LEGAL NOTES VOL 11/2018[1]

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BOOYSEN v MINISTER OF SAFETY AND SECURITY 2018 (6) SA 1 (CC)

Delict — Specific forms — Vicarious liability — Minister's liability for policeman shooting romantic partner — Policeman on duty, in uniform, dining with partner at her home, thereafter shooting her with service pistol.

On a Friday evening, while on duty and in uniform, Mr Mongo, a policeman, was dropped by a police vehicle at the home of the person he was romantically involved with, Ms Booysen.He dined with her and her family, and later she and he sat outside together. There he drew his service pistol and shot her in the face, before turning the gun on himself, fatally.

Ms Booysen later sued the Minister of Safety and Security, asserting that the Minister should be vicariously liable for the act of Mr Mongo and for the damages flowing therefrom. The test for vicarious liability is (1) whether the employee performed the act in his own or his employer's interests; and (2) if he acted in his own interests, whether there was nonetheless a sufficiently close link between his conduct and his employment.

A court need take account of normative factors in assessing whether such a link is present.Before the High Court, the issue was whether the second part of the test was satisfied.It held that it was.

It accepted that the established factor of trust in a policeman played no role in the case, but it understood that it was not a prerequisite for liability (see [25]).

To it, the significant factor was the Minister's issue of a firearm to Mr Mongo. In doing so, he created a risk that Mongo might misuse it, and consequently he should be responsible for any harm that flowed from its misuse (see [25]). It was also

[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!**

significant that Mr Mongo was on duty, in uniform, and dropped by a police vehicle (see [25]).
Ultimately the court concluded that the Minister was vicariously liable for Mongo's act and for Booysen's damages stemming therefrom.
The Minister then appealed to the Supreme Court of Appeal (see [26]).
The majority concluded that there was an insufficiently close link between Mongo's act and his employment for vicarious liability (see [29] and [32]).
It found that the trust factor — trust facilitating the delict — was essential for liability, but that it was entirely absent here: Booysen was relating to Mongo as a lover, not as a policeman.
The absence of the factor also lessened the significance of Mongo using his service pistol, being uniformed, and being dropped by a police vehicle (see [30]).
That the Minister had issued Mongo a gun, was not on its own sufficient for the Minister to be vicariously liable for how Mongo misused it. For that there had to be more, such as a failure to properly discipline or train him (see [31]).
What was significant was that he was there for dinner — he was not there in an official capacity (see [32]).
The court upheld the appeal, and set aside the High Court's decision (see [32]).
The minority would have dismissed the appeal (see [35]).
To it, a weighty factor was that the Minister, in giving Mongo a gun, had created a risk of its misuse, and the Minister should therefore be responsible for its misuse (see [33]).
It was also significant that Mongo was on duty, in uniform, rode in a police vehicle, and used his police firearm (see [34]).
That Mongo was at Booysen's home for dinner did not relieve him of his obligations as a police officer, in particular, his duty to protect members of the public, including Booysen (see [35]).
Booysen then applied to the Constitutional Court for leave to appeal to it (see [2]).
The court's jurisdiction is confined to constitutional matters and points of law of general public importance (see [47]).
Booysen said that the issue was the way in which the Supreme Court of Appeal had applied the test for vicarious liability to the facts of her case (see [50]).
The court has held previously that it does not consider an alleged misapplication of an accepted test to raise a constitutional issue (see [50] and [53]).
To it the case was purely about the application of an accepted test. The differences in reasoning in the High Court and Supreme Court of Appeal were about the weight to be attached to the different factors in the test. On the one part, substantial weight was given to the issue of the firearm and resultant creation of risk; on the other, to the absence of the trust element.
The matter was not about the development of the test, which was a constitutional matter; and Booysen had not pleaded that it concerned an issue of general public importance (see [48], [56] – [57] and [60]).
Accordingly, it had no jurisdiction, and it had to refuse Booysen's application for leave (see [60] – [61], [63] and [65]).
Zondo DCJ, dissenting, considered that there was a constitutional issue in the case (see [70]). This as:

- Booysen's case was that the Minister and Mongo had breached their constitutional and statutory obligations to her (see [75]); and
- to determine the Minister's liability the court would need to consider the facts against the backdrop of the Constitution (this would include considering the nature of

the act, which at the same time was a breach of constitutional obligations) (see [81], [86] and [89]).
Accordingly, he concluded the court had jurisdiction (see [70]).
It was also in the interests of justice for the court to grant leave: the division of opinion in the lower courts was suggestive of reasonable prospects of success on appeal (see [93] and [96]).
Concerning the appeal, Zondo DCJ's view was that there was a sufficiently close link between Mongo's act and his employment to find the Minister vicariously liable (see [97] and [120]).
Factors justifying this conclusion were that:

- Mongo was on duty and in uniform;
- his employment gave him access to the pistol and facilitated transport to Booysen's home;
- he used his pistol in unauthorised circumstances; and
- his act simultaneously invaded Booysen's constitutional rights and breached his constitutional obligations as a policeman (see [111] and [120]).

Misuse of trust was not a prerequisite for liability (see [101] and [106]); and a policeman was obliged to protect his romantic partner as much as any member of the public (see [108] and [121]).
Zondo DCJ would accordingly have upheld the appeal, set aside the Supreme Court of Appeal's decision, and replaced it with one dismissing the Minister's appeal to it (see [123]).

AON SOUTH AFRICA (PTY) LTD v VAN DEN HEEVER NO AND OTHERS 2018 (6) SA 38 (SCA)

Estoppel— Res judicata — Issue estoppel — Requirements — Same party — Identity of interest between plaintiffs in two different actions sufficient to satisfy same-party requirement.

The appellant (AON) acquired the business of Glenrand MIB Ltd (Glenrand), assuming liabilities for all claims against Glenrand. The liquidators of Protector Group Holdings (Pty) Ltd (Protector) brought an action against Glenrand and its wholly owned subsidiary, Glenrand MIB Financial Services (Pty) Ltd (Financial Services), on a number of grounds. The liquidators were mostly successful in the High Court but on appeal to the Supreme Court of Appeal, only one ground was upheld (enrichment) and only against Financial Services. Within a few months of of that judgment, Financial Services was liquidated. The present case concerns liquidation proceedings subsequently instituted by Financial Services' liquidators against AON (based on its aforementioned assumption of Glenrand's liabilities). Both actions were directed at recovering money from Glenrand which was paid as purchase consideration by New Protector Group Holdings (Pty) Ltd (New Protector) in its acquisition of Protector. Financial Services (which existed solely to hold the Protector shares) had a 65% stake in Protector, for which New Protector paid it (ie Financial Services) R50 million. This money found its way to Glenrand as payments discharging Financial Services' existing indebtedness to Glenrand by way of set-off. This appeal arose from the court a quo's rejection of AON's special plea, that the previous litigation against Glenrand (and therefore indirectly against AON) resolved the issues in its favour, and, to the extent that these were again being raised by

Financial Services' liquidators, they were res judicata (in the form of issue estoppel). The court a quo's reason for rejecting the special plea was that it failed on all three aspects of the defence of res judicata: the parties, the causes of action and the relief claimed were all different. On appeal to the Supreme Court of Appeal —
Held, although different individuals were appointed as liquidators in each action, they came from the same company and the litigation they instituted was clearly driven by the creditors of Protector. To all intents and purposes, the liquidators of Financial Services were merely surrogates for the liquidators of Protector. As for the defendants, there was a complete identity of interests between them, and it would be artificial to say that findings against or in favour of Financial Services in the previous case would not be binding upon Glenrand. The approach of the trial judge was incorrect. Too much focus was placed on the fact that the plaintiffs in the two actions were liquidators of two separate companies, and insufficiently on the fact that there was a complete identity of interests between the two sets of liquidators and a similar identity of interests between the defendants in both actions. (See [25] – [27].)
The claims advanced in these proceedings by the liquidators of Financial Services involved the reconsideration of the very evidence and issues that were the subject of determination in the previous action. And insofar as the relief was concerned, both were directed at recovering from Glenrand the R50 million paid to Financial Services as the price for its 65% stake in Protector. The court below erred in holding otherwise by looking mechanically at the elements of the causes of action in the two cases, instead of examining the issues that had been determined in the previous case and comparing them with the issues that would need to be determined if the present case went to trial. The elements of res judicata in the form of issue estoppel were accordingly satisfied and the special plea should have been upheld. In the result, the appeal would succeed.

MADIBENG LOCAL MUNICIPALITY v PUBLIC INVESTMENT CORPORATION LTD 2018 (6) SA 55 (SCA)

Practice — Trial — Witnesses — Evidence — By affidavit — Correct approach to — Uniform Rules of Court, rule 38(2).

The Brits Town Council, for the purpose of repaying a number of short-term loans it had previously entered into with certain institutions, borrowed a large sum of money from the Public Investment Corporation Ltd (the PIC). It did this (in around January 1994) by issuing to the PIC three zero-coupon stock certificates, to be redeemed on their maturity at their face values. When the coupons fell due, the Madibeng Local Municipality (Madibeng), being the successor of the Brits Town Council, failed to honour them. The PIC consequently sued in the High Court for the capital amount outstanding. In defence, Madibeng raises a number of issues, one of which was the enforceability of the loans. In particular, it argued that the loans were unenforceable as they were raised without the consent of the Administrator of the (then) Transvaal Province as required by s 52 of the Local Government Ordinance 17 of 1939. Before trial, the various issues were separated, with only the question of enforceability to be decided. And it was agreed, on the suggestion of the presiding officer, that no oral evidence would be tendered, but that each party would file affidavits in which they set out their contentions. The court found in favour of the PIC, rejecting Madibeng's defence. The latter appealed to the SCA, where, in addition to disputing the

enforceability of the loans, also argued that the court a quo, in allowing evidence to be adduced by affidavit in terms of rule 38(2) of the Uniform Rules of Court, committed an irregularity, and its order should therefore be set aside.
Held, that the loans were duly authorised because, in terms of s 52 of the Ordinance, consent was not required when the purpose of the loan was, as here, to pay back other loans (see [23]).
Held, that the approach to rule 38(2) was the following. A trial court had a discretion to depart from the position that, in a trial, oral evidence was the norm. When that discretion was exercised, two important factors would inevitably be the saving of costs and the saving of time, especially the time of the court in this era of congested court rolls and stretched judicial resources. More importantly, the exercise of the discretion would be conditional upon whether it was appropriate and suitable in the circumstances to allow a deviation from the norm. That required a consideration of the following factors: the nature of the proceedings; the nature of the evidence; whether the application for evidence to be adduced by way of affidavit was by agreement; and ultimately, whether, in all the circumstances, it was fair to allow evidence on affidavit. (See [26].)
Held, that the court a quo had not exercised its discretion injudiciously. The parties agreed to place evidence on affidavit before the court on the separated issue. It was, in essence, a law point, and the facts were never in dispute. In its plea, no facts were alleged to place in dispute anything that appeared in the trial bundle. (See [27].)
Accordingly, appeal dismissed (except to extent provided in [31] – [33]).

AMANDLA GCF CONSTRUCTION CC AND ANOTHER v MUNICIPAL MANAGER, SALDANHA BAY MUNICIPALITY AND OTHERS 2018 (6) SA 63 (WCC)

Local authority — Tenders — Award — Appeal — 21-day time limit — Whether official or office bearer of municipality empowered to condone non-compliance with time limits — No general power afforded to municipality (acting through its officials or office bearers) to extend a statutory time period, except if that power conferred on it by particular section of a statute — Section under consideration providing no such power — Local Government: Municipal Systems Act 32 of 2000, s 62(1).

The Saldanha Bay Municipality, in respect of its request for tenders for the construction of a landfill cell in its jurisdiction, received nine bids, amongst which included those of the applicants and the second respondent. On the recommendation of the Bid Adjudication Committee, the Municipal Manager awarded the tender to the applicants. All bidders were notified of such decision, as well as their right, in terms of s 62(1) of the Local Government: Municipal Systems Act 32 of 2000 — the Municipal Manager had acted under a delegated power, hence the provision's application — to appeal against the Municipal Manager's decision within 21 days (of being notified of such decision). The Municipal Manager decided to extend such appeal period for a few more days at the request of one of the bidders, who argued that 'fairness' demanded the extension, given that the appeal period fell over the festive season, and therefore a number of public holidays, as well as so-called 'builders' holidays'. Outside the initial 21-day period, but within the extended period, the second respondent lodged its appeal. Ultimately, the Mayor (as the appeal authority) upheld the appeal, and awarded the tender to the second respondent. That decision prompted the present proceedings before the High Court

(Cape Town), wherein the applicants sought the review and setting-aside of the decision of the Municipal Manager to extend the prescribed appeal period, as well as the Mayor's awarding of the tender to the second respondent.
The applicants argued, inter alia, that the Municipal Manager was not permitted to extend the appeal period beyond 21 days. They argued that, generally, an administrative authority had no inherent power to condone failure to comply with a peremptory requirement. It only had such a power if it had been afforded the discretion to do so. Section 62 conferred no such power. The respondents, however, submitted that s 62 of the Systems Act should be interpreted in a manner that promoted the right to fair administrative action in terms of s 33 of the Constitution, read with the Promotion of Administrative Justice Act, and the right to a fair and equitable consideration of tenders stipulated in s 179 of the Constitution. With this in mind, and the fact that the purpose of s 62 was to ensure a fair opportunity to submit an appeal, the provision had to be read as allowing a municipal official and office bearer acting under delegated powers to extend the prescribed 21-day appeal period in appropriate cases, based on the dictates of fairness.
Held, that it was the law that there was no general power afforded to the Municipality (acting through its officials or office bearers) to extend a statutory time period, except if that power was conferred on it, as allowed in that particular section of the statute. In the end, it came down to the interpretation of that particular statute. Therefore, if the legislature intended a statute to operate as an absolute bar, the 'general power', if there was any, could not trump that intention. (See [32].)
Held, that the language used in s 62 indicated the intention to have appeals dealt with *swiftly* (see [33]). Although the wording of the provision was neutral and contained no express wording to exclude or include powers to extend the period of 21 days, interpreting the section to give the Municipality implicit powers to extend the time period in s 62, in the interest of maintaining overall fairness, gave the Municipality wide powers to extend the deadline by whichever period it deemed fit, which period may be short, long or indefinite in duration. This went counter to what was sought to be achieved by the statute. Similarly, condoning non-compliance by some applicants who were held to be 'deserving' of such condonation, whilst others were held to the time limit, may not in fact represent the overall fairness advocated by the respondents. (See [39].) Further, deciding on which cases would be considered 'deserving' or 'appropriate', in the absence of any criteria built into the statute, could present a challenge (see [36]).
Held, accordingly, that the Municipal Manager was not empowered to extend the 21-day period in s 62(1) by another week, as he did. His decision had to be reviewed and set aside. It followed, therefore, that the decision by the Mayor had also to fall away, as it ought not to have been made, by virtue of the notice of appeal having been filed outside the 21-day period. It mattered not that the Municipal Manager invited bidders to do so. He exercised a power he did not have; accordingly, such extension was ultra vires.

BANNISTER'S PRINT (PTY) LTD v D&A CALENDARS CC AND ANOTHER 2018 (6) SA 77 (GJ)
Set-off — Requirements — Whether debts of same nature, between same persons, and liquidated.

Bannister's Print (Pty) Ltd (Print) instituted an action against Mr Darryl Bannister (Darryl) and D&A Calendars CC (Calendars).

From Darryl, Print claimed repayment of a loan, and from Calendars, payment for services rendered and materials supplied.
In the course of the proceedings, Calendars and Darryl's legal representative forged a settlement offer, which Print accepted, and which was made an order of court. This caused Calendars and Darryl to obtain its setting-aside.
Print then appealed unsuccessfully to the full court and the Supreme Court of Appeal.
The latter court ordered Print to pay Calendars and Darryl's costs in the successive applications for leave to appeal and the appeals (see [5]).
Calendars and Darryl then obtained writs of execution in respect of the costs order; the sheriff served the writs; and Print was unable to pay (see [7]).
Print now applied to stay execution of the writs, pending its action. This on the basis that the costs debt was set off against the loan debt and the services-and-materials debt (see [7] – [8]).
The issue was whether the requirements of set-off were met (see [8]).
Those are that the debts are (1) of the same nature; (2) payable between the same persons in the same capacities; (3) liquidated; and (4) due. (See [9].)
Held, as to (1), that the debts were of the same nature — money (see [10]).
But as to (2), that it was not established that they were between the same persons (see [11]).
Darryl's loan debt was owed to Print (see [12]).
But Print's costs debt was owed to Calendars and Darryl indivisibly. (That they were indivisible co-creditors was suggested by their being co-respondents in the applications for leave to appeal and the appeals; their being represented by the same attorneys and counsel; and by a single bill of costs being drafted and taxed in each proceeding.) (See [12].)
It was uncertain who owed the services-and-materials debt. (Print stated in its particulars of claim that Calendars owed it; alternatively, Darryl; further alternatively, Calendars and Darryl jointly and severally.) (See [13].)
As to (3), the services-and-materials debt was not liquidated, in the sense of being capable of prompt and easy proof: Print would need to establish what services and materials were supplied; as well as the terms of the agreement giving rise to the debt, which Calendars and Darryl disputed. (See [13], [15] and [17].)
The court accordingly found that Print had not established that the costs debt was set off against the loan debt and services and materials debt; and it dismissed Print's application for a stay of execution of the writs.

BRIGHT IDEA PROJECTS 66 (PTY) LTD v FORMER WAY TRADE AND INVEST (PTY) LTD 2018 (6) SA 86 (KZP)

Minerals and petroleum — Petroleum — Arbitration — Whether eviction proceedings to be stayed, pending outcome of s 12B arbitration of fairness of brand fee — Petroleum Products Act 120 of 1977, s 12B.

Applicant and an entity called Tomdia were franchisor and franchisee.
The franchise was in respect of a petrol station on applicant's property which Tomdia operated.During the agreement's term, Tomdia ceded its rights, including of occupation, to respondent.

The cession was in the context of negotiations between applicant and respondent to renew the agreement, and respondent's reluctance to pay a 'brand fee' as a condition for this.
With but days of the franchise remaining, respondent referred an allegation of unfair contractual practice to the controller of petroleum products, for arbitration (see [14]). This in terms of s 12B of the Petroleum Products Act 120 of 1977.
After the franchise expired respondent remained in occupation, and applicant brought the present proceedings for eviction.
The first issue was whether applicant and respondent had concluded a renewal agreement giving a right of occupation. *Held*, that they had not (see [21]).
The second issue was whether the court should stay the eviction application until the outcome of the s 12B arbitration. *Held*, that it need not. This because the application and the arbitration were separate processes, dealing with separate issues (ownership, eviction, existence of the renewal agreement; versus the brand fee and others), and what the court decided would not be decided by the arbitrator and vice versa. (See [22], [28] and [39] – [40].)
The third issue was whether the arbitration clause of the franchise agreement required the court to stay the proceedings. *Held*, that it did not. It referenced disputes concerning the franchise agreement only, while the present dispute was in respect of the renewal agreement (see [41]).
Application for ejectment granted; counter-application, to enforce the alleged renewal agreement and for a stay, dismissed (see [44]).

CILLIERS v LA CONCORDE HOLDINGS LTD AND OTHERS 2018 (6) SA 97 (WCC)

Company — Shares and shareholders — Shareholders — Appraisal rights of dissenting shareholders — Disposal of all or greater part of assets of subsidiary — Shareholders in holding company entitled to appraisal rights where disposal would amount to disposal of all or greater part of assets of holding company — Companies Act 71 of 2008, s 115(2)*(b),* s 164(2)*(b)*.

Section 164 of the Companies Act 71 of 2008 grants an 'appraisal right' allowing dissenting shareholders to exit a company at fair value if the majority votes to dispose of all or the greater part of the company's assets or undertaking. This right extends to dissenting minority shareholders of a holding company where a subsidiary company has implemented a transaction disposing of all or the greater part of its assets or undertaking that constitutes at the same time a disposal of all or the greater part of the assets or undertaking of the holding company.
The applicant was a minority shareholder in company A, a holding company that owned 100% of the shares in its subsidiary, company B. On 11 May 2016 it was announced that company B would dispose of all of its operational assets to company C. This would at the same time have amounted to a disposal of all or the greater part of the assets of company A. At a general meeting of A's shareholders convened to approve the transaction, the applicant and the fourth to ninth respondents objected and voted against the enabling resolutions.
While company A had initially advised its shareholders that s 164 appraisal rights were available to them, and made an offer to acquire the shares held by dissenting shareholders, the offer was rejected by the applicant, who instituted an application

for appraisers to be appointed by the court. The parties agreed that the question whether rights of appraisal accrued to the applicant in the circumstances outlined above should first be determined as a question of law under rule 6(5)*(d)*(iii) of the Uniform Rules of Court.

Held

The introduction of appraisal rights in the 2008 Companies Act changed the nature of the rights and remedies available to lawfully outvoted shareholders by providing a right for dissenting minority shareholders to exit the company at fair value (see [4], [34]). A key policy objective of the Act was to protect smaller investors in companies by giving them the ability to make informed choices when they were unable to effectively influence company direction or pursue private actions (see [42] – [43]). To treat the dissenting shareholders in a holding company any differently from those in the subsidiary would undermine the Act's objective of protecting minority shareholders (see [47]). Correctly interpreted, the relevant provisions of the Act (in particular s 112, s 115(8) and s 164(5)*(b)*) gave appraisal rights to both sets of shareholders. Hence the applicant, as a minority shareholder in the holding company A, was capable of holding a shareholder appraisal right (see [50]).

DEMOCRATIC ALLIANCE v MINISTER OF INTERNATIONAL RELATIONS AND CO-OPERATION AND OTHERS 2018 (6) SA 109 (GP)

International law — Customary international law — Whether including rule that head of state's spouse immune from criminal jurisdiction.

From 10 – 20 August 2017, South Africa hosted the Southern African Development Community Ordinary Summit of Heads of State. Then President Robert Mugabe of Zimbabwe attended. On Sunday the 13th, President Mugabe's wife, Dr Grace Mugabe, travelled to South Africa.

Thereafter, a Ms Engels laid a charge at the Sandton Police Station, that Dr Mugabe had assaulted her that Sunday, with intent to cause grievous bodily harm (see [1]).

On Tuesday the 15th Dr Mugabe left South Africa, and the Zimbabwe Embassy wrote to the Department of International Relations and Co-operation, to notify it, that Dr Mugabe was here as part of the official delegation; that it had come to the Embassy's attention that a case had been opened against her at the Sandton Police Station; and requesting the Department to protect Dr Mugabe from arrest and prosecution.

On Saturday the 19th, the Director-General of the Department wrote to the Embassy to inform it that the Minister had decided to confer immunity on Dr Mugabe (see [6]).

On the same day the Director-General wrote to the Acting National Commissioner of Police, to notify the Acting Commissioner that the Minister had conferred 'immunity from criminal prosecution' on Dr Mugabe. The Director-General conveyed that the Minister, after considering states' practice, had concluded that there was a rule of customary law, that a head of state's spouse has immunity from criminal jurisdiction. (See [6] and, particularly, paras 10 – 12 of the letter quoted there.)

The South African Police Services then ceased investigating the alleged offence.

On Sunday the 20th, the Minister published her decision in the *Government Gazette*. In a Minister's Minute and Government Notice, the Minister wrote, that using her powers in s 7(2) of the Diplomatic Immunities and Privileges Act 37 of 2001, she had recognised the 'immunities and privileges' of Dr Mugabe 'in terms of international law'.

On Wednesday the 23rd, the Democratic Alliance applied to the High Court for a declarator that the decision was unconstitutional and unlawful; and for it to be reviewed and set aside.
The court considered that the issue, was whether customary international law included a rule, that a head of state's spouse was immune from criminal jurisdiction (see [13] – [14]).
The court held that the evidence of states' practice and opinio juris was 'too contradictory', to conclude that customary international law included such a rule. (See [16], [21] and [35] – [36].)
Moreover, even were there such a rule, it would not be part of South Africa's domestic law, given as it was inconsistent with an Act of Parliament, the Foreign States Immunities Act 87 of 1981. (See [40] and s 232 of the Constitution.)
Thus the Minister made an error of law in recognising Dr Mugabe's immunity, and the court was required to review it, and to set it aside. This under the common law and s 6(2)*(d)* of the Promotion of Administrative Justice Act 3 of 2000. (See [42].)
Declared, that the Minister's decision to recognise the immunity of Dr Mugabe was inconsistent with the Constitution; and ordered that it be reviewed and set aside.

DU PLESSIS NO AND OTHERS v VAN NIEKERK AND OTHERS 2018 (6) SA 131 (FB)

Trust — Trustee — Removal — Clause in trust deed providing that office of trustee vacated if majority of trustees requesting such trustee to resign — Whether decision of majority to request resignation, without any reason provided, sufficient for trustee to lose office — Trust law not allowing removal of trustee on such grounds — Clause, properly interpreted, meant that there had to be good cause for request and that trustee should vacate office only in event of acceptance of request — Even if interpretation incorrect, requirement of 'good cause' implied in trust deed, on grounds of public policy and principles of ubuntu, reasonableness and fairness — Failure of trustees to act *arbitrio bono viri*.

Contract — Terms — Implied and tacit terms — Implied terms — Specific instances — Clause in trust deed providing that office of trustee vacated if majority of trustees requesting such trustee to resign — Considerations of public policy and principles of ubuntu, reasonableness and fairness — Implied term to effect there had to be good cause for request and that trustee should vacate office only in event of acceptance of request.

Contract — Legality — Constitutionality — Importation of constitutional principles into law of contract — Public policy, ubuntu, reasonableness and fairness — Clause in trust deed providing that office of trustee vacated if majority of trustees requesting such trustee to resign — Implied term to effect there had to be good cause for request and that trustee should vacate office only in event of acceptance of request.

The three applicants were trustees of the Ritom Trust, of which the sole income and capital beneficiary was the second respondent. In the present proceedings, the applicants sought an order declaring that the first respondent — the fourth trustee, and mother of the second respondent — had lost her office as trustee, and directing the Master of the High Court to amend its records to reflect such a fact. The basis upon which the first respondent had lost her office, the applicants asserted, was the following: According to clause 5.7.4 of the trust deed, the office of a trustee '*shall* be vacated' if 'the majority of trustees request a trustee to resign'. The applicants, as

such a majority, had so requested that the first respondent resign. Accordingly, she *had to* vacate her office, and the Master *had to* effect such change in his/her records. The applicants stressed that, given the clear wording of the trust deed, no reasons had to be given for their decision; the simple fact of the applicants' resolution meant that the first respondent had lost her position. They added that what the common law and the Trust Property Control Act 57 of 1988 had to say about the circumstances in which a trustee vacated office was irrelevant, and that the role of the Master was limited to effecting the change in the records, and that of the court to confirming the decision already made. The first and second respondents opposed the application, arguing as follows: the law was clear that the removal of trustees should be done with circumspection. Were the wording of clause 5.7 accepted as it stood, it would mean that the majority of trustees may cause a trustee to vacate his/her office for frivolous reasons or for no reasons at all, or worse, for mala fide reasons. Therefore, the court should find that an implied term had to be read into the relevant clause so that the request to resign may only be made on good cause shown. In the circumstances no good cause was shown, and the application had to be refused.

Held, that, in interpreting clause 5.7.4 — which was by no means unambiguous— the context and all relevant circumstances had to be taken into account. The original parties to the trust deed (the founder, the first respondent and the third applicant) when signing could never have intended a situation where the mother of the beneficiary might be requested to vacate the office of trustee and a stranger be appointed in her place or nobody else appointed at all, without any valid reason, or for no reason, or even out of malice and mala fides, and perhaps against the best interests of the beneficiary. Such an interpretation, as favoured by the applicants, made a mockery of trust law: the Trust Act authorised the removal of a trustee by the court only in limited circumstances, and only if such removal would be in the interests of the trust and beneficiaries; and under the common law a court's power to remove a trustee had to be exercised with circumspection (removal would be ordered where the trustee's continuance in office would prevent the trust from being properly administered or would be detrimental to the welfare of the beneficiaries.) (See [26] – [32] and [38].) Furthermore, on the interpretation of the applicants, the effect of a '*request*' (whether for good reason or not) was nothing but a unilateral removal from office, as the first respondent had apparently no option other than to resign and vacate her office. This was a *contradictio in terminis*. In order to give practical, sensible and businesslike meaning to the words used, the clause had to be interpreted to read that there had to be good cause for such a request and that the trustee should vacate his/her office only in the event of an acceptance of the request.

Held, further, that, even if the above interpretation were incorrect, an implied term should be read into clause 5.7.4 to the effect that good cause had to be present for a resolution to be taken by the majority of trustees to get rid of a trustee on the basis that he/she be 'requested' to resign, and that he/she shall only vacate office once the request was accepted. (See [50].) This was so, because to fail to do so, and allow the applicants to unilaterally cause the first respondent's vacation from the office of trustee in circumstances where they did not have to produce reasons, or even for mala fide reasons, would be against public policy and the principles of ubuntu, reasonableness and fairness. (See [47].) The applicants' interpretation — which in effect meant that a majority's decision was not subject to a challenge before a court — was also contrary to s 34 of the Constitution, which provides everyone the right to

have any dispute that could be resolved by the application of law to be decided in a fair, public hearing before a court. (See [42] and [47].)
Held, further, that, even were it accepted that the trustees unilaterally had the right to request a trustee to vacate his/her office, their discretion to make such a request had to be based on reasonableness. This was based on the legal principle that unless a contractual discretionary power was clearly intended to be completely unfettered, an exercise of such a discretion had to be made *arbitrio bono viri*. (See [43] and [51].)
Held, further, that, even if all the above findings were incorrect, the applicants' claim could not succeed. The applicants' resolution to request the first respondent to vacate her office had not been taken on a properly constituted trustees' meeting and upon proper notice of their intention. They accordingly failed to comply with the provisions of the Trust Act. (See [52].)
Accordingly, application dismissed with costs.

DIAS v PETROPULOS AND ANOTHER 2018 (6) SA 149 (WCC)

Land — Lateral support — Duty to maintain lateral support between contiguous pieces of land — Scope of — Extending not only to land in its natural state but also to land with buildings on it, provided that such land not so unreasonably loaded by buildings as to place disproportionate or unreasonable burden of lateral support on neighbouring land.

Land — Lateral support — Duty to maintain lateral support between contiguous pieces of land — Breach of — What constitutes failure to provide lateral support — No closed list — Not confined to support maintaining area of excavation, irrespective of what further consequences excavation having for stability of contiguous land — In present case, removal of lateral support manifesting as slope mobilisation, causing damage to plaintiff's property.

The plaintiff's residential dwelling was damaged by the mobilisation of the scree mountain slope on which it was located. In his action for damages against the owners of two properties contiguous to his, the plaintiff claimed that the slope mobilisation was caused by excavations on the defendants' properties which amounted to a breach of the duty of lateral support they owed to his property. The issues, separated in terms of rule 33(4), were:

- Whether a common-law duty to provide lateral support to plaintiff's property was owed by each of the first and second defendants' properties.(The first defendant submitted that, as under English law, it extended only to land in its natural state.)

Held
There was no authoritative or binding decision in our law limiting a landowner's right of lateral support to the land in its natural state only, as was the case in English law. There were, furthermore, cases where it was held that the right extended to support to buildings on the land. (At [49].)
However, where a property had been unduly or unreasonably loaded through the erection of disproportionately large or heavy structures, it would seem unfair that a neighbouring piece of land should attract an equivalently onerous duty of lateral support. The view that the duty of lateral support in relation to contiguous pieces of land was owed to buildings as well, was therefore too broad a formulation of the right or duty of lateral support — particularly where the contiguous parcels of land were situated on a slope.

Our law in regard to the right of lateral support was squarely located within the law of neighbours in which one of the guiding principles was reasonableness. There was therefore no bar to the concept of reasonableness playing a role in determining the scope of the duty of lateral support, more particularly in determining whether a duty of lateral support extending to buildings could be limited where the property damaged by a breach of this duty had been unreasonably loaded by artificial constructions. Therefore, the appropriate approach was to hold that the scope of duty of lateral support extended not only to land but also to buildings, save where such land had been unreasonably loaded so as to place a disproportionate or unreasonable burden on the neighbouring land. On the evidence, there was no basis to find that the plaintiff had unreasonably loaded his property. (At [60] – [63] and [65].)

- Whether excavations carried out on each of the defendants' properties breached this duty of lateral support, and if so whether that caused the slope mobilisation.

Held

The duty of lateral support was not confined to such support as would maintain the face of an excavation, irrespective of what further consequences an excavation may have for the stability of contiguous land. There was no closed list of what constituted failure to provide lateral support. Here, the removal of lateral support manifested as mobilisation and subsidence of the scree slope. (At [70], [108], [110], [115], [130]

On the evidence, plaintiff's dwelling was properly constructed, and in excellent condition, structurally and otherwise, before the excavations on defendants' land. The overwhelming probability was that, had the first defendant not effected his excavation, no slip circle failure would have occurred.

JOINT MUNICIPAL PENSION FUND v EHLANZENI DISTRICT MUNICIPALITY 2018 (6) SA 197 (GP)

Pension — Pension fund — Members — Benefits — Claim — Locus standi — Whether pension fund (Joint Municipal Pension Fund) to which member belonging entitled to claim from employer benefits payable by employer in terms of rules of fund, for purposes of paying member — Binding nature of rules — Statutory obligation to collect contributions and distribute benefits payable to its members — Pension fund having locus standi — Pension Funds Act 24 of 1956, ss 7D and 13.

Mr Scheepers was previously employed by the respondent municipality's predecessor. Under his contract of employment, Scheepers became a member of the Joint Municipal Pension Fund (the appellant). He was retrenched in April 1997. Under s 13A of the Pension Funds Act 24 of 1956, the respondent, as an employer of a member of the appellant pension fund, was obliged to pay to the appellant any contribution which, in terms of the appellant's rules, was to be deducted from the member's remuneration, as well as any contribution for which the employer was liable in terms of those rules. The rules obliged the respondent (as employer) to pay the appellant a lump sum (gratuity) and a monthly contribution to enable the latter to pay the funds due to Scheepers in terms of the Pension Act. The respondent paid Scheepers a gratuity on his retrenchment, and continued making monthly pension payments, but later stopped doing so. The appellant's position was that, in terms of its rules, Scheepers remained a member of the appellant despite his retrenchment, and that the respondent was accordingly still obliged to make monthly

pension payments to the appellant until Scheepers' retirement. In the court a quo the appellant claimed unpaid retirement-benefit contributions from the respondent. That court, however, upheld a special plea raised by the respondent to the effect that the appellant had no locus standi to claim such retirement benefits from the respondent, whether or not Scheepers remained a member. In explanation it stated that only a member/employee or trade union could sue for pension benefit contributions; that the benefits that were due to Scheepers were not due from the fund but from the respondent (as municipality); and that the fund was merely a conduit to pass on pension benefits to Scheepers, and had no direct or substantial interest in the matter. This was the appeal against such decision.
The court agreed with the appellant that Scheepers remained a member of the appellant, and that the respondent was still obliged to make pension payments to the appellant (see [32] – [33]). The question that remained was whether the appellant had locus standi to claim the benefits due to Scheepers as a member.
Held, that the appellant (as a fund) was statutorily obliged to collect the contributions and distribute the benefits payable to its members. This was apparent from s 7D of the Pension Funds Act, which dealt with the duties of the board of a fund, which included taking 'all reasonable steps to ensure that contributions are paid timeously to the fund in accordance with this Act'. To institute a claim for payment of contributions fell squarely within the concept of reasonable steps to ensure that contributions were paid. (See [40].) Further, in terms of rule 2(2), a fund could institute a claim which was reasonably necessary for or ancillary to the exercise of its powers or the performance of its functions.
Held, further, that the rules of the appellant — in terms of which contributions were payable by the respondent — were binding on itself (as a fund), its members, and employers such as the respondent. This was so in terms of s 13 of the Pension Funds Act, as well as the rules themselves.
Held, accordingly, that the appellant had a direct and substantial interest in the litigation in order to be accepted as a litigating party, and had proved the necessary *locus standi in judicio*. (See [35] and [44].) Appeal upheld and matter referred back to the court a quo to make a final decision on all the issues still outstanding.

MOLOBI v SOUTH AFRICAN NATIONAL PARKS AND OTHERS 2018 (6) SA 217 (LCC)

Constitutional law — Legislation — Validity — Extension of Security of Tenure Act 62 of 1997, s 1 sv 'occupier' para *(c)* — Persons with monthly income above income threshold excluded from definition of 'occupier' and therefore protection of Act — Whether provision amounting to infringements of rights to equal protection and benefit of the law, to not be unfairly discriminated against, and to legally secure tenure — Paragraph *(c)* of 'occupier' not unconstitutional — Constitution, ss 9(1) and (3) and 25(6).

The protection afforded by the Extension of Security of Tenure Act 62 of 1997 (ESTA) to those living on land owned by another is limited to persons who meet the definition of 'occupier'. Such definition, set out in s 1 of the Act, expressly states in para *(c)* thereof that an 'occupier' *excludes* a person who has an income above the prescribed amount, ie R13 625 per month (recently increased from R5000 per

month). The applicant in the present matter sought an order declaring this income-threshold provision to be unconstitutional. He argued that the provision differentiated irrationally between those earning below the threshold (low-income earners) and those earning above the threshold (high-income earners), and, in so doing, violated the rights of the latter to equal protection and benefit of the law under s 9(1) of the Constitution. He argued further that it amounted to unfair discrimination in breach of s 9(3) of the Constitution, and further violated the right to legally secure tenure guaranteed by s 25(6) of the Constitution.
Held, that, according to law, the differentiation would be irrational — and hence in breach of s 9(1) of the Constitution — were it arbitrary or to manifest naked preferences that served no legitimate government purpose (see [23] and [32]). That was not the case here. The legitimate government purpose that ESTA sought to achieve was the protection of the long-term security of tenure of a class of persons who, as a result of historically discriminatory laws, were vulnerable to unfair and extra-judicial evictions (see [25] and [34]). The income threshold served as a yardstick for ensuring that those who were vulnerable and poor were protected and insulated from extra-judicial evictions and had secure tenure (see [36]). As such, the differentiation bore a rational connection to a legitimate government purpose, and there was no violation of s 9(1) of the Constitution (see [28] and [37]).
Held, further, that the applicant had failed to establish that the differentiation amounted to unfair discrimination (see [39]).
Held, further, that the provision did not impair the right to legally secure tenure in terms of s 25(6) of the Constitution. Section 25 contained internal limitations which qualified the right. The state's obligation went no further than to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of the right. To exclude higher-income occupiers from the protection of the Act was reasonable. The state had an obligation to protect its indigent citizens. A failure to reserve this protection for those citizens was likely to have the unintended consequence of a total welfare state that would be burdensome on the state and its fiscus. Suitable alternative accommodation as required by s 9 of ESTA, and expropriation of land for purposes of establishing independent tenure rights on land that occupiers resided on, would be impacted upon by an undue widening of the class of persons that the Act sought to protect. (See [40] – [47].)
Accordingly, application dismissed with costs (see [52].

MONDI SHANDUKA NEWSPRINT (PTY) LTD v MURPHY 2018 (6) SA 230 (KZD)
Judge — Death — Before giving judgment in trial — Trial completed — Parties not wanting trial de novo — Proposal that matter be determined on available documents and after legal argument.

In 2004 a fire spread from Mr Murphy's land to Mondi's * land where it destroyed commercial forest.
Mondi then sued Murphy for damages and the matter went to trial from 2011 – 2014 and argument was heard a year later. Then in 2017 before giving judgment the presiding judge died (see [1]).
The parties had now come to court asking it to finalise the matter in a way that they had agreed, rather than their beginning the trial anew.
It was now considering whether it could give effect to their agreement (see [2]).

The proposed procedure was that the court read all of the documents that would have been available to the deceased judge; that it hear argument from the parties; and that it then make a decision (see [1]).
Its conclusion was that it could not give effect to the proposed procedure (see [25]). This because it would be unable to resolve the many disputes of fact without resort to the credibility of the witnesses (see [21] – [23]).
If it were to decide the matter on the basis agreed, it would be in breach of its oath of office (see [24]).
It dismissed the application and directed that if the parties wished to continue with the matter that the trial begin de novo.

NUMSA OBO NGANEZI AND OTHERS v DUNLOP MIXING AND TECHNICAL SERVICES (PTY) LTD AND OTHERS 2018 (6) SA 240 (LAC)

Labour law — Dismissal — Derivative misconduct — Failure to disclose knowledge of wrongdoing against employer — Failure to identify fellow strikers involved in violent misconduct during strike — Duty to speak triggered by presence during violence — May be proved by indirect evidence or inference — Each of dismissed employees, on probabilities, present during some or all of misconduct — Failed to give evidence or provide explanation — Derivative misconduct established — Dismissals fair.

Employee — Duty of good faith to employer — Disclosure of knowledge of wrongdoing against employer — Duty to identify employees involved in misconduct — Violence during strike — Duty to identify culprits — Duty to speak triggered by presence during violence — Presence may be proved by indirect evidence or inference — Dismissal apt sanction for failure to identify perpetrators of violence.

Dunlop Mixing and two associated companies (the respondents, collectively 'Dunlop') summarily dismissed their entire workforce, all members of trade union Numsa, after a violent strike. The violent conduct included arson, death threats, damage to property, assaults on staff and the blockading of the workplace. Many of the strikers were dismissed by name for participating in the violence, and others — the present appellants — on the basis of 'derivative misconduct' for their failure to protect the interests of their employer by identifying those responsible for the violence. The issue was whether the derivative misconduct was proved against those charged with it.
Dunlop had on several occasions requested Numsa and the strikers to identify the culprits, but to no avail. Numsa denied that any violence occurred, or if it had, that any of the appellants was aware of it. The matter went on arbitration before the CCMA. The arbitrator, having rejected Numsa's version as false, ruled that the appellants' dismissal was nevertheless unfair because they were not individually identified as being present during the primary misconduct. He directed Dunlop to reinstate them.
Dunlop asked the Labour Court to rescind the arbitrator's finding. It argued that the appellants' presence during the primary misconduct could be inferred, even though they were not specifically identified, and that this, together with their failure to come forward with the requested information or to exonerate themselves, made them guilty of derivative misconduct. The court found that the arbitrator had committed a material misdirection in failing to infer from the whole body of evidence that the appellants were present during the perpetration of the violence. It also found that

individual positive identification was not the threshold and that the appellants' decision to remain silent in the face of the evidence adduced by Dunlop constituted derivative misconduct. In an appeal to the Labour Appeal Court —

Held per Sutherland JA

Derivative misconduct arose where employees were potentially implicated in misconduct by reason of their membership of a group or category, about whom, on reasonable grounds, suspicion arose that they had to know of material information relevant to the perpetration of harm to the employer by members of the group or category. Such knowledge included knowledge of facts that could help to identify the actual culprits (see [25]). The onus was on the employer to prove, on the probabilities, that the employees knew or must have known of the principal misconduct (see [29].)

Once it could be inferred from the evidence that the appellants were probably present during the violence, the onus on the employer was satisfied, and absent a positive rebuttal, proof was established on a balance of probabilities that the appellants knew or must have known who perpetrated the violence. The arbitrator adopted too narrow an approach by requiring individual identification of each employee present during the violence (see [27], [29], [31] – [32]).

The appellants were part of a strike, a collective activity, during which various incidents of violent misconduct by their fellow strikers occurred. The inferences that each of the appellants was present at least some if not most of the time and that they had acquired actual knowledge of the misconduct and the perpetrators, were consistent with the proved facts, and the only plausible inferences that could be drawn. There was enough evidence to call for an explanation, and the false evidence tendered by Numsa and the failure of the appellants to testify, could justifiably be weighed in the balance against them. A reasonable arbitrator would not have found otherwise. (See [34] – [35], [39.4] – [39.6].) The appellants' failure to disclose the identity of the culprits was a serious enough breach of their duty of good faith to their employer to warrant dismissal (see [40]). Appeal dismissed.

Held per Coppin JA concurring

The appeal should be dismissed on the simple ground that the arbitrator had mistakenly concluded that Dunlop failed to prove that the appellants were present at any of the scenes of misconduct, that they had actual knowledge of the misconduct and the perpetrators, and that they had deliberately withheld the information (see [47], [54]). Mere presence at the scene of primary misconduct could not, without actual knowledge, trigger a duty to speak, and if this was what was held a quo, it was contrary to the right to remain silent, and wrong (see [55], [66]).

Held per Savage AJA dissenting

The arbitrator's conclusion that Dunlop failed to prove that the appellants were present at any of the scenes of misconduct or had actual knowledge of the misconduct or perpetrators, was reasonable (see [109]). The fact that the appellants did not exonerate themselves did not justify a different conclusion, nor did it allow a finding that they were, by inference, culpable (see [112]). Since actual knowledge could not be inferred, the arbitrator was correct in finding that their dismissal was unfair.

ROOS v SAAIMAN NO AND OTHERS 2018 (6) SA 279 (GP)

Will — Revocation — Instruction to cancel or destroy — Keeping of outdated will cannot revive it in face of clear written instruction by testator to cancel or destroy it — Wills Act 7 of 1953, s 2A(c).

The keeping of an outdated will cannot revive it where there was a clear written instruction by the testator to cancel or destroy it (see [45]).
A testator, subsequently deceased, per signed letter dated 5 December 2011 instructed her bank, which had a will of hers under safeguard, to cancel and destroy it. The letter stated that the 'outdated' will had already been cancelled back in 1999, but that the bank's records failed to reflect this. The bank, acting in accordance with internal policy, did not destroy the will but returned it to the deceased. The applicant, the deceased's spouse, sought an order declaring that the will was not the deceased's final will and testament, and that she had in fact died intestate. The second respondent, the deceased's mother and a potential beneficiary under the contested will, opposed the application. While she accepted that s 2A*(c)* of the Wills Act 7 of 1953 (inserted into the Act in 1992) did away with the requirement that the intention to revoke a will had to be stated in a testamentary instrument, she argued that an act of destruction was nevertheless required for revocation by way of destruction. Section 2A*(c)* provides that '(i)f a court is satisfied that a testator has . . . drafted another document . . . by which he intended to revoke his will . . . the court shall declare the will . . . to be revoked'.
Held
While Absa's policy not to cancel or destroy a will on a testator's instruction but to return it could not be faulted, this did not detract from the instruction contained in the deceased's letter, which was clearly indicative of an animus revocandi (see [40], [44]). The will was already outdated in 1999, and the keeping of an outdated will could not revive it where there had been a clear written instruction to cancel or destroy it (see [45]). The deceased's intention with the letter of 5 December 2011 was merely to get the bank to update its records to reflect an earlier cancellation (see [39], [45]). The absence of destruction was immaterial, given that the letter constituted a valid revocation under s 2A*(c)* of the Wills Act (see [46]). Hence the deceased died intestate (see [49]). Application granted.

SWART AND ANOTHER v CASH CRUSADERS SOUTHERN AFRICA (PTY) LTD 2018 (6) SA 287 (GP)

Execution — Application to execute pending appeal — Requirements — Applicant must allege absence of irreparable harm to all opposing parties — Leaving one out fatal to application — Superior Courts Act 10 of 2013, s 18(1) and (3).

Competition — Restraint of trade agreement — Enforcement — Order — Application to execute pending appeal — Irreparable harm — New employer opposing enforcement of restraint — Applicant must allege absence of irreparable harm to new employer — Superior Courts Act 10 of 2013, s 18(1) and (3).

An applicant seeking to execute pending appeal under s 18 of the Superior Courts Act 20 of 2013 (the Act) must allege absence of irreparable harm to all opposing parties. Therefore, where a former employer applies to execute an order enforcing a restraint of trade agreement pending an appeal by the affected employee, it must, if the main application was opposed by a new employer, also show absence of irreparable harm to the latter.
On 17 January 2018 the Pretoria High Court granted an order enforcing a restraint of trade agreement between S and Crusaders which interdicted S from working for Converters, the second appellant, until April 2019. The High Court refused leave to

appeal; S and Converters applied for leave to appeal to the Supreme Court of Appeal; and on 27 February 2018 the High Court granted an application by Crusaders, under s 18(1) of the Act, for an order directing that the interdict granted on 17 January should operate pending the appeal. The present case was an appeal by S and Converters against the order of 27 February. S and Converters opposed the enforcement of the restraint from the beginning.
Under s 18 two requirements had to be met before an order appealed against can be put into operation pending the outcome of the appeal: (i) exceptional circumstances must exist; and (ii) proof, on a balance of probabilities, that the applicant seeking execution will suffer irreparable harm if the order is *not* put into operation and the other party will not suffer irreparable harm if the order *is* put into operation.
Crusaders did not, when it applied for execution, deal with the position of Converters at all, having alleged only that S would not suffer irreparable harm if the order were put into operation.
Held
It was clear from the affidavits before the court a quo that it did not deal with the effects his preclusion from being employed by a competitor would have on S after the period of restraint, and that the scope of its enquiry under s 18(3) was therefore limited (see [8], [12]). However, Crusaders' failure to deal, in its s 18(1) application, with the position of Converters, went to the heart of the matter. Both S and Converters brought an application for leave to appeal against the order of 27 February. Consequently Crusaders was required to make out a case of absence of irreparable harm in regard to both S and Converters. Its failure to do so was a fatal omission to its application, and it ought on that basis alone to have been dismissed with costs by the court a quo

TROLLIP v TAXING MISTRESS, HIGH COURT AND OTHERS 2018 (6) SA 292 (ECG)

Costs — Counsel's fees — Taxation — Wasted costs of first day of postponed trial — Correct approach — Counsel entitled to full day fee as compensation for loss of opportunity, unless briefed and appearing in another matter on same day — Absent any reason to suspect counsel charged improperly, counsel not to be required by taxing officer to show loss of opportunity.

One day before the date that an action was set down for trial, the defendant filed an application for postponement. On the trial date the matter was postponed by agreement, the defendant tendering the wasted costs of his application for postponement and plaintiff's wasted costs. An order was granted at approximately 10h45. Counsel for the plaintiff subsequently charged a full first day trial fee but half of his bill was taxed off by the taxing mistress. This case concerned the review of her decision.
In her rule 48 stated case, the taxing mistress stated inter alia that she took into account that 'at most, counsel was before court for one hour and engaged in the matter from 08h00 to 10h45'; that she had 'listened to the recording of the hearing and it was apparent that [counsel] was not at court when the matter was postponed', and so 'the only inference' she could draw was that 'counsel's attendance was required elsewhere and he then returned to his chambers to do other work'; and that the plaintiff's attorney could have requested counsel to 'furnish written confirmation that he in fact did not attend to any other fee generating work on the day in question,

in order to persuade the Taxing Mistress to allow the full day fee' but that he did not do so. She also appeared to have relied on the Guidelines to Taxation of Bills of Costs — Eastern Cape High Courts, that counsel was not entitled to a day fee unless engaged in the matter up to and until 14h00 'at least', and that when 'counsel have kept themselves available for the day and are unable to proceed with any fee generating work on the day reserved for trial, then they must prove in writing that they turned away work which could have been done on the day the matter was set down for hearing'.

Held

The required approach to the task of taxing a bill of costs was to do so with an open mind: where a dispute was raised or good reason existed to suspect that the services claimed for had not been performed, the taxing officer was under a duty to afford the affected party an opportunity to deal with any disputed questions of fact. While the taxing officer may not ignore evidence that may show that work that had been charged for was, in fact, not done, this did not mean that there was a duty upon practitioners to prove their claims. The legal profession was a distinguished and venerable profession and its members officers of the court; absolute personal integrity and scrupulous honesty were expected of them. It followed that a taxing officer was entitled to take counsel's fee list at face value as constituting a record of the work that has been done. The honesty and professional ethics of counsel ought not to be lightly questioned. The suggestion that an advocate, when rendering a fee for a full first day trial fee in respect of a matter which has been settled or postponed, must necessarily demonstrate that he or she has turned away work and had no other work, was erroneous. A taxing officer's starting point should be that, in the absence of evidence to the contrary, advocates, as members of an honourable profession, rendered fees honestly and behaved ethically. (At [18] – [20] and [29].)

If a matter was settled, withdrawn or postponed, the function of the taxing officer was to determine a reasonable fee for counsel, taking into account the date when the case was settled or withdrawn or postponed. The settlement or postponement of a trial prejudiced counsel if they were not properly compensated for having reserved that day for trial. No other brief may properly be accepted for the days so reserved as this would constitute double briefing. This all constituted a loss of opportunity to earn fees from other work in consequence of the acceptance of the trial brief. Counsel's chamber work would have been performed at one time or another in any event, often after hours. If counsel performed chamber work on the day of a settled or postponed trial, this did not compensate for, and should not be taken into account, in respect of the entitlement to a full day trial fee. The only possible compensation for loss of opportunity in respect of the first day of trial would be the fortunate retention of another brief for court work accepted subsequent to it becoming apparent that the trial would not proceed. The position (as supported by case law) was therefore that an advocate was entitled to be compensated for his or her opportunity costs when a trial settled or was postponed, and that, generally speaking, would be on the basis of a full day fee. If, however, they were lucky enough to be briefed *to appear* on that day in another matter, they may not charge a full day fee for the matter that did not proceed. Counsel was entitled to be fairly compensated in accordance with these principles; the taxing officer must strive to give the successful party a full indemnity in respect of costs reasonably incurred. (At [24], [26] – [28] and [38] – [39].)

The paragraphs of the Guidelines to Taxation of Bills of Costs — Eastern Cape High Courts that the taxing officer appeared to have relied on, were in conflict with the

common law and case law, and to that extent could not be applied. She committed an irregularity in doing so. At the heart of her reasoning was her finding that counsel did other work on the day in question. There was however no evidence to suggest that that was so; accordingly her decision to halve counsel's fees was irrational. She also erred in placing the onus on counsel to show that he did not do other work — by which she meant chamber and not appearance work. A taxing officer should work from the premise that advocates act honestly and ethically, and do not overreach, rather than from the opposite premise; in the absence of reason to believe that counsel charged improperly, it was unnecessary for counsel to present evidence to establish the loss of opportunity to justify a full first day fee. By halving counsel's fee on the assumption that he had 'returned to his chambers to do other work', she applied a wrong principle and committed a material error of law: whether counsel did chamber work on the day in question was entirely irrelevant to the respondent's decision. Her decision to reduce the counsel's fee was therefore clearly wrong. The review thereof would therefore succeed.

WITZENBERG PROPERTIES (PTY) LTD v BOKVELDSKLOOF BOERDERY (PTY) LTD AND ANOTHER 2018 (6) SA 307 (WCC)

Water — Groundwater — Abstraction — Interim interdict sought by neighbouring landowner — Standing — Applicant claiming abstraction from boreholes on neighbouring farm draining its dam — Mere connectivity between boreholes and dam not enough to show harm actually committed or reasonably apprehended — No standing — Interdict denied — National Water Act 36 of 1998.

Water — National Water Act — Effect — Water law removed from private law to public law domain — National Water Act 36 of 1998.

W and B, both commercial farming businesses, were involved in a dispute over B's right to extract water from three boreholes that it had sunk on its farm but close to one of W's dams. W claimed the boreholes were draining its dam. During argument the Minister of Water Affairs and Sanitation (the second respondent) came out with a ruling that caused W to narrow down the relief sought to an interdict directing B to stop abstracting groundwater except as permitted under the National Water Act 36 of 1998 (the NWA). The minister's ruling, made under s 35 of the NWA, limited B's groundwater use to 161 400 cubic metres per year. B appealed the minister's ruling to the Water Tribunal, which had the effect of suspending it pending the tribunal's decision. W argued that the borehole issue was distinct from the issue of the validity of the minister's ruling, and should be separately decided by the present court. Under the NWA water users were allowed to continue with the 'existing lawful use' of water that had occurred during the two years prior to its commencement (on 1 October 1998). In B's case the minister determined such use to be the above-mentioned 161 400 cubic metres per year. W's argument was that B was already extracting far more than this from the three boreholes. B in turn argued that the limit determined by the minister had been calculated on the wrong basis. (See [14] – [19] for details of the parties' arguments.) The parties approached the matter in accordance with the usual test for final interdictory relief. But first came the matter of W's standing. W's claim to standing was based on the fact that, as a neighbouring water user dependent on water in the same drainage area, it was an entity — or at least a member of a class of persons — in whose interests the restrictions on the use of groundwater were imposed under the NWA.

The parties agreed that the NWA introduced a fundamental reform of water law by shifting away from the riparian principle of preferential and hierarchical water use rights to an administered system that operated in the interests of all water users, thereby removing traditional water law from the domain of private law to that of public law.

Held

Since the issue of the legality of B's abstraction of groundwater from the three boreholes was inextricably intertwined with the issue of the validity of the limit imposed by the minister, the court would not deal with the substantive merits of the appeal.

As to W's standing to claim interim relief: the NWA was enacted for the benefit of the general public and not in the interests of a particular person or class of persons, and therefore the harm required for W's standing was not presumed. W would have to show, as own-interest litigant, on a balance of probabilities, that it sustained or apprehended actual harm as a result of a breach of the NWA. Since it was not resolved that B had acted unlawfully at all, the court's putative duty to uphold the doctrine of legality did not arise. All W had shown was a theoretical possibility that the three boreholes were syphoning water from the dam, not that it sustained or apprehended actual harm (see [51]). Surface water and groundwater were always linked, and the mere fact of connectivity between the dam and the boreholes was of little, if any, assistance in this regard (see [50]). Application dismissed.

XANTHA PROPERTIES 18 (PTY) LTD v NATIONAL HOME BUILDERS REGISTRATION COUNCIL AND OTHERS 2018 (6) SA 320 (WCC)

Housing — Consumer protection — Enrolment of home — Whether home builder required, in terms of s 14 of Housing Consumers Protection Measures Act, to enrol construction of 'home', where home builder constructing home solely for purposes of leasing or renting out — Purpose of Act being protection of 'housing consumer' — Tenant in terms of lease with home builder was not 'housing consumer' — 'Home' was accordingly limited to homes acquired by housing consumers by means of sale — Enrolment therefore not required — Housing Consumers Protection Measures Act 95 of 1998, s 1 sv 'home' and 'housing consumer', and s 14(1).

Section 14(1) of the Housing Consumers Protection Measures Act 95 of 1998 requires that a home builder shall not commence the construction of a 'home' unless it has first enrolled such construction, which entails, inter alia, the submission of certain documents and information, and the payment of a fee, to the National Home Builders Registration Council (the Council). 'Home' is defined in s 1 of the Act to mean 'any dwelling unit constructed or to be constructed by a home builder . . . for residential purposes or partially for residential purposes, including any structure prescribed by the Minister for the purposes of this definition or for the purposes of any specific provision of this Act, but does not include any category of dwelling unit prescribed by the Minister'. The General Regulations Regarding Housing Protection Measures expand on the definition of 'home' for the purposes of s 14(1), by inter alia providing various exclusions.

Xantha Properties 18 (Pty) Ltd, a home builder registered as such in terms of the Act, was in the process of developing a number of apartments in a building it owned; not for the purpose of selling, but for renting out. Xantha was informed by the Council that it would need to enrol the apartments, even though it did not intend to

sell them to third parties. Xantha consequently approached the High Court (Cape Town) seeking, inter alia, a declaratory order to the effect that s 14(1), read with relevant provisions of s 1 (including the definitions of 'home' and 'housing consumer') and various other provisions of the Act and the Regulations, did not require the enrolment of the proposed construction of a home where the home builder was constructing such home *solely for the purposes of leasing or renting out*. For its part, the Council insisted that enrolment was required in such circumstances.
The court, in interpreting s 14(1), and in particular the meaning of 'home', had regard to the purpose of the Act — namely, the protection of the 'housing consumer' (see [42] – [45]). Such a person, the court held, having regard to the definition of the term 'a person who is in the process of acquiring or has acquired a home', *did not include* a tenant in terms of a lease with a home builder (see [40] and [46]). The court also had regard to the fact that the entire scheme of the Act was predicated upon the conclusion of a building contract between a registered home builder and a housing consumer.
The court consequently found that for the purposes of enrolment in terms of s 14(1), a 'home' was limited to homes acquired by housing consumers by means of a sale (see [40] and [49]).
In conclusion, the court held that the provisions of s 14, read with the definition of 'home' and 'housing consumer' in s 1 of the Act and regs 1(2) and 1(4) of the Regulations, did not require the enrolment of the proposed construction of a home in circumstances where the home builder was constructing such home solely for the purposes of leasing or renting out (see [50]).

S v SHIBURI 2018 (2) SACR 485 (SCA)
Trial — Accused — Legal representation of — Withdrawal of legal representative — On day of trial on grounds of ill health — Accused electing to proceed with trial without representation when asked what wished to do — Short of compelling accused to engage legal representation, nothing more could be expected of court — No irregularity occurring.
Plea — Guilty — Questioning in terms of s 112(1)*(b)* of Criminal Procedure Act 51 of 1977 — Not court's function to evaluate plausibility of answers at that stage, but only whether explanation disclosing possible defence in law to charge — Court should not attempt to extract concessions from accused.
The appellant was charged in a regional magistrates' court with three counts of rape. Two of the rapes were allegedly committed on the same day and the third on a separate occasion. The appellant pleaded guilty to all counts, but the plea to the third count was changed to one of not guilty. The magistrate then questioned the appellant in terms of s 112(1)*(b)* of the Criminal Procedure Act 51 of 1977 (the CPA) in respect of the counts to which he had pleaded guilty. From his answers he appeared to claim to have raped the complainants in the first two counts on the instructions of a companion who was armed with a knife. The magistrate's questioning also appeared to be directed at establishing the veracity of the defence of compulsion that the appellant was raising. The state ultimately accepted the plea of guilty and the magistrate convicted the appellant on those two counts. Evidence was led on the third count before he was convicted on that count also. The convictions were upheld on appeal to the High Court.
In a further appeal it was contended, inter alia, that the regional magistrate had failed, in the light of the seriousness of the charges he faced, to encourage the appellant to exercise his right to legal representation when his Legal Aid attorney

withdrew on the trial day due to ill health. The magistrate had asked the appellant what he wished to do in the circumstances and he indicated that he wanted the trial to proceed. Further, that the explanation by the appellant during the s 112(1)*(b)* questioning had raised a defence of compulsion, and the court should therefore also have altered those pleas to not guilty.
Held, as to the trial proceeding with the appellant unrepresented, that the application of the rule regarding legal representation was context-sensitive. In any given situation the inquiry was always whether an accused's fair-trial rights had been infringed. Short of compelling the appellant to seek further legal representation in the present matter, it was difficult to see what else the regional court could have done. There was therefore no merit in the argument on legal representation. (See [13] – [14].)
Held, as to the questioning by the magistrate in terms of s 112(1)*(b)*, that it was not the court's function to evaluate the plausibility of the accused's answers or to determine their truthfulness at that stage of the proceedings. Instead, for the purposes of the section, the accused's explanations had to be accepted as true. On that premise, the court had to consider whether the explanation disclosed a possible defence in law to the charge that he had pleaded guilty to. The presence of doubt was a jurisdictional factor to trigger the application of the procedure laid down in s 113. (See [19].)
Held, further, that it was clear that the regional magistrate had been at pains to extract a concession from the appellant that he was under no compulsion from his colleague to rape the complainants, and that was beyond the ambit of s 112(1)*(b)*. Both the regional court and the High Court had erred in this regard and the convictions and sentences therefore had to be set aside. (See [20] – [21].) The court also upheld the appeal on the third count on the basis of the evidence as it appeared on the record.
Held (per Pillay AJA, dissenting), that the convictions and sentences on the first and second counts did not need to be set aside on account of non-compliance with s 113 of the CPA, and that the state had proved the guilt of the appellant beyond a reasonable doubt on the third count.

PRETORIUS AND OTHERS v MINISTER OF JUSTICE AND CORRECTIONAL SERVICES AND OTHERS 2018 (2) SACR 501 (GP)
Prisoner — Rights — Use of laptop computer in cell — Applicants pursuing tertiary studies in prison and having insufficient opportunity to use communal computer facilities to study — Correctional Services authorities imposing blanket ban on use of laptop computers in cells — Failing to consider applicants as individuals with perfect security records and justifiable need for use of such laptops — Constituting unfair discrimination and relevant order granted in favour of applicants.

The three applicants, who were serving lengthy terms of imprisonment, sought an order declaring that the policy procedures on formal education programmes made by the second respondent, the National Commissioner of Correctional Services, insofar as they related to the use of a personal laptop computer (without a modem) in any communal or single cell, constituted unfair discrimination in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (Pepuda).

The applicants were all registered for tertiary educational courses and had already made significant progress with their studies whilst incarcerated. They were allowed

to be in the computer centre of the prison from 07h00 to 14h00 daily, but in terms of the policy were not allowed to use their laptops in their cells. They complained that they were often deprived of sufficient time to study due to unforeseen events in the prison, such as riots that caused shutdowns, delays in having breakfast, or other obligations they had to attend to. They calculated that in a two-month period they had lost approximately 52 hours of study time.
The respondents objected to the applicants using their computers in their cells on the basis that it constituted a security threat. They were concerned that inmates might smuggle modems into their cells or use illegal cellphones to create hotspots. They did not specify the actual risk but presumably were concerned that the use of computers might either pose a flight risk or that inmates might become involved in illegal activities over the internet.
Held, that the import of ss 37 and 38 of the Correctional Services Act 111 of 1998 (the Act) was that each sentenced prisoner had to be treated as an individual, and, where a prisoner had a spotless security record, as was evidently the case with the applicants, that fact should have been considered when their requests for the use of computers was considered. It was not proper to simply determine that all sentenced prisoners were subject to the same policy on the use of computers, immaterial of the needs and security record of the individual prisoner. Such a blanket approach was contrary to the purpose of the Act. (See [40] – [41].)
Held, further, that the respondents had instituted a policy that limited the applicants' basic rights, and they had the burden to justify the limitation by placing facts before the court, but had failed to do so. The policy probably constituted an unjustified limitation of the right to further education of all inmates and constituted unfair discrimination in accordance with the provisions of Pepuda. (See [42] – [44].) The court accordingly granted an order as sought by the applicants.

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS v FIVE STAR IMPORT & EXPORT (PTY) LTD 2018 (2) SACR 513 (WCC)

Search and seizure — Seizure — Return in terms of s 31(1)*(a)* of Criminal Procedure Act 51 of 1977 of article to owner — Proof of requirements of section — Two-stage inquiry — In casu, large sum of local currency seized in highly suspicious circumstances at airport — Applicant's C explanation preposterous and police having reasonable grounds for believing intended for use in commission of offence — Money forfeited to state.

On 21 October 2016, a certain Mr Aboo travelled on a flight from Durban to Cape Town and was stopped in the domestic-arrivals hall in Cape Town by two members of the South African Police Service (SAPS) conducting random stop-and-search inspections. They found R6 175 150 in various denominations in his suitcases. They also came upon his passport and a travel itinerary indicating that he was due to travel to Dubai within a few hours of his arrival. According to the police, Aboo informed them that the money belonged to his boss and that he needed to deliver it to a person in Cape Town. He refused to disclose the identity of either his boss or the intended recipient. He also failed to inform the police that he was on his way to Dubai or showed any urgency in getting onto the flight. The police formed the view that he was attempting to remove the cash from the country in contravention of Exchange Control Regulations under the Currency and Exchanges Act 9 of 1933

which criminalised the removal from the country of local currency in excess of R25 000. Aboo missed the flight to Dubai and was released without charge.
After almost a year no offence had been shown to have been committed and the Director of Public Prosecutions decided not to institute any prosecution. SAPS, however, refused to return the money to the applicant (Five Star) which had in the meantime laid claim to it. Its sole director alleged that he had asked Aboo to deliver an amount of R6 000 960 to one Mr Bassa in Cape Town, being the receipt of money for the sale of goods that it had imported into South Africa. Aboo could later not be traced by the police.
Five Star instituted an application for the return of the money and the Asset Forfeiture Unit of the National Director of Public Prosecutions (the NDPP) instituted an application for leave to intervene and forfeiture of the money.
The NDPP argued that there had been a significant increase in incidents of transnational crimes, including the smuggling of vast amounts of cash through the international airports of South Africa, and that in most of those instances the organised-crime syndicates would employ couriers to transport the criminal proceeds out of or into the country. According to the NDPP, Aboo had travelled the route and to a destination that was known for terror-financing, money-laundering and for black-market exchange systems where cash moneys were laundered. It argued that the peculiar circumstances of his travel plans, and particularly the short time between the flights to and from Cape Town, indicated the criminal nature of the activities. The NDPP also produced evidence that Five Star, although registered with Sars, had not rendered any income-tax or VAT returns. Neither was Aboo registered as a taxpayer and could accordingly not have paid for his flight, and the 16 other international flights overseas that he had undertaken in that year, other than from the proceeds of criminal activity.
Held, that on the objective facts, the reasonable belief that Aboo was attempting to remove cash from the country in contravention of the Exchange Control Regulations could hardly be faulted. Moreover, Five Star had elected not to oppose the preservation order, which could only mean it had accepted that the police must have established reasonable grounds that an offence had been committed at the time the cash was seized. In the circumstances, the challenge that the seizure of the cash was executed in an unlawful manner was without merit and had to be dismissed.
Held, further, that s 31(1)*(a)* of the Criminal Procedure Act 51 of 1977 called for a two-stage inquiry into the fate of an article seized by the police. In the first inquiry the onus was on the applicant seeking the return of its goods to show on a balance of probabilities that no criminal proceedings had been instituted and that there was no reasonable likelihood of such proceedings in the foreseeable future. Five Star had succeeded in proving that this was a case where no criminal proceedings were instituted within the meaning of the section. (See [47] – [49].)
Held, further, that in the second inquiry the onus was on the police to show that the applicant could not lawfully possess the money. Here SAPS had discharged its onus on a balance of probabilities, the explanation offered by Five Star bordering on the preposterous. (See [50] and [56].) The main application was dismissed with costs and the currency was declared forfeited to the state.

S v SCHOLTZ AND OTHERS 2018 (2) SACR 526 (SCA)
Corruption — Sentence — Factors to be taken into account — Effect of confiscation order on sentence to be imposed — Not inflexible rule that such order be disregarded — In casu, confiscation order in excess of R60 million — Despite court's

sympathy for accused's personal circumstances, no convincing reasons why statutory minimum sentence not to be imposed.
Corruption — What constitutes — Nature of statutory offence and effect of repeal of Corruption Act 94 of 1992 by Prevention and Combating of Corrupt Activities Act 12 of 2004 — Ambit of offence narrower under latter Act — Fight against corruption requiring legislative attention to definition of offence.

The appellants were convicted in the High Court on charges of corruption and money-laundering. The second to seventh appellants and the ninth appellant were companies, and they were accordingly sentenced to substantial fines. The first and eighth appellants, who were natural persons, were each sentenced to 15 years' imprisonment. They appealed against their convictions and sentences.
Evidence was led during the lengthy trial showing that the appellants had leased office space to various departments of the Northern Cape Provincial Government at inflated prices, without complying with supply-chain management procedures as laid down under the Public Finance Management Act 1 of 1999 and Treasury Regulations. They had also on occasion supplied and charged for office space that was not needed or exceeded the government's requirements. A pattern of transactions revealed a process by which the first appellant found office accommodation for government departments and, through the intervention of the eighth appellant (at the time the provincial secretary of the ruling party, but who had previously been the MEC for Transport, Roads and Public Works in the Northern Cape Government), pressurised departmental officials to enter into lease agreements on terms favourable to the lessors, which enabled the lessor companies to raise finance and thereby acquire ownership of the properties in question.
Although not necessary for its decision on the merits of the conviction on the counts of corruption, the court on appeal deemed it necessary to comment on the issue raised in the court a quo on the implications of the enactment of the Prevention and Combating of Corrupt Activities Act 12 of 2004 (the PCCA Act) and specifically whether its repeal of the Corruption Act 94 of 1992 had revived the common-law crime of bribery. The court expressed the hope that the executive, which daily expounded the necessity of fighting corruption, would take heed of the comments of learned authors, that the PCCA Act had in fact weakened the fight against corrupt activities by having a narrower definition of corruption than that in Act 94 of 1992 (that it could be interpreted as restricting liability to instances where the gratification was offered to act in a certain way in the future). It remarked further, however, that offenders would not be able to escape liability by simply arranging for gratification to be paid or delivered after the event: in both ss 3*(a)* and *(b)* of the PCCA Act the offence was committed when a person either accepted or gave the gratification or when such person agreed or offered to accept or give the gratification. The sections in their normal connotation therefore envisaged that a person who undertook to act in a way which constituted corruption committed the offence, even if the promised gratification was only forthcoming after the event. It was furthermore clear that agreement between a corruptor and corruptee, on precisely what action was required for any gratification to be given, need not be reached, and a general, common understanding sufficed. Neither was it necessary for the nature or amount of the gratification to be specifically agreed, before the crime of corruption was committed.

The court then considered the merits of the convictions and, in respect of the first appellant, set aside the conviction of corruption on one of the counts, but upheld the conviction on another, and set aside a conviction on a charge of money-laundering, but upheld the conviction on another count. In respect of the ninth appellant, the court set aside a conviction on one count of money-laundering, but upheld the conviction on a count of corruption. Save for the appeals of the second and third appellants on two counts of money-laundering, and the appeal of the ninth appellant on one count of money-laundering being upheld, the appeals of the other appellants were dismissed.
In respect of sentence, the court remarked that the legislature intended corruption to be severely treated, which was reflected in a possible sentence of life imprisonment being imposed upon conviction. (See [200].) The court considered the argument on behalf of the first appellant that the court a quo had misdirected itself in not properly taking into account the value of the assets forfeited to the state by order of the court pursuant to an application under s 18 of the Prevention of Organised Crime Act 121 of 1998. It held that an inflexible rule that, because the sentence imposed on an offender was generally to be disregarded in considering whether a confiscation order should apply, the converse should also apply, would be unjust; especially in a case such as the present where the amount of the confiscation order was in excess of R60 million. Thus, the court had to take into account the fact that compensation orders had been made, however, as the rationale of a confiscation order was to deprive an offender of the benefits of his or her offence, it would be wrong to place undue emphasis upon it as a factor relevant to sentence. Standing alone, it ought in no way be determinative of whether a prescribed minimum sentence ought not to be imposed. That was all the more so in a case such as the present, where the sentence prescribed, reflecting the severity of the crime, was a lengthy period of imprisonment. (See [204] – [205].) The court, in the circumstances, dismissed the appeals against sentence.

S v SM 2018 (2) SACR 573 (SCA)

Evidence — Witness — Oath — Administering of — Mental state of witness subjected to some doubt — Court failing to hold inquiry in terms of s 164 of Criminal Procedure Act 51 of 1977 — Such failure fatal — Proceedings set aside.

The appellant was convicted of rape in a regional magistrates' court and sentenced to life imprisonment. At the outset of the trial the prosecutor asked the magistrate to amend the charge-sheet to reflect that the complainant was 'not mentally stable'. The magistrate then explained to the appellant that it had been placed on record by the state that during consultation it transpired that the complainant was not mentally sound. Immediately thereafter, though, the complainant was sworn in in the usual manner and she proceeded to testify, and the trial proceeded to finality, with the appellant being found guilty. In his evidence the complainant's uncle described the complainant as 'not mentally sound', and based his opinion on the fact that the complainant had not passed the first grade at school and was receiving a social grant. This was the only evidence led before the trial court on the complainant's mental capacity.
Held, that, in the present case, the oath or affirmation could not, in the circumstances, be administered in the ordinary course. At the very least an inquiry in terms of s 164 of the Criminal Procedure Act 51 of 1977 should have been

conducted. Clearly, none of those considerations occupied the mind of the magistrate and as a result he never conducted an inquiry into whether the complainant could distinguish between truth and falsehood. The failure to hold such inquiry was fatal and the appeal had to be upheld and the conviction and sentence set aside.

S v MN 2018 (2) SACR 580 (GP)

Trial — Mental state of accused — Enquiry in terms of s 77 of Criminal Procedure Act 51 of 1977 — Court made aware of possible mental disturbance of accused and relying on memorandum bearing official stamp of hospital indicating that not suffering from any such disturbance — Document not indicating whether psychiatric hospital or by whom accused examined — Provisions of s 77(1) peremptory and irregularity occurring vitiating trial.

The appellant was convicted in a regional magistrates' court and sentenced to life imprisonment for the rape of his stepchild, an 11-year-old girl, in contravention of s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. In an appeal against the conviction and sentence his counsel contended that the court a quo had failed to properly apply the provisions of the Criminal Procedure Act 51 of 1977 (the Act) relating to an investigation into his mental state. It appeared that the appellant's mother had raised with the prosecutor at the trial that the appellant suffered from a mental illness. The matter was postponed a few times for the issue to be investigated and a memorandum was obtained bearing the official stamp of a hospital, stating: 'A. No mental disturbances. Apparently, there is no mental condition evidence during the medical interview.' It was not clear whether the hospital in question was indeed a psychiatric hospital as intended by s 79 of the Act or by whom the appellant had been interviewed for the purpose of the investigation. *Held*, that the provisions of s 77(1) of the Act were peremptory and that, when the court formed an impression, or its attention was directed to the fact, that the accused had a mental disturbance, the court should grant an order in terms of the section that his mental condition be investigated as prescribed by s 79. In the absence of any indication that a proper examination had been undertaken and in light of the insufficiency of the information in the memorandum, an irregularity had occurred which vitiated the proceedings. The conviction and sentence accordingly had to be set aside.

S v MHLOLA 2018 (2) SACR 588 (WCC)

Admission of guilt — Setting of by prosecutor — Amount exceeding determination made for district — Notice ultra vires provisions of s 57(5)*(a)* of Criminal Procedure Act 51 of 1977 and irregular — Magistrate correct in setting aside payment of fines.

In a matter submitted for special review, the court was required to determine whether a prosecutor is entitled to fix the amount of an admission-of-guilt fine in excess of a determination made under s 57(5)*(a)* of the Criminal Procedure Act 51 of 1977; and, if so, whether a magistrate was bound to confirm it when exercising discretion under s 57(7).

The prosecutor had set an admission-of-guilt fine of R100 in respect of each plug of dagga in two cases, involving 12 and 23 plugs, respectively. The determination for

the district allowed only for admission-of-guilt fines for possession of up to 10 plugs in any case. The magistrate set aside the conviction and sentence.
Held, that in both cases the admission-of-guilt fine stipulated was not in accordance with the determination made by the magistrate for the district, but exceeded it. Section 57(5)*(a)* made it clear that it was only in instances where a magistrate had not made such a determination that the admission-of-guilt fine in a notice could be fixed by a prosecutor. It followed that both notices were issued ultra vires the statutory provisions of the section and this alone rendered the proceedings resulting in payment of the admission-of-guilt fines irregular.
Held, further, that a reading of ss 57(4) – (7) made it clear that the prosecutor's discretion under s 57(4) was limited to reducing the amount of an admission-of-guilt fine, on good cause shown, to an amount less than a determination made under s 57(5)*(a)* where such determination had been made. And it was for the judicial officer concerned, not the prosecutor, to determine whether or not a conviction or sentence under ss (6) was not in accordance with justice or was not in accordance with a determination made by the magistrate. Any other interpretation would lead to the absurd result that the powers of a judicial officer under s 57(7) were subject to a prosecutor's overriding discretion under s 57(4). The magistrate was accordingly correct in setting aside the convictions and sentences.

S v MT 2018 (2) SACR 592 (CC)

Appeal — Leave to appeal — To Constitutional Court — Whether constitutional issue raised — Application of prescribed minimum-sentence legislation — Failure to inform accused of such — Effect of such failure — Challenge to court's decision that wrong on facts not constitutional issue.
Appeal — Leave to appeal — To Constitutional Court — Whether constitutional issue raised — Application of prescribed minimum-sentence legislation — Failure to inform accused of such — Question whether such failure infringed accused's right to fair trial constituting constitutional issue — Whether accused's right infringed in particular case not substantiated.
Three cases in which the issues were identical came before the court and were argued as one. All three of the applicants had been sentenced to life imprisonment and contended that their rights to a fair trial had been infringed by their not having been informed of the prescribed minimum sentences in the Criminal Law Amendment Act 105 of 1997 that were imposed on them. Two of the applicants also contended that the magistrates presiding over their trials were precluded from referring their cases to the High Court for sentencing, as they had been charged with rape in the magistrates' court and therefore reasonably expected that they would be sentenced within the jurisdiction of that court up to a maximum term of 10 years' imprisonment.
Held, that a significant proportion of each case concerned factual determinations by the courts a quo: on the question whether the applicants were prejudiced by not knowing that the minimum-sentencing legislation might apply, the applicants failed to prove such prejudice; and what the applicants may have done differently had they known that the prescribed minimum-sentencing legislation applied. A challenge to a decision on the basis that it was wrong on facts was not a constitutional matter and fell outside of the court's jurisdiction.

Held, further, that s 52(1) of Act 105 of 1997 (as it existed at the relevant time) provided that the magistrates' court 'shall stop the proceedings and commit the accused for sentence by a High Court having jurisdiction' if the prescribed sentence for the crime for which the accused was convicted exceeded its jurisdiction. The magistrates' court was not empowered to ignore that statutory injunction and the issue was not a point of law that ought to be considered at the present stage.
Held, further, that the question whether the failure to include the relevant section of the minimum-sentencing legislation in a charge-sheet infringed an accused's right 'to be informed of the charge with sufficient detail to answer it' was a constitutional matter, and the court therefore had jurisdiction to determine it. (See [35].)
Held, further, that, although it was desirable that the charge-sheet referred to the relevant penal provision of the minimum- sentencing legislation, this should not be understood as an absolute rule, and each case had to be judged on its particular facts. The cases before the court, however, were entirely unsubstantiated and failed to present arguments as to which Supreme Court of Appeal approach was constitutionally correct. Questions around these issues might yet be considered and dealt with by the court if they arose in a subsequent matter. (See [40] – [43].) The applications for leave to appeal were dismissed.

ALL SA LAW REPORTS NOVEMBER 2018

ABSA Bank Limited v Mokebe and 3 related matters [2018] 4 All SA 306 (GJ)

Civil procedure – Execution against immovable property – Mortgage bond foreclosure – Procedural requirements.

Civil procedure – Issue was whether a court faced with an application by the mortgagee for an immediate money judgment has a discretion to postpone an application for executability to afford the mortgagor an opportunity to remedy its default – Court held that in exceptional circumstances, a reserve price should be set by a court in all matters where execution is granted against immovable property, which is the primary residence of a debtor, where the facts disclosed justify such an order.

How a mortgage bond, registered over immovable property, affects rights of ownership lay at the heart of the present case. When a mortgagor (“home owner”) defaults on repayment of the loan secured by the mortgage bond, the mortgagee invariably exercises its rights in terms of the agreement of loan, and forecloses by seeking to execute against the property. Generally, the rights include the right to call up the loan, accelerate payment and claim execution against the property.

In April 2018, a number of foreclosure matters served in the motion court, invoked section 14(1)(b) of the Superior Courts Act 10 of 2013. Subsequent thereto, the Judge President of the Division issued a directive in terms of section 14(1)(a), setting out the issues requiring determination.

Held – The critical issue was whether a court faced with an application by the mortgagee for an immediate money judgment has a discretion to postpone an application for executability to afford the mortgagor an opportunity to remedy its default.

Prior to the amendment of Uniform Rule 46 and the promulgation of rule 46A, the execution procedure that lenders followed did not *per se* require the intervention of a court. The amended rule introduced specific and detailed provisions applicable to court oversight. That, in turn, requires full disclosure of all relevant facts to the court when judgment is sought as any monetary judgment may impact on the discretion which a court is required to exercise when execution is sought.

The money judgment is an intrinsic part of the cause of action and inextricably linked to in the *in rem* claim for an order for execution. The default of the debtor and the money judgment is a pre-condition for the entitlement of the mortgagee to foreclose. It is obligatory for a mortgagee seeking execution to find a cause of action based on execution to allege and prove its entitlement to the money judgment which, in turn, is a necessary averment in order to sustain the action to obtain an order for execution. The Court rejected the submission that rule 46(1)(a)(i) presupposes that a money judgment may be obtained separately from and prior to, an order of executability. The fact that both the money judgment and the order for executability must be given at the same time, is not in conflict with the rule which requires certain steps against movables prior to execution against the immovable property. It is purely a prior procedural step before a writ against the immovable property is issued – and is separate from the monetary judgment and the order declaring the immovable property executable. It was concluded that a duty rests on banks to bring their entire case including the money judgment, based on a mortgage bond, in one proceeding simultaneously. Piecemeal hearing of applications for foreclosure are undesirable and not cost effective.

The Court held further that execution against movable and immovable property is not a bar to the revival of the agreement until the proceeds of the execution have been realised. Any document initiating proceedings where a mortgaged property may be declared executable must draw the attention of the defendant to section 129(3) of the National Credit Act 34 of 2005 allowing him to pay the credit grantor all amounts overdue together with the credit provider's permitted default charges and reasonable taxed or agreed costs of enforcing the agreement prior to the sale and transfer of the property and so revive the credit agreement. Finally, it was held that save in exceptional circumstances, a reserve price should be set by a court in all matters where execution is granted against immovable property, which is the primary residence of a debtor, where the facts disclosed justify such an order.

Commissioner for the South African Revenue Service v Volkswagen South Africa (Pty) Ltd [2018] 4 All SA 289 (SCA)

Tax – Income Tax – Deduction from taxable income – Section 22(1)(a) of the Income Tax Act 58 of 1962 requiring taxpayer to attach a value to trading stock in determining its taxable income – Value of trading stock at year end – Whether value of taxpayer's trading stock had diminished entitling SARS to make a just and reasonable allowance – SARS may only grant a just and reasonable allowance in respect of a diminution in value of trading stock under section 22(1)(a) where some event has occurred in the tax year in question causing the value of the trading stock to diminish, or where it is known with reasonable certainty that an event will occur in the following tax year that will cause the value of the trading stock to diminish.

The respondent ("Volkswagen") was the South African subsidiary of the well-known German motor manufacturer, Volkswagen AG. At the end of each tax year, Volkswagen held, as trading stock, a number of unsold vehicles. Section 22(1)(a) of

the Income Tax Act 58 of 1962 (the "Act") required it to attach a value to that trading stock in determining its taxable income. That value is usually the cost price of the stock. In its tax returns for 2008, 2009 and 2010 years Volkswagen calculated the value of its trading stock at year end using its net realisable value ("NRV") in accordance with the provisions of International Accounting Standard 2 ("IAS 2") and the IFRS-Accounting Handbook for the Volkswagen Group. That yielded an amount less than the cost price of the trading stock and it claimed a deduction from the cost price of the trading stock represented by the difference between that and NRV.

After an extensive audit of Volkswagen's tax affairs, the appellant ("SARS") rejected the contention that NRV represented the diminished value of the trading stock at the end of the relevant years, and therefore disallowed the deductions. Revised assessments levying additional tax for those three years were issued. An appeal by Volkswagen against the revised assessments was upheld by the Tax Court, which set the revised assessments aside. That resulted in the present appeal.

Held – In determining its taxable income, a trading entity is entitled to deduct from its income expenses incurred in the production of that income. During the tax years in question, Volkswagen had derived income from the sale of vehicles and was therefore entitled to deduct from that income the costs incurred in the production and acquisition of those vehicles. But, from a timing perspective, there was not a perfect correlation between the income it earned during any given year and the costs it incurred in that year in the manufacture and acquisition of its trading stock. In order to reflect its taxable income accurately, the value of trading stock at the beginning of the tax year and sold during the year was included in its cost of sales and the value of its trading stock at the end of the tax year was deducted from the cost of sales. In this way it determined the actual cost of the sales effected during the tax year and the sales effected during the year were matched with the cost of effecting those sales.

From a tax perspective, the lower the value attributed to closing stock, the higher the cost of sales and the lower the taxable income for that year. If taxpayers had a free hand in determining the value of trading stock at year end it would open the way for them to obtain a timing advantage in regard to the payment of tax, by adjusting the value of closing stock downwards. Sections 22(1)(a) and (b) of the Act are directed at avoiding such manipulation by prescribing the basis upon which taxpayers are to value trading stock at the beginning and end of each year of assessment. The starting point is that trading stock at year end is to be valued at cost price.

During the tax years under consideration in this appeal, section 22(1)(a) read, "The amount which shall, in the determination of the taxable income derived by any person during any year of assessment from carrying on any trade (other than farming), be taken into account in respect of the value of any trading stock held and not disposed of by him at the end of such year of assessment, shall be (a) in the case of trading stock other than trading stock contemplated in paragraph (b), the cost price to such person of such trading stock, less such amount as the Commissioner may think just and reasonable as representing the amount by which the value of such trading stock . . . has been diminished by reason of damage, deterioration, change of fashion, decrease in the market value or for any other reasons satisfactory to the commissioner." The dispute in this case was whether the value of Volkswagen's trading stock had diminished entitling SARS to make a just and reasonable allowance under the section. In practical terms, an allowance permits the taxpayer to reflect the value of its trading stock at less than cost price in its tax return. Volkswagen contended

that it should be entitled to do this on the basis of the NRV of its trading stock at each of the three year ends. The effect of the Tax Court's judgment was that where the valuation of trading stock at NRV at the close of a fiscal year reflected a value lower than cost price, SARS was obliged to make an allowance for the diminution in value of the trading stock in accordance with section 22(1)(a). The correctness of that view had to be determined on appeal.

Section 22(1)(a) empowers SARS to allow a deduction from the cost price, by way of a just and reasonable allowance, in certain circumstances where the value of the trading stock has diminished. The taxpayer is required to determine the value of its trading stock at a particular point in time, namely, the end of the tax year. That is an exercise of looking back at what happened during the tax year in question. The section is accordingly not concerned with what may happen to the trading stock in the future, but with an enquiry as to whether a diminution in its value has occurred at the end of the tax year. The Court held that SARS may only grant a just and reasonable allowance in respect of a diminution in value of trading stock under section 22(1)(a), in two circumstances. The first is where some event has occurred in the tax year in question causing the value of the trading stock to diminish. The second is where it is known with reasonable certainty that an event will occur in the following tax year that will cause the value of the trading stock to diminish.

It is only when the value of the trading stock has been diminished that an allowance may be made. The cost price of the goods is the baseline against which any diminution in the value of the goods must be measured. Thus, on a proper interpretation of section 22(1)(a), the cost price of the goods, and not the actual or anticipated market value on their sale, is the benchmark against which any claimed diminution in value is to be measured.

In determining whether the Tax Court's conclusion was justified in the light of the construction placed upon section 22(1)(a) as set out above, the question was whether NRV represents the diminished value of trading stock in terms of that section. The Court held that the use of NRV is inconsistent with two basic principles that underpin the Act. The first is that taxable income is determined and taxation levied from year to year on the basis of events during each tax year. The second is that using NRV has the effect that expenses incurred in a future tax year in the production of income accruing to or received by the taxpayer in that future tax year, become deductible in a prior year. That is inconsistent with the basic deduction provision in section 11(a) of the Act, that what may be deducted in any tax year in the determination of taxable income is expenditure and losses actually incurred in the production of the income.

The Tax Court's decision was thus wrong and the appeal was upheld.

D'Oliveira v Road Accident Fund [2018] 4 All SA 341 (WCC)

Personal Injury/Delict – Motor vehicle accident – Claim for compensation – Contingency deductions – Court's approach explained – Entitlement to be compensated for domestic help necessitated by accident depending on need and ability to provide proof of extent of expenditure and the fact that it had actually been incurred.

Just before he and his family could relocate permanently to the United Kingdom, the plaintiff was involved in a serious motorcycle collision. He suffered extensive injuries, resulting in his move only occurring the following year.

In the present action, the plaintiff sought compensation arising from the injuries sustained in the collision.

Most of the issues having been settled, the questions for determination by the Court revolved around two discrete issues. The first was the question of the contingency deduction to be applied to certain statutory benefits payable to the plaintiff in the United Kingdom under the social security programme available to residents of that country. The second question was whether the plaintiff was entitled to be compensated for the cost of domestic help in the United Kingdom as a consequence of allegedly being unable to attend to certain domestic chores and personal functions which he otherwise would have been able to fulfil but for the injuries sustained in the collision. As a resident of the United Kingdom, the plaintiff was automatically entitled to the receipt of a personal independence payment ("PIP"), which was a welfare payment which the plaintiff received from the government of the United Kingdom by virtue of the fact that he was injured and unable to fully support himself. The parties agreed that the value of the PIP was a collateral payment which fell to be deducted from the plaintiff's damages award, but could not agree on the extent thereof.

Held – The purpose behind applying a contingency deduction in an award for damages is to take account of the unpredictable vicissitudes of life. The quantification of the extent of the contingency lies entirely within the discretion of the Court and must be determined upon the Court's impression of the case. In fixing the contingency deduction, a court will have regard to objective factors present, common logic and expert evidence. The principal problem in establishing a fair contingency deduction in respect of the PIP benefit was that, other than through the agreed facts provided by an English employment consultant employed by the plaintiff, the Court was not apprised of the socio-economic, socio-political or projected budgetary considerations currently at play in the United Kingdom. Given the unpredictable variables, the Court could do no more than accept 20% as a fair contingency in respect of the PIP issue.

The second issue for determination was whether the plaintiff was entitled to claim the value of the services of his wife in respect of domestic help and gardening and home maintenance services in circumstances where no agreement existed between plaintiff and his wife to remunerate her for rendering the services and no payment had in fact been made to her for rendering the services, as opposed to the reasonable costs of the services. The evidence established that the plaintiff had restricted mobility, significant pain and discomfort and was manifestly not able to perform the domestic chores and render the sort of assistance which he was able to do before the injury. The real issue was whether he required domestic assistance in addition to that provided by his wife and, further, whether his wife was entitled to be remunerated for the services which she rendered so as to be of assistance to her husband. That issue raised the question of whether a spouse, in such circumstances, can expect to be remunerated for providing services which coincide with the reciprocal duties of support which spouses would ordinarily be expected to render to each other.

The point of departure in this case was the statutory provision upon which the plaintiff relied for his damages, *viz* section 17(1) of the Road Accident Fund Act 56 of 1996. In terms thereof, an injured person such as the plaintiff is entitled to be compensated for

the actual loss which he has suffered as a consequence of bodily injury sustained in a collision. Such losses are usually proved by the submission of vouchers which establish the extent of the expenditure and the fact that it has actually been incurred. A claim for compensation for the past cost of the plaintiff's wife's services in assisting him faltered at that first hurdle, as there were no vouchers to support such claim. Therefore, the plaintiff was not entitled to recover from the defendant the alleged costs of his wife's services rendered to him in the past. Based on the evidence, including the testimony of the plaintiff's occupational therapist, the Court was not persuaded that the plaintiff had made out a case for the relief sought in relation to damages to cover the cost of a care person as contemplated in the particulars of claim. At best for the plaintiff, he was entitled to be compensated for the cost of the domestic assistance referred to by the occupational therapists, as well as the assistance of a handyman-cum-gardener six times per annum. A contingency deduction had to be applied to each category. The applicable contingency deductions were set out in the Court's order.

Democratic Alliance and others v MEC for Co-operative Governance and Traditional Affairs, Eastern Cape and others [2018] 4 All SA 356 (ECP)

Local Government – Municipal council – Lawfulness of meeting of council – Existence of quorum at meeting – Termination of membership of councillor by party not possible where rules of natural justice and due process, as provided for in party's constitution, were not adhered to – Meeting therefore remaining quorate despite purported termination of membership of councillor, and resolutions taken at meeting confirmed as lawful.

Until 27 August 2018, the second applicant ("Trollip") was executive mayor of the third respondent (the "municipality") and a third party ("Lawack") was Speaker of the municipal council. On 27 August, a duly constituted meeting (the "meeting") of the council commenced with Lawack presiding as Speaker. All 120 councillors making up the council were present. The voting alliance consisting of the first applicant (the "DA") and the third to fifth applicants was represented by 60 councillors and that consisting of the tenth to thirteenth respondents was represented by 60 councillors.

Included on the agenda for the meeting were motions received from various councillors for the removal of the Speaker of council from office and the election of a new Speaker, and the removal of the executive mayor and the election of a new executive mayor. The first motion which arose was that submitted by the sixth respondent ("Bobani"), for the removal of the Speaker from office and the election of a new Speaker. There were 60 votes for the motion and 59 votes against it, with the eighth respondent ("Manyati"), a councillor representing the DA in the council, having abstained from voting in the face of a specific resolution of the DA's caucus in the council to oppose the motion. Lawack accordingly announced that the motion had been carried and he left the chair, whereafter the fourth respondent ("Mettler"), the municipal manager, took Lawack's place as chairperson of the council. A request to Mettler to provide an opportunity to caucus prior to commencement of the process to select a new speaker was refused on the ground that the proceedings may only be interrupted by the Speaker. The meeting was however, then adjourned so that legal opinion on that issue could be obtained. During the adjournment, a number of statements and social media clips were handed to Trollip, providing evidence that Manyati had publicly declared his intention to resign his membership of the DA. The federal executive of the DA resolved that Manyati's membership of the DA had ceased with immediate effect and conveyed that decision to Mettler. The meeting was again

adjourned to allow Mettler to seek legal opinion on the matter of the cessation of Manyati's membership of the DA. The legal advice received by him he was that he was obliged to declare a vacancy as a result of the termination of Manyati's membership of the DA. Manyati in the meantime maintained that he remained a councillor until such time as his expulsion was lawfully confirmed after a disciplinary process and/or the DA had taken administrative steps for his removal as a councillor.

Taking the view that Manyati's position had been declared vacant and the meeting would therefore be without a quorum after the DA alliance had left, the DA councillors (except for Manyati) and their alliance members left the Council chamber. Accepting that there was no quorum, Mettler declared that the meeting could not continue, and also left. On subsequently being advised that he had incorrectly declared a vacancy, Mettler communicated his intention to convene a further council meeting the following day. A dispute arose as to what happened thereafter. While Mettler and Trollip alleged that Mettler was still available to chair the meeting, the respondents alleged the contrary. Late in the day, the second respondent ("Roestorff") arrived at the council chamber and took the chair. According to Bobani, councillors from the remaining majority tried to contact Mettler to proceed with the meeting, but Mettler allegedly declined, insisting that he would reschedule the council meeting to the following day. The meeting proceeded under the chairmanship of Roestorff, and the fifth respondent was elected as Speaker.

In the present application, the applicants sought the review and setting aside of the election of the fifth respondent as Speaker and certain other decisions taken at the meeting. A declaration was also sought that the meeting of the municipal council on 27 August 2018 was not properly constituted and was therefore unlawful and void.

Held – The first question to be addressed on the merits was whether the meeting was quorate. The applicants suggested in their founding papers that Manyati was no longer a member of the DA at the relevant time, and that there was therefore a vacancy, which would have meant, if that were correct, that only 60 councillors stayed behind, which was insufficient for a quorum. The Court held that the DA should have been fully aware of the provisions of its own constitution, which would have made a termination of Manyati's membership on 27 August 2018, without any prior notification to him, and without affording him an opportunity to present his case, impossible. The DA constitution guaranteed the right of its members not only to the principles of natural justice but also to the principles of a fair process. It was found that Manyati was still a member of the DA and a duly elected councillor on 27 August 2018. There was therefore factually no vacancy at any point on 27 August 2018 and because there was no vacancy there was, at all material times, a quorum of 61 councillors.

The meeting had not been formally adjourned immediately after Mettler's purported declaration of a vacancy in the council. In accordance with the council rules, the meeting should, after the departure of the DA coalition, have continued until it had completed its business.

It then had to be determined whether the municipal manager was available to chair the meeting. Section 36(3) of the Local Government: Municipal Structures Act 117 of 1998 provides that where the municipal manager of the municipality is not available, a person designated by the MEC for Local Government in the province shall preside over the election of a speaker. The provisions of section 36(3) are plainly intended to prevent a municipal manager from disabling the workings of the council by simply

refusing to preside over the election of a Speaker. Mettler was aware that 61 councillors were left in the chamber, that his ruling that the meeting was not quorate was incorrect, that his ruling had to be retracted, and that the rules of order required the meeting to continue uninterrupted. Despite that, he declined to return to the chamber. Such refusal rendered him unavailable to chair the meeting and the MEC then validly proceeded in terms of the provisions of section 36(3). The latter section provides that Schedule 3 to the Act applies to the election of a Speaker. The Court confirmed that there was at least substantial compliance with the provisions of Schedule 3 by the respondents.

Upholding a counter-application by Manyati on the merits, the Court declared that Manyati's membership of the DA still subsisted and would continue to do so until his resignation, or until the conclusion of disciplinary proceedings against him, properly brought in compliance with the DA's constitution.

Kangra Group (Pty) Ltd v Commissioner for the South African Revenue Service [2018] 4 All SA 383 (WCC)

Tax – Income Tax – Deductions from taxable income – Breach of contract – Payment of damages – Whether claimable as deduction – Section 11(a) of the Income Tax Act 58 of 1962, which deals with deductions which may legitimately be made by a taxpayer in relation to its taxable income provides that in determining the taxable income derived by any person from carrying on any trade, deductions may be allowed in respect of expenditure and losses actually incurred in the production of the income, provided such expenditure and losses are not of a capital nature.

The appellant (the "taxpayer") was a private company through which a well-known South African businessman ("Mr Beck") had conducted his various commercial interests before his death in 2010. In December 2001, the taxpayer and an American coal trader ("AMCI") concluded an agreement in terms of which the taxpayer was to deliver an agreed amount of coal to AMCI between January and December 2002. A second agreement to similar effect was concluded in December 2002. The price at which the coal was to be sold was specified in the agreements as US$27,50 *per* metric ton. During the currency of the second agreement, there was a significant escalation in the international price of coal, but being locked into the two agreements, the taxpayer was unable to sell its coal on the open market at the prevailing higher price. It seemed that Mr Beck weighed up his options and decided to renege on the contractual obligations to AMCI and to sell the coal on the open market at the higher price. AMCI commenced arbitration proceedings in Johannesburg in 2006 for contractual damages for the non-delivery of coal, claiming in excess of US$15 million. The matter was eventually settled on 5 September 2007 when Mr Beck conceded the claims and agreed that the taxpayer would pay AMCI the sum of R90 million. Payment was made by the taxpayer to AMCI on 6 September 2007.

When the taxpayer submitted its return for the 2007 tax year, it sought to claim a deduction of R90 million arising from the settlement with AMCI. Its stance was that that amount had been reasonably and *bona fide* incurred in the production of income and that the amount was wholly and exclusively laid out and expended for the purposes of the company's trade. In 2012, the respondent ("SARS") assessed the taxpayer on the basis that the amount of R90 million was not deductible. That led to an appeal by the taxpayer to the Tax Court. The question in that court was whether the payment of the amount agreed upon in settlement of the arbitration proceedings

was deductible as "relevant expenditure" in terms of section 11(a) read with section 23 of the Income Tax Act 58 of 1962. The Tax Court dismissal of the appeal led to the present appeal in terms of section 133 of the Tax Administration Act 28 of 2011.

Held – Section 11(a) of the Income Tax Act, which deals with deductions which may legitimately be made by a taxpayer in relation to its taxable income provides that in determining the taxable income derived by any person from carrying on any trade, deductions may be allowed in respect of expenditure and losses actually incurred in the production of the income, provided such expenditure and losses are not of a capital nature. The approach to the question of whether an expense has been incurred in the production of income, as contemplated in section 11(a) involves determining whether the act to which the expenditure is attached is performed in the production of income and whether the expenditure is linked to it closely enough. Consequently, it was incumbent on the taxpayer to establish before the Tax Court that the conclusion of the settlement agreement with AMCI was linked directly with the actual earning of income by the company before it could qualify as a deduction. In other words, the question was whether the taxpayer proved that such income as was produced by repudiating the supply agreements with AMCI, accrued to it as a consequence of such repudiation.

On the question of whether the payment of contractual damages could be termed expenditure in terms of section 11(a), the Court held that the question had to be answered in the negative. The taxpayer had not established that the relevant expenditure resulted in it earning any income. It was found further that a sufficiently direct link between the expenditure claimed and the income earned had not been established. As the taxpayer did not discharge the onus of establishing that it was entitled to claim the general deduction contended for, the appeal against that finding failed.

The taxpayer's appeal against the levying by SARS of interest in terms of section 89*quat*(3) of the Income Tax Act was upheld on the ground that the Tax Court had failed to properly exercise its discretion in considering whether to grant a remission of the interest levied.

Mahlangu and another v Minister of Defence and Military Veterans and another [2018] 4 All SA 402 (GP)

Constitutional and Administrative Law – South African National Defence Force – Members of reserve force – Termination of service – Application for judicial review – Failure to exhaust internal remedies as required by section 7(2)(a) of the Promotion of Administrative Justice Act 3 of 2000 – Section 7(2)(c) of the Promotion of Administrative Justice Act allowing court to condone failure.

The applicants were appointed to the reserve force within the South African National Defence Force ("SANDF"). They maintained that their appointments as officers commanding had been unlawfully terminated in April 2017. They sought the review and setting aside the alleged terminations, and sought to be reinstated.

By contrast, the respondents denied that the applicants' appointments were terminated, explaining that membership of the reserve force was ongoing for the duration of a member's appointment, but actual service was part-time and subject to being called up. Members were called up for fixed periods on a rotational basis, depending upon the needs of the regiment. The applicants' last call-up was said to have expired by effluxion of time on and they remained liable to be called up, subject

to rotation and need. The second respondent explained how the reserve force operated. Call-up orders were made at the discretion of the relevant general officer ("GOC") commanding the formation in question, who only had authority to call-up members for a maximum of 180 days in a year. In 2017, the applicants were called up for period of three months from 1 February to 30 April 2017. The applicants' contracts of service stipulated that the SANDF had no obligation to utilise the member for the period for which the member undertook to be available.

Held – Section 11 of the Defence Act 42 of 2002 provides that members of the reserve force serve on a part-time basis for such periods as they have been contracted for unless their service is terminated in accordance with the law. The regulations applicable to the present dispute were Regulations for the Reserve Force 2009 (the "2009 Regulations"). Regulation 15 of the 2009 Regulations deals with contracts of service for volunteer members.

Before considering the review applications, the Court had to address a preliminary issue regarding the exhaustion of remedies. The respondents contended that the applicants had failed to exhaust the internal remedies available to them in terms of section 61 of the Defence Act as they were required to do in terms of section 7(2)(a) of the Promotion of Administrative Justice Act 3 of 2000. The latter section provides that a court shall not review administrative action unless any internal; remedy provided for has first been exhausted. It therefore had to be determined whether or not there were internal remedies available to the applicants, which they should have exhausted before bringing judicial review proceedings.

Section 61 of the Defence Act deals with the procedures for redress of grievances. The Grievance Regulations were applicable to the applicants and the grievance process therein provided an internal remedy to the applicants as contemplated in section 7(2) of the Promotion of Administrative Justice Act. The Military Ombud Act 4 of 2012 also established a complaints mechanism representing an internal remedy that was available to the applicants.

Finding that neither of the applicants had exhausted the internal remedies available to them, the Court then turned to consider whether the failure could be condoned. The duty to exhaust remedies is not absolute. Section 7(2)(c) of the Promotion of Administrative Justice Act requires three things to be present before a court may exempt a person from the obligation to exhaust internal remedies. There must be an application for exemption; the applicant must show that there are exceptional circumstances present; and the Court must consider it to be in the interests of justice to grant the exemption. While the applicants did not bring an application for exemption, the Court found that there had been sufficient compliance with the requirement. It also found that the remedies available to the applicants were not adequate and effective in the circumstances of this case, and that constituted exceptional circumstances and showed that it was in the interests of justice to exempt the applicants from the duty to exhaust their internal remedies.

It was then left to the Court to consider the merits of the judicial review application. The Court was satisfied that the applicants had proven the existence of a decision to terminate their service. The question was whether the decisions were reviewable or unlawful. Any decisions terminating the applicants' appointments as officers commanding their respective units had to comply with regulation 11(3) and (4) of the 2009 Regulations. In terms thereof, termination could only be brought about by the

chief of the SANDF and only after the affected persons had been informed of the intended termination and given an opportunity to respond. As those requirements were not met, the decisions were unlawful, invalid and stood to be reviewed and set aside.

The impugned decisions were set aside and the applicants reinstated to their respective positions.

Pioneer Foods (Pty) Ltd v Minister of Finance and others [2018] 4 All SA 428 (WCC)

Trade (Customs and Excise) – Import duty tariff – Adjusted variable wheat import duty tariff – Implementation of an adjusted variable wheat import duty tariff – Recommendation by Minister of Trade and Industry.

Trade (Customs and Excise) – Proper characterisation of the powers of the Minister of Finance in terms of section 48(1)(b) of the Customs and Excise Act 91 of 1964 – Powers of the Minister when exercising his powers under section 48(1)(b) remain discretionary ie he is not obliged to follow the recommendation of the Minister of Trade and Industry.

The sixth respondent, the International Trade Administration Commission of South Africa ("ITAC") made a recommendation via the Minister of Trade and Industry, resulting in the implementation by the Minister of Finance (the "Minister") implementing an adjusted variable wheat import duty tariff on 23 June 2017. The variable nature of the tariff was due to the fact that it changed, in general terms, as a result of adjustments to the global price of wheat and the exchange rate. A comparison was made between the three-week moving average of the "world reference price" and the Dollar-based reference price over the same period, and if the three-week moving average varied by more than US$10 per ton, that would constitute a trigger event causing an adjustment to the tariff.

As a manufacturer and distributor of, amongst others, wheat-based products, the applicant sought an urgent order in Part A of its application compelling the Minister of Finance as well as National Treasury (the "respondents") to publish a certain adjusted wheat import tariff in the *Government Gazette* by not later than 8 September 2017, pending the determination of Part B (the "present proceedings"). In Part B, the applicant sought a declaration that the Minister of Finance was under a duty, to publish in the *Government Gazette*, any adjustment to the variable tariff applicable to imported wheat upon receipt thereof from the Minister of Trade and Industry within a reasonable period of such receipt; and that such a period is 10 working days, alternatively such other period determined by the Court.

Held – The central issue was the proper characterisation of the Minister's powers under section 48(1)(b) of the Customs and Excise Act 91 of 1964, which authorises him to make amendments to the level of import duties reflected in Parts 1 and 2 of Schedule 1 thereof pursuant to a request to do so from the Minister of Trade and Industry by publication in the *Government Gazette*. The adjusted tariff has no force and effect until it is published having regard to the legislative framework of the International Trade Administration Act 71 of 2002, the Customs and Excise Act and the Public Finance Management Act 1 of 1999, as well as section 41 of the Constitution, the Court found that the powers of the Minister when exercising his powers under section 48(1)(b) remain discretionary. That means that he is not obliged to follow the recommendation of the Minister of Trade and Industry. A request from the

Minister of Trade and Industry must, for purposes of section 48(1)(b),be subject to the Minister of Finance's own policy decision to implement it.

The application consequently failed.

Sime Darby Hudson and Knight (Pty) Ltd v Lerena [2018] 4 All SA 446 (WCC)

Labour and Employment – Employer's action against employee – Disgorgement of secret profits – Requirements of such action set out by court.

Personal Injury/Delict – Claim for damages – Breach of duty of good faith by employee, as owed to employer – Diverting of sales opportunities for personal benefit – Court finding breach of fundamental obligation of loyalty and good faith to the employer, leading to breach of employment contract.

During his employment by the plaintiff, the defendant was responsible for the management of the plaintiff's commercial relationship with its many customers in relation to the marketing and sale of its products ("Crispa Gold" or "Crispa"). His duties included procuring sales of Crispa for plaintiff's benefit and following up on sales opportunities. According to the plaintiff, the defendant breached those obligations by diverting sales opportunities to two companies that he owned or controlled – abusing his position with the plaintiff to procure a reduction in price for Crispa Gold which he then sold to the plaintiff's customers via his companies for his own personal benefit. It was common cause that throughout his employment (at least prior to his suspension) the defendant did not disclose his interest in the two companies ("Fast Track" and "FDC").

As a result of the above allegations, the plaintiff sued the defendant for damages, and also sought an order directing the defendant to disgorge secret profits made by him at the expense of the plaintiff. The plaintiff's claim for damages was calculated on the basis of what it referred to as "the Makro benchmark" being the price at which it sold Crispa Gold to Makro, one of its main customers, from time to time. Its case was that that price represented the base plate price – being the most competitive price at which the plaintiff could achieve its required margin.

The defendant filed a brief plea admitting the terms of his letter of appointment and that he was the sole member of Fast Track. Apart from that he denied the remaining contents of plaintiff's particulars of claim.

Held – The issues before the Court were whether the plaintiff in fact used the Makro benchmark as a "base plate price"; whether the defendant caused the plaintiff to sell Crispa Gold to plaintiff's customers at a lower price than the Makro price and by how much; whether, if proved, that was a breach of his employment contract; and whether, but for the defendant's breach of contract, the same quantities of oil would have been sold at no less than the Makro price.

Regarding the secret profits claim, the first question was whether the defendant stood in a position of confidence in relation to the plaintiff and owed it a fiduciary obligation, *inter alia*, not to place himself in a position where his personal interests might conflict with his duty and the interests of the plaintiff and which entailed that he was not entitled to make a secret profit out of the plaintiff's corporate opportunities. Secondly, it had to be determined whether his activities through Fast Track and FDC in relation to the sale of Crispa Gold breached any such fiduciary duties, that in turn

requiring a determination of whether he sold the product without the plaintiff's knowledge or whether he made a secret profit therefrom and whether such sales were corporate opportunities belonging to the plaintiff. Finally, the extent of any secret profit made had to be established.

Although the defendant disputed the existence of the Makro benchmark, having regard to the probabilities, the Court held that the plaintiff's evidence as to the Makro base plate price had to be preferred. The next issue to be addressed in respect of the damages claim was whether the defendant breached his contract by failing to adhere to the Makro benchmark pricing policy, by selling Crispa Gold to other customers at a price lower than the Makro price. An exhaustive investigation had been conducted by the plaintiff, and the Court accepted that this fact had been proven by the plaintiff. Furthermore, the evidence was clear that the defendant had caused the price difference.

The defendant was clearly under a general obligation to do his best for his employer and to conduct the plaintiff's business in good faith and for its benefit. In selling at a price below the Makro benchmark, he had breached his fundamental obligation of loyalty and good faith to the plaintiff, and thereby breached his employment contract.

The evidence established on the probabilities, that the sales made by the defendant through Fast Track and FDC would have been made by the plaintiff but for the defendant's conduct. An award for damages calculated on the basis computed by the plaintiff in an amount of R9 407 651,05 would place the plaintiff in the same position it would have been had the defendant complied with the provisions of his contract.

Turning to the general principles applicable where an employer sues an employee for disgorgement of secret profits, the Court stated that it is the duty of an employee when rendering his services always to act exclusively in the interest of the employer. An employee is not entitled to use his employment relationship with the employer without the employer's permission to make a profit or earn commission for his own account.

In order to succeed in its claim for a disgorgement of profits the plaintiff had to establish that the defendant owed it a fiduciary obligation; that in breach of that obligation the defendant placed himself in a position where his duty and his personal interest were in conflict and, that the defendant made a secret profit out of corporate opportunities belonging to the plaintiff. All those requirements were established by the plaintiff.

It was held that the defendant was liable for the payment of damages in the amount of R9,407 million, being the plaintiff's claim for damages arising out of the sale of plaintiff's products at a price less than the Makro benchmark. Concurrent judgment was granted in respect of the disgorgement claim, for payment by the defendant of R33 291 599,24.

Sugarless Company (Pty) Ltd v Quad Africa Energy (Pty) Ltd [2018] 4 All SA 486 (GJ)

Intellectual Property – Trade marks – Registration of trade marks – Issue before court was the copyright infringement relating to the respondent distributing a product which was in the same class for which the applicant's trade mark was registered and

to which the applicant's product belonged – Section 34(1)(a) of the Trade Marks Act 194 of 1993 provides that the rights acquired by registration of a trade mark are infringed by the unauthorised use, in the course of trade in relation to goods or services in respect of which the mark is registered – Court held that in deciding the applicant's case for copyright infringement, the applicant's S. Sugarless logo qualified as an "artistic work" for the purposes of the Copyright Act 98 of 1978 and attracted copyright protection.

The parties were previously in a contractual relationship, with the respondent being the applicant's exclusive local distributor. The applicant's business was based in Australia. Soon after their contract terminated, the respondent began competing with the applicant, by offering a product substantially the same as that of the applicant. The applicant's product targeted consumers of sugar free or low sugar confectionery. It stated that it created the concept and it procured the execution of the "S.Sugarless" logo, of the packaging specification, of the packaging artwork and consequently of the getup. It accordingly owned the copyright in the S.Sugarless logo as well as the packaging. It procured the local registration of the S.Sugarless logo as a trademark in class 30 (various forms of confectionery) with effect from 16 September 2015. It discovered that the respondent was distributing a competing product in the same retail outlets as the applicant. The product that the respondent was distributing was in the same class for which the applicant's trade mark was registered and to which the applicant's product belonged. When the applicant objected to the respondent's similar get-up, the respondent undertook to cease using the offending packaging and to destroy or deliver up its existing stock of the packaging and the artwork for it; and undertook not to infringe the S.Sugarless logo. However it took issue with the use of the words "sugarless" and "sugarless confectionery"; denied that the applicant owned copyright in the packaging artwork; and denied the validity of the applicant's trade mark. The respondent's logo after the objection contained the word, "Sugarlean."

Held – Section 34(1)(a) of the Trade Marks Act 194 of 1993 provides that the rights acquired by registration of a trade mark are infringed by the unauthorised use, in the course of trade in relation to goods or services in respect of which the mark is registered, " . . . of an identical mark or of a mark so nearly resembling it as to be likely to deceive or cause confusion." In terms of the badge of origin notion, there can only be actionable infringement if the offending mark suggests to consumers that the product of the alleged infringer originates from the owner of the registered mark. That is an objective test. One compares the two marks, and views them through the lens of the notional consumer of that product. If the offending mark, even if it is a close resemblance to the registered mark, conveys no more but a description of the product on which the offending mark is placed, there is no infringement.

While the first logo used by the respondent was deceptively similar to that of the applicant, the revised logo did not infringe the applicant's trade mark.

The next issue concerned the respondent's contention that the trade mark was descriptive rather than distinctive. The Court stated that the correct enquiry was not whether as an adjective "sugarless" could ever be more than descriptive, but rather whether the mark viewed as an integrated whole, with its adjective included, was inherently capable of distinguishing the applicant's product. The Court found for the applicant in that regard.

Even if wrong in the above respect, the Court believed that the applicant's case for passing-off had been established.

In deciding the applicant's case for copyright infringement, the Court held that the applicant's S.Sugarless logo qualified as an "artistic work" for the purposes of the Copyright Act 98 of 1978 and attracted copyright protection.

The Court granted the applicant appropriate relief.

UMSO Construction (Pty) Ltd v City of Johannesburg and another [2018] 4 All SA 507 (GJ)

Civil procedure – Interim interdict – Requirements – Applicant establishing prima facie right, irreparable harm if interim relief not granted, that the balance of convenience favoured it and that there was no suitable alternative remedy

Civil procedure – Locus standi – Whether individual party to joint venture has legal standing to seek relief in respect of bid where joint venture was the bidder – Court confirming standing on ground that party to the joint venture stood to benefit from the bid, if awarded, in its own right

Civil procedure – Non-joinder – Insofar as parties in new tender process would be affected by outcome of dispute, they had to be joined in the application.

In an urgent application, the applicant ("Umso") sought to interdict and restrain the first respondent (the "City") from proceeding with a tender process for the construction of civil engineering infrastructure and low cost housing.

In an earlier tender in 2015, for the same work, a joint venture to which Umso was a party had submitted a bid. UMSO was informed that on account of problems with the tax clearance certificates of UMSO and its joint venture partner, the second respondent ("Nebavest") and the withdrawal of Nebavest from the joint venture, the "bid validity had expired". UMSO sought to interdict the further processing of the new tender pending a judicial review of the decision not to proceed with the initial tender. UMSO also sought an order substituting the City's decision one confirming the award of the tender to the joint venture.

UMSO's founding affidavit was deposed to by one of its directors ("Mr Nkosi"). Stated that after providing audited financial statements in respect of both companies in the joint venture, he and a fellow UMSO director started receiving anonymous phone calls in which the caller purported to represent the City, and demanded a bribe. When UMSO refused to negotiate, the callers stated that the tender would not be awarded to the joint venture because of UMSO's unwillingness to cooperate. Two days after the last of the anonymous phone calls, the joint venture members received an email requesting updated tax clearance certificates, to which UMSO took the position that the tax clearance certificates already provided were sufficient for purposes of the bid. After eight months of silence from the City in response to requests for updates on the bid adjudication process, UMSO was advised that due to alleged fraud in connection with the tax clearance certificates provided, and due to Nebavest having in the meanwhile withdrawn from the joint venture, the joint venture would not be awarded the contract.

Mr Nkosi pointed out that neither the alleged fraud in relation to the tax certificates, nor the alleged collapse of the joint venture had ever been taken up with UMSO, and that it had not been afforded any opportunity to respond before the decision against it was made. That led to the bringing of the review application by UMSO. In February 2018, Mr Nkosi discovered that the City had decided to open a new tender process in respect of the works which were the subject matter of the initial tender. Notwithstanding the request for an undertaking not to proceed with the new tender, was advertised. That led to the present application interdict the processing of the new tender.

The City raised three points *in limine*, contending UMSO had no legal standing to seek relief because it was not the bidder in the initial tender. As the bidder was the joint venture, it was said to be the only entity that could seek relief. The second point was that the parties who submitted bids in the new tender were interested parties who ought to have been joined in the urgent application. Finally, it was contended that UMSO failed to make out any case for urgency, and that any urgency was self-created as a result of the delays in launching the application.

Held – In disputing UMSO's standing, the City that the effect of rule 14 was that an entity such as a partnership or unincorporated association must bring proceedings in the name of the partnership or the unincorporated association. Rule 14 provides that a partnership, a firm or an association may sue or be sued in its name. The use of the word "may" showed that the provision was not peremptory. UMSO therefore had a choice either to sue in the name of the joint venture or to follow the common law path and ensure that both parties to the joint venture were joined. It chose to do the latter. UMSO was a party to the joint venture and stood to benefit from the bid, if awarded, in its own right. It therefore had a direct and substantial legal interest in the dispute. The Court thus confirmed its standing to bring the urgent application.

On the issue of non-joinder, the court pointed out that UMSO sought relief that would take the form not only of reviewing the City's decision-making in relation to the initial tender, but also of confirming the award of the initial tender to it. As such the bidders in the new tender had a direct and substantial interest in the outcome of the dispute and were potentially prejudicially affected by its outcome. They therefore needed to be joined in the application. The Court decided to issue a rule *nisi* rather than dismissing the application. In terms of the rule City and the bidders in the new tender were called upon to show cause why an order should not be made as sought in the notice of motion.

The Court then turned to consider whether UMSO has satisfied the requirements for the grant of an interim interdict. It was found that UMSO had established a *prima facie* right to such relief by establishing a reasonable prospect of showing that the decision-making process pertaining to the initial tender was flawed in a manner giving rise to several potential review grounds.

The court was also satisfied that UMSO faced irreparable financial harm if the interim relief was not granted, that the balance of convenience favoured it and that there was no suitable alternative remedy.

Despite the City's disputing that urgency had been established, the Court found that UMSO was entitled to have brought the matter in an urgent basis in the circumstances of the matter.

Vaaltyn and others v Minister of Police [2018] 4 All SA 534 (ECP)

Personal Injury/Delict – Alleged unlawful arrest and detention – Section 40(1) of the Criminal Procedure Act 51 of 1977 – Lawfulness of arrest – Test to determine whether an arresting officer's suspicion of an accused person and subsequent arrest is reasonable, entails an objective enquiry involving the question whether a reasonable person in the position of the arresting officer and possessed of the same information would have considered that there were good and sufficient grounds for suspecting that the person to be arrested was guilty of the alleged offence.

On 14 November 2014, the plaintiffs were arrested by members of the South African Police Services ("SAPS") and later detained consequent to such arrest. They maintained that their arrest and detention was wrongful and unlawful and instituted action claiming damages from the defendant for their alleged unlawful arrest and detention.

The third plaintiff testified that late in the evening on 14 November 2014, he and the fourth defendant had met the first and second plaintiffs who requested them to wait with them as they were looking after a car while the owner fetched petrol. The owner did not return after a long wait, and the plaintiffs decided to remove the battery of the vehicle and other valuables which they intended to take to the home of the first two plaintiffs for safe keeping. When they were approximately ten meters away from the vehicle, they were approached by members of the SAPS. Not satisfied with the plaintiffs' explanation of their possession of the battery and other items, the police arrested the plaintiffs and took them to a police station where they were detained. Charges were withdrawn on 17 November. The third plaintiff conceded that the plaintiffs were unable to provide the name and home details of the owner of the vehicle to the police when asked. He also confirmed that his rights were explained to him upon his arrest by the police. The first plaintiff's testimony was in material respects similar.

Testifying for the defence, one of the constables who had arrested the plaintiffs highlighted conduct on the part of the plaintiffs which aroused suspicion at the time. He stated that the factors that informed his decision to arrest the plaintiffs were that a fifth person in the plaintiffs' group had fled on seeing the police; that the person who had been carrying the battery had dropped it on seeing the police; and the plaintiffs' inability to provide details of the vehicle's owner.

The defendant's case was that the arrest and detention of the plaintiffs were not unreasonable and unlawful as it was effected in terms of section 40(1) of the Criminal Procedure Act 51 of 1977, and that the plaintiffs had been lawfully arrested in terms of section 36 of the Criminal Law Amendment Act 61 of 1955.

Held – Deprivation of a person's liberty, such as arrest and detention at the hands of the police, is *prima facie* unlawful. In the present case, the reasonableness of the arresting officer's suspicion that the plaintiffs had committed an offence was supported by the facts. Although claiming to be intending to return the battery to the owner of the vehicle, the plaintiffs could not provide the police officers at the scene with the necessary identity and address of the owner of the vehicle. They also entered into a mediation agreement with the State and the vehicle owner without protesting their innocence. In terms of the mediation agreement, the owner of the battery confirmed that he had not given persons permission for the battery to be removed. That was

agreed to and signed by the plaintiffs. The two plaintiffs who testified failed to impress the Court as credible witnesses. Their version of events was improbable in the light of the above facts. The police witnesses by contrast, were credible and clear in their evidence.

The test to determine whether an arresting officer's suspicion of an accused person and subsequent arrest is reasonable, entails an objective enquiry involving the question whether a reasonable person in the position of the arresting officer and possessed of the same information would have considered that there were good and sufficient grounds for suspecting that the person to be arrested was guilty of the alleged offence. The only reasonable conclusion which could be drawn from the facts in this case was that the arresting officer's suspicion of the plaintiffs on the evening in question was reasonable, and that he had properly applied his discretion to arrest the plaintiffs in the circumstances. The plaintiffs' arrest was therefore lawful.

In respect of the detention, the Court noted that the investigating officer in a matter has a discretion as to whether to release an accused before his first appearance at a lower court. In the present case, there was no basis for interference with the exercise of that discretion.

The plaintiffs' claims were dismissed with costs.

Women's Legal Centre Trust v President of the Republic of South Africa and others (United Ulama Council of South Africa and others as amici curiae) and two related matters [2018] 4 All SA 551 (WCC)

Constitutional and Administrative Law – Marriage – Muslim marriage – Legal recognition – Non-recognition violating constitutional rights

Constitutional and Administrative Law – National Assembly, had failed to fulfil the obligation imposed on them by section 7(2) of the Constitution to protect, promote and fulfil the rights in sections 9(1), (2), (3) and (5), 10, 15(1) and (3), 28(2), 31 and 34 of the Constitution – Right to equality violated – Court granted the declaratory relief sought.

Marriages solemnised according to the tenets of Islamic law (also referred to as Muslim marriages) have not been afforded legal recognition for all purposes. In the three consolidated applications before the Court, the applicants argued that non-recognition and non-regulation of such marriages violates the rights of women and children in particular, in those marriages. The primary applicant was the Women's Legal Trust, and the relief sought in its application was largely similar to that sought by the other applicants.

A declarator was sought that the President, in his capacity as the head of the national executive, together with National Cabinet, and the National Assembly, had failed to fulfil the obligation imposed on them by section 7(2) of the Constitution to protect, promote and fulfil the rights in sections 9(1), (2), (3) and (5), 10, 15(1) and (3), 28(2), 31 and 34 of the Constitution, by preparing and initiating, diligently and without delay, a Bill to provide for the recognition of Muslim marriages as valid marriages for all purposes in South Africa and to regulate the consequences of such recognition. An order directing the respondents to fulfil their relevant obligations was also sought.

Held – Judgment would set out the rights underpinning the applicants' claim and determine whether there was any violation of those rights; and determine what obligations are imposed on the State by the Constitution, if any, as regards the fulfilment, protection and promotion of those rights.

The right to equality underpinned the applicants' case – as the right that continued to be violated. Section 9(1) of the Constitution provides that everyone is equal before the law and has the right to equal protection and benefit of the law. Section 9(3) provides that the State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. Discrimination may be direct or indirect. The applicants succeeded in showing discrimination on a listed ground – which was presumed to be unfair in terms of section 9(5). Other rights found to be infringed included the right to dignity, access to courts and children's rights. The Court found that the continued non-recognition of Muslim marriages infringed those rights.

Section 7(2) of the Constitution imposes an obligation on the State to respect, protect, promote and fulfil the rights in the Bill of Rights, which obligation may in some circumstances be a positive one, and may require protection through laws and structures, and whatever steps are taken must be reasonable and effective. In terms of international conventions, South Africa has committed itself to take appropriate and reasonable measures to eradicate discrimination against women in marriage and family relations.

Setting out the extent of its powers in fashioning a remedy, the Court granted the declaratory relief sought and directed the respondents to rectify the failure within 24 months of the date of the order.

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