LEGAL NOTES VOL 9/2017

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INDEX[1]

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KLD Residential CC v Empire Earth Investments 17 (Pty) Ltd [2017] 3 All SA 739 (SCA)

Prescription – Interruption of – Whether an acknowledgment of indebtedness by a debtor, embodied in a letter written for the purpose of settling litigation, and thus without prejudice, may nonetheless be admitted in evidence for the limited purpose of showing that the period of prescription has begun to run afresh in terms of section 14 of the Prescription Act 68 of 1969 – Recognition of exceptions to the without prejudice rule – Majority of court ruling that where acknowledgments of liability are made such that, by virtue of section 14 of the Prescription Act, they would interrupt the running of prescription, such acknowledgments should be admissible, even if made without prejudice during settlement negotiations, but solely for the purpose of interrupting prescription.

In November 2006, the appellant ("KLD") and respondent ("Empire Earth") entered into an agreement in terms of which KLD would receive commission for marketing Empire Earth's property development. Commission was alleged to be payable once transfer of each property was passed to the buyer. KLD alleged that it was the effective cause of 99 sales and was entitled to R2 147 million in commission. It sued for payment of the commissions in June 2013. In a special plea, Empire Earth pleaded that, save for one sale after 2009, the registration dates were more than three years before the summons was served, and that the claims for commission had become prescribed.

[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!**

KLD replicated to the special plea, alleging that on 29 July 2011, Empire Earth's then attorneys had written to KLD, acknowledging that it owed commissions in the sum of R2 105 960. According to KLD, that served to interrupt the running of prescription in terms of section 14 of the Prescription Act 68 of 1969, and the prescription period began to run afresh from the date of the letter.

The parties agreed that a stated case would be put to the court. The question of law posed by KLD was whether our law should "recognise an exception to the without prejudice rule (otherwise known as settlement or negotiation privilege), to the effect that such inadmissibility rule is not applied where the only purpose for which reliance is placed on a communication otherwise covered by the rule is to prove an acknowledgment of liability interrupting prescription as contemplated in s 14 of the Prescription Act".

The High Court held that there was no such exception, but granted leave to appeal to the present Court.

KLD took issue with the finding that there are no compelling reasons of public policy to limit the protection afforded by the without prejudice rule so as to recognise an exception to it for the purpose of interrupting prescription. That was the only issue on appeal.

Held – The question for the Court to determine was whether there should be an exception to allow for admissions of liability, made without prejudice, where the debt would otherwise prescribe.

Section 14 of the Prescription Act provides that the running of prescription shall be interrupted by an express or tacit acknowledgment of liability by the debtor. If the running of prescription is interrupted as contemplated in subsection (1), prescription shall commence to run afresh from the day on which the interruption takes place. Given that section 14 is intended to protect the rights of the creditor, the question was whether that protection falls away if the acknowledgment of debt is made without prejudice. The question required a consideration of the competing policy, which is that admissions made in the course of negotiating a settlement should not be admitted in proceedings between the creditor and the debtor.

KLD's case was that our law recognises that there are exceptions to the without prejudice rule. The Court held that the exception contended for was well-founded. Where acknowledgments of liability are made such that, by virtue of section 14 of the Prescription Act, they would interrupt the running of prescription, such acknowledgments should be admissible, even if made without prejudice during settlement negotiations, but solely for the purpose of interrupting prescription. The exception itself is not absolute and will depend on the facts of each matter.

The appeal was thus upheld and the question in the stated case answered in favour of KLD.

In a dissenting judgment, it was stated that the without prejudice rule should not be restricted to permit KLD to rely on the letter as an acknowledgment of liability interrupting prescription, on the ground that the recognition of the exception sought would contradict the public policy and contractual foundations of the without prejudice rule.

NMB Bank Ltd v Capsopoulos and another [2017] 3 All SA 765 (SCA)

Banking and Currency – Fraud perpetrated on bank – Contravention of exchange control laws – Illegal purchase of US dollars – Evidence establishing that recipient of unlawfully obtained US dollars had to have been aware of illegality attached to transaction – Bank entitled to repayment of money paid by it as a result of the fraud.

Alleging that the respondents were parties to a scheme which had misappropriated money from the appellant bank, the latter instituted action against the respondents claiming payment of a sum in excess of $6,2 million. The bank conducted business in Zimbabwe, where at the relevant time, the respondents resided. They had relocated to Durban by the time the action was instituted.

Whilst living in Zimbabwe, the respondents conducted business through a private company ("Haus"). They also owned a company ("Cardinal") based in the United States of America, which company they used to receive payments in foreign currency sourced in Zimbabwe which, on their instructions, were used to pay not only Haus's suppliers but also some of their personal expenses. An entity referred to as "Baobab" and made up of various companies, administered Cardinal's day to day affairs. On the respondents' instructions, Baobab established a trust. The beneficiaries of the trust were the respondents and their children and the trust was the sole holder of the shares in Cardinal. As the respondents used Cardinal in order to receive payments of US dollars and to pay Haus' foreign suppliers, they accepted that all amounts paid to Cardinal in fact accrued to their personal benefit.

Over the period relevant to the appellant's claim, the Zimbabwean dollar lost value to such an extent, that foreign suppliers refused to accept it in payment of their goods and insisted upon being paid both in another currency (usually US dollars) and in advance before dispatching their wares to an importer in Zimbabwe. That put the respondents under pressure to obtain US dollars, but it was almost impossible for them to source foreign funds from the Reserve Bank. In 2005, the first respondent was informed by a third party with whom he was acquainted, that the said person (Tome) had surplus United States dollars which he was willing to sell to the respondents. The first respondent was told was that he should furnish Tome with the orders that had been placed with Haus by clients in Zimbabwe in order to obtain sufficient US dollars to purchase those items abroad. Tome would then inform him of the rate of exchange he would require and, if he agreed to it, he would pay the required sum in Zimbabwe dollars to whomsoever Tome identified. The majority of the payments thus made by the first respondent were deposited into what purported to be a Reserve Bank account at the appellant bank. The appellant would then pay the desired funds in US dollars to Cardinal and, pursuant thereto, proof of such payment would be provided by Tome to the respondents. Baobab would then be instructed to make payments on behalf of Cardinal to Haus's suppliers.

The keystone of the respondents' case was that they did not think it had been unlawful for Tome to sell them his, or anyone else's, surplus funds.

Held – The fact that the first respondent was an experienced and astute businessman, and that the method of communicating with Cardinal about the funds that were paid out were secretly done, led to the conclusion that the respondents must have been aware that the 60% surplus funds which an exporter was paid but which were held by its bank, had to be used by that exporter for the furtherance of its business and could

not be sold to other persons for their use. Therefore, the first respondent's explanation that he thought that Tome was legally free to deal with his surplus was rejected.

The respondents then argued that even if they appreciated that their purchase of US dollars from Tome was unlawful, that did not mean that they also knew either that the appellant was being defrauded or that it was suffering a loss in the process. However, central to the internal fraud perpetrated upon the appellant was a forged Reserve Bank letter purporting to authorise the transfer of US dollars in repayment of a fictitious loan made to the Reserve Bank. Use was also made of the order forms provided by the respondents which appear to have been falsified so as to reflect that the goods therein reflected had been exported rather than imported. It was on the strength of that false documentation that the appellant made the payments to Cardinal. The first respondent's attempts to distance himself from any knowledge of the above were unsuccessful – the court finding that he must have known that the US dollars were being paid by the appellant to Cardinal solely as a result of improper procedures.

It was concluded that the payments made to Cardinal were not only unlawful in that they offended Zimbabwe's forex laws, but they were made pursuant to a fraud upon the appellant to which the respondents were complicit, even if they were not aware of the finer details of how the appellant's processes had been corrupted. In those circumstances, the respondents had to repay the US dollars which the appellant was fraudulently induced to pay to Cardinal and in respect of which they personally derived a benefit. The respondents had no right to the US dollars that were paid by the appellant into Cardinal's account and were not entitled to appropriate those funds for their own purposes. The appellant was entitled to be repaid those amounts, and the court *a quo* erred in reaching the contrary conclusion. The appeal was thus upheld. The order of the court *a quo* was set aside and replaced with one in terms of which the respondents were to pay the appellant the amount claimed.

Audi Financial Services (a division of Wesbank; a division of Firstrand Bank Ltd) v Safter [2017] 3 All SA 778 (WCC)

Contract – Credit agreement – Sale of vehicle – Cancellation of – Claim for balance due – Provisions of National Credit Act 34 of 2005 – Compliance with – Section 127 deals with a situation where the consumer wishes to terminate a credit agreement, by giving notice to the credit provider and surrendering the goods to same – Court finding that defendant had voluntarily surrendered vehicle and that plaintiff had complied with relevant requirements entitling it to payment of amount due to it.

In November 2006, the parties entered into an agreement in terms of which the defendant purchased a vehicle from the seller ("Audi Centre"). In terms of the agreement, the defendant would pay the purchase price in monthly instalments, and ownership of the vehicle would remain vested in Audi Centre until the full amount owed under the agreement was paid. In the event of the defendant breaching any term of the agreement, the plaintiff would be entitled to cancel the agreement, obtain possession of the vehicle, sell it, keep all payments made by the defendant and claim the balance, if any, from the defendant as damages. Audi Centre ceded its right, title and interest in the agreement to the plaintiff, which accepted the cession.

When the defendant breached the agreement by falling into arrears with his payment obligations, the plaintiff elected to cancel the agreement and issued summons against the defendant, claiming cancellation of the contract as well as return of its vehicle. The

court confirmed the cancellation of the agreement and ordered the defendant to deliver the vehicle to the plaintiff. Leave to appeal was refused. The defendant approached the Supreme Court of Appeal ("SCA") on petition, and that court granted leave to appeal to the Full Bench. However, the Full Court dismissed the appeal.

In the intervening period prior to the finalisation of the appeal, the plaintiff obtained possession of the vehicle when the defendant signed a notice of termination. The plaintiff alleged that the defendant had surrendered the vehicle voluntarily. It further contended that it sent the defendant a notice in accordance with the provisions of section 127(2) of the National Credit Act 34 of 2005, informing him of the value attributed to the vehicle. The defendant failed to respond to such notice and the vehicle was, according to the plaintiff, sold at auction. The plaintiff also contended that it had complied with sections 127(5)(a) and (b) of the National Credit Act, by crediting the defendant's account with the proceeds of the sale less any expenses reasonably incurred by the plaintiff in connection with the sale of the goods. As the settlement value exceeded the value obtained after the sale of goods, the plaintiff contended that written notice was sent affording the defendant 10 days in which to settle the outstanding balance, but the defendant failed to do so. The plaintiff alleged that it sent a notice in terms of the provisions of section 129(1)(a) via registered mail. The present action was for payment of that outstanding balance due.

Held – The first issue was whether the defendant voluntarily surrendered the vehicle to the plaintiff. That question was significant because, according to the defendant, if the surrender was not voluntary, the plaintiff would not have been entitled to repossess the vehicle, as the appeal was still pending. In those circumstances, the court order would have been suspended pending the finalisation of the appeal. The second question was whether there was compliance with section 127(2) of the National Credit Act. The defendant alleged that he did not receive the notice. According to him, had he received the notice, he would have had the opportunity to take the vehicle back instead of losing it and having to pay any further money to the plaintiff. Finally, it had to be determined whether the plaintiff complied with the Consumer Protection Act 68 of 2008 when advertising the vehicle for the auction.

As stated above, before the appeal was decided, the defendant signed a notice of termination. He claimed that he was forced to sign the notice but did not testify under oath and his version did not amount to evidence. The Court therefore had to accept that the notice of termination containing the signature of the defendant, was a reflection of what transpired on the date of signature. It was thus concluded that the termination of the agreement followed by the surrender of the vehicle was voluntary.

On the question of compliance with section 127(2), the Court explained the provisions of the section. Section 127 deals with a situation where the consumer wishes to terminate a credit agreement, by giving notice to the credit provider and surrendering the goods to same. Section 127(2)(b) then requires the credit provider to give the consumer written notice of the estimated value of the goods so that the consumer may, under section 127(3), consider whether or not to withdraw the written notice of termination of agreement and resume possession of the goods, if such consumer is not in default under the agreement. If the consumer does not respond to the notice sent in terms of section 127(2)(b) within the stipulated time period, then the credit provider must sell the goods for the best price reasonably obtainable as soon as possible. The provisions are applicable when the consumer surrenders the goods to the credit provider voluntarily. The Court found that section 127(2) was not applicable

in this matter because of the fact that the agreement was cancelled and the defendant was not entitled to reinstate the agreement and resume possession of the vehicle, which is what is envisaged in section 127(2).

Finally, setting out the requirements for advertising under the Consumer Protection Act, the Court confirmed that the plaintiff had in fact complied therewith.

The defendant was ordered to pay the plaintiff the amount claimed.

Barley and another v Moore and another [2017] 3 All SA 799 (WCC)

Children – Death of child – Day-care centre – Provincial Department of Social Development's liability for damages – Department had a constitutional and legislative mandate to regulate, manage and control the provision of early childhood development services within the province, and that in registering day-care centres, it was required to ensure that the facility constituted a safe environment – Court found that had the department processed the first defendant's application and visited the premises (which it was supposed to do as part of the evaluation of the application), then it would, inter alia, have realised that the first defendant and her staff were not properly qualified or trained to look after infants.

Delict – Death of child – Day-care centre – Provincial Department of Social Development's liability for damages – In order to succeed in a delictual claim, a claimant would have to prove causation; wrongfulness; fault (negligence); and harm – Plaintiffs had to prove, on a balance of probabilities that, but for the negligent omissions of the Department, the child would not have died – In casu, factual causation was established.

The plaintiffs' two daughters were at the first defendant's day-care centre. In October 2010, the younger child rolled off a bed on which she was sleeping at the day-care centre, and died. The plaintiffs averred that whilst the child was left unattended, she probably rolled off the bed and fell onto the floor and, due to the position in which she landed, could not breathe and died of asphyxiation. The child was 5½ months old at the time of her death.

Suing the defendants for damages, the plaintiffs averred that the first defendant was under a legal duty to ensure the safety and security of the child whilst she was in first defendant's custody and care. It was contended that the death of the child was as a direct result of the first defendant's wrongful and negligent breach of her legal duty, *inter alia*, in that she left the child alone and unattended on a bed and failed to place her in a cot or some other safe resting area.

The second defendant was the provincial Department of Social Development. It admitted that it had a constitutional and legislative mandate to regulate, manage and control the provision of early childhood development services within the province, and that in registering day-care centres, it was required to ensure that the facility constituted a safe environment. The plaintiffs alleged that the department had failed in its duty in a number of ways, including registering first defendant's facility without conducting a proper inspection. The department's defence was essentially a bald denial that it had any positive legal duty as alleged by the plaintiffs and a bald denial that it wrongfully and/or negligently breached its legal duty in any respect.

Held – The legislative background to the case encompassed the Constitution, the Children's Act 38 of 2005 and the Regulations promulgated thereunder.

Accepting the most likely conclusion to be drawn from the available evidence was that the child had rolled off the first defendant's bed onto the floor and that her positioning on the floor led to a lack of oxygen and death by asphyxia (suffocation). The totality of the evidence led concerning the first defendant led to the inescapable conclusion that the latter's actions in placing the child on her bed to sleep and then leaving her unattended on that bed, were wrongful and negligent.

On the issue of the second defendant's liability, the Court found that had the department processed the first defendant's application and visited the premises (which it was supposed to do as part of the evaluation of the application), then it would, *inter alia*, have realised that the first defendant and her staff were not properly qualified or trained to look after infants and that they were unfamiliar with safe sleep practices which practices were not in fact being implemented. The death of the child would probably have been prevented had the second defendant intervened as it could have and should have done.

In order to succeed in a delictual claim, a claimant would have to prove causation; wrongfulness; fault (negligence); and harm. The criterion applied to determine factual causation is the "but-for" test. That is a factual enquiry. The plaintiffs had to prove, on a balance of probabilities that, but for the negligent omissions of the Department, the child would not have died. Factual causation was established in this case.

The question of legal causation is not concerned with causation but involves a moral reaction, involving a value judgment and applying common sense, aimed at assessing whether the result can fairly be said to be imputable to the defendant.

It also had to be determined whether the negligent omission was unlawful. The test for determining negligence involves the question of whether the harm was reasonably foreseeable; whether the *diligens paterfamilias* would have taken reasonable steps to guard against such occurrence; and whether the *diligens paterfamilias* failed to take those steps.

The plaintiffs were found to have proved liability on the part of both defendants on a balance of probabilities. The defendants were jointly and severally liable to pay damages to plaintiffs arising from the wrongful death of their daughter.

Buildcure CC v Brews NO and others [2017] 3 All SA 843 (GJ)

Arbitration – Delivery of arbitration award – Whether section 25 of the Arbitration Act 42 of 1965 is peremptory in requiring that parties be present when award is delivered – Court finding section 25 to be a default procedure that parties may vary.

The appellant was a builder contracted to effect alterations to a house owned by a trust. The first to fourth respondents were trustees in the trust. A dispute between the appellant and the trust was referred to arbitration before the fifth respondent. The powers of the arbitrator were agreed upon between the parties. It was agreed that the arbitration would be conducted in accordance with the terms of the Arbitration Act 42 of 1965. The arbitrator was authorised to determine the format and procedure of the arbitration and to bear in mind the primary need to determine the dispute as expeditiously and cheaply as possible and with resort to as little formality as is

reasonably practical. In order to expedite matters, the arbitrator was entitled to initially furnish his award to the legal representatives of the parties by way of electronic mail and, thereafter, furnish the respective parties with a signed hard copy thereof.

On 14 August 2014, the arbitrator sent a hard copy of his award to each of the parties. He neither sent an email, nor called for the parries to appear before him. The appellant contended that no award was published because what was sent by the arbitrator was not delivered in the peremptory manner prescribed by section 25 of the Arbitration Act and the parties had not agreed to vary the peremptory provisions of section 25. As a result, the appellant sought the setting aside of the purported award as a nullity, and approached the court below for review of the arbitration award. The dismissal of the application for review led to the present appeal.

Held – The publication of the award is dealt with in section 25, which states that the award "shall be delivered by the arbitration tribunal, the parties or their representatives being present or having been summoned to appear". As such, section 25 provides for a high degree of formality. The duty of an arbitrator is to "deliver" an award in the presence of the parties. Subsection (2) belabours the point of "delivery" by describing that act as constituting "publication" to the parties, but more significantly, ordains the date of delivery with a certain status.

The first question was whether section 25 was incapable of variation, thereby denying to parties a right to vary the need to convene in the presence of the arbitrator and oblige them always to ritually have the award "delivered" to them whilst present. The Court referred to case authority for the view that even if the provisions of section 25 are peremptory, it does not follow that the award itself is void because it was not delivered in the prescribed manner. The Court agreed that to insist on a formalistic interpretation of a statute whose objective is to resolve private disputes as agreed upon by the parties, and where such parties decided on informality and reduction of costs, would be to strangle the purposes of the statute. Thus, purposefully interpreted, the provisions of section 25 of the Arbitration Act are not immune from variation by agreement, but are merely a default procedure which shall apply in the absence of a contrary intention evinced by the contracting parties.

Also rejected by the Court was the contention by the appellant that the agreement did not, in fact, vary the provisions of section 25. The Court stated that the interpreting of text in an agreement requires a holistic reading, not a narrow focus on a few selected words. Reference was made to express provision in the agreement that the chosen methods of communication of the award had been agreed upon in order to expedite matters. That objective was the underlying thread in the agreement. The parties could not therefore have intended that in furnishing the award, the arbitrator was obliged to summon them to a ritual meeting, imposing more costs, and defeating the express aim of expediting the matter.

In a third point, the appellant contended that the formality of a designated moment of publication was a critical juridical act, because the date of publication was functionally linked to various legal consequences. Therefore, it was argued, it had to follow that the date had to be objectively capable of identification. The Court pointed out that the facts of this case did not compel an answer to the question how to resolve a genuine confusion about the date of delivery of an award because it was common cause that it was indeed received by each party on the same day. It did, however, acknowledge that the risk of uncertainty is generic. The answer to the concern was to approach the

question on the basis that the date of delivery is a question of fact to be decided *ad hoc* by a court called upon to decide that question. If the "delivery" is by a means of a method of communication to the parties that cannot guarantee that the award will be received simultaneously, the appropriate date of delivery would be that date upon which the party, last to receive it, got it. The resolution of a controversy about the fact of which date delivery took place lies in a remittal to the arbitrator to deliver it in accordance with section 25(1).

The next point addressed was the appellant's allegation of a gross irregularity in the conducting of the arbitration proceedings. The manner in which the arbitrator came to a conclusion and made a finding of an unlawful cancellation of the agreement was the critical issue upon which the allegation of gross irregularity by the arbitrator was founded. The foundation of the appellant's case was that, anterior to the finding that the cancellation was unlawful, the arbitrator made a decision on an issue on which the appellant was not heard, thus violating the dictates of the arbitration agreement. The Court found the argument advanced on behalf of the appellant is fundamentally misconceived. It was not true that an extraneous issue had been introduced into the case in the shape of a supposedly lost right to cancel. The point was always apparent and was not newly introduced.

Unable to find the court below wrong in its findings, the present Court dismissed the appeal.

Centre for Child Law and others v Media 24 Ltd and others [2017] 3 All SA 862 (GP)

Constitutional law – Rights of children – Protection in criminal proceedings – Section 154 of the Criminal Procedure Act 51 of 1977 deals with the prohibition of publication of certain information relating to criminal proceedings, and in subsection (3) prohibits the disclosure of the identity of an accused or a witness under the age of eighteen years of age – Rights of child victims to similar protection – Applying the purposive approach to interpretation, court finding sufficient to warrant reading into section 154(3) that the child victim is covered in section 154(3) as far as criminal court proceedings are concerned – Limitation of protection to children under age of 18 found to be justified.

Section 154(3) of the Criminal Procedure Act 51 of 1977 was at the heart of the present application. Declaratory relief was sought by the applicants, involving either reading into or adding to section 154(3).

Essentially, the applicants sought a declaration confirming that the protections afforded by section 154(3) apply to victims of crime who are younger than 18 years of age. In the alternative, an order was sought declaring section 154(3) unconstitutional and invalid to the extent that it failed to confer its protection on victims under 18, as well as an order to remedy the defect. It was also sought to be declared that, on a proper construction of the provision, child victims, witnesses, accused and offenders do not forfeit the protections of section 154(3) when they reach the age of 18. In the alternative, the applicants finally sought an order declaring section 154(3) unconstitutional and invalid to the extent that children subject to it forfeit the protection of section 154(3) when they reach the age of 18, as well as an order to remedy the defect.

In April 2015, the applicants obtained an interim interdict to protect the anonymity of the second respondent ("KL") in Part A of their application. They now sought declaratory relief in terms of Part B of the application.

When KL was seventeen years old, she was informed that she had been abducted from her biological mother, by the woman whom she thought was her mother and who had raised her. The said woman was criminally charged and prosecuted for the abduction, and KL was to be a potential witness in the criminal proceedings. As such, KL would gain protection of anonymity in terms of section 154(3) as a witness. However, even before the commencement of the criminal proceedings, KL would have turned eighteen, and in terms of section 154(3) the media were at liberty to disclose and publish her true identity.

Held – Section 154 deals with the prohibition of publication of certain information relating to criminal proceedings. It provides that "No person shall publish in any manner whatsoever any information which reveals or may reveal the identity of an accused under the age of eighteen years of age or of a witness at criminal proceedings who is under the age of eighteen years of age: Provided that the presiding judge or judicial officer may authorise the publication of so much of such information as he may deem fit if the publication thereof would in his opinion be just and equitable and in the interest of any particular person". Thus, the identity of an accused and a witness, under the age of eighteen, who participates in criminal proceedings, is protected. The first of the applicants' concerns was that child victims under the age of eighteen, and involved in criminal proceedings, were not afforded the anonymity afforded to a child accused and child witnesses. The second concern was that section 154(3) only provided anonymity until the child accused or witness turned eighteen, whereafter the anonymity fell away. Therefore, the applicants sought to ascribe an interpretation to section 154(3), to include the anonymity protection of child victims involved in criminal proceedings, and for such protection of anonymity not to cease at age eighteen.

A number of constitutional rights were at play against each other in this matter. On the one hand, were the rights of the child (bearing in mind that the child's best interest are paramount in terms of section 28(2) of the Constitution), the right to dignity found in section 10, the right to equality in section 9, the right to privacy in section 14 and the right to a fair trial found in section 35(3) of the Constitution. On the other hand, stood the rights of the media and the public, such as the right to freedom of expression in terms of section 16 of the Constitution and the right to open justice in terms of section 152 of the Criminal Procedure Act.

The fact that children are the most vulnerable in our society, both physically and psychologically, results in a paramount need to guard and enforce the protection of children's rights through legislation. Legislation in turn must allow for application not on a blanket scale, in respect of children's rights, but rather on a case to case basis with each individual child being looked at individualistically.

Being tasked with interpreting section 154(3), the Court began by confirming the principles of statutory interpretation. The words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. Statutory provisions should always be interpreted purposively, the relevant statutory provision must be properly contextualised, and all statutes must be construed consistently with the Constitution.

Section 154 had to be read with section 153(1) of the Criminal Procedure Act and section 63(5) of the Child Justice Act 75 of 2008. The latter section states that no person may be present at any sitting of a child justice court, unless his presence is necessary in connection with the proceedings of the child justice court or the presiding officer has granted him permission to be present. On reading the cited provision together, the Court concluded that provision is made for proceedings involving a child in a criminal court to be closed to the public unless permission is sought from the presiding officer to have same in open court. The sections do not differentiate whether the child referred to is an accused, a witness, a complainant or a victim. Therefore, applying the purposive approach to interpretation, it was sufficient to warrant reading into section 154(3) that the child victim is covered in section 154(3) as far as criminal court proceedings are concerned. There was thus no need to declare section 154(3) unconstitutional.

That left the issue of the anonymity of the child (accused, victim, complainant and/or witness) only until the age of eighteen. The Court found the intention of the Legislature in limiting the protection as such to be quite deliberate. There cannot be open ended protection in favour of children, even into their adulthood. That would violate the rights of other parties. The Court was not convinced that the extension sought was permissible nor required by our Constitution.

Joubert v Meyer [2017] 3 All SA 878 (GP)

Civil procedure – Pleadings – Parties to litigation are limited to their pleadings – A party cannot be allowed to direct the attention of the other party to one issue in its pleading and then at the trial attempt to canvas another – It is the duty of the court to determine the real issues between the parties and provided that no prejudice is caused to any party, to decide the case on the real issues.

Delict – Claim for damages arising from medical procedure performed on plaintiff by defendant – Breach of duty of care – In the law of delict, a duty of care is a legal obligation, which is imposed on an individual requiring adherence to a standard of reasonable care while performing any acts that could foreseeably harm others.

The plaintiff sued for damages arising from a medical procedure performed on her by the defendant. The merits of the case were settled on the basis that the defendant undertook to pay 90% of the plaintiff's proven or agreed damages arising from the performance of the surgical procedure.

It was averred by the plaintiff that there were complications with the healing of the wound from her operation, and that the defendant had not informed her of the well-known normally associated complications with that type of procedure. According to the plaintiff, had she been informed about the possible complications, she would not have undergone the operation. She claimed to be suffering from extreme pain, suffering, loss of amenities of life, emotional trauma and emotional distress. It was submitted that the emotional *sequelae* were foreseeable in that the defendant should have foreseen that if complications arose, they could lead to emotional *sequelae*. She claimed general damages, past medical expenses and future medical expenses.

The defendant contended that there was nothing physically wrong with the plaintiff, and suggested that she was malingering.

Held – The Court had to decide which of the *sequelae* complained of arose from the incident and complications arising therefrom and what damages, if any, were to be awarded.

The plaintiff's particulars of claim were based on an alleged agreement between the plaintiff and the defendant containing material express, implied alternative tacit terms thereof. The plaintiff alleged that the defendant, by virtue of the agreement and the existence of a doctor-patient relationship which had come into being, was under a legal duty to comply with his obligations terms of the agreement. The particulars also alleged lack of informed consent and that the defendant, in breach of his legal obligations, was negligent in one more or more ways, causing damages to be suffered by the plaintiff.

A breach of duty occurs when one person has a duty of care towards another person, but fails to live up to that standard. A person may be liable for negligence in a personal injury case if his breach of duty caused another person's injuries. In medical malpractice cases, the question is not whether a medical professional acted as a reasonable ordinary man-on-the-street would, but whether the medical professional acted like a reasonable medical professional, with the same training and knowledge, would have acted. In the law of delict, a duty of care is a legal obligation, which is imposed on an individual requiring adherence to a standard of reasonable care while performing any acts that could foreseeably harm others. It is the first element that must be established to proceed with an action in negligence.

While admitting in his plea that a duty of care existed, the defendant denied breach thereof. The question of lack of informed consent was not contested by the defendant and it consequently had to be accepted that there was no informed consent.

The Court adhered to the parties' stance that the cause of action was based on contract and a breach of duty of care. It therefore did not consider any of the other issues raised. It pointed out that the parties to litigation are limited to their pleadings. A party cannot be allowed to direct the attention of the other party to one issue in its pleading and then at the trial attempt to canvass another. It is thus the duty of the court to determine the real issues between the parties and provided that no prejudice is caused to any party, to decide the case on the real issues.

The plaintiff's testimony that the defendant had not informed her of the possible complications that might occur was not contested. No documents were presented at the trial to show informed consent on the part of the plaintiff. The defendant did not testify on that issue. The Court therefore ordered the defendant to pay the plaintiff the amount computed as representing plaintiff's damages.

Miya and others v S [2017] 3 All SA 906 (GJ)

Criminal procedure – Use of section 204 witness' affidavit used in bail application, in subsequent trial proceedings – Section 60(11B)(c) of the Criminal Procedure Act 51 of 1977 – Whether section 204 witness could claim the protection afforded by section 60(11B)(c) – Section 60(11B)(c)provides that where an accused is charged with an offence referred to, the record of the bail proceedings shall form part of the record of the trial of the accused following upon such bail proceedings provided that if the accused elects to testify during the course of the bail proceedings the court must

inform him of the fact that anything he says, may be used against him at his trial and such evidence becomes admissible in any subsequent proceedings – Court must inform the accused of the fact that anything he says may be used against him when his matter is heard by the court – Failure by court to warn accused results in the evidence of the bail proceedings becoming inadmissible against the accused.

The applicants were four of five accused initially charged in this case. The fifth accused ("Grigorov") became a section 204 witness and the case against him was withdrawn.

The first accused wished to use the affidavit which Grigorov used in his bail application in the case against him ("the Sandton case"). The State, however, objected thereto. In response to the objection, the first accused argued that he was entitled to use the statement in the Sandton case as Grigorov was no longer an accused in this case but a section 204 witness. He argued that his right to a fair trial would be compromised if he was not allowed to adduce and challenge evidence by testing Grigorov's credibility using the very statement in question.

The State submitted that the defence first had to satisfy the provisions and the requirements of section 60(11B)(c) of the Criminal Procedure Act 51 of 1977 before they could use the statement. The accused on the other hand, disputed that Grigorov, as a witness, could claim the protection afforded by section 60(11B)(c).

Held – The resolution of the issue lay in the correct interpretation of section 60(11B)(c). In interpreting legislation courts need to obtain the meaning of the section from the plain language used in the section; establish the purpose of the legislation; and consider the spirit, purport and objects of the Bill of Rights.

Section 60(11B)(c) held the answer to the question of whether Grigorov, as a witness and not as an accused, enjoyed the protection provided by the section. The section provides that where an accused is charged with an offence referred to, the record of the bail proceedings shall form part of the record of the trial of the accused following upon such bail proceedings – provided that if the accused elects to testify during the course of the bail proceedings the court must inform him of the fact that anything he says, may be used against him at his trial and such evidence becomes admissible in any subsequent proceedings. The latter proviso is the second part of the section, as referred to below.

The section had to be analysed and interpreted. The court was given two interpretations. The State argued that the protection that the section afforded should be extended to cover a witness in a case. The defence held the view that such interpretation was wrong and absurd because the section only covered those who stood accused.

The first accused correctly argued that section 60(11B)(c) can be divided into two parts. The first part was not in issue, the second part was more difficult. The record of the bail proceedings is not excluded from the record of the trial of the accused following upon such bail proceedings. The crux of the matter is that the court must inform the accused of the fact that anything he says may be used against him when his matter is heard by the court. The warning has the effect of advising the accused that he must take an informed decision namely to testify or not to in the bail proceedings. The failure by the court to warn the accused results in the evidence of the bail proceedings becoming inadmissible against the accused. The bail record is automatically excluded insofar as it relates to the accused in his trial.

It was conceded that Grigorov was not warned in accordance with the provisions of section 60(11B)(c) in the Sandton matter. The effect of the failure to warn him meant that his bail record in the Sandton matter could not be used against him in that matter. The problem in interpreting the section lay in the following. The second portion of section 60(11B)(c) states that once warned the bail record became admissible against Grigorov at his trial. The same bail record became admissible "*in any subsequent proceedings*". The first part of section 60(11B)(c) creates an evidentiary inclusionary rule of the record of the bail proceedings. The words "in any subsequent proceedings" should not be restrictively interpreted. If the Legislature intended to only refer to the accused's trial proceedings it would have clearly said so. That meant that a wide interpretation was called for in the interpretation of the words. The meaning of the words was that the evidence becomes admissible where the accused has received due warning.

According to the Court, it would be absurd to only protect Grigorov in the Sandton matter and not in this case. Grigorov, by reason of the protection he enjoyed in the Sandton case was equally protected in this case even though he was a witness. He was not warned in the bail proceedings in the Sandton case which was still to be heard and concluded.

The State's objection was upheld and the use of Grigorov's affidavit for purposes of cross-examining him was not permitted.

Nash and another v Mostert and others [2017] 3 All SA 918 (GP)

Professions – Attorneys' profession – Billing of fees – Contingency fees agreements – General prohibition – Effect of prohibition on remuneration agreement in respect of curator of pension fund where such remuneration would be in the form of a commission payable on a contingency basis, where agreement was required to be in accordance with the norms of the attorneys profession, was that the remuneration agreement was rendered unlawful and invalid.

The second respondent ("Mostert") was the curator of the third respondent, a pension fund. In terms of an agreement between the curator and the sixth respondent ("the FSB") provision was made for the remuneration of the curator. Other than for the pension fund (which remained neutral), the remaining respondents contended that the remuneration agreement was valid, while the applicants contended that it was not.

The background facts were as follows. In 1995, a large amount of money was stolen from the fund. The participating employer in the fund at the time was the second applicant ("Midmacor"), which was a company controlled by the first applicant ("Nash").

Mostert alleged that Nash stole R36 million from the fund, while Nash disputed the allegation. The effect of the theft from the fund was that it was left with no assets under its control. In terms of the Financial Institutions (Protection of Funds) Act 28 of 2001, the FSB was empowered to act to remedy such a situation. Exercising such powers, the FSB applied to court to provisionally place the fund under curatorship and appointing Mostert as curator. The relief sought was granted. The order which was granted provided for periodical remuneration of the curator "in accordance with the norms of the attorneys profession" from the assets owned by the fund. In the present application, the applicants sought to set aside the remuneration agreement, and to have the curator repay all money received as a result of such agreement. The basis

of the application was the contention that on a proper interpretation of the phrase "in accordance with the norms of the attorneys profession", Mostert and the FSB were limited to contracting to the curator's remuneration on the same basis as members of the attorneys' profession were entitled to charge fees. In terms of the remuneration agreement, Mostert would instruct his law firm to do all the administrative work for a total contingency fee of 33,3%.

The respondents raised certain preliminary objections to the application. The first was that the application should not be entertained as Nash did not have clean hands. The second challenge was to the standing of the applicants. Finally, the respondents raised the question of whether the application should have invoked the provisions of the Promotion of Administrative Justice Act 3 of 2000 in bringing their application, in which case, the court would have to consider whether the delay in bringing the application should be condoned by extending the applicable time period.

Held – In respect of the clean hands issue, the Court held that the complaint of the applicants related to the remuneration of a public bearer exercising public power. The exercise of public power is a constitutional matter. On the basis that vindicating the Constitution is a value to which the court must attach great weight, the Court declined to allow any proper motive on the part of Nash to obstruct the ventilation of the issues.

In respect of the second preliminary issue, the Court confirmed that the applicants had established their standing in the matter, as member and principal employer of the fund and on the final point, the Court held that the applicants were not subject to the constraints of the Promotion of Administrative Justice Act, eliminating the need to consider the question of delay.

The Court then turned to the main issue of the validity of the remuneration agreement.

It was confirmed that the character of the curator's remuneration was to be agreed in accordance of the norms of the attorneys' profession. Setting out the position in respect of the legality of contingency fee agreements, the Court held that such agreements in relation to non-litigious work are against public policy for the same reasons as apply to their lawfulness in respect of litigious work. The critical phrase in this dispute confined the FSB and Mostert to concluding an agreement according with the norms of the attorneys' profession. The applicable norm in the profession was a general prohibition on contingency fee agreements. The remuneration agreement was thus unlawful and invalid.

Organisasie vir Godsdienste Onderrig en Demokrasie v Laërskool Randhart and others (Council for the Advancement of the South African Constitution and others as *amici curiae*) [2017] 3 All SA 943 (GJ)

Constitutional law – Freedom of religion – Religious observances in public schools – Section 15(1) and 15(2) of the Constitution of the Republic of South Africa, 1996 – Principle of subsidiarity applicable – Applicant either to have founded cause of action on basis of conduct not complying with applicable subsidiary national and provincial laws, or applicable rules of relevant school governing bodies; or to have applied for unconstitutionality of such subsidiary laws or rules – Applicant having done neither.

Education – Public schools – Religious observances – Application for large number of declaratory orders and interdicts against public schools, amongst others

restraining them from adopting a single religion to the exclusion of others, and restraining them from conducting specified religious practices – Neither the Constitution of the Republic of South Africa, 1996 nor the South African Schools Act 84 of 1996 confers on a public school or SGB the right to adopt the ethos of one single religion to the exclusion of others.

The applicant in this matter was a voluntary association which assisted its members and children in public schools when those schools infringe the learners' constitutional rights. The first six respondents were public schools as envisaged in the South African Schools Act 84 of 1996.

The relief claimed in the amended notice of motion fell into two sets of prayers. Prayer 1 and its subparagraphs were for declarations, and prayer 2 and its subparagraphs were for seventy-one final interdicts. The six main declarations sought to have declared as a breach of the National Policy on Religion and Education ("the National Religion Policy") and as unconstitutional a range of defined propositions, including promoting only one religion in favour of others; associating itself with any particular religion; requiring of a learner to disclose (to the school) adherence to any particular religion; and permitting religious observances during school programs on the basis that a learner may elect to opt out. The interdictory relief sought to restrain the six respondent schools each from partaking of an identified set of the seventy-one instances of circumscribed conduct with a religious theme.

The schools responded by asserting that they also enjoyed a right to freedom of religion; that the schools were entitled by law to have an ethos or character; and that the school governing bodies ("SGBs") envisaged in section 16 of the Schools Act were entitled to determine such ethos or character with reference to the religious make-up of the feeder community that served the particular school. The schools accepted that the latter proposition was subject to the proviso that any religious observances that might be conducted at the schools pursuant thereto were conducted, as required by section 15(2) of the Constitution, under rules issued by the governing body on an equitable basis. It was submitted that the schools' practices complied with those measures.

The applicant's central submission was that section 15(1) of the Constitution stood in the way of the adoption by a public school of any religion at all.

Held – Declaratory relief is discretionarily granted in terms of section 21(1)(c) of the Superior Courts Act 10 of 2013. The requirements for a final interdict are a clear right, an injury actually apprehended, and no alternative remedy. In cases where a court is appropriately seized with a constitutional matter, additional considerations apply. Section 172(1)(b) of the Constitution provides that in deciding constitutional matters, a court "may make any order that is just and equitable".

The Constitution was the starting point of both the applicant's case and the schools' case. Section 15(2) of the Constitution provides for religious observances to be conducted at State institutions, provided that such observances follow rules made by the appropriate public authorities are conducted on an equitable basis; and attendance at them is free and voluntary.

Since this case was concerned with the right to freedom of conscience, religion, thought, belief and opinion the Court saw fit to explain the approach adopted in such matters. As a general proposition, the State should not be seen to be picking sides in

matters religion. The Court referred to the existence of a body of laws dealing with religious matters, including religious observances, at schools, starting with section 15 of the Constitution at the pinnacle, and devolving down through national legislation to provincial legislation and ultimately to a patchwork of laws at individual school level. It was found that the National Religion Policy provided no direct basis of unlawfulness of the impugned conduct.

In terms of the principle of subsidiarity, an applicant who contends that religious conduct at a public school is unconstitutional in that it offends section 15 of the Constitution, must either found its case on a contravention of an applicable SGB rule or, if it contends that the conduct is unconstitutional despite being consonant with the SGB rules, it must attack the relevant SGB rules as being unconstitutional. The applicant did not challenge the lawfulness of the policies of any of the SGBs. Instead, it relied directly on the Constitution and on the National Religion Policy in alleging unlawfulness. The Court found it difficult to conceive of an unlawfulness attack that says that irrespective of what the SGB rules may provide, the impugned conduct – measured without any reference to any of the SGB rules – offends standards of equitability and voluntariness. Consequently, the applicant's cause of action was found not to have been framed on the basis of a recognition of the reach of the principle of subsidiarity.

Significant for the purposes of deciding on the issue of relief, was the fact that none of the SGBs had been joined in the matter. As a result, from the perspective of interdictory relief, a clear right against the schools themselves had not been shown, and the interdicts sought were, apart from anything else, not available against the schools.

Concern was expressed by the Court of the compromising of diversity. Neither the Constitution nor the Schools Act confers on a public school or SGB the right to adopt the ethos of one single religion to the exclusion of others. A public school may therefore not hold out that it has adopted one religion to the exclusion of others. The Court considered it appropriate to issue a declaratory order in that regard.

No order was made as to costs.

Passenger Rail Agency of South Africa v Swifambo Rail Agency (Pty) Ltd [2017] 3 All SA 971 (GJ)

Administrative justice – Judicial review – Time limits – Section 7 of the Promotion of Administrative Justice Act 3 of 2000 requires that any proceedings for judicial review in terms of section 6(1) must be instituted without any unreasonable delay and not later than 180 days on which the person became aware of the action and the reasons – Section 9 of that Act permits the period of 90 days to be extended on application where the interest of justice so requires.

Civil procedure – Affidavits – Founding affidavit – General rule is that a party must make out its case in the founding affidavit but such rule is not absolute – Test is whether all the facts pertaining to the matter have been placed before the court – If there is any prejudice, that prejudice must be brought to the attention of the court – A party that is prejudiced should be allowed to file a further affidavit.

Evidence – Hearsay evidence – Rule that hearsay evidence is generally not permitted in affidavits is not absolute – Section 3(1) of the Law of Evidence Amendment Act 45 of 1988 sets out the circumstances in which hearsay evidence will be permitted – Test for whether or not hearsay evidence should be admitted would be whether or not in a particular case before the court that it would be in the interest of justice that such evidence is admitted.

A tender for the purchase and supply of locomotives for use on the South African rail network ended with the applicant ("PRASA") awarding the contract to the respondent ("Swifambo"). PRASA subsequently brought an application to review and set aside its decision to award the contract to Swifambo. In the alternative, PRASA sought a declaratory order that the contract had lapsed and was of no force and effect as a result of a failure to satisfy the suspensive conditions within the period specified in the contract.

The founding papers suggested that there were several irregularities in the procurement process, including the procurement strategy, the preparation of the request for proposals ("RFP") and the scoring of bids.

The application was opposed by Swifambo on three grounds. The first was that the application fell to be dismissed on account of PRASA's undue and unreasonable delay in launching the application. Secondly, it was contended that PRASA's excessive reliance on inadmissible hearsay evidence was fatal to its application and all hearsay evidence in the founding affidavit fell to be disregarded. Finally, it was contended that it was not appropriate, just and equitable in the circumstances to set aside the tender with full retrospective effect since Swifambo was an innocent tenderer and would be prejudiced if the contract was set aside.

Held – Before dealing with the main issues, the Court had to address some other issues raised during the proceedings. The first issue was the averment that PRASA did not make out its case in its founding affidavit. The general rule is that a party must make out its case in the founding affidavit. It cannot do so in reply. That is not an absolute rule. Courts have been cautioned not to be overtly technical in such matters. Court rules are there for the courts and not the courts for the rules. A common sense approach should be used when dealing with such matters. The true test is whether all the facts pertaining to the matter have been placed before the court. If there is any prejudice, that prejudice must be brought to the attention of the court. A party that is prejudiced should be allowed to file a further affidavit that deals with that. In this case, a further affidavit filed by Swifambo took care of any prejudice that it might have suffered.

It was further contended on behalf of Swifambo that the founding and replying affidavits were impermissibly based upon hearsay evidence. Swifambo contended that no attempt was made to bring the hearsay evidence within the ambit of the Law of Evidence Amendment Act 45 of 1988. Hearsay evidence is generally not permitted in affidavits. Once again this is not an absolute rule and there are exceptions to it. Section 3(1) of the Law of Evidence Amendment Act sets out the circumstances in which hearsay evidence will be permitted. A court has a wide discretion in terms of section 3(1) of the Evidence Amendment Act to admit hearsay evidence. The test for whether or not hearsay evidence should be admitted would be whether or not in a particular case before the court that it would be in the interest of justice that such evidence is admitted. The factors that the court should take into account are those set out

in section 3(1)(c)(i) to (vii) of the Act. Taking into account the seven factors mentioned in section 3(1), the Court found that the admission of hearsay evidence in this case was justified.

Swifambo also relied on undue delay on the part of PRASA in seeking review. Section 7 of the Promotion of Administrative Justice Act 3 of 2000requires that any proceedings for judicial review in terms of section 6(1) must be instituted without any unreasonable delay and not later than 180 days on which the person became aware of the action and the reasons. Section 9 of that Act permits the period of 90 days to be extended on application where the interest of justice so require. The application by PRASA was 793 days late. That was a lengthy delay and good cause for such a delay had to be shown. When hearing an application for an extension of the time periods, the court had to have regard to the circumstances of the case. The date when the party became aware of the irregularity would be a factor that must be taken into account in deciding whether to extend the time period. The court will also have to consider the question of prospects of success. Ultimately, the most important factor that a court will have to consider is whether it will be in the interest of justice to grant such an extension. Due to the serious irregularities which occurred in the tender process, the prospects of success were overwhelming in this case. The Court highlighted the various irregularities. PRASA's case as far as the irregularities that took place before and during the tender was unanswerable since Swifambo had elected not to engage in the merits of the review. The Court was satisfied that a proper case had been made for the extension of the time limits to bring this application and the delay was condoned.

The Court then had to decide the merits of the review application and the remedy. As stated above, the merits were not challenged. Consequently, the decision to award the contract was declared unlawful and invalid.

The only just remedy was found to be the setting aside of the contract with retrospective effect.

Propell Specialised Finance (Pty) Ltd v Attorneys Insurance Indemnity Fund NPC and others [2017] 3 All SA 1005 (WCC)

Contract – Cession – Rights of insured under insurance policy aimed at providing cover to attorneys ceded to plaintiff – Validity of cession – Locus standi of plaintiff – Whether the nature of the contractual rights involved a delectus personae (a personal and closed relationship between the insurer and the insured) and whether the contract itself showed that the rights were not intended to be ceded – Properly construed and interpreted against all relevant circumstances, inclusive of the sui generis nature of the insurer, the insured and the relationship between them, the policy was clearly indicative of consensus between the insurer and the insured, not to cede or transfer rights and/or claims.

Alleging that it took cession of the second defendant's rights of recourse against the first defendant, the plaintiff instituted action as cessionary. The second defendant had been insured by the first defendant. Reliance was specifically placed on a written cession agreement in terms of which the second defendant ceded and made over its rights and claims against the first defendant to the plaintiff. Plaintiff sought monetary

relief against only the first defendant and, more particularly, payment of its six damages claims which it had against the second defendant.

In the present Court, only two special pleas raised by the first defendant had to be decided upon.

The first special plea related to the plaintiff's *locus standi in iudicio* – the question being whether the plaintiff as cessionary was entitled to make the claims against the first defendant. The special plea was in effect an attack on the cession upon which the plaintiff relied for its *locus standi in iudicio*. The second special plea was to the effect that the action should be stayed pending the final adjudication of a claim instituted by the second defendant against an entity called Ashtons.

Held – The first defendant bore the onus of proving the special pleas. The general manager of the first defendant testified on its behalf. He ("Harban") stated that the first defendant as an insurer was in fact a *sui generis* insurer who also regarded those it insured as being *sui generis* and accordingly also regarded the relationship between itself and those it insured as *sui generis*. A distinction was drawn between the first defendant (as a creature of statute, intended to provide insurance cover to a specifically defined risk pool) and commercial insurers. On the other hand, the plaintiff rejected the argument regarding the *sui generis* identity of the insurer and the insured, contending that whatever the nature, origin or cause of the existence of the first defendant and its insured, the fact remained that the first defendant was a short-term insurer and that the policy was a written insurance contract. It was contended that the rights and obligations of the parties to the policy should be determined from the policy itself and according to ordinary contractual principles. According to the plaintiff, there was no statutory or other legal prohibition against the cession, nor was it immoral or contrary to public policy. On the contrary, it was argued, our law is that all rights *in personam*, subject to certain exceptions based principally upon the personal nature of the right, can be freely ceded. The Court held that the Policy was an insurance contract between the first defendant (as the insurer) and the second defendant (as the insured). Cession is a juristic act which transfers the right from the estate of the creditor, the cedent, to that of another, the cessionary, who thereby becomes creditor, in his stead.

In order to determine whether the nature of the contractual rights involved a *delectus personae* (a personal and closed relationship between the first defendant and the insured) and whether the contract itself showed that the rights were not intended to be ceded, all circumstances had to be taken into account. In other words, a proper interpretation depended on all circumstances.

In order to determine whether the nature of the right involved a *delectus personae*, it was necessary in the present context to determine if it made a difference to the insurer with whom it was dealing and whether it was dealing with an attorney as opposed to the plaintiff, ie an entity that was not a practitioner. The testimony led in this matter was that it was important to the first defendant to only deal with practising attorneys, as its legislative mandate restricted it to the provision of insurance cover for practising attorneys. The Court agreed that if the rights of the practising attorneys to indemnification are held to be capable of transfer, it will prejudice the position of the first defendant because then whenever the enquiry arises, it would not be able to defend the underlying claims in the name of the insured and would not be able to insist upon the assistance of the insured in defending those underlying claims. It would not make business sense to conclude that rights so personal in nature are capable of

being transferred outside of the ambit and scope of the defined closed group entitled to those rights. In practice, that would mean that the public at large may become entitled to rights which the legislator never contemplated to bestow upon anybody else but a practitioner. Thus, properly construed and interpreted against all relevant circumstances, inclusive of the *sui generis* nature of the insurer, the insured and the relationship between them, the policy was clearly indicative of consensus between the insurer and the insured not to cede or transfer rights and/or claims.

Having found that the cession was bad in law, the Court held that the plaintiff did not have *locus standi in iudicio.*

Although the above finding rendered the second special plea academic, the Court did consider that plea, and found that it also stood to be upheld.

The plaintiff's action against the first defendant was, accordingly, dismissed with costs.

South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku and another [2017] 3 All SA 1029 (EqC, J)

Constitutional law – Hate speech – Section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 – No person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to be hurtful, harmful or to incite harm, or promote or propagate hatred – Reliance on freedom of expression in section 16 of the Constitution of the Republic of South Africa, 1996 – Court finding impugned statements to have constituted hate speech and not protected by the provisions of section 16 of the Constitution.

On behalf of the South African Jewish Board of Deputies (the "SAJBOD"), the South African Human Rights Commission (the "Commission") launched a complaint against the respondents in the Equality Court. The complaint was brought in terms of section 10(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ("the Equality Act"). The Commission stated that in about four statements made by the first respondent concerning the protracted feud in the Middle East, particularly between Israel and the Palestinians, hatred and violence towards Jewish people were propagated. On investigating the complaint, the Commission found the first respondent's utterances to amount to hate speech proscribed by section 16(2) of the Constitution and section 10 of the Equality Act.

Responding to the complaint, the first respondent stated that he had been speaking at a university forum on the plight of the Palestinians, and that his comments were directed at the ideology of Zionism and not at any particular group of people. He relied on the constitutionally guaranteed right of freedom of expression.

Held – The essential issue for determination was whether the offending statements fell within the purview of section 10(1) of the Equality Act, having regard, objectively, to all the relevant circumstances and the complete factual matrix in the proper context. In light of the contentions of the first respondent that he relied on section 16 of the Constitution, and that the offending statements constituted fair comment on matters of public interest, his *bona fide* beliefs regarding Zionism and the plight of the Palestinian people, also had to be examined.

Section 10 of the Equality Act provides that no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds,

against any person, that could reasonably be construed to demonstrate a clear intention to be hurtful; be harmful or to incite harm; or promote or propagate hatred. The provisions of the Act give effect to the equality provisions in section 9 of the Constitution. Section 3 of the Equality Act provides that any person applying or interpreting the Act must, take into account the context of the dispute and the purpose of the Act.

Although the right to freedom of expression is part of a democracy, it is neither absolute nor limitless. Section 36 of the Constitution specifically limits the right, provided that such limitation is reasonable and justifiable in an open and democratic society. In the present matter, the Court held that the limitation of freedom of expression imposed by sections 10(1) and 11 and related provisions of the Equality Act, are not unreasonable and not unjustifiable in an open and democratic society based on human dignity, equality and freedom, when regard is had to all the relevant circumstances. While hate speech is not defined in the Act, it has received significant judicial attention. The Court emphasised the importance of the State's regulating hate speech since it may cause harm to the constitutionally mandated objective of constructing a non-racial and non-sexist society which is based on common human dignity and attainment of equality. Based on the authorities and a proper contextual interpretation of the provisions of section 10(1) and the prohibited grounds in section 1 of the Equality Act, the Court found that at least two requirements for hate speech are created. Firstly, it must be based on a prohibited ground or any other ground where discrimination, which is based on that other ground, promotes or perpetuates systematic disadvantage, or undermines human dignity or adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner which is comparable to discrimination on a ground specifically listed. Secondly, the hate speech must be construed reasonably to indicate a visible or discernible intention to be hurtful, harmful or incite harm, or propagate hatred.

Section 13 of the Equality Act, which deals with the burden of proof, provides that, the complainant must make out a *prima facie* case of discrimination, and that the respondent, on the other hand, must prove, on the facts presented, that the discrimination did not take place as alleged – or that the conduct is not based on one or more of the prohibited grounds. The inquiry into whether an expression constitutes hate speech for which there is no constitutional protection under section 16 of the Constitution, involves two elements which should be present before an expression will be regarded as amounting to advocacy of hatred or hate speech. These are that, the advocacy of hatred which is based on race, ethnicity, gender or religion; and that which constitutes incitement to cause harm.

The defences raised by the first respondent, namely that the impugned statements were true, fair comment, and in the public interest, and based on his beliefs, had no merit as they were not permissible under the Equality Act, and having regard to the provisions of section 16 of the Constitution. The impugned statements clearly constituted hate speech and fell within the purview of section 10(1) of the Equality Act. They were not protected by the provisions of section 16 of the Constitution.

As a remedy, the Court deemed it fair, proper and equitable that an order for an unconditional apology be issued, and that the respondents pay the costs of the litigation.

The South African Hunters and Game Conservation Association v Minister of Safety and Security of the Republic of South Africa [2017] 3 All SA 1059 (GP)

Constitutional law – Firearm control and regulation – Renewal of firearm licences – Effect of failure to renew within specified time limit – Sections 24 and 28 of the Firearms Control Act 60 of 2000 – Constitutionality – Regime of renewal not defensible on grounds of rationality, clarity or non-arbitrariness, and violated property rights.

The Firearms Control Act 60 of 2000 ("the Act") replaced the Arms and Ammunition Act 75 of 1969 (the "1969 Act"), and established a transitional regime to migrate the regulation of firearm ownership from the regime created by the 1969 Act, to the new regime created. Provision is made for a system of automatic periodic relicensing of firearms. Schedule 1 of the Act provides for a five-year transitional period, during which licences obtained under the 1969 Act remained valid until 30 June 2009. On 29 June 2009, the applicant obtained an interim order preserving the status of the 1969 Act licences, pending the finalisation of its main application, in which it sought an order that certain provisions of Schedule 1 of the Act be declared unconstitutional.

The main application was never finalised because, after the initial litigation, the parties started negotiations which led to the publication of a Draft Firearm Control Amendment Bill on 3 March 2015 (the "Bill").

According to the applicant, the Bill addressed its concerns, as well as the constitutional challenges.

Despite an indication by the Minister that the Bill would be introduced in Parliament by September 2016, that did not happen. The failure to introduce the Bill, and the chaos and uncertainty that reigned pertaining to various aspects related to firearm administration, led to the present application. The affidavits filed by the applicant attested to the uncertainty and lack of clarity on how the legislation should be implemented and illustrated that those charged with administering the legislation simply did not know how to go about it, resulting in highly inconsistent outcomes. As a result, the applicant approached the court. It eventually limited the relief sought to the declaration of unconstitutionality of sections 24 and 28of the Act.

Held – The evidence established that chaos reigned in firearm licensing and administration. The stated purpose of the Act is to establish a comprehensive and an effective system of firearm control. In order to ensure proper control no one is allowed to possess a firearm, unless such a person holds the required licence. Under the Act a firearm licence has a limited lifespan. In respect of licences for self-defence the prescribed period is 5 years and in respect of hunting 10 years. The putting in place of a period of finite licences is one of the central features that distinguishes this Act from its predecessor, which made provision for licences in perpetuity. A person who wishes to renew the licence, must in terms of section 24, apply at least 90 days before the date of expiry to the Registrar for a renewal. The applicant contended that the problems with sections 24 and 28 arose as it was extremely difficult, if not impossible, to meet the requirements of legality once a person failed to comply with the 90-day time limit contained in section 24. If a person failed to apply for a renewal at least 90 days before expiry, there was no provision in the Act that facilitated the person bringing himself back within the parameters of the law – and he would thenceforth be in unlawful possession of a firearm. Section 28 deals with the circumstances in which a licence is cancelled. The crucial discrepancy in the legislation is that people who stand

to lose their licences through cancellation, or a declaration by the Registrar or a court that they are unfit to possess a firearm are granted certain procedures to ensure due process. No similar provisions exist if the licence expires due to the effluxion of time. Those affected by the latter scenario are not granted due process nor any manner in which they can bring themselves back within a scheme of legality, nor is there any clarity as to how they should surrender the now unlicensed firearm. The proposed amendment Bill would, according to the applicant, address those issues.

The applicant, therefore, argued that the regime of renewal that was put in place was not defensible on grounds of rationality, clarity or non-arbitrariness. It was argued that the way that the sections operate additionally impacted on the right to equality and on property rights. Closely linked to the rationality issue, was the challenge of vagueness – it being argued that it was not clear what should be done once on the wrong side of the law. The Court agreed that the existing scheme and the legislative framework were both irrational and vague. There appeared to be no rational nexus between the legislative scheme and the pursuit of a legitimate government purpose that could explain the discrepancies in procedure and outcome as referred to above. The mere fact that no proper procedure was provided to bring oneself back under a scheme of legality, nor to surrender a firearm for value or otherwise, pointed to irrationality and vagueness. It was, therefore, concluded that the legislation was unconstitutional on the basis of lack of rationality and clarity.

A final point raised by the applicant was that the impugned provisions violated section 25 of the Constitution, which guarantees one's right to property and prohibits the arbitrary deprivation of property. The argument arose because of the obligation to surrender a firearm under certain circumstances and the fact that one is not allowed to possess a firearm without a valid licence. The Court held that the deprivation of a firearm in the absence of proper procedure constituted a violation of the owner's property rights.

Sections 24 and 28 were declared unconstitutional and had to be amended to pass constitutional muster. Parliament was given 18 months within which to effect the amendment of the Act.

SA RIDING FOR THE DISABLED ASSOCIATION v REGIONAL LAND CLAIMS COMMISSIONER AND OTHERS 2017 (5) SA 1 (CC)

Land — Land reform — Restitution — Claim — Right to intervene — Claim for restitution of state land — Right to intervene of lawful occupier who made improvements to property during occupancy — May intervene only for purpose of determining compensation — Restitution of Land Rights Act 22 of 1994, s 35(9).

Land — Land reform — Restitution — Compensation of lawful occupiers of state and subject to restitution — May intervene if left out of restitution proceedings — Restitution of Land Rights Act 22 of 1994, s 35(9).

Section 35(9) of the Restitution of Land Rights Act 22 of 1994 affords lawful occupiers of state land the right to claim compensation — to be determined either by agreement or the Land Claims Court — when the land they occupy is awarded to a claimant for restitution of land rights.

The applicant (the Association) was the lessee of state land that the Land Claims Court (the court) transferred to the second and third respondents (the Sadiens) as compensation for land lost during apartheid. The court made the order without the knowledge of the Association, which had made improvements valued at R7,5 million during its tenancy. Dissatisfied, the Association applied to intervene and for the variation or rescission of the order under s 35(11) of the Restitution of Land Rights Act 22 of 1994. The court held that the Association lacked direct and substantial interest in the restoration of the land to the Sadiens, and refused the application. The Association sought relief from the Constitutional Court.

Held

To succeed, the Association had to meet the direct and substantial interest test — ie show a right that was, or was likely to be, adversely affected by the order sought. All it had to do at the intervention stage was to make allegations which, if proved, would entitle it to relief. A direct and substantial interest would exist if the Association were able to show that it had some right which was affected by the order issued. Here the LCC order had the effect of transferring the land, without determination of compensation to the Association, under s 35(9). While the LCC was correct in holding that the Association had no direct and substantial interest in the property, it erred by overlooking the Association's statutory right, as occupier, to just and equitable compensation. In the light of this the Association would be allowed to intervene for the purpose of determining compensation. The fact that a final order had already been issued at the time of the application for intervention was not material: the LCC should have granted leave to intervene for the purpose of considering the issue of compensation only. The matter would be remitted to the LCC for the determination of compensation payable to the Association.

OFF-BEAT HOLIDAY CLUB AND ANOTHER v SANBONANI HOLIDAY SPA SHAREBLOCK LTD AND OTHERS 2017 (5) SA 9 (CC)

Company — Oppressive conduct — Relief — Minority shareholder's claim under old Companies Act — Prescription — Not 'debt' — Incapable of prescription —Companies Act 61 of 1973, s 252.

Section 252 was the 'oppression' section of the (old) Companies Act 61 of 1973. It allowed the courts to provide equitable relief to minority shareholders aggrieved by

'unfairly prejudicial, unjust or inequitable' conduct by the majority or the board. The issue in the present application for leave to appeal was whether claims brought under s 252 were debts that could prescribe under the Prescription Act 68 of 1969. The applicants, both timeshare clubs, were minority shareholders in the first respondent (Shareblock), a company that operated holiday resorts. In 2008 the applicants commenced a High Court application for declaratory relief under s 252. They claimed that the third respondent (Mr Harri), the controlling mind and principal shareholder of Shareblock, had during 1998 – 1999 improperly amended Shareblock's articles to allow the allocation of shares in a timeshare development, and then allocated such shares in an unfair manner. They sought an order declaring the amended articles invalid, that the shares were improperly issued, and that the holders of those shares were barred from voting on them.

The issue was whether the applicants' s 252 claim had prescribed. The High Court held that it had because the claim was a 'debt' as intended in ss 11 and 12 of the Prescription Act and the applicants had been aware of their cause of action for many years. The court rejected the argument that the causes of action amounted to continuing wrongs. In an appeal the Supreme Court of Appeal, attaching a wide meaning to the term 'debt', endorsed the High Court's view that the s 252 debts had prescribed.

In the present application, also for leave to appeal, the applicants argued that the Constitutional Court's decision in *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC) (2016 (6) BCLR 709; [2016] ZACC 13) required a narrow meaning to be ascribed to 'debt': it could be either a claim for the payment of money, or a claim for the delivery of something, and since their claim under s 252 was neither, it had not prescribed. In the alternative, the applicants argued that their claims constituted continuing wrongs that were incapable of prescription. The respondents argued that the applicants' claim was a debt because it sought the alteration of Shareblock's articles, that is, the performance of an obligation as ordinarily understood.

Held per Mhlantla for the majority

The appeal would be upheld. The plain text of s 252 gave the court a broad discretion to grant equitable relief (see [28]). Until the court made a determination under s 252, neither party could discharge its obligations to the other because neither would be aware of their existence or extent (see [30]). A claim had to be correctly characterised before a decision on the applicability of the Prescription Act could be made (see [34]). The applicants' claim, being one for declaratory relief, was not a debt as defined in *Makate* and therefore incapable of prescription (see [31] – [34], [48]). The SCA's order would be replaced with an order declaring that a s 252 claim was not a debt under the Prescription Act, remitting the matter to the High Court (see [36], [56]).

Held per Froneman (concurring in part)

The appeal should succeed, but only to a more limited extent than ordered by the majority (see [57]). Every one of the claims in the notice of motion fell comfortably within the meaning of 'debt' as intended in the Prescription Act and *Makate* (see [60], [87] – [88]). The majority's approach turned an ordinary function of the courts — to determine the validity of claims — into an extraordinary one that meant that no claim under s 252 could ever prescribe (see [76]). Neither the existence of the just and equitable remedy nor the fact that it derived from statute was sufficient ground for holding that a s 252 claim was not a debt under the Prescription Act (see [78]). Only those claims of the applicants meeting certain prerequisites would, however, have prescribed (see [87] – [88], [95]).

Held per Madlanga (concurring in part)
The majority's focus on the nature of the relief sought could allow claimants to defeat the objectives of the Prescription Act by couching their claims in the language of s 252(3) (see [98] – [99], [102] – [103]). The correct approach was to examine the conduct complained of; and if it gave rise to a claim that qualified as debt under *Makate*, then the Prescription Act applied (see[105]). On this approach the claim based on the amendment of Shareblock's articles did not give rise to a debt that was capable of prescription, and the majority order should have been amended accordingly (see [107] – [108]).

FIRSTRAND BANK LTD v KJ FOODS CC 2017 (5) SA 40 (SCA)
Company— Business rescue — Business rescue plan — Vote — Rejection — Setting aside rejection vote — Effect — No further vote envisaged — Proposed business plan to be considered adopted by operation of law — Companies Act 71 of 2008, ss 153(1)(a)*(ii), 153(1)*(b)*(i)*(bb), *153(2)*(b) and 153(7).

Company— Business rescue — Business rescue plan — Vote — Rejection — Application to court to set aside rejection vote on grounds of being inappropriate — Court's discretion to, upon such application, set aside vote if reasonable and just to do so — Not entailing that vote's inappropriateness first be established before court may set it aside — Entailing single enquiry into whether its setting aside reasonable and just, with reference to listed factors and all circumstances — Companies Act 71 of 2008, ss 153(1)(a)*(ii)*, *153(1)*(b)*(i)*(bb) and 153(7).

Section 152(2) of the Companies Act 71 of 2008 sets the required minimum votes for the approval of a business rescue plan on a preliminary basis's 152(3) provides that, if not so approved, the plan may only be dealt with in terms of s 153; s 153(1)*(a)*(ii) that the business rescue practitioner may advise the meeting that the company in question may apply to a court 'to set aside the result of the vote by the holders of voting interests or shareholders, as the case may be, on the grounds that it was inappropriate'; s 153(1)*(b)*(i)*(bb)* that if the business practitioner does not do so, then such an application may be brought by an 'affected person'; and s 153(7) that, on an application in terms of either s 153(1)*(a)*(ii) or s 153(1)*(b)*(i)*(bb)*, 'a court may order that the vote on a business rescue plan be set aside if . . . satisfied that it is reasonable and just to do so, having regard to [a number of factors set out in sub paras *(a)* – *(c)*].'
The main issue in this case was whether s 153(1)*(a)*(ii) or s 153(1)*(b)*(i)*(bb)*,read with s 153(7), entailed that the court must first establish whether the vote was inappropriate before invoking its discretion under s 153(7) to set it aside. An ancillary issue was the effect of a court setting aside a vote under s 153(7), ie whether the business rescue plan must again be put to the vote after a court set it aside. In terms of s 153(2)*(b)*, after a business rescue practitioner or an affected person had informed the meeting that they intended bringing an application to set aside the result of the vote as inappropriate, the meeting was adjourned until the court disposed of the contemplated application. Here the court a quo, which had set aside the appellant's vote against approval of a business rescue plan, inter alia ordered that a revised business plan be adopted by the affected parties.
Held

Section 153(1)*(a)*(ii) and s 153(1)*(b)*(i)*(bb)* were inextricably linked to s 153(7).On an application to set aside the result of a vote in terms of any of these subsections, the court was enjoined by s 153(7) to determine only whether it was reasonable and just to set aside the particular vote, taking into account the factors set out in s 153(7)*(a)* – *(c)* and all circumstances relevant to the case, including the purpose of business rescue in terms of the Act. Put differently, in an application on the grounds that its result was inappropriate, the vote would be set aside if it were reasonable and just to do so in terms of s 153(7). This entailed a single enquiry and value judgment. (Paragraph [80].)
If a business rescue plan were again put to the vote at the resumption of the postponed meeting, it would enable a creditor who voted against the adoption of the business rescue plan to vote against it once more, starting the whole process all over again. The Act clearly did not envisage another round of voting. It followed that upon setting aside of the vote rejecting the business rescue plan, the business rescue plan would be considered to have been adopted by operation of law. At the resumption of the meeting adjourned in terms of s 153(2)*(b)*, it would only be necessary for the business rescue practitioner to report on the outcome of the application to court. The order of the court a quo, that the revised business rescue plan be adopted by the affected parties, was therefore superfluous; its adoption was a natural consequence of the setting aside of the result of the vote. (Paragraph [88] – [89].)

MPUMALANGA TOURISM AND PARKS AGENCY AND ANOTHER v BARBERTON MINES (PTY) LTD 2017 (5) SA 62 (SCA)

Environmental law — Protected areas — Prohibition on mining and prospecting activities in protected areas — Prohibition extending to areas declared, designated or reserved as such by provincial legislation — Whether provincial legislation adequately identified designated protected area — National Environmental Management: Protected Areas Act 57 of 2003, ss 12, 48(1)(a) *and* (b)*; Mineral and Petroleum Resources Development Act 28 of 2002, s 48(1)*(c).

Minerals and petroleum — Mining and prospecting rights — Prohibition on mining and prospecting activities in protected areas — Prohibition extending to areas declared, designated or reserved as such by provincial legislation — National Environmental Management: Protected Areas Act 57 of 2003, ss 12, 48(1)(a) *and* (b); *Mineral and Petroleum Resources Development Act 28 of 2002, s 48(1)*(c).

Sections48(1)*(a)* and *(b)* of the National Environmental Management: Protected Areas Act 57 of 2003 (NEMPAA) prohibits 'commercial prospecting or mining activities' in respect of inter alia a 'nature reserve' or a 'protected environment'; and s 48(1)*(c)* of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) the issuing of inter alia a prospecting right in respect of land 'being used for public or government purposes or reserved in terms of any other law'.
This case concerned an appeal to the Supreme Court of Appeal against a High Court's declaratory order that the respondent — the holder of a prospecting right over land in respect of which the appellants contended that the prohibitions in ss 48(1)*(a)* and *(b)* of NEMPAA and s 48(1)*(c)* of the MPRD Aapplied — was entitled to conduct prospecting activities on the relevant land and that the appellants be

interdicted from interfering with such activities. In arriving at its decision, the High Court had held that none of the provincial legislative acts relied on by the appellants as having established a nature reserve or protected area, validly did so — in particular, that the 1996 proclamation of the area as 'conservation area' was void for vagueness because it did not identify the designated area adequately (see [10] and [15]).

The land in question formed part of an ecologically important area in Mpumalanga Province that was approved as an area reserved for nature conservation and outdoor recreation in 1985 by the executive committee of the erstwhile Transvaal Provincial Administration. A resolution to this effect was made in terms of the Transvaal Nature Conservation Ordinance 12 of 1983 (the Ordinance) in respect of 'approximately 20 000 hectares of state land and mining in Barberton', and the reserved properties depicted on a map annexed to the memorandum of the resolution. Under the post-1994 provincial dispensation, conservation management in this region fell under the Eastern Transvaal Parks Board (the ETPB), established under the Eastern Transvaal Parks Board Act 6 of 1995 (the ETPB Act). This Act also provided for the transfer of the administration of certain provincial nature conservation laws, including the Ordinance, to the ETPB. A proclamation issued in 1996 under the ETPB Act (the 1996 Proclamation) included the Barberton Nature Reserve as a 'conservation area' as defined therein; and in a 2014 proclamation it was again included in a schedule of provincial nature reserves. This schedule included a map defining the boundaries of the reserve and a list of properties within it. The properties listed in Barberton’s prospecting right were included in the properties comprising part of the reserve.

Held

The High Court took too narrow a view of the matter. The definitions of a 'protected area' in s 1 of NEMPAA encompassed a 'protected environment’, which included an area 'declared or designated in terms of provincial legislation'; and the definition of 'nature reserve' included areas 'designated in terms of provincial legislation'. NEMPAA thus contemplated the protection of areas that had been either 'declared' or 'designated' in terms of provincial legislation. Also, the deeming provision in s 12 of NEMPAA (set out in [13]) extended the protection afforded to a nature reserve by NEMPAA, broadening its scope to include a protected area reserved in terms of provincial legislation. The effect of the 1996 Proclamation was thus that the designated area was reserved or protected in terms of provincial legislation for a purpose for which it could be declared as a nature reserve or protected environment under s 12 of the NEMPAA. (Paragraphs [10], [12] and [13] – [15].)

The validity and effectiveness of the 1996 Proclamation did not require a detailed description of the area concerned, as the High Court had found. The reference to the 'Barberton Nature Reserve' in the 1996 Proclamation had the meaning given and applied to it by the provincial authorities since at least 1985. And when regard was had to the nature of the 1996 Proclamation as a 'designation', and to its context — including its relationship to the 1985 resolution, the administration of the land as the Barberton Nature Reserve since then, and that it was a designation of an area already as a matter of fact reserved — it had achieved its purpose of informing the public that the areas were classified as 'conservation areas' under the ETPB Act. It therefore sufficed that it simply indicated the designated area by name. (Paragraphs [17].)

Section 48 of NEMPAA provided that it trumped other legislation in the event of a conflict concerning the management or development of protected areas. As the 1996

Proclamation met the requirements of s 12 of NEMPAA, it followed that the prospecting area fell to be protected against prospecting under s 48(1) of the MPRDA. The High Court was accordingly in effect being asked to compel an illegality, which it could not do, and Barberton Mines' application ought to have failed. In followed that the appeal would be upheld. (Paragraphs [11] and [20] – [21].)

MTO FORESTRY (PTY) LTD v SWART NO 2017 (5) SA 76 (SCA)

Delict — Elements — Unlawfulness or wrongfulness — Foreseeability — Foreseeability of harm should not be considered in determining wrongfulness, but should be confined to rubrics of negligence and causation.

Fire — Veld or forest fire — Presumption of negligence — Scope — Where essential facts known, role of presumption truncated — National Veld and Forest Fire Act 101 of 1998, s 34(1).

Fire— Veld or forest fire — Negligence alleged — Duty of landowner — Not obliged to ensure that in all circumstances fire on its property would not spread beyond its boundaries — Respondent obliged to take steps that were reasonable in circumstances to guard against such event occurring — If taking such steps and fire spreading nevertheless, it could not be held liable for negligence just because further steps could have been taken.

The appellant company, which ran a forestry business, was the beneficial owner of a plantation called Witelsbos in the district of Humansdorp. It suffered considerable damages when a fire burned through the plantation, despite the efforts of teams of firefighters to halt the spread. The fire had started on the respondent's immediately adjacent farm — in an area packed with dense thickets of highly flammable alien plants ('warbos') — and had spread rapidly as a result of a strong wind. The appellant sued the respondent in the High Court, Cape Town, for damages of more than R23 million, alleging that its negligent omissions had caused or allowed the fire to spread onto Witelsbos. Relief was refused in the High Court, so the appellant approached the SCA on appeal.

Wrongfulness and foreseeability

While the matter turned on negligence, the court took the opportunity to rule conclusively on the relevance of foreseeability in the determination of wrongfulness, an area of some controversy in the law of delict.

Held, that it was 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 would have the effect of the two elements being conflated and lead to wrongfulness losing its important attribute as a measure of control over liability. Accordingly, foreseeability of harm should not be taken into account in respect of the determination of wrongfulness, and its role should be confined to the rubrics of negligence and causation. (See [18].)

Negligence

As to the question of negligence, the key issue for consideration was whether the steps that had been taken by the respondent to prevent the fire spreading to its neighbour's property had been reasonable in the circumstances.

The court considered the firefighting facilities the respondent had in place, which the appellant attacked as inadequate. The respondent had appointed an independent

contractor, Mr Wasserman, to fight fires on its behalf. Mr Wasserman headed what was acknowledged by the appellant to be an effective, well-equipped firefighting unit. On the day in question Mr Wasserman reacted promptly on being alerted of the fire, immediately sending his team to the scene. Aside from these firefighting measures, on its part the appellant had also put in place extensive measures to fight fires on its own property *as well as that of the respondent*. The appellant had at its disposal a highly trained and equipped firefighting team. The respondent had come to rely on these services provided by the appellant, equally on the day in question when the appellant's team had arrived on the scene shortly after being informed of a fire on the respondent's land.
The court further considered the obligations of the respondent to remove from its property the 'warbos', a clear fire hazard.
A preliminary issue raised was the applicability of the presumption of negligence prescribed by s 34(1) of the National Veld and Forest Fire Act 101 of 1998. The respondent argued that, because it did not 'control' the land on which the fire started, it was not an 'owner' for the purposes of s 34(1), and the presumption therefore did not apply. The appellant submitted that the case authority upon which the respondent relied was flawed. The SCA noted that the presumption was really an evidential aid and where, as here, the essential facts were known, its role was to a large extent truncated. It however found it unnecessary to make a finding on this disputed point as the proven facts in this case in any event rebutted any presumption of negligence. The court proceeded on the assumption that the section placed an onus on the respondent to show that the fire spread to Witelsbos without negligence on its part.
Held, that a reasonable landowner in the respondent's position was 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. (See [47].)
Held, that the respondent had taken such steps that were reasonable in the circumstances to guard against the fire spreading beyond its property. It had engaged Mr Wasserman to make his firefighting services available if need be. Not only that, it was aware that the appellant would take steps (as it had always done in the past, and in the present instance) to come to its assistance in combating any fire that should break out. All these fire-fighting forces were considerable. Finally, the respondent had not acted negligently in failing to remove the warbos, a natural resource on the property, as opposed to a 'man-made tinderbox'. (See [40], [41], [46], [48] and [50].)
Appeal dismissed with costs. (See [51].)

NEW ADVENTURE SHELF 122 (PTY) LTD v COMMISSIONER, SOUTH AFRICAN REVENUE SERVICES 2017 (5) SA 94 (SCA)
Revenue — Capital gains tax — Assessment — Reopening and redetermination— Whether competent where agreement giving rise to capital gain cancelled in subsequent year of assessment, without full proceeds of disposal being received — No reopening of assessment for redetermination contemplated — Capital loss made

in year of cancellation to be set off against future capital gains — Income Tax Act 58 of 1962, sch 8, paras 25(2) and 35(3).

The taxpayer was assessed in 2007 for capital gains tax on the proceeds of its disposal of land but the sale was subsequently cancelled (in 2011) without the full purchase consideration having been paid. No payment was made in respect of the 2007 assessment nor was it objected against.
This appeal concerned the competing contentions of the taxpayer, that in such circumstances it was entitled to having its 2007 income tax assessment reopened and reassessed; and of the South African Revenue Services (Sars), that in terms of ss 81(1) and 81(2)*(b)* of the Income Tax Act 58 of 1962 the 2007 assessment had become final and that it could not be reopened. The taxpayer argued that these sections did not apply in respect of tax levied on a capital gain in the present circumstances; instead, if as contemplated in para 35(3)*(c)* of the eighth schedule to the Act, the result of the cancellation of the agreement was a reduction of 'an accrued amount forming part of the proceeds of that disposal' as was the case here, then a redetermination of the base cost of the asset was required (under para 25(2) of the eighth schedule), and so the original assessment had to be reopened to revise the capital gain.
Held
Paragraph 35(3) related to the determination of the proceeds of a disposal ‘during a year of assessment'. It was therefore inconsistent with the overall scheme of para 35(3) to construe para 35 as applying not only to the determination of capital gains in a particular year, but also as requiring a redetermination in a later year of a capital gain already accrued. Moreover, paras 25(2) and 25(3) of the eighth schedule made it clear that, should there be a redetermination of a capital gain or a capital loss that occurred in a prior year of assessment, that redetermination was to be taken into account in the determination of a capital gain or a capital loss in the current year, ie in the tax year in which the events giving rise to the redetermination took place — not in the prior year. (Paragraphs [20] and [23] – [24.)
The argument that para 35(3) entitled the taxpayer to have a confirmed tax assessment of a previous year reopened as a result of a cancellation, termination or variation of an agreement which reduced an accrued amount forming part of the proceeds of an earlier disposal of an asset, was therefore wholly inconsistent with the provisions of the eighth schedule, and was unsustainable. The cancellation of the sale did not entitle the taxpayer to have its tax liability for the 2007 year reassessed. The cancellation and its consequences were factors relevant to an assessment of any capital gain or capital loss that accrued during that current tax year, and not the year that the capital gain had initially accrued. (Paragraphs [26] and [29].)

SAHARAWI ARAB DEMOCRATIC REPUBLIC AND ANOTHER v OWNERS AND CHARTERERS OF THE CHERRY BLOSSOM AND OTHERS 2017 (5) SA 105 (ECP)
International law — Jurisdiction of courts — Act occurring abroad — Applicants seeking attachment of ship's cargo unlawfully taken from non-self-governing territory of Western Sahara — High Court holding that violation of inhabitants' sovereignty over territory's natural resources justifying granting of application — Order made with rider that cargo would be allowed to proceed if appropriate security furnished.

International law — Jurisdiction of courts — Act of state doctrine — Principle that domestic courts should exercise judicial restraint in pronouncing on acts of foreign states — Courts to be guided by Constitution when deciding whether to decline adjudication.

International law — Non-self-governing territory under article 73 of United Nations Charter — Right to self-determination — Sovereignty over natural resources — Ownership of cargo of phosphate mined by private company in Morocco-claimed and -controlled part of Western Sahara — High Court finding that sovereignty over cargo vesting in people of Western Sahara, legitimately represented by applicants — Granting application for its attachment pending vindicatory action by applicants.

International law — State immunity — Protection from indirect impleading — Party invoking protection to show that non-party state's rights and liabilities at international law affected by decision of domestic court.

The court had to decide whether to confirm its temporary interdict ordering the attachment of *NM Cherry Blossom*'s cargo. The decision involved consideration of the international law applicable to the ownership and exploitation of the natural resources of Western Sahara, the applicant's right to interim relief, and the applicability of the act of state doctrine and the principle of state immunity.
Cherry Blossom had docked at Coega Harbour, Port Elizabeth, to take on bunkers en route to New Zealand when the temporary order was granted. The phosphate on board was mined by a Moroccan company in the Morocco-controlled part of Western Sahara. The applicants were the Saharawi Arab Democratic Republic (the SADR), a government in exile that claimed sovereignty over Western Sahara and controlled the part not controlled by Morocco, and the Polisario Front, the local liberation movement. While the SADR — proclaimed by the Polisario Front in 1976 — was not a United Nations (UN) member, it was recognised by several member states, including South Africa. The UN designated Western Sahara a non-self-governing territory, conferring the right of self-determination on its inhabitants (1963, 1966), and recognised the Polisario Front as their legitimate representative(1979). In an advisory opinion handed down in 1975, the International Court of Justice found that Morocco had no claim to Western Sahara. * In 2006 the UN's recognition of the sovereignty of peoples and nations over their natural resources (1960, 1962) was extended to the inhabitants of non-self-governing territories. Lastly, the SADR's own constitution (2015) provided that its mineral wealth belonged to the people.
Onlytwo of the listed respondents opposed the confirmation of the temporary order: OCP SA, the exporter of the cargo, and its subsidiary, Phosphates de Boucraa SA, its miner. They claimed they had the right, under Moroccan law, to mine phosphate in Western Sahara. While the Moroccan government took no part in the proceedings, the respondents argued that since it was indirectly impleaded, state immunity and the act of state doctrine precluded the court from hearing the matter.

Held

Interim interdict

The applicants met the requirements for an interim interdict: the facts established, on a prima facie basis, that the people of Western Sahara owned the *Cherry Blossom*'s cargo, and the balance of convenience favoured the applicants (see [51] – [52]).

State immunity

Since there was no South African authority on what constituted indirect impleading of a state, the court would have regard to customary international law (see [63]). In the

English case of *Belhaj v Straw* [2017] UKSC 3, in which arguments similar to those made by the respondents were advanced, the court held that, to be protected, the non-party state's legal interests had to be directly affected — the mere fact that its rights and liabilities were in issue was not enough (see [74], [81]). Given that a finding by a South African court on the legality of respondents' mining operations in Western Sahara would not directly affect the international-law rights orliabilities of Morocco, the claim to state immunity would fail (see [83] – [84]). (The fact that Morocco's political or moral interests might be affected by the court's determination was deemed irrelevant (see [85]).)

Foreign act of state doctrine

This was a doctrine of domestic rather than international law (see [86]). Courts dealing with complex issues at the interlocutory stage were obliged todecide only such issues as were strictly necessary (see [92]). The court would, in deciding whether to adjudicate the matter, be guided by the Constitution, specifically the right of access to courts (see [96]). Since the matter was complex and the nature of the foreign act relied on by the respondents unclear, the decision on justiciability would best be dealt with on the pleadings by the trial court (see [89] – [101]).

Order

Since the applicants made out a case for an interim interdict, the temporary interdict would be confirmed and the respondents restrained from removing the cargo from the jurisdiction of the court pending the determination of the applicants' vindicatory action, which they had to institute within a month (see [101], [107.1], [107.10]). The sheriff would be authorised to release the cargo from attachment in the event that suitable security was furnished to the applicants (see [107.4]).

AD AND ANOTHER v MEC FOR HEALTH AND SOCIAL DEVELOPMENT, WESTERN CAPE 2017 (5) SA 134 (WCC)

Evidence — Privilege — Legal professional privilege — Scope — Rule prohibiting disclosure of 'without prejudice' communications — Exceptions to — Disclosure, after judgment granted, and in support of punitive costs order, of settlement offer expressly made 'without prejudice save as to costs' — Being in line with public policy considerations underlining rule, so-called 'Calderbank' offers were admissible in relation to costs and could be disclosed for that purpose once judgment had been given.

Costs — Punitive costs order — When to be awarded — Where defendant in damages action refusing to accept plaintiff's settlement offer made 'without prejudice save as to costs' — Factors to be considered.

In granting judgment to the plaintiffs on quantum in respect of their damages claim against the defendant (the merits had been conceded), the court ordered the determination of costs to stand over. In those proceedings the plaintiffs sought inter alia a punitive costs award on the attorney/client scale against the defendant. In support of this the plaintiffs wished to have disclosed a secret offer they had made during litigation to settle the case on the basis that the defendant pay the plaintiffs R20 million plus party/party costs, plus expenses of expert witnesses. The defendant's unreasonable refusal of the offer, the plaintiffs argued, meant that they had to run a lengthy trial at an enormous expense and that the costs order they sought was justified. The defendant opposed the production of the secret offer.

The law to be applied in South Africa regarding without prejudice communications was the English law as at 1961 (s 42 of the Civil Proceedings Evidence Act 25 of 1965). Generally speaking, without prejudice communications were inadmissible. However, the development of exceptions was allowed, with reference to public policy underlying the rule, ie that parties should be encouraged to settle disputes and be discouraged from costly litigation. As to the secret offer under consideration, the question presently was as follows: should South African law recognise an exception to the effect that, *once judgment had been granted*, a party should be permitted to produce, in support of a particular costs order, a settlement offer expressly made '*without prejudice save as to costs*'? The English Court of Appeal in *Calderbank v Calderbank* [1975] 3 All ER 333 (CA) recognised that in principle such offers ('Calderbank' offers) were admissible after judgment had been handed down. Such a view was approved and acted upon in *Cutts v Head*[1984] 1 All ER 597 (CA), and followed in various Commonwealth jurisdictions. The belief was that the public policy of encouraging settlements would be best served if litigants appreciated the risk of adverse costs orders should they disregard reasonable offers of settlement. (It was clear though that the offer had to explicitly state that it was made without prejudice 'except in relation to costs', or words to similar effect.) (See [41],[43] and [47].)

Held

There was no reason why South Africa law should not recognise the same exception as had found favour in England and other Commonwealth jurisdictions. The considerations of public policy in favour of settlements and discouraging costly litigation were as compelling now as they ever were. As such, Calderbank offers were admissible in relation to costs and could be disclosed for that purpose once judgment had been given. (See [50]and [60].)

A plaintiff who had made such an offer was entitled to costs on the attorney/client scale in circumstances in which the defendant had behaved unreasonably in rejecting the offer. Factors to be considered included whether the defendant had engaged reasonably in attempting to settle; whether the plaintiff was offering a fair discount based on a realistic assessment of the case rather than holding out for the best conceivable outcome; whether the plaintiff had allowed the defendant a reasonable time to consider the offer; the extent of the difference between the amount of the offer and the amount of the award; and the nature of the proceedings and resources of the litigants. In the circumstances of the present case and considering the aforementioned factors, a punitive scale of costs against the defendant was not warranted.(See [60] – [82].)

EX PARTE WHITFIELD AND SIMILAR MATTERS 2017 (5) SA 161 (ECP)

Land — Restrictive conditions of title — Removal — High Court's jurisdiction — Whether authority of High Court to remove restrictive conditions with consent of interested parties altered by Spatial Planning Act — Spatial Planning and Land Use Management Act 16 of 2013, s 47(1).

This judgment, dealing with several similar applications, concerned whether the recently promulgated Spatial Planning and Land Use Management Act 16 of 2013 had in any way altered the High Court's jurisdiction to remove a restrictive condition of title. The position as per the case law was as follows: The High Court could remove, vary or suspend a restrictive condition of title with the consent of all of the parties whose rights and interests were regulated thereby. But it had no independent jurisdiction in these respects. It merely served as court of enquiry to establish

whether all the interested parties had properly exercised their common-law rights to waive, vary or abandon their rights. If it was satisfied that this was so, it could issue a declarator to that effect. (See [4] and [10].)
The Spatial Planning Act located decision-making in relation to restrictive conditions at the level of the municipal sphere; more particularly, in municipal planning tribunals — consisting of municipal officials and independent experts — established in terms of s 35. Section 47(1) of the Act provided that a restrictive condition may, *with the approval of the municipal planning tribunal*, and in the prescribed manner — ie on application by an interested party (see s 41) — be removed, amended or suspended. (See [17],[24] and [28].)
The pertinent question was whether s 47(1) precluded a court from authorising the removal of a restrictive condition without the municipal planning tribunal's consent. The court held that it did not. The court firstly noted that the Act did not specifically address the ambit of the court's authority, and suggested this this very fact militated against a finding that the court's authority was in any way altered. The court further noted that the Act did not confer upon a municipal planning tribunal a general power in relation to restrictive conditions which it may exercise of its own discretion; it only exercised its powers upon application made by specified parties (as per s 45). The fact that a municipal planning tribunal had the power to remove a restrictive condition on application did not mean that it had any legal interest in the removal of a restrictive condition. The court concluded that a court's power to grant an order authorising the removal or amendment of a restrictive condition of title upon proof that all interested parties had consented thereto was not affected by the provisions of the Act. In each case it would be necessary to establish that all interested parties had indeed consented thereto. (See [29], [33], [37], [38] and [40].)

READAM SA (PTY) LTD v BSB INTERNATIONAL LINK CC AND OTHERS 2017 (5) SA 184 (GJ)

Contempt of court — Disobedience of court order — What constitutes — Order obtained in *SCA* requiring close corporation to partially demolish building erected in breach of applicable town planning scheme — Corporation deliberately not complying with order, but seeking to circumvent compliance through consolidation and rezoning applications — Corporation in deliberate contempt — To refuse finding of contempt would be to allow corporation to present unlawful exercise as fait accompli, undermining principle of legality.

Contempt of court — Disobedience of court order — Failure of court order to set out deadlines for compliance — Effect of.

Contempt of court — Disobedience of court order — Variation of court order — Whether respondent in contempt proceedings should be granted opportunity to apply for variation of order, to obtain judicial sanction for its course of conduct — Inappropriate where effect of doing so would be to excuse contemptuous non-compliance.

The Supreme Court of Appeal had previously ordered the close corporation BSB to partially demolish a building (the Building) it had commenced erecting on an erf it owned. The SCA had found the construction unlawful as it breached the applicable town planning scheme, in that, inter alia, its footprint covered more than the prescribed maximum of 60% of the erf floor area and it exceeded the three-storey height limit. Owing to BSB's failure to comply with the SCA order, the applicant —

the owner of a neighbouring property — instituted an application in the High Court to commit BSB, as well as Mike Slim, the controlling mind of BSB, for contempt of court.
It was common cause that BSB and Slim had deliberately not complied with the terms of the SCA order (as well as the High Court order the SCA largely confirmed). Instead — with a view, in their own words, 'to get things corrected', and circumventing the need for compliance — BSB purchased an erf neighbouring the one on which the Building was erected, it consolidated those erven, and applied to the appropriate town planning tribunal for the rezoning of that consolidated erf to allow for a greater building height, and a greater floor area coverage. The tribunal's acceptance of those changes (the adjudication of which was still pending) would, BSB and Slim argued, bring the building in line with applicable regulations and 'regularise' its unlawful conduct. In such circumstances its non-compliance should be excused.
In adopting such an approach, were BSB and Slim in contempt of the SCA's order? The court identified two critical issues for consideration: One, did the SCA order, properly interpreted, allow for such a course of conduct? Two, as a matter of principle and public policy, could a litigant be allowed to unilaterally choose not to comply with a direct order of court, thereby undermining the authority of the court and de facto achieving the objective of the unlawful enterprise by way of a *fait accompli*? BSB and Slim raised the further objection that the failure of the order to set out a deadline meant that there could be no contempt.
Additionally, BSB argued that an opportunity ought to be allowed to it to apply for a variation of the order — ie to obtain judicial sanction for their course of conduct — were it to be found that it was in contempt.
Held, that the strategy pursued by BSB and Slim was inconsistent with any fair meaning to be given to the SCA order. Properly interpreted, a demolition had to occur, not may occur. The order was not an injunction to engage in a process of obtaining authorisation, permissions and consents to keep a building which was an unlawful enterprise from the very inception of the project. (See [18].)
Held, further, that as a matter of principle BSB's evasive conduct could not be accepted. To do so would be to allow, in conflict with case law, BSB to present to the court an unlawful exercise as a *fait accompli*, thereby undermining the principle of legality. (See [19] – [23] and [29].)
Held, further, that the failure of an order to set out deadlines for compliance did not mean that there could be no contempt for non-compliance. Deadlines to comply in any court order served only the purpose of making proof of non-compliance easier. Once a litigant bound to comply evinced a stance that it had no intention to comply — as in the present case — intentional non-compliance was proven, even if given within the hour of the order having been handed down. In such circumstances, it was unnecessary even to consider whether a reasonable time had elapsed. (See [12].)
Held, that BSB and Slim, having deliberately not complied with the SCA order and having embarked on an illegitimate strategy to circumvent compliance with the order, were in contempt. In respect of Slim, an order of incarceration for 30 days, suspended on condition that further defiance did not occur, was appropriate. (See [43] – [44] and [54].)
Held, further, that there was no basis to allow BSB an opportunity to apply to vary the order. The effect of granting variation on the terms sought would be to purge contempt, and effectively amount to a rescission, in that the relief would fundamentally contradict the obligation to demolish the Building. The effect would be

to allow what the law had cautioned against, ie an unlawful enterprise to be presented as a *fait accompli*, and a seriousundermining of the principle of legality. Such an approach would constitute a licence for property developers to ride roughshod over laws and regulations with impunity and allow the gross dereliction of duties by local authority officials to be perpetrated without any accountability. Society ought not to have to endure such feral conduct. (See [24] and [29].)

NORMANDIEN FARMS (PTY) LTD v MATHIMBANE AND OTHERS 2017 (5) SA 204 (LCC)

Land — Agricultural land — Conservation — Prevention of erosion — Overgrazing — By livestock belonging to labour tenant — Remedies of landowner — Removal of labour tenant's livestock — Duty of state to relocate — Constitution, s 24; Conservation of Agricultural Resources Act 43 of 1983, s 6; Land Reform: Provision of Land and Assistance Act 126 of 1993, s 10(1); National Environmental Management Act 107 of 1998, s 32.

In 2001 the applicant purchased a farm on which the first to twelfth respondents (the tenants) were labour tenants. They held and grazed their livestock on the farm. In December 2013 the applicant, contending that the tenants were totally overgrazing the farm in contravention of the Conservation of Agricultural Resources Act 43 of 1983 (CARA) and the National Environmental Management Act 107 of 1998 (NEMA), asked the court to order the removal of the tenants' livestock from the farm. The applicant also sought an order directing the minister of agriculture (the thirteenth respondent) and the minister of land reform (the fourteenth respondent) to facilitate the relocation of the livestock to alternative land made available by the latter.
Relevant to the court's decision on the main application were s 6 of CARA, which empowered the minister of agriculture to prescribe binding soil-conservation measures; reg 9 of the regulations under CARA, which imposed a duty on land users to protect agricultural land against deterioration; and s 32 of NEMA, which conferred standing on 'any person' to enforce environmental laws.
The respondents, while conceding that the applicant's land was indeed overgrazed, denied the applicant's standing and sought, in a counter-application, an order awarding the land to the tenants. The counter-application was based on the Land Reform (Labour Tenants) Act 3 of 1996 and a Land Claims Court ruling of March 2014 (amended on 2 April 2014) that purportedly conferred on the tenants not only labour tenancy rights but also a right in the land, which they (allegedly) accepted and which the director-general of land reform was consequently bound to implement. Section 16 of the Labour Tenants Act set 31 March 2001 as the cut-off date for applications for the award of land rights under the Act.

Held

Applicant's standing

Since overgrazing was conceded, the applicant had standing by reason of its and the public's constitutional right to protection of the environment, duly reinforced by CARA and s 32 of NEMA (see [34] – [37], [41] – [42]).

Tenants' counter-application

Thecourt could not, in view of the absence of an application under ss 16 and 17 of the Labour Tenants Act and the passing of the cutoff date, award the farm to the tenants (see [49] – [51]). And even had the tenants so acquired the farm, it would not be a bar to the removal of their livestock because their rights in the land would be subject to the applicable legislative restrictions and land-users' obligation to protect

the land against deterioration (see[53] – [54]). Not granting the order sought in the main application would, moreover, be tantamount to condoning the tenants' continuing unlawful conduct (see [55]). Hence the counterclaim would be dismissed (see [56]).

Relief against ministers

The ministers' failure to exercise their mandate to administer and enforce CARA was evident (see [58]). Moreover, the minister of land reform had a duty under s 10(1) of the Land Reform: Provision of Land and Assistance Act 126 of 1993 to assist labour tenants, which duty included an obligation to make land available for the relocation of their livestock (see [59] – [61]).

Costs

The counter-application was, in view of the respondents' concession on overgrazing, frivolous and vexatious (see [63]). This and the unacceptable delays occasioned by the respondents merited a punitive costs order on the attorney and client scale (see [66]).

Order

The tenants would be directed to remove their livestock from the farm, and the minister of land affairs to make available alternative land and resources for its relocation (see [71]).

EARTHLIFE AFRICA AND ANOTHER v MINISTER OF ENERGY AND OTHERS 2017 (5) SA 227 (WCC)

Electricity — Generation and supply — Generation capacity — 2013 and 2016 determinations of need, source (nuclear) and procurer — Nature and validity of minister's determinations and regulator's concurrences therein — Electricity Regulation Act 4 of 2006, s 34(1); National Energy Regulator Act 40 of 2004, s 10(1)(d).

International law — International agreements, treaties and conventions — Agreements on nuclear energy — Whether validly tabled under s 231(3) — Constitution, ss 231(2) and 231(3).

The events in this case, sequentially, were as follows.

• In 1995 South Africa entered into an agreement concerning nuclear energy with the United States of America, and in 2010 it concluded a similar agreement with South Korea.

• Then in late 2013 the Minister of Energy, with the concurrence of Nersa *determined a new electricity generation need (9,6 GW), its source (nuclear energy), and its procurer (the Department of Energy). The determination was under s 34(1) of the Electricity Regulation Act 4 of 2006.

• In spring of 2014 the President authorised, and the Minister signed, an agreement between South Africa and Russia concerning the provision of nuclear energy.

• Midway through 2015 the Minister tabled the three agreements in the National Assembly and the National Council of Provinces. This under s 231(3) of the Constitution.

• In late 2015 the Minister gazetted the 2013 determination.

• Then near the end of 2016, the Minister, with Nersa's concurrence, made another determination of generation need (9,6 GW), source (again nuclear), and procurer (now Eskom). The determination was gazetted shortly thereafter.

Earthlife Africa instituted proceedings for review, and the issues in the High Court were the following.

The 2013 s 34 determination

• Whether a s 34 determination was administrative action. *Held*, that it was (see [32]).

• Whether a concurrence by Nersa in a s 34 determination was administrative action. *Held*, that it was (see [37]).

• Whether the Minister's 2013 determination was valid. *Held*, that it was not: the determination was contingent on Nersa's valid concurrence; and its concurrence was invalid because it was not preceded by an opportunity for affected persons to make submissions (s 10(1)*(d)* of the National Energy Regulator Act 40 of 2004, read with s 4 of the Promotion of Administrative Justice Act 3 of 2000). (See [40] and [46].)

• Whether the principle of legality had required Nersa, prior to concurring, to consult interested parties. *Held*, that it had; and that the concurrence was invalid, for non-compliance with this requirement (see [47] and [50]).

• Whether the delay in publicising the 2013 determination invalidated it. *Held*, that it did, in that the delay was irrational, and also contrary to the requirement that government be open, transparent and accountable. Furthermore, by the time the determination was gazetted, the concurrence, on which it depended, was no longer effective. (See [51] and [57] – [58].)

The 2016 determination

• Whether the 2016 determination was valid. *Held*, that it was invalid, in that the concurrence on which it relied, and which it received, was again ineffective. (Nersa had again failed to precede it with an opportunity for affected persons to make submissions.) (See [66] – [67].)

• The consequence of there being two gazetted determinations. (The 2016 determination did not amend or withdraw the 2013.) *Held*, that their inconsistency rendered the 2016 determination uncertain or vague. It was thus contrary to the principle of legality, and invalid (see [69] and

• Whether the 2016 determination was reviewable on substantive grounds. *Held*, that it was, in that its underpinning, Nersa's concurrence, was in substance flawed. (Nersa had concurred in the belief that to not do so would be mala fide: this was both an error of law (s 6(2)*(d)*, PAJA), as well as non-compliance with its duty to act independently (s 9*(c)*, NERA).

The international agreements

• Whether the law required the applicants to join the United States, South Korea and Russia. *Held*, that it did not: they had no interest in the constitutional issues involved, or in the orders, which were not sought against them (see [88] and [90] – [91]).

•Whether the applicants had standing to review the Minister's tabling of the agreements. *Held*, that they had standing in their own and the public interest: s 92 of the Constitution (members of cabinet are accountable to Parliament) did not exclude members of the public bringing judicial review of ministerial conduct; and indeed courts were dutied to invalidate such conduct where it was unconstitutional (s 172). (See [92] and[98] – [100].)

• Could the court interpret the Russian agreement, in order to determine if it should be tabled under ss 231(2) or (3). *Held*, that it could: negotiating, signing and tabling of international agreements were exercises of public power, and all such exercises of power were justiciable; tabling incorrectly under ss (3) rather than (2) would undermine the separation of the executive and legislature's powers, and a court's review of the tabling would support the separation; were it unable to interpret (and characterise) the agreement, it would be unable to determine the tabling's constitutionality. (See [101] and [103] – [104].)

• The nature of the Russian agreement. *Held*, that it was specific, often peremptory, of wide scope, and material consequence. It was not merely an agreement on nuclear co-operation (such was concluded in 2004), but was a binding agreement toward procurement of nuclear plants (see [109] – [112]).
• Whether the agreement should have been tabled under ss 231(3) or (2). *Held*, that only agreements of a routine nature should be tabled under ss (3); that the Russian agreement was not routine; and should thus have been tabled under ss (2). (See [114] and [116].)
• Whether the US and Korean agreements were tabled within a reasonable time (s 231(3) of the Constitution). *Held*, that they were not (see [127] – [129]).
The Minister's 2013 and 2016 determinations, and decisions to table the US, Korean and Russian agreements under s 231(3), set aside (see [146]).

LOUISTEF (PTY) LTD v SNYDERS NO AND OTHERS 2017 (5) SA 276 (SCA)

Minerals and petroleum — Petroleum — Fuelling station — Site licence — Nature of — Whether saleable — Petroleum Products Act 120 of 1977.

Louistef (Pty) Ltd held a site licence under the Petroleum Products Act 120 of 1977; it sold it to first respondent trust; and a High Court later declared the agreement void. This, apparently, on the ground that the licence gave Louistef no rights it could transfer to the trust (see [6], [15]).
On appeal to the Supreme Court of Appeal, the issues were:
(1) The nature of a site licence. *Held*, that it gave the licence-holder a right to use the site concerned to retail petroleum products (see [16]).
(2) Whether it was saleable. *Held*, that it was (see [18] – [19], [21]).
Appeal upheld, and the High Court's order substituted with an order, inter alia,that the sale was valid (see [22]).

TRUSTCO GROUP INTERNATIONAL (PTY) LTD v VODACOM (PTY) LTD AND ANOTHER 2017 (5) SA 283 (SCA)

Intellectual property — Patent — Registrar — Powers — Extend times — Whether reg 83 limiting registrar's discretion under s 16(2) to extend times for doing anything — Patents Act 57 of 1978, s 16(2); Patent Regulations, 1978, reg 83.

Trustco, a patent-holder, failed to pay the patent's renewal fee, and the patent lapsed. Trustco then applied to the Registrar of Patents for its restoration; the Registrar advertised the application; and Vodacom filed a notice of opposition. From that date, Trustco had two months (or a further period allowed by the Registrar) to file a counter-statement, failing which, its application for restoration would be deemed abandoned (reg 83 of the Patent Regulations).
The two months passed without Trustco filing, but shortly thereafter it applied for an extension of time in which to do so. The Registrar granted the extension in terms of s 16(2) of the Patents Act 57 of 1978.
Vodacom then appealed this grant to the Commissioner of Patents, who appears to have found that the Registrar was not competent to extend the time, and who declared the restoration application abandoned (see [12]). Trustco appealed to the Supreme Court of Appeal.

The issue was whether reg 83 limited the Registrar's discretion under s 16(2) to extend times for the doing of anything. *Held*, that it did not (see [13], [20]).
Appeal upheld, the Commissioner's decision set aside, and substituted so as to dismiss Vodacom's appeal (see [21]).

SMITH NO v CLERK, PIETERMARITZBURG MAGISTRATES' COURT 2017 (5) SA 289 (KZP)

Execution — Attachment of salary — Magistrates' court making administration order against debtor and authorising issue of emoluments attachment order — Another court having jurisdiction over debtor's employer — Which court could issue emoluments order — Which orders s 74I(5) applies to — Magistrates' Courts Act 32 of 1944, s 74I(5).

The Pietermaritzburg Magistrates' Court granted an administration order against a debtor, and authorised the issue of an allied emoluments attachment order. The debtor's employer was in the jurisdiction of the Durban Magistrates' Court. The administrator then asked the clerk of the Pietermaritzburg court to issue the emoluments order; it refused; and the administrator sought review. The court dismissed the review, and the administrator appealed to the High Court. The issues were:
(1) Which magistrates' court could issue the emoluments order. *Held*, that only the court with jurisdiction over the employer could do so (see [11], [22], [27]).
(2) Which emoluments orders s 74I(5) of the Magistrates' Courts Act 32 of 1944 applied to. *Held*, that it applied only to those in s 74I(3) — those whose issue had been suspended on conditions (see [33], [38]).
Appeal dismissed (see [49]).

UNITED DEMOCRATIC MOVEMENT v SPEAKER, NATIONAL ASSEMBLY AND OTHERS 2017 (5) SA 300 (CC)

Constitutional law — Parliament — Motion of no confidence in President of Republic — Voting procedure — Speaker empowered to direct that such motion be conducted by open ballot or by secret ballot — In exercising such discretion, Speaker may not act arbitrarily but must have rational basis for decision — Correctly exercised, Speaker's discretion should have effect of ensuring genuine motion for effective enforcement of executive accountability — Constitution, ss 57 and 102; National Assembly Rules 104(1) and (3).

Parliament— Members — Voting — Motion of no confidence in President of Republic — In exercising their votes, members obliged to uphold constitutional values over party loyalty.

Constitutional law — Parliament — Speaker — Impartiality and neutrality — Determination of appropriate voting procedure in motion of no confidence in President of Republic — In deciding whether to conduct voting by open or by secret ballot, Speaker obliged to uphold constitutional values over party loyalty.

The Speaker of the National Assembly refused a request by the applicant political party (the UDM) to direct that the voting in a scheduled motion of no confidence in the President of the Republic of South Africa be conducted by secret ballot. Her

reasons were that neither the Constitution nor the Rules of National Assembly (the Rules) gave her that power, and further that she was prevented from doing so by the High Court's finding in the *Tlouamma* case (cited at n28), that there was no implied or express constitutional requirement for voting by secret ballot on a motion of no confidence in the President. In response, the UDM launched the present application, directly to the Constitutional Court, for inter alia declaratory relief that the Constitution and the Rules permitted the Speaker to direct that a vote on a motion of no confidence in the President be conducted by secret ballot.

The Constitutional Court, apart from deciding that issue, also pronounced on the proper exercise of the Speaker's power to prescribe a voting procedure in a motion of no confidence in the President; and on the constitutional obligations of members when exercising their votes on such motions.

Held

The Constitution could have provided for a vote by secret ballot or an open ballot but it did neither. The purpose for leaving the voting procedure open could only have been for the Assembly itself to determine — under its powers in terms of s 57 of the Constitution to determine its own procedures — which procedure would best advance our constitutional project. The National Assembly therefore had the power to determine whether voting on a motion of no confidence would be by open ballot or secret ballot. It was for it to decide which voting procedure was necessary for the efficiency and effectiveness of the institution in holding the executive accountable. And rules 104(1) and (3) of the Rules, by empowering the Speaker to predetermine a manual voting system that may not permit a recordal or disclosure of the names and votes of members, effectively empowered the Speaker to have a motion of no confidence in the President voted on by secret ballot. Therefore, to the extent that *Tlouamma*may be understood as having held that a secret-ballot procedure was not at all constitutionally permissible, it was incorrect, and so the Speaker's decision was invalid and would be set aside. (Paragraphs [58] – [59], [64], [67] – [68] and [91].)

The appropriateness of a voting procedure was particularly important since our electoral system was structured in such a way that it was, broadly speaking, a party and not a member of Parliament that got voted into Parliament. There were therefore institutional and other risks that members, particularly of any ruling party, were likely to get exposed to when they openly questioned or challenged the suitability of their leader(s) for President. However, members of the Assembly were required to swear or affirm faithfulness to the Republic and obedience to the Constitution and laws; nowhere did the supreme law provide for them to swear allegiance to their political parties. This meant that, in the event of conflict between upholding constitutional values and party loyalty, their irrevocable undertaking to in effect serve the people and to do only what is in their best interests must prevail.

The Speaker was chosen from the members of the National Assembly. That gave rise to the same responsibility to balance party interests with those of the people. The power to decide on a voting procedure could not be used illegitimately or without regard to the surrounding circumstances that ought to inform its exercise; it was neither for the benefit of the Speaker nor his or her party; it belonged to the people and may thus not be exercised arbitrarily or whimsically; nor was it open-ended and unguided. There must always be a proper and rational basis for whatever choice the Speaker made. The freedom of members to follow the dictates of their personal conscience — to which their oath to remain obedient to the Constitution was central — was a factor the Speaker had to take into account. The correct exercise of the

Speaker's discretion should have the effect of ensuring a genuine motion for the effective enforcement of executive accountability. (Paragraphs [76], [78] – [79], [82], [85] – [88].)

SA CRIMINAL LAW REPORTS SEPTEMBER 2017

DIRECTOR OF PUBLIC PROSECUTIONS, GAUTENG v TSOTETSI 2017 (2) SACR 233 (SCA)

Murder — Sentence — Life imprisonment — Wife contracting killers to kill husband and then to kill one of contracted killers who attempted to blackmail her — Accused actively participating in both murders — Displaying no remorse — Murder of husband carried out for financial reasons — Sentences of 20 years' imprisonment on each count substituted on appeal with sentences of life imprisonment.

The state appealed in terms of s 316B of the Criminal Procedure Act 51 of 1977against two sentences of 20 years' imprisonment imposed on the respondent in the High Court in respect of two counts of murder. The sentences were ordered to run concurrently. That court found that there were substantial and compelling factors in respect of both counts that justified a lesser sentence than life imprisonment.
The deceased in the first count was the respondent's husband who was killed by three assassins, contracted by the respondent to do so, who contrived to make it appear that the deceased had committed suicide by hanging himself. The respondent had given the deceased sleeping tablets which allowed the three killers to execute their plan in her presence. This killing came about after she had made previous unsuccessful attempts to poison him. She had told witnesses that she wanted the deceased's money.
The deceased in the second count was one of the three men who had killed the respondent's husband and had subsequently attempted to blackmail her with evidence of the murder. The evidence indicated that she lured the would-be blackmailer to her home with promises of payment and when he arrived, she, and the other two men who had participated in the first murder, repeatedly stabbed him in the neck, causing his death.
Of the two remaining hired killers, one was diagnosed with schizophrenia and his trial was separated from the others. The other became a co-accused together with the respondent and was sentenced to life imprisonment for his participation in the murder of the would-be blackmailer.
Despite the evidence against her, the respondent maintained throughout that she was innocent of any wrongdoing. She testified (without raising this as a defence) that two weeks before her husband's death she discovered that he was infected with HIV, and a week before his death, that she was also HIV-positive. She was a 27-year-old first offender.
The trial court found that the same circumstances that were substantial and compelling in respect of the first count, also applied in respect of the second count because it was 'a snowball effect' of the murder of her husband. It concluded that her motive for killing her husband was that he had infected her with HIV, and there was no evidence that such motive was financial. It also found that the respondent's personal circumstances, clean record, and her HIV status, as well as the time she

had spent in prison awaiting trial, justified a lesser sentence than the prescribed minimum.
The Director of Public Prosecutions contended on appeal that the trial court had not given sufficient consideration to the weighty aggravating circumstances, such as the planning of the killings and the respondent's personal involvement in them.
Held, that the trial court had erred in finding that the respondent's motive in killing her husband was that he had infected her with HIV, since this was not her version, and she had in any event attempted to kill him months before she discovered her HIV status (see [22]).
Held, further, that the court had also erred in finding that there was no evidence that the respondent's motive for killing her husband was financial, and in giving insufficient weight to the respondent's lack of remorse. At the time of her sentencing more than three years had passed since the murders, and she still did not appreciate and acknowledge the wrong that she had done(see [23]–[25]).
Held, further, that the court had also erred in using the same circumstances that justified a lesser sentence in the first count also in the second count: certain of the circumstances taken into account in respect of the first count could not have been mitigating in respect of the second, for instance, her HIV status (see [26]).
Held,further, that there was a disturbing disparity between the sentence imposed on the respondent, as the planner and co-executioner of the two murders, and the sentence imposed on her co-accused, who was only convicted of murdering the deceased on the second count (see [29]).
Held, further, that, in the light of all the circumstances, the minimum sentence of life imprisonment in respect of both counts was not disproportionate and should have been imposed in both murders, that being the only appropriate sentence on each count (see [32]). The appeal was upheld and the sentences set aside and replaced with sentences of life imprisonment on each count, which were ordered to run concurrently.

NAIDOO v REGIONAL MAGISTRATE, DURBAN AND ANOTHER 2017 (2) SACR 244 (KZP)
Trial— Stay of prosecution — On grounds other than delay in prosecution — Jurisdiction of magistrates' courts — Such applications to be brought before High Court having jurisdiction.

The applicant applied for a review of the refusal by a regional magistrates' court of his application for the stay of the prosecution against him, that had been brought on the grounds that the investigation of the case was tainted by certain irregularities committed by the police. He made no complaint about the conduct of the judicial proceedings.
Held
Section 170 of the Constitution did not confer jurisdiction on magistrates' courts to hear applications not authorised by an Act of Parliament. An application for a permanent stay of the prosecution, that was not provided for by s 342A of the Criminal Procedure Act 51 of 1977, therefore had to be brought before the High Court that had the necessary jurisdiction (see [20] and [22]).

NL AND OTHERS v FRANKEL AND OTHERS 2017 (2) SACR 257 (GJ)
Sexual offences — Prescription of — Exclusion from prescription of only rape and compelled rape by s 18 of Criminal Procedure Act 51 of 1977 — Arbitrary, irrational and unconstitutional in relation not only to children, but to all persons.

The applicants applied for an order declaring s 18 of the CPA to be inconsistent with the Constitution, 1996, and invalid to the extent that it barred in all circumstances the right to institute prosecutions for all offences as contemplated by the Criminal Law (Sexual Offences and Related Matters) Amendment Act of 2007, other than rape or compelled rape, after the lapse of a period of 20 years from the commission of the offence. They also sought an order directing the third respondent (the Director of Public Prosecutions, Gauteng) to consider instituting a prosecution against the first respondent, whom they accused of having indecently assaulted them when they were between the ages of 6 and 15 years, more than 20 years earlier.
They contended that the effect of the section was that it afforded no discretion as to whether a prosecution ought to be instituted or not, and effectively caused the offences to prescribe after 20 years. They further submitted that the provision was irrational in that it made arbitrary distinctions in respect of the gravest of crimes and violated their rights to human dignity, equality and non-discrimination; their right to be protected from abuse as children; their right to be free from all forms of violence from both public and private sources; and their right to access to courts and a fair trial. They also submitted that the limitation was not justifiable under s 36 of the Constitution.
There were three amici curiae who made submissions to the court and they were unanimous that any declaration of invalidity should not be confined to sexual offences against children only.
The first respondent (he passed away before the hearing) opposed the application, but later advised the court that he did not oppose the relief for the declaration of the invalidity of the section, but maintained his opposition to the relief sought against him on the basis of the principle of legality.
Held, that, because s 18*(f)* made no distinction in excluding from prescription the crimes of rape and compelled rape between children as opposed to adults, it was a blanket exclusion from prescription for all persons. Furthermore, because the common-law crime of indecent assault was not confined to one against children only, it would not make sense for the court, in determining the constitutional invalidity of s 18*(f)*, to confine such invalidity to children only when the section itself provided for no such limitation (see [36] and [37]).
Held, further, that, having regard to the expert evidence that the trauma suffered by victims might be worse in non-penetrative sexual offences than in penetrative sexual offences, s 18 was arbitrary and irrational and accordingly inconsistent with the Constitution and invalid, in relation to not only children, but to all victims, including adults. Furthermore, to create a random cut off time of 20 years for prescription of sexual offences when evidence demonstrated that they inflicted deep continuous trauma on victims who either never disclosed the offences or only did so after varying lengths of time, was entirely irrational and arbitrary (see [63] and [67]).
Held, further, that the state's duty to protect all persons against sexual violence in terms of s 7(2) of the Constitution was a particularly onerous one, having regard to the extreme levels of sexual violence in South Africa, and that s 18 of the CPA stultified the state's constitutional obligations. The state also had international obligations to prohibit gender-based discrimination, and a prescription limit of 20

years, on sexual offences other than rape or compelled rape, appeared to frustrate the aims and objectives of those obligations (see [98] and [100]).

SOUTH AFRICAN HUNTERS AND GAME CONSERVATION ASSOCIATION v MINISTER OF SAFETY AND SECURITY 2017 (2) SACR 288 (GP)

Arms and ammunition — Licensing of — Constitutionality of ss 24 and 28 of Firearms Control Act 60 of 2000.

The applicant applied for an order declaring the provisions of ss 24 and 28 of the Firearms Control Act 60 of 2000 (the Act) unconstitutional. It was argued by the applicant that the regime of renewal of firearm licences, that had been put in place in terms of the Act, was not defensible on the grounds of rationality, clarity or non-arbitrariness, and that the way that the two sections operated infringed the right to equality as well as property rights. It was contended that there was a lack of clarity pertaining to how a firearm owner, who had failed to comply with the 90-day time limit set out in s 24, could rectify the situation and render his ownership of the firearm legal; there was no due process pertaining to a s 24 transgression in comparison with other classes of termination of firearm licences; there was uncertainty as to how one should deal with a firearm if one's licence expired due to effluxion of time, with specific reference to how, when and where one could surrender it; and no provision was made for surrender for value.
Held, that the existing scheme and the legislative framework were both irrational and vague, and there was no rational nexus between the aforementioned legislative scheme and the pursuit of a legitimate government purpose, that could explain the discrepancies in procedure and outcome, as argued for by the applicant (see [40]).
Held, further, that the deprivation of a firearm in the absence of proper procedures constituted a violation of the owner's property rights (see [47]).
Held, further, that ss 24 and 28 of the Firearms Control Act 60 of 2000 had to accordingly be declared unconstitutional and Parliament given 18 months within which to effect an amendment to the Act in order to ensure constitutional compliance. In the interim, all firearms which had licences issued in terms of the Act, which were or were due to be renewed in terms of s 24, had to be deemed to be valid until the Constitutional Court had made its determination on the constitutionality of the two sections (see [68]).

S v NDLOVU 2017 (2) SACR 305 (CC)
Rape — Sentence — Life imprisonment — Minimum sentence in terms of Criminal Law Amendment Act 105 of 1997 — Charge of rape read with provisions of s 51(2) — Regional magistrate finding accused 'guilty as charged', but imposing life term in terms of s 51(1) due to infliction of serious injuries during rape — Evidence of injuries not automatically curing charge because such complete and not defective — Accused accordingly convicted of rape read with s 51(2), and regional magistrate not entitled to impose sentence of life imprisonment.

The applicant was charged in a regional magistrates' court with rape subject to the provisions of s 51(2) of the Criminal Law Amendment Act 105 of 1997 (Minimum Sentencing Act). This was despite the fact that the complainant had suffered grievous injuries in the commission of the crime at the hands of the applicant. At the commencement of the trial the magistrate informed the applicant that if he were

convicted, the court was bound to impose a minimum sentence of 15 years' imprisonment if he were a first offender. After hearing the evidence of the serious nature of the injuries sustained by the complainant, the magistrate found the applicant 'guilty as charged', but sentenced him to life imprisonment in terms of s 51(1) of the Minimum Sentencing Act.
An appeal to the High Court was dismissed, the court not dealing with the issue of whether the regional court had jurisdiction to impose a life sentence in such circumstances. A further appeal to the Supreme Court of Appeal also failed without the court considering the question of the regional court's jurisdiction.
Held, that the magistrate's statement, that the accused was found 'guilty as charged', was unambiguous and meant that he was convicted of an offence referred to in part III of sch 2. The evidence of the complainant's injuries also did not automatically cure the charge as it was complete and not defective. The regional court accordingly did not have jurisdiction to impose life imprisonment in terms of s 51(1), and that sentence had to be set aside (see [44]–[48]).
Held, further, that the appropriate and proportionate sentence to be imposed in the circumstances was the maximum sentence that the regional court could have imposed following the conviction of rape read with s 51(2), namely 15 years' imprisonment (see [52]).

S v MASUKU 2017 (2) SACR 321 (WCC)
Appeal — Powers of court on appeal — Review powers — Not to be used as back door for appeal on merits where leave granted to appeal on sentence.
Indictment and charge — Charge-sheet — Requirements — Date of offence — Error in charge-sheet — Not material to offence and nature of defence — Proceedings not vitiated by defect.
In an appeal against sentences imposed in a regional magistrates' court in December 2002 (for robbery with aggravating circumstances and kidnapping), but where the appeal was heard only in June 2016, the court noted that the appellant's heads of argument were directed at the merits of the convictions, whereas there was no appeal before the court in that respect. The sole point relating to the alleged impropriety of the sentence was not proceeded with.
The thrust of the attack on the merits was that the convictions were irregular, since, at the times alleged in the charge-sheet, the appellant was in prison in respect of another case. At the hearing in the court a quo, the appellant had changed his initial plea of not guilty to one of guilty and admitted and confirmed the contents of a statement drawn up by his attorney and handed in on his behalf. In his original plea explanation, he had denied all knowledge of the first robbery at a hotel, and, in respect of the second robbery, in which a car had been taken from its owner at gunpoint and the owner was deprived of his freedom for a period whilst he was being driven around in his car, he stated that he was in the process of buying the car from its owner at the time.
Held, that, given that the appellant was legally represented at the time of his trial and had freely and voluntarily made certain admissions to each of the elements of the three charges against him, and that he was only before the court in regard to sentence, the provisions of s 304(4) of the Criminal Procedure Act 51 of 1977 (the CPA) could not be used as a back door appeal against his conviction on the merits. Nor could they be used for the court to act in terms of its special powers of review under the section (see [23]).

Held, further, that in the present instance the dates when the robbery and kidnapping occurred were not material and essential elements of the offence, nor were they material to the defence that was pleaded by the appellant in that regard. Even when the time of commission was a material element of an offence, where this was stated incorrectly in a charge-sheet, such defect could be cured by way of evidence formally rectified by the court in terms of s 86(1) of the CPA. The defect in the present matter accordingly did not render the proceedings unfair and did not vitiate the convictions (see [33]–[34]).

MINISTER OF SAFETY AND SECURITY v AUGUSTINE AND OTHERS 2017 (2) SACR 332 (SCA)

Search and seizure — Search — Without warrant — Unlawful search — Damages — Large number of police breaking into family's home in dead of night and subjecting them to assault, intimidation and humiliation —Family suffering severe post-traumatic stress disorder — Damages of R200 000 and R250 000 awarded.

The first to fourth respondents were a family consisting of, respectively, father, mother, 16-year-old son and 15-year-old daughter. They instituted an action for damages in the High Court arising from the unlawful entry into their home of numerous police officials without a lawful warrant, and for the unlawful pointing of firearms at them, for insulting them, and for assaulting, humiliating and intimidating them.
The court upheld their claim and awarded them general damages in the sum of R25 000 each. They appealed to the full court against, inter alia, the quantum of general damages. The full court upheld the appeal and increased the amount of general damages, in respect of the first three respondents to R200 000, and in respect of the fourth respondent to R250 000.
The appellant appealed against the quantum of damages awarded on the basis that it was unreasonably high and not commensurate with damages awarded in similar cases in the past.
The claim arose from an incident at 02h00 one morning when the family was woken by their dogs barking. The first respondent went to investigate, and before long felt a rifle barrel held against him. He was ordered not to look or talk and to lie down. It transpired that there were between 30 and 45 intruders in the house and yard, none of whom identified themselves. He heard his daughter scream and become hysterical. His son was pinned to the floor under the boot of one of the intruders. His wife was refused permission to attend to their two-and-a-half-year-old baby. After a while one of the intruders said that they were the police and were not there to rob them. Their home was searched and, after nothing was found, the intruders left. The first respondent could then make out that they were dressed in camouflage uniform without any form of identification. At one stage the intruders mentioned that they were looking for a person by the name of Eugene who had allegedly been involved in the robbery of a casino a few days earlier. The first respondent said that there was no one by that name in his house, but that there was a Eugene who lived in the adjoining house, each dwelling being a semi-detached unit. The police then went next door where they got access by booting in the door.
The respondents' attempts to have the matter investigated were stifled by the local station commander who also prevented the trauma counsellor from further assisting the family. The fourth respondent suffered more severe post-traumatic stress

disorder than the other members of the family, and the clinical psychologist who examined her expressed particular concern for her wellbeing.
Held, that, compared to previous cases of a similar nature, it could hardly be said that the awards made by the full court allowed for interference on appeal.
Gorven AJA (Shongwe ADP, Lewis JA, Petse JA and Mbha JA concurring)
In the light of the aggravating factors, that the incident happened in the dead of night; took place in the sanctity of the respondents' home; and the serious consequences they suffered, such that their ability to provide comfort and support to each other was compromised, the quantum of damages awarded was commensurate with comparable previous cases (see [34]). The appeal was dismissed.

S v MM 2017 (2) SACR 344 (NWM)
Trial— Mental state of accused — Order in terms of s 47 of Mental Health Care Act 72 of 2002 — Review of — Magistrate not entitled to submit matter on review after making order.

The accused was charged in a magistrates' court with attempted murder, but when it became apparent to the magistrate that he was not capable of understanding the proceedings, or conduct a defence, he was referred for observation in terms of s 77(1) and (1A) of the Criminal Procedure Act 51 of 1977 (the CPA). The psychiatric report obtained confirmed that he was incapable of understanding court proceedings, unable to contribute meaningfully to his defence, and, at the time of the alleged offence, unable to appreciate the wrongfulness of his deeds or act in accordance with any such appreciation.
The magistrate then referred the matter to the regional court where the magistrate conducted a trial of facts in terms of s 77(6)*(a)*(i). At the end of the enquiry, the court found that the accused had committed the crime in question, but was unable, at the time of the commission of the offence, to appreciate the wrongfulness of his deeds or act in accordance with such. He was, furthermore, incapable of understanding court proceedings or able to contribute meaningfully to his defence. In such circumstances, an order had to be made in terms of s 77(6)*(a)*(i) of the CPA, in terms of which he was to be detained in a psychiatric hospital pending a decision of a judge in chambers in terms of s 47 of the Mental Health Care Act 17 of 2002. The magistrate informed the accused of the review process and his right to make written representations to the reviewing judge. The matter was then submitted on special review.
Held, that the order granted was not reviewable at that stage, as it had not been properly referred to a judge in chambers in accordance with s 47 of the Mental Health Care Act: s 77(6)*(a)*(i) read with s 47(1) did not empower a magistrate to bring an application for the discharge of a state patient at any stage after the order for committal as a state patient had been made (see [21]–[22]).
Held, the magistrate's explanation to the accused was wrong. He ought to have explained the provisions of s 47 to him, as well as his right to appeal against the order as prescribed in s 77(8)*(a)*(ii) of the CPA (see [27]).