LEGAL NOTES VOL 12/2018[1]

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[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!**

SA LAW REPORTS DECEMBER 2018

DUNCANMEC (PTY) LTD v GAYLARD NO AND OTHERS 2018 (6) SA 335 (CC)

Labour law — Dismissal — Racially offensive conduct — Singing 'Hit the boers' struggle song during strike — While racially offensive and inappropriate, not amounting to hate speech or incitement to violence — 'Boer' not inherently racist — CCMA award of reinstatement not unreasonable in circumstances.

Labour law — Dismissal — Racism — While courts to deal firmly with racism in workplace, no principle that dismissal should follow automatically in case of racism.

Duncanmec, a manufacturing firm, dismissed nine employees, all Numsa members, for singing the struggle song 'Hit the boer' at the workplace during an unprotected strike in 2013. They were found guilty of participating in an unlawful strike and of racially offensive conduct, with the latter deemed serious enough to warrant dismissal. Numsa challenged the dismissal in the Metal and Engineering Industries Bargaining Council. The arbitrator, the first respondent, concluded that though inappropriate and offensive, the singing did not amount to crude racism. She ruled that the evidence did not show that the employment relationship had broken down irretrievably and ordered reinstatement.

Duncanmec went to the Labour Court for the review of the first respondent's decision, arguing that her award was irrational and unreasonable. Numsa argued that the song was an old struggle song used to unite workers during a strike, and did not constitute hate speech or incitement to commit violence against white people. The Labour Court endorsed the first respondent's award, finding that the argument that the singing had compromised the continued trust relationship between the employer and the striking employees was unsustainable. The Labour Appeal Court dismissed Duncanmec's application for leave to appeal, and it applied for leave to appeal to the Constitutional Court. It argued that the singing constituted unacceptable hate speech and racism, and that the sanction of dismissal was justified.

Held

While it was incumbent on the courts to deal firmly with the rising tide of workplace racism, there was no principle in law that dismissal should follow automatically on such conduct. The present matter raised constitutional issues relating to the appropriate sanction for workplace racism and the exercise of public power, and leave to appeal would be granted (see [29], [32], [35]). Two questions arose in the appeal: whether the singing constituted racism and whether the first respondent's award was reasonable (see [36]). While the word 'boer' was not by itself racially offensive, the matter would be approached on the basis that the dismissed employees were indeed guilty of racially offensive and inappropriate conduct (see [37], [39]). But even if the singing was racist, dismissal could not necessarily follow: the question was whether the first respondent's award was unreasonable (see [48]). A reading of the award showed that it was rationally arrived at, and the reasonableness requirement was therefore met (see [52]). Appeal dismissed.

HUNTER v FINANCIAL SECTOR CONDUCT AUTHORITY AND OTHERS 2018 (6) SA 348 (CC)

Financial institution — Financial Services Board — Whether constitutional duty to investigate alleged irregularities in cancelling of registration of retirement funds.

In recent years, many employers moved from their stand-alone retirement fund, to an umbrella fund — a single fund for multiple employers.
The consequence of this was that thousands of the original stand-alone funds ceased to have properly constituted boards and often no assets.
In response, the then deputy registrar of pension funds initiated a cancellations project, which resulted in the cancelling of the registration of nearly 7000 funds from 2007 – 2013.
When Ms Hunter was appointed deputy registrar of pension funds at the Financial Services Board (now the Financial Sector Conduct Authority), she probed into and raised concerns about the cancellations.
This brought her into conflict with her colleagues and resulted in disciplinary complaints being lodged against her.
Ultimately the registrar appointed forensic accountants (Gobodo) to investigate her conduct.
Hunter later alleged their investigation was unjustified and gave rise to considerable expenditure, and that the Board was guilty of financial misconduct for not investigating its commissioning. She therefore requested the Minister of Finance to intervene pursuant to Treasury reg 33, but he declined to do so.
Hunter later lodged an internal complaint with the Board (the first complaint), which raised concerns about alleged unlawful conduct in the cancellations.
In response, the Board appointed Justice O'Regan to chair an inquiry.
Justice O'Regan in her report, recommended the Board appoint auditors to investigate a sample of funds, to determine the likelihood of prejudice, due to the way the cancellations were carried out.
Pursuant thereto, the Board appointed KPMG.
Hunter then lodged a second internal complaint, which was about the Board's failure to properly deal with her allegations against the registrar.
Meanwhile, KPMG proceeded to investigate a sample of funds, and reported.
The Board was dissatisfied with both the investigation and the report, and conveyed this to KPMG.
KPMG's suggestion was that the report be referred to Justice O'Regan for her review.
The Board duly approached the Justice but she declined to review the report, recommending rather that the Board approach counsel specialised in pension law.
The Board then appointed an attorney who specialised in pension law, as well as an assistant, a pension-fund actuary, to review the report, and to advise it on how to proceed.
In his first report, the attorney concluded there was no evidence of material financial prejudice being sustained by any member, beneficiary or creditor of the funds assessed.
In his second report, he found there was no indication that any trustee or authorised representative who had facilitated a cancellation had conferred an improper benefit on the fund administrators concerned.
In his third report, he found there was an ongoing effort by administrators to trace the beneficiaries of unclaimed benefits.
Hunter ultimately approached the High Court.
She sought an order compelling the Board to investigate the matters in her first complaint; and compelling the Board, alternatively the Minister, to investigate the matters in her second complaint.

The High Court's holding was that Hunter lacked standing to claim the relief she sought, and dismissed her application.
Hunter then applied to the High Court for leave to appeal, but this was refused; and she thereon approached the Supreme Court of Appeal. It, likewise, refused her application for leave to appeal.
She then applied to the Constitutional Court for leave to appeal.
There, she asserted the Board had a duty to investigate the alleged irregularities in the cancellations; that the Board's investigations had been inadequate; and that the court should order the Board to conduct a further investigation (see [23]).
It *held*, that the matter, concerning, inter alia, the constitutional duties of a public functionary, to investigate allegations of irregularity in the performance of its constitutional mandate, was within the court's jurisdiction; and that Hunter, who was seeking redress for members of cancelled funds, had standing in the public interest (see [29] – [30]).
In addition, the matter raised an important constitutional issue — the existence of a constitutional duty to investigate the alleged irregularities; and the application had reasonable prospects of success. It was thus in the interests of justice to grant leave to appeal (see [31]).
Arising for consideration, firstly, was whether public functionaries had a general duty to investigate irregularities (see [37]).
Held, that the Constitution did not impose a general duty on functionaries to investigate irregularities in the exercise of public power (see [38]).
However, in *Khumalo*, * in the special circumstance of the case, the Constitutional Court held that public officials had a duty to investigate unlawfulness (see [40]).
Here, though, it was unnecessary to go into whether *Khumalo* applied, or whether the Board was dutied to investigate alleged irregularities in the cancellation of the funds (see [41]).
This because the Board had always recognised it was responsible to investigate alleged irregularities and had acted in accordance with this responsibility whenever required (see [42]).
Indeed, here it had discharged the responsibility, by instituting a process that could yield a fair outcome (see [44] – [45]).
The second issue was whether PAJA review was the appropriate cause of action (see [37]).
This raised whether the registrar's cancellation of the funds was administrative action (see [48]).
Held, that it was, and therefore that PAJA applied. This, unless the review was brought by a public functionary against its own decision (see [49]).
Here, Hunter was not acting for the Board but on behalf of the public, any member of which could challenge administrative action using PAJA (see [49]).
Given, as Hunter stood in such member's shoes, PAJA applied (see [49]).
Thus, if Hunter thought the registrar's decision was unlawful, the remedy was PAJA review, not further investigation (see [50]).
She had taken the wrong approach, and therefore her appeal had to fail (see [51]).
The third issue concerned the impugned commissioning of the Gobodo report and the Minister's failure to intervene (see [14], [37] and [52]).
Held, that the decision to commission was administrative action and stood until set aside. Hunter had not sought to review it, and it would be inappropriate to allow her to attack it in the Constitutional Court (see [52]).
Given this, the third issue should not be engaged with (see [52]).

Ordered, inter alia, that leave to appeal be granted, but that the appeal be dismissed (see [61]).
Froneman J, dissenting, concluded that:
- The Board had a duty to investigate potential unlawfulness (see [76] – [77] and [80]).
- The duty was sourced in the Constitution (s 195), Financial Sector Regulation Act 9 of 2017 (s 58) and case law (see [85] – [86] and [90] – [91]).
- The duty required that if an irregularity came to a public functionary's attention, the functionary was obliged to investigate it to an extent that was proportionate to its seriousness and basis (see [62], [81] – [82] and [84]).
- Hunter had to review the Board's failure to investigate, by means of legality review (see [99], [101] and [106] – [107]).
- The Board was dutied to investigate each cancellation (see [132] – [133]).

He would have upheld the appeal, set aside the High Court's order, and replaced it with one compelling the Board, inter alia, to investigate all the cancelled funds, and to rectify mistaken cancellations (see [137]).
Cachalia AJ would have refused leave to appeal (see [139] and [184]).
This, as Hunter's case in the Constitutional Court was not a case she made in the High Court. (Her case for investigation in the High Court was unlawfulness of the cancellations. In the Constitutional Court it was systemic irregularity.)

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT AND OTHERS v PRINCE AND OTHERS 2018 (6) SA 393 (CC)

Criminal law — Drug offences — Dagga — Possession or cultivation for personal consumption by adult in private — Statutory prohibition of such conduct constituting unjustified limitation of right to privacy — Impugned provisions declared unconstitutional and invalid to the extent it criminalising use or possession in private or cultivation in private place of cannabis by adult for own personal consumption in private — Constitution, ss 14 and 36(1); Drugs and Drug Trafficking Act 140 of 1992, ss 4*(b)* and 5*(b)* read with part III of sch 2 and in s 1 sv 'deal in'; Medicines and Related Substances Control Act 101 of 1965, s 22A(9)*(a)(i)* read with sch 7.

The High Court declared certain sections of the Drugs and Drug Trafficking Act 140 of 1992 (Drugs Act) and of the Medicines and Related Substances Control Act 101 of 1965 (Medicines Act) * inconsistent with the constitutional right to privacy, 'to the extent that they prohibit the use of cannabis by an adult in private dwellings where the possession, purchase or cultivation of cannabis is for personal consumption by an adult'. In this case — the Constitutional Court's confirmatory proceedings — the issue was whether the impugned provisions did limit the right to privacy as held by the High Court and, if so, whether that limitation was reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, with due regard to the factors listed in s 36(1) of the Constitution.
Held
The right to privacy entitled an adult person to cultivate, possess or use cannabis in private for one's personal consumption. Therefore, to the extent that the impugned provisions criminalised such cultivation, possession or use of cannabis, the High Court correctly concluded that they limited the right to privacy entrenched in s 14 of the Constitution. (See [43], [58] and [86].)

The limitation was not reasonable and justifiable: its purpose was 'replete with racism' (see [65]); it was quite invasive (see [66]); available data indicated that alcohol caused more social and individual harm than cannabis (at [78]); and less restrictive means than criminalisation were employed by many societies based on freedom, equality and human dignity.
The following aspects of the High Court's declaration would, however, not be confirmed —

- that the impugned provisions were inconsistent with the Constitution to the extent that they prohibited the purchase of cannabis, because that would have the effect of sanctioning dealing in cannabis (see [87] – [88]);
- its findings regarding s 22A(10) of the Medicines Act, because that section does not refer to the use, possession, purchase or cultivation of cannabis but only regulated the sale or administration of, among others, cannabis (see [89]); and
- the confinement of the declaration of invalidity to the use or possession of cannabis at a home or a private dwelling, because as long as its cultivation, use or possession was in private and not in public and was for the personal consumption of an adult, it was protected (see [85] and [100]).

In addition to the High Court's order relating to s 5*(b)* of the Drugs Act, this section would be declared unconstitutional as read with the definition of 'deal in' in s 1 of the Drugs Act, to the extent that together they prohibited the cultivation of cannabis by an adult in private for their own consumption in private (see [83] – [84] and [101]).
The appropriate remedy was reading-in, operating prospectively, and suspending the declaration of invalidity to give Parliament an opportunity to correct the constitutional defect, together with interim relief to avoid charges and prosecution (see [102] – [104]).
The reading-in (set out see [105] – [107]) would have the following effect — *(a)* adult persons may use or be in possession of cannabis in private for their personal consumption in private; *(b)* the use, including smoking, of cannabis in public or in the presence of children or in the presence of non-consenting adult persons would not be permitted; *(c)* the use or possession of cannabis in private other than by adults for their personal consumption would not be permitted; *(d)*the cultivation of cannabis by adults in a private place for their personal consumption in private would no longer be a criminal offence.

CIPLA AGRIMED (PTY) LTD v MERCK SHARP DOHME CORPORATION AND OTHERS 2018 (6) SA 440 (SCA)

Appeal — Appealability — Generally — Restatement of test for appealability of judgment or order.

Appeal— Appealability — Interim interdict — Interim interdict granted prohibiting infringement of patent — Claim that patent would have expired prior to determination of final interdict — Whether interdict final in effect, and therefore appealable — Discussion of test set out in BHT Water Treatment (Pty) Ltd v Leslie and Another 1993 (1) SA 47 (W) for whether application for interim interdict should be treated as final — Court concluding that interim interdict not final in effect and therefore not appealable.

Cipla was the proprietor of patent 92/7457 (the 1992 patent); Merck, of patent 98/10975 (the 1998 patent). In June 2011 Cipla instituted an application (revocation application) in the Court for the Commissioner of Patents (the CCP) for the revocation of Merck's 1998 patent, based on two grounds: that the 1998 patent was anticipated by Cipla's 1992 patent (anticipation point); and that it did not involve an

'inventive step' (obviousness point). Merck, in October 2011 in the CCP, launched an action (infringement action) for an interdict against what it alleged to be Cipla's infringement of its 1998 patent. Cipla, in its plea to such action, submitted that Merck's patent was invalid, and liable to be revoked on the same grounds set out in the revocation application. When the revocation application was heard before the CCP in March 2013 (the infringement action was stayed in the meantime), Cipla, in argument, attacked the validity of Merck's patent *only on*the anticipation point. The CCP granted revocation, but the SCA upheld the appeal (in which Merck again relied only on its anticipation point), heard in November 2015, finding that the 1998 patent was valid and that on such grounds the revocation application should have been dismissed.

In January 2016 Merck launched an urgent application in the CCP — the court a quo for present purposes — for an *interdict pending* the final determination of the infringement action. Cipla now sought to rely on its 'obviousness point' to once again dispute the validity of the 1998 patent. The CCP (delivering judgment in March 2016) granted an interdict, with the proviso that it would lapse on the expiry date of the 1998 patent — 3 December 2018 — if the action was not finally determined by that date. The sole ground on which the court granted relief was that the validity of the 1998 patent was res judicata. In explanation it added that, although only the anticipation point had been argued in the CCP and before the SCA, Cipla had been obliged to put forward, in the revocation application, all its attacks on the validity of the 1998 patent. The CCP granted leave to Cipla to appeal to the SCA.

Only one issue was in issue: the appealability of the court a quo's decision to grant the interlocutory interdict. The rule, referred to by the SCA, was that, for a decision to be appealable, as a general principle, it had to have three attributes (see [18] and [37]): it had to be final in effect; it had to be definitive of the rights of the parties; and it had to have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings. Cipla acknowledged the general rule that interdicts granted pending final relief were not appealable. It, however, argued that, although the interdict was interim in form, it was final in effect, because the pending infringement action was unlikely to be determined before the expiry of the patent on 3 December 2018. Since the final interdict claimed in the infringement action could itself not endure beyond 3 December 2018, the interim order in effect finally disposed of the interdictory relief. On such basis, Cipla concluded, the granting of the interim interdict was appealable. Gorven AJA and Rogers AJA wrote separate judgments. Both arrived at the same conclusion — that the court a quo's decision to grant an interim interdict was not appealable, and the appeal should hence be struck from the roll — but differed in their approach.

Gorven AJA (with whose judgment Ponnan JA, Cachalia JA and Mathopo JA concurred) (judgment from [34]) provided an overview of the principles governing the appealability of decisions of a court, in particular the circumstances in which interlocutory orders might qualify as being 'final in effect', despite their being interim in form. 'Final in effect' meant that an issue in the suit had been affected by the order such that the issue could not be revisited either by the court of first instance or the court hearing the appeal (see [47]). Gorven AJA noted that the fact that the granting of an interim interdict gave rise to prejudice on the person against whom it operated did not in itself render such an order appealable; the only prejudice which might make such an order appealable was prejudice that in some way affected the final determination of an issue in the suit or stood in the way of an issue being determined at a later date. (See [39] – [40].) Cipla's argument — that the interim interdict against

it was 'final in effect' because the patent would have run its course by the time the main action came to be considered — Gorven AJA held, boiled down to the argument that Cipla was prejudiced because 'time could not be recalled'. This kind of prejudice did not render the order of the court a quo appealable. The court a quo had not finally decided the res judicata issue; it would be considered by the court considering the infringement action. Gorven AJA concluded that the order was not final in effect, was in form and effect an interlocutory interdict and not appealable. (See [48] and [50].)
Rogers AJA differed from Gorven AJA to the extent that he found it appropriate to consider and apply the principles established in a case relied on by Cipla — *BHT Water Treatment (Pty) Ltd v Leslie and Another* 1993 (1) SA 47 (W). * In that case the applicant had sought to enforce a 12-month restraint of trade. Presiding Judge Marais said that, although what the applicant sought was an interim interdict, it was in substance final because the granting of an interdict would not be finally determined before the expiry of the restraint. Marais J thus considered that he should apply the test for final interdicts. (See [21].) A principle to be extracted from such case, Rogers AJA held, was that if a court granted an interim interdict in circumstances where it should, on the basis of BHT, have treated the application as one for final relief, the interdict, though interim in form, was final for purposes of appealability. This was particularly so where, as here, Cipla pertinently alleged in the court a quo, and subsequently argued, that the matter should, in accordance with *BHT*, be adjudicated as a claim for a final interdict and where the court a quo's failure to do so was one of the grounds of appeal. (See [23].) (Since the correctness of the competing lines of authority was not canvassed in argument, Rogers AJA assumed, without deciding, that the *BHT* approach was sound in principle (see [24]).) Rogers AJA, however, held that, on the basis of *BHT*, the court a quo was correct in treating the interdict asked for as an interim one (see [27]). This was so because the *BHT* approach had to be confined to cases *where it was clear*, at the time the court granted the interdict, that the matter would not be able to be finally determined before the interdict in any event expired.That condition was not met here on the facts: when the court a quo heard the matter in March 2016, the probabilities were that a final decision could be achieved prior to 3 December 2018 (see [26]). Rogers AJA concluded that the interdict that was granted was interim in form and in substance, and on ordinary principles it was not appealable.

MINISTER OF DEFENCE AND ANOTHER v XULU 2018 (6) SA 460 (SCA)

Administrative law — Administrative action — What constitutes — Decision of SANDF to not renew fixed term contract of soldier — Exercise of statutory, as opposed to contractual, power in terms of s 59(1)*(b)* of Defence Act — Refusal constituting administrative action in terms of PAJA — Defence Act 42 of 2002, s 59(1)*(b)*.

Review — Grounds — Legality — Approach when dealing with conduct of executive and administrative arms of government — Starting point was whether conduct constituted administrative action — If so, matter had to be dealt with under PAJA — Only when PAJA not applying, could litigants and court look to legality and other permissible grounds of review lying outside PAJA.

Mr Xulu, a soldier, was enrolled as a member of the Regular Force of the South African National Defence Force (SANDF) on a fixed term of two years. The contract was renewed on three occasions. The review board of the SANDF, assigned to make the decision whether to renew the contract for a fourth time, after considering Mr Xulu's representations, declined to do so, chiefly on the basis of two previous disciplinary offences. The effect of such non-renewal was the termination of Mr Xulu's services: his contract provided that his service was terminated on the lapsing of the contract in terms of 'the Act', a reference to s 59(1)*(b)* of the Defence Act 42 of 2002, which in turn provided that '(t)he service of a member of the Regular Force is terminated *on the termination of any fixed term contract concluded between the member and the Department or on the expiration of any extended period of such contract'*. Mr Xulu challenged the board's decision in the High Court (Pretoria) on the basis, inter alia, that the SANDF had failed in numerous respects to comply with the applicable policy (the Policy) governing the renewal of fixed term contracts of members of the SANDF. The single judge first hearing the matter dismissed the application; the full court, however, on appeal found in Mr Xulu's favour, setting aside the decision and ordering the SANDF, represented by the Minister of Defence and the chief of the SANDF, to appoint him on a contract for a further six years. The Minister and the chief of the SANDF then appealed to the Supreme Court.

Mr Xulu in the High Court had argued his case on the basis that the decision under question — that of the review board whether or not to renew the fixed-term contracts of members of the Regular Force — was administrative action within the meaning of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) (and was reviewable in terms of such Act). The single judge first hearing the matter disagreed (and rejected the application on this basis), finding that that employment-related decisions did not constitute administrative action. In reaching such conclusion, it relied on the Constitutional Court cases of *Chirwa* and *Gcaba*. On appeal to the full court, Mr Xulu relied on both PAJA and the constitutional principle of legality. The full court held that it was unnecessary to decide whether the decision constituted administrative action as it could be resolved by applying the principle of legality, ie in disregarding its own policy relating to non-renewal of fixed-term contracts and Mr Xulu's right to fair labour practices, the SANDF acted contrary to the principle of legality, and its decision not to renew Mr Xulu's contract accordingly fell to be set aside.

The focus of the SCA's attention was whether the decision under question qualified as administrative action, which in turn required the presence of the following (see [34]): *(a)* a decision of an administrative nature; *(b)* by an organ of state or a natural or juristic person; *(c)* exercising a public power or performing a public function; *(d)* in terms of any legislation or an empowering provision; *(e)* that adversely affects rights; *(f)* that has a direct, external legal effect; and *(g)* that does not fall under any of the listed exclusions. Only *(a)*, *(c)*, *(d)* and *(f)* were in issue because the SANDF conceded the presence of *(b)*, *(e)* and *(g)*. Otherwise, the SANDF submitted that the decision was not administrative action because it *was not taken* in the exercise of public power under a statute, but *was a contractual decision* not to renew Mr Xulu's contract. The decision, so the argument proceeded, had no direct, external legal effect. Regarding Mr Xulu's reliance on the principle of legality, the SANDF argued that all the grounds invoked under this head were grounds of review of administrative action under PAJA. The principle of legality, the SANDF concluded, was being used to disguise a PAJA review of conduct not constituting action as reviewable on a different basis.

Held, that certain factors indicated that the decision not to renew Mr Xulu's contract was administrative in nature. The Policy itself described as administrative the steps it prescribed to be taken when considering the non-renewal of fixed term contracts of SANDF members. These followed a clear bureaucratic course. The starting point was that, unless the member's commanding officer made a request that the contract not be renewed, it would be renewed automatically. That reflected a policy choice, as s 59(1)*(d)* of the Act provided for the automatic termination of the contract on expiry of its fixed term. Once such a request was made, a number of further steps had to be taken. The non-renewal of the contract would only occur at the end of this process after all the prescribed steps had been taken. This exhibited all the characteristics of an administrative process leading to an organ of state taking a decision. The process bore the hallmarks of 'the conduct of the bureaucracy in the application of policy', the characteristic of administrative action.

Held, further, that both the cases of *Chirwa* and *Gcaba* were distinguishable (see [38]). In *Chirwa*, the claimant had pursued her unfair dismissal claim — a claim falling under the Labour Relations Act — based on the right to just administrative action. The Constitutional Court rejected the claim because, although it involved the exercise of public power, it was not in terms of a statute, but the exercise of a contractual right, and therefore not administrative action. But in the present matter the non-renewal and termination of Mr Xulu's services involved *no exercise of contractual power*; they instead took place in terms of statute, the Defence Act. (See [39].) *Gcaba* involved a police officer who had unsuccessfully applied for a promotion post. The Constitutional Court held that the failure to appoint the officer was a quintessential labour issue with no direct consequence for other citizens, and, on that basis, the decision to not appoint was not administrative action. It added that generally employment and labour issues did not amount to administrative action within the meaning of PAJA. By contrast, the issue in the present case was of importance to the citizenry at large, namely the manner in which people were selected for enrolment in the armed forces and the circumstances in which their contracts might be terminated.

A further distinguishing feature was that, unlike *Gcaba*, a labour dispute in the context of a contract of employment, this was a non-contractual dispute over the exercise of a statutory power to extend Mr Xulu's period of enrolment falling outside the LRA. (See [40] – [42].)

Held, accordingly, that the decision to renew was of an administrative nature. The further requirements that the decision be made in the exercise of a public power, and that it have direct, external legal effect were also met. The decision therefore qualified as administrative action and was subject to review in terms of s 6 of PAJA. (See [43] – [46].)

Held, further, that, from a procedural perspective, the decision-making process in defiance of the SANDF's own policy was unfair. And from a substantive perspective, it was not a reasonable decision, being based on old, fairly inconsequential disciplinary offences which had not barred previous extensions of Mr Xulu's services. Accordingly, the decision not to renew Mr Xulu's contract should be set aside. (See [51] – [52].)

Held, further, that the approach of the full court, in avoiding the question whether this was a case of administrative action and disposing of it on the basis of the principle of legality, was in principle incorrect and one to be discouraged. When dealing with the conduct of the executive and administrative arms of government, the starting point was whether the conduct in question constituted administrative action. If it was, the

principle of subsidiarity demanded that it be dealt with under PAJA. If it fell outside PAJA, then the principle of legality may come into play. The development of a coherent administrative law demanded that litigants and courts started with PAJA, and, only when PAJA did not apply, should they look to the principle of legality and any other permissible grounds of review lying outside PAJA. (See [47] and [50].)
Held, accordingly, that the appeal be dismissed (but the order of the full court be varied in the manner set out in paras [54] – [55]).

ROAD ACCIDENT FUND v MASINDI 2018 (6) SA 481 (SCA)

Motor vehicle accident — Compensation — Claim against Road Accident Fund — Prescription — Five-year prescription period in terms of s 23(3) of RAF Act — Calculation of where last day of five-year period falling on public holiday — Whether appropriate to invoke provisions of s 4 of Interpretation Act 33 of 1957, and reg 1 of Road Accident Fund Regulations, 2008, in interpretation exercise — Road Accident Fund Act 56 of 1996, s 23(3) and reg 1 sv 'day'; Interpretation Act 33 of 1957, s 4.

Ms Masindi and her minor child sustained injuries after being hit by a motor vehicle, entitling Ms Masindi to claim compensation in terms of s 17(1) of the Road Accident Fund Act 56 of 1996. In terms of s 23(3) of the RAF Act, a five-year prescription period was applicable to Ms Masindi's claim. The date of the accident was 17 June 2009; so the last day of the five-year period was Monday 16 June 2014. But this was a public holiday, so the High Court with jurisdiction was closed. In fact, the last day the court was open during the five-year period was Friday 13 June 2014 (the court not being open on the weekend). Ms Masindi, however, served and issued summons on the day following the public holiday and hence, strictly speaking, outside the five-year period. In the High Court the RAF raised a special plea, arguing that in such circumstances Ms Masindi's claim had prescribed. But the court disagreed. In doing so, it relied on s 4 of the Interpretation Act 33 of 1957, which provides that, '(w)hen any particular number of days is prescribed for the doing of any act . . . the same shall be reckoned exclusively of the first and inclusively of the last day, unless the last day happens to fall on a Sunday or on any public holiday, in which case the time shall be reckoned exclusively of the first day and exclusively also of every such Sunday or public holiday'. The court further relied on reg 1 of the Road Accident Fund Regulations, 2008, which provides that 'a day' means any day other than a Saturday, Sunday or public holiday.
This is the appeal to the SCA brought by the RAF against the High Court's rejection of its special plea. The question to be decided was how the five-year prescription period applicable to the respondent's claim should be computed in circumstances where the last day of the five-year period, strictly calculated, fell on a day when the court was closed such that summons could not be issued and served. Ultimately, the SCA agreed with the High Court's conclusion that Ms Masindi's claim had not prescribed, but for differing reasons. In arriving at its conclusion, the court considered foreign case law, as it was entitled to in terms of s 39(1)*(c)* of the Constitution, and had regard to the injunction under s 39(2) to promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation.
Held, that the High Court was wrong in invoking the definition of 'a day' appearing in reg 1 in interpreting s 23(3) of the RAF Act. Regulations were subordinate to Acts of Parliament, and, as a general rule, could not be used to interpret any piece of

legislation where there was ambiguity. In any event, the regulations did not purport to regulate how 'day' had to be interpreted in any setting other than the regulations themselves. This case did not concern any act performed in terms of the regulations, but with the interpretation of s 23(3) of the RAF Act, a section which did not even use the word 'day'. (See [9] and [11].) The High Court was also wrong in invoking s 4 of the Interpretation Act (see [11]).
Held, that, in interpreting s 23(3) of the RAF Act, the court was enjoined to avoid limiting rights guaranteed by the Bill of Rights, and prefer a meaning that promoted those rights — of relevance here being the right of access to courts in terms of s 34 of the Constitution; regard too had to be had to the fact that the RAF Act was social legislation, the primary purpose of which was to give the greatest possible protection to persons who had suffered loss through negligence or unlawful acts on the part of a driver or owner of a motor vehicle. (See [12] and [13].) The task presented to the court, ultimately, was to strike a balance between an infringement of the right of access to courts and the objective of statutory time limits, namely bringing certainty and stability to social and legal affairs, and maintaining the quality of adjudication. (See [12].)
Held, in conclusion, that, on a proper interpretation of s 23(3) the RAF Act, where the five-year period for bringing a claim ended on a day when the court was closed, so that summons could not be issued and served on that day, the five-year period should end the next working day. To adopt instead a strict and literalist approach to the provision, with the result that the respondent failed to enjoy the full benefit of the five-year period, would result in an injustice and prejudice to her, and amount to an absurdity the legislature could not have contemplated. *Accordingly*, appeal dismissed with costs.

ABSA BANK LTD v MOKEBE AND RELATED CASES 2018 (6) SA 492 (GJ)
Credit agreement — Consumer credit agreement — Reinstatement of agreement in default — Permissible until credit provider realises proceeds of sale in execution — Mere attachment of goods or property no bar to reinstatement — Power to reinstate resting with consumer, not credit provider — National Credit Act 34 of 2005, s 129(3) and s 129(4).

Mortgage — Foreclosure — Judicial execution — Primary residence — Money judgment and execution claims inextricably linked — Must be sought and adjudicated together in one proceeding — If postponement required, then matter to be postponed in its entirety.

Mortgage— Foreclosure — Judicial execution — Sale in execution — Residential property — Reserve price — Court must, except in exceptional circumstances, set reserve price — Both sides to place all relevant facts before court — Uniform Rules of Court, rule 46A(8)*(e)*.

A full bench of the High Court was tasked, under s 14(1)*(a)* of the Superior Courts Act 10 of 2013, with making a ruling on the procedures to be followed by banks when foreclosing mortgages on primary residences, and on the propriety of the practice of the courts of granting applications for money judgments against defaulting homeowners while postponing the associated applications for sale in execution. The court was also required to consider under what circumstances courts should set a reserve price for the property, a matter that had to be determined under the new rule 46A of the Uniform Rules (effective since 22 December 2017).

The applicable statutory provisions were —

- s 26 of the Constitution, which guarantees the right to adequate housing;
- s 129(4) of the National Credit Act 34 of 2005 (the NCA), under which reinstatement (revival) of a credit agreement is no longer possible after —
  - the sale of property pursuant to an attachment (ss (4)*(a)*(i)); or
  - the execution of any other court order enforcing the agreement (ss (4)*(b)*); and
- rule 46A(8)*(e)* of the Uniform Rules of Court, which allows a court hearing an application for execution against residential property to set a reserve price.

Held

1. In all matters where execution was sought against a debtor's primary residence, the entire claim, including the money judgment, had to be adjudicated at the same time. The money judgment in personam was the basis of, and a necessary averment in, the claim in rem for execution (see [17], [20]). Since the two claims were inextricably interlinked, they had to be brought at the same time in one proceeding (see [22], [29].) If the matter required postponement, it had to be postponed in its entirety.
2. Execution against movable and immovable property was no bar to the revival of the agreement, up to the point when the proceeds of the auction sale were realised. * Until then the homeowner could, despite the existence of a money judgment and order for executability, revive the mortgage agreement by paying the arrears. 'Execution' in s 129(4)*(b)* meant execution against security under the bond, not against movables. (See [39] – [46].) Despite the 2015 amendment to s 129(4), the right to reinstate or revive the mortgage agreement still rested with the consumer (see [49]).
3. Save in exceptional circumstances, the court was obliged to set a reserve price in all matters where execution was granted against the primary residence of the debtor. It was incumbent on both sides to set out the relevant facts for the court to properly exercise its discretion in this regard (see [59], [65]).

BOOYSEN v STANDER 2018 (6) SA 528 (WCC)

Partnership— Universal partnership — Between unmarried cohabitants — Requirements — Restatement of principles — On facts, court finding that cohabiting life partners had entered into a universal partnership.

Partnership — Dissolution — Claim for termination of joint ownership of immovable property — Actio communi dividundo — Restatement of principles — Appropriateness of claim where universal partnership established.

Ownership— Joint ownership — Termination — Actio communi dividundo — Restatement of principles.

The plaintiff (Booysen) and the defendant (Stander) had lived together as life partners for approximately 17 years. After their relationship terminated, the plaintiff approached the High Court (Cape Town), seeking an order, based on the *actio communi dividundo*, for the termination of joint ownership of the immovable property in which the parties had been living together in Cape Town. (She also sought the return of a motor vehicle in the possession of the defendant.) The plaintiff submitted that the most practical, just and equitable way to effect partition of the house would be to divide the equity therein equally between the parties, with the plaintiff retaining possession.

The plaintiff added that, when calculating the defendant's portion, deductions had to be made in recognition that she (plaintiff) had made all bond payments on the property, had paid all municipal expenses, and had funded a number of improvements to the property. (The plaintiff offered a figure of R227 500 as representing the defendant's portion.) The defendant in answer brought a counterclaim, seeking an order declaring that a universal partnership (universorum bonorum) had existed between the parties, and declaring the termination of the partnership and the division of the joint estate.

The basis on which the defendant asserted that a universal partnership had come into existence was that the parties had cohabited as life partners, and each shared equally in contributing to their joint household; there was an agreement between them that they would pool their resources, including time and effort, for the joint benefit of both parties; and it was the understanding of both parties that there existed a joint estate. The plaintiff denied the existence of a universal partnership. She acknowledged that the parties considered each other as life partners, and that they shared a joint household; however, she claimed that there was never any 'joint estate'. Rather, she added, they retained separate estates, as evidenced by the fact that each party had separate banking accounts and pension funds, and that they each had separate wills in terms of which they bequeathed their separate estates to different persons. There was no 'sharing' of 'substantial assets'. Each party had specific financial obligations in terms of the agreement between them, so that where the plaintiff paid expenses in excess of her share, she was entitled to claim that amount back (as she did in respect of the house, where she was claiming back half of the bond payments and municipal expenses).

The issue then to be decided was whether a universal partnership had come into existence or whether the *actio communi dividundo* was applicable in deciding how the assets of the parties accumulated during the relationship should be divided. The court reviewed the overarching principles governing the *actio* (see [47], [54] and [57]) and the creation of a universal partnership between cohabiting life partners (see [64] – [76]). Ultimately, the court concluded that such a universal partnership had come into being (see [74]). It declined to grant an order on the terms set out by the plaintiff based on the *actio*, finding that an appropriate order in the circumstances was a partition of the entire joint estate in a manner that recognised the equal contribution of the parties.

Held, that, if regard was had to the duration of the relationship, the nature of the relationship between the parties and that the parties conducted a joint household, the only reasonable inference to be drawn was that the parties pooled their resources to the benefit of the joint estate. Pellucid was the fact that both parties put everything they had into the proverbial melting pot (including their pensions). Because they were both fully committed to the relationship, they each gave what they could. To put a rand value to each one's contributions would be tantamount to diminishing the value of their individual contributions. The manner in which the parties conducted their affairs fit with the concept of universal partnership which described a state of affairs between parties who met the requirements of a partnership, ie: contribution by both, to the benefit of both and for the purpose of making a profit. As such, a universal partnership came into existence between the parties. (See [74].)

Held, further, that a universal partnership was akin to the property regime governing marriages in community of property: in respect of the latter, each spouse automatically shared in the assets that each party brought into, and

that accumulated during, the marriage. On termination of the relationship, the relief that the parties could claim was the division of the joint estate, or for forfeiture of the benefits of the marriage in community of property. (See [39], [68] and [75].)
Held, that, in order to achieve fairness to both the parties, the end result would incorporate a hybrid of the *actio communi dividundo*, as well as a universal partnership, as there were obvious overlaps in the overarching legal principles which further extended to the principles analogous to a marriage in community of property. It therefore followed that a division of the joint estate had to follow. The deprivation of the use and enjoyment of the immovable property should be factored into the equation. Of pivotal importance was that a 'clean break' was achieved through the final order which would ultimately be granted in order to bring about an equitable partition amongst the parties. (See [85].)
Accordingly the court ordered division of the joint estate on the terms set out in [88].

CHAREWA v ROAD ACCIDENT FUND 2018 (6) SA 551 (GJ)
Delict — Elements — Negligence — What constitutes — Motor vehicle accident — Duties of motorist when overtaking a cyclist, especially regarding margin of space.

Delict — Elements — Negligence — What constitutes — Motor vehicle accident — Truck, when passing cyclist, driving so close to him and at such speed that resulting 'wind-rush' causing cyclist to initially wobble and subsequent vortex left behind causing him to fall, resulting in injuries — Driver of truck negligent in driving in such manner — Court setting out duties of motorist when passing cyclist, especially regarding adequate margin of space.

The plaintiff had been riding his bicycle in a public road, close to the pavement,when, after a truck travelling in the same direction passed him from behind, he fell from his bike, breaking his leg. He consequently sued the Road Accident Fund in the High Court for damages arising from the injuries he had sustained in such accident, which he alleged was the fault of the negligent driving of the truck driver. (The quantification of damages was deferred.) What precisely caused the plaintiff to fall from his bike was in dispute, but the court held as follows: The truck, when passing the plaintiff, drove so close to him (the truck driver gave an estimate of 0,5 metres) and at such a speed that the resulting 'wind-rush' caused the plaintiff to initially wobble and the subsequent vortex left behind caused him to fall (see [17]). In driving in such a manner, the court concluded, the truck driver had acted negligently (see [25], [39] and [44]). This conclusion held, despite that there was no contact between the vehicles: the principle of causation was not compromised by the lack of an actual collision; what was required was a causal link between the driver's conduct and the injury sustained (see [30]).
In reaching this conclusion, the court considered the duties of a motorist when passing a cyclist, particularly regarding the appropriate margin of space. Based on a review of South African and foreign law, these were (see [39]):

- The motorist was under a duty to be aware of the effect of wind-rush and tail-end vortex caused by the vehicle being driven; the larger the vehicle and the faster it was moving, the more marked would be the effect.
- The motorist was under a duty to assess whether there was sufficient space between the cyclist and the oncoming traffic to pass through the gap without interfering with the cyclist; to this end the gap had to be more than just enough physical space to fit through, but enough to leave the cyclist undisturbed.

- The motorist was under a duty to observe the road surface on which the cyclist was riding, the weather conditions, especially the presence and effect of wind and rain on the potential for the cyclist to weave.
- As a rule of thumb, the prudent distance to allow was not less than 1 metre, if the motorist was travelling at a modest speed, and 1,5 metres, if traveling faster. The courteous motorist would be generously cautious and always allow for a 1,5-metre space.
- Where the cyclist was a child, the response of the motorist included an awareness of a greater risk of an erratic path of travel by the cyclist.
- A motorist who drove past a cyclist close enough that the wind rush or tail-end vortex caused the cyclist to wobble was negligent.
- If a cyclist was interfered with by wind-rush or tail-end vortex, and, as a result of that interference, suffered injuries and damages, the motorist was liable to that cyclist.

The court concluded that the RAF was liable to compensate the plaintiff for 100% of the proven damages (see [45]).

METROPOLITAN EVANGELICAL SERVICES NPC AND ANOTHER v GOGE 2018 (6) SA 564 (GJ)

Housing — Right to housing — Prohibition against eviction from home without court order — Occupant barred from returning to room in emergency shelter — Regarded room as home — Left for three months after being injured in fight with other residents — Possessions left behind and key retained — Room not interfered with in his absence — Right not to be evicted without court order violated — No indication that occupant posed threat to anyone — Order restoring possession confirmed on appeal — Constitution, s 26(3).

The first appellant ran the Ekuthuleni emergency shelter on behalf of the City of Johannesburg. The respondent was a resident who had occupied a room there for four years. On 18 June 2016 he went away after an altercation with fellow residents. He left his belongings behind, locked his room and retained the keys. He returned three months later, on 25 September, and he re-entered his room using his keys, spent the night, and went out for a while the next day. But when he attempted to return to his room, he was barred from doing so by the appellants' security personnel. The appellants did not during the three months the respondent was absent open or otherwise interfere with his room.

On 28 September the respondent, claiming unlawful eviction and spoliation, launched an urgent High Court application for readmission to his room. The court ruled in his favour, finding that the respondent's right, under s 26(3) of the Constitution, not to be evicted without a court order, had been infringed. The appellants appealed to a full bench, arguing that the court a quo erred because the room was not the respondent's home and because he had abandoned the room when he left it on 18 June 2016. They also justified their conduct by relying on a form of private defence.

Held

The undisputed facts showed that the respondent regarded the room as his home, that he intended to return, and that he was still in occupation when his access was barred (see [21] – [22]). The appellants' conduct in barring the respondent's access to his room violated his right not to be evicted without a court order under s 26(3) of

the Constitution (see [23]). There was no evidence that the respondent attacked or threatened to attack anyone after he left on 18 June, and the appellants' reliance on private defence was unsustainable (see [24]). The appellants' resort to self-help meant that an order restoring the status quo ante was appropriate (see [23], [28]). Appeal dismissed (see [29]).

REEZEN LTD v EXCELLERATE HOLDINGS LTD AND OTHERS 2018 (6) SA 571 (GJ)

Company — Shares and shareholders — Shareholders — Approval for issuing of shares — Provision requiring shareholder consent where voting power of issued shares will exceed 30% of shares currently in class — Transaction in violation of provision void even where board was bona fide and shares sold and issued for adequate consideration — Companies Act 71 of 2008, s 41(3).

Section 41(3) of the Companies Act 71 of 2008 gives boards the power to issue shares without shareholder approval up to a maximum of 30% of the voting power of all shares in a class. It protects shareholders against excessive or impermissible dilution of their shareholdings by the issue of shares or the conclusion of a series of transactions that would result in the breach of the 30% limitation, in which event shareholder consent was required.

Company A concluded a share sale and subscription agreement with Company B. It created a cluster of shareholders that could control Company A and resulted in a significant dilution of minority shareholding from 66% to 46% of the total issued voting shares in the company (see [13]). One of the existing shareholders, Company C, sought an order that the sale and issue of shares be set aside on the ground that the share sale and subscription agreements were concluded in contravention of s 41(3). Company C argued that the sale and subscription transactions constituted a 'series of integrated transactions' as intended in s 41(3) and that the correct moment for calculating the 30% restriction in respect of the new shares issued as a result of those transactions was the moment immediately before the conclusion of the agreement.

Held

A transaction in violation of s 41(3) should be visited with the sanction of voidness for it to serve its purpose of protecting the shareholders (see [25]). The sale of shares and subscription agreements, which had resulted in the issuance of shares making up 33,2% of the voting power of the shares held by Company A's shareholders immediately before the transactions, would therefore be declared void (see [19] – [20]). The share sale and subscription agreement would be declared void even though the directors had exercised their powers bona fide and for a proper purpose (in casu to facilitate the acquisition of shares by a BEE partner of Company A), and the shares were sold and issued for adequate consideration. A contrary finding would result in the endorsement of the very situation that the legislature sought to prevent.

THUBAKGALE AND OTHERS v EKURHULENI METROPOLITAN MUNICIPALITY AND OTHERS 2018 (6) SA 584 (GP)

Housing — Right to housing — Breach by state — Remedy — Fraud and mismanagement by municipality resulting in misallocation of subsidised housing — Residents of informal settlement not receiving stands developed with their government-approved housing subsidies — Occupied by other people —

Residents' right to housing infringed by conduct of municipality — Municipality directed to provide them with appropriate housing within one year — Constitution, s 26(1).

The applicants were residents of the Winnie Mandela informal settlement, Ekurhuleni, who were granted housing subsidies under the Integrated Residential Development Programme contained in the National Housing Code, 2009. The subsidies were used to develop stands in the settlement, but the applicants were never given possession. Instead, they were occupied by other people. After negotiations with the first-respondent municipality, the applicants agreed to relocation to a new development in Tembisa, Ekurhuleni. But this did not materialise. The applicants accordingly sought an order directing the respondents to upgrade their current housing, alternatively to provide them with houses in the Tembisa development. The first respondent argued that it had acted reasonably throughout and that the misallocation of the stands intended for the applicants did not equate to a breach of their right of access to housing. The first respondent denied that the misallocation of the houses built for the applicants was the result of fraud or negligence, and relied on budgetary constraints and delayed processes for its inaction. (See [20] – [32], [45] for the parties' various arguments.)

Held

The applicants were, by virtue of the approval of their housing subsidies, the lawful beneficiaries of the stands that were allocated to them. The first respondent's failure to give them possession of the stands was a clear breach of their right to adequate housing. (See [42] – [44], [53] – [58], [63] – [65].) There was no reasonable explanation by the first respondent for misallocation of the stands or for its delay in addressing the applicants' complaints. In the circumstances the applicants were entitled to an order directing the first respondent to provide them with access to adequate housing within a reasonable and realistic time frame (see [58], [74]). The first respondent was directed to provide the applicants with the promised housing in Tembisa or in another agreed-upon location before 31 December 2018 (see [76]).

WOMEN'S LEGAL CENTRE TRUST v PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS 2018 (6) SA 598 (WCC)

Constitutional law — Human Rights — State's duty to protect, promote and fulfil — Non-recognition of Muslim marriages — Infringing rights to equality, dignity, right of access to court and children's rights — Failure to enact legislation recognising and regulating Muslim marriages declared constitutionally invalid — President, Cabinet and Parliament directed to enact such legislation with 24 months, failing which interim position would apply thereafter — Constitution, s 7(2).

The applicants (in three consolidated applications) argued that the non-recognition and non-regulation of marriages solemnised and celebrated according to the tenets of Islamic law (Muslim marriages) violated the rights of women and children in these marriages. This, they said, constituted a failure by the state (the President and Parliament) 'to respect, protect, promote and fulfil the rights in the Bill of Rights' as required in s 7(2) of the Constitution. In the first and third applications, declaratory orders to this effect were sought, and further (inter alia) orders directing

the state to prepare and initiate the enactment of legislation providing for the recognition and regulation of Muslim marriages.

Held

The continued non-recognition of marriages solemnised according to Islamic tenets infringed such spouses' rights to equality and dignity ([119] – [136] and [179]); their rights of access to court on dissolution of such marriages ([137] and [179]); and the rights of children born of such marriages ([138] – [139] and [179]).

The non-recognition of Muslim marriages was historical and persistent since the beginning of democracy — a systemic failure by the state to provide recognition and regulation, potentially affecting millions of people around the country. The state must take 'reasonable and effective' measures to discharge its s 7(2) duty. Given the nature of the rights violations, in the context of the complexity and importance of marriage, the only reasonable means of fulfilling the s 7(2) duty was through the enactment of legislation. Case-by-case and incremental development of the law was not entirely effective. Comprehensive legislation was required to provide effective protection of marriages concluded in terms of the tenets of Islamic law, whilst giving expression to Muslim persons' rights to freedom of religion. ([152], [178] – [181] and [184].)

A declarator stating that the state had failed to fulfil its constitutional obligations was appropriate, and, for it to be effective, it must also be mandatory. It was just and equitable to make an order that required both the executive and the legislature, as part of the state, to work in collaboration, within their constitutionally defined roles, to rectify the failure identified by fulfilling the duty placed on the state by s 7(2) of the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights.

In the result —

- it would be declared that the President and Cabinet have failed to fulfil their respective constitutional obligations under s 7(2) of the Constitution, by not preparing, initiating, introducing, enacting and bringing into operation, diligently and without delay as required by s 237 of the Constitution, legislation to recognise marriages solemnised in accordance with the tenets of Sharia law (Muslim marriages) as valid marriages and to regulate the consequences of such recognition; and
- the President and Cabinet together with Parliament would be directed to rectify the failure within 24 months of the date of this order. (However, if the contemplated legislation were referred to the Constitutional Court by the President in terms of s 79(4)*(b)* of the Constitution, or by members of the National Assembly in terms of s 80 of the Constitution, the relevant deadline would be suspended pending the final determination of the matter by the Constitutional Court.)

And, in the event that legislation were not enacted within 24 months from the date of this order, and until such time as the coming into force thereafter of such contemplated legislation, the following order shall come into effect —

o a union, validly concluded as a marriage in terms of Sharia law and which subsisted at the time this order becomes operative, may (even after its dissolution in terms of Sharia law) be dissolved in accordance with the Divorce Act 70 of 1979, and all the provisions of that Act shall be applicable, provided that the provisions of s 7(3) shall apply to such a union regardless of when it was concluded; and

- in the case of a husband who is a spouse in more than one Muslim marriage, the court shall take into consideration all relevant factors, including any contract or agreement, and must make any equitable order that it deems just;

and may order that any person who in the court's opinion has a sufficient interest in the matter be joined in the proceedings.

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BOOYSEN v MINISTER OF SAFETY AND SECURITY 2018 (2) SACR 607 (CC)

Police — Liability of — 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 (see [2] and [22]).

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 of his conduct and his employment (see [11]).

A court need take account of normative factors in assessing whether such a link is present (see [14] – [15] and [20]).

Before the High Court, the issue was whether the second part of the test was satisfied (see [24]).

It held that it was (see [25]).

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.

It was also 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 (see [25]).

The Minister then appealed to the Supreme Court of Appeal (see [26]).

The majority concluded that there was an insufficiently close link of 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 (see [30]).

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.
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.
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 of 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 (see [58] – [59]).
The matter was not about the development of the test, which was a constitutional matter; and Booysen had not pleaded 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 it considering the nature of the act, which at the same time was a breach of constitutional obligations) (see [81], [86] and [89]).

Accordingly, the 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 of 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.

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.

S v KRUSE 2018 (2) SACR 644 (WCC)

Trial— Accused — Language — Accused deaf and mute — Interpretation of proceedings taking place by means of written communication — Accused hampered by such procedure and amounting to violation of fair-trial right.

The appellant, who was deaf and mute, was convicted in a magistrates' court on a charge of murder and was sentenced to 15 years' imprisonment.
It appeared that the appellant did not understand sign language and had requested the services of a particular interpreter who could interpret for him. This was not accommodated, however, and the proceedings took place by means of written communication. The interpreter wrote down in Afrikaans the questions put to and answers given by the state witnesses, who testified in English. As each state witness finished testifying in chief, the interpreter's notes were shown to the accused and his counsel to verify that the proceedings had been correctly recorded, and to prepare for cross-examination.
The court noted on appeal that there were a number of difficulties with the procedure adopted, the most obvious being that the interpretation was substandard since it was not continuous, precise, competent and contemporaneous: the interpreter was required to simultaneously translate and record what was being said, which was irregular; because the accused was only afforded the opportunity to read the interpreter's notes at the end of each witness' testimony he was deprived of the benefit of contemporaneous interpretation; and the record showed that the accused was not always afforded a proper and timeous opportunity to consider what had been said.

Held, that the record gave rise to grave doubts about the efficacy of the accused's understanding and communication. His ability to adduce and challenge evidence was undoubtedly hampered by his disability and he would have benefited greatly from the assistance of the special interpreter he requested. (See [17].)
Held, further, that the procedure adopted by the magistrate was not sufficient to ensure that the accused was able to participate effectively in his trial. It was clear that the accused struggled to hear and to follow the proceedings. The violation of his right to a fair trial could and should have been avoided by the simple expedient of referring him for an audiological examination to ascertain the extent of his impairment, and obtain expert guidance on how best to facilitate effective communication with and by the accused. The appeal was upheld, and the conviction and sentence set aside.

DEMOCRATIC ALLIANCE v MINISTER OF INTERNATIONAL RELATIONS AND CO-OPERATION AND OTHERS 2018 (2) SACR 654 (GP)

International criminal law — Diplomatic immunity — 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, one 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 (see [2]).

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 Service 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' (see [8]).

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 (see [9]).

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 opinion 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 that 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.

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.

S v GUMBI AND OTHERS 2018 (2) SACR 676 (SCA)

Evidence — Evidence given at former criminal trial — Admissibility of — Trial judge becoming incapacitated during trial and unable to pronounce verdict — Trial resuming before new judge who proceeded, by consent of parties, on record of previous proceedings — Inquiry postulated by s 214 of Criminal Procedure Act 51 of 1977 not conducted — Accordingly no evidence before new judge and conviction and sentence set aside on appeal.

The appellants were being tried in the High Court on a number of serious charges. After the state and the defence had closed their cases, the court had made rulings on two admissibility trials and the prosecution and defence had been heard in argument, the trial judge reserved judgment. Before he could deliver a verdict, however, he became incapacitated and could not continue with the trial. The prosecutor then lodged an application for a special review seeking instructions on how the matter should proceed.
Two judges considered the application and held that the trial had to start de novo, and, with the consent of all the parties in terms of s 215 of the Criminal Procedure Act 51 of 1977 (the CPA), proceed on the evidence as recorded at the original trial. The matter then proceeded on that basis and the new judge convicted the appellants and sentenced them to terms of imprisonment. On appeal,
Held, that the inquiry postulated by s 214 of the CPA had not been undertaken by the new judge and the court was left completely in the dark as to whether she had purported to act under paras *(a)* or *(b)* of the provision. There was, moreover, no ruling by the judge in respect of the admissibility of the evidence of each witness or what factors weighed in the exercise of her discretion. She had also not considered whether the proper exercise of her discretion required her to first peruse the evidence of each witness or to afford counsel a proper opportunity to address her in argument on the dangers presented by the receipt of the evidence of each such witness — the fact that the evidence satisfied the requirements of s 214 was no assurance that the evidence had necessarily to be relied upon.
Held, further, that, as the evidence adduced before the original judge was not properly admitted under the CPA, it did not constitute evidence against the appellants at the subsequent trial and there was accordingly no evidence at all upon which the appellants could have been convicted. Neither the appellants nor their counsel could, by their acquiescence, validate the invalid procedure adopted by the new judge. The appeal was upheld, and the convictions and sentences set aside.

S v FREDERICK AND ANOTHER 2018 (2) SACR 686 (WCC)

Drugs Sentence — Generally — Substance abuse — Repeat offenders — Long-term imprisonment not answer to crimes against oneself or substance abuse — Mechanisms provided for by Prevention and Treatment for Substance Abuse Act 70 of 2008 and Probation Services Act 116 of 1991 to be employed.

The accused were convicted of possessing minimal amounts of undesirable dependence-producing substances in contravention of s 4*(b)* of the Drugs and Drug Trafficking Act 140 of 1992 in two separate cases that came before the court on review. Both offenders had a number of previous convictions for the same offence —

respectively five and 11 such convictions. For the present offences one accused was sentenced to a fully suspended sentence of three years' imprisonment, and the other to 36 months' imprisonment in terms of s 276(1)*(i)* of the Criminal Procedure Act 51 of 1977.
The court noted on review that, generally, drugs were abused by the emotionally afflicted. Substance abuse was a manifestation of a response to uncertain future developments inducing fear. Primarily, it was a crime against one's own self. Both accused presented one clear message, namely that long-term imprisonment, or the fear thereof, was not generally an answer to crimes primarily against oneself, and, in particular, substance abuse as a lifestyle choice. (See [8] – [10].)
In dealing with such substance abuse, magistrates' courts ought to bear in mind that there was a comprehensive national response that provided for mechanisms aimed at the demand and harm reduction through prevention, early intervention, treatment and reintegration programmes under the Prevention and Treatment for Substance Abuse Act 70 of 2008 (PATSAA). Where a case against the accused was prima facie that he was a person suspected of sustained or sporadic excessive use of substances, the National Prosecuting Authority (the NPA) should call for a probation officer to investigate the circumstances of said accused and the provision of a pre-trial report recommending the desirability or otherwise of a prosecution. Where the NPA failed to do this, a court convicting such a person should consider inquiring into whether they were a person as defined in s 33 of PATSAA. If they were not such a person then it was preferable that a probation officer's report be obtained and, depending on the diagnosis, it be decided whether they should be placed in appropriate programmes in terms of the Probation Services Act 116 of 1991. (See [11] – [13].)
The sentences imposed by the trial court were set aside and the matters were referred back for the court to consider holding an inquiry in terms of s 37 of PATSAA, with a view to acting in terms of s 36(1) in lieu of sentence, or order that the accused be placed under probation services in terms of the Probation Services Act.

S v MBUYISA 2018 (2) SACR 691 (GJ)
Trial — Irregularity in — What constitutes — Accused represented by person already struck off roll of advocates — Licensing of legal practitioners not mere formality and serious irregularity having occurred — Proceedings set aside in their entirety.

In a matter sent on special review, it had come to the attention of the court that at the time of the accused's trial he was being represented by an advocate who had already been struck off the roll of advocates.
Held, that the adversarial system of litigation, to which we adhere, was premised on a profession of licensed legal practitioners whose role it was to assist the courts in performing their adjudicative function. The licensing of these independent professional intermediaries was not a mere formality. Rather, the insistence on the materiality of representatives being licensed was an integral part of the very system itself. The reliance of the court upon persons who had been accorded a right of audience was heavy, not only for their skills in court craft, but because they were bound by an ethical code that addressed the considerable zone of the unseen, which was an important dimension of their role as representatives of persons who came

before the courts. The proceedings accordingly had to be set aside in their entirety and directions were given in the event of the accused being tried again.

CENTRE FOR CHILD LAW AND OTHERS v MEDIA 24 LTD AND OTHERS 2018 (2) SACR 696 (SCA)

Child — As victim of crime — Protection of anonymity — Proper interpretation of s 154(3) of Criminal Procedure Act 51 of 1977 — Exception to open-justice rule and had to be interpreted in favour of individual liberty — Section not conferring protection on child victims of crime.

Child — As victim of crime — Protection of anonymity — Exclusion of child victim from provisions of s 154(3) of Criminal Procedure Act 51 of 1977 irrational and in breach of s 9(1) of Constitution.

Child — As victim of crime — Protection of anonymity — Extension of protection after child reaching age of 18 for Parliament to consider.

Arising from the wide public interest in the subsequent 'finding' of a 17-year-old girl, who had been abducted as a baby and brought up as the abductor's child, and the imminent possibility of the child victim's identity being revealed when she turned 18, the first and third appellants obtained an interim interdict to protect her anonymity (the second appellant's).

On the return day they applied for orders: *(a)* declaring that the protection of anonymity afforded by s 154(3) of the Criminal Procedure Act 51 of 1977 (the CPA) extended to victims of a crime under the age of 18 (victim extension), alternatively, declaring the section unconstitutional for failing to confer protection on victims of crime who were under 18; and *(b)* declaring that children did not forfeit the protection offered by the section when they reached the age of 18 (adult extension), alternatively, declaring the section unconstitutional to the extent that such children forfeit the protection upon reaching 18.

The first, second and third respondents were media houses who opposed the application, although they agreed that the protection of children's anonymity required a case-by-case determination by a court.

The High Court granted an order declaring that the protection afforded by s 154(3) applied also to victims of crime who were under the age of 18 years, but did not continue to protect child victims, witnesses and accused after they turned 18, and dismissed the appellants' alternative constitutional challenges. On appeal,

Held, per Swain JA (Maya P and Van der Merwe JA concurring) for the majority, that the language of s 154(3) of the CPA was unambiguous and the interpretation contended for by the appellants, whether in respect of the victim extension or the adult extension, was unduly strained. The section was an exception to the open-justice rule and, because it carried a criminal sanction, had to be interpreted in favour of individual liberty. This was particularly so where a right to freedom of expression was implicated. The court a quo had accordingly erred in the interpretation it placed upon the section in respect of the victim extension. (See [12].)

Held, further, as to the victim extension, that the exclusion of child victims from the provisions of s 154(3) was irrational and in breach of s 9(1) of the Constitution which guaranteed the right to equal protection and benefit of the law to everyone. Although the section granted anonymity to an accused and a witness at criminal proceedings, who were under the age of 18 years, it offered no protection at all to the victim. This denial of equal protection to child victims, who were equally vulnerable, could not be

justified. The limitation on the right of the media to impart information was reasonable and justifiable and the constitutional challenge on this basis accordingly had to succeed. (See [29] – [30].)
Held, further, that in the absence of any limitation on the nature and extent of the adult extension, the relief sought by the appellants was overbroad and did not strike an appropriate balance between the rights and interests involved. The proposed limitation on the right of the media to impart information in this instance was neither reasonable nor justifiable and the constitutional challenge to the provision on this basis accordingly had to fail. (See [27].)
Held, further, that although the court sympathised with the objective of the appellants in seeking to protect the anonymity of children as victims, witnesses and offenders of crime once they reached adulthood, whether the law required amendment of the section, and, if so, the nature and extent of any such amendment, was a task more appropriately left to the legislature. The Minister of Justice and Correctional Services supported the victim and adult extensions to the protection of the anonymity of the children, and was therefore able to take the appropriate steps with a view to possibly introducing appropriate legislation in Parliament. (See [33].)
Held, per Willis JA (Mocumie JA concurring) for the minority, that the appeal had to be upheld: s 154(3) was constitutionally invalid to the extent that it did not protect children as victims of crime and insofar as their protection of them as victims, witnesses and offenders did not extend beyond their reaching adulthood. Parliament was to remedy the constitutional invalidity and pending parliamentary review 'read in' such protection.

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Centre for Child Law and others v Media 24 Limited and others [2018] 4 All SA 615 (SCA)

Constitutional and Administrative Law – Criminal justice system – Child victims of crime – Protection of identity – Section 154(3) of the Criminal Procedure Act 51 of 1977 – Declaration of constitutional invalidity because of a failure to protect the anonymity of children as victims of crime at criminal proceedings.

In terms of High Court order issued on 21 April 2015, an interim interdict was granted to protect the anonymity of the second appellant (“KL”).

KL was abducted from hospital on 30 April 1997, when she was two days old. She was found in February 2015, when she was 17 years old. Her case and the ensuing criminal trial became the subject of intense media scrutiny, both in South Africa and abroad. As a result, the appellants approached the High Court for a declaratory order that the protection of anonymity afforded by section 154(3) of the Criminal Procedure Act 51 of 1977 applied to victims of a crime who were under the age of 18 years – alternatively a declaration that section 154(3) was unconstitutional and invalid to the extent that it failed to confer protection on victims of a crime who were under the age of 18 years; and an order declaring that children subject to the section did not forfeit the protection offered by the section upon reaching the age of 18 years – alternatively, that section 154(3) was unconstitutional and invalid to the extent that children subject to the section forfeited the protection afforded by it upon reaching the age of 18 years.

The High Court granted an order declaring that the protection afforded by section 154(3) applied to victims of crime who were under the age of 18 years. It, however, also held that the section did not continue to protect child victims, witnesses and accused after they turned 18 years and dismissed the appellants' alternative constitutional challenges. The High Court then granted the appellants leave to appeal and the respondents leave to cross-appeal, against the orders granted.

Held – Section 154(3) provides that, "No person shall publish in any manner whatever any information which reveals or may reveal the identity of an accused under the age of 18 years or of a witness at criminal proceedings who is under the age of eighteen years: Provided that the presiding judge or judicial officer may authorise the publication of so much of such information as he may deem fit if the publication thereof would in his opinion be just and equitable and in the interest of any particular person."

The appellants were seeking to extend the provisions of section 154(3) in two respects. The first was to extend the publication ban to the identification of any child victim of crime and the second was to extend the duration of the ban on the identification of children indefinitely into adulthood.

The disputed issues between the appellants and the first, second and third respondents (the media respondents) were as follows. The first issue was whether there should be any limitation of the media's right to impart information concerning the identity of child victims (the victim extension) and children who forfeited the protection of their anonymity on attaining the age of 18 years (the adult extension). If there was to be a limitation, the second issue that arose was the nature and extent of the limitation, before a court could determine whether anonymity or publicity was in the best interests of a child in a particular case.

The Court held that the language of the section is unambiguous and the interpretation contended for by the appellants, whether in respect of the victim extension or adult extension, was unduly strained. The section was an exception to the open justice rule and by virtue of the fact that it carried a criminal sanction, it had to be interpreted in favour of individual liberty. That is particularly so where the right to freedom of expression is implicated. The court *a quo* accordingly erred in the interpretation it placed upon the section, in respect of the victim extension.

To extend the anonymity protection for children, whether by way of the victim extension or the adult extension, would be in conflict with the rights to freedom of expression and freedom of the press and other media, entrenched in section 16(1)(a) of the Constitution. It was also in conflict with the open justice principle. In determining whether the victim and adult extensions to section 154(3) constitutionally violated the right of the media to impart information, a two-stage test had to be applied. That involves determining whether a constitutional right has been violated, and whether the limitation can be justified in terms of section 33(1) of the Constitution. The crucial issue was whether the limitation of the right of the media to impart information, whether in terms of the victim or adult extensions to the section, was reasonable and justifiable in terms of section 36 of the Constitution.

The proportionality analysis requires that the right of the media to impart information in an open and democratic society based on human dignity, equality and freedom, be considered together with the nature and extent of the limitation of the right and then balanced against the purpose of the limitation, which in the case of the adult extension, was the protection of the anonymity of children on reaching the age of 18 years.

Whether the purpose of the proposed limitation may be achieved by less restrictive means, also has to be considered. An examination of the nature and extent of the limitation of the media's right to impart information, revealed that it is unlimited and has no exceptions.

In the majority judgment, it was found that the adult extension severely restricted the right of the media to impart information and infringed the open justice principle. In the absence of any limitation on the nature and extent of the adult extension, the relief sought by the appellants was overbroad and did not strike an appropriate balance between the rights and interests involved. Accordingly, the proposed limitation on the right of the media to impart information was neither reasonable nor justifiable, in terms of section 36 of the Constitution. The constitutional challenge to the provisions of section 154(3) on that basis therefore had to fail.

In the victim extension, the constitutional challenge to section 154(3) was that the section did not extend anonymity protection to children under the age of 18 years, who were the victims of a crime. The nature and extent of the limitation on the right of the media to impart information was clear. It was limited to prohibiting the publication of the identity of a victim at criminal proceedings, who was under the age of 18 years. The importance of the right of the media to impart information and the nature and extent of the limitation of that right, when balanced against the purpose of the limitation of the right, led to the conclusion that the limitation on the right of the media in this instance, was reasonable and justifiable in terms of section 36 of the Constitution. The constitutional challenge to section 154(3) on the basis that it did not extend anonymity protection to children under the age of 18 years who were the victims of a crime, accordingly had to succeed.

Consequently, in terms of the majority judgment, the appellants were unsuccessful in their appeal against the dismissal by the court *a quo* of the adult extension, and the media respondents were substantially unsuccessful in their cross-appeal against the order by the court *a quo* declaring that the protection offered by section 154(3) applied to victims of crime, under the age of 18 years.

Commissioner for the South African Revenue Service v Digicall Solutions (Pty) Ltd [2018] 4 All SA 647 (SCA)

Tax – Income Tax – Set-off of assessed loss against income – Section 103(2) of the Income Tax Act 58 of 1962 – If the Commissioner is satisfied that there has been a change in the shareholding of any company, as a direct result of which income has been received by or accrued to that company during any year of assessment, and the change of shareholding was effected solely or mainly for the purpose of utilising any assessed loss by the company in order to avoid tax liability on the part of the company, the set-off of such assessed loss against such income shall be disallowed.

In 2010, the appellant ("SARS" or the "Commissioner") issued additional assessments against the respondent ("Digicall") in respect of the 2005-2008 income tax periods. Based on section 103(2)(b)(A)(aa) of the Income Tax Act 58 of 1962 (the "Act"), SARS, in the additional assessments, disallowed the utilisation by Digicall of certain assessed losses during the relevant periods. Digicall's objection was dismissed but it successfully appealed to the Tax Court which granted an order setting aside the assessments and referring the matter back to SARS for reassessment on the ground

that Digicall was entitled to set-off the assessed loss against its income during the relevant years. SARS' appeal to the High Court was dismissed but special leave was granted for it to appeal to the present Court.

Held – In terms of section 103(2), if the Commissioner is satisfied that there has been a change in the shareholding of any company, as a direct result of which income has been received by or accrued to that company during any year of assessment, and the change of shareholding was effected solely or mainly for the purpose of utilising any assessed loss by the company in order to avoid tax liability on the part of the company, the set-off of such assessed loss against such income shall be disallowed. Accordingly, the Commissioner had to be satisfied that three requirements were fulfilled to justify the disallowance of the assessed loss. A change in the shareholding of the taxpayer had to have been effected; the change in the shareholding must have resulted directly or indirectly in income being received by, or accruing to the taxpayer, during any year of assessment, and the change in the shareholding must have been a transaction concluded for the sole or main purpose of utilising the taxpayers assessed loss, in order to avoid liability for the payment of tax on income.

In the present case, two changes in the shareholding of the taxpayer occurred in successive tax years. Only the first change in shareholding was relevant to the present appeal.

The Court referred to case law in explaining the purpose of section 103(2). The section is aimed at defeating tax avoidance schemes, and the intention is to cast the net as wide as possible. An explanation of the mischief at which the section is aimed was quoted in case law referred to by the court. Where in one year allowable deductions exceed income, the taxpayer may carry the balance of deductible excess forward as an assessed loss. That loss may be deducted from income earned in the next or a subsequent year. As a result, certain taxpayers, whose businesses have failed to profit, build up large assessed losses. Where the taxpayer is a company, whose shares can readily change hands, new proprietors will attach themselves to the company and inject new income into it in order to exploit the assessed loss. That "trafficking" in the shares of companies with assessed losses gave rise to the enactment of section 103(2).

When it is proved that a change in shareholding has occurred which results in the avoidance, or the postponement of liability for payment of any tax, it will be presumed that the change in shareholding was entered into, or effected solely or mainly for the purpose of utilising the assessed loss, in order to avoid liability for the payment of any tax on income. The taxpayer therefore bore the onus in terms of the sub-section, to rebut the presumption by proving that the change in shareholding was not effected solely or mainly for the prohibited purpose.

That brought the factual background into the court's focus. The sole shareholder of Digicall was an Australian company ("B Digital"). Digicall established a call centre facility in Cape Town, to sell cell phone contracts from two service providers to customers. Having had an assessed loss in 2001 and in December 2001, Digicall terminated its service provider contracts and disposed of its subscriber bases to the two cellular network service providers. At the beginning of 2002, B Digital Ltd wished to disinvest from South Africa and an investment company ("Global Capital") was approached, with the intent that it purchase the taxpayer to provide services to a rival cellular provider, with the object of making a profit. A legal action against Digicall

prevented Global Capital taking over Digicall. It therefore set up a shelf company ("SDM") to acquire the assets and the employees of Digicall immediately and take over the lease in respect of the call centre. It was to be granted an option to acquire the shares in Digicall, to be exercised once the legal dispute was resolved, to enable B Digital to retain control during the litigation. SDM was aware of the loss in respect of the tax year ending 30 June 2001, which had not as yet been assessed. It was also aware that in terms of section 20 of the Act any assessed loss could only be carried forward to a future year of assessment, where the company in question traded. Consequently, to utilise the assessed loss, the company would have to be brought back from the grave and start trading again. Digicall was not profitable, right from the start, and reflected an assessed loss for the year of assessment ending 30 June 2001, of R47 884 445, which the stakeholders all realised had a built-in tax advantage, with a concomitant commercial benefit. The Court then referred to a course of action leading to the acquiring of the taxpayer, which could be explained in no way other than the purpose in acquiring the taxpayer was not to make a profit, but to ensure that it was trading. Having ensured the taxpayer was trading as at 30 June 2002, the assessed loss was carried forward into the 2003 tax year and SDM then exercised the option to purchase the shares in the taxpayer, on 19 September 2002. By the time SDM exercised the option there was nothing left in the taxpayer, except the assessed loss. The purpose of SDM acquiring the shares in the taxpayer and thereafter transferring the business back to the taxpayer, must have been to ensure the taxpayer was a going concern as at the end of June 2003, in order to satisfy the requirements of section 20 of the Act. That goal having been achieved, the taxpayer again ceased trading at the end of June 2003, in the same manner and with the same goal as it had ceased trading at the end of June 2002. The result was that the assessed loss in the taxpayer was not only preserved by SDM, but was increased whilst under its control.

The Court rejected the respondent's proffered explanation for SDM's purchasing the shares in the taxpayer and held that the sole or at the very least the main purpose in purchasing the shares, was to utilise the assessed loss by setting it off against income to be received by the taxpayer in the ensuing tax years, in order to avoid liability for the payment of tax on such income. The taxpayer therefore failed to discharge the onus of proving that the first change in shareholding when SDM purchased the shares in the taxpayer, was not effected solely or mainly for the prohibited purpose.

The further requirement of section 103(2), namely whether the first change in shareholding in the taxpayer when SDM acquired the shares, had the direct or indirect result that income was received by, or accrued to the taxpayer, during any year of assessment, was also found to have been established on the facts.

The appeal was therefore upheld.

Monde v Viljoen NO and others [2018] 4 All SA 665 (SCA)

Property – Land – Eviction order – Requirements – Eviction of appellant was sought on basis that his right of residence flowed solely from his employment – Evidence establishing that appellant was in fact an occupier as defined in the Extension of Security of Tenure Act 62 of 1997 – Termination of appellant's right of residence not shown to have been just and equitable as required by section 8(1) of Extension of Security of Tenure Act.

On automatic review, in terms of section 19(3) of the Extension of Security of Tenure Act 62 of 1997 (the "Act"), the Land Claims Court ("LCC") confirmed an eviction order by the Magistrate's Court against the appellant. Leave to appeal having been granted by the LCC, the appellant noted an appeal against the eviction order in the present Court. The appellant was appointed as a general farm worker on 6 January 1995 and was given a house to occupy on the farm. On 4 November 2011, he concluded a written employment contract with the first respondent (a trustee of the trust which owned the farm). One of the essential terms was that the appellant would only have accommodation for as long as he was employed by the first respondent. At all times it was the policy of the farm, as well as other farms in the area, that an employee would be entitled to reside on the farm only whilst he worked on the farm. The appellant's right of residence was thus derived exclusively from his employment.

On 25 March 2013, the appellant was dismissed from his employment after he was found guilty on charges that he had been absent from work without permission. He did not challenge his dismissal and his right of residence terminated automatically upon termination of his employment. He was informed that his right of residence on the farm came to an end upon his dismissal, and he was given notice to vacate the house on the farm within 30 days.

While admitting that his employment gave rise to his right of residence, the appellant denied that it was the only source of that right. He alleged that he had been given permission to live on the farm and enjoyed a right of residence on the basis of his family connection to his mother, who was also an occupier with a right of residence. The appellant conceded that his employment had been terminated, but denied that the dismissal was fair. He said that he had referred a dispute to the CCMA, but had heard nothing further. He alleged that his right of residence had not been lawfully terminated.

Held – The central issue in the appeal was whether the first and second respondents satisfied the requirements for an eviction order in terms of section 9(2) of the Act.

The Act contains clear provisions that must be complied with before an eviction order can be granted. An applicant who seeks the eviction of an occupier under the Act is required to allege and prove all the elements of its cause of action. The respondents had to show that the termination of the appellant's right of residence was both lawful, and just and equitable, as required by section 8.

Significant in this case was the judgment of the Constitutional Court in the case of *Snyders and others v De Jager and others*, where it held that an owner of land or farm manager who relies on section 8(2) to justify the termination of an occupier's right of residence, bears the onus to prove that the occupier's employment was terminated for a fair reason related to the occupier's conduct as an employee and that it was effected in accordance with a fair procedure as required by the Labour Relations Act 66 of 1995. Although the termination of the appellant's employment was both substantively and procedurally fair, and his assertion that he had attempted to challenge the dismissal was unfounded, his right of residence did not flow from the employment contract. He claimed an existing benefit, alleging that he had enjoyed a right of residence from the time that he lived with his mother on the farm, prior to the allocation of a house to him in 1995. The respondents contended that the appellant was not an occupier in his own right while he was living with his mother and that he only became such an occupier when he received express permission to live in his own house. In upholding the respondents' contention, the magistrate disregarded the

definition of an “occupier” in the Act. The Act does not describe an occupier as a person occupying land in terms of an agreement or contract, but one occupying land with the consent of its owner.

Concluding that the respondents did not establish that the appellant’s right of residence flowed exclusively from the employment contract and, with the termination of the latter, that his right to occupy a room on the farm terminated, the Court upheld the appeal.

As the respondents failed to show that the termination of the appellant’s right of residence was just and equitable as required in terms of section 8(1) of the Act, the purported termination of the appellant’s right of residence was unlawful and invalid.

A final issue addressed by the Court was the requirement of a probation officer’s report prior to granting an eviction order. The Court confirmed the approach by the LCC that a probation officer’s report in terms of section 9(3) of the Act, is compulsory. In terms of section 9(3), a court granting an eviction order must consider, *inter alia*, the availability of suitable alternative accommodation, the effect of an eviction order on constitutional rights including the rights of children and any hardship which an eviction would cause.

The appeal was upheld and the eviction order set aside.

Herbert NO and others v Senqu Municipality and others [2018] 4 All SA 677 (ECG)

Property – Land ownership – Request to have permission to occupy converted into ownership – Whether section 1 of the Land Affairs General Amendment Act 61 of 1998 and section 25A of the Land Tenure Rights Act 112 of 1991 were inconsistent with the Constitution to the extent that they excluded section 3 of the Land Tenure Rights Act from application by virtue of section 25A of the Land Tenure Rights Act to the whole of the Republic of South Africa – Court finding exclusionary provisions to amount to unfair discrimination and ruling provisions unconstitutional.

The applicants were trustees in a trust which claimed an entitlement to acquire ownership of immovable property owned by the first respondent (the “municipality”). Essentially, the trust sought the conversion of its permission to occupy certificate to full ownership and transfer of the property from the first respondent to it.

The trust had engaged the municipality in discussions regarding the purchase of the property since 1997. A decade later, its attempts being unfruitful, the trust instructed its attorneys to handle the matter on its behalf. For the next 9 years the trust’s attorneys engaged in discussions and exchanged correspondence with the municipality in an effort to bring finality to the matter, but again nothing came of that. In the present application to Court, the trust contended that it was the legitimate occupier of the property as the holder of permission to occupy. It averred that the permission to occupy was a land tenure right as envisaged in item 2 of Schedule 2 of the Upgrading of the Land Tenure Rights Act 112 of 1991(“the Tenure Act”), and claimed an entitlement to have that asserted right converted into ownership by registration of the property in its name. It therefore required the municipality to submit a deed of transfer to the Registrar for that purpose as provided in section 3(1) of the Land Affairs General Amendment Act 61 of 1998.

Responding to the applicants, the municipality argued that the Tenure Act was old order legislation, having been enacted before the Interim Constitution took effect. In 1998, it was amended by the Land Affairs General Amendment Act 61 of 1998 ("the Amendment Act") by the inclusion of section 25A which provides that as from the coming into operation of the Amendment Act, the provisions of the Tenure Act excluding sections 3, 19 and 20 shall apply throughout South Africa. The municipality therefore contended that section 3 of the Tenure Act did not apply to the property and the Trust's application fell to be dismissed.

That led to the trust arguing that section 1 of the Amendment Act and section 25A of the Tenure Act were inconsistent with the Constitution to the extent that they excluded section 3 of the Tenure Act from application to the whole of the Republic and that those sections were accordingly invalid to the extent of that inconsistency. It was further asserted that the trust was entitled to an order that section 25A of the Tenure Act be read as excluding reference to section 3.

Held – Issues for determination, as agreed by the parties were whether section 1 of the Amendment Act and section 25A of the Tenure Act were inconsistent with the Constitution to the extent that they excluded section 3 of the Tenure Act from application by virtue of section 25A of the Tenure Act to the whole of the Republic of South Africa. The second issue was whether the said sections were accordingly invalid to the extent of that inconsistency and whether the trust was entitled to an order that section 25A of the Tenure Act be read as excluding the reference to section 3therein. A further issue raised by the municipality was whether or not the trust's permission to occupy was a land tenure right.

Old order legislation is legislation which applied prior to the advent of the interim Constitution promulgated on 27 April 1994. Item 2(1) of Schedule 6 of the Constitution provides that any law in force when the Constitution took effect remained in force as long as it was consistent with the Constitution and had not been repealed or amended. Item 2(2)(a) provides further that old order legislation which continues in force in terms of sub-item (1) does not have a wider application, territorially or otherwise, than it had before the previous Constitution took effect unless subsequently amended to have a wider application. The Legislature sought to amend the Tenure Act to provide it wider application. That was done by section 1 of the Amendment Act which allowed for the inclusion of section 25A as referred to above. The trust contended that section 25A of the Tenure Act incorporating the exclusionary provisions, was inconsistent with the rights enshrined in sections 9(1) and 25(1) of the Constitution. It contended that section 25A of the Tenure Act precluded it from converting its right of occupation to ownership and as such discriminated against it. The assessment of whether or not there is unfair discrimination is done in a two-stage enquiry. The first stage is to determine whether the impugned provision differentiates between people or categories of people. If it does, it must be determined whether the differentiation bears a rational connection to a legitimate government purpose. The second stage involves determining whether the differentiation amounts to unfair discrimination. The trust's case was that the exclusionary clause in section 25A unfairly and arbitrarily discriminates between the holders of two categories of land tenure rights and holders of the said rights are not treated equally. The constitutional validity of the provision had to be assessed in light of the stated purpose of the Tenure Act, which was to provide for the upgrading and conversion into ownership of certain rights granted in respect of land. The Court found that the effect of the exclusionary provision was to

deprive some of the holders of a category of land tenure rights the opportunity to convert their tenure rights into ownership. No reason for the differentiation could be established. The differentiation amounted to unfair discrimination which impacted unfairly on the trust, with the result that the differentiation infringed section 9(1) of the Constitution.

A further point taken by the trust, the inclusion of the exclusionary provision was entirely arbitrary, was conceded by the third respondent (the "Minister"). The exclusionary provision created a distinction apparently based solely on territory. There was no rational relationship between the differentiation on a geographical basis and the purpose of the statute.

The Court also agreed with the trust that item 2(2) of Schedule 6 of the Constitution contemplates only two possibilities with regard to old order legislation. Wither old order legislation which continued in force when the Constitution took effect does not have a wider application than it had before the Interim Constitution took effect, or it is amended to have such a wider application. In the latter respect, what is contemplated is the whole of the old order legislation in question and not piecemeal amendment of portions thereof. The inclusion by section 25A of the exclusionary provision therefore had the effect of extending the application of only a portion of the Tenure Act and was unconstitutional as section 9 of the Constitution envisages that national legislation must be of general application throughout the Republic on all persons unless a rational basis is provided for its limited application.

Section 25(1) of the Constitution provides that, "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property". The Court agreed with the trust that on an objective assessment, a permission to occupy land constitutes property as envisaged in section 25(1) of the Constitution. Section 25A of the Tenure Act extended the right by providing that it may be converted into ownership. To the extent that the exclusionary provision deprived the trust of the opportunity to apply for the conversion of the permission to occupy into ownership, it deprived the trust of property as envisaged in section 25(1) of the Constitution.

On the issue of appropriate relief, the trust advocated severance of the reference to section 3 in the exclusionary provision. The test for the severance of offending provisions requires determining if it is possible to sever the invalid provisions and, if it is, then determining if what remains gives effect to the purpose of the legislative scheme. The Court ultimately ordered that section 25A of the Tenure Act be read as excluding the reference to section 3 therein.

In re: Nedbank Limited v Thobejane and related matters [2018] 4 All SA 694 (GP)

Civil procedure – Courts – Access to – High Courts and Magistrate's Courts – Jurisdiction – Commercial institutions, to enrol in the High Court, foreclosure applications with amounts falling within the jurisdiction of the Magistrates' Courts – Litigants taking advantage of concurrent jurisdiction between the Gauteng Division, Pretoria and the Gauteng Local Division, Johannesburg, by enrolling matters in Pretoria even where it involves parties located within the jurisdiction of the Gauteng Local Division, Johannesburg.

Constitutional law – Question to be answered was how the court should ensure that access to justice was attained having regard to the issues before it – Court held that it

was appropriate for the court to regulate its own procedures in order to ensure access to justice.

Dealing with several applications before it, the Court raised the issue of parties enrolling in the High Court, foreclosure applications with amounts falling within the jurisdiction of the Magistrates' Courts; and of litigants taking advantage of concurrent jurisdiction between the Gauteng Division, Pretoria and the Gauteng Local Division, Johannesburg, by enrolling matters in Pretoria even where it involved parties located within the jurisdiction of the Gauteng Local Division, Johannesburg.

In all the matters being addressed by the Court, the applicants were financial institutions (the "banks"). They offered various reasons why they chose to institute actions in the High Court. They also conceded that in foreclosure matters and even in credit agreement matters, where vehicles were involved, they as a matter of course, instituted actions in the High Court. Those matters not only fell within the Magistrates' Courts jurisdiction, but were often for paltry amounts.

Held – Course taken by the banks affected the right of access to justice of impecunious litigants, and raised the issue of the sustainability of burdening the present division of the High Court with matters that could have been instituted in other courts. The approach followed by the banks could potentially result in an abuse of process, because if impecunious litigants were denied proper access to justice, or the High Court was incapable of dealing properly and effectively with its workload, due to the practice, it would constitute abuse.

The constitutional right of access to justice is inherent to the rule of law. Because of the issues of poverty and social economic inequality in our country,there is an even bigger obligation on our courts to ensure access to justice to everyone.

The question to be answered was how the court should ensure that access to justice was attained having regard to the issues before it. It was held that it was appropriate for the court to regulate its own procedures in order to ensure access to justice. The solution pertaining to matters that fall within the jurisdiction of the Magistrates' Courts was that such matters should be issued in the Magistrates' Courts. If a party is of the view that a matter that falls within the jurisdiction of the Magistrates' Courts should more appropriately be heard in the present Division, an application must be brought setting out reasonable grounds why the matter should be heard in the present Division. Inefficiency of the other court, real or perceived, and the convenience of the plaintiff alone will not constitute such reasonable grounds. Only after leave has been granted may the summons be issued in the High Court. The High Court is not obliged to entertain matters that fall within the jurisdiction of the Magistrates' Courts purely on the basis that the High Court may have concurrent jurisdiction. The Court confirmed that both the Local and Provincial Division can *mero motu* transfer a matter to the other court, if it is in the interest of justice to do so.

Mathimba and others v Nonxuba and others [2018] 4 All SA 719 (ECG)

Legal practice – Contingency fee agreements – Validity – Contingency Fees Agreements Act 66 of 1997 – In casu, there were two contingency fee agreements, one was for the attorney's fees and the other for Counsel's fees, which was impermissible – Contingency Act makes no provision for an advocate to sign a contingency fee agreement separately from the attorney; and it is not proper for an advocate to conclude a contingency agreement directly with a client – Court held that

section 2 of the Contingencies Act contemplates a single contingency agreement for a single matter to which all the relevant legal practitioners (attorneys and advocates) are party, and not separate agreements for each practitioner.

The present dispute arose from two actions for damages by the first applicant ("Mathimba") against two entities. The second respondent ("Nonxuba Inc") represented by the first respondent ("Nonxuba") acted as attorney of record for Mathimba in both actions. The third respondent ("Dutton") was the first applicant's Counsel in one of the matters.

After receipt of the amounts awarded to Mathimba in both matters, Nonxuba Inc deducted the fees and disbursements that it considered due to it. Mathimba disputed that the fees and disbursements deducted were reasonable. He alleged further that it came to his knowledge that first and second respondents were claiming fees based on a contingency agreement. He contended that the alleged contingency agreement concluded with Nonxuba Inc was invalid for want of compliance with the Contingency Fees Agreements Act 66 of 1997.

Held – First issue for determination by the Court was whether a settlement agreement was concluded between the applicants and first and second respondents concerning all disputes between them. The settlement agreement was disputed by the applicants, who claimed that interest should have been included therein. The evidence suggested that interest was never discussed during the negotiations preceding the agreement. The applicants attempted to rely on *iustus error* in that regard, but the Court found that the facts did not support that contention as it could not be found that the inclusion of interest had been contemplated but erroneously omitted.

In challenging the validity of the contingency fee agreement, the applicants relied on a number of grounds. Essentially, Mathimba sought an order that the agreement be declared invalid, void and of no force and effect. In the event that such relief were granted, he sought an order that the total fees of first and second respondent together with the fee of third respondent should not exceed 25% of the capital amount awarded in the action. The Court found that there were two contingency fee agreements in the matter. One was for the attorney's fees and the other for Counsel's fees. That was impermissible. The Act makes no provision for an advocate to sign a contingency fee agreement separately from the attorney; and it is not proper for an advocate to conclude a contingency agreement directly with a client. Section 2 of the Act contemplates a single contingency agreement for a single matter to which all the relevant legal practitioners (attorneys and advocates) are party, and not separate agreements for each practitioner. Matters with both an attorney and Counsel on contingency the globular fee must be assessed to see whether the agreement complies with the statutory 25% cap.

The agreement in this case did not comply with the Act in various respects, and was set aside.

Standard Bank of South Africa Limited v Master of the High Court, Eastern Cape, Port Elizabeth and others [2018] 4 All SA 871 (ECP)

Company law – Winding up of company – Liquidators – Role and duties – Section 394 of the Companies Act 61 of 1973 prescribes the manner in which the banking and investment of funds of a company in liquidation are to be dealt with.

The applicant (“Standard Bank”) sought the review and setting aside of the decision of the first respondent (the “Master”) regarding the payment to the second respondent (Lionel Shrosbree) of a commission on the investment of certain funds of a company in liquidation, and ancillary relief.

The company (“Mario Levi”) was finally wound-up in April 2014. The Master convened the first meeting of Mario Levi’s creditors and members, as contemplated in section 364 of the 1973 Companies Act, on 21 May 2014, at which meeting the third respondent (Gary Shrosbree) was appointed as one of the liquidators, together with the fourth respondent (Ms Pay) and fifth respondent (Mr Petersen). The sixth respondent (Ms Moodliar) was also appointed as one of the joint liquidators on 13 August 2014 Prior to her appointment, the administration of Mario Levi’s liquidation process was led by Gary Shrosbree. Ms Moodliar subsequently brought an investment of certain funds of Mario Levi with the seventh respondent (“PW Harvey”) to the attention of Standard Bank. The latter became concerned as to, *inter alia*, the propriety of this arrangement as well as other aspects relating to the administration of Mario Levi, Standard Bank formally applied to the Master to convene an enquiry to investigate, *inter alia*, whether commission was being earned on the investment of Mario Levi's funds with a private investment company. Gary Shrosbree, in his official capacity, had invested the said funds of Mario Levi in a corporate saver account with Nedbank, through the agency of PW Harvey on or about 30 June 2014. PW Harvey invested, as part of its business, funds placed with it on behalf of its clients with certain financial institutions, including Nedbank, and charged a fee, alternatively received a commission, for that service from Nedbank. PW Harvey had, at all material times, had an arrangement with Lionel Shrosbree in terms of which Lionel Shrosbree would receive a referral commission for any investments referred by him to PW Harvey. The arrangement was in terms of an oral agreement which included an entitlement to commission on all funds invested by Gary Shrosbree with PW Harvey.

Standard Bank contended that the nett interest rate earned on the corporate saver account at the time that the funds of Mario Levi were invested with Nedbank was significantly lower than the interest rate offered by similar investments by other financial institutions. Its complaint was that the investment of the funds of Mario Levi with PW Harvey on the basis set out above resulted in the unlawful payment of fees and/or charges out of the funds of Mario Levi; and the payment of the funds of Mario Levi to a third party (Lionel Shrosbree) who had no lawful entitlement thereto.

In response to Standard bank’s complaint, the Master conducted an investigation and issued a ruling that Lionel Shrosbree was not liable for the repayment of the commission paid to him by PW Harvey.

Held – Dispute was predicated on the suspicion on the part of Standard Bank that Gary Shrosbree had earned a secret referral commission or kickback from PW Harvey as a result of the investment made by Gary Shrosbree with Nedbank through the agency of PW Harvey. The essence of the dispute was whether or not the payment to Lionel Shrosbree of a portion of the interest earned on the funds of Mario Levi which had been invested with PW Harvey was lawful.

The object of the provisions of the Companies Act 61 of 1973 relating to winding-up, which provisions continue to apply in terms of item 9 of Schedule 5 to the Companies Act 71 of 2008, is to ensure a fair distribution of the company’s assets among its creditors in the order of their preference. The effect of a winding-up order is to establish

a *concursus creditorum* and once the law takes control of the estate, the rights of the general body of creditors have to be taken into consideration on a fair and equal basis. Included in the duties of a liquidator is the fiduciary duty not to make a secret profit or receive a kickback resulting from investments made by the liquidator. The liquidator must act with reasonable care in discharging his duties, whether the winding-up is compulsory or voluntarily.

Section 394 of the 1973 Companies Act prescribes the manner in which the banking and investment of funds of a company in liquidation are to be dealt with. In terms thereof, a liquidator is obliged to open a current account in the name of the company in liquidation. In addition, he may also open a savings account in the name of the company. The savings account is meant to be in addition to, and not instead of, the current account. All funds received by the liquidator on behalf of the company must be deposited into the current account and funds deposited in the savings account can be only those which have been transferred from the current account and which are not immediately required for the payment of any claims against the company. In addition to a savings account the liquidator may also place funds in a current account on an interest-bearing deposit with a banking institution, if such funds were not immediately required for the payment of any claims against the company.

The proposition on behalf of Gary Shrosbee that the corporate saver account was, for all intents and purposes, a current account in terms of section 394(a) was incorrect, and ignored the fact that he did in fact operate a current account in the name of the liquidated estate. None of Mario Levi's creditors or disbursements in the liquidation was paid from the corporate saver account. The corporate saver account was therefore a savings account for surplus funds, and not a current account. The Court found further that Gary Shrosbree opened the corporate saver account with Nedbank, through the agency of PW Harvey, in terms of section 394(1)(b), alternatively section 394(1)(c) of the 1973 Act.

The next question was whether or not the manner in which Gary Shrosbree carried out his obligations as a liquidator, in relation to the corporate saver account, was tainted with illegality. The critical facts were that Gary Shrosbree operated a current account in the name of Mario Levi, and also opened a corporate saver account in the name of Mario Levi. He transferred funds into the corporate saver account from the current account. He did not, on the evidence, withdraw any money from the corporate saver account otherwise than by way of a transfer of the funds to the current account. The agency fees payable to PW Harvey were deducted directly from the corporate saver account. While there was no need for the agency fees to be accounted for in the liquidation accounts of Mario Levi, the fact that the payments were reflected on the investment register of the corporate saver account was indicative of a full disclosure on the part of PW Harvey in relation to the corporate saver investment. That led to the conclusion that Gary Shrosbree complied with his obligations in terms of the provisions of section 394.

Finally, the Court considered whether or not PW Harvey was legally entitled to earn an agency fee from Nedbank. Section 1(1) of the Banks Act 94 of 1990 recognises circumstances in which a bank may act through a duly appointed agent. It followed that such an agent would be entitled to an agency fee. The Court confirmed that there is nothing wrong with the investment of funds through investment houses that charge administration fees for their services rendered.

Standard Bank having failed to prove any reviewable error on the part of the Master, its application was dismissed.

S v BN [2018] 4 All SA 759 (ECG)

Criminal law and procedure – Evidence – Circumstantial evidence – Test – Inference sought to be drawn must be consistent with the proven facts, and if it is not, the inference cannot be drawn – Proven facts should be such that they exclude every reasonable inference save the one sought to be drawn – Ballistic evidence leading to reasonable inference that accused had not shot the deceased.

After the fatal shooting of her husband (the "deceased") at their marital home, the accused was charged with his murder. The accused pleaded not guilty to all the charges and confirmed the contents of a plea explanation which was submitted by her Counsel in terms of section 115 of the Criminal Procedure Act 51 of 1977 (the "Act"). She also made certain formal admissions in terms of section 220 of the Act. In her statement, she alleged that whilst getting ready to go to work on the morning in question, she heard a bang and then the deceased shouting that he had been shot. With the help of their tenant, the accused took the deceased to a hospital. She denied that she had shot the deceased, and suggested that an intruder could have obtained access to the house after the deceased had opened the garage door that morning. She referred to the State's reliance of primer residue detected on her hand and the jacket that she had on during the morning of the incident, and explained that the primer residue could have been transmitted from the deceased to herself after the shooting.

The State's case was that the accused shot the deceased several times with a semi-automatic pistol in the chest at close range, causing his subsequent death. It was alleged further that the accused had then got rid of the firearm in question.

The Court detailed the testimony of each of the witnesses for both the State and the defence, before offering an analysis of such evidence.

Held – Undisputed evidence was that spent projectiles from at least two 9mm pistols were seized at the scene. An analyst at the forensic science laboratory testified that she found characteristic primer residue in a sample taken from the right hand of the accused and on various places on the accused's jacket. According to the authorities referred to by the Court, the presence of gunshot residue does not always indicate that the relevant person discharged a firearm. The detection of gunshot residue on a sample taken from the hands, face or clothing of an individual may not only indicate that the individual has been in the vicinity of the discharging firearm, but also that the person has made contact with a surface onto which gunshot residue has previously been deposited (which in this case appeared to be the jacket which was left in the main bedroom where at least one shot was fired). The tests done in this case fell short of what was required to eliminate all possibilities but that the accused had discharged a forearm. The Court found that a reasonable possibility existed for primer residue to have transferred to the accused in ways having nothing to do with her discharging a firearm.

The Court then turned to deal briefly with the value of the evidence presented by the relevant lay witnesses in the matter. The evidence of some of the State witnesses was of little value, and the Court addressed their testimony summarily. The evidence of the tenant of the accused and the deceased was dealt with in more detail. She did not

impress the Court as a witness, having deposed to at least three versions on oath. She mentioned eight occasions where she had deliberately lied in her first affidavit after having taken a solemn oath to speak the truth. Noting that she was a single witness regarding what transpired in the deceased's home directly before and after he was shot, the court declared itself uncertain as to which of her versions to take into account in order to qualify her as a witness who was both honest and reliable. By contrast, the accused made a good impression in the witness box, and her evidence remained consistent and clear.

It was clear to the Court that the most significant evidence before it was the ballistic evidence. The State's witness in that regard was a police captain working at the police forensic science laboratory. The key evidence testified to by the captain was that he was able to conclude beyond any doubt that the spent projectiles found at the scene had been fired from at least two 9mm pistols. That evidence was not challenged. Even if the evidence of the circumstantial witnesses was honest and reliable (which it was not) and even if the evidence regarding the primary residue was highly persuasive (which it was not) the court was still faced with the uncontested evidence that the projectiles submitted for ballistic testing showed that the probabilities were overwhelmingly strong that at least two 9mm firearms were used in the commission of the offence, neither of which had been found despite a diligent search. It was clear from the objective evidence that the accused had little or no opportunity to readjust the scene and to dispose of any weapon or weapons. The Court was therefore at a loss as to why the accused was charged and prosecuted when the prosecution was in possession of the ballistic evidence.

The State's case rested on circumstantial evidence. The test in that regard is two-pronged. The inference sought to be drawn must be consistent with the proven facts. If it is not, the inference cannot be drawn. The proven facts should be such that they exclude every reasonable inference save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be doubt whether the inference sought to be drawn is indeed correct. In this case, the only reasonable inference was not that the accused shot her husband. On the contrary, and in the light of the evidence, the reasonable inference was that she did not.

The accused was found not guilty on all charges and was discharged.

S v Ishwarall and another [2018] 4 All SA 799 (KZD)

Criminal law and procedure – Child abuse – Murder – Burden of proof – State bears onus of proving all elements of offences beyond reasonable doubt – Presence of culpability (mens rea), as a requirement for criminal liability, can be determined only once it is clear that there has been an unlawful and voluntary act that complies with the definitional elements.

Although two accused were charged in this case, the second accused died during the course of the trial. The remaining accused faced charges of assault with intent to do grievous bodily harm; numerous counts of child abuse in contravention of section 305(3) read with the relevant sections of the Children's Act 38 of 2005 read further with section 94 of the Criminal Procedure Act 51 of 1977; failure to provide medical assistance in contravention of section 305(4) read with the relevant sections of the Children's Act 38 of 2005 read further with section 94 of the Criminal Procedure Act; sexual assault and murder.

The complainants were three minor children. In order to afford them a measure of protection from identification, the court referred to the male child as “A”, the female child as “D” and the deceased three-year-old female child as Jamie.

The accused pleaded not guilty on all counts, and raised lack of criminal capacity as her defence. She was the biological child of the second accused and the mother of the three children.

Held – State bore the onus of proving all elements of the offences allegedly committed by the accused to establish her criminal liability beyond reasonable doubt. The first element was the conduct of the accused, whether an act or omission, as stated in each charge. Secondly, the act or omission had to be proved to be voluntary (as opposed to unconscious behaviour attributable to mental illness). Thirdly, that act or omission also had to be unlawful. The mere fact that the accused had committed an act which corresponded to the definitional elements of the crime and which was unlawful was however not sufficient to render her criminally liable. It was also required that her conduct be culpable, whether in the form of intention (*dolus*) or negligence (*culpa*). The State in this matter also bore the onus of proving the necessary intention on the part of the accused to commit the offences with which she had been indicted. Therefore, presence of culpability (*mens rea*) can be determined only once it is clear that there has been an unlawful and voluntary act that complies with the definitional elements. On that basis, the Court turned to determine the factual allegations against the accused before proceeding to determine her criminal capacity.

After detailing the evidence of A and D, the sister of the accused, the medical witnesses and the accused, the Court set out the law in such cases. The onus of proof, as set out above, is discharged if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that she is entitled to be acquitted if it is reasonably possible that she might be innocent. The Court was mindful of the cautionary rule applicable in the case of young children.

As corroboration for the evidence of the two minor complainants was found in the evidence of the accused’s sister and the two medical practitioners, it was appropriate to evaluate their testimony first. The Court undertook a detailed examination of A’s testimony, and concluded that he was an honest and reliable witness despite his youthfulness and that there was ample corroboration for his evidence. D’s testimony was found to corroborate that of A in material respects. The Court found no reason to reject her evidence as unreliable.

Assessing the evidence of the accused, the Court took note of the fact that she had sustained a brain injury in an accident in 2001. However, she came across in her testimony, as articulate and argumentative. She sought to justify any negative aspects of her personal conduct and had an explanation for all accusations levelled against her. The Court found her evidence to be fraught with contradictions and inconsistencies, and was satisfied from a consideration of the conspectus of evidence, that there was little veracity in her testimony and that her testimony fell to be rejected as false beyond reasonable doubt.

On the issue of unlawfulness of the accused’s actions, the Court confirmed that parents are legally entitled to chastise their children only if the chastisement does not exceed the bounds of moderation. Child abuse on the other hand relates to a continuous and *mala fide* maltreatment of children or the infliction of cruelty on them

over a prolonged period of time. The evidence of the acts perpetrated on the children in this case clearly supported the finding that the conduct of the accused exceeded the bounds of chastisement, as it was inflicted over an extended period, without just cause and not within the bounds of reason or moderation.

The final requirement for criminal liability is that of culpability. An indispensable ground for culpability is that the accused must have criminal capacity at the time of her conduct ie the accused must have the mental capacity or ability to distinguish between right and wrong and to conduct herself in accordance with this appreciation. Therefore, the accused must be neither a child nor have suffered from a mental illness when the offences were committed. Section 78(1) of the Criminal Procedure Act prescribes the criteria for criminal responsibility at the time of the conduct. The pertinent question was whether the accused had the ability to distinguish between right and wrong. While accepting that the accused had suffered a brain injury resulting in a mental impairment as contemplated in section 78(1), the Court went on to find that the accused did have the ability to appreciate the wrongfulness of her act or omissions. She had the conative ability to act in accordance with an appreciation of the wrongfulness of her act or omission. The defence had therefore failed to establish that the accused lacked the requisite criminal capacity to be held culpable for the charges with which she had been indicted. Such culpability was found to flow from her clear intention in the form of *dolus eventualis*.

The accused was thus convicted on all counts except for one count of assault with intent to do grievous bodily harm or child abuse in respect of D; sexual assault of D; and failure to provide medical assistance to D.

WWF South Africa v Minister of Agriculture, Forestry and Fisheries and others (South African Small-Scale Fisheries Collective as amicus curiae) [2018] 4 All SA 889 (WCC)

Environment – Fishing – Marine resources – West Coast rock lobster – Total allowable catch – Section 14 of the Marine Living Resources Act 18 of 1998 – Setting of – Review – Deputy Director General failed to have regard to mandatory objectives and principles concerning the need for lobster to be protected from over-exploitation and for the exploitation of lobster to be ecologically sustainable – Court held that the Deputy Director General acted arbitrarily and irrationally, failed to observe the mandated precautionary approach, and made a decision which no reasonable person could have made which resulted in the determination of the total allowable catch for West Coast rock lobster to be declared invalid and to be set aside.

In a case concerning the lawfulness of the regulation of West Coast Rock Lobster ("lobster") by the Department of Agriculture, Forestry and Fisheries ("Department"), the applicant ("WWF") was a non-profit organisation whose mission is to stop the degradation of the natural environment and to achieve harmony between people and nature by conserving biodiversity and the sustainable use of natural resources. The first and second respondents are the Minister of the Department and the Department's Deputy Director General: Fisheries Management Branch ("DDG"). One of the main mechanisms for regulating lobster is the annual determination, in terms of section 14 of the Marine Living Resources Act 18 of 1998, of the total allowable catch ("TAC"). In accordance with section 14(2), the TAC must be apportioned among small-scale, recreational, local commercial and foreign fishing respectively.

WWF sought a declaration that the TAC for the 2017/18 season was determined at 790 tons; and that all conduct of the Department predicated on a TAC of more than 790 tons be declared invalid. Alternative relief was also sought.

Held – Protection, conservation and sustainability feature directly in at least five of the Marine Living Resources Act's thirteen objectives and principles. Although the DDG who had made the decision in setting the impugned TAC listed some of the important objectives and principles contained in section 2 of the Marine Living Resources Act, she (Ms Ndudane) did not explain how she took these and the other objectives and principles in the Constitution, the National Environmental Management Act 107 of 1998 and the Marine Living Resources Act into account. All of the principles and objectives in question were binding on her. She could not ignore any of them and had to take practical steps towards their fulfilment.

Taking into account all of the evidence before it, the Court held that the 2017/18 TAC determination of 1924.08 tons was unlawful for several reasons.

Ms Ndudane failed to have regard to mandatory objectives and principles concerning the need for lobster to be protected from over-exploitation and for the exploitation of lobster to be ecologically sustainable. She failed to have regard to South Africa's international obligations under the United Nations Convention on the Law of the Sea and the Southern African Development Community Protocol on Fisheries, and disregarded the best scientific evidence available to her in setting the TAC. In setting the TAC at the previous season's level of 1924.08 tons, rather than at a level no higher than 1167 tons, she acted arbitrarily and irrationally, failed to observe the mandated precautionary approach, and made a decision which no reasonable person could have made.

The second respondent's determination of the total allowable catch for West Coast Rock Lobster for the 2017/18 fishing season was declared invalid and was set aside.

END-FOR NOW