LEGAL NOTES VOL 9/2018[1]

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JOHANNESBURG METROPOLITAN MUNICIPALITY v CHAIRMAN, NATIONAL BUILDING REGULATIONS REVIEW BOARD AND OTHERS 2018 (5) SA 1 (CC)

Constitutional law — Legislation — Validity — National Building Regulations and Building Standards Act 103 of 1977, s 9 — Provision creating right of appeal, against decision of local authority pertaining to approval of building plans, to review board falling under national sphere of government — Unconstitutional and invalid to extent it empowered national sphere of government to exercise appellate powers over matters falling within exclusive municipal executive power.

The National Building Regulations and Building Standards Act 103 of 1977 (the Act) prohibits construction of buildings in a municipal area without prior approval of the building plans by the relevant municipality. Under s 9 of the Act, a decision by a municipality pertaining to the approval of building plans is subject to appeal by an aggrieved person. This to a review board established by the Minister of Trade and Industry in terms of s 9 of the Act, with appellate powers sourced in reg 13 of the regulations made by the Minister under the Act. The review board is therefore authorised by s 9, read with reg 13, to uphold or reverse a decision by the relevant municipality.

The High Court construed s 9 as authorising the review board — an organ of state in the national sphere of government — to usurp the constitutionally allocated planning functions of municipalities, and declared that it was unconstitutional and therefore invalid 'to the extent that it empowers [the review board] to exercise appellate power over decisions of a municipality'. In this case, an application to the Constitutional Court for confirmation of the High Court's declaration of s 9's constitutional invalidity

[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!**

Held
Part B of sch 4 of the Constitution listed functional areas falling within the executive authority of municipalities. These included building regulations and municipal planning. This meant that matters relating to these two functional areas were subject to the exclusive executive power of municipalities. The legislative power that the national and provincial spheres exercised over functional areas allocated to the local spheres did not include the power to arrogate to themselves executive powers vested in the local sphere by the Constitution. It followed that the High Court was right in concluding that s 9 of the Act was inconsistent with the Constitution. The declaration of invalidity made by that court must be confirmed.

MOOSA NO AND OTHERS v MINISTER OF JUSTICE AND OTHERS 2018 (5) SA 13 (CC)

Constitutional law — Legislation — Validity — Wills Act 7 of 1953, s 2C(1) — Provision that where surviving spouse and descendants were beneficiaries in testator's will, benefits renounced by descendants vesting in surviving spouse — To extent that term 'surviving spouse' not including spouses in monogamous and polygamous Muslim marriages, provision offending their constitutional rights to equality and dignity — Appropriate relief that words to be read in that 'surviving spouse' to include 'every husband and wife of de facto monogamous and polygamous Muslim marriages solemnised under the religion of Islam'.

The term 'surviving spouse' in s 2C(1) of the Wills Act 7 of 1953 * does not include spouses in monogamous and polygamous marriages solemnised according to Islamic law, a differentiation that is inconsistent with the Constitution as it constitutes unfair discrimination in breach of such spouses' constitutional rights to equality (s 9(3)) and dignity (s 10).

The Constitutional Court so held, confirming a High Court declaration of the section's constitutional invalidity, endorsing also the High Court's relief (under s 172(1)*(b)* of the Constitution) that the following words were to be read in at the end of the section: 'For the purposes of this subsection a surviving spouse includes every husband and wife of a monogamous and polygamous Muslim marriage solemnised under the religion of Islam.' It was further ordered that the declaration of invalidity operated retrospectively with effect from 27 April 1994. However, it did not invalidate any transfer of ownership finalised prior to the date of the order of any property pursuant to the application of s 2C(1) of the Wills Act 7 of 1953, unless it was established that, when the transfer was effected, the transferee was on notice that the property in question was subject to a legal challenge on the grounds upon which the applicant brought the present application.

MTOKONYA v MINISTER OF POLICE 2018 (5) SA 22 (CC)

Prescription — Extinctive prescription — Commencement — Knowledge of debt — Whether, before prescription could start running, it was required that creditor have knowledge that conduct of debtor giving rise to debt was both wrongful and actionable — Prescription Act 68 of 1969, s 12(3).

Practice — Special cases and adjudication upon points of law — In terms of special case, there must be a question of law that parties require court to decide on agreed facts and in light of their contentions which to be set forth in agreed statement — Court to decide question of law presented to it and having no right to travel outside four corners of agreed statement and decide a different question — Uniform Rules of Court, rule 33(1).

Section 12(3) of the Prescription Act 68 of 1969 provides that '(a) debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.'
The present matter in the Constitutional Court concerned the interpretation of this provision and, in particular, whether it meant that, before prescription could start running, it was required that a creditor have *knowledge* that the conduct of the debtor giving rise to the debt was *wrongful and actionable*.
The applicant sued the respondent, the Minister of Police, in the High Court (Mthatha) for damages arising from wrongful arrest and detention by the South African Police Service. More specifically, the applicant claimed that he had been detained for more than 48 hours without appearing before a court. The Minister raised a special plea, in which he submitted that the applicant's claim had prescribed because, by the time summons was served on it — in April 2014 — more than three years had passed since when the debt had become due — ie on the applicants' release from detention in September 2010 (when he knew that he was arrested and the identity of the debtor). The matter did not proceed to trial; rather, in terms of rule 33(1) of the Uniform Rules of Court, the parties agreed to submit a special case on prescription for adjudication by way of a statement of agreed facts. In it the Minister reiterated his view that the claim had prescribed; the applicant stated that it had not, and referred to the fact that he had learnt only in July 2013, after a discussion with an attorney, that the conduct of the police was wrongful and actionable. The High Court understood the applicant's case, given the contents of the statement and certain submissions of counsel, to be the following: At the time he was released from detention in September 2010, the applicant *did have* knowledge of the identity of the debtor and the material facts giving rise to the debt. However, he did *not know* at that time that he had a legal remedy against the Minister, only acquiring such knowledge much later. And knowledge of a legal remedy was required for prescription to run. In which case, his claim had not prescribed. But the High Court disagreed. It held that whether or not the conduct of the debtor giving rise to the debt was wrongful and actionable was a conclusion of law and not of fact, whereas s 12(3) of the Prescription Act required the creditor to have knowledge of 'the *facts* from which the debt arises'. Prescription therefore started running in September 2010, in which case the Minister's special plea of prescription had to be upheld. The High Court dismissed the applicant's application for leave to appeal; so too did the SCA. The Constitutional Court, however, granted the applicant leave to appeal to it.
In setting out the issues to be decided, the Constitutional Court (CC) noted that this was an appeal in the context of a special case in terms of rule 33. It stated that in a special case there had to be a question of law that the parties required the court to decide on the agreed facts and in light of their contentions which had to be set forth in the agreed statement. The CC stressed that, when it was called upon to decide such a special case, it was required to decide the question of law presented to it and had no right to travel outside the four corners of the agreed statement and decide a

different question that, for example, it might have wished the parties to present for consideration.

Here, continued the CC, having regard to the submitted rule 33 statement (set out at [3]), and the agreed facts and contentions contained within, the *only* legal question to be decided was, as correctly articulated by the High Court, whether a creditor was required to have knowledge that the conduct of the debtor giving rise to the debt was wrongful and actionable before prescription could start running. What was not in issue, and which the High Court and the CC were not called upon to decide, was whether the applicant knew of the identity of the Minister as debtor in September 2010; the applicant's counsel had conceded in argument before the High Court that he had such knowledge.

Held, that s 12(3), on the face of it, required, before a debt could be deemed to be due and prescription could start running, *knowledge of the facts from which the debt arose*. It did not require the creditor to have any knowledge of any right to sue the debtor nor did it require him or her to have knowledge of legal conclusions that might be drawn from the facts from which the debt arose.

Held, further, that knowledge that the conduct of the debtor was wrongful and actionable was knowledge of a legal conclusion, not one of a fact. Such knowledge therefore fell outside the scope of s 12(3).

Held, further, to say that the meaning of the phrase *'the knowledge of . . . the facts from which the debt arises'* included knowledge that the conduct of the debtor giving rise to the debt was wrongful and actionable in law would render our law of prescription so ineffective that it might as well be abolished. This was so in the sense that prescription would, for all intents and purposes, not run against people without any legal training. As for those with legal training, it would only run against those familiar with the field of law within which the claim happened to fall. The percentage of people in the South African population against whom prescription would not run when they had claims to pursue in the courts would be unacceptably high.

Held, accordingly, that the appeal fell to be dismissed.

Minority judgment

Jafta J (with Nkabinde ADCJ and Mojapelo AJ concurring) disagreed, holding that prescription could only have started running against the applicant from the time of his first gaining knowledge that he had a claim against the Minister of Police, ie only in July 2013.

Jafta J pointed out that the Minister, as the party raising the special plea of prescription, bore the onus of establishing that the claim had prescribed in terms of s 12(3). This entailed proving that, before the institution of the action, over three years had elapsed since the claimant had acquired knowledge of both the identity of the debtor and the material facts from which the debt arose. The parties had opted to approach the court in terms of the special procedure allowed for in rule 33. Such procedure obliged the court to make findings *based only* on the agreed facts in the written statement. (See [102] and [167].)

Here, there were no facts in the statement presented to court which supported a finding that before July 2013 the applicant knew that the Minister was the debtor (see [103]). Rather, the agreed facts refuted the presence of such knowledge: these made it clear that before July 2013 the applicant did not know of the existence of a debt; it was logically impossible for a person who did not know that he had a claim to, at the same time, know the identity of the debtor. The finding of the High Court — which the majority of the Constitutional Court accepted — that the applicant had such knowledge was based on an inference it drew from a submission from the

applicant's counsel, in argument before the High Court. The High Court erred in so inferring from the words of counsel (which were to the effect, simply, that the plaintiff was not aware of his right to sue the defendant for damages). Further, a submission by counsel could not be a basis for a factual finding. (See [104] – [105].) Accordingly, the Minister failed to discharge the onus on him to prove its special plea (see [173]). Jafta J further held that both the High Court and the Constitutional Court had erred in formulating the legal question to be whether prescription could only start running once a creditor knew that the actions of the debtor were actionable and wrongful. Rather, the legal question posed in the agreed statement, and the one to be answered, was, simply, whether the applicant's claim had prescribed.

RUSTENBURG PLATINUM MINE v SAEWA (OBO BESTER) AND OTHERS 2018 (5) SA 78 (CC)

Labour law — Dismissal — Racist statement — Use of expression 'swart man' (black man) may in certain contexts be racist and result in fair dismissal — Employees under duty not to undermine harmonious relationships at workplace by making racist comments.

Mr Bester, a white employee of the applicant mine, was dismissed for insubordination and making a racist remark after he had interrupted a mine safety meeting and aggressively demanded that the person in charge of allocating parking bays to staff 'verwyder daardie swart man se voertuig' ('remove that black man's vehicle'). The man in question was Mr Tlhomelang, whom Mr Bester did not know at the time. Mr Bester throughout denied having used the expression 'black man' at all.
In unfair dismissal proceedings the CCMA commissioner ruled in Mr Bester's favour, finding that, though he did use the expression 'black man', he did so innocently in order to describe Mr Tlhomelang. The commissioner ruled the dismissal unfair and ordered the mine to reinstate him with retrospective effect. On review the Labour Court set aside the commissioner's decision, finding that the expression was, in context, racist and contrary to the mine's policy on derogatory language. On appeal the Labour Appeal Court (LAC) reversed the Labour Court's ruling, finding that it had erroneously adopted a subjective instead of objective test to decide whether the expression was racist and derogatory. It held that the expression was prima facie neutral and concurred in the commissioner's view that it was plausible that Mr Bester had used it merely to describe Mr Tlhomelang. In an application for leave to appeal to the Constitutional Court —
Held
There were two main issues. First, the court had to formulate the test to be used to decide whether referring to a co-worker as a 'swart man' was racist and derogatory; and if so, whether dismissal was an appropriate sanction. (See [1].)
The LAC in the first place misdirected itself by relying on a defence — that the expression was used merely to describe Mr Tlhomelang and that there had been no intention to demean anyone — that was never raised by Mr Bester. By relying on evidence that was not before it, the LAC misapplied the test, which was whether a reasonable, objective and informed person would, *on the correct facts*, perceive words to be racist or derogatory.

The LAC's view that the expression was on the face of it neutral failed to recognise the impact of the legacy of apartheid. Its approach held the danger that the dominant, racist view of the past — what was neutral, normal and acceptable — could be used as point of departure in the objective enquiry without recognising that this skewed the enquiry. By assuming neutrality and ignoring the institutionally entrenched racism of the past, the LAC's decision effectively sanitised the context in which the expression 'swart man' was used. The words 'swart man' had to be interpreted in the context of South Africa's history of racial segregation and apartheid and how this had resulted in a racially charged present. The correct test was whether, objectively, the words were reasonably capable of conveying to the reasonable hearer that the phrase had a racist meaning. Not only was Mr Bester's use of the words 'swart man' racially loaded and derogatory, but it was also unreasonable to conclude otherwise.
While often inappropriate, not every reference to race was a product or manifestation of racism or racist intent that should attract a legal sanction. But here the court was dealing with racism in the workplace, which could not be tolerated. Employees had a duty not to undermine harmonious working relationships by making racist comments. By his lack of remorse and persistence in a defence of complete denial, Mr Bester showed that he had not made a break with the apartheid past and embraced the new democratic order where the principles of equality, justice and non-racialism reign supreme. In the circumstances dismissal was an appropriate sanction.

BOUTTELL v ROAD ACCIDENT FUND 2018 (5) SA 99 (SCA)

Motor vehicle accident — Compensation — Claim against Road Accident Fund — Quantum — Loss of future earnings — Pre-accident voluntary contributions to retirement annuity fund — Cannot be taken into account when calculating future loss of earnings — Not amounting to unfair discrimination.

The appellant, a successful businessman who was not a beneficiary of pension fund contributions by his employer, instead voluntarily paid 15% of his earnings into a retirement annuity fund. In a claim for compensation by the Road Accident Fund, he argued that these contributions had to be taken into account for the purposes of calculating loss of earnings. Whether or not they were counted made a R3 million difference to his claim. The matter went to the Pretoria High Court, which agreed with the RAF that voluntary contributions to a retirement annuity fund should not be taken into account for purposes of calculating loss of earnings.
In an appeal, the Supreme Court of Appeal agreed with the High Court, and rejected the appellant's argument that this amounted to unfair discrimination, pointing out that an employee whose employer contributed to a pension fund as part of his remuneration and one whose employer did not do so, were treated equally in the sense that the court considered the employment contract as a whole in order to determine loss of future earnings (see [6], [13]). Appeal dismissed.

GONGQOSE AND OTHERS v MINISTER OF AGRICULTURE AND OTHERS 2018 (5) SA 104 (SCA)

Customary law — Rights — When legislation extinguishing — Whether Act extinguishing customary right of access to and use of marine resources — Marine Living Resources Act 18 of 1998.

Criminal law — Defences — Excluding unlawfulness of act — Necessary authority — Statute making attempt to fish in marine protected area unlawful — Act performed under customary law right — Marine Living Resources Act 18 of 1998, s 43(2)*(a)*.

The first to third appellants were tried in a magistrates' court on a charge of attempting to fish in a marine protected area without permission — a contravention of s 43(2)*(a)* of the Marine Living Resources Act 18 of 1998 (see [15] and [60]). They said they had a customary right of access to marine resources; the Act had not extinguished the right; and it rendered their conduct lawful (see [26], as well as para 14 of the High Court's judgment (HCJ)).The court found they had proven the right; but it had been extinguished by the Act; and it convicted them.
They appealed to the High Court.
It held that the right had been proved and had not been extinguished by the Act (see paras 23 and 37 HCJ). However, its exercise was subject to the requirements of the Act — obtaining a permission under s 43, or exemption from that requirement under s 81; and absent either, their actions were unlawful.
It upheld the convictions (see [18]).
The appellants then applied to the Supreme Court of Appeal for special leave to appeal.
The issues were:

- The status of customary law.

Held, that customary law (including rights thereunder) was protected by the Constitution; and subject only to the Constitution and legislation dealing specifically with it.

- Whether first to third appellants had proven a customary right of access to and use of marine resources.

Held, that they had.

- When legislation would extinguish a customary right.

Held, that it would need to deal specifically with customary law; and it would have to expressly or by necessary implication extinguish the right (see [50]).

- Whether the Act extinguished the right.

Held, that it did not.

- Whether the appellants' acts were unlawful.

Held, that they were lawful, in that they were performed with necessary authority — under the customary law right.

Application for special leave to appeal granted; part of the High Court's order set aside; and that part replaced with an order upholding the appeal, and setting aside first to third appellants' convictions and sentences (see [69]).

PAN AFRICAN MINERAL DEVELOPMENT CO (PTY) LTD AND OTHERS v AQUILA STEEL (SA) (PTY) LTD 2018 (5) SA 124 (SCA)

Minerals and petroleum — Mining and prospecting right — Application for prospecting right — Acceptance — Return of prospecting rights application for non-compliance with requirements — Not amounting to rejection — Substantial compliance with requirements sufficient, strict compliance not required — Mineral and Petroleum Resources Development Act 28 of 2002, ss 16(3) and 22(3).

Minerals and petroleum — Mining and prospecting rights — Application for prospecting right — Nature of MPRDA's queuing system — Where application of old order mineral right holder and that of another entity accepted in respect of same land and minerals — Once holder of unused old order right submitted application within one year exclusivity period, both unused old order right and the exclusivity it conferred remaining extant until the application is either granted or refused — Where application made but neither granted nor refused, unused old order right and its exclusivity period endure — During such period acceptance and processing of later application precluded — Mineral and Petroleum Resources Development Act 28 of 2002, ss 16(2)*(b)*, 22(2)*(b)* and sch II, item 8(2).

Minerals and petroleum — Mining and prospecting rights — Transition to new order under MPRDA — Duration of old order right-holder's preferent right to apply for prospecting and mining rights — Such exclusive right survived until application was either granted or refused — Mineral and Petroleum Resources Development Act 28 of 2002, sch II, item 8(3).

Minerals and petroleum — Mining and prospecting rights — Lapsing of upon deregistration of right-holder company and subsequent revival upon restoration of company's registration — Restored company deemed to have held prospecting right throughout period of deregistration until expiry of right — Legal effect thereof that, during such period, no other application could be validly accepted and granted — Mineral and Petroleum Resources Development Act 28 of 2002, ss 16(2)*(b)*, 22(2)*(b)* and sch II, item 8(2).

Section 16(2) of the Mineral and Petroleum Resources Development Act 28 of 2002 (the Act) (as it read at the time) provided that the Regional Manager (RM) of the Department of Minerals and Energy (now Department of Mineral Resources (the DMR) 'must accept an application for a prospecting right if — *(a)* the requirements contemplated in subsection (1) are met; and *(b)* no other person holds a prospecting right, mining right, mining permit or retention permit for the same mineral and land' (ss 16(2)*(b)* and 22(2)*(b)* are similarly worded); and s 16(3) that '(i)f the application does not comply with the requirements of this section the [RM] must notify the applicant in writing of that fact within 14 days of receipt of the application and return the application to the applicant . . .'.

This case concerned two different applications for prospecting rights in respect of overlapping properties, both accepted by and granted by the RM,apparently as a result of an administrative error. The first was an application by the holder of an unused old order mineral right in respect of the land concerned, ZIZA Ltd (ZIZA); the second that of the respondent company (Aquila). ZIZA made its application on 19 April 2005, within the period that, as the holder of an unused old order mineral right, it enjoyed the exclusive right to apply for a prospecting right under the transitional arrangements of item 8(2) of sch II to the Act. A prospecting right was registered in

favour of Aquila in July 2007, and another was granted to ZIZA in February 2008 (but executed by the DMR in November 2011 in the name of PAMDC *
In December 2010 the RM accepted an application by Aquila for a mining right in respect of one of the properties that its prospecting right related to, but this application was refused. Aquila nevertheless applied (in December 2011) to renew its prospecting right in order to preserve it, since five years is the maximum period for which a prospecting right may be awarded (in terms of s 17(6) of the Act). In October 2013 Aquila launched an internal appeal under s 96(1) of the Act against the decision of the DMR to grant ZIZA a prospecting right. PAMDC opposed Aquila's appeal, and lodged its own appeal against the decision of the DMR to grant Aquila a competing prospecting right. The Minister dismissed Aquila's appeal, finding that ZIZA's application was lawfully accepted, and upheld PAMDC's on the basis that Aquila's prospecting right application was unlawfully accepted during the period ZIZA was afforded exclusivity under the transitional arrangements.
Aquila next approached the court a quo for relief which included the review and setting aside (under the Promotion of Administrative Justice Act 3 of 2000) of the acceptance and grant of ZIZA's prospecting right application; that the court substitute the Minister's decisions with a decision upholding that appeal and the granting of a mining right subject to conditions to be determined by the Minister; and a declaratory order that ZIZA's prospecting right had lapsed with effect from 9 November 2010 when ZIZA had been deregistered (ZIZA's registration was restored in October 2014). Aquila contended that ZIZA's application was not submitted in the prescribed manner as required by s 16(1)*(b)* of the MPRDA because certain of the regulations in terms of the MPRDA were not complied with, in particular that ZIZA's application did not reflect the properties with sufficient particularity to allow the DMR to identify them on its systems. Aquila further contended that the RM could not permit the application to be supplemented after its initial lodgement. Therefore, the RM should have 'returned' the application (as contemplated in s 16(3)) which, so Aquila argued, amounted to its rejection.
The court a quo upheld the review, granted the substitution sought and, without making a declaratory order as requested by Aquila, held that the ZIZA right lapsed when it was deregistered, and because the right itself had expired by the time ZIZA's registration was restored, it did not re-vest in ZIZA upon its restoration. In ZIZA's appeal, and Aquila's cross-appeal (against the declaratory order it sought not having been granted) to the Supreme Court of Appeal, the majority *held* as follows:
Non-compliance with formalities
The failure to comply strictly with formalities and other procedural requirements imposed by a statute did not necessarily lead to invalidity. The question was whether, in spite of the defects, the object of the statutory provision had been achieved. Thus, although ZIZA's application did not strictly comply with all the requirements of the regulations, it sufficiently described the properties for the DMR to accept the application, identify the relevant properties and log them onto its system. In any event, the DMR appeared to allow applicants to supplement their applications, so that it followed that the RM was entitled to take the view that the ZIZA application complied sufficiently with the MPRDA to be accepted, and to call for further documentation to be submitted. (At [20] – [22].)
Return of the application not constituting refusal
Item 8(3) of sch II provided that the relevant unused old order right only terminated once an application for a prospecting or mining right had been dealt with and granted or refused. A return of such an application by a RM for want of compliance with the

prescribed formalities did not constitute a refusal of such application. Only the Minister or his delegate (acting under ss 17 or 23 of the Act) could refuse an application for a prospecting or mining right. (At [22].)

Substitution as remedy

The RM had in fact accepted ZIZA's application, and that barred the acceptance and granting of the Aquila application because, at the time, the ZIZA application had been accepted and not been set aside. The effect of substituting the Minister's decision regarding the acceptance of ZIZA's application, would be to validate the acceptance of Aquila's application and the subsequent grant of a prospecting right to it. However, the decision of the High Court was based on its interpretation of item 8, that the exclusivity period referred to in that provision only endured for one year from the commencement of the Act, ie from 1 May 2004 until 30 April 2005, and not beyond. However, the express language of item 8(3) perpetuated the continued validity of the unused old order right until the prospecting application was either granted or refused. Also, the Minister's decision not to grant Aquila's mining right application could not be faulted because Aquila's prospecting right expired in November 2011, before application was made for its renewal. (At [23], [26] and [28].)

Substituting the Minister's decision to reject Aquila's appeal against the refusal of its application for a mining right with a decision to grant the mining right on terms to be decided by the Minister, was fraught with difficulty. The grant of the right and the imposition of conditions could not be separated from one another. Granting the right without considering whether or what conditions to impose constituted an invalid exercise of the power. In the result, the appeal would be dismissed. (At [29] and [33].)

Effect of deregistration and restoration on *ZIZA*'s prospecting right

The High Court was correct that the prospecting right did not re-vest in ZIZA on its restoration because it had, by that time, expired. But it did not follow that restoration had no legal effect. Its effect was to deem ZIZA to have continued in existence as if it had never been deregistered, and thus to treat all the activities it engaged in and all the assets it held throughout the deregistration period as having been validly done or held. ZIZA was therefore deemed to have held its prospecting right throughout the period of its deregistration until the expiry of the right. That also meant that the ZIZA prospecting right was deemed to have been extant at the time that Aquila submitted its mining right application. And, in terms of s 22(2)*(b)*, the RM could not have validly accepted that mining right application. It followed that the application therefore could not have been processed and granted. In the result Aquila's cross-appeal would be dismissed.

PG GROUP (PTY) LTD AND OTHERS v NATIONAL ENERGY REGULATOR OF SOUTH AFRICA AND ANOTHER 2018 (5) SA 150 (SCA)

Administrative law — Administrative action — What constitutes — Energy regulator determining method to calculate piped gas price and later determining it — Whether determination of method was administrative action — Promotion of Administrative Justice Act 3 of 2000.

In 2011, pursuant to its mandate under the Gas Act 48 of 2001, Nersa determined a methodology to calculate the maximum prices for piped gas. (Piped gas prices at the time, were higher than in a competitive market.) (See [11] – [12] and [20].)

In 2012, Sasol Gas Ltd applied for a determination of those prices; and in 2013, Nersa made the determination.
This, the appellants applied to review and set aside (see [25]).
The High Court identified the determination of the method as the decision to be reviewed; found that the review had been instituted more than 180 days thereafter; and accordingly dismissed it (see [3], [25] – [26], [29] and [39]).
It granted leave to appeal to the Supreme Court of Appeal (see [3]).
The issues were:
Whether the determination of the method was administrative action, and so reviewable (see [30] and [39]).
Held, that it was not:

- The determination of method was a step in the process toward determination of the price, where only the determination of price had direct, external legal effect, and was administrative action (see [32], [35] and [39]).
- The methodology itself gave the party applying for the determination of price a choice of two calculation methods. Only when Sasol Gas applied for the determination and made its election was the method to be used finalised; before then, it was merely 'theoretical' and of 'no effect' (see [37]).
- The method determined in 2011 was not ultimately used to make the price determination (see [38]).

Whether the determination of maximum prices for piped gas was irrational and unreasonable (see [40] and [56]).
Held, that it was (see [56]). This stemmed from the methodology:

- The methodology calculated the piped gas price by reference to fuel alternatives which were too expensive to attract piped gas consumers, even where piped gas prices were non-competitive (see [46] and [48]);
- It sought to protect the revenue of the monopolist (see [54]);
- It included a criterion — 'revenue neutrality' — Nersa could not define and did not understand (see [52] and [55]); and
- It ultimately allowed an increase in the non-competitive piped gas price, contrary to the aim of the process (see [42], [45] – [47] and [49]).

Appeal upheld; order of the High Court set aside; and substituted with an order, inter alia, reviewing and setting aside Nersa's determination of maximum gas prices, and directing that any subsequent determination should apply from 2014 on (see [59]).

ROAD ACCIDENT FUND v ABRAHAMS 2018 (5) SA 169 (SCA)

Motor vehicle accident — Compensation — Claim against Road Accident Fund — Single-vehicle collision — Where driver not employee of owner of insured vehicle, and collision result of burst tyre — Driver's claim based on negligence of owner in failing to maintain vehicle — Such claim falling within ambit of Road Accident Fund Act 56 of 1996, s 17(1).

Section 17(1) of the Road Accident Fund Act (the Act) provides that the Road Accident Fund must 'compensate *any person* (the third party) for any loss or damage . . . suffered as a result of any bodily injury . . . caused by . . . the driving of a motor vehicle by any person . . . if the injury . . . is due to the negligence . . . of the driver *or of the owner* of the motor vehicle or of his or her employee in the performance of the employee's duties' (emphasis added).

The section's definition of a third party as 'any person' is wide enough to include a driver involved in a single-vehicle accident, such as the respondent (see [17]). Here, the respondent's claim was based on the alleged wrongful and negligent conduct of the insured owner — the failure to maintain the tyres of the insured vehicle in a safe and roadworthy condition — which resulted in the tyre-burst causing the accident (see [21]). This claim therefore falls within the ambit of s 17 of the Act (see [25]).

SOUTH AFRICAN NATIONAL PARKS v MTO FORESTRY (PTY) LTD AND ANOTHER 2018 (5) SA 177 (SCA)

Administrative law — Administrative action — What constitutes — SanParks agreeing, on forestry company's request, to vary their lease's tree-felling schedule — Whether Parkscape, an association, had legitimate expectation to be heard before SanParks made its decision — Promotion of Administrative Justice Act 3 of 2000.

In the early-2000s the Department of Water Affairs and Forestry awarded a tender for the management and felling of the Tokai plantation, which is a state forest, to MTO, a forestry company.
The Minister of Water Affairs, acting under s 27 of the National Forests Act 84 of 1998, and MTO, then concluded a lease. It detailed, inter alia, the parties' rights and duties with respect to the felling. Annexed to the lease was a tree-felling schedule.
The Department later assigned the lease, and the Minister assigned his statutory powers in the forest (s 47), to SanParks.

SanParks is an entity created by the repealed National Parks Act 57 of 1976, and is continued in its existence by the National Environmental Management: Protected Areas Act 57 of 2003 (NEMPA). NEMPA duties SanParks, inter alia, with the management of the national protected area in which the plantation falls.
In 2015 a fire destroyed the greater part of the trees MTO was yet to fell, causing it to conclude that it would no longer be commercially viable to maintain the agreed felling schedule.
Accordingly, it asked for, and SanParks agreed to, a variation of the schedule, which accelerated the felling.
MTO then began felling at this accelerated rate.
This caused Parkscape, an association concerned with the plantation area, to obtain an interdict; and to institute proceedings to review and set aside SanParks' decision agreeing to the schedule change.
The High Court found that the decision was administrative action; that Parkscape had had a legitimate expectation of a hearing before it was made; and that SanParks' failure to give the hearing was procedurally unfair. It set the decision aside.
SanParks then appealed to the Supreme Court of Appeal. Dambuza JA wrote the judgment for the court.
The first issue was whether the decision was indeed administrative action, specifically whether it was a 'decision taken . . . by . . . an organ of state, when . . . exercising a public power . . . in terms of any legislation . . .'

Held, that it was: SanParks derived its powers as lessor from the National Forests Act; its exercise of its lease rights fell within its powers under NEMPA; and the lease

itself, and the lessor's rights thereunder, had a public nature. (See [18], [20], [22] and [29].)
The second issue was whether Parkscape had a legitimate expectation of a hearing, before the decision. *Held*, that it did. This derived from SanParks' prior consultation with the public on management of the forest; from its commitment to ongoing consultation expressed in the forest's management framework and plan; and from its undertaking in the framework to hear the public, before making decisions adverse to its interests.
Appeal dismissed.
In a concurring judgment, Navsa JA and Davis AJA suggest certain indicators which might be used in deciding whether administrative law should govern a contract between a private party and an organ of state.
These are:

- The parties' powers;
- whether the public's interest is affected by the exercise of the contractual right concerned;
- the dispute resolution process agreed;
- whether the state is acting fairly; and
- proportionality. (See [37] – [39].)

They conclude that each case is to be decided on its merits, and a value judgment made (see [38]).
Rogers AJA, dissenting, would have upheld SanParks' appeal, and replaced the High Court's order with one dismissing Parkscape's application (see [87]).
In his view, the decision was not administrative action (see [40] and [47]). This, as:

- It was not taken 'in terms of any legislation' (see [49] – [50], [55], [57] – [58]);
- it did not involve the exercise of a 'public power' or a 'public function' (see, inter alia, [63] – [64], [66] – [69], [71], [77] – [78] and [85]); and
- it was not of an 'administrative nature'

PETTENBURGER-PERWALD v VOSLOO AND OTHERS 2018 (5) SA 206 (WCC)

Credit agreement — Consumer credit agreement — Debt rearrangement — Order — Powers of magistrates' court — To rearrange over-indebted consumer's repayment obligations by varying interest rate in credit agreement — Magistrates' court having such power, where parties having agreed to such amended interest rate — National Credit Act 34 of 2005, ss 87(1) and 86(7)*(c)*(ii).

There was a line of case authority to the effect that a magistrates' court, when rearranging an over-indebted consumer's credit obligations under a credit agreement, was not permitted to amend the interest rate set out in the credit agreement, as there was nothing in the National Credit Act 34 of 2005 which empowered it to do so. (See s 87(1) read with s 86(7)*(c)*(ii) and [3] – [5]). However, a purposive interpretation of the NCA — which encouraged the consensual resolution of disputes — led one to the conclusion that, in circumstances where the debt counsellor and credit provider *had agreed to an amended interest rate*, a magistrates' court had the jurisdiction to make an order rearranging the consumer's obligations based upon such amended interest rate.

ALDERBARAN (PTY) LTD AND ANOTHER v BOUWER AND OTHERS 2018 (5) SA 215 (WCC)

Company — Business rescue — Resolution to begin — Setting-aside — When permitted — 'Just and equitable' — Conclusion that termination of business rescue would be just and equitable involving exercise, not of discretion, but of judgment on relevant facts, but once that conclusion was reached, making of order to set aside resolution and terminate business rescue involved exercise of discretion — Companies Act 71 of 2008, s 130(5)*(a)*(ii).

Company — Business rescue — Resolution to begin — Setting-aside — Power of court to make 'any further necessary and appropriate order' — Discretion to be exercised judicially, and only limit on further order which may be made was that it had to be both necessary and appropriate — Companies Act 71 of 2008, s 130(5)*(c)*.

Company — Business rescue — Resolution to begin — Setting-aside — Requirement that copy of application be served on company and Companies and Intellectual Property Commission — Type of service required — Both company and Commission to be joined — In respect of company, service in terms of Uniform Rule of Court 4(1)*(a)*, ie service by sheriff in one of manners referred to in rule 4(1) — In respect of Commission, service in terms of Uniform Rule of Court 4A*(c)* as read with Commission's practice note 9 of 2017, ie service by electronic mail at email address provided by the Commission — Companies Act 71 of 2008, s 130(3).

Mr Bouwer obtained default judgment against the company Alderbaran (Pty) Ltd (Alderbaran) for the balance of the purchase price Alderbaran had failed to pay in respect of the property it had bought from Mr Bouwer. Mr Bouwer subsequently attached the property on the strength of a mortgage bond that had been registered in his favour as security for Alderbaran's obligations. Alderbaran's subsequent application to rescind the judgment and set aside the warrant of execution was dismissed. The same day of such dismissal Mr Shaheed Noor, the sole director of Alderbaran, passed a resolution in terms of s 129(1) of the Companies Act 71 of 2008 (the Act) to place the company under business rescue. Mr Faizel Noor was appointed as business rescue practitioner. After these events, and an unsuccessful appeal against the dismissal of the application for rescission, Mr Bouwer sold the property in execution. Alderbaran, with a view to halting the subsequent transfer of the property, then communicated to Mr Bouwer's attorneys its opinion that the sale of execution was precluded in light of the general moratorium on legal proceedings against companies in business rescue. Mr Bouwer responded that it would proceed with the transfer as the resolution commencing business rescue was a nullity for non-compliance with procedural requirements set out in s 129(3) and (4) of the Act. This communication prompted the present proceedings. Alderbaran sought an order interdicting the transfer of the property because it was in business rescue. And Mr Bouwer launched a counter-application, claiming an order for the setting-aside of the resolution placing Alderbaran underder business rescue and the termination of the business rescue in terms of s 130 of the Act. The major issues to be determined were the following:

(a) Should the resolution be declared invalid and set aside, in terms of s 129(5)*(a)* — which provides for the nullification of a resolution to begin rescue proceedings that fails to comply with the procedural requirements set out in s 129(3) and (4) — read with s 130(1)*(a)* — which allows an 'affected person' to apply for the

setting aside of a procedurally faulty resolution — and the resultant business rescue proceedings terminated in accordance with s 132(2)*(a)*(i) of the Act?
(b) If the answer to the above was positive, should a consequential order be granted in terms of s 130(5)*(c)* — which allows a court setting aside a resolution to, in addition, make 'any further necessary and appropriate order' — confirming the validity of the sale in execution?
(c) Had the respondent in respect of its counter-application for the setting-aside of the resolution complied with the requirements of s 130(3) — which provides that *(a)* it must *serve* a copy of the application on the company and the Companies and Intellectual Properties Commission (the Commission); and *(b)* notify each affected person of the application in the prescribed manner.

As to *(a)*, held

In considering an application in terms of s 130(1)*(a)* for the setting-aside of a resolution to commence business rescue, a court, in terms of s 130(5)*(a)*, may set aside the resolution '(i) on any grounds set out in [s 130(1)*(a)*, which includes non-compliance with procedural requirements]; *or* (ii) if, having regard to all of the evidence, the court considers that it is otherwise just and equitable to do so'. It was law that 'the just and equitable requirement' had not to be understood as an independent ground for setting aside a resolution, but as an additional requirement to be satisfied along with the need to establish one or more grounds for setting aside in terms of s 130(1)*(a)*. (See [39].) Further, the conclusion that the termination of the business rescue would be just and equitable involved the exercise, not of a discretion, but of a *judgment on the relevant facts*; but, once that conclusion has been reached, the making of an order to set aside the resolution and terminate the business rescue did involve the exercise of a discretion. (See [47].)
It was clear that the procedural requirements set out in s 129 were not satisfied by Aldebaran in respect of the resolution, in that no statement on oath was signed in support of the resolution, and there was no publication of the resolution to affected persons, as envisaged in s 129(3)*(a)*; and there was no publication of notice of the appointment of Faizel Noor as business rescue practitioner to affected persons, as required in s 129(4)*(b)*. (See [44].)
It would be just and equitable to set aside the resolution and terminate the business rescue. The facts suggested that the resolution was not passed in good faith in that there was no genuine intention to attain the objectives of the Act in regard to business rescue; the remedy was instead used simply as a stratagem to defeat Mr Bouwer's enforcement of the default judgment, and hold on to the property to be sold in execution. (See [48] – [49].)

As to *(b)*, held

A court when setting aside a resolution to commence business rescue was given, in terms of s 130(5)*(c)*, a wide discretion to grant 'any further necessary and appropriate order', the rationale being to equip the court to deal equitably with the various circumstances which might arise and require regulation following the setting-aside of a s 129 resolution and termination of business rescue. The discretion had to be exercised judicially, and the only limit on the further order which may be made was that it had to be both *necessary* and *appropriate*. (See [52] and [54].)
As such, it was necessary and appropriate, in all the circumstances, to make an order confirming the validity of sale in execution of the property. On the one hand, because business rescue, once validly initiated, remained operative until set aside by a court — even if affected persons have not been notified thereof as required in s 129 — it could not be said that there was a blanket rule that the setting aside of a s

129 resolution and termination of business rescue operated *ex tunc*, ie retrospectively with effect from the date of the s 129 resolution. On the other hand, it was established in law that action taken against a company in contravention of the moratorium on legal proceedings imposed by s 133 was not automatically invalid.
As to *(c)*, held
As regards the requirement in terms of s 130(3) of *service* on the company and the Commission, both the company and the Commission had a direct and substantial interest in any order the court may make, and both were required to be joined as parties in the application to set aside business rescue. However, it may be appropriate to dispense with the requirement of formal joinder of the Commission as a respondent in proceedings where the Commission had been properly served with a copy of the proceedings and the court was satisfied that the Commission had waived any right to be joined as a party. (See [60].)
Proper 'service' in terms of s 130(3) meant the following: in the case of *the company*, service in terms of Uniform Rule of Court 4(1)*(a)*, that is, service by a sheriff in one of the manners referred to in rule 4(1); in the case of *the Commission*, service in terms of Uniform Rule of Court 4A*(c)* as read with the Commission's practice note 9 of 2017, that is service by electronic mail at the dedicated email address provided by the Commission. (See [66].)
The Commission had not been joined as a party to the counter-application and there has been no service whatsoever of the application on the Commission. The requirements of s 130(3)*(a)* had therefore not been met. (See [75].) The notice requirements of s 130(3)*(b)* had also not been met inasmuch as a copy of the counter-application was not delivered in any form to any 'affected persons'. (See [77].) However, despite non-compliance with the peremptory requirements of s 130(3), the court would not dismiss the counter-application, but rather issue a rule nisi with directions as to service and notice, because there was a good case on the merits for the relief sought. Having found that it would be just and equitable in all the circumstances to grant the relief in the counter-application, it would not be conducive to justice and equity to refuse the relief on the technical ground of defective service. The interests of all affected persons could satisfactorily be catered for by way of the service and notice directions as provided in the order.

COLLARD v JATARA CONNECT (PTY) LTD AND OTHERS 2018 (5) SA 238 (WCC)

Company — Business rescue — Business rescue plan — Vote against its adoption — Voter's aim to frustrate damages claim that plan envisaged company bringing against it — Application to set vote aside — Companies Act 71 of 2008, ss 153(1)*(b)(i)(bb)* and 153(7).

In this matter, employees of Jatara Connect, a company in business rescue, applied to set aside the vote of Edcon Ltd, a creditor, against the business rescue plan. This on the ground that it was inappropriate.
Held, that it would be reasonable and just to do so: Edcon's aim, in voting as it did, was to frustrate a damages claim, which the plan envisaged Jatara bringing against it. This in a context where, assuming successful prosecution of the claim, the outcome for creditors and employee, would be better than in liquidation. (See [1], [6], [9], [20] and [26] – [27].)

Edcon's vote set aside; and the business rescue plan declared adopted (see [28]).

GROEP v WJ DA GRASS ATTORNEYS AND ANOTHER 2018 (5) SA 248 (WCC)

Evidence — Privilege — Legal professional privilege — Scope — Without prejudice rule — Rule protecting admissions made during settlement negotiations from subsequent disclosure, except for limited purpose of interrupting prescription — Party, in communication made in settlement negotiations, waiving its right to rely on prescription — Interruption of prescription not arising — Communication inadmissible against party — May rely on prescription.

Evidence — Privilege — Legal professional privilege — Scope — Without prejudice rule — Courts should be reluctant to classify matter as disconnected from settlement negotiations and hence not covered by rule.

Prescription — Extinctive prescription — Defence of — Waiver during settlement negotiations — Protected from disclosure at subsequent trial, except for limited purpose of interrupting prescription.

The question in the present case was whether the without prejudice rule — which states that communications exchanged by litigants in an attempt to settle their differences are protected from subsequent disclosure at trial and from admission into evidence — was applicable in the context of the facts. These were that Mr Groep had instituted a professional negligence claim against Mr Da Grass because Da Grass had allowed his earlier delictual claim against Golden Arrow Bus Services to prescribe. The court consolidated the two actions for separate determination of the question whether Golden Arrow (second defendant in the consolidated action) had, in a letter written by its attorneys during pre-trial negotiations in the earlier case, waived reliance on prescription. Golden Arrow argued that since the concession was made in an attempt to reach a settlement, it was excluded by the without prejudice rule. Counsel for Da Grass argued that the *KLD*case * — in which the Supreme Court of Appeal ruled that an acknowledgement of liability made in settlement negotiations was admissible for the limited purpose of interrupting prescription — meant that Golden Arrow's concession was not excluded. He further argued that even if KLD was not applicable, the concession was admissible because it was not connected or relevant to the settlement negotiations.

Held

The disclosure permitted in *KLD* was in the context of the interruption of prescription, and did not constitute a general rule permitting a court to go behind the protective shield provided by the without prejudice rule. Since the present case did not involve the interruption of prescription, *KLD* was distinguishable on the facts. (See [35].) Counsel for Da Grass' argument regarding the purported disconnection of Golden Arrow's concession from the settlement negotiations went against the entrenched view that courts should be cautious to lift the protection offered by the without prejudice shield (see [37] – [39]). Golden Arrow's undertaking not to rely on prescription was the bedrock of its offer to settle, and not an irrelevancy unconnected to the negotiations. (See [40].) Since Golden Arrow's concession was therefore inadmissible against it, the separated issue had to be determined in its favour, and the special plea upheld (see [41]).

THE *POLARIS* SOUTHERN AFRICAN SHIPYARDS (PTY) LTD v MFV *POLARIS* AND OTHERS 2018 (5) SA 263 (WCC)

Shipping — Admiralty law — Maritime claim — Enforcement — Arrest — Sale of arrested property — Property ringfenced from other claims — Court may order sale of maritime property where owner subsequently placed in business rescue — Admiralty Jurisdiction Regulation Act 105 of 1983, s 9 and s 10; Companies Act 71 of 2008, s 133(1).

Company — Business rescue — Moratorium on legal proceedings in relation to property belonging to company — Not applying to property already under maritime arrest — Admiralty court may order sale of arrested property — Admiralty Jurisdiction Regulation Act 105 of 1983, s 10; Companies Act 71 of 2008, s 133(1).

The applicant applied to sell property (a ship) under maritime arrest. The issue was whether such a sale could be ordered when the owner had been placed in business rescue. The respondents argued that the moratorium on legal proceedings against companies in business rescue contained in s 133 of the Companies Act 71 of 2008 * prevented the court from ordering the sale.
The court held that s 10 of the Admiralty Jurisdiction Regulation Act 105 of 1983 † excluded property already under maritime arrest from the moratorium in s 133, and granted the application for the sale of the ship.

THE *SEASPAN* GROUSE SEASPAN HOLDCO AND OTHERS v MS MARE TRACER SCHIFFAHRTS AND ANOTHER 2018 (5) SA 284 (KZD)

Shipping — Admiralty law — Maritime claim — Enforcement — Action in rem — Arrest, under protective writ, of associated ship — Ownership of arrested ship transferred after issue of writ but before arrest — Application to set aside arrest refused — Admiralty Jurisdiction Regulation Act 105 of 1983, s 1(2)*(a),* s 3(4)*(b)*, s 3(6) and s 6.

The respondents were ship-owning companies that alleged claims against Hanjin Shipping, a prominent South Korean shipping line that went bankrupt in September 2016. To protect themselves against changes in ownership of the vessels in the Hanjin fleet, the respondents caused a series of protective writs to be issued out of coastal divisions of the High Court, citing some 70 Hanjin vessels as defendants. A vessel the applicants had acquired, *Seaspan Grouse*, was arrested as an associated ship under one such writ. The applicants sought an order setting aside the arrest on the ground that they were innocent purchasers who had bought the vessel at arm's length after the writ was issued. They argued that the transfer of ownership meant that the writ was no longer effective. A similar application in respect of another ex-Hanjin vessel had earlier succeeded in the Western Cape High Court.
The enforcement of maritime claims by the arrest of property is governed by s 3(4) and 3(5) of the Admiralty Jurisdiction Regulation Act 105 of 1983 (the Act). Section 3(4)*(b)* provides that 'a maritime claim may be enforced by an action in rem . . . if the owner of the property to be arrested would be liable to the claimant in an action *in personam*'. Section 3(6) allows the arrest of associated ships, that is, ships other than the ship in respect of which the claim arose, provided there was common ownership or control (see s 3(7)). Section 6(1) provides that courts exercising

admiralty jurisdiction must apply English law as it stood in 1983 unless it is inconsistent with South African law. Section 1(2) provides that '(a)n admiralty action shall for any relevant process commence . . . (iii) by the issue of any process for the institution of an action *in rem*'.
The parties were agreed that the sole issue the court had to decide was whether the relevant time for determining the requisite control or ownership of a vessel as an associated ship and liable to be arrested as such, was the time of issue of the protective writs (as argued by the respondents), or both at the time of the issue of the protective writs and at the time of the arrest of the ship (as argued by the applicants). The answer depended on (i) when an action in rem against an associated ship commenced; and (ii) whether the leading English case on the matter, *The Monica S* [1967] 2 Lloyd's Rep 113 ([1967] 3 All ER 740 (PDA)), which favoured the respondents' position, was still binding in South Africa. The respondents accordingly argued that *The Monica S* was still binding in South Africa. The applicants argued that to interpret the Act in the way argued for by the respondents would sanction arbitrary and unconstitutional deprivation of property. The applicants also asked the court to strike out (i) respondents' expert testimony about the law in other maritime jurisdictions; and (ii) all allegations in respondents' affidavits relating to the ownership and financial structure of the Hanjin Shipping fleet.
Held
An action in rem brought under s 3(6) of the Act was commenced by the issue of summons, not the arrest of the associated ship (the words 'would be liable' in s 3(4)*(b)* did not allude to futurity but meant no more than that liability on the summons was yet to be determined at that stage) (see [14], [17], [19]). *The Monica S* had not been overturned in any way and still applied in South Africa (see [6] – [7], [20]). Adopting the applicants' (contrary) position would result in a loss of rights for plaintiffs, contrary to the Act's manifest purpose to assist them (see [9], [20*a*], [20*b*], [26]). Nor would adopting the respondents' position, as argued by the applicants, result in an unconstitutional deprivation of property: the arrest of associated ships to enforce maritime claims was an accepted part of international maritime law, and purchasers could protect themselves by taking out insurance and conducting writ searches, particularly when purchasing vessels from distressed fleets (see [24] – [27]). The court would therefore refuse the application to set aside the arrest of the *Seaspan Grouse* (see [28], [30]).
As to the applications to strike out: Respondents' reference to the law in foreign jurisdictions was necessary to bring the current position in those jurisdictions to the attention of the court (see [29*e*]). And since the ownership and finance structure of Hanjin were relevant to the application, the application to strike out this evidence would be refused, despite the respondents' concession that the purchase of the *Seaspan Grouse* was a legitimate arm's-length transaction (see [30]).

FIRSTRAND BANK LTD v CLEAR CREEK TRADING 12 (PTY) LTD AND ANOTHER 2018 (5) SA 300 (SCA)
Practice — Trial — Separation of issues — Procedural failures in applying rule 33(4) — Whether rendering separation order incompetent — To be decided on case-by-case basis — In present case, formulation of issue and order leading to anomalies, rendering separation order incompetent — In addition, insufficient factual basis laid for

separated issue to be properly determined — Court a quo's order on separated issue set aside on appeal — Uniform Rules of Court, rule 33(4).

At the commencement of the trial, the parties agreed to deal with whether the National Credit Act 34 of 2005 (the Act) was applicable to their credit agreement as a separate issue in terms of rule 33(4). This appeared to have been an informal agreement because the only indication in the record to this effect was in the judgment of the court below. No order was made separating the issues, and the issue to be determined was not stated at all nor raised in the pleadings. After the court a quo dealt with the issue, an order was granted to the effect that the Act did apply. In an appeal to the Supreme Court of Appeal against this order:
Held
Rule 33(4) referred to a 'question of fact or a question of law' in a pending action; this meant an issue arising on the pleadings. Apart from being a requirement in the rule, the fashioning of an order sharpened the focus of the enquiry as to whether the issue specified could conveniently be decided separately, and also assisted in defining the precise ambit of the enquiry to be undertaken. (At [10] – [11].)
While it would not always have this result, the procedural failures of the court a quo in applying rule 33(4) combined to render its approach incompetent in the circumstances of this case. The formulation of the issue as to whether the Act applied to the agreement, and the simple order that it did, led to anomalies such as passing over sections excluding its application to juristic persons. This gave no clarity on the question whether the respondents were entitled to rely on the defence that the agreement constituted reckless credit as contemplated in s 81 of the Act. (At [12] – [13].)
Also, the failure to address the matter properly under rule 33(4) led to a more substantial difficulty, which impacted on the ability of the court to arrive at a proper conclusion on the issue. This was that the parties failed to place agreed facts before the court (by way of rule 33(1)) or to lead any evidence, which meant that no facts were placed before the court which bore on the issue. Here evidence of 'relevant and admissible context, including the circumstances in which the document came into being', was crucial. (At [14] – [15] and [17].)
Therefore, the issue could not have been properly decided on the basis on which it was dealt with in the court a quo. In the result the appeal would be upheld.

BR v LS 2018 (5) SA 308 (KZD)

Children — Parents — Biological father — Sperm donor through natural insemination — Having statutory rights and responsibilities of biological father — Though such capable of post-natal variation by agreement, terms to be proved by party alleging variation — Quaere: Whether so-called 'known sperm donor agreement' waiving rights and responsibilities of biological father valid in South Africa.

This matter concerned a boy, ES, who born on 12 March 2015 after having been naturally conceived by the applicant (the father) and the respondent (the mother). The couple, never married, had in June 2014 revived an earlier relationship after the applicant agreed to the respondent's request to impregnate her via natural insemination. By July 2014 the respondent was pregnant. But when the applicant told her he wanted to take on parental responsibilities, she demurred. Matters deteriorated when she threatened to forbid him from being present at the birth and to

exclude his name from the birth certificate. But in the end he was present and his name included. The relationship remained under strain, and in September 2015 the respondent, having obtained legal advice, sent the applicant an email in which she raised the notion of a 'known sperm donor agreement', pointing out that it was more 'appropriate' than the parenting plan suggested by the applicant. The email included a draft agreement which the applicant did not sign.

Matters did not improve and in November 2015 the applicant asked the High Court for an order granting him scheduled contact and assigning him the full rights and obligations of unmarried fathers set out in s 21(1)*(b)* of the Children's Act 38 of 2005. * The court granted an interim order and referred the following questions for oral evidence: (i) whether the applicant met the requirements of s 21(1)*(b)*; (ii) whether the parties had concluded a sperm donor agreement; and (iii) whether it was in the best interests of ES for the applicant be assigned rights of contact.
While the applicant stated that the agreement between him and the respondent was that he could choose his level of involvement in ES's life, the respondent argued that the alleged known sperm donor agreement meant that the usual consequences of biological fatherhood in s 21(1)*(b)* did not apply. She argued that the applicant was a sperm donor with no legal rights in respect of ES save for any concessions made by her. She acknowledged that such agreements were not recognised by the Act and would be novel in South African law, but contended that they were increasingly common and that their recognition would be consistent with mothers' rights to dignity and sexual preference. She conceded, however, that the applicant had, inter alia, accompanied her on visits to obstetricians, attended pre-natal classes with her, and had paid certain expenses in respect of the pregnancy.
Held
The known sperm donor agreement contended for by the respondent was an innominate contract, the terms of which she had to establish on a preponderance of probabilities (see [13]). The recognition of such agreements, which were not necessarily invalid, was a novel issue which required the benefit of detailed argument. Any such enquiry would have to consider the best interests of the child and whether recognition might be *contra bonos mores* (see [15]). The present court would, however, assume — without deciding — that a known sperm donor agreement could be validly concluded in South Africa to vary the rights and responsibilities the Act awarded to biological fathers (see [16]).
In the present case the applicant had satisfied the level of commitment required by the Act to confer on him the rights and responsibilities mentioned in s 21 (see [21]). The respondent's conduct was consistent with the applicant's view that he could elect to involve himself in ES's life, and the fact that a parenting plan was even considered also pointed in this direction (see [27] – [29]). Since the respondent failed to prove, on a balance, the agreement alleged by her or to contradict the applicant's more probable version that there had been no variation of the normal consequences of biological fatherhood, the applicant was entitled to an order declaring that he had acquired full parental rights and responsibilities under s 21.

SACR SEPTEMBER 2018

S v OOSTHUIZEN AND ANOTHER 2018 (2) SACR 237 (SCA)

Bail — Pending appeal — Refusal of — Granting of application for leave to appeal not per se entitling person to be released on bail — Had to be real prospect in relation to success on conviction and that non-custodial sentence would be imposed.

The applicants applied for leave to appeal against the refusal of bail on their conviction by the High Court of, inter alia, assault with intent to do grievous bodily harm; kidnapping; attempted murder; and intimidation. Their convictions arose from an incident in which they apprehended the complainant — whom they suspected of being in possession of stolen copper cables — and assaulted him; held him against his will; put him in a coffin; and threatened to kill him. There appeared to be a racial element involved in the offences. They were sentenced to an effective 11 and 14 years' imprisonment, respectively.
Held, that the granting of an application for leave to appeal did not per se entitle a person to be released on bail. There had to be a real prospect in relation to success on conviction and that a non-custodial sentence might be imposed, such that any further period of detention before the appeal was heard would be unjustified. (See [29].)
Held, further, on an analysis of the record, that a probable outcome of the appeal on the merits would be that the offences admittedly committed by the applicants would attract significant custodial sentences, extending beyond the one year that they had already spent in custody, and beyond the time of the hearing of the appeal on the merits. This was likely to occur even if their version, namely that they had been provoked in the manner they alleged, were to be accepted. (See [40].)
Held, that, in refusing to grant bail pending the application for leave to appeal, the court a quo had correctly stated that a custodial sentence was inevitable, and, in the circumstances, it was not in the interests of justice that the applicants be released pending the hearing of their appeal on the merits. (See [41].) Application dismissed.

S v FRANSMAN AND ANOTHER 2018 (2) SACR 250 (WCC)

Trial— Record — Duty of presiding officer to keep record of proceedings — Questioning of accused — Must be carried out carefully and with scrupulous regard for elements relevant to charge — In case of written notation of questioning, record ought as far as possible to be reproduction of what actually transpired.
Review — Delay in submission of record of proceedings — Should be measures to ensure that judicial queries dealt with expeditiously and records submitted — Delay of one year in responding to query reported to Magistrates Commission.

In two matters that came before the court on automatic review from the same magistrate, the court noted that the magistrate's questioning of the accused in both cases was cryptic, and queried whether the record constituted a true and accurate representation of the proceedings. The magistrate only formulated a response to the queries a year after they were made, before returning the case records to the High Court. She explained that she had been swamped with work and it was only recently that she had been able to catch up with her backlog.

The court remarked that magistrates should take special care to ensure that the questioning of the accused was carried out carefully and with scrupulous regard for the elements relevant to the charges at hand. It should further appear from the contents of the record that the questioning took place in a clear manner and in terms which the accused understood. In addition, in the case of a written notation of the questioning, the record ought as far as possible to be a reproduction of what actually transpired and not simply an ex post facto attempt at reconstructing what the magistrate believed to be the gist of what was said. (See [13].)
In respect of the delay in finalising the response to the court's queries, the court found that the explanation by the magistrate was not acceptable. It was unable to accept that her workload was of such a nature that she had no opportunity within a period of 12 months to answer the review query. Even on her own sparse explanation, it was apparent that she had not given the matter the attention it should have enjoyed. (See [26].)
Further, despite attempts at putting a system in place to prevent a recurrence of egregious delay, that would adequately monitor and ensure timeous compliance with the duties in this regard by magistrates and administrative managers, it was disconcerting that there were still magistrates who appeared not to understand the urgency associated with automatic-review matters, and the importance of resolving queries in regard to such matters expeditiously. It was obvious that there should be an active and complementary support system in place at the level of the High Court, whereby the chief registrar not only kept a record of outstanding reviews but also took I proactive steps to follow up on outstanding queries in relation to such matters. The court accordingly made an order providing for a full retrospective review of the present system and a report on this to the court. (See [39] and [41].) In addition, the present matter had to be referred to the Magistrates Commission for it to consider whether the magistrate's conduct in relation to the delay warranted the institution of disciplinary proceedings.
The court upheld the conviction and sentence in one matter, but, in the other, set aside the conviction and sentence on the grounds that the record of the questioning was inadequate to sustain the conviction.

S v TAUTE 2018 (2) SACR 263 (ECG)

Traffic offences — Failure to render assistance to injured person at scene of accident — Accused, after stopping after accident and discovering damage to vehicle, proceeding to police station to report matter instead of rendering assistance to injured person — Such conduct constituting offence of contravening s 61(1)*(c)* of National Road Traffic Act 93 of 1996.

The appellant appealed against his conviction in a magistrates' court for a contravention of s 61(1)*(c)* of the National Road Traffic Act 93 of 1996, in that he had failed to render assistance to an injured person at the scene of an accident. The evidence indicated that, whilst driving on a three-lane highway, the accused noticed the traffic in the left and centre lanes backing up and pedestrians moving between the vehicles. He moved into the right lane and passed the vehicles in the lanes to his left, but in so doing heard a loud bang on the side of his vehicle. He was only able to stop safely one kilometre further, where he discovered that the left-wing mirror had become dislodged. He phoned his employer (the owner of the vehicle) who advised

him to report the accident at the nearest police station. He then drove towards the police station, but was stopped by traffic police shortly before arrival.
The appellant contended that the magistrate had adopted a very subjective approach to the matter and had, in effect, applied strict liability in relation to a contravention of the relevant section. The state had not proved the requisite mens rea. In his judgment, the magistrate accepted that the only place where the appellant could have stopped with safety was at the place where he had in fact stopped, and he accordingly discharged the appellant in respect of a count of failing to immediately bring his vehicle to a stop.
Held, that s 61(1) created several separate duties which were imposed upon the driver of the vehicle upon the occurrence of an accident. The failure to comply with any one or more of those duties constituted an offence.
Held, further, that, after stopping his vehicle and discovering the damage, the reasonable driver would have returned to the scene to render assistance such as he was able to render. The failure to do so did not meet the standard of a reasonable driver in the position of the appellant. That finding met the test of culpable conduct and accordingly the requisite mens rea on the part of the appellant had been established.

Held, further, that the fact, that the appellant took advice from his employer, did not establish that his failure to return and render assistance, as required by the provision, was not culpably negligent. (See [35].) The appeal was dismissed.

S v PORRIT 2018 (2) SACR 274 (GJ)

Bail — Cancellation of — Appeal against — Leave to appeal having been granted by Supreme Court of Appeal — Accused seeking declaratory order, by way of application, suspending cancellation of bail pending appeal hearing — Accused required to proceed in terms of Criminal Procedure Act 51 of 1977 — Application proceedings not competent.

The applicant's bail was cancelled by a judge in a local division who ordered that the applicant had to be held in custody unless a court decided to grant him bail in a fresh application. He made such an application, but that was refused. In the meantime, he had been granted leave to appeal by the Supreme Court of Appeal against the cancellation of bail. In the present application he sought an order suspending the order cancelling his bail. He contended that the common-law rule, that an appeal suspended an order, should apply. Leave to appeal having been granted by the Supreme Court of Appeal, the order cancelling his bail was therefore suspended and his bail reinstated on the same terms and conditions as were applicable before cancellation.
Held, that the reinstatement of bail in a criminal case was too closely related to the criminal case itself, that it had to be dealt with in terms of the Criminal Procedure Act 51 of 1977. To allow an accused out on bail, prior to the hearing of an appeal for that very purpose, would be to frustrate the entire criminal justice system, in that the application before the court did not deal with the merits of the applicant's entitlement to bail or otherwise. (See [9] – [10].) The application was dismissed.

S v LUZIL 2018 (2) SACR 278 (WCC)

Bail— Failure of accused on bail to appear at trial — Forfeiture of bail — Procedure in court after arrest of accused and final forfeiture of bail — Second inquiry had to follow relating to status of accused — Criminal Procedure Act 51 of 1977, ss 50 and 60.

The accused, who was on bail, failed to appear in court and a warrant of arrest was issued. She also missed the return date of the provisional forfeiture of her bail and a final order was made. After her subsequent arrest she appeared in court and pleaded guilty to a contravention of s 170(1) of the Criminal Procedure Act 51 of 1977 (the CPA). When it came to sentencing, the magistrate realised that it had been incorrect to proceed in terms of s 170(1) (where accused is on warning) instead of s 67 of the CPA, and submitted the matter on review for the proceedings to be set aside.
Held, that once bail was finally forfeited to the state and the accused appeared before the court after arrest, there was a second inquiry that had to follow relating to the status of the accused. The provisions of s 50 of the CPA relating to procedure after arrest were applicable in general, and, in particular, s 50(6) read with s 60 of the CPA. It followed that the accused were entitled to be informed of the reasons for their further detention if the court so ordered, and that they were entitled to be released on bail or even on warning. The magistrate's failure on this occasion to give attention to the status of the accused was a material misdirection. The proceedings had to be set aside and remitted to the magistrate for the accused to be dealt with in accordance with the law.

NL AND OTHERS v ESTATE LATE FRANKEL AND OTHERS 2018 (2) SACR 283 (CC)

Sexual offences — Prescription of — Section 18 of Criminal Procedure Act 51 of 1977 excluding rape and compelled rape from prescription, and no other sexual offences — Such distinction arbitrary, irrational and unconstitutional — Declaration of invalidity of provision confirmed, but suspended for 24 months to allow Parliament to enact remedial legislation.

The applicants applied for the confirmation of the declaration by a local division of the invalidity of s 18 of the Criminal Procedure Act 51 of 1977, to the extent that it barred the right to institute a prosecution for all sexual offences other than rape and compelled rape (s 18*(f)* of the Act) after the lapse of a period of 20 years from the time when the offence was committed. They did not support the confirmation of the High Court's suspension of the declaration for a period of 18 months to allow Parliament to remedy the constitutional defect and the reading-in to s 18*(f)* of certain words, pending the enactment of remedial legislation by Parliament.
The applicants were supported in these respects by the fourth, fifth and sixth respondents. The fourth respondent also sought permission to introduce new evidence which, it contended, would show that the reason for delayed disclosure in relation to all sexual offences, and not just in relation to those of rape or compelled rape, was the same in respect of all survivors of sexual assault. None of the parties objected to the introduction of this evidence which set out the effect of rape, trauma on adult survivors reporting sexual assault and getting support thereafter. The court

held that its findings on the nature and extent of rape-trauma syndrome would be a welcome addition to the court's jurisprudence and that the evidence should be admitted. (See [24].)
The Minister of Justice and Correctional Services supported the application for confirmation of the declaration of invalidity, but called for a longer period of suspension to allow Parliament to effect the remedial legislative amendments.
Held, that the prescription period of 20 years imposed by s 18 was insufficiently cognisant of the nature and process of sexual-assault disclosure, and the section was out of touch with the development regarding the application of prescription in relation to sexual offences. Its effect was that it penalised even a complainant whose delay was caused by or due to his or her inability to act, by preventing him or her from pursuing a charge, even if he or she may have a reasonable explanation for the delay. (See [54] – [55].)
Held, further, that there was no rational basis for the right to prosecute to lapse after 20 years in respect of other forms of sexual offences, and not for rape or compelled rape: sexual offences may differ in form, but the psychological harm they all produced may be similar. Section 18 also undermined the state's effort to comply with international obligations which imposed a duty to prohibit all gender-based discrimination that had the effect or purpose of impairing the enjoyment by women of fundamental rights and freedoms, and to take reasonable and appropriate measures to prevent the violation of those rights.
Held further, that the period of 24 months sought by the Minister to enable Parliament to enact remedial legislation could not be said to be unreasonably long to enact a statute that would be constitutionally compliant, having regard to the sensitivity of the impugned provisions and the need to obtain the views of various public-interest groups on the extent of the amendment to the section. The suspension would not cause the applicants or similarly situated survivors of sexual assault any prejudice, as the suspension order was coupled with an interim reading-in and, should Parliament fail to enact remedial legislation within 24 months, the interim reading-in remedy would become final.

MOYO AND ANOTHER v MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT AND OTHERS 2018 (2) SACR 313 (SCA)

Intimidation — Contravention of s 1(1)*(b)* read with s 1(2) of Intimidation Act 72 of 1982 — Constitutionality of — Expressions or threats of instigation of violence excluded from protection of freedom of expression by s 16(2) of Constitution — Provision in s 1(2) not creating reverse-onus provision,but contravening provisions of s 35(3)*(h)* of Constitution, in that it placed improper pressure on accused to forgo constitutional right to silence.
Intimidation — Contravention of s 1(1)*(b)* read with s 1(2) of Intimidation Act 72 of 1982 — Constitutionality of — Nothing in s 1(1)*(b)* to suggest that *mens rea* not required for offence — Did not encompass cases of conventional and protected freedom of expression — Provision passed constitutional muster.

In two cases consolidated by virtue of the similarity of the contentions advanced on behalf of the appellants, the issue was whether the provisions of s 1(1)*(b)* and s 1(2) of the Intimidation Act 72 of 1982 (the Act) were constitutionally valid. Both appellants were facing trials in separate magistrates' courts on charges under the Act and the proceedings in those courts were stayed, pending the decisions on the

constitutionality of the impugned provisions. In the first case, the appellant contended that the provisions of s 1(1)*(b)* violated the right to freedom of expression guaranteed in s 16(1) of the Constitution and criminalised any speech or conduct which created a subjective state of fear in any person, regardless of the intention to create fear. It was contended that the provision was overbroad, as it criminalised many forms of expression that fell within the protection of s 16(1) of the Constitution. In the second appeal, the appellant contended that s 1(2) of the Act created a reverse onus in all prosecutions under s 1(1)*(a)* of the Act, the effect of which was that an accused person had to prove on a balance of probabilities that he or she had a lawful reason to issue the threat unless they made a statement 'clearly indicating the existence' of a lawful reason before the prosecution closed its case. It was therefore contended that the provision breached the fair-trial rights entrenched in ss 35(3)*(h)* and *(j)* of the Constitution.

Held, per Wallis JA (Maya P and Makgoka AJA concurring) for the majority, that there was nothing in s 1(1)*(b)* to suggest that mens rea was not required for the offence. Intention, either in the form of dolus or culpa, was a requirement for conviction.
Held, further, that the submission that s 1(1)*(b)* encompassed cases of conventional and protected freedom of expression could not be accepted. That would only be the case if the section were interpreted to cover such cases, an interpretation that was inconsistent with the applicable principles of statutory and constitutional interpretation. The provision accordingly passed constitutional muster. (See [143] and [147].)
Held, further, that s 1(2) of the Act did not create a reverse-onus provision of the type that had been condemned in a number of cases by the Constitutional Court.
Held, further, that the provision was one addressing an evidential issue, but an evidential burden did not impose a reverse onus, nor was it per se a case of constitutional infringement. However, there was a constitutional problem with the section, in that it contravened the provisions of s 35(3)*(h)* of the Constitution, placing improper pressure on an accused to forgo the constitutional right to silence and not to give self-incriminating evidence. That was inconsistent with the broader right to a fair trial because it relieved the prosecution of the need to lead evidence to show that the actions of the accused were without lawful reason, and, after the close of the prosecution case, it constrained the accused to give evidence themselves or to lead evidence from others.
Held, further, that there was no basis upon which this constitutional infringement could be justified as a permissible limitation of rights under s 36 of the Constitution, and it fell to be declared invalid retrospectively.
Held, per Mbha JA (Van der Merwe JA concurring) for the minority, that both impugned sections were unconstitutional and invalid and ought to be referred to the Constitutional Court in terms of s 172(2)*(a)* of the Constitution.

All SA September 2018

City of Tshwane Metropolitan Municipality v Lombardy Development (Pty) Ltd and others [2018] 3 All SA 409 (SCA)

Constitutional and Administrative Law – Application by property owners for review and setting aside of decisions of municipality in imposing increased tariffs – Objection by municipality that application was brought late rejected by court as the nature of the power being exercised by the municipality was unclear, and because the application was in fact not late.

Local Government – Powers of municipality – Levying of property rates – Local Government: Municipal Property Rates Act 6 of 2004 regulates the power of a municipality to levy municipal property rates on the market value of immovable property – Failure by municipality to comply with section 49 of the Act in compiling supplementary valuation roll rendering such roll invalid.

The present case dealt with the power of a municipality to levy municipal property rates on the market value of immovable property (ie land and buildings). The Local Government: Municipal Property Rates Act 6 of 2004 (the "MPRA") regulates such power, as provided for in section 229 of the Constitution

The respondents were owners of vacant stands in a privately owned housing development in the municipal area of the appellant municipality. They had formerly fallen under the Kungwini Local Municipality until the latter was disestablished and absorbed into the appellant with effect from 1 July 2011. Whilst under the administration of Kungwini, the respondents' properties were categorised as "residential". For a year or more following the disestablishment of the Kungwini Municipality, rates were levied on the respondents' properties at the rate charged by the appellant for residential properties. About a year later, the respondents began to receive invoices from the appellant reflecting massive increases in their liability for rates. The increases were retrospectively imposed to July 2011. Attempts to gain clarification from the appellant received no response and the respondents approached the High Court for the review and setting aside of the decisions of the appellant in imposing the increased tariffs. The court declared the 2012 supplementary valuation roll invalid and set it aside to the extent that it recategorised as "Vacant" properties the properties formerly categorised as "Residential". The respondent's 2013 general valuation roll and all subsequent valuation rolls of the respondent were then declared invalid and set aside. The rates imposed by the appellant were thus declared invalid and set aside. The appellant consequently brought the present appeal.

The principal focus of the appeal was on the issues of the lateness of the respondents' application to the High Court; the grant by the High Court of an amendment sought by the respondents; and whether the orders of the High Court should have been confined to the respondents.

Held – The power to impose and collect rates from a property owner turns on the existence and the validity of a valuation roll reflecting the market value of that property. Section 30 of the MPRA provides that a municipality, intending to levy rates on properties within its jurisdictional area, has to value such properties and prepare a valuation roll reflecting the valuations. The valuation roll must contain the market value of the property. Section 49(1) requires the municipal valuer to submit the certified valuation roll to the municipal manager, who must then publish a notice stating that

the roll is open for public inspection for a period stated in the notice, and inviting any person who wishes to lodge an objection to do so in the prescribed manner within the stated period. The section sets out the manner in which such notice must be disseminated. A valuation roll takes effect from the start of the financial year following completion of the public inspection period required by section 49 and remains valid for that financial year or for one or more subsequent financial years as the municipality may decide but in total not for more than four financial years. A municipality must cause a supplementary valuation roll to be prepared in respect of any rateable property which has come to be included in the municipality after the last general valuation.

Relevant to the appellant's contention that the respondents' application was too late, was the fact that it remained unclear when the relevant decisions were taken, by whom and why. The application established that the appellant failed to follow the statutory procedures prescribed by the MPRA when it re-categorised the respondents' properties in 2012. The appellant had however declined to specify the extent to which it omitted to do so. It also declined to say whether it had ever attempted to subsequently cure its omissions. With effect from July 2012, the appellant changed the category of the vacant properties in the disestablished areas from residential to "vacant" in a 2012 supplementary valuation roll, and proceeded to charge the owners of the re-categorised properties the vacant land rate (which was some 4.5 times higher than the residential rate). All of that was done without complying with the requirements of the MPRA.

The appellant argued that the application should have been brought within 180 days of July 2012, which was when some of the respondents received invoices reflecting the higher charges. The premise of the argument was that the application entailed the review of administrative action. However, the application was aimed at the exercise by the appellant of its constitutional powers to impose rates on property in terms of section 229(1) of the Constitution. The Court held that the exercise of such power could be categorised as either an executive or legislative function of a municipal council and thus exempt from the Promotion of Administrative Justice Act 3 of 2000. Given the lack of candour on the part of the appellant, it was difficult to properly characterise the power exercised by it. In any event, the High Court had correctly taken the view that when the application had been launched by the respondents the appellant had yet to furnish adequate reasons for its decisions, hence, the application was not late.

The procedures set out in the MPRA for the compilation of a valuation roll are a jurisdictional prerequisite for the exercise by the appellant of its power to collect rates. If, as in this case, those procedures were not followed, the result was that the consequent collection of rates by the municipality premised on the valuation roll was invalid. The High Court's declaration of invalidity of the 2012 roll was thus unassailable.

The legal effect of the order of invalidity and setting-aside of the 2012 supplementary roll was that, until the causes of invalidity are addressed by the appellant, the subsequent valuation rolls were consequentially invalid. The appeal was therefore dismissed.

Jiba and another v General Council of the Bar of SA; Mrwebi v General Council of the Bar of SA [2018] 3 All SA 426 (SCA)

Legal Practice – Advocates – Admission of Advocates Act 74 of 1964 – Appeal against striking from roll of advocates – Whether fit and proper persons to remain on the roll of advocates – Court finding allegations of misconduct made by General Council of the Bar not to have been established in respect of one of the advocates and not to warrant striking from roll in respect of another – Only a court has the authority to strike a name from the roll of advocates or attorneys.

On application by the General Council of the Bar ("GCB"), the High Court granted an order striking from the roll of advocates, the names of two officials of the National Prosecuting Authority ("NPA"). They were the Deputy National Director of Public Prosecutions ("Jiba") and the Special Director of Public Prosecutions and head of the Specialised Commercial Crime Unit ("Mrwebi"). That led to the present appeal against the striking-off order.

Held – The National Prosecuting Authority Act 32 of 1998 provides for members of the NPA to be appropriately qualified and to possess legal qualifications that would entitle him or her to practise in all courts in the country. The GCB has the authority to apply to court for suspension of its members as advocates from practice and the removal of their names from the roll of advocates in terms of section 7(1)(d) of the Admission of Advocates Act 74 of 1964. Only a court has the authority to strike a name from the roll of advocates or attorneys.

In this case, the GCB had collected information which raised questions about the appellants' fitness to remain admitted as advocates. Section 7(1) of the Admission of Advocates Act provides that a court may, upon application, suspend any person from practice as an advocate or order that the name of any person be struck off the roll of advocates, if it is satisfied that he is not a fit and proper person to continue to practise as an advocate. The guidelines laid down in case law require a court to first decide whether the alleged offending conduct has been established. It must then consider whether the person concerned, in the discretion of the court, is not a fit and proper person to continue to practise. Finally, it must be determined whether in all the circumstances, the person in question is to be removed from the roll or whether an order of suspension from practice would suffice.

The GCB, as *custos morum* of the profession acts in the interest of the profession, the court and the general public. Its role is to present evidence of the alleged misconduct to court, for the court to exercise its disciplinary powers. On the other hand the practitioner is expected to proffer an acceptable explanation to counter the allegations. The nature of the proceedings is not subject to the strict rules that govern ordinary civil proceedings.

The court examined the complaints levelled against Jiba and Mrwebi. The main reason, in the court *a quo's* view, why Jiba and Mrwebi were found to be not fit and proper persons to remain on the roll of advocates was their handling of the criminal case against the head of Crime Intelligence within the South African Police Service (the "Mdluli case"). the specific complaints against Jiba were that she had failed to file a full complete rule 53 record even after a court order to that effect; that she failed to file an answering affidavit after directed to do so and that she did not file her heads of argument timeously; that her reason for the delays were sparse and unconvincing; that her conduct as a person of high rank in the public service was unbecoming; that

she failed to disclose that she had received a memorandum in the case and had deliberately attempted to mislead the court with reference to the memorandum; that the present court had criticised her conduct in the handling of the Mdluli matter; and that she failed to make a full and frank disclosure to refute, explain or ameliorate the serious allegations against her. However, the court found the explanations advanced by Jiba in respect of the accusations to be acceptable, and held that the GCB had failed to establish any misconduct against her. That meant that the very first jurisdictional requirement for her removal from the roll of advocates was lacking, and in the opinion of the majority of the court, her appeal had to succeed.

The main complaint against Mrwebi was that he sought to mislead the court on the extent of the consultation between himself and the Director of Public Prosecutions in North Gauteng ("Mzinyathi"), and took a decision to withdraw the fraud and corruption charges against Mdluli before such consultation. Mrwebi's explanations in response to the allegations against him were unsatisfactory, but established at the worst that he had been confused about what was expected of him. Although unable to classify his explanations as dishonest, the court was prepared to find that the GCB succeeded in establishing the alleged offending conduct on a preponderance of probabilities. As there was no personal gain from Mrwebi's conduct, the sanction against him was found to be justified. While acknowledging that a court of appeal's interference with the trial court's discretion is permissible only on restricted grounds, the Court found interference to be justified as the court below did not bring its unbiased judgment to bear on the question before it, and materially misdirected itself. Considering all the facts and circumstances, it was decided by the majority of the court that suspension of Mrwebi as an advocate was the appropriate sanction.

In the court below, the GCB's application was also brought against Mzinyathi, but the court dismissed the complaint against Mzinyathi with costs, up to the stage when the GCB indicated that it would not persist against Mzinyathi. In the present court, the GCB brought a cross-appeal against that costs order. Counsel for Mzinyathi contended that the general principle with regard to costs is that the court exercises its discretion and that the successful party should, as a general rule, have his costs. It could not be found that the court below had exercised its discretion in that regard improperly, and the present Court therefore was not empowered to interfere with the findings of the court *a quo*. The counter-appeal was dismissed with costs.

In a dissenting judgment, it was considered that the appeals of Jiba and Mrwebi should fail and the cross-appeal of the GCB should succeed.

African Development Bank v Nseera; In re: Nseera v Nseera [2018] 3 All SA 450 (GP)

Civil procedure – Emoluments attachment order – Role of employer – Interests of the employer relate to the practicability and enforceability of the emoluments attachment order, and an employer may not purport to enter the principal dispute between the parties.

Civil procedure – Emoluments attachment order – Section 26 of the Maintenance Act 99 of 1998 – Section does not render it peremptory to give an employer notice in advance.

In October 2016, the court granted an order declaring the respondent's husband to be in contempt of a maintenance order granted pending the finalisation of the divorce action between the respondent and her husband. In January 2017, the respondent deposed to an affidavit in which she averred that her husband has not complied with the maintenance order. The affidavit was presented to the Clerk of the Maintenance Court and an order for the attachment of emoluments was made against the respondent's husband, who was employed by the appellant. The order was brought to the attention of the appellant who brought an application in terms of section 28 of the Maintenance Act 99 of 1998, to have it rescinded and set aside.

The rescission application was based on three grounds. Firstly, the appellant took issue with discrepancies in the dates of the emoluments order as compared with the letter and notice accompanying the order, contending that it rendered the process irregular. Secondly, the appellant claimed to have been prejudiced in not being given notice of the application that the respondent had made before the maintenance court and which resulted in the emoluments order. it contended, thirdly, that the prejudice it faced was that it was not afforded the opportunity to oppose the emoluments order and if it had the opportunity, it would have raised the immunity it alleged it enjoyed. The dismissal of the rescission application led to the present appeal.

Held – Section 26 of the Maintenance Act provides for the enforcement of maintenance orders and subsection (1)(ii) authorises the attachment of emoluments. The section does not render it peremptory to give the employer notice in advance. The requirements of *audi alteram* can be satisfied in different ways depending on the context and the particular factual matrix. The Court emphasised that the employer is not a party to the dispute between the original parties who have a direct interest in the maintenance order.

In other grounds relied on by the appellant, it attempted to call into question whether the respondent's reference to her "ex-husband" should not be seen as an indication that the divorce had been finalised and that the respondent had no entitlement to maintenance *pendente lite*, and whether the arrear maintenance claimed by the respondent had been properly established. The Court questioned the appellant's right to raise such issues, which concerned the dispute between the respondent and her husband. The rescission application which was grounded in section 28(2), could not become an avenue through which the employer sought to litigate on behalf of a party who was not before the court. The interests of the employer relate to the practicability and enforceability of the emoluments attachment order. It would be undesirable for an employer to purport to enter the principal dispute between the parties as the appellant sought to do.

The respondent's explanation for the difference in the dates of the order and those that appeared on the accompanying letter and notice were acceptable to the court. In that regard, the court warned against elevating formalism and allowing it to become an obstruction of the course of justice and of the attempts by a court to establish and determine the real dispute between the parties.

In its claim to immunity, the appellant stated that it had been established as a result of an agreement (the "main agreement") signed in 1963 by the representatives of various African governments. It alleged that the main agreement afforded it immunity which effectively precluded the court making the order it made in terms of section 28(1). The Court found the fact that the agreement clothed the appellant with immunity

from every form of legal process to be of no assistance in the present matter. The maintenance dispute between the respondent and her husband was hardly a matter that fell within the general business of the appellant or the scope of its operations. In addition, how that dispute finally got resolved was of no concern to the appellant and did not impact on its operations, efficacy or its ability to discharge its mandate. The immunities that might attach to the employees of the appellant were not intended to operate for the personal benefit of such employees.

The appeal was dismissed with costs.

Booysen v Stander [2018] 3 All SA 466 (WCC)

Family Law and Persons – Division of assets on termination of permanent life partnership – Termination of joint ownership of immovable property – Actio communi dividundo – Universal partnership – Court required to establish intention of parties during course of their relationship.

The parties herein had been in a relationship with each other for over 17 years. On termination of the relationship, the plaintiff claimed termination of joint ownership of certain immovable property based on the *actio communi dividendo*, repayment of a loan and *rei vindicatio* in respect of the return of a motor vehicle registered in the name of the plaintiff.

In a counterclaim, the defendant sought an order declaring that a universal partnership existed between the parties, and declaring the termination of the universal partnership and division of the joint estate.

The immovable property in question had been purchased by the parties during the course of their relationship. The plaintiff's parents paid for the extension of the property by erecting a top floor dwelling. The plaintiff testified that she paid for the bond throughout the duration of her relationship with the defendant, and that she invested her pension benefit into the property in 2007, which she did on the understanding that she would receive it back again. In relation to the motor vehicle, the plaintiff testified that it was registered in her name and that she had paid for the vehicle. It was the only asset which the defendant had in her possession. The defendant confirmed that the plaintiff was the registered owner of the vehicle, but regarded them as being joint owners of the vehicle. The loan repayment claimed related to money which the plaintiff allegedly lent to the defendant to start a business. That was disputed by the defendant. According to the plaintiff, it was never her intention to give up her separate estate rights in any common law marriage. She testified that she and the defendant never intended to get legally married which was evidenced by the fact that they had no shared accounts. Although the parties conducted a joint household, she denied that a joint estate was formed.

The plaintiff submitted that the court, in the exercise of its discretion, should allot the immovable property to her and order her to pay an amount to the defendant as compensation. The defendant, on the other hand, submitted that a universal partnership had come into existence and that the estate should be divided equally between the parties, applying the principles of fairness.

Held – The main issue in the case related to the termination of joint ownership of immovable property.

The main issues in dispute were whether a universal partnership had come into existence or whether the *actio communi dividendo* was applicable in deciding how the assets of the parties accumulated during the period of their relationship should be divided. Secondly, it had to be decided whether the plaintiff had advanced a loan to the defendant and if so, whether the defendant was obliged to repay the loan.

It was common cause that the parties regarded each other as life partners. Life partners are defined as people who live together, outside of marriage, in a relationship which is analogous to, or has most of the characteristics of marriage.

In determining the termination of joint ownership of an immovable property based on *actio communi dividundo*, the court has a wide discretion to order an equitable partition amongst the co-owners. In applying the *actio communi dividend*, adjustment of various claims such as extant expenses for necessary improvements are factored into the partition. The plaintiff wished for deductions to be made from the defendant's share in respect of various expenses which she had been responsible for. She also contended that if the defendant's contention was accepted that there was joint ownership of the vehicle, the defendant should retain the vehicle as her sole and exclusive property but half of the value of the vehicle was to be deducted from the defendant's portion. The Court held that the *actio* may arise whether there was a partnership or not. The evidence suggested that the immovable property was acquired for the parties' retirement and not as a profit-generating investment. The court was not persuaded that the parties' intended to effect a *actio communi dividend*. The fundamental consideration therefore was what the parties' intentions were during the course of their relationship in order to establish *inter alia*, whether a universal partnership came into existence between the parties.

Regard being had to the duration of the relationship, the nature of the relationship between the parties and that the parties conducted a joint household, the only reasonable inference to be drawn was that the parties pooled their resources to the benefit of the joint estate. The manner in which the parties conducted their affairs fit the concept of universal partnership which describes a state of affairs between parties who meet the requirements of a partnership. Those requirements are that each of the partners bring something into the partnership; that the business should be carried on for the joint benefit of the parties; that the object should be to make a profit and that the contract should be a legitimate one. A universal partnership is similar to a marriage in community of property. The nature of the relief which parties can claim when married in community of property is either an order for division of the joint estate or an order for forfeiture of the benefits of the marriage in community of property. Each spouse automatically shares in the assets that are accumulated during the subsistence of the marriage. A marriage in community of property not only results in community of assets but also in community of liabilities. That confirmed the court's view that the plaintiff's claim based on *actio communi dividendo* could not be sustained as it was nearly impossible to untangle the contributions of life partners. The Court decided that the end result should incorporate a hybrid of both the *actio communi dividendo* as well as a universal partnership.

It was declared that a universal partnership existed between the parties. The parties' co-ownership of the immovable property was terminated. The defendant's registered share in the property was to be transferred and registered in the plaintiff's name

against payment to the defendant of the amount of R596 083.50. The Court set out how that amount was computed, and went on to make ancillary orders in the matter.

De Lille v Democratic Alliance and others [2018] 3 All SA 488 (WCC)

Local Government – Local governing political party – Cessation of membership of party member – Whether party complied with its Federal constitution and its rules when it decided to invoke cessation clause – In the face of clear non-compliance with its constitution, the party's determination that a member had ceased to be a member was unlawful and invalid.

As the governing political party in the Western Cape, the first respondent (the "DA") controlled the City of Cape Town (the "City") by holding the majority seats in its Council ("the Council"). The applicant ("De Lille") was a member of the DA and the City's Executive Mayor

In May 2018, a senior functionary ("Selfe") in the DA informed the City's municipal manager that De Lille's membership of the DA had ceased with immediate effect. On the same day, the Speaker of Council forwarded a letter to De Lille notifying her that she was to vacate her office as Executive Mayor with immediate effect. She responded with an urgent application for an interim order suspending the effect of the notification and restoring her to the position she occupied at the time, pending the outcome of a review of the termination of her membership.

The DA relied on the provisions of a clause ("the cessation clause") in its constitution for its notification of the termination of De Lille's membership. The clause provided that a member ceased to be a member of the party when she publicly declared her intention to resign therefrom.

The interim relief sought by De Lille was granted, and the present proceedings related to the review.

For the eighteen months preceding the present litigation, De Lille and her principals in the DA had been at odds with one other. The DA had initiated internal disciplinary proceedings against De Lille in respect of a number of alleged irregularities committed whilst she was in office as Mayor. Those related to alleged corruption in the procurement of buses for the City's bus service, and to the alleged irregular appointment of certain senior staff members in the City. A proposed motion of no confidence in De Lille in February 2018 failed to attract the requisite majority in Council, leading to the DA adopting an amendment to its constitution by inserting a "recall clause". The clause provided that if a member of the party who held executive office had lost the confidence of her caucus, the Federal Executive ("FedEx") could, after giving her the opportunity to make representations to it, resolve to require such member to resign from office within 48 hours, and a failure to do so would lead to cessation of membership of the party. De Lille indicated her intention to challenge the constitutionality of the recall clause, but before anything was done in that regard, she was informed that according to the DA, her membership of the party had come to an end in terms of the cessation clause. That was said to be as a result of a public declaration which she had allegedly made during the course of an interview with on a radio talk-show on 26 April, immediately following the outcome of the DA caucus' motion of no confidence. De Lille disputed that the cessation clause applied to the statements she had made during the interview, which she claimed pertained only to a possible expression of an intention to resign as Mayor after she had cleared her name

and did not constitute the expression of an intention to resign from the party. She further stated that in the event that the party insisted that her membership had ceased, she intended to challenge the validity of the clause on a number of grounds. The DA proceeded to appoint a panel to decide on the matter, and it was concluded that De Lille's membership had ceased.

Held – While De Lille raised numerous grounds of review, the court deemed it unnecessary to deal with all of them. It identified the critical issue as being whether the DA had complied with its Federal constitution and its rules when it decided to invoke the cessation clause. The question was whether or not the provisions of the cessation clause found application in this matter.

A reading of the transcript of the radio interview on which the DA relied did not lead to a clear understanding of De Lille's intention as far as her continued membership of the DA was concerned. Nevertheless, the court assumed, in favour of the DA, that the jurisdictional pre-requisites which were necessary for the cessation clause to find application, were present. But while the statements which were uttered by De Lille might have amounted to the expression of an intention to resign, that did not necessarily lead to the conclusion that her membership ceased either automatically or otherwise. The DA's rules dealing with cessation of membership in terms of the party's constitution stated that cessation of membership did not occur automatically in terms of a deeming provision, and before a public declaration of the intention to resign had legal effect, there had to be a determination of the cessation by a panel of the party's federal legal commission, which would then be confirmed by the Federal Executive. As a matter of law, until such confirmation by FedEx, cessation of membership does not occur and the membership of an affected member remains extant.

That finding had two further, important consequences. Firstly, it where there was a material defect in relation to the process ie where a panel is not properly constituted in terms of the party's constitution or rules, then there cannot be a valid determination made that membership has ceased, and secondly, there can be no valid and effective confirmation of such a determination.

The composition of the FLC was prescribed in Chapter 11 of the DA's constitution. It was clear that on the DA's own version, the relevant provision was not complied with, and such non-compliance was material and not trivial as the party tried to suggest. The FLC was not properly constituted and its finding on the cessation of De Lille's membership was compromised thereby.

A further irregularity was found to have been committed by the DA in not adhering to the peremptory provisions requiring it to give De Lille an opportunity to submit evidence in mitigation before making an adverse finding against her.

Consequently, the determination by the DA that De Lille had ceased to be a member of the party in terms of clause 3.5.1.2 of its (federal) constitution was declared unlawful and invalid and was reviewed and set aside, with costs.

Equal Education v Minister of Basic Education [2018] 3 All SA 509 (ECB)

Constitutional and Administrative Law – Making of regulations by Minister – Whether constituting administrative action – No general rule that the making of regulations automatically constitutes administrative action.

Education – Right to education – Schools – Making of regulations by the Minister, prescribing minimum uniform norms and standards for school infrastructure – Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure, 2013 – Constitutionality of Regulations.

The only parties which pursued this matter before the court were the first applicant and the first respondent (the "Minister").

The applicant based its case on section 172(1) of the Constitution, in seeking to impugn the Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure, 2013 (No. R. 920 in *Government Gazette* 37081 of 29 November 2013).

Before addressing the central issue, the Court had to consider two preliminary points raised by the Minister. The first was that the promulgation of the regulations constituted administrative action and in promulgating them she was performing her public functions in terms of section 5A of the South African Schools Act 84 of 1996. She therefore contended that the application was subject to the provisions of the Promotion of Administrative Justice Act 3 of 2000, and that that the relief sought by the applicant, insofar as it was based on a review application in terms of the Promotion of Administrative Justice Act, was incompetent.

The second point raised by the Minister was that the scope of the Regulations extended to other government agencies and the relevant entities should have been joined as parties to the application.

Held – In respect of the first point, that there is no general rule regarding the nature of the act of making regulations. Whether or not the regulation making process is an exercise of administrative action depends on the merits of each case. The first point *in limine* was thus rejected.

Regarding the issue of alleged non-joinder, the Court stated that in light of the parties who had been cited in the matter, before the court were the national and the provincial governments together with the national Minister of Basic Education and the members of legislatures heading the education portfolio in all 9 provinces. It was therefore incorrect that there should have been a joinder of other entities. The non-joinder point was therefore also rejected.

Section 5A of the South African Schools Act 84 of 1996 provides for the making of regulations by the Minister, prescribing minimum uniform norms and standards for school infrastructure. In keeping therewith, the Minister made the Regulations in question in November 2013. The applicant raised various concerns about the regulations, resulting in the present application.

Regulation 4(5)(a) of the Regulations made the implementation of the norms and standards referred to therein subject to the resources and co-operation of other government agencies and entities responsible for infrastructure in general and making available of such infrastructure. The dispute between the parties related to whether the Minister could be compelled to commit herself to stipulation of the norms and standards for essential basic infrastructure at schools without the qualification contained in regulation 4(5)(a) any or any other qualification; whether that qualification should not be accepted as a law of general limitation in terms of section 36 of the Constitution; and whether the other impugned regulations were irrational or

unreasonable. The applicant viewed the qualification in regulation 4(5)(a) providing government with a means of escaping the obligation to provide adequate school infrastructure in order to fulfil the right to basic education.

The applicant also took issue with regulation 4(1)(b)(i); 4(2)(b); 4(3)(a); 4(3)(b); 4(6)(a) and 4(7) on the ground that they were each inconsistent with the Constitution and the South African Schools Act in varying ways.

The exercise of all public power must comply with the Constitution and the doctrine of legality, which is part of the rule of law. The constitutional requirement of rationality is an incidence of the rule of law which requires that all public power must be sourced in law. When making law, the Legislature is constrained to act rationally. It may not act capriciously or arbitrarily. It must only act to achieve a legitimate government purpose. There must be a rational nexus between the legislative scheme and the pursuit of a legitimate government purpose.

In the present matter, the serious problems facing many schools were not disputed. The Minister's defence was simply that she had no access to money, which was with other State organs. The Court regarded that stance as compromising the constitutional value of accountability. The natural consequence flowing from the stance assumed by the Minister was that she could not make any commitment regarding the basic norms and standards for the infrastructure in public schools. That was unacceptable and inconsistent with the Constitution.

Regarding the relief that it could grant, the Court considered section 172 of the Constitution which gives the court power to adjudicate upon matters in which there is violation of the Constitution. It proceeded to declare the relevant regulations inconsistent with the Constitution and invalid, and directed the Minister to amend the Regulations as set out in the order.

Imperial Group Limited v Airports Company South Africa SOC Limited and others [2018] 3 All SA 555 (GJ)

Constitutional and Administrative Law – Procurement – Publication of invitation to tender – Application for review – Review based on Promotion of Administrative Justice Act 3 of 2000 and doctrine of legality – Non-compliance with section 217 of the Constitution rendering decision to publish the invitation to tender unconstitutional and unlawful.

The applicant ("Imperial") carried on the business of car rentals through its rental division. It had operated car-rental businesses from South African airports controlled by the first respondent ("ACSA") for approximately 32 years and was regarded as a major player in that area, holding approximately one quarter of South Africa's market share for vehicle rentals.

In September 2017, ACSA issued a request for bids ("RFB") in respect of car-rental opportunities at its airports. The evaluation of bids was to entail a four-stage process.

Imperial was concerned about some of the aspects of the bid evaluation process. For one, the RFB provided that a bid could be awarded to a bidder other than the highest scoring bidder where transformation imperatives allowed for that. Imperial complained that it was not known what transformation imperatives would be promoted and how bids would be distinguished from each other at that stage. The RFB also contained what Imperial referred to as "the single opportunity rule". Thus, if a bidder

had already been awarded one kiosk opportunity at an airport, it would not be awarded a second opportunity there, and such an opportunity would be awarded to the next highest bidder. Only if there were no other qualifying bidders who had one kiosk opportunity at the airport, would the second opportunity be awarded to bidders who had one, or more, opportunities. Pursuant to an invitation, Imperial sought clarification from ACSA regarding aspects of the RFB which it found problematic. Although not satisfied with the adequacy of ACSA's responses, Imperial submitted a bid on 12 January 2018 with full reservation of its rights and without waiver, novation or abandonment of any of its contentions regarding the invalidity of the decision to publish the RFB and the RFB itself.

In Part A of its application, Imperial had obtained an order compelling ACSA to provide the details of the other bidders. It then successfully brought an application to join those other bidders as respondents in the present application ("Part B") in which it sought relief on an urgent basis. Firstly, a declaratory order was sought that the RFB and the decision to publish it were unlawful, unreasonable, inconsistent with the Constitution and invalid. Secondly, it sought an order reviewing and setting aside ACSA's decision to issue or publication of the RFB and the RFB itself. An order for costs was also applied for.

ACSA submitted that since no final decision had yet been made regarding the bids, the application was premature and was not urgent and requested that it be dismissed summarily on that basis alone. In furtherance of its contentions, ACSA argued that the impugned decisions were not reviewable, unless they constituted administrative action as defined in section 1 of the Promotion of Administrative Justice Act 3 of 2000. It was common cause that ACSA was an organ of State. However, it contended that the definition of administrative action meant that a reviewable decision was one which adversely affected the rights of any person and which had a direct, external effect. As no final decision had yet been made, so the argument went, the impugned decision to publish the RFB had not directly and immediately impacted individuals and was therefore not administrative action as contemplated in the Act.

Held – Imperial's challenge was not only based on the Promotion of Administrative Justice Act, but in the alternative, on the principle of legality. The fact that a decision or action may not be ripe for challenge in terms of the Act, does not mean that it is not ripe for challenge on the basis that it does not comply with the principle of legality and the Constitution.

To qualify as administrative action for the purposes of the Promotion of Administrative Justice Act the decision or action must be of an administrative nature; taken by an organ of State, or a natural or juristic person; exercising a public power, or performing a public function; in terms of any legislation, or an empowering provision; that adversely affects rights; that has a direct, external legal effect; and that does not fall under any of the listed exclusions. ACSA disputed that its decision adversely affected rights, or had a direct, external legal effect. The Court pointed out that the impact of the RFB decision on interested parties (or bidders), such as Imperial, was their exclusion from the process beyond the first stage. The decision to publish the RFB and the RFB itself were therefore ripe for review in terms of the principle of legality, alternatively, the Promotion of Administrative Justice Act.

Section 217 of the Constitution regulates procurement by an organ of State. It was common cause that ACSA did not comply with section 217 in its conception,

publication and application of the RFB. It contended that the section was not applicable to the RFB, because the section only applied to the procurement of goods and services and not to the disposal and letting of State assets, and that the RFB dealt with the latter and not the former. It was held that ACSA was letting out space at its airports to car hire contractors in order to acquire car hiring services, albeit for the benefit of those using its airports. Section 217 was therefore applicable.

A fundamental principle of the rule of law that the exercise of public power is only legitimate where it is lawful. That principle of legality, to the extent that it is expressed by the rule of law, is implied in our Constitution and requires, *inter alia*, that the State and organs of State must act in accordance with the legal principles that are applicable to them, and not exercise a power or perform a function that has not been conferred upon them by law. Since section 217 of the Constitution was applicable to the letting of kiosks and parking bays to acquire car rental services, ACSA was constitutionally obliged to comply with that section and the legislation contemplated in that section, including the Preferential Procurement Policy Framework Act 5 of 2000 and the Regulations promulgated thereunder, in procuring that service. It did not comply with those provisions, which rendered the decision to publish the RFB and the RFB itself, unconstitutional and unlawful – and reviewable under the principle of legality, alternatively the Promotion of Administrative Justice Act. While that was determinative of the dispute, the Court went on to consider the challenges raised by Imperial, which were not based on section 217 of the Constitution. Having done so, it turned to the issue of the remedy.

It declared the RFP unlawful and invalid for being inconsistent with the Constitution and, in particular, for failing to apply section 217 of the Constitution and the framework legislation envisaged in that section. The RFB and the decision to publish the RFB were reviewed and set aside under the principle of legality, alternatively in terms of section 6(2) of the Promotion of Administrative Justice Act.

Indigenous Film Distribution (Pty) Ltd and another v Film and Publication Appeal Tribunal and others [2018] 3 All SA 587 (GP)

Constitutional and Administrative Law – Cultural rights – Freedom of expression – Balancing of rights – Application for review of classification of film by Film and Publication Tribunal – Decision reviewed and set aside due to failure by the Tribunal to follow the mandatory procedure prescribed by section 6(2)(b) of the Promotion of Administrative Justice Act 3 of 2000, and due to fact that Tribunal lacked jurisdiction to make decision because none of the parties before it had any standing.

Words and phrases – "Explicit sexual conduct" – Films and Publications Act 65 of 1996 – Defined as graphic and detailed visual presentations or descriptions of any conduct contemplated in the definition of "sexual conduct" in the Act.

On 6 July 2017, the Film and Publication Board ("the Board") classified a film ("*Inxeba*") as 16LS. On or about January/February 2018, the relevant parties cited amongst the respondents (referred to in the court's judgment in this case as "the appellants") approached the Board complaining about the film. On appeal, the Film and Publication Tribunal (the "Tribunal") classified the film as X18 SLNVP.

The applicants sought to review and set aside the decision of the Tribunal overruling the Board's classification. The application was based on both procedural grounds and the merits. Insofar as procedural grounds were concerned, the applicants averred that

the Tribunal had no power to consider the appeal and that the appellants had no *locus standi* to bring an appeal before it. Secondly, it was argued that the Tribunal followed an unfair and unlawful procedure. Insofar as the merits were concerned, the applicants submitted that the classification did not fall within the provisions of the Films and Publications Act 65 of 1996, and that the decision breached section 18(3)(c) of the Act.

Held – The distinction between review and appeal proceedings had to be borne in mind. Unlike an appeal, an application for judicial review is not concerned with the correctness or otherwise of the decision but with the manner in which the decision was taken.

The applicants' case was that in the absence of a proper statutory basis for restricting the availability of the film, they had a right to distribute and screen it, and the public had a corresponding right to see it. The Court confirmed that the present matter concerned the balancing of cultural rights and the right to freedom of expression.

The film was based on a Xhosa initiation school and the interactions between the attendees of the school namely the initiates (*abakhwetha*) and their nurses or caregivers (*amakhakatha*). The ritual of initiation or circumcision is a cultural practice central to Xhosa tradition. Sexual intercourse is a taboo subject in the context of the ritual. Any person associated with the initiates is strictly prohibited from engaging in sexual conduct, more especially the caregivers who have to deal with the initiates and get them to heal. The debate in this case was raised by the engagement in sexual activity at an initiation school by two initiation nurses.

Films are dealt with by section 18 of the Act. All films must be classified before being distributed. Section 16 of the Constitution deals with the right to freedom of expression. The applicants contended that the mere fact that some people may be shocked, offended or disturbed by the film is irrelevant to whether a film receives constitutional protection. The Court considered various relevant cases and confirmed that freedom of expression does not enjoy superior status in our law. It does not prevail over cultural rights.

Section 18(3)(c) provides that the Board or Appeal Tribunal shall classify a film as X18 if it contains explicit sexual conduct, and is not of scientific, dramatic or artistic merit. Section 18(3)(c) does not permit the Tribunal to classify a film as X18 on the basis of factors other than those two jurisdictional facts, unless if judged in context it is found that it contains explicit sexual conduct.

In deciding to curtail the applicants' freedom of expression and artistic creativity, the Tribunal took into account the competing rights of the affected communities – and particularly their rights to human dignity, equality and cultural rights. Human dignity and life are ranked above all other rights.

One of the applicants' grounds of review was that the mandatory procedure prescribed by section 6(2)(b) of the Promotion of Administrative Justice Act 3 of 2000 was not complied with by the Tribunal. Notably, the Tribunal afforded the Board and appellants opportunities to submit written heads of argument in advance of the hearing, but the applicants were not. The Tribunal also granted the appellants condonation for their late filing of appeals without providing the applicants with the application for condonation. In the premises, the Court found that the Tribunal did not

comply with the mandatory procedure prescribed by the empowering provision, and as such did not observe the *audi alteram partem* rule.

The applicants contended further that the Tribunal had no jurisdiction to make the decision because none of the purported appellants before it had any standing to appeal. Standing to appeal is dealt with by sec-tion 20(1) and only a person with the requisite standing under section 20(1) can exercise the procedural rights of appeal under section 19. The right of appeal is given only to any person who applied for the classification of a film. The appellants therefore had no standing to appeal to the Appeal Tribunal and the Tribunal consequently had no jurisdiction to determine the purported appeal. The decision of the Tribunal was accordingly reviewed and set aside.

Naki and others v Director General: Department of Home Affairs and another [2018] 3 All SA 606 (ECG)

Constitutionality – Sections 9 and 10 of the Births and Deaths Registration Act 51 of 1992 – Implementation of the regulations was the source of the difficulties facing the applicants – Court confirmed that the regulations in question were unconstitutional – Defect cured by a reading in as set out in the order.

Family Law and Persons – Births – Registration of – Regulations promulgated under Births and Deaths Registration Act 51 of 1992.

The first applicant was a South African citizen who had a relationship with the second applicant, a citizen of the Democratic Republic of Congo ("DRC") whilst posted in that country. Two children were born of that relationship, and the parties subsequently married. The marriage was not registered and no marriage certificate was issued because in the DRC, customary marriages are not registered.

In 2016, at a time when the first applicant was back in South Africa, the second applicant travelled to South Africa to join him. She was pregnant at the time, and gave birth to a child ("NN") in February 2016. The applicants then attempted to register the child's birth, but their application was refused by officials of the Department of Home Affairs. That led to the present application for review of the decision not to register NN's birth, and ancillary relief. That part of the order sought was granted and the issue now remaining for determination was whether the applicants were entitled to a declaration of unlawfulness in respect of the provisions of the Births and Deaths Registration Act 51 of 1992 which prevent the father of a child to register their child's birth in the event that the child's mother is a foreigner whose presence in South Africa may not be in accordance with the law or in the absence of the mother.

Held – The dispute turned on the interpretation of sections 9 and 10 of the Births and Deaths Registration Act and certain regulations promulgated thereunder.

When interpreting a statute, courts must consider the language used as well as the purpose and context and must endeavour to interpret the statute in a manner that renders the statute constitutionally compliant. An order of constitutional invalidity ought not to be granted where words are capable of being interpreted in a manner that renders the provision constitutional.

While sections 9 and 10 of the Births and Deaths Registration Act were found to be constitutional, the implementation of the regulations was the source of the difficulties

facing the applicants. The Court confirmed that the regulations in question were unconstitutional. The defect was cured by a reading in as set out in the order.

S v Dawjee and others [2018] 3 All SA 620 (WCC)

Criminal law and procedure – Corruption – Corrupt activities involving a public officer – Elements of offence as set out in Prevention and Combating of Corrupt Activities Act 12 of 2004 discussed by court

Criminal law and procedure – Corruption – Defeating or obstructing the course of justice Fraud – Sentencing – Principles of sentencing restated by court

The accused were charged with counts of racketeering in contravention of the Prevention of Organised Crime Act 121 of 1998, corruption, fraud, contraventions of the Firearms Control Act 60 of 2000 and money laundering. Underlying the charges was an allegedly corrupt relationship between the civilian accused (the "first to third accused") and those accused employed in the police service (the "fourth to sixth accused").

During the course of the presentation of the State's case, a trial-within-a-trial was held to determine, *inter alia*, the fairness of the trial with specific reference to whether the surveillance of the accused by the police was lawful. Before the conclusion of the trial-within-a-trial, the first to sixth accused decided to change their pleas on some of the counts from not guilty to guilty and to make certain admissions in terms of section 220of the Criminal Procedure Act 51 of 1977. The State chose to accept the pleas in terms of section 112(2) of the latter Act and the court, after having already considered the evidence led to date when it was presented with the change of pleas, accepted the pleas and convicted the relevant accused on their pleas.

Reasons for the conviction of the relevant accused on the counts to which they pleaded guilty as well as the reasons for the acquittal of the relevant accused on the counts for which they sought acquittals were now furnished in the present judgment.

The Prevention and Combating of Corrupt Activities Act 12 of 2004 is the main statute setting out the law applicable to the offence of corrupt activities involving a public officer. Section 4(1)(a)(i)(aa) describes the offences in respect of corrupt activities relating to public officers. Section 4(1)(b) deals with misconduct by the corruptor which can take the form of either direct or indirect gratifications. That sub-section goes on to describe the element of intent that must be present. The elements of the offence of corrupt activities relating to public officers are as follows. There must have been an offer of or actual gratification given to a public officer. Such gratification must be given for the purpose of moving the public officer to act in a manner that amounts to the unlawful exercise of or the failure to exercise his duty, functions or authority, and contemplates an improper act or omission ie unlawfulness. The said act must be designed to achieve an unjustified result (this is the element relating to intention).

In casu the civilian accused all admitted in their plea of guilty, that they provided the fourth to sixth accused with gratifications. The latter were public officers at the time they received those gratifications. They admitted in their pleas that they received the gratifications from the first three accused. It was admitted by the civilian accused that they had provided the gratifications for the purpose of obtaining assistance or preferential treatment for the first accused, and that their acts had the effect of unjustifiably preferring the first accused.

The court turned to deal with the remaining counts on which the accused pleaded not guilty and for which an acquittal was sought before setting out the convictions and acquittals handed down in respect of each of the accused.

Held – In considering an appropriate sentence, the court must strive to attain the primary objectives of sentence which are*, inter alia* those of deterrence, rehabilitation, where possible and retribution. Account must be taken of the accused's personal circumstances, the nature and circumstances of the offences and the consequences of the commission of the offences. A balancing exercise is required, serving the interests of the accused and the interests of justice. The court first looked at the personal circumstances of each of the accused in this matter considering the nature and circumstances of the offences. The fourth to sixth accused were officers in the police service ("SAPS"), and the court expected their knowledge and understanding of the offence of corruption in general to have been sufficiently detailed because each of them held senior leadership positions in the SAPS at the time they committed the offences. Despite that, they did not believe that receiving financial assistance from the first accused and according him favours or preferential treatment in their capacity as police officers, constituted corruption. Their conduct involved the exercise and abuse of public power, and the court emphasised that such power must be exercised responsibly, for the benefit of society as a whole and in accordance with the prescripts that define how that power is to be exercised.

The conduct of the first accused was such that he used SAPS resources for his own personal benefit. The court rejected his defence that the fourth to sixth accused were merely expected to do their official duties and in so doing, they were not being asked to act unlawfully. The authorities make it clear that it is an offence to bribe an official to do his duty and it is a crime for an official to accept money in return for doing his duty.

The sixth accused was liable to be sentenced in terms of the prescribed minimum sentence provisions of the Criminal Law Amendment Act 105 of 1997 because he was a law enforcement officer and he received gratifications in excess of R10 000. However, the court was persuaded that the ordinary mitigating factors applicable to him weighed against the role he played and the nature of the offence, constituted substantial and compelling circumstances to justify a deviation from the prescribed minimum sentence. The mitigating factors were considered by the court in the personal circumstances of each of the accused had to be weighed against the aggravating factors. In so doing, the court formed the view that correctional supervision would not send out a sufficiently strong signal of deterrence and sanction nor would it facilitate the accused's recognition and acceptance of responsibility for the severity of the offences. Direct imprisonment was found to be warranted, and was imposed on each accused according to his specific circumstances, as reflected in the court's eventual order.

Treasure Karoo Action Group and another v Department of Mineral Resources and others [2018] 3 All SA 700 (GP)

Civil procedure – Application proceedings – Pleadings – A party must make out its case in its founding papers.

Environment – Mining, Minerals and Energy – Regulations for Petroleum Exploration and Production – Application for review and setting aside on ground that Minister of Mineral Resources was not authorised to make such regulations – Court rejecting

submission that a 2008 amendment to the Mineral and Petroleum Resources Development Act 28 of 2002 resulted in the Minister of Mineral Resources no longer having the power to make regulations regarding the management of the environmental impact of petroleum exploration and production.

The first applicant ("Treasure Karoo") was a non-profit organisation and the second applicant ("Afriforum") was a non-governmental organisation involved in the development and protection of civil rights. They launched the present application in the public interest, seeking the review and setting aside of the Regulations for Petroleum Exploration and Production made by the second respondent (the "Minister") in June 2015. At the centre of the application, was the question of whether or not the Minister was authorised to make the Regulations.

According to the applicants, after the amendment to the Mineral and Petroleum Resources Development Act 28 of 2002 in 2008, the Minister of Mineral Resources was deprived of the power to make the Regulations as they included extensive environmental regulations. They stated that section 107(1)(a) of the Act was the only provision authorising the Minister of Mineral Resources to make regulations regarding the management of the environmental impact of petroleum exploration and production, and that once that section was deleted by the Mineral and Petroleum Resources Development Amendment Act 49 of 2008, the Minister no longer had the power to make regulations regarding such matters. It was submitted further, that the Regulations could not have been made in terms of any other statutory provision. Finally, the applicants argued that section 50 of the National Environmental Management Act 107 of 1998 limits the power of the Minister of Mineral Resources to make such regulations.

During argument, the applicants deviated from their pleaded case and relied squarely on the principles of review under the doctrine of legality. The respondents objected to the change in stance.

Held – A party must make out its case in its founding papers, and in application proceedings, the affidavits constitute both the pleadings and the evidence. The applicants' change in oral argument meant that a number of relevant issues raised were not fully dealt with in the papers and no evidence was presented in substantiation of the contentions made in argument.

The Court first examined the substance of the Regulations before moving to consider the development and history of our environmental legislation. It was noted that a lack of integration between the processes contained in the National Environmental Management Act and the Mineral and Petroleum Resources Development Act led to the conclusion of the One Environmental System Agreement ("OESA"). To give effect to that agreement, various pieces of legislation had to be amended. OESA envisaged all environmental issues being regulated through a single system which would be the National Environmental Management Act, and therefore all environmental provisions would be repealed from the Mineral and Petroleum Resources Development Act. at the time of publication of the Regulations, the Department of Mineral Resources was empowered to deal with the functional area of environmental impacts relating to mining in terms of the National Environmental Management Act and no longer the Mineral and Petroleum Resources Development Act.

In line with constitutional imperatives, the National Environmental Management Act promotes cooperative governance. Thus, under section 50 of the Act, the Minister of

Environmental Affairs sets the regulatory framework and norms and standards, and the Minister of Mineral Resources will implement the Act's provisions as far as it relates to mining. No limitation is placed on the Minister in that regard, and the making of regulations in the course of such implementation is not proscribed. The applicants did not make out a case that the Regulations were in breach of OESA or were otherwise improper.

The further grounds of review also failed as the papers did not set out a basis for review on the basis of the doctrine of legality and the issue of rationality was not adequately addressed.

In the premises, the appeal was dismissed.

VIP Consulting Engineers (Pty) Ltd v Mafube Municipality [2018] 3 All SA 726 (FB)

Corporate and Commercial – Contracts – Lawfulness – Contractor's claim for payment.

The appellant was a firm of consulting engineers appointed by the respondent municipality in four different projects. In November 2013, the appellant sued the municipality for payment of its professional fees and disbursements.

The court *a quo* correctly found that appellant did the work it was mandated to do. The issues in dispute were whether appellant was entitled to payment of the amount claimed considering the "no risk" defence raised (ie that no fees shall be paid in the event of no government funding be obtained for certain infrastructure projects), the validity of the four contracts, it being alleged there was no compliance with procurement law and finally, whether or not appellants could successfully rely on enrichment in the event of a finding that the contracts are void. The court below found that due to non-compliance with procurement laws, the contracts were illegal and unenforceable. It held that when entering into the contracts, the appellant took a risk well-knowing that its payment hinged on government funding. It dismissed an unjust enrichment claim brought by the appellant.

Held – An examination of the correspondence between the parties made it apparent that the court *a quo'*s conclusion that the appellant had accepted appointment letters based on risk was incorrect.

In purporting to rely in its plea on non-compliance with procurement laws, the respondent attracted an onus to show that the contracts were illegal and null and void based on the principle of legality. Significantly, the respondent had not sought review of the decisions to issue the appointment letters.

It was concluded that there was insufficient evidence upon which the court *a quo* could have found that the contracts were null and void and unenforceable. Although it had not been necessary to consider the claims based on enrichment, the Court was of the view that a proper case had been made out for relief in that regard as well. The appeal was upheld.

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