LEGAL NOTES VOL 6/2019

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SA LAW REPORTS JUNE 2019

AMARDIEN AND OTHERS v REGISTRAR OF DEEDS AND OTHERS 2019 (3) SA 341 (CC)

Land — Sale — Contract — Instalment sale agreement in respect of land — Compulsory registration of contract by seller in deeds registry — Late registration — Effect on purchaser's obligations — Notice of registration required before seller may take steps to enforce agreement — Notices under s 19 of ALA and s 129 of NCA must specify arrears — Alienation of Land Act 68 of 1981, ss 19, 20(1) and 26(1)(*b*); National Credit Act 34 of 2005, s 129(1)(*a*).

Credit agreement — Consumer credit agreement — Debt enforcement — Preliminary procedures — Notice of default — Drawing default to attention of consumer — Creditor must specify arrears — National Credit Act 34 of 2005, s 129(1)(*a*).

Section 20(1) of the Alienation of Land Act 68 of 1981 (the ALA) provides that if the purchase price of land is payable in instalments, the seller shall 'cause the contract(s) to be recorded by the registrar [of deeds] concerned' within a prescribed period; s 26(1)*(b)* that until such recordal is made, '(n)o person shall . . . receive any consideration'; and s 19 that certain notice requirements must be complied with before a seller may take legal action against a purchaser in default.

This case concerned the lawfulness of the cancellation of an instalment sale agreement for the sale of land on the basis that the purchasers were in arrears with their instalments. This where the contracts were recorded outside of the period prescribed in s 20 (ie on 1 April 2014, more than 10 years after they were entered into). In the interim, and in contravention of s 26(1)*(b)*, the seller received instalments, save for the arrears that it claimed by way of a notice sent to each purchaser in terms s 129(1)*(a)* of the National Credit Act 34 of 2005 (the NCA). Also,

[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!**

the requirements of s 19 of the ALA were not complied with in that its notice requirements were not met by the s 129 NCA notice.
The s 129 NCA notice, sent out on 14 April 2014, advised each purchaser that they were in arrears with their instalments but did not state the amount of arrears. The notices also advised them that the instalment sale agreements had been recorded under s 20 of the ALA — without stating exactly when — and that unless they responded within 10 days of receipt and remedied their default within 20 days, the instalment sale agreements would be cancelled. The purchasers did not respond to the notices nor did they pay their arrears, culminating in the seller launching eviction proceedings. These were, however, postponed pending the outcome of a High Court application the applicants had brought in which they sought, inter alia, a declarator that the seller's cancellation of the instalment sale agreements had been unlawful. (The first to fourth respondents were cited in respect of other relief sought.)
The purchasers argued that they could not have been in arrears or in default when they were informed that the instalment sale agreements had been recorded, because the seller was only entitled to receive consideration after the recordal of the agreements; and since the notice failed to inform them of the exact date of the recordal, they were unable to ascertain when the debt became due and payable and were therefore unable to make payment as required. The High Court, dismissing their application, held that all the amounts became immediately payable at the moment of recordal; that it was not an essential requirement for the s 129 NCA notices to set out the amounts of arrears; that there was a conflict between s 19 of the ALA and s 129(1)*(a)* of the NCA, and therefore the NCA prevailed over ch II of the ALA (in terms of s 172(1) of the NCA read with sch 1, which meant that cancellation of the agreement was subject only to compliance with s 129(1) of the NCA and not also s 19 of the ALA); and that since the applicants were in breach of their payment obligations, the agreements were amenable to cancellation.
On appeal, the Constitutional Court identified the following issues: (1) the effect on the purchaser's obligations of the seller's failure to record an instalment sale agreement as required by s 20 of the ALA; (2) whether notice of recordal was required before sending a s 129(1) NCA notice; (3) whether s 19 of the ALA and s 129(1) of the NCA were in conflict; and (4) whether a s 129(1) NCA notice (and/or a s 19 ALA notice) must state the amount alleged to be owing.
Held as to (1): It was only once the debt became due that a debtor had an obligation to make payment or perform. Where there was a statutory requirement that an agreement must be recorded, the correct position was that payment became due and payable only upon recordal of that agreement. The effect of the late recordal was clear: payments under the instalment sale agreements were not due and payable, and therefore the applicants were not in arrears as contended by the seller. (Paragraphs [35], [38] and [47].)
Held as (2): Section 26 of the ALA provided a clear statutory bar to the seller receiving payments (consideration) in the event of non-recordal of the agreement. The purchasers could therefore not have been in breach of the agreement at the time of the receipt of the s 129(1) NCA notice. It was incumbent upon the seller to notify the purchaser when the agreement had been recorded so that the purchaser could make the necessary payments. Also, when making demand for payment, a seller must afford the purchaser an opportunity to pay what was due within a reasonable time. The seller should accordingly have alerted the applicants of the recordal and have afforded them a reasonable opportunity to pay before moving to enforce and subsequently cancel the agreement. (Paragraphs [38] – [39] and [46].)

Held as to (3): Section 19 of the ALA limited a seller's right to take immediate and unilateral action by providing for certain steps to be taken before it could cancel an instalment sale agreement concluded with a purchaser, while s 129(1) of the NCA specified certain obligations a creditor must fulfil before it may proceed to the stage of legal enforcement or unilateral cancellation. Therefore, the requirements of the ALA and the NCA were not conflicting, and there was no need to have recourse to sch 1 of the NCA. Where they both applied, they could and should be read together: a seller must comply with the NCA in informing the purchaser of the default, and they must also inform a purchaser in terms of s 19 of the ALA if they intend relying on the remedies in terms thereof. Even if a s 129(1) NCA notice could additionally serve the purpose of s 19 ALA notice, in the present case the actual notice fell short of the requirements of s 19 of the ALA. It followed that the notices were premature and invalid insofar as they were relied upon as a basis for the cancellation of the instalment sale agreements.
Held as to (4): Section 129(1)*(a)* and *(b)* explained the obligations that the creditors must fulfil before moving to enforce their debt. The text explicitly referred to 'the default' that must be drawn to the notice of the consumer by the creditor — and not just the fact that the consumer was 'in default'. Read in conjunction with s 130(4) of the NCA, which provided an opportunity for the debtor to remedy the default, s 129(1) of the NCA should be interpreted to include the amount so that a debtor would know how much to pay to avoid cancellation. The same applied to the notice under s 19 of the ALA. The High Court thus erred in its conclusion that it was not essential that the s 129 NCA notices set out the amounts in which the applicants were in arrears. It must specify the default — that is, the actual amount of the arrears.

SOUTH AFRICAN COMMERCIAL, CATERING AND ALLIED WORKERS UNION AND OTHERS v WOOLWORTHS (PTY) LTD 2019 (3) SA 362 (CC)

Labour law— Dismissal — Dismissal for operational requirements — Reasonableness — Employer, citing need for flexibility, dismissing workers for refusing to convert from full-time to flexi-time employment — Need however fulfilled when workers accepted flexi-time during negotiations — Employer's failure to properly consider alternatives rendering dismissals substantially unfair — Reinstatement ordered — Labour Relations Act 66 of 1995, s 189A(19) (deleted 2015).

Labour law — Dismissal — Unfair dismissal — Reinstatement — Exceptions to remedy — 'Not reasonably practicable' — Meaning — Employer must prove compelling operational burden — Labour Relations Act 66 of 1995, s 193(2)(*c*).

In 2002 the respondent (Woolworths) decided that it would in future employ only workers working on a flexible working hour basis. Then, in 2012, it decided to convert remaining full-time workers to flexi-timers. Having been offered inducements, some workers volunteered. The rest, including present applicants, were given notices of termination. Woolworths also engaged in a consultation process, including one facilitated by the CCMA under s 189A(3) of the Labour Relations Act 66 of 1995 (LRA), with the first applicant (Saccawu) representing some of the full-timers. Towards the end of the consultation process Saccawu had accepted the need for a conversion to flexible hours, but Woolworths mistakenly interpreted their position to be that they were not prepared to work flexi-time and insisted on being paid on a full time basis (see [50]). It gave notice to terminate their employment and retrenched them 'for operational requirements' under s 189A. Saccawu, on behalf of some of the

retrenched workers, questioning the reasonableness of their dismissal, successfully pursued an unfair dismissal claim in the Labour Court, which held that the dismissals were both procedurally and substantively unfair, and ordered reinstatement. Woolworths' appeal to the Labour Appeal Court failed, but the court, swayed by Woolworths' argument that the positions were no longer available, changed the remedy from reinstatement to an award of 12 months' remuneration.

The present applicants (Saccawu and the affected workers) appealed against the amended remedy and sought confirmation that the dismissals were unfair on the ground that they were not operationally required as intended in s 189A(19) (the subsection was subsequently deleted, effective January 2015). The section provided that, in a dispute about the substantive fairness of large-scale retrenchments, the Labour Court must find that the worker was dismissed for a fair reason if the dismissal was 'to give effect to a requirement based on the employer's economic, technological, structural or similar needs', 'operationally justifiable on rational grounds'; there was 'a proper consideration of alternatives' and the 'selection criteria were fair and objective'. * Woolworths gave only one reason for the retrenchments, namely that it needed 'to be in a position to employ employees who are able to be used on a flexible basis'. The applicants argued that Woolworths did not properly consider the offered alternatives to retrenchment such as natural attrition and/or wage freezes for the full-time employees. Woolworths sought leave to cross-appeal those parts of the Labour Appeal Court decision that went against it.

Held

While case law established that s 189A(19) was a deeming clause directing the Labour Court to equate fairness with rationality, it did not follow that, because an employee was dismissed due to 'economic, technological, structural or similar needs', its precondition was met: the employer first had to establish that the dismissal of the employee contributed in a meaningful way to the realisation of that need; if not, the dismissal would be substantively unfair.

Woolworths' stated purpose of flexibility was achieved when the individual applicants agreed to work flexible hours, which meant that there was no longer a need for the retrenchments (see [32]). On the evidence, Woolworths failed to properly consider any of the alternatives proposed by the applicants (natural attrition or wage freezes), and offered no tenable reasons for this failure. This was a breach of s 189(19)*(c)*. If followed that the dismissal of the individual applicants was substantively unfair, Woolworths having failed to prove that it complied with s 189A(19)*(b)* or *(c)* by showing that the retrenchments were operationally justifiable on rational grounds or that it had properly considered alternatives to retrenchments (see [37] – [38]). This finding obviated the need to engage on the issue of the possible procedural unfairness in the dismissals (see [42]).

The primary remedy for substantively unfair dismissal was reinstatement, which would be ordered unless it was 'not reasonably practicable' as intended in s 193(2)*(c)* (see [43] – [45]). Being 'not reasonably practicable' meant more than mere inconvenience: it required the employer to prove a compelling operational burden (see [49] – [50]). Since the terms and conditions under which the applicants would have continued to work had they not been dismissed were unknown, their former contracts had to be revived on the basis that the parties would resume the consultation process that ended when the dismissals took place (see [56]). Since Woolworths was the party at fault, reinstatement with retrospective effect, as ordered by the Labour Court, was the correct remedy (see [57]).

Hence the order of the Labour Appeal Court would be set aside and replaced with an order dismissing Woolworths' appeal against the Labour Court order, thereby automatically restoring the Labour Court order. Woolworths' conditional cross-appeal would fail for the same reasons the applicants' appeal succeeded.

BUFFALO CITY METROPOLITAN MUNICIPALITY v NURCHA DEVELOPMENT FINANCE (PTY) LTD AND OTHERS 2019 (3) SA 379 (SCA)

Contract — Formation — Tacit contract — Proof — Test — Consideration of different formulations of test — 'No other reasonable inference' test — 'Balance of probabilities' test — No reason why onus of proof should be more burdensome for party alleging tacit contract than in other civil matters — Party alleging tacit contract must prove unequivocal conduct giving rise to an inference of consensus on balance of probabilities.

New Boss Construction CC (New Boss) contracted with Buffalo City Metropolitan Municipality (the City) to build a number of structures for the latter. To finance the venture, New Boss had previously, as borrower, entered into a loan agreement with Nurcha Development Finance (Pty) Ltd (Nurcha), as lender. Further terms of the loan agreement included that Tusk Construction Support Services (Pty) Ltd (Tusk) would administer the loan, and that New Boss would arrange for all the income from the building project to be paid into a dedicated banking account, also administered by Tusk. In order to give effect to such terms, New Boss issued to the City an 'irrevocable payment instruction' (which the City signed) in which it informed the City of its financing arrangements with Nurcha and Tusk, and ordered it to make all payments under the building contract into the abovementioned bank account, and that such bank account could only be changed with the written consent of Tusk. When New Boss started experiencing financial difficulties and was unable to perform its obligations under the loan agreement, Nurcha instituted an action in the High Court (Eastern Cape Circuit) against the City, claiming payment of R3,8 million in damages for breach of contract. Nurcha argued that a tacit contract between itself and the City had come into being, in terms of which the latter undertook to pay amounts due to New Boss into the designated account managed by Tusk, unless allowed otherwise by Tusk. While the City initially complied, it later made payments into another account, and in doing so defaulted. The High Court found that Nurcha had established a tacit contract, that the City had breached it and was obliged to pay R1,9 million in contractual damages to Nurcha. The City appealed to the Supreme Court of Appeal.
The issue before the SCA was whether Nurcha had proved the tacit contract. The court revisited the apparent conflicting formulations of the test for proving whether parties intended to conclude a tacit contract. There was the so-called traditional formulation — the 'no other reasonable inference' test — which held that, in order to establish a tacit contract, it was necessary to show, by a preponderance of probabilities, unequivocal conduct which was capable of no other reasonable interpretation that the parties intended to, and did in fact, contract on the terms alleged. This formulation had been subjected to a criticism in that it appeared to indicate a higher standard of proof than that of preponderance of probability in regard to the drawing of inferences from proven facts. The alternative formulation — the 'balance of probabilities' test — held that a court may hold that a tacit contract had been established where, by a process of making inferences, it concluded that

the most plausible probable conclusion from all the relevant proven facts and circumstances was that a contract had come into existence. (See [16] – [18].) Various attempts had been made to reconcile the tests (see [19]). The SCA, however, concluded that there was no need to do so, and that there was no reason why the onus of proof should be more burdensome for the party alleging a tacit contract than in other civil matters. It concluded that the party alleging a tacit contract needed to prove unequivocal conduct giving rise to an inference of consensus on a balance of probabilities.
The court concluded that Nurcha had shown, on a balance of probabilities, unequivocal conduct on the part of the City that proved that it had intended to enter into a contract with Nurcha to pay New Boss progress payments into the designated account managed by Tusk (see [22] and [27]). Nurcha was entitled to be paid what was due to it under the loan agreement in the form of damages payable by the City, which was in breach of contract (see [27]). Accordingly, the appeal was dismissed with costs.

CENTRIQ INSURANCE COMPANY LTD v OOSTHUIZEN AND ANOTHER 2019 (3) SA 387 (SCA)

Insurance — Policy — Interpretation — Professional indemnity policy — Liability exclusion clause — Principles governing interpretation of.

When Ms Oosthuizen approached her financial advisor (and registered financial services provider), Mr Castro, to recommend a safe and high-income investment vehicle, she was advised to invest in a particular property syndication scheme. When that investment failed entirely, she sued Mr Castro in the High Court (Free State) for the R2 million she had invested. In answer to the claim, Mr Castro joined Centriq Insurance Company Ltd (Centriq), submitting that he was entitled to be indemnified under the professional indemnity insurance policy he had taken out with Centriq protecting him from liability for breach of duty through negligent acts, errors or omissions. In turn, Centriq denied any such entitlement, claiming that Ms Oosthuizen's loss fell within the ambit of provisions of a liability exclusion clause in the policy, excluding Centriq from having to indemnify the insured member, in respect of third-party claims 'arising from or contributed to by depreciation (or failure to appreciate) in value of any investments' or 'as a result of any actual or alleged representation, guarantee or warranty provided by or on behalf of the Insured as to the performance of any such investments'. The High Court found that Mr Castro was liable for Ms Oosthuizen's loss as he had breached his fiduciary duties to his client to take reasonable steps to satisfy himself of the safety of the investment and to give her adequate financial advice to meet her needs. However, it found that Centriq was indeed obliged to indemnify him in terms of the policy, and that the exclusion clause was not triggered. Centriq appealed to the Supreme Court of Appeal, where the central task was the interpretation of the above policy exclusion provisions to determine whether Ms Oosthuizen's claims fell within their ambit. (The SCA accepted that Mr Castro was liable for Ms Oosthuizen's loss.)
Held, that, as an insurance contract was a contract like any other, in interpreting them, general principles of interpretation applied (see [17]). However, because insurance contracts had a risk-transferring purpose containing particular provisions, regard had to be had to principles governing the interpretation of insurance contracts specifically (see [18] – [21]). These included:

• Any provision that placed a limitation upon an obligation to indemnify was usually restrictively interpreted, for it was the insurer's duty to spell out clearly the specific risks it wished to exclude.

• In the event of real ambiguity the doctrine of interpretation of *contra proferentem* applied, and the policy was generally construed against the insurer who framed the policy and inserted the exclusion.

• An exclusion clause had to be read in the context of the contract of insurance as a whole, and be construed in a manner which was consistent with and not repugnant to the purpose of the insurance contract, and that was commercially sensible.

• Despite the above, courts were not entitled, simply because the policy appeared to drive a hard bargain, to lean to a construction more favourable to an insured than the language of the contract, properly construed, permitted. For, if that was what the insured contracted for, that was what he was entitled to, and no more. It was not for the courts to construe exclusions in favour of the insured simply because it considered them to be unfair or unreasonable.

Held, that, applying the above principles, the exclusion clause, in referring to claims arising from or contributed to by depreciation (or failure to appreciate) of the investment, meant claims arising from an investment that initially had had a material value but had then declined in value due to market fluctuations. It did not refer to investments that, like the one under consideration, were not capable of generating an appreciable value from the beginning. (See [24], [27] and [28].)

Held, further, that the exclusion clause, in referring to claims arising from an insured's representations as to the performance of an investment, did not mean claims arising simply from an insured's representations as to the fundamental character of an investment, as was the case in the present instance in which Mr Castro did no more than guarantee the 'safeness' of the investment, as opposed to its performance. (See [30].)

Held, accordingly, that the exclusion clause was not triggered, and that the court a quo correctly upheld Mr Castro's claim to be indemnified in accordance with the terms of the policy. Appeal dismissed.

TSHWANE CITY v BLAIR ATHOLL HOMEOWNERS ASSOCIATION 2019 (3) SA 398 (SCA)

Contract — Interpretation — Evidence — Approach to — Parol evidence — Evidence on negotiations.

Practice— Trial — Separation of issues — Approach to be adopted — Uniform Rules of Court, rule 33(4).

The City of Tshwane and the Blair Atholl Homeowners Association had come to an agreement concerning the supply of water to a residential estate (see [1]). A dispute arose as to the interpretation of one of the agreement's provisions, and this culminated in the Association approaching a High Court for an order that the 'normal rate' meant the 'bulk' rate charged to a municipality (see [15], [17] – [23] and [26]).

In the ensuing action, both the City and the Association called witnesses to testify as to the meaning of the provision. These witnesses were asked to, and did, interpret the provision (see [27], [29], [36] – [37], [41] and [71]).

The High Court found for the Association, and the City appealed to the Supreme Court of Appeal (see [45] – [46]).

The SCA confirmed the approach to be taken to interpreting documents (see [61], [69]); that the parol evidence rule was of continued application (see [66]); and that evidence on prior negotiations was inadmissible (see [76] – [77]).

In this regard, the parol evidence as to the meaning of the disputed provision was inadmissible (see [68]). The SCA further held that issues were to be separated under rule 33(4) only after careful thought to the implications of doing so, and not where the issues were inextricably linked to other issues (see [2] and [51]). Any order of separation was also to carefully circumscribe the issue or issues to be separated (see [2]).
The order here was only made at the conclusion of the separated proceedings, and where the separated issue was inextricably linked to others (see [27], [47] and [54]).
Appeal upheld; the order of the High Court set aside; and replaced with an order that the 'normal rate' was not the 'bulk' rate for municipalities; and that the remaining issues were remitted to the High Court for adjudication

DARK FIBRE AFRICA (PTY) LTD v CITY OF CAPE TOWN 2019 (3) SA 425 (SCA)

Telecommunication — Fibre optic network — Construction — City imposing requirements on — Lawfulness thereof — Electronic Communications Act 36 of 2005, s 22.

In a High Court, Dark Fibre Africa (Pty) Ltd, a licensee under the Electronic Communications Act 36 of 2005, attacked the validity of a permission and requirements imposed by the City of Cape Town as prerequisites to trench fibre optic cables. (See [4], [6] and [14].)
The permission and consents stemmed from s 11(1) of the City of Cape Town By-Law Relating to Streets, Public Places and Prevention of Noise Nuisances 2007, which provides that '(n)o person shall . . . dig . . . a trench in a . . . road *(a)* except with . . . written permission of the City; and *(b)* otherwise than in accordance with . . . requirements prescribed by the City'. (See [10].)
The requirements were (1) payment of a trenching deposit (if a trench was dug, the deposit would be forfeited; if no trench was dug, it would be returned); (2) payment of a trench reinstatement deposit (if there was unsatisfactory reinstatement of the road, it was forfeited; if satisfactory, returned); (3) agreement to the City reserving the right to charge for use of its property; and (4) agreement to pay the relocation costs if the City required it to relocate. (See [46] and [52] – [54].)
The High Court dismissed the challenge, and Dark Fibre appealed to the Supreme Court of Appeal. (See [2].)
The permission
Dark Fibre's assertion was that the requiring of consent was a thwarting of the power it was given by s 22 of the Act. The section allows a licensee to 'enter upon any land' and 'construct . . . an electronic communications network' (s 22(1)), but with 'due regard . . . to applicable law' (s 22(2)). (See [3], [10], [15] and [28] – [29].)
The SCA *held* that two consents could be distinguished: consent to lay cable; and consent as to the manner in which this was done. Imposition of a moratorium on, or flat refusal of consent to lay cable, would be to thwart the s 22 power. Here, there was no moratorium, but merely a requirement of consent to the manner in which cable would be laid. (See [18], [20] and [31].)
Moreover, in terms of *Maccsand*, * the requirement of this consent permissibly coexisted with the s 22 authorisation. (See [33], [35] and [37].)
The trenching deposit
- Dark Fibre's first attack was sprung from s 75A of the Local Government: Municipal Systems Act 32 of 2000. The section provides that 'A municipality may levy and recover . . . tariffs in respect of any function or service . . . .' Dark Fibre's

assertion was that the section did not provide a basis for levying the tariff. This in that it was not a user of services, and so the City had no power to tariff it.

Held, that provision of roads was a service, and that Dark Fibre used the roads that the City provided. Moreover, at common law, the City's ownership of the land entitled it to compensation for its use. (See [44] – [46].)

- Dark Fibre's second attack was that the deposit prevented the expeditious construction of the network. *Held*, that there was no evidence of this. (See [47].)
- The third attack was that a regulatory charge could not be used to disincentivise harmful conduct. *Held*, that there was authority that this was permissible. (See [48].)
- The fourth, was that there was no proportionality between the tariff and the damage anticipated. *Held*, that Dark Fibre had provided no evidence to substantiate this; nor any suggestion of what would be proportionate; and that in any event, the City had provided a basis that it was proportionate. (See [43] and [49] – [51].)

The trench reinstatement deposit

Held, that it was rational: there was a reasoned basis to impose it. (See [52].)

The City's reservation of the right to charge for use of its property

Held, that the City's entitlement to compensation for use of its property could be sourced in its common-law right of ownership of the land concerned.

The condition that if the City asked a licensee to relocate, the licensee would do so at its own cost

Held, that Dark Fibre appeared to have agreed to this condition.

Appeal dismissed.

ELAN BOULEVARD (PTY) LTD v FNYN INVESTMENTS (PTY) LTD AND OTHERS 2019 (3) SA 441 (SCA)

Practice — Judgments and orders — Foreign judgment — Recognition — Requirement of finality — Interpretation of order.

Elan Boulevard (Pty) Ltd contracted with the Farhat Essack Family Trust, an Australian trust, represented by its trustee Fnyn Investments (Pty) Ltd, and with Mr and Mrs Essack (second and third respondents), as guarantors, to sell it an apartment.

Elan also contracted with the Trust to sell it a second apartment. Mr Essack was guarantor of the Trust's obligations under this agreement.

The Trust later breached both agreements, and Elan, in an Australian court, claimed from it damages for each breach. Elan also claimed moneys under each guarantee from the guarantors.

The Australian court upheld Elan's claims for damages and on the guarantees.

Elan then applied to the Gauteng Division, for it to recognise the Australian judgment, and to direct payment of the amount stipulated therein.

In the papers, Elan cited Fnyn to be trustee of a South African Farhat Essack Family Trust.

The Gauteng Division dismissed the application; and Elan appealed to the Supreme Court of Appeal.

It noted Elan had accepted Fnyn was not a trustee of the South African Trust and that it had abandoned its claim for relief against it (see [8]).

In regard to Mrs Essack, the Australian court's order was that the Trust, Mr Essack and Mrs Essack make payment of the Trust's financial obligations in respect of both apartments (AUD 1 172 614; see [9]).

However Mrs Essack was guarantor of the Trust's obligations only in respect of one apartment (AUD 597 926; see [9]).
Mrs Essack contended that because of the error of quantum, the
Australian judgment was correctable, and therefore not final and enforceable (see [9] – [10]).
Held, that a final judgment was one not variable by the court making it; and the finality was to be as to the merits (see [11]).
Here, the judgment was final on the merits, and moreover, Mrs Essack had made no application to the Australian court to correct the quantum; nor had she appealed her liability (see [13] – [14]).
As to whether the Australian court intended, in its order, joint and several liability, or joint liability: *held*, that it was permissible for a South African court to interpret the order in light of the judgment, and, indeed, doing so, joint and several liability was intended (see [15] and [17]).
Furthermore, for enforcement of the judgment, no permission was required, in terms of the Act, * as the judgment did not arise from a transaction connected with raw materials (see [18] – [20]).
Appeal upheld, order of the High Court set aside, and replaced with an order: recognising and enforcing the judgment of the Supreme Court of Queensland, and granting judgment against Mr and Mrs Essack, jointly and severally, for AUD 597 926, and against Mr Essack, for AUD 574 688 (see [21]).

FOUR WHEEL DRIVE ACCESSORY DISTRIBUTORS CC v RATTAN NO 2019 (3) SA 451 (SCA)
Contract — Enforcement — Public policy — Claim for cost of repair of vehicle based in lease — High Court's findings in respect of public policy, good faith and applicability of Act erroneous — But High Court correctly finding no locus standi — Consumer Protection Act 68 of 2008.

In a High Court, appellant claimed the costs of repair of a vehicle from respondent, the executrix of the estate of the late Mr Rattan (see [1]).
It based its claim in an agreement of lease which it alleged it had concluded with Mr Rattan (see [16]).
The High Court dismissed the action, but granted leave to appeal (see [2]).
Held, by the Supreme Court of Appeal:
- The High Court had correctly found that appellant had failed to establish *locus standi* (see [19]).
- But its further findings, that the agreement was invalid for want of good faith; contrary to public policy and unenforceable; and that the agreement contravened the Consumer Protection Act 68 of 2008, were insupportable (see [25], [27], [29] and [33]).
- Moreover, the issues had not been raised in the pleadings, and ought not to have been decided at all (see [24]).
- Lastly, leave to appeal ought not to have been granted — there was no basis therefor (see [34]). Appeal dismissed

ST CLAIR MOOR AND ANOTHER v TONGAAT-HULETT PENSION FUND AND OTHERS 2019 (3) SA 465 (SCA)
Pension — Pension fund — Defined benefit pension fund — Actuarial surplus — Apportionment of future surplus — Amended rules allocating '*excess assets*' to

participating employer's employer surplus account — Whether constituting allocation of actuarial surplus — Pension Fund Act 24 of 1956, s 15C(1).

Section 15C(1) of the Pension Funds Act 24 of 1956 (the PFA), under the heading 'Apportionment of future surplus', provides that '(t)he rules [of a pension fund] may determine any apportionment of actuarial surplus arising in the fund . . . between the member surplus account and the employer surplus account'. The subject-matter of the dispute in this case was the lawfulness of an allocation of 20% of actuarial surplus in a defined benefit pension fund (the Fund) to the employer surplus account (the ESA) of the participating employer. The allocation was made pursuant to a conversion and restructuring exercise (the scheme) in terms of s 14 of the PFA, and was effected in terms of rule 11.5.4.1 of the Fund's rules, which rule formed part of a rule amendment approved by the Registrar of Pension Funds.

The appellants, * as they did unsuccessfully in the High Court, challenged the allocation on the basis that rule 11.5.4.1 — which provided for the allocation of 'excess assets' — did not provide a lawful basis for the allocation of actuarial surplus to the ESA. This because it was not a rule for the allocation of actuarial surplus but for allocation of 'excess assets'. The appellants also contended that s 15C required a single dedicated rule, dealing only with future surplus and which provided for an allocation to both the member surplus account and the ESA.

The Supreme Court of Appeal encapsulated the issue as whether the allocation was an apportionment of actuarial surplus for the purpose of s 15C, a question which required the following to be determined: whether (on the facts) the allocation was an actuarial surplus; and whether (in law) rule 11.5.4.1 was a rule as contemplated in s 15C(1).

Held

On the facts, the appellants had not placed in issue that the allocation was actuarial surplus. The high-water mark of their case was that the impugned rule did not in terms refer to 'actuarial surplus' but instead to 'excess assets'. Such a strictly technical, narrow interpretation would completely undermine the purpose of the legislation and would make no business sense. Neither a proper interpretation of the section nor the facts precluded the apportionment of actuarial surplus which was part of an apportionment of excess assets. To uphold the appellants' contentions regarding rule 11.5.4.1, simply on the basis that it referred to 'excess assets' and not to 'actuarial surplus', would be to impermissibly elevate form above substance. It was plain that what had been allocated to the ESA was in fact actuarial surplus.

Section 15C plainly left the apportionment of future surplus to the applicable rules of a particular fund and, absent any rules on the subject, to the board of that fund. There was nothing in s 15C(1) which required that a rule such as rule 11.5.4.1 must provide for an allocation to both the member surplus account and the ESA. Section 15C imposed strict prescripts for the disbursement of actuarial surpluses. Its ambit and objectives must be understood in the light of the historical disputes around surpluses in pension funds. There were only two ways in which a surplus apportionment could be made, namely through pension fund rules (s 15C(1)) and, absent any rules, by the determination of a board, provided that it took into account the interests of all stakeholders (s 15C(2)). In this instance the board decided to allocate the surplus to the Fund's ESA through a rule specifically enacted for that purpose. Rule 11.5.4.1 was therefore intended to be a rule envisaged in s 15C(1). (See [12] and [26].)

There was a further compelling consideration against the appellants' contentions: the impugned rule was made under a rule amendment forming part of a composite

conversion and outsourcing scheme in terms of s 14 of the PFA. The scheme had been implemented as a composite whole with the statutory approval of the Registrar and with the consent of stakeholders. Clearly, by its very nature as a composite package, the scheme could not and did not permit 'cherry-picking' parts of it. This, however, was precisely what the appellants sought to do by challenging only one component of the scheme (the allocation of the ESA), whilst leaving the rest of the scheme as it was. The discrete challenge to one component of the composite scheme must therefore fail for this reason also. The appeal would therefore not succeed.

EVERGREEN PROPERTY INVESTMENTS (PTY) LTD v MESSERSCHMIDT 2019 (3) SA 481 (GP)

Housing — Consumer protection — Community schemes ombud — Adjudicator — Jurisdiction — Dispute concerning payment of rates — Community Schemes Ombud Service Act 9 of 2011.

The City of Johannesburg rebated Evergreen Property, * the owner of a scheme in terms of the Sectional Titles Act 95 of 1986 and Housing Development Schemes for Retired Persons Act 65 of 1988, with certain rates, but Evergreen refused to pay over to Mr Messerschmidt, a life right holder, his share thereof (see [4]).
Mr Messerschmidt brought the matter before an adjudicator under the Community Schemes Ombud Service Act 9 of 2011, and obtained orders that Evergreen pay over to him all rebates not so paid; and that it credit him with future rebates (see [2]).
Evergreen appealed, under s 57, to the High Court (see [1]).

Held

- A dispute as to payment of rates and taxes was a 'dispute in regard to the administration of a community scheme' (s 1), and so within the jurisdiction of an adjudicator (see [9], [11] – [13] and [17]).
- The City of Johannesburg policy, which grounded the order, did not require an owner to pay over the rebate to the holder of a right of occupation; it required, merely, that it 'pass on the benefit of the . . . rebate'. Accordingly, the adjudicator's orders of payment were incompetent (see [22] – [23], [25], [27] and [30]).

Appeal upheld; and order set aside.

EX PARTE GOOSEN AND OTHERS 2019 (3) SA 489 (GJ)

Advocate — Admission — Requirements — Legal Practice Act — Admission of those who immediately before coming into operation of LPA entitled to be admitted as advocate under Admission of Advocates Act 74 of 1964 — Such applicants exempted from meeting new admission criteria under LPA — No cut-off date for invoking right to be so exempted — Legal Practice Act 28 of 2014, s 115.

Attorney — Admission and enrolment — Requirements — Legal Practice Act — Admission of those who immediately before coming into operation of LPA entitled to be admitted as attorney under Attorneys Act 53 of 1979 — Such applicants exempted from meeting new admission criteria under LPA — No cut-off date for invoking right to be exempted — Legal Practice Act 28 of 2014, s 115.

In the present matter — a referral in terms of s 14(1)*(b)* of the Superior Courts Act 10 of 2013 of ten applications for admission as an advocate — the full court of the Johannesburg High Court was tasked with answering certain important questions pertaining to the new Legal Practice Act 28 of 2014 (LPA). That Act became operative on 1 November 2018, and repealed the Admission of Advocates Act 74 of

1964 (AAA) and the Attorneys Act 53 of 1979 (ATT), which had previously regulated the admission of advocates and attorneys, respectively. In terms of s 24 of the LPA, a person may only practise as a 'legal practitioner' if admitted to so practise in terms of the LPA. The requirements for admission in the LPA, set out in ss 24 and 26, included practical vocational training for all applicants, which, in respect of advocates, was not a requirement under the previous regime. However, in terms of the transitional provisions of s 115 of the LPA —

'(a)ny person who, immediately before [1 November 2018], was entitled to be admitted and enrolled as an advocate, attorney, conveyancer or notary is, after that date, entitled to be admitted and enrolled as such in terms of this Act'.

The issues in dispute concerned the position of the above category of persons seeking admission under s 24 of the LPA. Did s 115 exempt such a person from complying with the new requirements for admission set out in the LPA, such that they could rely on the criteria as set out in the AAA or ATT? If it did, was the right to invoke s 115 limited to those whose applications for admission were pending at 1 November 2018? Or did the right extend, ad infinitum, to those whose applications for admission were made on or after the date of 1 November 2018?

The court held that s 115 of the LPA, properly interpreted, meant that anyone who, as at 1 November 2018, had satisfied the criteria for admission as an attorney or advocate existing at such time in terms of the ATT or the AAA, respectively, was entitled to admission as a legal practitioner under s 24 of the LPA (see [22], [23], [29], [33], [51], [53] and [54]). The right to invoke s 115 was not restricted to those whose applications were pending as at 1 November 2018, ie it extended to those making application on or at any time after such date.

In reaching such conclusion, the court acknowledged that such an interpretation could mean that untrained advocates could indefinitely be allowed to practise, a situation at odds with the clear objectives of the LPA to create equivalence between the legal training of advocates and attorneys (see [51]). However, it found that such consideration had to yield, in this case, to the presumption of statutory interpretation of the preservation of vested rights, except where the clearest indication to the contrary was expressed in the statute (see [37], [39], and [51]). The court added that the Minister of Justice and Correctional Services should consider amending the legislation to cure such anomaly (see [52]).

LARRETT v COEGA DEVELOPMENT CORPORATION (PTY) LTD AND OTHERS 2019 (3) SA 510 (ECG)

Company — Proceedings by and against — Derivative action — Leave — To continue proceedings on behalf of company — Leave will only be granted in respect of proceedings properly authorised at inception — Companies Act 71 of 2008, s 165(5).

Ms Larrett and Mr Ndzimela were directors of Independent Crushers Consortium (Pty) Ltd (the company). Ms Larrett had previously instituted action proceedings on behalf of the company against Coega Development Corporation (Pty) Ltd for outstanding payments in terms of a contract entered into between the companies; in the alternative, it sought, based in delict, payment from Standard Bank. Importantly, such action had not been authorised, either by way of a court order pursuant to the bringing of a derivative action under s 165, or a resolution by the company's board of directors. So, in the present application proceedings before the High Court, Ms Larrett (as applicant) sought an order, in terms of s 165(5) of the Companies Act 71 of 2008, *authorising her to continue with proceedings in the name of and on behalf of*

the company. She claimed that a directors' resolution authorising legal proceedings by the company was impossible to obtain, given Mr Ndzimela's uncooperativeness. Standard Bank (as fourth respondent) opposed the relief sought on the basis, inter alia, that s 165 of the Act could not be resorted to in these circumstances where the proceedings sought to be continued *were at inception unauthorised*.
Held, that, in terms of s 165(5) of the Act, a person may apply to a court for leave to continue, in the name of the company, *only legal proceedings that had been properly authorised at inception*. To grant leave to continue in respect of unauthorised legal proceedings — effectively ratifying them — would be to allow the avoidance of the requirements of s 165 for the bringing of a derivative action. Such conduct would be subversive of the plain and ordinary meaning of the section and its intention. (See [22] – [24].)
Held, accordingly, that the proceedings in respect of which Ms Larrett sought leave to continue were not proceedings contemplated in s 165(5) of the Act. The application could therefore not succeed. (See [26].)

MOLOTO COMMUNITY v MINISTER OF RURAL DEVELOPMENT AND LAND REFORM AND OTHERS 2019 (3) SA 523 (LCC)
Land — Land reform — Land Claims Court — Jurisdiction — Power to determine or approve compensation upon expropriation — Effect on such power of Valuer-General's valuation under Property Valuation Act — Restitution of Land Rights Act 22 of 1994, s 22(1)(*b*)*;* Property Valuation Act 17 of 2014, s 12(1)(*a*).

In terms of s 22(1)*(b)* of the Restitution of Land Rights Act 22 of 1994 (the LRA), the Land Claims Court has the power 'to determine or approve compensation payable in respect of land owned by or in the possession of a private person upon expropriation or acquisition of such land in terms of this Act; . . .'. And in terms of s 12(1)*(a)* of the Property Valuation Act 17 of 2014 (the PVA), '(w)henever a property has been identified for . . . purposes of land reform, that property must be valued by the Office of the Valuer-General for purposes of determining the value of the property . . .'.
In this case it was argued by the Minister that a Valuer-General's valuation in terms of s 12(1)*(a)* of the PVA of to-be-expropriated property ousted the jurisdiction of the Land Claims Court to do so under s 22(1) of the LRA. According to the Minister, she had no other basis for compensating the landowners than the Valuer-General's valuation under the PVA — which she argued included 'just and equitable compensation' — and that failure to comply with that determination by compensating landowners with different values would render such compensation unlawful.
The Minister had obtained the Valuer-General's valuation only after an agreement between her and a number of to-be-expropriated landowners was reached, to the effect that just and equitable compensation would be determined by the court, which agreement was made an order of court (the compensation order). The matter was subsequently set down for the hearing of an application by the Minister (and possibly the Valuer-General) to have the compensation order set aside. That application was, however, not instituted; instead on the date it was set down for, the court was presented with Valuer-General's valuation and the Minister's aforesaid submissions.
Held
Absent having the compensation order set aside, it remained binding on the Minister. And having abandoned her application to do so, the Minister was estopped from relying on the provisions of the PVA. Accordingly, the Minister remained bound by the compensation order. (Paragraphs [22] and [24]).

Although it was therefore not necessary to examine the PVA impact on the Land Claims Court's jurisdiction, the Minister's argument would be disposed of on the simple basis that, absent an express provision or necessary implication in a statute, the curtailment of a court's powers by statutory enactment was not to be presumed. The mere fact that the Valuer-General was empowered by s 12 of the PVA to determine compensation, did not, per se, oust the jurisdiction of the Land Claims Court to do so. Had that been the intention of the legislature, it would have done so in specific terms or by implication.

LAW SOCIETY, NORTHERN PROVINCES v STUART AND OTHERS 2019 (3) SA 535 (GP)

Attorney — Misconduct — Partner misconduct — Attorney cannot be found guilty of professional misconduct solely on basis of partner's having engaged in professional misconduct — But can be found guilty of misconduct in own right should they be found guilty of dereliction of duty, in sense of having failed to take measures that reasonable attorney would have taken in circumstances to detect partner's misconduct and prevent occurrence of harm.

First Respondent and Second Respondent were partners in, and co-directors of, the third respondent law firm. Despite his being a director, Second Respondent did not attend to the management of the administration and financial affairs of the firm (except in relation to his own clients and files). That task was left in the hands of First Respondent. Taking advantage of such state of affairs, First Respondent improperly drew from the trust account, leading to a deficit. This occurred *without the knowledge or involvement of Second Respondent*. The applicant law society, before the High Court (Pretoria), sought orders striking both First Respondent and Second Respondent off the roll of attorneys on the grounds that they were not fit and proper persons to continue to practise in terms of s 22(1)*(d)* of the Attorneys Act 53 of 1979. The present matter concerned only the relief as against Second Respondent (an order was obtained by agreement in terms of which First Respondent was struck off the roll of attorneys).

The applicant argued that, while there was no evidence that Second Respondent was in any way responsible for the trust deficit, he was liable to be professionally disciplined because he had not taken on the duties and responsibilities of a director; had been complacent in his duties as a director; and because 'one partner [could not] blame the other' because 'partners [were] jointly liable for irregularities in a practice and contraventions of the Attorneys' Act and the Law Society's rules'.

Held, that an attorney could not be found guilty of professional misconduct solely because a partner had engaged in professional misconduct. While it was true that partners and co-directors of incorporated partnerships were jointly and severally liable for the debts and financial obligations of the partnership and for losses arising from the professional misconduct of their partners, this did not extend to infringements of professional obligations. (See [11] and [17].)

Held, however, that in cases of partner misconduct, an attorney may be found guilty of misconduct in their own right should they be found guilty of dereliction of duty in the sense that they failed to take the measures that a reasonable attorney would have taken in the circumstances to detect their partner's misconduct and prevent the occurrence of the harm that eventuated. This question had to be evaluated on a case-by-case basis, taking into account the specific risks and circumstances that applied in each instance. Even then, there were only limited circumstances under which a merely negligent (as opposed to reckless or directly intentional) failure in this

regard could be regarded as unprofessional conduct justifying a striking from the roll of attorneys. When it came to trust moneys, the issue was whether the attorney had sufficiently interested their self in the books of account of the firm, not simply whether non-compliance had taken place. In other words, there was and could be no 'strict' liability of partners for the non-compliance of other partners. (See [17] and [20] – [21].)
Held, further, on the facts, that Second Respondent could not be held directly responsible for First Respondent's secret manipulation of the firm's administration and accounting systems. However, he had failed to take the steps a reasonable attorney would have done to ensure control over the finances and administration of the firm, and in such failure was himself guilty of professional misconduct. Accordingly, his conduct as director was inconsistent with that of a fit and proper attorney. (See [22] – [23].)
Held, further, that in this case Second Respondent's professional conduct did not merit his removal from the roll of attorneys (see [24]). An appropriate punishment in the circumstances was a suspension from practice, itself suspended. (The court had regard to the fact that Second Respondent had clearly had a change of heart in regard to the treatment of trust moneys, as was evidenced by his new firm's clean bill of health, and was currently fit to practise as an attorney.) (See [24] – [31] and [34].)

MTOMBA v MINISTER OF DEFENCE AND OTHERS 2019 (3) SA 548 (GP)
Defence force— Member — Service — Termination — Whether administrative action — Promotion of Administrative Justice Act 3 of 2000; Defence Act 42 of 2002, s 59(2)(*e*).

Applicant, a member of the South African National Defence Force, was convicted of theft. This caused first respondent, the Minister of Defence, to terminate his service in terms of s 59(2)*(e)* of the Defence Act 42 of 2002 read with reg 21(1)*(a)*(ii) of the General Regulations made under the Defence Act 44 of 1957. (See [5.3], [6], [17], [21] – [22], [34] and [43].)
Applicant applied to review and set aside the decision, and for his reinstatement. (See [1].)
Held
- The termination was administrative action (see [2.1] and [20]); and
- it ought to be reviewed and set aside, inter alia, because irrelevant considerations were taken into account in concluding that applicant's continued service was 'undesirable' (reg 21(1)*(a)*(ii)); and relevant considerations were not taken into account in concluding that his 'continued employment constitutes a security risk' (s 59(2)*(e)*). (See [37], [43] and [48].)

Ordered that applicant be reinstated.

NELSON MANDELA BAY METRO v ERASTYLE AND OTHERS 2019 (3) SA 559 (ECP)
Administrative law — Administrative action — Review — State seeking review of conduct of own officials on basis of legality — Proceedings may be instituted by way of action — Court dismissing special plea that state obliged to use rule 53 of Uniform Rules and file record.

State — Actions by and against — Actions by — Against own officials — State seeking review of conduct of own officials on basis of legality — Proceedings may be instituted by way of action — Court dismissing special plea that state obliged to use rule 53 of Uniform Rules and file record.

When the state seeks a review of its own officials' conduct, it is entitled to institute proceedings by way of action. It need not institute application proceedings in terms of rule 53 of the Uniform Rules and file a record as required by that rule. The suggestion that a review — whether founded on the Promotion of Administrative Justice Act 3 of 2000 or the principles of legality — by way of action proceedings denies the affected parties procedural benefits or defences, is contrary to authority. (See [23] – [24], [31] – [32].)
The court accordingly dismissed a special plea by the defendants that the plaintiff municipality, who wanted to set aside certain actions carried out by former municipal office bearers (the defendants) and reclaim moneys paid out as a result, ought to have proceeded under rule 53. (See [35].)

NK v KM 2019 (3) SA 571 (GJ)
Practice — Trial — Separation of trial on issues — When to be granted — Principles restated — Uniform Rules of Court, rule 33(4).

Practice — Trial — Separation of trial on issues — When to be granted — Application by plaintiff in divorce action for separation of decree of divorce from forfeiture — Refused as inconvenient to defendant spouse, because, once decree of divorce granted, her pending claim for maintenance pendente lite would fall away — Uniform Rules of Court, rules 33(4) and 43.

Marriage — Divorce — Maintenance — Spouse — Maintenance pendente lite — Application — Where, in divorce action, decree of divorce separated from other issues — Whether application for maintenance pendent lite could survive granting of decree of divorce — Conflicting decisions discussed — Court concluding that application for interim maintenance would not survive decree of divorce — Uniform Rules of Court, rules 33(4) and 43.

The applicant had instituted an action against his wife, the respondent, in terms of which he sought a decree of divorce and an order that the respondent forfeit her right to share in the joint estate on divorce. The respondent had also instituted an application in terms of Uniform Rule of Court 43 for maintenance pendente lite, pending the finalisation of divorce. In the present proceedings before the High Court, the applicant sought an order in terms of Uniform Rule of Court 33(4) for the separation of the decree of divorce, to be heard first on an unopposed basis, from the forfeiture issue, to be determined later.
The court held, on the facts, that it would not be convenient, fair and appropriate to separate the issues in the above manner (see [11] – [20] for a discussion of the relevant legal principles). Central to this conclusion was the court's finding that, based on a proper interpretation of rule 43, a party had the right to claim maintenance pendente lite only where a matrimonial action was pending, or about to be instituted. Hence, should the issues be separated in the above manner, and the decree of divorce granted, the respondent's application for interim maintenance would fall away with it (and prior to the finalisation of the forfeiture issue). Given this, granting the present application for separation would thus be unfair to the interests of the respondent. (See [35] – [40].) (Note that, in reaching this conclusion, the court declined to follow the Western Cape decision of *KO v MO* [2017] ZAWCHC 136, which had concluded that a maintenance order pendente lite, granted pending the finalisation of a divorce action, did survive a decree of divorce to the extent that the issues regulated thereby remained unresolved.)Accordingly, application dismissed.

TRIO ENGINEERED PRODUCTS INC v PILOT CRUSHTEC INTERNATIONAL (PTY) LTD 2019 (3) SA 580 (GJ)

Contract — Termination — Contract of perpetual duration — No presumption that terminable on reasonable notice.

Contract — Breach — Remedies — Concurrent liability in delict — Existence of contractual relationship between parties generally precluding imposition of duties in delict — But concurrent contractual and delictual liability possible where duty in delict arising independently of contract and reconcilable or concurrent with contractual obligations — Parties to contract should not be lightly burdened with delictual liability to outsider harmed by breach.

Delict— Liability — Concurrent liability in delict and contract — Existence of contractual relationship between parties generally precluding imposition of duties in delict — But concurrent contractual and delictual liability possible where duty in delict arising independently of contract and reconcilable or concurrent with contractual obligations.

The defendant, Pilot, in a counterclaim, sought to rely on an 'exclusive strategic distribution agreement' of allegedly indefinite duration between it and the plaintiff, Trio, under which Pilot enjoyed the sole right to sell Trio's products.

In a first claim Pilot alleged that Trio had breached this agreement by replacing it with the W Group, and claimed damages in contract. In a second claim Pilot alleged that Trio had breached an agreement under which Pilot enjoyed the sole and exclusive right 'continuously and indefinitely' to sell and distribute Trio's products. In an alternative to the second claim Pilot alleged that Trio had engaged in an unlawful stratagem to undermine the agreement and Pilot's position by allowing the W Group to usurp its goodwill and to use its confidential information, causing it economic loss.

Trio excepted to the second claim on the basis that Pilot failed to rely on any term that would prevent Trio from terminating it. In the absence of such an averment, argued Trio, it had to be taken to be silent as to its duration, and therefore terminable on reasonable notice. Trio further excepted to the claim on the basis that, being in delict, it was not sustainable in a contractual environment.

Held If, as pleaded, the contract was specified to be indefinite as opposed to being silent on the matter of duration, it had to be understood to endure in perpetuity. There was therefore no requirement for Pilot to plead that the agreement was not terminable, and in the absence of a term permitting termination, there was also no presumption that the agreement was tacitly subject to termination on reasonable notice. Once the averment is made that the agreement stood in perpetuity, it precluded Trio from terminating it. Accordingly, Trio's first exception had to fail. (See [9] – [17].)

The other exceptions turned on whether Pilot was confined to a claim in contract or whether, at least in the alternative, a delictual cause of action could be sustained (see [19]). The present position on concurrent delictual/contractual liability could be summarised as follows: *(a)* a breach of contract was not, without more, a delict; *(b)* the existence of a contract ordinarily excluded the recognition of delictual duties at variance with contractual ones; *(c)* parties to a contract could, however, have additional or complementary duties arising independently in delict; and *(d)* in determining wrongfulness, one had to proceed with caution in assessing whether a

third party, harmed by a breach of contract, could sue a party to the contract for such harm, outside well-defined causes of action (see [29]).
On a fair reading of Pilot's pleadings, the cause of action was not founded on breach of contract but on the delict of unlawful competition and breach of duty in respect of the preservation of confidential information (see [34], [38]). Although the duties pleaded arose from the agreement, the business relationship between Pilot and Trio extended beyond the agreement and was complementary to it, so that a cause in delict could be pursued in the alternative as a claim that subsisted concurrently with the contractual claim (see [40]). Hence a duty in delict distinct from the agreement was properly pleaded (see [41] – [42]). And the allegations regarding the provision of confidential information to the W Group were sufficient to make out a cause of action on wrongfulness (see [53]). In the result all the exceptions fell to be dismissed with costs

WATSON AND ANOTHER v RENASA INSURANCE CO LTD 2019 (3) SA 593 (WCC)

Insurance — Policy — Interpretation — Replacement-value clause entitling insured to replacement value of lost property — Clause subject to condition that insured should commence work on reinstatement with 'reasonable dispatch' — Insurer may not undermine insured's reliance on clause by withholding payment, thereby inhibiting insured's ability to reinstate.

On the morning of 10 January 2011 a fire erupted at a factory from which the plaintiff, Watson, conducted a print-finishing business. It burned to the ground. Watson claimed the cost of replacing or reinstating the destroyed machinery under an indemnity insurance policy issued by the defendant, Renasa. The policy allowed Renasa to elect to indemnify the insured either by payment or by reinstatement of the lost or damaged property. Renasa never exercised its option to reinstate but instead repudiated liability on ground of fraud, alleging that Watson had instituted a fraudulent claim after deliberately starting the fire. While it was undisputed that an arsonist was responsible, Renasa from the beginning focused on Watson as the prime suspect. Watson sued Renasa for breach of contract and won, both in the High Court (October 2014) and in the Supreme Court of Appeal (March 2016). Both courts rejected the arson-by-Watson theory as unproved. The present case concerned the quantification of Watson's claim.
The policy contained a 'reinstatement value conditions clause' (RVC) under which Renasa undertook to reimburse the insured for the full replacement value of lost property. Payment under the RVC was, however, subject to certain conditions, among them that the insured start reinstatement work with 'reasonable dispatch', failing which no payment beyond the indemnity value of the damaged or destroyed property would be made.
Watson immediately began taking steps to get the factory back on its feet, spending over R900 000 of his own money, all the while time attempting to get Renasa to commit to a decision on the claim. But Renasa ignored his pleas for assistance and the business ultimately failed. While Renasa accepted that it was bound by the SCA judgment, it argued that it was not obliged to indemnify Watson until he carried out the reinstatement. While it denied that its repudiation of the claim had anything to do with Watson's predicament, Renasa did not contest its underlying liability in respect of the indemnity value of the machinery in question.

Since Watson's inability to reinstate was not seriously contested by Renasa, the questions that remained were (i) whether this precluded him from relying on the RVC; and (ii) how the value of his claim ought to be quantified, particularly with regard to interest.
Expert testimony was that (see [58]) —

- Insurers in the position of Renasa would be expected to make payment on account to enable the insured to begin with reinstatement;
- insurers should at the very least pay the indemnity value of the damaged machinery, enabling the insured to secure replacement machinery; and
- it was unreasonable to expect the average insured to have the financial wherewithal to finance or even obtain the necessary financial backing for the replacement or reinstatement of damaged property and the start-up of the interrupted business without the co-operation and assistance of the insurer.

Held The term 'reinstatement' was used in two distinct ways: to give the insurer the option to reinstate the property instead of paying out money to the insured; and to determine the extent of indemnity payable in a replacement-value claim, like the RVC clause in the present case (see [25]). The latter type of clause disadvantaged impecunious claimants by requiring them to reinstate even in the absence of any payment or firm acceptance of liability by the insurer (see [29]).
Watson was, despite his inability to reinstate, entitled on the RVC clause to payment of the indemnity value, for this was the very mechanism that enabled insurers to compel compliance with RVC clauses. If the insured then failed to use the money for reinstatement, the insurer was absolved from making any further payment (see [59], [60]).
Moreover, as soon as the insurer elected to pay money instead of itself reinstating, it was limited to making payment under the policy (of either an indemnity or the replacement or reinstatement value) (see [61]). This proposition was fortified by the so-called once-and-for-all rule (see [61]).
It would offend the legal convictions of the community if Renasa were allowed to slash its payment liability by withholding the indemnity payment due under the policy (see [62]). Watson's inability to restart his business was a direct consequence of Renasa's conduct and, in the circumstances, its attempt to undermine Watson's reliance on the RVC had to fail (see [63]).
The court would accept the experts' valuation of the 2011 claim of R15,74 million ex VAT (see [69]). Interest on this sum would be calculated at the rate of 15,5% from the date of the summons (14 September 2011), and the VAT component would be included as an element of the claim (see [73], [75] – [77]).
Renasa would accordingly be ordered to pay Watson R18 million, together with interest to run at the rate of 15,5% per annum from 14 September 2011 until the date of payment in full.

AQUILA STEEL (SOUTH AFRICA) (PTY) LTD v MINISTER OF MINERAL RESOURCES AND OTHERS 2019 (3) SA 621 (CC)

Minerals and petroleum — Mining and prospecting rights — Applications — Acceptance — Applications not complying with requirements must be returned — Award of prospecting rights based on defective application unlawful — Mineral and Petroleum Resources Development Act 28 of 2002, s 16(3).

Minerals and petroleum — Mining and prospecting rights — Transition to new order under MPRDA — Duration of old-order rights-holder's preferent right to apply for

prospecting and mining rights — Such right lasting only for D limited period it was granted for — Other applicants may apply after such period but their applications may not be processed before old-order rights-holders' — Mineral and Petroleum Resources Development Act 28 of 2002, sch II, item 8.

Applicable statutory provisions

- Item 8(2) to sch II of the Mineral and Petroleum Resources Development Act 28 of 2002 (the MPRDA) confers an exclusive right, on holders of any unused old-order rights, to apply for a prospecting right or a mining right within the one-year period that such old-order mineral rights remained in force after the MPRDA took effect, ie until 30 April 2005;
- item 8(3) specifies that the unused old-order right 'remains valid' until the conversion application is disposed of;
- s 9 determines the order in which applications for prospecting rights are to be processed;
- s 16(3) provides that if an application for a prospecting right does not comply with the requirements of s 16, the regional manager of the Department of Mineral Resources (the DMR) 'must return the application to the applicant'; and
- s 22(2)*(b)* provides that the regional manager 'must' accept an application for a mining right if 'no other person holds a prospecting right, mining right, mining permit or retention permit for the same mineral and land'.

Facts

In order to preserve its old-order mineral rights, the sixth respondent, ZiZa Ltd (ZiZa), lodged a number of applications under item 8(2) on 19 April 2005. On 26 February 2008 it was granted prospecting rights over land which, it later transpired, included land in respect of which the DMR had also granted a prospecting right to Aquila Steel (SA) (Pty) Ltd (Aquila), the appellant. Aquila's application for prospecting rights was submitted on 18 April 2006 — ie outside the one-year period of exclusivity afforded to ZiZa under item 8(2) — and it was granted in October 2006, before ZiZa's application had been processed.

Aquila subsequently discovered substantial manganese deposits, and its application for mining rights was accepted by the DMR on 22 December 2010. In January 2011 the DMR advised Aquila of the double grant, and that ZiZa's prospecting right had since been transferred to the Pan African Mineral Development Company (Pty) (PAMDC), a joint venture company established with the purpose of eventually holding ZiZa's mineral rights. Further information from the DMR about the double grant was not forthcoming but Aquila eventually obtained information by way of requests in terms of the Promotion of Access to Information Act 2 of 2000. Based on this information, Aquila launched an internal appeal (on 29 October 2013) to the Minister of Mineral Resources (the Minister) against the grant of the prospecting right to PAMDC. Its complaint was that the decision by the relevant regional manager of the DMR to accept ZiZa application was irregular because ZiZa's application did not comply with the MPRDA and its regulations, inter alia, in that it did not sufficiently describe the area over which it sought prospecting rights. Aquila also challenged the Minister's decision to grant ZiZa's application as flawed and irregular, inter alia, because of the vague description of the area that the right covered. (See [22] – [23].)

The Minister decided the appeal 20 months later, after Aquila obtained a mandamus directing him to do so, and then rejected it on the basis that Aquila's own prospecting right application had been unlawfully accepted, processed and granted. This, the Minister said, was because Aquila's application was lodged and processed during the period that afforded exclusivity to ZiZa. The Minister also allowed PAMDC's

cross-appeal against the DMR's acceptance of Aquila's application for prospecting rights and the granting thereof, and dismissed Aquila's mining rights application. Aquila next brought a High Court application for the review of the Minister's decision, requesting related declaratory relief, including that the court substitute the Minister's decision with its own decision upholding the internal appeal and granting the mining right application. The High Court ruled in Aquila's favour (see [26] – [29]) but its decision was reversed on appeal by the Supreme Court of Appeal (see [30] – [34]).

Issues

In this case, Aquila's further appeal, the Constitutional Court stated the issues as — *(a)* whether the grant of a prospecting right to ZiZa on 26 February 2008 was valid; *(b)* whether Aquila was entitled to apply for a prospecting right when it did so on 18 April 2006; *(c)* whether the Minister should have upheld Aquila's appeal against the refusal to grant it a right to mine; and *(d)* whether the doctrine in *Kirland*/*Oudekraal* impeded relief for Aquila, and if not, to what remedy Aquila would be entitled.

Issue *(a)* was based on the court's approach that, if the grant of the prospecting right to ZiZa was invalid and set aside, s 22(2)*(b)* would no longer present a bar to Aquila being awarded a mining right. This regardless of whether Aquila's prospecting right was valid, because the MPRDA did not require an aspirant mining right-holder to hold a valid prospecting right (see [40]).

Issue *(b)* related to the duration of the exclusivity to queue for rights under the MPRDA that item 8(1) conferred. The High Court considered that it expired after one year; the SCA that it lasted until a prospecting right application by an unused old-order rights-holder had been granted or refused (in terms of item 8(3)) — regardless of how long that might take — and that, until then, no other application for a prospecting right may be lodged, considered, accepted or granted (see [63] – [66]).

Issue *(d)* addressed whether the decision awarding the prospecting right to ZiZa could be ignored as invalid, or whether it remained valid and binding until set aside on review. ZiZa relied on the *Kirland*/*Oudekraal* doctrine (see [94]) to argue that it was the latter, with the effect that, so long as ZiZa's prospecting right was in existence, s 22(2)*(b)* precluded the granting of a mining right to Aquila (see [92] – [93]). The second leg of this issue — Aquila's remedy if the *Kirland/Oudekraal* doctrine did not apply — involved the question whether there were grounds for the SCA to have interfered with the High Court's discretion (under s 8*(c)*(ii) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA)) to substitute the Minister's decision with its own (see [108]).

Held as to *(a)*: The foundation of the Minister's reasoning — that if Aquila's prospecting right was unlawfully accepted and granted then ZiZa's prospecting right was lawfully granted — was flawed. Just because Aquila's own prospecting right application had been unlawfully accepted, processed and granted, did not mean that the Minister lawfully granted ZiZa a prospecting right (see [39] – [40]). Whether ZiZa's prospecting right was lawfully granted depended on whether the Minister and ZiZa complied with the requirements of the MPRDA. ZiZa's application was grossly defective when it was accepted, and should instead have been returned in terms of s 16(3) of the MPRDA (see [41] – [49] and [50] – [51]). This meant that it was also defective when the Minister considered it in terms of s 17(1) of the MPRDA. Therefore, the Minister's grant to ZiZa of a prospecting right was unlawful and should be set aside; and this meant that there were no other prospecting rights-holder blocking Aquila's mining right. (See [53]).

Held as to *(b)*: The exclusivity in item 8(1) was expressly stated to last for one year, and one year only. At the end of the grace year, the continued validity of the old-order right, pending conversion, did not bar others from standing in line to apply for MPRDA rights over the same land. The ordering that s 9 ordained took effect after the one-year grace period; it barred other applications from being processed only until those of the old-order rights- holder had been processed. Once the grace period ended, the MPRDA's requirements applied equally to all applications, no matter where they were in the queue. Item 8 did not purport to deal with the right to apply for a prospecting right at all. The application item 8 envisaged was for a new-order MPRDA right.

So, when ZiZa lodged its application for a prospecting right on 19 April 2005, it was exercising its right to apply, within the grace year, for a prospecting right in terms of s 16. That excluded other applicants until the grace year expired. Others could join the queue after 30 April 2005. Their applications were valid. But they did so behind ZiZa. ZiZa's application preserved its priority under s 9, and its old-order right remained valid until its application was granted and dealt with under the MPRDA, or refused. This meant that Aquila's application for a prospecting right was capable of being lodged at the time that it was — over a year after the grace period expired — though its place in the queue was behind that of ZiZa. However, the grant of a prospecting right to Aquila, on 11 October 2006, was invalid since ZiZa's competing application, though defective, was first in the queue — and had at that stage not yet been processed as s 9 required.

The continued existence of the old-order right until grant or refusal of the new-order right did not exempt the old-order rights-holder from compliance with the requirements of the MPRDA, nor did it permit the regional manager to accept applications that did not comply with the statute. (See [88].)

Held as to *(c)*: The acceptance and grant of the ZiZa prospecting right application having been set aside, nothing stood in the way of recognising Aquila's application for a mining right on 14 December 2010, and the Department's acceptance of that application on 22 December 2010, as valid. It followed that the Minister should have considered Aquila's internal appeal, and ZiZa's counter-appeal, on the footing that ZiZa's prospecting right was invalid. The Minister did not do so, and his determination of the appeal was thus flawed and irregular and must be set aside. (See [102] – [103].)

Held as to *(d)*: The *Kirland/Oudekraal* doctrine did not entail that, unless public authorities in fact brought court proceedings to challenge an administrative decision, they were inevitably obliged to treat it as valid. The key point of the doctrine was that even an invalid administrative act may have lawful consequences, so that no official was entitled to pronounce a decision a nullity without going to court. Where a court — as this judgment did — pronounced that past administrative action was invalid, the principle did not mean that a proper remedy could not be granted. So, practically speaking, the doctrine had no application here; it did not breathe life into the DMR's invalid decisions to accept and grant ZiZa's defective prospecting right application; and it could not thwart the valid award of a mining right to Aquila. (See [96] – [98].)

The considerations the High Court set out plainly established that substitution was a permissible option. Its order substituting the decision of the Minister was imperatively just and equitable and should be reinstated. ; also see Theron J's minority judgment at [122] et seq, where it differs with the majority judgment with regard to this remedy.)

SA CRIMINAL LAW REPORTS JUNE 2019

S v MOYO 2019 (1) SACR 605 (SCA)

Appeal — Leave to appeal — From magistrates' court to High Court — Petition in terms of s 309C of Criminal Procedure Act 51 of 1977 — Nature of — Such in effect appeal against refusal of leave to appeal by magistrates' court in terms of s 309B of Act and accordingly appealable to Supreme Court of Appeal, with special leave of SCA — Order appealed against refusal of leave and not merits of matter.

The appellant was convicted in a magistrates' court on 14 counts of theft, one of which involved an amount of more than R500 000, thus triggering the provisions of s 51(2)*(a)*, part II of sch 2 to the Criminal Law Amendment Act 105 of 1997. The magistrate refused leave to appeal against the sentence. The High Court refused his petition for same. He then successfully applied in terms of s 16(1)*(b)* of the Superior Courts Act 10 of 2013 for special leave to appeal to the Supreme Court of Appeal (the SCA) against the refusal of the High Court to grant leave. On appeal,
Held, that a petition for leave to appeal to a High Court in terms of s 309C of the Criminal Procedure Act 51 of 1977 (the CPA) was in effect an appeal against the refusal of leave to appeal by the magistrates' court in terms of s 309B of the Act. Accordingly, it was appealable to the SCA with special leave of that court. The order appealed against, however, was the refusal of leave, with the result that the SCA could not decide the merits thereof. (See [6] – [8].)
Held, further, that the failure of the trial court to allow the appellant an opportunity to address it before imposing a non-parole period in terms of s 276B(2) of the CPA was a misdirection. The trial court further misdirected itself by its failure to give reasons for fixing the non-parole period. These constituted the special circumstances required for special leave to be granted. In the present circumstances an appeal would have a reasonable prospect of success on one of the counts. The matter therefore had to be referred back to the full court for it to be heard on its merits. (See [11].)

S v NDUDULA 2019 (1) SACR 609 (ECG)

Prosecution — Prosecutor — Powers and duties of — Duty to seek justice and not blindly pursue prosecution — Expected to disclose both prejudicial and beneficial information to accused — Prosecution *in casu* only calling police witness after close of defence case, who produced ballistic evidence leading to acquittal of accused.
Evidence — Expert evidence — Gunshot residue — Risks associated with and probative value discussed.

The accused was indicted to stand trial on a charge of having murdered her husband by shooting him. Although the area around the scene of the crime was extensively and thoroughly searched, no firearm was ever found.
At her trial the state relied, *inter alia*, on evidence of gunshot primer residue found on the accused and her clothing.
At the end of the defence case the state applied to reopen its case to deal with the evidence of a police ballistics expert purportedly to explain the presence of a projectile found in the accused's garden. This was found to be old and damaged and appeared to have been fired before the day of the fatal shooting. The witness did, however, establish conclusively that other projectiles recovered from the murder scene had been fired from at least two 9 millimetre pistols.

The court pointed to the risks associated with gunshot-residue evidence and the probative value of such evidence (see [144] – [151]), and held that on the evidence in the present case any residue which may have been found on the accused could conceivably have made its way onto her jacket which she said was lying on their double bed when the deceased was shot. The residue detected in a sample taken from her right hand could at the very least have been transferred there when she assisted the deceased — indoors or outdoors; when she touched her jacket when putting it on; or when she wiped her hands on the front of her jacket after she had washed them in the hospital. (See 153].) The court noted that it was well documented that the residue could be easily tampered with and altered due to its fine consistency, and that the weight to be attached to such evidence hinged on too many factors, which was one of the reasons the FBI had closed its test laboratory in 2006.
It held further that the duty of the prosecution was to seek justice and not to blindly and purposelessly plunder after a conviction at all costs. Prosecutors were expected to safeguard the rights of the accused persons and, as soon as reasonably possible, disclose to them relevant prejudicial and beneficial information, in accordance with the law and the requirements of a constitutionally fair trial. It was difficult to comprehend why the damning ballistics evidence had been withheld from the court throughout the state's case; and, also, why the accused was prosecuted on the grounds set forth in the state's indictment, particularly in that the prosecution had not called upon the court to find that the accused was brandishing two 9 millimetre pistols. In the circumstances the accused had to be acquitted.

S v JACOBS AND OTHERS 2019 (1) SACR 623 (CC)

Appeal — Leave to appeal — To Constitutional Court — Whether constitutional issue raised — Application of doctrine of common purpose — Question whether raised constitutional issue considered but not decided because court composed of even numbers and no majority decision emerging.

The applicants were convicted in the High Court of murder on an application of the doctrine of common purpose and were sentenced to lengthy terms of imprisonment. Their appeal to the full court was dismissed. Their application to the Supreme Court of Appeal for leave to appeal was also dismissed. They then brought the present application for leave to appeal and contended that there were constitutional issues concerning the application of the doctrine of common purpose. The directions issued by the Chief Justice required the parties to make submissions on whether the doctrine of common purpose was correctly applied by the trial court and the full court in the matter; and whether, if the doctrine of common purpose was not correctly applied, that would give the Constitutional Court jurisdiction in the matter.
Four judgments were delivered in the matter and, in the situation where 10 judges heard the matter, no majority decision emerged, with the result that the judgment of the full court had to stand.
The background to the matter is set out in the judgment of Goliath AJ (concurred in by Cachalia AJ, Froneman J, Khampepe J and Madlanga J), who held that the applicants had camouflaged the application as a constitutional matter based on their assertion that the common-purpose doctrine had been incorrectly applied and unconstitutionally developed by the lower courts. This matter, however, was neither grounded on the interpretation of the common-purpose doctrine, nor its

development, but was purely factual and did not raise any important constitutional issues which attracted the jurisdiction of the court. (See [44].) The applicants had therefore failed to identify a constitutional issue which would clothe the court with jurisdiction. Moreover, even on the court's extended jurisdiction, the matter failed to raise a point of law of general public importance which the court ought to consider. Consequently, the applicants had failed to demonstrate that the court had jurisdiction as contemplated in s 167(3)*(b)* of the Constitution. (See [51].)
Theron J (Zondo DCJ, Dlodlo AJ, Jafta J and Petse AJ concurring) concluded that the application of the doctrine of common purpose was a constitutional issue and that, therefore, the court had jurisdiction to entertain the matter. Theron J held further that it had not been established that the applicants were present when the fatal blow was administered, which was required in order for criminal liability to ensue on the basis of a common purpose. The applicants should therefore not have been convicted of murder on the basis of common purpose, but rather of an assault with intent to do grievous bodily harm.
Much attention was paid to the judgment in *Makhubela*[*] in respect of which judgment Froneman J held (Cachalia AJ and Madlanga J concurring) that the court had misunderstood and misapplied the reasoning and outcome of the court's own decision in Thebus. [†] Apart from its reliance on Thebus, the judgment in Makhubela offered no other substantive justification for asserting that the doctrine of common purpose implicated the constitutional rights of freedom of the person and the right to a fair trial, including the right to be presumed innocent. That was sufficient reason not to be held to the errant statement in Makhubela which was in conflict with the precedents it relied on. (See [105].) Froneman J held, in respect of the Constitutional Court's jurisdiction on common-purpose convictions, that there could be no principled basis for setting apart and giving a special place to the doctrine of common purpose. (See [112].)
In the fourth judgment, Zondo DCJ (Dlodlo AJ, Jafta J, Petse AJ and Theron J concurring) held that, just as an inquiry into wrongfulness raised a constitutional issue, an inquiry into criminal liability on the basis of the doctrine of common purpose also raised a constitutional issue, as both were based on public policy which was now represented by our constitutional values. If one accepted that the doctrine of common purpose was based on public policy, and that public policy was now represented by our constitutional values, it had to follow that the application of the doctrine of common purpose entailed the application of our constitutional values. (See [146] – [147].) Zondo DCJ concluded that the matter did raise a constitutional issue and that the court did have jurisdiction, and he concurred in the judgment of Theron J with regard to leave to appeal and the merits of the appeal.

S v SANGWENI 2019 (1) SACR 672 (KZP)

Evidence— Witness — Oath — Admonition to speak truth — Insufficient for magistrate merely to enquire whether child witness knew difference between telling lies and telling truth — Evidence inadmissible.

In an appeal by the appellant against his conviction for rape and sentence of life imprisonment, the only issue that required determination by the court was whether the evidence of the complainant, a girl who was 9 years old when the rape was committed, and 13 when she testified, was admissible. The magistrate had asked her whether she knew what it meant to take the oath and whether she knew the

consequences of taking the oath. She replied that she knew the oath but did not know what the consequences would be after taking the oath. The magistrate then asked whether she knew the difference between telling lies and telling the truth, and, when she answered 'yes', he proceeded to admonish her to tell the truth.
Held, that, although the magistrate was correct in not administering the oath to the complainant, the single question by him whether the complainant knew the difference between telling lies and telling the truth, without more, was not enough to establish that she understood what it meant to speak the truth, that it was important to speak the truth, and that it was wrong to tell lies. The result was that she could not have been admonished to speak the truth and was not a competent witness. The evidence was therefore inadmissible, and the conviction and sentence had to be set aside.

S v CARNEIRO 2019 (1) SACR 675 (SCA)

Appeal — Delay in finalisation of — Inordinate delay — Total of 13 years between conviction and finalising of appeal — Delay might well have vitiated appellant's right to fair trial and appeal.

In an appeal against a conviction in a regional magistrates' court for murder, the offence had been committed 20 years earlier and the appeal had taken a total of 13 years to be disposed of. The period from offence to conviction was nearly 7 years and the first appeal took a further 4 years. As a result of a number of administrative errors, the appellant's bail was estreated and he spent 15 months in prison.
Held, that the inordinate delay may well have vitiated the appellant's right to a fair trial and appeal and rendered it unconstitutional. However, in the light of the fact that the state and the appellant had not raised this issue, but argued solely on the merits of the conviction, it was unnecessary to make a finding on the constitutionality of the process. (See [12].) The court nevertheless held that it was not satisfied that the guilt of the appellant had been proved beyond reasonable doubt, and the appeal had to be upheld and the appellant acquitted.

S v NDLOVU 2019 (1) SACR 686 (KZP)

Presiding officer — Conduct of — Magistrate appearing to have insight into contents of police docket not introduced into evidence — Magistrate also interjecting in unbecoming manner during testimony — Conviction highly unsafe and set aside.

On appeal from a conviction in a regional magistrates' court for rape, it appeared from the record that the magistrate had insight into documentation forming part of the police docket that was not introduced into evidence, including the result of a DNA-swab analysis indicating the absence of any male DNA on the complainant. The report was also not part of the appeal record.
The court held that the most generous interpretation that could be placed on what the magistrate said was that the sample of DNA submitted for testing could not establish any link to the appellant. Whether that was in fact the case or it said something different, it would never know, but it engendered in the court such doubt that there was only one possible result that that doubt could generate, namely that it had to redound to the benefit of the appellant. (See [12].)

The court also found it disturbing that the magistrate had interjected in an unbecoming manner during testimony. He had quite brazenly intervened and assisted the state case by suggesting that the difference in language use was something that explained away discrepancies in the complainant's police statement. The conviction of the appellant was highly unsafe and had to be set aside.

S v BROWN AND ANOTHER 2019 (1) SACR 691 (ECP)

Bail — Reduction of — For purpose of paying accused's legal team — Not permissible in terms of ss 58, 60(2B) and 63(1) of Criminal Procedure Act 51 of 1977.

The first applicant brought an application for the reduction of his bail amount from R800 000 to R50 000, or any lesser amount that the court deemed fit. He did so on grounds that he had ceded his bail money to his attorney and senior counsel as security for their fees. The legal team had run out of funds and could not continue without payment. The applicant's counsel contended that the bail money 'belonged' to him and his instructing attorney because of the cession thereof by the first applicant to them for payment of their fees.
Held, that s 58 of the Criminal Procedure Act 51 of 1977 provided that bail money could not be reduced other than for those purposes stipulated in s 60(2B) (set out in [18]), and it was inconceivable in terms of the provisions that the bail money could be reduced before the completion of the trial, to allow the accused to pay his counsel's fees. Furthermore, s 63(1) (set out in [21] and providing for an increase or reduction in amount of bail) could not be interpreted to mean that bail money could be reduced to allow the accused to fulfil his financial obligations such as the payment of the aforesaid fees. That bail money was ceded to an attorney or counsel was not an entitlement that should be refunded to them, but stood as security for the attendance of the accused, and should endure until the finalisation of the matter. [See [26] and [28].] Application dismissed.

S v CEYLON AND ANOTHER 2019 (1) SACR 698 (GJ)
Rape — Sentence — Life imprisonment — Minimum sentence in terms of Criminal Law Amendment Act 105 of 1997 — Substantial and compelling circumstances — Youthfulness — Appellants brutally and callously raping complainant numerous times over extended period and leaving her for dead — Despite their being 18 and 19 years old at time of offence, sentence of life imprisonment appropriate.
Sentence — Factors to be taken into account — Youth of offender — Requirement of pre-sentencing report — Report not required where all facts relevant to sentencing before court — In casu such facts obtained from accused's testimony — Sentence of life imprisonment imposed on 18- and 19-year-old accused at time of offence upheld on appeal.

The two appellants appealed against sentences of life imprisonment imposed in a regional magistrates' court in respect of rape in contravention of s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. The incident involved extreme and callous brutality perpetrated for an extended period of time, during which they each raped the 28-year-old complainant more than once. The second appellant stabbed the complainant approximately seven times in her neck, face and upper body, and kicked her and jumped on her head two to three

times. They then dragged her into the bush and left her for dead. She, however, regained consciousness and managed to return home. The first appellant was 18 years old and the second 19 years old when they committed the crime. Counsel for the appellants argued that their youthfulness constituted substantial and compelling circumstances that warranted interference with the sentences of life imprisonment. No pre-sentencing report was obtained before sentence was passed.
Held, that, although a pre-sentencing report was required before the court sentenced a young person (unless the court had all the facts relevant to sentencing), in the present case both appellants had testified under oath and had placed such relevant evidence before the trial court. Given the totality of the circumstances of the case, there were no substantial and compelling circumstances that justified a deviation from the prescribed sentence of life imprisonment. The only appropriate sentence the regional court could have imposed was one of imprisonment for life for each of the appellants in respect of the rape charge. The sentences imposed were not totally disproportionate to the crimes and were not shockingly inappropriate. The appeal against sentence had to fail.

S v MOSIKILI 2019 (1) SACR 705 (GP)
Murder — Sentence — Correctional supervision — Accused convicted of murdering son — Deceased had history of aggressive and violent behaviour towards family and abused alcohol — Sentencing court ignored pre-sentence report and report by Correctional Services recommending correctional supervision — Misdirection justifying interference on appeal — Numerous mitigating circumstances, as well as negative effects of imprisonment on family, making correctional supervision appropriate sentence.

The appellant was convicted in a magistrates' court of the murder of his son and was sentenced to 12 years' imprisonment, five years of which were suspended for a period of five years. He appealed against his sentence.
It appeared from the magistrate's remarks in granting leave to appeal that he had closed his mind to correctional supervision as a sentencing option and did not consider either the pre-sentencing report and recommendation prepared by the Department of Social Development, which recommended a sentence of correctional supervision, or the suitability report prepared by the Department of Correctional Services, which found that the appellant was a suitable candidate for a sentence of correctional supervision. The state conceded that these were misdirections that justified the court's intervention on appeal.
The evidence revealed that, after returning from initiation school, the deceased became aggressive and difficult, and often abused alcohol. He had assaulted his parents as well as his girlfriend when drunk and had caused damage to property on numerous occasions, once breaking all the windows in his girlfriend's house, which the appellant had to replace. In 2013 he assaulted the appellant with a spade. A protection order was obtained against the deceased who failed to respond to many calls to change his behaviour. On the day in question the deceased had again arrived at the house drunk and assaulted his mother. The police were called and, whilst the deceased taunted and challenged the police, the appellant shot him.
The appellant was a 58-year-old first offender who was employed as a driver and supported his family, including the deceased's son.

Held, that the relatively low risk that the appellant would reoffend, combined with his remorse, rendered a sentence of correctional supervision more likely to achieve the goal of rehabilitation than other potential sentencing options. Imprisonment of the appellant could be expected to have negative consequences for his family and constitute a punitive measure for them, even though they had already suffered the effects of the crime and the loss of the deceased. It would break up the family and deprive it of a person that the pre-sentencing report referred to as a 'loving and respectful, husband and father' with 'good interpersonal relations'. (See [32] – [33].) The sentence was accordingly set aside and replaced with a sentence of 36 months' correctional supervision, which included house detention and the performance of free community service.

All SA [2019] Volume 2 June

Atwealth (Pty) Ltd and others v Kernick and others [2019] 2 All SA 629 (SCA)

Delict – Financial Planning and Investments – Financial advisor – Alleged negligence – Liability for loss incurred on recommended investments – What constitutes financial advice – Whether the duties listed in the Financial Advisory and Intermediary Services Act 37 of 2002 and the various codes of conduct promulgated under that Act had been breached – Whether evidence is sufficient to establish a breach of legal duties.

The respondents were a married couple and the third respondent was a close corporation owned by them. They stated that during 2009 to 2010, the second appellant, in the course and scope of her employment with the first appellant and thereafter with the third appellant in 2011, rendered financial advice to them. Her advice was that they should invest their funds in certain investment products falling under an entity known as Abante Capital.

Alleging that the second appellant had failed to comply with the legal duties which she owed to them and had given them negligent advice, the respondents sued the three appellants for damages after they lost their investments. The investment vehicles into which the second appellant was alleged to have advised the respondents to put their money turned out to be part of a scheme under which the investment returns were not genuine, but, when paid, were paid out of the capital invested (“a Ponzi scheme”).

Held – Arguments presented focused on whether the second appellant breached the provisions of the Financial Advisory and Intermediary Services Act 37 of 2002 read together with the General Code of Conduct for Authorised Financial Service Providers and Representatives (the “Code”). The Code provides that an authorised financial service provider “must at all times render financial services honestly, fairly, with due skill, care diligence and in the interests of clients and the integrity of the financial services industry.”

The Court confirmed that the second appellant had indeed given the respondents financial advice as contemplated in the legislation. However, no evidence was led by the respondents regarding what a reasonable financial advisor, possessed of the requisite skills, would have advised them. No evidence was led which engaged with the vital question of what advice a reasonable financial advisor would have given the respondents about the relevant products in 2009. In order to prove that the investment

advisor had acted wrongfully and negligently it was necessary to show that a reasonable skilled investment advisor in 2009 and 2010 (when the investments were made following the advice of the advisor) would have cautioned any investor from investing in the funds in question.

Unable to find that the advice given by the second appellant was negligent, the Court upheld the appeal.

Chairperson of the Municipal Appeals Tribunal, City of Tshwane and others v Brooklyn and Eastern Areas Citizens Association [2019] 2 All SA 644 (SCA)

Civil Procedure – Appeal – Appeals procedure – Mootness – Building complete by the time the appeal was heard – Whether the judgment sought on appeal will have any practical effect or result as contemplated by section 16(2)(a) of the Superior Courts Act 10 of 2013.

Local government – Town planning – Approval of rezoning application in terms of section 56 of the Town Planning and Townships Ordinance 15 of 1986 read with section 2(2) of the Spatial Planning and Land Use Management Act 16 of 2013.

In September 2015, the fourth appellant ("Caliber") applied to the third appellant municipality, in terms of section 56 of the Town Planning and Townships Ordinance 15 of 1986 (the "Ordinance"), read with section 2(2) of the Spatial Planning and Land Use Management Act 16 of 2013 for the rezoning of property from "Residential 1" to "Special". Objections were lodged by various parties, including the respondents. Nevertheless, the municipality's Municipal Planning Tribunal approved the application.

The first respondent ("BEACA") gave notice of its intention to appeal. The dismissal of its appeal led to it seeking review of the decision to dismiss the appeal, in the High Court. The review application was successful, leading to the appeal in the present Court.

Held – As the building on the property had been completed by the time the appeal came to be heard, the issue of mootness arose. The question was whether the judgment sought would have any practical effect or result as contemplated by section 16(2)(a) of the Superior Courts Act 10 of 2013. That section provides that, "When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on that ground alone". The Court has a discretion in that regard. It exercised that discretion in favour of hearing the appeal, as the issue of mootness had not been addressed in argument. Additionally, evidence of the completeness of the building was not before the Tribunal when it made its decision.

The merits of the dispute related to the appeals procedure. The effect of the Spatial Planning and Land Use Management Act 16 of 2013 and the Land Use Management By-Law 2016 is that land use adjudication, including internal appeals, remains within the municipal sphere – unlike with the Town Planning and Townships Ordinance 15 of 1986 in terms of which internal appeals are determined at provincial level. It was common cause that Caliber's rezoning application came before the Tribunal functioning in terms of the Spatial Planning and Land Use Management Act and the 2016 By-Law. The Court confirmed that the applicable appeal procedure was that set down in section 20 of the by-law read with section 51 of the Spatial Planning and Land

Use Management Act. The first of the two internal appeals was valid and the Appeals Tribunal was directed to determine that appeal.

Director-General of the Department of Home Affairs and others v De Saude Attorneys and another [2019] 2 All SA 665 (SCA)

Civil procedure law-Constitutional and Administrative Law – Immigration – Failure by Department of Home Affairs to comply with their obligations in terms of the Constitution and the applicable legislation by making decisions within set deadlines in pending applications brought under immigration statutes – Technical defences of *locus standi* – Section 38 of the Constitution – Misjoinder and jurisdiction without merit.

The respondents were respectively a law firm specialising in immigration law and a close corporation providing services to foreign nationals making applications under the Immigration Act 13 of 2002 and the Citizenship Act 88 of 1995. They alleged that they had submitted 473 applications in terms of the said legislation, on behalf of their clients. They sought to compel the respondents to comply with their obligations in terms of the Constitution and the applicable legislation by making decisions within set deadlines in those pending applications. According to the respondents, the Department of Home Affairs had unreasonably delayed making decisions in respect of applications brought in terms of several sections of the Immigration Act, in some instances for periods exceeding four years.

In response to the application, the High Court issued an extensive order reviewing and setting aside the failure of unknown officials in the employ of the appellants to determine and deliver, within a reasonable and lawful time, the applications which remained outstanding. The appellants were directed to determine and deliver decisions on the said applications within time frames specified in the Court's order. The appellants were three of the five respondents in the High Court. They appealed against the High Court order.

The appellants chose not to engage on the facts averred in the respondents' founding affidavit but opted to raise certain technical points.

Challenging *the locus standi* of the respondents, the appellants contended that the failure to join the 473 individuals who were the respondents' clients, as parties to the litigation, was fatal. The appellants also challenged the jurisdiction of the court below, arguing that since adjudicative functions were carried out in Pretoria and the statutory decision makers and supervisory officials were located there, the court below had no jurisdiction to hear the matter. A further point taken was that of misjoinder, it being averred that the 473 individuals should not have joined together in the single application in the court below. The court dismissed all the points raised and granted an order in favour of the respondents.

Held – On appeal that the appellants appeared to believe that they were entitled not to account to the Court or to the public at large for their failure to fulfil their constitutional and statutory obligations. They left unchallenged, extremely serious assertions about their repeated failure to process applications that the constitutional scheme and statutory regime demand.

On the issue of the respondents' *locus standi*, the Court began by referring to section 38 of the Constitution. In terms thereof, anyone acting in their own interest; anyone

acting on behalf of another person who cannot act in their own name; anyone acting as a member of, or in the interest of, a group or class of persons; anyone acting in the public interest; and an association acting in the interest of its members, may approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the Court may grant appropriate relief. A broad approach to standing should be adopted. The respondents had shown not only that their own interests were affected, but also that there was institutional dysfunction and that the broader public interest, including the interest of their clients were implicated. They therefore clearly had standing to bring the application.

The misjoinder defence was similarly without merit. The commonality in relation to the law and facts in respect of the cases of each of the respondents' clients was clear and it was undesirable for separate applications to be brought in each case.

Finally, the Court confirmed that the court below was clothed with jurisdiction to hear the application.

The appeal was dismissed.

Berman Brothers Property Holdings (Pty) Ltd v Madikana and others [2019] 2 All SA 685 (WCC)

Constitutional Law – Section 28(2) of the Constitution – Court considered the best interests of the child – Eviction to be ordered only when child has finished her matric year.

Property – Vacant occupation – Eviction application – Unlawful occupation of property – Termination of lease – Automatic rent interdict in terms of section 32 of the Magistrates' Court Act 32 of 1944.

The first respondent was a 52-year-old single mother of three who had been employed as a domestic worker since 1987. She currently resided in a single room which formed part of a small apartment in a sectional title scheme. Living with her were her granddaughter and two daughters.

The applicant was a property holding company which owned the building in which the first respondent's flat was situated. It sought to obtain vacant occupation of the property after it bought the building. In December 2017, the applicant applied to court for the eviction of the first respondent and those living with her.

Held – First respondent attempted to rely on a lease which had been concluded some years before. However, the Court found that such lease was lawfully cancelled by the applicant, and that the first respondent was since then, in unlawful occupation of the property. The applicant adduced evidence of its having followed proper procedure in seeking vacant occupation of the property.

Whilst the demands of justice and equity would be met if the first respondent was ordered to be evicted from the property, the Court took into account the fact that one of her daughters was about to enter her matric year at a nearby school. Having regard to the provisions of section 28(2)of the Constitution, regarding the paramountcy of the best interests of children, the Court considered it just and equitable to order the eviction only when the child had finished her matric year.

***Ex Parte* Goosen and others (Legal Practice Council and others as *amici curiae*) [2019] 2 All SA 702 (GJ)**

Legal Practice – Admission of advocates – Requirements – Legal Practice Act 28 of 2014 – Interpretation of section 115 – Requirement of vocational training as a sine qua non for admission to practice as an advocate – Minimum requirements for admission to practice under the Legal Practice Act regime are stipulated in section 26(1) of the Act.

The repeal of the Advocates Admissions Act 74 of 1964 and Attorneys Act 53 of 1979 by the Legal Practice Act 28 of 2014 on 1 November 2018 led to a number of issues being raised for the Full Court to consider. The new Act contained additional requirements which a prospective advocate has to fulfil before qualifying for admission as an advocate. The main questions before the Court were whether section 115 of the new Act applied to applicants for admission as an advocate, whose applications for admission were pending in any court on 1 November 2018; whether section 115 of the new Act exempted applicants who filed their applications before the commencement of the new Act, from complying with the requirements in terms of the new Act; and if so, whether such exemption applied to all such applicants, *ad infinitum*, and/or should provision be made for a cut off period within which applicants were found to qualify for exemption, should apply for admission.

Held – Questions referred to required the Court to interpret section 115. The section states that "Any person who, immediately before the date referred to in section 120(4), was entitled to be admitted and enrolled as an advocate, attorney, conveyancer or notary is, after that date, entitled to be admitted and enrolled as such in terms of this Act."

The Legal Practice Act unambiguously introduced the requirement of vocational training as a *sine qua non* for admission to practice as an advocate and unequivocally repudiated the anomaly that previously existed in respect of advocates, who unlike attorneys, could be unleashed on the litigating public, with no vocational training whatsoever. The minimum requirements for admission to practice under the Legal Practice Act regime are stipulated in section 26(1) of the Act.

On a proper interpretation of the Act, the Court answered the questions raised as follows. Persons who applied prior to 1 November 2018, may invoke section 115 to rely on the criteria in the former Admission of Advocates Act and the former Attorneys Act to be admitted as legal practitioners. Section 115 exempts applicants who filed their applications before the commencement of the new Act, from complying with the requirements in terms of the new Act. There is no cut-off date and the exemption entitlements remain available *ad infinitum*.

Gaum and others v Van Rensburg NO and others (Commission for Gender Equality and another as *amici curiae*) [2019] 2 All SA 722 (GP)

Constitutional and Administrative Law – Church resolution – Review – Same-sex marriages – Competing rights of freedom of religion and the right not to be discriminated against based on sexual orientation – Section 9(3) of the Constitution and section 1 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 prohibit discrimination based on sexual orientation – Right to practice religion in terms of section 31 of the Constitution – Doctrine of entanglement – Reluctance of the Court to become involved in doctrinal disputes of a religious character.

Constitutional and Administrative Law – Whether the 2016 decision was taken in terms of the procedure set out in the Church Order, which regulated the church – Constitutionality of the decision that gay or lesbian persons could only be ordained as a Minister if they were celibate, and Ministers not permitted to solemnise same-sex civil unions.

The General Synod of the Dutch Reformed Church, in 2015, took a decision that despite the church's view that marriage is the union between one man and one woman, Ministers in the church would be allowed to solemnise same-sex unions, but placed no positive duty on a Minister to do so. In November 2016, the church took another decision, reversing the 2015 decision.

In terms of the 2016 decision, a gay or lesbian person could only be ordained as a Minister if they were celibate, and Ministers were not permitted to solemnise same-sex civil unions.

The applicants sought to review and set aside the 2016 decision.

Held – This case dealt with the competing rights of freedom of religion and the right not to be discriminated against based on sexual orientation. The doctrine of entanglement entails a reluctance of the Court to become involved in doctrinal disputes of a religious character. The majority of judgments of our courts favour following the doctrine of entanglement.

The matter raised two questions. The first was whether the 2016 decision was taken in terms of the procedure set out in the Church Order, which regulated the church. The second related to the substantive constitutional debate.

In one of the preliminary issues raised in the matter, the Court confirmed that the review could not be brought in terms of the Promotion of Administrative Justice Act 3 of 2000, but the rules of natural justice nevertheless permitted judicial review of the impugned decision.

Insofar as the Church Order provided for mechanisms to amend, review or substitute decisions, those methods has to be used. The Church Order allowed for a previous decision to be substituted, amended or reviewed, but that decision had to be on the agenda and be discussed. As the 2015 decision had not been discussed or set aside, the 2016 decision was procedurally defective and had to be reviewed and set aside.

In the substantive grounds of review, the applicant submitted that the Church's 2016 decision was demonstrably discriminatory in that it differentiated on the grounds of sexual orientation. Section 9(3) of the Constitution as well as section 1 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 prohibit discrimination based on sexual orientation casting the duty to justify the discrimination on the Church.

The stages of an enquiry into the violation of the equality clause begin with whether the conduct differentiates between people or classes of people. Even if the differentiation does bear a rational connection it might nevertheless amount to discrimination. The rational connection enquiry need not be done first because if a court finds that the discrimination is unfair and unjustifiable the rational connection inquiry would be unnecessary. The next question is whether the differentiation amounts to unfair discrimination. If the discrimination is on a specified ground in section 9(3) of the Constitution, then discrimination is established. If discrimination

is established then the enquiry is whether the discrimination is unfair. The church was clearly differentiating between its heterosexual and homosexual members. That differentiation constituted discrimination that is presumed to be unfair in terms of section 9(5). The Court found no acceptable justification for the discrimination and declared the 2016 decision unlawful and invalid. The decision was reviewed and set aside.

Hodgkinson v K2011104122 (Pty) Ltd and another [2019] 2 All SA 754 (WCC)

Corporate and Commercial – Contract – Building agreement – Cancellation of contract – Alleged repudiation – Ordinarily, when faced with repudiation or any other circumstances which allow him to cancel, an innocent party has to elect whether he wishes to enforce the contract or cancel, he is not allowed to approbate and reprobate the contract – Where a contract contains a *lex commissoria*, the election by the innocent party to implement his own regime allowing the guilty party to remedy a breach must be communicated clearly and in a manner which leaves the guilty party in no doubt as to what is required of him.

Corporate and Commercial – Contract – Building agreement – Cancellation of contract — Claim for interest a tempore morae – Prescribed Rate of Interest Act 55 of 1975 not having effect of increasing the overall amount of liability fixed by parties when a performance guarantee was granted.

In November 2011, the plaintiff and first defendant entered into an agreement in terms of which the first defendant was required to remove the existing roof of plaintiff's house; manufacture and install wooden modules as the second floor; and construct and install internal walls and a new roof system. In April 2012, a week after the project had commenced, the second defendant executed a performance guarantee in terms of which she guaranteed first defendant's performance subject to the limitation of her liability to R250 000.

The timelines for completion of the project had to be extended in terms of two revisions to the agreement. The first defendant failed to comply with its contractual obligations and the plaintiff delivered a written notice (the "first notice") recording first defendant's defaults and informing it that unless it took practical steps to remedy those defaults, the plaintiff would cancel the project agreement. The first defendant failed to take the required practical steps to remedy its defaults within the 7-day period provided in the notice. Ten days after the first notice was sent, the plaintiff notified the first defendant that he was cancelling the project agreement (the "second notice"). On 1 October 2012, the second defendant was also notified of the cancellation and the intention to institute court proceedings against her.

After appointing another contractor to complete the project, the plaintiff sued the defendants, claiming damages. Default judgment was obtained against the first defendant. That left the claim against second defendant arising from the performance guarantee.

The second defendant brought an application in terms of Uniform Rule 33(4) in terms of which she sought a separation of issues so that the question of whether the plaintiff had validly cancelled the project agreement be decided first. It was agreed at the hearing that the Court would not only determine whether there should be a separation, but also deal with the merits of the dispute on whether the project agreement was

validly cancelled. The Court held that where a contract lays down a procedure for cancellation, it must be followed for the cancellation to be effective, and that in order for the innocent party to succeed, he has to show that he complied strictly with the peremptory provisions of the *lex commissoria* in question. Applying that to the facts, the court held that the provisions of the project agreement were peremptory and that the cancellation notice did not comply with those provisions. On appeal, the Full Bench confirmed that decision.

The present judgment dealt with an exception taken by the second defendant against the claim for post-cancellation and *mora* damages contained in the plaintiff's amended particulars of claim. The subject matter of the exception was damages in the form of the additional expenses incurred by the plaintiff to bring the construction project to completion. It was averred that the amended particulars of claim did not disclose a cause of action. Four grounds of exception were raised. The first was that the plaintiff's conduct as pleaded was inconsistent with the alleged repudiation, as plaintiff elected to follow the *lex commissoria* rather than rely on first defendant's repudiation and the plaintiff was bound by that election. The second ground was that the placing of first defendant in *mora* did not absolve the plaintiff from following the *lex commissoria*. Unlike repudiation, *mora* is not a separate basis for cancelling the project agreement outside the *lex* cancellation clause. Thirdly, it was contended that the introduction of repudiation as a ground for cancellation would undermine the Full Bench judgment granted by the Full Bench in the dispute (referred to as the "*res judicata*" point). Finally, it was contended that the claim for interest was impermissible as the performance guarantee limited the second defendant's total liability to R250 000.

Held – It was convenient to deal with the *res judicata* point first. The question was whether the Court of first instance or the Full Bench dismissed the possibility of post-cancellation damages on the basis of repudiation. Having regard to the first court's judgment, it was evident that the only issue before that court was whether plaintiff's cancellation notice complied with the time periods and other requirements set in the *lex commissoria* and not whether the plaintiff did or could have cancelled the project agreement on the basis of repudiation. Moreover, the Full Bench did not decide the issue of whether cancellation was justified on the ground of repudiation. It could therefore not be said that the claim for post-cancellation damages based on repudiation was a matter that was decided and the plaintiff could accordingly introduce such a claim by way of an amendment to the particulars of claim.

The Court then reverted to the first ground of exception. In the amended particulars of claim, the plaintiff introduced repudiation as a new ground for cancellation of the agreement. It was contended that first defendant's failure to remedy the defaults set out in the breach notice exhibited a deliberate and unequivocal intention not to be bound by the project agreement, which conduct constituted repudiation of the project agreement. The question was whether the plaintiff forfeited his entitlement to rely on repudiation as a ground for cancellation because he elected to invoke the *lex commissoria*. Ordinarily, when faced with repudiation or any other circumstances which allow him to cancel, an innocent party has to elect whether he wishes to enforce the contract or cancel. He is not allowed to approbate and reprobate the contract. The Court found that the course of action followed by the plaintiff fell foul of that principle. Where a contract contains a *lex commissoria*, the election by the innocent party to implement his own regime allowing the guilty party toremedy a breach must be

communicated clearly and in a manner which leaves the guilty party in no doubt as to what is required of her. The first exception was accordingly upheld.

The exception regarding *mora* interest was also found to be sound. The plaintiff cancelled the contract 17 days after the first defendant fell in *mora*. Plaintiff's damages claim did not relate to damages caused by the 17-day delay but to the costs of employing a different contractor to finish the works (ie cancellation damages). Any claim for post-cancellation damages based on *mora* ran into the same difficulties as the claim for damages based on repudiation. The existence of the *lex commissoria* indicated that the parties already contemplated that the right to cancellation only accrued, in the case of delay, after the guilty party was given an opportunity to remedy its defaults within a certain period of time.

In terms of the amended particulars of claim, the plaintiff introduced a prayer for interest a *tempore morae* on the capital amount of R250 000 alleged to be owed by the second defendant based on the performance guarantee. Plaintiff contended that interest is recognised as a form of damages suffered by the creditor if there is no payment on the due date, and such interest becomes payable by operation of law, in particular, the Prescribed Rate of Interest Act 55 of 1975. The second defendant's objection was that the Prescribed Rate of Interest Act does not have the effect of increasing the overall amount of liability which was fixed by the parties when the performance guarantee was granted. The Court agreed with that submission and upheld the exception.

Plaintiff was granted leave to amend his particulars of claim within 20 days of the date of the order.

S v Ndlovu and others (Judgment) [2019] 2 All SA 773 (ECG)

Criminal law and procedure – Evidence – Right of accused not to testify – If an accused exercises such right, the Court is left with nothing but the uncontroverted prima facie case presented by the State, and the accused's constitutional right to silence cannot prevent logical inferences being drawn.

Criminal law and procedure – Illegal poaching of rhinoceros – Assessment of evidence – Court's reliance on expert evidence.

The three accused were arrested in a chalet at a caravan park, and various items were found in their possession. Those included a freshly removed rhino horn, a dart gun and tranquiliser darts. The accused were charged with 65 counts relating to 13 separate incidents of alleged rhino poaching which were alleged to have occurred at various farms and reserves in the districts of Albany, Jansenville, Graaff Reinet and Cradock. The trial in the present Court related to ten of those incidents, each of which gave rise to five counts.

The defence contested the admissibility of the evidence relating to the finding of the items in the chalet referred to above, alleging that the search conducted by the police, which was conducted without a warrant and which led to the finding and seizure of the said items, was unconstitutional and unlawful. A trial-within-a-trial was accordingly conducted as to the admissibility of the evidence. At the conclusion thereof the Court ruled the evidence admissible. The evidence of the Commander of the Stock Theft and Endangered Species Unit and the Provincial Coordinator for Rhino Poaching Investigations in the Eastern Cape (Viljoen) was central in that regard. Viljoen also testified in the main trial, confirming the evidence which he had given in the trial-within-

a-trial. The defence attempted to discredit Viljoen's testimony, suggesting that it was a fabrication.

Held – Criticisms of Viljoen's evidence were not sufficient to call his testimony into serious question. Despite Viljoen's failure to adhere to Police Standing Orders, his evidence stood unshaken as to the events on the day in question. The Court also rejected the defence's suggestion that the ruling on the admissibility of the evidence as to the events at the chalet was wrong due to the Court's having incorrectly applied the provisions of section 35(5) of the Constitution in finding that the admission of the evidence did not render the trial unfair and that it had not brought the administration of justice into disrepute. The Court confirmed that it had considered and applied the current South African law relating to the admission of unconstitutionally obtained evidence. It was therefore unpersuaded that it had erred in admitting the evidence at the conclusion of the trial-within-a-trial.

The Court next dealt with the evidence of two State witnesses, in the employ of the South African Police Service, regarding certain darts recovered from some of the crime scenes. The Court found them to be good and credible witnesses. The onus was at all times on the State to prove by way of acceptable ballistic evidence that the exhibits found at the scene were positively linked to the firearm subsequently found in the possession of the accused. While the Court accepted that there was no onus on an accused to obtain his own expert in order to disprove the findings of experts called by the State, it concluded that the evidence of the two witnesses as to their standard operating procedure and what was visible under a comparison microscope stood uncontroverted and could safely be accepted as reliable. Where a comparison microscope is used to assess evidence, the Court will rely on expert evidence. Applying that approach, the Court found the State to have proved beyond reasonable doubt that the darts found at the scene of two of the incidents were fired from the tranquiliser gun found in the possession of the accused. It was also proved that the darts relating to two other of the rhino poaching incidents were fired from the same tranquiliser gun.

None of the accused testified in their defence. No adverse inference can be drawn against an accused merely by virtue of the fact that he has exercised his constitutional right to refuse to testify. If an accused exercises such right, the Court is left with nothing but the uncontroverted *prima facie* case presented by the State, and the accused's constitutional right to silence cannot prevent logical inferences being drawn. It therefore had to be determined whether the State had produced evidence sufficient to establish a *prima facie* case, in other words, whether there was evidence which called for an answer from the accused. Having regard to the totality of the evidence, albeit circumstantial in nature, the Court found that the State had produced evidence sufficient to establish a *prima facie* case which called for an answer against the accused. They chose to leave that evidence unanswered. In the circumstances that evidence was sufficient to prove the guilt of the accused beyond reasonable doubt.

S v Ndlovu (Sentence) [2019] 2 All SA 820 (ECG)

Criminal law and procedure – Illegal poaching of rhinoceros – Sentencing – Minimum sentence provisions of Criminal Law Amendment Act 105 of 1977 not applicable where market value of rhino horn not established – Accused each receiving effective sentence of 25 years' imprisonment, on being sentenced in accordance with the court's common law jurisdiction.

The accused having been convicted on various counts, the Court has now required to impose sentence.

Ten of the counts on which the accused were convicted relates to the theft of rhinoceros ("rhino") horns. The State alleged that the provisions of sec-ion 51(2)(a)(i) read with Part II of Schedule 2 of the Criminal Law Amendment Act 105 of 1977 were applicable. Those provisions establish a discretionary minimum sentence of 15 years' imprisonment per count where the accused committed the offence of theft involving amounts of more than R500 000. The accused submitted that the section was not applicable in the present matter as the State had failed to prove the value of the stolen horns in respect of each count and, more specifically, that the value of each horn exceeded R500 000.

Held – In determining whether the minimum sentence provisions were triggered, the Court had to establish the market value of the rhino horns. Market value refers to what price could be obtained for the thing in question. The State submitted that it had not been necessary for the State to lead any evidence concerning the market value of the horns inasmuch as the value thereof had been admitted by the accused in terms of the admissions made by them in terms of section 220 of the Criminal Procedure Act 51 of 1977. The admission in question was in line with the averments set out in a schedule to the charges, which schedule referred to amounts representing loss to the owners of the rhino. The Court agreed with the defence that the amounts listed referred to the loss occasioned to the owners in consequence of the killing of the various rhinos and did not relate to the market value of the horns alone. Insofar as the sentencing court must establish what could be obtained for the thing in question, the present Court was unable to determine what monetary amount the accused could obtain for each horn, and the minimum sentencing provisions of the Criminal Law Amendment Act could not apply.

The accused were therefore to be sentenced on the theft charges in accordance with the Court's common law jurisdiction.

Taking into account the mitigating circumstances of the accused, the Court noted that all three were first offenders with minor children and family commitments. The aggravating factors included the extent of the scourge of rhino poaching in South Africa, 6913 rhino having been poached since 2012, of which 91 were poached in the Eastern Cape. Also of relevance, was that none of the accused showed any remorse for their actions. They conducted their poaching operations over a sustained period, and despite being self-supporting, were clearly motivated by greed and financial gain. The Court also took into account the interests of the community. It was common knowledge that society is outraged at the ongoing slaughter of rhinos for their horns. Society's interests would not be served by a sentence which was disproportionately light having regard to the seriousness of the offences.

Against the above background, the Court turned to consider the sentence to be imposed on the accused on each count. Conscious of what the ultimate aggregate penalty might be, it considered taking the various counts in respect of similar offences together for purposes of sentence. Such a course was to be resorted to only in exceptional circumstances more especially where, as in the present case, the various offences, although similar, were committed at completely different times and places over an extended period of three years. It was thus deemed not appropriate to take the various counts together for purposes of sentence.

On the counts of theft, each of the accused was sentenced to 15 years' imprisonment. On the count of attempted theft of a rhino horn by the first and third accused, which resulted in the death of the rhino in consequence of a high dose of tranquiliser, the court sentenced the two accused to 7 years' imprisonment. For the convictions based on contravention of section 57(1) of the National Environmental Management: Biodiversity Act 10 of 2004, relating to carrying out a restricted activity involving a specimen of a listed threatened or protected species without a permit, the accused were sentenced on each count to 10 years' imprisonment. Further sentences were imposed for the convictions based on ancillary activities of the accused. The Court ordered some of the sentences to run concurrently with others, with the result that the effective sentence in respect of each accused was one of 25 years' imprisonment.

Solomons v S [2019] 2 All SA 833 (WCC)

Criminal Law and Procedure – Bail application – Section 60 of the Criminal Procedure Act 51 of 1977 – Section 60(4) lists five grounds which, if established, mean that the interests of justice do not permit the release of the accused from detention – Interests of justice do not permit the release from detention of an accused where there is the likelihood that the accused, if he were released on bail, will endanger the safety of the public or any particular person or will commit a Schedule 1 offence; or where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security – While an arrested person is generally entitled to be released on bail if a court is satisfied that the interests of justice so permit, where a person has been charged with a Schedule 6 offence, the Court must order that the accused be detained in custody until dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the Court that exceptional circumstances exist which in the interests of justice permit his release.

An investigation into the operation of criminal gangs in certain parts of Cape Town led to 12 individuals being charged with numerous counts of planned or premeditated murder, contraventions of the Prevention of Organised Crime Act 121 of 1998, and drug dealing. The applicant was one of those charged.

Opting not to bring his bail application in the Magistrates' Court, the applicant launched motion proceedings in the present Court, aimed at his release on bail, pending the finalisation of the trial.

Held – Circumstances in which bail may be granted are provided for in section 60 of the Criminal Procedure Act 51 of 1977. Generally, an accused person who is in custody is entitled to be released on bail if the Court is satisfied that the interests of justice so permit. Section 60(4) lists five grounds which, if established, mean that the interests of justice do not permit the release of the accused from detention. Relevant to the present case, the sec-tion provides (section 60(4)(a)and (e)) that the interests of justice do not permit the release from detention of an accused where there is the likelihood that the accused, if he were released on bail, will endanger the safety of the public or any particular person or will commit a Schedule 1 offence; or where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security.

More serious offences (as listed in Schedules 5 and 6 of the Criminal Procedure Act) are subject to a more stringent regime. While an arrested person is generally entitled

to be released on bail if a court is satisfied that the interests of justice so permit, the reverse applies where a person has been charged with a Schedule 6 offence. In such a case, section 60(11) requires the Court to order that the accused be detained in custody until dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the Court that exceptional circumstances exist which in the interests of justice permit his release. Exceptional circumstances do not mean that they must be circumstances above and beyond, and generally different from those enumerated in sections 60(4) to (9).

In order to successfully challenge the merits of the State's case in bail proceedings pertaining to a Schedule 6 offence, the applicant needs to prove on a balance of probability that he will be acquitted of the charge. Until an applicant has set up a *prima facie* case of the prosecution failing, there is no call on the State to rebut his evidence to that effect.

A court hearing a bail application is not required to analyse the evidence regarding the merits of the charges in great detail.

The applicant's case appeared to be that the circumstances were exceptional because even though the charges against the applicant were extremely serious, the State's case was, on a proper analysis, very weak. Having regard to the evidence, the Court concluded otherwise, finding that the strength of the State's case did not constitute exceptional circumstances within the meaning of section 60(11). On the other hand, the State had made out a case for exceptional circumstances under section 60(4)(a) and (e) that it was not within the interests of justice to grant bail. The factors advanced by the State weighed more heavily than the personal freedom of the applicant and the prejudice he was likely to suffer due to the continuation of custody pending the trial.

The application for bail was dismissed.

Tucker v Additional Magistrate, Cape Town and others and a related matter [2019] 2 All SA 852 (WCC)

Criminal law and procedure – Applicant to stand trial on charges pertaining to the alleged sexual assault of minors – Extradition to the United Kingdom – Extradition is regulated by the Extradition Act 67 of 1962 – Enquiry before magistrate – Improper conduct of proceedings – Breach of the appellant's constitutional rights in terms of section 35 of the Constitution.

In November 2017, a Magistrate's Court order was issued, declaring that the appellant was liable to be extradited to the United Kingdom to stand trial on charges pertaining to the alleged sexual assault of minors, and committing him to prison whilst awaiting the decision of the Minister of Justice in respect of his surrender. The appeal was against that order. Also before the Court was an application to review and set aside the proceedings before the magistrate on the grounds that they were manifestly and grossly irregular in numerous respects, in breach of the appellant's constitutional rights.

Held – Extradition has been described as a process based on treaty, comity or reciprocity, which is initiated by a formal request from one sovereign State to another, by means of which a person accused or convicted of the commission of a serious criminal offence within the jurisdiction of the requesting state, is surrendered to its courts for trial or the imposition of punishment. It consists of a series of acts, partly

judicial, executive and administrative in nature. Extradition proceedings are not about determining the guilt or innocence of an offender, but are aimed at determining whether there is lawful cause to surrender the offender to a foreign state, in order that he or she should face justice in such other state. In our law, extradition is regulated by the Extradition Act 67 of 1962, and the terms of any applicable treaty (ie extradition agreement which has been entered into with any foreign state and which has been ratified or acceded to by Parliament). The Act provides that any person who has been arrested in terms of a warrant, pursuant to a request for his extradition, shall be brought before a magistrate, who shall hold an enquiry with a view to his possible surrender to the foreign state concerned. Significantly, proceedings are to be in the form of an enquiry and not a trial. The rules of evidence are therefore somewhat more relaxed in the enquiry.

Having regard to the record of proceedings, the present Court noted that the appellant was badly treated both by the prosecutor and the magistrate, who was driven by impatience and intemperate haste to conclude the proceedings as quickly as he was able to without having due regard for the appellant's procedural rights. The prosecutor was also allowed to have free rein in his cross-examination and the magistrate failed to control him. However, the record showed that the appellant was not intimidated by the prosecutor and there was no suggestion that he was in any way unable to put before the Court what he wanted to by way of his own evidence. There was no reason to set aside the proceedings, and the failure to allow appellant to put forward affidavits and other evidence was remedied by remitting the matter to the magistrate and affording the appellant such an opportunity, before the matter could be referred to the Minister.

Uzani Environmental Advocacy CC v BP Southern Africa (Pty) Ltd [2019] 2 All SA 881 (GP)

Environment – Environmental Conservation Act 73 1989 – Contravention of section 22(1) read with sections 21(1) and 29(4) of the of Environmental Conservation Act 73 1989 – Private prosecution – Defence of lack of title to prosecute – Notice in terms of section 33(2) of the National Environmental Management Act 107 of 1998 was defective because it failed to identify the accused or the alleged offence with sufficient accuracy.

Leave was obtained by a an environmental group ("Uzani") to bring a private prosecution against a company ("BP") for alleged contravention of sec-tion 22(1) read with sections 21(1) and 29(4) of the of Environmental Conservation Act 73 1986.

BP formally pleaded to the charges. Its plea was divided into two sections. The first was a plea under section 106(1)(h) denying Uzani's entitlement to prosecute and the other is a plea of not guilty under section 106(1)(b).

Held – Defence of lack of title to prosecute was based firstly on the averment that the notice in terms of section 33(2) of the National Environmental Management Act 107 of 1998 was defective because it failed to identify the accused or the alleged offence with sufficient accuracy. The Court disagreed, and held that it was quite clear what the offence related to and who the accused was.

The Court also rejected the defence that there was no prior consultation with the Directorate of Public Prosecutions as envisaged by section 8 of the Criminal Procedure Act 51 of 1977. The Court was satisfied on the evidence presented that

there was consultation bearing in mind that a consultation need not necessarily be face to face (but may be satisfied by a phone call or the exchange of correspondence) to reach consensus.

The next question was whether the prosecution was in the public interest or in the interests of the protection of the environment. Detailing the conduct of BP, the Court found that the prosecution was in the public interest.

The Court went on to find BP guilty of numerous offences as listed in its order.

End-for now