LEGAL NOTES VOL 2/2019

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AB AND ANOTHER v PRIDWIN PREPARATORY SCHOOL AND OTHERS 2019 (1) SA 327 (SCA)

Education — School — Independent school — Contract between school and parents — School cancelling on account of parent's conduct — Whether parents had right to hearing before cancellation — Whether enforcement of termination clause contrary to public policy — Whether cancellation substantively unlawful — Constitution, 1996, ss 28(2) and 29(1).

Pridwin, a private school, cancelled its contracts with Mr AB and Mrs CB, for the schooling of their children, DB and EB. This was on account of AB's behaviour.
The High Court later dismissed the parents' application to review the decision.
On appeal to the Supreme Court of Appeal, held:

- The best interests of the child principle did not ground a right to a hearing before cancellation. To conclude it did would have untenable consequences; and no prior case supported this position.
- Likewise, a hearing could not be sourced in the right to a basic education.

The assertion, apparently, was that cancellation of the contract was equivalent to denial of the right, and this was only permissible if preceded by a hearing.

However, Pridwin bore no duty to provide a basic education, and cancellation would not impede access to the right.

- Nor could a hearing be sourced in PAJA: there was no governmental interest in Pridwin's exercise of its contractual power to cancel the agreements. (See [49] – [50] and [63].)
- The cancellations were not substantively unlawful. (See [64].)

[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!**

They were said to be unlawful because they were contrary to (1) the best interests principle and its derivative that the sin of a parent should not be visited on its child; and (2) a constitutional duty to act reasonably before terminating, and its consequence, a duty on Pridwin to consider alternative sanctions before doing so. (See [64] – [65].)

However, (1) the sins principle was not a legal rule; and the child's interests were not absolute and trumping of other interests. (See [66] – [67] and [89].)

Furthermore, (2) no duty of reasonableness was implied in the agreements; and even assuming such a duty, the cancellation decision was one a reasonable decision-maker could have taken. (See [69] – [71].)

- There was no basis to conclude that enforcement of the termination clause would be contrary to public policy. (See [75] and [78] – [79].)

Appeal dismissed. (See [82].)

Mocumie JA, dissenting, would have upheld the appeal, and set aside the order of the High Court. (See [83] – [84] and [126].)

In her view termination of the agreements without hearing and considering the views of the children would be unconstitutional and contrary to public policy. (See [84].)

Unconstitutional because they unjustifiably limited the right to basic education (termination, without a hearing, would infringe the duty to not interfere with the right); and the children's right to have their best interests accorded paramount importance.

Contrary to public policy and unenforceable because they allowed termination without a hearing upon breach of the agreement by a parent.

SOS SUPPORT PUBLIC BROADCASTING COALITION AND OTHERS v SOUTH AFRICAN BROADCASTING CORPORATION (SOC) LTD AND OTHERS 2019 (1) SA 370 (CC)

Competition — Competition Commission — Investigative powers — Merger control — Whether Commission may use its search and summons powers to investigate alleged notifiable merger between public and private television broadcasters — Whether such powers curbed by Competition Appeal Court order — Competition Act 89 of 1998, ch 5 part B; s 49A.

Media — Broadcasting — Television — SABC — Channel-distribution agreement with private broadcaster — Power of Competition Commission to investigate — Not restricted — Commission may use full search and summons powers — May interview those who signed agreement — Competition Act 89 of 1998, ch 5 part B; s 49A.

This case deals with the ambit of the Competition Commission's investigative powers, and specifically with its power to investigate whether a 2013 'channel distribution agreement' between the SABC and MultiChoice constituted a notifiable merger under the Competition Act 89 of 1998. The Act contemplates a compulsory self-reporting regime for mergers, but the SABC and MultiChoice, being of the view that the agreement was not a 'merger', did not report it to the Commission. The applicants, convinced that it was indeed a merger, applied to the Competition Tribunal for an order to this effect. The Tribunal dismissed the application on various grounds (see [10]).

In an appeal the CAC on 24 June 2016 set aside the Tribunal's decision and — after criticising the Tribunal for failing to use its investigative powers — referred the matter to the Commission for investigation. The CAC's order directed the SABC and MultiChoice to provide the Commission with 'all documentation . . . pertaining to the

negotiation, conclusion, and implementation of the agreement' ('the June 2016 order' — see [13]).
When the SABC and MultiChoice demurred, the applicants, supported by the Commission, approached the CAC for a further order declaring that the June 2016 order had sanctioned the use of the full array of coercive and non-coercive investigative powers available to the Commission under part B of ch 5 of the Act. These included powers of search and summons (hereafter 'the S&S powers') (see [46] – [50]). In a judgment dated 28 April 2017 the CAC held that the June 2016 order could not be interpreted as the SABC and MultiChoice wanted because it expressly limited the enquiry to 'documentation'. The present application was for leave to appeal against the April 2017 judgment.
MultiChoice argued that the Act, as currently framed, did not confer *any* S&S powers on the Commission to investigate suspected mergers and that the Commission was therefore limited to a so-called 'desktop study' of the documents supplied by them. The applicants, supported by the Commission, argued for unrestricted S&S powers that would allow the Commission to conduct interviews with those involved in the signing of the transaction.
The following were the applicable provisions of the Act: The long title, which states that the Competition Commission 'is responsible for the investigation . . . of . . . mergers'; s 12, which states that a merger occurs 'when one or more firms . . . acquire . . control over the whole or part of the business of another firm'; s 13A, which obliges parties to notifiable (ie intermediate or large) mergers to notify the Commission; s 13B, which allows the Commission to direct an inspector to 'investigate any merger'; s 21(1)*(c)*, which charges the Commission with the responsibility 'to investigate and evaluate alleged [prohibited practices]' and to 'perform any other function assigned to it in terms of this Act or any other Act'; and s 59(1)*(d)*, which allows for the imposition of an administrative penalty for failure to report a merger.

Held

Leave to appeal would be granted because the ambit of the Commission's investigative powers was a constitutional matter and because clarity was needed on whether the agreement constituted a notifiable merger under the Competition Act (see [21] – [22]).
The Act, not the June 2016 order, was the source of the Commission's investigative powers. Consequently, if the Commission could ordinarily exercise its S&S powers when investigating whether a transaction was a notifiable merger, then the only remaining question was whether the June 2016 order precluded it from doing so (see [28]). The S&S powers were crucial to the discharge of the Commission's duty to investigate mergers and transactions that might give rise to them (see [49]). A contrary construction — that is, one that would prevent the Commission from investigating mergers — would defeat the Act's aim of merger regulation and emasculate its entire compliance edifice (see [44] – [49]). It was essential that, where the Commission had grounds to believe that the parties to a merger had motive not to report it, it should investigate and not accept their mere say-so. Nor should such an investigation be confined to the documents submitted by the parties: merger investigations were not meant to be rudimentary, 'desktop' evaluations of such documents (see [50]).
Court orders are meant to provide effective relief and, correctly interpreted, the June 2016 order did not curtail the Commission's ability to exercise these powers, which

included the power to interview individuals where the furnished documentation was incomplete.
The applicants were therefore entitled to an order declaring that the June 2016 order did not preclude the Competition Commission from exercising its full coercive and non-coercive investigative powers in terms of part B of ch 5 of the Competition Act for the purposes of discharging its obligations under that order (see [90]).

SHAW AND ANOTHER v MACKINTOSH AND ANOTHER 2019 (1) SA 398 (SCA)

Credit agreement — Consumer credit agreement — What constitutes — 'Co-principal debtor' assuming liability for indebtedness of another — Constituting credit guarantee — *Quaere*: Whether co-principal debtor also 'surety' — National Credit Act 34 of 2005, s 8(5).

The issue in the present appeal was whether an agreement was subject to the National Credit Act 34 of 2005 (the Act) and therefore invalid. The dispute centred on the effect of clause 5 — headed 'Suretyship' — under which X agreed to assume liability, as 'co-principal debtor', for the repayment of Y's loan to Z. Z defaulted on its repayments and Y sued X in terms of clause 5. X and Y disagreed on whether their relationship was governed by the Act. Their argument in the High Court (both at first instance and on appeal to a full bench) proceeded on the basis that the main issue was whether the effect of clause 5 was to constitute X as surety. Both courts agreed with Y that it did and that the agreement was excluded from the ambit of the Act.
Held
It was unnecessary to decide whether clause 5 made X a surety: the appeal would be decided on the basis that X became a co-principal debtor with Z for the repayment of the admitted debt. The question, therefore, was whether the agreement between X and Y was a 'credit guarantee' under s 8(5), which would mean that the Act was not applicable because the underlying loan contract fell outside its purview, or a 'credit transaction' under s 8(4)*(f)*, which would mean that the Act was applicable. (See [7].)
An essential precondition to the operation of s 8(5) was that it had to involve an undertaking to satisfy an obligation of *another person*. In the present case the loan was advanced to Z, and the only purpose of the agreement was to arrange how X was to repay the amount owing to Y. X itself was not granted a loan, nor was any credit advanced to it, nor was it a party to the loan to Z. This brought X's obligations squarely within the language of s 8(5). Appeal dismissed. (See [10] – [13].)

DU BRUYN NO AND OTHERS v KARSTEN 2019 (1) SA 403 (SCA)

Credit agreement — Consumer credit agreement — Credit provider — Whether obligation to register — Where principal debt exceeding statutory threshold, registration required even where agreement single transaction and credit provider not involved in credit industry — *Semble*: Situation unsatisfactory and should be remedied by legislature — National Credit Act 34 of 2005, s 40(1).

Under s 40(1) of the National Credit Act 34 of 2005 (the NCA) a credit provider must register as such if the principal debt exceeds a fixed sum. The obligation to register is applicable to all credit agreements irrespective of whether the agreement was a

once-off transaction or the credit provider involved in the credit industry (see [27] – [28]).
Mr Karsten, who had at one time been like a son to the Du Bruyns, now an elderly couple, had a falling-out with Mr Du Bruyn over the business they ran together. They eventually agreed that Du Bruyn would buy Karsten out for R2 million, paid in monthly instalments over five years. Karsten was not a registered credit provider under s 40 of the NCA, and when the Du Bruyns defaulted, they parried Karsten's action for the balance of the purchase price with the defence that the sale was invalid for want of compliance with the NCA. The High Court, bound by *Friend v Sendal* 2015 (1) SA 395 (GP), a controversial case which held that the NCA was directed at the credit industry and that once-off transactions were not subject to it, reluctantly found in favour of Karsten.
In an appeal to the Supreme Court of Appeal Karsten argued that the NCA was not applicable because (i) the sale was not one at arm's length as required by s 4(1) of the Act; and (ii) the registration requirement was directed at participants in the credit market and not ordinary individuals like himself. Karsten claimed that since he and the Du Bruyns were like family he had made no attempt to 'obtain the utmost possible advantage out of the transaction', which made it non-arm's-length under s 4(2)*(b)*(iv)*(aa)*.
Held
The facts did not support Karsten's familial-arrangement scenario, showing instead that the sale was an arm's-length transaction from which Karsten had sought the utmost advantage (see [17]).
While the decision in *Friend* was pragmatic and made good sense, it was difficult to square with the text of s 40(1)*(b)*, which made the total amount of credit awarded the sole determinant of whether a credit provider was obliged to register (R500 000 at the time of the conclusion of the agreements) (see [20] – [21], [26] – [27]). The legislature set the thresholds that triggered the obligation to register, and to conclude that this did not apply to once-off transactions, or to those who were not regular participants in the credit market, was, however attractive and sensible, not true to the text and the context of the statute (see [27] – [28]). While the conclusion that the requirement to register was applicable to all credit agreements once the threshold was reached, was an imperfect solution, the matter was one for the legislature to remedy (see [28]). It was not for the court to accommodate deficient drafting by attributing a meaning to s 40(1)*(b)*that was not justified by the wording of that statute (see [28]). The agreements were therefore unlawful due to non-compliance with s 40(1) (see [30]).

COMPASS INSURANCE COMPANY LTD v COBUS SMIT PROJEKBESTUUR CC AND ANOTHER 2019 (1) SA 413 (WCC)

Engineering and construction law — Building contract — Construction guarantee — Rectification — A (as guarantor) issuing guarantee to B (as beneficiary), to cover C's (contractor's) performance in terms of contract between C and B — Rectification of guarantee may be sought at instance of contractor, even though not signatory to guarantee, on basis that guarantee intended to reflect common intention of guarantor, beneficiary and contractor.

The plaintiff, as guarantor, had issued a construction guarantee to the Malik Trust, as beneficiary, for the purposes of covering the performance of the first defendant (the

contractor) under the latter's construction contract with the Malik Trust. After paying out to the beneficiary, the plaintiff sought to recover such amount from the first defendant. The first defendant delivered a plea, and subsequently, in the present application, sought to amend it to advance a case for rectification of the guarantee, on the grounds that the guarantee did not reflect the parties' common intention. The plaintiff objected on the basis that the first defendant was not a party to the guarantee sought to be rectified, such a contract being viewed in law as an autonomous, independent contract between the guarantor and the beneficiary. The defendants accepted the plaintiff's characterisation of the guarantee contract as being autonomous, but added that it was founded on the common intention of the guarantor, the beneficiary and the contractor.
Held, that the present guarantee contract was intended to reflect the common intention of the plaintiff (guarantor), the Malik Trust (beneficiary), and the first defendant (contractor), even though the latter was not a signatory to the guarantee. This was so, given the following circumstances: The guarantee contract arose as a result of the underlying construction contract between Malik Trust and the first defendant, the guarantee providing that the Malik Trust would be able to claim from the plaintiff a specific amount should the first defendant not carry out its obligations in terms of the construction contract; further, the guarantee contract was drafted at the instance, and under the instructions, of the first defendant (which desired cover for its construction contract). (See [22] – [24].) Further, to say that the guarantee contract reflected this common intention did not detract from its autonomous nature (see [24]).
Held, further, that a guarantee contract could be rectified to reflect the common intention of the guarantor, beneficiary and contractor (see [11] – [13] and [25]).
Held, in the circumstances, that nothing barred the first defendant from seeking to rectify the guarantee contract to reflect what it alleged to be the common intention of the parties. Amendment granted.

EQUAL EDUCATION AND ANOTHER v MINISTER OF BASIC EDUCATION AND OTHERS 2019 (1) SA 421 (ECB)

Education — Right to education — Duties of state — Provision of school infrastructure — Norms and standards — Prescribed regulations made subject to availability of resources and cooperation of other government agencies responsible for infrastructure — Such proviso violating constitutional value of accountability and declared unconstitutional — Constitution, ss 7(2), 29(1)*(a),* 41(1)*(c)* and 195(1)*(f)*; South African Schools Act 84 of 1996, s 5A.

Section 5A(1)*(a)* of the South African Schools Act 84 of 1996 provides that the Minister of Basic Education 'may . . . by regulation prescribe minimum uniform norms and standards for [public] school infrastructure'. The applicant challenged the constitutionality of a number of regulations made under this section. One of these was reg 4(5)*(a)*, which subjects the realisation of the norms and standards to the availability of 'resources and co-operation of other government agencies and entities responsible for infrastructure'.
The applicant contended that reg 4(5)*(a)* violated, inter alia, the founding value of accountability (s (1)*(d)*) and the principle that public administration must be accountable (ss 41(1)*(c)* and 195(1)*(f)*). This because it had the effect of rendering

government unaccountable for the proper provision of school infrastructure — part of its obligations under s 7(2) to realise the right to basic education in s 29(1) — by providing justification for its failure to do so.

Held

Basic school infrastructure played a significant role in the delivery of basic education. The s 29(1) right to basic education was distinguishable from the other constitutional socioeconomic rights in that, unlike those rights, it contained no internal qualifiers stating that 'the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights'. The right to basic education was therefore unarguably immediately deliverable. (At [170], [180].)

Section 195(3) of the Constitution expressly provided that national legislation (which included subordinate legislation in terms of the Act Parliament) must ensure the promotion of accountability and transparency. Accountability required reasonable steps to be taken by the relevant organs of state to comply with their legislative and constitutional obligations. The proviso in subreg 4(5)*(a)* provided the Minister with a lifetime indemnity against discharging her s 29(1)*(a)* duty. This open-ended approach was unreasonable and thus unacceptable. It would therefore be declared inconsistent with the Constitution.

FNM v REFUGEE APPEAL BOARD AND OTHERS 2019 (1) SA 468 (GP)

Immigration— Refugee Appeal Board — Proceedings before — Burden and standard of proof — Information Board gathers — Opportunity to respond thereto.

Immigration — Refugee — Qualification for status of — Section 3*(a)* — Individual providing information relevant only to s 3*(b)* — Duty to investigate if individual falling within s 3*(a)* — Section 3*(b)* — Objective and subjective enquiry — Time-point to assess position in place departed from — Refugees Act 130 of 1998, ss 3*(a)* and 3*(b)*.

Applicant had applied for asylum and a Refugee Status Determination Officer had refused his application. He had then appealed, but the Refugee Appeal Board had dismissed his appeal. He applied to the High Court to review the Board's decision. It considered:

- The burden of proof in an appeal to the Board. *Held*, that the burden was on the appellant, but that the Board was also under a duty to gather evidence. It had to do so in a neutral manner. (See [46] and [48] – [49].)
- The standard of proof. *Held*, that the applicant had to show there was a reasonable possibility the facts concerned were true. (See [46] and [48].)
- The approach to a statement not supported by evidence. *Held*, that if it was consistent with the applicant's account, the applicant should be given the benefit of the doubt. (See [46] and [48].)
- The approach to be adopted by the Board to information it gathers. *Held*, that it had to give the applicant an opportunity to respond to it. (See [53] and [54].)
- The situation of an applicant providing information relevant only to s 3*(b)* of the Refugees Act 130 of 1998. *Held*, that, in this situation, the Board had a duty to investigate if the applicant fell within s 3*(a)*.

• The approach to s 3*(b)*. *Held*, that it involved examining (1) whether there was, objectively, one of the circumstances enumerated; and (2), whether, subjectively, it compelled the individual concerned to leave.
(See [64] – [65].)
• The timepoint at which an Officer, the Board or court should examine the position in the place departed from. *Held*, that it should consider the position at the time the individual departed, and not at the time his or her case came before it. Decision of the Board reviewed and set aside; and substituted with a decision that applicant qualified as a refugee under ss 3*(a)* and 3*(b)*.

GAMEDE v PUBLIC PROTECTOR 2019 (1) SA 491 (GP)

Constitutional law — Chapter 9 institutions — Public Protector — Preliminary investigation — Subject's right of access to evidence — Applicant, public official under investigation for maladministration and corruption, seeking review of Public Protector's decision to refuse him access — Applicant not yet entitled to requested information — No reviewable decision made — Promotion of Administrative Justice Act 3 of 2000, s 1 sv 'administrative action'; Public Protector Act 23 of 1994, s 7(9)*(a)*.

Administrative law — Administrative action — What constitutes — Decision of Public Protector to deny subject of investigation access to evidence — If investigation still at preliminary phase, then decision not adversely affecting subject's rights — No reviewable decision made — Promotion of Administrative Justice Act 3 of 2000, s 1 sv 'administrative action'; Public Protector Act 23 of 1994, s 7(9)*(a)*.

This case is about when the Public Protector is obliged to give the subject of an investigation access to the evidence, and whether a decision to refuse access should be overturned on review.
The applicant, an MEC, sought a review of the Public Protector's refusal to provide him with information and documents relating to the investigation of an anonymous complaint of corruption made against him. The complaint was lodged early in June 2015 and the applicant was informed of it on 17 June 2015. After an exchange of correspondence in which the Public Protector made it clear that she was still collecting evidence and would not divulge the requested information, the applicant on 11 December 2015 launched the present proceedings for review under the Promotion of Administrative Justice Act 3 of 2000 and the principle of legality. The applicant argued that the Public Protector's refusal adversely affected his rights and had a direct external effect, and therefore constituted reviewable 'administrative action' under PAJA (see [22] – [28] for the applicant's case). The Public Protector argued that because the investigation was still at the preliminary (fact-gathering) stage, she had made no reviewable decision, and that, even if she had, it was unassailable (see [29] – [34] and [40] for the Public Protector's case).
Section 7(1)*(a)* of the Public Protector Act 23 of 1994 permits the Public Protector to conduct 'a preliminary investigation for the purpose of determining the merits of [a] complaint'. Section 7(9)*(a)* then provides that —
'(i)f it appears to the Public Protector during the course of an investigation that any person is being implicated . . . and that such implication may be to the detriment of that person or that an adverse finding pertaining to that person may result, the Public Protector shall afford such person an opportunity to respond . . . .'

The applicant argued that the reception of the complaint by the Public Protector had already 'implicated' him, triggering his right to respond. The Public Protector argued that this could not have been the legislature's intention and that the provision had to be interpreted in the light of the large number of complaints received by her office and the need to protect the identity of whistle-blowers. She pointed out that it was only once she had evidence implicating the applicant, and which would result in an adverse finding being made against him, that she would share the details with him, as required under s 7(9). The applicant did not dispute the Public Protector's allegations of fact about her modus operandi, which were therefore accepted by the court (see [5]).

Held

How the Public Protector exercised her investigative powers was in her own discretion, including when to grant the subject an opportunity to respond (see [47] – [48], [56]). The present investigation was still at the preliminary stage when the applicant was informed of the complaint against him, at which point no provisional or final decision requiring any response from him had been taken by the Public Protector (see [51] – [56]). At that stage there were insufficient facts before her to warrant a conclusion that it 'appeared' that the applicant 'might' be implicated to his detriment (see [59]). She had not yet applied her mind and had therefore not made a decision under s 7(9)*(a)* that was reviewable under PAJA (see [60]). Nor was her denial of the applicant's request for access to the documents unreasonable: his entitlement to that information would arise only later in the investigative process, when protecting his rights became an issue (see [66] – [67]). A legality review was likewise inappropriate: the impugned decision (as far as it existed) was lawful, rational and justifiable (see [68]). Application dismissed.

JONES v ROAD ACCIDENT FUND 2019 (1) SA 514 (GP)

Motor vehicle accident — Compensation — Claim against Road Accident Fund — Sufficiency of information furnished in claim form — Identity of owner of insured vehicle — Specific vehicle and owner to be identified to bring claim within section — Road Accident Fund Act 56 of 1996, s 17(1)*(a)*.

A rock fell from a truck, went through plaintiff's windscreen, and struck him on the head.

Plaintiff could not identify the particular vehicle from which the rock fell, but identified 23, from one of which the rock probably came.

The owners of those vehicles were known. (See [8.2] – [8.4].)

The issue was whether the claim fell within s 17(1)*(a)* of the Road Accident Fund Act 56 of 1996.

It applies to 'a claim for compensation . . . arising from . . . driving of a motor vehicle where the identity of the owner or . . . driver thereof has been established; . . .'. (See [17].)

Held, that the specific vehicle, and specific owner, had to be identified, to bring the claim within s 17(1)*(a)*.

KANGRA GROUP (PTY) LTD v COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE 2019 (1) SA 520 (WCC)

Revenue — Income tax — Deductions — Contractual damages — Amount paid by taxpayer in settlement of claim for repudiation of contract where such repudiation enabled taxpayer to sell goods at higher price to other parties, increasing taxable income — Whether deductible expense — Income Tax Act 58 of 1962, s 11(a).

The taxpayer company entered into consecutive agreements with company A to supply it with coal, one for the year 2002 and another for 2003. The full amounts were, however, not delivered, and so a further agreement was concluded in terms of which the balance of the orders would be delivered in 2004 at the rate of USD 27,50 per metric ton. During the period that the taxpayer was obliged to perform in terms of the further agreement, the market price for coal escalated to around USD 40 per metric ton.

When company A was not prepared to pay more than agreed, the taxpayer repudiated the further agreement, electing instead to sell the coal to other parties at a higher price. However, in 2003 the taxpayer transferred its coal business to company B in order to comply with the transformation requirements of the mining charter, the latter company remaining under the control of the taxpayer's 'controlling mind', Mr Graham Beck, at all relevant times.

As a result of the taxpayer's repudiation, company A instituted arbitration proceedings which were settled in September 2007 by the taxpayer paying R90 million in damages. The taxpayer then sought to deduct this settlement amount as a deductible expense under s 11*(a)* of the Income Tax Act 58 of 1962, but the Commissioner would not allow it. This case concerned the taxpayer's appeal to the High Court after its appeal against the Commissioner's assessment was dismissed in the Tax Court. Notably, in the Tax Court the taxpayer conceded that 'the delivery by [company B] was made for its own benefit', ie not for the taxpayer's.

The High Court described the settlement agreement as the price paid for the opportunity to earn additional income by selling the coal at a higher price than had it been sold to company A; and encapsulated the issues arising as whether the payment of contractual damages, such as that incurred by the taxpayer in settling the arbitration claim, could be termed expenditure in terms of s 11*(a)* of the Act, and if so, whether such expenditure resulted in the taxpayer earning income (see [47]).

Held

The test for whether amounts paid in respect of damages and/or compensation constituted expenditure under the Act, was that the cause of the liability must have constituted an 'inevitable concomitant' of trade. Applying this to the present case raised the following question: did the business of delivering coal to company A in terms of an agreed contract necessarily entail the concomitant duty (or right) to breach that contract in circumstances where it was more profitable to conclude a contract with other parties for the same merx? The answer to this question was in the negative. The law would not tolerate that an intentionally unlawful act qualified for a deduction. In the result, the payment of the sum of R90 million by the taxpayer in settlement of the claim in arbitration did not constitute expenditure as contemplated under s 11*(a).*

And, even if it did, the relevant expenditure did not result in the taxpayer earning any income; it did not prove that such income as was produced by repudiating the supply agreements with company A was received by or accrued to it as a consequence of

such repudiation. It was evident (as conceded in the Tax Court) that company B delivered coal for its own benefit. In the result, the Tax Court correctly held that the taxpayer did not discharge the onus of establishing that it was entitled to claim the general deduction contended for, and accordingly the appeal would fail.

LIBERTY GROUP LTD v K & D TELEMARKETING CC AND OTHERS 2019 (1) SA 540 (GP)

Practice — Judgments and orders — Absolution from instance — Plaintiff seeking to proceed afresh on same papers — Requirement to obtain court's leave to do so.

In an action, plaintiff claimed the repayment of certain commissions from defendants. Plaintiff made its case, defendants theirs, and the court ordered absolution from the instance. Plaintiff did not appeal. (See [4] – [8].)
Later on, without seeking leave, plaintiff attempted to proceed anew on the same papers: it applied to amend its pleadings and for a trial date. Defendants opposed the application as an irregular step; and the court dismissed it for failure to seek its leave. (See [14] – [15].)
Then here, plaintiff applied for leave to reopen its action, on the same papers (see [2]).
But the court held again that the application should fail (see [36]).
It reiterated that where absolution is granted after close of a defendant's case, the plaintiff may proceed afresh on its claim, without leave. But if the plaintiff sought to proceed again on the same papers, it required the court's permission to do so. (See [19] – [20].)
In this instance, plaintiff had not applied to set aside the absolution order, and in consequence its claim had been hit by s 15(2) of the Prescription Act 68 of 1969 and had prescribed.
To grant leave would not be the same as to set aside the order of absolution; and while that order stood, renewed proceeding, on grant of leave, would be met with a defence of prescription (see [25]).
Plaintiff had also failed to give good reason for why it had not led the evidence of the head of its legal department, which it now sought to introduce; and further evidence, of an algorithm, that it sought to lead, was unlikely to be 'practically conclusive'. It was also doubtful whether the algorithm was a schedule that was necessary to support its claim. (See [5], [7], [16], [28] – [29] and [33] – [35].)
It would, furthermore, be prejudicial to the defendants to have to go to trial again, given the inequality of their resources as against the plaintiff's; and given the length of the plaintiff's delay in bringing the application to reopen its suit (see [30]).
Plaintiff's application accordingly dismissed; and likewise, defendants' counterclaim. (This had been to interdict plaintiff taking further steps, and for costs *de bonis propriis* against plaintiff's lawyers.)

MATHIMBA AND OTHERS v NONXUBA AND OTHERS 2019 (1) SA 550 (ECG)

Attorney — Fees — Contingency fees — Contingency fee agreement — Statutory limitation — Both advocate and attorney acting on contingency — Court summarising applicable principles — Whether cap of 25% a global cap applicable to all legal practitioners in case, so that jointly their fees cannot amount to more than

25% of amount awarded, or an individual cap applicable to each — Whether legal practitioner may charge maximum permissible under Contingency Fees Act, plus taxed costs to be paid by other side — Contingency Fees Act 66 of 1997, s 2.

Mr Mathimba had appointed law firm Nonxuba Inc to represent him, on a contingency basis, in two damages claims: one against the Road Accident Fund (RAF), in which he was ultimately awarded R6 977 105,84; and the other against the MEC for Health, Eastern Cape (MEC), in which he was awarded R2 550 548,60. After the sums were paid into Nonxuba Inc's trust account and Mathimba received a bill of costs, he concluded that his attorneys had deducted an excessive sum for fees and disbursements. Mathimba (as first applicant) approached the High Court on application, seeking an order —

- declaring that the contingency fees agreement entered into in respect of the RAF and MEC matters (AM37 and AM15, respectively) were invalid and void for non-compliance with the Contingency Fees Act 66 of 1997 (the Act);
- declaring that the total fees of Nonxuba Inc (second respondent) plus the success fee of the appointed advocate (third respondent) may not exceed 25% of the capital amount awarded to Mathimba in the MEC matter; and
- demanding payment (in respect of both the RAF and the MEC matter) of the capital amounts outstanding, plus interest thereon, less the amounts to be (once again) taxed in the attorneys' attorney and client bill of costs.

Two principal issues were to be decided in the present matter, heard before the full bench.

Whether settlement agreement reached was binding

After the matter was postponed, the parties, prompted by a tender contained in a supplementary affidavit filed by Nonxuba Inc, entered into negotiations and settled. A draft order purportedly encapsulating their settlement agreement was written. But the order was not made an order of court because Mathimba's attorneys withdrew their consent on the ground that the draft agreement made no provision for interest on the capital sums. Was the draft agreement binding?

Mathimba argued that the parties' real intention had been to include interest on capital and that this followed from the fact that Nonxuba Inc's previous tender — which formed the backbone of the negotiations — expressly stated that interest was payable. The failure to include interest in the written agreement was an oversight, something Nonxuba Inc would have been aware of and on which it could therefore not rely. In such circumstances Mathimba could not be held to the draft agreement. The court, however, held that the draft agreement was binding because there was no proof that the parties intended to include the interest in the draft agreement, or that Mathimba's attorneys were alive to the possibility of a mistake. (See [38], [42], [45], [52], [58], [60], and [70].)

Whether contingency fees agreement AM15 between Mathimba and Nonxuba Inc was valid

The remaining issue was the validity of agreement AM15. This agreement was entered into between Mathimba and Nonxuba Inc mainly for the purpose of providing for contingency fees for the appointed counsel (third respondent), who also countersigned such agreement. Important context was that Nonxuba Inc itself was already acting on contingency in terms of a prior agreement (AM37) with Mathimba, in terms of which it was entitled to 25% of the value of the claim (this was later conceded by Nonxuba Inc to be non-compliant with the Act). AM15's terms included, inter alia, the following: The advocate would recover no fees unless Mathimba was

successful (or partially successful) in his claim against the MEC; and, if Mathimba was successful, the advocate would be entitled to a success fee of double his normal fees which would be calculated as being R15 000 per day or part thereof and R2000 per hour or part thereof, and should not exceed 25% of the total amount awarded to Mathimba in consequence of the proceedings (for purposes of calculating the success fee, costs were not included).

In considering whether agreement AM15 was compliant with the Act, the court considered the law on contingency fees agreements (see [118]), and stated:

- Absent compliance with the Act, a contingency fees agreement was void.
- The Act did not allow an advocate to sign a contingency fee agreement separately from the attorney or to conclude a contingency agreement directly with a client. Section 2 contemplated a *single contingency agreement* for a single matter to which all the relevant legal practitioners (which included attorneys *and*advocates) on contingency were party, and *not separate agreements* for each practitioner.
- It was this single agreement with all legal practitioners involved on contingency that was subject to the constraints in s 2. Therefore the 25% cap (of the amount awarded) referred to in s 2(2) was not an individual cap applicable to each legal practitioner involved in a case on a contingency basis. Rather, it was a global cap applicable to all legal practitioners (including advocates) involved in a case, so that their joint fees could not exceed 25% of the amount awarded.
- A legal practitioner could not charge the maximum permissible under the Act plus taxed costs to be paid by the other side. The maximum practitioner's fees was what the Act said — a maximum above which no fees could be lawfully recovered. The party and party costs recovered by the successful party from the unsuccessful party were what the client recovered and were due to the client. An attorney could recover from party and party costs — once he or she has recovered the full attorney and client fees — only the reimbursement of one's out-of-pocket expenses and not fees.

The court concluded that contingency fees agreement AM15 was illegal and void for lack of compliance with the Act in the following respects (see [119] – [126]):

- Given that *both* Nonxuba Inc and the appointed advocate were acting on a no-win, no-fee basis, and on a success fee, these arrangements should have been dealt with in one and the same contingency fees agreement.
- The agreement provided only that it was the advocate's fee that may not exceed 25% of the total award, and not, as it should have, the globular fees of both attorney and advocate (who were both acting on a contingency basis).

The court accordingly set aside agreement AM15, and granted an order in the terms set out in [127].

NEDBANK LTD v THOBEJANE AND SIMILAR MATTERS 2019 (1) SA 594 (GP)

Court — High Court — Jurisdiction — Court may decline to hear matter falling within jurisdiction of magistrates' courts — Practice of bypassing magistrates' courts amounting to abuse of process—Gauteng Division, Pretoria issuing ruling that matters falling within jurisdiction of magistrates' courts in future be brought there unless High Court grants leave for matter to be brought before it.

Court — High Court — Jurisdiction — Inherent jurisdiction of High Court — High Court entitled to mero motu transfer matter to another court, ie magistrates' court, or local or provincial division of High Court, if in interests of justice to do so.

Court — High Court — Jurisdiction — Inherent jurisdiction of High Court — To protect and regulate its own processes — Circumstances in which High Court may exercise such power.

Constitutional law — Human rights — Right of access to court — Practice of litigants instituting in High Court matter falling within jurisdiction of magistrates' court — Practice of bypassing magistrates' courts hindering impecunious litigants' right to access to justice, and overburdening High Court — Practice amounting to abuse of process — Allowing for court to exercise its inherent power to protect and regulate its processes, and to decline to hear matter.

The background to the present matter — heard before a full bench of the Gauteng Division, Pretoria, of the High Court — was the ever increasing practice of financial institutions (1) enrolling in the High Court foreclosure applications which fell within the monetary jurisdiction of the magistrates' courts; and (2) enrolling matters in the Gauteng Division, Pretoria, even where they involved parties located within the jurisdiction of the Gauteng Local Division, Johannesburg. Such practices gave rise to two threats: (a) They added significantly to the workload of an already overburdened court, and resulted in delays in the delivery of judgments; (b) many respondents/defendants — often impecunious — might find to be prohibitively expensive the costs involved in having to litigate in the High Court, and to travel the necessary further distance (as compared to their closest magistrates' court or High Court local division). Their right to access to justice protected in s 34 of the Constitution was therefore potentially infringed. In the present matter a number of default-judgment applications instituted by certain banks against debtors, in which they also sought orders declaring their homes to be specially executable, were consolidated for the purpose of addressing the above. In the form of a directive, the following questions were posed:

• Was the High Court obliged to entertain matters that fell within the jurisdiction of the magistrates' courts purely on the basis that the High Court may have concurrent jurisdiction?

• Was the provincial division of the High Court obliged to entertain matters that fell within the jurisdiction of a local division on the basis that the provincial division had concurrent jurisdiction?

• Was there not an obligation on financial institutions to consider the costs implication and access to justice of financially distressed people when a particular forum was considered?

In dealing with the above, the court considered how courts in the past had approached the question whether they might decline to hear matters brought before them falling within their jurisdiction in circumstances in which another court shared jurisdiction (see [35]–[49]). It referred to the rule that, in general, a court was bound to entertain proceedings that fell within its jurisdiction, and could decline to do so only where a statute provided otherwise or in 'the exercise of the court's inherent jurisdiction to refuse to entertain proceedings which amount to an abuse of its processes' (see [37]). The court referred further to the long-standing principle that, where more than one court had jurisdiction in a matter, the plaintiff, as dominus litis, had the right to choose the court in which it wanted to institute its action (see [42]). It acknowledged that courts generally, in applying the above principles, felt that, once seized with jurisdiction, they were obliged to hear a matter. It was further apparent that, while courts acknowledged as problematic the overburdening of the High Court

with matters that belonged strictly speaking in the magistrates' courts, they believed it one to be addressed on a policy level, and the refusal to hear such matters was not regarded as an appropriate solution. (See [49].)
However, the court stressed that the aforementioned cases had not considered the right to access to justice (see [50]). A court, in terms of s 7(2) read with s 8(1) of the Constitution, had an obligation to 'respect, protect, promote and fulfil the rights in the Bill of Rights'. Consequently, a court had an obligation to ensure that access to justice was attainable and affordable to people from all walks of life. Therefore, the court had a duty to guard against a court system that negatively impacted impecunious litigants in accessing justice. (See [64] and [79].) The position that a plaintiff was dominus litis and could choose any forum that suited him/her lost sight of the deep-seated inequalities in our society and the constitutional imperative of access to justice. One had to also consider the rights of defendants or respondents. The plaintiff's rights should not dictate the choice of court at the expense of access to justice. (See [42] and [79].)
The court held that the practice of litigants in bypassing the magistrates' courts or local division of the High Court, where such courts had jurisdiction, hindered impecunious litigants' right to access to justice, and defied the legislature's attempts to bring justice to the people (see [74] and [79). Such practice, in having such an effect, and in also resulting in the High Court's being unable to deal effectively with its workload, constituted an abuse of process (see [52], [76], [77], [78], [81]). Such an abuse allowed for the court to exercise its inherent power to protect and regulate its processes, and to develop the common law, taking into account the interests of justice, granted to it in terms of s 173 of the Constitution (see [69], [73] and [77]). (The court rejected the argument that such a power could only be exercised where a legislative lacuna existed (see [68]).) A court order was warranted that promoted access to justice and uniformity in administering justice in an orderly and effective manner (see [72]).
The court concluded that the High Court was not obliged to entertain matters falling within the jurisdiction of the magistrates' courts purely on the basis that the High Court may have concurrent jurisdiction. And further that there was an obligation on all litigants to consider the question of access to justice when applications were issued, and the courts had a duty to ensure access to justice, by exercising appropriate judicial oversight. (See [91]–[92].) It further held, and granted a declaratory order to such effect, that:

- Matters within the jurisdiction of the magistrates' courts should be issued in the magistrates' courts. Should a party be of the view that a matter falling within the jurisdiction of the magistrates' courts should more appropriately be heard in this division, an application must be issued setting out reasonable grounds why, and only once leave was granted, may the summons be issued in the High Court. (The court added that inefficiency of the other court, real or perceived, and the convenience of the plaintiff alone, would not, however, constitute such reasonable grounds.) (See [91]–[92] and [96].)
- The High Court was entitled to mero motu transfer a matter to another court, ie the magistrates' court, and local or provincial division of the High Court, if it was in the interests of justice to do so. (See [89], [92] and [96].)

AS v NEOTEL (PTY) LTD 2019 (1) SA 622 (GJ)

Equality legislation — Equality Court — Jurisdiction — Concurrency with Labour Court — Equality Court having jurisdiction where able to provide more effective remedy, even though cause of action falling within scope of Labour Court — Equality Court, rather than Labour Court, having jurisdiction where cause of action arising from unconstitutional abuse of corporate power — Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, s 5(3).

This case concerned the jurisdiction of the High Court, sitting as Equality Court constituted under the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Equality Act), to decide on a matter that purportedly arose from an employment relationship. Section 5(3) of the Equality Act provides that it does not apply where the Employment Equity Act 55 of 1998 (the EEA) applies. In s 6 the EEA prohibits unfair discrimination involving an 'employment policy or practice'. Before the Equality Court the respondent raised a special plea that the court lacked jurisdiction because the cause of action — a work-related rape and subsequent obstructive conduct by the respondent — arose from an employment relationship, which meant that EEA fora (the CCMA and the Labour Court) had jurisdiction.
The alleged rape occurred when the complainant (the present applicant) was at the home of a senior executive of the respondent, ostensibly for work. The applicant claimed that she was the victim of gender-based discrimination, harassment and abuse of corporate power that compromised her rights to equality and access to justice. The respondent raised a special plea in which it contended that, because the allegations against it related to unfair discrimination and harassment against the applicant qua employee, the Equality Court's jurisdiction was ousted by s 5(3) of the Equality Act.

Held

If the Equality Court were able to provide a more effective remedy than the Labour Court or the CCMA, then it should have jurisdiction, even though the cause of action fell within the scope of the EEA (see [36]–[38]). Since neither the applicant nor the respondent had pleaded facts to indicate that the harassment complaint arose from an employment policy or practice, a *sine qua non* for the applicability of the EEA, the precondition for its application to the exclusion of the Equality Act fell away (see [43], [53]). But even if it did not, the matter was not justiciable under the EEA because the conduct complained of — gender-based discrimination or violence and abuse of corporate power to deny the applicant her right of access to justice — extended beyond the work environment, as did the nature of the relief sought (see [48]–[49], [51], [59]). The case was about a company's avoidance of reputational damage (and the protection of its shareholder value and brand image), not an employment policy or practice, however generously the words 'policy or practice' were interpreted (see [46], [59], [61]). Special plea as to jurisdiction dismissed (see [41]–[42], [63]).

VAN DER BIJL AND ANOTHER v FEATHERBROOKE ESTATE HOME OWNERS' ASSOCIATION (NPC) 2019 (1) SA 642 (SCA)

Delict — Elements — Unlawfulness or wrongfulness — Liability for omission — Test — Whether defendant under legal duty to act — Legal convictions of community — Specific criteria.

Delict — Elements — Unlawfulness or wrongfulness — Liability for omission — Whether homeowners' association of secured residential estate under legal duty to protect homeowners from robbery in their homes — No such duty, absent an agreement between homeowners and association to such effect.

Mr and Mrs Van der Bijl were residents of Featherbrooke Estate, a secured residential estate. One evening intruders entered the Van Bijls' home after gaining access to the Estate, robbed them, shot Mr Van der Bijl, and assaulted Mrs Van der Bijl, causing them serious injuries and mental trauma. The Van der Bijls brought an action against the Featherbrooke Estate Home Owners' Association (the Association) and Fidelity Security Services, whom the Association employed to provide security services at the Estate. The plaintiffs framed their cause of action as one of delictual liability. They argued that Fidelity and the Association wrongfully, in breach of their duty of care and with gross negligence, failed to take various measures to ensure the safety of the residents of the Estate, and the plaintiffs in particular; and it was as a result of this failure that they were attacked.

The plaintiffs consequently claimed from them damages arising from the injuries they had sustained. The plaintiffs also argued that a constitutional remedy was available to them by reason of the conduct of the defendants, which had infringed their rights to security of the person, bodily and psychological integrity, dignity and privacy. They argued that the infringement of their fundamental rights directly warranted an imposition of constitutional damages. They also argued that there was reason to develop the common law of delict to recognise the infringement of their fundamental rights.
The Association by way of exception denied that it was under a legal duty to protect the plaintiffs from robbery, and therefore submitted that no wrongfulness could be attributable to it. As to the constitutional claims, it argued that the common law provided adequate remedies and there was no warrant for the extension of the constitutional remedy sought by the plaintiffs. The present matter is the adjudication of this exception, and revolved around the question whether the Association had a legal duty to protect homeowners of the Estate.
Held, that it was established law that claims predicated upon omissions and for pure economic loss may be actionable if the defendant owed a legal duty to the plaintiff. That issue was determined by reference to the formulation: the legal convictions of the community. In turn, this formulation had been rendered as the general criterion of reasonableness, based on considerations of morality and policy. (See [11] and [12].) Difficulties existed as to how to apply such considerations to determine whether a particular duty was owed by a defendant. In this regard, it would be of assistance to formulate more specific considerations relevant to the determination of wrongfulness. (See [13]–[15].) *(a)* In light of the dangers of too many plaintiffs or indeterminate liability, the law proceeded from the precautionary principle of excluding liability for omissions and pure economic loss, unless there were good reasons to recognise liability. *(b)* While injury to persons and damage to property gave rise to the infringement of fundamental rights, which in turn harmed the aggregate welfare of society because society as a whole was worse off when persons were injured and property damaged, this was not necessarily the case with claims based on omissions and pure economic loss. A loss to one person might be a gain to another. The question then was whether the law had any reason to interfere with the residual principle that the loss should lie where it fell; this required a consideration of

deterrence and the question of who might most efficiently have prevented the risk of loss. *(c)* Omissions and claims for pure economic loss should be considered in the light of the requirement of s 39(2) of the Constitution to develop the common law in conformity with the rights and value system to be found in the Constitution. *(d)* Delictual liability for omissions had standardly proceeded from the premise that we are free of any duty to avert harm suffered by others, absent some special public or private duty of assistance. The norm of indifference, however, may not have the presumptive pull that was sometimes assumed because the fundamental rights in the Bill of Rights may be of horizontal application, and thus give rise to duties that no longer permit of indifference. (See [17]–[20].)

Held, further, that the mere fact that the Association employed Fidelity to provide security for the Estate did not establish that the Association, as employer, owed the same duty to the residents of the Estate — ie to protect them — as that assumed by Fidelity. Such a duty would have to be shown to exist apart from what Fidelity had undertaken to do. The particulars of claim established no such duty. There was no averment that such a duty derived from any contractual undertaking given by the Association to its members.

Nor was any reliance placed on the Association's rules or Memorandum. (See [31]–[35].)

Held, further, that a duty on the part of the Association to protect the residents of the Estate could not arise from the mere fact that the Association was the association of the homeowners of the Estate and that the Estate was a secured residential estate. The Association was simply an incorporated means by which the homeowners of the Estate chose to achieve common goods. Absent an agreement between the Association and its members to do so, there was no basis to hold that the Association was burdened with the duty to protect the homeowners of the Estate, or to secure their fundamental rights to security of the person, bodily, physical and psychological integrity, dignity and privacy.

Held, accordingly, that the plaintiffs' particulars of claim did not disclose a cause of action that the Association had a duty to protect, and consequently failed to make a showing that the Association acted wrongfully in failing to prevent the assaults upon the plaintiffs. (See [42].)

Held, with respect to the plaintiffs' constitutional claim that the Association had a duty to protect, that they failed to make out a cause of action on both bases proposed (see [53]). There was no deficiency in the common law that required correction. Courts already took a very wide view as to what public policy required, which included how wrongfulness was to be understood in the light of a plaintiff's fundamental rights as contained in the Bill of Rights. And, the most generous account of wrongfulness did not yield the conclusion that the Association had a duty to protect. (See [51].) A direct appeal to the infringement of the plaintiffs' rights under the Constitution did not yield a different conclusion. While they did have their rights to security, physical integrity and dignity infringed, as homeowners they could not look to an entity such as the Association to protect those rights. (See [52].) *Accordingly*, the exception had to be upheld.

S v BOTHA 2019 (1) SACR 127 (SCA)

Murder — *Mens rea* — Intention to kill — Accused must have foreseen possibility that by directing knife towards upper body of deceased, who was attacking her, she might injure or kill her — No proof, however, that she had reconciled herself with occurrence of death or disregarded consequences of it occurring — Conviction for murder changed to one of culpable homicide.

The prosecution of the appellant on a charge of murder arose from an incident occurring after the deceased arrived at a restaurant where she found her husband and the appellant, who were involved in a love relationship. The deceased assaulted the appellant, smashed the windscreen of her husband's car, returned to the appellant and attacked her again by hitting her over the head with an ashtray, grabbing her and pulling her by the hair to the ground. While the appellant tried with one hand to remove the deceased's grip on her hair, she grabbed a steak knife from the table and directed a stabbing movement towards the deceased who was standing behind her. The knife penetrated the deceased's chest through the muscles of the anterior chest wall, through the lung and into the brachiocephalic vein. Both her lungs partially collapsed, and she died. The appellant was tried in the regional court, convicted and sentenced to 15 years' imprisonment.
On appeal, the High Court substituted the conviction of murder with dolus directus to one of murder with dolus eventualis, and reduced the sentence to 12 years' imprisonment. In a further appeal against the conviction and sentence,
Held, per Tshiqi JA (Seriti JA, Zondi JA and Mokgohloa AJA concurring), that, while the appellant was clearly faced with a situation in which she was being assaulted and had to retaliate in order to protect herself, she must have foreseen the possibility that by directing the knife towards the deceased's upper body, she might injure or kill her. (See [13].)
Held, further, that although she had foreseen that possibility, it was not clear that the appellant had reconciled herself with the occurrence of death or disregarded the consequences of it occurring. There was no evidence that she had deliberately or purposefully aimed a firm thrust at the deceased. On the contrary, the evidence showed that she had simply turned around while sitting, and directed a stabbing movement towards the deceased's upper body. This suggested that her conduct was not an impulsive reaction to the attack being inflicted on her. The state did not prove all the elements of murder in the form of dolus eventualis, and the conviction fell to be set aside and substituted with one of culpable homicide. A sentence of three years' imprisonment, subject to the provisions of s 276(1)*(i)* of the Criminal Procedure Act 51 of 1977, was appropriate in the circumstances. (See [15] and [20] – [21].)
Held, per Schippers JA, dissenting, that the appellant's conduct did not begin to meet the test for negligence, namely that a reasonable person in the same position as the appellant found herself in when she was attacked, would have foreseen that the deceased would die as a result of her defensive act; that the reasonable person would have taken steps to guard against such a possibility; and that the appellant failed to take such steps. Moreover, it could not be said that her version, that she had to act in split seconds; grabbed something to get the deceased away from her; and that she did not think that her defensive act would result in the death of the

deceased, was not reasonably possibly true. In the circumstances she should have been acquitted. (See [62].)

JIBA AND ANOTHER v GENERAL COUNCIL OF THE BAR OF SOUTH AFRICA AND ANOTHER 2019 (1) SACR 154 (SCA)

Legal practitioners — 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. (See [1], [59] and [62] – [63].)
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. (See [18] and [29].)

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. (See [55] and [57].)
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 in 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 to one of no costs against the GCB (see [74]).

S v LIESCHING AND OTHERS 2019 (1) SACR 178 (CC)

Appeal — Further evidence — Leave to appeal from refusal by President of Supreme Court of Appeal of application to lead further evidence — Meaning of 'exceptional circumstances' in s 17(2)(*f*) of Superior Courts Act 10 of 2013 — Mere recanting by state witness insufficient without more.
Appeal — Further evidence — Leave to appeal from refusal by President of Supreme Court of Appeal of application to lead further evidence — Whether

Constitutional Court has jurisdiction to hear such application — Court not deciding in matter where issue not properly ventilated and argued.

The applicants applied for leave to appeal from the refusal by the President of the Supreme Court of Appeal (the SCA) of their application to lead additional evidence in their trial in the High Court, which had already concluded with them having been convicted and sentenced on counts of murder, and the unlawful possession of firearms and ammunition. They relied for their application on an alleged recantation by a witness who had testified against them in their trial. The President had found that there were no exceptional circumstances present to justify the application.
The parties assumed that the Constitutional Court had jurisdiction to entertain such an appeal and the matter proceeded on that basis. The majority of the court held, however, that the nature and justiciability of such an appeal required detailed legal argument but in the present case the issue had not been raised on the papers or at the hearing of the matter. In the circumstances, although it was tempting to attempt to settle the legal question, it was inappropriate to do so without the benefit of full legal argument from the litigants. The judgment therefore proceeded on the assumption that the court had jurisdiction over an appeal to determine the meaning of 'exceptional circumstances' in s 17(2)*(f)* of the Superior Courts Act 10 of 2013. (See [127].)
Held, that 'exceptional circumstances' in the context of the section should be linked to either the probability of grave individual injustice or a situation where, even if grave individual injustice might not follow, the administration of justice might be brought into disrepute if no reconsideration occurred. The section was not intended to afford disappointed litigants a further attempt to procure relief that had already been refused, but to enable the President to deal with a situation where otherwise injustice might result. It did not afford litigants a parallel appeal process in order to pursue additional bites at the proverbial cherry. (See [138] – [139].)
Held, further, on the information before the court it was doubtful whether the applicants would be able to establish that there was a prima facie likelihood of the truth of the evidence and that it was materially relevant to the outcome of the trial. The simple about-turn by the witness, without any externally verifiable signifier, did not constitute exceptional circumstances conferring a discretion on the President as envisaged in s 17(2)*(f).* The President was correct in finding that no such circumstances existed, and no grave injustice would result if leave to appeal were refused. (See [161].) The application for leave to appeal was accordingly dismissed.
Held, per Kathree-Setiloane AJ, dissenting, that the new evidence constituted an exceptional circumstance and the failure to refer the matter for reconsideration would result in a grave injustice to the applicants, and it would be just and equitable for the court to substitute its decision for that of the President of the SCA.

S v MEIRING 2019 (1) SACR 227 (GJ)
Contempt of court — Contempt in facie curiae — Sentence — Magistrate exceeding jurisdiction in imposing sentence — Overreaction by magistrate and prosecutor to frustrations expressed by accused — Conviction and sentence set aside.

The accused was convicted in a magistrates' court of contempt *in facie curiae* and was sentenced to a fine of R5000 or three months' imprisonment. The matter came before the High Court on automatic review where it appeared that the conviction

came about after the accused, who was appearing for the third time in the matter, audibly uttered an obscenity, perhaps twice, when his case was postponed yet again.
The events took place whilst the court was either not in session or was no longer dealing with his matter. The magistrate took umbrage and the accused, who had been out on bail, was taken to the cells. Upon resumption, the accused apologised and explained that he was experiencing many frustrations. He was busy losing everything: his marriage was crumbling; he was losing his house; he had to care for his parents; and he was in financial trouble which was exacerbated by paying for his attorney for each appearance at court when nothing happened. He expressed sorrow for the word that he had used and explained that he was just frustrated with life at the time. The prosecutor then subjected him to a lengthy and intense cross-examination that elicited nothing in addition to what had already been established.
On review,
Held, that it was immediately apparent that the magistrate was unaware of the provisions of s 108(1) and (2) of the Magistrates' Courts Act 32 of 1944 from which it was evident that the sentence of a fine of R5000 exceeded the maximum sum permissible. The magistrate had also failed to submit the statement prescribed by ss (2). On these grounds alone, the conduct was irregular. In addition, the fact that the court was either not in session or was no longer dealing with the accused's matter, was also a ground why the events could not constitute contempt *in facie curiae*. (See [2] and [4].)
Held, further, that mature persons did not approve of foul language being used, especially in any formal setting. However, the reality of life was that people who experienced exasperation would spontaneously swear. An overreaction was unwarranted.
The court suggested that appropriate steps should be taken by both the National Prosecuting Authority and the Magistrates Commission to educate officers of the court in the scope of their powers when unseemly behaviour occurred in and about a court. (See [16] – [17].) The conviction and sentence were set aside.

S v MAZIBUKO 2019 (1) SACR 239 (KZP)
Sentence — Magistrates' court — Jurisdiction — Provisions of s 302(1)(*a*) of Criminal Procedure Act 51 of 1977 simply providing for when automatic review triggered and having nothing to do with sentencing jurisdiction of magistrates.

In a matter that came before the court on automatic review, the court noted that in the same division in a similar matter the court had considered the provisions of s 276(2)*(a)* and 302(1)*(a)* of the Criminal Procedure Act 51 of 1977 and held that, in imposing a sentence of four months' imprisonment for a contravention of s 50(1) read with s 90(1)*(a)* – *(q)* of the National Land Transport Act 5 of 2009, the magistrate had exceeded his sentencing jurisdiction.
Held, that the learned judges in the earlier matter had clearly misread the provisions of s 302(1)*(a)* of the Act. The section simply provided for when an automatic review was triggered and had nothing to do with the sentencing jurisdiction of magistrates. The finding that the magistrate's jurisdiction in respect of s 302 of the Act was limited to three months' imprisonment was clearly wrong and should not be followed or applied.

S v MULLER 2019 (1) SACR 242 (WCC)

Plea— Plea-and-sentence agreement — Contents of — Agreement containing provision for suspension of accused's driver's licence — Inquiry under s 35 of National Road Traffic Act 93 of 1996 forming integral part of determination of appropriate sentence and therefore could be included in such agreement.
Plea— Plea-and-sentence agreement — Procedure — Where presiding officer not considering that sentence just, was duty-bound to follow peremptory provisions of s 105A(9) of Criminal Procedure Act 51 of 1977.
Traffic offences — Driving with excessive concentration of alcohol in blood — Sentence — Suspension of driver's licence — Circumstances to be taken into account — Conflicting decisions in Western Cape Division on number of circumstances that could be taken into account, and lower courts left in dark.

The appellant entered into a plea-and-sentence agreement in terms of s 105A of the Criminal Procedure Act 51 of 1977 in terms of which he pleaded guilty to a charge of having driven a motor vehicle while the concentration of alcohol in his blood exceeded 0,05 grams per 100 millilitres in contravention of s 65(2)*(a)* of the National Road Traffic Act 93 of 1996 (the NRTA).
The agreed sentence was a fine of R16 000 or 12 months' imprisonment of which R12 000 was suspended for five years. He would also do 60 hours of community service and his driver's licence would be suspended for six months. Without any warning, the magistrate proceeded to hold an inquiry in terms of s 35 of the NRTA and held that the appellant's licence was automatically suspended for five years.
On appeal, the appellant contended that the magistrate had misdirected himself in unilaterally altering the terms of the plea-and-sentence agreement in relation to the period of suspension of his driver's licence without informing the parties beforehand.
Held, that the s 35 inquiry formed an integral part of the determination of an appropriate sentence and it was therefore open to the parties to include an agreed specific period of suspension of the accused's driver's licence in the s 105A agreement. The magistrate had erred in concluding that the inquiry was merely a post sentence procedure. Further, in circumstances where the magistrate did not consider the sentence agreed upon in the agreement to be just, he was duty-bound to follow the peremptory provisions of s 105A(9). His failure to do so meant that the conviction and sentence had to be set aside. (See [15].) The matter was remitted to the magistrates' court to commence de novo before another magistrate.
Semble: there were two lines of conflicting decisions within the Western Cape Division on the amendments to s 35 of the NRTA that took effect from 20 November 2010 and whether there was a limit on the circumstances to be taken into account in respect of the suspension of a driver's licence. This had led to a most unsatisfactory result where lower courts were left in the dark as to which authority they were bound by.

Baleni and others v Minister of Mineral Resources and others [2019] 1 All SA 358 (GP)

Civil Procedure – Declaratory relief – Wide discretion of court – Court has to be satisfied that the applicant has an interest in an existing, future or contingent right or obligation, and once the court is satisfied of the existence of such a condition, it will exercise a discretion either to refuse or grant the order sought.

The applicants and their ancestors had lived on an area of coastal land called Umgungundlovu for centuries. The area was inhabited by about 70 to 75 households known in isiMpondo as "imizi" comprising of more than 600 individuals. The applicants held informal rights to the land as defined by the Interim Protection of Informal Land Rights Act 31 of 1996, and occupied their land in accordance with their law and custom.

The fifth respondent ("TEM") was an Australian mining company which wished to mine the titanium-rich sands in the area and applied for a mining right in that regard. The vast majority of the applicants, together with their families, lived within or in close proximity of the proposed mining area. They were opposed to TEM mining on their ancestral land on the basis that it would not only bring about a physical displacement from their homes, but would lead to an economic displacement of the community and bring about a complete destruction of their cultural way of life. The proposed mining area was an important resource and central to the livelihoods and substance of the applicants. Many of the applicants utilised the land for grazing for their livestock and for the cultivation of crops and depended on the water supply therefrom. The granting of mining rights to TEM had resulted in divisions within the community.

Declaratory relief was sought by the applicants.

Held – The applicants and the community within which they lived had not consented to mining activities. The issue of prior consent lay at the heart of this case.

The applicants relied on the Interim Protection of Informal Land Rights Act 31 of 1996 to justify their view that their consent was required in terms of section 2(1) of the Act before they could be deprived of their land. They further argued that such consent had to be free and informed. The respondents disputed that the applicants' prior consent was required, and referred to the provisions of the Minerals and Petroleum Resources Development Act 28 of 2002 in terms of which it is merely required that the community must be consulted before the Minister awards a mining right to an applicant.

The Court has a wide discretion to decide whether or not to grant declaratory relief. A two-stage approach is involved. First, the court has to be satisfied that the applicant has an interest in an existing, future or contingent right or obligation, and once the Court is satisfied of the existence of such a condition, it will exercise a discretion either to refuse or grant the order sought. In the present case, the Court was of the view that declaratory relief in the present circumstances was appropriate. Whether the consent of the applicants was required was central to the dispute and, while it might be possible for the applicants to review the eventual decision to grant a mining right without the applicants' consent, the applicants feared that that it was possible that mining would commence whilst they pursued their internal remedies – possibly rendering the

consent meaningless. Discretion in favour of granting declaratory relief was therefore appropriate in this matter.

The dispute required a consideration of the provisions of the Interim Protection of Informal Land Rights Act and the Minerals and Petroleum Resources Development Act in respect of the level of engagement that must be achieved prior to the grant of a mineral right. It further required a consideration of the potential conflict between the requirement of "consent" under the Interim Protection of Informal Land Rights Act as against the requirement of "consultation" under the Minerals and Petroleum Resources Development Act prior to the grant of a mineral right. The implication is that the latter provision, being less onerous, means that the Minister (provided that there was consultation), may grant a mining right against the will of the land owner.

Section 2(1) of the Interim Protection of Informal Land Rights Act requires the consent of the holder of an informal right before he may be deprived of property. Recognising that many informal rights are not held individually but communally, section 2(2) of the Act requires communal consent. The applicants contended that the grant of the mineral right constitutes a "deprivation" as contemplated by section 2(1), triggering the need for their consent. The Court was satisfied that the granting of a mining right amounted to a deprivation as the mining operations would interfere substantially with the applicants' agricultural activities and general way of life. In terms of section 2(1), the requirement of consent in the event of a "deprivation" is made subject to the provisions of the "Expropriation Act or any other law which provides for the expropriation of land or rights in land". That raised the question of whether the Minerals and Petroleum Resources Development Act was "any other law" and therefore applied to the exclusion of the Interim Protection of Informal Land Rights Act. The Court rejected that proposition, finding that the two Acts are intended to operate alongside one another.

Granting special protection to the community by requiring consent as opposed to mere consultation was consistent with the legislative framework. The court therefore granted declaratory relief in that regard.

Batohi v Roux [2019] 1 All SA 390 (KZD)

Civil Procedure – Evidence – Conflicting versions – Test in assessing evidence – Plaintiff can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected.

Personal Injury/Delict – Claim for damages – Alleged medical negligence – Court finding no negligence on part of defendant and that plaintiff had failed to prove causal negligence on the part of the defendant.

The defendant was a practising neurosurgeon in private practice and the plaintiff was his patient. During 2004, the plaintiff experienced left sided sciatica, and consulted the defendant who operated on the plaintiff to alleviate the problem. The operation was successful and the plaintiff was, almost immediately, rendered pain-free.

When the problem recurred in 2011, the defendant performed a revision operation. This time, the procedure was less successful. The plaintiff sustained nerve damage, resulting in nerve root neuropathy, and, it was common cause that he suffered from

severe L5 neuropathic pain and weakness. It was common cause that the condition was irreversible.

The plaintiff held the defendant accountable for his condition and sought damages from him in delict on the ground that the defendant was negligent in that he failed to allow for a sufficiently meaningful period of conservative treatment before advising the plaintiff to undergo the surgery in question. The plaintiff also complained that he was not sufficiently apprised of the risks attaching to the surgical procedure performed by the defendant.

Held – The material issues for determination were whether the defendant was negligent in not treating the plaintiff conservatively in the first instance and before resorting to surgery; whether the defendant failed in his duty to obtain the plaintiff's informed consent to the surgery; and whether any such negligence on the defendant's part contributed to, or was a cause of, any damages which the plaintiff might prove he has suffered (causation). The plaintiff bore the onus of proof on all the issues.

The versions of the parties in relation to the matters in issue were irreconcilable. The test, in such circumstances, is that the plaintiff can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities.

Both expert medical witnesses in the case shared the view that, in the circumstances of this case, it was not unreasonable for the defendant to have recommended surgery without further conservative treatment. It was clear on the defendant's evidence (which accorded with the probabilities and which the court accepted) that the risks of surgery were explained clearly to the plaintiff and that he was more than willing to take on the risks. Even if it could be established that the defendant was negligent in not treating the plaintiff conservatively before resorting to surgery, the plaintiff had not succeeded in establishing that further conservative treatment would have resulted in a recovery. The evidence clearly established that conservative treatment had been given to the plaintiff over many weeks before he consulted the defendant and, not only was this not successful, but the plaintiff had no faith in it. The plaintiff had thus not discharged the onus of proving causal negligence on the part of the defendant.

The Court accordingly found in favour of the defendant.

City of Tshwane Metropolitan v Blair Atholl Homeowners Association [2019] 1 All SA 291 (SCA)

Civil Procedure – Interpretation of agreement – Parol evidence rule – Interpretation of an Engineering Services Agreement – Recent experience showing that written text unjustifiably relegated – Extensive inadmissible extrinsic evidence wrongly allowed – Not for witnesses to interpret document – Court's task – Evidence of negotiations inadmissible.

Civil Procedure – Separation of issues – Principles – Objectives of separation – Uniform rule 33(4) – When issues are inextricably linked a full ventilation of all the

issues is more often than not the better course and might ultimately prove expeditiousness and provide finality.

The essential dispute between the parties was about which of a range of tariffs the appellant (the "City"), a local authority operating in terms of the Local Government: Municipal Structures Act 117 of 1998 (the "Structures Act") and the Local Government: Municipal Systems Act 32 of 2000 (the "Systems Act"), could charge the respondent (the "Association") for the water it supplied to a housing estate which the latter administered.

The High Court purportedly acting in terms of rule 33(4) of the Uniform Rules of Court, made an order of separation which had the effect that the essential issue remained unresolved.

During 2003 and 2004, the developer of the housing estate recognised a problem facing the development. Because the land was situated outside of the urban edge and beyond priority areas, the City was not yet supplying water to that area nor was it in contemplation in the immediate future. The City was only prepared to provide water to the area on the basis that the developer fund the construction of a 20km water pipeline that would enable the water to be supplied to the new development. It also required the developer to construct an internal and external reservoir and a sewage package plant. An Engineering Services Agreement (the "ESA"), central to the present dispute, was concluded in February 2006. The separated issue involved an interpretation of a clause in the ESA, which stated that water would be supplied by the municipality at the normal rate. The dispute centred on the parties' differing views on the interpretation of the clause and whether the words "normal rate" referred to the bulk rate for municipalities or one of the other categories on the scale of tariffs. The Court concluded that the reference to the normal rate was that charged for bulk water supply to other local governments.

Held – The granting of a separation of issues should be guided by the principle that the decision on a separate issue should be dispositive of a portion of the relief claimed and essentially should serve expedition rather than cause delay in the resolution of the principal issue. Insufficient thought by Counsel and the court below was given to whether rule 33(4) should be resorted to and applied in this matter. The issues raised in the pleadings in the Court below were inextricably linked. A full ventilation of all the issues would have led to expedition and finality.

Confirming the applicability of the parol evidence rule and having regard to the context within which the ESA was concluded, the Court held in favour of the City that the normal rate provided for in the ESA was not the bulk rate for municipalities. The appeal was thus upheld.

Kawa v Minister of Safety and Security and others [2019] 1 All SA 415 (ECP)

Personal Injury/Delict – Action against police – Rape victim – Claim for damages – Negligence in police investigation of crime

The plaintiff instituted action for damages against the defendants as a result of an incident which took place on 9 to 10 December 2010 and what followed thereafter. Whilst in the Eastern Cape in December 2010, the plaintiff was assaulted, robbed and raped while walking on a beach. She was repeatedly raped over a period of approximately fifteen hours by one or more assailants.

When the plaintiff failed to return home at the expected time, she was reported missing by her family. The relevant police units were activated and an investigation commenced. Ground and air searches were conducted by the police (the "SAPS"), but the plaintiff was not found. She eventually managed to escape the morning after her abduction and was assisted by a group of men out jogging. In the course of the investigation, which remained active for more than two years, some arrests were made, but the suspects were eventually cleared by DNA evidence. Nobody was tried or convicted in respect of the plaintiff's rape.

In her action, the plaintiff alleged that SAPS wrongfully and negligently breached its duty to investigate the crimes committed against the plaintiff; alternatively, if they did so investigate, they failed to do so with the skill, care and diligence required of reasonable police officers. As a result, the plaintiff contended that the SAPS caused her psychological injury and were liable to pay her damages.

Held – In order to succeed, the plaintiff bore the burden of proving the facts in support of her claim, namely actions or omissions on behalf of the defendants which were wrongful, negligent, caused damage suffered by the plaintiff, giving rise to an entitlement to damages.

The State has constitutional obligations to respect, protect and promote the citizen's right to dignity, and to freedom and security of the person. The trust that the public is entitled to repose in the police also had a critical role to play in the determination of the Minister's liability in this matter. It was common cause that the SAPS had a duty to carry out a search for the plaintiff with the care, diligence and skill required of reasonable police officers; and investigate the allegation of rape by her with the care, diligence and skill required of reasonable police officers.

The well-known test for negligence prescribes that negligence would be established if a *diligens paterfamilias* in the position of the defendant would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and would take reasonable steps to guard against such occurrence; and the defendant failed to take such steps.

Examining the evidence adduced through the various witnesses, the Court highlighted what it saw as the extreme indifference on the part of the SAPS in relation to ensuring that the area was properly and effectively searched. The police merely went through the motions of searching without conducting a reasonably effective search.

The action against the first defendant was granted with costs.

Lincoln v Minister of Safety and Security [2019] 1 All SA 454 (WCC)

Personal Injury/Delict – Claim for damages – Malicious prosecution – Requirements – It must be alleged and proved that the defendants set the law in motion (instituted or instigated the proceedings), acting without probable cause but with malice (animo injuriandi) and that the prosecution failed.

In his action against the respondent, the appellant averred that five employees of the respondent, acting in the course and scope of their employment with the respondent, had set in motion an investigation of the appellant without having reasonable and probable cause to do so. It was alleged that as a direct consequence of the conduct of the respondent's employees, the appellant suffered damages in the form

of *injuria* and patrimonial loss. The dismissal of the claim in the court *a quo* led to the present appeal.

It was the appellant's consistent allegation that the investigation on all the counts brought against him, was motivated by malice. He chronicled a saga of high-level corruption and criminal activity involving State officials, which he had uncovered during his stint as head of a task unit ("the PITU") appointed to deal with such matters. He alleged that the activities of the unit was not welcomed by certain members of the police services ("SAPS") who attempted to obstruct its work.

Held – The appellant's evidence concerning the resentment expressed by the five employees of the respondent towards the PITU, its work, *modus operandi* and how it was established was not only uncontested but also confirmed by the views expressed by four of the five employees. At the end of the appellant's case, his credibility remained intact.

Examining the evidence of Smith, one of the five employees of the respondent, the Court held in the majority judgment, that the complaints against the appellant were motivated by improper considerations. While an investigator may employ improper motives without necessarily vitiating the investigation or subsequent prosecution, in this case, there existed at the time of the investigation no objectively rational basis for holding the suspicion that the appellant had committed all the offences for which he was being investigated.

The Court proceeded to consider the probabilities concerning whether the decision to investigate and to hand the fruits of the investigation to the prosecuting authority could have been actuated by malice. Commenting on the view of the court *a quo*, that the five employees were good and credible witnesses, the present Court stated that the court below had failed to evaluate the credibility of the key witnesses with due regard to the probabilities..

Referring to case law, the Court stated the requirements for malicious prosecution. It must be alleged and proved that the defendants set the law in motion (instituted or instigated the proceedings), acting without probable cause but with malice (*animo injuriandi*) and that the prosecution failed. The requirements of malice and *animus injuriandi* has to be inferred from the conduct of Smith, who ought reasonably to have known that the allegations of fraud that he levelled against the appellant were false. Despite that knowledge, Smith proceeded to depose to an affidavit in which he made such allegations. The misconduct of Smith was perpetuated by the investigators, primarily because despite having suspicions, they failed to test those against objective facts.

The Court held that the probabilities did not favour the respondent's version that there was reasonable or probable cause to set the law in motion for the prosecution of the appellant on all counts. It was only in respect of a count of driving under the influence of liquor and a count of fleeing the scene of an accident, that the appellant had not established a lack of reasonable and probable cause on the part of the respondent. His appeal was refused to that extent. In respect of the remaining charges that he was charged with, the appellant's claim succeeded with costs.

Malebane v Dykema and another [2019] 1 All SA 316 (SCA)

Property – Development application in terms of Chapters V and VI of the Development Facilitation Act 67 of 1995 – Whether application pending before development tribunal on 1 July 2015 – Section 60(2)(a) of Spatial Planning and Land Use Management Act 16 of 2013 – Not determined before date on which suspension of order of constitutional invalidity in respect of those provisions ended.

Property – Development of land – Application for approval – Applicable statutory provisions – Effect of approval under unconstitutional legislation.

The appellant ("Mr Malebane") and the first respondent ("Mr Dykema") each owned farms situated within the area of jurisdiction of the second respondent (the "municipality"). In February 2012, Mr Dykema lodged an application with the Limpopo Development Tribunal (the "Tribunal") for planning permission for a petrol service station.

In June 2010, the Constitutional Court ruled that Chapters V and VI of the Development Facilitation Act 67 of 1995 under which Mr Dykema's application had been made, were unconstitutional. The Constitutional Court suspended its order of invalidity for two years to enable the Legislature to remedy the constitutional defect. The order of suspension expired on 17 June 2012, without fresh legislation having been passed.

The Tribunal handed down a decision approving Mr Dykema's application, on 1 November 2012. The municipality was rightly unwilling to give effect to that decision and required Mr Dykema to bring a fresh application for rezoning under the relevant planning legislation other than the Development Facilitation Act.

In the meantime Mr Malebane also came up with the idea of developing a similar service station on his property and applied to the municipality for the necessary planning approvals. Mr Dykema approached the High Court for an interim interdict preventing the municipality from approving Mr Malebane's application and for an order that it process his application in accordance with the approval granted by the Tribunal on 1 November 2012.

The present appeal was against the High Court's order directing the municipality to process Mr Dykema's application for a change of land use and dispose of it in accordance with the provisions of section 60(2)(a) of the replacement legislation, the Spatial Planning and Land Use Management Act 16 of 2013.

The grounds of appeal were that notwithstanding the fact that the Tribunal lacked any lawful authority to approve Mr Dykema's application, until set aside by a court of law, it remained valid and binding; and that at the date upon which the order of constitutional invalidity came into effect Mr Dykema had an application pending before the Tribunal and section 60(2)(a) of the Spatial Planning and Land Use Management Act provided that all applications pending before a tribunal at the commencement of that Act had to be continued and disposed of in terms of the Act.

Held – The question for decision was whether Mr Dykema's application was pending before the Tribunal on 1 July 2015, notwithstanding that by then the Tribunal had ceased to have any authority to determine it. For an application to be pending before a tribunal it must be awaiting the decision of that tribunal. If the tribunal no longer has any lawful authority to make a decision on the application, because the statutory

provisions under which it was acting have been declared unconstitutional, any outstanding application not completed at that time is no longer pending before it. The Spatial Planning and Land Use Management Act only came into operation three years later, by which time Mr Dykema could not rely on its transitional provisions.

The appeal was upheld with costs.

Mining and Environmental Justice Community Network of South Africa and others v Minister of Environmental Affairs and others [2019] 1 All SA 491 (GP)

Environment – Protected environment – Mining activities – Review of consent – Sections 3 and 4 of the Promotion of Administrative Justice Act 3 of 2000 – Sections 3(2)(b), 4(1), 4(2) and 4(3) prescribe either adherence to direct audi alterem partem principles or public participation respectively – In casu, impugned decisions were set aside, and the third respondent's application for written permission to conduct commercial mining in the protected environment in terms of section 48(1)(b) of the National Environmental Management: Protected Areas Act 57 of 2003 was remitted to the Ministers for reconsideration

Special application was made in terms of which the applicants sought to have decisions of the Minister of Environmental Affairs and the Minister of Mineral Resources to permit coal-mining activities in a protected wetlands area reviewed and set aside. The main ground of review related to the Ministers' failure to observe the provisions of sections 3 and 4 of the Promotion of Administrative Justice Act 3 of 2000. The Ministers conceded non-compliance with those provisions but contended that they were justified in departing therefrom. A further question central to the matter was the proper interpretation of the relevant statutory provisions governing the requisite consent of the Ministers.

Held – In terms of section 24 of the Constitution, everyone has the right to an environment that is not harmful to their health or well-being and to have the environment protected for the benefit of present and future generations through reasonable legislative and other measures that prevent pollution and ecological degradation, promote conservation and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

Sections 3 and 4 of the Promotion of Administrative Justice Act prescribes the components of procedurally fair administrative action. Sections 3(2)(b) and 4(1), 4(2) and 4(3) prescribe either adherence to direct *audi alterem partem* principles or public participation respectively. The aim is to ensure transparency. In the present case, there were a series of incidents of non-compliance with the prescribed requirements. The Court considered each alleged transgression on the part of the Ministers and found that there was no justification for the lack of transparency or the departure from sections 3 and 4.

The impugned decisions were set aside, and the third respondent's application for written permission to conduct commercial mining in the protected environment in terms of section 48(1)(b) of the National Environmental Management: Protected Areas Act 57 of 2003 was remitted to the Ministers for reconsideration.

Ngobese v S [2019] 1 All SA 517 (GJ)

Criminal law and procedure – Conspiracy to murder – State must prove that the accused intended to perpetrate the unlawful conduct or cause the unlawful consequence – Not only must there be the mens rea to commit the crime in question but the actus reus must consist of an agreement, between at least the accused and one other person, to do so – Conclusion of the agreement to engage in an unlawful activity suffices to establish a conspiracy, and no further act is required

Having been acquitted on the main charges of murder, defeating the ends of justice and unlawful possession of a firearm and ammunition, the appellant was convicted on the alternative charge of conspiracy to murder. He was sentenced to 22 years' imprisonment, of which five years were suspended.

Leave to appeal against both conviction and sentence was granted to the appellant by the Supreme Court of Appeal.

In challenging the conviction, the appellant argued that there was no meeting of minds between the appellant and the person he allegedly approached to kill the deceased. It was submitted that at no stage did any of the persons who allegedly were approached to assassinate the deceased have the requisite intention to kill. It was submitted that only a finding of attempted conspiracy was sustainable on the facts.

It was also argued that if the appeal against conviction was successful then the effective sentence of 15 years was shockingly inappropriate and that a significantly more lenient sentence should be imposed.

Held – The State relied on the statutory offence created by section 18(2)(a) of the Riotous Assemblies Act 17 of 1956, which was wide enough to cover the offence of conspiracy to commit any crime including that of murder. Section 18 is headed: "Attempt, conspiracy and inducing another person to commit offence". The broad wording of sections 18(2)(a) makes it evident that aside from a person being culpable if he conspires with another to commit the offence alone, he will also commit the statutory offence of conspiracy if the unlawful agreement involves executing only a step in the plan, or is but one of a number of separately concluded agreements with others to attain the same unlawfully agreed objective. It will also suffice if a preparatory step is taken towards achieving the unlawful objective agreed upon or in arranging that one of the conspirators will conclude another unlawful agreement with a third person who will actually do the deed. The State must prove that the accused intended to perpetrate the unlawful conduct or cause the unlawful consequence. Intention in the form of *dolus eventualis* is sufficient.

In dealing with the crime of conspiracy, not only must there be the *mens rea* to commit the crime in question but the *actus reus* must consist of an agreement, between at least the accused and one other person, to do so. The Court held that the starting point, as with common law crimes (save where negligence will suffice) is that the *mens rea* element is satisfied if the accused subjectively intended to conspire with any other person to commit the crime in question. The enquiry into *mens rea* and the *actus reus*, at least as a matter of principle, remain confined to the intention and actions of the accused himself. The conclusion of the agreement to engage in an unlawful activity therefore suffices to establish a conspiracy. No further act is required. The only bearing subsequent conduct may have is to provide the evidence necessary to prove *mens rea* and the unlawful conduct. Whether an agreement, or *consensus*,

has been reached is a conclusion of law drawn from a finding that there was an offer by one party and that its essential terms were accepted by the other. It therefore appeared to the Court that the *actus reus* in respect of a conspiracy may be sufficiently established by the conclusion of the agreement to commit the crime itself, but is not limited to that alone. The *actus reus* may be found in additional acts performed by one of the conspirators in furtherance of the purported agreement, and of which the accused was aware and did not disassociate from.

After an analysis of the issue in comparative foreign jurisdictions, the court held that a conspiracy is an inchoate crime which requires something more than soliciting (ie making an offer to) someone to assist in the commission of a substantive crime. One would therefore expect something more than the making of an offer to another person to participate in a criminal enterprise. Our law however is clear; no further overt act is required after the conclusion of the agreement. Accordingly it must be in the conclusion of the agreement itself that one is to find the unlawful conduct. However evidence sufficient to support that conclusion is not to be found in the internal workings of the co-conspirator's mind but in the conduct of the accused both prior to and post the conclusion of the alleged agreement to conspire. The Court was of the view that there is no reason for the offence of conspiracy to go beyond the ordinary characterisation of an *actus reus* where the overt manifestation of assent by the co-conspirator should suffice.

Applying the law to the facts of the present case, the Court found that not only was the agreement concluded but the appellant then located a gunman on two separate occasions and produced the firearm that was to be used in the commission of the substantive offence. The evidence established that the appellant had the necessary intention to kill. It was irrelevant that none of the co-conspirators had an intention to carry out their part of the bargain. The trial court did not err on the facts and in finding that there was a concluded agreement between the appellant and others, to commit the crime of murder.

The sentence imposed by the trial court did not induce a sense of shock, nor was there a failure either to take into account all relevant circumstances or to have weighed them incorrectly.

The appeal against conviction and sentence was dismissed.

Pexmart CC and others v H Mocke Construction (Pty) Ltd and another [2019] 1 All SA 335 (SCA)

Corporate and Commercial – Unlawful competition – Principles.

Unlawful competition – Unlawful use of confidential information and trade secrets of a competitor – Principles restated – Failure to call material witness – Adverse inference drawn from failure to testify.

The first respondent ("Mocke Construction") was a pipeline construction company that specialised in lining steel pipes used in the mining industry with a plastic high density polyethylene liner. Before the material events that gave rise to the present litigation, both the second respondent ("Mr Mocke") and the third appellant ("Mr Henn") had developed experience in the plastic lining of steel pipes.

In furtherance of his ambition to revolutionise the pipe-lining industry by rehabilitating old pipes through placing a plastic liner inside the steel pipe, Mr Mocke began

discussions with Mr Don Gish, an American, who sold Mr Mocke the exclusive and irrevocable licence to the process needed for plastic-lining steel pipes. In turn, Mr Mocke, with Mr Gish's consent, permitted Mocke Construction use of the intellectual property rights that flowed from the licence.

In February 2011, Mr Henn was offered and accepted employment with Mocke Construction. During his employment with Mocke Construction, he became involved in the plastic-lining process, but as revolutionised by Mr Mocke.

In October 2013, Mr Henn's services with Mocke Construction were terminated and he almost immediately thereafter took up employment with the first appellant ("Pexmart CC"). The respondents contended that the appellants then became their competitors in the pipe-lining industry through the alleged unlawful actions of Mr Henn. They averred that the appellants had unlawfully made use of their confidential information and trade secrets.

Held – The principles on which liability for unlawful competition rests are that every person is entitled freely to carry on his trade or business in competition with his rivals. But the competition must remain within lawful bounds. If it is carried on unlawfully, in the sense that it involves a wrongful interference with another's rights as a trader that constitutes an *injuria* for which the Aquilian action lies if it has directly resulted in loss. The protection of confidential information is not always absolute nor is the protection always permanently available.

The Court confirmed the reasoning and conclusion of the Court below that in this case, the processes adopted by the appellants were dissimilar to those employed by the respondents. Mr Henn's failure to testify was another factor that counted against the appellants. He was at the centre of the dispute. The affidavits he filed were emphatic in their denial of material aspects of the respondents' case. The material assertions by him in the answering affidavit filed on his behalf ought to have been testified to during the trial. His failure to testify was rightly held against the appellants.

Confirming that there was unlawful use made by the appellants of the respondents' confidential information and trade secrets, the Court dismissed the appeal.

Quest Petroleum (Pty) Ltd v Walters and another [2019] 1 All SA 547 (WCC)

Corporate and Commercial – Contract – Cancellation of – Consequences – Court undertook an interpretation of the 4c Agreement, the tripartite agreement and the terms of the product servitude in order to establish the intended inter-relationship between the agreements – Court found that the intention was that if either of the parties had lawfully cancelled the 4c Agreement, they would be entitled to exercise the right to cancel the tripartite agreement.

Property – Servitudes – Nature of – Praedial or personal servitudes – A praedial servitude will survive the transfer of ownership of the land in question while a personal servitude attaches to the person in whose favour it is granted and is incapable of alienation – Product servitude in casu was no more than a recordal of ordinary contractual rights and obligations whose registration in the Deeds Office serves as notice to the public at large of the consensual arrangement between two parties.

A petrol filling station operated was owned by an individual who used the second respondent ("Van Zyl's") as his corporate entity. The petroleum products that were sold by Van Zyl's on the property were supplied to it by the applicant ("Quest") under

an existing written agreement ("the 2013 agreement"). In March 2014, the first respondent ("Walters") bought the property and accepted Van Zyl's as her tenant. Quest continued to supply Van Zyl's in terms of the 2013 agreement. In March 2016, a new supply agreement ("the 2016 supply agreement") was concluded between Quest and Van Zyl's which entitled Quest to be the exclusive supplier to the service station business for a period of 10 years, the effective date for the commencement of that period being the date upon which all suspensive conditions under the agreement had been fulfilled. One such suspensive condition provided that if Van Zyl's did not own the property, a tripartite agreement would have to be concluded between those parties and the owner to regulate their relationship.

A relevant clause in the draft tripartite agreement put up by Quest related to its demand for the registration of a servitude over the property in favour of Quest that only its products would be sold from the property. That agreement was subsequently revised and two agreements were then concluded on 31 October 2016, *viz* the revised tripartite agreement and a memorandum of agreement ("the 4c Agreement") between Quest and Walters regarding the literage of fuel to be sold at the property.

The termination of Van Zyl's tenancy led to an attempt by Quest to procure Walters' compliance with the tripartite agreement and the servitude. Walter's refusal to comply with the request led to the present application by Quest for an interdict preventing Walters from allowing automotive fuel or petroleum products to be sold at the filling station unless authorised by Quest.

In a counter-application, Walters sought a declaration that it was a tacit term of the tripartite agreement and the 4c Agreement, as well as the servitude, that if any one of the agreements was to be void and unenforceable, the other agreements would suffer the same fate and the servitude would be of no force and effect and would be cancelled.

Held – Servitudes may be either praedial or personal. A praedial servitude will survive the transfer of ownership of the land in question while a personal servitude attaches to the person in whose favour it is granted and is incapable of alienation. A personal servitude, on the contrary, is a limited real right pursuant whereto a burden is imposed over the servient tenement (or a movable object) for the benefit of a particular person. Importantly, a personal servitude is constituted in respect of the holder personally and not in his/her capacity as an owner of land. The product servitude in this case could not be regarded as a praedial servitude. It was no more than a recordal of ordinary contractual rights and obligations whose registration in the Deeds Office serves as notice to the public at large of the consensual arrangement between two parties. It had no special status in law and fell to be interpreted, not in accordance with the law relating to servitudes but in terms of the customary approach to the interpretation of written instruments which are the product of agreement.

The Court undertook an interpretation of the 4c Agreement, the tripartite agreement and the terms of the product servitude in order to establish the intended inter-relationship between the agreements. It found that the intention was that if either of the parties had lawfully cancelled the 4c Agreement, they would be entitled to exercise the right to cancel the tripartite agreement. On that basis, the tripartite agreement was lawfully cancelled in March 2017, with the result that the product servitude was no longer capable of enforcement by Quest. Walters on the other hand, had successfully proved the existence of the alleged tacit term relied on in the counter-application and

the fulfilment thereof afforded her the basis for the lawful cancellation of the agreement. She was thus granted a declaratory order that the two agreements were lawfully cancelled and that the product servitude fell to be cancelled together with the consequential relief which flows from the cancellation of that servitude.

The application was dismissed and the counter-application upheld.

Sengadi v Tsambo; In re: Tsambo [2019] 1 All SA 569 (GJ)

Civil Procedure – Motion proceedings – Disputes of fact – Where disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order – Exceptions to general rule explained.

Family Law and Persons – Customary law marriage – Existence of – Requirements discussed – Recognition of Customary Marriages Act 120 of 1998 – All that is required is that the prospective spouses are above the age of 18 years, must both consent to be married to each other under customary law, and the marriage must be negotiated and entered into or celebrated in accordance with customary law.

In an urgent application, the applicant sought a declaratory order confirming that she was the customary law wife of the deceased; an interdict preventing the respondent (the father of the deceased) from burying the deceased; a declarator entitling the applicant to bury the deceased; and a spoliation order against the respondent to restore to her the matrimonial house and other effects.

The founding affidavit set out the facts relied upon by the applicant. She stated that she and the deceased had married in terms of section 3(1)of the Recognition of Customary Marriages Act 120 of 1998 in 2016. She described how the deceased and his family had planned the celebration of the customary law marriage between herself and the deceased to be held on the same day as the *lobolo* negotiations. The event was captured by way of a video recording which depicted the respondent embracing her, and also depicted the deceased's family and the applicant's family celebrating together with the deceased and the applicant dressed in their wedding attire. The deceased was addicted to cocaine and suffered from depression, and the applicant wanted him to seek rehabilitation. Due to the deceased's infidelity, the applicant left the matrimonial home, but returned in October 2018 after the deceased's death. Three days after her return, the respondent informed her that she was not welcome at the matrimonial home because he did not recognise her as the customary law wife of the deceased, and that she was not entitled to arrange the burial of the deceased. He then changed all the locks of the matrimonial home and the applicant was deprived access thereto.

The respondent disputed the applicant's claim that she was the deceased's customary law wife or that she had the right to bury the deceased. He denied that the applicant and the deceased concluded a valid customary law marriage and stated that in order for a valid customary law marriage to have occurred, various formalities and procedures should have been complied with.

Held – In motion proceedings, where disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the

respondent, together with the facts alleged by the respondent, justify such an order. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or *bona fide* dispute of fact, in which case, if the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof. There may also be exceptions to this general rule, as for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers. In the present case, the application of the general rule would be untenable due to the extreme urgency of the matter.

Evaluating the evidence, the Court held it to be indisputable that the applicant and the deceased with the full knowledge and approval of their respective families cohabited together for a period of approximately three years before concluding their customary law marriage. The respondent's insistence on the rigid formality in the handing over of the bride as evidencing the coming into existence of a valid customary marriage was wrong. The Recognition of Customary Marriages Act does not specify the formal requirements for the celebration of a customary marriage. All that is required is that the prospective spouses are above the age of 18 years, must both consent to be married to each other under customary law, and the marriage must be negotiated and entered into or celebrated in accordance with customary law. Customary law is not fixed and evolves as norms change. In the present constitutional era, the custom of handing over the bride as an indispensable requirement to validating a customary law marriage cannot pass constitutional muster because it is inconsistent with the spirit, purport and objects of the Constitution. It was thus declared that the custom was not a lawful requirement for the existence of a customary law marriage when section 3(1) of the Recognition of Customary Marriages Act had been complied with.

The right to bury a deceased customary law husband reposes on his customary wife (the "widow") who is normally the heiress to the deceased's estate. As the customary law wife of the deceased, the applicant was therefore entitled to bury him. However, in the present case, considerations of fairness, convenience and the interests of justice led the Court to decline the order sought by the applicant with regard to the burial. The deceased was a public figure of national importance and was to be accorded a civil funeral by the provincial government of the North West, which was funding the costs of the funeral, and the venue for the funeral had already been booked with large numbers of people already travelling to the venue. In those circumstances, the Court was obliged to exercise a practical common sense approach, and refused the applicant's request to be permitted to bury the deceased.

END-FOR NOW