delay in gazetting decision rendering it irrational and unlawful, and violated the requirements of open, transparent and accountable government – Determination rendered unconstitutional and unlawful.

Energy – Determinations made by Minister of Energy in terms of section 34 of the Electricity Regulation Act 4 of 2006 – Whether the Minister and National Energy Regulator breached statutory and constitutional prescripts in making the section 34 determinations – Decision by the Minister or the National Energy Regulator falling short of constitutional legality for want of consultation with interested parties.

In furtherance of its nuclear power procurement programme, the State (in the form of the "Minister of Energy") made two separate determinations in 2013 and 2016 in terms of section 34 of the Electricity Regulation Act 4 of 2006. The applicants challenged those determinations. In 2015, the Minister had also tabled three intergovernmental agreements ("IGAs") before Parliament. The agreements were between South Africa and the United States of America, concluded in August 1995, the government of the Republic of Korea, concluded in October 2010 and the government of the Russian Federation, concluded in September 2014, all with

regard to co-operation in the field of nuclear energy. Those agreements were the subject of a constitutional challenge raised by the applicants. The challenge to the IGAs was largely procedural in nature and based on the different procedures set out in section 231(2) and 231(3) of the Constitution to render such agreements binding over South Africa. Section 231(2) provides that an IGA binds South Africa only after it has been approved by resolution in both the National Assembly ("the NA") and the National Council of Provinces ("the NCOP") 'unless it is an agreement referred to in subsection (3). Section 231(3) provides that IGA's of a technical, administrative or executive nature bind the country without the approval of the NA or the NCOP but must be tabled in the Assembly and the Council within a reasonable time. The applicants averred that inasmuch as one of the agreements was entered into more than two decades before it was tabled in terms of section 231(3), and another nearly five years previously, the delay in tabling them rendered them non-compliant with section 231(3) and therefore non-binding.

The applicants were non-profit organisations concerned with environmental issues. They sought the review and setting aside of the Minister's signing of the Russian IGA and the review and setting aside of the two section 34 determinations. In respect of the section 34 determinations, the applicants' case was that both the Minister's decision as contained in the determinations and the third respondent's ("NERSA's") concurrence therein constituted administrative action but breached the requirements for such action to be lawful, reasonable and procedurally fair. Amongst the grounds that they relied on in that regard were that neither the Minister's decision nor that of NERSA's was preceded by any public participation or consultation of any ground. Secondly, as regards the first section 34 determination, the applicants contended it was unlawful by reason of the two-year delay in gazetting it. Thirdly, they contended, both determinations were irrational, unreasonable and taken without regard to relevant considerations or with regard to irrelevant considerations.

The respondents contended that neither the decisions of the Minister nor those of NERSA in concurring with the section 34 determinations constituted administrative action. Instead, they contend the determinations amounted to policy directives and that a ministerial determination under section 34 of the Electricity Regulation Act amounts to "executive policy".

Held – The issues for determination were whether the Minister and NERSA breached statutory and constitutional prescripts in making the 2013 and 2016 section 34 determinations; whether the second respondent (the "President") and the Minister breached the Constitution in deciding to sign the 2014 Russian IGA in relation to nuclear procurement and then in tabling it under section 231(3) of the Constitution rather than section 231(2); and whether the Minister breached the Constitution in tabling the US IGA and South Korean IGA in relation to nuclear co-operation two decades and nearly five years, respectively after they had been signed.

Section 34(1) operates as the legislative framework by which any decision that new electricity generation capacity is required and any decision taken by the Minister in that regard, has no force and effect unless and until NERSA agrees with the Minister's decision. It first had to be decided whether the section 34 determinations constituted administrative action and if they did, whether they were lawful, reasonable and procedurally fair. The right to just administrative action is enshrined in section 33 of the Constitution. The source of the power exercised by the Minister was section 34(1) and the nature of the power was one which had far-reaching consequences for the

public as a whole and for specific role-players in the electricity generation field. The determination also had external binding legal effect. Looking at the decision taken by NERSA to concur in the Minister's proposed 2013 section 34 determination, the Court stated that for a valid decision of such nature, it had to be taken within a procedurally fair process in which affected persons had the opportunity to submit their views and present relevant facts and evidence to the Energy Regulator. The decision was confirmed as being an administrative one. That conclusion made it difficult to view the section 34 determination, as a whole, as anything other than administrative action. NERSA did not oppose the application and therefore offered no explanation as to what procedure, if any, it followed to give effect to the right to procedurally fair administrative action. The Court held that a rational and a fair decision-making process would have made provision for public input so as to allow both interested and potentially affected parties to submit their views and present relevant facts and evidence to NERSA before it took a decision on whether or not to concur in the Minister's proposed determination. NERSA's decision to concur in the Minister's proposed 2013 determination without even the most limited public participation process rendered its decision procedurally unfair and in breach of the provisions of section 10(1)(d) of the National Energy Regulator Act 40 of 2004 read together with section 4 of the Promotion of Administrative Justice Act 3 of 2000.

Even if wrong in concluding that NERSA's decision to concur (or the combined decision of the Minister and NERSA) amounted to administrative action, the Court pointed out that the decisions still had to satisfy the test for rational decision-making, as part of the principle of legality. Applying that to the applicants' challenge on the basis of an unfair procedural process the question was whether the decision by either the Minister or NERSA (or the combined decision of the Minister and NERSA) fell short of constitutional legality for want of consultation with interested parties. NERSA failed to explain how it acted in the public interest without taking any steps to ascertain the views of the public or any interested or affected party, and its decision failed to satisfy the test for rationality based on procedural grounds alone.

A further procedural challenge to the 2013 section 34 determination was based on the delay in gazetting the decision. Having regard to the effects of the delay, the Court held that the failure to gazette or otherwise make the determination public for two years not only breached the Minister's own decision, thus rendering it irrational and unlawful, but violated the requirements of open, transparent and accountable government. Those defects rendered the Minister's 2013 section 34 determination unconstitutional and unlawful, in the latter case by virtue of breaches of the principle of legality and thus liable to be set aside. Similar considerations applied to the 2016 determination, which was therefore also unlawful. More importantly, the Court found that the 2013 and 2016 determinations could not co-exist. The failure to expressly withdraw or amend the earlier determination, rendered the 2016 determination irrational and subject to being set aside.

Turning to the impugned IGAs, the Court considered various preliminary points raised by the respondents. Those included non-joinder of the foreign governments, the alleged non-justiciability of the IGAs and the applicants' alleged lack of standing to challenge the manner of tabling the IGAs in terms of section 231 of the Constitution. On the merits, the respondents contended that failing the upholding of any of the preliminary points, the Russian IGA was, upon a proper interpretation, not a "procurement contract" with immediate financial application and fell within the category

of a “technical, administrative or executive agreement” as envisaged by section 231(3) of the Constitution, thus not requiring ratification or accession, and was therefore properly tabled.

On the issue of non-joinder, the Court explained that no order was sought against any foreign government, the court being asked rather to determine whether the Minister’s actions in terms of section 231 of the Constitution were lawful, as a matter of domestic law. The Minister’s obligations to act constitutionally and in accordance with section 231 are owed to the citizens of this country and not to foreign governments. None of the foreign governments that were party to the IGA’s had any direct and substantial legal interest, as a matter of South African domestic law, in the constitutionality of the Minister’s actions. There was therefore no need to join the foreign States and the joinder point had no merit.

The Court also confirmed that the applicants had standing both in their own right and in the public interest to challenge the constitutionality of the tabling of the relevant IGA’s.

The respondents contended that the Russian IGA, being an international agreement, should not be justiciable by a domestic court, which may not even interpret or construe such an agreement nor may it determine the legal consequences arising therefrom. However, the Court held that not only was it permissible for the court to interpret the Russian IGA to determine its proper tabling procedure and whether the Minister acted unconstitutionally or not, but it was the court’s duty to do so. It was therefore ruled that the respondents’ contention that the Russian IGA was non-justiciable was without merit. The Court held further that the Russian IGA could not be classified as falling within that category of international agreements which become binding by merely tabling them before Parliament. It clearly was required to be scrutinised and debated by the Legislature in terms of section 231(2) of the Constitution. Therefore, the Minister’s decision to table the agreement in terms of section 231(3) was, at the very least, irrational.

Next the Court considered whether the US and South Korean IGAs were properly tabled in terms of section 231(3). The applicants’ challenge to the constitutionality of the tabling of the US and South Korean IGA’s was based upon what they considered to be the unlawful and unconstitutional delay in tabling those agreements before Parliament. The Court held that the delays were of such magnitude that they could never qualify as reasonable, not least because accepting such delays would render the time requirement in section 231(3) meaningless. It was concluded that the tabling of the US and South Korean agreements violated the provisions of the Constitution and fell to be set aside. The application was, accordingly, upheld.

Elite Bingo (Uth) (Pty) Ltd v Zwane NO and others [2017] 3 All SA 236 (ECG)

Local government – Gambling – Disqualification of applicant for licence to operate a bingo hall due to failure to obtain special consent for use of property – Zoning of property – Whether special consent to operate bingo hall on property was required – Interpretation of provisions of zoning scheme – Property zoned as place of amusement not encompassing use as place of gambling – Special consent was therefore required.

The appellant and the fourth respondent were both applicants in respect of a licence to operate a bingo hall in a town falling within the jurisdictional area of the second respondent (“the Board”). The fourth respondent was successful with the appellant

having been disqualified by the second respondent. The appellant brought an application to review the decision of the Board. The dismissal of the review application led to the present appeal.

The Request for Proposals ("RFP") contained the terms and conditions of the tender. The clauses of the RFP pertinent to this appeal were those which dealt with Essential Minimum Requirements ("EMRs") contained in the RFP and briefing sent out by the Board in terms of the EMRs. The Board had resolved amongst others that the appellant's failure to furnish the Board with the special consent/zoning certificate for a bingo hall was a material non-compliance with the EMRs of the RFP and that the appellant had failed to demonstrate that it was in a position to operate a bingo hall at the sites earmarked for that purpose as contemplated in the RFP.

The grounds of appeal were that the "business zoning" of the properties was sufficient to permit an operation of a bingo hall and that an application for special consent should have been disregarded by the Board as unnecessary. By failing to have regard to those factors, the appellant contended, the Board committed a reviewable irregularity.

Held – The interpretation by the appellant that the language used in the zoning scheme made it clear that the operation of a bingo hall did not require special consent, could not be correct. The buildings intended to be used by the applicant were zoned as places of amusement, which the Court held could not include a gambling establishment or a venue where legal gambling or betting might take place. Bingo was held not to be a sport or cultural activity but a gambling game in terms of the National Gambling Act 33 of 1996. In terms of the purpose for which the property could be used and the type of gambling to be operated thereon, there was a difference between an "amusement game" and a "gambling game". It was held to have been highly unlikely that the drafters of the zoning scheme would have contemplated that a place of amusement would encompass a bingo hall or any hall that may involve gambling, as it was illegal at the time. To expand the definition to include such, would be taking the definition too far to include activities which could not have been contemplated by the drafters of the zoning scheme. It therefore could not be correct that the zoning certificate submitted by the appellant sufficed to satisfy the requirements of the RFP and in particular, that it did not require special consent.

Satisfied that the Board did take into account relevant considerations in disqualifying the appellant's bid, the Court concluded that the court *a quo* correctly dismissed the appellant's application.

The appeal was dismissed as far as the merits were concerned, and was upheld solely in so far as it related to the costs order made in respect of the fifth and sixth respondents.

Helen Suzman Foundation and another v Minister of Police and others
[2017] 3 All SA 253 (GP)

Leave to appeal – Effect of – Suspension of impugned order – Application for order declaring that the operation of order would not be suspended and would continue to be operational regardless of any applications for leave to appeal – Section 18(1) of the Superior Courts Act 10 of 2013 provides that 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 – In terms of section 18(3), a court may only order otherwise if the party who applied to the court proves on a balance of probabilities that he 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.

Words and phrases – "exceptional circumstances" – Section 18(1) of the Superior Courts Act 10 of 2013 provides that 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 – What is contemplated by exceptional circumstances, is something out of the ordinary and of an unusual nature.

On 17 March 2017, the court reviewed the decision of the first respondent (the "Minister") to appoint the second respondent as National Head of the Directorate of Priority Crimes Investigations and ordered it to be set aside. The second respondent applied for leave to appeal against that order, but his application was dismissed. As he could still approach the Supreme Court of Appeal with a petition for leave to appeal, in which case the order would be suspended, the applicants brought a counter-application, seeking an order declaring that the operation of the order issued on 17 March 2017 would not be suspended and would continue to be operational regardless of any applications for leave to appeal.

Held – In order to succeed with the counter-application, the applicants had to prove, on a balance of probabilities, that there were exceptional circumstances for the granting of an order to bring the judgment into operation, notwithstanding an appeal by the second respondent. They also had to prove that they would suffer irreparable harm should the judgment not be put into operation pending the outcome of the appeal; or that the second respondent would not suffer irreparable harm should the judgment be enforced pending the outcome of the appeal.

Section 18(1) of the Superior Courts Act 10 of 2013 provides that 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.

In terms of section 18(3), a court may only order otherwise if the party who applied to the court, in addition proves on a balance of probabilities that he 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. It had to be established what would constitute "exceptional circumstances" allowing a court to order otherwise than for the suspension of an order pending appeal. The Court referred to case authority in which it was stated that what is contemplated is something out of the ordinary and of an unusual nature. The existence of exceptional circumstances is a matter of fact which the court must decide accordingly. Turning to the exceptional circumstances on which the applicants relied, the Court found that a finding that the second respondent had been unlawfully appointed; the important role played by the National Head of the Directorate of Priority Crimes Investigations; and the fact that there were no prospects of success on appeal, the Court was satisfied that the applicants had satisfied the requirements of "exceptional circumstances".

The court, accordingly, made an order as contemplated in section 18(3) of the Act.

Kwazulu-Natal Law Society v Sharma and another
[2017] 3 All SA 264 (KZP)

Appeal – Doctrine of peremption – If the conduct of an unsuccessful litigant is such as to point indubitably and necessarily to the conclusion that he does not intend to attack the judgment, then he is held to have acquiesced in it.

Leave to appeal – Test – In terms of section 17(1) of the Superior Courts Act 10 of 2013, leave to appeal may only be granted where the court is of the opinion that the appeal would have a reasonable prospect of success, or failing that, where there is some other compelling reason justifying the matter receiving the attention of the court of appeal.

Attorneys – Striking from roll – Granting of lesser sanction – Costs – Whether law society was as a matter of course, entitled to costs in striking off application – Decision regarding costs in such circumstances would depend upon the particular facts of the matter, would fall within the discretion of the court of first instance and that a court on appeal would be reluctant to intervene in this regard, unless the lower court failed to exercise a judicial discretion.

This judgment deals with an application by a law society to have the name of the first respondent ("the respondent") struck from the roll of attorneys. Although the respondent was found to have acted dishonourably, her conduct was held not to have rendered her unfit to continue in practice. The application to strike her name from the roll of attorneys was accordingly refused, but she was nevertheless sentenced to pay a fine of R20 000 conditionally suspended for three years. The court made no order as to costs. The applicant sought leave to appeal against the costs order. However, it subsequently sought to broaden the scope of the appeal to include the sanction imposed by the court. The respondent pointed to rule 49(1)(b) of the Uniform Rules of Court which provide for an application for leave to appeal to be made within fifteen days and pointed out that whilst the application for leave to appeal against the costs order had been lodged on the last day permitted therefor, leave to appeal against the sanction imposed upon the respondent was well out of time. It was submitted that the applicant, by giving notice of intention to seek leave to appeal against the costs order only, had thereby made a conscious election to abide by the remainder of the judgment, including the sanction imposed. The argument was that the applicant was precluded, by virtue of the doctrine of peremption, from bringing a late application for leave to appeal against the sanction imposed. It was also contended that it was impermissible for an informal application to amend the notice of leave to appeal to include leave against the sanction to be made. Finally, the respondent submitted that the approach on the issue of sanction was inappropriate since the court of appeal would not readily interfere with the discretion of the court *a quo* in exercising discipline over an attorney, unless there was some irregularity in the exercise of the discretion.

Held – The doctrine of peremption is such that if the conduct of an unsuccessful litigant is such as to point indubitably and necessarily to the conclusion that he does not intend to attack the judgment, then he is held to have acquiesced in it. But the conduct relied upon must be unequivocal and must be inconsistent with any intention to appeal and the onus of establishing that position is upon the party alleging it. In the circumstances of this case, where the doctrine of peremption was raised shortly before the hearing so that the applicant had not had an opportunity of dealing with the factual situation

underlying the attempted application of the doctrine, the Court was disinclined to base its decision on whether to grant the application to amend the notice of application for leave to appeal, upon the application of the doctrine of peremption.

The application to broaden the scope of the appeal was brought late, and in the absence of a substantive application for condonation there was no explanation for the delay. The Court was also not able without a clear indication of what sanction the applicant would contend for, to adequately assess the prospects of success if condonation and leave were to be granted. The application should have been brought upon adequate notice by way of a substantive application, including an application for condonation for the late noting of an application for leave to appeal against the sanction imposed. The application for leave to amend the notice of application for leave to appeal, so as to include leave to appeal the sanction, was refused.

Consequently, the only ground upon which leave to appeal was sought was limited to the order in relation to costs, as contemplated in the applicant's original notice of application for leave to appeal.

On the issue of costs, the applicant submitted that it was compelled, as *custos morum* of the profession, to bring the application for the striking-off of the respondent and to place the matter before the court for decision. It was submitted that it was not the task of the applicant to determine the appropriate sanction, but that of the court and that the applicant merely facilitated the matter being placed before the court for that purpose. The submission that the law society was entitled, as a matter of course, to a costs order in its favour because of the above duty, was rejected by the Court. The correct principle is that the decision regarding costs in such circumstances would depend upon the particular facts of the matter, would fall within the discretion of the court of first instance and that a court on appeal would be reluctant to intervene in this regard, unless the lower court failed to exercise a judicial discretion.

In terms of section 17(1) of the Superior Courts Act 10 of 2013, leave to appeal may only be granted where the court is of the opinion that the appeal would have a reasonable prospect of success, or failing that, where there is some other compelling reason justifying the matter receiving the attention of the court of appeal. The test to be applied in applications for leave to appeal is not just the prospects of success, but there must also be a sound, rational basis for the conclusion that there are prospects of success on appeal. Applying that to the present matter, the Court concluded that the application for leave to appeal against the costs order did not meet the threshold set for the grant of such relief.

Considering all the circumstances of the matter, including its background, the lack of merit in the application for leave itself, the criticism levied at the conduct of the applicant as contained in the main judgment, as well as in relation to the application for leave, the Court was of the view that the present application called for an order of costs against the applicant.

Ngomane and others v City of Johannesburg Metropolitan Municipality and another [2017] 3 All SA 276 (GJ)

Constitutional law – Right to occupy traffic island where shelters were erected at night – Act of sleeping on a traffic island in a "shelter" put up and taken down each night is not an act, which properly construed, can constitute an "occupation" for the purposes of section 26 of the Constitution of the Republic of South Africa, 1996 or of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

Property – Spoliation – Vindicatory claim by homeless persons whose personal possessions were seized by city officials – Claim not sustainable where items not properly identified and issue was moot – Claim for supply of similar items not sustainable as the standard alternative to the (unsuccessful) vindication of property is a claim for damages, not the provision of alternative goods.

Words and phrases – "building or structure" – Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 – Includes any hut, shack, tent or similar structure or any other form of temporary or permanent dwelling or shelter.

Words and phrases – "evict" – Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 – "Evict" means to deprive a person of occupation of a building or structure, or the land on which such building or structure is erected, against his will.

Words and phrases – "unlawful occupier" – Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 – An unlawful occupier refers to a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land.

The applicants were indigent, homeless people who had taken to sleeping on a traffic island on a street in Johannesburg. In February, during a clean-up of the city in keeping with city by-laws on public health, employees of the first respondent removed material being used by the applicants from the traffic island. No inventory was made of the items removed. That led to an urgent application being made by the applicants, requiring the respondents to return all property and shelter material confiscated from the traffic island. The applicants alleged that the material taken consisted of personal belongings including identity documentation, bedding, and materials such as plastic sheeting, wooden pallets, and the like, used to erect shelters at night and which were dismantled each morning and left on the traffic island whilst they went out to try to make a living.

The respondents explained that it would not be possible to return the confiscated material as it had been taken to a landfill and disposed of. They denied that identity documents or other self-evident personal items of ostensible value were taken during the operation.

Held – A video recorded by a bystander showed that in many instances, bags, backpacks and items which would typically keep personal belongings, mattresses, blankets, clothing and the like were indiscriminately gathered and tossed up into a van. It was obvious that the personnel who carried out the operation knew full well that what they were removing was not only rubbish but chiefly, domestic goods, which would be the typical material that homeless people would be using.

In respect of the relief claimed based on possession, the Court identified such relief as a vindicatory claim, alleging a spoliation. The problem facing the applicants in that

regard was the inadequacy of the description of the property sought to be returned. The items called upon to be delivered had to be sufficiently described to enable exact identification. The point was in any event moot as the respondents had made it clear that the confiscated material had been discarded rendering it impossible to return it, even were such an order to be issued. The alternative relief sought by the applicants was for them to be provided with material similar to that taken away. The impediments to that prayer included that the standard alternative to the (unsuccessful) vindication of property is a claim for damages, not the provision of alternative goods. The applicants were free to pursue a damages claim, but could not succeed in the relief sought based on spoliation.

Turning to the relief sought based on the applicants' constitutional rights, the Court questioned whether such relief was permissible, having been mentioned for the first time in the heads of argument. The respondents had no notice of such relief being sought and could therefore not in the papers have addressed the issues implicated thereby. Furthermore, the prayer aimed at preventing the respondents from violating the applicants' constitutional rights was too vague and the allegations of violent conduct by the employees of the first respondent raised a dispute of fact. More importantly, the two prayers were premised on the contention that the applicants enjoyed a right to dwell on the property. The notion that individuals may choose to make a home on a traffic island on a public street was mistaken, and no rights of occupation could arise from the occupation of such a location. Accordingly, the applicants could not claim failure to follow due process in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("PIE"). The habitual act of sleeping on a traffic island in a "shelter" put up and taken down each night is not an act, which properly construed, can constitute an "occupation" for the purposes of section 26 of the Constitution or of PIE. Where no occupation exists, logically, there can be no eviction.

The dignity of the applicants was another relevant factor in the matter. The first respondent stated that it was aware of the problem of homelessness in its area, and that it had taken steps to deal with it by making shelters or hostels available. However, it appeared form the papers that the reluctance or refusal to use municipal shelters might well be linked to the two conditions upon which they may be admitted, *viz* an R8 per day tariff and a SA ID document. Although the Court questioned the necessity of the barriers to entry to shelters, it was not able to make any order in that regard as it would be inappropriate on the papers as they stood.

Although the application was dismissed, the Court issued a rule *nisi* calling on the respondents to show cause why in future operations of such a nature, the steps set out in the order should not be followed.

Shange and others v S [2017] 3 All SA 289 (KZP)

Criminal procedure – Criminal trial – Assessment of evidence – Court's duties – A court must neither look at evidence implicating the accused in isolation to determine whether there is proof beyond reasonable doubt, nor should it look at exculpatory evidence in isolation to determine whether an accused's version is reasonably possibly true – Correct approach is to consider all the evidence in the light of the totality of the evidence of the case – A court of appeal, shall not interfere in the

findings of the trial court in regard to conviction unless there is a material misdirection which resulted in an incorrect conclusion being reached.

Evidence – Circumstantial evidence – In drawing any inferences from circumstantial evidence, the inference sought to be drawn must be consistent with all the proven facts; and the proven facts must be such that they exclude every other reasonable inference.

In October 2006, two cash-in-transit vehicles were ambushed at two separate places. The incidents gave rise to a plethora of charges being brought against the appellants, and the appellants' conviction and sentencing on a range of charges.

In argument before the present Court on appeal, the appellants made numerous concessions. The Court, accordingly, clarified the convictions remaining in issue on appeal.

Held – The issues for determination were whether any of the appellants should have been convicted on the counts relating to the theft of motor vehicles; whether the accused who were convicted on four counts of possession of firearms and ammunition should have been convicted in that regard; whether eight of the appellants who had conceded the correctness of their conviction on counts relating to one of the incidents should also be convicted on counts relating to the attempted robbery and attempted murders in the other incident; whether eight of the appellants, who had made no concessions, should have been convicted on the basis of common purpose; and whether any of the appellants should have been convicted of certain further subsidiary offences – which would entail a consideration of the terms of any alleged prior agreement amongst the appellants and whether the State had proved a common purpose in respect of those offences beyond reasonable doubt. Finally, the Court would consider the appeal against the sentence of life imprisonment on a count of murder, and if so which determinate sentences should be directed to run concurrently.

The evidence against the appellants was entirely circumstantial, being based largely on records of cell phone numbers used by the appellants and/or items found in their possession after their arrest. A court is enjoined to examine all the evidence. It must neither look at evidence implicating the accused in isolation to determine whether there is proof beyond reasonable doubt, nor should it look at exculpatory evidence in isolation to determine whether an accused's version is reasonably possibly true. The correct approach is to consider all the evidence in the light of the totality of the evidence of the case. A Court of Appeal shall not interfere in the findings of the trial court in regard to conviction unless there is a material misdirection which resulted in an incorrect conclusion being reached. An appeal lies against the conclusions reached and not against the trial court's reasons for convicting.

In drawing any inferences from circumstantial evidence, the inference sought to be drawn must be consistent with all the proven facts; and the proven facts must be such that they exclude every other reasonable inference.

In examining the offences, the Court began with four counts of the theft of motor vehicles. The State alleged that the vehicles were stolen to be used in the primary robberies and were thereafter abandoned at the respective scenes. It was argued that with theft being a continuous crime, it made no difference that the appellants were not involved in the original stealing of the motor vehicles but that their subsequent participation in permanently depriving the owners of their vehicles made them just as

guilty as the original thief. The Court found that reasonable doubt existed as to how the appellants came to be in possession of the vehicles. The appellants had to benefit from such doubt, and the convictions and sentences on the four counts were set aside.

Next the Court examined the counts relating to contravention of the Firearms Control Act 60 of 2000. The issue was whether joint possession of the firearms found in one of the vehicles was proved on the part of the relevant appellants. The Court held that the bag containing the rifles could have been carried into the vehicle by a single but unidentified accused. The convictions and sentences in respect of the counts of joint possession were thus also set aside.

The next question addressed was whether the appellants who had admitted liability in respect of the robbery and the secondary offences at one location (Charters) and whose cell phone records place them at or near Charters (which meant they could not simultaneously have been at the other location) could be guilty of the attempted robbery at the other location (Penicuik) when they could not have been present physically. The only possible basis upon which criminal liability can be imputed to them would be common purpose. The Court set out the factual matrix, and held that it pointed to an interwoven web of association in the robberies which in turn pointed to the guilt of the appellants, unless they could advance an explanation which could be said to be reasonably possibly true. They failed to do so and, accordingly, their guilt in respect of both robberies was established.

On the issue of the convictions of a number of the appellants on charges of attempted robbery with aggravating circumstances and attempted murder, the Court examined the facts in respect of each of the affected appellants and found no grounds upon which to interfere with any of the convictions and sentences other than for one of the appellants.

Leave to appeal against sentence was granted only in respect of the murder of a security guard near Penicuik. As the Court had concluded that all the appellants should be acquitted on that count, the sentence of life imprisonment fell away and the only issue remaining to be considered was which sentences should be directed to run concurrently. The Court held that the cumulative effect of the sentences imposed in respect of the secondary offences at each of the scenes was best ameliorated by directing that a portion thereof run concurrently with sentence imposed in respect of the primary offences. The effective sentences imposed in respect of each of the appellants was 25 years' imprisonment. The fourteenth appellant was given an additional three months on top of the 25 years' imprisonment.

St Charles College v Du Hecquet De Rauville and others [2017] 3 All SA 358 (KZP)

Constitutional law – Action by independent school against defaulting parents – Attachment of home – Whether it is unconstitutional that the dwelling of a parent of a learner at an independent school may be attached to recover tuition fees, while the dwelling of a parent of a learner at a public school may not be so attached in terms of section 41(6) of the South African Schools Act 84 of 1996 – Court finding differential treatment not to constitute unfair discrimination, and declaring immovable property of debtors executable.

The applicant was an independent school which had been attended by the two sons of the first and second respondents (referred to in the judgment as “the respondents”). The respondents were indebted to the school for tuition fees and other charges in respect of their sons, who had since matriculated and left the school. As a result, the school obtained summary judgment against the respondents, and later, default judgment in respect of another amount. Pursuant to obtaining summary judgment but prior to obtaining default judgment, the applicant caused a warrant of execution to be served against the movable assets of the respondents. The movable goods which were attached pursuant to the warrant fell far short of the judgment debt. According to the applicant, the only means it had of recovering and satisfying the judgment debt was for it to attach and sell in execution the immovable property owned by the second respondent. Its application in that regard was brought in terms of rule 46(1)(a) of the Uniform Rules of Court. In terms of the rule, as the applicant had obtained a return which indicated that the respondents were not in possession of sufficient movable property to satisfy the writ for the judgment debt, the applicant in the ordinary cause would be entitled to a writ against immovable property owned by either or both respondents.

Held – In deciding whether or not a court should declare the primary residence of a judgment debtor who is a natural person executable, the Court ought to consider all circumstances relevant to the particular case.

The respondents argued that it was unconstitutional that the dwelling of a parent of a learner at an independent school may be attached to recover tuition fees, while the dwelling of a parent of a learner at a public school may not be so attached. It was contended that the differential treatment was arbitrary and irrational and the distinction that has been made is unrelated to any legitimate government purpose, and constituted unfair discrimination against parents who had children attending independent schools. The respondents therefore averred a violation of their right to equality. Section 41(6) of the South African Schools Act 84 of 1996 prohibits a public school from attaching the dwelling of a parent of a learner for the purpose of enforcement of the payment of school fees. Of significance in this case were the following facts. The judgment debt was substantial, and was incurred in circumstances over which the respondents had control. They were aware that by enrolling their sons with the applicant, they would incur the cost of tuition fees and they did so voluntarily. The respondents could also not claim that they were losing their primary residence as the evidence established that they had considered selling the immovable property. There was no suggestion that they could not afford alternative accommodation. There was no evidence that could persuade a court to exercise its discretion in favour of the respondents – to avoid the attachment and execution of the immovable property.

On the constitutional point raised, the Court stated that what was sought by the respondents was to put parents of learners at independent schools on the same footing as parents of learners at a public school. The first problem with that argument was that the respondents could only succeed if it could be shown that such differential treatment constituted unfair discrimination. The enquiry in that regard is an objective one, and if a court finds that the differentiation does not amount to discrimination then there can be no question as to whether the differentiation amounts to unfair discrimination. The Court held that the exercise of a choice based on economic or financial considerations, as in the present case, does not fundamentally impair the dignity of a parent who chooses to enrol his child at an independent school. It was

therefore held that the differentiation as contended for by the respondents did not constitute discrimination let alone unfair discrimination.

The respondents' immovable property was declared executable.

END-FOR NOW