LEGAL NOTES VOL 10/2018[1]

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SOUTH AFRICA LAW REPORTS OCTOBER 2018

ASSIGN SERVICES (PTY) LTD v NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA AND OTHERS 2018 (5) SA 323 (CC)

Labour law — Temporary employment service (labour broker) — Employer — Deeming — Placed workers earning less than prescribed amount deemed, after three months, to be employees of company they are placed with — Company becoming sole employer for purposes of LRA — Dual-employer model favoured by brokers rejected — Placed workers retaining no direct contractual ties to broker — Labour Relations Act 66 of 1995, s 198A(3)*(b)*.

This case established that, under s 198A(3)*(b)* of the Labour Relations Act 66 of 1995 (LRA), lower-paid workers placed with companies by labour brokers become the sole employees of those companies after three months on the job.
The general provision of the LRA dealing with labour brokers, s 198, states in ss (2) that placed workers are employed by the broker. But s 198A, which deals with the application of s 198 to workers earning less than a minimum threshold, in s 198A(3)(b)(i) states that, if such workers are not performing a temporary service (ie one lasting less than three months), they are 'deemed to be' the client's employees. These provisions are part of the 2014 amendments to the LRA enacted to regulate the labour-brokering industry and protect marginalised workers.
The majority of the court, per Dlodlo AJ, held that s 198(2) and s 198A(3)*(b)*(i) created incompatible deeming provisions (legal fictions), with the result that, when s 198A(3)*(b)*(i) kicked in after the three-month period, s 198(2) ceased to apply, so that the client became the sole employer (see [50] – [51], [54], [69], [75], [83]).
Apart from being in line with workers' constitutional right to fair labour practices, the single-employer model offered greater protection to vulnerable workers than the

[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!**

alternative dual-employer model suggested by the applicant (see [63] – [64], [67], [78] – [82]). The triangular broker-client-worker relationship did not, however, cease to exist but continued as long as the contract between the broker and the client remained in force, so that the broker was still required to pay the placed workers (see [64], [71] – [75]). But the client could be sued directly if the broker defaulted on its obligations (see [63]).
In a dissenting judgment Cachalia AJ held that the sole employer model was contrary to the language of the LRA (see [91] – [99], [108]) and the interests of workers (see [100] – [105]), and that the dual-employer interpretation was therefore the correct one (see [109]).
The facts of this case were that in April 2015 the applicant, Assign, a labour-brokering concern, placed 22 workers with its client, Krost Shelving and Racking (the fourth respondent), to supplement Krost's salaried employees. The placed workers, several of whom were members of the first respondent trade union (Numsa), rendered services at Krost on a full-time basis for a period in excess of three consecutive months. This triggered s 198A(3)*(b)*, and a dispute arose between Assign and Numsa over its interpretation and effect. Assign argued that its effect was that both it and Krost were the workers' employers; Numsa, that Krost had become their sole employer.
The matter went to the CCMA tribunal as a stated case. The CCMA sided with Numsa, but on appeal the Labour Court agreed with Assign. Then, on further appeal, the Labour Appeal Court favoured Numsa's view. In an appeal the Constitutional Court granted leave to appeal but dismissed the appeal for the reasons mentioned above.

MINISTER OF JUSTICE AND ANOTHER v SA RESTRUCTURING AND INSOLVENCY PRACTITIONERS ASSOCIATION AND OTHERS 2018 (5) SA 349 (CC)

Constitutional law — Human rights — Right to equality — Right not to be unfairly discriminated against — Affirmative action — Non-arbitrariness and rationality as distinct requirements — Ministerial policy for appointment of insolvency practitioners not reasonably capable of achieving equality — Also ultra vires enabling Act (by displacing Master's discretion) and arbitrary (by excluding citizens born after 27 April 1994) — Unconstitutional — Constitution, s 9(2); Insolvency Act 24 of 1936, s 158(2).

Insolvency — Trustee — Appointment — Ministerial affirmative action policy unconstitutional — Constitution, s 9(2); Insolvency Act 24 of 1936, s 158(2).

The present respondents (the associations) challenged the government's policy on the appointment of insolvency practitioners (IPs), adopted in February 2014, in the High Court on constitutional grounds. The stated aim of the policy, which was promulgated under s 158(2) of the Insolvency Act 24 of 1936 (the Act), was the transformation of the IP industry. It was intended to govern, in addition to the appointment of insolvency trustees, the appointment of provisional liquidators under the Companies Act and liquidators under the Close Corporations Act. To achieve its goal the policy regulated the Master's power, under s 18(1) of the Act, to appoint provisional insolvency trustees.
Clause 6 of the policy provided that IPs who became eligible to be appointed as trustees had to appear on the Masters list, which was under clause 7.1 divided into

four categories. Category A comprised African, Coloured, Indian or Chinese females who became citizens before 27 April 1994; category B, African, Coloured, Indian or Chinese males who became citizens before 27 April 1994; category C, white females who became citizens before 27 April 1994; and category D, white males and African, Coloured, Indian or Chinese persons who became citizens on or after 27 April 1994. Clause 7.1 in mandatory terms obliged the Master to appoint practitioners 'consecutively in the ratio A4:B3:C2:D1'. The Master was required to proceed sequentially from category A to category D, and could not appoint from other categories until four practitioners from category A had been appointed, and so forth.

The Master was not permitted to deviate from this scheme, except if the matter was complex and the next-in-line practitioner was not suitable, in which case clause 7.3 permitted him to appoint a suitable senior practitioner in addition to the unsuitable practitioner.

The Cape High Court ruled that the policy was irrational and imposed impermissible quotas, and declared it invalid. An appeal to the Supreme Court of Appeal failed. The SCA found that the policy (i) was irrational because it was arbitrary and capricious, with no saving discretion; and (ii) breached the principle of legality because it failed to promote the interests of creditors, in line with the purpose of the Insolvency Act. In *Van Heerden,* the leading case on s 9(2) of the Constitution, the Constitutional Court held that, for a restitutionary measure to comply with s 9(2) of the Constitution, it had to meet three requirements: it had to (i) target people or a category of people who had been disadvantaged by unfair discrimination; (ii) be designed to protect and advance such people; and (iii) promote the achievement of equality, ie be reasonably capable of achieving equality. In formulating the second requirement, the court pointed out that arbitrary, capricious or nakedly preferential measures were not 'designed to achieve a constitutionally authorised end'.

Held by Jafta J for the majority

The statement in *Van Heerden* regarding the unconstitutionality of arbitrary, capricious or nakedly preferential measures was a separate requirement that applied to all exercise of public power generally, which always had to be underpinned by plausible reasons. Arbitrariness and rationality are discrete, though overlapping, concepts. Rationality, which was about the link between the purpose and the means chosen to achieve it, was a lower standard than arbitrariness, which was established by the absence of reasons, or reasons which did not justify the action taken. While clause 7.3 retained a limited residual discretion for the Master, most of the appointments were made under clause 7.1, in respect of which the Master's discretion under s 18 of the Act was completely eroded. Clause 7.3 was therefore no answer to the displacement of the Master's discretion in respect of appointments to which clause 7.1 applied.

But the policy's most serious defect was the lumping together in category D of white males and all practitioners who attained citizenship on or after 27 April 1994. This effectively punished all practitioners born on or after that date and undermined the realisation of equality which the other parts of the policy were designed to achieve. The policy was therefore not a restitutionary measure as envisaged in s 9(2) of the Constitution. (See [42] – [43].) The exclusion of disadvantaged persons who became

citizens after 27 April 1994 meant that it was also arbitrary (see [50] – [54]). And the absence of proof that the policy was reasonably likely to achieve equality meant that it was, in addition, irrational.

Held by Madlanga J for the minority

The policy was invalid only to the extent that it placed in category D citizens who, but for having attained citizenship on or after 27 April 1994, would otherwise have qualified for other categories (see [70], [104]). On the whole, the policy met the requirements of s 9(2) by seeking to eliminate unfair, unjustified preference by a transparent, consistent process (see [77] – [78], [81], [86], [104]). Since the policy was plainly and justifiably to the advantage of its beneficiaries, it could not be argued that it was unlikely to achieve the goal of equality (see [89], [94]). There was, moreover, no irrationality in distributing IP work in a way that used the demographic make-up of the country as a point of departure (see [98], [102]).

MY VOTE COUNTS NPC v MINISTER OF JUSTICE AND CORRECTIONAL SERVICES AND ANOTHER 2018 (5) SA 380 (CC)

Constitutional law — Human rights — Right of access to information — Details of private funding of political parties and independent candidates — Disclosure required for exercise and protection of right to vote and freedom of expression — State obliged to ensure that such information be recorded, preserved and disclosable in a reasonably accessible manner, and for free — Constitution, s 32(1), read with ss 7(2), 16 and 19.

Constitutional law — Legislation — Validity — Promotion of Access to Information Act 2 of 2000 — Unconstitutional and invalid to extent that it does not allow for disclosure of private-funding details of political parties — Constitution, s 32(1), read with ss 7(2), 16 and 19.

Constitutional practice — Courts — Powers in constitutional matters — Order suspending declaration of constitutional invalidity — When appropriate — Not appropriate where continued operation of invalidated provision would not adversely affect rights or interests facilitated by invalidated provision — Constitution, s 172(2)*(b)*(ii).

The High Court, at the instance of My Vote Counts NPC (MVC), declared the Promotion of Access to Information Act 2 of 2000 (PAIA) constitutionally invalid to the extent of its failure to provide for access to information on the private funding of political parties. This in that such deficiency rendered PAIA inconsistent with the constitutional right of access to information (s 32); the obligation of the state to protect, promote and fulfil the rights in the Bill of Rights (s 7(2)); and citizens' political rights (s 19). It suspended the declaration of invalidity for 18 months in order to allow Parliament an opportunity to remedy the defect.
MVC had also applied for the court's order to include a declaration providing for the 'continuous and systematic' recordal and disclosure of information on private funding of political parties, but the High Court refused this relief on the ground that to do so would amount to prescribing to Parliament how to execute its constitutional mandate, thus impermissibly encroaching on its exclusive domain.

The Constitutional Court, in the application for confirmation of the High Court's order and an application for leave to appeal against its refusal to order 'continuous and systematic' recordal:

Held

A citizen's constitutional right to vote necessarily entailed the right to cast an informed vote. Information on the private funding of political parties and independent candidates was essential for the effective exercise of the right to make political choices and to participate in elections. An informed vote included the obligatory recordal and preservation of, and simplified yet effective and reasonable access to, information on the private funding of political parties and independent candidates.

The right of access to information, read with the entitlement to exercise or protect the informed right to vote, and the state's s 7(2) obligation to respect, promote and fulfil the rights in the Bill of Rights, including freedom of expression (s 16), implicitly demanded that information on the private funding of political parties and independent candidates be recorded, preserved and made reasonably accessible to the public.

The cumulative effect of these responsibilities yielded an outcome requiring the state to pass legislation providing for the recordal, preservation and reasonable accessibility of information on private funding.

The existing regulatory framework for the exercise of the right of access to information did, however, not enable a voter to enjoy real access to that critical information. In sum, PAIA was deficient because it did not provide that information on the private funding of political parties and independent candidates be recorded and preserved; it be made reasonably accessible to the public; and that independent candidates and all political parties were subject to its provisions.

Section 7(2) imposed an obligation on the state to facilitate the enjoyment of rights in the Bill of Rights, and s 32(2) required the enactment of national legislation to essentially provide for the recordal or 'holding' and disclosure of required or needed information. It thus fell to the state to honour its s 7(2) obligations. On a proper reading of s 32 with ss 19 and 7(2), it was obliged to make this information reasonably accessible to the public. It did, however, not fall within the remit of this court to prescribe how this was to be done, ie whether by an amendment to PAIA or by other legislation or a combination of both. It was enough to lay down a principle requiring the state to ensure that the information be recorded, preserved and disclosable in a reasonably accessible manner, and that it was not to be paid for.

The application for leave to appeal against the High Court's exclusion of 'continuous and systematic' recordal would be granted (on the basis of a reasonable prospect of success) but the appeal itself would be dismissed. It was not for this court to insist on Parliament having to provide for a 'continuous and systematic' recordal and disclosure of information on private funding. It sufficed to require of Parliament to provide for the holding, preservation and reasonable disclosure of information on private funding. (At [77] – [80].)

As to the High Court's suspension of the order of invalidity, it was necessary to reflect on the rationale for such an order. Declarations of constitutional invalidity were often accompanied by a suspension, but it should never be done without a purpose. Remedies given by our courts must after all be effective. The underlying reason for suspension was that a failure to do so would otherwise yield consequences adverse to the rights or interests hitherto enjoyed or advanced. The nature of the defect must be such that the enjoyment of benefits provided for by the invalidated provision would cease to flow if the order of invalidity were not suspended. It would therefore be necessary to suspend an order of invalidity in

circumstances where its continued operation would otherwise have a detrimental effect on the rights or interests whose enjoyment was facilitated by the invalidated provision. In this case, no consequence would flow from a failure to suspend the declaration of invalidity. No provision of PAIA was declared invalid in the sense that it would, barring the suspension, ordinarily be required not to apply to the extent of its inconsistency with the Constitution. The extent of the inconsistency was nothing but a lamentation of the lacunae in PAIA. An order directing Parliament to address the deficiencies of PAIA within a specified period would thus be made.

MOSTERT AND OTHERS v NASH AND ANOTHER 2018 (5) SA 409 (SCA)

Pension — Pension fund — Appointment of curator by order of High Court — Remuneration of curator — Term of order that remuneration, in terms of agreement to be entered into between curator and Financial Services Board, be 'in accordance with norms of attorneys' profession' — Agreement entitling curator to fees as percentage of amounts recovered on behalf of fund — Legality of — Whether 'in accordance with norms of attorneys' profession' — Whether infringing Contingency Fees Act 66 of 1997 — Whether contrary to common-law principle prohibiting contingency fee agreements — Financial Institutions (Protection of Funds) Act 28 of 2001, s 5(2).

Administrative law — Administrative action — What constitutes — Conclusion of remuneration agreement between court-appointed curator of pension fund and Financial Services Board — Curator's appointment and entitlement to remuneration arising from terms of order of court, not from agreement — Conclusion of agreement not amounting to administrative action.

Attorney — Fees — Contingency fees — Contingency fee agreement — In respect of non-litigious matters — Common law — Court a quo making blanket statement that such agreements unlawful on basis that they were against public policy, thereby extending reach of common-law prohibition against contingency fee agreements, which previously only covering contingency fee agreements in respect of litigious work — SCA finding that court a quo was wrong to do so, and that if the common-law prohibition was to be extended to other situations, that should be done on case-by-case basis after careful analysis of all interests involved.

The Sable Industries Pension Fund (the Sable Fund), after an investigation into its affairs by the Financial Services Board (FSB) — the allegations were that the assets of the Fund had been 'stripped' as a result of a fraudulent scheme encompassing a number of transactional devices — was placed under curatorship, in terms of a High Court order obtained at the instance of the executive officer of the FSB.
The curatorship order appointed the attorney Mr Mostert as provisional curator. He aimed to recover those assets which he believed rightfully belonged to the Fund. It was a term of the order that Mr Mostert would 'be entitled to periodical remuneration *in accordance with the norms of the attorneys' profession*, as agreed with [the executive officer of the FSB], such remuneration to be paid from the assets owned, administered or held by or on behalf of the Fund, on a preferential basis, after consultation with [the executive officer of the FSB]'. The agreement ultimately reached between Mr Mostert and the FSB — in effect, a contingency fee agreement — provided that 'recovery of assets . . . *shall be subject to the curators' remuneration of 16,66%* (exclusive of VAT) *of such assets recovered*'. Mr Nash and Midmacor (henceforth collectively referred to as the respondents) — the former a member of

the Fund, and the latter a company controlled by him and being the principal employer of the Fund — approached the Pretoria High Court to challenge the lawfulness of this remuneration agreement and to seek its setting-aside, inter alia, on the grounds that it was not in accordance with the norms of the attorneys' profession. Mr Mostert appealed to the Supreme Court of Appeal (the SCA) against the decision of the High Court to grant the application.

Merits

The High Court had upheld the respondents' claim, setting aside the remuneration agreement, on the grounds that, at common law, contingency fee agreements in respect of non-litigious work were prohibited, because they were against public policy. In so holding it extended the reach of the common-law prohibition against contingency fee agreements, which had previously only applied in respect of contingency fee agreements between an attorney and client *in respect of litigious work*.

The SCA, however, held that the High Court was wrong to do so. It had not been asked by the applicants to extend public policy in such a dramatic manner, and there was no material before the court to justify it. The SCA added that, if the common-law prohibition on financial arrangements between attorney and client that involved the attorney being remunerated with a share of the proceeds of litigation was to be extended to other situations, that should be done on a case-by-case basis after a careful analysis of all the interests involved, the likelihood of this conducing to conduct on the part of the attorney that was unacceptable and the impact of constitutional values on transactions of the type under consideration.

Counsel for the respondents did not try to support the High Court's approach. It argued rather that the remuneration agreement was illegal because it was not in accordance with the 'norms of the attorneys' profession', as the curatorship order required it to be. (See [53] and [58].) It was initially argued that the remuneration agreement's illegality stemmed from its non-compliance with the terms of the Contingency Fees Act 66 of 1997, which set out the conditions in which contingency fee agreements were permitted (see [53] – [55]). The SCA rejected such a line of reasoning, highlighting the fact that the CFA was specific in providing for contingency fees for *legal representatives in the performance of their professional obligations*; Mr Mostert was not acting as a legal practitioner and was not engaged in proceedings as defined in the CFA. (See [56] – [57].)

It was then argued that such a remuneration agreement was prohibited in terms of the broad guidelines provided by the terms of the attorneys' profession (see [58] – [59] and [64]). On this, the SCA agreed, holding that evidence presented to court demonstrated that the remuneration of an attorney *in accordance with the norms of the attorneys' profession* was to be understood as a fee calculated on a time basis at an hourly rate, and that was the meaning to be attached to the curatorship order (see [73] and [75]). The arrangement in fact made was not in accordance with such a requirement, and it followed that Mr Nash was entitled to an order declaring it to be inconsistent with the curatorship order and therefore unlawful, and setting it aside (see [75] and [77]). The SCA added, however, that an agreement in terms of which Mr Mostert received a fee determined as a percentage of the amounts recovered for the benefit of the Sable Fund was not in itself unlawful; it would, however, be a departure from the curatorship order, and would require the sanction of the court (see [78] and [80]). The SCA, in conclusion, dismissed the appeal on the main point (but see [80]).

Preliminary defences raised by Mr Mostert, and rejected by the SCA

Mr Mostert argued that the conclusion of the fee agreement between himself and the FSB constituted administrative action by an organ of state, and hence any challenge to its lawfulness had to be made in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). As such, it was submitted, the present application had to fail because it was brought considerably outside of the 180-day period prescribed by PAJA, which delay could not be condoned. In the alternative, it was submitted that, even if the proceedings constituted a review outside of PAJA, under the principle of legality the broad common-law delay rule applied and there was no reason to overlook the delay. (See [27] – [28].) However, the SCA held that the agreement was not administrative action. It reasoned as follows: It could be accepted that the FSB was an organ of state. It could also be accepted that, in general, the conclusion of a contract for the procurement of goods or services by an organ of state constituted administrative action. However, the agreement under consideration *was not such a contract*. Mr Mostert's appointment and his entitlement to remuneration for his services arose from the terms of the order of the High Court; the only function of the FSB was to agree with him the basis for his periodic remuneration in accordance with the 'norms of the attorneys' profession'. The agreement was not one to procure his services on behalf of any organ of state. He was to render services as curator of the Sable Fund because the High Court appointed him to that position, not in terms of a contract with the FSB. (See [30], [33] and [34].) (The SCA added that, even if it could be accepted that these proceedings were properly a review under PAJA or the principle of legality, it would have, without hesitation, extended the period of 180 days or overlooked the delay, as the case might be.

Dissenting judgment

Willis JA, dissenting, held that the remuneration agreement constituted administrative action to which PAJA applied (see [83]). By way of reasoning, he added that the fact that an act may derive from an order of court did not, without further ado, necessarily deprive it of its administrative character and quality. An administrative act authorised or prohibited by an order of court was not thereby removed from scrutiny according to the law of review. (See [119].) The judge noted that the respondents were out of the 180-day time period provided in PAJA (see [83] and [117]), and ruled that in the circumstances such failure could not be condoned (see [149]). He concluded that the appeal should be upheld, the order of the court a quo set aside, and replaced with an order dismissing the application with costs (see [150]). In reaching this conclusion Willis JA considered the merits of the application, and held that the law did not prohibit agreements for contingency fee agreements in respect of non-litigious matters and that, in particular, there was nothing wrong with the agreement under consideration: the pension fund had been stripped of its assets, so, without such an agreement, it would not, realistically, have been possible for the fund to recover any of its previously held assets, never mind pay fees in the ordinary course for this purpose.

PALABORA COPPER (PTY) LTD v MOTLOKWA TRANSPORT & CONSTRUCTION (PTY) LTD 2018 (5) SA 462 (SCA)

Arbitration — Award — Application to set aside — Grounds for — Gross irregularity — Severability of award — Permissible if irregular part clearly severable from part good in law — Award may then be enforceable for residue after such severance — Arbitration Act 42 of 1965, s 33(1)*(b)*.

Section 33(1)*(b)* of the Arbitration Act 42 of 1965 provides that '(w)here an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers . . . the court may . . . make an order setting the award aside'.
In this case the issue arose whether, on a proper interpretation of s 33(1)*(b)*, a court may set aside only the irregular part of an award and not the whole, allowing the part that is good in law to stand. (See [45].)
Held
There did not appear to be any sound reason why a properly conducted arbitration that properly determined certain issues should be set aside in its entirety because of an irregularity in relation to a wholly separate issue — provided that a court were satisfied that the irregularity related to a wholly separate issue. This approach was consistent with the language of s 33(1)*(b)* and gave effect as far as possible to the parties' agreement to have their dispute determined by the arbitrator.

ST v CT 2018 (5) SA 479 (SCA)

Marriage — Divorce — Proprietary rights — Accrual system — Calculation of estate's accrual — Onus to prove asset excluded from estate — Whether living annuity part of estate — Duty to furnish particulars of estate's value — Matrimonial Property Act 88 of 1984, s 7.

Marriage — Divorce — Maintenance — Antenuptial contract containing waiver of right to claim maintenance on dissolution of marriage — Enforceability of waiver.

In the early-1990s Mr ST and Mrs CT concluded an antenuptial contract and married. The marriage was out of community of property but subject to accrual. In 2010 CT instituted proceedings for divorce. She claimed, inter alia, accrual and maintenance.
The High Court upheld her claims and ST appealed to the Supreme Court of Appeal. It considered, inter alia:

- The duty of a spouse, on request, to 'furnish full particulars of the value of [his] estate', for the purpose of calculating the estate's accrual (see the Matrimonial Property Act 88 of 1984, s 7; and [33] – [36]);
- The onus to prove an asset was excluded from an estate, for the purpose of calculating its accrual. *Held*, that it was on the party asserting its exclusion (see [39]);
- Whether the value of the capital underlying a living annuity was to be included in the estate of the annuitant, for the purpose of calculating the estate's accrual. *Held*, that it should not be ;
- The enforceability of the clause in the antenuptial contract, in which CT waived her right to claim maintenance on dissolution of the marriage.

Held, that the clause was unenforceable
In Majiedt JA's view, this was because it offended public policy as expressed in s 7(2) of the Divorce Act 70 of 1979.
In Rogers AJA's view, it was unnecessary to make this finding. This, in that the legislation accommodated the public policy-concerns, by giving the court a discretion to enforce agreements on maintenance. (Section 7(1) provides that a court 'may' make an order in accordance with an agreement as to maintenance.)

Here, he would exercise the discretion by declining to enforce the waiver, for the reasons at [199].
Appeal upheld in part.

ABM MOTORS v MINISTER OF MINERALS AND ENERGY AND OTHERS 2018 (5) SA 540 (KZP)

Administrative law — Administrative action — Review — Application — Service — Must be on all affected parties, not just decision-maker — Court may in interests of justice extend 180-day period where applicant failed to serve one of several affected parties — Promotion of Administrative Justice Act 3 of 2000, s 7(1).

Minerals and petroleum — Petroleum — Retail — Site licence — Refusal — Internal appeal against — Discretion of Minister — Minister did not err in taking into account impact on existing fuelling stations in area — Petroleum Products Act 120 of 1977, s 2B(2) and reg 18(2).

Practice — Applications and motions — Application proceedings — Service of documents initiating proceedings — On attorney of record of respondent — Attorney of record meaning attorney formally representing party in proceedings already instituted — Uniform Rules, rule 4(1)(*aA*).

The applicant company intended opening a filling station on a site it owned in Newcastle, KwaZulu-Natal, but its application for site and retail licences under s 2B the Petroleum Products Act 120 of 1977 (the PPA) was refused by the second respondent, the Controller of Petroleum Products, on the ground that there were already 15 other filling stations in the Newcastle area and that another one was not needed.
The first respondent, the Minister of Minerals and Energy, then dismissed the applicant's internal appeal under s 12A of the PPA. In the present application the applicant sought the review, under the Promotion of Administrative Justice Act 3 of 2000 (PAJA), of the Minister's decision to dismiss the appeal. The review application was, like the appeal itself, opposed by existing filling stations in the Newcastle area (the filling stations). They argued that the application had lapsed because the papers were served on them well after the expiry of the 180-day period provided for in s 7(1) of PAJA. The applicant in turn argued that timeous service on the actual decision-makers, the Minister and the Controller, was sufficient to constitute good service and that the papers were in any event also properly served on the filling stations' 'attorneys of record', namely the attorneys who had represented them in the internal appeal. It argued that service on them was therefore effective in terms of rule 4(1)(*a*A) of the Uniform Rules of Court.
Two questions arose: (i) whether service of the review papers on the Minister and Controller — the decision makers — sufficed, with the result that the review proceedings were timeously instituted; and (ii) whether service on the attorneys who had represented the filling stations in the appeal constituted good service under rule 4(1)(*a*A).
Held
As to (i): It made no sense to hold that service of review papers on the decision maker, but not on the other affected parties, sufficed for review proceedings to be instituted: in many cases, as in the present one, it was not the decision-maker who opposed the review, but a third party who was involved, who had a direct and

substantial interest in the outcome of the review. While all affected parties had to be served, courts could, in order to avoid imposing an undue burden on applicants where the review papers were issued and served timeously on most but not all such parties, extend the period of 180 days in the interests of justice. (See [18] – [19].)
As to (ii): The applicant's reliance on rule 4(1)(*a*A) was misplaced because there was nothing in the papers to indicate that after the Minister dismissed the appeal, the respondents' attorney remained 'on record' to deal with any review that may be instituted. An attorney of record was one who had formally placed himself on record as representing a party in legal proceedings already instituted. The delivery on the filling stations' former attorney was therefore of no effect, and it followed that the review proceedings were not instituted within the period of 180 days referred to in s 7(1)*(b)* of PAJA. (See [26] – [27].) Application dismissed (see [32]).
The court pointed out that it would in any event have dismissed the application on the merits. The Minister and Controller were in terms of s 2B(2) of the PPA entitled to take into account the viability of the existing filling stations and the need for another one. There was also no evidence that the Minister had overemphasised the status quo.

ABSA BANK LTD v NJOLOMBA AND ANOTHER, AND OTHER CASES 2018 (5) SA 548 (GJ)

Mortgage — Foreclosure — Application for judgment on accelerated debt, where all legal and contractual requirements for such judgment met, and mortgaged property primary residence — Court not having discretion to postpone matter until judicial consideration of executability — Practice directive requiring such postponement not capable of displacing substantive law entitling credit provider to judgment.

Credit agreement — Consumer credit agreement — Reinstatement of agreement in default — Mortgage agreement — Sale in execution — Of movable property 'after execution of any other court order enforcing that agreement' as contemplated in s 129(4)*(b)* of NCA — Not affecting debtor's right to reinstate mortgage agreement under s 129(3) of NCA — National Credit Act 34 of 2005, ss 129(3) and 129(4)*(b)*.

In these cases, a number of separate applications heard together, each applicant credit provider sought judgment for the accelerated debt in respect of mortgage loan agreements that each of the respondents were in default of. None of the agreements had been cancelled, and no orders were sought declaring the mortgaged properties — primary residences in each case — executable.
The repondents relied on case law which held courts to have a discretion to postpone such applications until consideration of executability, and also on a High Court practice directive that expressly precluded the granting of a default judgment where it was necessary to postpone the claim for a declaration of executability. The central reasoning behind this practice directive is that s 129(4)*(b)* — which provides that a consumer loses the right in terms of s 129(3) to revive or reinstate a credit agreement, 'after the execution of *any other court order* enforcing that agreement' — will preclude the debtor from reinstating the credit agreement by paying the arrears. This because, if the money judgment were given and the judgment debtor's movables executed against, it would constitute 'any other court order enforcing the

agreement' as contemplated in s 129(4)*(b)*, and so the right to reinstate a mortgage agreement, afforded by s 129(3), would no longer be available.

Held

The interpretation of s 129(4)*(b)* posited by the practice directive was irreconcilable with rules 46 and 46A (which ensured judicial oversight to protect debtors when declaring immovable property executable) in that the rules envisaged a procedure where judgment was already taken; and also with the common-law principle that debtors were entitled to enforce their contractual rights. Properly interpreted, s 129(4)*(b)* did not apply to all credit agreements (and thus also mortgage agreements); it related exclusively to the type of credit agreement singled out for debt enforcement by the sale of the movable property, and found no application in the case of mortgage agreements.

There was, in the absence of cogent circumstances that could translate into the rendering of a debtor homeless, no reason to delay giving judgment in relation to an indebtedness to which a judgment creditor was entitled in terms of substantive law. Such an approach could not, with respect, serve the stated aims of the NCA or the rule of law. Attaching the right to enforce contractual terms to the discretionary question of whether the mortgaged property should be declared executable, created uncertainty as to when or even if judgment could ever be granted for contractual indebtedness. In effect, it sought to create a discretion in relation to the application of substantive law where none existed, and substantive law could not be displaced by a practice directive. Accordingly, the applicants were entitled to the orders they sought.

BAFOKENG LAND BUYERS ASSOCIATION AND OTHERS v ROYAL BAFOKENG NATION AND OTHERS 2018 (5) SA 566 (NWM)

Customary law — Tribal community — Litigation on behalf of — Supreme Council of Royal Bafokeng Nation passing resolution authorising litigation on behalf of tribal community — Whether, under customary law, required to first consult broadly with community — Council obliged to do so — Maxim 'kgosi ke kgosi ka morafe' (the king is the king by virtue of the people) underlining governance structure of tribal community — Court giving effect to living customary law, and stressing need to interpret customary law in line with Constitution.

The present matter concerned the question whether tribal leaders were obliged to consult with the members of the tribal community they led before litigating on behalf of such community. In the High Court, Mahikeng, the Royal Bafokeng Nation (the RBN), a tribal community of approximately 300 000 people, had brought an application (main application) against the Minister of Home Affairs for an order declaring itself to be the registered owner of certain land, at the time held, as per the title deeds of the properties concerned, 'in trust for the RBN' by the Minister. Entities comprising members of the tribal community (the appellants in the present appeal) — who held the view that the land was held in trust for them personally, and not the whole RBN — intervened in the proceedings. In terms of rule 7 of the Uniform Rules of Court, they challenged the authority of the RBN to launch the main application. This is the appellants' appeal, to the full bench of the High Court, against the finding

of the High Court per Landman J that the bringing of the main application was duly authorised.
The institution of the main application had been authorised by a resolution passed by the 'Supreme Council' of the RBN. Such a body sits at the highest level of the RBN's governance structure, and is a joint sitting of the Executive Council — a statutorily recognised body comprising elected members charged with the administration of governance — and the Council of *Dikgosana* — a body comprising the hereditary leaders of the various wards making up the traditional community. The decision to institute litigation was made without direct prior consultation with the community, whose interests are represented within the lower governance structures of the RBN, ie the *Kgotha Kgothe*, and the *Makgotla* (see [43]). The *Kgotha Kgothe* is the general meeting of the RBN's members, which takes place twice a year but more if necessary, and is a forum for the general community to raise issues for discussion and for the RBN administration to report back to members on what activities are being undertaken and what decisions have been made by the Supreme Council. The *Makgotla* make up the local level, or village governance structures, and are constituted by a number of wards, each of which has its own representative structure, the *Kgotla*.
The appellants argued that, under customary law, the Supreme Council did not alone have the power to decide to authorise the litigation under question— an important decision affecting the interests of the community as a whole, given the subject-matter of the litigation. Insofar as it did have such power, they added, it had to consult very broadly within the traditional community before making the decision in question (which it failed to do), and act on the community's wishes. The RBN, for its part, insisted that the Supreme Council had the power to make the impugned decision, and to do so in the manner it adopted (ie without direct prior consultation with the community), because, ultimately, it had previously acted in this manner and it was the general practice and custom of the RBN.

Decision of the appeal court

The court emphasised that, in ascertaining customary law, courts had to have regard to past and current practices, and developments in communities to meet changing needs (see [39] and [36.1]). The court stressed that the law that was recognised was living customary law, which evolved as the people who lived by its norms changed their patterns of life; and that, in other words, a court should not assert a version of customary law that was 'out of step with the real values and circumstances of the societies they [were] meant to serve' . The court importantly added that customary law had to be interpreted in the light of the values of the Constitution and was only recognised to the extent it complied with such values.
With this in mind, the court considered the evidence of the parties as to the customs of the RBN. It held that, in fact, consultation underpinned the governance structure and decision-making processes of the RBN (see [49]). The court found support for such a finding in the words of the *kgosi* himself. The latter stressed the importance to the RBN of the maxim '*kgosi ke kgosi ka morafe*' — the 'king is the king by virtue of the people', and insisted that no major decision affecting the community could be taken without the approval of the community. (See [44].) The court held that consultation fostered participatory democracy, which lay at the heart of the Constitution, and enhanced the right to dignity, because it acknowledged the worth of individuals in decision-making processes (see [44], [48] and [49]).
The court concluded that the Supreme Council had a duty to consult broadly with the community on matters of public importance, such as the decision under question,

and that it failed to do so. The litigation was therefore not properly authorised. Appeal upheld.

BRYER NO AND OTHERS v HERITAGE WESTERN CAPE 2018 (5) SA 597 (WCC)

Heritage — Protection of heritage resources — Development of sites — Obligation of developer to notify provincial heritage authority where development will change character of site exceeding 5000 m2 in extent (s 38(1)*(c)*(i) of NHRA) — 'Site' meaning area of ground on which development in fact taking place, not 'erf' — If footprint of development less than 5000 m2, notification not required, even where erf on which development located exceeds 5000 m2 — National Heritage Resources Act 25 of 1999, s 38(1)*(c)*(i).

Section 38(1)*(c)* of the National Heritage Resources Act 25 of 1999 requires a person contemplating development of a heritage-resource site to notify the provincial heritage authority if, inter alia, the development will 'change the character of a site (i) exceeding 5000 m2 in extent'. Taken in context, 'site' means the area of land on which the development is in fact taking place, and does not equate to 'erf'. Accordingly, where the footprint of the development is less than 5000 square metres, notification will not be required even if the size of the registered erf on which the development happens to be located exceeds 5000 square metres.

EDCON HOLDINGS LTD v NATIONAL CONSUMER TRIBUNAL AND ANOTHER 2018 (5) SA 609 (GP)

Credit agreement — Consumer credit agreement — Cost of credit — 'Club fee' — Whether cost of credit — Whether agreement 'requires' payment thereof — National Credit Act 34 of 2005, s 101(1).

The National Credit Regulator initiated a complaint that Edcon Holdings Ltd was charging its customers a 'Club fee' in its credit agreements; that the fee was a cost of credit; but that it was not a cost of credit that s 101 of the National Credit Act 34 of 2005 allows a credit provider to charge in a credit agreement. (See [1] and [3].)
The Regulator brought the complaint to the National Consumer Tribunal, and asked it for an order, inter alia, that Edcon had repeatedly contravened s 101(1)*(a)*of the Act (see [1]).
Edcon's evidence was that it sold a 'Club Membership' to customers; that the membership was a product comprising services and benefits; and that when a customer applied for credit, it gave the customer the option to apply for the membership. It also said that the customer could cancel the membership at any time, and that the Club fee was payable monthly in arrears (see [4]).
Before the Tribunal, both the Regulator and Edcon considered that the issue was whether the Club fee was a cost of credit (see [5]).
The Tribunal identified the issue to be whether the Act allowed a fee other than those it listed (see [5]).
The Tribunal reasoned that Parliament's intention was that consumers should know the fees in their credit agreements; that supportive of this was that only the fees

listed were permitted; that neither s 101 nor any other section allowed a Club fee; and so Edcon's inclusion of the fee was a contravention of s 101.
The Tribunal found that Edcon had repeatedly engaged in prohibited conduct, and that there should be a hearing on sanction (see [2]).
Edcon appealed the finding to the High Court (see [2]).
The High Court held that the Tribunal considered the wrong issue, and that the correct issue was whether the agreement 'requires' payment of the Club fee. (See [6] – [7].)
It concluded that the agreement did not 'require' payment of the fee: 'require' could only mean 'to demand' or 'impose an obligation'; and the agreement neither demanded nor imposed an obligation that the consumer pay the fee — the consumer was given a choice to apply for a Club membership or not.
The court also held that the Club fee was not a cost of credit: a cost of credit was a cost to lend money, while the Club fee was a fee to buy a product; and that the membership (and hence fee) could be cancelled at any time was inconsistent with the fee being such a cost (see [7]).
The court concluded the Tribunal was wrong in finding Edcon engaged in prohibited conduct (see [8]).
It upheld the appeal; set the Tribunal's order aside; and replaced it with an order dismissing the Regulator's complaint.

HUIJINK-MARITZ v MUNICIPAL MANAGER, MATJHABENG MUNICIPALITY AND ANOTHER 2018 (5) SA 614 (FB)

Administrative law — Access to information — Request for access — Refusal — Deemed refusal — Internal appeal procedure peremptory also in case of deemed refusal — Promotion of Access to Information Act 2 of 2000, ss 27 and 74(1)*(a)*.

Section 74(1)*(a)* of the Promotion of Access to Information Act 2 of 2000 (PAIA) provides that '(a) requester may lodge an internal appeal against a decision of the information officer of a public body . . . to refuse a request for access'; and s 27, that 'if an information officer fails to give the decision on a request for access to the requester concerned within the period contemplated in section 25(1), the information officer is, for the purposes of this Act, regarded [ie deemed] as having refused the request'.
At issue here was whether the internal appeal procedure prescribed by s 74(1)*(a)*was peremptory also in the case of a deemed refusal in terms of s 27. This where the applicant had requested information and documents relevant to a dispute between her and the respondent, and when none were forthcoming, launched the present application seeking an order that the municipality provide her with the requested documents — that is, without first lodging an internal appeal in terms of s 74(1)*(a)*.
Held
Section 74(1)*(a)* did not exclude a deemed refusal, nor did it differentiate between a deemed and actual refusal. An internal appeal was an administrative appeal available to a requester in the case of a deemed and an actual refusal. The appeal provisions of PAIA included an administrative appeal based on a deemed refusal. In the context of PAIA, a failure to take a decision amounted to a refusal of the request. A failure to take a decision was already a ground of review under the Promotion of Administrative Justice Act 3 of 2000. It followed that the deeming provision was

meant to achieve something more than what PAJA regulated: it imputed a decision (the refusal) and thereby obviated the need for the requester to apply to a court to compel the information officer to make a decision. (At [29].)
Section 78 of the Act made it compulsory for an aggrieved requester to first exhaust internal remedies against a decision of the information officer before approaching a court. The applicant did not exhaust her internal remedy of appeal as provided for in PAIA, and the application was therefore premature and must fail.

NDORO AND ANOTHER v SOUTH AFRICAN FOOTBALL ASSOCIATION AND OTHERS 2018 (5) SA 630 (GJ)

Voluntary association — Domestic tribunal — Decision of Safa's Arbitration Tribunal — Whether administrative action — Promotion of Administrative Justice Act 3 of 2000.

During the 2017 – 2018 football season, Mr Ndoro, a footballer, played for Orlando Pirates, the Saudi Arabian club Al Faissaly, and Ajax Cape Town. This came to the attention of the NSL, and it directed Ajax not to field Ndoro, pending confirmation of the legal position. The direction was based on the Fifa regulation that a player may not play for more than two clubs in a season.
Ndoro and Ajax challenged the direction in the Dispute Resolution Chamber of the NSL. It found it had jurisdiction over the matter; and Ndoro was eligible to play.
The NSL appealed to the Arbitration Tribunal of Safa. It upheld the appeal, finding that the Chamber lacked jurisdiction.
Ndoro and Ajax then applied to the High Court to, inter alia, review and set aside the Tribunal's award.
The issues were:

- Whether the Tribunal's decision was administrative action. Held, that it was. The character of the Tribunal's powers was informed by that of the structure of which it was a part. That structure was composed of private entities, linked by agreements, and bound by regulatory instruments. Those entities' powers were regulatory, and they performed public functions; and the Tribunal's role in this compulsory scheme was to enforce its rules.
- Whether the Tribunal's decision was reviewable on the ground in s 6(2)*(d)* of the Promotion of Administrative Justice Act 3 of 2000 ('the action was materially influenced by an error of law'). *Held*, that it was not.

Application dismissed.

PROXI SMART SERVICES (PTY) LTD v LAW SOCIETY OF SOUTH AFRICA AND OTHERS 2018 (5) SA 644 (GP)
Conveyancer — Relationship between conveyancer and parties to transaction — Scope of work reserved for conveyancer — Commercial enterprise dividing transfer work between 'reserved work' and 'non-reserved work' and purporting to perform only latter — Whether such scheme contravening statutory and regulatory framework — Attorneys Act 53 of 1979, s 83(8)*(a)*(i).

The applicant (PSM), in anticipation of setting up a business offering certain 'administrative and related services' forming part of the conveyancing process, approached the court for a declaratory order that doing so would not constitute the

performance of conveyancing work reserved by law to an attorney or conveyancer or otherwise contravene any legislation or regulation.
The court, in considering aspects of PSM's business plan against the applicable statutory and regulatory framework, held as follows:

- The subject legislation did not divide the functions performed by a conveyancer between 'reserved' and 'non-reserved' work. Insofar as its business plan was based on supplying supporting documents in a 'typical transfer', it ignored the fundamental reality that every property transaction was unique and not typical. Supporting documents that were required to be lodged with a deed of transfer required the exercise of professional discretion and legal knowledge.
- PSM's proposed employment of 'suitably experienced individuals to review the deed of sale', involved more than offering 'administrative services'; it amounted to dispensing legal advice, such as whether suspensive conditions were fulfilled. As such PSM would be causing documents to be 'drawn and prepared', in contravention of s 83(8)*(a)*(i) of the Attorneys Act 53 of 1979 (the Act), which reserved not only 'preparing' but also 'drawing up' documents to practising practitioners and prohibited any person other than a practising practitioner from causing such a document to be 'drawn up or prepared' (see [14]).

On a proper interpretation of this section, the legislature had in mind that a conveyancer or his subordinates would obtain the information required, check and verify it, and do everything involved in 'causing' the reserved documents to 'be drawn up' or 'prepared'. PSM's procuring of information to be inserted into a reserved document, and capturing that information onto a software platform from which it would be accessed by the conveyancer who would import it into a template on PSM's platform, formed an integral part of 'drawing up' or 'preparing' the document concerned. Also, s 83(12) of the Act prohibited persons other than employees of the practitioner from preparing or causing to be drawn up or prepared any documents on behalf of a practitioner; a prohibition that would be redundant if the administrative work of the type PSM proposed to perform were not included in the definition of 'causing to draw up or prepare'.

- That PSM would remain in overall control of the registration process, with conveyancers on its panel agreeing to cap their fees, contravened the prohibition in rule 43(1) of the Consolidated Rules of the Attorneys Profession against attorneys entering into arrangements with non-practitioners in order to secure professional work.
- That PSM would deal with all finances relevant to the transfer, contravened the prohibition in s 33(3) of the Legal Practice Act 28 of 2014 which reserved the 'preparing' and the 'drawing up' of documents to practising practitioners, and also prohibited any person other than a practising practitioner from causing such a document to be 'drawn up or prepared' or performing acts or rendering services reserved by law for advocates, attorneys, conveyancers or notaries.
- That PSM would conclude 'introduction agreements' with estate agencies under which it would remunerate agencies marketing its and its panel of conveyancers' services to home sellers and buyers, contravened the prohibition on touting in para 49.17 of the Consolidated Rules for the Attorneys Profession.

The court would also not grant the relief sought because it was incompetent and impermissible, PSM having failed to show a direct and substantial interest in the subject-matter

GONGQOSE AND OTHERS v MINISTER OF AGRICULTURE, FORESTRY AND FISHERIES AND OTHERS 2018 (2) SACR 367 (SCA)

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

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 proven; and it 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 (see [65] and para 37 HCJ).
It upheld the convictions (see [18]).
The appellants then applied to the Supreme Court of Appeal for special leave to appeal (see [19]).
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 (see [23] and [50]).
- Whether first to third appellants had proven a customary right of access to and use of marine resources. Held, that they had (see [35] and [39]).
- 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 (see [59]).
- Whether the appellants' acts were unlawful. *Held*, that they were lawful, in that they were performed with necessary authority — under the customary law right (see [63] – [64]).

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.

S v XABA AND OTHERS 2018 (2) SACR 387 (KZP)

Murder — Sentence — Factors to be taken into account — Belief in witchcraft — Fact that legislature including witchcraft offences in Criminal Law Amendment Act

105 of 1997 indicating that law increasingly less tolerant of such belief as mitigating factor — Court, however, accepting that played role in offence, albeit limited one.

All but one of the eight accused were convicted of murder within the ambit of s 51(1) and part I of sch 2 to the Criminal Law Amendment Act 105 of 1997, in that the murder was committed by a group acting with a common purpose, and the death of the deceased was related to an offence contemplated in ss 1*(a)* – *(e)* of the Witchcraft Suppression Act 3 of 1957. It appeared that a child of the community had been found hanged in the veld and his death was subsequently ruled a suicide. Despite this, money was collected from community members to send a fact-finding mission to Swaziland. An induna undertook the mission. When he returned he addressed a meeting of the community who were armed with dangerous weapons such as cane knives, knobkerries and other weapons. He named the culprits responsible for the death of the child, including the deceased who was called forward to answer the allegations against him and subjected to a trial by mob. The mob failed to heed the order of the induna to put their dangerous weapons away and killed the deceased in a brutal, barbaric and horrific way.
In sentencing the accused, the court took into account that the fact that the law had placed such witchcraft offences under the Criminal Law Amendment Act, was an indication that it was becoming increasingly less tolerant of the belief in witchcraft as constituting a mitigating factor. The court was further of the view that a belief in witchcraft should not be considered as a mitigating factor at all and pointed to the fact that some of the accused before court were educated, having attended high school. Those without a formal education had been exposed to religion, and, despite them living in rural areas, were aware that there was a legal system in the land. Ultimately the court accepted that a belief in witchcraft had played a part in the present matter, but only to a very limited extent, and had been aggravated by the involvement of the leadership who were at the forefront of 'sniffing out the witch'. Mob euphoria had been created by the delivery of the outcome of the naming of the culprits by *izangoma*, which had been sanctioned and supported by the induna. (See [23] – [24].)
The court took into account that some of the accused were primary caregivers whose participation in the attack on the deceased was less serious than the others, and, given that they had been in custody for almost two and a half years awaiting trial, a sentence of three years' imprisonment, wholly suspended for five years, was appropriate. In respect of three other accused who had viciously attacked the deceased, a sentence of 12 years' imprisonment was appropriate.

S v KAROLUS 2018 (2) SACR 398 (WCC)

Maintenance — Failure to pay — Contravention of s 31(1) of Maintenance Act 99 of 1998 — Proof of — Partial compliance with order — Painstaking and laborious examination of payments, and periods in which accused unemployed and unable to pay, required.

The accused pleaded not guilty in a magistrates' court to a charge of failing to pay maintenance in contravention of s 31(1) of the Maintenance Act 99 of 1998. The state produced evidence by way of a statement in terms of s 212 of the Criminal Procedure Act 51 of 1977 that the accused should have paid R53 000 over the

period in question, but had only paid about R9000. The accused testified that he paid money into an account from which the complainant could draw funds; however, during the period in question he was only doing seasonal work and was for part of the time imprisoned. He also had unforeseen medical expenses at that time, but conceded that he could have made more payments when he was working. On conviction he was sentenced to 12 months' imprisonment.
On review, the court was not satisfied with the sufficiency of the evidence adduced to prove the commission of the offence. It held that it was the duty of the state to prove each and every element of the offence. The process was often painstaking and laborious, and it was for this reason that more time had to be devoted to methodically and thoroughly ploughing through the period of non-compliance; this might encompass a day-by-day, week-by-week, and/or month-by-month interrogation of the accused's ability to pay in order to establish whether he had means to comply or was unwilling to work or was guilty of misconduct. The way the present matter had been dealt with lacked sufficient ventilation of the facts for the magistrate to conclude that the accused was guilty. The magistrate should not have found the accused guilty for the full arrear amount as alleged in the charge-sheet. He should have adjusted the arrears accordingly and clearly indicated in the judgment the periods in respect of which the accused was not guilty. In the circumstances the conviction and sentence were not in accordance with justice and had to be set aside.

S v MKULU 2018 (2) SACR 408 (WCC)
Drugs— Dagga — Dealing in in contravention of s 5(b) of Drugs and Drug Trafficking Act 140 of 1992 — Proof of — Liability of person acting as agent of user without separate role in supply of drugs — Such person not performing acts amounting to dealing in as envisaged by s 1 of Act.

In a review of a conviction and sentence in a magistrates' court for dealing in 189 'stops' of dagga, the court queried the conviction based on the accused's plea of guilty and questioning by the magistrate in terms of s 112(1)*(b)* of the Criminal Procedure Act 51 of 1977. In said questioning by the magistrate, the accused admitted only that he had been sent by a friend to buy the dagga and was transporting it for his friend. The court, after remarking that the magistrate's excuse that she was 'swamped with work' was an unacceptable explanation for a delay of 18 months (see [3] – [4]), held that none of the acts of a person who merely acted as an agent of the user, without any separate role in the supply of the drugs, fell within the definition of 'deal in' as envisaged by s 1 of the Drugs and Drug Trafficking Act 140 of 1992. The conviction and sentence accordingly had to be set aside. (See [7] – [9].) Given the inordinate delay in finalising the case, the court held that there was no point in remitting the case to the magistrate. It therefore substituted the conviction for one of possession of dagga and imposed a wholly suspended sentence.

S v RAMATAR 2018 (2) SACR 414 (WCC)

Trial — Irregularity in — What constitutes — Magistrate eliciting information on accused's previous convictions before taking plea in terms of s 112(1)*(b)*of Criminal Procedure Act 51 of 1977 — Material irregularity — Conviction and sentence set aside.

The accused came before a regional magistrate on a charge of theft of razor blades to the value of R850. It appeared from the record of the plea proceedings that at the inception of the proceedings, immediately after the accused had indicated that he wished to plead guilty, the magistrate asked the prosecutor whether the accused had previous convictions. The prosecutor informed her that there was one previous conviction. Apparently not satisfied with this response, the magistrate then asked the accused whether he had only one previous conviction, to which he replied that he had more, whereupon the magistrate proceeded to take his guilty plea and convict him.
When the matter came on review the court requested the magistrate to provide reasons for her conduct and to comment on whether the proceedings should not be set aside on the grounds of a failure of justice due to a material irregularity, in that she had sought to elicit information on the accused's criminal record prior to conviction. The magistrate responded that, given the accused's insistence on pleading guilty to the charge of theft of goods which had a relatively minor value, the court had actually wanted to know if the matter could be diverted. She should have asked if the accused qualified for diversion, but the prosecutor had inadvertently divulged one of the accused's previous convictions.
The court held that the magistrate's questions were irregular as they were not directed at satisfying the requirements of s 112(1)*(b)* of the Criminal Procedure Act 51 of 1977, and had nothing to do with either the facts relevant to the underlying allegations in the charge-sheet or the accused's state of mind and knowledge of unlawfulness in relation to the charge.
The magistrate's explanation for what occurred was disingenuous. If she had thought that this was potentially a matter for diversion then she could, and should, simply have enquired whether this was so from the prosecutor, but had instead directed questions to the prosecutor and the accused in which she had sought directly to elicit his criminal record, even before taking his plea. It was highly disconcerting that, when faced with the transcript of what actually occurred, instead of owning up to her improper conduct, the magistrate had sought not only to provide an explanation which was untenable and not borne out by the transcript, but sought to place the blame on the prosecutor. (See [14].) The conviction and sentence were set aside, and a copy of the judgment forwarded to the Magistrates' Commission, the regional court president, and the Director of Public Prosecutions.

PATEL v NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS AND OTHERS 2018 (2) SACR 420 (KZD)
Prosecution— Prosecutor — Decision to prosecute — Prosecutor required to establish not only prima facie case against accused but also reasonable and probable cause for prosecution.

The plaintiff, a former Judge President, instituted action for malicious prosecution against the defendants arising from his prosecution on a charge of crimen injuria. The prosecution arose from an incident that occurred in the judge's chambers when there was a disagreement between members of the administrative staff of the court over the provision of office stationery. The judge summoned the respective staff and the court manager to his chambers and, according to the complainant (the fourth defendant), belittled her in front of the others by using words such as 'rubbish' and'useless'. She laid a charge of crimen injuria at the police station and the matter

was investigated by the police and members of the National Prosecuting Authority. The fact of the proposed prosecution was reported in the national press. The witnesses to the incident in the judge's chambers were not in agreement as to what had transpired. There were material discrepancies in their statements. The National Director of Public Prosecutions recommended that the plaintiff be given the option of paying an admission-of-guilt, but this recommendation was not reflected in the summons that was served on the plaintiff. The charge against the plaintiff was subsequently withdrawn.
Held, that the second defendant (the Director of Public Prosecutions, KwaZulu-Natal) should have been satisfied that there was reasonable and probable cause for a prosecution and not just a prima facie case against the plaintiff. When regard was had to the evidence that was before the first and second defendants, before the decision to prosecute was taken, there must have been considerable doubt regarding the version and understanding of the complainant as to what had been said during the incident. The complainant would have been a single witness and the defendants would therefore also have had to be satisfied that her evidence would have passed the threshold of being satisfactory in all material respects.
Held, that the prosecution team ultimately correctly found that there was no reasonable prospect of a successful prosecution and in the present case the plaintiff had proved on a balance of probabilities that the first, second and fourth defendants had acted animo iniuriandi. (See [34].) The court awarded the plaintiff damages amounting to R900 000.

S v HEUWEL 2018 (2) SACR 436 (WCC)

Trial — Judgment — Reasons for — Sentence — Constituting explanatory analysis of decision without which any pronouncement not transparent — Justice by trier of fact had to be visible, ensuring all issues considered and carefully weighed — In casu nothing on record to show trial court applied properly informed mind in sentencing accused — Sentence set aside and accused sentenced afresh.
Theft — Sentence — Theft of biltong to value of R1100 from supermarket — Sentence of 18 months' direct imprisonment shockingly severe and replaced with sentence of 12 months' imprisonment under s 276(1)(i) of the Criminal Procedure Act 51 of 1977.

The accused, a 29-year-old man with three minor children, was convicted in a magistrates' court of having stolen seven packets of biltong to the value of R1100 from a supermarket. He was sentenced to 18 months' imprisonment and the matter was sent on automatic review. It appeared that the accused had six previous convictions and had previously been sentenced to imprisonment. The trial court provided no reasons for the sentence.
Held, that a judgment was an explanatory analysis of a decision of a judicial officer and, without that proper analysis, the pronouncement made was not transparent. In a judgment by a trier of fact, justice had to be visible, ensuring that all the issues had been considered and carefully weighed. In the present case there was nothing on record to show that the trial court had applied a properly informed mind to its duty in sentencing the accused.
Held, further, that a sentence of 18 months' direct imprisonment for theft of biltong to the value of R1100 was not only severe but shocking in its disproportion to the offence. It was also avoidable, having regard to the other alternatives which the trial

court had not considered. The sentence was set aside and replaced with a sentence of 12 months' imprisonment under s 276(1)*(i)* of the Criminal Procedure Act 51 of 1977.

CORRUPTION WATCH NPC AND OTHERS v PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS 2018 (2) SACR 442 (CC)

Prosecution — National Director of Public Prosecutions — Appointment, suspension and dismissal of — Lawfulness of agreement offering excessive financial incentive for resignation of *NDPP* — Agreement, vacation of office and subsequent payment all constitutionally invalid for having come about in manner inconsonant with constitutionally required independence of office of *NDPP*.
Prosecution — National Director of Public Prosecutions — Appointment, suspension and dismissal of — Provisions of s 12(4) of National Prosecuting Authority Act 32 of 1998 empowering President to extend term of office undermining independence of office and constitutionally invalid.
Prosecution — National Director of Public Prosecutions — Appointment, suspension and dismissal of — Provisions of s 12(6) of National Prosecuting Authority Act 32 of 1998, empowering President to suspend *NDPP* with or without pay for indefinite period, susceptible to abuse and constitutionally invalid.

The applicants sought confirmation of the following High Court orders of constitutional invalidity: the settlement agreement entered into between the former President, and Mr Nxasana, a former National Director of Public Prosecutions (the NDPP), terminating his position; the decision to authorise payment to him of R17 million in terms of the agreement; the subsequent appointment of Adv Abrahams; s 12(4) of the National Prosecuting Authority Act 32 of 1998 (the NPA Act) and s 12(6) to the extent that it permitted the suspension by the President of an NDPP and a Deputy NDPP for an indefinite period and without pay; and that Mr Nxasana was ordered to repay the sum of R10 million to the state forthwith.

In the matter before the present court the main issues were whether the settlement agreement and Mr Nxasana's vacation of the office of the NDPP were constitutionally valid and whether he should be required to repay the settlement amount; whether the appointment of Adv Abrahams as NDPP was constitutionally invalid; and whether ss 12(4) and (6) of the NPA Act were constitutionally invalid.
Held, per Madlanga J (Cachalia AJ, Dlodlo AJ, Froneman J, Goliath AJ, Khampepe J and Theron J concurring), that the facts pointed to one thing and one thing only, namely that the former President was bent on getting rid of Mr Nxasana by whatever means he could muster, in circumstances where he could have, with relative ease, pursued an inquiry against him, and the inference was inescapable that he was effectively buying Mr Nxasana out of office with an excessive financial settlement. The vacation of office and obligation to pay and subsequent payment in terms of the settlement agreement were all constitutionally invalid for having come about in a manner inconsonant with the constitutionally required independence of the office of NDPP. (See [25] – [29].)

Held, further, the appointment of Adv Abrahams as NDPP was an act consequential upon the constitutionally invalid vacation of office by Mr Nxasana and it followed that the appointment of Adv Abrahams was also constitutionally invalid. (See [35].)

Held, further, in respect of the constitutional validity of ss 12(4) and (6) of the NPA Act, that the challenge to their constitutional validity was not founded on any factual matrix and in the present proceedings nobody was affected by the provisions of s 12(4). Mr Nxasana had in fact been suspended with full pay and therefore the provisions of s 12(6) were not called into play, but despite that it was imperative in the present circumstances that the abstract challenge be entertained. What stood out was the nature of the unconstitutionality complained of and its susceptibility to occurring without detection, and, in these circumstances, it was better to pre-emptively challenge the relevant statutory provisions rather than give the factual matrix an opportunity to occur. (See [39] – [40].)

Held, further, that the President's power in terms of s 12(4) to extend an NDPP's term of office undermined the independence of the office and the High Court's declaration of constitutional invalidity had to be confirmed. (See [42] – [44].)
Held, further, that the tool afforded the President by s 12(6) to suspend the NDPP with or without pay for an indefinite period was susceptible to abuse and could be invoked to cow and render compliant an NDPP or Deputy NDPP. It was not a tool that should be availed to the executive and had the potential to undermine the independence and integrity of the offices of NDPP and deputy NDPP and, indeed, of the National Prosecuting Authority itself. The section was constitutionally invalid. (See [45] and [48].)

Held, further, as to the relief to be afforded, although the court had a lot of sympathy for the undue and persistent pressure to which he was subjected, his subsequent willingness to be bought out of office if the price was right was not the reaction expected of the holder of so high and important an office. Even allowing for human frailties, the holder of the office of NDPP could have been expected to do better and his conduct led to the conclusion that a just and equitable remedy was not to allow him to return to office. (See [85].)

Held, further, as to the position of Adv Abrahams, although no one had suggested that he was not a fit and proper person to hold office, the removal of Mr Nxasana was an abuse of power and Adv Abrahams had benefited from the abuse of power. It did not matter that he may have been unaware of the abuse of power, the rule of law dictated that the office of NDPP be cleansed of all the ills that had plagued it for the past few years and it would therefore not be just and equitable to retain him, as this would not vindicate the rule of law. (See [88].)

Held, per Jafta J (Petse AJ concurring), that, since the dismissal of Mr Nxasana constituted a nullity there was nothing further that might be done in the law to vindicate his rights arising from the dismissal, and this meant that he could report for duty and resume his work.

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Ludidi v Ludidi and others [2018] 4 All SA 1 (SCA)

Local government – Traditional leadership – Customary law – Recognition of a traditional leader – In terms of the Traditional Leadership and Governance Framework Act 41 of 2003 read with the Traditional Leadership and Governance Act 4 of 2005 (Eastern Cape), the right to identify traditional leader vests solely in the royal family.

In a battle for succession as Inkosi ("Chief") of the amaHlubi tribe in Qumbu in the Eastern Cape, the appellant and the first respondent were cousins vying for the position. Their fathers and their grandfather (Chief Dyubhele) were, during their lifetimes, chief of the tribe. The seventh respondent, the Member of the Executive Council for Co-operation, Governance and Traditional Affairs, Province of the Eastern Cape (the "MEC") recognised the first respondent as chief pursuant to her identification as such by the fourth respondent, the Hlubi Royal Family. The dismissal of the appellant's application for review of that decision led to the present appeal.

According to the custom and practice of the amaHlubi, the eldest child from the senior house of the royal family ie born of the great or senior wife, inherits a vacant chieftainship of the tribe. In the event that the chief and the great wife die childless, a child born of the chief's "right hand" wife ie a lower ranking wife where the chief had more than one wife, assumes the chieftainship. Otherwise the chief's surviving brothers, in order of seniority, assisted by the royal family and the tribe, reconstitute the great house by marrying a royal wife and assuming the chieftainship.

At the time of the death of the last chief in 2012, the recognition of traditional leaders countrywide was now regulated by the Traditional Leadership and Governance Framework Act 41 of 2003 (the "National Act"), read with the Traditional Leadership and Governance Act, 2005 (Eastern Cape) (Act 4 of 2005) (the "Provincial Act").

Acting in terms of the Provincial Act, the Hlubi Royal Family identified the first respondent for recognition as the Chief of the amaHlubi by the Premier. The fifth respondent, the Mancaphayi Royal Family, identified the appellant for the same position. Unable to resolve the impasse, the MEC referred the matter back to the Hlubi Royal family for its decision. The MEC was then informed that the first respondent had been identified as the next Chief of the amaHlubi. The MEC recognised the first respondent as chief and issued a recognition certificate to that effect. However, he did not inform the House of the recognition before it was published as required by section 18(2) of the Provincial Act.

Held – The issues on appeal were whether the appellant's expectation that he had an automatic right to the chieftainship of the amaHlubi upon his father's death based on the validity of the latter's appointment under the Transkei Constitution Act as the permanent Chief of the amaHlubi – was legitimate; whether the MEC arbitrarily recognised the first respondent as the Chief of the amaHlubi in disregard of evidence that she was identified by only one faction of the fractured royal family and the opposing faction's recommendation; whether the MEC was obliged to afford the appellant a hearing before recognising the first respondent; and whether the MEC's failure to inform the House of the first respondent's recognition before its publication in the *Gazette* nullified the recognition.

The court *a quo* correctly decided the various material disputes of fact on the respondents' version, and found that the Mancaphayi Royal Family was a recent splinter of the Hlubi Royal Family, formed by the latter's erstwhile members who were not direct descendants of Chief Dyubhele and were opposed to having a female chief.

The foremost question which arose in the dispute concerned who had the right to choose a Chief of the amaHlubi. Based on the relevant provisions of the National and Provincial Acts, and the respondent's version, the Court found that the Hlubi Royal Family was a royal family as envisaged in the statutory definition. It was made up of Chief Dyubhele's direct descendants, and remained the custodian of the customs of the amaHlubi and their royal family's lineage and was the sole repository of the right to identify the Chief of the amaHlubi. Significantly, when it exercised that right, it did not consider only that the candidate was the eldest child in the great house, but considered the potential candidate against the relevant customary law. It also considered whether there was any impediment to the candidate's succession as chief. The identification was not a predetermined conclusion as the appellant described. Against that backdrop, the appellant's father had had no right to identify his successor, and the appellant's expectation had no valid basis as it did not meet the requirements. To qualify as a legitimate expectation, the underlying representation, which must have been induced by the decision-maker, must be clear, unambiguous, reasonable, competent and lawful for the decision-maker to maker. There was no evidence that the decision-maker in this case, ie the Hlubi Royal Family, ever made any representation to the appellant that he would become the Chief of the amaHlubi when his father died.

The consequences of the dissension within the royal family regarding who should be identified as the tribe's chief still had to be determined. On receiving the conflicting recommendations, the MEC complied with the precepts of section 18(4) of the Provincial Act by remitting the matter to the royal family for reconsideration. There was no need for the MEC to grant the appellant any hearing as he had been adequately heard by the royal family. In any event, his views on the chieftainship were placed before and considered by the MEC. In the circumstances the identification of the first respondent was lawfully made by the royal family as envisaged in sections 1 and 18 of the Provincial Act.

The issue of whether the MEC's failure to inform the House about the recognition before the relevant notice was published in the *Gazette*, in breach of section 18(2) of the Provincial Act, nullified the recognition process. That point was correctly not fully pursued on appeal. From the plain wording of section 18(2), it was clear that the House played no role in the identification and recognition of a chief. All that was envisaged by the provisions was that it would be informed of the result of the process before such result was announced to the public.

In the premises, the appeal was dismissed.

Scholtz and others v S [2018] 4 All SA 14 (SCA)

Criminal law and procedure – Corruption – Prevention and Combating of Corrupt Activities Act 12 of 2004 – Anybody who accepts any gratification from anybody else, or gives any gratification to anybody else in order to influence the receiver to conduct herself in a way which amounts to the unlawful exercise of any duties, commits corruption – Offence is committed even if the gratification is paid after the event.

Charges were brought against the appellants relating to a number of lease agreements concluded by various State entities in the Northern Cape, with members of what was known as the Trifecta Group of Companies (the "second to seventh accused") during the period May 2006 to August 2008. The court *a quo* convicted the first accused ("Mr Scholtz") and the second to seventh accused, companies in which he had an interest, on a charge of corruption. The first and third accused were also each convicted on a further charge of corruption, as well as two counts of money laundering. The second accused was convicted on one count of money laundering. Mr Block, the ninth accused, and his company Chisane Investment (Pty) Ltd, the tenth accused, were both convicted of corruption, as well as of money laundering. Substantial fines were imposed on the second to seventh accused, whilst the first and ninth accused was each sentenced to an effective 15 years' imprisonment.

Although separate appeal files were inexplicably opened, the Court provided a single judgment on appeal.

The Court set out the background as follows. Mr Scholtz administered a private equity fund which advanced funds for investment in commercial ventures and, as a *quid pro quo*, obtained shares in the companies used to conduct such ventures. He thus became a shareholder in the Trifecta Group of companies, of which Mr Sarel Breda, another businessman, was a Director and shareholder. In late 2004, or early 2005, Mr Scholtz learned that the Northern Cape lacked the necessary infrastructure and housing to accommodate provincial government departments. Leasing suitable accommodation to the State thus appeared to be a potentially lucrative source of income, particularly for an entrepreneur having Black Economic Empowerment ("BEE") credentials. He envisaged a business model of acquiring largely rundown buildings, renovating and refurbishing them, and then leasing them to provincial government departments. Mr Breda was a historically disadvantaged individual, who had BEE credentials and was regularly in the Northern Cape. It was decided that Mr Breda would identify people or entities as potential BEE participants in the venture.

Held – Section 217(1) of the Constitution prescribes that when an organ of State in the national, provincial or local sphere of government contracts for goods or services it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. Supply chain management procedures are regulated by Regulations (the "Treasury Regulations") promulgated under section 76(4)(c) of the Public Finance Management Act 1 of 1999. The Treasury Regulations and the Northern Cape government's provincial Supply Chain Management ("SCM") policy contain various provisions relevant to the present matter. Regulation 16A8.3(a) provides that a SCM official or other role player must recognise and disclose any conflict of interest that may arise while regulation 16A8.3(c) stipulates that such a person may not use their position for private gain or to improperly benefit another person. Regulation 16A8.3(d) requires officials to ensure that they do not compromise the credibility or integrity of the supply chain management system through the acceptance of gifts or hospitality or any other act.

The Court considered the circumstances under which the various leases which formed the heart of the charges against the appellants came to be concluded. It appeared that the general strategy of Mr Breda in securing the leases involved his identifying a property which might be suitable to be converted into office accommodation. He would then introduce such property to the provincial government, mostly before the formality of an advertisement calling for bids for accommodation

having been published. He would then negotiate the terms of the lease for such property. In the event of such negotiations being successful and a lease either having been concluded or likely to be agreed, he would then acquire the property using one of the Trifecta group of companies. The conclusion of the leases was riddled with irregularities, some of which were highlighted in detail in the Court's judgment.

At common law, it is a crime for a person to offer or give to an official of the State, or for any such official to receive from any person, an unauthorised consideration in respect of such official doing, or abstaining from, or having done or abstain from, any act and exercise of his official capacity. The statutory crime of corruption is currently set out in the Prevention and Combating of Corrupt Activities Act 12 of 2004. In terms of the Act, anybody who accepts any gratification from anybody else, or gives any gratification to anybody else in order to influence the receiver to conduct herself in a way which amounts to the unlawful exercise of any duties, commits corruption. Both the giver of the gratification and its receiver, commit the crime. The trial court took the view that the giving or acceptance of a gratification as compensation for something which the receiver has already done in the past should be read as forming part of the modern day offence of corruption as set out in sections 3 and 4 of the Act. That was held to be incorrect on appeal. The present Court held that the sections in their normal connotation envisage that a person who undertakes to act in a way which constitutes corruption commits the offence, even if the promised gratification is only forthcoming after the event.

The appeal in respect of sentence was limited to the charges of corruption on which Mr Scholtz and the eighth appellant ("Mr Block") were convicted. Each count involved an amount far in excess of R500 000. Consequently, Part II of the Second Schedule to the Criminal Law Amendment Act 105 of 1997 applied, in terms of which a minimum sentence of 15 years' imprisonment was prescribed unless there were substantial and compelling reasons justifying a lesser sentence. While the courts have a residual discretion to decline to pass the prescribed minimum sentence, they should only do so where there are circumstances present which provide truly convincing reasons for a lesser sentence. The court *a quo* determined that there were no such circumstances in the case of either Mr Scholtz or Mr Block and, accordingly, imposed the prescribed minimum of 15 years' imprisonment. It was against those sentences that they appealed, contending that the court *a quo* erred in its conclusion. In considering the appeal, the present Court emphasised the seriousness of the offences, and found no mitigating circumstances weighty enough to depart from the prescribed minimum sentences. The two appeals against sentence were thus dismissed.

Viewing the convictions of the appellants against the principles set out above, the Court ordered that the appeals had to be upheld in respect of some of the counts of which the appellants had been found guilty. Those were set out in the Court's final order.

Basson v Hollard Life Assurance Company Limited [2018] 4 All SA 77 (GJ)

Insurance – Life insurance policy – Repudiation of claim – Misrepresentations and non-disclosure in application for insurance – Section 59 of the Long-Term Insurance Act 52 of 1998 – An insurer has the right to avoid a contract of insurance not only if the insured has misrepresented a material fact but also if he has failed to disclose one – Onus of proving materiality is on the party alleging the misrepresentation or non-disclosure.

As the beneficiary under a life insurance policy taken by her husband before his death, the plaintiff sued the defendant (as insurer) for payment of the proceeds of the policy. The defendant had rejected the claim on the grounds of the deceased's alleged misrepresentation and non-disclosure of certain facts to the defendant at the time when application was made for the policy. It was alleged that the deceased had misrepresented the truth regarding a lung mass/dot which showed on an X-ray. The deceased was also alleged to have failed to disclose that he had a heart or circulation ailment; suffered from a breathing or lung ailment; suffered from depression; and that a proposal for life insurance on his life was previously declined.

The plaintiff admitted that the insured failed to disclose certain facts but stated that the manner in which the relevant questions were phrased in the policy application form was confusing and the insured acted in the honest belief that he was answering correctly. According to the plaintiff, once it was shown that the insured acted *bona fide* and with an honest belief, it could not be regarded as misrepresentation. The plaintiff also pointed to the fact that the defendant had paid out a funeral benefit, as indicating that the insurer considered itself liable. On the ground that both the funeral policy and the life policy were regulated by the same agreement, the plaintiff argued that any material misrepresentations would result in forfeiture of *all* benefits in terms of the agreement.

Held – Section 59 of the Long-Term Insurance Act 52 of 1998 deals with misrepresentation and failure to disclose material information. An insurer has the right to avoid a contract of insurance not only if the proposer has misrepresented a material fact but also if he has failed to disclose one. The burden of proving materiality is on the party alleging the misrepresentation or non-disclosure. There is a duty *ex lege* to disclose in insurance contracts. Closely coupled with the duty to disclose is the duty of good faith. For a non-disclosure or a misrepresentation to be legally relevant it must be material. The representation or non-disclosure shall be regarded as material if a reasonable, prudent person would consider that the information constituting the representation, or which was not disclosed, as the case may be, should have been correctly disclosed to the insurer so that the insurer could form its own view as to the effect of such information on the assessment of the relevant risk.

The Court found the defendant's application and proposal form to be clearly worded and unambiguous. The failure to answer the relevant questions truthfully fell short of what was required to overcome the breach of the warranty pleaded by the defendant.

On the plaintiff's own version, there had been two previous refusals to insure. Nevertheless, the plaintiff attempted to rely on the absence of documentary proof thereof. That was misplaced because the relevant information fell within the knowledge of the insured and the plaintiff prior to the conclusion of the life insurance policy. The evidence of the previous two applications being declined was hearsay evidence but as it was the hearsay evidence of the plaintiff's own witness, the plaintiff was free to call such witness and elected not to do so.

The Court also rejected the plaintiff's submissions regarding the payment of the funeral cover costs as it was only after payment of such proceeds that the defendant established that there were material non-disclosures and misrepresentations.

It being clear that the defendant was entitled and justified in avoiding the policy, the Court dismissed the plaintiff's claim.

Bo-Kaap Civic and Ratepayers Association and others v City of Cape Town and others [2018] 4 All SA 93 (WCC)

Constitutional and Administrative Law – Judicial review – Distinction between appeal and review – Court's role on review – When the law entrusts a functionary with a discretion it gives recognition to the evaluation made by the functionary to whom the discretion is entrusted – Role of a court is no more than to ensure that the decision-maker has performed the function with which he was entrusted.

Local government – Granting of approval for development of property – Heritage impact of the development – Decision-makers, in granting approval for development, found to have properly considered heritage impact.

Local government – Granting of approval for development of property – Heritage impact of the development – Section 27(18) of the National Heritage Resources Act 25 of 1999 – No person may destroy, damage, deface, excavate, alter, remove from its original position, subdivide or change the planning status of any heritage site without a permit issued by the heritage resources authority responsible for the protection of the site – Court finding that a development on a site, other than a heritage site, does not trigger section 27(18).

In terms of the National Heritage Resources Act 25 of 1999 (the "Heritage Act"), the district of Bo-Kaap in Cape Town is a provincially declared heritage site.

The fourth respondent (the "Developer") owned two properties which, although not part of the traditional Bo-Kaap area, were located on the border of that area. It applied for approval of a proposed redevelopment of its properties, into a multi-storey, 60m mixed use building. Such approval was granted by the second respondent (the "MPT") and thereafter confirmed on appeal by the third respondent (the "Mayor"). The first to third applicants sought the review and setting aside of the planning approvals that were granted in terms of the City of Cape Town Municipal Planning By-Law 2015 (the "MPBL"). The fourth applicant ("HWC") intervened and joined the other three applicants in seeking the review of the approvals granted. The HWC also sought a declaratory order that the development could not take place without a necessary permit granted in terms of section 27(18) of the Heritage Act. The first applicant was an association of persons residing in Bo-Kaap, the second applicant was the body corporate of a building directly adjacent to the proposed development, and the third applicant also owned property in the Bo-Kaap which property stood to be affected by the proposed development.

The bulk of the criticisms against the proposed development were that the development proposal did not comply with the City's policies; property values would be negatively affected; balconies and windows would overlook properties; the visual and historic connection between the Bo-Kaap and the City of Cape Town would be blocked; the development was too high with too many dwelling units; the area's historic significance would be undermined; social cohesion would be undermined; and traffic congestion in the surrounding streets would be increased.

Held – The distinction between an appeal and a review had to be highlighted. In an appeal the parties are absolutely bound by the record, whereas in a review it is competent for the parties to travel outside the record, and to bring extrinsic evidence to prove the irregularity or illegality. In that regard, the Court acknowledged the fact that experts' reports may be filed in review matters. In the present case there were competing views by the relevant experts regarding the heritage impact and that of a

traffic impact assessment ("TIA") relied on by the developer. The Court held that the reports could be useful and could not simply be ignored in deciding whether the decision-makers took the relevant factors into account as envisaged under the MPBL. However, when the law entrusts a functionary with a discretion it gives recognition to the evaluation made by the functionary to whom the discretion is entrusted, and it is not open to a court to second-guess such evaluation. The role of a court is no more than to ensure that the decision-maker has performed the function with which he was entrusted.

The review grounds raised by the first and third applicants were that the MPT and Mayor failed to have regard to the heritage impact of the development, and in granting the subject approvals, acted irrationally and/or unreasonably. It was contended that the City failed to properly consider all the relevant factors pertaining to the heritage impact of the development. Other grounds of review were that the City should have required the Developer to submit a Visual Impact Assessment ("VIA"); that the City failed to have proper regard to the impact of traffic; and that the Developer's proposal did not comply with various planning policies.

Setting out the applicable legal framework, the court stated that section 99 of the MPBL applied to all the approvals sought by the Developer. In terms of section 99(1), an application must be refused if the decision-maker is satisfied that the application fails to comply with the listed minimum threshold requirements. Under section 99(2), if an application is not refused under sub-section (1), when deciding whether or not to approve the application, the decision-maker must consider all relevant considerations including, where relevant, the considerations listed under sub-section (2). The Court was not persuaded that the decision-maker's approach to section 99 of the MBPL was flawed or improperly applied.

It then turned to consider the heritage impact and the rationality and reasonableness of the decision. In considering the Developer's application, the City was obliged to consider the effect that the development might have on the significance of the heritage place or the heritage area concerned. In that regard, the City was confronted with two contradictory reports. The applicants' submission that the City had no regard or failed to have appropriate regard to heritage impact when it considered the Developer's planning applications was not borne out by the facts. It was evident that heritage enjoyed a distinct degree of attention throughout the various stages of the application. Having regard to the reasons provided for the approval, the City's decision could not be regarded as irrational and or unreasonable. The applicants raised a number of other aspects in respect of which the City was alleged to have acted unreasonably, but the court found none of those to be sustainable. It held that the MPT's and Mayor's decisions were rationally connected to the purpose for which they were taken; the purpose of the empowering provision; the information before them; and the reasons given for them. No good ground existed for interfering with their decisions. It was also found that the relevant policies applicable to the matter were clearly and properly considered by the decision-makers.

Section 27(18) of the Heritage Act provides that, "No person may destroy, damage, deface excavate, alter, remove from its original position, subdivide or change the planning status of any heritage site without a permit issued by the heritage resources authority responsible for the protection of the site." HWC argued that the proposed development triggered section 27(18), which meant that the development could not take place without the necessary permit being issued. The nub of the dispute on that

issue related to whether section 27(18) should be interpreted as, HWC contended, that a permit is required for a proposed development on a site, other than a heritage site, where such proposed development may or will cause damage or alter, a heritage site and whether the City failed to give effect to section 24(b) of the Constitution. Two questions flowed therefrom. The first was a legal one, *viz* whether a development on a site, other than a heritage site, can trigger section 27(18). If so, the second was a factual question viz whether heritage sites (such as Bo-Kaap) in close proximity, would as a matter of fact be damaged or altered by the proposed development. The court rejected HWC's interpretation of section 27(18), opting instead for an interpretation to the effect that the Heritage Act does not require a permit for the development of a place that is not itself a heritage site.

The Court, accordingly, dismissed the applications.

Democratic Alliance v Minister of International Relations and Co-operation and others (Trustees for the time being of the Women's Legal Centre Trust and others as *amici curiae*); Engels and another v Minister of International Relations and Co-operation and another [2018] 4 All SA 131 (GP)

Constitutional and Administrative law – Diplomatic immunity – Whether spouse of head of foreign State enjoyed immunity for alleged unlawful act perpetrated while in the country – Neither section 7(2) of the Diplomatic Immunities and Privileges Act 37 of 2001 nor customary international law providing basis for conferring of immunity on spouse of head of State for injury caused to person in South Africa.

On a visit to South Africa in August 2017, the then First Lady of Zimbabwe ("Dr Mugabe") was alleged to have assaulted three young South African women. One of those women ("Ms Engels"), who was said to have suffered severe facial and mental injuries as a result of the alleged assault, laid a criminal charge of assault with intent to cause grievous bodily harm against Dr Mugabe. The South African Police Services ("SAPS") made attempts to contact Dr Mugabe but were unsuccessful, and two days after the incident, Dr Mugabe left South Africa. On the same day, the Embassy of Zimbabwe informed the Department of International Relations and Co-operation (the "Department") that Dr Mugabe had travelled to South Africa on a diplomatic Zimbabwean passport and that it wished to invoke diplomatic immunity for her in the case brought against her by Ms Engels. The notice to the Department by the Embassy was subsequently withdrawn and replaced with another in which it was specified that Dr Mugabe was visiting South Africa on official duties.

After due consideration, the Department informed the Embassy of Zimbabwe that it had decided to confer diplomatic immunity against criminal prosecution on Dr Mugabe. The Minister (as the head of the Department) published the decision in the *Government Gazette*, indicating that she had relied on her powers derived from section 7(2) of the Diplomatic Immunities and Privileges Act of 2001, and that the immunities and privileges conferred upon Dr Mugabe were in terms of international law. The Democratic Alliance then lodged an application wherein it impugned the decision on the grounds that it was unconstitutional and unlawful. The application was for a declarator to that effect, for the decision to be reviewed and set aside and for a costs order against the Minister.

In defending her decision, the Minister contended that Dr Mugabe automatically qualified for immunity from prosecution by virtue of her status as a spouse of a head of State, and that it was in the national interests of South Africa that such immunity be conferred upon her in terms of section 7(2) of the Diplomatic Immunities and Privileges Act.

Held – The question of whether Dr Mugabe enjoyed immunity for the alleged unlawful act perpetrated against Ms Engels by virtue of being a spouse of a head of State focused on whether customary international law provides for automatic immunity for a spouse of a head of State. The question of whether it was in the national interests of South Africa that such immunity be conferred upon her in terms of section 7(2) of the Act focused on whether the conferment of immunity on Dr Mugabe by the Minister complied with our constitutional prescripts and principles. If she automatically enjoyed the immunity, then there was no need to confer it upon her. Accordingly, the submission by the Department that the Minister did no more than "recognise" the immunity Dr Mugabe already enjoyed was not in keeping with the objective facts, inconsistent with the reasoning upon which the decision was grounded, and contrary to the stance adopted by the Minister in response to the applications.

The law concerning relations between nations is made up of treaties and customs. A custom or customary norm is a recognised well-established practice that nation-states adhere to in their dealings with each other. The basic premise of customary law is that rules and practices which can be derived from custom should be and are accepted as legal obligations by States. However, for the rule or practice to achieve the status of a legal obligation it has to be firstly, a settled practice (*usus*) that is widespread and extensive and be recognised by a majority of States and, secondly, the action must occur out of a sense of legal obligation, ie it has to be carried out as a binding *opinio juris.*

In terms of the customary international law, officials of a State enjoy immunity from civil and criminal jurisdiction. The immunity takes two forms: immunity based on the functions they perform (functional immunity or immunity *rationae materiae*); and, immunity granted to certain officials because of the office they hold (personal immunity or immunity *rationae personae*). The question for the court's determination was whether the immunity *rationae personae* extends to the spouse of the head of State. After a consideration of the relevant jurisprudence, the Court found that there was no customary norm to the effect that the spouse of a head of State enjoys immunity from prosecution for the offence that Dr Mugabe was alleged to have committed.

The Court then turned to examine the national legislation specifically addressing the issue of head of State immunity, insofar as it had a bearing on the issue of spousal immunity. The national legislation in question was the Foreign States Immunities Act. In terms of the Act, "a foreign state shall be immune from the jurisdiction the courts of the Republic except as provided in this Act or in any proclamation issued thereunder". One of the exceptions is that a foreign State shall not be immune from the jurisdiction of the courts of the Republic in proceedings relating to the death or injury of any person. In terms of the exception, former President Mugabe would not have enjoyed the immunity *rationae personae* had he been the one accused of perpetrating the alleged assault on Ms Engels, for such immunity was specifically withdrawn by the section. The Minister's view that Dr Mugabe enjoyed "derivative immunity" was thus incorrect.

It was clear therefore, that the Minister had committed an error of law. The decision to recognise or confer immunity in respect of Dr Mugabe was reviewed and set aside.

Dias v Petropulos and another (Nik Moroff & Associates CC and others as Third Parties) [2018] 4 All SA 153 (WCC)

Civil procedure – Evidence – Expert or opinion evidence – Expert evidence is admissible when it can appreciably assist the court, and the opinions of expert witnesses are admissible only where, by reason of their special knowledge and skill they are better qualified to draw inferences than the judicial officer.

Personal Injury/Delict – Damage to immovable property – Claim for damages – Excavation of property causing damage to neighbouring property – Duty of lateral support – Whether the right to lateral support is owed only to land in its natural state – Court finding that the duty of lateral support in relation to contiguous pieces of land is owed to buildings as well - save where such land has been unreasonably loaded so as to place a disproportionate or unreasonable burden on the neighbouring land.

In an action for payment of damages, the plaintiff alleged that the excavation of the first and second defendants' properties resulted to damage to his own property. The plaintiff's case was that the damage to his property was caused by the mobilisation in June 2008 of the scree mountain slope on which it was located. That slope mobilisation, the plaintiff's case proceeded, was caused through breaches by the defendants of the duty of lateral support they owed to his property.

The first defendant disputed that she owed the plaintiff a duty of lateral support for a number of reasons, including that plaintiff's property had previously been excavated and was no longer in its natural state and that the plaintiff had consented to the first defendant's excavation and thereby waived any right of lateral support it might otherwise have had.

Held – The issues for determination were whether a common law duty to provide lateral support to the plaintiff's property was owed by the first and second defendant's properties; whether the excavations carried out on each of the defendant's property breached that duty of lateral support; and whether the slope mobilisation relied on by the plaintiff had occurred or not.

In considering the law regarding the duty of lateral support, the Court identified the differences between the parties as concerning the question of whether the right to lateral support is owed only to land in its natural state and, secondly, if that was the case, what is meant by "natural state". Examining the two leading cases on the subject, the Court held that the principle of lateral support is a rule of neighbour law, introduced because it was regarded as just and equitable, and that it is not simply a carbon copy of the English law of lateral support. The cases referred to did not shed any light on one of the central issues in the present matter which was whether the duty of lateral support between contiguous pieces of land extends to buildings on that land or only the land in its natural state and, if the latter, the scope of any exceptions to that rule. The Court found no authoritative or binding decision in our law that limits a land owner's right of lateral support to the land in its natural state only, as is the case in English law. There are, furthermore, cases where it was held that the right extended to support to buildings on the land. Furthermore, our law in regard to the right of lateral support is squarely located within the law of neighbours in which one of the guiding principles is that of reasonableness. The Court decided that the duty of lateral support in relation to contiguous pieces of land is owed to buildings as well – save where such

land has been unreasonably loaded so as to place a disproportionate or unreasonable burden on the neighbouring land. In the circumstances of the present case, the first and second defendants were the owners of land contiguous to the plaintiff's property. In the light of the Court's finding that a duty of support was owed in those circumstance both to land and buildings, both defendants were under a common law duty to provide lateral support to the plaintiff's property.

The Court then turned to consider whether the plaintiff unreasonably loaded his property through the construction of a residential dwelling thereon. There being no basis on which to make such a finding, it could not be found that the plaintiff forfeited his right to lateral support from his neighbours by unreasonably loading his land.

Remaining issues for the Court's determination included whether the excavations breached the duty of lateral support and, if so, whether that lead to the slope mobilisation. The overall conclusion as to whether there was failure of lateral support was one which the Court had to determine, based on the evidence in front of it, including, to the limited extent relevant, the expert evidence. Expert evidence is admissible when it can appreciably assist the court, and the opinions of expert witnesses are admissible only where, by reason of their special knowledge and skill they are better qualified to draw inferences than the judicial officer. An expert witness should not usurp the function of the court.

The evidence established that the plaintiff's property clearly moved laterally and downwards towards the excavation on the first defendant's property. The Court adopted the view that there is no closed list of mechanisms through which a removal of lateral support will manifest *vis-à-vis* a neighbouring property. It also found that the plaintiff had established the requirement of causation.

It was concluded that the defendants owed the plaintiff a duty to provide lateral support to the plaintiff's property, and that such duty had been breached as a result of the excavations on the defendants' properties.

FNM v Refugee Appeal Board and others [2018] 4 All SA 228 (GP)

Immigration – Asylum seeker – Application for refugee status – Review of refusal of application – Decision of Refugee Appeal Board not rationally connected to the reasons given for it, as contemplated in section 6(2)(f)(ii)(dd) of the Promotion of Administrative Justice Act 3 of 2000, and was so unreasonable that no reasonable person could have so exercised the power, as contemplated in section 6(2)(h) – Substitution by court of decision by Refugee Appeal Board.

After fleeing the Democratic Republic of Congo ("DRC"), the applicant arrived in South Africa, where he applied for asylum at a Refugee Reception Office ("RRO"). His English was poor, and he required help with completion of the application form. He was not certain that the form had been properly completed by the person who assisted him. His interview by the Refugee Status Determination Officer ("RSDO") was conducted with the assistance of an interpreter. The interview lasted for about 2 to 3 minutes and essentially involved a conversation between the person interpreting for him and the RSDO. None of the exchange was translated to the applicant. The RSDO subsequently rejected his asylum claim, based on a report of a change in the situation in the part of the DRC from which the applicant had fled. The applicant had someone assist him to complete the notice of appeal form, but could not establish whether that was done properly. His attempts to submit his notice of appeal to the RRO were

frustrated, as security officials would not allow him to enter the offices. He only managed to lodge the appeal weeks later – and after the 30-day period allowed for the noting of appeals. He was required to submit an application for condonation, but the application was rejected by the Refugee Appeal Board ("RAB").

In the present application, the applicant sought to review the decision of the RAB.

In his founding affidavit, the applicant detailed how, while participating in an anti-government protest as a university student, he and others were arrested by soldiers from the Armed Forces of the DRC (the "FARDC"). They were beaten by the soldiers, handcuffed and then forcefully conscripted and trained in order to be integrated into the FARDC. An attack on the FARDC by a rebel group allowed him to desert the FARDC, but he was then captured by the rebels. After five or six days with the rebels, he escaped and spent about six weeks in the forests of the eastern DRC, surviving by walking from village to village and begging for food before travelling for approximately two months on foot until he reached the DRC border. A truck driver helped him to cross the border into Zambia and travel through Zimbabwe to South Africa. The founding affidavit was accompanied by numerous annexures from a number of publications about the atrocities being committed in the DRC, corroborating the applicant's assertion that he feared for his life in the event of his being forced to return to the DRC.

The respondents' answering affidavit was deposed to by the chairperson of the RAB who disputed the extent of the difficulties experienced by the applicant in applying for asylum, or that condonation of the late submission of the appeal had been refused. He sought to limit the basis on which the applicant had made his application under the Refugees Act 130 of 1998, and denied that there was any flaw in the decision-making of either the RSDO or the RAB.

Held – The RAB first purported to condone the late filing of the appeal but, in the concluding paragraph decided to dismiss the application for condonation. It was not logically possible in one and the same decision to both grant and dismiss an application for condonation. That flaw in the decision meant that the administrative action taken by the RAB was not rationally connected to the reasons given for it, as contemplated in section 6(2)(f)(ii)(dd) of the Promotion of Administrative Justice Act 3 of 2000, and was so unreasonable that no reasonable person could have so exercised the power, as contemplated in section 6(2)(h).

In its decision, the RAB placed the burden of proof on the applicant to prove his case on the basis of the principle that he who alleges must prove. That approach has been rejected by the courts. While the applicant did bear the onus of proving that he was at risk in the DRC, section 26(3) of the Refugees Act bears out, and facilitates the adoption of, an inquisitorial and facilitative approach by the RAB to the burden of proof. That was not complied with in this case. The substantive content of the decision also suggested that the incorrect approach was adopted. Although the RAB gathered country of origin information, it did not do so in the facilitative manner required, and focused on showing that the prevailing conditions in the eastern DRC favoured return. That ignored the fact that the applicant had shown through the documents attached to his founding affidavit that there were other credible reports by recognised institutions, readily available, that suggested ongoing instability in the eastern DRC. In applying the burden of proof incorrectly and in failing to carry out the facilitative, inquisitorial exercise required, the RAB acted in a procedurally unfair manner in breach of section 6(2)(c) of the Promotion of Administrative Justice Act and the action taken by the RAB

was materially influenced by an error of law as contemplated in section 6(2)(d). To the extent that the RAB failed to use or consider using its powers in terms of section 26(3), it was also guilty of administrative action that was not rationally connected to the purpose of the empowering provision, as contemplated in section 6(2)(f)(ii)(bb). The decision was thus reviewable.

Further irregularities highlighted included the RAB's failure to inform the applicant of its intention to rely on the country of origin information that it had gathered, and to request the applicant in terms of section 26(3)(e) to appear before it and provide a response to that information. The RAB also wrongly only considered the possibility of refugee status being granted under section 3(b), when section 3(a) should have been considered as well.

As a result of the various flaws, the decision of the RAB was reviewed and set aside.

In deciding on a just and equitable remedy, the Court noted that the applicant sought substitution by the court of its decision for that of the RAB. The Court held that it was in as good a position as the RAB to make the decision and confirmed that the applicant qualified for refugee status in terms of sec-tions 3(a) and (b) of the Refugees Act. Having regard to the incompetence displayed by the RAB in its decision-making in this case, its apparent unwillingness to apply the correct burden of proof and indications of bias in its assessment of the country of origin information, it was considered unjust and inequitable to expect the applicant to place his fate once more in the hands of the RAB. Exceptional circumstances were present, rendering it is just and equitable that an order of substitution be granted. The fourth and fifth respondents were ordered to issue the applicant with formal written recognition of refugee status.

Krivokapic v Transnet Ltd t/a Portnet [2018] 4 All SA 251 (KZD)

Civil procedure – Oral evidence – Adducing of evidence by way of video link conference – Main consideration is whether if evidence is placed before the court in such manner; justice is likely to be done – Court's power to regulate its own processes in the interests of justice allowing it to allow evidence by way of video link conference where jurisdictional facts shown to be established.

Words and phrases – "admiralty action" – Definition – Section 1 of the Admiralty Jurisdiction Regulation Act 105 of 1983 – "proceedings. . . for the enforcement of a maritime claim whether such proceedings are by way of action or by way of any other competent procedure, and includes any ancillary or procedural measure, whether by way of application or otherwise, in connection with any such proceedings".

The applicant was a resident of Yugoslavia. In May 2001, her son was killed whilst being transported by an employee of the respondent when the vehicle in which he was being transported collided with a gantry crane and proceeded over the edge of a wharf into the bay on the respondent's property. The applicant instituted an action for damages against the respondent, alleging that the deceased owed her a duty of support.

The respondent conceded liability and the action was settled to the extent of seventy percent of the applicant's proven or agreed damages. The only outstanding issue was the determination of the quantum of damages in respect of the loss suffered by the applicant. That led to the present application in which permission was sought for the applicant to testify from premises in Montenegro in Yugoslavia, by way of a video

conference link, and giving the respondent an opportunity to appoint legal representatives to monitor and be present during the process. It was envisaged that the applicant's attorneys would arrange for the video conference link to be set up at the offices of a South African firm of attorneys or any other place agreed to by the court, in order for the presiding officer and the legal representatives of the respondent to be present during the process. The basis for the application was that due to old age, ill-health and impecunious state of the applicant, she was unable to attend a court in South Africa.

The deceased was employed aboard a ship which had docked in the respondent's port at the time of the accident. The applicant's Counsel contended that this was an admiralty matter and that a proper case had been made out for the relief sought. Regarding whether the court could receive hearsay evidence in the application, the applicant's Counsel invoked the provisions of section 6(3) of the Admiralty Jurisdiction Regulation Act 105 of 1983, which provides that, "A court may in the exercise of its admiralty jurisdiction receive as evidence statements which would otherwise be inadmissible as being in the nature of hearsay evidence, subject to such directions and conditions as the court thinks fit."

Opposing the application, the respondent contended that the application was not an admiralty matter, that it did not fall within the parameters of the Uniform Rules of Court, that the applicant had not explicitly stated that the present Court had inherent power to regulate its own procedures, and that the applicant had failed to make out a case for the relief sought.

Held – The applicant had to prove that her action was a maritime claim, which fell under the admiralty jurisdiction of the court and which would entitle the court to invoke the provisions of section 6(3) of the Act. Section 7(2) of the Act, which deals with proceedings before a provincial or local decision in the High Court, requires that when in any proceedings the question arises as to whether a matter pending or proceedings before that court is one relating to a maritime claim, the court should forthwith decide that question.

The Court was satisfied that the applicant's claim was a maritime claim as defined in section 1(1) in that the applicant's son had died as a result of an accident which occurred in connection with the employment of a ship (sec-tion (1)(f)), it involved the employment of the deceased as an officer or seaman of a ship (section 1(1)(s)) and fell within the all-embracing provisions of sec-tion (1)(1)(f), section (1)(1)(s), section 1(1)(ee) and (ff). The application could therefore be entertained in line with the provisions of section 6(3).

That left the application by the applicant to adduce oral evidence by way of video link conference for the court's determination. Ordinarily, in civil proceedings, oral testimony is given by the plaintiff in a court of law. However, the court acknowledged that the advance of technology makes it possible for direct evidence to be taken from a witness in another country and for cross-examination to take place whilst the witness is visible to all. The test with regard to evidence in general is that the court should consider all material which may help it reach a proper conclusion. Noting that the value of some evidence is outweighed by the problems it creates, the authorities stated that the court is required to balance the competing considerations in the exercise of its discretion.

Rule 38 of the Uniform Rules of Court provides for various procedures to produce evidence for trial. It also provides for the manner in which evidence will be adduced at trial. The granting of orders as regulated in rule 38 are within the discretion of the court, and such discretion must be exercised judicially. The main consideration is whether if evidence is placed before the court in that manner; justice is likely to be done. The applicant has to depose to an affidavit, give reasons why it is necessary for the purposes of justice to depart from the norm; explain the nature of the evidence to be given; names of witnesses and if it is convenient and necessary for the purposes of justice.

In the present matter, the Court was satisfied that the nature of the evidence to be adduced by the applicant was material to the real issues in the litigation and likely to contribute significantly to their determination. Taking into account a number of factors, including old age, serious illness, costs of travelling and other incidental costs, the Court concluded that the applicant would not be in a position to give oral testimony in court due to her advanced age and serious illness. Referring to its power to regulate its own processes in the interests of justice, the Court held that the absence of any rules that regulate the applications for hearing of evidence through video link conferences should not prevent it from considering the application. As the hearing with the aid of a video link conference would be a public hearing in a court of law, where all the parties would be appearing before a judge seized with the matter, there was no reason why such evidence could not be admissible in any court of law. Furthermore, the reference to a High Court in the Superior Courts Act 10 of 2013 was to be extended to cater for such a situation.

The application succeeded and the applicant was authorised and directed to adduce her evidence as sought.

Mostert and others v Nash and others [2018] 4 All SA 267 (GJ)

Civil procedure – Ex parte applications – Requirement of full disclosure – In an ex parte application for interim relief, failure to reveal material facts and information in an application where such facts might have influenced the court in arriving at a decision to grant relief would in itself be sufficient to warrant a dismissal and setting aside of the order complained of.

Civil procedure – Urgency – When courts are enjoined by rule 6(12) to deal with urgent applications in accordance with procedures that follow the rules as far as possible, the exercise of judicial discretion is involved.

Personal Injury/Delict – Defamation – Law of defamation in protecting the reputation of people, limits the right to freedom of expression – Such limitation can be consistent with the Constitution only if it can be said that an appropriate balance is struck between the protection of freedom of expression on the one hand, and the value of human dignity on the other.

The applicants (collectively referred to as “Mostert”) sought an order in Part B of their application against the first to fourth respondents prohibiting them from disseminating, directly or indirectly, false and defamatory allegations about Mostert. They also sought ancillary relief directing the respondents to close down certain websites and preventing the respondents from instituting proceedings against Mostert without first having obtained leave of the court. In Part A, Mostert had sought and obtained an order *ex*

parte on an urgent basis preventing the respondents from publishing the present application papers.

Disputing that the statements complained of were defamatory, the first respondent ("Nash") asserted that the order sought would constitute a severe violation of his right to freedom of expression, in that, firstly it sought to limit his right to impart information and ideas unjustifiably; and secondly, it unjustifiably limited the public's right to receive the information about Mostert's unlawful conduct.

As the relief was sought on an urgent basis, Nash disputed that grounds for urgency were established.

Held – When courts are enjoined by rule 6(12) to deal with urgent applications in accordance with procedures that follow the rules as far as possible, the exercise of judicial discretion is involved. The Court had regard to the evidence that Nash was repeating previous defamatory statements about Mostert, and that he had addressed a letter to the Deputy Director General, National Treasury making unsubstantiated allegations regarding the falsification of inspection reports and the commission of perjury by Mostert. Nash also repeated defamatory statements that Mostert had unlawfully conducted himself and that he was involved in corrupt activities – without any facts to support such statements. In the circumstances, the matter was of sufficient urgency to justify Mostert approaching the court on the notice provided for in the notice of motion.

Alleging a failure to comply with the requirement of full disclosure in *ex parte* applications, Nash alleged that Mostert had concealed a commission agreement signed between himself and the CEO of the Financial Services Board ("FSB"), which agreement Nash alleged a court had found to be fraudulent. A perusal of the judgment referred to showed that insofar as contingency fee agreements in respect of non-litigious matters were against public policy, the court referred to by Nash had simply set aside the agreement. There was no finding that Mostert had committed fraud as alleged by Nash, and accordingly, Mostert could not have been obliged to disclose a fraud that did not exist. The Court set out the numerous other allegations made by Nash about facts which Mostert had allegedly concealed in his application. It held that in an *ex parte* application for interim relief, failure to reveal material facts and information in an application where such facts might have influenced the court in arriving at a decision to grant relief would in itself be sufficient to warrant a dismissal and setting aside of the order complained of. The alleged instances of non-disclosure were found not to be material and would not have influenced the outcome of Part A.

Regarding the main relief, the Court had to decide whether Nash had undermined the right of Mostert to the protection of his dignity and reputation or *fama* which personality right was protected by the law of defamation; whether freedom of expression exonerated Nash from all liability for his untruthful statements about Mostert; and whether the order sought was justified.

The law of defamation is designed to protect the reputation of people. In doing so, it limits the right to freedom of expression. Such limitation can be consistent with the Constitution only if it can be said that an appropriate balance is struck between the protection of freedom of expression on the one hand, and the value of human dignity on the other.

Section 10 of the Constitution protects the right to dignity, while section 16 entrenches freedom of expression. The Court had to first determine whether the expression was one specifically protected under section 16(1) or specifically excluded under section 16(2); and, if the expression was one which was protected by section 16(1) and not excluded by section 16(2), the Court had to then determine whether the purported limitation complied with the requirements of the general limitation clause under the section 36 limitation clause.

In defamation cases the truth of what is said and the public interest are relevant factors. Also relevant are the context in which the statements were made, their reasonableness, the tone used, the identity of the person who made the statements and the identity of the victim. Those criteria are also useful when determining whether freedom of expression justifies the violations of a person’s right to dignity. The defamatory statements by Nash were not made honestly and in good faith and were not supported by any evidence. They were retaliation against Mostert for uncovering Nash's fraud and corruption.

The relief sought by Mostert was final in effect. The applicants therefore had to establish a clear right, that injury was reasonably apprehended; and that no other suitable form of relief was available. Those requirements were satisfied, and the application succeeded.

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