LEGAL NOTES VOL 2/2019

Compiled by: Adv Matthew Klein

INDEX[1]

SOUTH AFRICAN LAW REPORTS MARCH 2019

SA CRIMINAL LAW REPORTS MARCH 2019

ALL SOUTH AFRICAN LAW REPORTS MARCH 2019

SA LAW REPORTS MARCH 2019

MALEDU AND OTHERS v ITERELENG BAKGATLA MINERAL RESOURCES (PTY) LTD AND ANOTHER 2019 (2) SA 1 (CC)

Land — Informal land rights — Deprivation — Right of informal land right holders to be consulted — Interim Protection of Informal Land Rights Act 31 of 1996, s 2.

Minerals and petroleum — Mining and prospecting rights — Associated rights — Access to land — Disputes between holders of mining and prospecting rights, and owners or holders of informal rights in land — Mandatory to exhaust dispute-resolution mechanism of MPRDA before mining may commence — Mineral and Petroleum Resources Development Act 28 of 2002, s 54(7)(*a*).

The respondents were the holders of mining rights under the Mineral and Petroleum Resources Development Act 28 of 2002 (the MRPDA). This in respect of farmland registered in 1919 in the name of the Minister of Rural Development and Land Reform, 'in trust for the Bakgatla-Ba-Kgafela community'. The first 37 applicants were members of the Lesetheng Village Community, part of the Bakgatla-Ba-Kgafela community. They claimed ownership of the farmland by virtue of it having been purchased by their forebears, though it was registered in the name of the Minister and not in theirs because of past racially discriminatory laws and practices.
During 2008 the first respondent, in preparation for commencing mining operations, concluded a surface lease agreement with the Bakgatla-Ba-Kgafela Tribal Authority and the Minister of Rural Development and Land Reform (the Minister) in respect of the farm. When, in 2014, preparations for full-scale mining operations on the farm commenced, it impacted negatively on the applicants' occupation of the farm and

[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 obtained a spoliation order against the respondents. This prompted the respondents to launch a High Court application for the applicants' eviction and to interdict them from entering the farm. The High Court granted the application, rejecting all the applicants' defences.
The Supreme Court of Appeal having refused their application for leave to appeal, the applicants approached the Constitutional Court, which granted leave to appeal (see [32]).
The court identified the central issues as (1) whether s 54 of the MPRDA,which provides for dispute resolution between mining right holders and owners of land, was available to the respondents, and if so, whether they were precluded from obtaining an interdict before exhausting such dispute resolution mechanisms; and (2) whether the applicants had consented to being deprived of their informal land rights to or interests in the farm as required by s 2 of the Interim Protection of Informal Land Rights Act 31 of 1996 (IPILRA), which provides that 'no person may be deprived of any informal right to land without [their] consent'. (See [42].)
Held
The most relevant constitutional provisions were s 25(6) and s 211 of the Constitution (see [47] – [48]). With the advent of constitutional democracy, customary law was restored to its rightful place, s 211(3) decreeing that courts must apply customary law when applicable, and s 25(6) that any 'person or community whose tenure of land [was] legally insecure as a result of past racially discriminatory laws or practices [was] entitled to tenure which [was] legally secure or to comparable redress' (see [94] – [95]).
As to issue (1): Section 54 employed mandatory language. Since the repeal of 5(4)*(c)* of the MPRDA (which prohibited the commencement of mining activities by a permit holder unless it notified and consulted with the owner or occupier of the land in question), the dispute resolution mechanisms of s 54 had to be exhausted. The respondents were therefore required to take all reasonable steps to exhaust the s 54 process — which they had in fact initiated — before approaching a court for an eviction and an interdict. It was unclear why, pending the finalisation of this process, a mining right holder should be entitled to mine — on the contrary, to allow them to do so would undermine the object of s 54 to strike a balance between the interests of the mining right holder and the owner.
As to issue (2): Where land was held on a communal basis, a person may be deprived of such land or right in land in accordance with the custom or usage of the community concerned, except where the land in question is expropriated. Section 2(4) of IPILRA required that affected parties must be given sufficient notice and be afforded a reasonable opportunity to participate, either in person or through representatives, at any meeting where a decision to dispose of their rights to land is to be taken. Here, there was no shred of evidence to substantiate the respondents' assertions that the applicants were deprived of their informal land rights in conformity with the prescripts of s 2(4) of IPILRA. Accordingly, the judgment and order of the High Court would be overturned.

PRETORIUS AND ANOTHER v TRANSPORT PENSION FUND AND OTHERS 2019 (2) SA 37 (CC)

Constitutional law — The state — Unlawful state action — Breach of promise — State unlawfully and unconscionably reneging on promise — Court recognising claim based on unlawful state action distinct from claim to administrative justice.

Constitutional law — Human rights — Right to fair labour practices — May be directly relied on — Constitution, s 23(1).

State — Promise by — Enforcement — Exception to claim against state based on breach of contract — State unconscionably breaching promise to grant annual pension increase to employees of state organ — Exception to pleaded contract dismissed.

In 1989 the general manager of the state transport enterprise (South African Transport Services — SATS) promised employees that their pension benefits would remain the same when a new commercial entity (Transnet Ltd, the third respondent) took over. The promise was repeated by the boards of the SATS pension funds, the then transport minister, and in a SATS brochure distributed to employees.

When the promise was broken a decade later, the applicants, both members of the successor funds (the first and second respondents), instituted a class action against them. In their claim the applicants challenged the failure to keep the promise on three grounds: (i) breach of contract; (ii) unlawful state action; and (iii) unfair labour practice under s 23(1) of the Constitution. For (ii) the applicants relied on a legal principle — allegedly recognised by the Constitutional Court in the *KZN* decision — that a promise by the state to pay is enforceable if it would be legally and constitutionally unconscionable for the state to renege on it.

The respondents filed three exceptions to this claim, all of which were upheld by the High Court. They were that the contractual claim was vague and embarrassing; that the state-action claim should have been challenged under the Promotion of Administrative Justice Act 3 of 2000 (PAJA); and that the unfair labour practice claim failed to aver the existence of a labour relationship between the applicants and the respondents. When leave to appeal to the Supreme Court of Appeal was refused, the applicants made the present application for leave to appeal to the Constitutional Court. The applicants argued that the High Court's upholding of the exceptions deprived them of the opportunity to pursue two constitutional causes of action.

Held

Leave to appeal would be granted. The upholding of the exceptions was final and dispositive of important legal issues, and it was in the interests of the parties and the country that they be finally determined (see [14]).

Breach of contract claim:

The pleaded contract — 'an offer to contract duly made by and on behalf of SATS' 'tacitly accepted . . . by the remaining employees and pensioners of SATS [and] the [old pension funds] without demur' — was elegantly and clearly set out, rather than vague. There was nothing vague and embarrassing that prevented the respondents from knowing the case they had to meet, and the appeal against the High Court's upholding of the exception against the contractual claim would therefore succeed.

Unlawful state action claim:

The making of the promise and its implementation for more than a decade created a legitimate expectation that it would be kept. The principle established in *KZN* was not, as found by the High Court, based on a breach of the right to just administrative action, but on far more fundamental misconduct by the state. That conduct was unconscionable in that it failed to meet the constitutional standards of reliance, accountability and rationality. This conclusion was further buttressed by the

constitutional right to social security; the reasonable pension-benefit expectations of pensioners; comparative law; and the doctrine of legitimate expectation. The unlawful state action claim so arising was independent of a claim to administrative justice under PAJA (see [30]). Since the *KZN* decision was authority for the proposition that a non-PAJA claim could lie, even though the state conduct complained of might also amount to administrative action under PAJA, the High Court's upholding of the exception could not stand.

Unfair labour practice claim:
The High Court's view that an employer/employee relationship had to be pleaded was unnecessarily restrictive: jurisprudence under the Labour Relations Act 66 of 1995 (the LRA) recognised that unfair labour practices could extend beyond the termination of employment (see [47]). Contemporary labour trends and the fact that the LRA protected only those in formal employment were also compelling reasons for not restricting the protection of s 23(1) only to those who had formal contracts of employment (see [48]). Nor did the principle of subsidiarity prevent direct reliance on s 23(1): the section did not require Parliament to act, and the LRA did not regulate the entire field of unfair labour practices (see [49] – [50]). There was more than enough legal uncertainty on the issue to send the unfair labour practice claim to trial (see [53]). Therefore the appeal against the High Court's upholding of the exception to the unfair labour practice claim would also succeed (see [55]).

Order:
Leave to appeal would be granted and the appeal upheld with costs.

RAHUBE v RAHUBE AND OTHERS 2019 (2) SA 54 (CC)

Constitutional law — Legislation — Validity — Upgrading of Land Tenure Rights Act 112 of 1991, s 2(1) — Automatic conversion of certain land tenure rights into ownership — Provision unconstitutional and invalid to extent that inconsistent with right to equality — Constitution, s 9.

The first respondent, Mr Rahube, became the owner of property by virtue of his land tenure rights in respect thereof having been converted to full ownership under s 2(1)*(a)* of the Upgrading of Land Tenure Rights Act 112 of 1991 (the Upgrading Act), which provides for the automatic conversion into ownership of '(a)ny land tenure right mentioned in Schedule 1'. His tenure rights were conferred by a deed of grant — a category included in sch 1 to the Upgrading Act — issued in his favour on 13 September 1988 in terms of Proclamation R293 of 1962. Section 9(1) of sch 2 to the Proclamation provides for the issuing of a deed of grant in respect of residential units but limits its issuing to the *head of the family* who desires to purchase a dwelling for 'occupation by *him* and members of *his* family for residential purposes' (emphasis supplied).
The High Court had declared s 2(1) of the Upgrading Act unconstitutional in that its inherently gendered automatic conversion mechanism was inconsistent with the right to equality in s 9 of the Constitution. This because in terms of the Proclamation a woman could not be 'the head of the family', and, by failing to provide any mechanism in terms of which any other competing rights could be considered and assessed and a determination made, it perpetuated the exclusion of women from the rights of ownership. It was further unconstitutional, the High Court had held, because

the lack of notice of the conversion, and the absence of a procedure for raising issues with the conversion of land rights into ownership, defied the *audi alteram partem* principle and accordingly was inconsistent with the right of access to courts in s 34 of the Constitution.
In this case, an application for the Constitutional Court's confirmation of the High Court's order, the court focused on the issue whether s 2(1) of the Upgrading Act violated s 9 of the Constitution (see [35]; s 9 is quoted in full at n18 below).
Held
It was obvious on a plain reading of the Proclamation that it envisaged a situation where only men could be the head of the family, with women relatives and unmarried sons falling under their control. And when read in the context of the multiple discriminatory statutes that aimed to limit the autonomy of women at the time, it was unlikely that the legislature intended that the masculine pronouns should be read to be gender-neutral. Reading the Proclamation to have gender-neutral provisions, so that s 2(1) of the Upgrading Act — which is based on the Proclamation — would be saved from constitutional invalidity, was not reasonably possible. (See [32] – [35].)
A provision in a statute that differentiated between groups of people and did so without a legitimate governmental purpose would be irrational and unconstitutional due to its inconsistency with s 9(1). That s 2(1) of the Upgrading Act was not enacted with a legitimate governmental purpose, was underscored by the fact that it also contradicted the overall purpose for which the Upgrading Act was enacted, ie as part of a scheme of legislation focused on land reform in order to redress the injustices caused by the colonial and apartheid regimes. Instead, the Upgrading Act relied on the legal position created by the Proclamation — subordinate legislation which gave limited subservient rights to African people but excluded women — in order to establish which rights warrant upgrading.
This lack of a legitimate governmental purpose for the provisions of s 2(1) of the Upgrading Act was thus irrational, and the section is constitutionally invalid due to its inconsistency with s 9(1) of the Constitution. It was also an unreasonable legislative measure in terms of s 9(2) and amounted to unfair discrimination on a prohibited ground under s 9(3).
A just and equitable order would, like the one made by the High Court, include limitations on retrospectivity, and exceptions so as not to disturb the South African property scheme by making an order that would impact substantially on the financial interests of buyers, sellers and banks who acted in good faith by relying on a law that they thought was valid. (That court's list of exceptions would, however, be expanded.) The High Court's order suspending declaration of invalidity for 18 months to give Parliament an opportunity to remedy the unconstitutional effects of s 2(1) of the Upgrading Act would be confirmed, as would its order offering interim relief pending such legislative intervention.

DIRECTOR-GENERAL, DEPARTMENT OF RURAL DEVELOPMENT AND LAND REFORM, AND ANOTHER v MWELASE AND OTHERS 2019 (2) SA 81 (SCA)

Land — Land reform — Labour tenant — Claim — Appointment of special master to supervise processing of labour tenant claims under Land Reform (Labour Tenants) Act 3 of 1996 — Special master tasked with preparing implementation plan for processing labour tenant claims, including determination of skills, infrastructure and budget required — Special master, a complete outsider, effectively taking over

functions and responsibilities of Director-General and Department — Breach of separation of powers — Appointment of special master by Land Claims Court set aside by SCA.

A 'special master' was a private attorney, law professor or retired judge, appointed with or without the parties' consent, to assist in the adjudicative process. This appeal before the Supreme Court of Appeal was against an order of the Land Claims Court appointing such a person to supervise the task of processing labour tenant claims under the Land Reform (Labour Tenants) Act 3 of 1996 (the LTA), a task assigned in law to the Director-General (DG) of the Department of Rural Development and Land Reform (the Department) and the Minister of the Department (the Minister), but which they had failed to adequately perform. Whether such an order was appropriate — a novel one in South Africa — especially having regard to the principle of separation of powers, formed the focus of this appeal.

The present matter arose from proceedings instituted by the respondents in the Land Claims Court (LCC) against, inter alia, the DG and the Minister. There they sought to compel the DG to refer to the LCC the first to fourth respondents' labour tenant claims under the LTA. They also sought systematic relief: *They claimed an order declaring that the persistent failure of the DG* to process or refer applications to the *LCC* was inconsistent with ss 9, 10, 25(6), 27(1)(b)*, 30, 31, 33, 34, 195 and 237 of the Constitution. They claimed a structural interdict directing the DG to process or refer all outstanding applications to the LCC within one year, and obliging him to report back to the court on a regular basis to explain the Department's plan to achieve the goal, and the progress in doing so.* The matter was postponed, then followed by a series of supervisory orders obtained by agreement, wherein the DG affirmed the commitment of the Department to fully implement the LTA, set out the plans to do so, and agreed to file regular reports recording progress. However, the respondents, in light of their view that the DG had not complied with the court orders and had still failed to adequately process labour tenant claims, set the original matter down for hearing before the LCC, in which they now sought the appointment of a special master. That court granted declaratory relief — to the effect that the DG's failure to process or refer to the court applications brought under s 16 of the LTA was inconsistent with ss 10, 25(6), 33, 195 and 237 of the Constitution — and also appointed a 'Special Master of Labour Tenants' to prepare, in collaboration with the DG, an implementation plan 'for the performance of the duties of the [DG] and the Department with supervision of the Special Master, in relation to pending labour tenant claims under ss 16, 17 and 18 of the Act'. The respondents also instituted an application for an order that the Minister be held in contempt of the last obtained supervisory order by agreement — the so-called negotiation order. This the LCC refused. This is the appeal before the SCA against those two orders.

Held, that the order of the LCC, declaring the DG's failure to adequately process labour tenant claims to be unconstitutional, was unassailable.

Held, that the LCC's order, in placing squarely in the hands of the special master the responsibility of preparing the implementation plan, directed a complete outsider to effectively take over the functions and responsibilities of the DG and officials of the Department in relation to labour tenant claims. The implementation plan would set out the skills pool and infrastructure required for processing of labour tenant claims; annual targets for the resolution of claims; the budget necessary in each financial year for carrying out the implementation plan; plans to ensure the adjudication or arbitration of unresolved claims; and any other matter which the special master

may consider relevant. In doing so, the order cut directly across the powers of the DG. It would also entangle the appointed person in the budget and operational issues of the Department. The appointment of a special master was accordingly a textbook case of judicial overreach, and amounted to a gross intrusion by a court into the domain of the executive in breach of the principle of separation of powers. The LCC's appointment of a special master could not stand (see [54]).
Held, further, that the respondents' contempt application had to fail, their having failed to prove an act of wilful or mala fide non-compliance on the part of the Minister (see [58] and [66]).
(The court set aside the order of the Land Claims Court, and replaced it with one, as set out in [69], directing the DG to, inter alia, submit an implementation plan in relation to pending labour tenant claims, in terms of which senior managers in the Department would be responsible for managing implementation.)
Mocumie J, dissenting, held that the LCC was within its powers to appoint a special master (see [92]). She stressed that the continued constitutional infringements of labour tenants' rights by the DG and the Department demanded such radical relief in circumstances in which ordinary court supervision had failed to remedy the situation (see [74] – [76], [78], [87] and [89]). She added that, while the doctrine of separation of powers was an important one, it could not be used to avoid the obligation of a court to provide appropriate relief that was just and equitable (see [89]). She expressed the view that the LCC, in appointing a special master, had properly exercised the discretion it possessed to grant an appropriate remedy. Bearing in mind the deference to be shown by the SCA to the LCC as a specialist court with primary responsibility for adjudicating and implementing the LTA and with expertise in such matters , no case had been shown justifying interference with the decision of the LCC.

FISCHER v UBOMI USHISHI TRADING CC AND OTHERS 2019 (2) SA 117 (SCA)

Land — Ownership — Vesting of — Spouse undertaking, in settlement agreement made part of divorce order, to transfer half-share in property to other spouse — Whether ownership vesting on date of order or on date of endorsement of deed.

Mr and Mrs Haynes were married in community of property. The co-owned assets included a house. In an agreement made part of an order of divorce, Mr Haynes agreed to transfer his share in the house to Mrs Haynes.
Some time later, while Mr Haynes was still recorded as co-owner in the Deeds Registry, appellant sought to execute against his share (see [3] and [8]).
The High Court dismissed the application for an order of special executability.
On appeal to the Supreme Court of Appeal, the issue was whether ownership vested on making of the divorce order, or on endorsement of the deed in the Deeds Registry.
Held, for the latter.
Held, further, that while the High Court had erred on the law, the appeal should be dismissed on another ground (Mrs Haynes' claim preceded appellant's).

GROOTKRAAL COMMUNITY AND OTHERS v BOTHA NO AND OTHERS 2019 (2) SA 128 (SCA)

Servitude — Acquisition — Vetustas (immemorial user) — Requirements — Claimant to show that right to occupation and usage existed for time immemorial — Presumption of legality arising — Immemorial meaning that circumstances in which right arose beyond living memory — Claimants showing 200-year community usage, for religious and other purposes, of portion of private land — Presumption of legality not rebutted — Court ordering registration of public servitude over land in question.

The first-appellant Community conducted church services and sent their children to a school on a part of a farm owned by the respondents. When the respondents brought proceedings to evict the school from the farm, * members of the Community, which had a long history in the area, brought a counterclaim for an order for the registration of a public servitude in its favour over the farm. They based it on the common-law doctrine of vetustas, which safeguarded long-standing rights — 'immemorial user' — exercised against another.†

Held

Vetustas did not create a right but dispensed with the need to prove its origin, which was by its nature beyond proof. Once immemorial user was proved, the lawfulness of the right was rebuttably presumed (see [8] – [12]). Immemorial meant that the circumstances in which the right arose were beyond living memory (see [16]).

While the right the Community sought to establish was novel, there was no reason why immemorial user should not give rise to a public servitude entitling the public at large, or a particular section of it, to use private land in a certain way, which was precisely what the Community was seeking.

There was thus no legal bar to the Community's contention that it was entitled to the registration of a public servitude, provided it could establish a right to use, for religious and educational purposes, a small and defined portion of the farm by invoking the presumption of lawful creation afforded by the principles of *vetustas* (see [19]).

The historical evidence showed that the Community was established at some uncertain date between 1820 and the building of the church in the late-19th century and that it had worshipped and conducted other church activities there ever since (see [38]). This was sufficient to establish a state of affairs existing from time immemorial, which gave rise to the presumption that the right so exercised was exercised lawfully. Since the respondents failed to rebut this presumption, the Community had the right, in the form of a public servitude, to use and occupy the property for the purposes of a Christian church and any related community activities, including the conduct of a school. The Registrar of Deeds would be directed to register such a servitude.

HARVEY NO AND OTHERS v CRAWFORD NO AND OTHERS 2019 (2) SA 153 (SCA)

Trust — Trust deed — Interpretation — Children, issue, descendants and legal descendants — Whether including adopted children.

In 1953 first appellant's father had bequeathed benefits in a trust to his 'children' and their 'issue', 'descendants' and 'legal descendants'.

Recently first appellant (now deceased, and substituted by her estate's executor) and second and third appellants, first appellant's adopted children, had applied to the High Court for a declaration that children, issue, descendants and legal descendants, as used in the deed, included adopted children. The High Court dismissed the application.
On appeal to the Supreme Court of Appeal, appellants asserted (1) public policy, (2) alternatively s 13 of the Trust Property Control Act 57 of 1988, supported the declaration they sought.
Regarding (1), they contended that their right to equality should outweigh the settlor's freedom of testation, and that public policy should be applied, as described, to amend the deed.
Held
• The donor had intended children, issue, descendants and legal descendants to not include adopted children;
• the case did not fall within an established category of cases where public policy could be used to amend the terms of a deed (this was not a public trust, and nor was it a private bequest subject to a condition);
• there were further considerations against application of public policy (the limited scope of the deed, the nature of the discrimination, and practical difficulties that might result);
• the requirements for the use of s 13 of the Act had not been met (see [72] – [73]).
Appeal accordingly dismissed.

Molemela JA, dissenting, would uphold the appeal.
She would find 'children', 'issue', 'descendants' and 'legal descendants' included adopted children.
This given that:
• The word 'children' as used in the deed was neutral: it did not point against adopted children, and it could include adopted children (see [31]);
• the word 'any' was used before 'children' (see [32]);
• first appellant's father was aware, before executing the deed, first appellant might adopt. This circumstance should inform interpretation of 'any' children (see [33]);
• the use of 'legal', before 'descendants', suggested adopted children (see [33]);
• there was no express exclusion of a class of persons (see [34]);
• failure to expressly mention the class (adopted children), did not suggest its exclusion (see [36]);
• the Bill of Rights' spirit, purport and objects should inform application of the Children's Act 31 of 1937. When the deed's text was neutral (non-discriminatory), the application of the Act should not have a discriminatory result (see [17] and [38] – [39]).

LIFE HEALTHCARE GROUP (PTY) LTD v SULIMAN 2019 (2) SA 185 (SCA)

Medicine — Medical practitioner — Malpractice — Parents claiming damages against defendant doctor for harm suffered by child during birth — Defendant doctor attending labour as cover for mother's own doctor — Failure by defendant to personally attend to mother shortly after her admission, instead managing situation telephonically by giving instructions to treating nurses — Breach of legal duty to avoid negligently causing harm, which duty arising when defendant first giving telephonic instructions to

nurses as to care of patient — Earlier attendance could have prevented injuries, therefore causation established.

Mr and Mrs S's child, N, developed cerebral palsy as a result of a deprivation of oxygen during his birth. In the High Court Mr and Mrs S sued in delict the appellant — the Life Healthcare Group (Pty) Ltd, at whose hospital Mrs S underwent labour and gave birth — and the respondent — Dr Suliman, the specialist obstetrician and gynaecologist who had attended to Mrs S — jointly and severally, for the damages resulting from the birth injuries sustained by their child. The appellant and the respondent subsequently agreed to pay an amount in settlement of quantum and liability, without admitting liability. The proceedings in the court a quo concerned only the appropriate apportionment of liability between the appellant and the respondent; the appellant having filed along with its plea a notice in terms of Uniform Rule of Court 13 seeking a contribution from the respondent in terms of the Apportionment of Damages Act 34 of 1956. The appellant, while admitting that its nursing staff at the hospital had been negligent, argued that the respondent had also been negligent in his treatment of Mrs M, which negligence had contributed to the injuries sustained by N. The respondent denied all liability. The court a quo found that the respondent had in fact been negligent, but that no causation could be proven between such negligence and the harm suffered. This is the appeal against such decision.
The relevant background was the following. When the respondent attended to Mrs S's labour and delivery of her baby, he was acting as cover for Dr Maise (at Dr Maise's request), the doctor with whom Mrs S had contracted. On being informed of Mrs S's admission at hospital, the respondent's approach was to manage the situation telephonically, by giving appropriate instructions to the treating nursing staff, based on the information received from them. He only personally attended to Mrs S over 10 hours after being informed of her admission, at which time he discovered that the foetus had been in distress for some time and that delivery was a matter of urgency. It was apparent on the child's delivery that he had suffered 'birth hypoxia', and a little bit later it was discovered he had developed cerebral palsy. The questions that needed answering before the SCA were the following. (1) Did the respondent owe a legal duty to the patient to avoid negligently causing harm? The respondent claimed that, given he was merely covering for Mrs S's own doctor, there was no doctor-patient relationship between himself and Mrs S until such time as he arrived at the hospital to personally see her. Before such time, it was argued, he was under no legal duty. (2) If there did exist such a legal duty, had the respondent breached such a duty by acting negligently, more particularly, by failing to personally attend to the patient much earlier? (3) Had the failure of the respondent caused the harm?
Held, that a legal duty arose immediately when the respondent acceded to the request to cover for Dr Maise and when he positively responded to a call from nursing staff that the patient had been admitted to hospital. The respondent manifested his responsibility by giving instructions to the staff with regard to Mrs S's care. His conduct of getting involved in the treatment of the patient placed him in a position of being responsible for her and the baby.
Held, that the respondent breached such a duty by failing to act as a reasonable obstetrician would have in the circumstances, who would have visited the patient shortly after her admission to create the doctor – patient relationship and to assure her that, in the absence of her own doctor, he was standing in and would take good care of her.

Held, that, contrary to what the court a quo had found, the evidence showed that, had the respondent personally attended the patient earlier (more precisely, at least after a phone call from the hospital reporting, inter alia, a deceleration of the foetal heart rate), the injuries would have been avoided.
Held, that an apportionment of damages of 60% – 40% in favour of the hospital was reasonable and appropriate (see [20]). Appeal accordingly upheld.

MASUKU AND ANOTHER v SOUTH AFRICAN HUMAN RIGHTS COMMISSION 2019 (2) SA 194 (SCA)

Constitutional law — Human rights — Right to freedom of expression — Limitation — Only statements falling within purview of s 16(2) of Constitution not protected — Statement to be interpreted in context in which made — Hostile, hurtful, distasteful or inflammatory statements not necessarily hateful.

Constitutional law — Human rights — Right to freedom of expression — Limitation — *Quaere*: Whether internal limitation clause in s 16(2) obviating s 36(1) limitation analysis.

Constitutional law— Human rights — Right to freedom of expression — Limitation — Hate speech — What constitutes — Alleged advocacy of hatred in speech directed at Jewish people — Seen in context, speech political in nature and not constituting advocacy of hatred against Jews.

Equality legislation — Constitutionality — Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 — *Quaere*: Whether s 10 of Act condemns constitutionally protected speech — Constitution, s 16.

This case was about the prohibition of hate speech and the interpretation of the freedom of expression clause in s 16 of the Constitution. Section 16(1) guarantees the right of freedom of expression and s 16(2) then lists types of speech not covered by the right in s 16(1), including hate speech.
The second respondent (the SA Jewish Board of Deputies) considered four statements made by Mr Masuku, a leading member of trade union Cosatu, to be anti-Jewish hate speech and lodged a complaint with the first respondent (the Commission). The statements were made against the backdrop of a spike in the Israeli-Palestinian conflict and Cosatu's support for the Palestinians (see [6] – [7] for the impugned statements, which used terms like 'racists', 'fascists' and 'friends of Hitler').
The Commission concluded that the statements amounted to hate speech prohibited under s 10 read with s 12 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Equality Act), and referred the matter to the Equality Court, which agreed. Section 10 prohibits speech 'that could reasonably be construed to demonstrate a clear intention to . . . be hurtful; be harmful or incite harm; promote or propagate hatred'. Mr Masuku appealed to the Supreme Court of Appeal.
Although the respondents persisted in their reliance on the offensive and hurtful nature of the statements, during the hearing of the appeal they disavowed reliance on the Equality Act. Instead, they accepted that the statements would be excluded from protection (as hate speech) under s 16(1) of the Constitution only if they fell foul of s 16(2) (see [13]). The respondents argued that they did because

they constituted unambiguous threats of harm and violence, and amounted to hate speech directed at members of the Jewish community.
Held
The respondents' retraction was properly made. It was a cause for concern that s 10 of the Equality Act had the effect of condemning speech that was protected under s 16(1) of the Constitution (see [14]). And since s 16(2) had its own internal limitation clause, it was debatable whether a more expansive definition of hate speech under s 36(1) of the Constitution *could be justified (see [14]). The issues arising in the appeal would hence be decided on the Constitution (see [15]).
The starting point for the present enquiry was that s 16(1) protected freedom of expression while the boundaries of that protection were delimited in s 16(2) (see [19], [31]). Of relevance to the present case was that advocacy of hatred was excluded from protection where such hatred was based on race, gender or religion and constituted an incitement to cause harm (see [19]). The fact that particular expression might be hurtful to people's feelings, or wounding, distasteful, politically inflammatory or downright offensive, did not exclude it from protection. The evidence supported Mr Masuku's explanation that his utterances were directed at supporters of the state of Israel and not Jews (see [29]). Nothing he wrote or said transgressed the boundaries in s 16(2), however hurtful or distasteful they may have seemed to members of the Jewish and wider community. The fact that many deplored them did not deprive them of constitutional protection (see [31]). In the result, the appeal would be upheld.

MONDE v VILJOEN NO AND OTHERS 2019 (2) SA 205 (SCA)

Land — Land reform — Statutory protection of tenure — Requirements for eviction — Probation officer's report — Report to be furnished to court before eviction may be ordered — Extension of Security of Tenure Act 62 of 1997, s 9(3).

A magistrates' court had evicted Mr Monde from a farm, and the eviction had been confirmed on automatic review to the Land Claims Court (see [1]).
Monde appealed to the Supreme Court of Appeal.
It upheld the appeal and set aside the magistrates' court's order.
This on two bases:
(1) Monde's right of residence continued (it had not been extinguished, as asserted, with termination of his employment contract) (see [15] – [17], [21] and [23]); and
(2) The court had not been in possession of a probation officer's report before grant of the order. (The furnishing of such a report to the court was a peremptory requirement, for grant of an eviction order.)

NKOLA v ARGENT STEEL GROUP (PTY) LTD 2019 (2) SA 216 (SCA)

Execution— Immovable property — Debtor claiming, but not pointing out or making available, movables sufficient to satisfy debt — Whether creditor may execute against debtor's immovable property.

The High Court declared immovable property specially executable and the full bench dismissed an appeal (see [1] – [2]).

On appeal to the Supreme Court of Appeal the issue was whether, if a debtor claims movables to satisfy a debt but fails to point them out and make them available, the creditor may execute against immovable property (see [8]).
Held, that the common law and Uniform Rules allowed this (see [11]).
Appeal dismissed.

PROPELL SPECIALISED FINANCE (PTY) LTD v ATTORNEYS INSURANCE INDEMNITY FUND NPC 2019 (2) SA 221 (SCA)

Attorney — Fidelity Fund — Claims against — Cession of indemnification rights under insurance policy to third party — Nature of contractual relationship between parties involving delectus personae — Agreement to cede rights under policy without Fidelity Fund's consent invalid.

Insurance — Professional indemnity insurance — Whether indemnification rights cedable — Nature of contractual relationship between parties involving delectus personae — Agreement to cede rights under policy without insurer's consent invalid.

The appellant (Propell) advanced bridging finance to clients of BSL, a law firm, in property transactions BSL acted in on behalf of such clients. Propell paid the loan amounts into BSL's trust account against an undertaking by BSL to repay such loans to Propell from the proceeds of the property transactions. BSL however failed to honour these undertakings because one of its directors and/or an employee misappropriated the proceeds of the property transactions. Propell subsequently instituted a number of magistrates' court actions to recover these loans; and BSL sought indemnity against such liability from the respondent, the Attorneys Fidelity Fund (the AFF), which repudiated BSL's claim (see [3]). Instead of suing the AFF for specific performance, BSL purported to cede to Propell its indemnification rights under its insurance policy with the AAF (the Policy).
Propell then instituted action against the AFF in the High Court, as cessionary of BSL's claims against the AFF under the Policy. The High Court upheld the AFF's special plea that Propell lacked locus standi because the cession on which it was relying to assert its claim was invalid, and it accordingly dismissed Propell's claim (see [11]). In this case, Propell's appeal to the Supreme Court of Appeal, the central issue was whether the nature of contractual rights flowing from the Policy was such that it excluded the transfer of the personal rights created.
Held
In general, all contractual rights could be transmitted unless their nature involved a *delectus personae*, or the contract itself showed that they were not intended to be ceded. To determine this, it was necessary to interpret the terms of the Policy. (See [17] and [20].)
As testified for on behalf of the AFF, it was established to provide specific services to a specific group or class of people — legal practitioners. The relevant clause dealing with claims against the AFF other than by the insured (BSL) personally, was clause 6.8. It read that '(u)nless otherwise expressly stated nothing contained in this Policy shall give any rights against the insurer to any person other than the insured'. It meant that the Policy did not give rights of indemnity to anyone else but the insured; it covered or indemnified the insured solely or exclusively. Clause 6.8 properly construed merely emphasised the inherent right of the AFF to insist upon the insured being in the class of persons insurable under the Policy. The nature of the contractual rights under the Policy indicated that the insured was a *delectus*

personae;the contract gave no rights of indemnity to anyone but a legal practitioner. BSL may not cede its right to obtain indemnification under the Policy from the AFF to a third party without the AFF's consent because of the personal, restricted and statutorily regulated nature of the AFF's obligation to BSL. The appeal would accordingly be dismissed with costs.

ROAD ACCIDENT FUND v KERRIDGE 2019 (2) SA 233 (SCA)

Motor vehicle accident — Compensation — Claim against Road Accident Fund — Loss of income or earning capacity — Expert evidence not to be accepted without more — Both courts and Road Accident Fund should actively evaluate facts on which expert evidence based — In present case, this not done — On appeal, post-morbid contingencies increased.

This case concerned an appeal to the Supreme Court of Appeal (the SCA) by the Road Accident Fund (the RAF). It was against a decision of a full bench of the Grahamstown High Court to dismiss an appeal by the RAF against an award of past and future loss of earnings, or earning capacity, in Mr Kerridge's motor vehicle accident claim. The RAF's case was that Mr Kerridge, at the time of the accident a 23-year-old aspiring to qualify as a diesel mechanic, failed to prove that he had suffered any past or future loss of income because he did not produce any evidence of his alleged earnings from a family business (see [8]). Mr Kerridge's case was he was permanently precluded by the injuries he sustained from completing his qualification as a diesel mechanic or any similar occupation and therefore lost such future income until retirement age.
When the accident happened on 29 November 2009 Mr Kerridge, who had left school at the age of 15, was enrolled at a Technical College training to be a motor mechanic. He had taken seven years to complete his N1 certificate and had passed only two courses towards his N2 certificate. Of the 18 subjects he had registered for, he wrote six and passed three. (See [46].) However, the trial court accepted the evidence of Mr Kerridge's expert witness, an industrial psychologist who testified that, but for the accident, he would have completed his studies by 2012, then have begun his apprenticeship, and by 2016 would have started employment as a skilled employee, advancing up the Paterson scale between ages 45 and 50 to remain there until retirement age. The trial court also accepted an actuarial calculation estimating pre-morbid and post-morbid past and future loss of earnings based on this scenario, and applied a contingency deduction of 5% and 15% in respect of past and future loss of earnings, respectively.
The full bench, in dismissing the appeal, considered this the best available evidence to determine reasonable damages. (See [12] – [17] and [20].) In its majority judgment the SCA, disagreeing with the contingency deduction that was accepted by the courts a quo (and by the SCA's minority judgment) —
Held
The role of experts in matters such as these and the opinions they provided could only be as reliable as the facts on which they relied for this information. Too readily, our courts tend to accept the assumptions and figures provided by expert witnesses in personal injury matters without demur. The facts upon which experts rely could only be determined by the judicial officer concerned. An expert could not usurp the function of the judicial officer, who was not permitted to abdicate this responsibility — the court should actively evaluate the evidence. This problem was

exacerbated by the Road Accident Fund (the Fund) failing to properly investigate the true situation of a claimant, instead being content to rely on projections and assumptions of experts with no factual basis. (See [50].)
Based on his past academic endeavours, the likelihood that Mr Kerridge would have qualified with an N3 certificate at all, or within the time periods assumed in the industrial psychologist's highly optimistic scenario, was remote. Nor were the assumed salary scales compatible with the evidence. And, in addition, no account appears to have been taken of Mr Kerridge's residual earning capacity. There were various considerations which impacted on the contingency deduction: Mr Kerridge's age; his limited employment history; his limited prospects of achieving success in his chosen field as evidenced by his academic record; and his residual earning capacity. These factors militated against a general contingency deduction of 15% in respect of future loss of earnings, which was strikingly disparate with the contingency that should have been applied. On the facts of this case, a contingency deduction of 35% would be applied.

D'OLIVEIRA v ROAD ACCIDENT FUND 2019 (2) SA 247 (WCC)

Damages — Bodily injuries — Loss of income or earning capacity — Calculation — Deduction of collateral benefit — Foreign welfare entitlement — Contingency to be applied — Court, citing unpredictable variables, applying contingency deduction of 20% to future value of benefit.

Damages — Bodily injuries — Medical expenses — Past medical expenses — Domestic care — Care by spouse — Claim against Road Accident Fund — Claimant to establish actual cost of wife's services — Road Accident Fund Act 56 of 1996, s 17(1).

Damages — Bodily injuries — Medical expenses — Past medical expenses — Domestic care — Employment of full-time careperson — Whether warranted.

The plaintiff, a British citizen resident in South Africa, sustained serious injuries in a car crash before permanently leaving for the United Kingdom, where his injuries qualified him for a welfare payment called a personal independence payment (PIP), currently valued at R2 million. Two issues arose in the present claim for compensation against the Road Accident Fund: the contingency deduction to be applied to the PIP, and whether the plaintiff was entitled to claim the cost of domestic care in the UK. The parties' disagreement on whether the latter would include the value of extra domestic services rendered by the plaintiff's wife, raised the additional question of whether spouses could expect to be remunerated for
providing services that coincided with their mutual duty of support. For their argument that the ambit of the law in this regard should be extended to cater for the plaintiff's claim, counsel relied on *Cunningham v Harrison*, an English case in which a quadriplegic plaintiff was allowed full-time nursing services after his spouse died, and *General Accident v Uijs*, in which a claim for part-time institutional care of a grievously injured plaintiff was allowed in the absence of spousal assistance. While the parties' experts agreed in a joint minute that the plaintiff required ten hours of domestic help per week, the plaintiff also sought, as past medical expenses, R3,4 million for the employment of a full-time UK 'careperson' since late-2008.
Section 17(1) of the Road Accident Fund Act 56 of 1996, which regulates the liability of the RAF, provides that it is obliged to compensate a person for any loss or

damage he or she *has suffered* as a result of bodily injury caused by the driving of a motor vehicle (see [34] for the wording of the section).

Held

Since the court was not apprised of the socioeconomic, sociopolitical or projected budgetary considerations at play in the UK, or of the effect the plaintiff's award for damages might have on his eligibility when he is reassessed for PIP in 2021, a 20% deduction would, given the unpredictable variables at play, be a fair contingency (see [17]).

Cunningham and *Uijs* were distinguishable because in each of them the injured party was incapable of looking after himself, which was not the case with the plaintiff, who was able to function independently (see [33]). Since s 17(1) contemplated compensation for actual loss, the plaintiff's failure to establish the number of hours of care his wife had put in meant that his claim for the 'cost' of his wife's 'services' could not be recovered (see [35] – [37]). In addition, the plaintiff's attempt to elevate the established need for domestic help to a need for a careperson was a distortion of the expert opinion in the joint minute (see [44]). At best for the plaintiff, he was entitled to claim the costs of domestic assistance as agreed in the joint minute. This claim should, given that it was largely dependent on the non-availability of his wife, be subjected to a contingency deduction of 40%. So ordered.

GOVENDER NO AND OTHERS v GOUNDEN AND OTHERS 2019 (2) SA 262 (KZD)

Administration of estates— Heirs and legatees — Heir — Inheritance — When right to inheritance vesting — Whether spouse married in community of property may renounce inheritance without other spouse's consent — When in time renunciation may be made.

Mr and Ms Gounden were married in community of property. Ms Gounden's sister died. Ms Gounden was the heir to her estate. Mr Gounden later died. Ms Gounden then renounced her inheritance. Meanwhile, the administration of the sister's estate proceeded and accounts were advertised.

Mr Gounden's executors objected thereto that the inheritance was not awarded to the joint estate of Mr Gounden and Ms Gounden. Ms Gounden objected that her renunciation was not given effect to.

The Master's ruling was that the inheritance was part of the joint estate; and that the renunciation was invalid (see [10]).

Ms Gounden then applied against the Master, her sister's executors and Mr Gounden's executors for a declaration that the renunciation was valid and that the Master accept it (see [11]). The court granted this and Mr Gounden's executors appealed to the full bench (see [13] – [14]).

The grounds of appeal were that the court erred in finding that the right to the inheritance vested in the joint estate on confirmation of the estate accounts (the moment the right became enforceable), rather than on the sister's death; and that it further erred by failing to find that, after the death and vesting, Ms Gounden required Mr Gounden's consent to renounce it.

Held, by the full bench:

- The right to the inheritance vested in the joint estate on the sister's death (see [28], [32] and [43]);

- Ms Gounden did not require Mr Gounden's consent to renounce the inheritance (see [1], [29], [40] and [45]);
- Ms Gounden could renounce even after confirmation of the estate accounts (see [44]).

Consent granted to withdrawal of an application to lead further evidence; the order of the court a quo upheld for different reasons; and the appeal dismissed (see [48] and [50]).

JACOBS v ROAD ACCIDENT FUND 2019 (2) SA 275 (GP)

Motor vehicle accident — Compensation — Claim against Road Accident Fund — Liability of Fund — Claim, by surviving partner in live-in relationship, for loss of maintenance and support — Deceased still married to someone else when he died — Whether duty of support proved — Issue of *boni mores*.

Delict — Specific forms — Loss of support — Dependant's action — Whether arising in respect of surviving partner in live-in relationship where deceased still married to another person — Issue of *boni mores* — Liability of Road Accident Fund.

The plaintiff's live-in partner died in a motor vehicle accident. The Road Accident Fund opposed her claim for loss of maintenance and support on the ground that the relationship between her and the deceased was *contra bonos mores* and thus not protectable. The parties having agreed on the liability of the insured driver and the locus standi of the plaintiff, it was decided that the court would first determine the issue of liability and then proceed to quantum in the event that the RAF was found to be liable.

The evidence was that during their six years of living together the deceased, who was still married to someone else, had supported the unemployed plaintiff and her children. They intended to marry once the deceased had divorced his current spouse. If the deceased owed the plaintiff a duty of support, the RAF would be liable.

Held

The question was whether the facts established a relationship akin to a marriage entailing a legally enforceable duty of support (see [12], [14]). Since it was clear that the deceased had undertaken to support the plaintiff with the intention to be legally bound by such undertaking, he owed the plaintiff a contractual duty of support which the law was bound to protect. While the law was cognisant of the sanctity of marriage, it was a matter of fact that millions of South Africans lived together without entering into formal marriages (see [16], [19] – [20]). The plaintiff's relationship to the deceased was similar to a family relationship arising out of a legally recognised marriage, and it followed that she should be afforded her dependant's action as an unmarried person in a heterosexual relationship (see [21]). The RAF was therefore 100% liable to the plaintiff for loss of maintenance and support.

MINISTER OF POLICE AND ANOTHER v YEKISO 2019 (2) SA 281 (WCC)

Prescription — Extinctive prescription — Delay in completion — Incarceration — Plaintiff seeking damages for unlawful arrest and detention — Whether incarceration amounting to 'superior force' preventing plaintiff from interrupting prescription — Incarceration not preventing plaintiff from giving instructions to attorney to institute proceedings on his or her behalf — Key question being whether plaintiff

having access to legal representative whom he or she could instruct to institute civil proceedings — Prescription Act 68 of 1969, s 13(1)(*a*).

This was an appeal, heard before the full bench of the Western Cape High Court, against the decision of the court a quo to grant condonation for the failure of the respondent (Mr Yekiso) to comply with the notice requirements set out in s 3 of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 (the Act), in respect of his claims for damages against the Minister of Police (the Minister) based on unlawful arrest and detention, and against the National Prosecuting Authority (NPA) based on unlawful detention and malicious prosecution.
The focus of the appeal court's attention was whether the requirements for the granting of condonation in s 3(4)*(b)* of the Act had been met. One such requirement was that good cause existed for the failure of an applicant to comply. Another, and which formed the focus of the dispute, was that the debt could not have been extinguished by prescription. The Minister and the NPA argued that Yekiso's claims based on unlawful arrest and detention had prescribed in terms of s 11*(d)* of the Prescription Act 6 of 1969, in circumstances in which he was arrested on 21 February 2006, detained for the period 22 February 2006 until 7 October 2011 (when he was released), but only served summons on the Minister and the NPA on 21 July 2014 and 1 September 2014, respectively. Yekiso had successfully argued before the court a quo that the claim for unlawful arrest, subsequent detention and malicious prosecution was a continuous transaction which could not be regarded as complete until the outcome of the criminal prosecution, in which case the claim had not prescribed. The appeal court rejected such a characterisation as being contrary to established law, the truth of which Yekiso appeared to acknowledge on appeal (see [19]). Yekiso instead invoked s 13(1)*(a)* of the Prescription Act to argue that his incarceration amounted to a 'superior force' preventing his pursuing his claim and thus interrupting prescription, in which case the completion of prescription was delayed.
Held, that, in the ordinary course, Yekiso's claims based on unlawful arrest in February 2006 would have prescribed on 21 February 2009 in terms of s 11*(d)* of the Prescription Act. Furthermore, Yekiso was not prevented by superior force from pursuing his claim and interrupting prescription, in which case he was not entitled to rely on s 13 of the Prescription Act. The fact of incarceration did not on its own prevent a plaintiff from giving instructions to an attorney to institute proceedings on his behalf. The key question was whether Yekiso had access at all relevant times to a legal representative. The facts suggested that he had. There was no suggestion that he was denied access to legal advice in respect of a proposed civil action. Accordingly, Yekiso's unlawful arrest claim had prescribed.
Held, further, that, on the basis that the continued detention from 22 February 2006 until 7 October 2011 gave rise to a separate cause of action for each day that he was so detained, the detention period from 22 February 2006 until 21 July 2011 had also prescribed for the same reasoning as employed in respect of the unlawful arrest. The proceedings against the Minister commenced when summons was issued on 21 July 2014 and therefore it would mean that a period of more than three years had elapsed for the detention period ending on 21 July 2011. On the same basis a period of more than three years had elapsed since 1 September 2011 when the respondent served summons on the second appellant on 1 September 2014.
Held, further, that, in respect of the claims based on malicious prosecution and for the detention from 2 September 2011 to 7 October 2011, which had not prescribed,

Yekiso had failed on the facts to show the necessary good cause to justify an application for condonation. Accordingly, the application for condonation should have been dismissed (see [35]). Appeal upheld.

VAN ROOYEN OBO MOTAU v ROAD ACCIDENT FUND 2019 (2) SA 290 (GP)
Motor vehicle accident— Compensation — Claim against Road Accident Fund — Prescription — Insane person — Collision rendering claimant insane — Claim brought more than three years after collision — Section 13(1)(*a) o*f Prescription Act applying and saving claim from prescription under s 23(1) of Road Accident Fund Act — Prescription Act 68 of 1969, s 13(1)(*a*); Road Accident Fund Act 56 of 1996, s 23(1).

The collision leading to the present claim rendered the claimant, Mr Motau, insane and unable to comply with the time, stipulated in s 23(1) of the Road Accident Fund Act 56 of 1996, for bringing a claim (see [1] and [3]).
The issue was whether s 13(1)*(a)* of the Prescription Act 68 of 1969 applied. It would save the claim from prescription.
Held, that it did. (*Smith*, supporting this position, had not been overruled by Mdeyide.

Extracts from case:
[14] In *Mdeyide 2*9 no reliance was placed on s 13(1)*(a)* of the Prescription Act. Mr Mdeyide instead continued to make his case on s 12(3) of the Prescription Act. The Constitutional Court held that a claimant under the RAF Act such as Mr Mdeyide was not entitled to rely on s 12(3) of the Prescription Act because s 12(3) was in conflict with s 23(3). But it is clear from the court's analysis of the issues before it that the question, whether s 13(1)*(a)* of the Prescription Act was available to a plaintiff whose claim was not protected by s 23(3) of the RAF Act, was not one of the issues before the Constitutional Court. Although *Mdeyide 2* refers to *Smith* with approval, but in another context, *Smith* is not overruled or even criticised in *Mdeyide 2.* And the judgment in *Mdeyide 2* did not refer to the issue of the availability of s 13(1)*(a)*, left open in *Mdeyide 1.*
[15] A conclusion that *Smith* was impliedly overruled by *Mdeyide 2* would carry with it the consequence that our apex court has decided that not only insane persons, but also adult persons prevented by superior force from seeing an attorney or themselves going to court to take out process with which to interrupt prescription in a claim under the RAF Act, would be deprived of any prescription protection. I put three categories of such adults to counsel for the Fund: the insane person, the person in solitary confinement without any power to give instructions to an attorney, and a young woman living in a highly patriarchal society which forbade her to take any action herself to enforce her rights and ignored her wishes to do so.
[16] Counsel for the Fund acknowledged that each of the persons affected in those examples must, by the logic of counsel's argument, be deprived of Prescription Act protection.
[17] Furthermore, as was observed in *Mdeyide 1*, even under the pre-democratic dispensation, the failure of a person to do the impossible could constitute an answer to a defence that the plaintiff's action was time-barred. Parliament is presumed to know the law. On the Fund's argument, the answer that it was impossible for the plaintiff to comply with s 23(3) of the RAF Act would not be available in relation to claims under the RAF Act. One would expect clear language to express such an intention and to change the law.

[18] On the Fund's argument, the Constitutional Court has held, without ever actually saying so, that significant classes of highly vulnerable people have been deprived of the protection afforded by *Smith*. And this in relation to a statute intended to afford relief to, amongst others, those same vulnerable people. I cannot accept that our apex court would, to adapt the language in *Smith,* without saying so expressly impute such an unjust intention to Parliament; the more so because those, in my view, obvious examples were not even referred to, let alone examined, by the Constitutional Court in Mdeyide 2.
[19] I therefore conclude that *Mdeyide 2* did not overrule *Smith*, and that *Smith*, by which I am bound, remains good law.

STAUFEN INVESTMENTS (PTY) LTD v MINISTER OF PUBLIC WORKS AND OTHERS 2019 (2) SA 295 (ECP)

Expropriation — Legality — State expropriating part of farm on which Eskom had mistakenly built substation two decades before — Substation serving public good — Costs of relocation prohibitive — Expropriation rational, valid — Application for review of decision to expropriate dismissed — Constitution, s 25(3); Electricity Regulation Act 4 of 2006, s 26(1) and (3); Expropriation Act 63 of 1975, s 2(1).

Electricity — Supply — Eskom — Obtaining expropriation order to secure electricity supply via substation mistakenly built on wrong land — Application for review of decision to expropriate dismissed — Constitution, s 25(3); Electricity Regulation Act 4 of 2006, s 26(1) and (3); Expropriation Act 63 of 1975, s 2(1).

National electricity provider Eskom (the second respondent) had since 1997 operated an electricity substation on a fenced-off one-hectare area (the site) of a farm Staufen had bought in 2007. Staufen and Eskom subsequently agreed that Eskom had no legal right to occupy the site because the substation had mistakenly been built on the wrong farm. In November 2015 Staufen brought an application for the eviction of Eskom. In April 2016 the parties agreed to an order suspending eviction pending an application by Eskom to the responsible minister (the first respondent) for the expropriation of Staufen's rights over the site. In September 2016 Eskom submitted an expropriation application framed in terms of s 26 of the Electricity Regulation Act 4 of 2006 (the Regulation Act) and s 2(1) of the Expropriation Act 63 of 1975. Staufen argued throughout for the relocation of the substation to adjacent state-owned land. But the minister granted the application and approved the registration of servitudes in favour of Eskom. The minister reasoned that the resulting expropriation was for a public purpose and in the public interest, and would, moreover, facilitate the achievement of Eskom's objectives under the Regulation Act. The minister pointed out that the relocation suggested by Staufen would be expensive and wasteful (see [40] for the minister's reasons).
In the present application for the rescission of the minister's decision Staufen argued that the actual purpose of the expropriation was to ex post facto legalise Eskom's unlawful occupation of the site; that the decision to expropriate was in conflict with the principle of legality; and that the expropriation was not in the public interest or for any of the purposes set out in s 26 of the Regulation Act (see [44] – [64] for the details of Staufen's arguments).
Section 2(1) of the Expropriation Act states that the state may expropriate 'any property for public purposes' and s 26 of the Regulation Act allows it if the land is reasonably required 'to enhance electricity infrastructure in the national interest' and

Eskom is unable to acquire it by agreement with the owner (see [33]). Both provisions are subject to s 25 of the Constitution, which provides that 'property may only be expropriated in terms of a law of general application . . . for a public purpose or in the public interest . . .'. (see [35] for the text of s 25). The legality of arbitrary expropriation under a law of general application is testable under the limitation clause in s 36 of the Constitution.

Held

Staufen's argument that the expropriation was not for the limited purposes set out in s 26 of the Regulation Act lost sight of the fact that regularising Eskom's occupation, albeit ex post facto, would logically enhance electricity infrastructure as intended in s 26 while the alternative would be disastrous electricity supply to the surrounding area (see [63]). As to Staufen's relocation argument, such an undertaking would entail enormous expenditure and would result in highly prejudicial power outages by consumers dependent on the substation, to whom Eskom provided a service for a vital public purpose.

To strike a fair balance between this public purpose and Staufen's property rights it had to be kept in mind that Eskom's lack of rights was the result of an error and that it did not wilfully violate the principle of legality or Staufen's property rights (see [72]). The minister's decision to expropriate was correct: the substation served the public and the costs and effort involved in dismantling, relocating and installing a new substation a short distance away could rather be applied to build a new substation where there was a greater demand for electricity (see [73]). The expropriation was bona fide, for a public purpose, and enhanced the electricity infrastructure for the benefit of the public (see [74] – [75]). In the result the application for the review of the minister's decision would be dismissed.

SEBENZA SHIPPING & FORWARDING (PTY) LTD v PASSENGER RAIL AGENCY OF SOUTH AFRICA SOC LTD 2019 (2) SA 318 (GJ)

Provisional sentence — Practice — Requirement in High Court practice manual that original liquid document on which provisional sentence sought must be handed up in court — Plaintiff relying on acknowledgement of debt sent to it by defendant by electronic means — Such document constituting original for purposes of provisional sentence — If not constituting original, then non-production thereof would be condoned — Practice manual should be amended to delete such requirement.

The plaintiff based its claim for provisional sentence against the defendant on a liquid document, sent by electronic means, acknowledging the defendant's debt to plaintiff. One of the bases upon which the defendant attempted to answer the claim for provisional sentence was that the plaintiff failed to hand up the original document on which the claim was based. This, based on a provision in the practice manual of the High Court division hearing the matter, which provides that '(t)he original liquid document upon which provisional sentence is sought must be handed to the court when the provisional sentence is sought'.

Held

For purposes of provisional sentence, the document in the possession of the plaintiff was indeed an original, as that was what the plaintiff received from the defendant. (At [3].)

If not the original, it was 'the best evidence that the person adducing it could reasonably be expected to obtain', as provided for in s 15(3) of the Electronic

Communications Act (Ecta) which confirmed the admissibility of data messages in such cases. The document should accordingly be given due evidential weight. The availability of the only document which the plaintiff received should be adequate for purposes of provisional sentence — especially where, as in the present case, it was not disputed that it was indeed the correct document — whether seen as the original or as a copy received by the plaintiff.
The practice manual purported to narrow the ambit of Uniform Rule 8, which dealt with provisional sentence and did not require an original document to be produced; was more onerous than s 68 of the Bills of Exchange Act 34 of 1964, which only prohibited a court from granting provisional sentence where the claim was based on a 'promissory note' — which was not the case here — if the original bill or note could not be produced; and left a lacuna by failing to provide for the modern-day practice of electronic communications. The court was enjoined 'to protect and regulate its own process' as confirmed in s 173 of the Constitution, and the practice manual rather restricted a process which it should not; it should accordingly be amended by deleting the requirement that it was obligatory to produce an original document.
The reason why the original was with the defendant was clear: that it was transmitted electronically; and that the defendant refused to furnish an 'original' document to the plaintiff was undisputed. For these reasons, if the document were not an original, the non-production thereof would be condoned, and consequently the defence of the absence of the original document would fail.

SOUTH AFRICAN CRIMINAL LAW CASES MARCH 2019

S v KHOZA AND ANOTHER 2019 (1) SACR 251 (SCA)

Sentence — Prescribed minimum sentences — Criminal Law Amendment Act 105 of 1997 — Failure to give notice to accused of applicability of minimum-sentence legislation — Whether accused prejudiced — Prejudice would exist if reasonable possibility that defence or response of accused may not have been same.

In an appeal against sentences of life imprisonment and 20 years' imprisonment imposed for murder and robbery with aggravating circumstances, where the provisions of the Criminal Law Amendment Act 105 of 1997 were applicable, the court needed to consider the effect of the appellants' having been informed of the applicability of the minimum-sentencing regime only after conviction.
Held, that the question of prejudice was determined by an objective facts-based inquiry and was similar to the question whether an accused person had been prejudiced by a defective charge, which also directly implicated s 35(3)*(a)* of the Constitution. Prejudice would exist therefore if there was a reasonable possibility that an accused may have conducted their defence differently had they been informed at the outset of the trial of the applicable provisions.
Held, further, that, had the appellants known from the outset that they were exposed to life imprisonment, they may well have conducted their cases differently. In the peculiar circumstances of the present case, the sentencing proceedings in respect of the appellants were vitiated by an infringement of their fair-trial rights. Their sentences therefore had to be set aside and the matter remitted to the trial court to impose sentence afresh.

S v DAVIDS 2019 (1) SACR 257 (WCC)

Robbery — Aggravating circumstances — What constitutes — Accused pushing complainant out of way while escaping not constituting aggravating circumstances for purposes of s 1(1) of Criminal Procedure Act 51 of 1977.

The appellant was charged in a regional magistrates' court with a single count of housebreaking with intent to rob and robbery with aggravating circumstances, as intended by s 1(1) of the Criminal Procedure Act 51 of 1977 (the CPA). He pleaded guilty and handed in a statement in terms of s 112(2) of the CPA in which he said that, as he was walking past a certain building, he noticed that the window on the second-floor balcony was open.He climbed up onto the balcony, opened the window wider and entered the main bedroom where he took a cellphone and a watch. While he was still busy the complainant jumped up and screamed, and he immediately fled, pushing her off her feet as he ran away.
The magistrate convicted him of housebreaking with intent to rob and he was sentenced to six years' imprisonment in respect of that offence. He was also sentenced to 15 years' imprisonment in respect of robbery with aggravating circumstances.
Held, that the act of pushing the complainant off her feet did not establish 'aggravating circumstances' as defined in s 1(1) of the CPA.
Held, further, that the court had committed a serious misdirection in convicting the appellant of two offences, whereas he had only been charged with one, and had pleaded guilty to only one charge.
Held, accordingly, that the conviction had to be changed to one of housebreaking with intent to rob and robbery, and the sentence reduced to six years' imprisonment.

S v BRAND 2019 (1) SACR 264 (GJ)

Sentence— Habitual criminal — Declaration as in terms of s 286 of Criminal Procedure Act 51 of 1977 — Accused not warned in advance of provisions of section — Such warning should have been given at previous trial — Declaration set aside and replaced with sentence of fixed term of imprisonment.

The appellant was convicted in a magistrates' court of fraud involving an amount of R24 000. When his previous convictions were revealed the magistrate took the view that the offence merited punishment in excess of its jurisdiction and accordingly referred it to the regional court for sentence. The regional court then declared the appellant a habitual criminal.
On appeal, the court noted that there had been no prior warning to the appellant that on a subsequent conviction he could be declared a habitual criminal.
Held, that declaring an accused a habitual offender was a drastic sentencing option and, if imposed, led to exceptional punishment. The preconstitutional authorities grasped this notion and established the salutary practice of requiring a prior warning at a previous hearing. If this was the position prior to our constitutional era, the practice should find even more application in the constitutional era, having regard to an accuseds' entrenched constitutional right to a fair trial. (See [10] and [33].)
Held, further, that, since the warning could not be given at the commencement of a subsequent trial because of the prejudicial consequences of revealing the previous

convictions to the court at that stage, the warning should be given at the sentencing stage in the earlier trial.
Held, accordingly, that the declaration as habitual criminal had to be set aside and replaced with a term of direct imprisonment. A sentence of seven years' imprisonment was appropriate.

S v MASUKU 2019 (1) SACR 276 (GJ)

Evidence— Witness — Children — Identification — Child complainant in sexual offence — Incumbent on court to never reveal such child's identity.
Evidence — Witness — Children — Cross-examination — Child complainant in sexual offence case — Questioning on details of genitalia and intricate sexual matters showing disrespect to child — Duty of legal representatives and court to protect child.

In an appeal against a conviction and sentence in a regional magistrates' court for rape, the court dismissed the appeal and increased the sentence of 15 years' imprisonment to 18 years' imprisonment, but noted its concern with aspects of the trial.
The first was that the court a quo named the two children who were the complainants, and their mothers. The court held that in criminal proceedings dealing with a sexual offence against a child, the court was obliged to protect the child complainant in every possible way without undermining the rights of an accused to a fair trial. This meant that the identity of the child had to be protected because that would serve the best interests of the child: identification compromised the child's future and placed them at risk of being ridiculed or pitied, which diminished their dignity as well as that of their parents. To avoid this harm from ensuing it was incumbent on courts to never reveal such child's identity.
The second matter of concern was that of the cross-examination of the children. The court held here that they were both subjected to the same intense and crude questioning. The appellant's attorney had crossed the line of common decency and had conducted himself in a manner contrary to his ethical duty as an officer of the court. To ask a child questions about the details of a man's anatomy, or to query her knowledge about intricate sexual matters, showed grave disrespect to the child. It was generally wrong for a child to be subjected to such crude cross-examination. The questions as well as the tone used by the attorney also demeaned the court and its processes. It was important that legal representatives avoided becoming overzealous in the pursuit of their client's case and losing all sense of proportion. It was the duty of presiding officers to vigilantly guard against allowing such pointless questions being raised, whose only effect was to cause embarrassment and psychological harm to the victims of those brutal assaults.

S v MADHINHA 2019 (1) SACR 297 (WCC)

Admission of guilt — Review — Conviction and sentence in terms of s 57(6) of Criminal Procedure Act 51 of 1977 — Not verdict but automatic consequence of administrative act — Review in terms of s 304(4) of Act appropriate way to bring review of proceedings.

When the accused attempted to acquire a police clearance certificate so that he could become an Uber driver he discovered that he had a criminal record relating to an admission-of-guilt fine that he had paid eight years earlier resulting from an altercation at the roadside where he was attempting to sell grass sods. He was arrested on that occasion by the police and taken to the police station where a docket was opened, and his fingerprints taken. He was detained but was handed a written notice (J534) which included provision for an admission-of-guilt fine of R500 without appearing in court. He paid the fine and was released. After payment, the notice and the admission-of-guilt fine were processed at the magistrates' court and the particulars written in the criminal record book. A magistrate examined the documents in terms of s 57(7) of the Criminal Procedure Act 51 of 1977 (the CPA) and did not, after examination, set aside the conviction and sentence in terms of the provision. On the strength of this the police entered the accused's particulars, and the particulars of the charge and admission of guilt, as a criminal record. The accused stated in his affidavit that he had only paid the fine to secure his release.
Held, that a conviction and sentence of an accused in terms of s 57(6) was sui generis and not a verdict. It was not even a pronouncement by the clerk of the court but was an automatic consequence of an administrative act performed by a member of the court's support services.
Held, further, that s 304(4) of the CPA was the appropriate way to bring a review of the proceedings where the magistrate had not set aside the conviction and sentence in terms of s 57(7). The accused had placed sufficient material before the court to set the proceedings aside and allow should the state still be inclined to prosecute, to have the accused's guilt proved beyond reasonable doubt in a court of law. (See [39].) The conviction and sentence had to be set aside.

Search and seizure — Search — What constitutes — Law-enforcement official shining light into vehicle revealing two hunting rifles — Items would have been easily visible in daytime — No search carried out.

As a result of information received by the provincial nature-conservation authorities concerning illegal hunting out of season, night patrols were introduced in the district concerned. Late one night in December 2014 two nature conservation officials observed a spotlight moving repeatedly back and forth across the veld in the distance, a common occurrence during illegal night hunting. The officials observed this for approximately 45 minutes until the spotlight disappeared. Whilst they stood next to their patrol vehicle on the side of the road with its headlights on, a vehicle approached from the same direction where they had seen the spotlight activity. The vehicle stopped next to them and they could see two kudu carcasses on the load bed of the vehicle, that were still warm. Two spotlights and a battery were also clearly visible in the back of the vehicle, which had been driven by the third applicant, a 16-year-old boy who was accompanied by his girlfriend. Another vehicle arrived and the occupants (the first and second applicants) approached the two nature conservation officials. Whilst one was interacting with the occupants of the vehicles, the other official walked to the vehicle that had just arrived and shone his torch into it where there was a fairly large area between the seats in the back of the cabin. He observed two hunting rifles lying in plain view in the area behind the seats of the vehicle. There was also a steenbok lying in plain sight on the load bed of that vehicle. Criminal charges were brought against the applicants, and the carcasses, lighting equipment and rifles were seized for use as evidence against the applicants.

In the present application the applicants sought an order declaring, inter alia, that certain of the evidence was obtained in an unlawful and unconstitutional manner and could accordingly not be used in their trial. It was contended on behalf of the applicants that the official who had walked to the second vehicle and used his torch to illuminate the interior of the vehicle through the closed window had thereby conducted an unlawful search of the vehicle. No serious complaint was made in respect of the items found on the back of the first vehicle which were all in plain public view.
Held, that common sense dictated that the official's observations would not have constituted a search had the incident occurred in daylight, and in the present circumstances there could not have been any reasonable expectation of privacy in relation to the steenbok and the hunting rifles. It followed that there was therefore no search and accordingly no violation of the applicants' rights in terms of s 14 of the Constitution. The application was dismissed.

LATHA AND ANOTHER v MINISTER OF POLICE AND OTHERS 2019 (1) SACR 328 (KZP)

Damages — Measure of — For unlawful arrest, detention and assault — Plaintiffs subjected to most humiliating, degrading and dehumanising treatment at hands of police and held for six years and 11 months before they were acquitted — Plaintiffs awarded R3,5 million each in respect of non-patrimonial damages.

The plaintiffs were arrested on 12 June 2006 on several serious charges and were held in custody until their acquittal on 6 May 2013, some six years and 11 months later. Whilst incarcerated, they were viciously assaulted and tortured by members of the police and were held in squalid conditions. They instituted action for wrongful arrest and detention, claiming R7 million each. The defendants conceded liability but disputed the quantum and had already made an offer of R3,8 million for each plaintiff, which offer had been rejected.
Held, that in the light of the factual situation and the nature of the evidence adduced by both plaintiffs; awards in previous cases; the unprecedented duration of the detention; and the huge injustice done to both plaintiffs, while without in any way trying to punish the defendants for the wrongs committed by their servants, a fair and reasonable amount for non-patrimonial damages should be the sum of R3,5 million for each plaintiff.

VAN ROOYEN AND ANOTHER v MINISTER OF POLICE AND OTHERS 2019 (1) SACR 349 (NCK)

Search and seizure — Search warrant — Validity of — Affidavit attested before officer in same directorate but different unit — No abuse of power or gross violation of rights of person searched — Search warrant valid.
Search and seizure — Search warrant — Validity of — Warrant not setting out specific sections of legislation alleged to have been breached nor dates and times of the alleged offences — Such specifics not expected of police at outset of investigation — Search warrant valid.

The applicants applied for an order setting aside a search warrant in terms of which the police had searched their premises and seized documentation, cellphones, cheque books, and computer equipment for the purposes of a prosecution for alleged illegal gambling. They contended, inter alia, that the affidavit in terms of which the warrant was authorised was defective in that it had been attested before a lieutenant colonel attached to the same unit of police that conducted the search. They also attacked the alleged insufficiency of the information provided for the obtaining of the search warrant in that the offences were referred to in an omnibus fashion, where no dates, periods or the particular sections of the relevant legislation were identified.
Held, that to set aside a warrant on the basis that a police officer had an interest in the matter would constitute a purely technical basis, especially in the present case where there was no evidence of any abuse of power or gross violation of the rights of a person to be searched. In the present instance it had not been shown nor was it alleged that the respondents had disregarded the rights of the applicants. In any event, although the two police officers in question were attached to the Directorate for Priority Crime Investigation, they functioned in two separate units: one in the Commercial Crime Investigation Unit and the other in the Serious Corruption Investigations Unit.
Held, further, that it could not be expected from the police, at the initial stages of an investigation, to include in a warrant when, where and what specific offences were committed as they still had to thoroughly investigate to determine which offences had been committed. The search warrant was accordingly not defective. (See [50].)

S v MYENI 2019 (1) SACR 360 (ECG)

Fraud— Sentence — Conspiracy to defraud municipality by hacking its software and intercepting bank payment notifications — Involving R1,4 million — Society expected courts to treat persons who stole from public purse harshly — Such money intended for much-needed services to be delivered by municipalities — Sentence of 15 years' imprisonment confirmed.
Fraud — Sentence — Factors affecting — Targeting of local authorities — Society expected courts to treat persons who stole from public purse harshly — Such money intended for much-needed services to be delivered by municipalities — Sentence of 15 years' imprisonment confirmed.

The appellant and two other accused were convicted in a magistrates' court of contravening provisions of s 86 of the Electronic Communications and Transactions Act 25 of 2002; fraud, alternatively theft; and contravening s 4 of the Prevention of Organised Crime Act 121 of 1998. He and his co-accused were sentenced to effective terms of 15 years' imprisonment. He appealed against his conviction and sentence.
The counts related to a conspiracy by the three accused and a person already convicted of the same offence and who had planned the present conspiracy whilst serving sentences for identical offences. The conspirators, by use of computer software that captured keystrokes, gained access to the computer system of a municipality; intercepted data from the computer; intercepted a RVN (random verification number) sent to an authorised employee of the municipality by its bank; and pretended that certain payments made by the municipality had been made to properly authorised beneficiaries (a count of fraud involving R1,4 million).

The court dismissed the appeal against conviction. In respect of the appeal against sentence, the appellant contended that there were substantial and compelling circumstances that justified the imposition of a lesser sentence than that of the 15-year minimum sentence prescribed for the fraud count — the municipality had only suffered a loss of R500.
Held, that the fact that the appellant had not benefited from the offences and that he played a lesser role than one of his co-conspirators, that he was the father of three minor children, earned a salary of R8000 per month and had no previous convictions, did not constitute substantial and compelling circumstances justifying a lesser sentence. He had been convicted of serious offences and members of society expected courts to treat persons who stole from the public purse harshly. Such money was intended for much-needed services to be delivered by municipalities. The appellant and others had planned the commission of these offences over a long period and in the circumstances the sentences were appropriate. The appeal was dismissed.

All SA [2019] Volume 1 March 2019

Haarhoff and another v Director of Public Prosecutions Eastern Cape (Grahamstown) [2019] 1 All SA 585 (SCA)

Criminal law and procedure – Rape – Mental competence of complainant – Admonition by trial court – Correctness of procedure – Issues for determination before the trial court were whether the complainant's evidence was properly before the trial court, whether her evidence was sufficiently reliable to sustain a conviction and whether the sentence imposed by the trial court was appropriate.

Evidence – Discrepancy between the complainant's biological and mental age – Issues raised on appeal related to whether the complainant had been properly admonished to tell the truth as contemplated in section 164 of the Criminal Procedure Act 51 of 1977 – Whether her evidence was sufficiently reliable to sustain the appellants' convictions and whether the sentences imposed on them by the trial court were appropriate.

The appellants were convicted of rape in contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, and were each sentenced to 20 years' imprisonment. They obtained leave to appeal in the present Court, against their convictions and sentence.

Held – The issues for determination before the trial court were whether the complainant's evidence was properly before the trial court, whether her evidence was sufficiently reliable to sustain a conviction and whether the sentence imposed by the trial court was appropriate. A report by a clinical psychologist stated that there was a considerable discrepancy between the complainant's biological and mental age. The trial court, accepted the unchallenged evidence of the clinical psychologist that although the complainant was mentally challenged with a mental age of a 10-year-old, she was competent to testify, as she was able to understand what it meant to tell the truth, what it meant to lie, and could be admonished. The issues raised on appeal related to whether the complainant had been properly admonished to tell the truth as contemplated in section 164 of the Criminal Procedure Act 51 of 1977, whether her

evidence was sufficiently reliable to sustain the appellants' convictions and whether the sentences imposed on them by the trial court were appropriate.

The trial court's acceptance of the unchallenged evidence of the clinical psychologist was confirmed as correct, as was that Court's admonition of the complainant.

That left the issue of whether the evidence presented on behalf of the State was reliable enough to sustain a conviction on the charge of rape. The State bears the onus of proving the guilt of an accused person beyond reasonable doubt.

Evidence of a child must be approached with caution. The same applies to the evidence of a single witness. The Court has to satisfy itself that the evidence given by the witness is clear and substantially satisfactory in material respects. The Court is to look for features, in the evidence, which bear the hallmarks of trustworthiness to substantially reduce the risk of wrong reliance upon the evidence of a single witness. The judgment of the trial court demonstrates that it was alive to the application of the cautionary rule on account of the complainant being a single witness to the rape and also on account of her mental age. The present Court found that although the complainant was not an intelligent witness, she was a demonstrably honest, credible and reliable witness. On the other hand, the appellants' evidence was correctly found by the trial court to be false beyond reasonable doubt. It was riddled with improbabilities and inconsistencies. The Court was satisfied that the appeal against the convictions and sentences had to be dismissed.

Masuku and another v South African Human Rights Commission obo South African Jewish Board of Deputies [2019] 1 All SA 608 (SCA)

Constitutional and Administrative Law – Freedom of expression – Hate speech – Bounds of constitutional protection – Core of the appeal was the Equality Court's interpretation of hate speech – Section 16(2)(c) of the Constitution qualifies the extent and scope of the right to freedom of expression – Bounds of constitutional protection are only overstepped when the speech involves propaganda for war; the incitement of imminent violence; or the advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

A military operation launched by Israel against Hamas in the Gaza Strip led to the death of more than 700 people, sparking strong worldwide reaction. The first appellant ("Mr Masuku") was the secretary of the International Relations arm of the Congress of South African Trade Unions ("COSATU") at the time. COSATU fiercely opposed the Israeli actions. Mr Masuku made several statements online and at a university gathering. The second respondent, the South African Jewish Board of Deputies ("SAJBOD"), lodged a complaint with the first respondent, the South African Human Rights Commission (the "Commission"), alleging that the statements made by Mr Masuku amounted to hate speech. The Commission found that the statements did amount to hate speech. The Equality Court agreed when the complaint was referred to it. The present appeal, with leave of the Equality Court, was against that judgment.

Held – That at the core of the appeal was the Equality Court's interpretation of hate speech. The Court's consideration of the contention that the statements amounted to unambiguous threats of harm and violence, and amounted to hate speech directed at members of the Jewish Community, was based solely on the Constitution. Section 16 thereof guarantees the right to freedom of expression. However, the Constitution

recognises that the right to freedom of expression must be limited in certain circumstances for the protection of other rights, particularly the right to dignity. Thus, section 16(2)(c) of the Constitution qualifies the extent and scope of the right to freedom of expression. Of relevance to this case was that under that sub-section, advocacy of hatred is excluded from protection where such hatred is based on race, ethnicity, gender or religion and constitutes incitement to cause harm. A hostile statement is not necessarily hateful in the sense envisaged under section 16(2)(c). The bounds of constitutional protection are only overstepped when the speech involves propaganda for war; the incitement of imminent violence; or the advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm. Nothing that Mr Masuku wrote or said transgressed those boundaries, however hurtful or distasteful they might have seemed to members of the Jewish and wider community.

Upholding the appeal, the Court dismissed the complaint against the appellants.

Changing Tides 17 (Pty) Ltd NO v Mabiletsa and others and a related matter [2019] 1 All SA 619 (GJ)

Banking and Finance – Debtor's personal circumstances – Relevance – Foreclosure of residential property – Court had to decide whether the defendant's personal circumstances should preclude the creditor from taking a monetary judgment and foreclose on the mortgaged property – A court cannot grant a judgment for repayment of the loan prior to ordering a foreclosure of the property.

Constitutional and Administrative Law – Constitutional imperatives have softened the general common law principle that a party is bound by the terms of his contract, including those terms dealing with the consequences of a breach.

In two separate cases on the unopposed roll, the considerations to be taken into account were similar. The first case was for default judgment and the other for summary judgment. Both cases dealt with payment of the outstanding balance on a home loan and foreclosing on the property bonded as security.

Held – The Court had to decide whether the defendant's personal circumstances should preclude the creditor from taking a monetary judgment and foreclose on the mortgaged property. Each defendant contended that there were circumstances that should be taken into account to prevent foreclosure. It is accepted that a court cannot grant a judgment for repayment of the loan prior to ordering a foreclosure of the property.

Constitutional imperatives have softened the general common law principle that a party is bound by the terms of his contract, including those terms dealing with the consequences of a breach. Legislation such as the National Credit Act 34 of 2005 and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 have led to the establishment of certain clear principles relevant to the present enquiry regarding residential property subject to a bond held as security for a home loan. A home loan creditor cannot separate the monetary judgment from the order for foreclosure. Accordingly, if the executability of the bond is postponed for any reason then the order for payment must also be postponed. Judicial oversight is required in all cases of execution against immovable property. Sale of a property for a nominal amount results in the home-owner not only losing the house but also remaining indebted to the mortgagee for the outstanding sum of the indebtedness.

One of the aims of the National Credit Act is to enable a credit receiver to retain and ultimately own the property purchased while fulfilling his contractual obligations under the agreement or if he falls into arrears to have determined in a fair manner whether he will be able to pay the debt by a reasonable restructuring of his payment obligations in a manner consistent with equity, good faith, reasonableness and equality.

In the first case before the Court, the parties subsequently concluded a consent to judgment. It was therefore inappropriate for the Court to consider re-adjusting rights. It was decided that an order foreclosing on the security of the bond should not be granted at this stage with the consequence that the monetary judgment sought had to be stayed. The defendants had to demonstrate their ability to meet their financial obligations going forward by being afforded some degree of debt relief through a three-month partial moratorium.

In the second case, the defendant was a single mother who had run into financial distress due to changing circumstances. Nevertheless, she had consistently made some level of repayment to the plaintiff bank. To facilitate the plaintiff's rehabilitation, the Court set out a payment plan, offering the defendant a short moratorium on action by the bank.

City of Cape Town v Namasthethu Electrical (Pty) Ltd and another [2019] 1 All SA 634 (WCC)

Constitutional and Administrative Law – Procurement – Tender process – Award of contract – Cancellation – Validity of cancellation – Adjudication process.

Contract – Validity of the contract was intended to be determined by reference to adjudication – Adjudicator not empowered to deal with the question of the validity of the agreement.

In March 2014, the applicant (the "City") advertised a tender for the supply, retrofit and installation of energy efficient luminaries at the Cape Town Civic Centre. Having been the successful bidder, the first respondent ("Namasthethu") was awarded the tender on 19 August 2014. On 17 September 2014, an unsuccessful bidder lodged an appeal in which it claimed that Namasthethu and its directors had been convicted of fraud in August 2013. The appeal was not entertained by the City due to its lateness. The City went ahead and concluded a written agreement with Namasthethu on 25 November 2014, which contract was to run for 18 months. On the same day, the City wrote a letter to Namasthethu informing it that it had come to the City's attention that Namasthethu and/or its directors had been found guilty on charges relating to fraud or corruption during August 2013. The City's Forensic Services Department conducted an investigation, and on being advised that the allegations of fraud were true, the City terminated the contract with Namasthethu.

Namasthethu disputed the cancellation of its contract, and had an adjudicator (the "second respondent") appointed to arbitrate the dispute. The City refused to participate in the process. The adjudicator upheld various claims by Namasthethu and found the City liable to Namasthethu for payment of various amounts.

In the present application, the City sought a declaration that its agreement with Namasthethu was void *ab initio*; alternatively that the agreement was validly terminated by the City on 15 March 2016. It also sought to set aside the determination made by the second respondent.

Held – The question to be determined first was whether the parties intended the question of the validity of the contract allegedly induced by fraud to be referred to adjudication. On a proper interpretation of the relevant clauses of the agreement, it could only have been the intention of the City that any dispute arising from the termination of the contract in terms of applicable clause could be referred to adjudication. However, it could not be found that the validity of the contract was intended to be determined by reference to adjudication. Therefore, the adjudicator was not empowered to deal with the question of the validity of the agreement.

Although the issues to be determined by the adjudicator were issues of law, the second respondent was a surveyor and a construction expert. His determination was found to have been arbitrary in many respects.

Finally, the Court found that the City had good grounds for cancellation of the agreement. The allegations of fraud on the part of Namasthethu and its directors required the City to cancel the agreement. The Court confirmed the validity of the cancellation.

Cloete v Van Meyeren [2019] 1 All SA 662 (ECP)

Personal Injury/Delict – Claim for damages – Actio de pauperie – Attack by dogs – Liability on the part of the defendant had to be established based on the actio de pauperie – Two categories of instances applicable to special defences in pauperian liability exist – Defendant relied on the second category – Third party is in charge or control of the animal and by his negligent conduct failed to prevent the animal from injuring the victim.

In February 2017, the plaintiff was attacked by the defendant's three dogs on the street outside the defendant's home. He was very seriously bitten, ultimately having his left arm amputated at the shoulder as a result of the attack. Although the defendant's property was walled, fenced and separated from access to the street by a gate, that gate was open on the day in question. It was suggested that the gate had been opened by an intruder. What was in dispute was whether the gates had been left padlocked until then, or merely closed. The defendant stated that the gate was locked on the day in question and the padlocks were broken and damaged by an intruder.

Held – The Court was unable, on the probabilities (and in the absence of controverting evidence), to reject the defendant's evidence that the gate had been locked by the defendant and later broken open by an intruder. It was therefore accepted that the sole cause of the dogs escaping was the locked gate having been broken open, and left open by a third party intruder. Consequently, liability on the part of the defendant had to be established based on the *actio de pauperie.*

Two categories of instances applicable to special defences *in pauperian* liability exist. The defendant relied on the second category referred to by the Court, *viz* where a third party in charge or control of the animal and by his negligent conduct failed to prevent the animal from injuring the victim. That would exonerate the owner from *pauperian* liability – although the victim could claim under the *lex aquilia* from the third party. The owner of the domesticated animal, which *contra naturam* harmed a victim, must prove the defence that the harm was caused by the "controller's" negligence in his control of the animal. The causative position of negligent conduct of the third party relies on the third party being in control, or in charge, of the animal. No evidence existed in this case establishing the requirement of a third party controller's negligence as required or at all. However, the defendant attempted to place reliance

on a wider exception which raises the question of whether fault on the part of a third party, short of conduct falling within the established exception, which causatively contributes to injury arising from an animal acting *contra naturam sui generis*, is similarly an answer to a *pauperian* claim. An example is the negligence of a visitor to premises who leaves a gate open giving access to a yard within which a vicious dog is confined. Examining the authorities, the Court found no convincing support justifying the extension of a *pauperian* defence or exception as contended for by the defendant.

The plaintiff's claim thus succeeded on the merits, and the defendant was held liable for his proven damages.

Democratic Alliance v President of the Republic of South Africa and others and a related matter [2019] 1 All SA 681 (GP)

Constitutional and Administrative Law – Legal representation for government officials litigating in their private capacities – Obligation by State to pay such costs – Proper interpretation of section 3 of the State Attorney Act 56 of 1957 and of regulation 12.2.1 of the Treasury Regulations made in terms of the Public Finance Management Act 1 of 1999 – Court finding decisions by Presidency to procure private legal representation for former President and for the State to pay the legal costs incurred by him in his personal capacity in his criminal prosecution to be a breach of the principle of legality and unconstitutional – Impugned decisions also fell to be reviewed and set aside in terms of the Promotion of Administrative Justice Act 3 of 2000, as they were not authorised and ultra vires, and were materially influenced by an error of law.

Criminal charges brought against former President of South Africa, Jacob Zuma, led to decisions by the Presidency and the State Attorney to procure private legal representation for Mr Zuma and for the State to pay the legal costs incurred by him in his personal capacity in the criminal prosecution instituted against him.

In the two applications before the court, two political parties (the "DA" and the "EFF") sought the judicial review of the decisions in question. Other than for declaratory relief that the State was not liable for the legal costs incurred by Mr Zuma in his personal capacity in the criminal prosecution instituted against him, in any civil litigation related or incidental thereto and for any other associated legal costs, the DA sought to have the impugned decisions judicially reviewed under the provisions of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") or under the principle of legality, and the EFF sought the judicial review of the impugned decisions under the principle of legality.

The Presidency's stance was that it would continue to provide State funding for Mr Zuma's criminal trial on the basis that the decision was presumed to be valid and binding until it was set aside by a court.

Held – That the applications were heard together as they arose out of the same facts and both concerned the legality of the decisions to appoint private legal representation for Mr Zuma and to pay the legal costs incurred by him in his criminal prosecution and the related civil litigation.

The Court set out the history of the prosecution of Mr Zuma, and detailed previous attempts by the DA to challenge decisions made in such prosecution. It also explained what was referred to as the "Stalingrad" defence strategy adopted by Mr Zuma. In

terms of that strategy, criminal trials are postponed pending approaches to the civil courts, causing justice to be delayed and the speedy trials for which the Constitution provides not to take place. The State had funded Mr Zuma's Stalingrad defence strategy from before he had been indicted for the first time on 20 June 2005, with a costs to the taxpayer of between R16 788 781,14 and R32 million.

Generally, legal costs incurred by the State are paid by the department with authority over the person requesting legal assistance. The State Attorney may only obligate the funds of a department with the prior written approval of the accounting officer of that department. Legal costs are normally defrayed from funds allocated for that purpose from the departmental budget. In this case, the payment of Mr Zuma's private legal costs required the approval of the Director-General in the Presidency and it was paid to the Department of Justice and Correctional Services – the Office of the State Attorney in particular – from the budget of Legal and Executive Services in the Presidency.

The legislative authority invoked for the impugned decisions were section 3(1) or 3(3) of the State Attorney Act 56 of 1957 and regulation 12.2 of the Treasury Regulations made in terms of the Public Finance Management Act 1 of 1999 (the "PFMA"). The DA and the EFF argued that neither section 3 of the State Attorney Act nor regulation 12.2.1 of the Treasury Regulations authorises the State to procure private legal representation for government officials in their private capacities or to fund such private legal costs. Section 3, they argued, permits only the office of the State Attorney to itself provide legal representation to government officials in certain circumstances. In any event, the argument continued, those circumstances were clearly not met in Mr Zuma's case. Mr Zuma, on the other hand, argued that section 3(3) vests the State Attorney with a discretion to act for a government official in a matter, whether the government is a party or not, where it has an interest in the matter or where it is otherwise concerned in the matter. Government's interest or the public interest, Mr Zuma argued, is automatically implicated when a government official is charged with any criminal offence. Applying a contextual interpretation of the statutory provisions invoked by the Presidency and the State Attorney as authority for the impugned decisions, the Court found that the meaning to be attributed to the asserted statutory provisions as contended for by Mr Zuma was not warranted and had no basis in its language or in context. On its clear wording section 3(1)authorises the State Attorney to act on behalf of government and perform the work ordinarily performed by attorneys and other legal representatives in court. Section 3 is not a provision which provides authority for the appointment of private legal representatives for government officials to represent them in their private capacities in criminal proceedings against them and in related civil litigation nor does it confer the authority for state funding of such private external legal representation. Furthermore, Regulation 12.2 of the Treasury Regulations does not govern the provision of legal representation for government officials nor the payment by the state of the private legal costs incurred by government officials. The court concluded, therefore, on a proper interpretation of section 3 of the State Attorney Act and of regulation 12.2.1 of the Treasury Regulations, that those provisions did not authorise the impugned decisions by the Presidency and by the State Attorney to procure private legal representatives for Mr Zuma and for the State to pay for his private legal costs in defending the corruption and other criminal charges against him and in the ancillary or related civil legal proceedings. The impugned decisions were not authorised by the statutory provisions invoked by the Presidency and by the State Attorney and consequently amounted to

a breach of the principle of legality. The decisions were unconstitutional and fell to be set aside. They also fell to be reviewed and set aside in terms of PAJA, as they were not authorised and *ultra vires*, and were materially influenced by an error of law.

The court finally turned to consider a remedy that was just and equitable in the particular circumstances of this case. A just and equitable remedy is one that corrects and reverses unlawful conduct. The Court was of the view that a just and equitable remedy in all the circumstances of this case was one that required the State Attorney to render an account of all the private legal costs that were incurred by Mr Zuma in defending the criminal charges against him and in all the related or ancillary litigation, and to take the necessary steps to recover the amounts paid by the State for his private legal costs.

The DA and the EFF instituted their present review applications on 23 March 2018 and on 2 May 2018 respectively. Mr Zuma raised the issue of delay in bringing the applications, arguing that the DA, on its own version, became aware of the decisions that the State would fund the legal costs he incurred in his personal capacity in the criminal prosecution against him on 12 September 2008. He alleged further that the EFF application had not been brought within a reasonable time since the decision to fund Mr Zuma was taken as far back as 2006, that the EFF should have known about the decision to fund Mr Zuma's private legal costs from at least 2008. The Court considered whether the delay in each instance was unreasonable. It found that the DA and the EFF only came to learn of the nature and extent (at least in part) of the impugned decisions in March 2018, when the new President disclosed the relevant facts. It was concluded that the delays in initiating the DA and EFF review applications were not undue or unreasonable.

The Court went on to grant the DA condonation for bringing its review application out of the 180-day time limit imposed by PAJA. Having regard to all the facts and circumstances, the interests of justice dictated that the DA's delay in instituting its review application in terms of PAJA should be condoned and the 180-day period extended in terms of section 9.

Moyane v Ramaphosa and others [2019] 1 All SA 718 (GP)

Civil procedure – Costs – A court, in constitutional litigation, should not make an order against an applicant who acts bona fide to preserve his constitutional rights, or to uphold the rule of law in any given context, but there may be conduct on the part of the litigant that deserves censure by the court which may influence the court to order an unsuccessful litigant to pay costs.

Civil procedure – Interim relief – Requirements – In an application for interim relief, what needs to be established is a prima facie right even if it is open to some doubt, a reasonable apprehension of irreparable and imminent harm to the right, if an interdict is not granted, the balance of convenience must favour the grant of the interdict, and the applicant must have no other reasonable remedy.

In March 2018, the first respondent (the "President") suspended the applicant from his position as Commissioner for the South African Revenue Services ("SARS"), pending the institution of disciplinary proceedings against him. On 23 May 2018, the President announced the appointment of the fourth respondent as chairman of a disciplinary enquiry to be held. On the same day, the President also announced the appointment of the SARS Commission, to be chaired by the third respondent sitting with a number

of assessors. The third respondent prepared an interim report, including a recommendation that the applicant be removed from his post as Commissioner.

In an application to the Constitutional Court, the applicant sought to challenge, *inter alia*, the decisions and/or conduct of the President, and the conduct and rulings of the third respondent. In October 2018, the fourth respondent granted an application staying the proceedings before him, pending the outcome of the application to the Constitutional Court. However, based on the findings of the SARS Commission, the President delivered a letter notifying the applicant of his removal from office. After the President refused to retract the termination of employment, the applicant issued an urgent application in the present Court on 13 November 2018.

Shortly before the hearing, the applicant applied for the withdrawal of the third respondent's Counsel ("*Trengrove* SC") based on the fact that such Counsel had provided the applicant with a legal opinion in his capacity as Commissioner of SARS. The opinion which he solicited and obtained from Counsel concerned the powers of the Commissioner and the Minister of Finance and concerned the decision of the President to remove him from office. A conflict of interests was alleged.

Held – Given the facts, the only fiduciary duties owed to anyone in the present matter were by *Trengrove* SC to the President and the third respondent. Neither of them objected to his participation in the present proceedings. Accordingly, there was no basis for the applicant's objection, and his application in that regard was dismissed.

In an application for interim relief, what needs to be established is a *prima facie* right even if it is open to some doubt, a reasonable apprehension of irreparable and imminent harm to the right, if an interdict is not granted, the balance of convenience must favour the grant of the interdict, and the applicant must have no other reasonable remedy. When it evaluates where the balance of convenience rests, a court must recognise that it is invited to restrain the exercise of statutory power within the exclusive terrain of the Executive, such as in the present matter. It must assess carefully how and to what extent its interdict will disrupt such executive functions conferred by law, and thus whether the restraining order will implicate the tenet of division of powers. While a court has the power to grant a restraining order of that kind, it does not readily do so, except when a proper and strong case has been made out for the relief and then, even so, only in the clearest of cases.

The Court referred to the cogent, justifiable and rational considerations offered by the President in support of the decision taken by him. It was critical that the systemic issues plaguing SARS be dealt with expeditiously and decisively. In sharp contrast to those considerations, the applicant only relied on his loss of salary as a result of his removal from the position of SARS Commissioner. That was clearly and manifestly over-shadowed by compelling national interest at stake. Furthermore, in the absence of unlawfulness, fraud or corruption, the Court should not intrude on the terrain of the Executive.

Having regard to the submissions of the applicant as against those of the President and the third respondent, the Court concluded that the application for interim relief had to be dismissed. The first reason was that the application was not urgent as the applicant had failed to show that the *prima facie* rights he relied upon were of such a nature that, if not protected by an interim order, irreparable harm would result to them, which harm could not be reasonably addressed in the future. There was also no cause of action pleaded that could sustain the grant of interdictory relief against the release

of the final report of the third respondent. Thirdly, interim relief was sought pending the determination of the Constitutional Court application which had now been dismissed. In the absence of a proper pending application for final relief, interim relief could not be granted. The applicant failed to establish a *prima facie* right to set aside the third respondent's ruling, or the President's acceptance of the SARS Commission's recommendation. Significant too was the fact that the applicant had alternative remedies available to safeguard his rights and therefore did not require interim relief.

While the applicant sought punitive costs orders against the first and third respondents, and also in their personal capacity, the first and third respondents sought an order that the court dismiss the application with costs on an attorney and client scale. The accepted principle is that a court, in constitutional litigation, should not make an order against an applicant who acts *bona fide* to preserve his constitutional rights, or to uphold the rule of law in any given context. There may be circumstances that justify departure from the rule such as where the litigation is frivolous or vexatious. There may be conduct on the part of the litigant that deserves censure by the Court which may influence the Court to order an unsuccessful litigant to pay costs. In this matter, the conduct of the applicant was regarded as particularly reprehensible. It was vexatious and abusive. The application was consequently dismissed with costs including the costs of two Counsel, and on the attorney and client scale.

S v Rohde [2019] 1 All SA 740 (WCC)

Criminal law and procedure – Murder – Defeating or obstructing the administration of justice – Assessment of evidence – Conviction.

Evidence – Expert testimony as a substantial part of the evidence – Fundamental principle for the hearing of expert evidence is that experts are there to assist the Court – Court finding that the experts must remain unbiased and true to their disciplines and expertise.

In July 2016, the 46-year-old wife of the CEO of a prestigious realty company was found dead in her hotel room. The accused was the husband. He was charged with murder, with the State alleging that he had killed his wife and staged it to look like a suicide.

The deceased was accompanying the accused who was attending a realty conference at the hotel. The reason for her presence there was her knowledge that her husband's mistress would also be attending the conference, and although she had been assured that the affair was over, she still harboured suspicions. In the hours before her death, the deceased discovered that her husband's affair was still continuing, and an altercation occurred between her and the accused. Her death followed soon afterward.

According to the accused, due to his wanting to end their marriage, the deceased had hanged herself from the towel hook behind the bathroom door with the cord of her hair curling iron.

Held – Expert testimony was a substantial part of the evidence in this case. The fundamental principle for the hearing of expert evidence is that experts are there to assist the Court. They must remain unbiased and true to their disciplines and expertise. The Court remains the trier of fact. Adjudication of the dispute before it is the expertise of the Court, not the expertise of any expert witnesses.

The Court then assessed the evidence of each of the witnesses called. The State witnesses were found to be reliable and credible. The Court highlighted the various aspects of their evidence which raised doubts about the alleged suicide as the cause of death. On the other hand, the accused's testimony as to the events of the fateful morning was interspersed with inherent improbabilities and seen within the factual matrix of the matter, fell to be rejected as not being reasonably possibly true. His testimony was described as scripted and he was found to be unable to give answers on crucial issues which cast doubt on his version. The evidence of the accused not only left more questions than answers, but disintegrated into illogical statements. Based on the facts, the Court found that the evidence proved that the deceased, beyond reasonable doubt, did not commit suicide but that the accused had murdered the deceased.

The accused was convicted as charged.

Standard Bank of South Africa Limited v Hendricks and another and related matters [2019] 1 All SA 839 (WCC)

Civil Procedure – Foreclosure – Requirement of judicial oversight over orders of execution made against immovable property which is the primary residence of the judgment debtor – Uniform Rule 46A – Application of – Court concluding that new practice directive required, aligned with rule 46A, to provide for the manner and form in which information should be placed on affidavit before the Court in order that it can exercise its judicial oversight role in foreclosure matters.

On 13 September 2018, a number of foreclosure matters served in motion court by way of application in which an order of execution was sought against immovable property which was the primary residence of the judgment debtor. The matters were postponed, and the Judge President of the division, in terms of section 14(1)(a) of the Superior Courts Act 10 of 2013, thereafter referred the matters for hearing before the present Court as a Full Bench.

Uniform Rule 46A, which came into effect on 22 December 2017, is concerned with matters related to the execution against immovable property which is the primary residence of the judgment debtor. The application of the Rule was, in the main, the issue before the Court in this matter.

In *Gundwana v Steko Development CC and others* 2011 (8) BCLR 792 (2011 (3) SA 608) (CC), the Constitutional Court stated that the constitutional requirement of judicial oversight did not challenge the principle that a judgment creditor is entitled to execute upon the assets of a judgment debtor in satisfaction of a judgment debt sounding in money when the judgment debtor had willingly put his home up in some manner as security for the debt.

Submissions were invited by the Court on various issues, as set out by the Court in its judgment.

Held – Section 26(1) of the Constitution guarantees the right of access to adequate housing. As the Constitution requires judicial oversight over orders of execution made against immovable property which is the primary residence of the judgment debtor, rule 46A was promulgated. The present Court has previously stated that, as a fundamental aspect of the rule of law, execution mechanisms must be effective if they are to have legitimacy, and public confidence in them should not be lightly disturbed. They are also required to comply with mandatory consumer-protection processes

before a sale in execution can occur. The National Credit Act 34 of 2005 aims to protect consumers, while recognising that there must be reliable and effective enforcement mechanisms in the event of default.

The first issue raised for consideration is whether rule 46A introduces substantive legal requirements as opposed to simply procedural requirements, and if so, whether the rule is *ultra vires* the powers of the Rules Board. Rules of court may not lay down substantive legal requirements for a cause of action. They may restate the existing law and regulate the procedure that applies to that law, but where a rule of court is not procedural but substantive in nature, or seeks to expand the substantive law, it will be *ultra vires* and of no force or effect. As all the parties agreed that rule 46A was *intra vires*, the Court did not need to decide on the first issue.

The second question was whether, as is the practice in other divisions of the High Court, personal service by the sheriff is required prior to granting a money judgment for the accelerated full outstanding balance of monies lent, which monies are secured by a mortgage bond over immovable property. Rule 46A(3)(d) states that every notice of application to declare residential immovable property executable shall be served by the sheriff on the judgment debtor personally: Provided that the Court may order service in any other manner. All the parties agreed that personal service has benefits for the debtor and the banks. In matters where leave to execute against property which might be a person's home is sought, it was agreed that bringing notice of proceedings to the attention of the debtor by way of personal service leads to the possible resolution of a matter and can obviate the need for the matter to proceed to court. it was also agreed that a Sheriff's return of service which merely indicates that personal service was not possible and the summons was affixed to an outer door or placed in a post box on its own is not sufficient or acceptable service where an order to execute against the primary residence of the debtor is sought. Rule 46A(3) expressly requires that where personal service is not possible, the Court must be approached to order service in any other manner and that sufficient material is required to be placed before the Court to allow it to make such an order.

Next, the Court considered the circumstances under which it may be appropriate to grant a money judgment for the accelerated full outstanding balance and then postpone the application to declare the property secured by the bond specially executable given the impact on costs and the potential for attachment and execution of movables in the meantime. It also considered whether it has a discretion to decline to grant a default money judgment for the accelerated full outstanding balance and whether there are considerations to which regard should be had to ensure uniformity of treatment. The Court was of the view that both the money order and the execution order should be sought simultaneously by the creditor given the nature of the nature of the claims, the cost advantages in dealing with both orders at the same time, and the necessity to limit the piecemeal adjudication of such matters.

On the question of whether the postponement of the application for the money judgment under certain circumstances is objectionable or desirable, the Court held that a loan agreement secured by a mortgage bond over the primary residence of the judgment debtor has the potential to impact the right of access to housing, with the money order causally connected to and intrinsically linked to the order of special execution, given the existence of the mortgage bond over the primary residence of the debtor. Having regard to the debtor's section 26 right, the money judgment may be

postponed together with the order for special execution where a court, on a proper consideration of the facts before it, considers that to be in the interests of justice. The Court held that it would not be irrational for the Courts to adopt a procedure in terms of which in appropriate circumstances they postpone money judgments arising from home loans which have been granted over the primary residence of the debtor.

The conclusion of the Court after considering all the issues raised, was that it would be beneficial if a Practice Directive on foreclosures was implemented in the Division, which directive was congruent with rule 46A and the evolving constitutional jurisprudence, to provide for the manner and form in which information should be placed on affidavit before the Court in order that it can exercise its judicial oversight role in foreclosure matters. A draft affidavit was annexed to the judgment, as a possible directive.

The applications before the Court were postponed *sine die*.

End-for now