LEGAL NOTES VOL 5/2019

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COMPETITION COMMISSION v HOSKEN CONSOLIDATED INVESTMENTS LTD AND ANOTHER 2019 (3) SA 1 (CC)

Competition — Competition Tribunal — Jurisdiction — To make declaratory orders — Competition Tribunal possessing such power — Competition Act 89 of 1998, ss 27(1) and 58.

Competition — Competition Tribunal — Jurisdiction — Declaratory order sought that proposed transaction not constituting notifiable merger — Whether Tribunal could be approached directly in absence of notification of transaction to Competition Commission — Tribunal could hear matter in absence of notification — Competition Act 89 of 1998, s 13A.

Competition — Promotion of competition — — Merger control — Merger — Notifiable merger — Change in nature of control — *De facto* to *de jure* — Acquiring firm, having obtained merger approval for transaction that resulted in *de facto* control of another company, proposing second new transaction that would result in increased shareholding and *de jure* control — In accordance with once-off principle, latter transaction not notifiable — Competition Act, s 12(2)(*a*), s 12(2)(*g*), s 15, s 16(3).

Hosken Consolidated Investments Ltd (HCI, the first respondent) was an investment-holding company in the casino and non-casino gaming and entertainment sectors. Tsogo Sun Holdings Ltd (Tsogo, the second respondent) was a subsidiary of HCI. In 2014, as a result of the disinvestment of a joint owner, HCI's ownership in Tsogo increased from 39% to 47,61%, making it the largest shareholder in Tsogo. The transaction was a 'merger', given that HCI, in line with the definition of the term in s 12(1) of the Competition Act 89 of 1998, acquired 'control' over Tsogo by meeting one of the forms of control specifically contemplated in s 12(2) — in this case, *de*

[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!**

facto control in terms of s 12(2)*(g)*. As it was obliged to under s 13A of the Act, HCI sought merger approval from the Competition Commission (the applicant), which was granted and then confirmed by the Competition Tribunal.

The present proceedings were prompted by HCI's 2016 decision to consolidate most of its gaming interests, held in other subsidiary companies, under Tsogo. Because this would result in HCI's increasing its shareholding in Tsogo to over 50% and achieving the de jure form of control contemplated in s 12(2)*(a)*, it approached the Commission for an advisory opinion on whether it had to notify this proposed 2017 transaction to the competition authorities.

HCI was of the opinion that it did not have to because the consolidation was simply a manifestation of the 2014 approval by the Commission, and further that the proposed transaction did not entail an acquisition of control since it merely involved the combination of assets that were already subject to the sole, unfettered control of HCI. But the Commission disagreed, holding that HCI was obliged to notify the transaction, because the requirement of notification was triggered once a transaction fell within the purview of s 12(2) (or, as the Commission put it, once the transaction crossed one of the 'bright lines' of the various forms of control set out in ss (2)); and given the changed market structures since 2014. HCI and Tsogo, on an urgent basis, approached the Competition Tribunal for an order declaring that the proposed 2017 transaction was not notifiable. The Tribunal declined, on the grounds, inter alia, that the Act did not grant it the power to give declaratory relief; that the Tribunal's jurisdiction was triggered only when notification of the merger had been given to the Commission; and there was no live dispute because the Commission's advisory opinion was not binding on the parties, in which case it should not exercise its discretion in favour of granting declaratory relief.

HCI and Tsogo successfully appealed to the Competition Appeal Court. It found that the Tribunal had jurisdiction to grant declaratory orders. It found further that the Tribunal ought to have granted a declaratory order to the effect that the 2017 transaction was not notifiable, holding that an acquiring company, that had obtained merger approval for a transaction that would result in the acquisition of control in any one of the ways mentioned in s 12(2), need not again seek merger approval when control was subsequently acquired in another of the ways set out in the provision. Before the Constitutional Court, the Commission sought leave to appeal against such decision. The Constitutional Court granted leave, and heard the appeal.

Whether the 2017 transaction was notifiable

Held, that once a firm had already acquired de facto control over another firm in any of the instances contemplated by s 12(2)*(b) – (g)*, a further transaction need not again be notified simply because the nature of control changed to de jure control envisaged in s 12(2)*(a)*. Such an approach was in line with the 'once-off principle', that held that a change of control was a once-off affair for which notification was only required upon the initial acquisition. Once a firm had acquired control over another in any one of the instances contemplated by s 12(2)*(b) – (g)*, the crossing of a further 'bright line' did not result in the acquisition of control that it did not have before. This was consonant with the requirement that control had to be acquired over the whole or part of the business of another firm. Where the nature of control over the firm

which was already controlled changed, it would not constitute a 'merger', and, where there was no merger, no notification was required.
Held, however, that the Commission retained its power, in terms of s 16(3), read with s 15, of the Act to investigate the past merger transaction to determine whether revocation of the approval was justified. (Hence, the Constitutional Court disagreed with the finding of the Competition Appeal Court that the earlier merger approval could not be revisited.)

Whether the Tribunal should have exercised jurisdiction
Held, that the Tribunal could be approached directly without there first being a notification in terms of the Act, and that the Tribunal had the power to issue declaratory orders, for the following reasons. Section 27(1)*(d)* of the Act — providing that the Tribunal may make any ruling or order that was necessary or incidental to the performance of its functions in terms of the Act — and s 58 of the Act — granting the Tribunal the power to make an appropriate order in relation to a prohibited practice — were formulated widely enough to include the power to grant declaratory relief in respect of issues in dispute referred to it. Further, persuasive policy considerations supported such a finding. For one, the Act ousted the High's Court's jurisdiction regarding competition matters; therefore, forbidding parties the option to approach the Tribunal for declaratory relief on an issue which potentially might invoke the Commission's investigative powers could effectively leave a party without a remedy. Furthermore, declaratory orders could bring clarity and finality to disputes that may, if unresolved, have far-reaching consequences for each party. Lastly and most importantly, litigants had a constitutional right to a remedy to resolve a dispute in an appropriate forum. (See [76] – [78].)

Whether to grant declaratory relief
Held, that a declarator ought to have been granted. (There were no grounds for the view of the Commission that there did not exist a live dispute.)
Accordingly, the appeal was upheld only to the limited extent set out in para 4 of the order.
Froneman J in a concurring judgment cautioned that the order granted by the Constitutional Court should not be read as an invitation to flood the Tribunal with applications for declaratory orders of the above kind.

LAW SOCIETY OF SOUTH AFRICA AND OTHERS v PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS 2019 (3) SA 30 (CC)

President— Conduct — Constitutionality — Participation decision to suspend operations of SADC Tribunal and subsequent signing of 2014 Protocol stripping it of its jurisdiction to hear complaints by individuals against member states — President's conduct unconstitutional, unlawful and irrational — Constitution, s 231(1).

International law — International agreements, treaties and conventions — Vienna Convention on Law of Treaties (1969) — Constituting binding customary international law — Constitution, s 232; Vienna Convention, art 18.

In May 2011 the then State President (President Zuma) supported a resolution by the Southern African Development Community Summit (the supreme organ of the SADC, consisting of its heads of state) to suspend the operation of the SADC

Tribunal. Then, in August 2014, the President signed the 2014 Protocol to the SADC Treaty (see next paragraph for more on Treaty). The 2014 Protocol, though never ratified, effectively stripped the Tribunal of its jurisdiction to hear complaints by individuals against member states. The present case deals with the legality of those two presidential acts.

The SADC was established by the SADC Treaty of 1994. Member states bound themselves to a human rights culture, a democratic order and the rule of law. The Tribunal was established to ensure adherence to the Treaty and adjudicate disputes referred to it. The original Tribunal Protocol, which regulated the Tribunal's procedure, allowed the adjudication of complaints by individuals against member states. South Africa approved the Treaty and Tribunal Protocol in 1995.

The President's conduct had its origins in the Zimbabwe land reform programme. Zimbabwe had removed its courts' jurisdiction over the matter, leaving the Tribunal as the only forum available to affected landowners. In a complaint by several of them, the Tribunal ruled that Zimbabwe had violated the Treaty. Spurred on by Zimbabwe, the Summit — including President Zuma — reacted by suspending the Tribunal and stripping it of its human rights mandate via the 2014 Protocol.
The Law Society (the first applicant) * approached the Pretoria High Court for an order declaring President Zuma's conduct unconstitutional.

The President argued that the application waspremature since the 2014 Protocol was not yet binding, as it was yet to be ratified by Parliament. But the High Court found in favour of the Law Society and referred its order of invalidity to the Constitutional Court for confirmation.

Two sections of the Constitution were relevant: s 231(1), which vests the responsibility of negotiating and signing international agreements in the executive; and s 232, which provides that customary international law is law in South Africa unless it clashes with the Constitution or an Act of Parliament. Also relevant was art 18 of the Vienna Convention on the Law of Treaties (1969), which obliges states to refrain from defeating the object and purpose of a treaty that it has signed but not ratified. South Africa is not a party to the Vienna Convention.

Majority judgment per Mogoeng CJ (Basson AJ, Dlodlo AJ, Goliath AJ, Khampepe J and Theron J concurring)
While the 2014 Protocol was, due to its non-ratification, not binding on the face of it, that did not necessarily dispose of its consequentiality or of the prematurity challenge (see [22]). Courts were entitled to intervene in an unfinalised process to prevent a violation of the Constitution or the rule of law. Here immediate relief was required due to the serious threat the President's signature of the 2014 Protocol posed to the constitutional and Treaty rights of those who might seek recourse to the Tribunal (see [29]). The prematurity question could also be addressed from the perspective of art 18 of the Vienna Convention, which formed part of customary international law under s 232 of the Constitution and obliged South Africa not to act against the spirit of an unratified international agreement such as the 2014 Protocol (see [34] – [40]). In summary, the President's signature of the 2014 Protocol had serious consequences which required prompt intervention to prevent a violation of the Constitution and the rule of law (see [41]).

The President's decision to suspend the Tribunal was unlawful because he followed an impermissible and irregular procedure, purported to exercise powers he did not have, and failed to act in good faith and in pursuit of the object and purpose of the Treaty (see [56]). And his disregard for procedure meant that his conduct was also irrational, in the sense of not being rationally related to the end sought to be achieved, namely the reduction of the Tribunal's jurisdiction (see [62], [64], [70]). In addition, his signature of the 2014 Protocol was unconstitutional because he lacked the authority to sign away constitutional and Treaty rights of access to justice. To the extent that he purported to do so, he acted contrary to his constitutional obligations and impermissibly exercised his powers under s 231(1) of the Constitution (see [84]).

Concurring minority judgment per Cameron J and Froneman J (Mhlantla J and Petse AJ agreeing)
The irrationality and unlawfulness of the President's conduct sprang not from any affront the President directly inflicted on international law, but from the infringement of our own Constitution (see [98], [103], [105]). This was because the President could not directly fall foul of the international law of treaties — only a sovereign state or international organisation could (see [100]).
Order
The President's participation in the decision-making process and his decision to suspend the operations of the Southern African Development Community Tribunal was unconstitutional, unlawful and irrational, as was his signature of the 2014 Protocol (which had to be withdrawn) (see [97]). The Presidency had to pay the applicants' costs.

SA VETERINARY ASSOCIATION v SPEAKER OF THE NATIONAL ASSEMBLY AND OTHERS 2019 (3) SA 62 (CC)

Constitutional law — Constitution — Foundational principles — Participatory democracy — Parliament's obligation to involve public when drafting and enacting legislation — Test — Nullity resulting from failure to comply.

Constitutional law — Parliament — Obligations — National Assembly's obligation to facilitate public participation in legislative process — Ambit — Amendment to Bill — Materiality and standard of reasonableness — Sufficiency of notice period — Constitution, s 59(1)(*a*); s 72(1)(*a*); s 118(1)(l).

Constitutional law — Legislation — Validity — Medicines and Related Substances Act 101 of 1965, s 22C(1)(*a*) — Word 'veterinarian' excised.

Veterinarian — Dispensing and compounding of medicines — Statutory amendment requiring license declared unconstitutional and invalid — Word 'veterinarian' excised from relevant statutory provision — Medicines and Related Substances Act 101 of 1965, s 22C(1)(*a*).

This case dealt in the main with the ambit of the National Assembly's duty under s 59(1)*(a)* of the Constitution to involve the public when drafting and enacting legislation, and the nullifying effect of its failure to comply.

The applicant (SAVA), which represents South African veterinarians, alleged that Parliament had failed to adequately facilitate public participation in the legislative

process when — by means of an amendment Bill — it introduced the word 'veterinarian' into s 22C(1)*(a)* of the Medicines and Related Substances Act 101 of 1965, thereby requiring veterinarians, like other health practitioners, to obtain a licence to compound and dispense medicines. The amendment Bill was published twice in two separate *Government Gazettes*, but never in a form that included the word 'veterinarian'. The change, supported by the Pharmaceutical Society of South Africa, was made on the recommendation of the Department of Health to the National Assembly's Portfolio Committee on Health. The Bill was passed on to the National Council of Provinces and then to the various provincial legislatures, which did hold hearings, but either on very short notice or without any notice at all. The Bill was then adopted by the National Assembly and signed into force on 23 December 2015.

SAVA approached the Constitutional Court for direct access to challenge ‡ the procedure adopted by the National Assembly. SAVA claimed that the National Council of Provinces and the provincial legislatures had also fallen short of their obligations under, respectively, s 72(1)*(a)* and s 118(1)*(a)* of the Constitution. It was common cause that the matter, involving as it did an allegation that Parliament failed to fulfil a constitutional obligation, engaged the court's exclusive jurisdiction. The respondents did not oppose the application and abided the court's decision.

Held
It was clear from Constitutional Court jurisprudence that legislation could be declared invalid for lack of public participation in the lawmaking process (see [19] – [23]). Section 59 of the Constitution required public involvement to be facilitated at all stages of the National Assembly's processes, including at committee level. The standard by which public participation had to be measured was that of reasonableness (see [32]).

The insertion into the Act of a word that materially affected a specific group was exactly the situation for which this obligation was created. (See [26], [46].) Since a complete failure to take any steps to involve the public in a material amendment to a Bill was completely unreasonable, the National Assembly failed in its s 59(1)*(a)* duty. The insertion of the word 'veterinarian' was therefore invalid. (See [32], [46].)

The National Council of Provinces and the provincial legislatures also failed in their obligation to facilitate public participation. While the latter made an effort, it was inadequate due to the unreasonably short notice periods provided (see [40]). Moreover, their failure to notify SAVA and other organisations representing the interests of veterinarians undermined the purpose of facilitating public participation (see [42]). Accordingly the insertion of the word 'veterinarian' was also contrary to s 72(1)*(a)* and s 118(1)*(a)* of the Constitution (see [46]).

The only appropriate remedy was to declare s 22C(1)*(a)* constitutionally invalid to the extent that it included the word 'veterinarian' and to order that it be severed from the rest of the section.

TRUSTEES, SIMCHA TRUST v DA CRUZ AND OTHERS 2019 (3) SA 78 (CC)

Local authority — Buildings — Building plans — Approval — Disqualifying factors — Legitimate expectations test — Whether applying to all three disqualifying factors under National Building Regulations and Building Standards Act 103 of 1977, s 7(1)(*b*)(ii)(*aa*).

The appellant (the Trust) obtained local authority approval to build an additional four storeys to its existing structure. The top three additional storeys would have touched existing balconies on three floors of the neighbouring Four Seasons building, a sectional title scheme. Aggrieved by the approval, the body corporate of the Four Seasons and an owner of a unit in the scheme, Mr Da Cruz, successfully applied for the approval to be set aside on review (in August 2013). New plans were submitted, the approval of which (in January 2017) was again successfully challenged on review. An appeal against this decision was dismissed by a full bench of the High Court. After a petition for leave to appeal to the Supreme Court of Appeal was unsuccessful, the Trust and the local authority applied to the Constitutional Court for leave to appeal.

The Trust submitted inter alia that the full court erred when it applied the legitimate expectations test to the disqualifying factors *(aaa)* and *(bbb)* in s 7(1)*(b)*(ii)*(aa)* of the National Building Regulations and Building Standards Act 103 of 1977 (the Act).

This subsection provides that a local authority 'shall refuse' to approve an application to erect buildings if it 'is satisfied that the building to which the application relates is to be erected in such a manner or will be of such a nature or appearance that — (*aaa*) the area in which it is to be erected will probably or in fact be disfigured thereby; (*bbb*) it will probably or in fact be unsightly or objectionable; (*ccc*) it will probably or in fact derogate from the value of adjoining or neighbouring properties'.

The Constitutional Court found that the appeal had no prospect of success, but in the interest of justice granted leave to appeal on the question of law 'whether the legitimate expectations test [which] applied in the context of the disqualifying factor relating to derogation in value, also applie[d] to the other disqualifying factors found in s 7(1)*(b)*(ii)*(aa)*'.

Held

The purpose of the Act was to ensure the harmonious, safe and efficient development of urban areas. Local authorities must exercise the powers conferred on them under the Act in pursuit of that purpose; they were the caretakers of the community interest in relation to building applications. This impelled them to consider the impact of a building proposal on the surrounding area and particularly the neighbours. When applied to each of the disqualifying factors in s 7(1)*(b)*(ii)*(aa)*, the legitimate expectations test was an accurate translation of the duties of local authorities under the Act and the Constitution. It required the decision maker to consider the impact of the proposed development on neighbouring properties, from the perspective of a hypothetical neighbour. This infused the exercise of the discretionary power under s 7(1)*(b)*(ii)*(aa)* with the constitutionally mandated requirements of reasonableness, lawfulness and procedural fairness, informed by the contextual approach mandated by the Act. The test was consistent with the

objects of the Act and the constitutional requirement of just administrative action. The decision maker should consider whether the proposed building would probably, or in fact, be so disfiguring of the area, objectionable or unsightly that it would exceed the legitimate expectations of a hypothetical owner of a neighbouring property.
For these reasons the legitimate expectations test was the appropriate means through which to establish the existence of the disqualifying factors in ss 7(1)*(b)*(ii)*(aa)(aaa) – (ccc)* of the Act, and accordingly the appeal would be dismissed.

COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE v BIG G RESTAURANTS (PTY) LTD 2019 (3) SA 90 (SCA)

Revenue— Income tax — Deductions — Allowance in respect of future expenditure on contracts — Whether income accrued in terms of contract — Narrow meaning of 'in terms of' — In present case, taxpayer's income not accruing in terms of franchise agreement — Income Tax Act 58 of 1962, s 24C(2).

Section 24C(2) of the Income Tax Act 58 of 1962 (the Act) provides that —
'(i)f the income of any taxpayer in any year of assessment includes or consists of an amount received by or accrued to him *in terms of* any contract and the Commissioner is satisfied that such amount will be utilised in whole or in part to finance future expenditure which will be incurred by the taxpayer in the performance of his obligations under such contract, there shall be deducted in the determination of the taxpayer's taxable income for such year such allowance (not exceeding the said amount) as the Commissioner may determine, in respect of so much of such future expenditure as in his opinion relates to the said amount'.

The taxpayer, a franchisee, was obliged, under its franchise agreement with the franchisor, to upgrade and refurbish its franchise restaurants at intervals determined by the franchisor. In respect of its 2011 – 2014 years of assessment, the taxpayer claimed an allowance in terms of s 24C in relation to future expenditure to be incurred by virtue of this obligation. The Commissioner, disputing the taxpayer's claim for such allowances, raised additional assessments. The taxpayer appealed against these to the Tax Court, which was asked to decide two questions of law: (1) whether the income received by the taxpayer from operating the franchise businesses were amounts received or accrued *in terms of* the franchise agreement as contemplated in s 24C; and (2) whether the expenditure required to refurbish or upgrade restaurants was incurred 'in the performance of [the taxpayer's] obligations under such contract' as contemplated in s 24C.

The Tax Court answered both questions in favour of the taxpayer and set aside the assessments. In the Commissioner's appeal to the Supreme Court of Appeal —
Held
Section 24C(2) had two basic requirements: first, there must be income received or accrued *in terms of* a contract; second, the Commissioner must be satisfied that the income received from the contract would be used wholly or partially to finance future expenditure that a taxpayer would incur in performing its obligations under that same contract. (At [14].)

The context and the background of the phrase 'in terms of' in s 24C supported a narrow meaning thereof, ie it did not have the wide meaning of 'pursuant to' or 'in accordance with' the agreement as contended for on behalf of the taxpayer. Applying the narrow meaning of the phrase, the question was whether the taxpayer received income under the franchise agreement. The answer was clearly no. None of the rights accorded to the taxpayer under the franchise agreement were rights to income. The fact that a contract was useful or even necessary to enable a taxpayer to earn income did not mean that its income was earned 'in terms of' such contract. (At [10], [17] and [20].)
This conclusion was dispositive of the appeal, and accordingly it would be upheld.

LOUIS PASTEUR HOLDINGS (PTY) LTD AND OTHERS v ABSA BANK LTD AND OTHERS 2019 (3) SA 97 (SCA)

Company — Business rescue — Disposal of property — Secured property — Requirements — Whether met — Practitioner proposing periodic payment from property (rental income) in eventual discharge of secured debt — Companies Act 71 of 2008, s 134(3).

Practice — Applications and motions — Separation of issues for preliminary determination — Caution to be exercised.

A High Court had granted orders (1) finally liquidating a pair of companies; (2) setting aside a resolution placing one of them in business rescue; and (3) dismissing applications to intervene.
On appeal to the Supreme Court of Appeal appellants sought the setting aside of the orders for failure on the High Court's part to determine a separated issue; and further, that the matter be remitted to the High Court (see [7] and [12]).
Held

- The Supreme Court of Appeal should decide the separated issue.
- The separated issue was (1) whether the companies' business rescue practitioner could use property of one of them (rental income), in which Absa Bank Ltd had a security interest, without Absa's consent (see [15]); and (2) if Absa withheld consent, whether the business rescue practitioner could nonetheless use it (see [20]).
- In this regard s 134(3) provides, inter alia, that a company in business rescue may dispose of property in which a third party has a security interest if:
  (i) the third party consents; or
  (ii) the proceeds would discharge the secured debt; and
  (iii) the company promptly pays over proceeds equivalent to the debt (see [16]).
- Issues (1) and (2) should be answered in the negative.

As to (2), there would not be prompt paying over of proceeds which would discharge the debt. (The practitioner proposed periodic payments from the rental income which would only eventually discharge the debt.)

- The answers were supportive of the High Court's final liquidation order.
- In application proceedings, circumspection was to be exercised in separating issues for preliminary determination. Appeals dismissed.

ORANJE AND OTHERS v ROUXLANDIA INVESTMENTS (PTY) LTD 2019 (3) SA 108 (SCA)

Land — Land reform — Statutory protection of tenure — Relocation — Occupier may resist relocation where proposed accommodation will impair dignity — Extension of Security of Tenure Act 62 of 1997, ss 5(*a*) and 6(2)(*a*).

The first appellant was an occupier in terms of ESTA and resided with his wife and children in a manager's home on the respondent's farm (see [13]).
The first appellant's residence in the home was dependent on his employment as a manager, and when he ceased to be one, the respondent asked him to relocate to other accommodation on the farm.

The first appellant, however, refused to do so, and the respondent obtained an order from the Land Claims Court compelling him to.
The first appellant here appealed against that order to the Supreme Court of Appeal.
Held
An occupier could resist relocation where the proposed alternative accommodation was such, that it would impair his dignity (see [17] – [18]). Here however, the proposed accommodation was not such, as to do so.Appeal dismissed.

PEXMART CC AND OTHERS v H MOCKE CONSTRUCTION (PTY) LTD AND ANOTHER 2019 (3) SA 117 (SCA)

Competition — Unlawful competition — Unlawful use of confidential information and trade secrets — Principles restated.

Competition — Unlawful competition — Unlawful use of confidential information — What constitutes protectable confidential information — Requirements.

Evidence — Witnesses — Calling, examination and refutation — Failure to call material witness — Circumstances in which adverse inference to be drawn.

Mocke Construction (the company) was a pipeline construction company that specialised in applying plastic lining to steel pipes used in the mining industry, thereby improving their longevity. The company, along with its driving force, Mr Mocke, had acquired an exclusive licence from an American-owned entity, Polymeric, to the latter's plastic lining process — the Polymeric/Sureline Process (the Process) — as well as associated intellectual property. They had also purchased the Polymeric 'deforming' machine underlying the process. Polymeric provided intensive training regarding the Process and use of the machine. Mr Mocke, along with Polymeric and Mr Henn, the operations manager of the company and a long-time associate of Mr Mocke, had since modified the Process — in particular the method of deforming the plastic liner — to address various problems that arose when employing the machine in the South African context. What triggered the present proceedings were the termination of Mr Henn's services, his subsequent employment with a competitor Pexmart CC, and their development of machinery and techniques for the purposes of deforming pipelines. In developing such machinery and techniques, the company and Mr Mocke insisted, they had engaged in unlawful competition by making use of their (the company and Mr Mocke's) confidential information, and trade secrets, comprised of their various exclusive proprietary

knowledge, namely their deforming process, intellectual property, machine, techniques, on-site training and technology and know-how associated therewith. The company and Mr Mocke accordingly instituted proceedings in the High Court, seeking an interdict against Pexmart CC and Mr Henn, to restrain them from engaging in unlawful competition. The High Court granted the order sought. This is the appeal of Pexmart CC and Mr Henn to the Supreme Court of Appeal.

The SCA found, based on the evidence, that the High Court could not be faulted on its findings to the effect that the two deforming processes were similar; that the company and Mr Mocke's Process, its machine, intellectual property, techniques and on-site training, technology and the know-how associated therewith, were protected by the exclusive licence obtained from Polymeric, and constituted protectable confidential information; and that Mr Henn and Pexmart CC unlawfully used such protectable confidential information. The SCA accordingly dismissed the appeal (see [79]).

In reaching its conclusion, the SCA reviewed the principles relating to the unlawful use of confidential information and trade secrets of a competitor as an instance of unlawful competition (see [64], [65] and [67]). In particular, it confirmed the three requirements for information to be viewed as protectable confidential information: *(a)* It had to be related to, and be capable of application in, trade and industry. *(b)* It had to be secret or confidential. And *(c)* it had to be of economic value to the plaintiff. Such requirements, the SCA held, had been met in this instance. The SCA also considered the significance of Mr Henn's failure to testify. In this regard, it acknowledged that an adverse inference was not always to be drawn where a party failed to call as a witness someone who was available and able to elucidate the facts. Whether to draw such an adverse inference depended on the facts: In the present circumstances the appellants' failure justified it. Those circumstances included, inter alia, the centrality of Mr Henn to the dispute; his emphatic denial of material aspects of the respondents' case; and the evidence contrary to his version calling for rebuttal.

REFUGEE APPEAL BOARD AND OTHERS v MUKUNGUBILA 2019 (3) SA 141 (SCA)

Immigration — Refugee — Refugee Appeal Board — Appeal to following exclusion decisions — Nature of appellate jurisdiction — Refugees Act 130 of 1998, ss 4(1)(*b*) and 24(3)(*c*).

Courts — High Court — Jurisdiction — To enquire into and determine rights — Approach to be adopted by court — Superior Courts Act 10 of 2013, s 21(1)(*c*).

Mr Mukungubila was a citizen of the Democratic Republic of Congo who entered South Africa and applied for asylum. However a Refugee Status Determination Officer rejected his application and he lodged an appeal with the Refugee Appeal Board. It refused to hear his appeal on the ground that it had no jurisdiction over s 4(1)*(b)* exclusion decisions. (See Refugees Act 130 of 1998; and [2] – [3], [5] and [24].)

Mukungubila then asked the High Court to review the Refugee Appeal Board's refusal and also to make the asylum decision (see [8]).

It inter alia reviewed and set aside the refusal and also granted asylum (see [13]). The Minister, the Director-General * and the Board then appealed to the Supreme Court of Appeal (see [1]).
It *held* that:
- The Officer appeared to have concluded that the application was unfounded and to have rejected it on this basis (see [29]);
- The reasons for the decision were inadequate and this was a reviewable irregularity (see [26] – [27]);
- Where an application was rejected as unfounded under s 24(3)*(c)* there was an appeal to the Board (see [27] – [29]);
- The High Court was incompetent to make the asylum decision as an internal remedy (appeal to the Board) remained unexhausted; and there were no exceptional circumstances justifying the High Court taking the decision rather than the Board (see [30] and [35]);
- The Board had a wide appellate jurisdiction: it was not confined to the Officer's record and it could make its own enquiries and gather evidence (see [34]);
- Regarding the application of s 21(1)*(c)* of the Superior Courts Act 10 of 2013:a court has first to be satisfied that the applicant has an interest in an existing, future or contingent right or obligation; then second, it exercises its discretion whether to enquire into and determine that right or obligation (see [36]);
- While Mr Mukungubila may have had an interest in a right, the High Court should not have determined that right (see para 6 of the High Court's order at [13] and [37]).

Ordered that the High Court's order be set aside, excepting for those parts setting aside the Board's jurisdiction decision, and awarding costs. Matter referred back to the Board for it to determine the appeal of the Officer's asylum decision.

TAVAKOLI AND ANOTHER v BANTRY HILLS (PTY) LTD 2019 (3) SA 163 (SCA)

Local authority — Buildings — Building plans — Approval — Application to set aside where building plans not complying with municipal bylaw — Locus standi — Requirements — Proximity of applicant's building to non-compliant building not sufficient on its own to establish locus standi — Applicant must establish membership of class for whose benefit bylaw enacted or, if enacted in public interest generally, that violation of bylaw caused applicant damages.

Mr Tavakoli and a company were the owners of three adjacent properties about 80 metres from the development of a block of flats on the respondent's property (Bantry Hills property) in respect of which building plans had been approved. The Bantry Hills property was zoned GR4, which made item 40*(c)* of the Development Management Scheme in sch 3 of the City of Cape Town Municipal Planning By-law of 2015 applicable. This provides that 'if the only vehicle access to the property is from an adjacent road reserve that is less than 9 [metres] wide, no building is permitted other than a dwelling house or second dwelling'. Contending that the development did not comply with item 40*(c)*, Mr Tavakoli and the company applied to have the local authority's approval of the Bantry Hills building plans set aside on review.

The High Court dismissed the review application on the basis, inter alia, that the applicants lacked *locus standi*. The court, however, refused leave to appeal on this

finding, granting leave only on the issue of the interpretation of item 40*(c).* On appeal the Supreme Court of Appeal, however, granted the appellants leave to appeal also on the *locus standi* issue. This because an appeal lies against the order of the court (not the reasons) and therefore, unless the appellants could overcome the attack on their *locus standi*, the dismissal of their application could not be reversed on appeal.And so, because it was dispositive of the appeal, in the SCA the issue was whether the appellants had *locus standi*.

Held

Proximity may often be an important consideration, though this depended on the nature of the provision at issue. It could not be said, as the appellants sought to argue, that a proximity of 80 metres was always close enough. If item 40*(c)* was imposed solely for the benefit of the general public, the appellants — in order to have locus standi — needed to establish that they suffered harm from a contravention thereof beyond that which it may be supposed all owners and users in Cape Town suffered. If, on the other hand, item 40*(c)* was imposed for the benefit of a specific class of owners and users, or partly for the benefit of such a class and partly for the benefit of the general public, the appellants could establish standing by showing that they belonged to the specific class.

The starting point was therefore to ascertain whether item 40*(c)* was enacted for the benefit of a specific class to which the appellants belonged. It was not sufficient in this regard that the item in fact operated to the advantage of a class of persons to which the appellants belonged; it must appear that the lawmaker had the interests of the particular class in mind in enacting the provision. Since it was only the properties on the abutting road itself which may be prejudicially affected by the fact that the road was narrow and may become congested, the class which the lawmaker had in mind when enacting item 40*(c)* comprised the owners and users of properties in the narrow road or roads giving access to the subject property. The appellants were not such persons. The appellants accordingly did not have locus standi by virtue of membership of a specific class for whose benefit item 40*(c)* was enacted.
And, assuming item 40*(c)* was enacted not only for the benefit of a specific class but also for the benefit of the general public — ie all owners and users of property within the geographic area of Cape Town — the appellants failed to prove that the violation caused or would cause them damage. The appeal would accordingly be dismissed.

VIZIYA CORPORATION v COLLABORIT HOLDINGS (PTY) LTD AND OTHERS 2019 (3) SA 173 (SCA)

Discovery and inspection — *Anton Piller* orders — Requirements — Principles restated.

Discovery and inspection — *Anton Piller* orders — Nature — Anton Piller order directed at preserving evidence that would otherwise be lost or destroyed — Not a form of early discovery or mechanism for applicant to determine whether it has cause of action.

An *Anton Piller* order that had been granted *ex parte* was set aside by the court *a quo*. The present application was one for leave to appeal against that decision. The original order was sought by Viziya — a developer of enterprise resource planning software — against Collaborit, after its alleged breach of the contract between them under which Collaborit undertook to promote the sale of Viziya's products. Viziya

alleged that Collaborit had during the period of contract developed and sold a product that competed with those of Viziya and used its confidential information. The documents covered by the *Anton Piller* order were described in extremely broad terms, effectively granting Viziya access to Collaborit's entire business operation. The order in addition set out 149 keywords — also covering a broad field — that had to be used to search the seized documents to locate those that might be relevant to Viziya's case. (As a consequence of the order initially granted, all forms of digital and physical information at the premises of Collaborit were copied.)

The SCA's task was to decide whether the requirements for the granting of an *Anton Piller* order had been met, ie it had been *prima facie* established that *(a)* the applicant had a cause of action against the respondent; *(b)* the respondent had in its possession specific documents which constituted vital evidence in substantiation of the applicant's cause of action; and *(c)* there was a real and well-founded likelihood that such evidence might be hidden, destroyed or removed.

Held, that Viziya had made out a *prima facie* case that Collaborit had competed with Viziya in breach of contract (see [28]), but not that it had used its confidential information.

Held, that, contrary to the assertion of Viziya, it was *still* a requirement of the law that an applicant show a prima facie case of the existence of specific, or specified, documents or things that were vital and required preservation (see [32]).

Held, further, that an applicant for an *Anton Piller* order was obliged to identify with a degree of specificity the documents or materials constituting vital evidence it wished to preserve (see [32] and [36]). Here, there was no attempt by Viziya in its affidavits to do so (see [33], [36] – [38]). What was not permitted was a blanket search for unspecified documents or evidence, that may or may not exist (see [32]).
An *Anton Piller* order was directed at preserving evidence that would otherwise be lost or destroyed. It was not a form of early discovery, nor was it a mechanism for a plaintiff to search for evidence to ascertain whether it may have a cause of action. The cause of action had to already exist and the preserved evidence had to be identified. Accordingly, the second requirement of specific documents or things constituting vital evidence had not been met (see [41]).

Held, that Viziya failed to establish that there was a well-founded and reasonable apprehension that evidence would be concealed (see [42] – [47]). Accordingly, leave to appeal refused.

ASTRAL OPERATIONS LTD AND OTHERS v MINISTER FOR LOCAL GOVERNMENT, WESTERN CAPE AND ANOTHER 2019 (3) SA 189 (WCC)
Evidence — Privilege — Legal professional privilege — Scope — Memo drafted by counsel and conveyed to respondents' attorneys.

In review proceedings, the first and second respondents (the Minister and the City) were represented by the same senior counsel, who was assisted by two juniors — one briefed by the state attorney, the other by the City's attorneys (see [11]).

The present case concerned an application, flowing from the review, to compel disclosure of a memo drafted by the Minister's junior and conveyed to the state attorney and City's attorneys.
The memo consisted of the junior's analysis of the applicants' allegations; advice on their implications; questions to be conveyed to the City's expert concerning the allegations; and a recommendation that the expert conduct a further study (see [16]).
The existence of the memo later came to light, when it was mentioned by the expert in an attachment to his affidavit (see [19]).

Held:
The memo was protected from disclosure by legal professional privilege; and that the privilege had not been waived. (It was proposed that counsel's provision of the memo to the City's attorney, or references to it in respondents' papers, was suggestive of waiver.)
Moreover, disclosure of the memo could not be justified on the basis that it was a source document informing the substance of the expert's report.
Application dismissed.

GREEFF v COOPER AND OTHERS 2019 (3) SA 203 (WCC)

Magistrates' court — Practice — Interdict — Whether magistrates' court could competently interdict magistrates' court subpoena *duces tecum* which was purportedly an abuse of process.

In a magistrates' court, a s 65A(1)*(a)* enquiry into the third respondent pending, the appellant subpoenaed the second respondent bank to produce certain documents of the first respondent in that enquiry. The appellant was of the belief that the documents might shed light on the third respondent's financial position. (See the Magistrates' Courts Act 32 of 1944; and [14] – [15] and [22].) In response the first respondent interdicted the second respondent from filing the document on the basis that the subpoena was abusive (see [19]). The appellant appealed to the High Court.

Held
A magistrates' court could not competently interdict a subpoena on the basis that it was an abuse.
The proper course would have been for the first respondent to apply to the High Court to set the subpoena aside (see [37]).
The High Court condoned the late noting of the appeal; upheld the appeal; set aside the magistrates' court order; and substituted it with an order dismissing the first respondent's application for an interdict.

LUANGA v PERTHPARK PROPERTIES LTD 2019 (3) SA 214 (WCC)

Lease — Termination — Lease for undetermined period — Notice of termination — Rental Housing Act providing that if landlord allows tenant to remain on property on expiry of lease, parties deemed to have entered into periodic lease, terminable on at least 'one month's written notice' — Meaning of 'one month's written notice' — Referring to one calendar month running from first day of month and expiring on last day of month — Rental Housing Act 50 of 1999, s 5(5).

Land — Unlawful occupation — Eviction — Statutory eviction — Duties of respondent's legal practitioner — Where eviction proceedings opposed and respondent legally represented, respondent's legal practitioner under positive duty to furnish court with all relevant information in possession in order for court to properly interrogate justice and equity of ordering eviction — Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, s 4(6) and (7).

Words and phrases — 'One month's written notice' — Meaning of in s 5(5) of Rental Housing Act 50 of 1999 — Refers to one calendar month running from first day of month and expiring on last day of month.

The appellant, as tenant, and the respondent, as landlord, entered into a 12-month lease, commencing 1 March 2016. The appellant remained on the premises on the lease's expiry on 28 February 2017, and, accordingly, in terms of clause 9, the agreement automatically continued on a month-to-month basis. The respondent sent a letter to the appellant on *4 May 2017* giving notice of cancellation and requiring the occupants of the property concerned to vacate by no later than *5 June 2017*. When the occupants failed to vacate by such date, the respondent instituted proceedings in the magistrates' court, and obtained an order evicting the appellant, as well as all those occupying through her.

In the present appeal before the High Court (constituted by two judges), the appellant argued that the notice of termination failed to comply with s 5(5) of the Rental Housing Act 50 of 1999, and that her right of occupation had therefore not been validly terminated. The provision in question read:

'If on the expiration of the lease the tenant remains in the dwelling with the express or tacit consent of the landlord, the parties are deemed, in the absence of a further written lease, to have entered into a periodic lease, on the same terms and conditions as the expired lease, *except that at least one month's written notice must be given of the intention by either party to terminate the lease.*'

It was submitted that s 5(5) of the Act, when read with the common law, demanded that the notice of termination of a monthly lease had to run concurrently with the period of the lease and expire at the end of a month; the notice in question did not do so, and so was invalid.

Held

It was a principle of common law that indefinite-period contracts of lease and employment from month to month could only be terminated by way of one month's notice *expiring at the end of a month* (see [29]). Section 5(5) of the Act had to be interpreted in line with this principle in light of the well-established presumption that the legislature did not intend to alter the common law unless such intention appeared clearly from the language of the statute (see [22] and [30]). Accordingly, the words 'one month's written notice' in s 5(5) of the Act meant one calendar month, running from the first day of the month and expiring on the last day of the month. It followed that the notice of 4 May 2017 did not comply with the requirements of s 5(5) of the Act, and was accordingly invalid and of no force and effect. Instead of requiring the lessees to vacate the property on 5 June 2017, the lessees should have been afforded until 30 June 2017 to vacate. (See [31].) The respondent had therefore failed to discharge the onus resting on it of proving a valid termination of the lease. The appellant had therefore not been shown to be in unlawful occupation of the

premises, and the magistrate accordingly erred when he granted an eviction order. Appeal upheld, and order granting eviction set aside.

The court also deemed it necessary to comment on the conduct of the appellant's legal representative in failing to disclose information on the financial circumstances of the appellant and the other occupants that would have assisted the court in deciding whether it would be just and equitable to grant an eviction order, instead relying on bald statements regarding unemployment, impecuniosity and the risk of homelessness (see [36] and [48].) The court stressed that, where eviction proceedings were opposed and the respondent legally represented, the legal practitioner representing the respondent, as an officer of the court, was under a positive duty to furnish the court with all relevant information in his possession in order for the court to properly interrogate the justice and equity of ordering an eviction (under s 4(6) and (7) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998).

MOTLOUNG AND ANOTHER v SHERIFF, PRETORIA EAST 2019 (3) SA 228 (GP)

Sheriff — Service — Whether sheriff having duty to serve summons not signed by Registrar.

Practice— Pleadings — Summons — Not signed by Registrar — Whether null.

The Registrar had not signed plaintiffs' summons and the sheriff had declined to serve it. The action had prescribed.
Plaintiffs, suing here for damages, alleged a duty to serve, regardless of defect.
Held, there was no such duty, and the summons was null, and would not have interrupted prescription. Special plea upheld; and plaintiffs' action dismissed.

WESTERN CAPE DEPARTMENT OF SOCIAL DEVELOPMENT v BARLEY AND OTHERS 2019 (3) SA 235 (SCA)

Delict — Elements — Unlawfulness or wrongfulness — Liability for omission — Failure by state to perform regulatory function — Processing of application to register early child development facility.

Third respondent (Ms Moore), the proprietor of a daycare facility, had put Ava, first and second respondents' (Mr and Mrs Barley's) five-month-old child, on a bed to sleep. Ava had rolled off, become stuck between the bed and pedestal, and asphyxiated. (See [4], [6] and [8].) The Barleys had later claimed damages from Moore for her wrongful causing of the death of Ava. They also claimed damages from the appellant department for psychiatric injuries to themselves stemming from the death. This claim rested on the department's omission to perform a regulatory function in respect of the facility, namely the processing of Moore's application to register it. The High Court upheld both claims, and gave the department leave to appeal to the Supreme Court of Appeal.

Held • The department's omission was not wrongful. Relevant factors and the regulatory framework pointed away from such a conclusion. (See [32] – [34] and [44] – [46].)

- The omission was also not a cause of Ava's death and the Barleys' resultant psychiatric injuries.
- Nor was there evidence of such injuries (see [24]).
- Courts may separate issues only after careful thought on the implications of doing so. Those issues must be clearly circumscribed in the order of separation. (See [21] and [25].)

Appeal upheld; the High Court's order set aside and replaced. In its stead, ordered, inter alia, that Moore was liable for the Barleys' damages as a result of the wrongful death of Ava; and that the Barleys' claims against the department be dismissed.

RECYCLING AND ECONOMIC DEVELOPMENT INITIATIVE OF SOUTH AFRICA NPC v MINISTER OF ENVIRONMENTAL AFFAIRS 2019 (3) SA 251 (SCA)

Company — Winding-up — Application — *Locus standi* — Extended standing to apply for remedies under s 157 of Companies Act, 2008 — Whether Minister of Environmental Affairs qualifying as 'person' who may invoke s 157(1)(*d*) for standing in public interest — Companies Act 71 of 2008, s 157(1)(*d*).

Company — Winding-up — Application — Grounds — Just and equitable to do so — Availability of alternative means to address complaint — Court to be satisfied applicant having no alternative means to address complaint before granting winding-up order on basis that it would be just and equitable to do so — Companies Act 71 of 2008, ss 81(1)(*c*)(ii) and 81(1)(*d*)(iii).

Practice — Applications and motions — *Ex parte* application — Impermissible use of — Court to vindicate *audi alteram partem* rule by discharging provisional order so obtained.

Practice — Applications and motions — *Ex parte* application — *Uberrima fides* rule as to disclosure of facts — If not observed, court to discharge provisional order so obtained when it would not have been granted had fair disclosure been made.

The respondent (the Minister) brought two urgent *ex parte* applications in the High Court for the provisional winding-up of, respectively, the Recycling and Economic Development Initiative of South Africa (Redisa) and Kusaga Taka Consulting (Pty) Ltd (KT), both solvent at the time. Redisa was a non-profit company and an organ of state responsible for the implementation of a waste-tyre recycling scheme (the Plan) promulgated by the Minister in November 2012. As contemplated in the Plan, KT was the management company appointed to implement the scheme.

The Plan entailed the creation and management of a national network for collecting waste tyres, storing them and delivering them to recyclers for processing. It was funded from a waste-tyre management levy that tyre manufacturers paid to Redisa in terms of the Waste Tyre Regulations, * with 20% of such levy allocated under the Plan to administration which included the fee payable to the management company. This funding model was however changed during 2016, so that as of February 2017 Redisa was no longer entitled to collect tyre levies from producers but instead became dependent on an allocation of funds from the Department of Environmental Affairs (which in the event was not forthcoming).

In the latter part of 2016 Redisa launched two review applications challenging the new funding model, both of which were still pending in a different division of the High Court at the time of the Minister's *ex parte* applications. Earlier, in February 2016, the Department of Environmental Affairs appointed iSolveit to conduct an audit of Redisa. Relying on iSolveit findings adverse to Redisa, the Minister (on 29 November 2016) issued a directive withdrawing the Redisa Plan. This directive was however withdrawn following a legal challenge by Redisa. Then, in May 2017, Redisa presented a business plan to the Department in which it explained that unless the funding issues were resolved, it would scale back its operations from 1 June 2017 and that it had already informed stakeholders that it would have to 'wind down' its operations. Shortly afterwards, on 1 June 2017, the Minister launched the urgent *ex parte* applications for the winding-up of Redisa and KT. The justification for bringing it on an urgent *ex parte* basis was that Redisa's May 2017 presentation raised immediate concerns about the unlawful dissipation of funds (see [86]).

The Minister's grounds for seeking the winding-up of both companies was that it would be 'just and equitable' to do so as contemplated ss 81(1)*(c)*(ii) and 81(1)*(d)*(iii) of the Companies Act 71 of 2007. In respect of Redisa the Minister's founding affidavit made out the case that it would be just and equitable to do so because, firstly, Redisa's directors had not disclosed their relationship with or significant shareholding in KT, which 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; and secondly, that Redisa's May 2017 presentation revealed a rapid depletion of its cash and reserves. In respect of KT the Minister contended that its winding-up was just and equitable because its existence was entirely dependent upon the money it generated through the Redisa Plan. (See [93].)

Not being one of the class of applicants in s 81 who may bring an application for winding up a solvent company, the Minister in both applications also applied for leave in terms of s 157(1)*(d)* to bring the applications, which was granted, as were the provisional liquidation orders the Minister had sought. Upon learning of the provisional orders, Redisa and KT applied, also urgently, for the provisional orders to be discharged. They, inter alia, disputed the allegation in the Minister's founding affidavit, that she and the Department had only 'discovered during May 2016, when the Department received a report from iSolveit', that certain of Redisa's executive directors had an interest in KT, and that a copy of the management contract between Redisa and KT had been withheld by the parties. They also questioned the Minister's founding affidavit's non-disclosure of the pending litigation between the parties.

The applications were consolidated and judgment given, finally winding-up both entities on 'just and equitable' grounds. In the court *a quo* and in the present case — Redisa's and KT's appeal to the Supreme Court of Appeal — the Minister advanced additional grounds, not made out in her papers but presented orally, that Redisa's directors had abused KT's corporate personality and contravened item 1(3) of sch 1 of the 2008 Act and the equivalent provisions in Redisa's memorandum of incorporation (MOI) (see [95] – [98]). And on appeal the Minister abandoned reliance on s 81(1)*(c)*(ii) and/or s 81(1)*(d)*(iii) to sustain the finding that it was 'just and equitable' to wind up the appellants. Instead, the Minister contended that, as a public

interest litigant, she could rely on any of the substantive grounds in s 81 of the Act to apply to wind-up a solvent company (see [149]).

Redisa's and KT's grounds of appeal (see [6]) and the Minister's additional submissions raised the following issues: (1) whether the factual findings of impropriety against Redisa and KT were sustainable, having been refuted in their answering papers; (2) whether there were proper grounds for a resort to ex parte proceedings; (3) whether, having elected to proceed ex parte, the Minister had failed in her strict duty to disclose all relevant material to the court; (4) whether it was shown that ordering their winding-up would be 'just and equitable'; (5) whether the Minister was a public interest litigant with standing in terms of s 157(1)*(d)* and was therefore entitled to rely on any of the substantive grounds for liquidating a solvent company set out in s 81(1) of the Act; (6) whether Redisa's directors had abused KT's corporate personality and contravened item 1(3) of sch 1 of the 2008 Act and the equivalent provisions in Redisa's memorandum of incorporation (MOI).

Held by the majority

As to (1): Aside from a dispute regarding calculation of the management fee, it was thus common cause that the fees KT received from Redisa fell within the 20% allocation that the Minister had approved (at [18]). The Minister's version that she and the Department had only discovered that certain of Redisa's executive directors had an interest in KT during May 2016 was not correct. In reply to the answering papers, she accepted that the Redisa executives' interest in KT had been known since at least the receipt of Redisa's financial statements for the 2014 financial year (at [24] and [30]). There remained a dispute of fact on the papers as to whether the management contract was withheld from the Minister and the Department but in accordance with the rule regarding evidence in motion proceedings, Redisa's version must be accepted (at [25]).

As to (2): It was a fundamental principle of the administration of justice that relief should not be granted against a person without allowing such person to be heard; very rarely was a case so urgent that there was no time to give notice. In some cases there may be a reasonable and substantiated apprehension that giving notice would defeat the applicant's legitimate purpose in seeking relief. In such cases a court may be willing to dispense with the need to give notice but this power should be exercised with great caution and only in exceptional circumstances. The procedure adopted was even more objectionable when the applicant's case rested largely on untested hearsay, which it was in this case. Even taking the founding papers in isolation, the Minister failed woefully to justify the *ex parte* proceedings. The court *a quo* said that the Minister had made out a sufficient case that urgent and drastic action was needed in view of the 'underhand and secretive manner' in which Redisa's executive directors had acted. However, having regard to the rules in application proceedings, this was not a conclusion that could reasonably be reached on the papers. On the contrary, it was an abuse to seek provisional orders *ex parte*. It was competent for the court *a quo* to discharge a provisional order obtained through impermissible use of *ex parte* proceedings. This case was one where the court *a quo* should have vindicated the principles of *audi alteram partem* and uberrima fides by discharging the provisional orders.

As to (3): The duty of utmost good faith, and in particular the duty of full and fair disclosure in *ex parte* applications, was imposed because orders granted without notice to affected parties were a departure from a fundamental principle of the administration of justice, namely *audi alteram partem*. If material non-disclosure was established, a court should be astute to ensure that a plaintiff, who obtained an ex parte order without full disclosure, was deprived of any advantage they may have derived by such breach of duty. The Minister's skewed disclosures and non-disclosures were extensive. They related to matters that must have influenced the judges hearing the *ex parte* applications; the *ex parte* orders would not have been granted if fair disclosure had been made. (At [46], [51], [90] and [148].)

As to (4): The Minister's allegations were either incorrect or unsustainable on the papers, having regard to the rule on the treatment of evidence in application proceedings. She failed to show that the management contract between Redisa and KT was not *bona fide*; or that the payments made to KT in accordance with the agreement were unlawful; or that a feared loss of their substratum justified their winding-up. Another consideration for not winding-up these companies on just and equitable grounds, and therefore discharging the provisional orders, was the possible impact of Redisa being successful in its litigation against the Minister, which would restore its ability to fund its operations. There was one more reason why it was not just and equitable to wind up the appellants: the court had to be satisfied that the Minister had no alternative means to address complaints before resorting to the drastic expedient of winding up the appellants. The court *a quo* did not address this requirement. (At [94] and [115] – [116].)

As to (5): Under the 1973 Act the Minister of Trade and Industry (the Trade Minister) had the power to institute winding-up proceedings against a company, but only after a court had declared that the affairs of the company required investigation, and this only if it appeared from an inspection report that this was warranted. These provisions were however repealed in the 2008 Act. The Minister (ie the 'member of the Cabinet responsible for companies') may only, in terms of ss 190(2)*(b)*(i) and 190(2)*(b)*(ii) of the 2008 Act, direct the Companies and Intellectual Property Commission (the Commission) to investigate contraventions of the 2008 Act. However, s 157(1)*(d)* permitted 'a person' 'acting in the public interest', 'with leave of the court' to apply for 'remedies'. The question was whether 'a person' included the Trade Minister. The answer appeared to be 'no' because the power of the Trade Minister to apply to wind up companies in the 1973 Act was removed and given to the Commission and the Panel in the 2008 Act. A 'person' did not ordinarily signify 'government'. There were no indications in the 2008 Act that 'person' included the government as represented by a Minister; or that the Trade Minister (and by parity of reasoning the Minister of Environmental Affairs) may apply for remedies also as a 'person' acting in the public interest outside of the regulatory framework in ch 7 of the 2008 Act. The conclusion was therefore that the Environment Minister could not rely on s 157(1)*(d)* to wind up the appellants in the public interest. (At [121] – [131].)
But even if it were assumed that the Minister had the right to approach the court under s 157(1)*(d)* of the Act, the criteria for evaluating whether an applicant should be given leave in the 'public interest' were not met. At the heart of the enquiry was a consideration of alternative remedies. The Minister had remedies available to her under the 2008 Act to address her concerns. The court *a quo* ignored the arguments proffered by the appellants regarding a consideration of alternative remedies; it was

not justified in doing so. The Minister had made out no case for resorting to the drastic remedy of winding-up without having considered the extensive alternative remedies or enforcement procedures that were available to her. It was, therefore, not in the public interest for her to be given the right to pursue this relief in these circumstances. On the facts, the Minister had not established grounds for the winding-up of the appellants.

As to (6): This case — that the scheme was developed by the creators of the Plan to misappropriate public funds — was pleaded neither in the founding affidavit nor in reply. It therefore did not get out of the starting blocks. First, the Minister would have had to allege and prove that the management contract between Redisa and KT was not a bona fide agreement as envisaged in item 1 of sch 1 of the 2008 Act; and second that its true purpose was to divert funds to Redisa's executive directors rather than to provide fair remuneration for management services to be provided by KT. Not only was this case not pleaded, but to reach this conclusion a court would also have to be satisfied that there were no prejudice to the parties, and that the order sought could be justified on the undisputed facts. None of these requirements were satisfied and the court *a quo* was not justified in ignoring these principles in coming to the conclusions it did. (At [95] – [103] and [150].) In the result both appeals would succeed.

Held by the minority

There was sufficient disclosure of pending litigation (at [152] – [154]); the appellants raised no genuine disputes of fact (at [158]); that certain Redisa directors held directorships in other companies was in contravention of the Plan and Redisa's MOI, and this constituted an untenable conflict of interest which was not disclosed or mitigated (at [173], [175], [183] – [184] and [217); the clause in the management agreement relating to the collection of management fees was a deviation from the Plan and constituted non-compliance therewith (at [189]); an unauthorised change in the computation of the management fee took place which enabled KT to collect far more than it was entitled to (at [204] – [213]); given the role the Minister played in the implementation of the Plan, there was no reason why the Minister would not have standing under the provisions of s 157 (at [233]); the use of *ex parte* proceedings was justified in the circumstances (at [234] – [235]); winding-up had been granted in analogous circumstances (at [237]); the Minister's case regarding abuse of corporate personality was not a 'new' case but properly supported in her founding affidavit, and the court *a quo's* finding of abuse of corporate identity fully justified (at [249] – [254]); given that Redisa and KT were recidivist in their contravention of the Plan, Redisa's MOI and the Companies Act, the most appropriate remedy that would simultaneously stop the bleeding and salvage what was left of the public funds was an order of liquidation in respect of both Redisa and KT (at [256]).

STOW v REGIONAL MAGISTRATE, PORT ELIZABETH NO AND OTHERS 2019 (1) SACR 487 (SCA)

Sentence — Suspended sentence — Putting into operation of — Appealability of such decision — Properly interpreted s 309(1)(*a*) of Criminal Procedure Act 51 of 1977 not prohibiting appeal of decision to put suspended sentence into operation.

In dismissing two appeals from the putting into operation of previously suspended sentences due to breach of conditions of the suspension, the court analysed the provisions of s 309(1)*(a)* of the Criminal Procedure Act 51 of 1977 to determine whether the putting into operation of a suspended sentence was a 'resultant sentence' (from a conviction) as envisaged by the section and therefore subject to appeal.

Held, per Nicholls AJA and Carelse AJA (Seriti JA and Zondi JA concurring), that, although the original sentence may well be the 'resultant sentence' in the strict sense, there was no reason why the phrase should not be more expansively interpreted to encompass the putting into operation of a suspended sentence — it was a consequence of the resultant sentence in the broader sense. Therefore, properly interpreted, s 309(1)*(a)* was not a statutory prohibition on the appeal of a decision to put into operation a suspended sentence. (See [32].)

Held, per Ponnan JA (Seriti JA, Zondi JA, Nicholls AJA and Carelse AJA concurring), that the section was quite capable of a construction which included within its terms a decision by a magistrate to put a suspended sentence into operation, and that was the construction that ought to be favoured in order to give proper effect to the spirit, purport and objects of the Bill of Rights. It would be unconscionable if a decision of that nature could be made capriciously, and a higher court could not provide redress by way of appeal. (See [46].) The appeal was dismissed.

S v SMITH 2019 (1) SACR 500 (WCC)

Sentence— Habitual criminal — Declaration as in terms of s 286 of Criminal Procedure Act 51 of 1977 — Warning prior to declaration — Duty to inform accused should rest upon state and could be discharged by providing certificate produced contemporaneously with accused's criminal record.

The appellant appealed against the decision of a regional court magistrate to declare him a habitual criminal in terms of s 286 of the Criminal Procedure Act 51 of 1977 upon his conviction of housebreaking with intent to steal and theft, of two pieces of cheese and a bar of soap to the value of R52,80, from a fellow farmworker. The appellant was 27 years of age and was illiterate. There was no indication on the record that the magistrate reminded him prior to pleading that he had previously been warned of the possibility of s 286 being applied, and the drastic consequences it held for him.

Held, that the duty to inform the accused of the provisions of s 286 and its consequences, and to remind the accused of a previous warning, if there had been any, should rest upon the state. It was not an onerous burden and could be discharged by providing a certificate, alternatively, any written proof that the accused's attention was drawn to the provisions. The certificate could be produced contemporaneously with the accused's criminal record. Warning an accused prior to pleading, that they ran the risk of being declared a habitual criminal, would enhance their right to a fair trial.

Held, further, that in the present case the previous warning had been made approximately four years earlier and may have faded from the appellant's memory. It appeared that his legal representative was not aware of the warning. Furthermore, the court a quo had no information which could assist it to determine whether the appellant had committed the offences out of habit, and had declared him a habitual criminal solely on the basis of the record of his previous convictions. In the circumstances the declaration had to be set aside, and an appropriate sentence would be one of three years' imprisonment antedated to the date of the declaration in terms of s 286.

RM v MOKGETHI AND ANOTHER 2019 (1) SACR 511 (NWM)

Police — Liability of — For criminal acts committed by police officer — Officer off duty but dressed in uniform and using police-issue firearm in committing rape — Fact that policeman off duty not irrelevant consideration to liability of Minister — In particular circumstances of case, Minister not liable.

The plaintiff instituted action for damages against both defendants, a constable in the South African Police Service and the Minister of Police, respectively. It arose from an incident in which the plaintiff was allegedly raped by the first defendant who died before the matter came to trial. The first defendant's widow, the executrix of his estate, abandoned her defence to the claim at the outset of the trial.
The rape occurred when the first defendant was still in his uniform. The plaintiff's evidence was that she had voluntarily accepted a lift from the first defendant to a taxi rank but, instead of driving there, he took her, under threat of being shot with his service firearm, to a house where he again threatened her with his firearm and raped her.

The second defendant applied for absolution from the instance, contending that, as the first defendant was not on duty at the time of the rape, the second defendant could not be held vicariously liable.

The court dismissed the application, holding that rape was a deviation from the first defendant's duties as a police officer, and the subjective element was met, as the first defendant was acting for his own purpose. There was no evidence that the first defendant was not on duty and there was prima facie evidence that his conduct comprised both a commission, which was the assault, and an omission, which was the failure to protect the plaintiff. There was also prima facie evidence of a close connection between the delict and the business of the second defendant, as the plaintiff had trusted the first defendant, as he was a policeman wearing his police uniform and carrying his firearm.

After the second defendant called a witness to testify that the first defendant was not on duty at the time of the incident, the court needed to consider whether the conduct of the first defendant was sufficiently close to the business of the second defendant to render the latter liable for the damage sustained by the plaintiff.

Held, that, taking into consideration that the first defendant and the plaintiff knew each other before the incident; the first defendant's meeting with the plaintiff was solely for his own purposes and interests; the first defendant was in his private vehicle and off duty; when he met with plaintiff he was not there in his capacity as a police officer; and that the plaintiff was neither a vulnerable woman nor a child, but had voluntarily accepted a lift from the first defendant, the plaintiff failed to show a real and sufficiently close link between the conduct of the first defendant and his employment.

Held, further, that the first defendant was not on duty was not an irrelevant consideration when considering it cumulatively with the rest of the facts, and in those circumstances the second defendant could not be held vicariously liable. (See [46].)
Held, however, that the first defendant's estate was liable for the plaintiff's damages.

AK v MINISTER OF SAFETY AND SECURITY AND OTHERS 2019 (1) SACR 529 (ECP)

Police — Liability of — For failure to conduct proper search for missing person — No proper command and control of search — Police liable.
Police — Liability of — For negligent investigation of charges of rape — Police to be held to account to prevent self-help — Public trust in police playing role in determination of liability in instant case.

The plaintiff instituted action against the defendants arising from a series of incidents in which she was accosted while walking along the beach in Port Elizabeth, dragged into the bush and repeatedly gang-raped over a period of 15 hours, until she was able to escape early the following morning.

She alleged that the South African Police Service (the SAPS) had wrongfully and negligently breached its duty to properly search for her, investigate the crimes committed against her; alternatively, if they had so investigated, failed to do so with the skill, care and diligence required of reasonable police officers. As a result of this, no one was ever prosecuted, and that, accordingly, the SAPS had caused her psychological injury and was liable to pay her damages. In the present proceedings, the court was required to determine only the liability of the defendants and not the quantum of any damages sustained.

Evidence adduced at the trial indicated that, when the plaintiff failed to make contact with her family and a friend with whom she was to travel to the airport later that afternoon, her family put out an alert. Shortly before midnight, when her car was found parked and broken into at the parking area near the beach, the police started searching the area contiguous to the car park. A police official and a sniffer dog conducted a search and came close to where the plaintiff was being held, but then returned to the car park where he had started the search. A short while later a

helicopter equipped with a 'Nightsun' traversed the area at a height of between 30 and 50 metres but also did not go close to where the plaintiff was being held, as that area was regarded as a no-fly zone.

The plaintiff alleged that the way the search had been conducted was negligent and that, if it had been conducted in a proper manner, it would have significantly diminished her overall suffering. She also took issue with the way in which the subsequent investigation had been handled, as the investigating officer had not immediately interviewed the bush dwellers who lived in the locality, and had not conducted an identification parade before the bush dwellers were relocated before the Christmas holiday period.

Held, that it was not reasonable, on the evidence presented, for the police official with the sniffer dog to have ended his search where he ended it; it was clear that he was aware that the area extended further, as he had earlier driven up alongside the harbour wall. Similarly, the helicopter search fell short of what was required of a helicopter search and rescue operation. There was clearly no proper command and control of the search and no communication and coordination between the various SAPS units, and this in itself constituted negligence on the part of SAPS.
Held, further, that SAPS had failed or delayed in searching the area for bush dwellers and failed to round up and/or photograph them to enable the plaintiff to attempt to identify her abductors, or to take statements from them or to interview them. While it could not have been expected of the police official to delay his foot search to do so, it was reasonable to expect this of the other SAPS members in attendance. The investigating officer's inaction in relation to CCTV footage that was available at the time was also grossly negligent.

Held, further, that if the police service was not held to account for its actions and inactions it would have a chilling effect on the ability of members of our society to enjoy the freedoms guaranteed to them by the Constitution, and could lead to the further use of 'self-help'. The trust that the public was entitled to repose in the police also had a critical role to play in the determination of the Minister's liability in the present matter. Public policy and legal considerations imposed an obligation on the police to fulfil their obligations, and a failure to do so had to lead to a finding that their conduct was wrongful.

Held, accordingly, that there was little doubt that the plaintiff had suffered significant trauma. The omissions of the SAPS had caused her harm and they were sufficiently closely linked to this trauma. The plaintiff had therefore discharged the burden of proving that there was a causal link between the omissions of SAPS and the harm that she had suffered. The Minister was liable for 40% of the damages that the plaintiff had suffered.

S v RADEBE AND OTHERS 2019 (1) SACR 565 (FB)

Murder — Sentence — Murder in course of mob justice — Accused relatively young, not inherently wicked and largely influenced by community — Effective sentence of 30 years' imprisonment reduced on appeal to 18 years' imprisonment in respect of three accused, and 20 years' imprisonment to 15 years in respect of another accused.

The appellants were convicted in the High Court of housebreaking with intent to murder and murder (counts 1 and 2), kidnapping, assault with intent to do grievous bodily harm, and public violence. They had not been charged with assault with intent to do grievous bodily harm but only common assault. In respect of counts 1 and 2, three of the appellants were sentenced to an effective 30 years' imprisonment, and one appellant to an effective 20 years' imprisonment. The evidence indicated that the appellants had broken into the deceased's home and taken him outside where he was placed on a burning tyre. A crowd was gathered there singing and ululating whilst they attacked and killed the deceased.

Held, that the trial court had erred in returning guilty verdicts on assault with intent to do grievous bodily harm, as opposed to common assault; which was the charge to which they had pleaded. They never faced the risk of being convicted of assault with intent to do grievous bodily harm and it was simply not fair to convict them of that charge.

Held, in circumstances where the accused were relatively young, were not inherently wicked, were largely influenced by the community and who thought that they were actually serving the interests of the community when they committed the relevant crimes, the sentences were disproportionately severe. A sentence of 18 years' imprisonment would be appropriate for three of the appellants who were sentenced to 30 years' imprisonment, and a sentence of 15 years' imprisonment for the other appellant. Sentences altered accordingly.

S v NKOSI 2019 (1) SACR 570 (GJ)

Theft— By false pretences — Accused taking deposits from customers for purchase of trucks which he had no intention of delivering — Accused using deposits for his own purposes — Conviction upheld on appeal.
Fraud— What constitutes — Theft by false pretences — All cases of theft by false pretences also fraud.

The appellant appealed against his conviction on one count of fraud and two counts of theft. The evidence indicated that he had taken deposits from three customers amounting to R900 000 for the purchase of trucks. He did not deliver the trucks, despite numerous promises to do so and instead he used the money for his personal expenses. He contended on appeal and during the trial that the matter was a civil matter and that he still intended delivering on his promises as soon as other third parties had performed their obligations.

Held, that all cases of theft by false pretences were also fraud.

Held,further, that it was clear from the evidence that the appellant had no permission to keep the money of the complainants after he failed to deliver the trucks. The agreement was that the money would be paid back to the complainants if the trucks were not delivered within a specified time. By utilising the money and by failing to pay back after he failed to deliver the trucks, the appellant had effectively excluded the complainants' control over it. The appellant's conduct was clearly unlawful and

the only reasonable conclusion that could be made in the circumstances was that he had had the intention to permanently deprive the complainants of their money. The appeal was accordingly dismissed.

S v NGOBESE 2019 (1) SACR 575 (GJ)

Conspiracy — To murder — What constitutes — *Mens rea* — Seriousness of offender's commitment to carry out crime to be determined — Subjective state of mind of alleged co-conspirator irrelevant and overt manifestation of assent sufficient.

Whilst incarcerated as an awaiting-trial prisoner in another matter, the appellant was joined in his cell by a certain Mr Zungu. After establishing that Zungu knew a policeman by the name of Moses, the appellant sought Zungu's assistance in identifying and monitoring Moses' movements so that he could kill him. Zungu went along with the plan but did not give any indication that he would assist in the killing and in fact ran away before Moses could be killed. He did, however, attend on two occasions when the appellant enlisted the aid of two assassins. Zungu subsequently warned Moses about the plot to kill him and, despite this, he was in fact killed some two months later. The court was required to decide whether in the circumstances the court a quo had correctly convicted the appellant of a conspiracy to murder in contravention of s 18(2) of the Riotous Assemblies Act 17 of 1956.

Held, that, prior to the legislative enactment of the crime of conspiracy to commit an offence, our common law recognised the crime of conspiracy and, since the full-bench decision of *R v Harris* (1927) 48 NLR 330, it was considered that the offence could only be committed if there was 'actual' agreement and not an 'apparent' agreement.

Held, that what had to be determined was the seriousness of the offender's commitment to carry out the crime or have a proxy do it for him, and the presence of an overt unlawful act. Evidentially, this had to be satisfied by having regard to the intention of the accused, demonstrated by his subjective belief that he had obtained the agreement of the other person to participate in the crime in question, and by taking some step or associating himself with the act of his alleged co-conspirator, in furtherance of that pact.

Held, further, that the judgment in *Harris* relied on English authority which had since been overruled by its highest court on the grounds that it was premised on English procedural rules introduced to avoid unfairness, and not on substantive law.

Held, further, that there was no reason for the offence of conspiracy to go beyond the ordinary characterisation of an actus reus, where the overt manifestation of assent by the co-conspirator should suffice. If this were not so then absurdities would arise.

Held, further, that the unlawful conduct on the part of the appellant was demonstrated by the conclusion of the conspiracy with Zungu, but even if this was wrong on the facts and the law, it was demonstrated by the pact made at the meeting between the appellant and each gunman on the two separate occasions at

which Zungu was present. It was also evidenced by the appellant's conduct, which included handing over the firearm to at least one other co-conspirator for the purpose of killing Moses, procuring the gunmen, and introducing each of them to Zungu so that Zungu could point Moses out in order to kill the correct person. It was irrelevant that none of the co-conspirators had an intention to carry out their part of the bargain. The appeal against the conviction was dismissed.

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Polokwane Local Municipality v Granor Passi (Pty) Ltd and another [2019] 2 All SA 307 (SCA)

Constitutional and Administrative Law – Sale of municipal land – Refusal to effect transfer – Decision based on error – Review – Court found that Council's decision to be a material error of fact – Evidence to the contrary was proved – Appeal dismissed.

In terms of a sale agreement entered into between the appellant municipality's predecessor and the respondent ("Granor"), the municipality sold immovable property to Granor for a purchase price of R181 000. A deposit of 20% of the purchase price was payable in cash on the date of sale and the balance was payable thereafter in 60 equal monthly instalments. Possession of the property was given immediately and Granor was obliged, within three years of the date of conclusion of the agreement, to erect an industrial building on the site to a minimum value of R100 000. If it failed to do so, the municipality would be entitled to take the property back.

Granor claimed that it paid the purchase price in accordance with the agreement. It was also common cause that it constructed industrial buildings on the site with the approval of the municipality. The current value of the improvements it made over the years was assessed as some R 22 million. Since 1994, the municipality had demanded that Granor pay rates on the property on the footing that it was the owner. In approximately 2011, it was discovered that the property was still registered in the name of the municipality (by then the "appellant"). The reasons that the property was not transferred to Granor were unclear.

In February 2015, the municipal council resolved that the proof of payment provided was insufficient and that it would not transfer the property to Granor. Granor launched proceedings to set aside the resolution and for an order that the municipality transfer the property to Granor. The Court below granted the first order and remitted the matter to the municipality for reconsideration. The present appeal ensued.

Held – It was only necessary to have regard to the ground of review that the decision was based on clear factual error on the part of the municipality. The factual basis for the council's decision was that there was no adequate proof that Granor had paid the full purchase price. The High Court correctly held that to be a material error of fact. The evidence before the council clearly pointed to the contrary.

The appeal was dismissed.

Raubex Construction (Pty) Ltd v Bryte Insurance Company Ltd [2019] 2 All SA 322 (SCA)

Insurance – Construction agreement – Retention guarantee issued by insurer in lieu of retention money provided for in construction agreement – Insurance company refusing to comply with demand for payment under guarantee – Allegation of fraud and non-compliance with terms of guarantee – Interpretation of contracts.

The appellant ("Raubex") was a construction company. In 2013, its tender for the construction of certain works was successful and it was awarded the contract. It then subcontracted a portion of the works to another company ("Dolphin"). The subcontract provided for 10% of the contract price to be withheld as and for retention money during the contract period. Raubex, however, waived its rights to retain any retention money against the delivery of a satisfactory retention money guarantee.

To that end, a "Retention Money Guarantee" (the "guarantee") was issued by the respondent ("Bryte") in favour of Raubex.

After Dolphin completed the work, a dispute arose between it and Raubex regarding incomplete and defective work which still had to be performed. By February 2015, Dolphin refused to perform any further remedial work. Raubex called upon Bryte to make payment in the amount of R1 409 726,11 in terms of the guarantee. However, Bryte refused to comply with the demand and Raubex successfully applied to the High Court to compel payment under the guarantee. The setting aside of the order in its favour by the Full Court led to the present appeal.

Held – The basis of Bryte's refusal to honour the guarantee was its contention that the demand for payment in terms of the guarantee did not comply with the provisions of the guarantee itself as it contained fraudulent misrepresentations. It alleged that Raubex knew that Dolphin was not in breach of its contract and that no money was therefore due and payable. Bryte therefore argued that it was released from liability by the fraud of Raubex. It also contended that the guarantee was limited to defects arising after issue of certificate of completion, and that the amount claimed was not a correct estimate of cost of remedying such defects. The Court stated that the parties clearly intended the guarantee to be a separate contract enforceable on its terms, and expressly made the guarantee unconditional, subject only to compliance with the terms and conditions in respect of the demand to be made. Upon compliance with the terms of the guarantee, the guarantor could not escape liability unless there was proof of fraud on behalf of the beneficiary. A party alleging fraud bears the onus to establish it, which is not to be easily inferred.

In concluding that Raubex's demand was not in accordance with the terms of the guarantee, the court *a quo* stated that Raubex was required, in its certification of its demand, to show that the certification was, in fact, made in the honest belief that it was a correct estimate of what it was entitled to be paid under the guarantee. That approach incorrectly placed the onus upon Raubex to prove that it had not acted fraudulently. An allegation of fraud is a serious charge and the onus to prove it clearly and distinctly will always rest on the party making such allegation.

The guarantee was provided in lieu of the retention of the money stipulated in the subcontract as retention money. The purpose for which such money could be retained had to be determined by a process of interpretation of the contract. A contract must be interpreted in its entirety in order to place any particular term relied upon in its

proper context. In seeking to determine the purpose for which the retention money could be retained in terms of the particular contract, the Court had to have regard to the terms of the contract in the context in which they appeared in the contract as a whole. On that approach, the Court had to have regard to the terms of the main contract where they applied to the subcontract. The subcontract, read in the context of the general conditions of the main contract, made it clear that retention money could be retained both for work which remained outstanding on the date stated in the taking-over certificate and defects or damage which existed in the works after such date, irrespective of when they first manifested.

On a proper interpretation of the contract, the Court found it to provide that upon the issue of the completion certificate, Raubex was entitled to require Dolphin to complete any work which was outstanding on the date stated in the certificate of completion within a reasonable time, and would be entitled to withhold certification for the repayment of the retention money for the estimated costs of such work until it had been executed. Retention money would therefore, but for the guarantee, have been retained in respect of the work set out in the list attached to the certification of the demand. Raubex was entitled to include such items on the list and was entitled to rely on such items in demanding payment from Bryte in accordance with the guarantee. As such, the court *a quo* erred in its understanding of the purpose of retention money and in its assessment of the purpose of the guarantee.

Finally, the Court addressed the argument on behalf of Bryte that Raubex fraudulently misrepresented the amount of its estimation of the costs to remedy the alleged breach by Dolphin. A mere error, misunderstanding or oversight, however unreasonable, does not amount to fraud and it is insufficient merely to show that contentions are incorrect. A party has to go further and show that the representor advanced the contentions in bad faith, knowing them to be incorrect. No foundation was laid in the papers for such a conclusion.

Concluding that Bryte had failed to discharge the onus of establishing fraud on the part of Raubex, the Court upheld the appeal.

Black Eagle Project Roodekrans v MEC: Department of Agriculture, Conservation and Environment, Gauteng Provincial Department and others [2019] 2 All SA 322 (GJ)

Constitutional and Administrative Law – Administrative decision – Judicial review – Test – Rationality and reasonableness – Is administrative action rationally related to the purpose for which the power was given to the functionary – Whether there is a rational connection between the material made available to the functionary and the conclusion arrived at by the functionary.

The applicant ("Black Eagle") was a section 21 company with two main aims and objectives, *viz* to educate the public about a pair of black eagles that reside in the Walter Sisulu National Botanical Gardens and to take all necessary steps to protect, conserve and maintain raptors and their environment.

In August 2006, the second respondent (the "HOD") took a decision to authorise the development of certain phases of a proposed residential estate on a piece of land in the Mogale Municipal District. The land was to be developed by the third respondent ("Landev"). Black Eagle's appeal against the approval granted was dismissed by the first respondent (the "MEC"). In the present application, Black Eagle sought the review

of the MEC's decision. It also sought the review of a second decision by the MEC, to overturn a decision of the HOD who refused an application for an amendment to the development.

Landev and Black Eagle were not in agreement on the effect of the development on the ecological footprint in the area.

Black Eagle's case regarding the appeal decision was that the decision was tainted by error of law and should therefore be reviewed and set aside. The error was said to be a failure on the part of the HOD to appreciate that he was not empowered to take the decision as he had already refused the very same application previously and had become *functus officio*. Regarding the refusal of the amendment, Black Eagle argued that the MEC had no authority to consider it as the exemption decision of the HOD had lapsed, and that he had taken the decision without the public being given an opportunity to comment on the application for an amendment despite public participation being mandatory.

Held – The earlier decision made by the HOD differed from the subsequent application in respect of which the HOD made the impugned decision. Accordingly, the contention that the exemption decision of the HOD was marred by an error of law was incorrect.

In applications for judicial review, the test is one of rationality. In assessing whether the rationality threshold has been met the Courts have raised two pertinent questions. The first is whether the administrative action is rationally related to the purpose for which the power was given to the functionary, and the second is whether there is a rational connection between the material made available to the functionary and the conclusion arrived at by the functionary. *In casu*, it could not be found that the MEC's decision was rationally dislocated from the facts that were before him. The challenge to the appeal decision on the basis of reasonableness also failed.

However, the challenge in respect of the amendment decision was found to have merit. The failure to furnish any substantive reason for interfering with the HOD's decision rendered the amendment decision irrational. Furthermore, public participation in the process was necessary before a decision on the amendment application could be considered. The failure to allow for it meant that the amendment decision was marred by a fatal flaw. The amendment decision of the MEC was reviewed and set aside.

Galsworthy Limited v Pretty Scene Shipping SA and another [2019] 2 All SA 355 (KZP)

Shipping – Maritime – Arrest of ship – Requirements – Rule 2(1)(a) and (b) of the Admiralty Rules – Non-compliance with rules – Writ of summons in rem and the warrant of arrest set aside in first judgment – Second warrant of arrest and summons in rem issued against the vessel before first judgment was handed down – Security in respect of a counter-application for damages for wrongful arrest was sought – Appeal upheld.

An appeal was brought against two judgments of the High Court, sitting as a court of admiralty, in terms of the Admiralty Jurisdiction Regulation Act 105 of 1983.

In the first judgment, a writ of summons *in rem* and the warrant of arrest issued out of this Court in respect of the ship, MT "Pretty Scene", were set aside. Before that

judgment was handed down, the applicant ("Galsworthy") caused a second warrant of arrest and summons *in rem* to be issued against the vessel. That was done *ex parte*, without any notification to the ship or its owner, or to the Court. The application was granted by the Registrar of the High Court. Consequently, the ship and its owner brought an application to set aside the second arrest of the vessel. They also sought security in respect of a counter-application for damages for wrongful arrest, which they intended pursuing against Galsworthy in the action *in rem*.

In the second judgment, the above-mentioned applications were dismissed.

Galsworthy appealed against the first judgment and the shipping parties against the second.

Held – In the first judgment, the arrest was set aside for want of compliance with rule 2(1)(a) and (b) of the Admiralty Rules. The shipping parties had taken issue with Galsworthy's failure as regard the writ of summons, to comply with rule 2(1) and Practice Directive 27 as the summons did not contain "a clear, concise statement of the nature of the claim" and "a statement of the facts upon which the claim is based" and "a statement of facts on the basis of which it is stated that the ship is an associated ship".

In general, when proceeding to enforce a maritime claim, the plaintiff issues a writ of summons *in rem* as prescribed in terms of section 3(4) of the Act and rule 2(1). Application is made to the Registrar of the High Court (not the court) for the issuing of an arrest warrant supported by a rule 4(3) Certificate signed by the applicant or his attorney. The registrar is empowered to issue such process unless he feels that the matter should serve before a judge. The requirements of rule 2(1)(b) are peremptory in nature, stating that a summons shall contain a clear, concise statement of the nature of the claim and of the relief or remedy required and of the amount claimed, if any and rule 2(1)(b) states that the statement referred to in paragraph (a) shall contain sufficient particulars to enable the defendant to identify the facts and contentions upon which the claim is based.

It is a requirement of an action *in rem* that ownership of the *res* as an associated ship by the defendant must be established, as the *res* must be linked to the ownership of the ship concerned. The processes issued in terms of section 3(4) of the Act being final in nature, require an adequate concise statement of facts as to the establishment of the association between the arrested vessel and the claim. Galsworthy's averments in that regard were inadequate.

The stringent procedure provided for by the Act mean that the procedural safeguards require strict observance. Thus, the arrestor bears the onus to prove compliance with all procedural and substantive issues.

In considering the appeal by the shipping parties, the court found that Galsworthy was not entitled to effect the arrest of the ship, and that the appeal had to be upheld.

Independent Institute of Education (Pty) Ltd v KZN Law Society and others [2019] 2 All SA 399 (KZP)

Constitutional and Administrative Law – Right to equality – Unfair differentiation – Right to practice a chosen profession, trade or occupation – Limitation of rights – Legal Practice Act 28 of 2014, section 26 (1)(a) – Unconstitutionality

Legal Practice Act 28 of 2014-section 26 (1)(a) – Unconstitutionality-Section 29(3) of the Constitution provides that everyone has the right to establish and maintain, at their own expense, independent educational institutions that not discriminate on the basis of race-the limitation was not justified, and was declared constitutionally invalid regarding the use of the word "university" to exclude private Higher Education Institutions duly accredited and registered to provide the LLB degree.

The applicant (the "IIE") was registered in terms of section 54(1)(c) of the Higher Education Act 101 of 1997 as a private higher education institution. It provided higher education in 21 campuses throughout South Africa under several brands, one of which was Varsity College. After being accredited in 2016, to provide the LLB degree, the IIE started offering the LLB degree at 6 of its Varsity College campuses in the 2018 academic year, registering approximately 200 first year students.

However, on 19 January 2018, the first respondent, the KZN Law Society, indicated that the LLB offered by the IIE did not meet the requirements for admission as an attorney in terms of section 2(1) of the Attorneys Act 53 of 1979 which provided that an LLB obtained from a university qualified one for articles of clerkship, which were a prerequisite for admission as an attorney, and neither the applicant nor its Varsity Colleges were a university. The Attorneys Act was repealed in its entirety by the Legal Practice Act 28 of 2014, which came into effect on 1 November 2018.

Held – The issue to be decided was whether section 26(1) of the Legal Practice Act infringed the rights to equality before the law, freedom of trade, profession and occupation, and to establish private education institutions in the Constitution of the Republic of South Africa.

Section 39 enjoins the courts to read legislation in a manner that most conforms with the Constitution, and only declare legislation unconstitutional if it is incapable of such other interpretation.

Section 29(3) of the Constitution provides that everyone has the right to establish and maintain, at their own expense, independent educational institutions that not discriminate on the basis of race; are registered with the State; and maintain standards that are not inferior to standards at comparable public educational institutions. Finding that the applicant met the criteria set out in section 29(3) and those in Chapter 7 of the Higher Education Act 101 of 1997, the Court held that its exclusion from section 26(1)(a) of the Legal Practice Act, limited its right to offer the accredited four-year LLB.

The impugned provision clearly differentiated between public universities and private higher education institutions. There was no rational connection between the differentiation and a legitimate government purpose. The impugned provision therefore limited the equality provisions of section 9(1) of the Constitution. It also limited the right of the applicant and of its LLB students to practice a chosen profession, trade or occupation as provided in section 22 of the Constitution.

Section 36(1) of the Constitution provides that rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the

purpose. In this case, the limitation was not justified, and was declared constitutionally invalid regarding the use of the word “university” to exclude private Higher Education Institutions duly accredited and registered to provide the LLB degree.

Manuel v Sahara Computers (Pty) Ltd and another [2019] 2 All SA 417 (GP)

Civil Procedure – Application for access to information – Section 50 of the Promotion of Access to Information Act 2 of 2000 – Whether impermissible pre-litigation discovery in contravention of section 7 of the Promotion of Access to Information Act – Section 7 no bar where records were sought before the commencement of any civil proceedings.

Civil Procedure – Referral for oral evidence – Rule 6(5)(g) of the Uniform Rules of Court – Where an application cannot properly be decided on affidavit, the Court may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact.

Based on an article published in the media, the applicant believed that his personal information had been unlawfully obtained and disclosed, and that he had been subjected to unlawful surveillance. The article claimed that Manuel and his wife (“Ramos”) had been subject to unlawful surveillance, and that their personal details, including particulars of their travel arrangements, had been collected and disclosed to the respondents. It detailed allegations regarding emails and documents revealing that a certain family (the Gupta family) had spied on various prominent South Africans. At the centre of the emails was the second respondent (“Chawla”), the former Chief Executive Officer of the first respondent (“Sahara”). He was shown to have been involved in collecting information about Manuel, Ramos and others.

On the ground that it was not clear who was responsible for the unlawful conduct, he requested access to certain records to identify the appropriate defendants in order to protect and exercise his constitutional right to privacy. The application was brought in terms of section 50 of the Promotion of Access to Information Act 2 of 2000.

The documents sought by Manuel were the emails, including any other correspondence, source documentation, record, or surveillance relating to Manuel and/or his family; a spreadsheet that was allegedly compiled by Chawla containing the identity numbers and international flight details of Manuel and Ramos; and the names of all third parties, including any organs of State, who provided Sahara, its employees and Chawla with Manuel’s personal information, or who Sahara assisted in the surveillance of Manuel.

In the answering affidavits, the respondents contended that the documents sought by Manuel did not exist, and that if they existed, which was denied, they were not in their possession. Manuel contended that the version provided in the answering affidavits amounted to a refusal, in terms of the Promotion of Access to Information Act, to provide access to the relevant records.

Held – The right to access to information is contained in section 32 of the Constitution, and is given effect to by the Promotion of Access to Information Act.

Manuel seeks to exercise and protect his right to privacy as contained in section 14 of the Constitution. In establishing that information was required for the exercise or protection of a right, Manuel was required to satisfy two distinctrequirements. Firstly, he had to identify the right that he sought to exercise or protect, and show that *prima*

facie, he had established that he had such a right. Secondly, he had to demonstrate how the information would assist in exercising or protecting the right in question.

The respondents contended that Manuel was seeking impermissible pre-litigation discovery, and also contended that such pre-litigation discovery is further prohibited by section 7 of the Promotion of Access to Information Act, which provides that the Act does not apply to records requested after the commencement of legal proceedings. The Court pointed out that section 7 was no bar in this case as Manuel sought the records before the commencement of any civil proceedings. He was entitled to use the Act to establish who his defendants might be and/or what cause of action he had against them. He did not require the records to assess his prospects of success, which would amount to pre-litigation discovery.

Section 55 of the Act requires a private body that claims that records do not exist or cannot be found to go under oath to say that it is not possible to provide access to the record; provide a full account of all steps taken to find the record or determine whether it exists; and provide such an affidavit or affirmation in response to the initial request, in which case it is deemed to be a refusal. A mere statement that a record cannot be found or does not exist does not suffice. Courts are required to scrutinise the private body's version on affidavit to determine whether its account is satisfactory. The respondents' response to the application fell short of what was required in terms of section 55.

Insofar as section 50 of the Act governs requests for access to information held by private bodies, Chawla alleged that the Act did not apply to him as he was not a "private body" or the head of a private body. The Court found that, despite their current allegations to the contrary, Chawla and Sahara treated the situation as if Chawla was the CEO or an equivalent officer of Sahara. He therefore fell within the definition of "head" of a private body and the Act was applicable to him.

As the original relief became academic and would have amounted to a *brutem fulmen* if granted, Manuel sought an order directing that Chawla and three others be required to give oral evidence, and be subjected to cross-examination, on the question of whether the records were, or had ever been, in the respondents' possession. The question that arose was whether the court should go behind such affidavits and find them unsatisfactory and therefore non-compliant with the Act and if so, whether a reference to oral evidence would constitute appropriate relief.

In terms of rule 6(5)(g) of the Uniform Rules of Court, where an application cannot properly be decided on affidavit, the Court may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact. The rule applies not only where there is a true dispute of fact on the papers, but also in circumstances where one party casts doubt on the relevant allegations of another. Finding that Manuel had satisfied the requirements of rule 6(5)(g), the Court postponed the matter for a date to be arranged for the hearing of oral evidence on the issue of whether the respondents had the records in their possession.

Master of the High Court, Western Cape Division, Cape Town v Van Zyl [2019] 2 All SA 442 (WCC)

Insolvency – Appointment of liquidator – Removal of liquidator from office – Review – Companies Act 61 of 1973 – In terms of section 379(1)(b) and/or (e) liquidator had failed to perform satisfactorily any duty imposed upon him by the Act or to comply with

a lawful demand of the Master or a commissioner appointed by the Court under the Act.

Exercising the power vested by section 379(1) of the Companies Act 61 of 1973, the Master of the High Court made a decision to remove the respondent from his position as liquidator (or co-liquidator) of more than 100 companies. On review, the Master's decision was set aside in respect of all but ten of the affected appointments.

In the present appeal, the Master challenged that part of the judgment that went against her, and the respondent cross-appealed against the decision not to interfere with the Master's decision to remove him from office in ten of the companies.

Held – Section 379(1) of the 1973 Companies Act provides for the removal of a liquidator by the master or the Court. In terms of section 379(1)(b) and/or (e), on which the Master relied, that the liquidator had failed to perform satisfactorily any duty imposed upon him by the Act or to comply with a lawful demand of the Master or a commissioner appointed by the Court under the Act. If an affirmative finding was made, it then had to be decided whether removal is an appropriate and proportionate consequence in the circumstances. The Master must, in every case in which she considers removing a liquidator from office, conscientiously take into account the interests of the liquidation and the wishes of the creditors.

Regarding the degree of scrutiny to which the Master's decision was subject on review, the present Court confirmed that the court *a quo* could review and set aside the Master's decision on any of the conventional review grounds set out in the Promotion of Administrative Justice Act 3 of 2000 as well as on the wider review basis applicable in the circumstances in terms of section 151 of the Insolvency Act 24 of 1936. That entitled the Court to set aside the decision simply because it considered it to be wrong.

The Master's decision in this case was found to have been flawed in various respects. Important considerations were not taken into account and there was no evidence that the respondent had failed to perform satisfactorily any duty imposed upon him by the Act or to comply with a lawful demand of the Master. The Court below was correct in setting aside the decisions which it did, and the appeal had to fail.

The Court then turned to the cross-appeal against the dismissal by the court *a quo* of the respondent's application to review and set aside the Master's decision to remove him from his appointments as liquidator of the ten corporations. The Court found that the Master's decision was wrong as was not supported by, and therefore not rationally connected either to the information before her, or the purpose of the empowering provision.

The cross-appeal was upheld.

Mining Forum of South Africa and another v Minister of Mineral Resources and others (Bapo Ba Mogale Unemployment Forum and another as intervening applicants) [2019] 2 All SA 485 (NWM)

Mining, Minerals & Energy – Holder of mining permit – In terms of the Mineral and Petroleum Resources Development Act 28 of 2002, a holder of a mining right must submit a Labour and Social Plan which is in line with the objectives of the Act – Allegations of non-compliance with plan found to be without merit.

The first applicant (the "Mining Forum") was appointed by the Bapo-Ba-Mogale Traditional Council to represent the interests of its communities regarding compliance with the Social and Labour Plans submitted by all mines operating in the land of the Bapo-Ba-Mogale tribe. The second applicant ("Ramoba") was the president of the Mining Forum.

The fifth respondent ("Lonmin"), the sixth respondent ("Western Platinum") and the seventh respondent ("Eastern Platinum") were holders of various mining right licences as defined in section 5 of the Mineral and Petroleum Resources Development Act 28 of 2002 (the "MPRDA"). The three entities were collectively referred to by the court as Lonmin. The MPRDA prescribes that a holder of a mining right must submit a Labour and Social Plan which is in line with the objectives of the Act, and requires the holder of mining rights to contribute towards the socio economic development of the areas within which they are operating.

After Lonmin submitted its Social and Labour Plan to the Department of Mineral Resources for the period October 2013 to September 2018, the Department received complaints from the community about Lonmin's non-compliance with the plan. An audit conducted by the Department revealed that Lonmin had failed to meet its targets in respect of several matters. Lonmin conceded that it had not fully complied with its Social and Labour Plan, citing amongst the reasons, a steep decline on financial results and a tough operating environment. As a result, on 28 November 2017, the Department issued a notice in terms of section 93(1)(b)(i) of the MPRDA, directing Lonmin to suspend all mining activities with immediate effect, and to address the issues raised in the notice. Lonmin made an undertaking to comply and the notice was withdrawn. An action plan submitted by Lonmin was found to be wanting by the Department, and Lonmin submitted a revised action plan on 26 January 2018. The Department was satisfied with the revised action plan and found that it addressed the concerns raised in the section 93 notice. From that point on, Lonmin operated in terms of the amended Social and Labour Plan of 26 January 2018.

In the present application, the Mining Forum sought a declaration that the first respondent (the "Minister") had acted in breach of his statutory obligations by failing to act against Lonmin for its failure to implement the Social and Labour Plans over the period 2014 until 2017, and ancillary relief. Lonmin's assertion that it was impossible to fully comply with the Social and Labour Plan undertakings because of its financial constraints were disputed by Ramoba. Ramoba also accused Lonmum of trying to escape its obligations in terms of the Social and Labour Plan by disposing of its interest in one of its mines to an entity ("Sibanye-Stillwater") whose shareholders were the executive directors of Lonmin. That transaction was sought to be interdicted.

Held – The issues for determination were whether the applicants had the necessary legal standing to institute these proceedings; whether the Promotion of Administrative Justice Act 3 of 2000 was applicable in the proceedings; and if so, whether the applicants should nonetheless be granted the declaratory and other orders sought in the notice of motion. Finally, the Court had to decide whether section 24 of the Constitution, on which the applicants also placed reliance, was applicable in this matter.

Applications for judicial review may be brought in terms of the Promotion of Administrative Justice Act if relating to administrative action, or in terms of the principle of legality if not relating to administrative action.

The application for a declaratory order that the Minister had acted in breach of his statutory obligations by failing to act against Lonmin for its failure to implement the Social and Labour Plans could be dispensed with in light of the applicants' acknowledgement to the contrary. It was conceded that the Department did take action against Lonmin which resulted in the invocation of the section 93(1) notices, in order to ensure that Lonmin complied with its obligations and commitments in the Social and Labour Plan. For similar reasons, the Court declined to order Lonmin to suspend its operations pending compliance with the plan.

Turning to the applicability of section 24 of the Constitution, the Court noted that one of the objects of the MPRDA is to give effect to section 24of the Constitution by ensuring that the nation's mineral and petroleum resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development. Section 24 of the Constitution guarantees the right to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures. The power to enact such legislative measures is vested in the Legislature and had no bearing on the Lonmin respondents.

The Court then considered the order sought regarding an interdict against Lonmin restraining them from ceding and or transferring their mining rights to Sibanye-Stillwater, pending the implementation of its obligations arising from the Social and Labour Plan. It was found that the order sought was not supported by any facts. The Court could not prevent Lonmin from exercising its rights to take decisions that would enhance its business opportunities, which would in no way effect it obligation in terms of the Social and Labour Plan.

The application was dismissed with costs.

South African Broadcasting Corporation SOC Limited v South African Broadcast Corporation Pension Fund and others [2019] 2 All SA 512 (GJ)

Employee Benefits and Retirement – Pension benefits – Withdrawal benefit – Withholding by fund – Misconduct on part of fund member – Application for interim interdict brought in terms of section 37D(1)(b)(ii) of the Pension Funds Act 24 of 1956.

As a result of his employment with the applicant ("SABC"), the second respondent ("Motsoeneng") became a member of the first respondent pension fund. When his employment was terminated in June 2017, Motsoeneng became entitled to payment of a withdrawal benefit in terms of the fund rules. However, the SABC informed the fund that it was investigating allegations of misconduct against Motsoeneng, and requested that the fund withhold payment of the benefit until a judgment it anticipated securing was obtained.

The SABC brought an urgent application for an interim interdict preventing the fund from paying the pension benefit. That was based on section 37D(1)(b)(ii) of the Pension Funds Act 24 of 1956. In the second part of the application, the SABC sought to review and set aside a decision of its Governance and Nominations Committee to award Motsoeneng an amount equivalent to 2,5% of R1,19 billion. The fund opposed the application on the ground that the SABC had failed to bring its case within the ambit of section 37D(1)(b)(ii), disentitling the fund to withhold payment of the benefit.

Held – The fund and Motsoeneng would jointly be referred to as the "respondents".

The respondents raised preliminary objections to the SABC's filing of a supplementary founding affidavit without the leave of the Court; the late filing of its replying affidavit and the inclusion of new matter in the replying affidavit. The Court however, pointed to its discretion to overlook the irregularities, and exercised such discretion against the respondents, finding that they would suffer no prejudice thereby. The Court was also not persuaded that the SABC had made out a new case in its replying affidavit. On the basis that the fund would suffer no prejudice, the Court also refused a striking out application in respect of the SABC's replying affidavit. It went on to condone the late filing of the said affidavit.

The requirements for an interim interdict meant that the SABC had to show a *prima facie* right; that such right would be infringed; the balance of convenience in its favour, and that irreparable harm would occur if interim relief was not granted.

Section 37D(1)(b)(ii) allows a fund to deduct any amount due by a member to his employer, and pay that amount to the employer, as compensation for any damage caused to the employer as a result of any theft, fraud, dishonesty or misconduct on the part of the member. The section must be read together with the rules of the fund. The misconduct alleged to have been committed by Motsoeneng was his having allegedly accepted an irregular payment without disclosing that. The evidence supported the SABC's allegations and the Court found that a *prima facie* right to recover the losses incurred by the SABC had been established.

The Court, accordingly, granted an interim interdict against the fund.

S v Brown and others (judgment) [2019] 2 All SA 552 (ECP)

Criminal law and procedure – Evidence – Accomplice evidence – Evidence of an accomplice witness must be approached with caution – Test is whether the Court, after proper consideration of the accomplices' evidence with the caution required by the law, is beyond all reasonable doubt satisfied that the version the accomplice advances is essentially true.

Criminal law and procedure – Evidence – Hearsay evidence – Organised crime cases – Section 2 of the Prevention of Organised Crime Act 121 of 1998 allows the Court to admit hearsay evidence relating to the offences contemplated in sub-section (1) provided that such evidence would not render the trial unfair.

Criminal law and procedure – Search and seizure – Search warrants – Section 21, Criminal Procedure Act 51 of 1977 – Requirements for validity.

Criminal law and procedure – Search and seizure – Search without warrant – Section 22 of the Criminal Procedure Act 51 of 1977 authorises a police official to search any person, container or premises for the purpose of seizing any article if the person concerned consents thereto or if the police officer has reasonable grounds to believe that a search warrant will be issued to him in terms of section 21(1)(a) if he applied for it and that a delay in obtaining such a warrant would defeat the object of the search.

Accused of having committed offences relating to various racketeering activities, the accused were charged with contraventions of provisions of the Marine Living Resources Act 18 of 1998; the Prevention of Organised Crime Act 121 of 1998; the Criminal Procedure Act 51 of 1977; and the National Road Traffic Act 93 of 1998. The offences were in the main alleged to consist of the fishing, collecting, disturbing, keeping, controlling, storing, transporting or possession of abalone without a permit. According to the State, the enterprise which the first and second accused had formed,

conducted its affairs through a pattern of racketeering activities set out in the indictment and all the racketeering activities were individually Schedule 1 offences in terms of the Prevention of Organised Crime Act. It was submitted that cumulatively, the offences constituted a pattern.

The accused pleaded not guilty to the charges, with only the first accused giving a detailed plea explanation. He challenged the veracity of the allegations of at least five of the State witnesses who had turned State witness (the "section 204 witnesses").

The State informed the Court that it would call as one of its witnesses, the investigating officer ("Captain Swanepoel") who would repeatedly refer to hearsay evidence in this testimony. He gave a detailed account of how the investigation into poaching of abalone commenced, culminating in the arrest of the accused. The first incident occurred in March 2015, when a sergeant under the command of Captain Swanepoel arrested a person ("Ellerbeck") who was transporting abalone. Ellerbeck gave information which led to the discovery of the other activities.

After the close of the State case (and with the defence not opting to lead any evidence), the Court declared four search warrants used by the police to be invalid, and two to be valid. Three searches conducted without warrants were also declared valid. The State was allowed to lead evidence so that the Court might be able to make a determination in terms of section 35(5) of the Constitution. In the present judgment, the Court provided its reasons for its orders.

Held – The Court allowed Captain Swanepoel's evidence to be led in terms of section 2 of the Prevention of Organised Crime Act the provisions of which allow the Court to admit hearsay evidence relating to the offences contemplated in sub-section (1) provided that such evidence would not render the trial unfair.

Section 20 of the Criminal Procedure Act authorises the State to seize any property within the Republic of South Africa or elsewhere if the State on reasonable grounds believes it to be concerned in the commission of an offence and provides evidence thereof. The Constitutional Court has dealt with the issues pertaining to search warrants and the execution thereof. The person issuing the warrant must have authority and jurisdiction, and the person authorising the warrant must satisfy herself that the affidavit contains sufficient information on the existence of the jurisdictional facts. The terms of the warrant must be neither vague nor overboard, and the warrant must be reasonably intelligible to both the searcher and the searched person. The Court must always consider the validity of the warrants with due regard for the searched person's constitutional rights and the terms of the warrant must be construed with reasonable strictness.

The four warrants which were declared invalid did not comply with the requirements of section 21 as the offences were vaguely defined. Although those warrants related to statutory offences, the relevant statutes or the sections allegedly contravened were not specified. The warrants also did not specify the name of the person to be searched.

Noting that some of the searches were conducted without search warrants, the Court referred to section 22 of the Criminal Procedure Act, which authorises a police official to search any person, container or premises for the purpose of seizing any article if the person concerned consents thereto or if the police officer has reasonable grounds to believe that a search warrant will be issued to him in terms of section 21(1)(a) if he

applied for it and that a delay in obtaining such a warrant would defeat the object of the search. On that basis, the relevant searches were lawful.

In attempting to prove the charges against the accused, the State relied largely on the evidence of the police witnesses who were involved in the investigation. The evidence of the police had to be read together with the evidence of the section 204 witnesses. The Court found the evidence of the police to substantially corroborate that of the section 204 witnesses regarding the commission of the various racketeering activities. The evidence was that there was an enterprise in operation, and that the section 204 witnesses worked as a group in committing the various offences for an enterprise or a group of persons. They were remunerated for their activities in poaching abalone.

As a result of the first accused's challenge to the credibility of the section 204 witnesses, the Court explained the probative value of such evidence. Evidence of an accomplice witness must be approached with caution. The test in the final analysis is whether the Court, after proper consideration of the accomplices' evidence with the caution required by the law, is beyond all reasonable doubt satisfied that the version the accomplice advances is essentially true. Acknowledging that accomplices and 204 witnesses have self-serving reasons to turn into such witnesses, the Court still found that that on its own did not mean that the section 204 witnesses were lying. Sufficient corroboration for the evidence adduced by those witnesses existed, and the Court found that proof beyond reasonable doubt was established, that some of the offences were committed. The accused were convicted on the counts which had been proved against them.

S v Brown and others (sentence) [2019] 2 All SA 622 (ECP)

Criminal law and procedure – Organised crime – Abalone poaching – Sentencing.

Having convicted the accused of contravening the provisions of section 2(1)(f) of the Protection of Organised Crime Act 121 of 1998, the Court had to decide on an appropriate sentence.

Held – Section 3 of the Act deals with the penal provisions. It provides that a person convicted of contravening section 2(1)(f) is liable to pay a fine of R1000 million rand or to imprisonment for a period up to life imprisonment.

The seriousness of abalone poaching and the violations of the Act are reflected in the sentences the Legislature has ordained. The government incurred exorbitant costs in replenishing the sea with abalone, and in taking measures to prevent abalone poaching which has reached alarming proportions.

The Court took note of the fact that the first accused was the employer of the second and third accused. He was also the employer of all the section 204 witnesses. He was the ultimate person who was to benefit from the unlawful activities. The Court found that he showed no remorse for his actions. The second accused was instrumental in carrying out the affairs of the enterprise, but he and the third accused bore less culpability than the first accused.

Even after considering the mitigating circumstances of each accused, the Court was unable to impose non-custodial sentences.

The first accused was sentenced to an effective 18 years' imprisonment, the second accused to an effective 15 years' imprisonment, and the third accused to an effective 15 years' imprisonment.

END-FOR NOW