LEGAL NOTES VOL 1/2019

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EDITORIAL

"It is a strange, strange world we live in, Master Jack". Without giving away my age, this was one of my favourite songs. But it is indeed a strange world we live in!

Last year this time we were looking at the National Forum timeline, this year it is something of the past, we now have a new regulating body for the Legal Profession!

Also, all the problems will now start. We just have to work through it…

For example, just after 1 November 2018, a few applications for admissions as advocates were postponed due to the question whether the applicants should still be admitted although their applications were received prior to 1 November 2018, but heard after 1 November 2018 when the Admissions of Advocates Act was repealed.

In all the cases before the court, we assume for argument's sake, that the applicants had complied with all the provisions of the Admission of Advocates Act, 74 of 1984 and the rules of court pertaining to the admissions.(Thus also being a "fit and proper person".)[2] The applications were all made in terms of section 3 (1) of the (now repealed) Admission of Advocates Act, the said act was repealed and replaced on 1 November 2018 by the Legal Practice Act 28 of 2014.(The LPA)

Sections 24 and 26 of the latter Act govern the admission of advocates from 1 November 2018 onwards.
Applicants could prior to 1 November 2018 be admitted in terms of section 115 of that Act and reads as follows:-

[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!**

[2] All applications in this case were lodged before 1 November 2018, see Ex Parte Goosen and others, case 2018/3660, South Gauteng High Court, par 2.3 but enrolled on 22 November 2018 (par 2.4)

“Any person who, immediately before the date referred to in section 120(4), was untitled to be admitted and enrolled as an advocate, attorney, conveyancer or notary is, after that date, entitled to be admitted and enrolled as such in terms of this Act.”

The date referred to in section 120 (4) is 1 November 2018. Thus in terms of this section a person who on 31 October 2018 met the criteria set out in section 3 (1) of the Admission of Advocates Act is entitled to be admitted also in terms of the Legal Practice Act.
The meaning of this section is clear. Simply put if somebody was entitled to be admitted as an advocate on 31 October 2018, then such person is entitled to be admitted under the LPA.

The matter is due to be heard by a full bench in Gauteng (Johannesburg) on 13 and 14 February 2019. Adv Megan Else will represent the NBCSA. (Our view is that they should be admitted)

Congratulations to adv Hein Brauckmann for becoming an acting judge in Mpumalanga!

We now have ten acting judges.

Also, the NBCSA has been accredited to provide training!

Concerning our fees, which has not changed for the last couple of years, our Chairperson, adv Bafo Momoti, voiced the following:

“Firstly, the Legal Practice Council is a statutory body. In terms of the Act ,Rules and Regulations, all legal practitioners whether they are in practice or not will be required to pay their annual subscription fee. This fee will be paid directly to the LPC. In simple terms this will be yourself annual 'license fee'. LPC will not be responsible for your day to day functions as a practising or non practising advocate. The bulk of the work will be performed by the voluntary associations.

Secondly, all Bar Councils including NBCSA will remain voluntary associations responsible for inter alia training for members, training of pupils , liaison with State Attorneys etc, conducting webinars and seminars, etc. NBCSA will continue to accept membership of non practising advocates. Other Bars do not. The Code of Conduct of the LPC will also be applicable to non practising advocates. Consequently, NBCSA will ensure that it also protects the interests of non practising advocates. The monthly subscription of NBCSA will remain. NBCSA has been accredited by the LPC to offer legal education and training in terms of the Act.”

It is a strange , strange world we live in!

WISHING YOU A PROSPEROUS NEW YEAR!

MATTHEW KLEIN

SALR JANUARY 2019

AHMED AND OTHERS v MINISTER OF HOME AFFAIRS AND ANOTHER 2019 (1) SA 1 (CC)

Immigration — Refugee — Asylum seeker — Whether and where may apply for visas and permanent residence permits — Immigration Act 13 of 2002.

Second, third and fourth applicants were asylum seekers.
Second applicant's children were in the country with her husband, who had a work permit. She applied to the Department of Home Affairs for a visitors visa.
Third and fourth applicants applied for critical skills visas.
The Department refused the applications on the basis of Immigration Directive 21 of 2015 (see [1] and [7]). The Directive states that asylum seekers may not apply for visas or permanent residence permits.
Second, third and fourth applicants applied to the High Court for a declarator that the Directive was invalid.
The High Court set aside the Directive as arbitrary, and found that asylum seekers could apply for visas within South Africa.
On appeal, the Supreme Court of Appeal held asylum seekers could apply for visas, but visitors and critical skills visa applications had to be made outside South Africa.

On further appeal to the Constitutional Court, *held*:

- The Immigration Act 13 of 2002 and Regulations permitted asylum seekers to apply for visitors and critical skills visas outside South Africa (see [35] and [39]).
- The Directive's blanket bar on asylum seekers applying for visas or permanent residence permits was inconsistent with the Immigration Act which allows all non-citizens to apply for them (see [50] – [51]).
- The Directive's bar on asylum seekers applying for permanent residence permits within South Africa was inconsistent with the Regulations which permit such applications within South Africa (see [53] and [55]).
- While the Regulations required visa applications to be made outside South Africa, an asylum seeker could apply to be exempted from the requirement (see [35], [60] and [65]).

Ordered, inter alia:

- Leave to appeal granted; appeal upheld; and order of the Supreme Court of Appeal set aside.
- To the extent the Directive put a blanket bar on an asylum seeker applying for visas, it was inconsistent with the Immigration Act.
- To the extent it barred asylum seekers applying for permanent residence permits inside South Africa, it was inconsistent with the Regulations.

GAVRIC v REFUGEE STATUS DETERMINATION OFFICER AND OTHERS 2019 (1) SA 21 (CC)

Immigration — Refugee — Qualification as — Exclusion — Whether refugee status decision precondition for exclusion decision — Internal remedy after exclusion — Determination of whether crime political — Refugees Act 130 of 1998, s 4(1)*(b)*.

Applicant, a Serbian national, entered South Africa in 2007, and was later convicted in absentia of murder by a Serbian court. He was sentenced to 35 years'

imprisonment. In South Africa applicant came to apply for asylum. His application was rejected by first respondent Refugee Status Determination Officer (RSDO). However the Officer's decision was set aside by the Standing Committee for Refugee Affairs (SCRA), and remitted to her, for re-interview.
She concluded s 4(1)*(b)* disqualified applicant from refugee status. It provides:
'A person does not qualify for refugee status . . . if there is reason to believe that he . . .
. . .
(b) has committed a crime which is not of a political nature and which, if committed in the Republic, would be punishable by imprisonment . . . .'
Applicant applied to the High Court to review and set aside the Officer's decision, and for declarators he was a refugee, and s 4(1)*(b)* was constitutionally invalid.
The High Court dismissed applicant's application, and application for leave to appeal to the Full Bench.
The Supreme Court of Appeal refused leave to appeal.
Here, applicant applied to the Constitutional Court for leave to appeal.
Held
- Leave to appeal and condonation should be granted (see [14] – [15]).
- Section 4(1)*(b)* was constitutional. (Applicant asserted it had unconstitutional consequences; and gave an Officer an overbroad discretion to make a decision affecting constitutional rights. The court held that s 4(1)*(b)* was saved by s 2, with which it had to be read. Section 2 contains the principle of non-refoulement.) (See [20] – [22] and [31].)
- It was not a precondition for a s 4 (exclusion) decision, that an Officer have taken a s 3 (refugee status) decision. An officer could take a s 4 decision where there had been no s 3 decision, or after there had been a s 3 decision.
- On an exclusion decision under s 4, the internal remedy was an appeal to the RAB (see [47] and [53]).
- Applicant was exempted of his obligation to exhaust internal remedies before instituting his review (s 7(2)*(c)*, Promotion of Administrative Justice Act 3 of 2000). (See [64] – [65].)
- The Officer's exclusion decision should be reviewed and set aside. (It was unreasoned, and based on documents (court judgments) and information, applicant did not have an opportunity to make representations on.)
- The court could make a substitution order (see [83]).
- The approach to deciding if a crime was political should be flexible, not overly inclusive or exclusive, and should take account of our historic context. The factors at [106] should be considered. (See [92] and [106].)
- Section 4(1)*(b)* disqualified applicant from refugee status. (There was reason to believe he had committed the crimes concerned (murder); and they were not of a political nature.) (See [107], [110], [113] and [115].)
- The High Court's order of costs against applicant should be set aside.

Leave to appeal granted; the appeal upheld; and the High Court's order set aside. Further, the Officer's disqualification decision set aside; and declared that applicant excluded from refugee status. No order as to costs. (See order, after [121].)
Jafta J, dissenting, would have granted leave to appeal, but would not have substituted the exclusion decision, or have made an asylum-application decision (see [163]). This, for inter alia, the following reasons.

- With both decisions the Constitutional Court would be the court of first and last instance, which would deny applicant his right of appeal and deprive the High Court and Supreme Court of Appeal of their jurisdiction.
- With respect to the exclusion decision, the existence of the internal appeal entailed that this remedy had to be exhausted before review, and there were no exceptional circumstances justifying exemption from it (see [134] – [135] and [140] – [141]).
- Nor were there exceptional circumstances justifying substitution of the decision (see [147] – [148]).
- Indeed, the majority's grounds to set aside the exclusion decision —inadequate reasons and procedural unfairness — warranted remittal (see [162] – [163]).

POPCRU v SACOSWU AND OTHERS 2019 (1) SA 73 (CC)

Labour law — Collective bargaining — Minority union — Existence of threshold agreement between employer and majority union not precluding collective agreement conferring organisational rights on below-threshold minority union — Contrary view would deny minority union's constitutional right to engage in collective bargaining — Labour Relations Act 66 of 1995, s 18, s 20.

Section 18 of the Labour Relations Act 66 of 1995 enables majority unions to enter into collective agreements setting thresholds of representativeness for the granting of organisational rights to minority unions. Section 23(1)*(d)* provides for the extension of these agreements to non-parties, provided certain requirements are met. Section 20 states that 'nothing in this Part [part A of ch 3, which includes s 18 but not s 23] precludes the conclusion of a collective agreement that regulates organisational rights'. This case is about the effect of these provisions on the organisational rights of minority unions, and whether a threshold agreement concluded under s 18 would preclude them from acquiring organisational rights.
In 2001 labour union Popcru and the Department of Correctional Services (the DCS) concluded a series of collective bargaining agreements, including a threshold agreement. Popcru argued that the threshold agreement and s 18 precluded the DCS from concluding a collective bargaining agreement with Sacoswu, a below-threshold minority union. Popcru also argued that since s 23(1)*(d)* made a collective agreement with a majority union binding on all employees, including non-members, Sacoswu was bound by the threshold agreement. In reply Sacoswu argued that s 20, which was dominant over s 18, enabled it to engage in collective bargaining and conclude the agreement with the DCS.
The ensuing disagreement went to arbitration. The arbitrator, relying on the Constitutional Court ruling in *Numsa v Bader Bop*, * found that the Sacoswu agreement was valid, even though Sacoswu was a minority and unrepresentative union. In subsequent appeals the Labour Court ruled for Popcru and the Labour Appeal Court (LAC) for Sacoswu.
In an application by Popcru for leave to appeal to the Constitutional Court, Sacoswu, besides relying on s 20 as before, argued that the appeal was moot because the 2001 Popcru – DCS threshold agreement had been repealed by way of a 2013 bargaining chamber resolution.
Held per Jafta J for the majority
While the appeal was indeed moot, the court would nevertheless decide it since the interpretation of s 18 and s 20 of the LRA was of particular importance to the

collective bargaining rights of minority unions (see [62], [69], [72], [74]). Since the LAC's judgment on these issues constituted binding precedent, any errors of law in it had to be corrected (see [81], [105]).
Popcru's interpretation of s 18 had to be rejected as being contrary to its text, which did not refer to collective bargaining nor authorise an employer and a majority union to determine which constitutional rights unions that were not parties to the collective agreement could exercise. A prohibition on collective bargaining by below-threshold unions would not only be contrary to the Constitution and international law, but also meaningless in the light of the wording of s 20. (See [95] – [96], [103] – [104].) Nor did s 23 prohibit agreements with below-threshold unions: if s 20, which was dominant, allowed them, then s 23 — which did not prohibit anything — could not preclude them (see [100]). Since neither s 18 nor s 23 prevented the conclusion of a collective agreement between an employer and a minority union in circumstances where a s 18 agreement between the same employer and a majority union existed, the LAC's outcome was good (see [101], [105]). But it was based on errors that had to be corrected. They were that the right to collective bargaining could be limited by an agreement; that collective agreements could be concluded under s 20; and that a union's right to represent employees in grievance and disciplinary proceedings was sourced in s 12 (and hence subject to thresholds). Appeal dismissed.
Held per Zondo DCJ concurring
Nothing prevented the DCS and Sacoswu from concluding a separate collective agreement conferring *contractual* organisational rights on Sacoswu while the earlier collective agreement conferring *statutory* organisational rights on Popcru was still operational (see [133], [138] – [144]).
Held per Cachalia AJ (with Froneman J) dissenting
While Sacoswu's status as minority union did not preclude it from acquiring organisational rights from the DCS, the repeal of the 2001 threshold meant that the appeal was moot and leave to appeal should be refused (see [37], [42], [45]). Moreover, the allegedly wrong findings of the LAC referred to in the majority judgment either misconstrued that court's order, were obiter, or not erroneous.

COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE v EXECUTORS, ESTATE ELLERINE 2019 (1) SA 111 (SCA)

Company — Shares and shareholders — Shareholders — Variation of rights — What constitutes — Decrease in value of ordinary shares when preference shares converted to ordinary shares — Not constituting variation of rights.

Revenue — Capital gains tax — Deemed disposal of asset — Disposal to and from deceased estate — Valuation of preference shares for purposes of determining capital gain — Whether rights attaching to preference shares entitling holder thereof to convert them to ordinary shares — Whether such rights to be taken into account to determine its market value — Income Tax Act 58 of 1962, sch 8 paras 31(3) and 40(1).

Paragraph 40(1) of sch 8 to the Income Tax Act 58 of 1962 provides that 'a deceased person is treated as having disposed of his/her assets . . . for an amount received or accrued equal to the market value of those assets at the date of the person's death'; and para 31(3) that the market value of shares in an unlisted company is equal to the price it would 'obtain upon the sale of the shares between a willing buyer and a willing seller dealing at arm's length in an open market'.

This case, an appeal to the Supreme Court of Appeal against a Tax Court decision, concerned a dispute over the market value of certain preference shares held by the deceased upon his death. The Commissioner assessed the respondent deceased estate's liability for capital gains on the basis of its market value as ordinary shares. This on the basis that the deceased was entitled, by using his voting power, to convert his preference shares to ordinary shares.

In the Tax Court the only issue was whether the rights that attached to the preference shares, and which entitled the holder thereof to convert them, should be taken into account in the determination of the market value. The Tax Court agreed with the executors that the terms of a special condition in the company's memorandum of incorporation, read together with its articles of association, precluded the deceased from converting preference shares to ordinary shares, and that they should therefore be valued equal to their nominal value. The SCA disagreed. It held that, on a proper interpretation of the company's articles of association and memorandum as amended, the deceased was entitled to convert the preference shares to ordinary shares.

The SCA also rejected the executor's argument that dilution in the value of ordinary shares, caused by the conversion of preference shares to ordinary shares, amounted to variation of the rights associated with the ordinary shares. (Under the company's articles of association, approval by 75% of the holders of ordinary shares was required for a variation of rights.) It held, following English case law, that a variation of rights occurred when the rights attaching to the shares were varied, not when they became commercially less valuable. (At [34] – [36].)

The appeal was accordingly upheld, and the Tax Court's order replaced with the following:

'The deceased was entitled, on the date of his death, to convert the preference shares to ordinary shares and the preference shares must be valued, for the purposes of para 40 read with para 31(3) of the eighth schedule to the Income Tax Act, on this basis.'

DE VILLIERS AND OTHERS v GJN TRUST AND OTHERS 2019 (1) SA 120 (SCA)

Company — Dissolution — Application for order declaring dissolution void — Notice of application — Order granted in absence of appellants — Appellants seeking rescission of order under rule 42(1)(a) on grounds erroneously made because notice not given to them — Ambit of s 420 of old Companies Act, and effect and purpose of order avoiding dissolution of company, considered — Rescission refused, given appellants' lack of locus standi in that they were not affected by s 420 order — Companies Act 61 of 1973, s 420.

Company— Dissolution — Application for order declaring dissolution void — Nature of discretion granted to court — Court provided with discretion to avoid dissolution of company in any circumstances where interests of justice warranting such cause — Discretion was wide, and defied precise definition — Companies Act 61 of 1973, s 420.

Company— Dissolution — Application for order declaring dissolution void — Purpose and effect of order granted avoiding dissolution of company — Companies Act 61 of 1973, s 420.

The appellants in the present matter were Mr De Villiers; the Cape Veterinary Wholesalers CC (the CC), of which Mr De Villiers was the sole member; and the Francois de Villiers Share Trust (the Share Trust), of which Mr De Villiers was a trustee. Mr De Villiers and the CC were creditors of the company Cape Animal Health Brokers (Pty) Ltd (the company). The Share Trust was the sole shareholder of the company. The company was liquidated (in terms of an order obtained at the instance of Mr De Villiers in the High Court, Cape Town), and afterwards dissolved in terms of s 419 of the Companies Act 61 of 1973 (the Act). Subsequently, the first respondent, the GJN Trust, also a creditor of the company, successfully sought an order in the High Court (Cape Town) declaring the dissolution of the company to have been void in terms of s 420 of the Act, on the grounds of impropriety on the part of the appellants.

In the court a quo the appellants sought the setting aside of the s 420 order, in terms of rule 42(1)*(a)*, on the grounds that it had, erroneously, been made without any notice to any of them. The court a quo refused such rescission application. This is the appellants' appeal to the Supreme Court of Appeal against such refusal. The critical question for decision, the SCA found, was whether the appellants had established locus standi to bring an application under the rule, ie had they a legal interest in the subject-matter of the action or application which could be prejudicially affected by the order in that action or application? In answering this question, the court considered relevant background, in particular the ambit of s 420 of the Act, and the purpose and effect of an order granted in terms of s 420 of the Act.

Held, that s 420 of the Act provided a court with the discretion to avoid the dissolution of a company in *any* circumstances where the interests of justice warranted such a cause. The discretion was wide, and defied precise definition. (See [11] – [13].)

Held, further, that the effect of an order under s 420 was to revive the company and to restore the position that existed immediately prior to its dissolution. Thus, the company was recreated as a company in liquidation, with the rights and obligations that existed upon its dissolution. Property of the company that passed to the state as bona vacantia was automatically revested in the company by operation of law. An order under s 420 was only retrospective in this sense and did not validate any corporate activity of the company which may have taken place during the period of its dissolution. The effect of an order in terms of s 420 had therefore to be contrasted with the effect of the reinstatement of a company in terms of s 82(4) of the new Companies Act after its deregistration by the Companies and Intellectual Property Commission in terms of s 82(3) thereof. The steps taken during the prior liquidation, up to the time of dissolution, stood. (See [14].) There would be no reopening of the confirmed first and final liquidation and distribution account in terms of which distribution had already taken place (contrary to that argued by the appellants).

Held, further, that it was clear that the purpose of a s 420 application was to enable an investigation aimed at distribution of assets not dealt with in the confirmed account, and to enable liquidators to deal with further assets of the company. (See [18] and [25].)

Held, accordingly, that the court had to reject the appellants' argument that the s 420 order adversely affected their interests in that they were not afforded the opportunity to respond to the serious allegations of impropriety that had been made in the s 420 application. Although the purpose of the s 420 application was to enable the liquidators to claim from the appellants, the subject-matter of that application was the

restoration of the dissolved company to a company in liquidation and not the enforceability of the alleged claims against the appellants. The prosecution of these claims would no doubt take place by due process, during which the appellants would be afforded the full opportunity to protect their rights. Thus, no legal interests of the appellants were adversely affected by the s 420 order. (See [25].)
Held, accordingly, that the appeal had to be dismissed

JIBA AND ANOTHER v GENERAL COUNCIL OF THE BAR OF SOUTH AFRICA AND ANOTHER 2019 (1) SA 130 (SCA)

Advocate — Misconduct — Removal from roll — Appeal by advocates struck from roll — Complaints, inter alia, of provision of incomplete records, late filing of affidavits, and attempts to mislead court — Cross-appeal by General Council of Bar against adverse costs order.

The GCB * asked the Gauteng Division (Legodi J and Hughes J) for the removal from the roll of Ms Jiba, Mr Mrwebi and Mr Mzinyathi.
The request flowed from, in the case of Jiba, her conduct in three matters. At the time Jiba was Acting National Director of Public Prosecutions.
The first involved filing of an incomplete record, late filing of answering affidavits, and statements Jiba made on affidavit. The matter was the review of the withdrawal of charges against Lieutenant-General Richard Mdluli. (See [37], [46] – [47], [50] – [51] and [53] – [54].)
The second concerned the truth of statements Jiba made in an affidavit. Her statements related to her decision to authorise prosecution of Major-General Johan Booysen. (See [38] and [45].)
The third referenced Jiba's provision of a deficient record of the decision to discontinue prosecution of then President Jacob Zuma. (See [42].)
The GCB's application in the case of Mrwebi concerned the failure to provide a proper record, and timeous affidavits, in the review of the withdrawal of charges against Lieutenant-General Mdluli. It also related to the truth of statements Mrwebi made on affidavit and in certain disciplinary proceedings. He was then Special Director of Public Prosecutions.
The GCB's application in respect of Mzinyathi related to a High Court (Murphy J) finding that Mzinyathi made false statements in an affidavit. Mzinyathi was then a Director of Public Prosecutions. (See [1] and [70].)
The Gauteng Division struck Jiba and Mrwebi from the roll, and dismissed the GCB's application against Mzinyathi with costs (see [69]).
Here, Jiba and Mrwebi appealed, and the GCB cross-appealed the adverse costs order in the Mzinyathi complaint, to the Supreme Court of Appeal. Shongwe ADP wrote the judgment for the majority, and Van der Merwe JA wrote for the minority.
Jiba
The majority agreed with the Gauteng Division's dismissal of the complaints relating to the Booysen and Zuma matters (see [11]).
But they disagreed with the Gauteng Division's holding on the Mdluli complaint (see [18]).
In the latter, the bases the GCB cited did not support a finding of misconduct.
They were that Jiba submitted an incomplete record in the review; Jiba attempted to mislead the court by not disclosing a memo; Jiba's refusal to internally review the withdrawal of charges against Mdluli; Jiba's statement she had not received an

affidavit, when she had; Jiba's disagreement with counsel's view there was a case against Mdluli. (See [15] – [18].)
The minority's view was that the Gauteng Division was correct in finding Jiba not fit and proper to practise (see [58]).
This conclusion was supported by the instances of dishonesty described at [45], [51] and [53] – [54]; the failures to assist the court described at [42] and [46] – [47]; and the absence of integrity.

Mrwebi

The majority was satisfied the alleged misconduct was established. (Mrwebi tried to mislead the court about his consultation with Mzinyathi; and by not providing a proper record.) (See [19] and [28] – [29].)
They were also satisfied Mrwebi was not fit and proper to practise as an advocate (see [29]).
But in their view the Gauteng Division was biased and misdirected itself on the appropriate sanction. This was suspension. (See [27] – [29] and [31].)
The minority's view was that the Gauteng Division's order was correct. That was that Mrwebi should be removed from the roll. Mrwebi was unreliable, told repeated untruths and abused his position. (See [59] – [61], [63] – [64] and [67] – [68].)

The GCB's cross-appeal against the award of costs to Mzinyathi

The majority's holding was that the Gauteng Division exercised its costs discretion correctly: the GCB continued with the proceedings even when it became aware there were no grounds for them (see [25]).
The minority's conclusion was that the GCB should not have been ordered to pay Mzinyathi's costs (see [73]).
This because the GCB was dutied to bring Murphy J's findings to the attention of the court, and it was not for the GCB to end the proceedings when the GCB received Mzinyathi's explanation in his answering affidavit (see [73]).
Moreover, the Gauteng Division misdirected itself in not applying the principle that the GCB should not, in bringing a disciplinary matter to the attention of the court, be mulcted with costs (see [72] – [73]).

Order

The majority ordered that Jiba and Mrwebi's appeal be upheld, and the GCB's cross-appeal be dismissed (see [31]).
The majority replaced the Gauteng Division's order, in relevant part, with an order dismissing the GCB's application to remove Jiba and Mrwebi from the roll of advocates, and suspending Mrwebi from practising as an advocate for six months (see [31]).
The minority would have ordered that the appeals of Jiba and Mrwebi be dismissed. It would have upheld the GCB's cross-appeal, altering the Gauteng Division's order so it ordered no costs against the GCB.

MINISTER OF RURAL DEVELOPMENT AND LAND REFORM v NORMANDIEN FARMS (PTY) LTD AND OTHERS, AND ANOTHER APPEAL 2019 (1) SA 154 (SCA)

Environmental law — Conservation of agricultural resources — Prevention of erosion — Overgrazing — By livestock belonging to labour tenant — Labour tenant subject to statutory prohibition on overgrazing — Removal of livestock not constituting 'eviction' of labour tenant — State not obliged to provide tenants with alternative

grazing land for displaced livestock — Conservation of Agricultural Resources Act 43 of 1983; Land Reform: Provision of Land and Assistance Act 126 of 1993, s 10(1).

Land — Land reform — Labour tenant — Overgrazing of land — Remedies of owner — Removal of livestock — Duty of state to relocate — Removal of livestock not constituting 'eviction' of labour tenant — State not obliged to provide tenants with alternative grazing land for displaced livestock — Conservation of Agricultural Resources Act 43 of 1983; Land Reform: Provision of Land and Assistance Act 126 of 1993, s 10(1).

Words and phrases — 'Eviction' — Meaning of in Land Reform (Labour Tenants) Act 3 of 1996 — Deprivation of right of occupation of land resulting from purported termination or repudiation of that right.

These appeals were against orders granted in favour of Normandien (Pty) Ltd, the owner of the farm Albany, in the Land Claims Court (LCC). The first appeal was by the Minister of Rural Development and Land Reform (the land minister), and the second by a group of persons (the occupants) who had lived on Albany for many years and who grazed their livestock there. The LCC's orders were, essentially, that the occupants' livestock should be temporarily removed from Albany to allow the pasturage to recover from overgrazing. Government officials, including the land minister, were directed to facilitate the removal. * The orders were made on the basis that the continued presence of the livestock on Albany contravened the Conservation of Agricultural Resources Act 43 of 1983 (the Conservation Act), and that the Land Reform: Provision of Land and Assistance Act 126 of 1993 (the Reform Act) permitted the court to order the state to make land available for their relocation.
The LCC had in related proceedings declared the occupants to be labour tenants under the Land Reform (Labour Tenants) Act 3 of 1996 (the Labour Tenants Act). The LCC purported to grant the occupants the right to acquire, if they so elected, the part of Albany occupied by them. The occupants argued that they had exercised this election, and in a counter-application they sought its affirmation. They also sought a declaration that the removal application would be subversive of the rights conferred on them by their election.
The LCC granted Normandien's application, finding that s 10(1) of the Reform Act, read with that Act's objects, obliged the state to make alternative grazing land available to the occupants. * The LCC refused the occupants' counter-application on the ground that they had missed the Labour Tenants Act's 31 March 2001 cutoff date.
In the appeal counsel for the land minister and the occupants argued that the LCC should have refused the removal application because it amounted to an 'eviction' under the Labour Tenants Act, which defines eviction to include 'the deprivation of a right of occupation or use of land'. It was also argued by the minister that the order directing him to make alternative land available for the relocation of the occupants' livestock was impermissible because it fell outside his powers.

Held

The occupants' appeal against the dismissal of the counter-application would fail: even had they been granted the right to acquire the affected part of the farm — which was debatable (see [50] – [51]) — this would not exempt them from the Conservation Act (see [46]). There was also no proof that the occupants had filed a timeous application under s 16(1) of the Labour Tenants Act for the award of the affected land (see [47]).

Nor was the removal application an 'eviction' under the Labour Tenants Act: in it 'eviction' connoted a deprivation of the right to occupation of land resulting from the purported termination or repudiation of that right (see [59]). Normandien was merely seeking to enforce the Conservation Act, not to terminate the relationship between itself and the occupants as labour tenants or to deny their right to graze their livestock on Albany (see [60]). Moreover, the Labour Tenants Act did not exempt labour tenants from other laws that limited the way in which land could be used — labour tenants, like everyone else, were subject to the Conservation Act (see [61] – [62]).
The LCC had erred in making the order directing the minister to make land available under the Reform Act (see [69]). Before land could be made available under that Act, it had to be designated 'for the purposes of settlement . . . of persons on designated land' (s 2 read with the definition of 'settlement' in s 1) (see [70]). This would not normally include grazing land — and even if it did, it did not follow that the land minister was obliged to exercise his powers under the Reform Act by making grazing land available to the occupants (see [71] – [72]). His powers under the Act were permissive and it was for him, not the court, to determine whether those powers should be exercised in a given instance (see [72]).
The court accordingly allowed the appeal of the land minister against the LCC's order that he make land available for grazing by the occupants' livestock but dismissed the occupants' appeal against the LCC's order denying them a land award (see [85]).
In respect of costs as between Normandien and the occupants the court found that *Biowatch* did not apply because both sides were private parties, and that there was no reason to interfere with the LCC's punitive costs order against the occupants

TRUWORTHS LTD v PRIMARK HOLDINGS 2019 (1) SA 179 (SCA)

Intellectual property — Trademark — Infringement — Well-known mark — Protection of well-known mark — Requirements for proof that mark is a well-known mark — Trade Marks Act 194 of 1993, ss 27(5) and 35(1).

Intellectual property — Trademark — Infringement — Well-known mark —Protection of well-known mark — Unnecessary to establish that mark well known in entire Republic; mark protected if well known in any 'relevant sector' — Identification of relevant sector — Relevant sector of SA public constituted by those who were potentially likely to be attracted by mark's reputation to do business with proprietor of mark — Proper identification of relevant group involved a factual enquiry that was specific to particular mark and goods or services to which it related — Trade Marks Act 194 of 1993, ss 27(5) and 35(1A).

Truworths, a prominent South African fashion retailer, wished to register the mark PRIMARK in class 25 (clothing, boots, shoes and slippers) of the trade marks register. Primark Holdings (Primark), a discount fashion retailer based in Ireland but with presence throughout the UK and Europe, had registered the same mark in the same class in South Africa in 1976, but had never since opened a store here. Truworths brought an application for the removal of Primark's mark from the register on the grounds of non-use in terms of s 27(1)*(a)* and *(b)* of the Trade Marks Act 194 of 1993. It was unsuccessful there, so appealed to the Supreme Court of Appeal. Primark's principal defence was that PRIMARK was a trademark entitled to protection under the 'Paris Convention' as a 'well-known mark' (in South Africa) as

intended in s 35(1) of the Act. This meant that, in terms of s 27(5) of the Act, Truworths could not rely on the ground of 'non-use' for the mark's removal from the register. The focus of the SCA's attention then was whether PRIMARK was a well-known mark in South Africa. The court noted that the mark in question as per s 35(1A) did not need to be known among the whole population of South Africa, but merely in the 'relevant sector' — the sector of the public interested in the goods or services to which the mark related, of which there might be more than one (see [6] – [7]). The task of the court was to identify the relevant sector or sectors of the public and to determine whether the mark was well known within those sectors (see [7]). In doing so it was obliged, it said, to consider the Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks of the World Intellectual Property Organization (WIPO) (see [12]). Article 2(2)*(a)* of WIPO provided that relevant sectors of the public shall 'include, but shall not necessarily be limited to: (i) actual and/or potential consumers of the type of goods and/or services to which the mark applies; (ii) persons involved in channels of distribution of the type of goods and/or services to which the mark applies; (iii) business circles dealing with the type of goods and/or services to which the mark applies.' (See [11].)

For its part, Truworths identified the only relevant sector of the public in South Africa as 'all South Africans interested in clothes and accessories', which it regarded as being the 'actual and/or potential consumers of the type of goods and/or services to which the mark applies' as per art 2(2)*(a)*(ii) of the Recommendation. It submitted that the mark was not well known in this group. Primark argued that potential customers were instead limited to the better educated and more affluent of society, who would have been familiar with the mark. It introduced a further relevant sector of the public, ie those people involved in the design, distribution, marketing and retail of inexpensive fashion clothing, amongst whom, it insisted, the PRIMARK mark was well known.

Held, relying on article 2(2)*(b)* of the Recommendation, that if a party established that its mark was well known in *any* relevant sector of the public, the mark had to be taken to be a well-known mark entitled to protection. The fact that it was not well known in other relevant sectors was irrelevant. (See [17].) The proper identification of the relevant groups involved a factual enquiry that was specific to the particular mark and the goods or services to which it related (see [16]).

Held, further, that when dealing with a mark applied to goods, such as fashionable but relatively inexpensive clothing, sold in the retail market to a wide body of consumers, those potential consumers would constitute one relevant sector of the public (see [18]). However, Truworths' characterisation of Primark's potential customers — ie effectively *all South Africans* with an interest in clothing — was overbroad. It was improbable that its potential market would extend to the poorer echelons of society, or the bulk of rural towns. On the other hand, one could not narrow the sector to the extent that Primark sought to do, restricting it to the better-educated and more affluent members of society. The relevant market would comprise much of the middle-to-lower-income groups. (See [43] – [46].) However, in such groups, the evidence did not suggest that the mark PRIMARK was well known.

Held, further, that the evidence supported the conclusion that the mark PRIMARK was well known in the sector of the public identified by Primark, ie those involved in the design, distribution, marketing and retail of inexpensive fashion clothing (see [52] and [54]). However, such a sector was not a *relevant* sector falling within either of the other classes identified in the WIPO recommendation, namely 'persons involved in channels of distribution of the type of goods' or persons within 'business circles

dealing with the type of goods'. An essential requirement for any identified sector of the public to be regarded as a *relevant*sector in an enquiry whether a mark was a well-known mark in South Africa was that the persons constituting the sector in question had to know of and be interested in the mark for the reasons that trademarks were given protection, namely their attractive force in the trade in goods and services and their role as a badge of origin of those goods and services. In other words, relevant sectors would be constituted only by those who were likely to be attracted by the mark's reputation to do business with the proprietor of the mark, whether as consumers, agents, importers, channels of supply, retailers or otherwise. However, here the evidence did not indicate knowledge of that sort; rather the mark was well known to people in the clothing retail sector because they wished to emulate the success of the Primark brand. (See [56] – [59].)
Held, accordingly, that Primark's reliance on ss 35(1) and 27(5) of the Act had to fail (Primark's mark not being well known in the only relevant sector of the public). (See [60].)
Held, further, that Primark had not demonstrated that there had been bona fide use of the PRIMARK mark by it in South Africa (See [64]). Accordingly, appeal upheld, and order granted expunging PRIMARK mark from the register.

AIRPORTS COMPANY SOUTH AFRICA v TSWELOKGOTSO TRADING ENTERPRISES CC 2019 (1) SA 204 (GJ)

Review — Grounds — Legality — Mistake of fact — Requirements.

Acsa applied to review its decision to award a tender to Tswelokgotso. * The review was based on the principle of legality (see [2]).
It asserted the decision was based on, and flawed, by a mistake of fact (see [3]).
A decision based on a mistaken fact is reviewable, where the fact concerned is material and established. (Established in the sense of objectively verifiable, and uncontestable.) (See [10] – [12].)
Acsa asserted two errors.
Firstly, a failure to inform bidders of a certain requirement (to complete and return an addendum) (see [17]); and secondly, its failure to follow a requirement it had specified. (A bidder issued with a letter of non-conformity would be disqualified. Tswelokgotso was issued such a letter, but nonetheless awarded the tender.) (See [18].)
Held, that the first was a failure of procedural fairness (see [19], [26 – [27]);
and regarding the second, that it was not 'established', in the required sense, that Tswelokgotso was issued a letter of non-conformance (see [39] – [40]).
Application dismissed.

DEMOCRATIC ALLIANCE v MATIKA AND OTHERS 2019 (1) SA 214 (NCK)

Local authority — Municipal councils — Meetings — Only speaker entitled to call meeting — Local Government: Municipal Structures Act 117 of 1998, s 29(1).

Local authority — Municipal councils — Meetings — Where called to consider resolution for removal of mayor — Notice requirements — Aimed at achieving democratic right of members of municipal council to participate in proceedings, as secured in s 160(8) of Constitution — Local Government: Municipal Structures Act 117 of 1998, s 58; Constitution, s 160(8).

Local authority — Municipal councils — Meetings — Whether speaker retaining discretion whether to call meeting, when called to do so by municipal council — Local Government: Municipal Structures Act 117 of 1998, s 29(1).

The DA brought an urgent application in the High Court, Kimberley, for an order (in the form of a rule nisi) directing Mr Matika to vacate the post and office of executive mayor of the Sol Plaatje Municipality (the Municipality) on the basis of a motion of no confidence in him passed at a 'special meeting' of the municipal council that took place on 25 July 2018. In the alternative, the DA sought an order directing the acting speaker to call a meeting of the municipal council for the tabling of the above-mentioned motion of no confidence. Mr Matika, as well as, inter alia, the acting speaker, opposed the above relief. Mr Matika instituted a counter-application in which he sought the review and setting-aside of the special council meeting of 25 July 2018, as well as all resolutions taking place at such meeting. This is the consolidated hearing of those two applications.
Mr Matika argued that the special meeting was not lawfully constituted and convened and the outcome thereof invalid and unlawful, in circumstances where, inter alia, he (as well as other councillors) received no notice whatsoever of the meeting, and where *the meeting had not been convened by the acting speaker*, the latter having refused the request of the DA. The DA insisted that the meeting was indeed properly constituted and the resolutions passed valid. While it was common cause that the acting speaker did not convene the special meeting, the DA disputed that Mr Matika received no notice of the meeting. In this regard it drew attention to chief whips' meetings convened by the acting speaker held earlier to discuss the original request calling for a motion of no confidence in Mr Matika, as a result of which Mr Matika would have become aware of the intended notice of motion against him.
Held, as to whether the meeting was properly convened
Only the acting speaker was competent to call the special meeting of the municipal council; this was apparent from the provisions of s 29(1) of the Local Government: Municipal Structures Act 117 of 1998 (as well as the similarly worded rules 6.1 and 6.7 of the Municipality's 'Standard Rules of Order for Council and its Member' (the rules)) which provided that 'the speaker of a municipal council decides when and where the council meets . . . but if a majority of the councillors requests the speaker in writing to convene a council meeting, the speaker must convene a meeting at a time set out in the request'. Here, in breach of such provisions, the special meeting of 25 July 2018 was not convened by the acting speaker. (See [20] and [23].)
The DA relied on s 41 of the Municipal Structures Act (MSA) to argue that it was entitled to elect a councillor to act as speaker for the purpose of a particular meeting and to preside over such meeting (which occurred here). However, while s 41 did provide for this, this would surely presuppose that such election take place at a properly convened meeting, of which proper notice had been given, but which was then left without a speaker or an acting speaker to preside over it. What transpired in the council chamber during the afternoon of 25 July 2018 did not form part of a meeting convened by the acting speaker. (See [24] – [25].)
Held, as to whether proper notice was given
In terms of s 58 of the MSA, 'prior notice of an intention to move a motion for the removal of the executive mayor . . . must be given'. Rule 6.3 required the municipal manager to give five working days' written notice of meetings to all members of the municipal council. Rule 6.8, in respect of special meetings of councils, calls for notice setting out the time, date and venue of such meeting to be given. Rule 6.9

provided that notice to members of the municipal council was effected by dispatch of the notice to their email or physical addresses. (See [27] – [30].) It was common cause that notice of the special meeting did not take place in any of the above forms. With respect to Mr Matika, he received no notice of the proposed motion of no confidence, and further he was not aware of it at all. (See [31] – [32].)
It was submitted on behalf of the DA that the steps taken by the majority of councillors were effective, even if falling short of the statutory requirements, when measured against the object of the legislature as far as the issue of notice was concerned. Section 58 of the MSA was aimed at achieving the democratic right of members of a municipal council to participate in its proceedings, as secured in s 160(8) of the Constitution. To give effect to s 160(8) of the Constitution, inclusive deliberation prior to decision-making was required. It was clear that, even were a single councillor deprived of the right to debate and to participate, because of the absence of notice, the objects of the MSA and the Constitution would be frustrated. On the facts of the present matter, such objects had not been achieved, in the absence of any evidence that even an attempt was made to notify either Mr Matika or the absent councillors. The failure also offended the *audi alteram partem* principle of natural justice. (See [40] – [46] and [58].)
The DA argued that s 160(3) of the Constitution (as well as the similarly worded s 30(3) of the MSA) required only that a majority of members be present at a meeting and that decisions take place by a majority vote; given that the majority of members were indeed present at the special meeting and that the decision was taken unanimously, it was valid. However, this argument had to be rejected because s 160(3) of the Constitution presupposed a properly constituted and convened meeting for members to vote at — ie one of which proper notice had been given. (See [47] – [48].)
The result was that the proceedings at the meeting of 25 July 2018 were unlawful and invalid, and the decisions taken there were unlawful and invalid and fell to be set aside. (See [62].)
Held, as to alternative relief directing acting speaker to call a special meeting to deal with motion of no confidence
The crucial question to be decided was whether the acting speaker was wrong to refuse to convene a meeting in response to the DA's request. On the part of the DA, it was argued that the acting speaker had no discretion whether or not to convene the meeting, because s 29(1) of the MSA enjoined him to convene a meeting when requested to do so. (See [66] – [67].) This was incorrect. The request in s 29(1) of the MSA presupposed a valid request as envisaged in the rules. This followed from the provisions of s 37*(f)* of the MSA which enjoined a speaker to ensure that council meetings were conducted in accordance with the rules and orders of the council. A speaker or acting speaker who received a request to call a public meeting would not have to do so on demand, but would be entitled to consider questions of compliance with notice requirements and time limits. (See [69] – [72].) It followed that the acting speaker was not obliged to call the special meeting on demand, and was entitled to consider whether appropriate notice had been given, and to refuse to convene a meeting in circumstances which would have left less than 90 minutes within which to notify all members of the council and the public. (See [82].)
Accordingly, application dismissed, and counter-application granted.

DUNN v ROAD ACCIDENT FUND 2019 (1) SA 237 (KZD)

Motor vehicle accident — Compensation — Claim against Road Accident Fund — Consent order — Interest on judgment debt — Order providing that payment would be deferred for four months — No express provision for interest — Interest running from date of default — Where payment deferred, s 17(3)*(a)* of Road Accident Fund Act 56 of 1996 not applying in absence of specific clause providing for its operation.

Interest — A *tempore morae* — When commencing — Claim against Road Accident Fund — Consent judgment granted for payment on deferred date — No express provision for interest — Interest running from date of default — Where payment deferred, s 17(3)*(a)* of Road Accident Fund Act 56 of 1996 not applying in absence of specific clause providing for its operation.

When a settlement agreement made an order of court defers payment of a debt to a future date, mora interest shall run from that day, and not from the date of judgment (see [18] – [21]).
Applicant Ms Dunn's R6 million claim against the respondent, the RAF, was settled and a court order based on the settlement agreement made on 17 August 2016 (the consent order). The consent order provided that Ms Dunn would receive payment on or before 17 December 2016. It was, however, silent on the issue of interest. The RAF paid late, on 16 January 2017. While the parties agreed that mora interest was due, they disagreed on when it started running. Ms Dunn argued that s 17(3)*(a)* of the Road Accident Fund Act gave the RAF 14 days' grace 'from the date of the . . . order', after which mora interest would start running. The RAF argued that since the consent order itself deferred the date of payment to 17 December 2016, s 17(3)*(a)* had to yield to the common-law principles of mora, under which interest would be payable only from that date.
Held
The court ruled in favour of the RAF. It found that the consent order, which lacked a provision indicating that s 17(3)*(a)* was applicable, precluded Ms Dunn from relying on it to gain interest, and that she was therefore only entitled to interest from 17 December 2016 to 16 January 2017 (see [13], [18] – [21], [23], [25] and [27]). The court also emphasised that the 14-day interest-free period in s 17(3)*(a)* was enacted for administrative purposes in recognition of the claims burden on the RAF (see [16]) and that the RAF Act was not intended as a mechanism to gain interest.

FRANSCH v PREMIER, GAUTENG PROVINCE AND ANOTHER 2019 (1) SA 247 (GJ)

Practice — Pre-trial conference — Preliminary list of questions — Applicant not content with respondent's answers and seeking interlocutory order to compel — Applicant must show reasonable grounds for stated inference that supplied answers untruthful — Uniform Rules of Court, rule 37(4).

Rule 37 of the Uniform Rules of Court, which deals with pre-trial conferences, in subrule (4) states that parties must beforehand exchange lists of the admissions required and enquiries to be made at the conference. The objects of the subrule are to allow parties to prepare for the conference and to ensure that it runs smoothly and without unnecessary delay.

The applicant, gauging the respondents' replies to her questions under rule 37(4) to be incomplete or false, relied on rule 30A ('non-compliance with rules') for an order to compel. The respondents opposed the application on the basis that they had answered the questions and that the applicant could not rely on rule 30A to extract replies she believed appropriate.

Held

The respondents' stance was correct. Instead of simply bemoaning the inadequacy of the replies, the applicant should have demonstrated that there were reasonable grounds to infer that the respondents were being untruthful. Her failure to do so meant that her application would fail.

The court also pointed out (i) that the procedure of filing formal notices and replies thereto under rule 43(4) could well constitute an abuse of process; and (ii) that the appropriate remedy for a party frustrated by a lack of cooperation or bona fides on the part of its opponent was to request that the conference be held before the judge in chambers.

Adams, J ruled:

Costs

[13] The applicant has been successful, albeit to a limited extend only, in her application in terms of rule 35(7) to compel the respondents to make further and better discovery. This means that, applying the general rule, she would normally be entitled to the costs of the said application.

[14] Conversely, the respondents also successfully opposed the applicant's application in terms of rule 30A(2), which means that they are entitled to the costs of that application.

[15] The costs order to which the applicant is entitled would probably be cancelled out by the costs order which should be granted against her in favour of the respondents. Therefore, in my judgment, the fairest and most expedient way to deal with costs in relation to both applications is to order that each party shall bear his/her own costs. Such a costs order would be fair, reasonable and just to all concerned.

Order

[16] Accordingly, I make the following order:1. The respondents shall within 10 days from date of delivery of this order deliver a reply to the applicant's notice to discover in terms of rule 35(3) and (6) dated 16 September 2017, relating only to the documents to be produced by the Bertha Gxowa Hospital.

KASSEL v THOMPSON REUTERS (MARKETS) SA 2019 (1) SA 251 (GJ)

Defamation — Liability — Listing of foreign national as 'politically exposed person' (PEP) — Constituting warning that person, due to high office, exposed to increased risk of corruption and that business dealings with them warranting high scrutiny — Part of measures for combating of money-laundering and terrorist financing initiated by Financial Action Task Force, an intergovernmental body to which South Africa belongs — Listing not implying corruption, only exposure to risk due to high office — Continued listing after exit from office not defamatory.

Mr Kassel was listed as a 'politically exposed person' (PEP) in Thompson Reuters World-Check, a subscription-based database. PEPs are persons who perform prominent public functions. The listing is intended to warn financial institutions of the enhanced due diligence many countries, including South Africa, require when business dealings with PEPs are scrutinised. It forms part of the efforts of the

Financial Action Task Force on Money Laundering — an international organisation of which South Africa is a member — to combat money-laundering and the financing of terrorism. The Task Force publishes a loose definition of PEPs to include senior politicians, judicial and military officials and managers of state-owned enterprises. World-Check listed Mr Kassel as a PEP because he had, until October 2014, been an official of a Zimbabwe state-owned diamond-mining company. Mr Kassel argued that his continued listing was defamatory because it conveyed the implication that he was someone to whom an enhanced risk of involvement in money-laundering and the financing of terrorism still attached. He therefore approached the court for an interdict directing Thompson Reuters to delist him.

Held

The PEP listing was not defamatory. The reasonable reader of the World-Check — a highly specialised publication — would understand the regulatory purpose behind the listing and that it did not imply corruption or wrongdoing but occupancy of high office, which was a wide class that included the good and the great (see [14] – [19], [22]). Nor was the post-2014 retention of Mr Kassel's listing defamatory: while those who vacated their offices became less exposed over time, the diminishing utility of their listing did not render it defamatory (see [20] – [21]). At worst, the continued listing of Mr Kassel was an incorrect assessment of political risk, which was a matter of judgment (see [22], [27]). Application dismissed with costs.

NAMPAK GLASS (PTY) LTD v VODACOM (PTY) LTD AND OTHERS 2019 (1) SA 257 (GJ)

Practice — Judgment and orders — Orders — To provide information necessary to identify wrongdoer.

Unknown wrongdoers perpetrated a robbery at Nampak's * premises.
Here Nampak urgently applied for an order that third parties provide it with information that could assist it in identifying the perpetrators to enable it to institute an action against them (see [1]).

Held

Such relief should be recognised (see [20]).
Preconditions for the order were that:

- A wrong must have been committed (see [16] and [28]);
- The order was needed to enable an action to be brought against the wrongdoers (see [16] and [29]);
- The third party against whom the order was sought must be mixed up in the wrongdoing so as to have facilitated it; and must be able or likely able to provide the information (see [16] and [30] – [31]).

Even where the preconditions were met, the court retained a discretion to refuse the order's grant, or to grant it on terms (see [17]).
Order granted

ORIGO INTERNATIONAL (PTY) LTD v SMEG SOUTH AFRICA (PTY) LTD 2019 (1) SA 267 (GJ)

Contract — Breach — Remedies — Cancellation — Tender of payment — Effect — Whether tender of payment amounting to performance in terms of contract — Entitlement to cancel where tender proving to be amount owed.

Tender — Of payment — Contractual setting — Effect — Whether tender of payment amounting to performance in terms of contract — Entitlement to cancel where tender proving to be amount owed.

The parties had entered an agreement in terms of which the respondent appointed the applicant as its exclusive retailer in respect of certain of its products. The respondent later demanded from the applicant payment of the sum of R419 310,65 (in respect of goods sold by the latter) which in terms of the agreement had become due and owing. The letter of demand added that, failing payment by the specified date, the agreement would be cancelled. In answer to the demand, the applicant wrote to the respondent in terms of which it disputed the correctness of the amount claimed; acknowledged that it was indebted to the respondent for a lesser amount based on its own reconciliation which it attached; and tendered to pay such lesser amount (admitted amount), 'which payment shall be effected upon confirmation [by respondent] of this amount constituting full and final settlement of this dispute'. The respondent subsequently by letter cancelled the agreement (not receiving the payment demanded by the specified date), and instituted action (which was pending) against the applicant for the amount originally claimed. In the present application the applicant sought an order declaring the respondent's purported cancellation as invalid. The question was whether the tender constituted compliance with the demand. The applicant argued that the tender in lieu of payment was properly made, disentitling the respondent to cancellation. The respondent disputed that a proper tender had been made, and that, in any event, a tender for payment did not constitute payment, which was what the applicant was required to do in order to avoid cancellation of the agreement pursuant to the demand.
Held, that, in order to qualify as a proper tender for payment, a tender must be unconditional, for the full amount owing, and made '*met openbeurs en klinkende munt*'. (See [12].)
Held, that the present tender was unconditional. It could not, however, be conclusively said, on the papers, that it was 'for the full amount owing'. The quantum was still in dispute and would only be finally determined in the pending action instituted by the respondent. (See [14] – [15].)
Held, further, that the tender did not constitute performance in terms of the contract: the agreement required a payment; the tender was merely an undertaking or promise to pay. (See [16].) The tender was not, however, without legal effect. Should it be found in the pending action that the admitted amount (or the lesser amount subsequently paid) was in fact the true amount owing, the applicant would be protected from the consequences of non-compliance set forth in the demand for payment, which was cancellation of the agreement. (See [17].) (The court in conclusion granted no order in respect of the applicant's application (see [20]).)

PIONEER FOODS (PTY) LTD v MINISTER OF FINANCE AND OTHERS 2019 (1) SA 273 (WCC)

Revenue — Customs and excise — Import duty — Power of Minister of Finance to make amendments to level of import duties reflected in parts 1 and 2 of sch 1 of Customs and Excise Act 91 of 1964, pursuant to request to do so from Minister of Trade and Industry — Nature of power of Minister of Finance — Whether administrative function, or whether wide and discretionary executive power which, if

exercised, in effect legislative in nature — Customs and Excise Act 91 of 1964, s 48(1)*(b)*.

Administrative law — Administrative action — What constitutes — Amendment, by notice in Government Gazette*,* of import duties in order to give effect to request of Minister of Trade and Industry — Not mechanical, administrative power; rather wide and discretionary executive power which, if exercised, in effect legislative in nature — Customs and Excise Act 91 of 1964, s 48(1)*(b)*.

In terms of s 48(1)*(b)* of the Customs and Excise Act 91 of 1964 (the CEA), the Minister of Finance (the Minister) may from time to time by notice in the *Government Gazette* make amendments to import duties (which are set out in sch 1) 'in order to give effect to any request by [the Minister of Trade and Industry]'. The present matter concerned the proper characterisation of the Minister's powers under such section. The background was that the Minister of Trade and Industry — who under the International Trade and Administration Act 71 of 2002 (ITA) was empowered to regulate the import and export of goods into South Africa — had made a request to the Minister to implement an adjustment to the prevailing wheat import duty tariff by publication in the *Gazette*. Such request had been made after the Minister of Trade and Industry had approved the recommendations of the International Trade Administration Commission — the body created in terms of the ITA to investigate such matters. In light of the Minister's delay in implementing such tariff, the applicant — a major South African wheat miller and supplier of wheat-based products — instituted the present urgent application in which, in part A, * it sought a mandamus compelling the Minister to publish the updated tariff in the Gazette (by a certain date) under s 48(1)*(b)* of the Act. The applicant argued that the Minister's function under s 48(1)*(b)* was merely an administrative one, and its task, in effect, was to rubber-stamp and give effect to the request of the Minister of Trade and Industry. The respondents — inter alia, the Minister, National Treasury, and the Minister of Trade and Industry — in contrast, described the powers of the Minister as wide and discretionary executive powers which could not be compelled and, when exercised, were in effect legislative in nature.

Held, that, when interpreting the provisions of s 48(1)*(b)* in context, in particular when read with s 48(1)*(e)*, and having regard to the fact that the Minister's powers were framed in wide, discretionary and permissive terms, it was apparent that he may, but was not obliged to, amend customs duties on wheat imports as listed in sch 1 when and if he deemed it necessary in the public interest to do so. In exercising his powers, the Minister thus was of necessity engaged in a policy exercise, in which he would have to have regard to a number of issues, including fiscal and economic matters. This much was further apparent if one had regard to the enquiries currently made by various policy, legal and research units of National Treasury and Sars and related departments before the Minister ultimately decided whether or not to promulgate the amended duties. As such, he was not merely a rubber-stamp functionary. (See [28] – [30].)

Held, further, that this had certain consequences. Firstly, it meant that, when exercising powers under s 48(1)*(b)*, the Minister was not engaged in administrative action. In the first place, when considering whether or not to accept a recommendation in this regard from the Minister of Trade and Industry, the Minister was carrying out an executive function. And, once the Minister had considered that amended import duties were necessary in the public interest and caused them to be promulgated in the *Gazette*, he carried out a legislative function. Secondly, given that the Minister exercised a policy choice which lay within his (executive) terrain, it was

not up to the court to second-guess him, nor should the court interfere with the process by granting a mandatory order, save in the clearest of cases when irreparable harm would otherwise ensue, and it was constitutionally appropriate to grant the order concerned. (See [31] – [32] and [37].)
Held, further, that it was apparent from the various investigations and procedures preceding a decision of the Minister — aimed ultimately at establishing the effect of the implementation of an adjusted tariff on the fiscus — that a request by the Minister of Trade and Industry for an amendment to the import duties on wheat, did not result in an automatic acceptance and amendment by the Minister and it did not necessarily follow that a request by the Minister of Trade and Industry would be approved by the Minister. In the circumstances the applicant was not entitled as of right to a legislative amendment of the import duty as proposed by ITAC and recommended by the Minister of Trade and Industry, nor was the Minister of Finance obliged to promulgate the recommended amendments to the tariffs unless and until he deemed it to be expedient to do so, in the public interest. Part A of the application was accordingly dismissed with costs.

SOUTH AFRICAN HUMAN RIGHTS COMMISSION v KHUMALO 2019 (1) SA 289 (GJ)

Equality legislation — Hate speech — Incitement of harm required — Objective test for hate speech — Scope of envisaged 'harm' — Constitution, s 16(2)*(c)*; Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, s 10(1)*(a)* – *(c)*.

The applicant (the SAHRC) instituted proceedings in the High Court, sitting as an Equality Court, against the respondent (Mr Khumalo) following complaints that his social media posting, that 'we must act [against white people] as Hitler did to the Jews', constituted hate speech. This, however. only after a different complaint relating to the same media posting had already been heard by a magistrates' court sitting as an Equality Court, and that court had made an order after settlement was reached between the complainant in that case and Mr Khumalo. In this case, the High Court proceedings, settlement was also reached between the SAHRC and Mr Khumalo (who acknowledged that his statement constituted hate speech) but was not made an order of court. Instead, when, at the hearing of the matter, the High Court learned of the magistrates' court proceedings, it made an order that an amicus curiae be appointed and that the parties address the court on a number of specific issues arising from the multiple complaints in different Equality Courts, including whether it was permissible for the court to hear the matter with due regard to, inter alia, res judicata and issue estoppel (see [7]).
At the next hearing the court was informed that Mr Khumalo wished to have legal representation, and that the SAHRC would amend the complaint (or lodge a fresh complaint), incorporating a second social media posting made by Mr Khumalo. In that posting, made a few hours after the first, he had stated that 'white people in (S)outh Africa deserve to be hacked and killed like Jews' and that they 'must be [burned] alive and skinned', and their 'off springs [sic] used as garden fertiliser'. The SAHRC subsequently lodged a separate complaint impugning both postings, which were addressed together by the parties and the High Court in the present case. As with the earlier complaint, it was based on postings constituting hate speech under s 10(1)*(a)* – *(c)* of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Equality Act; s 10(1) is quoted in [77]).

Acting on legal advice, Mr Khumalo, in his opposing affidavit, withdrew his earlier acknowledgement that these statements constituted hate speech, claiming instead that they were 'meaningless hyperbole' made in angry response to an earlier racist social media posting aimed at black people, and that it could not have been understood to incite harm.

Held

Neither res judicata nor issue estoppel applied: the former because the parties were not identical and the cause of action (including the second utterance) was broader; the latter because the High Court proceedings were not of the same character as the first proceedings, especially given that the subsequent retraction of the admission that the speech was indeed hate speech, required a definitive decision on that question.

In order to achieve alignment with s 16(2)*(c)* of the Constitution (freedom of expression), s 10(1) must be read conjunctively rather than disjunctively. As a result, the factor of 'incitement' must be present in the prohibited utterances. (At [82] – [83].)

The test for hate speech was whether Mr Khumalo's utterances 'could be reasonably construed to demonstrate a clear intention to incite harm'. It postulated what a reasonable reader *could* think about the speech. If a reasonable person reading the text could understand it to mean an incitement to cause harm, the test was met. And because the objective test of the reasonable reader applied, it was the effect of the text (not the intention of the author) that was assessed — ie did the *text* incite harm? It must therefore be asked if harm could be incited by the effect of the utterances on readers. (At [88] – [89].)

The 'harm' envisaged derived from interracial hostility and was not to be limited to physical harm to the category of persons against whom the hatred was directed. The risk of harm existed in several forms but all were necessarily a *reaction* to utterances. Reactions may arise from persons inclined to share the views expressed, or from the target group responding in kind, both of which may harm social cohesion, undermining the nation- building project. (At [94] – [97].)

The idea that in a given society members of a 'subaltern' group who disparaged members of the 'ascendant' group should be treated differently than if the roles were reversed had no place in the application of the Equality Act and would indeed subvert its very purpose. Section 10 must be understood as an instrument to advance social cohesion. The 'othering' of whites or any other racial identity, was inconsistent with our constitutional values. These utterances, inasmuch as they, with dramatic allusions to the holocaust, set out a rationale to repudiate whites as unworthy and that they ought deservedly to be hounded out, marginalised, repudiated and subjected to violence in the eyes of a reasonable reader, could indeed be construed to incite the causation of harm in the form of reactions by blacks to endorse those attitudes, reactions by whites to demoralisation, and rachet up the invective by responding in like manner. Thus, by such developments, on a large enough scale, the transformation of South African society may be derailed. Accordingly, Khumalo's utterances were statements prohibited by s 10(1) of the Equality Act.

S v KEKANA 2019 (1) SACR 1 (SCA)

Murder — Plea — Plea of guilty — Sentence — Statement in terms of s 112(2) of Criminal Procedure Act 51 of 1977 — Plea purporting to be one of guilty to murder in terms of s 51(2) of Criminal Law Amendment Act 105 of 1997 — Act not creating

new offences and such plea could not, without more, bind court to impose lesser sentence.
Murder — Indictment — Prescribed sentences in terms of s 51 of Criminal Law Amendment Act 105 of 1997 — Act not creating new offences and applicable only to sentencing — No such charge as murder under s 51(1) or murder under s 51(2).
Murder — Sentence — Prescribed sentence of life imprisonment in terms of s 51(1) of Criminal Law Amendment Act 105 of 1997 — Plea of guilty to murder 'in terms of s 51(2)' — Acceptance of such plea by state could not, without more, bind court to impose lesser sentence.
Murder — Sentence — Prescribed sentence of life imprisonment in terms of s 51(1) of Criminal Law Amendment Act 105 of 1997 — Father having killed each of his four children by slitting their throats, one whilst wife was forced to listen over phone — Whatever accused's personal mitigating circumstances, such outweighed by aggravating circumstances, and life imprisonment only appropriate sentence on each count.
The appellant was tried in the High Court on charges of having murdered his four children (aged between 4 and 13 years) who lived with him. He was estranged from his wife, the mother of his children, who lived some 280 kilometres away. After an attempt at reconciliation the couple had a quarrel over the telephone whereafter the appellant decided to kill his children and himself. He then killed each of his children by slitting their throats, one of them whilst the phone was still connected with his wife. An attempt at hanging himself failed.
At his trial he pleaded guilty to four counts of murder and handed in a written statement in terms of s 112(2) of the Criminal Procedure Act 51 of 1977 (the CPA). The plea purported to be one 'in terms of s 51(2) of Act 105 of 1997'. There was no explanation for such a plea, but it seemingly sought to bind the court to a sentence of 15 years' imprisonment on each murder count in terms of that section.
He was sentenced to 20 years' imprisonment on each of the murder counts, 10 years of the sentences on three of the counts were ordered to run concurrently with the remaining count. He appealed against the sentence, his appeal to the full court having been unsuccessful.
The court gave notice to the parties that it was considering exercising its power in terms of s 322(6) of the CPA to impose a punishment more severe than that imposed by the trial court.
The appellant's main complaint was that the trial court had misdirected itself by imposing a sentence of 20 years' imprisonment on each murder count instead of the prescribed 15 years.
Held, that it was difficult to accept that a trial court's sentencing discretion could be fettered in the manner it had been done in the present case, where the court seemingly had in mind the trite principle that the state was entitled to accept the accused's plea of guilty on a lesser or alternative charge. But the appellant had not pleaded to a lesser or alternative charge, he had pleaded guilty to murder subject to the provisions of the Criminal Law Amendment Act 105 of 1997 where the ultimate decision as to which sentence to impose remained with the court. Where these provisions were applicable, neither the state nor the appellant could oust the court's increased penal powers provided for by s 51(1), by a passing reference to s 51(2). (See [16] – [19].)
Held, further, that the facts in the present case showed that there was premeditation on the part of the appellant when he killed his children, and it was therefore difficult to accept that an unsubstantiated reference to s 51(2) in the guilty

plea could render the court impotent to consider life imprisonment in terms of s 51(1). It was for the appellant to lay a factual foundation for a conclusion that the murders were not premeditated, and the issue was one for the trial court to decide. (See [20] – [21].)
Held, further, that the provisions of Act 105 of 1997 did not create different or new offences but were relevant to sentence. There was no such charge as 'murder in terms of s 51(1) or s 51(2)' and it followed that there could never be a plea to such a non-existent charge. (See [22].)
As to the nature of the offences, the court considered it difficult to imagine a more callous and despicable deed than a parent killing his own children. One after the other, he had slaughtered each of his children like animals while their mother was forced to listen helplessly to the killing of one of her children after the horrific killing of his sibling. This led to an ineluctable conclusion that he had killed the children in order to spite his wife for having had an extramarital affair and for rejecting him. He also seemed to be disposed to violence, having, just over two months before the killings, savagely attacked his wife with an axe for spurning his sexual advances. Whatever his complimentary personal circumstances and prospects of rehabilitation, those paled into insignificance when weighed against the aggravating factors, and a sentence of life imprisonment on each of the murder counts was the only appropriate sentence. The sentence was altered accordingly. (See [32] – [42].)

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT AND OTHERS v PRINCE AND OTHERS 2019 (1) SACR 14 (CC)

Drugs — 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 extent 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 (in [78]); and less restrictive means than criminalisation were employed by many societies based on freedom, equality and human dignity (see [79] and [94]).
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 in [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. (See [109].)

S v ARMSTRONG 2019 (1) SACR 61 (WCC)
Evidence — Witness — Oath — Administering of — Omission of words 'the whole truth' insufficient on own to render evidence of witnesses unreliable — Criminal Procedure Act 51 of 1977, s 162(1).
In an appeal against conviction and sentence for murder the appellant averred that one of the witnesses who had testified for the state had not been sworn in and that the oath administered to the other witnesses was defective in that the words 'the whole truth' had been omitted from the oath.
Held, that the intention of the legislature in enacting ss 162(1) and 163(1) of the Criminal Procedure Act 51 of 1977 was to make it clear to a witness who was about to testify that he should speak the truth. The court therefore had to make an assessment whether the omission of the words could have detracted from the veracity, truthfulness and value of the evidence which the witness had given.
Held, further, that the substance of the oath which was sworn to by the witnesses, apart from the witness who had not been sworn in, was sufficient to satisfy the requirements of s 162(1). The use of the exact words quoted in the section was not

peremptory and the failure to use such was not sufficient on its own to render the evidence of the witnesses unreliable. (See [36].) The appeal was dismissed.

S v MOSES 2019 (1) SACR 75 (WCC)
Indictment and charge — Charge — Putting of charge to accused — Compliance with provisions of s 105 of Criminal Procedure Act 51 of 1977 — Section should ordinarily be complied with according to its tenor — Substantial compliance, however, where legally represented accused tenders statement in terms of s 112(2).
Plea — Guilty — Alteration of to one of not guilty — Court required to enquire into circumstances before altering plea in terms of s 113 of Criminal Procedure Act 51 of 1977.
Plea — Guilty — Alteration of to one of not guilty — Procedure after alteration of plea — Trial to continue before same presiding officer in terms of s 113 of Criminal Procedure Act 51 of 1977 — Where, however, presiding officer felt constrained to recuse themself, fact of previous convictions to be sealed in record placed before substituted presiding officer.

The court was required in a special review to consider the lawfulness of three procedures in a magistrates' court where the legally represented accused pleaded guilty to the charges against him and confirmed a written statement in terms of s 112(2) of the Criminal Procedure Act 51 of 1977 (the CPA) that was read into the record by his attorney. The statement was signed by both the accused and his attorney.
The matter was then postponed for a probation officer's report, during which period the magistrate passed away. When it came before another magistrate, the accused was represented by a different attorney who informed the court that the content of the accused's s 112(2) statement was not consistent with his instructions. This magistrate then altered the plea, without further inquiry, to one of not guilty in terms of s 113 of the CPA. The magistrate then discovered that he had presided in the accused's bail application and accordingly recused himself. Before doing so, however, he ordered that the clerk of the court place the proceedings already on record in a sealed envelope so that it did not form part of the visible record.
The matter then came before the third magistrate who perused the record and came across the accused's previous convictions, these not having been sealed in accordance with the second magistrate's instructions. The third magistrate was uncomfortable about proceeding in the matter in the circumstances. He sent the matter on special review, however, because of his concern that the record showed that the charges had not been put to the accused in strict compliance with s 105 of the CPA at the commencement of the trial before the original magistrate.
In respect of the application of s 105 of the CPA, the court held that the section should ordinarily be complied with according to its tenor. In the circumstances of the current case, however, where it was (i) clear that the accused was familiar with the charge-sheet; (ii) he had already signed a plea statement in terms of s 112(2) that had been prepared by his attorney; (iii) he had expressly stated his plea of guilty to the charges in open court and (iv) confirmed the content of his plea statement; and where (v) the prosecution recorded its acceptance of the plea in open court, the object of s 105 had been substantively fulfilled and there was no prejudice to the accused's right to a fair trial. (See [21].)

In respect of the changing of the plea in terms of s 113 of the CPA, the court held that the magistrate should have enquired into the matter before changing it and ascertained which of the allegations in his plea statement were no longer admitted and why this was so. Without such inquiry he could have no basis to assess whether there was a reasonable possibility of the explanation being true or whether he should be in reasonable doubt about the tendered and accepted pleas of guilty. In addition, the magistrate's failure to elucidate the accused's position meant that no basis was provided for the operation of the proviso to s 113(1). The ruling made by the magistrate was not competently made and therefore fell to be reviewed and set aside. (See [28] – [30].)
As to the further conduct of the trial, the court held that s 113 expressly provided for the continuation of the matter before the judge or magistrate before whom the accused pleaded guilty. Unless the third magistrate was persuaded by a reasonable explanation that the accused's plea had to be altered in terms of the section, he had to proceed to impose sentence on the accused. If he altered the plea and felt constrained to recuse himself, he had to ensure that the references in the record to the accused's previous convictions was sealed before the matter was placed before a different magistrate for completion in terms of s 118. (See [32] – [33].)

S v SIMBA AND SIMILAR MATTERS 2019 (1) SACR 90 (WCC)
Admission of guilt — Review — Fine determined by prosecutor where there were district limits set by magistrate of number of items involved in offence — Where number exceeding limit, admission-of-guilt fine manifestly not in accordance with determination — Conviction and sentence set aside.
Admission of guilt — Review — Fine determined by prosecutor — Magistrate retaining discretion given by s 57(7) of Criminal Procedure Act 51 of 1977 to find that admission-of-guilt fine not in accordance with justice even where fine set within district limits.
Conservation — Environmental offences — Rock lobster — Possession of undersized rock lobster — Accused in possession of 454 undersized rock lobster — Prosecutor setting admission-of-guilt fine of R9000 (ie R20 per lobster) where fine for district as determined by magistrate was R500 per lobster — Admission-of-guilt fine set aside by magistrate in exercise of discretion under s 57(7) of Criminal Procedure Act 51 of 1977.

In three separate cases, which came before the court on special review at the instance of the prosecutor at a magistrates' court, the issue was whether the magistrate had correctly set aside the convictions and sentences where admission-of-guilt fines had been paid, the amount of the fines having been set by the prosecutor.
In two of the cases there were determinations which set limits in respect of the number of items involved and the prosecutor had allowed admission-of-guilt fines to be paid in both cases, despite the fact that the number of items involved in each case exceeded the determination made for that district. In the other matter, involving possession of 454 undersized West Coast rock lobster, the prosecutor had set a fine of R9000 (roughly R20 per lobster) where the determination was R500 per lobster for a first offence.
Held, that in the two offences where there were limits on the number of items involved for which an admission-of-guilt fine could be fixed, the fines were manifestly

not in accordance with the determination by virtue of them exceeding the maximum number. It followed that the magistrate was entitled to set aside the convictions and sentences. (See [10].)
Held, in the case involving the undersized rock lobster, where the determination did not stipulate a maximum number of lobster, the prosecutor was entitled to impose the admission-of-guilt fine of R9000. However, the magistrate was equally entitled, in the exercise of the discretion given to her by s 57(7) of the Criminal Procedure Act 51 of 1977, to find that the conviction or sentence was not in accordance with justice. On so finding, she was entitled to set aside the conviction and sentence.

S v JAMES 2019 (1) SACR 95 (ECB)
Contempt of court — Contempt in facie curiae — General rule that departure from rules of natural justice only justified in exceptional circumstances and accused to be apprised of how and why behaviour offending and punishable.

It appeared on review that the accused had, in addition to the offences for which the matter was sent on review, been convicted of contempt of court *in facie curiae*. The latter conviction arose from an incident in which the accused disobeyed instructions or requests from the court's staff and continued talking. He had also been chewing gum in court and shouted abuse.
Held, that when a court applied the summary procedure to determine a person's guilt for contempt of court *in facie curiae*, the general rule was that the *audi alteram partem* principle applied. A departure from the rules of natural justice would be justified where there was a flagrant contempt, where the court itself was a witness to the act of contempt and in circumstances which required prompt and drastic action to preserve the court's dignity and the due carrying-out of its functions. (See [16])
Held, further, that in a scenario such as the present where the matter had escalated suddenly, the accused was obviously taken by surprise and was not given the chance even to react in time before the full might of the summary proceedings came down on him. He ought to have been apprised of how and why his behaviour was offensive and made to understand that the infraction was punishable in law. In the circumstances the conviction and sentence imposed in respect of the contempt of court were set aside.

S v BROOKS AND OTHERS 2019 (1) SACR 103 (NCK)
Prosecution — Conduct of — Duty to convey information to defence — Information that attempts had been made to bribe and threaten presiding judge — Matter investigated by Director of Public Prosecutions for two years while trial continuing without defence being informed thereof — Ethical duty on prosecution to convey such information.
Prosecution — Permanent stay of prosecution — Application for — Trial- related prejudice — Application for permanent stay after judge presiding in lengthy trial recused herself — State having blown up case to appear more serious — State case based on trap where star witness was paid R1 million without having testified — Applicants having suffered extreme hardship since their arrest four years previously — Permanent stay granted.
Evidence — Witness — Payment to state witness — State case based on trap authorised by Director of Public Prosecutions — Payment of large sum to witness even before he testified deprecated.

The applicants applied for a permanent stay of their prosecution, triggered by the recusal of the trial judge in August 2018. They had all been arrested in August 2014 in a trap operation authorised by the Acting National Director of Public Prosecutions of the Northern Cape to secure illicit diamond transactions with them. The trap used by the police, one Mr Jephta, was paid R1 million for his contribution to the operation.
The first witness in the trial started testifying only two years after the applicants were arrested. A trial-within-a-trial commenced at the beginning of 2017 and had not yet been concluded by the time the judge recused herself (Mr Jephta did not testify in the trial-within-a-trial).
The recusal of the trial judge arose from an attempt to bribe and threaten her in August 2016. She had informed the Director of Security in the Office of the Chief Justice, who requested the Director of Public Prosecutions (the DPP) in Kimberley to investigate the matter. The DPP declined to prosecute after an investigation that took nearly two years to finalise. The fact of the attempted bribe and threat was not conveyed to the applicants until June 2018, which then precipitated the recusal application brought by applicants 1 – 6 and 8.
In her ruling in the recusal application, the judge stated that she was not aware that the DPP had been informed of the incidents and had been requested to investigate the matter. It appeared from other evidence that Mr Jephta had also been approached and offered bribes not to testify.
Held, that the prosecution team was under an ethical duty to take their colleagues for the defence into their confidence and inform them of the threats and attempts to bribe the trial judge and a crucial state witness. If the matter had been openly discussed therein, then in August 2016 the trial would in all probability not have become a nullity two years later after numerous witnesses had already testified. (See [19].)
Held, further, in considering and balancing the interests of the applicants and the state, it had to be taken into account that the state had included a charge of racketeering on the basis of a criminal enterprise between the applicants and Mr Jephta, the former investigating officer, and other participants in the trap. The state had clearly tried to blow up the case to something more serious than illicit diamond-dealing. (See [51].)
Held, further, that the most damning aspect in respect of the state's case was the character and attitude of its star witness, Mr Jephta, who, on his own version, had personally contacted at least one of the accused and allowed people to negotiate with him not to testify for the state, and even to splash his 'story' in a local newspaper. His credibility was in tatters and the question had to be asked whether the applicants should go through another trial to see whether he came to testify or was kept away from the witness box. (See [52].)
The court also remarked obiter that the star witness had already received R1 million for his involvement in the entrapment, but demanded a further R4 million to testify. The Constitutional Court had not yet considered the use of traps but there was little doubt that the court would not sanction the payment of traps, to the extent in the present case, especially prior to the testimony of the trap or finalisation of the trial. (See [56].)
The court held that in circumstances where the applicants had suffered tremendous hardship, some having had to sell their properties in order to survive; others having lost business deals and/or partners; and many in a serious financial

predicament and who might not be able to afford further legal services, they ought not be subjected to a further trial. The state might not only try to rectify mistakes made, but the applicants would also have even more ammunition to further cross-examine witnesses who had already testified, bearing in mind what others had testified about later. There could be no fairness in allowing the state a second bite at the cherry in the circumstances. The application was accordingly granted.

All SA LAW REPORTS [2019] January 2019

AB and another v Pridwin Preparatory School and others (Equal Education as amicus curiae) [2019] 1 All SA 1 (SCA)

Constitutional and Administrative Law – Children – Section 28(2) of the Constitution – A child's best interests are of paramount importance in every matter concerning the child – Section 29(1)(a) of the Constitution – Right to basic education – Termination by private school, of contract with parents – An implied right to be heard before a parent contract is terminated, is not a right that arises generally from section 28(2), and section 29(1)(a) is an obligation on the State, not one imposed on private institutions.

As a result of the behaviour of the appellants, who were the parents of two learners at the first respondent school ("Pridwin"), the school terminated its contracts with the appellants. In doing so, it invoked a termination clause in its contract with the appellants. The appellants disputed that the school was entitled to do no more than invoke the termination clause, contending that it was required to afford them a hearing and to act reasonably before cancelling the contracts. They also contended that the Promotion of Administrative Justice Act 3 of 2000 gave them a right to be heard. Finally, they raised a constitutional challenge to the termination clause on public policy grounds. They therefore sought the review of the cancellation of the contract in the High Court.

The Court dismissed the review application and upheld Pridwin's right to cancel the contract. Leave to appeal to the present Court was granted.

Pridwin's contract with the parents placed obligations on both the school and on parents. One obligation on parents was to maintain a courteous and constructive relationship with school staff. Both parties had the right to cancel the contract for any reason, on notice to the other party.

As principal of Pridwin, the second respondent ("Mr Marx") deposed to the school's affidavits setting out the history of the matter. The facts alleged showed that from October 2015 to June 2016, the first appellant had engaged in conduct which constituted serious harassment of the school's staff. His conduct included aggressively accusing a tennis coach of incompetence, expressing his displeasure at the team selection for the under-9 cricket team in which his 8 year old son played. The papers highlighted three significant incidents. In November 2015, during a cricket game in which the first appellant was watching his son play, he reacted to his son being given out by hurling abuse at the umpire, swearing at him while holding a cricket bat, and threatening to wait for him after the match and kill him. The second incident occurred on 27 January 2016, and also involved the first appellant verbally abusing a cricket coach after his son was given out in an under 10 cricket match. He also made disparaging remarks about other boys in the team. Mr Marx and two members of the

school board called the first appellant to a hearing, the upshot of which was that the school reached an agreement with the appellants, in terms of which the first appellant undertook not to engage in the behaviour complained of. However, in June 2016, Mr Marx was called to the soccer field where he found a soccer-coach, not associated with the school, present at the first appellant's behest, attempting to give unsolicited and unwelcome advice to the school's soccer-coach while the under 10 soccer trials were in progress. While the first appellant was responsible for most of the conduct giving rise to the school's decision, the second appellant was shown to be complicit. She penned a letter to the school complaining of the school's head of sport, and stated, "I don't think JP realises the calibre of people he is choosing to take on."

At the end of June 2016, following the last incident referred to above, Pridwin wrote to the appellants, terminating the contract on five months' notice (which was more than the termination clause required).

Held – Section 28(2) of the Constitution, on which the appellants relied, states that the child's best interests are of paramount importance in every matter concerning the child. In each case what is required, therefore, is for a court to weigh the interests protected by the right against any countervailing interests protected by other rights to produce a legally sensible outcome. It follows that there would be instances where section 28(2) requires a hearing before a decision having an impact on a child is made, but not in others. What is clear is that there is no general requirement for a hearing. In this case, the Court was satisfied that Pridwin applied the best interests principle when it terminated the contracts. The school balanced the rights of the appellants' children against those of all the other children as well as other stakeholders, in coming to its decision. The deleterious effect that AB's behaviour was having on the other children was a factor taken into account. The implied right to be heard before a parent contract is terminated, is not a right that arises generally from section 28(2), and it cannot be deployed to limit a party's rights to terminate a contract on notice.

The other constitutional provision relied upon by the appellants was section 29(1)(a), guaranteeing the right of everyone to a basic education. Although that is an obligation on the State, not one imposed on private institutions, the appellants contended that Pridwin provided a basic education and was thus performing a constitutional function. The Court found no merit in the point. It held that the appellants' attempt to source the right to a hearing from a negative duty to act fairly arising from section 29(1)(a) of the Constitution had to fail, as too its attempt to impose a duty on the school to act reasonably.

In insisting on a right to be heard, the appellants placed reliance on the Promotion of Administrative Justice Act. The Court stated that in cancelling the contracts, Pridwin was not exercising a public power or performing a public function, but was exercising a contractual right that did not constitute administrative action.

There were therefore no grounds for importing a duty to act fairly or reasonably into the termination clause from sections 28(2) and 29(1) of the Constitution, or from the Promotion of Administrative Justice Act. And, because fairness and reasonableness are not free standing grounds to impugn the terms of a contract, the attempt to invalidate the terms of the contract had no merit. There was nothing in the termination clause that offended any constitutional value or principle or was otherwise contrary to public policy.

The majority judgment therefore dismissed the appeal with costs.

A dissenting opinion was handed down, in which the minority Judge opined that the appeal should be upheld. The reasons for the minority view was that the school's parent contracts were unconstitutional, contrary to public policy and unenforceable to the extent that they purported to allow the school to terminate the contracts without following fair procedure, and without the views of the children being given due and appropriate consideration.

Botha v S [2019] 1 All SA 42 (SCA)

Criminal law and procedure – Murder – Appeal against conviction and sentence – Self-defence – Requirements for defence – Accused must show that her actions were necessary to avert the attack; that the means used was a reasonable response to the attack; and that such means was directed at the attacker.

Criminal law and procedure – Murder – Intention – Dolus eventualis – Test – Court must assess whether the accused subjectively foresaw the possibility of the death of the victim ensuing from his conduct; and whether he reconciled himself with that possibility.

In July 2012, the appellant was a restaurant with a person with whom she was romantically involved, when her partner's wife (the "deceased") arrived and confronted the pair. In the ensuing altercation, the deceased allegedly assaulted the appellant twice. The appellant's defence was that she had stabbed the deceased in self-defence. Her version was that she had, in the face of a serious attack by the deceased, attempted to ward off the attack by reaching for something on her table to assist her. What she managed to get a hold of was a steak knife, which was the instrument used to stab the deceased. According to the appellant, she was not aware that it was a knife because it was wrapped in a serviette, and only realised that she had stabbed the deceased when she saw her bleeding.

The trial court accepted that the deceased was the aggressor but criticised the appellant for failing to move away from the scene after the first attack and at any available opportunity during the altercation. It also criticised her for failing to use other means to avert the attack. It then found that the appellant had exceeded the bounds of self-defence and convicted her of murder. On appeal, the High Court held that while it was necessary for the appellant to ward off the attack, her retaliatory conduct was excessive, disproportionate and unreasonable. It concluded that the appellant had the requisite intention to kill in the form of *dolus eventualis* and that her conviction of murder should stand.

Held – On appeal, the first question to be addressed was whether the appellant was aware that she had taken a knife from the table in order to ward off the attack. The evidence established that the appellant was well aware of what was going on at the relevant time. It was improbable that she would be fully aware of numerous details but not realise the kind of weapon she had grabbed from the table. The trial court was therefore correct in rejecting the appellant's evidence that she was not aware that she had a knife in her possession when she retaliated.

The next question was whether the elements of self-defence were satisfied. In order to successfully raise self-defence as a defence, an accused must show that her actions were necessary to avert the attack; that the means used was a reasonable

response to the attack; and that such means was directed at the attacker. Only the first two of those requirements had to be addressed in this case.

In considering whether the appellant was entitled to ward off the attack, the Court accepted that the appellant did not expect the deceased to return after the first assault, and that when the deceased did come back a second time, everything happened so fast that the appellant had no time to reflect on options open to her. The Court agreed that she could not reasonably be expected to do nothing in order to avert the attack. However, the use of a knife to ward off the attack could not be said to be reasonable. There were other alternatives the appellant could have explored, such as aiming at the lower body or actions short of directing the stabbing movement towards the deceased's upper body. Significantly, the appellant testified that she never felt that her life was in danger during the attack.

As stated above, the trial court found that murder in the form of *dolus eventualis* was proved. The test for *dolus eventualis* form is two-fold, and asks whether the accused subjectively foresaw the possibility of the death of the victim ensuing from his conduct; and whether he reconciled himself with that possibility. In the present appeal, the Court was of the view that the appellant subjectively foresaw the risk or the possibility that a stab wound to the chest area might result in the death of the deceased the court was not persuaded that having foreseen this possibility, the appellant reconciled herself with the occurrence of death or disregarded the consequences of it occurring. There was no evidence that the appellant deliberately or purposefully aimed a firm thrust at the deceased. On the contrary, the evidence showed that she simply turned around whilst sitting, and directed a stabbing movement towards the deceased's upper body, suggesting that her action was an impulsive reaction to the attack which was being inflicted on her. That however, was not sufficient to save the appellant from a conviction on a charge of culpable homicide. She ought to have foreseen that if she directed stabbing movement with a steak knife, with what was found to be a moderate amount of force, towards the upper chest of the deceased, whom she knew was very close to her, that might puncture any of the deceased's vital organs, causing her death. The conviction of murder was set aside and substituted with one of culpable homicide.

On the issue of sentence, the Court took into consideration the provocation and aggression by the deceased. It concluded that although the appellant was justified in taking action to ward off the attack, she had to be punished for her excessive impulsive reaction which caused the death of a human being. A sentence of three years' imprisonment subject to the provisions of section 276(1)(i) of the Criminal Procedure Act 51 of 1977 was held to be appropriate in the circumstances.

In a minority opinion, it was stated that it could not be found that the appellant acted unreasonably in defending herself against the unlawful attack on her by the deceased, or that she ought reasonably to have foreseen that she might exceed the bounds of self-defence and kill the aggressor. In the view of the minority judgment, the State had failed to prove both unlawfulness and *mens rea* on the part of the appellant.

Cape Gate (Pty) Ltd v Eskom Holdings SOC Ltd [2019] 1 All SA 141 (GJ)

Civil Procedure – Interim interdict – Nature of – Requirements – As an interim interdict is not a right but a remedy, a prerequisite for the relief is a right thereto.

Constitutional and Administrative Law – Co-operative governance – Section 41(1)(h) of the Constitution exhorts all spheres of government and all organs of State within

each sphere to cooperate with one another in mutual trust and good faith by, inter alia, avoiding legal proceedings against one another – Section 41(4) giving court the power to refer a dispute back to the organs of State involved where it finds that the organs of State had not made every reasonable effort to settle the dispute by means of the available mechanisms and procedure.

The applicants all operated business within the geographic area of the second respondent municipality ("Emfuleni"). Emfuleni reticulated electricity that it received in bulk from the first respondent ("Eskom") to consumers such as the applicants.

As a result of Emfuleni neglecting to pay Eskom for ongoing electricity consumption, and its owing Eskom a debt of R1 billion for electricity consumption charges, Eskom wished to interrupt the supply of bulk electricity to it. That would have a deleterious effect on consumers such as the applicants who would be forced to shut down.

The applicants sought both interim and final relief. The final relief sought, would only be heard in due course, was for the review of Eskom's decision to interrupt the supply of electricity to Emfuleni. Pending that review, the applicants applied to interdict Eskom from implementing interruptions in bulk supply to Emfuleni. In alternative prayers in the application for interim relief, the applicants sought an order directing Eskom, pending the review, to supply electricity on an uninterrupted basis to Emfuleni on the basis that the applicants would make direct payment to Eskom for the supply of electricity to it. A second alternative prayer was to order Emfuleni to pay all outstanding amounts due to Eskom for the supply of electricity to Emfuleni in order to ensure that an interrupted supply of electricity is provided to the municipality. In a third alternative prayer, the applicants asked for an order that Eskom, Emfuleni, and/or the fourth respondent (the "Premier") were ordered to agree, within three days, on a payment plan in respect of Emfuleni's indebtedness to Eskom so as to ensure that an uninterrupted supply of electricity was provided to Emfuleni.

Held – Applicants were seeking an interim interdict pending a final administrative law review. As an interim interdict is not a right but a remedy, a prerequisite for the relief is a right thereto. It being evident from the papers and submissions that the relevant organs of State might not have complied with their co-operative government obligations under the Constitution, the court queried whether it should engage at all on the parties' respective rights and duties, or whether it should not under section 41(4) of the Constitution decline to deal with the matter and instead refer it back to the organs of State involved. Section 41(1)(h) of the Constitution exhorts all spheres of government and all organs of State within each sphere to cooperate with one another in mutual trust and good faith by, *inter alia*, avoiding legal proceedings against one another. The Court addressed the question of the approach to the merits where it resolves to refer a dispute back to organs of State under section 41(4) of the Constitution. It confirmed that the applicants should be required independently to make out a case, even if an order under section 41(4) issued. Thus, the four requirements for an interim interdict, as stated in the case of *Setlogelo v Setlogelo*, 1914 AD 221 still had to be established.

The first of those requirements is a *prima facie* right, although open to some doubt. The applicants' asserted right to be supplied with electricity by Emfuleni was not disputed. However, they contended for a right against Eskom to be supplied with electricity which, if adversely affected by Eskom's decision to interrupt bulk supply to Emfuleni, would open up rights in relation to Eskom's decision under the Promotion of

Administrative Justice Act 3 of 2000. The Court agreed that Emfuleni had a right in respect of Eskom's obligations to it, but questioned whether the applicants, as retail consumers next in line, had a comparable right. The Court was prepared to accept that the applicants did have a right directly enforceable against Eskom, in a broad public law sense, to insist that Eskom discharged its public law duty of the supply of electricity downstream to Emfuleni, duly and properly. That right would be adversely affected by the interruption of supply.

As the decision to interrupt was administrative action, the applicants were entitled to challenge it under the Promotion of Administrative Justice Act standard. That led to the question of whether the Eskom decision to terminate complied with the tenets of rationality and reasonableness. Eskom's stated purpose in taking the decision could not be faulted. The next question was whether the decision and its consequence were rationally connected to that purpose. The problem of non-payment by Emfuleni was unlikely to be solved by the termination of the electricity supply. The destroying of businesses of large, paying consumers of electricity was not going to better enable Emfuleni to pay its debts. The rationality test having failed, the applicants had shown that the interruption decision was reviewable under the Promotion of Administrative Justice Act.

Turning to the issue of an appropriate remedy, the Court held that the organs of State had not made every reasonable effort to settle the dispute by means of the available mechanisms and procedures, and accordingly the Court exercised its power under section 41(4) to refer the dispute back to the organs of State involved. The interim interdict was made pending the resolution of the dispute by the State organs, but within a limited time-frame of six months, the applicants were, in that period, allowed to make their electricity payments directly to Eskom.

Global Environmental Trust and others v Tendele Coal Mining (Pty) Ltd and others [2019] 1 All SA 176 (KZP)

Civil Procedure – Interdictory relief – Nature of – An interim interdict is a court order preserving or restoring the status quo pending the final determination of the rights of the parties – without any final determination of right – Legal requirements for an interim interdict call upon the applicant to show that the right which is the subject-matter of the main action and which he seeks to protect by means of interim relief is clear or, if not clear, is prima facie established, though open to some doubt; that, if the right is only prima facie established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right; that the balance of convenience favours the granting of interim relief; and that the applicant has no other satisfactory remedy – A structural interdict is one in which the violator is instructed to take steps to comply with its constitutional obligations and then report back to the court on the extent to which it has complied with the court's order.

Mining, Minerals and Energy – Lawfulness of mining operations – Necessity of environmental authorisation, land use authority, heritage compliance and waste management licence considered by court and found to be not required in present case.

The operation by the first respondent ("Tendele") of the Somkhele Mine ("Somkhele") which carried on mining operations adjacent to the Hluhluwe-Imfolozi Park in northern KwaZulu-Natal was at the centre of the present litigation. The applicants sought an interdict to shut down the mine on the ground that it was operating illegally and in

contravention of various pieces of legislation. The complaint was that Tendele's mining operations were unlawful because it had no environmental authorisation issued in terms of section 24 of the National Environmental Management Act 107 of 1998; it had no land use authority, approval or permission from any municipality having jurisdiction; no waste management licence was issued by the Minister of Environmental Affairs in terms of section 43 of the National Environmental Management: Waste Act 59 of 2008 and no written approval was obtained in terms of section 35 of the KwaZulu-Natal Heritage Act 4 of 2008 to damage, alter, exhume or remove any traditional graves from their original position.

Tendele responded with the assertion that it was not required to obtain the approvals and licence referred to by the applicants.

The applicants' founding papers were deposed to by a person who resided in an area near the site of the coal mining conducted by Tendele at Somkhele. He averred that the quality of life enjoyed by residents in the area had changed completely since Tendele commenced its mining operations. He also alleged that the quality of the environment had been materially affected by the mining relief originally sought in the notice of motion was for a final interdict, the applicants, in the replying affidavit, denied that the relief sought was final. Their submissions led the Court to express the view that they were not entirely sure as to precisely what relief they sought. The Court therefore set out the nature of interdictory relief. An interim interdict is a court order preserving or restoring the *status quo* pending the final determination of the rights of the parties. It does not involve a final determination of these rights and does not affect their final determination. The legal requirements for an interim interdict call upon the applicant to show that the right which is the subject-matter of the main action and which he seeks to protect by means of interim relief is clear or, if not clear, is *prima facie* established, though open to some doubt; that, if the right is only *prima facie* established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right; that the balance of convenience favours the granting of interim relief; and that the applicant has no other satisfactory remedy. A structural interdict on the other hand is one in which the violator is instructed to take steps to comply with its constitutional obligations and then report back to the Court on the extent to which it has complied with the Court's order. It thus involves the continued participation of the Court in the implementation of its orders. Structural interdicts are ordinarily only appropriate in cases where it is necessary to secure compliance with a court order. It had to be seen whether the applicants had made out a proper case for the relief sought or for some other relief that would be appropriate in the circumstances.

In terms of the National Environmental Management Act, an applicant who intends to commence an activity specified in a listing notice, needs an environmental authorisation as contemplated in section 24. While prior to 8 December 2014, mining *per se* appeared not to be a listed activity, anyone intending to embark on mining would of necessity have to perform certain activities which were listed activities and would therefore have required environmental authorisation for those activities in terms of section 24. The primary purpose of the Mineral and Petroleum Resources Development Act 28 of 2002 is to make provision for equitable access to and sustainable development of the nation's mineral and petroleum resources. Prior to certain legislative amendments on 8 December 2014 which gave rise to what was called "the One Environmental System", the environmental impacts of mining were

regulated exclusively through the Mineral and Petroleum Resources Development Act and through a requirement under that Act to obtain an environmental management plan ("EMP") prior to commencing mining and to ensure that mining takes place in accordance with such an approved EMP. The Minister's decision to approve an applicant's mining EMP and to grant the mining licence effectively constituted the environmental authorisation to conduct the mining activity.

Tendele's mining operations commenced at Somkhele in 2006, pursuant to the grant of a mining right and subsequently a mining licence. The statutory framework under the Environment Conservation Act 73 of 1989, applicable at the time, and dealing with environmental authorisations, required the actual listing of activities which could not commence without such authorisation first being obtained. The listed activities were generally published by the Ministers from time to time. An examination of the listed activities as they were published between 1998 and 2006 reveals that mining *per se* was not part of such listing. Thus, one of the fundamental difficulties facing the applicants was that they failed to identify precisely what activities Tendele had embarked upon without obtaining the necessary environmental authorisations. They attempted to overcome that by listing various activities in their replying affidavit. However, the court pointed out that the general rule in motion proceedings is that an applicant must stand or fall by the founding affidavit and the facts alleged in it. It is not permissible to make out a case or allege new grounds in reply. In the present matter the applicants have not only failed to make out a proper case in their founding affidavit but their belated attempt in their replying affidavit in putting up a document ("annexure R1") without any elaboration of its contents in the affidavit itself, cannot be permitted.

The second and more important hurdle facing the applicants on the issue of environmental authorisations related to the transitional arrangements contained in the One Environmental System that came into effect on 8 December 2014, contained in section 12 of the National Environmental Amendment Act 62 of 2008. The Court was of the view that the transitional provisions adequately catered for the position of a mining operator such as Tendele as at 14 December 2014 when the amendment took effect. Concluding that the applicants failed to make out a proper case for an interdict (temporary, structural or otherwise), the Court proceeded to address the further complaints raised by the applicants.

In respect of the contention regarding absence of land use authority, the question was whether the provisions of the KwaZulu-Natal Planning and Development Act 6 of 2008, the Special Planning and Land Use Management Act 16 of 2013, and the relevant bylaws were applicable to Tendele. The Court found that the legislation relied on by the applicants did not apply to Tendele's mining operations, which were found to be lawfully conducted.

On the issue of damaging, altering, exhuming or removing traditional graves, the evidence showed that while Tendele had previously removed or altered traditional graves without being in possession of the necessary authorisations, on realising its error, it took steps to ensure that its continued conduct in relation to traditional graves was wholly within the law.

Finally, on the issue of the lack of a waste management licence, the Court again found that Tendele had shown that it was acting lawfully.

The Court concluded that the applicants had failed to make out a proper case for the relief as claimed or for such other relief as was contended for on their behalf. The application was dismissed with costs.

Kekana v S [2019] 1 All SA 67 (SCA)

Criminal law and procedure – Murder – Appeal against sentence – Court exercising its power in terms of section 322(6) of the Criminal Procedure Act 51 of 1977, which gives a court of appeal the power to impose a punishment more severe than that imposed by a lower court – Prescribed minimum sentence for premeditated murder is life imprisonment – A plea in terms of section 51(2) of the Criminal Law Amendment Act 105 of 1997 may not bind the trial court to impose a lesser sentence – For an accused to escape the prescribed minimum sentence, he must lay a factual foundation for a conclusion that the murders were not premeditated.

Charged with four counts of murder relating to his killing of his four children by slitting their throats with a knife, and one count of assault with intent to do grievous bodily harm in respect of his wife, the appellant pleaded guilty on all counts. He was convicted on the basis of his guilty plea, and was sentenced to 20 years' imprisonment on each of the murder counts, and to two years' imprisonment on the count of assault with intent to do grievous bodily harm. Ten years of each sentence on the second to fourth murder counts were to run concurrently with the sentence on the first count, so that the effective sentence was 52 years' imprisonment.

An appeal to the Full Court by the appellant against the sentence imposed for the murder counts was dismissed, and the present further appeal was with the special leave of the present Court.

In his written statement in terms of section 112(2) of the Criminal Procedure Act 51 of 1977, the appellant described how he had returned to his home with his four children after going to visit his estranged wife, and had called her to let her know that they were safely home. However, an argument ensued, leaving the appellant angry and deciding to kill himself. After he ended the call with his wife, one of the children went to him, and he wondered what would happen to the children if he was dead. He immediately took a knife and killed the child. He followed suit with each of the other three children.

The State averred that the murders were pre-planned. As a result, the formulation of the indictment was such that the murder counts were to be read with the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997. In terms thereof, in the event of a conviction, the applicable sentence was life imprisonment on each of the murder counts, unless substantial and compelling circumstances were present.

On appeal, the appellant contended that the sentence was harsh, disproportionate and induced a sense of shock; that the trial court misdirected itself by imposing a sentence in excess of the minimum sentence of 15 years' imprisonment in respect of each murder count, without identifying the aggravating circumstances to justify the increased penal jurisdiction; and the trial court misdirected itself in finding that there were no substantial and compelling circumstances warranting a deviation from the prescribed minimum sentences.

Held – After perusing the record the Court notified the parties that it was considering exercising its power in terms of section 322(6) of the Criminal Procedure Act, which

gives a court of appeal the power to impose a punishment more severe than that imposed by a lower court.

The sole issue on appeal was whether the sentence imposed by the trial court was appropriate in the circumstances. Related to that, was the nature and effect of the appellant's plea in terms of section 51(2) of the Criminal Law Amendment Act. In his plea, the appellant stated that he was pleading guilty in terms of section 51(2), but made no further reference to the section. The present Court held that that the purpose of the reference to the section was to suggest that the murders were not premeditated or pre-planned. If they were, section 51(1) of the Act would be applicable, and the appellant faced life imprisonment on each murder count, unless substantial and compelling circumstances were present. Thus, the appellant sought to bind the trial court to a sentence of 15 years' imprisonment on each murder count. The trial court proceeded on that footing, and in light of that reference, considered itself precluded from considering life imprisonment as a sentencing option. The appeal court took issue with the fettering of the trial court's sentencing discretion in that manner. Where the minimum sentences provided for in the Criminal Law Amendment Act are applicable, an accused is not entitled to pre-determine his sentence by referring, without more, to section 51(2). The appellant was instead required to lay a factual foundation for a conclusion that the murders were not premeditated, and the issue was one for the trial court to decide.

In the particular circumstances of the present case, the trial court was entitled to consider life imprisonment as a sentencing option, irrespective of the State's acceptance of an unsubstantiated plea in terms of section 51(2). Its failure to adopt that approach constituted a material misdirection rendering the present Court free to consider sentence afresh.

In considering an appropriate sentence, the court is guided by the traditional triad of the crime, the offender and the interests of society. Adopting that approach, and weighing up the mitigating and aggravating circumstances of the case, the Court found the aggravating factors to be overwhelming. It concluded that life imprisonment on each of the murder counts was the only appropriate sentence.

Mayekiso and another v Patel NO and others [2019] 1 All SA 221 (WCC)

Civil Procedure – Admissibility of the facts – Allegations amounted, in the main, to inadmissible hearsay and were lacking in materiality as to the decision to evict the occupants from the property.

Property – Eviction order – Appeal – Date fixed for eviction had passed and the Court had to fix a new date – Court had regard to the jurisprudence which required it to consider what justice and equity demanded – Court granted an order of eviction, and had to fix the date of eviction while simultaneously affording the insolvents an opportunity to make financial arrangements to secure the settling of their debts through an external source.

In September 2016, an eviction order was granted against the appellants and those occupying the relevant property under them. The property was purchased by the appellants for R19,95 million in March 2007. From at least November 2011, the first appellant, who described himself as a pastor and entrepreneur, appeared to have been in financial difficulty and became embroiled in protracted litigation to stave off the

sale of the property. However, the property was attached and sold for R8 million at a sale in execution. The sale was eventually thwarted by a friendly sequestration application. The friendly sequestration then turned to a hostile one, after an intervention application was granted. After the granting of a final order of sequestration, the first to third respondents were appointed as the joint trustees in the insolvent estate of the appellants, and were ultimately responsible for obtaining the eviction order.

The main argument on appeal was that the court *a quo* failed to have proper regard for the effect of an eviction order on the parties' minor children and, further, it failed to consider the prospect of the family being left homeless.

In a late application, the first appellant sought to adduce further evidence regarding the identity of the first respondent, and his lack of authority to bring the eviction application.

Held – Court was not persuaded that the first appellant had established the admissibility of the facts he now wished to place before the Court on appeal. The allegations amounted, in the main, to inadmissible hearsay and were lacking in materiality as to the decision to evict the occupants from the property more than two years previously. In any event, the allegations of dishonesty, deceit and possible fraud on the part of the first respondent were already before the court *a quo* at the relevant time. The application to adduce further evidence on appeal was thus refused.

On the main issue, the Court found that the court below did not misdirect itself in any way and that it gave due consideration to all the relevant factors. In the circumstances it was just and equitable, firstly, to grant an order of eviction,and secondly, to fix the date of eviction while simultaneously affording the insolvents an opportunity to make financial arrangements to secure the settling of their debts through an external source. The date fixed for eviction has come and gone and the Court had to fix a new date. In so doing the Court had to have regard to the jurisprudence which required it to consider what justice and equity demanded. The date fixed was approximately two months from the date of the order.

Propell Specialised Finance (Pty) Ltd v Attorneys Insurance Indemnity Fund NPC [2019] 1 All SA 79 (SCA)

Corporate and Commercial – Insurance – Professional indemnity insurance – Cession of rights under policy – Validity – Nature of contractual rights flowing from professional indemnity policy are such that they exclude the transfer of the personal rights created.

Between April 2010 and April 2011, the appellant ("Propell") instituted six separate actions against a law firm ("BSL") arising from a number of bridging finance transactions in terms of which Propell advanced money to clients of BSL. BSL failed to repay the loans as one of its employees had misappropriated the relevant funds. Being insured by the respondent ("Attorneys Insurance") in a professional indemnity insurance contract (the "policy"), BSL notified Attorneys Insurance of Propell's claims and sought indemnification from it under the policy. Attorneys Insurance repudiated liability in respect of Propell's claims on the ground that the money that was paid into BSL's trust account was entrusted to it as contemplated by section 26 of the Attorneys Act 53 of 1979, and the loss that Propell suffered was a loss that is excluded in terms of the policy. Instead of suing Attorneys Insurance for specific performance, BSL then

purportedly ceded to Propell its indemnification rights against Attorneys Insurance under the policy.

Propell then instituted action against Attorneys Insurance in the High Court, as cessionary of BSL's claims against Attorneys Insurance under the policy. In a special plea, Attorneys Insurance argued that the purported cession on which Propell relied was invalid as BSL's rights of recourse and/or claims against it arising out of the policy were not capable of being ceded and, for that reason Propell lacked *locus standi* to sue it.

The High Court upheld Attorneys Insurance's plea that the cession by BSL of its rights to Propell was not valid in law and dismissed the action. It held that BSL's claims against Attorneys Insurance under the Policy were incapable of cession on the grounds first, that the nature of the policy was such that it involves a *delectus personae*; secondly, that the parties to the policy had expressly, alternatively tacitly, agreed not to cede rights and/or claims (*pactum de non cedendo*); and thirdly, the cession would impair Attorneys Insurance's position and negatively impact its rights.

Held – On appeal it was held that Propell was correct that the relevant clauses of the policy could not be construed as constituting a *pactum de non cedendo*. The Court thus held that the matter concerned a *delectus personae* not a *pactum de non cedendo* and therefore had to be approached on that basis. The question was whether the nature of contractual rights flowing from the policy was such that it excluded the transfer of the personal rights created. In general, all contractual rights can be transmitted unless their nature involves a *delectus personae*, or the contract itself shows that they were not intended to be ceded.

Attorneys Insurance was a non-profit, short term insurance company, established in 1993 by the Attorneys Fidelity Fund Board of Control in terms of section 40A(a)(i) of the Attorneys Act and subject to the Short-Term Insurance Act 53 of 1998. Its primary purpose was to provide insurance cover to attorneys who are obliged to be in possession of a fidelity fund certificate in respect of claims which might proceed from their professional conduct. The specific group or class of people for whose benefit the insurance was established was specifically defined in the policy. It was therefore clear that the nature of the contractual rights under the policy indicate that the insured was a *delectus personae*. The contract gave no rights of indemnity to anyone but a legal practitioner. Attorneys Insurance's obligation to BSL was to indemnify it against legal liability arising from its professional conduct. In turn, BSL had to be in possession of a fidelity fund certificate for the relevant period to enjoy cover. From the point of view of Attorneys Insurance, the identity of the insured mattered to it.

The High Court was thus correct in holding that the rights of indemnification under the policy were not capable of being ceded on the grounds that first, the nature of the contractual relationship flowing from the policy involved a *delectus personae* and secondly, that the cession had the effect of burdening Attorneys Insurance's position. The purported cession was therefore invalid and was incapable of conferring *locus standi* on Propell.

The appeal was dismissed with costs.

Road Accident Fund v Kerridge [2019] 1 All SA 92 (SCA)

Personal Injury/Delict – Motor vehicle accident – Past and future loss of earnings – Trial court erring in relying on salary scales that were not compatible with the evidence and failing to take into account the claimant's age and pre-morbid career – Court increasing contingency deduction from 15% to 35%.

In November 2009, the respondent sustained serious bodily injuries in a motor vehicle collision. He then instituted an action for damages against the appellant (the "Fund"). The merits were settled, with the Fund conceding liability for 100% of the damages which the respondent would prove to have suffered as a result of the collision. The matter then proceeded to trial for determination of the quantum of general damages, past and future loss of income or income earning capacity, and costs of suit.

At the end of the trial, the High Court awarded the respondent R700 000 for general damages, R4 562 306 for past and future loss of earnings, interest on the awarded damages, and costs of suit, including the qualifying costs of certain medical expert witnesses. The Fund appealed unsuccessfully to the Full Bench (the court *a quo*) against the award made in respect of past and future loss of earnings or earning capacity and costs. The appeal against the order of the court *a quo* now came before the present with its leave.

Held – Respondent was a student at the time of the collision, and wished to be a diesel mechanic. Whilst studying, he co-owned a business (R-Tec Motorsports) together with his brother. The business sold car accessories and spare parts. About a year after the collision, he returned to work at R-Tec Motorsport on a full time basis. His injuries rendered him unable to finish his studies and pursue the type of work that he was interested in. The Fund conceded that the respondent would have pursued his chosen career and followed his chosen career path but for the accident, but it was contended that he had not proved that he suffered actual loss of income in the past or that he would suffer such loss in the future. The Fund focused on the respondent's failure to provide evidence of income derived from R-Tec Motorsport, and contended that the effect of his slow progress in his studies was a relevant factor in the determination of contingencies.

In the majority judgment, it was held that any claim for future loss of earning capacity requires a comparison of what a claimant would have earned had the accident not occurred with what a claimant is likely to earn thereafter. The loss is the difference between the monetary value of the earning capacity immediately prior to the injury and immediately thereafter. Courts have used actuarial calculations in an attempt to estimate the monetary value of the loss. Such calculations are obviously dependent on the accuracy of the factual information provided by the various witnesses. In order to address life's unknown future hazards, an actuary will usually suggest that a court should determine the appropriate contingency deduction. A trial court has a wide discretion when it comes to determining contingencies, and an appeal court will therefore be slow to interfere with a contingency award of a trial court and impose its own subjective estimates.

The Court pointed to several factors in this matter which impacted on the contingency deduction. Those included the respondent's age at the time of the collision and lack of evidence as to the nature and extent of the work he had done in the past; the court's view that his pre-morbid earnings had, been inflated; and the fact that some residual earning capacity was not considered. Those three factors militated

against a general contingency deduction of 15% which had been applied in respect of future loss of earnings. The Court opted for a contingency deduction of 35% which would reduce the future loss earnings from R4 354 766 to an amount of R2 830 597. To that was added the past loss of earnings of R207 540. The appeal was accordingly upheld by the majority of the court.

Sasol Oil Proprietary Limited v Commissioner for the South African Revenue Service [2019] 1 All SA 106 (SCA)

Tax – Income Tax – Assessment of taxation – Simulated transactions – Disregarding of – Section 103(1) of the Income Tax Act 58 of 1962 – Requirements for applicability – Residence based tax was introduced via an amendment to the Income Tax Act in the form of the insertion of section 9D – Taxpayer must show on a balance of probabilities that the agreements reflect the actual intention of the parties.

In an appeal against a decision of the Tax Court the first issue was whether two contracts for the sale of crude oil sourced in the Middle East, acquired by a company in the Sasol Group in the Isle of Man, sold to another company in the Sasol Group based in London, and in turn sold and shipped to the appellant ("Sasol Oil") in Durban, were simulated transactions and should be disregarded by the respondent (the "Commissioner") in the assessment of taxation in 2005, 2006 and 2007. The second issue was whether, if the transactions were not simulated, they fell within the provisions of section 103(1) of the Income Tax Act 58 of 1962, and were thus to be disregarded for the purpose of assessing liability for income tax in the hands of Sasol Oil.

The two contracts in issue before the Tax Court were entered into between Sasol Oil and Sasol International Services Ltd ("SIS"L), and between SISL and Sasol Oil International Ltd ("SOIL"). In terms of these, SISL agreed to sell crude oil and deliver it to Sasol Oil on a DES (delivered ex ship) basis, and SOIL agreed to procure crude oil and deliver it to SISL on an FOB (free on board) basis.

The Commissioner's contention both in the Tax Court and on appeal was that the intention was to avoid the payment of a new residence tax introduced in 2001.

The Tax Court found that the impugned transactions were simulated and it did not consider the implications of section 103(1). It upheld the Commissioner's assessments and confirmed the imposition of penalties and the obligation to pay interest.

Held – Residence based tax was introduced via an amendment to the Income Tax Act 58 of 1962 (the "Act"), in the form of the insertion of section 9D. Section 9D is designed to prevent deferral through South African owned foreign entities, and taxes South African owners on the foreign income owned by their foreign entities as if those foreign entities immediately repatriated their foreign income when earned. A taxpayer must show on a balance of probabilities that the agreements reflect the actual intention of the parties. In order to establish simulation, one should not look only at the terms of the disputed transaction but also the probabilities and the context in which it was concluded.

Based on the evidence, the Court found that Sasol Oil had discharged the onus of proving that the supply agreements between STI ("SOIL"), SISL and Sasol Oil were genuine transactions, which they implemented from 1 July 2001 through to the years

of assessment being 2005, 2006 and 2007. The transactions had a legitimate purpose, and were not false constructs created solely to avoid residence based taxation. There was good commercial reason for the transactions.

The Commissioner argued that, even if the supply agreements were found to be genuine, they nonetheless should be disregarded in the assessment of Sasol Oil's income tax liability, as they fell foul of section 103(1) of the Act. For the section to be applied by the Commissioner he must be satisfied that a transaction, operation or scheme has been entered into; if so, that it had the effect of avoiding, postponing or reducing the liability for the payment of tax; the transaction, operation or scheme must have been entered into solely or mainly for the purposes of obtaining a tax benefit and it must have been abnormal in one of the respects referred to in paragraph (b). The Commissioner had not shown that the impugned transactions had the effect of avoiding liability for tax or that there was anything abnormal about them.

The appeal was upheld by the majority of the Court.

South African Human Rights Commission v Khumalo (Legal Resources Centre as amicus curiae) [2019] 1 All SA 254 (GJ)

Constitutional and Administrative Law – Equality Court – Complaint about hate speech – Test for hate speech requires determination of whether impugned utterances could be reasonably construed to demonstrate a clear intention to incite harm – Irregular proceedings – Section 21 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 provides that, "The Equality Court. . .must hold an enquiry in the prescribed manner and determine whether. . . hate speech. . .has taken place as alleged."

In January 2016, the respondent ("Khumalo") published two statements filled with racial invective on his social media accounts. That saw the South African Human Rights Commission ("SAHRC") lodging a complaint in the Equality Court in its own right and also in the public interest. It was the second time the respondent had appeared to answer a complaint about the first statements. The first was in proceedings which took place at the instance of the African National Congress ("ANC") as complainant, in the Roodepoort ("Magistrate's") Equality Court. The SAHRC was ignorant of the Roodepoort proceedings when it initiated the present proceedings, but argued that the Roodepoort proceedings were not an impediment to these proceedings. It sought a declarator that the first utterance constituted hate speech as contemplated in section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the "Equality Act"). Relief of various types are sought, including the paying of damages in the sum of R150 000 and a referral of the matter for possible prosecution.

At the hearing, the Court was informed that the parties had reached agreement in settling the matter. In terms of the settlement agreement, the respondent admitted that his statements constituted hate speech, and undertook to issue an unconditional public apology to all South Africans. The respondent was to be interdicted and restrained from publishing, propagating, advocating or communicating hate speech, and agreed that he was liable for damages in the amount of R150 000. Payment of that amount was wholly suspended, subject to certain conditions.

On learning of the Roodepoort proceedings, the present Court requested the court file of those proceedings and then set the matter down for hearing on the question of whether the present complaint to be lodged and heard. The issue involved a consideration of the doctrine of *autrefoit acquit*, *res judicata* and issue estoppel and whether the second set of proceedings constituted an abuse of the court process. The Court also raised the issue of appropriate measures to address and manage the prospect of multiple complaints being lodged by several complainants in various Equality Courts.

Held – Record of proceedings in the Roodepoort court showed that a number of unexplained procedural anomalies had occurred. Section 21 of the Equality Act provides that, "The Equality Court. . .must hold an enquiry in the prescribed manner and determine whether. . . hate speech. . .has taken place as alleged." The irregularities as highlighted by the present court showed that no enquiry took place in the Roodepoort proceedings. However, the order of the Roodepoort court, even if irregular for want of adherence to the provisions of the Equality Act, remained standing until formally set aside. No steps to achieve that had been set in motion.

The defence of *autrefoit acquit* was correctly withdrawn during argument, as the doctrine belongs exclusively to the realm of criminal procedure. Proceedings in terms of the Equality Act are not akin to criminal proceedings. The defence of *res judicata* also had to fail, as the parties agreed that the complainants in the two proceedings were different and were wholly unrelated parties. However, the strict application of the principles have been recognised as sometimes leading to inequity, and issue estoppel is aimed at addressing that. In deciding on the applicability of the defence of issue estoppel, the Court found the fact that the Roodepoort court did not deal with the second utterance to be a material fact, and that the serious flaws in the Roodepoort proceedings were also relevant. The most significant reason to dismiss the defence of issue estoppel was Khumalo's repudiation of the concession that his utterances were hate speech. The question of whether the utterances were indeed hate speech therefore still had to be answered. The defence of issue estoppel thus failed, as did the contention that a second enquiry, in the specific circumstances, constituted an abuse of process.

The central issue then was whether the respondent's utterances constituted hate speech as contemplated by section 10 of the Equality Act.

The constitutional guarantee of free speech is not unlimited. In terms of the test for hate speech, it had to be decided whether Khumalo's utterances could be reasonably construed to demonstrate a clear intention to incite harm. The nature of the statements made by Khumalo satisfied the Court that they were prohibited by section 10(1) of the Equality Act. In deciding on an appropriate order, the Court held that Khumalo shall be interdicted from a repetition of his conduct and should be made to apologise to all South Africans. As he was already paying a R30 000 compensation award as a result of the Roodepoort proceedings, the court deemed it unnecessary to make an additional order to pay money.

Section 21(2)(n) of the Equality Act confers a discretion to refer a matter to the National Prosecuting Authority. The court exercised its discretion in favour of such referral.

Finally, it was decided that judicial intervention was not appropriate for management of the problem of multiple referrals to different Equality Courts having concurrent jurisdiction.

End-for now