LEGAL NOTES VOL 8/2017

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Section 25(6) of the Constitution provides that a person or community whose tenure of land is legally insecure because of earlier racially discriminatory laws or practices is entitled, to the extent permitted by statute, to either legally secure tenure or comparable redress. That statute is the Extension of Security of Tenure Act 62 of

[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!**

1997 (ESTA). Section 6 gives 'occupiers' — 'person(s) residing on land which belongs to another person' with 'consent or another right in law to do so' — a series of rights. Section 13(1) allows courts to order the owner (or 'person in charge') to compensate evicted occupiers for improvements made or crops planted.
Ms Daniels, a domestic labourer working and living on Chardonne Farm, Stellenbosch, was making basic improvements to her living quarters when she received a letter from the farm manager (Mr Scribante, in casu the 'person in charge') ordering her to stop the work. Despite conceding that without the improvements, the dwelling was unfit for human habitation, the respondents (Mr Scribante and the farm owner) claimed that they were unlawful because Ms Daniels did not obtain the owner's permission.
In her defence Ms Daniels invoked ESTA, arguing that her right, as occupier under ESTA, included the right to improve her living quarters. She argued that s 13 of ESTA imposed a positive obligation on the owner or person in charge (in casu Mr Scribante) to allow occupiers to make improvements. The respondents argued that since s 6 of ESTA did not mention a right to make improvements, it afforded none. They also argued that the court could not impose a positive obligation on owners to ensure an occupier's right under s 25(6) of the Constition since that would mean that the owner would in effect finance the improvements.
The Stellenbosch Magistrates' Court dismissed Ms Daniels' application. It held that an occupier under ESTA did not have a right to effect improvements to her dwelling without the consent of an owner or person in charge. A subsequent approach to the Land Claims Court (the LCC) was also unsuccessful. The LCC held that allowing Ms Daniels to make improvements without consent was a drastic intrusion that required an express provision which ESTA lacked. Both the LCC and Supreme Court of Appeal refused leave to appeal, and Ms Daniels turned to the Constitutional Court.
The court had to answer the following questions: (i) whether ESTA afforded a tenant the right to make improvements to her or his dwelling; if so, (ii) whether the consent of the owner was required; and if not, (iii) whether an occupier could make improvements in total disregard of the owner.
Held per Madlangafor the majority (Cameron J, Froneman J, Khampepe J, Mbha AJ and Musi AJ assenting)
Section 25(6) of the Constitution and ESTA had to be purposively interpreted to afford occupiers the dignity that eluded them during the colonial and apartheid years (see [2], [13] – [24]). The respondents' interpretation of s 6 of ESTA was unduly narrow, and could result in an empty right to either live in conditions of indignity or otherwise leave (see [29] – [33]). An occupier's rights under ESTA included the right to make improvements required to bring his or her dwelling up to a standard consonant with human dignity (see [34] – [36]).
The respondents' positive/negative-obligation argument had to be confronted head-on (see [38]). Section 8(2) of the Constitution made fundamental rights applicable to private persons if the right in question was such that it would bind them, and the obligation imposed by s 25(6) via ESTA — to accommodate another on one's land — was by its nature a positive one that bound private individuals (see [49]). The possibility of compensation by the landowner for the improvements made by the occupier was contingent on a court order and could not serve to defeat this obligation (see [50] – [53]).
While the owner's consent was not a prerequisite for the making of the required improvements, the occupier had to respect the owner's right to property by

approaching the owner or person in charge to raise the issue of the proposed improvements (see [61] – [62], [64]).
Ms Daniels was accordingly entitled to an order allowing her to make the intended improvements (see [57], [71]).

Concurring judgment (in Afrikaans with English translation) per Froneman(Cameron assenting)

The common-law, absolutist, conception of property was not a given under the Constitution (see [96] – [97] (Afr) and [133] – [134] (Eng)). Nor could existing, skewed, patterns of property allocation be justified by blind reliance on economic-efficiency arguments. Since people were actively excluded from the initial distribution, the basic assumptions for status quo economic-efficiency arguments were absent (see [106] (Afr) and [142] (Eng)). The argument that the protection of existing property is a necessary condition for personal and economic freedom was not self-explanatory in the South African context (see [107] (Afr) and [143] (Eng)).

Concurring judgment per Cameron J

Courts should be cautious to rely on historical sources when neither side had referred to them, especially where accounts were incomplete and where they were not directly functional in the determination of the dispute (see [149]). The Constitutional Court's power to influence South Africa's collective historical narrative suggested a diffident approach and a light footfall (see [152]).

Concurring judgment per Jafta(Nkabinde assenting)

While s 8(2) of the Constitution showed that the rights in the Bill of Rights were horizontally enforceable, this did not mean that the provision was the source of any obligations, let alone a positive obligation borne by a private person (see [156] – [162]). Hence the right to security of tenure did not impose a positive obligation on private persons (see [163]).

Concurring judgment per Zondo J

Under ESTA an occupier had a right to effect improvements to his or her dwelling without the consent of the owner of the land where, as here, the improvements were basic improvements that would ensure that the occupier ceased to live in conditions of human indignity (see [210]). The present matter would be decided on what would be just and equitable between the parties when the rights of the occupier were balanced against those of the landowner or person in charge (see [216]). In casu these considerations dictated that Ms Daniels was entitled to make the improvements.

JACOBS v COMMUNICARE NPC AND ANOTHER 2017 (4) SA 412 (WCC)

Land — Unlawful occupation — Eviction — Statutory eviction — Eviction order — Just and equitable date to vacate land — Determination of — Relevant factors — Homelessness — Where such result reasonable inference, courts must consider local-authority report on availability of alternative or emergency accommodation — Failure to do so constituting procedural defect in eviction proceedings — Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, ss 4(8)(a) and 4(9).

When granting an eviction order, s 4(8)*(a)* of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) requires a magistrate to determine 'a just and equitable date on which the unlawful occupier must vacate the land under the circumstances; . . .'. In determining what such a just and equitable date may be, a magistrate must 'have regard to all relevant factors' (s 4(9) of PIE).

This case, an appeal against the magistrates' court eviction order, raised the issue of a magistrate's obligation — when making a determination under ss 4(8)*(a)* and 4(9) — to consider the availability of alternative or emergency accommodation where the circumstances justified a reasonable inference that the eviction may result in homelessness.

Here the applicant for eviction, Communicare — a non-profit company which made affordable, low-cost housing available to deserving tenants — had cancelled its lease agreement with one Mr Jacobs after he fell into arrears with increased instalments. Mr Jacobs opposed the application for eviction but did not raise any sustainable defences on the merits; he did however claim that his eviction would render him homeless. His occupation had been unlawful for fewer than six months, and so the magistrate was not statutorily enjoined (by s 4(7) of PIE) to consider whether alternative accommodation could be made available by a municipality or another organ of state. The City of Cape Town had nevertheless been joined in the eviction application but no report on the availability of alternative accommodation was obtained by the applicant, neither did the magistrate request it.

Held

Experience in this division in similar matters showed that the City of Cape Town was able to provide the court with information about the availability of alternative housing and, in particular, the availability of emergency housing. Were such emergency accommodation to have been made available to Mr Jacobs, and had he refused to take it up for whatever reason, the magistrate would have been well placed to determine how much time to give the appellant to quit the premises. However, neither the magistrate nor this court had been made aware of the current position in this regard. The leading Supreme Court of Appeal decisions dealing with the procedural aspects of evictions, stress that the court making the decision to evict must have sufficient information before it to enable a just and equitable decision to be made. (Paragraphs [14], [17] – [18].)

If Mr Jacobs could not afford to rent from Communicare, he was not going to be able to easily afford to rent elsewhere. It was therefore reasonable to infer that his eviction might lead to him being without a roof over his head, certainly in the short term. In such circumstances, a report from the City as to alternative accommodation — be it permanent or emergency — was imperative before the court could make a determination as to what notice period was just and equitable. In a matter such as this, the magistrate had a constitutional obligation to respond proactively by calling for and considering a local authority report; his failure to do so was a procedural defect in the proceedings. (Paragraph [23] and [25] – [27].)

On the facts before this court and in the absence of a report from the local authority, it was not possible to say with any degree of certainty whether this procedural defect was fatal or not. In the circumstances the prejudice to Communicare, in sending the matter back to the magistrate to reconsider the period of notice, far outweighed the prejudice to Mr Jacobs. The appeal would therefore be dismissed with costs, and Mr Jacobs (and all holding title under him) ordered to vacate the premises by 30 April 2017 — a date both parties agreed would be a just and equitable notice period to vacate the premises if the eviction order stood. (Paragraphs [28] – [31].)

MWELASE AND OTHERS v DIRECTOR-GENERAL, DEPARTMENT OF RURAL DEVELOPMENT AND LAND REFORM AND OTHERS 2017 (4) SA 422 (LCC)

Land — Land reform — Labour tenant — Claim — Application for appointment of special master to supervise processing of labour tenant claims under Land Reform (Labour Tenants) Act 3 of 1996 — Viewed as necessary in light of failure of Department of Rural Development and Land Reform in processing applications by labour tenants for awards of land since commencement of Act — Court permitted to make such order — Restitution of Land Rights Act 22 of 1994, s 32(3)(b), allowing departure from normal adversarial approach to litigation — Law acknowledging that where constitutional rights threatened, such as those of labour tenants, courts empowered to resort to new remedies — Special Master of Labour Tenants appointed.

The Land Reform (Labour Tenants) Act 3 of 1996 (the Act) was enacted for the constitutionally mandated purpose (s 25(6) of the Constitution) of providing security of tenure for labour tenants impacted by past discriminatory practices. To meet such aims, the Act provides that labour tenants may apply, to the Director-General of the Department of Rural Development and Land Reform (the Director-General), for an award of land that they are entitled, in terms of the Act, to occupy or use. However, since the Act's commencement, applications have not been adequately processed by the Department — more particularly by the Director-General and the Minister of Rural Development and Land Reform (the Minister), who play the key roles in processing labour tenant applications. As at August 2016, some 10 914 labour tenant applications remained unsettled. Further, many applications have been lost, and record-keeping by the Department has been poor. This state of affairs prompted the present proceedings, defended by the Director-General and the Minister. The applicants finally sought a novel remedy — the appointment of a special master to supervise the processing of labour tenant claims. Leading up to the hearing of the matter, the parties had obtained orders by agreement, calling on the Director-General to implement the Act, and, further, to report to court how it intended to do so, and its progress in meeting such plans. The Director-General repeatedly failed to comply with the terms of the orders. The applicants were therefore of the view that the appointment of a special master was necessary to ensure the implementation of the Act; court supervision was not enough.

The Land Claims Court considered the nature and functions of a special master, whether it was permitted to make an order of the type sought, and whether it was appropriate to do so in the circumstances of this case.

Held

A special master was an independent person who was appointed by, and reported to, the court. Their duties were to assist the court in matters where specialist skills or capacity was needed, in the present instance in the processing and adjudication of labour tenant claims. Their powers were determined by the court. They could devote time to become fully acquainted with the parties and the extensive information involved, and they engaged informally with the parties, more than a judge could. (Paragraphs [19] – [20] at 427H – 428C.)

The Land Claims Court was permitted to make an order of the type sought. Such a course would be in line with the law. Section 32(3)*(b)* of the Restitution of Land Rights Act 22 of 1994 permitted the court to conduct any part of any proceedings on an informal or inquisitorial basis, allowing the court to depart from the normal adversarial approach to litigation in South Africa. Further, it had been acknowledged

in the Constitutional Court that resort could be made to *new remedies* to effectively protect threatened constitutional rights such as those of labour tenants. (Paragraphs [21] and [34] – [35] at 428D and 431C – 432A.)
Effective relief was required for the many thousands of vulnerable labour tenants, and the Department had thus far experienced grave difficulties in providing this. If a special master could potentially achieve this end, such an appointment was justified. The appointment of a special master was called for to assist the Department in processing and referring applications, in the light of the following: the size and complexity of the task of settling land tenant claims; the proven failure of the Department to process applications with the haste and scale required; and the risk of the court's being overburdened, given its limited resources should the present approach of simply referring all applications to it be allowed to continue. An order for the appointment of a 'Special Master of Labour Tenants' would be made. The terms of the order are set out in [38] of the judgment.

MINISTER OF HOME AFFAIRS AND OTHERS v SAIDI AND OTHERS 2017 (4) SA 435 (SCA)

Immigration — Refugee — Asylum seeker permit — Extension — Whether refugee reception officer has power to extend permit after asylum seeker has exhausted internal review or appeal — Refugees Act 130 of 1998, s 22(3).

The respondent asylum seekers had been unsuccessful in their applications for asylum and in internal reviews and appeals. They had then applied to a High Court for review. Pending that, they had sought to extend their asylum seeker permits under s 22(3) of the Refugees Act 130 of 1998. (It provides that '(a) Refugee Reception Officer may from time to time extend the period for which a permit has been issued in terms of subsection (1), or amend the conditions subject to which a permit has been so issued'.)
However, the refugee reception officer (third appellant) had refused to do so, and the asylum seekers had approached the High Court to compel her to. It declined, but instead declared that s 22(3) permitted a refugee reception officer to extend a permit after an internal review or appeal had been exhausted; set aside the refusals to extend; and remitted the extension decisions for reconsideration. The Minister (first appellant) and her servants appealed, and the asylum seekers cross-appealed.
The first issue in the Supreme Court of Appeal was whether a refugee reception officer had the power to extend an asylum seeker permit, after an internal review or appeal had been exhausted. *Held*, that it did (see [10], [31]).
The second issue was whether the asylum seekers had a legitimate expectation that their permits would be extended. *Held*, that they did not (see [32], [40]).
The third issue was whether, despite its outwardly permissive language ('may'), s 22(3) in fact obliged a refugee reception officer to extend a permit. *Held*, that it did not (see [41] – [42]).
The fourth issue was whether the High Court ought to have substituted its own extension decisions for those of the officer. *Held*, that it correctly did not do so (see [43] – [44]).
Appeal and cross-appeal dismissed (see [45]).

MANUKHA v ROAD ACCIDENT FUND 2017 (4) SA 453 (SCA)

Motor vehicle accident — Compensation — Claim against Road Accident Fund — Prescription — Within three years after cause of action, claimant issuing summons against, and lodging claim with, RAF for pecuniary and non-pecuniary damages — However, required serious injury report substantiating non-pecuniary damages lodged much later, outside extended five-year time period allowed for issuing of a summons — Whether claim for non-pecuniary damages having prescribed — Road Accident Fund Act 56 of 1996, ss 17(1), 23 and 24, read with Road Accident Fund Regulations, 2008, reg 3(3)(b)(i).

Within three years after her cause of action arose, the appellant lodged a claim with, and issued summons against, the Road Accident Fund for pecuniary and non-pecuniary damages arising from bodily injuries she had suffered in a motor vehicle accident. However, the appellant only lodged much later her 'serious injury assessment report' — required in terms of reg 3(3)*(b)*(i) of the Road Accident Fund Regulations, 2008 — substantiating her claim for non-pecuniary damages. The RAF argued that, because the report had been lodged outside the extended five-year time period allowed for the issuing of summons under s 23(3) of the Road Accident Fund Act 56 of 1996 (the Act), the appellant's claim *in respect of non-pecuniary damages* had prescribed. The Supreme Court of Appeal however held that it had not, reversing the High Court's decision. This conclusion followed, the SCA held, from the fact that, on a reading of ss 17(1), 23 and 24, read with reg 3(3)*(b)*(i), a party claiming compensation in terms of the Act had but a unitary and indivisible claim for compensation. A claim for non-pecuniary loss would fall under such a single claim; it was not separate. Hence prescription in respect of the appellant's claim for non-pecuniary damages was interrupted when proceedings were initially instituted. (Paragraphs [19] – [22] at 458G – 460B.)

ESTERHUIZEN AND OTHERS v ROAD ACCIDENT FUND 2017 (4) SA 461 (GP)

Damages — Loss of support — Quantification — Determination of remarriage contingency — Factors — Widow's physical appearance and nature — Taking it into account offensive towards women and against constitutional values of equality and dignity — No reliance to be placed on factors such as appearance.

In the past, in loss of support claims the appearance and personality of the widow were one of the factors taken into account when determining a contingency deduction for the possibility of her remarriage. This reveals an outdated and offensive approach to women; to consider their appearance and nature is not in accordance with the constitutional values of equality and dignity. No reliance should be placed on factors such as appearance. (Paragraphs [7], [10] and [12].)

MS v HEAD OF DEPARTMENT, WESTERN CAPE EDUCATION DEPARTMENT AND OTHERS 2017 (4) SA 465 (WCC)

Education — School — Public school — School fees — Liability — Divorced or separated parents — Interpretation of s 40(1) of South African Schools Act 84 of 1996 — Parents jointly, not jointly and severally, liable to pay school fees — South African Schools Act 84 of 1996, s 40(1).

Constitutional law — Legislation — Validity — South African Schools Act 84 of 1996, reg 6(2) read with reg 1, sv 'combined annual gross income of parents', of Regulations Relating to the Exemption of Parents from the Payment of School Fees in Public Schools — In determination of whether a parent qualified for exemption, sum of annual incomes of both parents taken into account — Whether violating right to equality and dignity of separated or divorced custodian parent — Approach as per regulations in best interests of child; and encouraged both parents to comply with obligations to support their children — Neither right to equality nor dignity violated.

The applicant, MS, and MG were the divorced parents of ZG. MS retained custody of ZG. The latter at the time of these proceedings was a Grade 10 learner at Fish Hoek High School (the school), a public fee-charging school. MS's present application arose out of her repeated failed attempts, from the years 2011 – 2013, to qualify for a partial exemption from the liability to pay her daughter's school fees. Of particular concern in the present matter was the decision of the second respondent — the school governing body (the SGB) — to refuse her application for a fee exemption for the 2013 school year, and the consequent decision of the first respondent — the Head of Department, Western Cape Education Department (the HOD) — to reject her appeal owing to its being lodged outside the prescribed time period. The grounds of the SGB's decision was that they had not received information (on the relevant application form) regarding MG's financial position, which information was vital because the determination of an exemption was made on the basis of the gross income of *both parents*. Ultimately, the school claimed payment of the full school fees from MS. In the present application proceedings in the High Court, MS sought varied relief, which included inter alia the following.
She sought the setting-aside of the HOD's refusal of her appeal. This relief was ultimately conceded by the HOD after it became apparent that the notice of the SGB's decision was sent to the wrong address. MS also sought an order declaring that she qualified for an exemption. The court declined such an order of substitution, holding rather that MS should submit a fresh application for exemption for the 2013 year.
She sought a declaration to the effect that the liability imposed by s 40(1) 1 of the South African Schools Act 84 of 1996 (SASA) on *separated or divorced biological parents* for the payment of school fees in public schools was *joint*, as opposed to *joint and several*. Joint liability in this context meant that each parent would only be liable for (and could be called upon to pay) his/her proportionate share of the fees; joint and several liability meant that each parent was liable to the school for the full amount of the fees and, if one parent should pay the full amount, he/she would have a right of recovery against the other.
MS also placed in issue the constitutionality of the regulations, made in terms of s 39(4) of SASA, relating to the exemption of parents from the payment of school fees in public schools, in particular reg 6(2), read with the definition in reg 1 of 'combined annual gross income of parents'. In terms hereof, qualification for an exemption was subject to the applicant's school fees, measured as a proportion of income, falling above certain percentages. In calculating such proportion, *both parents' incomes* were added together. The effect of this was that both parents' particulars relating to their incomes had to be included in the relevant application form, a situation which could cause problems where one parent failed to cooperate, as in the present instance. MS argued, firstly, that the said regulations irrationally differentiated — in breach of s 9(1) of the Constitution — between single or divorced

parents, like herself, and those who shared a joint household, in the manner reg 6(2) took into account the income of the learner's non-custodian parent in determining whether the custodian parent qualified for an exemption from school fees. She argued, secondly, that, in light of her being the custodian parent of her child, living a separate life from her ex-husband, and being the sole breadwinner of her family, it was degrading and humiliating to her that the outcome of her fee exemption application should be dependent on her obtaining from her ex-husband particulars concerning his income. She criticised the SGB's treatment of her and her husband as a 'family unit' for the purposes of her application. She argued that her right to dignity was infringed. She sought declarations to the above effect.
Held, that, on a proper construction of the provisions of s 40(1) of SASA, the liability of a parent to pay school fees was joint, and not joint and several. To hold otherwise would be to impose an unnecessarily heavy burden on parents like MS and was irreconcilable with the constitutional principle of the paramountcy of the best interests of the child. The interpretation favoured by the applicant was also in accordance with the general principle that co-obligators were liable only jointly unless an intention to impose joint and several liabilities was plainly expressed or could be clearly inferred, which was not the case here. (Paragraph [104] at 482B – D.)
Held, that the differentiation complained of by the applicant could not be construed as irrational. It was undoubtedly in the best interests of the child that, in the determination of the outcome of an application for exemption, the income of both parents be taken into account. Such an approach served to encourage both custodian and non-custodian parents to comply with the legal duty imposed upon both of them in terms of the law to support their children. (Paragraphs [110], [111] and [115] at 483I – 484A, 484A –and 484G – H.)
Held, to be legally untenable, MS's argument that the obligation imposed upon her, to obtain her ex-husband's financial details in order to complete the exemption application form, and to be compelled to view her ex-husband as being part of her family unit, infringed her right to dignity. This was so in the light of the common-law duty of support imposed upon both the parents, and also given that both had previously agreed to remain, post-divorce, involved in all aspects of ZG's life, including her schooling, and to remain co-holders of parental responsibilities in terms of the Children's Act 38 of 2005.

FACTAPROPS 1052 CC AND ANOTHER v LAND AND AGRICULTURAL DEVELOPMENT BANK OF SOUTH AFRICA 2017 (4) SA 495 (SCA)

Prescription — Extinctive prescription — Period of prescription — Debt secured by special notarial bond — Phrase 'mortgage bond' in Prescription Act having wide meaning and including 'special notarial bond' in terms of Security by Means of Movable Property Act 57 of 1993 — Period of prescription of 30 years therefore applying — SCA confirming decision of High Court — Prescription Act 68 of 1969, s 11(a)(i).

The phrase 'mortgage bond' in s 11*(a)*(i) of the Prescription Act 68 of 1969— given the language of the section, the context in which it appears, its purpose, and the history of the Prescription Act — has a wide meaning and includes a 'special notarial bond' in terms of the Security by Means of Movable Property Act 57 of 1993. Therefore, the period of prescription applicable to a debt secured by a special notarial bond is 30 years.

WALDIS AND ANOTHER v VON ULMENSTEIN 2017 (4) SA 503 (WCC)

Defamation — Elements — Defamatory statement — To be actionable, statement must have 'illocutionary force', ie specific assertive form that conveys its intended effect — May emanate from context.

Media — Social media — Defamation — Final interdict to remove defamatory content from blog granted — Court ordering removal of defamatory statements, leaving balance of blog untouched in public interest.

The applicants requested an interdict ordering the respondent to remove an allegedly defamatory Internet blog post in which the applicants were accused of fraudulently mislabelling their chocolate products. Similar allegations had already been reported in other publications, including Noseweek (a national magazine). The applicants argued that the blog statements were untrue and made with the sole intention to defame. The respondent pleaded (i) truth and public interest; and (ii) fair comment. The applicants responded that public benefit was absent where the information was already in the public domain, and that absence of public interest would also derail the fair-comment defence.

Held

This matter had to be decided in the broader context of the right to freedom of expression (see [36], [39]). To qualify as defamatory, an utterance had to possess 'illocutionary force', that is, a specific assertive form (which could emanate from context) (see [25]). The illocutionary force connoted the effect the speaker intended the words to convey (see [26]).

The mislabelling of applicants' chocolate products was a public health matter that fell squarely within the truth-and-public-interest and fair-comment domains, and remained there even though the allegations in question were previously published in *Noseweek* (see [45] – [46]). The only statements in the respondent's blog that possessed the required illocutionary force were 'His claims on the Le Chocolatier chocolate slab range have been misleading and even life-threatening to diabetics' and 'It is clear that Waldis is a fraud continuously looking for business opportunities to make money at the expense and even the health of consumers' (see [54]).

Since the court was dealing with an Internet publication, it would order that the offending passages be deleted — leaving the balance of the report untouched in the public interest (see [47] – [48]).

MOGALE CITY MUNICIPALITY AND OTHERS v FIDELITY SECURITY SERVICES 2017 (4) SA 516 (GJ)

Appeal — Execution — Application to execute pending appeal — Premature and irregular if it precedes lodging of appeal — But irregularity may be cured by taking of further procedural steps — No attempt to rescind and appeal lodged — Application cured — Superior Courts Act 10 of 2013, s 18(4); Uniform Rules of Court, rule 30.

Appeal — Execution — Application to execute pending appeal — Irreparable harm — To applicant if not granted — Irreparable harm meaning irretrievable loss of what applicant entitled to under court order — Loss not retrieved by speculative future claim for damages.

State — Actions by and against — Actions by — Wasteful litigation — Court criticising waste of public funds through dilatory and obstructive rear guard litigation by state.

Mogale City, having been ordered, on review, to reinstate a contract with Fidelity, indicated that it would not comply and would request leave to appeal. In response, and pre-empting the lodging of the appeal, Fidelity applied, under s 18(1) of the Superior Courts Act 10 of 2013, for execution of the order. Mogale City then filed an answering affidavit and an application for leave to appeal.
Fidelity's application to execute was granted by the court a quo. It found (i) that s 18(1) allowed an application to execute to precede an application for leave to appeal; and (ii) that Fidelity would suffer irreparable harm, in the sense intended in s 18(3), if the order to execute were not made. On appeal Mogale City argued (i) that Fidelity's application to execute was premature and that the court a quo should not have heard it; and (ii) that refusing execution would not cause Fidelity irreparable harm because it could in future sue for damages in delict and would not be bankrupted by waiting to do so until after the appeal was decided. In a full bench appeal —
Held, as to (i) (the alleged prematurity of Fidelity's application to execute)
While the lodging of the application was premature and irregular, Mogale City was estopped from complaining *(a)* by its failure to set it aside under rule 30 of the Uniform Rules of Court; and *(b)* by its subsequent application for leave to appeal (see [14] – [15]). The purpose and scope of s 18 were wholly procedural and hence capable of being cured by further procedural steps (see [16]). Dismissing the application to execute would in any event serve only a dilatory purpose, and be wasteful and contrary to s 18's purpose to afford urgent relief (see [19]). The court a quo correctly heard the matter (see [21]).
Held, as to (ii) (the alleged absence of irreparable harm to Fidelity)
The harm of a refusal to execute would not be offset by a highly speculative delictual claim for damages (see [27] – [29]). Nor did the concept of irreparable harm imply the bankruptcy of a litigant (see [30]). Its core meaning was the *irretrievable loss of what the litigant was entitled to under the court order*, and in the present case Fidelity was entitled to be reinstated in the contract (see [30]).
Held, as to Mogale City's conduct in its litigation
The court criticised Mogale City's obstructive conduct in its litigation with Fidelity (the present being the fifth judgment in an ongoing saga), but declined to make a punitive costs order, pointing out that an urgent appeal was not the appropriate forum (see [4], [20], [31]). The court instead referred the matter to the MEC and Minister for Local Government for an investigation into the resultant squandering of government funds (see [32]).

EX PARTE HP AND OTHERS 2017 (4) SA 528 (GP)

Children— Conception and birth — Surrogacy — Surrogacy facilitation agreement — Unlawful if for remuneration — Courts should be reluctant to confirm surrogate motherhood agreement tainted by unlawful facilitation agreement — Valid payments limited to those set out in Children's Act 38 of 2005, s 301.

The court was faced with two applications for confirmation of surrogate motherhood agreements. In each case they sought the services of one Ms Strydom, a 'surrogacy coordinator'. The resulting surrogacy facilitation agreements provided that Ms Strydom would be paid R5000 for her services. The problem was that commercial surrogacy was unlawful in South Africa: s 301 of the Children's Act 38 of 2005 provided that only specified claims relating to surrogate motherhood could be

paid. These did not include those rendered by Ms Strydom. The contravention of s 301 constituted a criminal offence.
Ms Strydom, who filed an affidavit at the court's invitation, argued that the intention behind s 301 was not to criminalise all paid-for services relating to surrogate motherhood agreements, but to prohibit payments to the surrogate mother. Ms Strydom argued that otherwise interpreted, s 301 would jeopardise her constitutional right to exercise her chosen profession. A second issue was whether, if the facilitation agreements were indeed invalid, the court should refuse to confirm the surrogate motherhood agreement.
Held
Section 301 catered for two types of lawful expense — (i) costs directly related to artificial insemination, pregnancy, birth and confirmation of the motherhood agreement; and (ii) professional medical and legal expenses — and Ms Strydom's services were not directly linked to either (see [45]). Hence her services were hit by the prohibition in s 301 (see [47]).
Section 301 did not limit Ms Strydom's right to exercise her profession, but her right to require payment, which limitation was in the public interest and therefore justified (see [19], [51]). Allowing surrogacy facilitation agreements would open the floodgates and lead to commercial surrogacy and the abuse of vulnerable people, exactly what s 301 was intended to prevent (see [52]).
The court would, in light of the applicants' bona fides, the fact that the surrogates were not vulnerable women, and the applicants' desire to have children, confirm the motherhood agreements despite the unlawfulness of the facilitation agreement (see [67] – [71]).

HUYSER v QUICKSURE (PTY) LTD AND ANOTHER 2017 (4) SA 546 (GP)

Prescription — Extinctive prescription — Interruption — By service of process — Notice of joinder — *SCA* decision that notice of joinder not interrupting prescription, distinguished — Case law establishing that process served interrupting prescription where proceedings begun thereunder were instituted as step in enforcing claim for payment of debt — Notice of joinder in present circumstances meeting such standard — Prescription Act 68 of 1969, s 15(1).

The applicant instituted an insurance claim, for damage to his vehicle, against Quicksure (Pty) Ltd, whom the applicant believed had undertaken to insure the vehicle in terms of a policy entered into between them. The applicant (as plaintiff) sued Quicksure (as defendant) after the latter rejected the claim. In its plea Quicksure disputed liability, claiming that it had at all relevant times acted only as insurance *administrator* on behalf of New National Assurance Co Ltd. In the light of this information the applicant launched the present application to join New National as second defendant. When the application eventually came before the presiding officer, New National (as second respondent) argued that any claim which the plaintiff might have against it had prescribed, because, at the time of the hearing, more than three years had passed since prescription had started running (ie from when the plaintiff obtained knowledge of the second defendant on receipt of the plea (s 12(2) of the Prescription Act 68 of 1969)). The issue in dispute was whether the joinder application, served only a few months after prescription had started running, had, as argued by the applicant and disputed by New National, interrupted the running of prescription of the applicant's claim as against New National (as second

defendant), in terms of s 15(1) of the Prescription Act. Section 15(1) provides that '(t)he running of prescription shall . . . be interrupted by the service on the debtor *of any process whereby the creditor claims payment of the debt*'. New National relied on the SCA decision in *Peter Taylor & Associates v Bell Estates (Pty) Ltd and Another* 2014 (2) SA 312 (SCA) to argue that the joinder application could not be viewed as a '*process whereby the creditor claims payment of the debt*'. On an analysis of the present law, the court disagreed.

Held

Itwas generally accepted that a joinder application was a 'process' for the purposes of s 15(1). As to whether it was one whereby the creditor 'claims payment of the debt', while the joinder did not itself resolve issues of liability it did lead to pleadings and finally a trial in which such issues were resolved. It was recognised that a process to be served would be deemed to be sufficient for the purposes of interrupting prescription where it was one *whereby the proceedings begun thereunder were instituted as a step in the enforcement of a claim for payment of the debt that was owed*. The joinder application under consideration met such a standard. (See [41], [44], [46] and [53].)

In circumstances in which plaintiffs were uncertain as to which parties to hold liable, they were permitted, and in fact encouraged, to join them as defendants, rather than to institute action afresh against them. Doing so avoided a multiplication of actions and a waste of costs. To suggest that a joinder application could never interrupt prescription would be to argue that a fresh summons issued and served on the second defendant at the time when the joinder application was issued and served, would serve to interrupt prescription, but the joinder application, which was the preferred procedure, would not. Such a conclusion could not be correct. (See [44] and [53].)

In *Peter Taylor* the SCA had found that the service of a joinder application had not interrupted prescription. This, the SCA held, was because (1) the joinder application could not be said to finally dispose of some elements of the claim, but merely made it possible, from a procedural perspective, for the plaintiff to institute a claim against the defendant who had been joined; and (2) the causes of action in the joinder application and the original claim were not the same, or at least substantially the same. The present matter was however distinguishable. Firstly, there was a distinction between: on the one hand, a straightforward application — as in the present matter — to join, by means of the application per se, another party as a defendant, where the order was that the further defendant be joined immediately in the action; as opposed to a provisional-type joinder application, where leave to join was sought, leave was granted, and directions given by the court for the implementation of the order — further steps were necessary for the prosecution of the claim, including the service of the amended summons and particulars of claim. Secondly, in the present matter, the two causes of action were identical; in both cases the applicant claimed indemnification on the basis of exactly the same contract of insurance. (See [41], [44] and [46] – [54].)

It was appropriate, and in the interests of justice, to grant the joinder application. (See [54].)

JIGGER PROPERTIES CC v MAYNARD NO AND OTHERS 2017 (4) SA 569 (KZP)

Spoliation — Mandament van spolie — When available — Dispossession of right of access — Not available where no occupation or physical control exercised over property but right of access arising solely from contract.

Spoliation — Mandament van spolie — When available — Threats of spoliation — Actual wrongful deprivation of right of possession required — Not available to protect against mere threat of dispossession.

The deed of sale in terms of which the appellant (J Prop) purchased an exclusive use area in a sectional title scheme, acknowledged an agreement between the seller and a third party, a trust represented by the first three respondents, entitling the trust to access to the property 'for the purpose of servicing underground tanks'. The fourth respondent was a close corporation (the CC) which took over the trust's business during 2010, the same year that Prop acquired the property. The CC's right of access to the tanks was governed by a lease agreement with the trust.
During February 2012Prop suggested (for the first time) that the trust and/or the CC should pay a market-related rental of R3000 per month for access to the tanks, and by April 2013 threatened to deny any of the respondents access in lieu of payment. The respondents countered that unless Prop withdrew this threat and confirmed that it would not interfere with their right of access to the tanks, they would approach the High Court for appropriate relief. Not having received the demanded response, the respondents brought an urgent application for spoliatory relief. They contended that their right of access amounted to a quasi-possessio in the form of right of servitude, demonstrated by the actual use of that servitude; and that Prop's threats amounted to dispossession thereof. Prop, in a separate case, brought an application for a declaratory order that no servitude or other right of access existed in favour of the respondents in respect of the exclusive use area, and for an order prohibiting the respondents from accessing it without its permission. This attracted a counter-application by the respondents in which they, in turn, sought an order declaring that they had rights of access in terms of an unregistered servitude.
The High Court granted a mandament van spolie in favour of the respondents and dismissed Prop's application for a declaratory order. In this case —appeals against both decisions heard together by the full bench — the main issues were (1) whether the respondents' access to the exclusive use area amounted to a quasi-possessio which was deserving of protection by means of a mandament van spolie; and (2) whether a threat of spoliation amounted to an act of spoliation entitling a party to relief by way of amandament van spolie.
Held as to (1)
It was clear that the respondents' right to access the tanks flowed from a contractual arrangement which the parties had with each other over the years. This was the right which the trust and the CC were exercising and which Prop threatened to stop. All that they enjoyed was a right of access; they neither occupied the premises nor did they exercise any physical control over it. It was well-established that mere personal rights were not protected by the mandament; only rights to use or occupy property or incidents of occupation will warrant protection by a spoliation order. Their right of access was the consequence of an agreement — not an incident of actual possession — and their claim amounted to nothing more than a claim for specific

performance of their contractual rights. This was not permissible by way of a mandament van spolie. (See [18], [21] and [23].)
Held as to (2)
There were fundamental differences between the mandament van spolie, which was aimed at the recovery of lost possession, and a final interdict to prohibit a threatened spoliation or dispossession. An essential requirement to qualify for spoliatory relief was that there must have been a spoliation, ie there must have been a 'wrongful deprivation of another's right of possession'. Without an actual and wrongful deprivation of their purported right of possession, the spoliatory relief sought was not justified from the outset. It followed that a mere threat of dispossession could find no ground for relief through amandament van spolie.

TS AND ANOTHER v LIFE HEALTHCARE GROUP (PTY) LTD AND ANOTHER 2017 (4) SA 580 (KZD)

Medicine — Medical practitioner — Malpractice — Unlawfulness or wrongfulness — Whether legal duty to exercise required care could exist in absence of doctor/patient relationship — Parents claiming damages against doctor for harm suffered by child during birth — Defendant doctor attending labour while covering for mother's own doctor — Existence of doctor – patient relationship not determinative of whether legal duty existing — Proper test being whether public-policy considerations requiring that doctor owed patient and unborn baby legal duty and whether he should be held liable to compensate them for damage caused by negligence on his part.

During the course of his birth a child suffered birth asphyxia, which resulted in his later developing cerebral palsy. His parents claimed damages against the hospital at which the mother, Mrs S, gave birth, as well as the attending obstetrician, Dr Suliman. The parents claimed that in attending to the mother's labour they had acted negligently, which negligence caused the harm. The defendants undertook, jointly and severally, to pay to the plaintiffs an amount in settlement of quantum and liability. The present proceedings concerned the apportionment of liability between the hospital and Dr Suliman, with the former seeking a contribution from the latter in terms of the Apportionment of Damages Act 34 of 1956. While the hospital accepted that there was negligence on the part of its nursing staff in failing to recognise warning signs of the baby's distress during labour, Dr Suliman denied all liability.
Dr Suliman was not in fact Mrs S' own obstetrician; that was Dr Maise. At the time Mrs S went into labour, Dr Maise was unavailable, but he had arranged with Dr Suliman for the latter to cover for him. On being informed, telephonically, by hospital staff of Mrs S' admission to the hospital subsequent to her having gone into labour, Dr Suliman proceeded to manage the labour process telephonically on the basis of information received from the treating nurses from time to time. He only personally saw the patient at the hospital more than 10 hours after being initially informed of her admission. He then discovered that the baby had been in distress for some time and had to be delivered as a matter of urgency. The child was born in poor condition and developed cerebral palsy later. The hospital claimed that Dr Suliman had acted negligently in failing to personally attend to Mrs S much earlier than he did, and in relying exclusively on the nurses' telephonic reports as to her condition.
Addressing the question of wrongfulness, Dr Suliman argued that in the absence of a doctor – patient relationship, there could be no legal duty on a doctor which could give rise to liability on his part for harm suffered by a person. Dr Suliman argued that

in the present case there was no such relationship during the period during which he had directed the nursing staff telephonically. This was because Dr Maise was the patient's obstetrician and he (Dr Suliman) was merely covering for him in the event of an emergency or imminent delivery. Only when he arrived at the hospital and treated Mrs Spersonally did such a relationship, and legal duty, arise. Dr Suliman denied further that he was negligent, and, in the event that it was found that he was, he denied that any negligence on his part was causally related to the injury to the child.
Held, as to the issue of legal duty, that the question was not whether there was a doctor – patient relationship between Dr Suliman and the patient, but rather whether public-policy considerations required that Dr Suliman owed the patient and her unborn baby a legal duty and whether he should be held liable to compensate them for the damage caused by negligence on his part. (Paragraph [16] at 587C – D.)
Held, that considerations of reasonableness and public policy required that Dr Suliman should be held liable for the consequences of any negligent omissions on his part. He in other words had a legal duty to exercise the degree of care and skill required of a specialist obstetrician, and that duty had arisen at the latest when he was informed of the patient's admission and gave telephonic instructions to the nursing staff with regard to her care. (Paragraphs [23] and [27] at 588E – I and 590A.)
Held, that Dr Suliman was negligent in not personally examining Mrs S earlier and verifying for himself that everything was in order. (Paragraphs [27] – [28] at 590A – B.)
Held, however, that the hospital had failed to prove a causal link between Dr Suliman's negligence and the cerebral palsy suffered by the child. (Paragraph [35] at 591E – F.)

BP SOUTHERN AFRICA (PTY) LTD v INTERTRANS OIL SA (PTY) LTD AND OTHERS 2017 (4) SA 592 (GJ)

Company law — Business rescue — Effect on contracts — Suspension of 'any obligation' arising from agreements — Scope of 'any obligation' — Including company's obligations contractually tied with reciprocal obligation of creditor under same agreement — Creditor retaining contractual remediesin event of such suspension but may not demand performance contrary to suspension — Companies Act 71 of 2008, s 136(2)(a)(i).

Company law — Business rescue — Effect on contracts — Suspension of 'any obligation' arising from agreements — Effect on cession of future book debts — Companies Act 71 of 2008, ss 134(3), *136(2)*(a)*(i) and 136(2A)*(c).

Company— Business rescue — Moratorium on legal proceedings against company — Leave of court to commence or proceed with legal proceedings — Application for — Whether may be made by way of prayer in application to commence or proceed with legal proceedings, or must be made in separate application — Companies Act 71 of 2008, s 133(1)(b).

Company law— Business rescue — Termination — Setting aside resolution to begin rescue and putting company into liquidation — Factors — Resulting unemployment — Companies Act 71 of 2008, s 132(2)(a)(i).

The main relief that the applicant (BPSA) sought in this application was the liquidation of the first respondent (IOSA), a company in respect of which a resolution

to place it under business rescue had been adopted but not yet the business rescue plan.
Section 133 of the Companies Act 71 of 2008 places a general moratorium on legal proceedings against a company, without the written consent of the business rescue practitioner (s 133(1)*(a)*) or without the leave of the court (s 133(1)*(b)*). Here no separate application was made for leave to institute legal proceedings against IOSA, BPSA asking for such leave in a separate prayer of the liquidation application. This raised the following procedural issue:
• Whether a separate substantive application was required (as IOSA contended) to lift the moratorium before the present application could have been launched.
Held, that prospects of an application for leave would generally be heavily reliant on the prospects of success in the main relief to be sought. Where the main relief went to the very status which invoked the moratorium protection, it seemed overly technical to insist on two distinct applications as opposed to one application with two sets of prayers: one for permission, and one for the substantive relief. In other words, if the application were bad on the merits, the order should be to refuse leave to institute the proceedings. (See [27] – [28].)
BPSA was a major creditor of IOSAs, supplying it with petroleum products for on-selling to the 'macro-consumption retail market' and leasing it premises to conduct such business. This was in terms of two agreements in respect of which the second respondent, the business rescue practitioner (the BRP),had invoked s 136(2)*(a)*(i) of the Act to suspend all IOSA's obligations. The BRP however insisted that BPSA's reciprocal obligations remained enforceable at IOSA's instance; and also that the suspension included IOSA's obligations under a cession of its book debts to BPSA in respect of book debts arising in business rescue. This raised the following issues regarding the meaning and effects of the suspension of 'any obligation . . . under an agreement' in terms s 136(2)*(a*):
• Whether the suspension of 'any obligation . . . under an agreement' included company obligations that were tied to a creditor's reciprocal obligations under the same agreement; and if so, what the creditor's rights were when these were suspended but the BRP (as in this case) still insisted on the creditor performing the reciprocal obligations.
Held, that the words 'any obligation' are of wide (if not unlimited) import, and so they would, at least prima facie, include obligations that were contractually tied with a reciprocal obligation of the creditor. Since the section was silent about the effect that the suspension would have on such an obligation, and since the legislature must be taken to know the law of contract, it must be accepted that the creditor had available, subject to the normal rules, the *exceptio non adimpleti contractus* and, if the normal rules of materiality and contractual notices applied, also the normal rights of cancellation. It followed that the BRP's suspension of all IOSA's obligations — including obligations tied to BPSA's reciprocal obligations — entitled BPSA to withhold product, access to the leased premises and equipment, and to cancel the relevant agreement on appropriate notice. However, BPSA may not simply ignore the suspension and insist on performance contrary to it. (See [34] – [40].)
• The status of the security afforded by a cession of book debts in respect of book debts incurred after such suspension, ie whether the cession of book debts continued to operate in respect of book debts arising from sales concluded after suspension.
Held, that s 136(2A)*(c)* expressly provided that an agreement relating to security 'continue(d) to apply for the purpose of s 134 [dealing with the protection of property

interests] with respect to any proposed disposal of property by the company'. A security cession of future book debts was complete and effective by mere initial agreement. When at the future date the book debts came into existence, then, without more and without any further obligation on the cedent, they became the property of the cessionary. In consequence, whenever the book debts arose, now or in the future, they belonged to the cessionary — at least to the extent of the indebtedness — and may in terms of s 134(3) of the Act not be disposed of without the cessionary's consent. (See [42] – [48].)
On behalf of the employees it was submitted that the court should prefer business rescue to liquidation since the latter would lead to job losses. This raised the issue of the consideration to be given to resulting unemployment in the choice between business rescue and liquidation, where (as in this case) liquidation was inevitable (see [81]).
Held, that, where a company was distressed, it was not always the solution to deny principal creditors the entitlement to realise the very security that persuaded them to extend the working capital in the first place. If courts were not prepared to enforce commercial securities, investment — the essential precursor to employment opportunities — would seek other pastures.

BRODSKY TRADING 224 CC v CRONIMET CHROME MINING SA (PTY) LTD AND OTHERS 2017 (4) SA 610 (SCA)

Estate agent — Fidelity fund certificate — Estate agent company converted to close corporation; certificate issued to erstwhile company; corporation procuring buyer for property — Whether corporation complying with requirement that only holder of certificate may perform acts of estate agent and receive remuneration therefor — Whether property sold comprising 'business undertaking' — Whether buyer or joint venture liable for commission— Estate Agency Affairs Act 112 of 1976, ss 1, 26 and 34A(1).

In mid-2005 the Estate Agency Affairs Board issued a company a fidelity fund certificate that was valid until the end of the year. No certificate was issued to it for 2006.
In early 2006 the company was converted to a close corporation (appellant). No certificate was issued to it in that year.
Then in early 2007 a seller mandated the corporation to find it a buyer for certain shares, an immovable property, and a permit. In mid-2007 the Board issued the erstwhile company and its director with certificates, and shortly thereafter the corporation introduced a buyer (second respondent) to the sellers, thereupon allegedly becoming entitled to commission.
The corporation later instituted an action for the commission, and the High Court concluded that it had complied with ss 26 and 34A of the Act; that what had been sold was a 'business undertaking' (s 1); but that the corporation had failed to prove its mandate. It accordingly dismissed the action, but granted the corporation leave to appeal to the Supreme Court of Appeal (see [1] and [3] – [4]).
The issues were:

- Whether there had been compliance with ss 26 and 34A. Those provisions provide that no one shall perform an act of an estate agent (s 26) or receive remuneration for such an act (s 34A (1)) unless they have been issued with a valid fidelity fund certificate. *Held*, that there had not been. Before conversion, the

company had no certificate that on conversion could vest in the corporation; nor had the company or Board done anything in respect of an application for a certificate that could be attributed to the corporation (s 27(5) of the Close Corporations Act 69 of 1984). Post-conversion, the certificates the Board issued to the non-existent company and director were invalid under s 16(4). (See [11], [13] – [14] and [20] – [22]).

- Whether the sale of shares, a permit, and an immovable property was a sale of a 'business undertaking' (s 1). *Held*, that it was, and that absent a certificate, appellant was barred from receiving commission on it (s 34A (1)). (See [23], [27] and [29].)
- Whether the buyer (second respondent) or a joint venture were liable to pay the commission. *Held*, that they were not (see [30] and [33] – [38]).

Appeal dismissed (see [39]).

MOBILE TELEPHONE NETWORKS (PTY) LTD v BEEKMANS NO AND OTHERS 2017 (4) SA 623 (SCA)

Local authority — Buildings — Temporary buildings — Meaning of 'provisional authorisation' — Requirements for classification as temporary building — National Building Regulations and Building Standards Act 103 of 1977; National Building Regulations, regs A23(1) and A23(6).

Appellant had obtained from the City of Cape Town an authorisation to erect, as a temporary building, a cellular communications base station. A trust had succeeded in setting the authorisation aside. On appeal to the Supreme Court of Appeal, the issues were:

(1) The meaning of 'provisional authorisation' in regs A23(1) and (6) of the National Building Regulations. *Held*, that it meant temporary authorisation (see [10] and [13]).

(2) The requirements for a building to be classed as a 'temporary building'. *Held*, that they were those expressly mentioned in the regulation's definition of 'temporary building', as well as an implicit requirement that, in nature and purpose (objectively assessed), the building was temporary (see [10], [17] – [18] and [26]).

Appeal dismissed (see [27]).

MTSHALI AND OTHERS v MASAWI AND OTHERS 2017 (4) SA 632 (GJ)

Local authority — Housing — Temporary emergency accommodation — Whether lawful for municipality to charge for and to engage private party to provide — Mediation to resolve accommodation-allocation disputes — Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, s 7.

Land— Unlawful occupation — Eviction — Statutory eviction — Groups — Identification of members — Resistance to service — Instigators to non-compliance with eviction orders — Recommendations.

In this case the owners of an inner-city building obtained an eviction order against its occupants; the order was executed; and the evictees were rendered homeless. They then applied, inter alia, for rescission of the order, and that the City of Johannesburg provide them with temporary emergency accommodation. The court ultimately dismissed the rescission application; ordered the City to provide the accommodation;

and adult evictees who were able to, to pay the City R10 a day for it (see [5], [19], [23], [39],[62] – [64] and [136]).
The evictees appealed to the full bench (see [2], [5] – [6] and [86]). The issues were:
(1) Whether the court should have rescinded the eviction order. *Held*, that it had correctly not done so (see [87], [107]).
(2) Whether it was lawful for the City to charge for temporary emergency accommodation. *Held*, that it was, provided the amount was affordable (see [115], [118], [120] and [134]).
(3) Whether the amount was reasonable (s 26(2) of the Constitution). *Held*, that it was: it was less than what the evictees had tendered to pay the building's owners as rental, were their occupation restored (see [101],[121], [135] and [138]).
(4) Whether it was lawful for the City to engage a private party to provide the accommodation. *Held*, that it was (see [125]).
(5) Whether it had been reasonable to outsource provision of the accommodation. *Held*, that it had been: the evictees had declined the only City-run and -owned accommodation that was available (see [50], [73], [126],[141] – [142], [145] and [147]).
(6) Whether the court erred in refusing to grant a structural order. (The order would have provided for court oversight of the City's actions towards more permanently housing the evictees.) *Held*, that it had not (see [153], [161] and [163]).
The court also raised the possibility of costs awards against parties who instigated non-compliance with eviction orders; and proposed that attempts be made to resolve accommodation-allocation issues by mediation (s 7 of PIE * before the courts were turned to (see [160] – [161], [181] and [187] – [188]).
The court further suggested that if an applicant was a group, that the group members identify themselves in a list annexed to the group's affidavit (see [196] – [197], [201]). Where an applicant was against a group whose members resisted identifying themselves, the applicant could obtain an order that the sheriff ascertain the identity of the group's members (see [196], [201]).
If the group's members resisted personal service, the measures described at [198] could be employed. Appeal dismissed.

SACR AUGUST 2017

S v KLASSEN 2017 (2) SACR 119 (SCA)

Sentence — Imprisonment — Parole — Order that accused not to be released on parole for certain period in terms of s 276B of Criminal Procedure Act 51 of 1977 — Such power to be sparingly exercised and only after proper enquiry.

The appellant was convicted in a regional magistrates' court of murder and was sentenced to 15 years' imprisonment under the provisions of s 51(2)*(a)*(i) of the Criminal Law Amendment Act 105 1997. After sentencing him, the court, without further ado, issued an order in terms of the provisions of s 276B of the Criminal Procedure Act 51 of 1977 (the CPA), that he was not to be placed on parole before he had served two-thirds of his sentence. An appeal to the High Court against conviction and sentence was dismissed but the Supreme Court of Appeal granted leave to appeal against sentence.
Held, that the grant of parole was something best left to the executive and those officials charged with the duty of considering and deciding upon it. The power of a trial court to act under s 276B of the CPA should be sparingly exercised, and then

only after having held an enquiry as to the desirability of such an order and hearing argument on the issue (see [11]).
The court dismissed the appeal against sentence on the merits, but deleted the provision relating to the withholding of parole.

S v NWABUNWANNE 2017 (2) SACR 124 (NCK)

Bail— Application for — Onus — On accused — Section 60(11) of Criminal Procedure Act 51 of 1977 — Before accused burdened with onus, jurisdictional fact that offence was one listed in sch 5 or 6 to Act to be properly established.
Bail— Application for — Onus — On accused — Section 60(11) of Criminal Procedure Act 51 of 1977 — Given drastic consequences of s 60(11), desirable that procedural provisions of s 60(11A) be closely adhered to.
Bail — Application for — Second or subsequent application — New facts — Accused should not lightly be denied opportunity of presenting new facts.

The appellant appealed against an initial refusal of bail by a magistrate and also a subsequent application to introduce new facts in a further application for bail. The charge-sheet indicated that he was charged with two counts of contravening s 5*(b)* of the Drugs and Drug Trafficking Act 140 of 1992 (the Act), in that he had dealt in cocaine and methamphetamine, undesirable dependence-producing substances listed in part III of sch 2 to the Act. The weights of the substances were specified in said charge-sheet, but not the value thereof.
At the outset of the initial bail application, the prosecutor indicated that the application was one in terms of sch 5 as envisaged in s 60(11)*(b)* of the Criminal Procedure Act 51 of 1977 (the CPA). Despite this, the prosecutor appeared to accept the onus and commenced proceedings by leading the evidence of the investigating officer, after which affidavits by the appellant (and his co-accused) were presented in support of the application. It was only during argument that the appellant's legal representative addressed this issue, submitting that it was a sch 1 application and that thestate accordingly bore the onus. In her judgment, the magistrate said that she would treat it as a normal bail application and found that the appellant was not a suitable candidate for bail. She also considered him to be a flight risk and accordingly refused bail.
In respect of the second application based on the introduction of new facts, the appellant averred that the evidence of the investigating officer, in the initialbail application relating to video footage, appeared to be false and that he had misled the court. It was placed on record that the case docket indicated that there was neither video nor audio footage that linked him to either of the two offences that he had been charged with, because he was not the person in the video. In her further judgment, the magistrate did not deal with these issues, but found that the strength of the state's case would only become clear at the end of a trial-within-a-trial. She also found that the appellant had not convinced her of any new facts, and denied him the opportunity to adduce evidence in this respect.
Held, that before an accused was burdened with the onus envisaged in s 60(11) of the CPA, the jurisdictional fact that the offence was one listed in sch 5 or 6 had to be established either by a certificate from the Director of Public Prosecutions in terms of s 60(11A) or by means of a full description of the charge in the charge-sheet, including the value of the dependence-producing substance. The absence of both in

the present case meant that it could not be ascertained whether the offences fell within the ambit of sch 5 (see [13]).
Held, further, that, given the drastic consequences for an accused if s 60(11) of the CPA applied, it was desirable that the procedural provisions of s 60(11A) be closely adhered to, and that proof of the nature of the charges should occur with some formality, either at the commencement of proceedings or as soon thereafter as possible. The magistrate had erred in this respect and the appeal had to be allowed on this ground alone (see [15], [17] and [19]).
Held, further, as to the second application, that an accused should not lightly be denied the opportunity of presenting new facts by means of adducing evidence. The submissions by the appellant's counsel indicated that, at least prima facie, the evidence in the initial bail application may have been compromised and the state's case might not be as strong as was suggested. The magistrate was also incorrect in ruling that the appellant had not established new facts, without having provided him the opportunity of adducing evidence in respect of the alleged new facts (see [25] and [27]).
Bail application remitted to the court a quo for a ruling on whether it was to be adjudicated in terms of s 60(11) *(b)* and appellant to be afforded opportunity to adduce evidence pertaining to new facts in support of his further application.

DIRECTOR OF PUBLIC PROSECUTIONS, GAUTENG v MG 2017 (2) SACR 132 (SCA)

Appeal — By Director of Public Prosecutions in terms of s 311 of Criminal Procedure Act 51 of 1977 — Question of law — What constitutes — Imputing consent to sexual acts by 10-year-old child in mitigation of sentence constituting error of law triggering s 311.

The respondent was convicted in a regional magistrates' court three counts of rape and several other counts relating to child pornography. The complainant on the rape counts was the respondent's 10-year-old stepdaughter whom he also used in some of the child-pornography counts. He was sentenced to life imprisonment on each of the counts of rape and 10 years' imprisonment (effective) in respect of the remaining counts.
He appealed to the High Court against his convictions and sentences. In respect of two of the rape counts, the court found that there was no proper proof of penetration, and that those convictions had to be set aside and replaced with convictions of sexual assault in contravention of s 5(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the Sexual Offences Act). As to the remaining counts, the court found that there was a strong suspicion that the victim was not an unwilling participant, even though she was only 10 years old at the time, and thus, for the purposes of s 57(1) of the Sexual Offences Act, unable to consent to sexual acts. It then imposed a globular sentence of 10 years' imprisonment, treating all the counts as one for purposes of sentence, of which five years were suspended.
The state appealed against the sentences under s 311 of the Criminal Procedure Act 51 of 1977 (the CPA) and contended that imputing consent by conduct to the commission of the offences by a child under the age of 12, for the purposes of mitigation of sentence, amounted to an error of law by the High Court, justifying the appeal in terms of the section.

Held, that, in imputing such consent to the complainant, the High Court had done so despite the clear and unequivocal provisions of s 57(1) of the Sexual Offences Act, and had committed an error of law. The case therefore fell foursquare within the purview of s 311 of the CPA and, in the circumstances, the interests of justice dictated that the sentence imposed by the High Court had to be set aside (see [28]). The matter was remitted to the High Court for the appeal on sentence to be dealt with in accordance with the principles set out in the judgment.

S v JA 2017 (2) SACR 143 (NCK)

Rape — Sentence — Life imprisonment — Minimum sentence in terms of Criminal Law Amendment Act 105 of 1997 — Relatively old offender — Argument that would only be eligible for parole when very old and therefore life imprisonment not appropriate, rejected.

The appellant was 59 years of age when he was sentenced in the High Court to life imprisonment for the rape of his 12-year-old daughter. On appeal it was contended, inter alia, that his advanced age should have been considered as a mitigating factor, as he would become eligible for parole (with reference to the provisions of s 73 of the Correctional Services Act 111 of 1998) no sooner than the age of 74, and possibly, only when he reached the age of 84.
Held, that, in imposing sentence, the court could not take into account or rely on the possibility that the offender could be released on parole after having served a specified portion of the maximum period. It was not for the sentencing court to try to work out how old an offender could be when (if at all) the executive decided to release him or her on parole (see [38] – [39]). The appeal was dismissed.

S v PILANE 2017 (2) SACR 154 (SCA)

Evidence— Witness — Oath — Administering of — By interpreter — Permissible where done in presence of judicial officer.

The High Court found in an appeal from a conviction and sentence in a regional magistrates' court that, insofar as the oath taken by the three state witnesses was administered by the interpreter and not by the magistrate, it was done irregularly. This vitiated the proceedings and the conviction and sentence imposed by the regional court had to be set aside. The state appealed against this decision on a question of law under s 311 of the Criminal Procedure Act 51 of 1977 (the CPA).
Held, that, where a witness testified through the interpreter, the latter was empowered to administer the oath if the judicial officer so preferred and if the interpreter did so in the presence of or under the eyes of the judicial officer. In doing so, judicial officers were not abdicating their responsibilities but were doing what was permissible in terms of s 165 of the CPA (see [14]).
Held, accordingly, that the appeal had to be upheld and the order of the High Court set aside, and the conviction and sentence imposed by the regional court reinstated.

S v MOKGALAKA 2017 (2) SACR 159 (GJ)

Sentence — Prescribed minimum sentences — Criminal Law Amendment Act 105 of 1997 — Charge — Charge-sheet not specifying whether accused charged with murder under s 51(1) or (2) — Record of bail proceedings indicating that accused charged with sch 6 offence and that provisions of s 51(1) applicable — No prejudice suffered.

In an appeal against a conviction in a regional magistrates' court for murder, and against sentence in respect of a sentence of life imprisonment, it appeared that the appellant was charged with murder read with s 51 of the Criminal Law Amendment Act 105 of 1997, but the charge-sheet did not specify whether he was charged under s 51(1) or s 51(2). The record of proceedings indicated that, although the magistrate explained the minimum-sentence provisions, it did not reflect whether he drew the appellant's attention to the fact that he might face a minimum sentence of 15 years in terms of s 50(2), or life imprisonment in terms of s 50(1). It was accordingly contended that the appellant had been prejudiced thereby.
Held, that it was clear from the record of the bail proceedings that the state alleged that the murder was premeditated and that it was accordingly a sch 6 offence. He could therefore not have been under any misapprehension that the state intended to rely on s 51(1) rather than s 51(2) and that, if convicted, he faced a potential sentence of life imprisonment. There had accordingly been no unfairness or prejudice (see [25]–[26]).
Held, however, on the evidence, that the state did not prove that the offence was either premeditated or planned and the sentence had to be reduced accordingly. The sentence was replaced with one of 18 years' imprisonment (see [33] and [38]).

S v MUNYAI 2017 (2) SACR 168 (GJ)

Appeal— Further evidence — Application for — Approach to — Application fundamentally flawed in that circumstances in which complainant recanted her incriminating evidence not explained, but evidence on which conviction based problematic — Court providing directions for further conduct of case.

The appellant was convicted in a regional magistrates' court of rape and was sentenced to life imprisonment. He appealed against his conviction and sentence and an application was brought on his behalf to lead further evidence in terms of s 309B (5) and (6) of the Criminal Procedure Act 51 of1977, which was not opposed by the state. Said application was based on an affidavit in which the complainant recanted her earlier evidence of rape. At the trial the complainant testified that the appellant, who was the father of her two children, had been abusive towards her and that she had broken off their relationship sometime before the offence. On the day in question he had abducted her and taken her to his home where he had raped her twice. There was no explanation of how the affidavit had found its way into the court record and the affidavit itself was silent as to what had happened on the day in question. It appeared furthermore that the evidence substantiating the rape was problematic in that, inter alia, the complainant had, after the incident, laid a charge of assault against the appellant, and not one of rape. She also testified that she had had consensual sex with the appellant whilst he was out on bail, contrary to his bail conditions.

Held, as to the application to lead further evidence, that it was fundamentally flawed in the absence of a full and convincing case explaining how the affidavit came to be in the court file; the circumstances in which the complainant decided to recant; what role the appellant, his family or friends had played in her decision to recant; and who had drafted the affidavit (see [9] and [11]).
Held, further, as to the merits of the appeal, that it was plain that the evidence substantiating the rape was problematic. Although there was substantial evidence pointing to an abusive relationship between the appellant and the complainant, and assaults on the night and day in question, there was very little to offer assurances that a rape had indeed occurred, other than the complainant's belated say-so (see [21]).
Held, further, that the trial had been conducted with such robustness that the many finer details and nuances which were important were not addressed (see [22]). In the circumstances, it was appropriate to set aside the conviction and sentence and allow the trial to be reopened for further evidence (see [24]). The court gave directions for the further conduct of the case.

DIRECTOR OF PUBLIC PROSECUTIONS, GAUTENG v KM 2017 (2) SACR 177 (SCA)

Appeal — By Director of Public Prosecutions in terms of s 311 of Criminal Procedure Act 51 of 1977 — Leave to appeal — Not required under section.

The Director of Public Prosecutions (the DPP) appealed in terms of s 311 of the Criminal Procedure Act 51 of 1977 (the CPA) against a decision in the High Court in an appeal to that court by the respondent against his conviction and sentence imposed in a regional magistrates' court for the rape of a 13-year-old girl. The High Court set aside the conviction and sentence based on the grounds that sexual intercourse had not been proved; the lackof evidence proving the chain of events relating to the blood sample taken from the respondent; and the failure by the state to lead evidence to 'corroborate the samples and the authenticity of the tests conducted and to link such samples' to the respondent. The DPP argued on appeal that the failure by the court to take into account relevant evidence was an error of law — it had not considered anything other than the DNA evidence, neglecting to consider the direct evidence.
Held, by the majority (Gorven AJA, with Maya AP and Theron JA concurring), that the High Court had simply failed to consider admissible evidence by confining itself to the DNA evidence. This was accordingly a question of law decided in favour of the respondent and the provisions of s 311 of the CPA were therefore triggered. That question of law had to be decided in favour of the appellant (see [31]).
Held, further, that an application for leave to appeal was not required in a matter arising from the application of s 311 (see [51]).
Held, by the minority (Dambuza JA, with Molemela AJA concurring) (both judges concurring with the majority that the High Court had failed to consider the admissible evidence and that this constituted a question of law triggering the provisions of s 311), that, although s 311 created the right of appeal, s 16(1)*(b)* of the Superior Courts Act 10 of 2013 set the procedure and bench mark for all appeals to be held in the Supreme Court of Appeal, and therefore leave to appeal was required (see [24]–[25]).

The appeal was allowed and the matter remitted to the High Court for the appeal to proceed on the merits.

S v LIESCHING AND OTHERS 2017 (2) SACR 193 (CC)

Appeal — Leave to appeal — Refusal of by Supreme Court of Appeal — Reconsideration of — Applicability of s 17(2)*(f)* of Superior Courts Act 10 of 2013 to criminal appeals — Definition of 'appeal' in s 1 not excluding all criminal matters from scope of ch 5 of Act — Section 17(2)*(f)* applicable in present matter.

A High Court had found that the three applicants had been involved in an assassination-style killing of the deceased. They were sentenced to life imprisonment. A fourth person was subsequently charged with the same offence, but in his trial, the witness, upon whom the state had relied in the earlier trial, recanted his testimony and this accused was then acquitted.
When the applicants became aware of this development, they approached the President of the Supreme Court of Appeal with an application to refer the refusal of their petition to the court for reconsideration in terms of s 17(2)*(f)* of the Superior Courts Act 10 of 2013 (the SC Act) — this was based on the further evidence that came to light in the subsequent trial.
The President dismissed the application on the basis that the evidence was discovered after they had exhausted all their recognised appeal procedures. He noted that s 1 of the SC Act provided that the word 'appeal' in ch 5 of the Act did not include matters regulated in terms of the Criminal Procedure Act 51 of 1977 (the CPA). He found that s 327(1) of the CPA made provision for cases where a convicted person wanted to adduce further evidence that became available after all the recognised legal procedures pertaining to appeal had been exhausted, and that ch 5 was therefore not applicable to their case.
The applicants then applied in the present proceedings for leave to appeal against this dismissal.
Held, that it was incorrect that ch 5 of the SC Act did not apply at all to criminal proceedings, as this was not textually supported by a careful reading of s 1 of the Act. The President had correctly, on numerous occasions, applied s 17(2)*(f)* to criminal proceedings (see [62]).
Held, further, that the President's interpretation created an anomaly, in that a litigant in a civil matter, who wanted to adduce further evidence after a petition had been dismissed, could utilise s 17(2)*(f)*, whereas a convicted person in the same position could not (see [63]).
Held, further, that the interpretation, that s 17(2)*(f)* could be utilised by litigants in criminal or civil proceedings to adduce further evidence after a petition had been dismissed, eradicated that anomaly. It also preserved the applicants' right to equal treatment before the law and was in conformity with the command in s 39(2) of the Constitution (see [64]).
Held, further, that the President had not considered whether the further evidence sought to be adduced was an exceptional circumstance, as required by the section, and had therefore not made a determination whether the matter presented an exceptional circumstance that warranted its referral to the court for reconsideration or variation in the interests of justice (see [65]). The court accordingly granted leave to appeal and upheld the appeal, and remitted the matter to the President of the Supreme Court of Appeal to consider the application.

MATHE v MINISTER OF POLICE 2017 (2) SACR 211 (GJ)

Damages — Measure of — For unlawful arrest and detention — Plaintiff unlawfully arrested and detained for 37 hours before release at court after charge of prostitution dismissed — Arrest taking place whilst waiting for taxi with her two friends after having had meal at restaurant — Conditions in cell where she was detained inhumane, stigmatised as result of nature of charge and lost job — Damages of R120 000 awarded.

The plaintiff instituted action against the defendant for damages for an alleged unlawful arrest and detention. The claim arose from an incident that occurred late one Monday evening when the plaintiff, a 31-year-old mother of two children, left a restaurant in the company of two of her female friends and, after finding that a nightclub that they wished to attend was closed, they decided to go home. They then proceeded to a nearby filling station where they sat on chairs outside waiting for a taxi to arrive. After about 10 minutes an unmarked vehicle pulled up next to them and two men alighted and questioned them as to what they were doing there. They responded that they were waiting for a taxi, whereupon the one man asked whether they took him for a fool. They were told that they were being arrested and the man ordered them into the vehicle, without informing them of the charge against them, although he did identify himself as a policeman.
They were taken to the holding cells at the nearby police station. After some time the police arrived and told them that they were being charged with prostitution. The cell into which they were placed was filthy, had a toilet which was not functioning, and there was no toilet paper. There was one tap but it had no water. There were dirty blankets on the floor and, because of the excrement in the toilet, the smell inside the cell was unbearable.
The plaintiff, the only one of the three women who instituted action, testified that she had not been permitted to make a telephone call, despite her being anxious as to the fate of her sickly mother and her children. At 07h00 on the Wednesday morning she was handed a document which reflected that she had been arrested for prostitution. She was then taken to the magistrates' court where she was released at 15h00 in the afternoon, after having been detained for approximately 37 hours. She further testified that the case was important to her because when she arrived home, some young men said to her that they heard that she had been out selling her body and wanted to know what her fee was. She said that she had suffered shock, psychological trauma, emotional shock and contumelia.
The defendant admitted that the arrest and detention were unlawful and the court was only called upon to determine the quantum of general damages and the scale of costs.
Held, the police had abused the power entrusted to them and had not even taken the basic step of identifying themselves before starting their interrogation of the women. They had not explained the plaintiff's constitutional rights to her until the Wednesday morning, and had conducted themselves in a high-handed manner. The plaintiff had also been subjected to prejudices which were exclusively based on gender. She had not only been detained under inhumane conditions, but had also lost her employment and been stigmatised as a result of the nature of the offence which she was alleged to have committed (see [32], [36] and [39]).

Held, further, that, having regard to the facts as a whole, past award and the relevant case law, a fair and reasonable amount for the damages to be awarded to the plaintiff was the amount of R120 000 (see [40]). Costs were awarded on the High Court scale.

ALL SA LAW REPORTS AUGUST 2017

AON South Africa (Pty) Ltd v Van den Heever NO and others [2017] 3 All SA 365 (SCA)

Civil procedure – Action to recover dispositions made by company prior to liquidation – Special plea – Res judicata – Issue estoppel – Requirements – Res judicata deals with the situation where the same parties are in dispute over the same cause of action and the same relief, and issue estoppel involves the relaxation in appropriate cases of the common law requirements that the relief claimed and the cause of action are the same – Identity of interests between plaintiffs in the two actions sufficient to satisfy requirement of same party.

New Protector Group Holdings (Pty) Ltd ("New Protector") was a company which had been liquidated. Its acquisition of the business of Protector Group Holdings (Pty) Ltd ("Protector") for some R63 million gave rise to the present litigation. Of that sum, R50 million was paid to Glenrand MIB Financial Services (Pty) Ltd ("Glenrand Financial Services") as the purchase price of its 65% stake in Protector. That was sold to a company ("Freefall") which held a 49% stake in New Protector. Glenrand Financial Services was a wholly owned subsidiary of Glenrand MIB Ltd ("Glenrand") and existed solely for the purpose of holding the 65% interest in Protector. It used the entire sum of R50 million to repay an existing indebtedness to Glenrand.

The present case was the second one in which it was sought to recover that amount for the benefit of New Protector's creditors. Shortly before the previous action reached finality, the appellant ("AON") acquired Glenrand's business and assumed liability for any claims against Glenrand. It, accordingly, intervened in the previous action and was the defendant in the present case.

The previous case, brought by the liquidators of Protector, resulted in the liquidators succeeding against Glenrand Financial Services on the ground of enrichment alone. Within a few months of the previous judgment, Glenrand Financial Services was liquidated and its liquidators instituted proceedings against AON. The present appeal arose from a special plea by AON flowing from the fact that the previous litigation against Glenrand, and therefore indirectly against AON, was resolved in its favour. It contended that the issues raised by the present case were resolved in its favour in the previous litigation and were *res judicata* as against Glenrand Financial Services' liquidators. The form of *res judicata* on which it relied is commonly referred to as issue estoppel. The special plea proceeded as follows. In the previous litigation, the substantial issue was the recovery from Glenrand Financial Services and Glenrand of the capital amount of R50 million and the interest accrued thereon. Glenrand Financial Services and Glenrand made common cause in that litigation. The judgment granted against Glenrand in the High Court was abandoned prior to the appeal to this Court. The appeal to this Court dismissed all claims based on dishonesty. In those circumstances and by reason of public policy; fairness (particularly in that AON should

not be exposed to a second trial); the fact that the same sum of money paid in the same circumstances was in issue; the facts, evidence and the underlying cause of the claim being, by and large, similar to the facts, evidence and underlying cause of the first action; and the question of the payment of the money having previously been definitively disposed of, the liquidators of Glenrand Financial Services were precluded by the *exceptio res judicata vel litis finitae*, or issue estoppel, from pursuing the present proceedings.

The High Court held that the special plea failed on all three aspects of the defence of *res judicata*. It said that the parties were different because the plaintiffs in this case are the liquidators of Financial Services, whereas in the previous case the plaintiffs were the liquidators of Protector. As regards the causes of action it compared the relevant facts on which the claims in each case were based and held that they were entirely different.

Held – *Res judicata* deals with the situation where the same parties are in dispute over the same cause of action and the same relief. Issue estoppel involves the relaxation in appropriate cases of the common-law requirements that the relief claimed and the cause of action are the same. Where the circumstances justify the relaxation of these requirements those that remain are that the parties must be the same (*idem actor*) and that the same issue (*eadem quastio*) must arise. Broadly stated, the latter involves an enquiry into whether an issue of fact or law was an essential element of the judgment on which reliance is placed.

Only a technical distinction existed between the plaintiffs in the present action and the plaintiffs in the previous action, but that was a matter of form not substance. The liquidators of Protector were the persons who sought and obtained the liquidation of Glenrand Financial Services and they did so on the basis of the judgment they obtained in the previous action. As matters stood at present they were the only creditor of Glenrand Financial Services. The sole purpose of the litigation was to recover the amount of R50 million, in order that it could be distributed to Protector on the winding up of Glenrand Financial Services. To all intents and purposes, the liquidators of Glenrand Financial Services were merely surrogates for the liquidators of Protector.

Glenrand (in whose shoes AON stood) was a defendant in the previous action. It was a party to the previous appeal, and the same attorneys and Counsel represented it and Glenrand Financial Services in that case. That led the Court to conclude that there was a complete identity of interests between Glenrand and Glenrand Financial Services and it would be artificial to say that findings against or in favour of Glenrand Financial Services in the previous case would not be binding upon Glenrand.

The respondents' focus was on whether the decision in the previous case involved a finding on an issue that would be determinative of the outcome of the present case. The Court found that it was and that the claims advanced in the present proceedings by the liquidators of Glenrand Financial Services involved the reconsideration of the very evidence and issues that were the subject of determination in the previous action. The elements of *res judicata* in the form of issue estoppel were, accordingly, satisfied and the special plea should have been upheld. The appeal was upheld.

Home Talk Developments (Pty) Ltd and others v Ekurhuleni Metropolitan Municipality
[2017] 3 All SA 382 (SCA)

Delict – Claim for damages – Failure by municipal manager to issue a section 82 certificate in terms of the Town-Planning and Township Ordinance 15 of 1986 – Pure economic loss – Conduct is wrongful in the delictual sense if public policy considerations demand that in the circumstances the plaintiff has to be compensated for the loss caused by the negligent act or omission of the defendant – Court finding that municipality did not act wrongfully in the delictual sense and was not in breach of any legal duty owed by it to the appellants.

The dismissal of the appellants' claims gave rise to the present appeal. The basis of the claims was that officials in the respondent municipality's employ failed to discharge the duties they owed to the appellants, causing the appellants to suffer loss.

Each of the appellants owned land which they intended developing as nature estates. The dispute centred around a land swap transaction pursuant to which a land developer ("Booysen"), the controlling mind of the three appellants, and the municipality, each transferred land respectively owned by them to the other. The municipality and various interested stakeholders had endeavoured for some time to determine a management framework to conserve, yet allow, the controlled development of the Meyersdal Nature area. During July 2000, the municipality approved in principle, the establishment of the Meyersdal Nature area consisting of certain portions of land, inclusive of land involved in the land swap transaction. In April 2005, the Corporate Affairs Committee ("CAC") of the municipality resolved to approve the land swap. However, legal opinions subsequently provided to the municipality advised that the municipality did not have the power to delegate its function under section 14(2) of the Local Government, Municipal Finance Management Act 56 of 2003 to its CAC, and that such delegation was unauthorised and thus invalid and consequently, subsequent approvals by the CAC to transfer the municipality's properties to third parties were also unauthorised and invalid. The opinion recommended steps that the municipality should take to rectify the problem.

By the end of 2007, Booysen believed that all of the required services had been completed and that he was entitled to a certificate in terms of section 82 of the Town-Planning and Township Ordinance 15 of 1986 (the "section 82 certificate"). As the section 82 certificate was still not issued, the appellants applied to the High Court for relief. The particulars of claim underwent a series of amendments, the most significant of which was effected some three years later on 23 May 2013 when, for the first time, the relevant municipal manager ("Flusk") was mentioned by name, and it was contended that he had acted *mala fide* in withholding the issuance of the section 82 certificate.

The municipality's plea was that the claims were *Aquilian* claims for pure economic loss arising from the alleged delay occasioned by the failure of the defendant to issue certificates in terms of section 82 of the Townships and Town Planning Ordinance, which legislation did not anticipate either compensation or damages to any person aggrieved by the failure of, or delay by, the local authority in the issue of any such certificate. It was pleaded that the statutory duty does not provide a basis for inferring that a duty exists to the first plaintiff at common law; and that neither public policy nor

public interest favoured the holding of the alleged conduct on the part of the defendant unlawful in the *Aquilian* sense and thus susceptible to a remedy in damages.

Held – While the appellants were entitled to proper administrative legal proceedings, that did not mean that the breach of the administrative duties as set out in the particulars of claim necessarily translated into private law duties giving rise to delictual claims. An incorrect administrative decision is not *per se* wrongful, and the breach of every legal duty, especially one imposed by administrative law, does not necessarily translate into the breach of a delictual duty. Whether the existence of an action for damages can be inferred from the controlling legislation depends on its interpretation and it is necessary to have regard to the object of the legislation. That involves a consideration of policy factors which, in the ordinary course, will not differ from those that apply when one determines whether or not a common-law duty existed.

Conduct is wrongful in the delictual sense if public policy considerations demand that in the circumstances the plaintiff has to be compensated for the loss caused by the negligent act or omission of the defendant. It is then that it can be said that the legal convictions of society regard the conduct as wrongful.

One of the questions in this case was whether the Legislature intended a claim for damages in respect of loss caused in addition to the other administrative law remedies available to the appellants. The Court noted the provision of the remedy of an internal appeal. That indicated that it was not within the contemplation of the Legislature that the refusal of a section 82 certificate would, without more, was to be regarded as a wrong entitling an action for damages against the municipality.

The Court referred to case authority stating that public policy considerations require that adjudicators of disputes are immune to damages claims in respect of their incorrect and negligent decisions.

The respondents appeared to suggest that insufficient particularity was given of the material facts sought to be relied upon by the appellants to support the contention that Flusk had acted *mala fide* and/or with a *mala fide* ulterior purpose. During the course of the evidence it came to be clarified that the appellants' case rested on extortion. The Court confirmed that allegations of fraud, dishonesty or bad faith must be supported by particulars and the other party is entitled to notice of the particulars on which the allegations are based. The onus rested upon the appellants to establish, as a matter of probability, the conduct complained of on the part of Flusk. The appellants were unsuccessful in that regard. Were Flusk to have issued the certificate in the light of a legal opinion that the land transaction was tainted by invalidity and was a nullity and that the council had to reconsider the matter, it might well have resulted in the land being transferred to third parties despite invalidity.

The principal complaint of the appellants was that they suffered pure economic loss, for the most part, in being deprived of investment opportunities by reason of the delay in the issuance of the section 82 certificate. However, militating against the appellants was their failure to report the alleged *mala fide* conduct on the part of Flusk, and to thereafter seek to hold his employer liable in damages.

The considerations of legal and public policy led the Court to the conclusion that the municipality did not act wrongfully in the delictual sense and was not in breach of any legal duty owed by it to the appellants. The municipality enjoyed immunity against liability for damages resulting from the conduct complained of.

The appeal was, therefore, dismissed by the majority of the Court.

Mahaeeane and another v Anglogold Ashanti Ltd [2017] 3 All SA 458 (SCA)

Civil procedure – Class action – Records requested under section 50(1) of the Promotion of Access to Information Act 2 of 2000 – Refusal of access to records based on sec- tion 7(1) of Act – Applicant for access must state what the right is that he wishes to exercise or protect, what the information is which is required and how that information would assist him in exercising or protecting that right – Appellants not establishing that the records requested were required for the exercise or protection of right relied upon.

Having been employed by the respondent in its gold mining operations, the appellants were medically boarded by the respondent on the ground of having contracted silicosis. An application was launched for the certification of a class action (the "certification application"). The class relevant to silicosis sufferers was defined as comprising current and former mine workers who had silicosis and who worked or had worked on the relevant goldmines. The certification application was granted and was on appeal.

The present appeal concerned records requested under section 50(1) of the Promotion of Access to Information Act 2 of 2000 (the "Act"). Section 50(1) provides that a requester must be given access to any record of a private body if that record is required for the exercise or protection of any rights. Section 7(1) excludes the operation of the Act if the record is requested for the purpose of criminal or civil proceedings; if the request is made after the commencement of the relevant criminal or civil proceedings; or if the production of or access to that record is provided for in any other law. Relying on section 7(1), the respondent refused the appellants' request, stating that the request had been made after the commencement of the certification application.

As a result, the appellants applied to the High Court for access to the requested records. That court found that the appellants were excluded by operation of section 7(1) and, in addition, had not satisfied the test in section 50 of the Act, of showing that the records were required for the exercise or protection of any rights. The present appeal was with the leave of that court.

Held – The appellants bore the onus of showing that the request fell within the ambit of section 50. If that onus was discharged, the question was whether the provisions of section 7(1) excluded any of the requested records from the operation of the Act.

An applicant need only put up facts which *prima facie*, though open to some doubt, establish that he has a right which access to the record is required to exercise or protect. The applicant must state what the right is that he wishes to exercise or protect, what the information is which is required and how that information would assist him in exercising or protecting that right. As conceded by the respondent, the appellants had a right to seek compensation in delict for personal injury. In order to exercise that right, an action had to be brought against the respondent. The question was whether the records requested were required for the exercise or protection of that right. The underlying reasons given for why the records were required did not relate to the exercise of the right to claim damages but to the evaluation of whether the appellants should do so or not. The reasons given, therefore, did not meet the test of the records

being required to exercise or protect the right relied upon. Even if it could be said that the reasons related to the right, the question was whether the records were reasonably required to exercise or protect the right relied on. In the present matter, the proposed defendant and its details were clearly known to the appellants. At least some of the facts are within the knowledge of the appellants. The Court concluded that the records requested were not reasonably required to exercise the right of the appellants to claim damages from the respondent.

It was found further that at the time that the request was made, the class action had commenced – in the form of the certification application. As such, the documents could not be said to be required to exercise or protect the right to claim damages since the class action to do so had commenced on their behalf. It was concluded in the majority judgment, therefore, that the appellants had not met the threshold test required by section 50(1) to *prima facie* establish that access to the record was required to exercise or protect the right relied upon. The appeal was dismissed with costs.

In the minority judgment, it was stated that the appellants had satisfied the criteria set out in section 50(1) of the Act, and the civil proceedings in question had not commenced for purposes of section 7(1) thereof.

Moraitis Investments (Pty) Ltd and others v Montic Dairy (Pty) Ltd and others [2017] 3 All SA 485 (SCA)

Civil procedure – Settlement agreement – Consent order – Application to set aside – Alleged lack of authority to enter into settlement agreement – Starting point had to be existence of order made pursuant to settlement agreement, and whether grounds for rescission had been established.

The fifth appellant ("Moraitis") and thirteenth respondent ("Kebert") conducted a dairy business together, through the first respondent ("Montic"). Other companies were formed to hold properties and engage in other activities related to the dairy business. Moraitis and Kebert each held their interests in the business in a trust.

A fall out between Moraitis and Kebert in 2006 led to litigation in the High Court, in which Moraitis sought liquidation of the companies in the business. Pursuant to an agreement between the parties to that litigation, the court ordered that Kebert's trust and a company owned by it ("Tropica Investments") would purchase the shares owned by a company owned by Moraitis' trust ("Moraitis Investments") in the various companies. An independent third party, acting as a valuer, would determine the purchase price of the shares and loan accounts. However, the valuation of R5 million was unsatisfactory to the parties. The companies whose shares were to be valued, together with Tropica Investments and the Kebert Trust, commenced proceedings to set aside the valuation and have a far lower valuation substituted for it. Moraitis Investments and the Moraitis Trust opposed those proceedings and it was suggested that in truth there had been an under-valuation.

Whilst the above proceedings were ongoing, Kebert, in his capacity as the executor in his late mother's estate, commenced an action in High Court against Mr Moraitis personally. He sought payment in respect of the purchase price of his late mother's interest in a company owning an hotel on an island. When the dispute regarding the hotel was set down for hearing the parties engaged in intensive negotiation,

culminating in the drafting and signature of a settlement agreement. The agreement recorded that it was in settlement of the litigation over the hotel as well as the liquidation dispute and the valuation dispute. The signatories were Moraitis and Kebert. Of importance for present purposes was that Moraitis signed on behalf of Moraitis Investments and the Moraitis Trust. Both he and Kebert warranted that they were duly authorised to sign on behalf of the trusts and companies whom they purported to represent. The settlement agreement was then made an order of court.

However, that did not settle matters. An application was brought by the appellants, seeking to have the settlement agreement and the order of court set aside. The appellants contended that Moraitis had not been authorised by the Moraitis Trust and Moraitis Investments to conclude the agreement and that it was therefore invalid and unenforceable against them. Moraitis invoked sections 75, 112 and 115 of the Companies Act 71 of 2008 to contend that the agreement was unlawful and void. In regard to the order making the agreement an order of court, he contended that once it was shown that the agreement was invalid or unenforceable for any of these reasons the court order fell to be set aside.

Held – The focus in the court below was on the issue of Moraitis' authority to execute the settlement agreement on behalf of the Moraitis Trust and Moraitis Investments. That was not the correct starting point for the enquiry, because it ignored the existence of the order making the agreement an order of court. For as long as that order stood it could not be disregarded. The necessary starting point in this case was therefore whether the grounds advanced by the appellants justified the rescission of the consent judgment. If they did not then it had to stand and questions of the enforceability of the settlement agreement would become academic.

In contested proceedings, a judgment can be rescinded at the instance of an innocent party if it was induced by fraud on the part of the successful litigant, or fraud to which the successful litigant was party. Apart from fraud the only other basis recognised in our case law as empowering a court to set aside its own order is *justus* error.

The Court held that the present case could be disposed of in relation to Moraitis' authority to represent the Moraitis Trust and Moraitis Investments on the basis that the central proposition that a court may not grant an order making a settlement agreement an order of court, unless the parties to the agreement consent thereto, is correct. The Court could not find in relation to either the Trust or Moraitis Investments, that lack of authority could be inferred. The objection was thus rejected.

With regard to sections 112 and 115 of the Companies Act, which govern the disposal of assets by a company, the appellants contended that as the settlement agreement involved the transfer to Kebert of the interests of Moraitis Investments, it fell within the ambit of the sections and accordingly could only be validly effected by way of a special resolution in terms of section 115(2)(a) of the Companies Act – and that as no such resolution was taken the transaction was void. The purpose underpinning the requirements of sections 112 and 115 is to ensure that the interests and views of all shareholders are taken into account before the company disposes of the whole or the greater part of its assets or the undertaking itself. In the present case, the Moraitis Trust was itself a party to the settlement agreement and, the appellants had failed to prove that it was not authorised by the trustees. It could not then be said

that it did not, by its own agreement to the settlement, agree to Moraitis Investments becoming a party to the settlement agreement.

None of the appellants' arguments being found to have any merit, the Court dismissed the appeal.

MTO Forestry (Pty) Ltd v Swart NO [2017] 3 All SA 502 (SCA)

Delict – Forestry and fire – Elements of delict – Wrongfulness – Wrongfulness and negligence are two separate and discreet elements of delictual liability which should not be confused – While a landowner is under a duty to control or extinguish a fire burning on its land, that is not an absolute duty, and instead, it is required that reasonable avoidance steps should be taken.

Forestry – Section 34 of the National Veld and Forest Fire Act 101 of 1998 – Presumption of negligence – Whether reasonably adequate steps taken by landowner to prevent fire spreading to neighbour's property – Court held that the presumption is really an evidential aid and where, as in casu, the essential facts are known, its role is to a large extent truncated.

The appellant conducted a forestry business on a plantation ("Witelsbos"), and was the beneficial owner of the forest on Witelsbos in the sense that it had the right to harvest the trees and enjoy the income from the forest's production. On 27 October 2005, a fire started on a farm owned by the respondent, situated immediately adjacent to Witelsbos. The fire spread onto Witelsbos where, according to the appellant, it caused some 1 300 ha of forest to be destroyed. The appellant instituted action in the High Court, alleging that the fire had either been caused, or allowed to spread onto its plantation, by negligence on the part of the respondent. It claimed damages in excess of R23 million.

The court *a quo* held that the respondent's liability had not been established, and it dismissed the appellant's claim but granted leave to appeal to the present Court.

Held – As the appellant's claim was founded in delict it had to establish, first, the conduct of the respondent of which it complained; second, the wrongfulness of that conduct; third, fault on the part of the respondent (in this case in the form of negligence); fourth, that it had suffered harm; and fifth, a causal connection between such harm and the respondent's conduct that is the subject of its complaint.

The appellant sought to hold the respondent liable, not for starting the fire on the day in question, but for its alleged negligent omission to take preventative steps which allowed or caused it to spread onto Witelsbos. It was clear that such a negligent omission, if established, can found liability.

The Court put into perspective the usefulness of terms such as "legal duty" in the context of such cases. It then turned to deal with the importance of distinguishing between the elements of wrongfulness and fault. Wrongfulness functions, effectively, as a limitation to ensure liability is not imposed in cases in which it would be undesirable or overly burdensome to do so. A wrongfulness enquiry depends on considerations of legal and public policy, and focuses on the duty not to cause harm and questions the reasonableness of imposing liability. It is only if an action is wrongful in that sense that, if it is associated with fault, it becomes actionable. Despite

a number of judgments of this Court pointing out that wrongfulness and negligence are separate elements of a delict, there has been a debate in academic circles as to whether it is important in the determination of liability for the two elements to be kept apart. The Court clarified that wrongfulness and negligence are two separate and discreet elements of delictual liability which should not be confused.

It was also pointed out that it is potentially confusing to take foreseeability into account as a factor common to the inquiry in regard to the presence of both wrongfulness and negligence. Such confusion will have the effect of the two being conflated and lead to wrongfulness losing its important attribute as a measure of control over liability. Accordingly, the Court held that the time had come to specifically recognise that foreseeability of harm should not be taken into account in respect of the determination of wrongfulness, and that its role may be safely confined to the rubrics of negligence and causation.

Before addressing the respondent's liability in this case, the Court considered the presumption of negligence contained in section 34 of the National Veld and Forest Fire Act 101 of 1998. The Court held that the presumption is really an evidential aid and where, as here, the essential facts are known its role is to a large extent truncated. In any event, the proven facts in the present matter rebutted any presumption of negligence, making it unnecessary to reach a decision on whether the reasoning in that case was correct.

While a landowner is under a duty to control or extinguish a fire burning on its land, that is not an absolute duty. Instead, it is required that reasonable avoidance steps should be taken. A reasonable landowner in the respondent's position was therefore not obliged to ensure that in all circumstances a fire on its property would not spread beyond its boundaries. All the respondent was obliged to do was to take steps that were reasonable in the circumstances to guard against such an event occurring. If it took such steps and a fire spread nevertheless, it could not be held liable for negligence just because further steps could have been taken. The Court confirmed that the steps taken by the respondent to avoid a fire on its property spreading to its neighbours were reasonable in the circumstances.

The appeal was dismissed with costs.

Mulaudzi v Old Mutual Life Assurance Company (South Africa) Ltd and others; National Director of Public Prosecutions and another v Mulaudzi [2017] 3 All SA 520 (SCA)

Civil procedure – Joinder – Joinder is required, only if the party has a direct and substantial interest which may be affected prejudicially by the judgment of the court in the proceedings concerned.

Civil procedure – Provisional restraint order – Discharge of – Bias of presiding officer – Not only actual bias but also the appearance of bias disqualifies a judicial officer from presiding over judicial proceedings.

Insolvency – Litigation involving insolvent estate – Section 20(1) of the Insolvency Act 24 of 1936 – Effect of sequestration of the estate of an insolvent shall be to divest the insolvent of his estate and to vest it in the Master until a trustee has been appointed, and, upon the appointment of a trustee, to vest the estate in the trustee, and it is then the trustee, and not the insolvent who acts in litigation concerning the

estate – Insolvent may then take steps only if the trustees decide not to take steps in litigation.

In May 2009, the appellant invested R33,5 million in a policy underwritten by the first respondent ("Old Mutual"). In March 2011, he concluded a written deed of cession with a third party ("Nedbank") in terms of which he ceded all rights in the insurance policy. Nedbank subsequently notified Old Mutual of the cession and requested confirmation that the policy had been endorsed with the cession in its favour. Due to an error, Old Mutual did not substitute Nedbank as the owner of the policy in the place of the appellant on its computer system, and the appellant continued to be reflected as the owner of the policy. In August 2012, the appellant informed Nedbank in writing that he wanted to cancel the cession and to have his investment documents returned. Nedbank declined to cancel the cession. On 2 June 2014, the appellant submitted a disinvestment application form to Old Mutual in respect of the policy in terms of which he sought payment of the full disinvestment value of the policy. Old Mutual paid the full maturity value of the policy, namely R48 163 098,55, into a bank account nominated by the appellant, in the mistaken belief that the appellant was still the owner of the policy. It only realised its error when Nedbank sought payment in terms of the cession. It paid Nedbank the full maturity value of the policy as it was obliged to in terms of the cession, and thereafter sought repayment from the appellant, who refused. Old Mutual consequently reported the matter to the South African Police Services ("SAPS") pursuant to the provisions of section 34(1)(b) of the Prevention and Combating of Corrupt Activities Act 12 of 2004. The National Director of Public Prosecutions (the "NDPP") then applied *ex parte* to the High Court, for a provisional restraint order in terms of section 26 of the Act. The application cited the appellant, his wife, and three close corporations of which he was a member. The court hearing the application issued a rule *nisi*, in terms of which it placed under restraint, and appointed a curator *bonis* to take charge of, property, save for such property as the curator might certify to be in excess of R48 163 098,55. The assets subject to restraint included four investments made by the appellant using the proceeds of the policy. On the return date, the provisional restraint order was discharged, and an application by Old Mutual to intervene in the application was dismissed. The NDPP and Old Mutual successfully applied for leave to appeal the judgment.

In the meanwhile, on 3 October 2014, Old Mutual launched an urgent application against the appellant, and two other entities. Relief was sought in two parts. Under Part A, it sought an order prohibiting the appellant from dealing in any manner with the four investments or any part thereof remaining to his credit, pending the determination of the relief sought in Part B. In terms of Part B, it sought payment from the appellant in the sum of R48 163 098,55, together with interest and costs on the attorney and client scale. The court directed payment by the appellant as sought in Part B, and pending payment, directed that the four investments be held in trust. The appellant obtained leave to appeal to the present Court. His appeal lapsed on 4 June 2015 on account of his failure to timeously file the record of appeal with the registrar. Some eight months later, on 9 February 2016, the appellant delivered the record together with an application for condonation and reinstatement of the lapsed appeal. That appeal was set down together with that of the NDPP and Old Mutual. However, the appellant's estate was in the interim sequestrated.

In December 2016, both the NDPP and Old Mutual duly gave notice to the Master of the High Court (the "Master") in terms of section 75(1) of the Insolvency Act 24 of

1936 of their intention to proceed with the second appeal, and in February 2017, Old Mutual applied to join the trustees of appellant's insolvent estate as parties to the proceedings. In May 2017, the trustees gave notice of their intention to be substituted for the appellant as respondents in the second appeal and as the applicants in the application for condonation and reinstatement of the lapsed first appeal.

Held – In terms of section 20(1) of the Insolvency Act, the effect of the sequestration of the estate of an insolvent shall be to divest the insolvent of his estate and to vest it in the Master until a trustee has been appointed, and, upon the appointment of a trustee, to vest the estate in the trustee. It is then the trustee, and not the insolvent who acts in litigation concerning the estate. The trustees were therefore necessary parties in both matters. The issue therefore was whether the appellant should also be entitled to participate in the proceedings in this Court (which would be the case if the trustees were to have been joined) or whether he had to seek and obtain the court's leave to participate (something he would have to do if the proper course was for the trustees to be substituted for him). The Court held that upon the sequestration, the trustees had to take the place of the appellant in the litigation; and that the appellant could take steps only if the trustees decided not to take steps in the litigation. Therefore, the proper course was for the trustees to be substituted for the appellant in the second appeal; and the appellant in the application for condonation and the reinstatement of the first appeal. As the trustees had indicated that they would abide the decision of the court in both matters, the appellant was entitled to take steps which, if successful, would enhance the value of the estate, in the second appeal or reduce the liabilities in the estate in the first appeal. The appellant was thus entitled to intervene in both matters.

The appellant also sought to have Nedbank joined in both matters. Joinder is required, only if the party has a direct and substantial interest which may be affected prejudicially by the judgment of the court in the proceedings concerned. Nedbank did not have any such interest in either matter. The joinder application was therefore dismissed.

The Court then turned to consider whether the appellant's lapsed appeal should be condoned and revived. The delay in the timeous prosecution of the appeal, and the delay in seeking condonation required explanation. Condonation should be sought without delay. A full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the court to understand clearly the reasons and to assess the responsibility. Factors which usually weigh with this Court in considering an application for condonation include the degree of non-compliance, the explanation therefor, the importance of the case, a respondent's interest in the finality of the judgment of the court below, the convenience of this Court and the avoidance of unnecessary delay in the administration of justice. The appellant did not furnish the Court with sufficient detail to enable the Court to assess the matter properly. The Court could therefore not find that the delay in bringing the application had been satisfactorily explained. It also found that the appellant's prospects of success on the merits were not good. As a result, the application for condonation failed.

In considering the second appeal, the Court noted the allegation made by, *inter alia*, the NDPP, that the judge in question was biased. Not only actual bias but also the appearance of bias disqualifies a judicial officer from presiding (or continuing to preside) over judicial proceedings. The disqualification is so complete that continuing to preside after recusal should have occurred renders the further proceedings a nullity.

An impartial judge is a fundamental prerequisite for a fair trial. In this case, the judge complained of was being represented in disciplinary proceedings against him, by the attorney representing the appellant in this case. However, there were various other factors involved in the judge's adjudication of the case, which cumulatively led to a reasonable apprehension that the judge did not bring an open and impartial mind to bear on the adjudication of the matter. The relevant order (refusing Old Mutual leave to intervene and discharging the provisional restraint order) was set aside. The effect thereof was that the restraint order was revived and the appellant's insolvent estate would be subject to the restraint order. The second appeal succeeded with costs.

National Energy Regulator of South Africa and another v Borbet SA (Pty) Ltd and others; Eskom Holdings Soc Ltd and another v Borbet SA (Pty) Ltd and others [2017] 3 All SA 559 (SCA)

Administrative justice – Adjudication by the National Energy Regulator of South Africa (NERSA), a statutory regulator, of tariff adjustment application by Eskom – Whether decision by NERSA rational and whether adjudication process and decision unfair – Court held that the nature of adjudication process and decision amounted to administrative action which is subject to review in terms of the Promotion of Administrative Justice Act 3 of 2000.

Energy – National electricity supplier – Approval by National Energy Regulator of South Africa (NERSA) of increase in electricity tariff – Appeal against setting aside of approval on review – Proper interpretation of regulator's price adjustment methodology establishing that decision to approve tariff adjustment was rational and fair.

In March 2016, the first appellant ("NERSA") approved an additional 1,4% increase in the electricity tariff, over and above an earlier, properly approved 8% increase, that the second appellant ("Eskom") was allowed to impose on its customers. At the end of March 2016, the first to sixth respondents successfully challenged NERSA's approval of the additional 1,4% increase in the High Court. The court reviewed and set aside the decision taken by NERSA, on the basis that it had failed to follow its own statutorily based provisions (the "MYPDM") dealing with adjustments to already approved tariffs. NERSA and Eskom appealed against the High Court's decision.

Held – The question was whether NERSA had discharged its statutory obligations. If it did then Eskom was entitled to charge the tariffs it authorised.

The generation, transmission and distribution of electricity is regulated by the National Energy Regulator Act 40 of 2004. The powers and duties of NERSA are set out in the Electricity Regulation Act 4 of 2006. Tariffs to be charged by licensees such as Eskom are determined by NERSA at intervals in accordance with the MYPDM, ostensibly in terms of section 14(1)(e) of the Electricity Regulation Act. Each price determination interval covers a period of three to five years, and the MYPDM is updated in relation to each interval. The interpretation and application of the MYPDM for the relevant period (ie the five tariff years between 1 April 2013 and 31 March 2018) lay at the heart of the present appeal.

Having already obtained the 8% increase in its tariff, Eskom then applied for a "selective reopener" of the MYPDM based on shortfalls in expected revenue. NERSA decided to decline the application on the basis that the MYPDM did not provide for a

selective reopening, but stated that Eskom could resort to the risk management control and pass-through mechanism which was described in the MYPDM as the Regulatory Clearing Account ("RCA"). Eskom then submitted an RCA application to NERSA, seeking an adjustment in respect of the tariff for the 2013/2014 tariff year of approximately R22 billion. The RCA exists to facilitate *ex post facto* adjustments to the approved revenues under the MYPDM determination. The public participation process leading up to NERSA's decision was extensive and interactive. The decision-making by NERSA was well motivated and detailed.

In order to assess the appellants' submission that the courts will be offending against the doctrine of the separation of powers in reviewing NERSA's decision, the Court began with the legal nature of NERSA's decision-making in relation to Eskom's RCA application. It held that when NERSA makes decisions concerning adjustment applications, it is acting in an administrative capacity even though it is applying policy. NERSA's decision-making in relation to an RCA application constitutes administrative action reviewable in terms of the Promotion of Administrative Justice Act 3 of 2000. The scope of review was therefore wider than contemplated by the appellants and the court below.

Turning to the approval of the additional 1,4% increase, the Court stated that the statutory framework and the MYPDM imposed certain obligations on licensees, but they also recognise that such obligations may not always be met and that corrective or remedial measures on the part of NERSA might ensue. It was NERSA's decision as to what those measures would be. The RCA existed in line with that possibility.

In terms of the MYPDM, the RCA account had to be updated quarterly, and Eskom was required to submit actual financial data on a quarterly basis. The respondents appeared to suggest that Eskom's failure to do so meant that the RCA application should not have been approved. The Court noted that the imposition of sanctions for non-compliance by a licensee with its licence obligations or the condonation thereof, were entirely within NERSA's remit. The contention by the respondents that the failure by Eskom to supply quarterly reports vitiated the entire RCA process was inconsistent with the regulatory and licencing structure catered for by the legislative framework.

It was concluded that the respondents and the court below misconceived the manner in which the MYPDM operated and how it was to be applied. They both erred in considering that Eskom's failure to submit quarterly reports, without more, precluded the approval of an RCA application. Furthermore, they misconstrued the role of NERSA as Regulator. The appeal was thus upheld with costs.

Ntlemeza v Helen Suzman Foundation and another [2017] 3 All SA 589 (SCA)

Civil procedure – Appeal – Effect of – Application in terms of section 18 of Superior Courts Act 10 of 2013 for execution order pending finalisation of an appeal process – Proof of existence of exceptional circumstances as contemplated in section 18(1) established in this case, as was proof on balance of probabilities that respondents would suffer irreparable harm in the event of the execution order not being granted and that the appellant would not.

The appellant ("General Ntlemeza") was appointed National Head of the Directorate for Priority Crime Investigations ("DPCI") on 10 September 2015 by the erstwhile Minister of Police. Before his aforesaid permanent appointment, General Ntlemeza

had served as acting National Head of the DPCI for a period of approximately one year.

General Ntlemeza's appointment as National Head of the DPCI by Minister was purportedly effected in terms of section 17CA(1) of the South African Police Service Act 68 of 1995, which imposed as one of the requirements for his appointment, that he be a fit and proper person, with due regard to his experience, conscientiousness and integrity.

In March 2016, General Ntlemeza's appointment was challenged in the High Court by the first and second respondents, who contended that in appointing General Ntlemeza, the Minister had acted irrationally and unlawfully and failed to fulfil his constitutional duty to protect the integrity and independence of the DPCI. The principal ground of review was that the Minister had not taken into account materially relevant considerations, more particularly, he failed to have proper regard to a judgment of the High Court, in an earlier case in which General Ntlemeza's integrity was called into question. The High Court held in favour of the first and second respondents, finding that the criteria set by the relevant provisions of the Act were objective and constituted essential jurisdictional facts on which General Ntlemeza's appointment had to be predicated. An application by General Ntlemeza for leave to appeal was dismissed. The court upheld a counter-application by the first and second respondents, for a declarator that the operation and execution of the principal order not be suspended by virtue of any application for leave to appeal or any appeal.

The present appeal was against that order (the execution order) and the conclusions on which it was based.

In argument on appeal, General Ntlemeza relied on a jurisdictional point which it was submitted, was dispositive of the appeal. In terms of section 18(1) of the Superior Courts Act 10 of 2013, a pending decision on an application for leave to appeal or an appeal is a jurisdictional requirement before a court considering an application to enforce an order was empowered to make an execution order of the kind it did. It was contended that sequentially the application for leave to appeal by General Ntlemeza had been refused before the second respondent's counter-application was upheld and thus the High Court was precluded from considering the counter-application, because the jurisdictional fact of a pending decision in relation to an appeal or an application for leave to appeal was absent.

Held – The Court would first consider the position at common law in relation to such applications before the enactment of section 18 of the Superior Courts Act. In the event of it being held that the preliminary point was without substance, the Court would deal with the further provisions of section 18 to determine whether the first two respondents had satisfied its requirements thereby justifying the grant of the execution order.

In terms of the common law position, in an application for leave to execute the onus rests on the applicant to show that he or she is entitled to such an order. It has been held in case law that an order granting leave to execute pending an appeal was one that had to be classified as being purely interlocutory and was thus not appealable. There were, however, exceptions to the rule that purely interlocutory orders were not appealable.

Section 18 of the Superior Courts Act was introduced on 23 August 2013. Section 18(4)(ii) has made orders to execute appealable, fundamentally altering the general position that such being purely interlocutory orders, they were not appealable. Moreover, it granted to a party against whom such an order was made, an automatic right of appeal. In addition, section 18(3) requires an applicant for an execution order to prove on a balance of probabilities that he would suffer irreparable harm if the order was not granted and that the other party would not suffer such harm.

In order to determine whether the preliminary jurisdictional point raised on behalf of General Ntlemeza had substance, it was necessary to consider the provisions of section 18(1) and (2). Where a judgment is final in effect, as contemplated in section 18(1), the default position is that the operation and execution of the principal order is suspended pending the decision of the application for leave to appeal or appeal. In terms of section 18(2), the default position in respect of an interlocutory order that does not have the effect of a final judgment is that the principal order is not suspended pending the decision of the application for leave to appeal or appeal. Both sections empower a court, assuming the presence of certain jurisdictional facts, to depart from the default position. The High Court's judgment on the merits of General Ntlemeza's appointment was final in effect and therefore section 18(1) applied. That section provides that the operation and execution of a decision that is the subject of an application for leave to appeal or appeal is suspended pending the decision of either of those two processes. When the High Court made its decision on the merits of General Ntlemeza's appointment, that order immediately came into operation and could be executed. When General Ntlemeza filed his application for leave to appeal, the order (the "principal order") of that court was suspended pending a decision on that application. The counter-application by the first two respondents, seeking the execution order, was thus well within the parameters of section 18(1). The preliminary point on behalf of General Ntlemeza did not accord with the plain meaning of section 18(1) and was dismissed.

The next question of substance addressed was whether the High Court, in granting the order to execute, had due regard to the relevant provisions of section 18 and applied them correctly. Section 18(1) entitles a court to order otherwise under exceptional circumstances. Section 18(3) provides a further controlling measure, namely, a party seeking an order in terms of section 18(1) is required in addition, to prove on a balance of probabilities that he will suffer irreparable harm if the court does not so order *and* that the other party will not suffer irreparable harm if the court so orders. In adjudicating the application for leave to execute the principal order, the High Court considered General Ntlemeza's prospects of success on appeal in relation to the finding that his appointment was unlawful. It concluded that the findings in the earlier case which reflected negatively on General Ntlemeza were a major obstacle for him to overcome and held that his prospects of success were severely limited. The present Court concluded that the High Court could not be criticised for concluding that the first and second respondents had proved, on a balance of probabilities, that the public would suffer irreparable harm if the court did not grant the order, and that General Ntlemeza would not suffer irreparable harm in light thereof.

The appeal was dismissed with costs.

Sigcau and another v Minister of Co-operative Governance and Traditional Affairs and others [2017] 3 All SA 608 (SCA)

Administrative justice – Traditional leadership – Decision of the Commission on Traditional Leadership Disputes – Whether implementation of Commission's decision in terms of section 26(2) of the Traditional Leadership and Governance Framework Act 41 of 2003 required prior consultation with royal family under section 9 of the Act – Court finding that prior consultation not necessary.

The background of the present dispute was the contestations in relation to various kingships by traditional leaders around the country. The third respondent, the Commission on Traditional Leadership Disputes and Claims (the "Commission") was established under the Traditional Leadership and Governance Framework Act 41 of 2003 (the "Old Act") to investigate and resolve traditional leadership claims and disputes. In terms of section 26(2), the decision of the Commission had to be conveyed to the second respondent, the President of the Republic of South Africa (the "President") within two weeks of it being taken, for immediate implementation in accordance with section 9 or section 10, where the position of a king or queen was affected by such a decision. On 25 January 2010, the Old Act was amended extensively in terms of the Traditional Leadership and Governance Framework Amendment Act 23 of 2009 (the "New Act"). Of significance, under the New Act, the powers of the Commission regarding resolution of traditional leadership disputes and claims were altered so that it could only make recommendations on the resolution of the disputes, as opposed to making decisions in respect thereof. The New Act provides that the recommendation of the Commission must be conveyed to the President within two weeks (of having been made) for him to make a decision thereon within 60 days. A further relevant change brought about by the New Act was a deeming provision, section 28(8), in terms of which an incumbent paramount chief, at the time of coming into effect of the New Act, was deemed to be a king subject to the investigation and recommendation of the Commission in terms of section 25(2).

The main issue in the present appeal was the correct procedure to be followed by the President in implementing a decision of the Commission, made in terms of section 26(2)(a) of the Old Act. The appellants contended that, before implementing the decision of the Commission on the disputed kingship of the amaMpondo aseQaukeni, the President had to consult the royal family as prescribed in section 9 of the Old Act.

Following a claim to the kingship of the amaMpondo aseQaukeni, the Commission decided that Zanozuko Telovuyo Sigcau ("Zanozuko") was the rightful king. On the same day, the Commission communicated its decision to the President. However, only some nine months later, on 3 November 2010 did the President purport to recognise the kingship and Zanozuko as the legitimate king. When Zanozuko lodged the claim with the Commission his brother, Mpondombini Sigcau, was the incumbent paramount chief of amaMpondo aseQaukeni, having succeeded his father Botha Sigcau who had been installed as a paramount chief, firstly in terms of the Black Administration Act 28 of 1927 and later under the Transkei Constitution Act 48 of 1927. The Commission found that the appointment of Botha over his brother Nelson (Zanozuko's grandfather) had been irregular and not in accordance with the law and customs of amaMpondo. The incumbent regent at the time of establishment of the Commission was Botha's son, Mpondombini. He brought court proceedings, challenging the decision of the Commission and the President's recognition of Zanuzuko. He contended that the

President should have consulted the royal family before implementing the decision of the Commission as prescribed in sections 9 and 10 of the Old Act. The Constitutional Court did not make any ruling on the challenge to the decision of the Commission. It only found that, because the proceedings and the decision of the Commission had been made in terms of the Old Act, the President should have appointed Zanozuko in terms of that Act. Mpondombini's widow, the second appellant ("Masobhuza") adopted the stance that the decision of the Constitutional Court vindicated the position of her late husband as the *ikumnkani* of amaMpondo aseQaukeni. She then took up position as the regent. In that capacity she nominated her daughter, the first appellant ("Wezizwe") as the queen. She then called upon the President to recognise Wezizwe, in terms section 9 of the Old Act, as the queen of the amaMpondo.

The first respondent (the "Minister of Co-operative Governance and Traditional Affairs"), the President, and the Commission (the "respondents") instituted proceedings in the High Court asserting their view that the decision of the Commission remained valid and seeking a declaratory order on its implementation. The issue was the extent to which the provisions of sections 9 and 10 of the Old Act were applicable in the implementation process. The appellants insisted that the President was obliged to consult the royal family prior to implementing the decision of the Commission, as provided for in section 9 of the Old Act. Essentially, the respondents sought a declarator that there was no obligation on the President to consult the royal family when implementing the decision of the Commission.

Held – In terms of the Old Act neither the President nor members of the royal family could ignore, or act contrary to, the decision of the Commission. Such would be the case if the provisions of section 9 would be applicable as contended by the appellants. It was inconceivable that, having vested the Commission with the power to decide disputes, the Legislature would, thereafter, put in place a process that would undermine the authority of the Commission. As set out above, proper adherence to section 25(3) meant that consultations were to be held prior to the decision being taken by the Commission. Therefore once the Commission had taken a decision on a dispute, there was no room for consultation after the fact. That decision had to be communicated to the President for immediate implementation. The Court held that implementation of the order of the Commission, as directed under section 26(2) of the Old Act, did not require consultation with the royal family. The Court held that although section 26(2) of the Act, prior to amendment, made reference to sections 9 and 10 thereof, section 9(1) which provided for consultation with the royal family in the appointment of a king or queen was not applicable where there had been a dispute, and the Commission had, in the exercise of its dispute resolution powers, determined the identity of the rightful king.

The appeal was, accordingly, dismissed.

Van Breda v Media 24 Ltd and others; National Director of Public Prosecutions v Media 24 Ltd and others [2017] 3 All SA 622 (SCA)

Constitutional law – Freedom of the press – Application by media to broadcast criminal proceedings – Right to open justice principle and the right to freedom of expression versus the right to a fair trial – Power of the court to limit the nature and scope of the broadcast where necessary to ensure the fairness of the proceedings before it is an inherent one flowing from section 173 of the Constitution of the Republic of South

Africa, 1996 and must be exercised in the interests of justice – Courts ought not to restrict the nature and scope of the broadcast unless prejudice is demonstrable and there is a real risk that such prejudice will occur.

The first appellant was charged with murdering three of his family members with an axe. His trial was underway in the High Court, and had attracted great media attention. Shortly before the trial was due to commence, the first respondent ("Media 24") brought an urgent application to be allowed to install two video cameras in the courtroom in order to record and broadcast the proceedings, alternatively to be permitted to broadcast the proceedings by microphone and sound. It also applied to be allowed to take still photographs and video footage in court for 30 minutes before the commencement of court and after the adjournment of proceedings each day. The appellant and the second appellant, the National Director of Public Prosecutions (the "NDPP"), opposed Media 24's application.

The present appeal was directed at the court's decision to allow Media 24 to record and broadcast the criminal proceedings during sittings of the court.

Held – Section 16 of the Constitution, which guarantees freedom of expression, includes the right to freedom of the press and other media and to freedom to receive or impart information. The media's right to freedom of expression is not just for the benefit of the media: it is for the benefit of the public. Free speech goes hand-in-hand with open justice. Freedom of the press and the principle of open justice are closely interrelated. The media, reporting accurately and fairly on legal proceedings and judgments, make an invaluable contribution to public confidence in the judiciary and, thus, to the rule of law. The broadcasting of court proceedings involves the use by the media of video and sound recordings to communicate events directly to members of the public.

Undertaking a survey of other countries' approaches, the Court found that none of the foreign jurisdictions examined appeared to have recognised an explicit constitutional right to allow cameras in courtrooms. Moreover, some jurisdictions, like the US, have refused to expressly acknowledge such a right. However, all of the jurisdictions experienced a massive growth in the presence of cameras within their courtrooms.

After taking account of the use of cameras in South African trials, the Court stated that the question whether, and under what circumstances, cameras should be permitted in South African courtrooms provokes tension between the rights of the press, on the one hand and the fair trial rights of an accused person, on the other. The right to a fair trial has been interpreted as including the foundational values of dignity, freedom and equality which lie at the heart of a fair trial in the field of criminal justice.

It was emphasised that giving effect to the principle of open justice and its underlying aims now means more than merely keeping the courtroom doors open. It means that court proceedings must where possible be meaningfully accessible to any member of the public who wishes to be timeously and accurately apprised of such proceedings. Broadcasting of court proceedings enables that to occur. Concerns of privacy and security may justify limits on how the media go about gathering and transmitting information about judicial proceedings. However, in accordance with the public-centred perspective, when individuals appear in a courtroom, their privacy interests might have to give way because their disputes are being resolved in a public forum that must be open to public scrutiny.

Where there is a debate about whether given court proceedings should be broadcast, a court is vested with the power to limit the nature and scope of the broadcast where necessary to ensure the fairness of the proceedings before it. The power of the court to do so is an inherent one flowing from section 173 of the Constitution and must be exercised in the interests of justice.

The NDPP's approach that there should be no broadcast whatsoever – whether, visual or audio – cannot amount to the proper exercise of the sec- tion 173 power to limit the nature and extent of the broadcast.

It remains the duty of the trial court to carefully examine each application. That court should exercise proper discretion in such cases by balancing the degree of risk involved in allowing the cameras into the court room against the degree of risk that a fair trial might not ensue. It remains open to the court to issue such directions as may be necessary to safeguard the interest of all parties. The default position has to be that there can be no objection in principle to the media recording and broadcasting Counsel's address and all rulings and judgments (in respect of both conviction and sentence) delivered in open court. When a witness objects to coverage of his or her testimony, such witness should be required to assert such objection before the trial judge, specifying the grounds therefor and the effects he or she asserts such coverage would have upon his or her testimony. If the court determines that the witness has a valid objection to the presence of cameras, alternatives to regular photographic or television coverage could be explored that might assuage the witness' fears. Whenever an accused person in a criminal trial objects to the presence of cameras in the courtroom, the objection should be carefully considered. If the court determines that the accused's objection to cameras is valid, then that may require that cameras be excluded. By framing the inquiry in these terms, courts will be better able to strike a constitutionally appropriate balance between policies favouring public access to legal proceedings and the accused's right to a fair trial. The court would, accordingly, have regard to all the relevant circumstances in identifying whether the right to a fair trial in a particular case is likely to be prejudiced.

In the present case, not all of the High Court's order could be supported. The framing of the order regarding the permitting of two video cameras in the courtroom had to be set aside. The appeal, therefore, succeeded to that extent only. The matter was remitted to the High Court for reconsideration in accordance with the principles set out in the present judgment.

Afriforum NPC and others v Eskom Holdings Soc Ltd and others [2017] 3 All SA 663 (GP)

Civil procedure – Review application – Mootness – Doctrines of mootness and justiciability – Doctrine of justiciability permits courts to avoid rendering decisions where an insufficient legal interest is impacted – For any claim to be justiciable, it must present a real and substantial controversy which unequivocally calls for the adjudication of the rights asserted – Courts retain a discretion to hear matters where there is no live controversy when it is in the interests of justice to do so.

Electricity – Scheduled interruptions of the supply of electricity by Eskom to three municipalities – Sections 152 and 153 of the Constitution of the Republic of South Africa, 1996 oblige municipalities to strive, within available resources, to ensure the

provision of services to communities in a sustainable manner and to structure and manage their budgeting and planning to give priority to the basic needs of communities – Eskom in acting under section 21(5) of the Electricity Regulation Act 4 of 2006 was implementing legislation and as such the exercise of the power constituted administrative action in terms of the Promotion of Administrative Justice Act 3 of 2000 and section 33 of the Constitution which is subject to constitutional and administrative law review.

Four separate applications by various parties, against Eskom Holdings Soc Ltd ("Eskom") and other respondents were set down for hearing together as the same legal issues arose in each.

Eskom's decisions to implement scheduled interruptions of the supply of electricity to three municipalities were challenged in the applications. The scheduled interruptions in certain municipalities were an attempt to collect arrear debts owed to Eskom for the supply of electricity. The applicants sought the review and setting aside of that decision on the grounds that it was unconstitutional, unlawful and unreasonable.

Each applicant sought different relief against Eskom. In summary, they sought variously, declaratory orders to the effect that Eskom is not permitted to interrupt the supply of electricity to any local authority as a means to collect acknowledged debts owed to it; final interdicts interdicting Eskom from exercising the power to interrupt electricity as a debt collection measure in respect of any local authority; alternatively interdicts restraining Eskom from exercising such power without in each instance first obtaining an order of court authorising it to do so; and orders reviewing and setting aside Eskom's decisions to interrupt electricity to the municipalities on constitutional and administrative law grounds.

Held – Sections 152 and 153 of the Constitution oblige municipalities to strive, within available resources, to ensure the provision of services to communities in a sustainable manner and to structure and manage their budgeting and planning to give priority to the basic needs of communities. The functions of generation and transmission of electricity in South Africa are carried out by Eskom.

Section 27 of the Electricity Regulation Act 4 of 2006 provides that, in relation to the exercise of its powers in respect of the supply of electricity, a municipality must, *inter alia*, provide basic reticulation services free of charge, or at a minimum cost, to certain classes of end-users; ensure sustainable reticulation services through effective and efficient management; and keep separate financial statements, including a balance sheet of its reticulation business. Eskom supplies the licensed municipalities in bulk at a pre-determined tariff, and the municipalities then re-sell electricity to end-users within their municipal borders at a mark-up. The terms on which electricity is supplied by Eskom to municipalities are recorded in electricity supply agreements ("ESAs").

Because of widespread delinquency it has become necessary for Eskom to take extraordinary steps to collect substantial outstanding debts from various municipalities.

Eskom raised several defences and challenged the competency of the relief sought by the various applicants in all the applications. It also raised a plea of mootness as a preliminary issue based on the fact that after reaching agreement with two of the municipalities on payment proposals, there was no longer a live controversy.

A case is moot and therefore ordinarily not justiciable if it no longer presents an existing or live controversy which should exist if the court is to avoid giving advisory opinions on abstract propositions of law. The Court explained the doctrines of mootness and justiciability. Not every constitutional argument raised by litigants is deserving of judicial consideration. The doctrine of justiciability permits courts to avoid rendering decisions where an insufficient legal interest is impacted. For any claim to be justiciable, it must present a real and substantial controversy which unequivocally calls for the adjudication of the rights asserted. Litigants should not approach a court if they have not been actually subjected to prejudice or face the real threat of prejudice as a result of legislation or conduct alleged to be unconstitutional or illegal. However, courts retain a discretion to hear matters where there is no live controversy when it is in the interests of justice to do so. The onus rests on the party seeking to have the matter heard to show that there are sufficiently exceptional circumstances for the exercise of this discretion. A prerequisite for deciding an issue despite the fact that it is moot is that any order the court may make must have some practical effect on the parties or someone else. Relevant factors include the nature and extent of the practical effect that any possible order might have, the importance of the issue, its complexity and the fullness or otherwise of the argument that has been advanced by the parties. Where there is a compelling public interest that the constitutionality of a statutory provision be determined, the doctrine of mootness should be less strictly applied. The essential question for decision in relation to the justiciability of the issues and the relief sought in these applications, therefore, was whether the voluntary cessation of Eskom's alleged wrongful conduct has rendered the applications moot. The Court found that the prayers of all the applicants seeking declaratory, interdictory and review relief in relation to the impugned decisions on the grounds of constitutionality, illegality and unreasonableness fell to be dismissed. The claims were moot and there were no exceptional circumstances requiring their decision.

However, two of the applications, which related to the constitutionality of section 25(1) of the Electricity Regulation Act, stood on a different footing. The applicants therein sought declarators to the effect that Eskom must approach a High Court to authorise it to terminate or interrupt the supply of electricity to a municipality customer in terms of section 21(5), failing which any decision would be unconstitutional and invalid. In the alternative, they sought orders declaring section 21(5) unconstitutional to the extent that it does not require judicial oversight of Eskom's powers to interrupt supply, coupled with an order reading a requirement into section 21(5) that prior to taking a decision to interrupt the supply of electricity, Eskom must first approach a High Court for an order confirming that that would be just and equitable, and authorising such an interruption. The requirement for judicial oversight, the applicants maintained, stemmed from sections 1(c) and section 34 of the Constitution. The Court disagreed with the applicants' submissions. Eskom in acting under section 21(5) was implementing legislation and as such the exercise of the power constituted administrative action in terms of the Promotion of Administrative Justice Act 3 of 2000 and section 33 of the Constitution. The exercise of power is, accordingly, subject to constitutional and administrative law review. Those subjected to the exercise of power will be free to approach the courts for an *ex post facto* review. Such review and the ancillary remedy of an interim interdict pending review give adequate expression to the right of access to the courts in section 34 of the Constitution.

Ashanti Wine & Country Estate (Pty) Ltd v Smith and others [2017] 3 All SA 709 (LCC)

Land – Eviction applications – Appeal against dismissal – Section 9(2) of the Extension of Security of Land Tenure Act 62 of 1997 sets out the requirements to be met before a court may order the eviction of an occupier of property – Section 3(5) provides that a person who continuously and openly resides on land for a period of three years shall be deemed to have done so with the knowledge of the owner or person in charge – In casu, the respondents continuously and openly resided on the land for a period of four years after the termination of their employment – Right of residence of the respondents derived, not from their former employment contracts, but rather from the consent that had to be presumed from the operation of section 3(4) and (5) – Court was not satisfied that the appellant had proven that a fair procedure was followed in terminating the right of residence.

The six appeals dealt with in this judgment arose from the dismissal by the Magistrate's Court of the appellant's applications, in terms of the Extension of Security of Land Tenure Act 62 of 1997, for the eviction of the respondents from its property. The facts and the legal issues raised by the appeals are identical in each case.

The appellant was the owner of the property, which had originally been part of a larger farm. Amongst each group of respondents in the six appeals, one or more of them had been employed by the previous owner of the larger farm. When the previous owner ceased its farming activities on the larger farm, it terminated the employment of all the employees working on the farm. The fairness of the terminations was not challenged, and the respondents employed by the previous owner admitted that their rights to occupy the workers' cottages arose solely from their employment. However, they disputed the appellant's assertion that the previous owner ("Nederburg") had also terminated all the respondents' rights of residence of the property. They also denied that the appellant had also given them any notice to vacate the property.

In dismissing the eviction applications, the magistrate held that the applications were not properly authorised; the appellant had failed adequately to prove its ownership of the property; the relevant person lacked authority to give notice of termination and the persons to whom he addressed the notice lacked authority to receive it on behalf of all the respondents; the notice of termination of the right of residence was defective; and there was no indication of where the respondents were to go in the event that eviction was ordered.

Held – Section 9(2) of the Extension of Security of Land Tenure Act sets out the requirements to be met before a court may order the eviction of an occupier of property. In assessing the correctness or otherwise of the magistrate's dismissal of the application for eviction, it had to be decided whether the appellant complied with the requirements of section 9(2)(a) to (d).

Section 9(2)(a) requires that the occupiers' right of residence must have been terminated in terms of section 8. Section 3(5) provides that a person who has continuously and openly resided on land for a period of three years shall be deemed to have done so with the knowledge of the owner or person in charge. It was common cause that the respondents continuously and openly resided on the land for a period of some four years after the termination of the employment of those respondents who were employed by Nederburg. In those circumstances, it had to be accepted that the right of residence of the respondents then derived, not from their former employment

contracts, but rather from the consent that had to be presumed from the operation of section 3(4) and (5). The appellant put up no evidence to rebut the operation of the presumptions. Flowing from the above facts, a distinct termination of the right of residence that came into being during the period 2006 to 2010 was required. Assuming in favour of the appellant that its labour consultant had orally terminated the respondents' right of residence, the Court had to determine whether that termination was just and equitable as required by section 8(1). Examining the evidence, the Court was not satisfied that the appellant had proven that fair procedure was followed in terminating the right of residence. The appellant, therefore, failed to show that the termination of the respondents' rights of residence was just and equitable as required by section 8. That, in turn, meant that the requirements of section 9(2)(a)were not fulfilled.

On that basis alone, the appellant failed to make out a case for eviction. However, for the sake of completeness, the Court considered the appellant's compliance or otherwise with the remaining subparagraphs of section 9(2). It found that section 9(2)(c) had also not been satisfied. Section 9(2)(c) requires that the conditions for an order for eviction in terms of section 10 or 11 must have been complied with.

The appeals were dismissed.

Kenene NO v Invela Financial Corporation (Pty) Ltd and others [2017] 3 All SA 725 (ECG)

Administration of estates – Deceased estate – Alienation of property by Master's representative – Powers of Master's representative and of executor of deceased estate – An executor (charged with the liquidation of a deceased's estate) has powers distinct from a Master's representative, appointed by the Master in terms of section 18(3) of the Administration of Estates Act 66 of 1965 – A Master's representative is appointed merely to "distribute the assets" of the estate where the value is below R125 000, and has limited powers.

As executor of a deceased estate, the appellant had brought an application in the Magistrates' Court, for rescission of the default judgment granted in favour of the first respondent ("Invela"); rescission of a declaration that the property owned by the deceased was executable; setting aside of the warrant of execution and the sale in execution in terms of which the property was sold in execution; and directing the sixth respondent to retransfer the property to the appellant in her representative capacity. The dismissal of the application led to the present appeal.

The appellant was the granddaughter of the deceased who died intestate on 7 December 2004. The second respondent was one of the deceased's daughters and the mother of the appellant. In October 2008, the second respondent concluded an agreement of sale of the property. The transfer of the property was to be effected by the seventh respondent. The second respondent wished to carry out certain renovations to the property, which still formed part of the deceased's estate. To that end the second respondent, in her capacity as Master's representative borrowed money from Invela, in the form of bridging finance in the sum of R30 000. The loan was arranged through the seventh respondent, as agent. The buyers cancelled the agreement of sale, but the bridging finance advanced by Invela, remained due and payable to it. Invela issued summons in the Magistrates' Court against the second

respondent in her capacity as Master's representative of the deceased's estate, claiming repayment of the amount lent, and obtained default judgment against the second respondent in her representative capacity. When Invela applied to have the property declared executable, the second respondent and Invela concluded a settlement agreement in terms whereof the second respondent, still in her representative capacity, agreed to repay the loan by way of monthly instalments. By then, the Master had substituted his representative with the appellant, as executor of the deceased's estate. Therefore, according to the appellant, when the second respondent concluded the settlement agreement, she had no authority to bind the deceased's estate.

Since no payments were made in terms of the agreement of settlement, Invela successfully applied in the Magistrates' Court for default judgment and later for the property to be declared executable. A warrant of execution was subsequently issued and the property was sold on auction.

The appellant argued that the magistrate ought to have found that good cause was shown for rescinding the judgments in question; the second respondent, who was not issued with letters of authority or executorship from the Master, did not have the necessary authority in terms of section 18(3) of the Administration of Estates Act 66 of 1965 to burden the estate in question with debt or to dispose of property and accordingly, the appellant had a valid *bona fide* defence; the lack of authority on the part of the second respondent resulted in all subsequent agreements being void *ab initio*; and that the order declaring the property owned by the deceased estate to be executable, was not made in terms of section 30(a)and (b) of the Act and any sale in contravention thereof was a nullity and the order thus erroneously made.

Held – An executor (charged with the liquidation of a deceased's estate) has powers distinct from a Master's representative, appointed by the Master in terms of section 18(3) of the Act. A Master's representative is appointed merely to "distribute the assets" of the estate where the value is below R125 000. Therefore, a Master's representative has limited powers.

Section 30 of the Act imposes restrictions on the sale in execution of property in deceased estates. Non-compliance with the prescripts of the Act will result in a nullity. Since the property was attached while it still formed part of the deceased's estate, the ninth respondent was required by section 30 of the Act, to first obtain an order from the High Court directing him to execute. In the absence of such an order the ninth respondent did not have the necessary authority to transfer the property.

It was concluded that the magistrate erred in her application of the relevant legal principles and her judgment had to be set aside.

END-FOR NOW