LEGAL NOTES VOL 4/2019

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SOUTH AFRICAN LAW REPORTS APRIL 2019

RUTA v MINISTER OF HOME AFFAIRS 2019 (2) SA 329 (CC)

Immigration — Refugee — Asylum seeker — Delay in applying for asylum — Effect — Operation of Refugees and Immigration Acts — Crimes excluding individuals from refugee status — Place of commission — Refugees Act 130 of 1998, Immigration Act 13 of 2002.

When Mr Ruta, a Rwandan national, entered South Africa in December 2014, he did not do so at a port of entry. He also had no visa. This made him an illegal foreigner under the Immigration Act 13 of 2002.

Fifteen months passed, and then Mr Ruta was arrested for traffic offences. His illegal foreigner status was then discovered.

He was later tried and imprisoned for the traffic offences. While imprisoned, the Department of Home Affairs moved to deport him. He sought to apply for asylum, but the Department's attitude was that it was too late, and his deportation should proceed. (See [1].)

Ultimately Mr Ruta obtained a High Court's interdiction of the deportation, and the Minister sought and received the High Court's leave to appeal to the Supreme Court of Appeal. The High Court also ordered Mr Ruta's release, and he thereupon applied for asylum. (See [4] – [5] and [7].)

A majority of the Supreme Court of Appeal later upheld the Minister's appeal, and Mr Ruta appealed to the Constitutional Court. It granted leave to appeal, notwithstanding the matter's mootness. (See [7] and [13].)

The issues were:

- Whether Mr Ruta's delay before evincing an intention to apply for asylum debarred him from the asylum process. *Held*, that it did not. There was Supreme

[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!**

Court of Appeal authority for this, and the Supreme Court of Appeal had erred in not following it. (See [14], [18] – [19] and [22].)

- How the Immigration Act and the Refugees Act 130 of 1998 were to be harmonised in respect of asylum seekers who did not enter South Africa at a port of entry and so became illegal foreigners and subject to arrest, detention and deportation. *Held*, that the asylum claim had first to be determined, and any arrest, deportation and detention under the Immigration Act deferred until then.

This interpretation was consonant with the Constitution; the principle of *non-refoulement* (see [54]); the *lex generalis specialibus non derogate* maxim ; the text of the Refugees Act; its aims (see [45]); and the circumstances of most asylum seekers (see [48] and [50]).

This interpretation also confirmed the prior Supreme Court of Appeal decisions on related points. (See [11], [18], [22] and [55].)

- The interpretation of s 4(1)*(b)* of the Refugees Act. ('A person does not qualify for refugee status . . . if there is reason to believe that he . . . has committed a crime which is not of a political nature and which, if committed in the Republic, would be punishable by imprisonment; . . . .') *Held*, that the exclusion operated only if the crime concerned was committed outside South Africa. (See [57].)

Leave to appeal granted; appeal upheld; order of the Supreme Court of Appeal set aside and substituted with an order dismissing the Minister's appeal.

COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE v VOLKSWAGEN SOUTH AFRICA (PTY) LTD 2019 (2) SA 362 (SCA)

Revenue — Income tax — Deductions — Expenditure incurred in production of income — Trading stock — Valuation of stock at year-end — Whether to be valued at net realisable value in accordance with International Accounting Standard 2 (IAS 2 or AC 108) — Income Tax Act 58 of 1962, s 22(1)(*a*).

Section 22(1)*(a)* of the Income Tax Act 58 of 1962 provides for a deduction from the cost-price valuation of closing stock 'of such amount as the Commissioner may think just and reasonable as representing the amount by which the value of such trading stock . . . has been diminished by reason of damage, deterioration, change of fashion, decrease in the market value or for any other reasons satisfactory to the Commissioner' (see [8]).

The taxpayer contended that there had been a reduction in the value of its trading stock for 'other reasons' in that valuing its trading stock at year-end using 'net realisable value' (NRV) in accordance with International Accounting Standard 2 (IAS 2 or AC 108) properly reflected a diminution in value of that trading stock. The Tax Court agreed with the taxpayer.

In the Commissioner's appeal to the Supreme Court of Appeal —

Held

Whether the concept of NRV — ie the amount it was thought would be realised in the market at a future date — reflected a diminution of value of trading stock for the purposes of s 22(1)*(a)* depended, not on its acceptance as part of Generally Accepted Accounting Practice, but on its conformity with the requirements for such a diminution in value as determined on a proper interpretation of that section.

The language of s 22(1)*(a)* was couched in the past tense; it was not concerned with what may happen to the trading stock in the future but with whether the diminution in its value occurred at the end of the tax year. The element of futurity was, however, not entirely removed from the enquiry. The correct position was that the Commissioner may only grant a just and reasonable allowance in respect of a diminution in value of trading stock under s 22(1)*(a)* in two circumstances: where some event has occurred in the tax year in question causing the value of the trading stock to diminish; and where it is known with reasonable certainty that an event will occur in the following tax year that will cause the value of the trading stock to diminish. (At [16], [18] and [26].)
It was only when the 'value of the trading stock has been diminished' that the allowance applied. To read the section as referring to a reduction in the market value of the trading stock would be absurd; only reductions in value below the cost price of the trading stock would justify the exercise of the Commissioner's discretion. The 'value of such trading stock' meant the value represented initially by the cost price of the goods, and that was the baseline against which any diminution of value must be measured.Therefore, on a proper interpretation of s 22(1)*(a)* the cost price of the goods, and not the actual or anticipated market value on their sale, was the benchmark against which any claimed diminution in value must be measured. The determination of NRV was firmly based on the entity's assessment of future market conditions, taking into consideration matters such as fluctuations in price or cost relating to events occurring after the end of the period for which the accounts were being prepared. This did not mean that those conditions were anticipated or foreseen at the end of the relevant period; it meant that if subsequent events made it clear that at the end of the period the inventory was worth less than cost, it should be written down to NRV. Further, the use of NRV was inconsistent with two basic principles that underpin the Act: taxation was backward-looking (but NRV forward-looking); and the basic deduction provision in s 11*(a)* of the Act which did not allow deduction in a current year of expenses to be incurred in the following year. Accordingly, the Tax Court erred, and the appeal would succeed.

GCC ENGINEERING (PTY) LTD AND OTHERS v MAROOS AND OTHERS 2019 (2) SA 379 (SCA)

Company — Business rescue — Liquidation proceedings already initiated — Effect of application for business rescue — Not suspending appointment, office or powers of provisional liquidators — No legal provision providing for revesting of control of company's property in its directors — Companies Act 71 of 2008, s 131(6).

Company — Business rescue — Master — Role with respect to business rescue proceedings.

First appellant company was in business rescue. Ultimately the business rescue practitioner obtained a provisional winding-up order (see [5] and s 141(2)*(a)*(ii) of the Companies Act 71 of 2008).
It appears a second business rescue application was then instituted and pending (see [3] and [8]).
Thereafter, the company's shareholder (first respondent) applied to the High Court for the relief (see [3]).
The court reasoned that the liquidation proceedings were suspended by the application for business rescue; that the liquidators' powers were suspended; and

that the company's assets fell under the control of the Master (see [8] and s 131(6) of the Act).
The court reasoned further that if the company traded, and the liquidators' powers were suspended, the Master could not assume the directors' powers, and those powers revested with the directors, to control and manage the company pending the determining of the business rescue application (see [8]).
The court granted the relief at [3]. This included that a 'manager' be appointed, with the powers and capacity of a director of the company, to manage the company's business until finalisation of the pending business rescue application.

The liquidators and Master appealed to the Supreme Court of Appeal.
Held
- Section 131(6) did not suspend the appointment, office and powers of the provisional liquidators ;
- no legal provision permitted the revesting of control and management of the company's property in its directors (see [9] and [21]);
- no legal provision permitted the appointing of a 'manager' (see [23]);
- the order that the Master hold security given by the manager, and monitor his use and disposal of the company's assets, was incompetent (see [23]).

Appeal upheld. The paragraphs of the High Court's order at [3] set aside and substituted with an order dismissing the application (see [26]).

MILNERTON ESTATES LTD v COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE 2019 (2) SA 386 (SCA)

Revenue— Income tax — Deemed accrual of proceeds of sale of property on date of agreement — Whether applicable to sale of immovable property where sales occurring in one tax year, all suspensive conditions fulfilled in that year but transfer registered and purchase price received in following year — Court bound by earlier decision on issue — Income Tax Act 58 of 1962, s 24(1).

The definition of 'gross income' in s 1 of the Income Tax Act 58 of 1962 (the ITA) includes 'the total amount, in cash or otherwise, received by or accrued to or in favour of' the taxpayer in relation to a tax year; and s 24(1) deems the whole of the purchase price of property sold by a taxpayer — where ownership passes to the purchaser upon full or partial payment on transfer of immovables, or delivery of movables — to accrue to a taxpayer upon the date of signature of the agreement.
The taxpayer, a property developer, sold stands in a development in the 2013 tax year, and in respect of each received payment of the balance of the purchase price (over the initial deposit made) on transfer in the 2014 tax year. In all the instances all suspensive conditions were met and the costs of effecting transfer had either been paid or secured. The taxpayer omitted the purchase prices of these stands from its gross income for the 2013 tax year on the basis that its entitlement to the purchase price remained conditional on its performance of the remaining tasks necessary to effect transfer. The Commissioner, however, assessed the proceeds as having accrued as per the definition of gross income during the 2013 tax year, alternatively that it was deemed to have accrued in that year by virtue of s 24(1).
The Tax Court dismissed the taxpayer's appeal against the assessment, in part because it was bound by the Supreme Court of Appeal's interpretation of s 24(1)

in *Secretary for Inland Revenue v Silverglen Investments (Pty) Ltd* 1969 (1) SA 365 (A). In that case the Appellate Division confirmed that s 24(1) applied not only when the purchase price of immovable property was payable before or simultaneously with transfer, but also where no amount was payable until transfer (see [18]).
In the taxpayer's appeal to the Supreme Court of Appeal, the court narrowed the issues to a single one: whether s 24(1) applied. In this regard the taxpayer's contentions were that s 24(1) was not concerned with cash sale agreements of the type as in the instant case but only with agreements for the sale of immovable property on credit where transfer was only given once the full purchase price had been paid; and further that *Silverglen Investments* was wrongly decided.
Held
In law the guarantees provided by the purchasers of erven from the taxpayer constituted payment of the purchase price, such payment being concurrent with transfer of ownership by registration in the deeds registry. The agreements accordingly provided for the taxpayer to pass ownership to the purchasers upon or after receipt of the whole of the purchase price in terms of s 24(1). The purchase price was therefore deemed to have been received in its entirety in the 2013 tax year, not the 2014 year when payment was in fact made. That was what was decided in *Silverglen Investments* and it applied equally to the present case. (At [19].)
Neither of the points raised in criticism of *Silverglen Investments* was sufficiently weighty to justify departing from the decision. The Tax Court was accordingly correct to dismiss the appeal on the grounds that it was bound by *Silverglen Investments*, and this appeal would suffer the same fate.

MINISTER OF HOME AFFAIRS AND ANOTHER v ALI AND OTHERS 2019 (2) SA 396 (SCA)
Immigration — Citizenship — By naturalisation — Whether section applying to persons born before its effective date — Order that regulations be made in respect of applications under section, and that pending promulgation of regulations, applications be accepted on affidavit — South African Citizenship Act 88 of 1995, s 4(3).

Respondents were born in South Africa to non-South African parents, had lived here until now, and had recently reached majority (see [3] – [8]).
They had sought to apply for citizenship in terms of s 4(3) of the South African Citizenship Act 88 of 1995 (see [1]).
Appellant Minister's department had refused to receive their applications (see [1]).
Respondents had then obtained High Court orders that (1) their applications be accepted on affidavit and decided; (2) that s 4(3) applied to persons born before 2013, when the section became effective; (3.1) that the appellants enact application forms; and (3.2) pending enactment receive such applications on affidavit (see [11] and [16]).
The Minister and Director-General of the department appealed to the Supreme Court of Appeal (see [17]).
Held, that (1) and (2) of the High Court's order would be confirmed, and (3.1) and (3.2) amended to give the Minster one year to make regulations respect of applications for citizenship by naturalisation, and to accept, in the interim, applications for citizenship on affidavit (see [27]).

Held, as to order (1), that, given the factors at [12] and [22] – [23], it did not overstep the separation of powers.
Held, as to (2), that no retrospective application of the section, which it was suggested would have negative consequences, was involved, and that an interpretation that the section applied only to children born after the section's effective date would be unfairly discriminatory (see [13], [21] and [26]).

WWF SOUTH AFRICA v MINISTER OF AGRICULTURE, FORESTRY AND FISHERIES AND OTHERS 2019 (2) SA 403 (WCC)

Fisheries and fishing — Fishing quotas — Determination of total allowable catch (TAC) for West Coast Rock Lobster — Review — Failure by decision-maker in department to have regard to binding principles of environment protection, conservation and sustainability, as well as obligations to follow best scientific evidence, and abide by 'precautionary principle' — Decision arbitrary, irrational and unreasonable — Determination set aside — Constitution, s 24(*b*); Marine Living Resources Act 18 of 1998, s 2; National Environmental Management Act 107 of 1998, s 2.

Environmental law — Environmental conservation — Environmental damage — Prevention and remediation — Where lack of scientific certainty — Applicability of precautionary principle — Discussion of — Marine Living Resources Act 18 of 1998, s 2; National Environmental Management Act 107 of 1998, s 2.

The present matter concerned the lawfulness of the determination, in terms of s 14 of the Marine Living Resources Act 18 of 1998 (MLRA), of the total allowable catch (TAC) for West Coast Rock Lobster for the 2017/18 season. Such determination had been made by the Deputy Director-General: Fisheries Management Branch (DDG) (first respondent) in the Department of Agriculture, Forestry and Fisheries, having been delegated the power to do so by the Minister of the department. The DDG had set the TAC at 1924,08 tons, being the same as the previous season's. This, where the scientific working group (SWG) (comprising scientists and representatives from the industry and NGOs) established by the department — and tasked with monitoring and studying the performance of the lobster resource, and recommending an annual TAC based on their assessment of collected data — had advised a figure of 790 tons, representing a substantial reduction from the previous year. The SWG saw the reduction as necessary, given the previously acknowledged need to rebuild the lobster resource in circumstances in which it had been so critically depleted, being at only 1,9% of 'pristine', and where there was continual decline and increased poaching. The reasons the DDG offered for not approving the SWG's recommendation included claims that a substantial cut to the TAC would result in significant job losses and social harm; that TAC reductions did not aid in the recovery of nearshore high-value resources such as lobster; and that recovery of stocks would be aided by reducing illegal exploitation through an array of management tools. She made it clear that her decision was not based on any science. In the present review proceedings, the applicant — WWF South Africa, a conservation organisation (non-profit) — sought an order, inter alia, declaring the DDG's determination of the TAC for lobster for the 2017/18 fishing season to be inconsistent with the Constitution as read with s 2 of the National Environmental Management Act 107 of 1998 (NEMA) and s 2 of the MLRA, and accordingly invalid.

The Minister and the DDG (as first and second respondents, respectively) disputed the relief.
The government parties raised certain in limine points. For one, they argued that WWF had not exhausted its right of appeal conferred by s 80 of the MLRA. The court disagreed, finding that WWF had in fact no right of appeal as it was not an 'affected person' for the purposes of the Act (see [68] – [69]). The government parties further argued that the review was moot because the 2017/18 season had closed. However, the court once again disagreed, on the ground that, although a declaration of invalidity concerning the 2017/18 determination would not affect fishing in the season governed by that determination, it might well have prospective impact, because recommendations in respect of current years did have regard to previous years' determinations (see [75]). In any case, the court concluded, even if the matter was moot, it should be heard because of the importance of the constitutional issues raised (see [78]).
Held, as to merits
The DDG, in determining the TAC for the 2017/18 season, and discounting the need for lobster to be protected from overexploitation and for its exploitation to be ecologically sustainable, ignored principles and objectives that were binding on her (see [83], [84] and [117]): Section 24*(b)*of the Constitution secured everyone the right to have the environment protected through measures, including legislative, that, inter alia, promoted conservation and secured sustainable development (see [11] and [84]). Both NEMA, in s 2, and the MLRA, in s 2, obliged the Minister and any organ of state to have regard to the objectives and principles of *protection, conservation and sustainability* (amongst others), in respect of actions that might significantly affect the environment (NEMA) or the exercise of powers in terms of the MLRA (see [12] – [14] and [84]). Furthermore, both the United Nations Convention on the Law of the Sea (the Convention) and the Southern African Development Community Protocol on Fisheries obliged South Africa as a signatory to such agreements to take into account the *best scientific evidence* available to it — in this case the advice of the SWG, which she ignored — in formulating measures to ensure marine resources were not overexploited (see [15] – [16] and [85] – [87]). The DDG acted irrationally in considering that mandatory principles set out in the MLRA and NEMA concerning food security, socio-economic development and the alleviation of poverty *were inconsistent with, and overrode*, the principles of *protection, conservation and sustainability* (see [117]). All the principles and objectives in question were binding on the DDG, and she could not ignore any of them (see [83]). Further, none of the principles on which she relied could be promoted where a critically depleted resource was depleted further (see [88] – [93]). The reasons on which the DDG relied were not rationally connected to the information before her and disregarded the best scientific evidence (see [117]). Furthermore, to the extent that there was any doubt as to the efficacy of a course of action, the 'precautionary principle', mandated by NEMA (s 2) and the MLRA (s 2), was applicable and did not support her reasoning. That principle entails that where there was a threat of serious or irreversible damage to a resource, the lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation. (See [100] – [109], [116], and [117].) Further, in relying on the reasons she had — without having placed them, and any evidence on which they were based, before the SWG, her officials and other stakeholders — the DDG disregarded the binding principle of the need to achieve, to the extent

practicable, a broad and accountable participation (mandated by s 2 of the MLRA) in the TAC's determination (see [110] and [117]).
Accordingly, in setting the TAC at the previous season's level, the DDG acted arbitrarily and irrationally, failed to observe the mandated precautionary principle, and made a decision no reasonable person could have made. The determination of the TAC for lobster for the 2017/18 fishing season was accordingly invalid and should be declared as such. (See [117] and [131].)
(The court refused further relief, namely for orders declaring, effectively, that for later fishing seasons the government parties be directed to ensure that the TAC comply with certain binding objectives and principles. The court found it inappropriate for a court to order a public body in general terms to heed principles and objectives by which the body was in any event bound by statute, and where such principles were stated in such broad and imprecise terms.

AFRICAN DEVELOPMENT BANK v TN 2019 (2) SA 437 (GP)

Marriage — Divorce — Maintenance — Maintenance order — Civil enforcement — Emoluments attachment order — Application for — Whether employer entitled to notice — *Ex parte* nature of applications for emoluments attachment orders confirmed — Maintenance Act 99 of 1998, s 28(1),

Marriage — Divorce — Maintenance — Maintenance order — Civil enforcement — Emoluments attachment order — Application for rescission of — Good cause shown — What constitutes — Whether competent to challenge it on basis that founding affidavit of applicant for emoluments attachment order not setting out computation or amount of arrear maintenance — Maintenance Act 99 of 1998, s 28(2)(*a*).

Section 28(2)(*a*) of the Maintenance Act 99 of 1998 provides for the rescission of emoluments attachment orders 'at any time, on good cause shown'. This case concerned an appeal by an employer (ADB) against a magistrates' court order dismissing its application for rescission of an emoluments attachment order — granted *ex parte* — in respect of the arrear maintenance obligations of one of its employees.
Two interrelated grounds ADB advanced in its s 28(2) application was that it was prejudiced in not being given notice of the application which resulted in the emoluments order, and that this was because it had a valid defence which precluded the court from issuing an emoluments attachment order. This contention raised the issues of the *ex parte* nature of emoluments attachment orders and of the validity of its defence. Another ground, one of a number of new grounds advanced in the present appeal, was that the founding affidavit in support of the emoluments attachment order failed to set out details of the arrears which were the subject of the order, such as how it was arrived at or what the amount was. This raised the issue of what constituted 'good cause shown' for the purposes of s 28(2)(*a*).
Held
The fact that s 28(2) provided the remedy of rescission and the detail of how it may be invoked, showed that the section did not make it peremptory to give an employer notice in advance. If that were the case, or the reasonable interpretation to be afforded to the section, then it hardly made sense that the legislature would have devoted so much attention in creating both the remedy and the procedure for an aggrieved employer to invoke. Accordingly, the section supported the granting of an

order ex parte, and this did not offend the right to be heard, which was expressly provided for in s 28(2).
The applicant's complaint about the calculation of the arrears goes to the dispute between the respondent and the applicant for the emoluments attachment order. A rescission application which was grounded in s 28(2) could not become an avenue through which an employer sought to litigate on behalf of a party who was not before the court. If their employee had an issue with the computation of the arrears, then it was open to him to raise it in the appropriate forum. It hardly behoved ADB to raise it, and it was doubtful if ADB even had the necessary *locus standi* to raise it.
For these reasons, the appeal would be dismissed.

BALENI AND OTHERS v MINISTER OF MINERAL RESOURCES AND OTHERS 2019 (2) SA 453 (GP)

Land — Informal land rights — Deprivation — Consent of informal land rights-holders — Applicant for mining rights required to obtain consent from informal land rights-holders deprived of their informal land rights by proposed mining activities — Interim Protection of Informal Land Rights Act 31 of 1996, s 2(1).

Minerals and petroleum — Mining and prospecting rights — Application for mining rights — Applicant required to obtain consent from informal land rights holders deprived thereof by proposed mining activities — Interim Protection of Informal Land Rights Act 31 of 1996, s 2(1).

The fifth respondent, Transworld Energy and Mineral Resources (SA) Pty (Ltd) (TEMR), applied for mining rights in the Xolobeni area, Eastern Cape. Most of the applicants, a 'community' as defined in the Interim Protection of Informal Land Rights Act 31 of 1996 (IPILRA), lived in close proximity or within the proposed mining area. It was not in dispute that the applicants held informal rights to the land as defined by IPILRA, and that they had not consented to but were opposed to the mining activities.
The applicants applied for a number of declaratory orders, inter alia, that the proposed mining activities would constitute a deprivation of their informal rights to land as contemplated in s 2(1) of IPILRA, and, that being so, under this provision their full and informed consent was required prior to granting any mining licence. TEMR and the state respondents, in rejecting that such consent was required, relied on provisions of the Mineral and Petroleum Resources Development Act 28 of 2002 (the MPRDA), which only require consultation with a community before awarding mining rights to an applicant, and argued that the MPRDA trumped IPILRA.
Held
In light of the facts placed before it, the nature of the contemplated mining operations would interfere substantially with the applicants' agricultural activities and general way of life, and therefore would constitute a 'deprivation' as contemplated.
The introductory proviso in s 2(1) of the IPILRA could not be read to mean the MPRDA was 'any other law', so that it applied to the exclusion of IPILRA. This was because, as the Constitutional Court has confirmed, the granting of a statutory mineral right under the MPRDA does not constitute expropriation, which was what the proviso was concerned with. What both Acts had in common was that they were enacted to redress our history of economic and territorial dispossession and marginalisation in the form of colonisation and apartheid; both seek to restore land and resources to black people who were the victims of historical discrimination. They

must therefore be read together. And, having regard to the different overall purposes of each Act — the MPRDA regulated mining activities and did not purport to regulate customary law at all, whereas IPILRA provided for the temporary protection of certain rights to and interests in land, and specifically dealt with customary law — there was no reason why the two Acts could not operate together. IPILRA imposed an additional obligation upon the Minister to seek the consent of a community holding land in terms of customary law as opposed to merely consulting with them as is required in terms of the MPRDA. Granting this community special protection was not in conflict with the provisions of the MPRDA, and especially s 23(2A) thereof, where it was made clear that protecting community rights to land was part of the purpose of the MPRDA. Also, granting special protection to these communities, by requiring consent as opposed to mere consultation, was in accordance with international law.
Accordingly, in keeping with the purpose of IPILRA to protect the informal rights of customary communities that were previously not protected by the law, the applicants had the right to decide what happened with their land. As such they may not be deprived of their land without their consent. Where the land was held on a communal basis, the community must be placed in a position to consider the proposed deprivation and be allowed to take a communal decision in terms of their custom and community on whether they consent or not to a proposal to dispose of their rights to their land.

EX PARTE BAKKES AND SIMILAR CASES 2019 (2) SA 486 (ECG)[2]

Advocate — Admission — Qualifications — Legal Practice Act — Applicant seeking admission after coming into operation of LPA — Obtained qualification prior to such date under former Admission of Advocates Act — Entitled to be admitted as advocate without having to meet new minimum qualifications under LPA — Legal Practice Act 28 of 2014, s 115.

The new Legal Practice Act 28 of 2014 (LPA) changed the requirements for admission and enrolment as an advocate. In terms of the previous Admission of Advocates Act 74 of 1964 (AAA), in s 3(2), a person was deemed 'duly qualified' to be admitted as an advocate where they had satisfied all the requirements for an LLB degree after completing a period of study of not less than four years, or had met the other academic requirements set out. But the LPA in s 26 introduced further requirements of, inter alia, vocational training and examinations. However, the LPA, in s 115, provided that 'any person who, immediately before [the coming into operation of the LPA, being 1 November 2018] was entitled to be admitted or enrolled as an advocate . . . is, after that date, entitled to be admitted and enrolled as such in terms of [the LPA]'. In the present reasons offered consequent to admitting the applicants as advocates, the court addressed the question whether, on a reading of s 115, a person who had obtained qualification under the AAA prior to 1 November 2018 could, after such date, be admitted as an advocate without having in addition achieved the minimum qualifications for admission and enrolment as provided in the LPA in s 26.
Held, that it was clear from the section that persons who qualified for admission in terms of the AAA prior to 1 November 2018 were entitled to be admitted and enrolled

[2] The full bench in Gauteng came to the same conclusion, Ex parte Goosen.

as advocates, without having to in addition satisfy the requirements of the LPA. The reference to admission and enrolment 'in terms of this Act' meant nothing more than that the LPA may be used as a vehicle for the admission of such persons, given that the AAA had been repealed. To require such a person to satisfy the requirements of the AAA *and* the LPA in order to be admitted would unfairly require such persons to be dually qualified, and would negate the provision in the section that they were entitled to be admitted and enrolled if they were so entitled prior to 1 November 2018. This could not have been the intention of the legislature.
Held, further, that a dual admission system was not in conflict with the LPA. Section 115 clearly recognised different requirements for admission and enrolment prior to and from 1 November 2018 onwards. Such a system would in any event eventually disappear. More and more applicants would have obtained their LLB degrees from 1 November 2018 onwards, and the number of applicants who obtained their LLB degrees prior to 1 November 2018 would diminish.

CLOETE v VAN MEYEREN 2019 (2) SA 490 (ECP)

Animal — Damage caused by — *Actio de pauperie* — Defences — Third-party negligence — Established defence requiring negligent failure by third party to control animal — No basis in law or logic to extend defence to situations in which element of control absent — Intruder negligently left gate open, allowing defendant's dogs to escape and attack plaintiff — No control — Defence of third-party negligence not availing defendant.

Delict — Specific forms — Strict liability — *Actio de pauperie* — Dog attack — Defence of third-party negligence — Intruder left gate open — To establish third-party negligence, plaintiff to prove negligent failure by third party to control animal — Defence not availing defendant.

Third-party negligence, an established defence to a pauperian claim for damages caused by an animal, requires the third party to have negligently failed to exercise control over the animal. There is no basis either in law or in logic to extend the defence to situations where the element of control is absent. (See [24], [28] – [30], [34], [36], [40] – [41].)
The plaintiff (Cloete) was attacked and seriously injured by three dogs belonging to the defendant (Van Meyeren), and claimed damages under the *actio de pauperie*. The issue before the court were whether Van Meyeren's defence of third-party negligence on the part of an intruder who negligently left a gate open would succeed. The court, applying the above reasoning, refused to uphold Van Meyeren's defence and granted judgment in favour of Cloete.

EX PARTE KF AND OTHERS 2019 (2) SA 510 (GJ)

Children— Surrogacy — Surrogate motherhood agreement — Confirmation — Requirement that surrogate mother be 'in all respects suitable person' to act as such — Criteria for assessing suitability — Children's Act 38 of 2005, s 295(*c*)(ii).

Section 295*(c)*(ii) of the Children's Act 38 of 2005 provides that a court may not confirm a surrogacy agreement unless the proposed surrogate mother 'was in all respects a suitable person to act as a surrogate mother'.

There is a need to develop further the requirements and guidelines for applicants and the courts to assess the suitability of a surrogate mother. In view of the utmost good faith required of the parties to a surrogacy agreement, the role of the court is to scrutinise the contract for all factors which would compromise the health of the child to be born or jeopardise the surrogacy agreement through malperformance or a breach, including factors which would cast the lawfulness of, or consent to, the surrogate agreement in doubt. (At [20] and [25].)

The assessment is an objective one but nevertheless the decision must be made in the subjective circumstances of the applicants, which will differ from case to case. At a minimum the personal clinical assessment of the prospective surrogate mother and her surrounding circumstances must be supported by other collateral information. This must, where necessary, include information on whether the surrogate mother is physically and medically fit to carry the gamete and the child to be born to full term; has an agreement with the commissioning parents regarding selective reduction and the risks pertaining thereto; is of sound mind, enjoys good mental health or suffers from any personality disorder, severe psychiatric illness, has a history of self-harming behaviour, substance abuse or addiction.

The emotional welfare, emotional needs and resources available to the surrogate mother are relevant factors for consideration to determine the likely effects on the child to be born as well as the fulfilment of the agreement. A report is required on the host mother's need for emotional resources; the quality and stability of the existing emotional support structure; and whether the surrounding relationships are conducive to the fulfilment of the surrogacy agreement.

The surrogate mother must understand the nature of the relationship of surrogate motherhood: that the child to be born will not legally be hers but the commissioning parents'. In this regard there must be a report on the surrogate mother's psycho-social support structure; the understanding and influence of the spouse, partner, relatives or extended family in the decision; the understanding that the child to be born will belong to the commissioning parents; how handing the baby over to the commissioning parents will affect her; that the psycho-social support structure is not likely to result in the termination of the agreement after fertilisation or in a breach; and whether she is emotionally available for her own child or children, including her readiness to discuss the surrogate pregnancy with her child or children, depending on their ages and levels of comprehension.

MAYEKISO AND ANOTHER v PATEL NO AND OTHERS 2019 (2) SA 522 (WCC)

Insolvency — Trustee — Lack of authority — Removal by Master — Not automatically invalidating decisions taken before removal — Insolvency Act 24 of 1936, s 76.

Land— Unlawful occupation — Eviction — Statutory eviction — Whether appropriate — Obligation on illegal occupant to provide relevant information, particularly where legally represented — Claim of imminent homelessness contradicted by occupant's wealthy lifestyle and ability to afford protracted litigation — Appeal against eviction dismissed — Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, s 4(7).

The trustees of the present appellants' insolvent joint estate, acting under s 4(7) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE), applied for their eviction on the ground that their home had been sold in

execution and their continued illegal occupation was impeding the liquidation process. Section 4(7) provides that a court may, after considering the relevant circumstances, evict unlawful occupiers if it is just and equitable to do so. The appellants bought the property in question in 2007 for just under R20 million, and it was in September 2017 sold in execution for R13,2 million. The High Court granted the eviction application on the ground that the appellants' continued occupation of the house after its sale in execution was unlawful. In a full-bench appeal the appellants, who conceded that their occupation was illegal (see [21]), argued that the court *a quo* failed to properly consider the effects of the eviction on the family, particularly the minor children.

Shortly before the hearing was to commence, the appellants, having earlier accepted that the property had to be sold to satisfy creditors' claims (see [25]), made an application to introduce new evidence on appeal — much of it hearsay — to show that one of the trustees (the first respondent) was an impostor who was bent on stealing the funds under his control (see [40]). The appellants argued that this state of affairs rendered the eviction application fundamentally flawed (see [28]). The respondent trustees opposed the application for the introduction of further evidence. In November 2016 the first respondent was removed by the Master and replaced by the fourth and fifth respondents.

Held per Gamble J, Sher J concurring

The allegations made against the first respondent did not invalidate the decisions taken by him, particularly in light of the first appellant's admission that the property had to be sold to cover the liabilities of the insolvent estate (see [39], [41], [53] – [54]). In addition, s 76 of the Insolvency Act 24 of 1936 expressly provided for the continuation of pending legal proceedings in situations such as the present (see [42]). There was thus no merit in the argument that the conduct of the first respondent warranted the dismissal of the application to evict (see [49]). Since it was, moreover, not clear that the application to adduce further evidence was *bona fide*, the appeal had to be decided on the record as it stood together with the relevant common-cause facts (see [54], [55], [58] – [59]).

The presence of children on the property did not necessarily trump the right of the owner to seek the eviction of their parents (see [60]). Save for raising the possibility of homelessness, the appellants did not point out other factors relating to the children that the court *a quo* considered material, and the reason was clear: there was none (see [66]). The court *a quo* gave full consideration to the issue of homelessness and the effect it might have on the minor children, which was the only context in which the children's interests fell to be considered (see [67]). But the appellants' continuing opulent lifestyle and their ability to conduct drawn-out and expensive litigation suggested unequivocally that homelessness was not a likely consequence of their eviction (see [4], [69] – [70]). This was confirmed by the first appellant himself, who promised under oath that the family would move out when the property was sold and transferred to its new owner (see [71]). It was accordingly just and equitable in the circumstances to grant an order of eviction (see [74]).

Held per Mantame J dissenting

The sophistication of the appellants' lifestyle was not a sufficient reason not to conduct an investigation into the relevant circumstances as intended in s 4(7) of PIE (see [110] – [111]). The court could not assume that, because the appellants occupied a R19,95 million house, they could not be rendered homeless by eviction: due process required that an inquiry be made (see [114] – [115]). The court *a quo* should have investigated the appellants' arrangements for alternative

accommodation and enquired into the circumstances of the children (see [116], [121]).

NM v JOHN WESLEY SCHOOL AND ANOTHER 2019 (2) SA 557 (KZD)

Education — School — Independent school — Exclusion policy — Policy excluding learners where parents failing to pay school fees in breach of contract — Not in itself unlawful, but any decision taken had to be reasonable; not infringe child's right to education; in best interests of child; and procedurally fair — Court finding that exclusion policy under which learner excluded from exams and seated apart from fellow learners in classroom not in best interests of child and in breach of s 29(3) of Constitution (obligation of independent school to maintain standards not inferior to public schools) — Constitution, ss 28(2) and 29(3).

ZM, a minor, was a learner at John Wesley School (the first respondent), an independent school registered in terms of the South African Schools Act 84 of 1996 (the Act). ZM's father (the applicant), who, in terms of the fees agreement entered into with the school in 2015 had accepted responsibility for paying the 2016 school fees, had fallen into arrears with such payments. After unsuccessfully demanding full payment, the school, purporting to act in terms of its 'exclusion policy', disallowed ZM from writing examinations commencing in May 2016. ZM was obliged to sit in the art room apart from his fellow learners while they wrote their exams. The school rejected the applicant's offer to negotiate repayment terms. The school claimed that its policy was guaranteed by the Act, and confirmed by the policy document of the Independent Schools Association of Southern Africa (ISASA) — of which the school was a member — which expressly allowed the exclusion of learners on the grounds of non-payment of school fees by their parents. The school's course of conduct prompted the present application. The applicant sought an order declaring that the policy of exclusion as practised by the school constituted law and conduct that was unlawful and inconsistent with s 28(2) of the Constitution — which proclaimed a child's best interests to be of paramount importance in every matter concerning the child — and s 29 of the Constitution, in particular s 29(3) — which required independent schools to maintain standards that were not inferior to standards at comparable public educational institutions.
Held, that while it was accepted that independent schools were autonomous, they were still subject to the operations of the Act and the Constitution (see [80]).
Held, further, that as the Constitution required private parties or bodies not to interfere with or diminish the right to basic education, independent schools had to act in a manner that minimised any harm to the learner's right to basic education (see [69]). Further, in collecting school fees, the first respondent had always to take cognisance of its duties/obligations and the role it played in society. This was reflected in the manner it enforced its rights, including the recovery of fees. It had to always take into account that it was dealing with children who were specifically protected by the Constitution and whose rights were paramount. (See [76].)
Held, further, that while the Act did not prohibit independent schools from excluding learners on the grounds of non-payment of school fees by parents in breach of contract, any decision on exclusion had to be reasonable and one that did not encroach on a learner's right to education, made in the best interests of the child concerned, for a fair reason, and had to be preceded by a fair procedure, which in

turn called for an adequate warning prior to exclusion, the opportunity to make arrangements to settle fees or to enrol a learner at a new school.
Held, that it was unreasonable for the first respondent school to refuse to negotiate to settle arrear fees without first establishing from ZM's parents the cause of their default, in circumstances in which there might very well be a reasonable explanation why school fees were not paid timeously. Further, the first respondent's conduct in isolating ZM and placing him in the art room while other learners wrote examinations was degrading, humiliating and inhumane, and clearly not in the child's best interests.
Held, accordingly, that the exclusion policy as a result of non-payment of school fees insofar as it was applied by the first respondent resulted in standards inferior to those at public school institutions, in breach of s 29(3) of the Constitution, and was not in the bests interests of learners, in breach of s 28(2) of the Constitution. It was contrary to public policy and was aimed at humiliating, degrading and victimising learners. The suggestion that it was a reasonable and justifiable limitation of the abovementioned rights was devoid of any merit. It fell to be declared invalid.

RESILIENT PROPERTIES (PTY) LTD v ESKOM HOLDINGS SOC LTD AND OTHERS 2019 (2) SA 577 (GJ)

Electricity — Supply — Termination — Court granting application by shopping mall owner for interim order prohibiting Eskom from cutting electricity to local authority pending review — Electricity Regulation Act 4 of 2006, s 21(5)(*c*).

National electricity supplier Eskom (the first respondent) supplies bulk electricity to the Gamagara Local Authority (the second respondent), which then on-distributes it to end users in its area, including a shopping mall operated by Resilient (the applicant). When Eskom decided to cut off Gamagara's electricity supply for non-payment, Resilient — invoking an impending humanitarian disaster — applied for urgent interim relief, pending review, (i) prohibiting Eskom from proceeding in terms of a 'termination notice' dated 14 March 2018; (ii) directing Gamagara to pay Eskom all amounts owing under an acknowledgment of debt; and (iii) allowing Resilient and other electricity consumers in the Gamagara jurisdiction to pay Eskom directly (see [7]). For its *prima facie* right against Eskom, Resilient relied on the alleged unlawfulness of Eskom's decision to discontinue electricity supply to an entire local authority, including innocent customers. This, argued Resilient, would be contrary to Eskom's distribution licence (see [12] – [17] for Resilient's arguments).
Eskom supported the proposed interim order. It argued, however, that s 21(5)*(c)* of the Energy Regulation Act 4 of 2006 (ERA) — which stated (in the negative) that electricity suppliers *may not* disconnect supply to a customer such as Gamagara *unless* the latter 'contravened payment conditions' — permitted it to cut off electricity supply to non-paying customers. Resilient argued that a positive power to disconnect could not reside in such a prohibition. Gamagara, which essentially pled poverty, relied on its own default and supported Eskom's proposed interruption of its electricity supply.
Held
Eskom was, on a proper construction of s 21(5) of the ERA, read with the electricity supply agreement between Eskom and Gamagara, entitled to interrupt the supply of electricity to Gamagara for non-payment (see [74]). But since this constituted administrative action for the purposes of s 33 of the Constitution and PAJA, Eskom

was constrained, if not by the standard of reasonableness, then by the baseline standard of rationality (see [74] – [75]). The facts, weighted as they had to be in favour of Resilient as an applicant for interim relief, showed that a humanitarian catastrophe would result from the disconnection of Gamagara's electricity supply (see [77]). Eskom's direct knowledge — rooted in experience — of this consequence meant that its decision was not rationally connected to the purpose for which the power to do so was given (see [79]). This conclusion was sufficient to establish for Resilient a *prima facie* case, though open to some doubt, for a review down the line of Eskom's decision (see [80]).
The balance of convenience did not, however, favour item (iii) of the interim relief sought, for if Gamagara's legitimate margin from electricity on-sales was threatened, paying customers would be prejudiced (see [81]). In the result, Gamagara would be ordered to comply with its obligations under the acknowledgement of debt and Eskom would be interdicted from implementing its termination notice.

SAMONS v TURNAROUND MANAGEMENT ASSOCIATION SOUTHERN AFRICA NPC AND ANOTHER 2019 (2) SA 596 (GJ)

Voluntary association — Disciplinary proceedings — Finding and sanction — Whether administrative action — Promotion of Administrative Justice Act 3 of 2000.

First respondent association's disciplinary committee found applicant, a member and licensed business rescue practitioner, guilty of misconduct, and imposed a fine and suspension (see [7] and [23]). On appeal the appeals committee increased the sanction to expulsion (see [8] and [24]). In consequence, second respondent, the Companies and Intellectual Property Commission, withdrew applicant's licence (see [16] and [33]).
Applicant brought review proceedings.
Held
- The finding and sanction were administrative action.
- The finding was procedurally unfair, because it was on a charge to which applicant had had no opportunity to respond (see [26]).
- Likewise, the increasing of the sanction was procedurally unfair, because applicant had not been informed of the possibility that this might be done (see [28]).

First and second respondents' decisions reviewed and set aside (see [34]).

WINGS PARK PORT ELIZABETH (PTY) LTD v MEC, ENVIRONMENTAL AFFAIRS, EASTERN CAPE AND OTHERS 2019 (2) SA 606 (ECG)

Administrative law — Administrative action — Review — After failure of internal appeal — In most cases, both decisions to be challenged.

Environmental law— Protection of the environment — Environmental authorisation — Internal appeal against refusal — Wide appeal created — National Environmental Management Act 107 of 1998, s 43.

Section 43 of the National Environmental Management Act 107 of 1998,
which provides for internal appeals against administrative decisions taken under the

Act, contemplates an appeal in the wide sense, that is, a full rehearing on the merits of the matter (see [30]).
As a general rule, when an administrative action is internally appealed, review proceedings should, at the very least, be directed at the appellate decision. Whether the appellate decision alone may be challenged depends on the nature of the decision at first instance and the remedy sought by the applicant, but in most cases both decisions will have to be challenged. It is doubtful that, even where failures of procedural fairness cannot be cured on appeal, it is only the first decision that must be set aside: the appellate decision, while invalid for being tainted by the illegality of the first decision, will still have to be set aside to terminate its factual effect. (See [46].)
In the present case Wings Park applied under the Promotion of Administrative Justice Act 3 of 2000 for the review of the Department of Environmental Affairs' decision of 12 May 2016 to refuse it environmental authorisation to build and operate an airfield near Port Elizabeth. Wings Park's internal appeal to the first defendant (the departmental MEC) was dismissed on 22 November 2016.
Wings Park made it clear that the decision being taken on review was that of the Department — the decision at first instance — and not the appellate decision of the MEC (the MEC was cited in its representative capacity rather than as the decision-maker). The MEC argued that the application was academic because the appellate decision would stand even if the decision at first instance was set aside.
The court applied the above-mentioned principles to find that Wings Park's failure to challenge the MEC's appellate decision meant that the setting-aside of the decision at first instance would be academic and of no practical effect, and refused the application on this basis alone.

STANDARD BANK OF SOUTH AFRICA LTD v HENDRICKS AND ANOTHER AND RELATED CASES 2019 (2) SA 620 (WCC)

Mortgage — Foreclosure — Judicial execution — Primary residence — Application for (i) judgment for accelerated full outstanding balance and (ii) order declaring property executable — Money judgment and execution claims inextricably linked, and must be sought simultaneously in same proceedings — Court, where it considers it to be in interests of justice, may postpone money judgment together with order for special execution.

Mortgage — Foreclosure — Judicial execution — Primary residence — Application for (i) judgment for accelerated full outstanding balance and (ii) order declaring property executable — Practice of banks proceeding to court to seek both money judgment and order for special execution for 'trifling amounts' after debtor had been in arrears for only limited time, and without any appropriate steps having been taken to resolve matter, deprecated.

Mortgage — Foreclosure — Judicial execution — Primary residence — Service of process — Application for order declaring primary residence specially executable must be personally served on debtor by sheriff, alternatively in manner as authorised by court — This was so even where *domicilium citandi* clause provided — Uniform Rules of Court, rule 46A.

Mortgage — Foreclosure — Judicial execution — Primary residence — Reserve price — Where court grants order for execution against primary residence of debtor, saving

exceptional circumstances it is obliged to set reserve price — Uniform Rules of Court, rule 46A.

Execution — Sale in execution — Immovable property — Primary residence — Reserve price — Where court grants order for execution against primary residence of debtor, saving exceptional circumstances it is obliged to set reserve price — Uniform Rules of Court, rule 46A.

A number of foreclosure applications brought by banking institutions were referred for hearing, in terms of s 14(1)*(b)* of the Superior Courts Act 10 of 2013, before the full bench of the Western Cape High Court. The applicants were invited to address a number of practical and procedural questions (some which were raised by the introduction of the new Uniform Rule of Court 46A) relevant to the bringing of an application for a money judgment consequent upon the default on a loan by a borrower, and an order authorising execution against the borrower's primary residence mortgaged to secure the loan. After hearing argument, the court held as follows:

- Where a creditor seeks a money judgment for the accelerated full outstanding balance on a loan, as well as an order of special execution against the debtor's primary residence mortgaged to secure such a loan, such orders should be sought simultaneously in the same proceedings (as opposed to being brought piecemeal in separate proceedings). This is so, given the nature of the claims, the cost advantages of dealing with both orders at the same time, and the necessity to limit the piecemeal adjudication of such matters. (See [40].)
- A court, where it considers it to be in the interests of justice, may postpone the money judgment together with the order for special execution. (See [48].)
- The practice of banks proceeding to court to seek both the money judgment and order for special execution, for 'trifling amounts', after the debtor had been in arrears for only a limited time, and without any appropriate steps having been taken to resolve the matter, could not be allowed to continue. Their approach did not strike an appropriate balance between the interests of consumers and credit providers as mandated by the National Credit Act 34 of 2005. (See [49] – [51].)
- An application for an order declaring a primary residence specially executable must be personally served on the debtor by the sheriff, alternatively in a manner as authorised by the court. This was so even where a domicilium citandi clause was provided in the loan agreement.
- Where a court grants an order for execution against the primary residence of a debtor, saving exceptional circumstances it is obliged to set a reserve price (see [63]).

The above findings (as well as other procedural issues) were reflected in a new practice directive and draft affidavit inserted in the Western Cape Practice Directions (both of which are included at the end of this report).

STARWAYS TRADING 21 CC (IN LIQUIDATION) AND OTHERS v PEARL ISLAND TRADING 714 (PTY) LTD AND ANOTHER 2019 (2) SA 650 (SCA)

Sale — Contract — Terms and conditions — Implied and tacit terms — Terms implied by statute — Statutory variation in price to reflect increase or decrease in customs duty payable by importer (seller) — Constituting implied term — Inclusion of words 'ex warehouse' not constituting agreement to contrary — Seller's insistence on contrary

interpretation constituting repudiation of contract — Customs and Excise Act 91 of 1964, s 59.

Revenue— Customs and excise — Import duty — Statutory variation of contract price to reflect alteration in duty payable — Constituting implied term in contract of sale — Inclusion of words 'ex warehouse' not constituting agreement to contrary — Seller's insistence to contrary interpretation constituting repudiation of contract — Customs and Excise Act 91 of 1964, s 59.

S, a sugar importer, sold P, a distributor, an amount of sugar. S calculated the price to include the import duty it, as importer, was obliged to pay under the Customs and Excise Act 91 of 1964. Section 59 of the Act provides that, absent contrary agreement, the contract price would vary in line with changes in customs duties. After the conclusion of the contract, import duty on sugar fell dramatically, with the result that the application of s 59 effectively reduced the purchase price by R51 million. P argued that since the contract contained no agreement to the contrary, it was entitled to pay a reduced contract price, while S argued that the provision for delivery 'ex warehouse' excluded the operation of s 59. S was of the view that an 'ex warehouse' agreement altered the common law by postponing the passing of risk, including the s 59 risk, until delivery took place. P took S's insistence on this interpretation as a repudiation of the sale and purported to accept it, thereby ending the contract. The resulting dispute went to the High Court, which held in favour of P. In an appeal to the Supreme Court of Appeal —

Held

Under the common law, risk, which included the attachment of a legal burden to the *merx*, passed to the purchaser when the contract was *perfecta*, that is, when the price and *merx* were agreed (see [11]). But under s 59 the advantage or disadvantage caused by fluctuations in the import duty would be passed on to P unless there was an agreement to the contrary (see [12]). Hence s 59 subjected the sale to terms implied by law, and the onus was on S to show that the ordinary meaning of 'ex warehouse' excluded its application (see [13]). Since S failed dismally in its attempt to do so, P was entitled to a reduction in the price (see [14] – [17]). S's conduct in enforcing the contract and quoting the price without any reduction entitled P to cancel the contract (see [23]). Appeal dismissed.

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HAARHOFF AND ANOTHER v DIRECTOR OF PUBLIC PROSECUTIONS, EASTERN CAPE 2019 (1) SACR 371 (SCA)

Evidence — Witness — Oath — Admonition to speak truth — Compliance with provisions of ss 162 and 164 of Criminal Procedure Act 51 of 1977 — Court receiving expert evidence (in application for evidence to be delivered through intermediary) that complainant competent to testify — Court entitled to accept such evidence and justifying conclusion that complainant competent to testify — Complaint that court's inquiry preceding admonition cursory not justified when seen against background of detailed expert evidence.

Evidence — Witness — Oath — Admonition to speak truth — Compliance with provisions of ss 162 and 164 of Criminal Procedure Act 51 of 1977 — Court not

making specific finding that complainant did not understand nature and import of oath or affirmation — Such express finding not prerequisite.
The appellants were convicted in the High Court of rape in contravention of s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the Act) in that they had had sexual intercourse with a woman with a biological age of 24 years but a mental age of 10 years.
A psychologist testified in court that the complainant was able to testify in court and had the cognitive capacity suitable to being admonished by the court. She did not fall within the definition of mentally disabled person as envisaged by s 1 of the Act because she understood what it meant to have sexual intercourse and was able to appreciate the nature and reasonably foreseeable consequences thereof. She was, accordingly, able to express her consent, or otherwise, to sexual intercourse. This particular evidence was led for the purposes of allowing the complainant to testify in a separate room through an intermediary.
On appeal the thrust of the argument for the appellants was that the trial court had failed to comply with the provisions of s 162 read with s 164 of the Criminal Procedure Act 51 of 1977 (the CPA). It appeared that the trial court had not made a specific finding that the complainant was not competent to take the oath, but after having posed questions to the complainant, and defence counsel having submitted that the complainant was not competent to take the oath, had proceeded to admonish the complainant. Because counsel for the appellants also made submissions directed at the complainant's general competence to testify as contemplated by s 192 of the CPA, the court also addressed this issue in its judgment.
Held, that the appellants' counsel had not challenged the psychologist's evidence at the trial that the complainant was competent to testify but had merely expressed misgivings about the recommendation that she testify through an intermediary. The appellants were in court and knew the complainant very well and would have been able to instruct their counsel to dispute some of the findings made by the psychologist pertaining to the complainant's history or general competence, but this was not done. The court was entitled to accept the unchallenged view of an expert expressed based on such expert's scientific knowledge and experience, and this justified the conclusion that the complainant was competent to testify as envisaged in s 192 of the CPA.
Held, further, that the fact that the trial court did not make a specific finding that the complainant did not understand the nature and import of the oath or affirmation before deciding to admonish her, was not raised as an issue in the appeal. In any event it was settled law that an express finding was not a prerequisite to admonishing a witness.
Held, further, that the criticism, that the trial court's inquiry preceding the admonition was inadequate, was without merit as it failed to take into account the proper context in which the questioning was embarked upon (this was that the court's questioning was preceded by detailed testimony of an expert who had not only interviewed the complainant but evaluated her mental capabilities by performing recognised IQ tests). Seen against this background the trial court's decision to admonish the complainant to speak the truth was correctly made, and the argument that the complainant's evidence was not properly taken, therefore, had no merit. (See [33] – [34].) The appeals were dismissed.

KEATING AND OTHERS v SENIOR MAGISTRATE AND OTHERS 2019 (1) SACR 396 (GP)

Search and seizure — Search warrant — Validity of — Affidavit on which warrant based — Identification of commissioner of oaths — Fact that not indicating whether commissioner acted ex officio not resulting in invalidation of affidavit.
Search and seizure — Search warrant — Validity of — Whether Independent Police Investigative Directorate investigators could perform search — *IPID* investigators cast in same position as police officials for various purposes of Criminal Procedure Act 51 of 1977 — Warrant valid.
Search and seizure — Search warrant — Validity of — Use of civilian advisers in search to identify and value certain items — No reason such expertise should not be used.

In an urgent application the applicants challenged the validity of a search warrant obtained from a magistrate and the manner in which it had been executed. The warrant had been sought to obtain material, relevant information and documentation relating to the commission of serious offences of corruption in the procurement of goods and services for the South African Police Service's forensic division.
As to the validity of the warrant, the applicants contended that the statement which formed the basis of the application for the search warrant was defective: it did not amount to an affidavit as there was no proper identification of the commissioner of oaths, including their designation and whether the office was held ex officio; it seemed from the certificate that the person who appeared before the commissioner of oaths was a woman, whereas the statement indicated that the person making the statement was in fact a man; and there was no reference to the prescribed oath having been taken. They also contended that the warrant was ultra vires, in that it authorised the Independent Police Investigative Directorate (IPID) officials to execute it and allowed the presence of certain civilians during the search.
Held, that there was little merit in the applicants' objections to the affidavit: the reference to 'she' was merely an error that was subsequently explained. The questions that customarily preceded the signature of the document relating to understanding the contents of the statement, the absence of objection to taking the oath, and the oath being binding, all appeared clearly and without ambiguity from the attestation section. The signature of the commissioner of oaths appeared together with his full name, as well as details of his physical address, rendering it capable of readily identifying him and his physical location. That there was no indication whether he was a commissioner of oaths ex officio could hardly be material, to the extent that it would result in the invalidation of the affidavit. There had been substantial compliance with the requirements and the affidavit was sufficient for its purposes.
Held, further, that s 24(2) of the Independent Police Investigative Directorate Act 1 of 2011 specifically provided for an IPID investigator to be cast in the same position as a police official for various purposes contemplated in the Criminal Procedure Act 51 of 1977, and the magistrate did not act ultra vires when he authorised IPID investigators to be involved in the execution of the warrant. (See [28].)
Held, further, that the role that the warrant contemplated the outside persons to play was very limited, namely for the identification of specific documentation in the case of two of the persons who had undertaken a forensic investigation, and for the third person to act as a valuator. The necessity for these persons to be present was

explained in the affidavit. The inclusion of such names was well motivated and authorised and their role did not extend to being authorised to search and seize. *Held*, further, that one had to take a realistic approach to the issue of authorisation of non-police officials to be present on such occasions. There was no principled reason that offended the legal and constitutional order that should prevent the expertise of private specialists from being used. On the contrary, efficient and effective policing may require them to assist in the effective investigation of crime. (See [37] – [38].) The application was dismissed.

S v MOTLADILE 2019 (1) SACR 415 (FB)

Plea — Guilty — Unrepresented accused — Magistrate's duty in respect of — Accused pleading guilty to possessing undesirable dependence-producing substance and confronted with legal phrases and statutory definitions beyond his purview — Magistrate not questioning accused in terms of s 112(1)*(a)* of the Criminal Procedure Act 51 of 1977 to establish whether accused appreciated consequences of plea and admitted all elements of offence — Conviction and sentence set aside.

The unrepresented accused pleaded guilty in a magistrates' court to a charge of a contravention of s 4*(b)* of the Drugs and Drug Trafficking Act 140 of 1992, for the possession of methaqualone in the form of 39 Mandrax tablets. The charge-sheet did not allege that the accused had an intention to possess the substance, nor was he asked whether he knew and understood what an undesirable dependence-producing substance was. The presiding magistrate failed to question the accused in terms of s 112(1)*(a)* of the Criminal Procedure Act 51 of 1977 to establish whether the accused appreciated the consequences of his plea, and whether he admitted all the elements of the offence he was charged with. The magistrate convicted the accused summarily. On review,
Held, that the accused was confronted with legal phrases and statutory definitions beyond his purview. Because he was not asked to explain his personal knowledge of the substance he was being charged with, it followed that there was no proof that the substance allegedly found in his possession was an undesirable dependence-producing substance. The accused had not had a fair trial in this respect. The court had a duty to assist and give guidance to an unrepresented accused who lacked sophistication to understand complex court proceedings. The conviction and sentence were set aside.

S v BOMVANA 2019 (1) SACR 418 (ECM)

Evidence— Admissibility — Statement to police officer — Police alleging that accused not regarded as suspect when brought to police station — Clear that accused was considered suspect at that stage, given evidence in possession of police — Also clear that police wished to obtain admissions from accused — Courts to be vigilant in examining such circumstances to protect constitutional right against self-incrimination.

In a criminal trial on a number of serious charges, including two counts of murder related to minibus-taxi feuds, a trial-within-a-trial was held to determine the admissibility of certain statements made by the accused. The state's evidence,

provided partly by the commander of the Directorate for Priority Crime Investigations, was that the accused was not regarded as a suspect when the police went to fetch him at a building site and took him to the police station where they questioned him without explaining his constitutional rights.
Held, that it boggled the mind that the accused could not have been regarded as a suspect in circumstances, firstly, in which a witness had told the police that he had bought a firearm from him; secondly, that the accused had told him that it had been used in the commission of some undisclosed offences; and thirdly, that the very same firearm had been linked by ballistics reports in the possession of the police to the taxi-violence-related cases that the police were investigating. It was clear that the police had branded the accused as not being a suspect to obtain admissions from him which they might not otherwise have got if they had informed him of his constitutional rights beforehand. (See [22] – [23].)
Held, further, that courts should probe whether the circumstances of a case were such that the accused would have understood that he was not obliged to go with the police immediately. It was significant to check whether the accused would have been able to challenge the authority of the state, as represented by the police, where he felt that the police were on a fishing expedition. If the courts failed to examine these difficult issues, they might become unwitting participants in lending legitimacy to the abuse and trampling by the police on the constitutional rights of the citizenry. The fact that crime and even violent crime were rampant in the country was no excuse for the police to brazenly ignore basic requirements of policing, such as advising a suspect of his constitutional right against self-incrimination, and it was similarly no basis for the court to be tolerant of such infractions where they occurred. The statements made by the accused were held to be inadmissible.

S v MLUNGWANA AND OTHERS 2019 (1) SACR 429 (CC)

Public order offences — Gatherings and demonstrations — Requirement in s 12(1)*(a)* of Regulation of Gatherings Act 205 of 1993 of prior notice of gathering — Criminalisation of failure to give notice constituting unjustifiable limitation of right in s 17 of Constitution to assemble, demonstrate, picket and petition.

The applicants had obtained an order in the High Court declaring s 12(1)*(a)* of the Regulation of Gatherings Act 205 of 1993 (the Act) unconstitutional on the basis that the criminalisation of the failure to give prior notice of a gathering constituted an unjustifiable limitation of the right in s 17 of the Constitution to assemble, demonstrate, picket and petition. The applicants applied for confirmation of the declaration of constitutional invalidity, whereas the respondents opposed it and sought leave to appeal against the declaration.
Held, that s 12(1)*(a)*, in criminalising the failure to give notice for a peaceful assembly, clearly constituted a limitation of the right to assemble freely. This did not imply, however, that the right in s 17 ought to be exercised otherwise than peacefully and unarmed. It was only when those convening and participating in a gathering harboured intentions of acting violently, that they forfeited their right. So long as they acted within the parameters prescribed for the exercise of this important right, they would be assured constitutional protection.
Held, further, that the limitation on the right to peaceful assembly was severe, in that (1) the definitions of gatherings and conveners were broad; (2) where a convener was not appointed under s 2 of the Act, anyone who had taken any part in planning

or organising or making preparations for the gathering, however marginal their participation might be, could be criminally liable; (3) there was a widespread chilling effect that extended beyond those who convened assemblies without notice — a criminal sanction deterred others from acting similarly to a convicted criminal; and (4) the limitation did not distinguish between adult and minor conveners. (See [83] – [89].)
Held, further, that there was no doubt that criminalising the failure to give notice incentivised the giving of notice to some extent, but there were numerous ways in which the giving of notice could be incentivised, other than through a criminal sanction. (See [94] – [96].)
Held, accordingly, that it was clear that s 12(1)*(a)* was not appropriately tailored to facilitate peaceful protests and prevent disruptive assemblies. The right entrenched in s 17 was simply too important to countenance the sort of limitation introduced by the provision. The nature of the limitation was too severe, and the nexus between the means adopted and any conceivable legitimate purpose too tenuous, to render the section constitutional. This was even more so when regard was had to the existence of less restrictive means to achieve the purpose of the provision, and the court could consequently only conclude that s 12(1)*(a)* was unconstitutional.

S v DLAMINI 2019 (1) SACR 467 (KZP)

Evidence — Witness — Oath — Admonition to speak truth — Provisions of ss 162 and 164 of Criminal Procedure Act 51 of 1977 — When such procedure competent — Court required first to undertake inquiry in terms of s 162 before applying provisions of s 164 — Sufficient compliance where court satisfied that it established capacity to understand nature and import of oath, or ability to distinguish between truth and lies.

Evidence — Identification — Dock identification — Value of — Child witness unable to articulate description of rapist, but after seeing photograph of accused went straight to accused in identification parade without looking at other participants — Later identifying accused in dock — Insufficient evidence on which to convict accused.

The appellant appealed against his conviction in a magistrates' court on a count of having raped a 10-year-old girl (6 years old at the time of the incident). He raised two main issues, namely that the questions asked by the magistrate before allowing the complainant to testify without taking the oath, did not amount to compliance with the provisions of ss 162 – 164 of the Criminal Procedure Act 51 of 1977 (the Act); and secondly, the insufficiency of the state's evidence identifying him as the perpetrator of the rape.
The record indicated, in respect of the first issue, that the magistrate had enquired of the complainant if she knew what it meant to take the oath and her response indicated that she did not. There was no decision by the court in respect of compliance with s 162 and nothing to state that, in view of the complainant's inability to comply with the provisions of that section, it was embarking on an inquiry in accordance with s 164. In respect of the second issue, the complainant could not describe the perpetrator's height but mentioned that he was light of complexion. She attended an identity parade where she pointed out the accused as the person who had raped her. She later made a dock identification. The only means of identification

she had tendered was that the perpetrator was wearing white trousers and was built like her father. There was no evidence to suggest distinct features of her father which would have resulted in the appellant being identified as the perpetrator.
Held, that, in determining whether to apply the provisions of ss 162 – 164, there firstly had to be an inquiry by the judicial officer to determine whether the witness understood the nature and import of the oath. Secondly, a finding had to be made from that inquiry which would determine whether or not to admonish the witness. The court a quo had not followed this route and, without enquiring sufficiently into issues related to s 162 and making its findings, proceeded to implement s 164.
Held, however, that the failure by the magistrate did not constitute an irregularity. The inquiry conducted provided sufficient compliance, as the court was satisfied whether the complainant was capable of understanding the nature and import of the oath and the ability to distinguish between truth and lies. He was satisfied that the witness was competent to give reliable evidence, and the finding that she was a competent witness and therefore that her evidence was admissible, was correct. (See [14] – [15].)
Held, further, in respect of the finding relating to identification, that the complainant conceded that she had seen photographs depicting the appellant, prior to identifying the appellant at the identity parade, and it was worrying that when she attended the identification parade, despite there being at least nine people in the room when she was allowed into the room, she had walked straight to the appellant without looking at the other people who were participating in the parade. These factors would have influenced her dock identification and, in these circumstances, it could not be said that the state had proved the guilt of the appellant beyond a reasonable doubt.The appeal was upheld, and the conviction and sentence of the appellant were set aside.

S v WILDRIDGE 2019 (1) SACR 474 (ECG)
Trial — Presiding officer — Duties of — Accused not legally represented — Accused choosing to defend himself — Magistrate becoming hostile towards accused after his decision to terminate services of his legal representative — Magistrate then refusing to assist accused — Conviction and sentence set aside.

After the appellant lost faith in his legal representative in his trial in a magistrates' court on a charge of negligent driving, and decided to defend himself, the magistrate disavowed his duty to assist the now unrepresented appellant and told him in no uncertain terms not to seek his assistance; and also allowed the prosecutor to repeatedly interrupt the appellant whilst he was being cross-examined.
Held, that these features were indicative of hostility on the part of the magistrate towards the appellant and, at the very least, created an apprehension in the mind of a reasonable person that the magistrate was not even-handed and fair. The conviction and sentence were set aside.

S v KHATHUTSHELO AND ANOTHER 2019 (1) SACR 480 (LT)

Review — Special review in terms of s 304(4) of Criminal Procedure Act 51 of 1977 — Manner in which such application to be brought.
Legal practitioners — Conduct of — Behaviour in court — Counsel displaying annoyance in court at decision of magistrate — Duty of practitioners towards court reiterated.

Counsel representing the two accused in a magistrates' court on a charge of corruption contested the admissibility of trap evidence and wanted a trial-within-a-trial to be held to establish its admissibility, but the magistrate dismissed the request. After displaying annoyance in the court at this decision, counsel brought an application for the special review of the decision in terms of s 304(4A) of the Criminal Procedure Act 51 of 1977.
Held, that, although the court had inherent powers to review cases brought before it where the interest of justice so required, such proceedings had to be brought on notice in terms of the procedure prescribed by the Uniform Rules in a substantive application clearly setting out the issues for determination and supported by an affidavit. In the present case the accused had failed to do so and there was therefore no proper review to be considered. (See [6].)
Held, further, that, in any event, the magistrate had correctly applied her mind to the facts, including the basis of defence stated by the accused, and in the exercise of her judicial discretion arrived at a decision. There was no discernible reason to interfere with that ruling.
Held, further, that the words used by counsel were both unnecessary and unfortunate and demonstrated an acute lack of respect to the court. Once the court had made a ruling, it became counsel's duty to advise a client on the remedies available to correct what he may regard as an error of fact, law or procedure. Counsel should understand that they make submissions to court with a view to persuading it to find in their clients' favour, and do not make demands. The application for review was dismissed.

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Carelse v City of Cape Town (Eksteen and another as third parties) [2019] 2 All SA 125 (WCC)

Personal Injury/Delict – Attack by dog at public facility – Claim for damages – Negligence – Test for negligence – For the purpose of liability, culpa arises if a diligens paterfamilias in the position of the defendant not only would have foreseen the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss, but would also have taken reasonable steps to guard against such an occurrence, and if the defendant failed to take such steps.

Personal Injury/Delict – Attack by dog at public facility – Claim for damages – Wrongfulness – When a court has to determine whether wrongfulness has been established, it is important for it to consider whether a defendant acted in a reasonable manner.

In December 2013, at a park (the “Day Camp”) operated by the defendant (the “City”), the plaintiff was swimming in one of the swimming pools of the public facility, when she was attacked by a dog. In consequence of the injuries sustained by her in the attack, the plaintiff sued the City for damages. She averred that the incident was caused wrongfully and negligently by the City’s employees by *inter alia* failing to ensure that no dogs were allowed on the premises.

Whilst disputing liability, the City claimed a contribution from the first and second third parties in the event of it being held liable. It admitted in its plea that it owed the

plaintiff a duty of care, but disputed the issues of negligence and wrongfulness. The City also denied the plaintiff's allegations that the park was under the control and in possession of the City, who exercised such control and possession through its employees, who were at all material times acting in the course and scope of their employment.

The parties agreed that the issue of liability had to be adjudicated first, and the question of *quantum* would stand over for later determination, if necessary.

Held – Issues to be decided were the nature of the City's admitted legal duty; whether the City acted in a wrongful and negligent manner; whether the premises were under the control of the City; whether employees of the City exercised control at the park; whether the employees were acting within the course and scope of their employment; and whether the third parties were liable to make a contribution to the City.

An *omissio* is not *prima facie* wrongful. Negligence is assessed against foreseeability. When a court has to determine whether wrongfulness has been established, it is also important for it to consider whether a defendant acted in a reasonable manner.

In determining whether the City acted in a wrongful manner, the Court noted that on the day of the incident, the City owed a legal duty to the plaintiff to ensure her safety at the park. Her safety was in fact not ensured, because she was bitten by a dog. It was also common cause that the park was operated, managed and controlled by the City's employees, and that it had three entrances for access by visitors. However, only the main entrance was access-controlled in order to prevent alcohol, drugs, firearms and dogs from being brought into the park. It was irrational and ineffectual to manage, supervise and conduct strict access control at only one entrance, while conducting no supervision or access control at the other entrances. The City could have put up signboards at the other entrances, warning visitors not to bring dogs onto the premises, or placed officials at those entrances to control access. It did not do so. The City knew that visitors and dogs entered the park through the two unmanned entrance areas, but took no reasonable steps to prevent that. It therefore breached its legal duty and acted wrongfully.

The test for negligence is as follows. For the purpose of liability, *culpa* arises if a *diligens paterfamilias* in the position of the defendant not only would have foreseen the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss, but would also have taken reasonable steps to guard against such an occurrence, and if the defendant failed to take such steps. The enquiry into the question whether the City was negligent, therefore centred around whether the City should have foreseen the reasonable possibility that a dog attack could occur at the park, and if so whether the City should have taken reasonable steps to guard against such event. The City's own by-laws indicated that it was aware that dogs can be dangerous. The City knew that dogs were entering the park. Therefore, a reasonable person, in the position of the City, would have foreseen the reasonable possibility that a dog attack could occur inside the park. In failing to take steps to prevent the risk of dog attacks, the City acted negligently.

The City's claims against the third parties were then addressed. The first third party was the owner of the dog in question and the second third party was the person who had taken the dog into the park. The claim against the first third party was based on

the *actio de pauperie*. The action lies against the owner in respect of harm (*pauperies*) done by domesticated animals acting from inward excitement (*sponte feritate commota*). In those circumstances, the animal is said to act *contra naturam sui generis* in that its behaviour is not considered typical of a well-behaved animal of its kind. Based on that principle, the Court concluded that the first third party was liable to make a contribution to the City for 50% of any damages that the plaintiff might prove.

To establish liability on the part of the second third party, it had to be alleged that he should have foreseen that the dog was likely to bite the plaintiff and that he acted in a negligent manner. Those allegations were not made against him. The City thus failed to establish that the second third party was liable to make any contribution to it.

Law Society (formerly the Law Society of the Cape of Good Hope) v Gihwala [2019] 2 All SA 84 (WCC)

Legal Practice – Attorney – Misconduct – Striking from roll – In terms of the Attorneys Act 53 of 1979, an attorney may, at the instance of the law society of which he is a member, be struck from the roll or suspended from practice if the court in the exercise of its discretion considers him not to be a fit and proper person to continue to practise – Section 72(1) of the Attorneys Act provides that where an attorney is found guilty of unprofessional, dishonourable or unworthy conduct before a disciplinary enquiry of a law society, it may impose a limited range of sanctions on him, which include a fine or a reprimand, and may in such event also recover the costs which were incurred in connection with the enquiry.

The Cape Law Society brought an application for the respondent to be struck from the roll of attorneys on the grounds that he had made himself guilty of unprofessional and dishonourable conduct. The respondent was a senior practitioner who was admitted as an attorney in 1978, and retired from active practice in 2011 due to ill-health, after a long and distinguished career.

The present application followed a number of complaints of alleged professional misconduct which were lodged against the respondent in 2009 and 2011 by the Chief Executive Officer (“Mawjii”) of a Swiss asset management company (“MG”) based in Zurich. MG acted as investment advisor and agent of an investment company (“Grancy”) used by Mawjii and a friend of the respondent as a vehicle to take up two investments which the respondent introduced them to in 2005. Extensive litigation ensued between the parties, over many years, following the termination of their business relationship.

In January 2010 and June 2011 MG and Grancy launched two separate actions which were subsequently consolidated. Their claims were upheld, the Court finding that the respondent and another (“Manala”) had breached the agreements which they had entered into with MG and Grancy, in numerous respects, and had grossly abused their position as directors of a corporate entity over which they held control. The Court found that the respondent had made unfair use of information and opportunities which became available to him in his position as director, in order to gain personal advantage at the expense of Grancy, to whom he owed a fiduciary duty, and his conduct constituted the repeated, wrongful misappropriation of substantial sums of money. On appeal, the Supreme Court of Appeal (“SCA”) confirmed the findings and judgment of the High Court and upheld both the declaration of delinquency as well as most of the monetary claims which it awarded.

In his answering affidavit, in the present proceedings, the respondent stated that he unequivocally accepted the findings of the SCA and of the various High Courts. The present Court therefore undertook a close analysis of the said judicial findings. Aside from its damning findings in relation to the respondent's gross violation of the investment agreement, the SCA also made a number of other equally serious findings of misconduct in relation to the respondent's delinquency as a director.

Flowing from the above, in March 2013, the applicant charged the respondent with 10 counts of alleged unprofessional and dishonourable or unworthy conduct.

Held – As officers of the Courts, lawyers play a vital role in upholding the Constitution and ensuring that our justice system is efficient and effective, and as a result absolute personal integrity and scrupulous honesty are required of them.

In terms of the Attorneys Act 53 of 1979, an attorney may, at the instance of the law society of which he is a member, be struck from the roll or suspended from practice if the Court in the exercise of its discretion considers him not to be a fit and proper person to continue to practise. An application to strike an attorney is a *sui generis* proceeding and is neither criminal nor civil in nature.

The adjudication of an application such as this involves a threefold enquiry. The Court must determine, on a balance of probabilities, whether the law society has established the misconduct upon which it seeks to rely. Thereafter, it must determine whether the attorney is a fit and proper person to continue to practise. That requires the Court to weigh up the conduct complained of against the conduct expected and, to that extent, it involves a value judgment. Finally, the Court must decide whether the misconduct warrants the ultimate sanction of being struck from the roll or whether an order of suspension from practice will suffice. The exercise of discretion is thus concerned with the second and third parts of the enquiry, not the first.

Based on the submissions before it, the Court found that the applicant had clearly established that the respondent had made himself guilty of numerous acts of serious misconduct, committed over a period of many years, including acts which amounted to misappropriations, abuse of funds of co-investors (and which were entrusted to him or which fell under his control) in order to enrich himself and his co-director Manala at their expense, a persistent and deliberate refusal to account to co-investors, and various acts of dishonesty, breach of integrity and of his fiduciary duties, as well as of the professional Rules of the applicant society. The Court was of the view that the conduct of the respondent was likely to recur. It held that an order suspending the respondent from practice, even for an indefinite period, would be wholly inappropriate. According to the Court, the respondent had a fundamental lack of honesty and integrity which he had exhibited for a considerable period of time, and which would in the ordinary course have rendered him wholly unfit to continue to practice, had he not retired.

Section 72(1) of the Attorneys Act provides that where an attorney is found guilty of unprofessional, dishonourable or unworthy conduct before a disciplinary enquiry of a law society, it may impose a limited range of sanctions on him, which include a fine or a reprimand, and may in such event also recover the costs which were incurred in connection with the enquiry.

The respondent's name was struck off the roll of attorneys, and he was held liable for the costs of the application on the attorney and client scale. He was also held liable

for the costs incurred by the applicant in connection with, as well as the costs of, the disciplinary enquiry which was conducted by it.

Jackson v Louw NO and another [2019] 2 All SA 145 (ECG)

Insolvency and Business Rescue – Impeachable transaction – Voidable preferences – Joint trustees of the insolvent estate of an inter vivos trust instituted action against the appellant, for the setting aside of two agreements entered into between him and the trust and the return of livestock – Sections 29, 30 and 31 and 32 of the Insolvency Act applied – Court satisfied that the agreements were dispositions which fell to be set aside as voidable preferences as envisaged in section 29(1) of the Act – Appeal upheld.

Acting in accordance with their authority in terms of section 32 of the Insolvency Act 24 of 1936, the joint trustees of the insolvent estate of an *inter vivos* trust instituted action against the appellant, for the setting aside of two agreements entered into between him and the trust. The liquidators also sought the return of 163 head of livestock and certain movable goods.

The essence of the respondents' pleaded case was that in August 2011, and at a time when the liabilities of the trust exceeded the value of its assets, the appellant and a number of other creditors of the trust, with the knowledge of each other, colluded to jointly take possession of all the cattle in the possession of the trust, and to divide and distribute it between them as they saw fit. It was alleged that that was not an appropriation and distribution by the creditors of livestock owned by them, but included livestock owned by the trust.

The present appeal was against the trial court's entire order.

Held – Sections 29, 30 and 31 of the Insolvency Act are aimed at safeguarding the interests of the creditors in an insolvent estate, and to ensure an equitable distribution of the assets of the insolvent amongst all the creditors in general. To achieve this they create a mechanism for the impeachment of certain categories of transactions entered into by the insolvent pre-sequestration. Section 32 invests the trustee in insolvency (or the liquidator of a company in liquidation) with the right to institute legal proceedings for the setting aside of impeachable transactions, or for the recovery of compensation equal to the value of the property disposed of, or for the payment of a penalty.

In the grounds of appeal the issues for decision raised by the requirements of sections 29 to 30 were narrowed down to whether the agreement in respect of the cattle was a disposition of the property of the trust; whether the agreement in respect of the equipment, was a disposition made in the ordinary course of business, and was not intended to prefer one creditor above another, and was a disposition made with the intention of preferring one creditor above another; and whether the agreements were collusive dispositions.

Having regard to the evidence, the Court was satisfied that the agreements were dispositions which fell to be set aside as voidable preferences as envisaged in section 29(1) of the Act. The appeal was thus upheld.

Minister of Police v Vowana and another [2019] 2 All SA 172 (ECM)

Legal Practice – Conduct of attorney and magistrate – Independence of judiciary enshrined in the Constitution – Unlawful abuse of judicial authority – Court reviewed and set aside the proceedings.

The first respondent was a magistrate based in the Magistrates' Court for the district of Herschel, but passed away before the date of hearing. The second respondent was an attorney in private practice. She represented six plaintiffs in a delictual action against the applicant (the "Minister"). The first respondent was the presiding magistrate in the case. He prepared a draft judgment which he sent to the second respondent. The latter then discussed the draft telephonically with the magistrate and it was agreed that the second respondent would rewrite the draft judgment. The judgment then written by the second respondent became the final judgment in the matter. After becoming aware of the irregularity, the Minister launched the present application for the review and setting aside of the judgment. The review application was brought over a year after the Minister discovered the irregularity. That led to respondents raising a point *in limine* that there had been an unreasonable delay in the launch of the application.

Held – The gravity of the misconduct at the heart of the present matter made it imperative that the merits be addressed. The respondents' point *in limine* was dismissed and condonation granted.

The requirement of judicial officers to not only be independent but also be seen to be independent is one of the foundational prescripts of our law and one of the very important aspects of the rule of law. The independence of the courts and judicial officers is not only enshrined in our Constitution but it is a universal principle respected by all civilised judicial systems.

The first respondent abdicated his responsibility of writing a judgment in the matter by delegating the task to the second respondent, who had a vested interest in the outcome of the case as she represented the four plaintiffs in the matter.

Describing the conduct of the respondents as an unconstitutional, disgraceful, dishonest and unlawful abuse of the judicial authority which the Constitution vests in the Courts, the Court reviewed and set aside the proceedings and ordered the respondents to pay the costs of this application on an attorney and client scale.

Recycling and Economic Development Initiative of South Africa v Minister of Environmental Affairs and a related matter [2019] 2 All SA 1 (SCA)

Constitutional and Administrative Law – Administration of justice – Audi alteram partem principle – Relief should not be granted against a person without allowing such person to be heard.

Corporate and Commercial – Company law – Winding up of solvent companies – Whether just and equitable to wind up companies – Allegations in support of application found not to be justified.

Civil Procedure – Ex parte applications – Duty of utmost good faith – All material facts must be disclosed which might influence a court in coming to its decision, and the withholding or suppression of material facts, by itself, entitles a court to set aside an order, even if the non-disclosure or suppression was not wilful or mala fide.

Civil Procedure – Standing – Whether Minister of Water and Environmental Affairs may invoke section 157(1)(d) of the Companies Act 71 of 2008 for standing in the public interest – Where alternative remedies were available, the bringing of the applications could not be in the public interest.

Two solvent companies were placed under final liquidation at the instance of the Minister of Water and Environmental Affairs. The said companies were the appellants in the two appeals before the present Court. The appellant in the first appeal was a company ("Redisa") responsible for the implementation of a waste tyre recycling scheme. On 29 November 2012, the Minister approved an industry waste tyre management plan that Redisa had conceptualised and submitted to her under the National Environmental Management: Waste Act 59 of 2008. The plan operated indefinitely, subject to a review conducted every five years. The first was in November 2017. Redisa contracted the appellant in the second appeal ("KT") to manage the implementation of the plan.

Although approving the above and commending the plan, the Minister shortly thereafter sought and obtained an *ex parte* urgent provisional winding-up order; first against Redisa and then against KT, on the same basis. Final winding-up orders were granted against both entities, on just and equitable grounds. In finding that it was just and equitable to wind-up the appellants, the court *a quo* upheld the Minister's broad contention that certain of Redisa's directors had not disclosed their relationship with or significant shareholding in KT and that this had enabled them to misappropriate public funds by using KT as their vehicle to unlawfully channel funds collected by Redisa under the plan for their personal benefit. It also upheld the Minister's second ground for winding up Redisa, which was that Redisa's business plan had acknowledged that it would have to begin to wind down from 1 June 2017, if the Department of Water and Environmental Affairs (the "Department") allocated insufficient funds to meet its operational requirements. Once Redisa was wound up, KT had to follow as its existence was entirely dependent upon the money it generated through the plan.

The appellants applied for leave to appeal against the judgment and orders on several grounds. The court *a quo* granted leave to appeal to the present Court only on the ground that the court *a quo* had erred in conferring standing on the Minister, purportedly in terms of section 157(1)(d) of the Companies Act 71 of 2008, to wind up the two solvent companies.

After setting out the background to the Minister's *ex parte* application, the Court considered the complaint by the appellants regarding the Minister's use of *ex parte* proceedings and her failure to disclose material facts to the Court.

Held – Where an order is sought *ex parte* it is well established that the utmost good faith must be observed. All material facts must be disclosed which might influence a court in coming to its decision, and the withholding or suppression of material facts, by itself, entitles a court to set aside an order, even if the non-disclosure or suppression was not wilful or *mala fide*. In deciding whether or not to set aside an *ex parte* order on grounds of non-disclosure, regard must be had to the extent of the non-disclosure, the question whether the judge hearing the *ex parte* application might have been influenced by proper disclosure, the reasons for non-disclosure and the consequences of setting the provisional order aside.

The Minister's founding affidavit fell far short of the disclosure required in *ex parte* proceedings. Disclosure that was made was one-sided and there was also material non-disclosure. She also portrayed Redisa in a negative light despite having publicly praised the plan for its success. The Court highlighted numerous serious instances of inadequate disclosure.

Also relevant to *ex parte* applications is the basic principle of the administration of justice that relief should not be granted against a person without allowing such person to be heard (*audi alteram partem*). The Court confirmed that the Minister's recourse to *ex parte* proceedings was unjustified and that the provisional orders could have been discharged in the court below on that basis.

A trial court has a discretion to discharge a provisional order in circumstances where the use of *ex parte* proceedings was unjustified or where there has been non-disclosure. This is a discretion in the true sense, meaning that on appeal a court will only interfere if the trial court exercised the discretion on a wrong principle or made a decision that was not reasonably open to it. In this case, the court *a quo* was shown to have exercised no discretion at all. The present Court took issue with that, finding that it was an abuse to seek provisional orders *ex parte*. It held that the court *a quo* should have vindicated the principles of *audi alteram partem* and *uberrima fides* by discharging the provisional orders. That conclusion alone dispensed with the appeal.

However, the Court decided to still deal with the questions of whether it was just and equitable to wind up the companies; and the Minister's standing in terms of section 157(1)(d) of the Companies Act.

The basis of the Minister's averment that it was just and equitable to wind up the companies was that they were involved in an illegal operation to siphon off public funds. The allegations in that regard were either incorrect or unsustainable on the papers.

On realising that, the Minister presented a new case in oral argument. It was contended that Redisa's directors had abused KT's corporate personality and contravened item 1(3) of Schedule 1 of the Companies Act. It was alleged that KT had devised a scheme to have the plan approved by the Minister. Its purpose was to improperly divert public funds earned by Redisa to KT's shareholders by receiving management fees under the management contract it had concluded with Redisa before the plan had been approved. The management agreement was therefore said not to be a *bona fide* agreement as contemplated in item 1(3) of Schedule 1 of the Act. Secondly, it was alleged that Redisa's executive directors, who indirectly owned 92,5% of KT, abused KT's corporate personality by unlawfully diverting public funds generated by Redisa to themselves. In terms of item 1(3) of Schedule 1, a non-profit company (such as Redisa) may not transfer any portion of its income or assets to another person unless it does so in accordance with a *bona fide* agreement between the parties and the objects of the company. The Minister's case had to fail as it was not pleaded in the founding affidavit nor in reply. There was no evidence to support the allegation that the management agreement was not a genuine, *bona fide* agreement. The related claim regarding the abuse of KT's corporate personality was also unsustainable.

The last issue was whether the Minister was properly held to have standing to institute these proceedings in the public interest in terms of section 157(1)(d) of the Companies Act. That was a matter of considerable public importance and had important consequences for the winding-up of solvent companies. Section 157(1)(d) entitles a creditor to apply to court to wind up a company on the ground that it is just and equitable to do so, and section 81(1)(d)(iii) of the Act permits the company, a director or a shareholder to apply for the winding-up on the same basis. The Minister was not a creditor, director nor shareholder of Redisa or of KT, and did not purport to represent their interests or step into their shoes. She had no standing to wind up a company in the interests of any of those persons or for the companies themselves. Consequently, the Minister argued that a public-interest litigant with standing in terms of section 157(1)(d) is entitled to rely on any of the substantive grounds for liquidating a solvent company set out in section 81(1) of the Act. At the heart of the inquiry of whether an applicant should be granted the right to seek relief in the public interest, lies a consideration of alternative remedies. The Courts granting the Minister the right to seek provisional orders clearly did not consider any of the criteria relevant to the determination of whether the applications were genuinely in the public interest. The Minister had remedies available to her under the 2008 Act to address her concerns, and made out no case for resorting to the drastic remedy of a winding-up without having considered the extensive alternative remedies. It was also not in the public interest for the Minister to be allowed to seek Redisa's liquidation because the company was an organ of State and section 40 of the Intergovernmental Relations Framework Act 13 of 2005 became applicable. Thus, the Minister as a representative of the national government, had a duty to avoid legal proceedings against Redisa by attempting to settle the dispute first through recourse to other remedies before resorting to litigation.

The appeal was upheld with costs by the majority of the Court.

Resilient Properties (Pty) Ltd v Eskom Holdings Soc Ltd and others [2019] 2 All SA 185 (GJ)

Civil Procedure – Interim interdict – Requirements – Nature of prima facie right which needs to be established.

Local Government – Debt by municipality – Failure to pay for electricity supplied by national energy supplier – Obligations of municipality set out.

Mining, Minerals and Energy – National energy supplier – Rights of – Section 21(5) of the Electricity Regulation Act 4 of 2006 – Energy supplier entitled to interrupt supply of electricity to local authority for non-payment – Decision to terminate supply, being administrative in nature, must meet standard of reasonableness and rationality – Proposed decision irrational and balance of convenience favouring applicant.

The applicant ("Resilient") owned a shopping mall in which it let shops. Although it dutifully paid its electricity bill to the second respondent as the municipality, the latter's failure to pay its account with the electricity supplier ("Eskom") saw Resilient confronted by a decision on the part of Eskom to cut electricity supply to the municipality.

Pending an application for review of Eskom's decision, Resilient brought an application for interim relief. Shortly thereafter Eskom reached a compromise with

GLM, in the form of an acknowledgment of debt by the municipality. The latter defaulted on that arrangement, causing Eskom to revert to its decision to interrupt the electricity supply. The parties reached an agreement that Eskom would not implement its interruption decision pending finalisation of the review application provided that Resilient was able to obtain additional interim relief that protected Eskom's interests against the municipality in the interim period. Consequently, the interim relief sought by the applicant in Part A of its application was amended to seek to have the municipality pay all arrear amounts due to Eskom; to allow the applicant and other such consumers who joined in a class action to pay their electricity bills directly to Eskom; and to interdict Eskom from implementing its decision to cut the electricity supply. A declaration was also sought that section 21(5)(c) of the Electricity Regulation Act 4 of 2006 was inconsistent with the Constitution and invalid.

The applicant's argument was that in terms of Eskom's licence it was obliged to supply electricity to all end-users of local authorities, and does not permit it to discontinue electrical supply to an entire local authority for non-payment. The constitutional attack was based on the contentions that Eskom's decision was tantamount to impermissible self-help, offending the rule of law and the right to access to courts. It was also submitted that Eskom's decision was substantively reviewable under section 6(2)(e)(iii) of the Promotion of Administrative Justice Act 3 of 2000 because relevant considerations were not considered.

Held – The first requirement for interim relief was a *prima facie* right (though open to some doubt). Such right, though open to some doubt conveys that the strength of the right is allowed to fluctuate from strong to weak. If it is strong, the other requirements for an interim interdict may be weak, and if it is weak, the other requirements for an interim interdict may be strong.

The municipality's obligations were clear. It was obliged to have paid Eskom in terms of the acknowledgment of debt, and it was obliged to ensure the provision of services to its community in a sustainable manner. It also had to pay its bills in 30 days.

While Resilient was able to establish a *prima facie* right as against the municipality, its case against Eskom differed. The Court confirmed that in principle Eskom has the power under section 21(5) of the Electricity Regulation Act to terminate or interrupt the supply of electricity to the municipality, given its contractual default. As that power constituted administrative action, it was constrained if not by the requirement of reasonableness, then by the baseline standard of rationality. It would have acted irrationally if the exercise of the power was not rationally connected to the purpose for which it was given. That involved a fact-driven enquiry. Ordinarily, the power to interrupt or to terminate supply of electricity would have been intended to prevent Eskom from having to supply electricity when it will not be paid for it. But it could not be accepted that the power could have been intended to be exercised in such a manner that it would in a given circumstance result in wide-spread human catastrophe. The Court agreed that a human catastrophe would follow the implementation of Eskom's particular interruption decision.

In the premises, the Court granted an interim order directing the municipality to pay Eskom the amounts due in terms of the acknowledgment of debt, and interdicting Eskom from implementing its termination notice.

S v Witbooi and others [2019] 2 All SA 204 (WCC)

Criminal law and procedure – Doctrine of common purpose – Applies where two or more people agree to commit a crime or actively associate in a joint unlawful enterprise – Each will be responsible for the specific criminal conduct committed by one of their number which falls within their common design.

Criminal law and procedure – Robbery with aggravating circumstances; kidnapping; attempted murder; murder; rape – Conviction and sentence – Accomplice evidence – When an accomplice gives evidence implicating his co-accused, the Court must approach that evidence with caution and establish if the accomplice does so in an attempt to exculpate himself or to minimise his role.

Arising from the murder of a university student in Stellenbosch, the four accused were charged with murder, four counts of robbery with aggravating circumstances, two counts of kidnapping, attempted murder and rape. Pleas of not guilty were entered in respect of all the charges. All the accused made formal admissions in terms of section 220 of the Criminal Procedure Act 51 of 1977.

The first accused made a formal confession stating that he was in the company of his co-accused on the evening of 26 May 2017 through to 27 May 2017. Going into the town of Stellenbosch, the accused saw a vehicle with two people (a male and a female) sitting inside. The second accused suggested robbing the two people of the vehicle and put them in its boot. The four proceeded to carry out the suggestion. The male victim was robbed of his wallet and cell phone and put into the car's boot while the accused drove to a person whom the second accused said was a potential buyer of the hijacked vehicle. The accused used drugs while on their journey. At some point, the second accused stopped the vehicle and took the man out of the boot and into the bush, emerging without him. By then, the fourth accused had left and the group was joined by another person. The latter and the second and third accused informed the first accused that they were going to have sexual intercourse with the female victim. At a further stop, the female was abandoned, although the first accused alleged that he did not know what the others in the group had done with her. The group was subsequently chased and apprehended by the police.

The third accused made certain allegations when a police officer took his warning statement on 30 May 2017, after his rights were explained to him. He expressed regret for what he had done and wanted the parents of the female victim (the "deceased") to forgive him.

The fourth accused made a statement describing his involvement in the robbery of the male victim, after which he left the group.

The male victim was the complainant in the first, third and fifth counts.

Held – When an accomplice gives evidence implicating his co-accused, the Court must approach that evidence with caution and establish if the accomplice does so in an attempt to exculpate himself or to minimise his role.

The doctrine of common purpose is described as applying where two or more people agree to commit a crime or actively associate in a joint unlawful enterprise. Each will be responsible for the specific criminal conduct committed by one of their number which falls within their common design. In the present case, the four accused, who set out together to see what ill-gotten gains they could acquire, were in the company of

one another when the first and second accused discussed how they could rob the occupants of the vehicle. To give effect to their plan to rob, every accused fulfilled a specific role in ensuring that their victims could not escape from the car. Having seen that the first and second accused managed to get the car doors open and were standing on either side of a front door next to each occupant, the third and fourth accused reconciled themselves with the conduct of the first and second accused and not only approached the car, but also climbed inside the back seat and proceeded to rob and facilitate the robbing of the male victim. The doctrine of common purpose requires that the accused must all have had the intention to commit the offence as evinced by their lack of disassociation and act of association with the conduct of one another in the commission of the offence. The Court concluded that the State has proved beyond reasonable doubt that the first three accused committed the offences set out in counts 1 to 10 with direct intent and that the fourth accused perpetrated the offences described in counts 1 to 4 with direct intent.

In its judgment on sentence, the Court set out the established principles applicable to sentencing. It sentenced the first three accused to an effective term of life imprisonment and the fourth accused to an effective 22 years' imprisonment.

Staufen Investments (Pty) Ltd v Minister for Public Works and others [2019] 2 All SA 258 (ECP)

Constitutional and Administrative Law – Application for review in terms of rule 53 of the Uniform Rules of Court – Decision to expropriate land – A decision resulting in a deprivation of property is arbitrary if it does not provide sufficient reasons for the deprivation, or if it is procedurally unfair – Court finding challenge to decision based on public interest to be unfounded.

The applicant owned a farm on part of which the second respondent ("Eskom") had an electric substation. Eskom had occupied the approximately one hectare electric substation area of the farm for two decades.

In November 2015, the applicant brought an application to terminate Eskom's occupation of the electric substation area, and directing Eskom to remove all plant equipment and material from the substation area and to rehabilitate such area to accord with surrounding vegetation and topography. The application for eviction was based on the fact that Eskom's occupation of the substation area was illegal in that no servitude in respect of its use of a portion of the farm was ever registered in the offices of the third respondent (the "Registrar of Deeds, Cape Town").

In April 2016, and by agreement between the parties, orders were made as set out in the applicant's application referred to above. However, the implementation of the eviction orders was suspended pending the finalisation of Eskom's application for expropriation of certain rights over the substation area. In September 2016, the first respondent (the "Minister") took a decision to expropriate certain rights over the affected portion of the applicant's farm in favour of Eskom.

In terms of rule 53 of the Uniform Rules of Court, the applicant sought the review and setting aside of that decision.

Eskom opposed the application on the basis that it had until recently believed it had real rights over the farm to maintain and have access to it's substation site, and that

it's use of the farm had been in practice for many years. It also argued that the evacuation of the substation would have an enormous impact on the citrus and tourism industry and all the townships that relied on the electricity supplied to them by the particular substation.

Held – Expropriation decision constituted administrative action. Accordingly, the application was also brought in terms of section 6 of the Promotion of Administrative Justice Act 3 of 2000.

All the parties accepted that Eskom had no legal right entitling it to have access to and maintain and operate the substation on the portion of the farm currently under its control. The applicant explained how the continued occupation of the substation site has impacted negatively on its farming activities.

Section 2(1) of the Expropriation Act 63 of 1975 gives the Minister the power to expropriate any property for public purposes and to either approve or decline an application for expropriation. The Electricity Regulation Act 4 of 2006 also provides for expropriation of land in furtherance of that Act. The above statutory provisions remain subject to section 25 of the Constitution in terms of which no-one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property. Property may be expropriated only in terms of law of general application for a public purpose or in the public interest; and subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court. The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances.

A decision resulting in a deprivation of property is arbitrary if it does not provide sufficient reasons for the deprivation, or if it is procedurally unfair.

In the review application, the applicant's main arguments were that the purpose of the expropriation application was not to facilitate the objects of the Electricity Regulation Act, but to *ex post facto* regularise and legalise Eskom's unlawful occupation of the farm, which is not an objective envisaged in the aforesaid Act. The second contention was that the decision to expropriate was in conflict with the constitutional principle of legality and the common law and constituted a deprivation of the applicant's rights in the farm and could never be regarded as a legitimate public purpose. The Court held that if Eskom's current occupation of the substation site was not regularised, it would be evicted. The only route available to achieve regularising of the occupation was through expropriation. If Eskom's occupation was regularised, albeit *ex post facto*, the infrastructure would be enhanced thereby – which was in the public interest. The alternative would be disastrous for the supply of electricity. Eskom's lack of rights was the result of an error. It did not wilfully and grossly violate the principle of legality and the applicant's property rights as the applicant contended. The decision to expropriate was the correct decision to take in the circumstances. The first respondent's decision could therefore not be said to be arbitrary.

The review application was thus dismissed.

Watson and another v Renasa Insurance Company Ltd [2019] 2 All SA 280 (WCC)

Insurance – Contract of indemnity – Aimed at procuring for the insured indemnity, in the strictest sense of that word, for any losses he may sustain, through the agency of the risks against the effect of which the insurer has undertaken to protect him – Insured would usually be entitled to recover the real and actual value of what he has lost through the happening of the event insured against – Insured is entitled to receive the value of the loss based on replacement value of equivalent new property, not the actual value of the property insured at date of the loss, but subject to the maximum of the insured value under the policy.

In January 2011, a fire at the first plaintiff's place of business destroyed machinery insured by the defendant. The plaintiff claimed the cost of replacing or reinstating his machinery in accordance with the reinstatement provisions of the insurance policy issued by the defendant. The claim was repudiated and the plaintiff instituted action. The main defence on the merits at the trial was that the plaintiff had deliberately set fire to his factory in order to make a fraudulent claim under the policy. The trial court found for the plaintiff, and its judgment was upheld by the Supreme Court of Appeal.

The matter came before the present Court in respect of the *quantum* of the plaintiff's claim.

Held – Our law of insurance is based on English insurance law. As stated in case law, the essence of the contract of insurance is that it is a contract of indemnity aimed at procuring for the insured indemnity, in the strictest sense of that word, for any losses he may sustain, through the agency of the risks against the effect of which the insurer has undertaken to protect him. Accordingly, the insured would usually be entitled to recover the real and actual value of what he has lost through the happening of the event insured against. In the context of indemnity insurance two important fundamental principles apply. The first is that the event giving rise to the claim under the policy constitutes a fictional breach of the contract (a legal fiction). The second is compensation for damages as a consequence of that legal fiction (that should not be conflated with any subsequent repudiation by the insurer under the policy). Insurance policies frequently give the insurer the option of reinstating the property insured instead of paying a money indemnity to the insured. Should the insurer so elect, it thereby substitutes a different mode of discharging its obligation under the policy. The contract is no longer a contract to pay a sum of money, but a contract to reinstate the insured property. Once having made such election, the insurer cannot withdraw from such election and is obliged to reinstate the property adequately regardless of the cost, and is further liable for the consequences of a failure to perform such reinstatement adequately. In the instant matter, it was not suggested that the defendant at any stage elected to exercise such option under the policy and itself reinstate the damaged property.

The other manner in which the term reinstatement is sometimes encountered in indemnity policies is in the context of the basis upon which a claim is to be valued. In the policy in this matter, the basis of valuation of a claim was contained in a "Reinstatement value conditions clause" ("RVC clause"). The insured is entitled to receive the value of the loss based on replacement value of equivalent new property, not the actual value of the property insured at date of the loss, but subject to the maximum of the insured value under the policy. In the policy under consideration,

provision was made for the full costs of repair of the property; alternatively, in respect of property not capable of repair, replacement by “like-for-like” property (in the instant matter, machinery) where the same (or closely similar) property existed in the market.

The first issue to be addressed in the present proceedings was whether the plaintiff had demonstrated an inability, despite his best efforts, to reinstate. The Court set out the plaintiff’s attempts to revive his business and found that the plaintiff was clear and credible in requiring a commitment from the defendant that it would pay his claim so that he could resuscitate the business.

It then had to be decided whether the plaintiff’s inability precluded him, as a matter of law, from relying on the RVC provisions of the policy. Where there is such a clause in a policy, the insurer should make payment of the indemnity value. If the insured fails to expend it on reinstatement within any time period contemplated in the policy, then the insurer is absolved from making further payment. Moreover, as soon as the defendant elects not to exercise its option to reinstate itself, but to perform its obligation to pay money, it no longer has any entitlement to such reinstatement by itself and is limited to making payment under the policy, whether of an indemnity or of the replacement or reinstatement value. The defendant’s attempt to undermine the plaintiff’s reliance on the reinstatement provisions of the policy after the Supreme Court of Appeal’s decision had to fail.

The Court then had to rule on the valuation of the plaintiff’s claim. In that regard, it accepted the values arrived at by the expert witnesses in their valuation of the replacement claim. It held further that the correct and appropriate manner in which to compensate the plaintiff was to value the claim as at the date of the incident (in 2011). Interest had to be calculated at the rate of 15,5% per annum on the basis that it ran from the date of the incident or, at the very latest, from the date of service of summons, being 14 September 2011. Taking a cautious approach, the Court fixed the date at 14 September 2011. That applied equally to the provision for Value-Added Tax.

end-for now