LEGAL NOTES VOL 7/2018[1]

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Mostert and others v Nash and another [2018] 3 All SA 1 (SCA)

Pensions – Curatorship of pension fund – Appointment of attorney as curator in terms of section 5(2) of Financial Institutions (Protection of Funds) Act 28 of 2001 – Remuneration of curator – Curatorship order providing that remuneration be agreed with Financial Services Board in accordance with norms of attorneys' profession – Whether curatorship fee as a percentage of amounts recovered on behalf of fund in accordance with those norms – Agreement to recover fees on a contingency basis as a percentage of amounts recovered for fund at variance with norms of attorneys' profession and therefore not in accordance with curatorship order.

Pursuant to an application by the fifth appellant (the "Executive Officer of the Financial Services Board"), the third appellant pension fund ("Sable") was placed under provisional curatorship in terms of section 5(2) of the Financial Institutions (Protection of Funds) Act 28 of 2001. The second appellant was appointed as provisional curator. The provisional order of curatorship was made final in June 2006. The present dispute related to his remuneration as curator.

The order appointing the second appellant as curator confirmed an agreement between him and the Financial Services Board ("FSB") which provided for him to be paid remuneration on the basis of a percentage of the amounts recovered on behalf of Sable. The agreement between the second appellant and the FSB was challenged by the first respondent ("Nash") and a company ("Midmacor") controlled by him. They contended that the agreement was not in accordance with the norms of the attorneys' profession (to which the second appellant belonged). Their challenge succeeded in the High Court, leading to the present appeal.

[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!**

Upon his appointment as curator, the second appellant had investigated Sable's financial position and transactions in which it had been involved. He reported to the FSB that the various transactions were unlawful and involved the commission of criminal offences. He believed that Sable had claims against various parties including Nash and Midmacor. His problem was that it lacked the resources to conduct the necessary investigations and then pursue actions against those parties to recover what he believed was due to Sable. That led to him concluding the disputed fee agreement with the FSB. He reasoned that the court order which appointed him anticipated that the costs of the curatorship would be paid by the fund and he expressed concern about the possibility of Sable being unable to pursue the claims it had because of lack of funds. As a potential solution to that problem, the second appellant was to continue the curatorship and undertake any legal proceedings at his risk, and at his expense on the basis of a contingency arrangement in terms of which his remuneration would only become payable against recoveries of monies on behalf of the fund. That offer was taken up by the FSB and formed the basis of the agreement challenged by the respondents.

Several preliminary points were raised by the curator. It was contended that the respondents lacked *locus standi* to bring the application. That argument was expanded to include a contention that the application was an abuse of the process of the court and should be dismissed on the grounds of undue delay.

Held – The invalidity of the fee agreement was directed at recovering funds for Sable that would in turn form part of a surplus in the fund available for distribution in accordance with a surplus apportionment exercise. Nash was a former member of the fund and Midmacor was the principal employer. They clearly had an interest in the surplus apportionment, and that constituted a sufficiently direct and substantial interest in the outcome of the litigation to confer standing.

The Court also rejected the contention that the application should be dismissed as an abuse of process, or as being tainted by unclean hands. The respondents clearly believed that they had good grounds for setting aside the fee agreement between the second appellant and the FSB.

A further preliminary point raised by the curator related to delay in the respondents' bringing of their application. That point was based on the contention that the conclusion of the fee agreement constituted administrative action and the present proceedings were a review of that action. In argument a different stance was adopted. It was submitted that the conclusion of the fee agreement between the second appellant and the FSB constituted administrative action by an organ of State. A challenge to the lawfulness of the agreement had to be made in terms of section 6(2) of the Promotion of Administrative Justice Act 3 of 2000. By virtue of section 7(1) of that Act, the application had to be brought within 180 days of Nash becoming aware of the allegedly unlawful administrative action. While it was correct that the FSB is an organ of State, the Court took issue with the proposition that the fee agreement between the second appellant and the FSB was a contract for the procurement of goods or services by an organ of State. The second appellant was the curator of Sable because he was appointed as such by the High Court. His entitlement to remuneration for his services arose from the terms of that order, which the Court was empowered to make in terms of section 5(5)(c) of the Financial Institutions (Protection of Funds) Act. The only function of the FSB was to agree with him the basis for his periodic remuneration in accordance with the norms of the attorneys'

profession. That agreement was not one to procure his services on behalf of the FSB or any other organ of State. The complaint of delay was thus rejected.

The Court then turned to address the merits.

The source of the fee agreement was the requirement in the order appointing the second appellant as curator that he would be entitled to "periodic remuneration in accordance with the norms of the attorneys' profession" as agreed between him and the FSB. The Court acknowledged that in circumstances such as those that arose in the present case, there might be good reasons for a curator to be remunerated on a basis other than the norm, including a fee calculated as a percentage of the amount recovered on behalf of the fund. The law does not rule out contingency fee arrangements in all circumstances. The critical question was whether the arrangement was one providing for periodical remuneration in accordance with the norms of the attorneys' profession as contemplated in the court order appointing the second appellant. The Court held that an arrangement in terms of which a curator is to be remunerated on a periodical basis in accordance with the norms of the attorneys' profession is one under which the attorney is paid a fee calculated at an hourly rate, plus an amount to cover any disbursements. As the arrangement made between the second appellant and the FSB (ie to recover fees on a contingency basis as a percentage of the amounts recovered for the fund) was at variance therewith, it was not in accordance with the court order and for that reason the agreement had to be set aside.

The appeal was therefore unsuccessful on the main point, but the order of the High Court had to be substantially altered. The respondents succeeded in preserving the order that the fee agreement was inconsistent with the curatorship order and therefore unlawful. However, they did so on a far narrower basis than in the High Court and the consequential relief that they were granted in that court had to be set aside. The second appellant had therefore obtained some substantial success on appeal. As both parties achieved substantial success, the Court ordered that they each bear their own costs of the appeal.

PG Group (Pty) Ltd and others v National Energy Regulator of South Africa [2018] 3 All SA 52 (SCA)

Administrative law – Determination of methodology used to regulate gas prices under section 21(1)(p) of the Gas Act 48 of 2001 – Whether constituting administrative action – Rationality of determination by the National Energy Regulator which resulted in an increase in permissible maximum gas prices – Where objective behind determination of tariffs was to address high prices, eventual increased prices not capable of passing rationality test.

Mining, Minerals & Energy – Piped gas industry – Determination of tariff of maximum prices by National Energy Regulator.

The first respondent ("NERSA") had as one of its functions, the regulation of the piped gas industry. In March 2013, it granted an application made by the second respondent ("Sasol") to determine a tariff of the maximum prices it was permitted to charge for piped-gas. Sasol Gas enjoyed a monopoly in respect of the supply of piped-gas in South Africa.

The appellants were all large-scale consumers of piped-gas, and the new tariffs led to substantial increases in the prices they had been paying. Contending that the

increases were unreasonable and irrational, they applied to the High Court to review and set aside NERSA's decision.

Without entering into the merits of the application, the court held that there had been an unreasonable delay before the proceedings were launched and, on that basis alone, it dismissed the application. That led to the present appeal.

The background facts were as follows.

In 2001, Sasol and the South African government entered into a regulatory agreement in respect of Sasol's pumping gas to South Africa from gas fields established in Mozambique. In terms of the method of determining prices under the regulatory agreement, Sasol was entitled to charge a monopoly price for the gas supplied. When NERSA came into existence, it was bound by the regulatory agreement for a period of 10 years from the date natural gas was first received from Mozambique. As a result, the dispensation extended by that agreement lasted until 25 March 2014, from which date Sasol's gas prices first became subject to NERSA's regulation.

Section 4(g) read with section 21(1)(p) of the Gas Act 48 of 2001 provided that maximum prices for distributors, reticulators and all classes of consumers had to be approved by NERSA where there was inadequate competition. Regulation 4(3)(a) of the Piped-gas Regulations promulgated under the Gas Act required NERSA, in considering maximum prices, to base its approval of maximum prices on a systematic methodology applicable on a consistent and comparable basis. NERSA therefore out to determine a methodology to be applied in setting maximum prices and published its final methodology in 2011. In so doing, it favoured a method of determining a maximum price by having regard to the comparative cost of a basket of alternative fuels.

The appellants' review challenged the maximum price which was a composite of both gas prices and other charges, on the sole basis that the gas price element of the composite charge had been irrationally and unreasonably determined. It did not embrace a challenge to the transmission and storage prices.

Opposing the appeal, the respondents argued that the court *a quo* had been correct in dismissing the application on the issue of delay and without entertaining the merits. They also raised a further objection to the present Court deciding the merits of the review, based on a contention that the matter was now of academic interest only.

Held – The latter point would be addressed first. It is a long standing rule of practice that the court should not decide issues of academic interest which would have no practical effect. In the present case, however, there still existed a live issue between the parties. The appellants sought an order that should the approval of Sasol's prices be set aside, any maximum prices for that period should apply retrospectively with effect from 26 March 2014 until the date of termination of such approval. In addition, there was considerable public interest in deciding whether the basic methodology NERSA adopted, and which it presumably intended to utilise again in the future, was valid. The issue was therefore one which could not be regarded as having no practical effect.

On the issue of undue delay, the court *a quo* stated that section 7(1) of the Promotion of Administrative Justice Act 3 of 2000 requires a judicial review to be brought without unreasonable delay and not later than 180 days after the person

concerned became aware of the administrative action. It held that the appellants ought therefore to have reviewed NERSA's final methodology decision within 180 days of 24 November 2011, but had unreasonably delayed doing so until October 2013, some two years later. The appellants contended that the court *a quo* had erred in such reasoning, and argued that the determination of the methodology was not, in itself, administrative action subject to review. The question was therefore whether the determination of the methodology to be used in respect of future price applications was administrative action defined in section of 1 of the Promotion of Administrative Justice Act as referring to a decision ". . . which adversely affects the rights of any person and which has a direct, external legal effect". The Court approved the appellants' argument that the decision which had a direct, external legal effect was not the decision in regard to the methodology but the determination of the maximum gas prices, and as there was no suggestion of the review of that decision not being timeous, the court *a quo* had reached the wrong decision. There was no final decision having a direct external effect until such time as a decision was announced on Sasol's maximum price application. The court *a quo* therefore erred in not recognising that the administrative action that fell to be reviewed was NERSA's decision on Sasol's application. Consequently, it ought not to have declined to hear the matter due to undue delay, and should have addressed the merits.

It is a fundamental requirement of administrative law that an administrative decision must be rational. In considering the rationality of NERSA's decision, it was necessary to bear in mind the process upon which it had embarked in the first place. Gas prices higher than what would have been charged in a competitive market, and the abuse by Sasol of its market power, were the evils NERSA had set out to address. Yet, the maximum prices which NERSA determined that Sasol was entitled to charge after the 10-year grace period was over were substantially higher than had previously been the case, despite the entire operation having been undertaken due to the monopoly prices charged by Sasol in its decade of grace having been regarded as too high. NERSA's decision of 26 March 2013, determining maximum prices for piped-gas supplied by Sasol Gas, was therefore wholly irrational and unreasonable and, for that reason, ought to have been reviewed and set aside by the court *a quo*. The appeal therefore succeeded.

Alderbaran (Pty) Ltd and another v Bouwer and others [2018] 3 All SA 71 (WCC)

Corporate and Commercial – Company law – Business rescue proceedings – Application to set aside resolution to place company under business rescue – Section 130(1)(a) of the Companies Act 71 of 2008 provides for setting aside of a company resolution to place a company under business rescue if there is no reasonable basis for believing that the company is financially distressed; there is no reasonable prospect for rescuing the company; or the company failed to satisfy the procedural requirements set out in section 129 – In terms of section 130(5)(a) , the court may set aside the resolution on any of the above grounds or if, having regard to all of the evidence, the court considers that it is otherwise just and equitable to do so.

In 2014, the first applicant ("Alderbaran") purchased immovable property from the first respondent ("Bouwer"). The sale agreement provided for payment of a deposit and the balance to be paid in monthly instalments, Alderbaran failed to pay any of the monthly instalments due to Bouwer who consequently sued for payment of the balance of the purchase price and obtained default judgment against Alderbaran. Pursuant thereto the property was attached and advertised for sale in execution. Alderbaran launched

an application for rescission of the default judgment as well as the setting aside of any warrant of execution issued in respect of the property and the staying of any sale in execution pending the determination of the rescission. That application was dismissed. Immediately thereafter, the sole director of Alderbaran passed a resolution ("the first resolution") in terms of section 129(1) of the Companies Act 71 of 2008 to place Alderbaran under business rescue.

During the course of the following year, a sale in execution was held and the property was sold to the third respondent ("Trade Off"). Bouwer's attorneys were informed that the sale in execution was invalid because Alderbaran was in business rescue, and the sale in execution was therefore precluded by the moratorium on "*legal action or execution of judgments already obtained*" (presumably a reference to section 133(1) of the Act). The attorney requested proof of compliance with the requirements of sections 129(3)(a) and (4) of the Act. Only the Notice of Beginning of Business Rescue Proceedings (Form CoR 123.1) and a Notice of Appointment of Business Rescue Practitioner (Form CoR 123.2) were furnished. No statement of facts relevant to the first resolution was furnished; nor was proof provided of publication to all affected persons of the notices of commencement of business rescue and appointment of a business rescue practitioner, as required by sections 129(3)(a) and 129(4). As a result, Bouwer's attorney indicated that the first resolution was a nullity and that he intended to proceed with the transfer of the property pursuant to the sale in execution.

The second applicant, as Alderbaran's business rescue practitioner, alleged that it was discovered in August 2017, that Alderbaran was described in the Companies and Intellectual Properties Commission database as being "In Business", ie, no longer in business rescue. He believed that to have occurred as a result of a processing error on the part of the Commission. Therefore, in August 2017 Alderbaran, represented by its sole director, passed another resolution in terms of section 129(1) of the Act to begin business rescue proceedings ("the second resolution").

Bouwer was convinced that the resort to business rescue was not genuine and was a delaying tactic aimed solely at preventing the transfer of the property in satisfaction of the judgment debt. He refused to halt the transfer of the property and proceeded to lodge the transfer documents.

That led to the two applications presently before the court. The main application sought to interdict the transfer of the property and to declare such transfer unlawful in terms of section 133 of the Act. The second application was a counter-application by Bouwer for the setting aside of the resolution placing Alderbaran under business rescue and the termination of the business rescue in terms of section 130.

Held – The question for determination was whether the relief sought in the counter-application should be granted. In particular, the question was whether the first resolution should be declared invalid and set aside, in terms of section 129(5)(a) read with section 130(1)(a), and the resultant business rescue proceedings terminated in accordance with 132(2)(a)(i) of the Act, and, if so whether a consequential order should be granted confirming the validity of the sale in execution as a necessary and appropriate order of the type envisaged in section 130(5)(c).

Section 130(1)(a) provides for setting aside of a company resolution to place a company under business rescue if there is no reasonable basis for believing that the company is financially distressed; there is no reasonable prospect for rescuing the

company; or the company failed to satisfy the procedural requirements set out in section 129. In terms of section 130(5)(a) , the court may set aside the resolution on any of the above grounds or if, having regard to all of the evidence, the court considers that it is otherwise just and equitable to do so.

It was clear that the procedural requirements set out in section 129 were not satisfied by Alderbaran in respect of the first resolution. As a result, the first resolution fell to be set aside in terms of section 129(5)(a) read with section 130(1)(a)(iii). The next enquiry was whether, in the light of all the facts, it would be just and equitable to set the first resolution aside and terminate the business rescue. The conclusion that the termination of the business rescue would be just and equitable involves the exercise, not of a discretion, but of a judgment on the relevant facts, but once that conclusion has been reached, the making of an order to set aside the resolution and terminate the business rescue does involve the exercise of a discretion. Setting out the relevant facts and circumstances, the Court concluded that justice and equity would best be served by setting aside the first resolution and terminating the resultant business rescue.

The Court then had to decide whether any further order was necessary and appropriate. It was regarded as necessary and appropriate, in all the circumstances of this case, to make an order confirming the validity of the sale in execution of the property and authorising the finalisation of transfer of the property in terms thereof.

That left Bouwer's counter-application. An affected person who applies in terms of section 130(1) of the Act to set aside a company resolution to commence business is obliged to comply with the requirements of section 130(3). That entails service of a copy of the application on the company and the Commission, and notification of each affected person of the application in the prescribed manner. The Court considered what would constitute service for purposes of section 130(3)(a). In the case of the company, it refers to service by the sheriff in one of the manners referred to in rule 4(1) of the Uniform Rules of Court. And, in the case of the Commission, it is service by electronic mail at the dedicated email address provided by the Commission. Although there was compliance with section 130(3)(a) insofar as Alderbaran was concerned, the Commission had not been joined as a party to the counter-application and there was no service whatsoever of the application on the Commission. The requirements of section 130(3)(a) had therefore not been met. The Court decided to deal with the defect by issuing a rule *nisi* with directions regarding service of the counter-application and the rule on the Commission, as there was good case on the merits for the relief sought in the counter-application.

The main application was thus dismissed and the counter-application succeeded.

Bafokeng Land Buyers Association and others v Royal Bafokeng Nation [2018] 3 All SA 92 (NWM)

Civil procedure – Evidence – Admission of affidavit into evidence in terms of rule 38(2) of the Uniform Rules of Court – General rule in trials is that evidence should be given viva voce – Rule 38(2) contains an exception to the general rule, and an applicant who seeks to invoke the exception must prove that "sufficient reason" exists to do so.

Local government – Customary law – Whether Supreme Council of tribal community had the power under customary law to take the decision to authorise litigation – Court finding that no such power existed.

Local government – Customary law – Whether Supreme Council of tribal community was required to consult broadly within the traditional community before taking decision to bring court application – Proper approach in ascertaining customary law is that courts must have regard to past and current practices and developments in communities to meet changing needs – Duty to consult on matters of public importance found to be a legally enforceable duty under Bafokeng customary law.

The Royal Bafokeng Nation ("RBN") is a tribal community of approximately 300 000 people, a *universitas personarum* and a traditional community recognised in terms of section 28(3) of the Traditional Leadership and Governance Framework Act 41 of 2003.

In the main application, the RBN sought an order against the Minister of Land Affairs, declaring that the Bafokeng tribe was the registered owner of land held by the Minister in trust for the tribe. The RBN sought an order directing the Registrar to take the necessary steps to endorse the title deeds to reflect the RBN as the owner of the land. As the title deeds currently stood, each of the properties was registered in the name of the Minister in trust for the RBN. The Minister's view was that, having regard to the wording of the title deeds, he held the properties as trustee for the RBN. There was no written trust instrument in respect of any of the properties. The RBN, on the other hand, disputed that the Minister held the properties in trust for it and did not accept that there was a true trust in relation to the properties or that the Minister was in fact and in law a trustee.

The appellants were members of the RBN, and claimed that many of the properties were kept in trust for their ancestors and for them and not for the RBN. They raised a challenge to the authorisation of the bringing of the RBN's application. The RBN alleged in the main application that the institution of the application was authorised by the Supreme Council by a resolution adopted unanimously at a meeting on 22 September 2005. The Supreme Council authorised Fasken Martineau to act on behalf of the RBN. The appellants challenged the said authority in a rule 7 application. The court finding that RBN's attorney (Fasken Martineau) had established the necessary authority to act on behalf of the RBN in the main application resulted in the present appeal.

A cross-appeal was also brought by the RBN against the decision of the court *a quo* to allow the affidavit of a Professor to be tendered into evidence.

The court *a quo* referred the issue of authorisation for oral evidence, which was limited to three specific questions. Those were whether the Supreme Council of the RBN took a decision to authorise the bringing of the application on 22 September 2005; whether the Supreme Council had the power to take such decision under customary law, and if so, whether it was necessary for it to consult broadly within the traditional community before taking such a decision; and whether such decision was overturned or reversed by subsequent events, and more particularly by certain meetings of the traditional community held in 2006.

Held – The first question was not seriously disputed and the Court accordingly began with the question of whether the Supreme Council had the power to authorise the

bringing of the main application and whether the decision was taken in accordance with the requirements of customary law. It was necessary in that regard, to consider the legislative framework governing traditional leadership, the evidence led regarding the RBN's actual practice and in respect of the nature and function of the representative structures that existed within the RBN, namely the Supreme Council, the Kgotha Kgothe and the Kgotlas in each ward.

The court *a quo* found that the Supreme Council did not have the power to take the impugned decision and that the RBN failed to demonstrate that the Supreme Council had that power. It found that such power lay with the Executive Council as the statutory body having the power generally to administer the affairs of the traditional community. However, the court *a quo* found that because the Executive Council was one of the two bodies that made up the Supreme Council at the time, the decision of the Supreme Council could be regarded as a decision of the Executive Council. That view was rejected on appeal. The present Court held that the Executive Council does not function as the Executive Council when its members form part of a meeting of the Supreme Council. The Executive Council is a different body from the Supreme Council. Some of the members of the Supreme Council, meeting as part of the Supreme Council, cannot exercise the powers of the Executive Council.

What the Court had to consider was whether the Supreme Council had the power under customary law to take the decision to authorise specifically the litigation in the main application. It was concluded that neither the Executive Council nor the Supreme Council had the power to take the impugned decision without referring the matter to a general meeting.

The next question was whether it was necessary for the Supreme Council to consult broadly within the traditional community before taking the decision.

The proper approach in ascertaining customary law is that courts must have regard to past and current practices and developments in communities to meet changing needs. More importantly, it must be interpreted in light of the Constitution and its values. It was clear from case law that consultation and public participation in local decision-making has always been the norm. The right to be consulted is also an incident of the right to procedurally fair administration in terms of section 33 of the Constitution. The decision to institute the proceedings constituted administrative action and was subject both to section 33 of the Constitution and the Promotion of Administrative Justice Act 3 of 2000. The RBN neither alleged nor proved that there was consultation before the impugned resolution was taken. Considering the evidence in relation to the issue in dispute, namely the transfer of land to the RBN and considering the custom of the RBN and interpreting that in the light of the Constitution and its values, the Court found that the duty to consult on matters of public importance, such as the present dispute, is a legally enforceable duty under Bafokeng customary law. The appeal on this ground was, accordingly, upheld.

The cross-appeal by the RBN was finally considered. The court below had granted an application in terms of rule 38(2) of the Uniform Rules of Court to admit as evidence in the trial, the contents of a report by a Professor. The rule 38(2) application was necessitated by the Professor becoming ill and being unable to travel to South Africa to attend court. The general rule in trials is that evidence should be given *viva voce.* Rule 38(2) contains an exception to the general rule. An applicant who seeks to invoke the exception must prove that "sufficient reason" exists to do so. The

determination of "sufficient reason" necessarily involves the exercise of a discretion which discretion has to be exercised judicially having regard to the options available to the court. A court on appeal may interfere with the exercise of discretion only if there has been a wrong application of a legal principle or a misdirection of fact. The court on appeal does not have the power to substitute its own discretion, on the basis that it would have exercised the discretion differently. Finding that the court below exercised its discretion judicially when it admitted the affidavit, the present Court dismissed the cross-appeal.

Eastern Produce Estates SA (Pty) Ltd v Wales Communal Property Association and others [2018] 3 All SA 123 (LCC)

Land – Long-term lease – Validity of – Settlement agreement in respect of land restitution claim – Court finding lease to remain valid and enforceable until its termination despite settlement agreement in respect of leased land – No reason for the court to set aside the settlement agreement.

In June 1990, the applicant had entered into a long-term lease with the South African Development Trust ("the Trust") in respect of State-owned land. It exercised its right under the lease agreement and renewed the lease for a further 15 years to 31 March 2020 after giving due notice to all the relevant State Departments, the Regional Land Claims Commissioner ("the RLCC") and to the representatives of land claimants.

In terms of a settlement agreement regarding the restitution claims, the leased property was subsequently awarded to the first respondent in terms of an agreement entered into in terms of section 42D of the Restitution of Land Rights Act 22 of 1994.

The applicant was unaware of the existence of the settlement agreement until it received a letter from an attorney for the first respondent, threatening the applicant with eviction. The applicant remained in occupation of the property, and had complied with its contractual obligations in terms of the lease agreement.

As a result of the above, the applicant sought, *inter alia*, the review and setting aside of the decisions to approve transfer of the leased property to the first respondent, and to authorise the RLCC to sign the settlement agreement on behalf of the second respondent in respect of the leased property. Further relief sought was for a declaratory order that the section 42D agreement entered into between the RLCC and the first respondent be declared null and void to the extent that it purported to settle the land claims to the leased property.

The first respondent disputed the validity of the lease on several grounds, including that section 42D does not provide for lessees; that the principle of *huur gaat voor koop* does not apply to unregistered long-term leases in terms of the Formalities in Respect of Leases of Land Act 18 of 1969; and that the lease agreement offended against the Constitution and the Restitution of Land Rights Act.

Held – The Minister's power to conclude the settlement agreement is set out in section 42D of the Restitution of Land Rights Act. It was not disputed that the Minister's decision to approve the transfer and the decisions and actions of the officials of the Department of Rural Development and Land Reform and the RLCC, to facilitate the settlement and conclude the settlement agreement, were administrative in nature. What was put in issue was whether the impugned administrative action adversely affected the applicant's interests or rights. The applicant argued that it was clearly a person interested in the claim and whose rights might be affected by its settlement. It

stated that it had, by virtue of its occupation of the leased property, acquired a limited real right (a *ius in re*) to it. The Court found that case law and the provisions of rule 38(1)(b)(i) established that the applicant did have a right which required protection from the impugned administration actions. However, that only held true if there was no merit in the first respondent's submissions that the lease was invalid because it was prohibited by the Development Trust and Land Act 18 of 1936 and the principle *huur gaat voor koop* did not apply to unregistered long-term leases land, and if the counter-application failed.

None of the grounds on which the first respondent contended that the lease fell foul of the Development Trust and Land Act were sustainable, and the first respondent's reliance on that Act accordingly failed.

As a result of the first respondent's contention that the common law principle of *huur gaat voor koop* does not extend to long leases and unregistered long leases, the Court had to decide whether the principle is applicable to unregistered long-term leases. Counsel for the applicant argued on both common law principles and on the doctrine of knowledge. He contended that section 1(2) of the Formalities in Respect of Leases of Land Act 18 of 1969 is only applicable to a successor under onerous title if the long lease is not registered and the successor did not know about the lease at the time of entry into the transaction by which he obtained the leased land. It was not disputed that the attorney representing the first respondent had knowledge of the existence of the lease agreement. The Court, accordingly, found that even if the first respondent was a successor under onerous title, the lease would still be binding on it because it knew of the lease. The Court held further that the first respondent had not convinced it that the *huur gaat voor koop* principle would reverse the gains brought about by the restitution process. There was consequently no need to interfere with the common law principle of *huur gaat voor koop* insofar as it applied to the restitution process.

Turning to the relief sought by the applicant, the Court found that the settlement agreement neither extinguished the applicant's lease in respect of the leased property nor did it affect its legal rights. The applicant had also not established the requirements for interdictory relief sought. There was, in the premises, no reason for the court to set aside the settlement agreement. The lease agreement was confirmed as valid and enforceable until its termination in 31 March 2020.

Although the present Court has developed a practice not to award costs against private litigants on the concern that an adverse costs order might deter legitimate litigants from approaching the courts and so, undermine the object of the Restitution of Land Rights Act as well as other constitutional and social interest litigation, the Court was of the view that the first respondent's CPA's persisting to question the validity of the lease agreement in the face of the State respondents' concession that same was valid, deserved censure. The first and second respondents were ordered to jointly and severally pay the costs of the application, taxed on a party and party scale.

Ex Parte Stoffberg; In re: Xaba v Road Accident Fund and two related matters

Civil procedure – Appointment of a curator ad litem in matters against the Road Accident Fund where plaintiff suffers mental impairment as a result of brain injury – Rule 57 of the Uniform Rules of Court – Requirements of rule are peremptory and failure to comply results in application being defective.

Three applications dealt with simultaneously by the court sought the same relief, *viz* the appointment of a curator *ad litem* in actions already instituted against the Road Accident Fund ("RAF"). The appointments were sought so that the curator could pursue and fulfil the actions instituted and ratify the actions already taken on behalf of the plaintiffs.

One of the three matters (the *Xaba* case) was set down for trial and settlement offers had been made in the other two (the *Matshidi* and *Miambo* matters). In the latter two cases, an order was sought that the curator *ad litem* report to the court on the ability of the plaintiff to manage his or her own affairs, and that costs be reserved for determination by the court seized with the action.

In all three applications, the respective attorneys were the applicants and deponents to the application.

Held – The manner in which the attorneys approached the court led the court to believe that it was expected to act as a mere rubber stamp – ignoring the relevant judgment of the division, rule 57 of the Uniform Rules of Court and the practice directives. The Court referred to the case of *JM Modiba obo Sibusisiwe Ruca*, in which the issue of non-adherence to rule 57 in RAF matters was addressed. Despite the comprehensive judgment in that case, practitioners continued to attempt to circumvent the court's rules. The present Court therefore felt bound to remind attorneys of the requirements in such applications.

Whether a client has the legal capacity to litigate is a basic preliminary question an attorney should consider before continuing with the legal process. No explanation was provided in any of the matters before the court why, in the face of indications early on that the plaintiffs might be mentally impaired due to the seriousness of their head or brain injuries, the attorneys did not consider rule 57 and approach the court earlier.

Settlement offers were made and/or accepted in the *Matshidi* and *Miambo* matters and it was important for the court to be placed in a position where it could establish that the said plaintiffs were able to make rational decisions in the conducting of the litigation and the considering of the settlement offers. Attorneys appeared to be approaching the court for the appointment of a curator *ad litem* towards the end of the litigation, and the curator was then expected to rubber stamp all steps taken by the attorney.

Rule 57 specifically requires the application to be supported by affidavits from at least one person to whom the patient is well-known and from two medical practitioners who have conducted recent examinations of the patient. A clear case must be made out for the appointment of the curator *ad litem*. In the three applications before the Court, the medical reports were inadequate and did not address whether the plaintiffs could manage their own affairs. None of the applications fully complied with rule 57 – the provisions of which are peremptory. Failure to comply with all the provisions of the Rule render the application defective.

The Court also emphasised the need for the curator to be appointed as early as possible. The Court was unable to establish in the three cases at hand, whether the plaintiffs were capable of giving instructions in their litigation. A finding that the plaintiffs were unable to understand the process would affect the validity of the instructions given by them and the acceptance of the settlement offers. The Court also emphasised the need for the curator to be impartial and independent. The applications before the

Court did not comply with the practice directive referred to by the court or with the *Ruca* judgment.

Ruling the application to be procedurally flawed, the Court laid the blame squarely at the feet of the attorneys. It held that the plaintiffs could not be held responsible therefor, and proceeded to consider the plaintiffs' cases.

In the *Xaba* and *Matshidi* cases, the Court ordered the appointment of a curator *ad litem*, other than that sought to be appointed in the applications. Adverse costs orders were made against the attorneys. In the *Miambo* case, the plaintiff was a minor, and no case was made why the child's natural parent was not fit and proper to protect her interests. The application was dismissed and the attorney was not permitted to charge any fees for the application.

Mazizini Community and others v Minister for Rural Development and Land Reform and others [2018] 3 All SA 164 (LCC)

Land – Land restitution – Competing claims for restitution of land rights – Restitution of Land Rights Act 22 of 1994 – Providing for restitution of property or equitable redress to persons dispossessed after 19 June 1913 as a result of past racially discriminatory laws or practices.

Words and phrases – "community" – Restitution of Land Rights Act 22 of 1994 – Refers to "any group of persons whose rights in land are derived from shared rules determining access to land held in common by such group, and includes part of any such group".

Words and phrases – "right in land" – Restitution of Land Rights Act 22 of 1994 – Refers to "any right in land whether registered or unregistered, and may include the interests of a labour tenant or a sharecropper, a customary law interest, the interest of a beneficiary under a trust arrangement and beneficial occupation for a continuous period of not less than 10 years prior to the dispossession in question".

Each of the three plaintiffs in this case had lodged competing land restitution claims in respect of land which lay between the Fish and Keiskamma Rivers in the Eastern Cape. For some reason, the Commission on the Restitution of Land Rights in the Eastern Cape ("the Commission") referred only the first plaintiff's claim to the court for adjudication. Judgment was granted in favour of the first plaintiff on 12 March 2010. The judgment restored some of the claimed land to the first plaintiff, including the land on which the Fish River Sun Hotel operated by the second defendant was situated. In September 2011, the Supreme Court of Appeal rescinded the judgment on the basis that it had been delivered without knowledge of the competing land claims, and remitted the matter to the present Court for reconsideration. All three land claims were now before the Court.

The respondents were variously landowners or persons with an interest in the claimed land.

During the course of the trial, the Court was informed that the third plaintiff's claim had been settled. As the Court was not furnished with the complete signed agreement in settlement of that claim, it directed the parties to furnish the complete signed agreement within 14 days of the date of the present judgment.

Held – The Restitution of Land Rights Act 22 of 1994 ("the Act") was promulgated to provide for restitution of property or equitable redress to persons dispossessed after

19 June 1913 as a result of past racially discriminatory laws or practices. It specifies the threshold requirements for entitlement to restitution in section 2. In terms of section 2, a person would be entitled to restitution of a right in land if, *inter alia*, he or a traditional community of which he was a part was dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices. There would be no entitlement to restitution if just and equitable compensation as contemplated in section 25(3) of the Constitution or any other just and equitable consideration calculated at the time of any dispossession of such right, was received in respect of the dispossession. Unless a claimant is able to satisfy the threshold requirements set out above, the court cannot order restitution. The claim for such restitution must have been lodged no later than 31 December 1998.

Given the competing claims of the three plaintiffs, the central issue for adjudication before the Court was which plaintiff, if any, would succeed in proving a valid claim to the land in terms of section 2 of the Act. The Court undertook a comprehensive study of the historical background to the plaintiffs' alleged rights in the land in question. Based on that history, the Court found that the first plaintiff was unable to establish rights of ownership in the claimed land. It was however open to the first plaintiff to establish any "right in land" as defined in the Act in respect of the claimed land as at 19 June 1913. It succeeded in demonstrating that it had both a customary law interest and a right of beneficial occupation in two sets of the claimed land, and therefore had a right in such land as at June 1913. The Court therefore confirmed that the first plaintiff has a valid claim as a community in respect of the two sets of land in question.

Turning to the second plaintiff's claim, the Court found that it was not disputed that the members of the second plaintiff held rights in land referred to as "the Prudhoe claimed farms", including the Fish River Sun farms. It was also not disputed in the trial that the members of the second plaintiff were forcibly removed by the Ciskei government in 1986 and 1987 and did not receive just and equitable compensation. The issue of contention in the trial as far as the second plaintiff was concerned, was whether it constituted a community as defined in the Act. The Act defines a community as "any group of persons whose rights in land are derived from shared rules determining access to land held in common by such group and includes part of any such group." The Court found that the second plaintiff complied with that definition and held that it had established that it had a valid claim, as a community, to the Prudhoe claimed land, including the Fish River Sun Farms.

Section 33 of the Act sets out the factors to be taken into account by the court in deciding on the appropriate relief to be granted in restitution cases. Restoration, where it is sought, enjoys primacy as the remedy for dispossession as a result of past racially discriminatory laws or practices.

Restoring the relevant land in respect of which the first plaintiff had established a valid claim would amount to upgrading its rights of beneficial occupation to full ownership. The Minister indicated that the land was capable of restoration and that the State was prepared to restore them. With reference to section 33(cA) of the Act, the restoration of the lands was therefore feasible. The Court held that the requirements of equity and justice in section 33(c) of the Act operated in favour of the restoration of the land to the first plaintiff.

The second plaintiff led important evidence on the value of the agricultural losses it suffered as a consequence of the forced removals. The Court took cognisance of the

fact that the forced removal of the second plaintiff community was economically devastating. A critically important factor to be considered under section 33 where restoration is claimed, is, in terms of section 33(cA) of the Act, the feasibility of such restoration. The feasibility of the restoration of the Fish River Sun Farms was no longer an issue as the Minister had agreed to purchase the Fish River Sun Farms together with the Hotel and had indicated that those could feasibly be restored to the successful plaintiff in this case. The Court therefore focused on the defences raised by private owners or persons with an interest in the claimed land. Based thereon, the Court set out in its order, the land which should be excluded from the order of restoration made in favour of the second plaintiff.

MFV "Polaris": Southern African Shipyards (Pty) Ltd v MFV "Polaris" and others [2018] 3 All SA 2019 (WCC)

Shipping – Arrested vessel – Application for leave to sell vessel – Court examined the interface between section 133 of the Companies Act 71 of 2008 and section 10 of the Admiralty Jurisdiction Regulation Act 105 of 1983 – Court held that the sensible interpretation was found to be that proceedings that do not involve maritime property belonging to a company under business rescue or maritime property arrested post business rescue would be unaffected by section 10 of the Admiralty Jurisdiction Regulation Act.

Business rescue-maritime property arrested post business rescue- unaffected by section 10 of the Admiralty Jurisdiction Regulation Act.

The applicant conducted business as a shipyard and provided ship repair services in respect of vessels. In February 2016, the first respondent ("MFV Polaris") was delivered by the third respondent to applicant's shipyard in order for repairs to be effected to it. According to the applicant, it duly effected the requested repair services and submitted invoices to the third respondent in respect of such services. In or about April 2017, the third respondent communicated its inability to make payment to the applicant. As a result, the applicant refused to release the MFV Polaris from its shipyard. The vessel was currently under arrest, at the instance of the applicant and a number of other creditors.

In the present application, the applicant sought leave to sell the vessel, her equipment, furniture, bunkers and her cargo in terms of section 9 of the Admiralty Jurisdiction Regulation Act 105 of 1983 and for the appointment of a referee. The applicant averred that with the passage of time the vessel's condition would inevitably deteriorate, and value fall. The longer the vessel was under arrest the greater the risk of equipment failing or some other damage or harm befalling her.

The respondents' answering affidavit was filed out of time, and the applicant consequently opposed its admission. The Court had to therefore consider the respondents' application or condonation, the intended answering affidavit as well as the applicant's reply thereto. In deciding whether the late filing of the answering affidavit should be condoned, the Court had to deal with the merits of the case.

Held – The first issue to be determined was whether the sale of the vessel could be ordered when the company owning it had been placed under business rescue in terms of the Companies Act 71 of 2008. The respondents said that it could not because of the general moratorium placed on all legal proceedings by section 133 of the Companies Act. The applicant on the other hand, contended that the order for the sale of the vessel could be made by virtue of section 10 of the Admiralty Jurisdiction

Regulation Act which excludes property arrested in respect of a maritime claim from assets vesting in a trustee in insolvency or administered by a liquidator, judicial manager or any other person who might otherwise be entitled to such property.

The court therefore had to address the novel issue of the interface between section 133 of the Companies Act and section 10 of the Admiralty Jurisdiction Regulation Act. The Court undertook a proper interpretation of section 10 and concluded that the section does incorporate business rescue. It then acknowledged that the provisions of that section 10 and section 133 of the Companies Act appeared to be in conflict with each other. The sensible interpretation therefore was found to be that proceedings that do not involve maritime property belonging to a company under business rescue or maritime property arrested post business rescue would be unaffected by section 10 of the Admiralty Jurisdiction Regulation Act. Based on that interpretation, the applicant was found entitled to the order sought.

Mlilo v Minister of Police and another [2018] 3 All SA 240 (GP)

Personal injury/Delict – Unlawful arrest and detention – Claim for damages – Section 45(1) of the Criminal Procedure Act 51 of 1977 requires a telegraphic or other printed communication to have reached the arresting officer prior to the arrest and to serve as authority for the arrest – Non-compliance resulting in arrest being unlawful.

In July 2013, the plaintiff was arrested at a border post, by police officers acting in the course and scope of their employment. After spending six nights in detention, she was released without ever appearing in court. She was informed that charges against her had been withdrawn.

In the present action, she sought damages from the defendants, flowing from her alleged unlawful arrest and detention by the defendants' employees. Her case initially was that the warrant for her arrest was obtained under false pretences as the investigating officer had not followed up on all available leads and that had he done so, he would have realised that the plaintiff was not the perpetrator of the fraud and forgery. The case was advanced on the basis that had the magistrate been presented with the fill picture, the warrant would not have been issued. After the conclusion of evidence during the trial, the plaintiff applied for an amendment to the particulars of claim to reflect that the plaintiff had been arrested on a charge of fraud without a warrant of arrest after the arresting officer telephonically obtained knowledge of a warrant of arrest. The amendment was granted.

Held – The plaintiff's evidence about the circumstances surrounding her arrest and the conditions in which she had been detained were not discredited in cross-examination. The Court found her to be a strong and impressive witness. By contrast, the arresting officer was an unimpressive witness. His testimony consisted in part of hearsay evidence regarding the telefaxing of the warrant of arrest by another police station. The Court provisionally allowed the evidence in terms of section 3(3) of the Law of Evidence Amendment Act 45 of 1988 but subsequently ruled the evidence inadmissible. The defendants had not explained the failure to call the recipient of the telefaxed warrant. In any event, section 45(1) of the Criminal Procedure Act 51 of 1977 requires the telegraphic or other printed communication to have reached the arresting officer prior to the arrest and to serve as authority for the arrest. That was not the case in this matter.

In all the circumstances, it was clear from the evidence (and conceded by the defendants) that the arrest was effected without the "telegraphic or similar written or printed communication" as foreshadowed by section 45(1) and was therefore unlawful.

The second defendant (the "Minister of Justice") was belatedly joined as a party to the proceedings and the Court turned to consider whether he could also be held liable to compensate the plaintiff for damages in this particular case. For the second defendant to escape liability, the plaintiff would have to have been brought before a "reception court" which would have had to have made an order regarding the further detention of the plaintiff. In the absence of such matter being considered by any court, the detention of the plaintiff was unlawful and both defendants were liable. The first defendant was ordered to pay the plaintiff R100 000 in damages and payment of a further R200 000 was awarded against both defendants jointly and severally.

Nandutu and others v Minister of Home Affairs and others [2018] 3 All SA 259 (WCC)

Immigration – Regulation 9(9)(a) of the Immigration Regulations issued in terms of section 7 of the Immigration Act of 2002 – Constitutionality – Section 10(6) of the Immigration Act allows a foreigner to apply to the Director-General to change his status in terms and conditions attached to his visa, while in the country – A person holding a visitor's or medical treatment visa cannot make an application for a change of status while in the country, except in exceptional circumstances – Failure to extend rights accorded by means of exceptional circumstances contemplated in section 10(6)(b) of the Immigration Act to foreign spouse or child of a citizen or permanent resident – Court highlighting different requirements for different types of visas and finding justification for distinction.

Two couples approached the court with a constitutional challenge to regulation 9(9)(a) of the Immigration Regulations issued in terms of section 7 of the Immigration Act of 2002 ("the Act"). Section 10(6) of the Act allows a foreigner to apply to the Director-General to change his status in terms and conditions attached to his visa, while in the country. A person holding a visitor's or medical treatment visa cannot make an application for a change of status while in the country, except in exceptional circumstances. In terms of regulation 9(9)(a), the exceptional circumstances contemplated in section 10(6)(b) of the Act shall in respect of a holder of a visitor's visa, be that the applicant is in need of emergency lifesaving medical treatment for longer than three months, or is an accompanying spouse or child of a holder of the business or work visa, who wishes to apply for a study or work visa.

The constitutional challenge was based on the duty of the parties in a marriage or life partnership to cohabit and to provide each other with support, and was directed at the fact that the rights accorded by means of the exceptional circumstances contemplated in section 10(6)(b) are not extended to the foreign spouse or child of a citizen or permanent resident.

The first applicant was a Ugandan national who entered South Africa on 20 February 2015 on a visitor's visa issued in terms of section 11(1) of the Act. She was three months pregnant at the time and was joining the father of the expected child, the second applicant who was a British citizen and a holder of a permanent residence permit in South Africa. The couple married in April 2015, and then sought to apply for a visa to enable the first applicant to remain in South Africa for them to live as a family. Their application was not granted and the reason provided was "No change of status

or conditions attached to the temporary visa while in the Republic in terms of section 10(6) of the Immigration Act, 2002." Their son's birth in August 2015 was not registered as the first applicant was not in possession of a valid temporary residence visa.

The third applicant was a Greek citizen who entered South Africa on a section 11(1) visitor's visa. He was in a cohabiting life partnership with the fourth respondent who was a South African citizen. His application for a section 11(6) visa to enable him to continue to cohabit with the fourth respondent was rejected on the same ground as in the case of the first applicant in this matter. It was also stated in the reasons that there was no documentation to prove the financial support to each other and the extent to which the related responsibilities were shared by the third applicant and his partner in terms of section 3(2)(d).

Held – The issue was whether regulation 9(9)(a) of the Immigration Regulations was inconsistent with section 9 (equality before the law and the equal protection and benefit of the law) and section 10 (inherent dignity and the right to have their dignity respected and protected) of the Constitution and therefore invalid; and if so what the appropriate remedy would be.

Someone in the first applicant's position, according to the court, should have applied for a spousal visa as provided for in section 11(6) of the Act. In interpreting regulation 9(9)(a), the court held that "an accompanying spouse or child" refers to a person who was a spouse or child of a holder of a business or work visa at the time of travel into South Africa. Having married the second applicant only after getting to South Africa, the first applicant was found not to be an "accompanying spouse" as envisaged in the Act, and was simply a visitor in terms of the Act and the regulations.

The Court held that she ought to have applied for a section 11(6) visitor's visa as a spouse of a permanent resident when she first entered the country. The marriage of the first applicant within two months of entering the country whilst a section 11(1) visitor was found not to have absolved her of her obligation to meet the requirements imposed on a foreigner who aspires to the status of a spouse in terms of the Act and wishes to sojourn in the country with some degree of permanence.

The Court was of the view that the mere fact that a section 11(1) visitor is treated differently from a section 11(6) visitor is not in itself a reason to hold them to be unconstitutional. A visitor is different from a spouse or child in terms of the Act, and the reasons and the requirements for their admission and presence are different.

The Court held further that a person issued with a section 11(1) visa who meets the requirements for the change of status to a section 11(6) in terms of the Act may apply to the Minister in terms of section 31(2)(c) for waiver of any prescribed requirement. Good cause has to be shown in that regard. Such application would allow the first applicant to lodge her application while in the country, and therefore regulation 9(9) was not a total bar for consideration of an application for change of status whilst an applicant is within the Republic.

The third applicant was also admitted into South Africa on a section 11(1) visa and applied for a section 11(6) visa whilst within the country. The Court held that it is simply legally impossible to extend a visitor's visa issued in terms of section 11(1) to a spousal visa provided for in terms of section 11(6). As with the case of the first applicant, the Court viewed the remedy for the third applicant to lie in section 31(2)(c). The Court consequently rejected the constitutional challenge raised by the applicants.

Despite the refusal to grant the main relief sought, the Court, in the best interests of the first and second applicants' child, directed the Department of Home Affairs to assist in having the child's birth registered.

Ndoro and another v South African Football Association and others [2018] 3 All SA 277 (GJ)

Administrative law – Sporting bodies – Decisions of – Whether administrative in nature – Judicial review – Promotion of Administrative Justice Act 3 of 2000 – Court found that sporting bodies, though private associations, enjoy regulatory powers that discharge public functions and when they do so, their actions amount to administrative action undertaken by juristic persons in terms of the empowering provisions of their Statutes and regulations.

The first applicant ("Mr Ndoro") was a professional football player registered as a team member of the second applicant ("Ajax"). The latter competed in the second respondent league ("NSL"). The NSL was a special member of the first respondent ("SAFA"). SAFA was affiliated to the Federation Internationale de Football Association ("FIFA"), the governing body of world football.

In the course of the 2017/2018 football season, Mr Ndoro was found to have played for three different football clubs in apparent contravention of a FIFA regulation precluding a player from playing for more than two clubs in a season. The NSL advised Ajax that, pending confirmation by senior Counsel, Ajax should not field Mr Ndoro in its official games. Mr Ndoro and Ajax brought urgent proceedings before the Dispute Resolution Chamber ("the DRC") of the NSL and obtained an order that Mr Ndoro was eligible to play for Ajax in all its official matches during the 2017/2018 season. In making that ruling, the DRC dismissed the NSL's challenge to the jurisdiction of the DRC to determine the relief sought. The NSL appealed to the SAFA Arbitration Tribunal where the arbitrator upheld the NSL's appeal. The applicants sought the review of that decision.

Held – The Court had to determine whether the arbitrator's decision was reviewable; whether the applicants had established grounds for review; and if they had, what the appropriate remedy was.

Our courts have not been unanimous on whether sporting bodies that regulate a particular sport without statutory authority may be characterised as private bodies that exercise public powers capable of review under the Promotion of Administrative Justice Act 3 of 2000. The Court found that FIFA, SAFA and the NSL, though private associations, enjoy regulatory powers that discharge public functions. And when they do so, their actions amount to administrative action undertaken by juristic persons in terms of the empowering provisions of their Statutes and regulations. That renders such actions open to scrutiny by way of judicial review under the Act. The Court found further that the arbitrator's decision was administrative in nature.

One of the grounds of review was that the arbitrator committed an error of law in finding that the DRC lacked jurisdiction to hear the dispute. Upholding the arbitrator's characterisation of the dispute as one relating to Mr Ndoro's status as a player, the Court found that no error of law was committed. The review grounds were therefore rejected and the application was dismissed.

Tekalign v Minister of Home Affairs and others and two similar cases [2018] 3 All SA 291 (ECP)

Legal practice – Conducting of litigation by attorneys – Use of identical affidavits in different cases – Where same facts could not be applicable to different cases of different litigants, court finding that irregularities served to render applications defective.

Three cases which came before the court in which relief was sought against the first respondent and the Department of Home Affairs, led to the Court raising certain queries.

The Court's concerns arose from the fact that the specific averments made to establish the applicants' entitlement to refugee status were identical in each case. The founding affidavit contained not only the identical narrative, but repeated precisely the same grammatical and other errors. As the applicants were represented by two firms of attorneys and had apparently fled from different countries at different times, the Court considered that the founding affidavits could not possibly reflect the true experiences of the applicants. The suspicion that it was being misled caused the Court to request the files of all matters against the Department in the preceding two months and in which the two firms of attorneys had been involved. It discovered 5 cases involving one of the firms, in which identical founding affidavits had been used.

Held – Apart from the identical averments in each application, there were several other features which the applications had in common. The Court set out those features before turning to the explanations offered by the attorneys engaged in the matters. The explanations did nothing to allay the Court's concerns. In addition to the concern about the misleading effect of the averments, the fact that orders were granted in matters in which identical affidavits were utilised related to the propriety of the conduct of the attorneys in raising fees for the work done by them. The attorneys were shown to have charged a substantial fee for the drafting of the founding affidavit. They also charged a fee for a consultation to confirm the correctness of the averments contained in the affidavit prior to it being deposed to before the commissioner of oaths. And they charged a substantial fee for the drafting of a supplementary affidavit. Considering that the founding affidavits were entirely in standard form, it was unlikely that any professional skill and expertise was applied at all to the production of the papers. The Court therefore referred its concerns to the relevant Law Society to consider whether an investigation ought to be initiated.

Questioning the veracity of the averments made in the affidavits in the different matters, the Court not only called into question the conduct of the attorneys, but also that of the commissioner of oaths before whom most of the founding affidavits were attested. Several disquieting aspects of the manner in which the affidavits had been attested were highlighted by the Court.

The impact of all of the irregularities was that the applications were rendered fatally defective. It was held that the only appropriate order to be made in relation to the three applications was to dismiss them.

SALR JULY 2018

HELEN SUZMAN FOUNDATION v JUDICIAL SERVICE COMMISSION 2018 (4) SA 1 (CC)

Judge — Appointment — Judicial Service Commission — Selection process — Review — Record on review — Extent of record — Transcript of commission's post-interview deliberations forming part of record — Must be supplied to applicant — Uniform Rules of Court, rule 53(1)*(b)*.

Review — Procedure — Record on review — Extent of record — Applicable rule to be interpreted to advance applicant's rights of access to courts and to equality of arms before it — Judicial Service Commission's post-interview deliberations on appointment to bench forming part of record on review — Must be supplied to applicant — Uniform Rules of Court, rule 53(1)*(b)*.

Under Uniform Rule 53(1)*(b)* a decision-maker must make available, to a party seeking a review of its decision, the 'record of . . . proceedings'. The issue here was whether the deliberations of the Judicial Service Commission (the JSC), the body which selects judges for appointment by the President, formed part of the rule 53 record on review of its decision to select certain candidates for appointment.

When the Helen Suzman Foundation (HSF) decided to challenge the JSC's decision in the Cape High Court, the JSC withheld the transcript of its deliberations from the rule 53 record on the ground that the deliberations were confidential, and their disclosure was prohibited by its rules of procedure and relevant provisions of the Promotion of Access to Information Act 2 of 2000 (PAIA). The HSF argued that there were good reasons for confidentiality: it would promote the rigour and candour of the deliberations, encourage future applications, and protect the dignity and privacy of candidates. The High Court and the Supreme Court of Appeal both agreed with the JSC, ruling that it did not have to provide a transcript of its deliberations to the HSF.

In an application for leave to further appeal, the Constitutional Court delivered three judgments: one by Madlanga J for the majority and one dissenting judgment each by Jafta J and Kollapen J. The judgments disagreed, inter alia, on whether the High Court had, in its conclusion on compliance with rule 53, exercised a discretion under rule 30A(2), which allowed courts to make an appropriate order in case of non-compliance with the rules.

Held by Madlanga J for the majority

The issue at hand, which implicated an applicant's right of access to the courts under s 34 of the Constitution and was hence appealable, had to be considered in two stages: whether deliberations in general ought to be excluded from rule 53 records, and whether the JSC's deliberations in particular ought to be excluded (see [10], [20]).

The filing of the full record furthered the applicant's right of access to the courts by ensuring that the court had the relevant information before it and that there was equality of arms between the person challenging the decision and the decision-maker (see [15]). Since the deliberations were relevant to the decision, there was no reason to exclude them, as a class of information, from a rule 53 record. They might provide evidence of reviewable irregularities in the process — such as bias, ulterior purpose, bad faith, the consideration of irrelevant factors or a failure to consider relevant factors — which would otherwise have remained hidden (see [23] – [24], [27]).

The JSC's concerns regarding confidentiality were overstated and did not entitle it to refuse to disclose the recordings of its deliberations (see [38] – [42]). Nor did the exemptions on disclosure in PAIA entitle it to do so: it was inapt to transpose PAIA proscriptions on access to information to the rule 53 scenario (see [44] – [50], [53] – [54]). The JSC's internal procedures did not alter the fact that the constitutional right of access to the courts required disclosure (see [62]). Nor could its a priori declaration that its deliberations were private ipso facto make them confidential (see [63]). The secrecy the JSC was clamouring for might, moreover, result in negative public perceptions not only of the JSC itself, but of the judiciary it appointed (see [66]).

Since the JSC did not raise any fact-specific basis for non-disclosure or confidentiality, the present court could not order non-disclosure or impose a confidentiality regime. To prevent unfairness to review applicants, who would be harmed in their ability to make the best possible case if denied access to the deliberations, *all* relevant documentation had to be provided unless there was a legally cognisable basis — such as a public- interest privilege — for withholding something (see [52], [77]).

The High Court was obliged to determine, as an objective matter of fact or law, whether there was non-compliance with the court rules, and the appeal court then had to determine whether the lower court's conclusion on compliance with rule 53 was correct. In these circumstances a discretion under rule 30A(2) did not arise. Accordingly the present court was not, in deciding whether the High Court's conclusion was correct, subject to the strictures applicable to appeals in matters concerning the exercise of a discretion in the true sense (see [79] – [80]). Hence the appeal should be upheld and the JSC ordered to deliver the full record of its proceedings to the HSF (see [83]).

Held by Jafta J, dissenting

The present application was instituted under rule 30A, and the question was whether the High Court had judicially exercised the power conferred by the rule (see [87], [112]). The power of higher courts to intervene was circumscribed, and a decision on non-compliance could be set aside on appeal only on the narrowest grounds, for example where the court was influenced by wrong principles of law (see [115] – [117]). Rule 53 could not be used to achieve what was excluded by PAIA, which allowed the state to refuse access to certain information (see [137] – [138]). Since the word 'record' in rule 53 did not incorporate the JSC's deliberations, the High Court did properly exercise its discretion under rule 30A (see [136], [142], [147]). Therefore the appeal had to be dismissed (see [154]).

Held by Kollapen AJ (with Zondi AJ), dissenting

While, ordinarily, the deliberations of the JSC were relevant and would form part of a rule 53 record, considerations of confidentiality justified their exclusion. Concerns about litigation in the dark did not arise in the present case since a substantial record was made available to the HSF (see [188], [204]). Excluding the deliberations from the record would neither injure the applicant's right to properly prosecute its review application nor impermissibly breach the principles of openness and transparency. Disclosure, however, carried the real risk of causing substantial harm to the dignity, privacy and reputational interests of many (see [213]). Therefore the appeal had to be dismissed (see [212], [214]).

CITY CAPITAL SA PROPERTY HOLDINGS LTD v CHAVONNES BADENHORST ST CLAIR COOPER AND OTHERS 2018 (4) SA 71 (SCA)

Winding-up — Master — Only Master authorised to appoint liquidators — Not competent for High Court to appoint liquidators — Where, as in present case, High Court declaring separate wound-up companies as single entity, its appointment of liquidators in respect thereof amounting to nullity — Companies Act 71 of 2008, ss 20(9), 22, 141(2)(c) and 141(3)

Appeal — Power of court of appeal — Power to dismiss appeal where judgment or order sought would have no practical effect or result — Appeal against court a quo's refusal to set aside earlier court's appointment of liquidators — Where appeal based on it not being competent for court to appoint liquidators, but Master thereafter appointing same liquidators, appeal having no practical effect — Appeal accordingly dismissed — Superior Courts Act 10 of 2013, s 16(2)(a)(i).

In July 2014 the High Court declared that five separate companies, all of which had been wound up, were 'a single entity' as envisaged by ss 20(9), 22, 141(2)*(c)*and 141(3) of the Companies Act 71 of 2008. It also declared (in para 3 of the order) that the respondents, who had already been appointed as liquidators in the winding-up of two of the five companies, would be liquidators of the single entity. A dispute subsequently arose between the respondents and the Master of the High Court (the Master) as to whether, as the latter insisted, a first meeting of creditors had to be held in the estate of the single entity, where all interested parties could nominate and vote for liquidators of their choice. Unable to resolve the dispute, the respondents approached the High Court for an order directing the Master to comply with the July order. This application was granted in December 2014. In the same month, the Master appointed the respondents as liquidators.

In May 2015 City Capital SA Property Holdings Ltd (City Capital) launched a counter-application for, inter alia, the setting-aside of both the July and December orders. This on the basis that the court that made the July order was not empowered to appoint the respondents as liquidators, and accordingly its order was a nullity, as was the December order which purported to give effect to it. The court held that para 3 of the July order did not constitute the appointment of liquidators as contemplated in ch 14 of the Companies Act 71 of 2008, and dismissed the counter-application.

In this case, City Capital's appeal, the issues were whether it was competent for the court to have appointed liquidators of the single entity when making an order as envisaged under ss 20(9), 22, 141(2)*(c)* and 141(3) of the 2008 Act; and if not, whether that finding would have any practical effect as contemplated in s 16(2)*(a)*(i) of the Superior Courts Act 10 of 2013 —quoted in [40] — given that the Master in any event appointed the liquidators of the single entity in December 2014.

Held

Whether non-compliance with a statutory prohibition nullified an act must be determined according to the language of the relevant statute. Section 367 of the 1973 Act conferred on the Master — exclusively — the power to appoint a liquidator in the winding-up of a company. By issuing para 3 of the July order, the court usurped this power. Consequently, para 3 was a nullity and of no force and effect. It was trite that, as a general rule, what was done contrary to the prohibition of the law was of no effect and must be regarded as never having been done. The December order was both erroneous and vague: erroneous because it directed the Master to comply with the July order when the latter did not require the Master to do anything;

and vague because it did not tell the Master with any measure of certainty what he or she was required to do to comply with the order. Also, it was inextricably linked to para 3 of the July order, which was a nullity. (See [33] – [39].)
The Master's decision to appoint the respondents as liquidators of the single entity constituted administrative action as defined in the Promotion of Administrative Justice Act 3 of 2000. It remained valid until reviewed and set aside, which relief City Capital did not pursue. Consequently, the Master's appointment remained unaffected. Accordingly, a finding that para 3 of the July order and the December order in its entirety was a nullity, would have no practical result as envisaged in s 16(2)*(a)*(i) of the Superior Courts Act. For this reason, the appeal fell to be dismissed.

MADIKIZELA-MANDELA v EXECUTORS, ESTATE LATE MANDELA AND OTHERS 2018 (4) SA 86 (SCA)

Review — Application — Delay in bringing application — Whether delay unreasonable — Factors to be considered — Duty on applicant to be reasonably vigilant of rights — Applicant instituting review 17 years after decision taken — While applicant only recently learning of decision, reasonable person vigilant of his or her rights would have acquired knowledge of decision much earlier — Delay unreasonable.

Review — Application — Delay in bringing application — Condonation — Factors to be considered — Court finding that, even assuming prospects of success on merits, not sufficient to overlook excessive delay when due regard was had to potential for severe prejudice to respondents should decision be set aside.

In October 2014 the appellant, Ms Nomzamo Winifred Madikizela-Mandela, instituted review proceedings (to which the common law, not PAJA, applied) in the court a quo (Eastern Cape Local Division, Mthatha). In her application she sought an order declaring the Minister of Land Affairs' decision of November 1997 to donate certain property to the late Mr Nelson Mandela as null and void. She also sought an order declaring as invalid the legacy set out in the will of Mr Mandela bequeathing the property to a family trust.
The appellant had been previously married to Mr Mandela, but they had divorced each other in March 1996. She claimed that she was the rightful owner of a portion of the property by virtue of its allocation to her in around 1989 or 1990 by the tribal chiefs having authority over the land in question, and the continued existence of the customary marriage between herself and Mr Mandela (that, she claimed, survived the parties' divorce in civil law). The court a quo dismissed the review application mainly on the basis that there was unreasonable delay on the part of the appellant which resulted in severe prejudice to Mr Mandela's heirs and his estate.
This is the appeal to the SCA brought by the appellant. The Minister and the executors in the estate of the late Mr Mandela appeared as respondents, amongst others.
The appellant explained that the significant delay in bringing the review was due to her only finding out about the donation decision when she obtained a copy of Mr Mandela's will in August 2014; until then, she insisted, she had been unaware that Mr Mandela was the registered owner of the property or that he thought himself entitled to dispose of it. In common-law review proceedings, a court has the power to refuse a review application if the aggrieved party has been guilty of unreasonable delay in bringing its application (see [9]). The application of the rule required the

consideration of two questions (see [9]): *(a)* Was there an unreasonable delay? The answer depended on a consideration of all relevant circumstances, including any explanation offered for the delay (see [10]). *(b)* If the delay was unreasonable, should it in the circumstances be condoned? The consideration of such question took place relative to the challenged decision, and particularly to the potential for prejudice should it be set aside (see [18]). Questions *(a)* and *(b)* formed the focus of the SCA's attention. The other issue, *(c),* was whether the principles established in *Biowatch* operated to excuse the appellant from paying costs, should she be unsuccessful in her claim.
As to *(a)*, *held*, that there was a duty on an applicant to be reasonably vigilant of her rights. Where there existed circumstances that should have alerted an applicant to the existence of a decision adverse to her rights, she was obligated to investigate. *Held*, that the conduct of the appellant was not consistent with that of a reasonable person. Subsequent to divorce, significant improvements were made by Mr Mandela to the property in question, which would have prompted a reasonable person in the position of the appellant to swiftly react and assert her rights to such property [in which case she would have obtained knowledge of the decision affecting her rights]. The appellant did not do so, but was supine throughout, only instituting review proceedings after Mr Mandela's death. In the circumstances, the appellant delayed unreasonably.
As to *(b)*, *held*, that, even assuming that the appellant's case on the merits — that she was in law entitled to the land in question — had good prospects of success, they were not sufficient to overlook the delay. This was so when due regard was had to the potential for severe prejudice to the heirs and the estate if the decision were set aside, given the fact that, because of the unreasonable delay of the appellant, Mr Mandela was not available to present his version of events. (See [26] – [28] and [30].)

As to *(c)*, *held*, that in essence the appellant was challenging the legality of a decision of the Minister to donate to Mr Mandela what she alleged to be her property. The litigation thus implicated the constitutional principle of legality, as well as her right to property. The *Biowatch* principle was thus of application, and each party should therefore bear its own costs. (The appellant was, however, ordered to pay the late estate's costs, as they were both private parties and the *Biowatch* principle therefore did not apply to them.) (See [32] – [34].)

Held, in conclusion, that the appeal should be dismissed, on the basis of the excessive undue delay, coupled with the potential for severe resultant prejudice to be suffered by the respondents, and the lack of an acceptable explanation for the unreasonable delay.

NATIONAL POLICE COMMISSIONER AND ANOTHER v NGOBENI 2018 (4) SA 99 (SCA)

Police — National Commissioner — Powers — To establish board to inquire into allegations of misconduct by provincial commissioner — South African Police Service Act 68 of 1995, ss 8(2)(c), 8(8) and 9(1).

In this case, the National Police Commissioner received allegations of misconduct on the part of the Provincial Commissioner of Police for KwaZulu-Natal; and established

a board to inquire into them. (This, in terms of s 8(2)*(c)*, read, with necessary changes, with ss 8(8) and 9(1) of the South African Police Service Act 68 of 1995.) He then received submissions from the Provincial Commissioner; and suspended her (s 8(3)*(a)*).
She then brought proceedings in the High Court to review the board's establishment and her suspension; and obtained their setting aside.
The court's holding was that the National Commissioner ought to have referred the allegations of misconduct to the Province's Executive Council, for it to follow the procedure in ss 8(2)*(a) – (c)*. (See [8].) That is, if a Province's Executive Council loses confidence in the Provincial Commissioner, it can notify the Minister for Safety and Security of this (s 8(2)*(a)*); and the Minister, if he deems it necessary and appropriate, must refer the notice to the National Commissioner (s 8(2)*(b)*). The National Commissioner, on receiving the notice, is obliged to establish the board (s 8(2)*(c)*.
The National Commissioner appealed to the Supreme Court of Appeal, and the issue was which procedure ought to have been followed: that used by the National Commissioner; or that endorsed by the High Court (see [4]).
Held, for the former (see [21] – [22]).
Appeal upheld, and the High Court's order altered to dismiss the Provincial Commissioner's application.

PATMAR EXPLORATIONS (PTY) LTD AND OTHERS v LIMPOPO DEVELOPMENT TRIBUNAL AND OTHERS 2018 (4) SA 107 (SCA)
Appellants had applied to the High Court to review and set aside the Tribunal's approval of an application for development rights. Kgomo J dismissed the appellant's application, and they appealed to the Supreme Court of Appeal (SCA).
The issues were:
(1) When a single judge may depart from a prior decision of a single judge of the same division on a point of law; and
(2) When the SCA may depart from its prior decision on a matter of law.
Held, as to (1): when the judge is satisfied the earlier decision is clearly wrong. (Here, that could not have been the case.) (See [7] – [8].)
As to (2): when the earlier decision is clearly wrong (see [3]).
Appeal upheld (an earlier SCA judgment had found such tribunals lacking the power to approve development-rights applications at the time the Tribunal did); the High Court's order set aside, and replaced with an order setting aside the Tribunal's approval.

PIETERMARITZBURG AND DISTRICT COUNCIL FOR THE CARE OF THE AGED v REDLANDS DEVELOPMENT PROJECTS (PTY) LTD AND OTHERS 2018 (4) SA 113 (SCA)
Water — Actio aquae pluviae arcendae — Upper property discharging water into municipality's waterworks under municipality's direction and water fed by municipality's pipes into lower property's canal — Lower property seeking to interdict supra-natural flow of water from upper property.

The properties in this case were on a hill. The highest were those comprising Redlands Estate, whose owners were the respondents; beneath Redlands was a road owned by the municipality; below it two further properties; and then the land owned by Padca.

Rainwater on Redlands was combined and diverted into a catchment pit on the municipality's road, which was fed also by the gutter of another municipal road. From the pit the water flowed by municipal pipe across the next two properties, and to a canalised watercourse on Padca's property.
Here, Padca sought to interdict the supra-natural flow of water from Redlands onto its property. It based its claim on the *actio aquae pluviae arcendae*; alternatively, in neighbour law.
The High Court dismissed the action, and Padca appealed to the Supreme Court of Appeal.
It, per Pillay AJA, likewise dismissed the appeal. This on the basis that the manner of collection on Redlands, and its discharge, had been directed by the municipality.
The concurring judgment of Wallis JA raised, but left open:

- whether the actio was available in respect of urban properties (see [30]);
- whether the properties concerned need be contiguous (see [33]); and
- whether wrongfulness was an element of a neighbour-law claim

SCALABRINI CENTRE, CAPE TOWN AND OTHERS v MINISTER OF HOME AFFAIRS AND OTHERS 2018 (4) SA 125 (SCA)

Immigration — Refugee — Asylum seeker — Refugee Reception Office — Decision to close Cape Town office — Legality review.

The Director-General had closed the Cape Town Refugee Reception Office, using the power in s 8(1) of the Refugees Act 130 of 1998:

'The Director-General may establish as many Refugee Reception Offices . . . as he . . . after consultation with the Standing Committee, regards as necessary for the purposes of this Act.'

This had caused the appellants to apply to the High Court to review the decision; they were unsuccessful; and they had then appealed to the Supreme Court of Appeal.
The issue was whether the decision, an executive act, should be reviewed and set aside in terms of the legality principle. (See [12] and [28] – [29].)
Held, that it should be (see [64]). This, as it:

- Failed to comply with s 8(1) (the Office remained necessary)
- Ignored relevant considerations as to the Office's need (see [50] and [52], and, for example, [39], [41] and [45] – [46]);
- Rested on an error of law (that the Act disallowed satellite offices — see [59]); and
- Was made for an ulterior purpose (to curb abuses of the asylum process (see [60] – [62])).

The appeal upheld; the High Court's order set aside; and substituted with an order, inter alia, that:

- The closure decision was unlawful, reviewed and set aside; and that
- A full Refugee Reception Office be reopened and maintained in Cape Town.

CHOWAN v ASSOCIATED MOTOR HOLDINGS (PTY) LTD AND OTHERS 2018 (4) SA 145 (GJ)

Delict — Elements — Unlawfulness or wrongfulness — Breach of statutory duty — Breach by employer of duty under PDA not to subject whistle-blowing employee to occupational detriment — Employee dismissed after lodging internal complaint of

gender and race discrimination against employer — Provided requirements of PDA met, constituting wrongful conduct for purposes of imposition of delictual liability — Protected Disclosures Act 26 of 2000, s 3 and s 6.

Labour law — Whistle-blowers — Protected disclosure — Occupational detriment — Whether employer's imposition of occupational detriment on employee contrary to PDA giving rise to delictual action justiciable by High Court — Labour Relations Act 66 of 1995, s 156; Protected Disclosures Act 26 of 2000, s 3 and s 6.

Labour law — Courts — Jurisdiction — High Court and Labour Court — LRA not intended to destroy civil remedies — High Court may entertain Aquilian action for breach of employer's duty not to subject employee to occupational detriment for making protected disclosure under PDA — Labour Relations Act 66 of 1995, s 156; Protected Disclosures Act 26 of 2000, s 3 and s 6.

Ms Chowan, who was employed by AMH (the defendant) as group financial manager, applied for appointment as its chief financial officer (CFO), but was turned down despite the fact that Mr Lamberti — the CEO of AMH's holding company, Imperial Holdings — had promised her the position. Instead, the position was given to Mr Van Rensburg, a white male. At a subsequent meeting held to discuss Chowan's future at AMH — attended by Chowan, Lamberti, Van Rensburg and other senior executives — Lamberti told her she was 'a female, employment equity, technically competent, they would like to keep her but if she wants to go she must go' (the utterance). Chowan was upset by the allusion, in front of senior management, to her race and gender, and by the insinuation that she was hired only on employment equity grounds. She complained to the CEO of AMH, Mr De Canha, telling him that she intended lodging a grievance against Lamberti with the chairman of the Imperial Group, Mr Gcabashe, to whom Lamberti reported. This was not in accordance with official AMH grievance procedure, but there was no one senior to Lamberti at AMH. De Canha did not voice any objection to Chowan's intended course of action.

Chowan addressed a letter to Gcabashe in which she raised a racial-discrimination and unfair-treatment grievance against Lamberti. Shortly thereafter she also raised a formal grievance against her direct superior, Van Rensburg, who had made an inappropriate racial remark to her. Gcabashe appointed an independent investigator to look into these allegations. Chowan was suspended from work pending the conclusion of the investigation. Imperial's board, having been handed the investigator's report, resolved that her allegations were without merit and that disciplinary proceedings would be instituted against her because she had abused the grievance procedures. They resulted in her summary dismissal.

Chowan sued AMH, Imperial Holdings and Lamberti for delictual damages for pure economic loss (via an Aquilian claim) as well as for defamation and impairment of dignitas (via an injuria claim). Central to her Aquilian claim was her averment that her dismissal was wrongful because it contravened AMH's duty under the Protected Disclosures Act 26 of 2000 (the PDA) not to subject her, as employee, to an 'occupational detriment' for having made a 'protected disclosure' — see s 3 of the PDA. Section 1 defined a 'disclosure' as 'any disclosure of information regarding the conduct of an employer . . . made by an employee . . . who has reason to believe that the information concerned shows [inter alia] . . . unfair discrimination'. Under s 6(1)*(a)*such disclosures, when made to employers, were protected if they were made in good faith and substantially in accordance with prescribed procedures.

Counsel for the defendants argued that the disclosure Chowan made to Gcabashe was not made to her employer and was therefore a 'general protected disclosure' that was unprotected because it had been made for personal gain. He also argued that Chowan's disclosure was in any event unprotected because she had no reason to believe it showed unfair discrimination and because it was not made in good faith. Counsel argued in addition that the Aquilian action should not be extended to fashion a remedy for Chowan because she had adequate remedies under the Labour Relations Act 66 of 1995 (LRA) and the Employment Equity Act 55 of 1998 (EEA).

Held

Chowan's disclosure was not an external one that fell under s 9 of the PDA: it was consented to by De Canha and therefore an authorised internal procedure covered by s 6(1)*(a)* of the PDA (see [46]). Given the facts, her subjective belief that she was being discriminated against was 'reasonable' within the meaning of 'disclosure' in s 1 of the PDA (see [47]). Since the disclosure was, on the evidence, also made in good faith, it was protected, and the occupational detriments to which she was subjected — suspension, disciplinary action and dismissal — were contrary to s 3 of the PDA and hence unlawful (see [48], [50] – [51]).

While alternative remedies might in an appropriate situation scupper wrongfulness, this was not such a case: s 156 of the LRA did not destroy other remedies and the courts would always consider an action for pure economic loss intentionally caused (see [53] – [54]). In her pleadings Chowan asserted her constitutional right to equality. She had claimed for an intentionally caused loss involving the breach of a statutory duty to protect her from being exposed to racial or gender discrimination in the workplace (see [55]). The PDA, which imposed a duty of protection of a class of persons to which Chowan belonged, expressly did not exclude civil remedies such as the Aquilian action asserted by her (see [57]).

The present matter was a textbook example of a case in which delictual liability had to be imposed. There were ample public-policy reasons for doing so, including the protection of the rights to equality and against unfair discrimination; public interest in the eradication of systemic discrimination; and the need to incentivise employers to comply with s 3 of the PDA (see [60]). The requirements of causality and harm were also satisfied: had Chowan not been subjected to occupational detriments because of her protected disclosure, she would not have been suspended and dismissed, and it was undisputed that she suffered pure economic loss — anything from one month's salary to the equivalent of several years' employment. AMH's conduct was, moreover, sufficiently linked to the harm suffered by Chowan for legal liability to ensue. Considerations of reasonableness, justice and fairness dictated that AMH should be held liable for the harm suffered by Chowan. (See [61].)

While the utterance could not be said to have been defamatory, she did establish the common-law requirements for her injuria claim to succeed (see [68] – [69]).

Accordingly Imperial and Mr Lamberti were liable, jointly and severally, for Chowan's damages resulting from the impairment of her dignity (see [70]).

DE LILLE v DEMOCRATIC ALLIANCE AND OTHERS 2018 (4) SA 171 (WCC)

Local authority — Municipal council — Councillor — Voting — Motion of no confidence in Mayor — Councillors entitled to vote freely and in accordance with their conscience — Cannot be held bound to party line — Speaker of Municipal Council having discretion to order whether or not vote to take place by secret ballot.

At a meeting of the Cape Town DA caucus it was decided by majority decision that a motion of no confidence against the Mayor of the City of Cape Town, Patricia de Lille, be tabled before the Cape Town municipal council (the Council). (What prompted this course of action was the release of the so-called Steenhuisen Report, the outcome of an investigation into the conduct of the Mayor, in which certain adverse findings were made against her.) At a subsequent meeting of the caucus, members were informed by one James Selfe, in his capacity as chairperson of the federal executive of the party (FedEx), that they were obliged to vote in accordance with the majority position of the caucus, that is, to vote in favour of the motion of no confidence. The Mayor, however, held the view that party councillors should be entitled to a free vote, which necessarily implied a secret one. In light of her firmly held belief, she sought clarity from the DA's attorneys. The answer she received was that, in fact, councillors would be entitled to a free vote, but that it was unnecessary that it be secret. However, she later received communication from the chairperson of the DA caucus reaffirming the initial position of Mr Selfe, that councillors were bound by the caucus decision, as this was demanded by the DA's constitution. This communication prompted the Mayor to institute the present proceedings before the High Court wherein she sought, pending further relief, an order interdicting members of the DA's caucus for the City of Cape Town from participating in the forthcoming motion-of-no-confidence proceedings other than on the basis that each member be free to vote within the dictates of one's conscience; and interdicting the Speaker and the Council from proceeding with the vote unless it was by way of secret ballot. The DA, the Speaker of the Council and the City entered as respondents.

The DA ultimately conceded that the members of the Council caucus were entitled to vote freely and with their conscience, in the light of the decision in *United Democratic Movement v Speaker, National Assembly and Others* 2017 (5) SA 300 (CC) (2017 (8) BCLR 1061; [2017] ZACC 21) (which case involved a motion of no confidence in the President of the Republic). The court in the present matter held that such concession was rightfully made, adding, in explanation, that, given the severe consequences posed by a motion of no confidence, due care had to be given to the rights of the person against whom such motion was directed — in this case the Mayor.

The question that remained for consideration was whether the motion of no confidence should be exercised or executed by means of a secret ballot. In this regard, the court stated that what relief was being requested was that the court should order that the DA instruct its members of the caucus to support the vote by a secret ballot in respect of the motion to be considered and voted on. However, the court held that it was not permitted in law to issue an order in such terms, because to do so would be to breach the principle of separation of powers. This was so even though the order was directed at a political party as opposed to the Council; in making such an order, a court would be directing a political party to perform a specific function in the legislative sphere of local government. (See [27] – [28].)

The court had regard to the attitude of the Mayor that, in the absence of a secret vote, councillors would still be hesitant to vote in accordance with their own conscience. The court further noted the position of the respondents that, while they had no firm objection to a vote being held by means of a secret ballot, in terms of the applicable Rules of Order any decision, whether or not to hold a vote by secret ballot, had to be made by the Council. However, the court held that it would be very difficult, if not impossible, for the Council — made up as it was of a majority of DA members — to make a decision in this regard that was fair, rational and

constitutionally compliant (see [31] and [35]). The Speaker, a non-partisan figure, would be the person or authority best suited to make a decision whether a motion of no confidence should be decided by means of secret ballot (see [35]). The discretion to do so was granted to it by rule 4 of the Rules of Order, properly interpreted in line with s 39(2) of the Constitution (see [32] – [33] and [36] – [37]). The court decided that 'just and equitable relief' in terms of s 172(1)*(b)* of the Constitution would be to order, as an interim measure, the Speaker to exercise his/her discretion as to whether or not there should be a secret vote (see [39] – [42] and [44]). The court held that the Mayor had met the requirements for the granting of an interim interdict (see [44] – [46]), and granted an order in the terms set out at [48].

DARK FIBRE AFRICA (PTY) LTD v CAPE TOWN CITY 2018 (4) SA 185 (WCC)
Telecommunication — Fibre optic network — Construction — City imposing conditions on — Lawfulness thereof — Electronic Communications Act 36 of 2005, s 22.

Dark Fibre Africa (Pty) Ltd was a licensee under the Electronic Communications Act 36 of 2005 (ECA). The Act gives a licensee the rights to 'enter upon any land' and to 'construct . . . an electronic communications network' (s 22(1)), but makes their exercise subject to 'applicable law' (s 22(2)).
Here, Dark Fibre sought to install pipes beneath the City of Cape Town's road reserve in Durbanville, in order to house fibre-optic cabling. The City approved the project, but made it subject to conditions, four of which Dark Fibre objected to. Those were:

- A trenching deposit: were a trench not dug, it was refunded.
- A trench-reinstatement deposit.
- A tariff for use of the City's land to install the pipes.
- A relocation-costs condition: if the City determined that a 'service' had to be relocated, the 'service owner' would bear the cost of doing so.

Dark Fibre applied to finally interdict the City 'enforcing, prescribing or imposing' such conditions on its works; and to review and set aside the Durbanville-project conditions.
The issues were:
Whether there was a legal source, and whether there was a legitimate reason, for imposing each condition. *Held*, that:
The Municipal Systems Act gave the power to levy the *trenching deposit*; and that its justification was that trenching weakened the road, and increased its maintenance cost. Likewise, the Systems Act underlay the *trench-reinstatement deposit*; which was justified by Dark Fibre's record of substandard reinstatement. (See [60] and [64] – [65].)
The common law was the basis of the *land-use tariff* and *relocation-costs condition*. Dark Fibre had waived its right to the latter costs (s 25, ECA). (See [13], [28], [69] – [71] and [75].)
Whether any condition thwarted the purposes of the ECA. *Held*, that none did. (See [15], [54], [67] and [78].)
The application for the interdict, and to review the conditions, dismissed.

EASTERN CAPE PARKS AND TOURISM AGENCY v MEDBURY (PTY) LTD t/a CROWN RIVER SAFARI 2018 (4) SA 206 (SCA)

Animals — Wild animal — Land sufficiently enclosed to confine game — Where so, and game escaping, then contra common law, ownership not lost — Whether certificate of sufficient enclosure prerequisite for protection — Game Theft Act 105 of 1991, s 2.

The Agency's buffalo escaped onto Medbury's land, and Medbury declined to return them, considering it had become their owner under the common law.
Under the common law, when a wild animal escapes its owner it becomes res nullius, and susceptible to the ownership of another party by means of *occupatio* — capture and control with intention to possess.
However, under s 2 of the Game Theft Act 105 of 1991:

'(1) Notwithstanding the . . . common law —

(a) a person who keeps or holds game . . . on land that is sufficiently enclosed as contemplated in subsection (2) . . . shall not lose ownership of that game if the game escapes from such enclosed land . . . ;

. . .

(2)*(a)* For the purposes of subsection (1)*(a)* land shall be deemed to be sufficiently enclosed if, according to a certificate of the Premier of the province in which the land is situated, . . . it is sufficiently enclosed to confine to that land the species of game mentioned in the certificate.'

The Agency instituted an action for the buffalo's return and the matter proceeded on a stated case confined to the question, inter alia, whether the certificate in s 2(2)*(a)* was a prerequisite for the protection in s 2(1)*(a)*. (The Agency had no certificate.)
The High Court held that it was, and dismissed the action, causing the Agency to appeal to the Supreme Court of Appeal.
It *held* that the certificate was not a prerequisite for the protection — it was intended merely to facilitate proof of the enclosure required to receive s 2(1)*(a)*'s protection (sufficient enclosure to confine the game concerned).
The appeal upheld, the High Court's order set aside, and substituted with an order favouring the Agency on the above issue. This would have the effect that the matter would continue in the High Court on the remaining issues.

EASTERN PRODUCE ESTATES SA (PTY) LTD v WALES COMMUNAL PROPERTY ASSOCIATION AND OTHERS 2018 (4) SA 220 (LCC)

Land — Land reform — Restitution — Where land awarded subject to lease — Whether huur gaat voor koop applicable, and if so whether constituting infringement of constitutional right to restitution — Constitution, s 25(7); Restitution of Land Rights Act 22 of 1994, s 42D(1)(a).

During 1990 the applicant company (EPESA) entered into an unregistered long-term lease with a state entity in respect of state-owned land. The lease was extended in 2004 until 2020, but in 2013 the land — different portions and the remaining extent of a farm — was awarded to land-restitution claimants. This was in terms of an agreement under s 42D(1)*(a)* of the Restitution of Land Rights Act 22 of 1994 (the Act) between the claimants, represented by the first respondent (WCPA), and the Minister of Rural Development and Land Reform, represented by the regional

land claims commissioner. The agreement included that possession and occupation of the land be given to WCPA on registration of transfer of the land.
EPESA, while aware of the restitution claim, only learnt of the agreement when, after transfer of some of the land, it was threatened with eviction. It then launched the present application in which it applied for relief (see [4]) which included a declaratory order — relying on the *huur gaat voor koop* principle — that the lease agreement remained of full force and effect against the state's successors in title. In this regard WCPA lodged a counter-application for an order declaring whether *huur gaat voor koop* 'applied to and/or binds successors in title in respect of land acquired . . . pursuant to the provisions of the [Act]'; and if so, whether it was unconstitutional to the extent that it was applicable. WCPA argued that, if *huur gaat voor koop* applied to such claims, it would limit s 25(7) of the Constitution's aim of full restoration of both ownership and possession, thereby perpetuating the mischief land-reform measures sought to address; and accordingly the court should develop the common law to limit its applicability.
Held
Under the common law an unregistered long-term lease was binding on a new owner who had acquired the leased property without value or valuable consideration (a gratuitous successor), even without knowledge of the long-term agreement. And, under s 1(2)*(b)* of the Formalities in Respect of Leases of Land Act 18 of 1969 (the Leases Act), an unregistered long-term lease was binding on a new owner who had acquired the leased property for value or valuable consideration (a successor under onerous title) if they knew of the lease. WCPA, having known about the lease, therefore fell within s 1(2)*(b)* of the Leases Act, and accordingly the lease would be binding on it. (See [37] – [45].)
Where land was to be restored to a claimant free of a lease and by way of a voluntary agreement, the cancellation of the lease and adequate compensation must be negotiated with the lessee. The Minister had the option of either expropriating the applicant's real right and to compensate it therefor, or could have acquired it by agreement but chose not to do so. The settlement agreement was entered into with the full knowledge by the contracting parties of the lease agreement. WCPA stepped into the position of the state on registration of transfer, and became entitled to rental under the agreement — it was not deprived of any of its rights. Also, the Act provided both the Minister and this court with sufficient options to deal with any perceived impediments presented by this principle. There was accordingly no merit in the mischief argument, and consequently no need to interfere with the common-law principle of *huur gaat voor koop* insofar as it applied to the restitution process.

ESKOM HOLDINGS LTD v GRUNDY 2018 (4) SA 242 (KZP)
Contract — Consensus — Caveat subscriptor — Contract providing that standard conditions contained in annexure were incorporated as part of agreement — Party A seeking to hold party B to such conditions — A failing to provide evidence that annexure was attached to agreement — Instead seeking to rely on clause in contract whereby B acknowledging receipt of annexure — Caveat subscriptor rule not applying to matters of fact in agreement, such as a recordal that another document was attached to it — If not attached, cannot be deemed to have been so attached on basis of signature — Whether or not document attached remaining a question of fact.

This was an appeal to the full bench of the Pietermaritzburg High Court by Eskom against the court a quo's order directing it to remove certain overhead power lines from a portion of a farm owned by Mr Grundy. The basis on which Mr Grundy sought the removal of the lines in question (which were there when he purchased the farm in 2009) was that he owned the farm over which the power lines ran; that Eskom has no permission to have its equipment on his land; and that he wanted Eskom to remove it from the area which he wanted to irrigate. The issue before court was whether Eskom had established its entitlement to have its power lines on the farm. Eskom sought to rely on an agreement entered into between the parties in February 2011 in terms of which Eskom agreed to supply electricity to a newly built dwelling on the farm. More specifically, Eskom placed reliance on a clause contained in its 'standard conditions', which were, it insisted, incorporated as part of the agreement, and annexed thereto. That term provided that all existing lines on the farm would be regarded as part of the servitude granted in respect of the new line. Mr Grundy denied that he had received any annexure containing 'standard conditions', in which case he could not be bound by them.
The document Eskom presented to court containing the standard conditions did not bear Mr Grundy's signature or initials. The sole evidence on which Eskom relied to establish that Mr Grundy had in fact received the 'standard conditions' was the wording of the supply agreement signed by Mr Grundy. Namely, clause 1 of the agreement recorded that the standard conditions which were annexed to the agreement would form part of it. And above Mr Grundy's signature appeared the words 'Signed by Customer', and below, in smaller font, 'I acknowledge receipt of Annexures A & B'. Eskom argued that, given such signature, by virtue of the caveat subscriptor rule, Mr Grundy could not claim that he had not received the terms and conditions and that they did not form part of the contract.
Held, that the caveat subscriptor rule to the effect that a party, by putting their signature to a document, assents to whatever appears in the document above their signature, only applied in respect of the terms of the contract. It did not apply to matters of fact stated in the agreement, such as a recordal that another document was attached to it. If in fact it was not so attached, then it could not be deemed or agreed to have been so attached. This did not mean that an acknowledgment in a written agreement that a particular document was received by a party or attached to the agreement had no evidential value. All it meant was that, if the party concerned was not aware of the acknowledgment in the agreement, then he could not be held to it in the way that a party could be held to a contractual term which he had not bothered to read. Whether or not the document was attached to the agreement remained a question of fact. If it was found that the document was in fact not attached, then a printed acknowledgment above a party's signature that it was attached had no further value. Conceivably an estoppel might arise, but not on the facts of this case. (See [14].)
Held, that, based on the evidence presented by Eskom and Mr Grundy, Eskom had failed to establish that its standard conditions formed part of the electricity supply agreement (see [15]). Appeal accordingly dismissed.

HOSKEN CONSOLIDATED INVESTMENTS LTD AND ANOTHER v COMPETITION COMMISSION 2018 (4) SA 248 (CAC)
Competition — Competition Tribunal — Jurisdiction — To make declaratory orders — Competition Tribunal having jurisdiction to make declaratory orders — Declaratory

order made that proposed transaction not constituting notifiable merger — Competition Act 89 of 1998, s 27(1).

Competition — Promotion of competition — Merger control — Merger — What constitutes — Whether, after obtaining unconditional merger approval, subsequent transaction to increase controlling company's shareholding in controlled company constituting notifiable merger — Not where, as in present case, transaction not giving rise to change in post-transaction qualitative control — Determination of such change must be made when merger is approved, and could not be revisited later — Competition Act 89 of 1998, s 12.

Hosken Consolidated Investments Ltd (HCI) and Tsogo Sun Holdings Ltd (Tsogo) obtained unconditional merger approval from the Competition Tribunal (the Tribunal) in 2014. The approval was granted on the basis that HCI would obtain sole control of Tsogo's gaming interests. Pursuant to the approval, HCI increased its shareholding in Tsogo to approximately 47,5%. Subsequently, HCI decided to consolidate most of their gaming interests held in other subsidiary companies, under Tsogo. Since that transaction would result in an increase of HCI's shareholding in Tsogo to over 50%, HCI approached the Competition Commission (the Commission) for an advisory opinion as to whether they were obliged to notify the proposed transaction to the competition authorities for approval. The Commission's opinion, issued in August 2017, was that the decision was notifiable prior to implementation (see [11]). HCI and Tsogo then approached the Competition Tribunal (the Tribunal) on an urgent basis for a declaratory order that the proposed transaction was not notifiable. The Commission, they contended, erred: the proposed transaction constituted the further implementation of a merger approval previously granted to HCI to acquire sole control of Tsogo, and even if the proposed transaction involved an acquisition of an additional instance of control within the meaning of s 12(1) of the Competition Act 89 of 1998 (the Act), approval for such acquisition of control had already been obtained in the form of the 2014 merger approval. The Tribunal however dismissed their application on the bases that it did not have the power to grant declaratory relief, and that absent notification of a transaction to the Commission in terms of s 13 of the Act, its jurisdiction was not triggered. In this case, HCI and Tsogo's appeal to the Competition Appeal Court against the Tribunal's decision —

Held

As to the Tribunal's jurisdiction to grant declaratory orders

In terms of s 62 of the Act, the Tribunal and this court had exclusive jurisdiction to hear any matter that the Act defined. It followed that a party seeking declaratory relief regarding the notifiability of a transaction under the Act would not be able to approach the High Court for such relief but only the Tribunal, and on appeal, this court. Therefore, if the Tribunal's finding that it did not have the power to grant declaratory relief were to be endorsed, a party seeking such relief in respect of the notifiability of transactions under the Act would be deprived of the right to seek such relief from any forum and would be left without a remedy — depriving such party of their right to access to court enshrined in s 34 of the Constitution. The jurisdictional basis was therefore established that the Tribunal's powers included making orders for declaratory relief. (See [22] and [25] – [26].)

As to whether the Tribunal ought to have granted the declaratory order sought

In this case no conditions were imposed relating to mode or timing of the acquisition or exercise of control. HCI had acquired sole control over Tsogo by virtue of its shareholding, when, following the 2014 merger approval, it increased its shareholding in Tsogo to 47,5%. HCI currently exercised sole control of Tsogo. The

2014 merger approval was for the acquisition of sole control by HCI over Tsogo: it was expressly recognised in the Tribunal's decision that HCI would acquire control of Tsogo by ultimately increasing its shareholding in Tsogo to over 50%. There was no further acquisition of establishment of control that was brought about by its acquisition of over 50% of the shares in Tsogo. This was a further implementation of an existing sole control structure which was approved by the Tribunal in 2014, and which permitted HCI to conduct the operations of Tsogo as it saw fit. The effects of an acquisition of control were to be considered and determined when the approval of the merger was sought and obtained — a forward-looking assessment of the likelihood of competition harm and the public interest — and could not be revisited once it had been determined. The important factor in assessing whether a transaction constituted a merger, was prior- and post-transaction control. The present restructuring by HCI of its assets did not give rise to a change of qualitative control. In the particular facts of this case, the proposed transaction did therefore not amount to a notifiable merger under the Act.

MEC FOR HEALTH, LIMPOPO v RABALAGO AND ANOTHER 2018 (4) SA 270 (LP)

Constitution — Human rights — Freedom of religion — Spraying of insecticide onto body during 'faith healing' — Interdiction of — Constitution, ss 15(1) and 31(1).

In this matter the High Court finally interdicted Mr Rabalago and members of second respondent religious organisation from, inter alia, spraying insecticide onto members. Rabalago had apparently done so in the course of 'faith healing'.

In granting the interdict the court concluded that:

- Applying insecticide to the body could result in physical harm (see [12] – [13]);
- legislation prohibited such application (see [34]);
- this legislation limited the rights in ss 15(1) and 31(1) of the Constitution (see [34]);
- but that the limitation was justifiable (it was not in the interests of society to allow such a harmful practice

MEDIA 24 (PTY) LTD v COMPETITION COMMISSION 2018 (4) SA 278 (CAC)

Competition— Unlawful competition — Prohibited practices — Abuse of dominance — Predatory pricing — Test objective, dominant company's intention irrelevant — Appropriate cost benchmark 'average avoidable costs' — Competition Act 89 of 1998, s 8(c).

Section 8 of the Competition Act 89 of 1998 (the Act) prohibits a dominant firm from engaging in an 'exclusionary act', defined as one 'that impedes or prevents a firm from entering, or expanding within, a market'. Section 8*(d)*(i) – (iv) lists a number of such exclusionary acts; s 8*(d)*(iv) specifically referring to 'selling goods or services below their marginal or average variable cost [AVC]'. Section 8*(c)* prohibits a dominant firm from engaging in exclusionary acts not listed in s 8*(d)*(i) – (v) and is therefore a more expansive 'catch-all' provision in respect of forms of exclusionary conduct — including predatory pricing — which fall outside of s 8(d)(iv) (see [46]). However, unlike s 8(d)(iv), s 8(c) does not specify any cost benchmarks for what would constitute prohibited exclusionary conduct.

This case, an appeal to the Competition Appeal Court against a Competition Tribunal decision, concerned the issue of an appropriate cost benchmark for a case of predatory pricing under s 8*(c)*. The Tribunal, having concluded that the appellant (Media 24) did not price below its AVC, dismissed the complainant's case under s

8*(d)*(iv). It however upheld the alternative basis for the complaint based on s 8*(c)*. In this regard, the Tribunal applied average total costs' (ATC) as the cost benchmark, coupled with an intention to predate, as the appropriate test under s 8*(c)*.

Held

The Tribunal grafted onto the cost benchmark of ATC a further requirement of predatory intent, but no such requirement was to be found in the wording of the Act. The test for exclusionary conduct was objective. The acts of a dominant firm must be examined and the effect thereof determined, ie whether it prevented another firm from entering into or expanding within the market. Section 8 emphasised conduct rather than intention; the latter played no part in a s 8 case. (See [52] – [53] and [55].)

The Tribunal accepted, by implication, that ATC was an inappropriate cost benchmark, absent proof of intention, even for a case brought under s 8*(c)* of the Act. A number of attempts have been made to formulate an appropriate test to determine when a price was predatory. Significantly, shortly before the Act became law, a further influential approach was developed in economic literature, namely the cost benchmark of average avoidable costs (AAC). It was probably for this reason that s 8*(d)*(iv) utilised marginal and average variable costs as benchmarks, but did not include AAC in the provision. AAC was however relevant to the application of s 8*(c)*, which did not specify any cost benchmark for a case of predatory pricing — it was the benchmark that must be employed when seeking to apply s 8*(c)* to a case of predatory pricing. (See [28], [33] – [37], [53], [56] – [58].)

The idea of AAC as a cost benchmark was that a price below AAC indicated a sacrifice by the dominant firm, as it would not have increased its cash profits by producing any increment during the relevant period at such prices. At a price below AAC, a dominant firm would be capable of excluding an equally efficient competitor because AAC captured all the costs that the competitor already in the market had to cover during the relevant period so as to not make a loss. It was for the respondent to prove that AAC exceeded revenues. This it failed to do, and the appeal must therefore be upheld.

MR LED (PTY) LTD v WAXFAM INVESTMENTS (PTY) LTD AND ANOTHER 2018 (4) SA 308 (GJ)

Contract — Performance — Demand — Demand of sum that is overstated — Admission that part of sum owing and due — Whether demand valid.

Waxfam Investments (Pty) Ltd and Mr LED (Pty) Ltd had concluded a sale of land. Waxfam was the seller, LED the buyer.When LED delayed in a performance, it incurred an obligation to pay a sum of penalty interest (see [2.13]).

Waxfam came to demand this sum, and LED failed to pay it. After warning, and continued non-compliance, the agreement was cancelled.

LED later sought specific performance of the agreement; it was declined; and LED appealed to the full bench.

The issue was whether the demand was valid. This where Waxfam had overstated the penalty interest owed, but LED had admitted owing a part thereof, and that it was due.

Held, that the demand was valid, and the ensuing cancellation competent (see [8] and [11]).Appeal dismissed.

TN v NN AND OTHERS 2018 (4) SA 316 (WCC)

Marriage — Divorce — Proprietary rights — Accrual system — Parties declaring commencement values of their estates in antenuptial contract — Whether declared values binding — Whether accrual claim may be decided during divorce proceedings — Matrimonial Property Act 88 of 1984, s 6(3).

Mrs N and Mr N were married out of community of property but with accrual. Their antenuptial contract declared the value of her estate to be R650 000 at the commencement of the marriage, and that his was R3 million.

Here, Mrs N sought an order of divorce.

She also sought an order that the accrual be calculated off a value lower than that declared for Mr N's estate. Her assertion was that its commencement value was overstated, and she sought to prove its lower actual value. (See [7] and [25].)

He said she was bound to the value they had agreed, and ought to have sought the agreement's rectification. (See [10] and [19].)

Both of them wanted the accrual claim to be decided during the divorce proceedings (see [28]).

The issues were:

- The effect of s 6(3) of the Matrimonial Property Act 88 of 1984 on the commencement values the parties had declared. *Held*, that it made the declared values merely prima facie proof of the actual commencement values, and subject to rebuttal by any party, including the spouses. (See [11] – [12], [14] and [16] – [18].)
- Whether Mrs N had proven the actual commencement value of Mr N's estate was lower than the value declared. *Held*, that she had not. (See [19] – [20] and [24].)
- Whether an accrual claim may be decided during divorce proceedings. *Held*, that it may be. (See [26] and [28] – [29].)

Ordered, inter alia, that the marriage was dissolved; that the claim, that accrual should be calculated off a lower commencement value for Mr N's estate, should be dismissed; and that the party with greater accrual was to pay the other party half the difference of accruals.

SACLR JULY 2018

DIRECTOR OF PUBLIC PROSECUTIONS, GRAHAMSTOWN v PELI 2018 (2) SACR 1 (SCA)

Rape — Sentence — Life imprisonment — Minimum sentence in terms of Criminal Law Amendment Act 105 of 1997 — Substantial and compelling circumstances — First offender, 24 years of age, claiming to have been under influence of alcohol at time when raped 6-year-old boy — No true remorse shown — Serious misdirection in finding presence of substantial and compelling circumstances — Effective sentence of six years' imprisonment disturbingly lenient — Replaced with life imprisonment.

The appellant appealed against a sentence of 10 years' imprisonment, of which four years were suspended, imposed on the respondent in the High Court for the rape of a 6-year-old boy. The respondent was a 24-year-old first offender who claimed to have been under the influence of alcohol when he committed the offence. The court found that the respondent's youth; that he was a first offender who had been under the influence of alcohol; and his remorse, constituted substantial and compelling circumstances justifying a lesser sentence than the prescribed minimum of life imprisonment. On appeal,

Held, that the fact that the respondent was a first offender and had consumed alcohol, which affected his appreciation of the wrongfulness of his conduct at the time he committed the offence, paled into insignificance when the gravity of the offence was considered. That he was remorseful was not borne out by the facts. (See [9] – [10].)
Held, further, that the sentence of an effective six years' imprisonment imposed by the High Court was shockingly and disturbingly lenient, trivialising the offence committed by the respondent. The High Court had committed a serious misdirection when it unjustifiably decided that the factors advanced in mitigation constituted substantial and compelling circumstances sufficient to impose a lesser sentence. The appeal by the state was upheld and the sentence was altered to one of life imprisonment.

S v BRINK 2018 (2) SACR 6 (WCC)
Traffic offences — Driving with excessive concentration of alcohol in blood — Contravention of s 65(2)*(a)* of National Road Traffic Act 93 of 1996 — Sentence — Suspension of driver's licence — Circumstances to be taken into account — Includes personal circumstances of accused.
Traffic offences — Driving with excessive concentration of alcohol in blood — Contravention of s 65(2)*(a)* of National Road Traffic Act 93 of 1996 — Sentence — Previous convictions — Proof of — Insufficient for court to rely solely on evidence of accused.
Traffic offences — Driving with excessive concentration of alcohol in blood — Contravention of s 65(2)*(a)* of National Road Traffic Act 93 of 1996 — Sentence — Previous convictions — Determination of whether offence was first, second or third offence for purposes of s 35(1) — Relevant question was whether offence fell under ss 35(1)*(a),* (a*A*)*, (b)* and *(c)* and not whether it fell under identical statutory provision.
The appellant was convicted in a magistrates' court on his plea of guilty in terms of s 105A of the Criminal Procedure Act 51 of 1977, to a charge of driving a motor vehicle whilst the concentration of alcohol in his blood exceeded 0,05 grams per 100 millilitres, in contravention of s 65(2)*(a)* of the National Road Traffic Act 93 of 1996 (the Act). A previous conviction of contravening s 65(1)*(a)* of the Act in 2009 was proved and, whilst being questioned by the magistrate, the appellant admitted that he had been convicted of a further offence of contravening s 65(2)*(a)*, although the precise details of this offence were not ascertained. He admitted that, in respect of the current offence, he was driving without a licence, his licence having been suspended in 2015 until 2020. The magistrate, taking the two previous convictions into account, sentenced him to the fine agreed upon in terms of s 105A, but suspended his licence for a period of 10 years. On appeal the court was required to consider the magistrate's approach to the interpretation of the mandatory minimum suspension provisions in s 35(1) of the Act.
Held, that when determining whether an offence was a first, second or third offence for the purposes of s 35(1), the relevant question was whether the offence fell under ss 35(1)*(a)*, *(a*A*)*, *(b)* and *(c)*, and not whether it fell under an identical statutory provision. On this approach an offence qualified as a second or third offence for the purposes of ss 35(1)(ii) and (iii) if it were listed under the same subsection or category as the previous conviction. This interpretation honoured the text and promoted the clear purpose of the provision, namely to protect the public from road users posing a risk because they had a tendency for certain dangerous conduct.

Held, further, that the 2009 conviction, although for a different statutory offence, was relevant and had to be counted as a first offence. (See [41].)
Held, further, that it was insufficient as a matter of principle for a court to rely solely on the evidence given by a convicted person regarding his or her previous convictions for the purposes of applying the mandatory minimum suspension periods referred to in s 35(1). In any event, in the present case the appellant's evidence regarding the conviction in 2015 could hardly be regarded as sufficiently clear and satisfactory to constitute proof beyond a reasonable doubt. (See [47] – [49].)
Held, further, that the words 'circumstances relating to the offence' in s 35(3) of the Act were not limited to circumstances which could properly and rationally be said to relate to the offence, and included the traditional sentencing factors, such as the personal circumstances of the accused. (See [57].)
The appellant's sentence accordingly had to be altered by reducing the period of suspension of his licence to five years.

S v DE BESCH 2018 (2) SACR 22 (NCK)
Murder— Sentence — Life imprisonment — When to be imposed — Murder committed with dolus directus attracting different minimum sentence than same murder planned or premeditated, accordingly imperative that trial court specify whether murder indeed planned or premeditated.
The appellant was granted leave by the Supreme Court of Appeal to appeal against his sentence of life imprisonment imposed by the High Court for murder. The evidence against the appellant was that he had quarrelled with the deceased, whom he claimed was his girlfriend, and who was holding a 3-year-old child at the time. He stabbed the deceased several times with his knife on the upper part of the body, in full view of her other child. After conviction it appeared that he had a long list of previous convictions for crimes of a violent nature.
Held, that murder committed with dolus directus attracted a different minimum sentence than the same murder that had been planned or premeditated. It was therefore imperative that during the verdict a court should specify whether the murder the accused was found guilty of was planned or premeditated. In the present matter, since the court had not specified that the murder was planned or premeditated, it followed that the applicable provision for purposes of sentence was s 51(2) of the Criminal Law Amendment Act 105 of 1997 and the prescribed minimum sentence was 15 years' imprisonment. (See [13].)
Held, further, that sentencing an accused person on the basis that the prescribed sentence of life imprisonment was applicable if there were no substantial and compelling circumstances, without having found that the murder was planned or premeditated, amounted to a misdirection warranting interference on appeal. Although the trial court had indicated that it would still have imposed the same sentence if the provisions of Act 105 of 1997 were not applicable, it was nonetheless reasonable to infer that the appellant may not have conducted his case on the basis that he was facing possible mandatory life imprisonment.
Held, further, that, given that a long period had already elapsed since the original sentence was imposed in 2004 (caused by the loss of part of the record), it was preferable that the court impose sentence itself rather than remit the matter. (See [16].). The court accordingly set aside the sentence of life imprisonment and replaced it with a sentence of 23 years' imprisonment.

DE KLERK v MINISTER OF POLICE 2018 (2) SACR 28 (SCA)

Arrest— Without warrant — For assault with intent to do grievous bodily harm — Nature and seriousness of wound not established — Arrest without warrant not justified in such circumstances — Criminal Procedure Act 51 of 1977, sch 1.

Arrest— Procedure after arrest — Detention of accused after appearing in court — Investigating officer aware that accused would not be released on bail on appearance in court, despite recommending bail — Such appearance mechanical act and no inquiry made into justification for further detention — Police not responsible for damages for further detention, even though initial arrest unlawful.

The appellant instituted action in the High Court against the respondent for damages for unlawful arrest and detention, arising from his arrest on a charge of assault with intent to do grievous bodily harm and his subsequent detention for eight days.

The charge arose from an incident in which he pinned the complainant up against a wall during an altercation over money, and the glass from a frame, sandwiched between the complainant and the wall, cut the complainant's back. After the complainant laid a charge, the appellant was required to attend at the police station where the charge was explained to him. He was unable to contact his attorney and made no statement, but was immediately arrested and taken to the magistrates' court where he appeared only two hours after arriving at the police station. He was remanded in custody, despite the investigating officer's recommendation that bail of R1000 be fixed. The investigating officer was aware that the appellant would not be released on bail at his first appearance in court, such appearance being a mere formality in a busy remand court. The High Court dismissed the action. On appeal,

Held, per Shongwe ADP (Majiedt JA and Hughes AJA concurring) for the majority, that the arresting officer had relied only on the statement by the complainant and the J88 form when she made the decision to arrest, and had failed to investigate further the circumstances of the assault itself and the nature and seriousness of the wound. She had wrongly assumed that the assault was committed with intent to do grievous bodily harm and was an offence listed in sch 1: arrest without a warrant in those circumstances was not lawfully permissible. The appellant had accordingly succeeded in proving that the discretion to arrest had been exercised in an improper manner (See [11].)

Held, further, that, as to the claim for unlawful detention, it was the duty of presiding officers in courts of first appearance to ensure that the rights in s 35(1)*(e) – (f)* of the Constitution were not undermined. It was imperative to enquire from the prosecution why it was necessary to further detain a subject. Failure to do so was a contravention of the aforementioned constitutional imperatives, and the further detention of a suspect without just cause would therefore be arbitrary and unlawful. The police, however, could not be held liable for the further detention, even if the arrest were found to have been unlawful: it was the Justice Department that was responsible for said further detention because of its failure to observe the constitutional rights of the detained person. (See [14].)

Held, further, that the respondent could only be held liable for the detention of the appellant for two hours until he appeared in court, and damages of R30 000 would in those circumstances be appropriate. (See [16].)

In a separate judgment concurring with the majority on the unlawfulness of the initial arrest, but dissenting over the lawfulness of the subsequent detention after the appellant's first appearance in court,

Held per Rogers AJA (Leach JA concurring), that the appellant's further detention by the court after arrest was not only foreseeable by the investigating officer but was in

fact foreseen: she knew that the court would not deal with the question of bail at the appellant's first appearance and that he would be remanded in custody. She knew therefore that the remand was a routine or mechanical act rather than a considered judicial decision. What happened was a shocking violation by the prosecutor, the magistrate and the investigating officer of their duties to ensure that the question of bail was properly considered at the appellant's first appearance. Detention in prison for a week was no small matter and, had the question of bail been considered, it would immediately have been apparent that there was no justification for not granting the appellant bail in a modest amount. The present was not a case where remand in custody pending further investigation could ever have been warranted. (See [49] – [50].)
The appeal was accordingly upheld to the extent set out in the majority judgment.

AUSTIN v MINISTER OF JUSTICE AND OTHERS 2018 (2) SACR 49 (ECG)

Trial — Stay of prosecution — Temporary stay — Application for — Pending decision of Constitutional Court on constitutionality of various provisions of statutes impacting on present cases — In interests of justice to grant stay.
The applicants, who had been charged in separate cases in a magistrates' court with dealing in cannabis, applied for orders staying the proceedings against them, pending their institution of applications challenging the constitutionality of certain provisions of the Drugs and Drug Trafficking Act 140 of 1992 and the Medicines and Related Substances Control Act 101 of 1965, relating to the use, possession and dealing in cannabis, and the various presumptions in respect thereof. The application was made on the basis of another case in another division in which certain provisions of the same Acts had been declared unconstitutional and that the final outcome of that case, which was on appeal to the Constitutional Court, would have an impact on their cases. It appeared that other divisions of the High Court had made similar orders, pending the decision in the Constitutional Court.
Held, that the granting of a stay in any court proceedings was not a right, but a matter of discretion exercised by the court, based on individual circumstances and the merits of a case. The granting of a stay by a single judge in one division could not and did not establish a precedent binding on all other divisions. Such stays were, however, persuasive on similar facts to the present matters. It would be wasteful of costs affecting the public purse, and contrary to the interests of justice, were the prosecution to proceed in the present matters, pending the outcome of the Constitutional Court matter. In the circumstances a stay was justified. (See [15] – [17].) The court accordingly granted an order in the terms sought.

S v MABUZA 2018 (2) SACR 54 (GP)
Evidence — Witness — Children — Appointment of intermediary in terms of s 170A(1) of Criminal Procedure Act 51 of 1977 — Prosecutor making use of services of social worker to interview children to determine whether intermediary required — Competency report not required before appointing intermediary — Contents thereof not constituting evidence on which witnesses could be cross-examined.
In an appeal against convictions for the rape of four girls under the age of 14 years, the appellant attacked the evidence of the witnesses who testified through an intermediary. He complained that at the trial the magistrate had not required the social worker, on whom the state relied for its assertion that the children needed to testify in this way, to testify as to what the children had told her about the rapes. The

magistrate found that a competency report was not a prerequisite to making a ruling that a witness's evidence may be presented through an intermediary; and further, that a determination could be done without any evidence being presented by merely taking the ages and the nature of the charges into account.
Held, that the magistrate was correct in the conclusion that he arrived at and it was evident that the reports were compiled solely for the purpose of determining whether the particular child witnesses should testify through an intermediary, and no other. The social worker was not supposed to get the children's version of events relating to the charges and, to the extent that she had done so, she went outside of the ambit within which she was to operate. Counsel's submission that the competency reports constituted evidence on which the witnesses could be cross-examined was without merit. The appeal was dismissed.

S v MAHLANGU 2018 (2) SACR 64 (GP)
Evidence — Identification — Voice identification — Such evidence acceptable, subject to its credibility and reliability — Criminal Procedure Act 51 of 1977, s 37(1)*(c)*.
The appellant was convicted in a regional magistrates' court of robbery with aggravating circumstances and was sentenced to 18 years' imprisonment. He appealed against his conviction and the sentence. The appellant was, according to the state, one of three robbers armed with guns who confronted the complainant in his home. After demanding money they ransacked his home and then drew money from his bank account at the nearby ATM. During the course of the robbery the appellant asked the complainant if he recognised him, as he had previously worked for him. The complainant pretended that he did not, but in fact did remember him. After the appellant was arrested, he was identified by the complainant in an identification parade, through his voice.
Held, that s 37(1)*(c)* of the Criminal Procedure Act 51 of 1977 made provision for an identification parade. The voice was part of the category of marks, characteristics or features of the body. Provided the parade was properly held, the evidence of voice was acceptable in our courts, but it had to be credible in the sense of reliability.
In the present case the recommended safeguards were rigorously observed and the procedure was not challenged. The most important safeguard was the fact that the complainant had known the appellant for a long time and was familiar with his voice. In the circumstances the room for mistake was substantially minimised and the appellant had been properly identified. The court upheld the conviction, but set aside the sentence and replaced it with one of 15 years' imprisonment.

S v HEROLDT 2018 (2) SACR 69 (KZP)
Witness — Competence of — Child witness — Questioning by presiding officer — Magistrate's questions direct and specific and answers clear and precise — Five-year-old child competent to testify.
Witness — Children — As complainants in sexual offences — Use of infantile words to describe parts of genitalia acceptable and sufficiently understood by all concerned.
On appeal against his conviction in a regional magistrates' court for the rape of a 5-year-old girl, the appellant took issue with the admissibility of the evidence of the complainant and contested her competency to testify. He also queried the court's acceptance of her use of infantile words to depict parts of male and female genitalia that had not been clarified to determine what the complainant was referring to.

Held, that the magistrate's questions were direct and specific, as she had enquired of the complainant whether it was good or bad to tell lies, which had elicited the correct response. The magistrate also determined that the complainant understood what she was saying, and her answers were clear and precise. There was nothing to suggest that she could not distinguish between the truth and falsehood. (See [6].)
Held, further, that it was patently clear from the record that the complainant was referring to the male and female genitalia. Parents found appropriate words to use for private parts when they spoke to young children and it had been accepted by well-known and authoritative dictionaries that the words she used were informal terms used in polite conversation referring to the respective gender's genitalia. In the circumstances there could be no suggestion that one did not appreciate what she had been referring to. The appeal was dismissed.

S v MILLER AND OTHERS 2018 (2) SACR 75 (WCC)
Conservation — Fishing — Abalone — Possession or control for commercial purposes — Contraventions of regulations under Marine Living Resources Act 18 of 1998 — Sentence — Effect of poaching on environment and social implications for coastal community highlighted — Not victimless crime — In case where large amounts of abalone involved, severe sentences imposed.
Conservation — Fishing — Abalone — Possession or control for commercial purposes — Contraventions of regulations under Marine Living Resources Act 18 of 1998 — Sentence — Value of abalone involved — No direct correlation between value of abalone and sentence — Large profits to be made by participants in value chain.
Prevention of crime — Offences — Contraventions of s 2(1) of Prevention of Organised Crime Act 121 of 1998 — Racketeering in contravention of s 2(1)*(e)*— Sentence — Involvement in poaching and processing of abalone — Large amounts of abalone involved.
Sentence — Factors to be taken into account — Length of trial — Lengthy trial and case having hung over accused's heads for 11 years — Sentence had to be ameliorated.
The five accused who were before the court had been arrested by members of the South African Police Service and were tried on numerous counts relating to the possession or control for commercial purposes of quantities of abalone. Accused Nos 1 – 4 were convicted of contravening reg 39(1)*(a)* of the regulations published under the Marine Living Resources Act 18 of 1998 (the MLRA), as well as s 2(1)*(e)* of the Prevention of Organised Crime Act 121 of 1998 (POCA), for having conducted or been associated with the running of an unlawful enterprise through a pattern of racketeering activity. Accused Nos 2, 3 and 4 were also convicted of contravening s 18(1) of the MLRA for having operated a fish-processing establishment without a licence. The court heard evidence in mitigation and aggravation of sentence, and received pre-sentencing reports in respect of the accused, as well as a social worker's report in respect of the domestic circumstances of accused 3, who was the caregiver of his two minor children, as his wife suffered a chronic and potentially life-threatening illness.
The court took into account that the legislature viewed the offences under the MLRA as serious, as evidenced by the severity of the sentences that could be imposed under the Act. Allied to this were the sentences under POCA, which were even more severe (see [11] – [12]). It also took into account the effect of abalone-poaching on the marine environment and the unmitigated plunder of the country's natural

resources in a large area of the Overberg (see [24] – [25]). The court stated with a fair degree of certainty that the evidence had established that extraordinarily large amounts of South African abalone had left our shores for the Far East market, and that only a very small percentage of that had been legally harvested and exported (see [37]). This plundering was likely to have significant ecological consequences beyond just the extinction of the species (see [43]).

The court also heard evidence of the social implications of the abalone-poaching for local communities, and held that there were a variety of socioeconomic, sociopolitical and historical factors that contributed to the predicament of poor communities in the area. However, it could not ignore the anecdotal evidence before it of the negative impact that abalone-poaching had had on the residents of the areas where the resource had been so actively poached. It rejected the notion that the illegal exploitation of abalone for commercial purposes was a victimless crime. The court also had little doubt that both the leaders and the residents of those communities looked to the courts to take appropriate steps to improve the quality of life and safety of their communities when the perpetrators of the scourge were brought to book. (See [47] – [48].)

Much evidence was led and documentation produced relating to the value of the poached abalone, but the court held that it was not necessary, nor practically possible, for it to arrive at an accurate figure: the present case was not one where there was a direct correlation between the quantity of contraband involved and the extent of the sentence, such as in drug legislation. What the court could find was that there was a massive difference between what the South African diver or rights-holder earned for a kilogram of live abalone and what the Far East consumer paid for a kilogram of the product in its dried form. The figures demonstrated persuasively that there were very good profits to be made along the value chain through the illegal poaching, processing and exporting of South African abalone. (See [75].)

The court took into account, in respect of all the accused, that there was one general factor in mitigation: the case had hung like a dark cloud over their heads for more than 11 years. It had taken eight years before the trial could commence and, once it commenced, it had stretched over more than three and a half years. Their earning capacities had been compromised accordingly, and all had complained of the depressing effect which the uncertainty attached to the case had brought them. Their sentences had to be ameliorated somewhat in the light of that. (See [180].)

In respect of the personal circumstances of the accused, the court held:

Accused No 1, who was a 57-year-old man with two adult children, had a lesser role in the activities of the enterprise, having supplied pilchards to help mask the illegal export of 44 tons of frozen abalone worth approximately R11 million. He was struggling financially at the time, and, driven by need rather than greed, deserved a lighter sentence than his co-accused (see [110]). Sentence imposed: in respect of contravention of s 2(1)*(e)* of POCA — four years' imprisonment in terms of s 276(1)*(i)* of the Criminal Procedure Act 51 of 1977 (the CPA); in respect of 15 counts of contravening reg 39(1)*(a)* — six months' imprisonment in terms of s 276(1)*(i)* of the CPA on each count, suspended for five years.

Accused No 2, a 45-year-old successful businessman, married, with two young children, who never said a word in the proceedings, was convicted on counts in respect of 28,5 tons of frozen abalone. The court held that he was driven to commit the offences by greed, given that he had a successful business offering a reasonable income. Because he had been associated with a lesser amount of abalone, his sentence would be ameliorated accordingly (see [128]). Sentence imposed: in

respect of contravention of s 2(1)*(e)* of POCA — eight years' imprisonment; in respect of 11 counts of contravening reg 39(1)*(a)* — eight months' imprisonment on each count; in respect of contravening s 18(1) of the MLRA — four years' imprisonment. The sentences were ordered to run concurrently with the effect that the accused would serve an effective eight years' imprisonment.

Accused No 3, a 42-year-old man, married, with four children, two of whom were under the age of 18, had two previous convictions for the unlawful possession of abalone and the running of an illegal fish-processing enterprise. The court held that he had not shown true remorse and had persistently been involved in abalone-smuggling (see [148]). The court also had to consider that his wife had a chronic and potentially terminal medical condition, and the accused had to share the role of caregiver to the two younger children. There were, however, two older children in the home capable of caring for their younger siblings, and both parents had extended families who resided in the Western Cape and to whom the children could turn in times of need. The accused had clearly been driven by greed, as he and his wife had been running a profitable business from their home. His moral blameworthiness was high, and he deserved a heavy sentence (see [152] – [154]). Sentence imposed: s 2(1)*(e)* — 15 years' imprisonment; in respect of 10 counts of contravening reg 39(1)*(a)* — eight months' imprisonment on each count; in respect of three counts of contravening s 18(1) of the MLRA — five years' imprisonment on each count. The sentences were ordered to run concurrently, to the extent that the effective sentences was 15 years' imprisonment.
Accused No 4, a 62-year-old man who was divorced and had three adult children, was convicted of being responsible for processing more than 74 tons of frozen abalone, which equated to about 247 tons of live product valued at around R62 million. His moral blameworthiness was high, although the court was prepared to accept that he was now contrite. He had been overtaken by greed for the easy money which abalone presented. The court held that he deserved a heavy sentence (see [158] – [161]). Sentence imposed: contravening s 2(1)*(e)* — 15 years' imprisonment; in respect of 28 counts of contravening reg 39(1)*(a)* — six months' imprisonment on each count; in respect of contravening s 18(1) — five years' imprisonment. The sentences were ordered to run concurrently so that the accused would serve a sentence of 15 years' imprisonment.
Accused No 5, was 46 years of age, single, and self-employed as a chef. He was convicted of only one count of contravening reg 39(1)*(a)* in relation to 1969 units of frozen abalone. His moral blameworthiness was not high, and he deserved a lesser sentence (see [162] – [163]). Sentence imposed: one year's imprisonment suspended for five years.

End-for now