LEGAL NOTES VOL 7/2019

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BARKER v BISHOPS DIOCESAN COLLEGE AND OTHERS 2019 (4) SA 1 (WCC)

Costs — Security for costs — Peregrine plaintiff — Private individual — Court's discretion to order security — Plaintiffs, foreign-based parents and their son, instituting action against incolae — Son pleading poverty in resisting order for provision of security — Stifling of claim — Court entitled to consider all son's potential sources of funding, including parents — Appeal against order directing him to furnish security dismissed.

The issue in the present case involved the court's discretion to order peregrine private individuals to furnish security for the costs of claims pursued against incolae of South Africa.

The plaintiffs, MB and his parents, were permanent residents of the United Kingdom who owned no SA assets. They claimed damages from the defendants for injuries MB sustained in South Africa in 2005. Being peregrini, the plaintiffs initially furnished security for the defendants' costs, but they refused to increase it when the defendants later complained that it had been depleted by the costs incurred by the plaintiffs. The defendants successfully applied to the High Court seized of the matter for an order directing the plaintiffs to furnish additional security. MB appealed to a full bench (the present appeal).

The defendants (the respondents in the appeal) based their right to security on the plaintiffs' status as peregrini. The High Court granted their application on the basis of what it regarded as the plaintiffs' inadequate disclosure of their financial situation. In the appeal MB argued that the High Court should have considered his financial position in isolation from that of his parents, and that he had adequately established his financial inability to provide security. MB further argued that he would suffer disproportionate prejudice if this were to stifle his claim.

Held

While peregrini were generally obliged to provide for security for costs for litigation conducted in South Africa, incolae had no right to demand it: it was a discretionary matter for the judge, who had to conduct a balancing exercise, taking into account considerations of equity and fairness and weighing the injustice to the plaintiff if prevented from pursuing his claim by an order for security, and the injustice to

[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!**

defendant if no security was ordered (see [26] – [27]). A litigant resisting an application for security had to provide documentation to support allegations of impecuniosity, and a failure to do so might lead to the inference that the allegations were unfounded and that undisclosed documentation might contradict them (see [10]).
If MB had wanted the High Court to consider his financial position in isolation from that of his parents, he should have shown, on a balance of probabilities, that being required to furnish security would stifle his action. It was incumbent on him to clearly set out the financial backing available to him from all sources, including his parents (see [18]). But he failed to do so, and the resulting lack of detail undermined his allegation that his claim would be stifled, should he be ordered to furnish security (see [20] – [21], [24]). Since it was probable that MB had access to funds from his parents, he had failed to show that he would be unable to furnish security if considered separately from them, or that he would as a result of this inability be unable to continue with the action (see [50]). Accordingly the High Court's finding that MB was not impecunious was correct (see [51]). Appeal dismissed.

CAPE GATE (PTY) LTD AND OTHERS v ESKOM HOLDINGS (SOC) LTD AND OTHERS 2019 (4) SA 14 (GJ)
Electricity — Supply — Eskom — Duty to supply end users where municipal intermediary defaulting on Eskom debt — Right of end user to enforce supply — User having public-law right to electricity supply, directly enforceable against Eskom — Eskom's decision to interrupt supply potentially reviewable under Promotion of Administrative Justice Act 3 of 2000.
Electricity — Supply — Termination — Remedy — Eskom deciding to cut off supply to delinquent municipality — Court declaring intragovernmental dispute — Dispute referred back to Eskom and municipality for resolution within six months, failing which Eskom's decision to terminate may be set down for review — Constitution, s 41(3), s 41(4).

The applicants bought their electricity from the Emfuleni Municipality (the second respondent), which in turn bought it in bulk from Eskom (the first respondent). When Emfuleni defaulted on its Eskom debt (over R1 billion), Eskom decided to interrupt its electricity supply, which in turn threatened the survival of the applicants' businesses. The applicants sought interim and final relief. The final relief was administrative review of Eskom's decision, the interim relief an interdict prohibiting Eskom from implementing its decision pending the review (alternatively directing it to keep Emfuleni supplied; or directing Emfuleni to pay up; or directing the parties to come up with a payment plan).
The present judgment concerned the application for interim relief. One of the issues was whether the court should intervene in what was, in essence, a dispute between two organs of state, Eskom and Emfuleni. Intragovernmental disputes are regulated by s 41 of the Constitution, which directs parties to such disputes to make every reasonable effort to settle them before approaching the courts (s 41(3)), and allows courts confronted with them to refer them back if such effort was not made (s 41(4)). The applicants proposed a referral under s 41(4) and a report-back within 60 days.
Held
The applicants were obliged to establish the traditional requirements for interim relief — a prima facie right threatened by impending and irreparable harm, a favourable balance of convenience, and the absence of another remedy — before the court

would make a restraining order (see [8], [106], [109] – [110]). The applicants' prima facie right consisted in their right to just administrative action under PAJA, which in turn presumed the existence of another right, the one endangered by the decision (see [113] – [114]). In the present case that right was applicants' right to insist A that Eskom discharge its public-law duty to supply electricity to paying consumers downstream of Emfuleni (see [125], [130], [134] – [136]). Since Eskom's decision would adversely affect that right by destroying applicants' businesses, it constituted administrative action for the purposes of PAJA (see [136] – [139]). The next question was whether the decision and its consequence were rationally connected to that purpose (see [128]). Since it was unlikely that the problem of non-payment by Emfuleni would be solved by the termination of the electricity supply to large, paying customers, Eskom's decision was neither rational nor reasonable (see [139] – [152]). It followed that, at least on a prima facie level, the applicants showed that the interruption decision was reviewable under PAJA (see [153]).
As to the other requirements for interim relief (irreparable harm, balance of convenience and availability of another remedy): if the interruption were proceeded with, it would shut the applicants down and render the review moot, yet Eskom would not be destroyed were the decision not implemented; and the applicants had no alternative than to seek a restraint on Eskom's right to interrupt the supply of electricity.
Since there existed a dispute between Eskom and Emfuleni as to how to resolve the latter's indebtedness, which the parties did not reasonably attempt to resolve via the available mechanisms, the court would refer the matter back under s 41(4) (see [160]). The court would accordingly grant a six-month interim interdict pending the resolution of the dispute by the state organs involved. During this time the applicants would be allowed to make their electricity payments directly to Eskom.

LS v RL 2019 (4) SA 50 (GJ)
Customary law— Customary marriage — Requirements — Handing-over of the bride — Custom declared discriminatory and unconstitutional — No longer requirement for existence of customary marriage — Recognition of Customary Marriages Act 120 of 1998, s 3(1).

The customary-law usage of handing over a bride to the bridegroom's family, being inherently discriminatory, is no longer an essential prerequisite for the validation and existence of a customary-law marriage. As such it is not a prerequisite for customary marriage under s 3(1) of the Recognition of Customary Marriages Act 120 of 1998. The applicant, relying on her status as the customary-law wife of one JT, sought an urgent order to interdict JT's father, the respondent, from burying him. The respondent argued, inter alia, that since the applicant had not been ceremonially handed over to the groom's family, she was not JT's customary-law wife. The court, while finding in the applicant's favour that she was JT's customary-law wife despite the non-handing-over, refused her application on various practical grounds (see [42]).

MBELE v ROAD ACCIDENT FUND 2019 (4) SA 65 (WCC)
Motor vehicle accident — Compensation — Claim against Road Accident Fund — Definition of 'motor vehicle' — 72-ton 'reach stacker' used to lift and move containers around harbour — Differing from forklift in that designed to be used on roads — Qualifying as 'motor vehicle' for purposes of s 1 of Road Accident Fund Act 56 of 1996.

The appellant's husband, a stevedore, was knocked over at his workplace, Cape Town Harbour, by a so-called 'reach stacker'. He later succumbed to his injuries. The stacker in question, a large diesel-powered machine designed to grab, lift, move and load ocean containers, was 12 metres long, 4 metres wide, and weighed over 70 tons

The appellant sued for loss of support under the Road Accident Fund Act 56 of 1996, but the Fund disputed liability on the ground that the stacker was not a 'motor vehicle' as defined in s 1 of the Act, thus excluding the claim from its ambit. Section 1 defines 'motor vehicle' as a 'vehicle designed for propulsion . . . on a *road*', which was itself not defined and so had to bear its ordinary dictionary meaning (see [7]).

It appeared that while the stacker had a normal Cape Town registration number, its weight and size prevented it from operating on public roads without appropriate escort. In its day-to-day operations it did duty on both public and non-statutory roads within Cape Town Harbour.

A single judge of the Cape Town High Court concluded that the stacker was not a motor vehicle as defined in s 1. In an appeal to a full bench, counsel for the respondent argued that the present case was on all fours with *Mutual and Federal Insurance Co Ltd v Day* 2001 (3) SA 775 (SCA), in which the Supreme Court of Appeal found that a motorised forklift was not a motor vehicle as contemplated under the Act's predecessor.

Held

Precedent dictated that the court had to objectively ascertain what the primary purpose of the design of the road stacker was. If, in giving effect to that purpose, it might need to travel on a road, then it would follow that it was a 'motor vehicle' as defined in the Act (see [13]). The test was not whether it travelled on roads, but whether, viewed objectively, the persons responsible for its design *intended* that it should be propelled on a road (see [24]).

The stacker was clearly designed and equipped to move around the harbour along roads and over adjacent areas such as parking and storage lots in the ordinary course of its work, and the fact that it might need to be escorted along certain of those routes did not detract from the fact that that was still part and parcel of its everyday work (see [29]).

The utility of a stacker was different from that of the forklift in *Day*, in that it was required as part of the stacker's everyday function to traverse both public and non-statutory roads. Since its designers, objectively viewed, would have contemplated that it would be required to be propelled along such roads, it was a motor vehicle as intended in s 1 of the Act (see [32]). Appeal upheld.

PINE GLOW INVESTMENTS (PTY) LTD AND OTHERS v BRICK-ON-BRICK PROPERTY AND OTHERS 2019 (4) SA 75 (MN)

Practice — Judgments and orders — Suspension of execution — Application for rescission of court order does not automatically suspend its operation — Party fearing irreparable harm from execution having remedy in rule 45A of Uniform Rules.

Practice — Judgments and orders — Suspension of operation — Application for its rescission not automatically suspending order of court — Judgments holding otherwise wrongly decided.

An application for the rescission of a court order does not automatically suspend its execution. A party fearing irreparable harm from the execution of a bad order can

apply under rule 45A of the Uniform Rules of Court (which states that '(t)he court may suspend the execution of any order for such period as it may deem fit'), and there is no need to develop the common law in this regard (see [10] – [14]). Holding otherwise would result in parties resorting to meritless rescission applications to frustrate the execution of judgments or orders.

SOCIAL JUSTICE COALITION AND OTHERS v MINISTER OF POLICE AND OTHERS 2019 (4) SA 82 (WCC)

Equality legislation — Discrimination — What constitutes — Poverty qualifying as unlisted prohibited ground — Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, s 1 sv 'prohibited grounds' para (*b*).

This judgment dealt with the separated issue of whether the South African Police Service's human resources allocation policy in the Western Cape indirectly resulted in unfair discrimination — as contemplated in the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA) — against black and poor people. While race is listed under para *(a)* of the 'prohibited grounds' of discrimination in s 1 of PEPUDA, poverty is not. This raised the issue whether poverty constituted 'any other ground' under para *(b)* of the 'prohibited grounds'.
The court agreed with the applicant that, while the policy was ostensibly intended to benefit historically black, poor areas, it actually resulted in allocations which were skewed in favour of privileged and historically white areas. It held that this prima facie constituted indirect discrimination on the listed ground of race and on the unlisted ground of poverty; and that — the respondents having failed to discharge the onus of proving that such discrimination was fair — it was unfair under PEPUDA.

SYMONS NO AND ANOTHER v ROB ROY INVESTMENTS CC t/a ASSETSURE 2019 (4) SA 112 (KZP)

Financial institution — Financial services providers — Duty to investor — Liability of financial advisor for losses incurred by investor — Company recommended by advisor collapsed — Investor made informed decision to invest there — No breach — Collapse triggered by intervention of Reserve Bank — No causation either.

The plaintiffs instituted an action for damages against the respondent, represented by financial advisor G. G was registered with the Financial Services Board as a financial services provider. When the first plaintiff, S, a wealthy former company director, in May 2009 told G, his financial advisor, that he was interested in investments that would produce a monthly income, G mentioned Sharemax Investments (Pty) Ltd, a property syndication scheme. G explained that the Sharemax product was an investment in a shopping mall and that S would receive 12,5% interest from the date of the investment. G left S a brochure and a prospectus that, inter alia, described the investment as a risk capital investment in a newly formed company. Two weeks later S signed the investment documents. He eventually invested R5 million in Sharemax.
Then the Reserve Bank intervened. Accusing Sharemax of taking unlawful deposits from the public, the bank directed it to change its funding model, which it was unable to do. Finding it impossible to raise further funds, Sharemax collapsed.
While S did not initially blame G for having recommended Sharemax, he eventually sued the defendant. S alleged that the defendant undertook to advise the plaintiffs on low-risk investments; to execute its mandate with the diligence and skill expected of financial advisors (which the defendant represented it possessed); and that the

defendant would not recommend any investment until it had satisfied itself that it was low-risk.
The plaintiffs contended that, contrary to these undertakings, the defendant persuaded them to invest in Sharemax, which it falsely represented to be a low-risk investment with guaranteed returns. This, and defendant's failure to exercise the requisite level of skill and diligence by properly investigating Sharemax, resulted in the loss of their investment. The plaintiffs specifically pleaded that it was a material term of the agreement until it had satisfied itself that it was a low-risk investment.
In deciding whether the defendant was liable, the court considered the following issues: the risk attaching to the investment; whether the defendant breached its contractual obligations; and whether any such breach was the cause of the plaintiffs' loss.
Held
The allegation that the defendant, via G, breached its contractual obligations by advising the plaintiffs to invest in Sharemax made little sense since S understood he was investing in a syndicated property development (see [42]). And since the documents S had signed made it clear that repayment of income and capital was *not guaranteed*, there was no basis for a finding that G told him otherwise (see [44]). On the information given to S, he was able to make an informed decision, and it was probable that he substantially understood the nature of the investment, and went into it with his eyes open (see [51], [68]). S's initial failure to blame G tended to show that the aim of the action was to get compensation from the defendant's professional indemnity insurer without having to go to court (see [52]).
It could not in the circumstances be said that G breached his contractual obligations to the plaintiffs (see [53]). But even if it were so, the cause of the collapse was the unforeseeable intervention of the Reserve Bank, in the absence of which the scheme would, on the evidence, probably have succeeded (see [56]). The cause of the loss was the intervention of the Reserve Bank, and not any breach on the part of the defendant (see [58]). Even if it could be said that G failed in his duty to understand the scheme better and to explain the potential risks to S, any such breach was not causally connected to plaintiffs' loss (see [61]).
Oosthuizen v Castro and Another 2018 (2) SA 529 (FB), in which a financial services provider was held liable for damages after he had recommended an investment in the Sharemax scheme, did not assist the plaintiffs because there was no evidence led in *Oosthuizen* that the scheme probably would have been successful had the Reserve Bank not intervened, and also because the circumstances in *Oosthuizen* were quite different.
S was an astute businessman who made a considered investment when the intervention of the Reserve Bank, the cause of his loss, was not foreseeable by G. In the circumstances the plaintiffs failed to establish liability on the part of the defendant.

BERGRIVIER MUNICIPALITY v VAN RYN BECK 2019 (4) SA 127 (SCA)
Delict — Elements — Negligence — Storm-water system overwhelmed and home flooded — Alleged negligent and wrongful omission to provide effective system.
In 2011, following rainfall, the storm-water system near Mr Van Ryn Beck's home was overwhelmed, and his house was flooded (see [1], [6] – [7] and [15]).

Van Ryn Beck later sued the municipality for his damages, alleging it had negligently and wrongfully failed to provide an effective system; to maintain the system; and to timeously effect flood-prevention measures (see [42]).
The High Court dismissed the action, concluding that the evidence established neither negligence nor wrongfulness, nor causation (see [3] – [4]).
Van Ryn Beck appealed to the full bench, which upheld the appeal (see [5]). It was satisfied the evidence established those elements (see [40]).
The municipality here appealed to the Supreme Court of Appeal. It agreed with the High Court (see [45]).
In its view, as regards negligence, Van Ryn Beck had failed to establish what could be foreseen by the municipality, and what steps it could have taken to prevent the flooding (see [47] and [49]).
Concerning wrongfulness, such a finding would result in an onerous duty on municipalities generally, and would ignore the budgetary priorities of the Bergrivier Municipality specifically.
Appeal upheld; the full bench's order set aside; and substituted with an order dismissing Van Ryn Beck's appeal against the High Court's decision (see [55]).

BF v RF 2019 (4) SA 145 (GJ)
Marriage — Divorce — Proprietary rights — Accrual system — Whether Act permitting exclusion from accrual of asset not possessed at commencement of marriage, and not later acquired by virtue of an asset possessed at commencement — Matrimonial Property Act 88 of 1984, s 4(1)(*b*)(ii).

Husband, respondent, and wife, appellant, were married out of community of property but with accrual. They were presently in divorce proceedings, and disputed a clause of their antenuptial contract excluding, inter alia, certain shares from the husband's estate, for purposes of the accrual calculation (see [1] – [2]).
Factually, on the commencement of the marriage, the husband had possessed a certain number of the shares (see [3]). These, it was not disputed, were excluded from the calculation (see [3]). However, during the marriage the husband had acquired further shares in the company concerned, and the issue was whether these were excluded from his estate for accrual purposes (see [4]). These additional shares had not been acquired through the fruits, or realisation, of any of the shares possessed at the commencement of the marriage (see [25]).
A single judge, who was presented with the issue in a stated case, held that the clause excluded the shares acquired after commencement of the marriage (see [37]).
Here, the wife appealed to the full bench.
It *held* (Sutherland J and Matojane J concurring, Siwendu J differing), that properly interpreted, the clause did not exclude the later-acquired shares from the husband's estate (see [11] – [12]).
Moreover, the Matrimonial Property Act 88 of 1984 only permitted exclusion, in an antenuptial contract, of assets actually possessed at the commencement of the marriage (see [22] and [26] – [27]). These, and assets acquired later, by virtue of them, could alone be excluded (see [25]). Assets not already possessed on commencement, and which would not derive from assets held on commencement, could not be excluded (see [20] and [23] – [24]).
Appeal upheld, and it declared, inter alia, that only the shares possessed at the commencement of the marriage were excluded from the accrual calculation.

GORA v KINGSWOOD COLLEGE AND OTHERS 2019 (4) SA 162 (ECG)

Delict— Elements — Negligence — What constitutes — Classroom left unattended for one hour — In that time plaintiff provoking, and being struck in face by fellow pupil — No negligence found.

Education — School — Delicts — Liability of school — Classroom left unattended for one hour — In that time plaintiff provoking, and being struck in face by fellow pupil — No negligence found.

Through an oversight, a grade 9 history class at first defendant school was left unattended for an hour, and in that time plaintiff, then a 15 year old, provoked and was struck in the face by another 15-year-old pupil. The blow broke plaintiff's glasses and injured his eye, and here, aged 20, he sued for his damages.

Defendants were the school, the trust that administered it, and an entity that administered the school (see [23] – [24]). Plaintiff's claim was that leaving the class unattended was negligent and wrongful (see [5]). Defendants denied negligence, but asserted that were it established, then liability therefor was excluded by the contract between plaintiff's parents and the school (see [6] and [10]). They did, however, concede wrongfulness (see [7]).

Held, that the law was to the effect that the degree of supervision required was dependent on the risks in the environment concerned (see [32] and [36]).

Here, it was not foreseeable that, left unattended, the incident would occur (see [40]).

This because:

- there were no inherent risks in the classroom;
- the school was 'extremely well regulated';
- pupils were daily left unsupervised outside the classroom without incident; and
- the age of plaintiff and the boy he had provoked supported an expectation that they would act maturely (see [40]).

Accordingly, neither negligence, nor indeed gross negligence, established, and action dismissed (see [40], [43] and [45]).

INTERNATIONAL FRUIT GENETICS LLC v REDELINGHUYS AND OTHERS NNO 2019 (4) SA 174 (WCC)

Practice — Judgments and orders — Foreign judgment — Enforcement — Ministerial permission for enforcement — Requirement of where judgment or order arising from act or transaction connected with possession of 'matter or material' — Whether vines and grapes were 'matter or material' — Partial enforcement of foreign order — Protection of Businesses Act 99 of 1978, ss 1(1)(*a*) and 1(3).

Applicant, an American company, applied for the recognition and enforcement of a judgment of a Californian court which it obtained against first and second respondents, who were the trustees of a trust (see [1]).

Applicant, the holder of rights in certain varietals of grapes, had entered agreements with the trust allowing it to plant, grow and market certain of the varietals (see [3]).

Applicant later discovered the trust was growing quantities beyond those permitted and varietals that were not authorised, and it cancelled the agreements (see [4]).

The trust disputed the cancellation and ultimately the applicant obtained (i) a declaration in the Californian court that the cancellation was valid, and (ii) an injunction on the trust's use of its plant material and information. The injunction also directed the destruction of all such material in the trust's possession (see [6] – [7]).

The trust initiated an appeal that was pending (see [8]).

The issues in the High Court were:
(1) Whether ministerial permission was required before the court could enforce the judgment (see [13]). This would be the case where the judgment arose from an act or transaction connected with, inter alia, the production, possession and use of 'any matter or material'. (See [15] and ss 1(1)*(a)* and 1(3) of the Protection of Businesses Act 99 of 1978.) *Held*, that it was not required because the vines and grapes concerned did not fall within the meaning of 'matter or material' in the section (see [25]).
(2) Whether third respondent had a right to cultivate the vines. If it did, this would preclude an order for their destruction (see [13] and [27] – [28]). *Held*, that it did not (see [29] and [44]).
(3) Whether, given the pending appeal, the judgment ought to be enforced (see [13] and [45]). *Held*, that enforcement of certain of the orders might have irreversible negative consequences, and render success on appeal meaningless (see [47] – [48]). In order to avoid this, only part of the Californian order ought to be enforced (see [50] – [51]).
The judgment and order of the Californian court, and taxation and a costs order recognised as binding on the trustees; but their immediate enforcement stayed in part.

PARKTOWN HIGH SCHOOL FOR GIRLS v EMERAN AND ANOTHER 2019 (4) SA 188 (SCA)

Education — School — Delicts — Liability of school — While attending fashion show at public school, table top falling onto and injuring boy's hand — Whether show a 'school activity' or 'enterprise or business', and thence whether state or school liable — South African Schools Act 84 of 1996, ss 36 and 60.

Second respondent, a boy, came to attend a fashion show at Parktown High School for Girls organised by its representative council of learners. After paying the entrance fee and entering the grounds, he at some point came to lean against a concrete table. The table, which was for use of learners, comprised a top which rested on, but was not secured to, its base. When second respondent so leaned, the top fell off and to the ground, and in so doing, injured his hand.
Second respondent and his father, first respondent, later instituted an action for their respective damages against the school. They based the action on the school's alleged omission to secure the table tops.
In response the school raised a special plea that the state was the proper defendant. This on the basis of s 60(1) of the South African Schools Act 84 of 1996. First and second respondent contended it was properly cited, on the basis of s 60(4). (See [1], [7] and [9].)
The High Court dismissed the plea but granted the school leave to appeal to the Supreme Court of Appeal.The issue there was whether the omission was in connection with a 'school activity' (s 60(1)), which would render the state liable; or in connection with a 'business' or 'enterprise', which would result in the school being liable. (See [7] and [11].)
Held, that the show was merely a 'school activity' and not an 'enterprise or business', and accordingly that the school had been miscited as the defendant. (See [15], [18] and [21].)
Appeal upheld; order of the High Court set aside; and replaced with an order upholding the special plea, and dismissing first and second respondents' claims.

TEMBU CONVENIENCE CENTRE CC AND ANOTHER v CITY OF JOHANNESBURG AND OTHERS 2019 (4) SA 194 (SCA)

Local authority — Streets and roads — Closure of part of street — Creation of bus lane bounded by rumbling stones and solid island — Section governing — Local Government Ordinance 17 of 1939, ss 66(1)(*b*)(i) and 67(1).

First appellant ran a service station on the north side of a west – east street. At the street's centre was a solid painted island with a gap opposite the station's entrance and another one a little further west. Vehicles on the south side of the line could use these gaps to cross to the north side of the street and access the station.

The City of Johannesburg later came to construct a pair of bus lanes at the centre of the street, and the painted central island was replaced by a concrete one with no gaps. Moreover, the bus lane on the south side of the street was separated by rumbling stones from the outer non-bus lane, on the south side.

The effect, said appellants, was a loss of custom from vehicles on the southern side. They sued for this loss.

The High Court dismissed the action.

On appeal to the Supreme Court of Appeal, the issue was whether the south side bus lane, rumbling stones, and concrete island, resulted in a permanent closure of a portion of a street, contemplated by s 67(1) of the Local Government Ordinance 17 of 1939 .

Held, that the lane, stones and island did not have this result (see [17]). There was merely a closure to a class of traffic (non-bus traffic) which was governed by s 66(1).

Appeal dismissed.

INDEPENDENT INSTITUTE OF EDUCATION (PTY) LTD v KWAZULU-NATAL LAW SOCIETY AND OTHERS 2019 (4) SA 200 (KZP)

Attorney— Admission and enrolment — Admission — Requirements — LLB degree obtained at any university — Constitutionality — Legal Practice Act 28 of 2014, s 26(1)(*a*).

Applicant, a private higher education institution, after accreditation and registration came to provide the LLB degree at certain of its campuses (see [2], [4] – [6] and [10]).

It however realised that first respondent law society had decided that LLB degrees provided by private higher education institutions would not meet the requirements for admission (see [6]).

First respondent based its decision on s 26(1)*(a)* of the Legal Practice Act 28 of 2014, which makes an 'LLB degree obtained at any university' a requirement for admission as a legal practitioner (see [7]).

This prompted applicant to apply, initially, to review the decision, and later to also challenge s 26(1)*(a)*'s constitutionality. (see [11] – [13]).

Held

- The word 'university' did not encompass private higher education institutions (see [15] and [23]);
- The section infringed applicant's right to establish and maintain an independent educational institution (see [24] and [26]); its right to equal protection and benefit of the law (see [27], [33] and [36]); it and its students' right to choose their trade, occupation or profession freely (see [37] – [39] and [47]);
- The limitations were unjustifiable (see [51] – [52]).

Ordered, inter alia, that s 26(1)*(a)* was constitutionally invalid in that it excluded accredited and registered private providers of LLB degrees; and that graduates with private institutions' LLBs were as qualified for admission as those with university LLB.

S v LIESCHING AND OTHERS 2019 (4) SA 219 (CC)

Appeal — Leave to appeal — Refusal by Supreme Court of Appeal — Referral by President of Supreme Court of Appeal for reconsideration — 'Exceptional circumstances' — Meaning of — Superior Courts Act 10 of 2013, s 17(2)(*f*).

The applicants were convicted and sentenced in the High Court on various counts, including murder. Without success, they applied, first to the High Court, and then to the Supreme Court of Appeal (SCA), for leave to appeal. Subsequently, a further person was charged for his involvement in the same crimes for which the applicants had been convicted. A witness upon whom the state had relied in the applicants' trial to convict them once again testified for the state. This time, however, the witness recanted his earlier testimony against the applicants. This turn of events prompted the applicants to apply, in terms of s 17(2)*(f)* of the Superior Courts Act 10 of 2013, to the President of the SCA to refer the decision refusing leave to appeal to the court for reconsideration, based on new evidence. Ultimately, the President refused, on the basis that the applicants had failed to prove the existence of 'exceptional circumstances', as demanded by the provision in question. The applicants consequently applied to the Constitutional Court for leave to appeal that refusal.

A question arose as to whether the Constitutional Court possessed jurisdiction to hear an appeal of the kind in question, ie one against a decision by the President, in terms of s 17(2)*(f)* of the Act, that no exceptional circumstances existed justifying a referral for reconsideration of a refusal of an application for leave to appeal to the SCA. The parties had assumed that the court did have such jurisdiction. Given that, and the consequent lack of full argument from them on what was a complex question, the court made the same assumption, without resolving the question. It proceeded to deal with what was meant by 'exceptional circumstances', and whether the President of the SCA was correct in finding that none were present. (See [125] – [127].)

Held, that the phrase 'exceptional circumstances' as it appeared in s 17(2)*(f)* of the Act could not be generally defined, as each case had to be considered on its own facts (see [132]). However, without being exhaustive, exceptional circumstances, in the context of s 17(2)*(f)*, should be linked to either the probability of grave individual injustice or a situation where, even if grave individual injustice might not follow, the administration of justice might be brought into disrepute if no reconsideration occurred. The section was not intended to afford disappointed litigants a further attempt to procure relief that had already been refused. It was intended to enable the President to deal with a situation where otherwise injustice might result and did not afford litigants a parallel appeal process in order to pursue additional bites at the proverbial appeal cherry. (See [138] – [139].)

Held, that it was doubtful that the relief sought by the applicants on appeal to the SCA — ie that their convictions and sentences be set aside and their case be sent back to the High Court for the hearing of further evidence — would have been granted. That is, they would likely have failed to establish that there was a prima facie likelihood of the truth of the evidence, and that it was materially relevant to the outcome of the trial. The simple about-turn by the witness, without any externally verifiable signifier, did not constitute exceptional circumstances conferring a

discretion on the President as envisaged in s 17(2)*(f).* As such, the President was correct in finding that no such circumstances existed, and no grave injustice would result if leave to appeal were refused. (See [145] and [161].) Application for leave to appeal accordingly dismissed.
(Kathree-Setiloane AJ, dissenting, after a detailed analysis of s 17(2)*(f)* and the meaning of the phrase 'exceptional circumstances' (see [34] – [52]), held that the new evidence did in fact constitute an exceptional circumstance; that the failure to refer the matter for reconsideration would result in a grave injustice to the applicants; and that it would be just and equitable for the court to substitute its decision for that of the President of the SCA. (See [112] – [113].)

CLOETE AND ANOTHER v S AND A SIMILAR APPLICATION 2019 (4) SA 268 (CC)
Appeal — To Constitutional Court — Leave to appeal — Against decision of President of Supreme Court of Appeal under s 17(2)(*f*) of Superior Courts Act whether to refer decision of SCA refusing leave to appeal — Normally no appeal lying against such decision of President — Superior Courts Act 10 of 2013.

The applicants, in respect of their individual matters heard in the High Court, had sought leave to appeal from the Supreme Court of Appeal. The SCA dismissed those applications. The applicants then applied to the President of the SCA, in terms of s 17(2)*(f)* of the Superior Courts Act 10 of 2013, to refer such dismissals (of the SCA) for reconsideration, given the existence of 'exceptional circumstances'. The President refused to do so. In the present proceedings before the Constitutional Court, the applicants sought leave to appeal such refusals by the President. The key question to be addressed was whether a decision under s 17(2)*(f)* of the Act was appealable to the Constitutional Court, which question in turn comprised two components: *(a)* Did the Constitutional Court have jurisdiction over these appeals? *(b)* If so, would it ordinarily grant leave to appeal against a s 17(2)*(f)* decision?
Held, that ordinarily the Constitutional Court would not have jurisdiction to hear these appeals. This was because, essentially, they amounted to appeals against factual findings of the President on whether exceptional circumstances existed. And appeals against purely factual findings did not ordinarily raise a constitutional matter, nor did they usually give rise to an arguable point of law, sufficient to bring the matter within the Constitutional Court's jurisdiction in terms of s 167(3)*(b)* of the Constitution. (The court held that such finding was enough to dispose of the present matters (see [20]). It left open the question whether a refusal by the President in terms of s 17(2)*(f)* was in fact a 'decision of a court', one of the prerequisites for the Constitutional Court to be vested with jurisdiction in terms of s 167(6) of the Constitution (see [20]). The court, however, presented the opposing points of view on this point at [29] – [34], and found the Act ambiguous in this regard.)
Held, in any case, that it would often not be in the interests of justice to grant leave to appeal (see [21] and [38]). Firstly, except in exceptional circumstances, a decision by the President under s 17(2)*(f)* was not final, but merely a limited procedural power to ensure that, in truly exceptional circumstances, a further decision could be taken by the Supreme Court of Appeal (see [40] – [41]). Secondly, to find as a matter of course that an appeal lay to the Constitutional Court against the decision of the President acting in terms of s 17(2)*(f)* would in effect create a dual appeal process (after a litigant had appealed to the Constitutional Court within the narrow ambit of s 17(2)*(f)*, they would still be able to appeal to the Constitutional Court in

respect of the merits) (see [47]). Thirdly, there would be no prejudice if the President's decision was not appealable. This was because the refusal of a s 17(2)*(f)* decision was not the end of the road for the litigant; they could still seek leave from the Constitutional Court to appeal against the merits of the judgment of the High Court. (See [62].)
Held, in conclusion, that normally no appeal lay against the decision pursuant to s 17(2)*(f)*. An applicant who wished to appeal had to do so within the ordinary appeal process. (See [64] – [65].)

EMAKHASANENI COMMUNITY AND OTHERS v MINISTER OF RURAL DEVELOPMENT AND LAND REFORM AND OTHERS 2019 (4) SA 286 (LCC)
Land — Land reform — Restitution — Purchase of land by state for restitution — Compensation of owner — Jurisdiction of Land Claims Court to determine compensation where Office of Valuer-General having valued property in question — Court retaining power to determine compensation and not bound by valuation — Property Valuation Act 17 of 2014, s 12(1)(*a*).

Land — Land reform — Land Claims Court — Jurisdiction — Power to determine or approve compensation upon expropriation or acquisition — 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 a settlement agreement later made an order of court, the Minister of Rural Development and Land Reform (the Minister) and the Regional Land Claims Commissioner, KwaZulu-Natal (collectively referred to as the state), acquired from various owners land that had been identified for the purposes of land reform. The agreement provided for the payment of 'just and equitable compensation', to be arrived at either by agreement between the parties or, in the case of disagreement, on determination by the court. The parties failed to reach agreement and the compensation fell to be decided by the court.
However, the state, shortly before the commencement of the court hearing, served on the landowners a document titled 'Notice', informing them that they would be paid as compensation the amounts referred to therein *as determined by the Office of the Valuer-General* (the OVG). It was the state's view that the parties and the court were, given the provisions of s 12(1)*(a)* of the Property Valuation Act 17 of 2014, * read with the definition of 'value' in the Act, bound by the OVG's determination. The present judgment addressed the impact of that Notice, and whether the Act constrained the parties and ousted the court's jurisdiction in the manner alleged.
Held, that the 'Notice' had no legal effect since it was not a decision by the Minister or the OVG as to the amount of compensation to be paid, but merely a document evidencing the compensation determined by the OVG, and for which compensation the Minister alleged she was bound to purchase the affected properties. (See [18], [22] and [28].)
Held, further that, on a proper reading of the Act, the court retained the power to determine just and equitable compensation in respect of land identified for land-reform purposes purchased by the Minister. It was not bound by the OVG's determination of value. Further, the Minister was not prevented from paying compensation that exceeded the value determined by the OVG. (See [34] – [37].)
(The court commented that the OVG's determination could at best be used as a guideline by the Minister when negotiating the purchase price of any property he or she intended acquiring under s 42D of the Restitution of Land Rights Act 22 of 1994. It added that the landowner should then be able to approach the court for a

determination of the just and equitable compensation, should they be unhappy with the value arrived at by the OVG and at which the Minister undertook to acquire the property.
Held, accordingly, that the Minister was not constrained by the Act in the manner alleged by the state (see [37]). Order granted in terms set out below.

MINISTER OF POLICE v VOWANA AND ANOTHER 2019 (4) SA 297 (ECM)
Practice — Judgments and orders — Judgments — Judgment rewritten by attorney with approval of magistrate — Independence and impartiality of judicial officers — Proceedings set aside on review.

Magistrates' court — Civil proceedings — Judgments and orders — Judgment — Salutary practice that delivery of reserved judgments be done in open court.

This was an application for the review and setting-aside of the proceedings and judgment in a matter — a successful claim against the applicant for damages for unlawful arrest and detention — heard in the magistrates' court, on the grounds of misconduct of the first-respondent presiding magistrate (the magistrate). The latter had written a draft judgment, and then faxed it to the second respondent, the attorney for the claimant in the delictual action. The magistrate and second respondent discussed the matter, and it was agreed that the latter would rewrite the draft judgment, who subsequently did so, making significant amendments and additions and returning it to the magistrate. The magistrate then signed that, considering it to be the final judgment. This all occurred without the applicant's knowledge. The magistrate subsequently faxed the signed version to the second respondent, and a copy of the judgment was made available in the court file, which was collected by the applicant.
The respondents raised the procedural point that there had been an undue 11-month delay in the bringing of these proceedings. But the court held that condonation should be granted (see summary of common-law principles on undue delay at [12]). It found that while there was no adequate explanation for the delay, the importance of the issues raised and the applicant's good prospects of success called for the matter to be heard (see [13]). As to the merits,
Held, that the magistrate, in abdicating his responsibility of writing a judgment to the second respondent, acted deplorably and improperly. His misconduct violated not only the constitutional principle of the independence and impartiality of judicial officers and the courts under s 165 of the Constitution but also the right to a fair trial under s 34 of the Constitution. (See [24], [26], [30], [31], [34], [35] and [43].) It also violated core values of the judiciary, including the prohibition on being a judge in one's own case (see [35]).
Held, as to the practice of the magistrates' courts of merely placing the judgment in the court file, that it was a salutary practice that delivery of a reserved judgment should take place in open court. The High Court and appellate courts routinely followed this practice, and there was no reason why magistrates' courts should not follow suit. (See [42].)
Held, accordingly, that the proceedings of the court a quo had to be set aside.

COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE v DIGICALL SOLUTIONS (PTY) LTD 2019 (4) SA 312 (SCA)

Revenue — Income tax — Scheme for avoidance of — Change in shareholding of company solely or mainly for purpose of utilising assessed loss — Requirements for disallowing utilising assessed loss — Where successive changes in company's shareholding in consecutive tax years — Purpose requirement may be satisfied by reference to any year of assessment in which income received — Where sole purpose of first change to preserve and utilise assessed loss, income received from second change may, as question of fact, be indirect result of first change — Income Tax Act 58 of 1962, s 103(2)(*b*)(A)(*aa*).

Section 103(2)*(b)*(A)*(aa)* of the Income Tax Act 58 of 1962 (the ITA) provides that the Commissioner may disallow the set-off of an assessed loss if satisfied that 'any change in the shareholding of any company . . . as a direct or indirect result of which . . . income has been received by or accrued to that company . . . has at any time been entered into or effected . . . solely or mainly for the purpose of utilising any assessed loss . . . in order to avoid liability on the part of that company . . . for the payment of any tax'.

The Commissioner invoked s 103(2)*(b)*(A)*(aa)* to disallow the utilisation by the taxpayer of assessed losses in respect of its 2005 – 2008 years of assessment. The taxpayer successfully challenged the resulting additional assessments in the Tax Court; the High Court dismissed the Commissioner's appeal; and the Commissioner appealed to the Supreme Court of Appeal.

This case featured two changes of shareholding in the taxpayer company, in consecutive years. First, all the taxpayers' shares were acquired by a company (SDM) in the 2003 year of assessment — when the taxpayer had an assessed loss of R47 884 445 carried over from its 2001 year of assessment. Then another company (Glasfit's nominee, Nutbridge) acquired the shares from SDM during the 2004 year of assessment. A portion of the consolidated assessed loss in question was set off against the taxpayer's income during the 2004 year of assessment, after the shares had been acquired by Nutbridge. (The assessment for the 2004 income tax period was not adjusted, because this was precluded by the lapse of time in terms of s 79 of the ITA, as it read at the time.) The balance was thereafter set off against the income of the taxpayer during the 2005 – 2008 income tax periods. These were the amounts subsequently disallowed by the Commissioner, and the subject-matter of the dispute.

The main issues before the SCA were whether the 'purpose' and 'income' requirements of the subsection were met. The taxpayer submitted that the first change in shareholding could not have been effected for the sole or main purpose of utilising the assessed loss, as there was no income during the taxpayer's 2003 year of assessment against which the assessed loss could be offset; and that the income that was received by it after the second change in shareholding was beyond the reach of s 103(2) of the Act because this income did not result directly or indirectly from the first change in shareholding but from the second change, upon which the Commissioner could not rely.

Held

SDM conceded that, at the time that it exercised its option to purchase the shares in the taxpayer, there was nothing left in the taxpayer except the assessed loss. The professed purpose in selling the shares to SDM — of making profit — was grossly improbable; it was only explicable on the basis the purpose was to ensure that it continued trading as at 30 June 2002 so as to ensure the preservation and carry-forward of the assessed loss. The taxpayer therefore failed to discharge the onus of proving that the first change in shareholding, when SDM purchased the shares in the

taxpayer, was not effected solely or mainly for this prohibited purpose. (Paragraphs [24] – [27], [39] and [51].)
The subsection expressly provided 'for the purpose of utilising *any* assessed loss' to avoid liability 'for the payment of any tax'. It also expressly disallowed the set-off of 'any such assessed loss' against 'any such income'. Therefore, the set-off of any assessed loss against any income that was received directly or indirectly by the taxpayer company, as a result of the change in its shareholding, will be disallowed (where the sole or main purpose in effecting the change in its shareholding was to avoid liability for, or to reduce the amount of, tax payable by the taxpayer). The purpose requirement of the subsection may accordingly be satisfied by reference to any year of assessment in which income was received, whether directly or indirectly as a result of the change in shareholding of the taxpayer company, which was effected, whether solely or mainly, for the prohibited purpose. (Paragraph [11].)
Whether income had been received by, or accrued to, a company 'as a direct or indirect result' of the change in shareholding was a question of fact. These clearly illustrated that the taxpayer's large assessed loss, which SDM had conveniently carried over into the 2003 tax year, must have been of paramount importance to Glasfit. The conclusion, that SDM purchased the shares in the taxpayer with the sole, or at the very least the main, purpose of utilising the assessed loss to avoid liability on the part of the taxpayer for the payment of tax in the following tax years, must have had as its objective the enablement of Glasfit to utilise the assessed loss for the same prohibited purpose. The first change in shareholding therefore resulted indirectly in income being received by or accruing to the taxpayer during the 2005 – 2008 years of assessment.
It followed that the Commissioner was correct in concluding that the provisions of s 103(2) of the Act were satisfied and in disallowing the taxpayer's claim to set off the assessed loss against such income during these years of assessment. The appeal would therefore succeed. (Paragraphs [35], [57] – [58] and [61].) I

SA CRIMINAL LAW REPORTS JULY 2019

DIRECTOR OF PUBLIC PROSECUTIONS, KWAZULU-NATAL v RAMDASS 2019 (2) SACR 1 (SCA)

Appeal — Reservation of question of law — Application for in terms of s 319 of Criminal Procedure Act 51 of 1977 — Refusal of by trial judge in High Court — Challenge to refusal to be by way of s 317(5) of Act by petition to President of Supreme Court of Appeal.
Appeal — Reservation of question of law — Application for in terms of s 319 of Criminal Procedure Act 51 of 1977 — Refusal of by trial judge in High Court — Challenge to refusal — Proper interpretation of s 17(2)(*f*) of Superior Courts Act 10 of 2013.
Dissatisfied with the acquittal of the respondent on a charge of murder, the Director of Public Prosecutions (the DPP) requested the High Court to reserve a number of questions of law in terms of s 319(1) of the Criminal Procedure Act 51 of 1977 (the CPA) for consideration by the Supreme Court of Appeal.
The application was refused by the High Court, and then, instead of petitioning the Supreme Court of Appeal in terms of s 317(5) of the CPA, the DPP brought an application in terms of s 319(1) of the CPA, read with s 16(1)*(b)* of the Superior Courts Act 10 of 2013 (the SC Act), asking for special leave to appeal against the refusal. The application was considered by two judges of the Supreme Court of

Appeal designated by the President of the court, and, presumably because it was cast as an application for special leave to appeal, was dismissed on the erroneous ground that there were no special circumstances meriting a further appeal to the court.
Dissatisfied with this outcome, the appellant then applied in terms of s 16(1)*(b)* and s 17(2)*(f)* of the SC Act, read with s 319(1) of the CPA, for a reconsideration and variation of the refusal of special leave.
Held, that the application had followed the incorrect procedure and was defective in two respects: *(a)* special leave was not required: the state only required the ordinary leave of the Supreme Court of Appeal, and the provisions of s 16(1)*(b)* of the SC Act were not applicable. That section dealt with appeals against any decision of a division of the High Court taken on appeal to it, where the special leave of the Supreme Court of Appeal was required; and *(b)* the definition of 'appeal' contained in the SC Act provided that 'appeal' in ch 5, which included ss 16 and 17, did not include an appeal in a matter regulated in terms of the CPA. Because the appeal in the present matter was regulated in terms of the CPA, it followed that those sections of the SC Act did not apply. (See [9].)
Held, further, that the proviso to s 17(2)*(f)* of the SC Act qualified the finality of the decision by two judges in dealing with an application for leave to appeal under s 16, whether it was an application for leave or special leave. There was no equivalent provision in s 316, and there was no principle of statutory interpretation permitting a proviso to a section in the SC Act, qualifying appeals in civil cases and appeals from a court composed of more than a single judge in the High Court, to be transplanted to the provisions of the CPA governing appeals in criminal cases originating in the High Court. (See [15].)
Held, further, the proviso to s 17(2)*(f)* had to be understood as conferring on the President of the Supreme Court of Appeal a power, to be used in exceptional circumstances, for reconsideration of an application for leave to appeal or petition, whether brought in terms of s 16 of the SC Act or s 316 of the CPA, that had been refused. The fact that the incorrect section had been used as the source of the Supreme Court of Appeal's authority to grant leave to appeal could therefore be condoned, and the dismissal of the application be treated as a dismissal of a petition under s 316(13)*(c)* of the CPA. In dealing with it, the test to be applied was that applicable in any case on appeal against the refusal of a trial court to reserve a question of law for the Supreme Court of Appeal's consideration, not the test for the grant of special leave to appeal. (See [19].)
Held, further, that none of the issues relied upon by the state could be reserved as questions of law, there were no reasonable prospects of success and there was no compelling reason why an appeal should be heard.

S v BEALE 2019 (2) SACR 19 (WCC)
Sexual offences — Child pornography — Possession of in contravention of s 24B(1)(*a*) of Films and Publications Act 65 of 1996 — Sentence — Factors to be taken into account — Fact of possession creating market for illegal industry, and every image reflecting sexual violation of and impairment of dignity of child each time viewed.
Sexual offences — Child pornography — Possession of in contravention of s 24B(1)(*a*) of Films and Publications Act 65 of 1996 — Sentence — Accused convicted of 18 644 counts of possession of child pornography and sentenced to 15

years' imprisonment — Court taking into consideration that appellant also victim of abuse as child — Sentence reduced to 10 years' imprisonment.
The appellant, a 39-year-old unmarried man, was convicted in a regional court of 18 644 counts of contravening s 24B(1) of the Films and Publications Act 65 of 1996 (the Act), in that he had possessed digital images that depicted scenes of child pornography.
He was sentenced to 15 years' imprisonment and appealed against the sentence imposed on him. He had obtained the images by becoming a member of a child-pornography network, where members of the network engaged in peer-to-peer file-sharing of pornographic child images. Many of the images constituted hard-core and violent child pornography involving babies, toddlers and teenagers. It appeared that the appellant had, as a child, been subjected to severe emotional, sexual and physical abuse that may have played a role in the development of deviant sexual interests. It was acknowledged that he had a paedophilic disorder. He had no history of contact offences and had only one previous conviction, namely for the possession of cannabis.
On appeal, whilst acknowledging that the crime the appellant had been convicted of was a serious one, his counsel submitted that 'possession' was the least serious of the offences created by s 24B(1) of the Act.
Held, that, while accepting that the appellant had not been convicted of manufacturing child pornography or of molesting children, the argument, that he had 'only' possessed disturbing and disgusting images was a mitigating factor, ignored the reality that possession of the prohibited material created a trading platform or market for this illegal industry. Every image contained in child pornography reflected abhorrent prohibited sexual conduct, often including violence, involving children. Every image also reflected the sexual violation of and the impairment of the dignity of a child, each time that it was viewed. (See [15].)
Held, however, that, after balancing the mitigating and aggravating circumstances and including an element of mercy in view of the history of abuse suffered by the appellant in his younger days, a sentence of 10 years' imprisonment would be more appropriate and proportionate than the sentence of 15 years' imprisonment imposed by the court *a quo*. The disparity was such that the court was entitled to and obliged to interfere. The sentence was altered accordingly.

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS v THERON AND OTHERS 2019 (2) SACR 32 (WCC)
Prevention of crime— Forfeiture order — Prevention of Organised Crime Act 121 of 1998 — Immovable property subject to mortgage — Preservation order simpliciter in respect of immovable property resulting in preservation of property subject to its encumbrances — In circumstances no need for application in terms of s 52 to protect interest of holder of mortgage.
Search and seizure — Unlawful search — Effect of order of invalidity of provisions of Drugs and Drug Trafficking Act 140 of 1992 by Constitutional Court — Order prospective and not applicable to person opposing forfeiture application in terms of s 48 of Prevention of Organised Crime Act 121 of 1998 where search carried out before declaration of invalidity.
The present application was brought by the National Director of Public Prosecutions (the NDPP) for the forfeiture of certain immovable property to the state in terms of s 48 of the Prevention of Organised Crime Act 121 of 1998 (POCA) on the grounds

that it was either the instrumentality of an offence, or the proceeds of unlawful activities.
The application was opposed by the first to third respondents who, seemingly relying on s 52 of POCA, sought an order excluding their interests as trustees of a trust that held a mortgage over the property which acted as security for a loan of R1 million to the first respondent.
Held, that the trust's interest in the immovable property as security for the redemption of any claim it might have against the registered owner was not property that was subject to the preservation order and was therefore excluded from susceptibility to forfeiture in the NDPP's application. On a proper reading of POCA, and consistent with the ordinary incidence of the common law of property, a preservation order simpliciter in respect of immovable property resulted in the preservation of the property subject to its encumbrances, if any. In the circumstances, a need for the trustees to protect their interest in the immovable property, by way of an application in terms of s 52, did not arise on the facts.
In a further argument, the respondents contended that the evidence found in the search-and-seizure operation at the first respondent's property had to be excluded from consideration because it had been obtained unlawfully, based on the decision of the Constitutional Court in *Minister of Police and Others v Kunjana* 2016 (2) SACR 473 (CC) (2016 (9) BCLR 1237; [2016] ZACC 21). The judgment in that matter had been handed down nearly a year after the search at the first respondent's home.
Held, that the Constitutional Court had restricted its order of invalidity of the relevant provisions of the Drugs and Drug Trafficking Act 140 of 1992 to operate only prospectively. The court's remarks, that it was still open to the respondent in that case to challenge the admissibility of the search and seizure at her subsequent criminal trial, were not applicable to the present proceedings which were civil in nature. (See [21] – [22].)
Held, further, that it had to be accepted that the warrantless search-and-seizure operation conducted at the first respondent's premises was permitted at the time under the authority of an effective statutory provision. There was nothing to suggest that the information provided to the police did not afford them reasonable grounds to suspect that drug-related offences were being committed at the premises. The argument, that the evidence obtained in the operation should be excluded, could accordingly not prevail. (See [24].) The court granted the application and issued an appropriate order.

S v KOPSANI AND ANOTHER 2019 (2) SACR 53 (ECG)
Theft — Proof of — Circumstantial evidence — Reasonable inference — Possession, one month later, of two brand-new vehicles (of model not yet released) stolen from vehicle manufacturer — Such evidence not *per se* justifying inference that persons in possession of vehicles had stolen them — Conviction of theft changed to contravention of s 36 of General Law Amendment Act 62 of 1955.
The appellants (and two other accused who were not parties to the present appeal) were convicted of the theft of two brand-new motor vehicles from a motor vehicle manufacturer. The cars were of a model range that had not yet been released to the public. They were recovered exactly a month later in a police sting operation, after the vehicles had covered only 20 – 30 kilometres after having been stolen.
In the operation, the designated policeman agreed with the four accused to buy the vehicles for R40 000 in cash. He testified that he arranged to collect the vehicles the following day at a prearranged spot. On that day the four accused met the

policeman. The first appellant, who wanted to see the money, then went with the policeman to meet an undercover policewoman who had the money. Satisfied with the arrangements, the first appellant drove to the prearranged place where they met the other accused who drove the stolen vehicles to the spot. More police officials then arrived, and the four accused were arrested. The four accused testified that they had merely gone to pick up a friend at a hiking spot.
The magistrate held that, although there was no direct evidence that the accused had stolen the vehicles, they had been found in possession of the vehicles, had not given any explanation for their possession and had in fact denied that they had been in possession of the vehicles. In the circumstances the only inference that could be drawn from the facts was that the accused had stolen the vehicles.
Held, that the magistrate's factual and credibility findings could not be disturbed, but the issue was whether the inference that was drawn was justified on the facts. In the light of the evidence it could not be properly concluded by inferential reasoning that the accused were linked to the theft sufficiently to justify the conclusion that they had stolen the vehicles. This conclusion amounted to mere conjecture and the conviction of theft had to be set aside. (See [18] – [21].)
Held, further, in the circumstances where the appellants were found in possession of the vehicles and there was, at the time, a reasonable suspicion that the goods had been stolen and neither of the appellants had given a satisfactory explanation or any account at all of their possession of the vehicles, the appellants fell to be convicted of the alternative count, namely a contravention of s 36 of the General Law Amendment Act 62 of 1955.

BRACKENFELL TRAILER HIRE (PTY) LTD AND OTHERS v MINISTER OF TRANSPORT 2019 (2) SACR 62 (WCC)
Traffic offences — Moving violations in contravention of National Road Traffic Act 93 of 1996 — Proof of — Presumption in s 73(1) of Act — Application of to owner of trailer hired out to customer — Presumption not applicable to owner of trailer — Different considerations applying in respect of presumption in s 73(2) relating to stationary violations.
The applicants, the owners of a business that hired out trailers, experienced problems with the application by the authorities nationally of the presumption in s 73 of the National Road Traffic Act 93 of 1996 (the Act). This was because they, as the owners of the trailers, were presumed in terms of s 73(1) and (2), respectively, to have driven or parked the trailers in a manner that contravened the provisions of the Act, whereas the trailers in question had been driven or parked by their customers. Their frustrations caused them to launch the present application in which they applied for an order declaring that, on a proper construction of ss 73(1), (2) and (3) of the Act, the presumptions for which they provided were not applicable to trailers. The difficulties encountered by the traffic-enforcement agencies in this regard stemmed from their inability in most instances to establish the owner of the motor vehicle, their cameras only being able to pick up the registration number of the trailer which obscured the rear registration plate of the vehicle being driven. Hence their prosecutions targeting the applicants by virtue of being the owners of the trailers involved.
Held, that on a proper interpretation of the word 'drive' in the Act one did not drive a trailer and it was quite irrelevant to the task of a prosecutor attempting to prove the commission of a moving violation that a trailer was being driven at the time.

Therefore, the words 'such vehicle' in s 73(1) related to the vehicle that was being driven and not any other vehicle. (See [25].)
Held, further, that the respondent's argument, that a purposive construction of s 73(1) required accepting that the presumption applied against the owner of the trailer, because that was the only party that could be identified, meant that violence had to be done to the plain language of the provision and was fallacious. Engaging in that sort of legislative embroidery would be to add to the legislation, not to construe what the legislature had put there. If the lacuna were problematic it was for the legislature to remedy the position by amending the legislation. The presumption did not operate against the owner of the trailer in any prosecution where the trailer was being towed by another vehicle driven by the person involved in the commission of the offence. (See [28] – [31].)
Held, further, that different considerations applied to s 73(2): with parking offences it was the fact that the vehicle was stationary that constituted the offence, and if it were not, the owner who had put the trailer there, the owner would know who had been in possession of it at the relevant time. The applicants had accordingly not made out a case for relief in respect of s 73(2).

AFRIKA AND OTHERS v MINISTER OF POLICE 2019 (2) SACR 77 (GP)
Arrest — Detention of child — Unlawfulness of — Two-year-old twins taken by police to cell where mother detained and kept overnight, mother having to breastfeed them — Where detention of mother in violation of her constitutional rights and unlawful, children's rights also violated and their detention unlawful.
Fundamental rights — Rights of children — Detention of — Two-year-old twins taken by police to cell where mother detained and kept overnight, mother having to breastfeed them — Other women older than 18 years also occupying cell — Even if detention of mother lawful, detention of minor children with her unconstitutional if in violation of provisions of 28(1) of Constitution.
The first plaintiff, the mother of the second and third plaintiffs who were infants at the time of her arrest in 2014, instituted action against the defendant for her unlawful and malicious arrest and detention, and the unlawful and unconstitutional detention of her two infants. The plaintiff was accused by the complainant of having stolen a shack. The arresting officer appeared, however, to have misread the part of the complainant's statement where he said that he had located the shack and the person who should have been investigated was the occupier of the land where the shack was found. After her arrest, the police went to her home to fetch the two infants at the request of the first plaintiff, as she said that she needed to breastfeed them.
The defendant conceded that the first plaintiff's arrest and detention were unlawful, but denied liability in respect of the second and third plaintiffs on the grounds that the first plaintiff had insisted on having them with her in the cell overnight because she needed to breastfeed them.
Held, that s 28(1) of the Constitution provided that every child had the right not to be detained except as a measure of last resort. Where the detention of the mother or guardian of the child was in violation of her constitutional rights and unlawful, it followed that the rights of the minor children who were detained with her were equally violated and their detention unlawful. However, even if the detention of the mother were lawful, the detention of the minor children with her would be unconstitutional if in violation of the provisions of s 28(1), as in the present case where the second and third plaintiffs were kept in the same holding cell with their mother and other persons over the age of 18 years. (See [20] – [22].)

Held, further, that an award of damages of R250 000 for the first plaintiff and R100 000 in respect of each baby, would be appropriate.

PHAAHLA v MINISTER OF JUSTICE AND CORRECTIONAL SERVICES AND ANOTHER 2019 (2) SACR 88 (CC)

Prisoner — Parole — Eligibility of prisoner for placement on — Provisions of ss 136(1) and 73(6)(*b*)(iv) of Correctional Services Act 111 of 1998, in adopting date of sentence rather than commission of offence for coming into operation of harsher parole regime, inconsistent with ss 9(1) and (3) and s 35(3)(*n*) of Constitution — Parliament required to amend provisions within 24 months.

Prisoner — Parole — Eligibility of prisoner for placement on — Rules lengthening parole non-eligibility periods resulting in increase of severity of imprisonment and thereby imposing more severe 'punishment' within ambit of s 35(3)(*n*) of Constitution — Correctional Services Act 111 of 1998, ss 136(1) and 73(6)(*b*)(iv).

The applicant and a man granted leave to intervene were prisoners serving life sentences. In terms of the provisions of s 136(1), read with s 73(6)*(b)*(iv), of the Correctional Services Act 111 of 1998 (the 1998 Act), inmates sentenced to life imprisonment before 1 October 2004 were eligible for parole after having served 20 years. Inmates sentenced to life imprisonment from 1 October 2004 onwards, however, had to serve a minimum of 25 years before they could be considered for release on parole. Section 136(1) thus created a dual system of assessment, consideration and placement on parole of sentenced inmates determined by their date of sentence.

The applicant was convicted on 25 September 2004 and sentenced to life imprisonment on 5 October 2004. Because he was sentenced four days after the commencement of the new parole regime, he had to serve a minimum of 25 years before he became eligible for consideration for parole. Had he been sentenced a few days earlier, he would have had to serve only 20 years of his sentence before he could be considered for release. Aggrieved by this, he challenged the constitutionality of ss 136(1) and 73(6)*(b)*(iv) of the 1998 Act in the High Court, on the basis that they infringed his right to the benefit of the least severe of the prescribed punishments in terms of s 35(3)*(n)* of the Constitution, and his right to equality under s 9 of the Constitution.

The High Court held that s 35(3)*(n)* of the Constitution did not apply because non-eligibility for parole was not part of the punishment prescribed by a court, unless the court specifically imposed a non-parole period in terms of s 276B of the Criminal Procedure Act (the CPA). It did, however, find that the impugned sections amounted to a breach of the applicant's right to equality in terms of ss 9(1) and (3) of the Constitution because the use of the date of the sentence as a determining factor, rather than the date of commission of the offence, was arbitrary and irrational; led to a retroactive application of the law; and amounted to unfair discrimination against the applicant and inmates in his position. It held that, to the extent that the impugned sections imposed a stricter parole regime on the basis of date of sentencing, they were constitutionally invalid. In the present application the applicant applied for confirmation of the order.

Held, that, on a broad interpretation of s 35(3)*(n)* of the Constitution, at the very least, the legislated preconditions for parole eligibility in s 276B of the Criminal Procedure Act 51 of 1977 fell within the ambit of 'prescribed punishment' as intended by the section. (See [43].)

Held, further, that if it were accepted that parole was part of the punishment, then it also had to be accepted that people who committed similar offences at the same time could, depending on elements of the criminal-justice system beyond their control, receive punishments that differed vastly in severity. The different treatment meted out to the applicant immediately implicated the right to equality, and the court had to consider whether the different treatment of sentenced inmates contravened either s 9(1) or (3). It also triggered the right to receive the least severe of the prescribed punishments in terms of s 35(3)*(n).* (See [44].)
Held, further, that one of the tenets of the principle of legality enshrined by s 1*(c)* of the Constitution was non-retroactivity of the law. To afford protection from retroactivity only to one group and not to another therefore could not be a legitimate purpose. It could not have escaped the government's attention that, by extending the protection only to a group sentenced before 1 October 2004, the group sentenced after 1 October 2004 would be left exposed.
Held, further, that to say that it could be for a legitimate government purpose to differentiate on the basis of the date of sentence was to say that a purpose at odds with the rule of law was legitimate. For this reason, the government's purpose in differentiating between inmates on this basis was not legitimate and failed the test for s 9(1).
Held, further, that the transitional arrangements discriminated between people on the basis of their status as convicted persons. Although not a listed ground, this status was an attribute that undoubtedly had 'the potential to impair the fundamental dignity of [these] persons as human beings, or to affect them adversely in a comparably serious manner'. In the present case the impact of this differentiation was unfair, as it subjected a group of people to a more severe parole regime than those who happened to be sentenced earlier. This limitation of the right to equality could also not be justified under s 36 of the Constitution. (See [53].)
Held, accordingly, that the impugned provisions had to be declared constitutionally invalid insofar as they denied equal protection of the law on the basis of date of sentencing. This was, in itself, sufficient for holding the section constitutionally invalid. (See [54].)
Held, further, in respect of the right to a fair trial, that, since the rules lengthening parole non-eligibility periods resulted in an increase of the severity of imprisonment, the impugned provisions clearly had the effect of imposing a more severe punishment, and thereby also contravening s 35(3)*(n)* of the Constitution. (See [69].)
Held, further, as to what should take its place if the date of sentencing were abandoned: punishment and parole eligibility should be determined by the date of the commission of the offence. (See [70].)
Held, per Froneman J concurring, but disagreeing that s 9(1) had been contravened. Although s 9(1) required that the purpose and scheme be examined in proper context, it did not require an analysis of the impact of the impugned action or of the policy choices made, but merely required the government to have a defensible purpose, together with reasons for its actions that bore a rational relationship to the stated purpose, which it had done. (See [78].)
Held, per Cameron J, Dlodlo AJ concurring, that the legislation violated s 9(1) of the Constitution and had to be set aside on that ground too. (See [90].)

Director of Public Prosecutions, KwaZulu-Natal v Ramdass
[2019] 3 All SA 1 (SCA)

Criminal law and procedure – Reservation of questions of law in terms of section 319(1) of the Criminal Procedure Act 51 of 1977 – Irregular proceedings followed by court – Refusal of application – Petition for special leave to appeal refused.

The respondent was acquitted of murder on the ground that there was reasonable doubt whether he possessed the requisite criminal capacity, to appreciate that what he was doing was wrongful and to act in accordance with such appreciation, when he strangled the deceased. He alleged that he had no recollection of what had happened to the deceased on the evening when he killed her, as he had been drinking and smoking crack cocaine.

Dissatisfied with the outcome of the trial, the State then requested the court *a quo* to reserve a number of questions of law in terms of section 319(1) of the Criminal Procedure Act 51 of 1977.

The application having been refused by the court *a quo*, the State then embarked upon an incorrect jurisdictional path in order to challenge in this Court, the decision of the High Court. Whether that incorrect procedure resulted in this Court lacking jurisdiction to hear the appeal, had to be determined at the outset.

Held – Originally, the State had erroneously and unsuccessfully sought the special leave of the present Court (the "SCA") to appeal. The State then successfully sought and obtained from the President of the SCA an order in terms of section 17(2)(f) of the Superior Courts Act 10 of 2013, for a reconsideration and variation of the refusal of special leave by this Court. The Court reconsidered the order refusing special leave, and condoned the irregularities in the procedure followed by the State.

Turning to the merits, the Court examined the issues that the State sought to have reserved as questions of law and found that none of the issues sought to be reserved could be classified as questions of law. The Court concluded that the order refusing special leave to appeal should be varied, by replacement with an order refusing ordinary leave to appeal to the SCA.

Cell C Service Provider (Pty) Ltd v MEC: Free State Provincial Government: Department of Treasury [2019] 3 All SA 80 (FB)

Civil Procedure – Request for information – Non-joinder – Issue of third party notices – Validity of notices in question – Notices served in an irregular way – Rule 13(3)(b) of the Uniform Rules of Court provides that after the close of pleadings, a third-party notice may be served only with the leave of the Court.

In response to a call by the respondent for public tenders, the applicant submitted a bid for the supply and delivery of voice and data solutions to the provincial departments of the Free State government for two years. Its bid was successful, and an agreement termed the "Free State Provincial Transversal Contract" was entered into. The provincial transversal contract was terminated by effluxion of time on 30 August 2017, at which point it was converted into a month-to-month agreement which was finally extended to 13 October 2017. In early 2016, National Treasury invited public tenders for the supply and delivery of mobile communication services to the national government departments and the provincial government departments as from 15 September 2016 to 31 August 2020. Despite being aware of that, the

applicant did nothing to protect its interests. However, in the present application, it sought to challenge the respondent's decision to migrate from the provincial domain where the provincial transversal contract was operative to the national domain where the national transversal contract was operative. The respondent was requested to provide reasons and underscoring documents pertaining to its alleged unfair administrative decision in that regard.

Held – First issue for the Court to address was that of non-joinder. The question was whether the accounting officers of the four provincial departments that participated in the provincial transversal contract which was awarded to the applicant, should have been joined to the proceedings as co-respondents *ab initio*. Finding that each of the departmental accounting officers in question had a legal interest in the matter, the Court held that they should have been joined right from the onset. On that ground alone the Court would have struck the application off the roll with costs.

In an attempt to cure the above defect of the non-joinder, the applicant caused "third-party notices" to be issued. The respondent objected and complained that the notices in question were issued and served in an irregular way and that, therefore, they did not cure the defect occasioned by the non-joinder. Rule 13(3)(b) of the Uniform Rules of Court provides that after the close of pleadings, a third-party notice may be served only with the leave of the Court. As pleadings were already closed at the time the applicant's "third party notices" were issued and served, and the Court's permission had not been obtained, the service of the notices was improper.

The Court found further that the option to participate in the national transversal contract did not constitute an administrative decision because such an optional decision had no direct and external legal effects on any of the applicant's rights.

The application is dismissed, with an adverse costs order issued against the applicant for pursuing an unmeritorious application.

Chaba and others v S [2019] 3 All SA 103 (FB)

Criminal law and procedure – Participation in a criminal racketeering activity – Illegal mining – Appeal against conviction and sentence – Circumstantial evidence overwhelmingly pointing to guilt of appellants as illegal miners working in common purpose – Neither convictions nor sentences found to be assailable on appeal.

In April 2014, a clean-up operation was conducted at a gold mine, with the objective of flushing out suspected illegal miners. The appellants were arrested and charged in the wake of that operation. Despite their pleading not guilty on all charges, they were variously convicted and sentenced on numerous counts. Blanket leave to appeal was granted against all the convictions and sentences.

The grounds of appeal were that the trial court had erred in rejecting the possibly true versions of the appellants, and in accepting the allegedly doubtful version of the State. It was also submitted that the trial court drew questionable inferences from the circumstantial evidence without proven objective facts existing to justify such inferences. The appellants contended further that the prosecution had failed to prove the identity of the appellants as illegal miners. Finally, it was submitted that the trial court had erred in finding that the prosecution had proved the alleged offences beyond reasonable doubt.

Held – First question to be addressed was whether the alleged offences had in fact been committed. The appellants contended that there was no direct evidence

adduced proving the alleged illegal mining, removal of ore from the mine, or physical possession of the missing ore. The Court found the appellants' submissions to be without substance. The offence was that of participation in a racketeering criminal activity. The essential element was conspiracy to commit an organised criminal activity or to participate in an unlawful enterprise. Once participative agreement is established, the offence of organised crime is complete. It is that agreement that is of importance, and not the actual commission of the offence. The undisputed evidence in this case was of unlawfully constructed gold refining plants being discovered underground. The only reason for the existence of the plants could be the extraction of ore. The activity discovered pointed to an implicit agreement concerning the racketeering association. The appellants' attempt to cast doubt on whether any theft occurred was rejected. The Court accepted that there was clearly criminal mining activity taking place.

The next issue was whether the respondent had proved that any act of unlawful appropriation of gold from the mine had been committed. The Court held that the fact that there was no proof of the transportation of the ore out of the mine was irrelevant. The physical extraction of the ore from the rocks completely satisfied the element of appropriation required to prove the offence of theft. It was not necessary to prove that the ore had been transported out of the mine altogether.

The main ground of appeal related to the identity of the appellants as the perpetrators. The question on appeal was whether the evidence established beyond reasonable doubt that the appellants were involved in the racketeering enterprise. In order to resolve the issue, the Court examined the circumstances in which the appellants had been arrested. Most were arrested stepping out of the shaft cage elevator coming from underground. They were unable to identify themselves as legal miners and denied any participative involvement in the alleged illegal mining activities. However, the trial court correctly concluded that there could be no innocent explanation for their presence at the mine in accepting that the appellants were the illegal miners, the trial court committed no material misdirection.

A further submission by the appellants was that there was no evidence to sustain the trial court's finding that the appellants had acted with common purpose. The basis on which the doctrine of common purpose operates is the individual accused's active association with the common purpose of a group. The circumstantial evidence against the appellants in that regard was overwhelming. The trial court's conclusion was therefore unassailable.

All the convictions were confirmed on appeal.

Turning to the appeal against sentence, the Court issued a reminder of the limited powers of a court of appeal on the issue of sentence. It found no material misdirection warranting interference on appeal.

Consequently, the appeals against conviction and sentence were all dismissed.

Democratic Alliance v Public Protector and a related matter [2019] 3 All SA 127 (GP)

Constitutional and Administrative Law – Applications brought against report of the Public Protector – Maladministration by the Free State Department of Agriculture in respect of a dairy project – Powers and constitutional duties of the Public Protector reviewed – Review application brought on grounds of legality and setting aside.

Criminal law and procedure – Reservation of questions of law in terms of section 319(1) of the Criminal Procedure Act 51 of 1977 – Irregular proceedings followed by court – Refusal of application – Petition for special leave to appeal refused.

Two applications were brought against the Public Protector regarding the latter's investigating and reporting on allegations of maladministration by the Free State Department of Agriculture in respect of a dairy project. The applicants in each application (the "DA" and "CASAC") sought the review and setting aside of the Public Protector's report in that regard. The review application was based on grounds of legality.

In 2012, the Free State Department of Agriculture identified the dairy project as a means of revitalising the province's agricultural sector. A company ("Estina") submitted a proposal for management of the project. A year later, reports surfaced of irregularities in the awarding of the contract to Estina, and of corruption. Treasury undertook an investigation and issued a report setting out irregular conduct of officials in the Department.

Held – Before analysing the merits, the powers and duties of the Public Protector had to be considered. Having set out the powers and duties, the Court stated that once the Public Protector receives a complaint of impropriety or abuse of public office, she is obliged to use the powers vested in her. In the present matter, despite the DA filing several complaints regarding Estina, the Public Protector did not investigate all the complaints. She also did not investigate who the true beneficiaries of the dairy project were, or consider the corrupt relationships of government officials involved in the project, or address the failure of the provincial government to follow the recommendations in the Treasury report. In limiting the scope of her investigation, the Public Protector was irrational and led to her failure to execute her constitutional duty.

The Public Protector's defences of capacity and financial restraints, as well as her alleged discretion to opt out of investigating a matter, were all rejected by the Court.

The remedial action which the Public Protector did recommend was found to be ineffective.

The report was found to be unlawful and unconstitutional and consequently, failed to comply with the requirement of legality. It was declared invalid and set aside.

Gobo Gcora Construction and Project Management CC and others v Nelson Mandela Municipality (Public Protector of the Republic of South Africa as an Interested Party) and a related matter [2019] 3 All SA 172 (ECP)

Civil Procedure – Rescission applications – Uniform Rules of Court, rule 42(1)(b) and (c) – Rescission and variation of an order or judgment may be granted where there is an ambiguity or patent error or omission or where judgment was granted as a result of a mistake common to the parties.

Two applications for the rescission and setting aside of three judgments were heard simultaneously and dealt with in one judgment.

The matter stemmed from a report of the Public Protector and a directive made by her that the Nelson Mandela Bay Municipality (the “Metro”) was to take specified remedial action, *inter alia*, in favour of a close corporation (the “close corporation”).

In the first of two applications, the close corporation and its members sought to compel the Metro to comply with, and to implement the directive of the Public Protector. The Metro responded by launching an application for review of the decision of the Public Protector. The Court hearing the applications upheld the review application and set the remedial action ordered in favour of the close corporation aside. The result was that the application of the close corporation to compel compliance with the remedial action directed by the Public Protector was also dismissed.

In addressing the applications for rescission, the Court first set out the history of the litigation in this matter. It then turned to the question of whether the judgments in question could be rescinded.

Held – Power of a court to set aside its own orders is very limited. The general principle is that once a court has duly pronounced a final judgment or order the matter is *res judicata*, and it has no authority to correct, alter or supplement it as it becomes *functus officio*. Certain exceptions to the general principle exist. A court may in certain circumscribed circumstances set aside its own judgment. That may in appropriate cases be achieved by invoking the Court’s common law powers, or the rules of court. In defended cases where judgment has been granted after evidence had been adduced on the merits of the dispute, and both parties have been heard, the test is more stringent and the judgment is capable of rescission on very limited grounds.

In this matter, the applicants relied on rule 42(1)(b) and (c), which provides for the rescission and variation of an order or judgment in which there is an ambiguity or patent error or omission or which was granted as a result of a mistake common to the parties. The applicants listed various alleged errors in the impugned judgments. The question of what constitutes an error or a mistake for purposes of rule 42 must be approached against the background of the principle that a judgment is, in the interests of certainty, final and that the court does not have the general authority to correct, alter, or supplement its own judgment. An error as envisaged in rule 42(1)(b) has been held to be confined to a “patent error or omission” which has the result that the judgment or order does not reflect the intention of the judicial officer pronouncing it. The ambiguous language or the patent error or omission in the order must be attributable to the Court itself, and relief will only be granted where the terms of the judgment do not reflect the true intention of the Court. The rule is not aimed at correcting a judgment that is wrong because the Court arrived at a wrong decision on the facts or the law.

On a reading of the three judgments, it was evident that they reflected the intention of the Court, and were made upon a consideration of the evidentiary material placed before it. What the applicants contended were errors or mistakes in the judgments were no more than errors or mistakes in the reasoning of the Court, and therefore did not fall within the scope of rule 42(1)(b).

That left rule 42(1)(c) which contemplates a common mistake by the parties. A common mistake occurs when the parties are *ad idem*, that is, they are of one mind

and share the same mistake. There must further be a causative link between the mistake and the granting of the order. As it was not the applicant's case that the judgments were granted as a result of a mistake common to the parties, the rule did not find application.

The applications for rescission were thus dismissed with costs.

Ex Parte Goosen and others (Legal Practice Council and others as amici curiae) [2019] 3 All SA 161 (GJ)

Civil Procedure – Role of amicus curiae – Whether an amicus who is invited to participate by a court has standing to apply for the recusal of a member of that bench – Court finding sound policy considerations that confine standing in regard to recusal of a judge to a party and not extend standing to an amicus of the kind who appeared in present matter.

Legal Practice – Recusal – Application by amicus curiae for recusal of judge who was also a member of another amicus curiae – Test in recusal applications is whether a reasonable apprehension of bias on the part of the judge exists.

A controversy regarding the proper interpretation of a point of law relating to the Legal Practice Act 28 of 2014 led to the Judge President to convene the Full Court in terms of section 14(1) of the Superior Courts Act 10 of 2013. The composition of the bench was decided by the Judge President, who also set out the terms of reference for the issues to be considered. The questions to be addressed were whether section 115 of the Legal Practice 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 exempted applicants who filed their applications before the commencement of the Act, from complying with the requirements in terms of the 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.

The Judge President invited several entities concerned with the regulation of the legal profession to assist the Full Court as *amici curiae*. Among the *amici* was the Legal Practice Council ("LPC"). One of the presiding officers ("Millar AJ") on the Full Bench was a practising attorney and sitting member of the LPC. That membership was part-time and unremunerated.

Another *amicus* was the General Bar Council. It applied for Millar AJ to recuse himself to avoid the perception of bias arising from a conflict of interest derived from his membership of an *amicus* appearing in the matter. Millar AJ's position on the LPC was expressly disclosed to the parties and to the *amici* immediately prior to the hearing. The application for a recusal was not supported by any of the ten applicants who were the parties before court. Other than the Pretoria Bar, the other *amici* also did not support the application for recusal.

Held – Article 13 of the Code of Conduct for Judges provides that a judge must recuse himself from a case if there is a real or reasonably perceived conflict of interest or reasonable suspicion of bias based upon objective facts – and shall not recuse himself on insubstantial grounds.

The test is whether a reasonable apprehension of bias on the part of the judge exists. There is an anterior presumption that a judge is impartial (which must apply to an acting judge too). The test must therefore be objective and an onus to establish the pertinent facts and the inference rightfully to be drawn, rests on the person who alleges it.

The circumstances relevant to the LPC *qua amicus* in the case was then considered by the Court. The role of an *amicus* is to draw the attention of the Court to relevant matters of law and fact to which attention would not otherwise be drawn. Its duty is to provide cogent and helpful submissions that assist the Court. An *amicus* is not a party in the litigation. The questions raised by the Court were whether an *amicus* who is invited to participate by a court has standing to apply for the recusal of a member of that bench; and whether an "association" as evidenced in this case between a member of a bench and an *amicus* gives rise to a taint that warrants a recusal. The Court held that there are sound policy considerations that confine standing in regard to recusal of a judge to a party and not extend standing to an *amicus* of the kind who appeared in this matter.

On the issue of a reasonable apprehension of bias, the Court held that it is unnecessary for a judge to occupy a place of utter isolation from an issue or from even a party for that matter. In the absence of the LPC having a view on an issue at stake, it could not be said that a member of the LPC acting in a judicial role, could be compromised. The mere association of Millar AJ with the LPC was insufficient to establish bias in the present circumstances. The association must be of a nature to contaminate the expectation of a fair and unbiased decision.

The recusal application was found to be without merit and was accordingly refused.

Joint Venture Between Aveng (Africa) (Pty) Ltd and another v South African National Roads Agency SOC Ltd and another [2019] 3 All SA 186 (GP)

Construction – Construction agreement – Cancellation by contractor – Performance guarantees – Presentation for payment – Application to interdict payment – Legal position in South Africa, in the absence of allegations of fraud, the contractor is not entitled to challenge payment of construction guarantees, even where there are contractual disputes in terms of the building contract – Validity of the applicant's cancellation of the contract was critical – Existence of force majeure not established – Cancellation of the contract had no legal basis.

The applicant ("ASJV") had been awarded a tender by the first respondent ("SANRAL"), for the building of a bridge. The parties entered into a construction contract in that regard, ASJV was required to provide SANRAL with guarantees for proper performance of the works as well as for rectifying any defects on the works actually executed. These are known as performance and retention money guarantees. The undertaking in respect of the guarantees was made by the second respondent ("Lombard").

Having cancelled the contract, ASJV sought to interdict payment by Lombard under a performance guarantee, on the basis that SANRAL first had to comply with the terms of the building contract before it could present the guarantees for payment.

Held – Legal position in South Africa is that in the absence of allegations of fraud, the contractor is not entitled to challenge payment of construction guarantees, even

where there are contractual disputes in terms of the building contract. Our courts are not oblivious of the relevance of the underlying agreement between the employer and the contractor and the effect that it may have on the rights of the former should it seek to make a claim against the guarantees.

In this case, the validity of the applicant's cancellation of the contract was critical. The grounds for cancellation were related to *force majeure*, but the Court found that the facts did not establish the existence of *force majeure*. The cancellation of the contract had no legal basis and SANRAL was justified in regarding ASJV's actions as a repudiation. That would justify its presenting the guarantees for payment.

The application was dismissed with costs.

Matiwane v President of the Republic of South Africa and others [2019] 3 All SA 209 (ECM)

Constitutional and Administrative Law – Judicial review – Delay in seeking review – Requirements for condonation restated by court.

Local Government – Customary law – Traditional community – Claims to kingship – Decision by President based on invalid recommendations of Commission on Traditional Leadership Disputes and Claims and therefore invalid.

The AmaMpondomise was a traditional community whose members reside in the main in the Eastern Cape province of South Africa. The present application arose from competing claims to kingship of the AmaMpondomise. The applicant described himself as "the senior Chief of AmaMpondomise", and the fifth respondent describes himself as "a great grandson of the AmaMpondomise King Dosini Royal Family", which was the sixth respondent.

The first to the fourth respondents, were respectively the President of the Republic of South Africa, the Minister of Co-operative Governance and Traditional Affairs, the Government of the Republic of South Africa and the Commission for Traditional Leaders.

Having not been joined as parties to the application, the fifth and the sixth respondents successfully brought a substantive application for their joinder based upon the substantial interest they held in the outcome of the proceedings.

In the main application, the applicant sought condonation for the late institution of the proceedings and the review and setting aside of the decision of the President of the Republic of South Africa, refusing to instate or re-instate the kingship on the ground that the AmaMpondomise never had a kingship.

Held – In taking the impugned decision the former President was performing an administrative action, making the Promotion of Administrative Justice Act 3 of 2000 applicable. In terms of section 7(1) of the Act, proceedings for judicial review must be instituted without unreasonable delay, but in any event not later than 180 days after the applicant became aware of the decision. In order to comply therewith, the applicant was obliged to institute the proceedings prior to 21 January 2018. Proceedings were in fact only instituted in early May 2018. The applicant therefore was required to give a full explanation for the delay, and to seek condonation. The Court has a discretion whether or not to grant condonation. That discretion must be exercised in a judicial manner, with due regard to the nature of the relief sought, the extent of the effect of the cause of the delay upon the administration of justice, the

reasonableness of the explanation for the delay, whether or not the delay has caused prejudice to the other parties, the importance of the issue for determination to the parties and the applicant's prospects of success. As the applicant gave a satisfactory and reasonable explanation for the delay in commencing the proceedings, and enjoyed good prospects of success in the application, condonation was granted.

The Traditional Leadership and Governance Framework Act 41 of 2003 first came into operation on 24 September 2004. It was later amended by the enactment of the Traditional Leadership and Governance Framework Amendment Act 23 of 2009. In making his decision, the President had taken into consideration the recommendations of a Commission on Traditional Leadership Disputes and Claims (the "Tolo Commission") established under the 2009 Amendment Act. The Tolo Commission was the successor in law of the Nhlapho Commission, which had been established under the original (2003) Act. The Nhlapho Commission performed its functions in terms of the powers conferred upon it by the provisions of the original Act. On 9 February 2010, it produced its report which contained its decision upon the claim regarding AmaMpondomise kingship. That decision was that the AmaMpondomise did not have a kingship and accordingly there was no kingship to be restored. The Commission then became *functus officio*. The applicant successfully applied for the review of the Nhlapho Commission's decision. When the Tolo Commission subsequently decided to reinvestigate the kingship claims, it did so *mero motu*. It had had no power to take such a decision and to commence a re-investigation of a claim which, in any event, had been investigated to completion. The re-investigation of the claim relating to AmaMpondomise kingship by the Tolo Commission was thus unlawful. Its further investigations and reports were *ultra vires* and should not have been considered by the former President. Section 172(1) of the Constitution compels every court to declare invalid any conduct inconsistent with the Constitution.

Insofar as the decision made by the former President was based upon recommendations made by the Tolo Commission which were invalid, that decision could not be valid and had to be set aside upon review. The Court then had no discretion, and was obliged to make a declaration of invalidity.

Whenever administrative action is set aside, the Court has the power to grant an order which is just and equitable. It was considered appropriate in the circumstances of this matter to grant an order in substitution for the impugned decision of the former President. Satisfied that it had been established on a balance of probabilities that the AmaMpondomise had a kingship, the Court issued a declaratory to that effect.

Mbina-Mthembu v Public Protector [2019] 3 All SA 241 (ECB)

Public Protector – Findings of maladministration by provincial government relating to the expenditure incurred in preparation for the funeral of the late former President Nelson Rolihlahla Mandela – Application for review in terms of section 6 of the Promotion of Administrative Justice Act 3 of 2000 – Principle of legality was relied on to found the review application.

The State funeral for Nelson Mandela in December 2013 involved the national, provincial and local spheres of government. The Eastern Cape provincial government was centrally involved and decided to make available R300 million to fund the funeral. That amount had been allocated to the Eastern Cape Development

Corporation (the "ECDC") for social infrastructure development. The provincial government's thinking when it embarked on that arrangement was that it would reimburse the ECDC in due course.

A number of complaints were made to the Public Protector that maladministration had occurred during the process. She investigated the complaints and produced a report in which adverse findings were made against the applicant in this matter – who was, at the time, the head of the provincial treasury in the provincial government.

In terms of section 6 of the Promotion of Administrative Justice Act 3 of 2000, the applicant sought the review of the Public Protector's decisions against her. In the alternative, the principle of legality was relied on to found the review application. After the application had been launched, however, the issue as to which pathway to review applies to the investigative, reporting and remedial powers of the Public Protector was determined by the Supreme Court of Appeal. It was held that the Promotion of Administrative Justice Act does not apply to the review of exercises of power by the Public Protector, but that the principle of legality applies to the review of those exercises of power.

Held – Generally speaking, the same grounds of review that apply to reviews in terms of section 6 of the Promotion of Administrative Justice Act now apply to reviews in terms of the principle of legality.

The key finding made by the Public Protector was that the provincial government's diversion of the ECDC's funds from social infrastructure development to paying for the funeral was improper. In order to determine whether the Public Protector committed an error of law, it was necessary to consider the process that regulates virements (the process of transferring funds from one financial account to another). Having regard to Treasury Regulations and the Public Finance Management Act 1 of 1999, the Court found that the Public Protector was correct in her view that the diversion of funds in this case was unlawful.

A second finding by the Public Protector was that the procurement process followed by the provincial government was not fair, equitable, transparent, competitive and cost effective. It was common cause that the applicant had been involved, since 2011, in a limited number of meetings concerning planning for Mr Mandela's funeral. Nevertheless, by the time Mr Mandela died, there was no budgetary provision made for funding the funeral that everyone knew would take place in the Eastern Cape. There was also no costed plan in place for the procurement of goods and services necessary for the funeral. The Court agreed with the Public Protector that the applicant was a central figure in an unlawful procurement process. It also accepted, based on the evidence, the findings that there had been a transfer of public funds to a private account and the incurring of irregular, fruitless and wasteful expenditure.

None of the grounds of review being sustainable, the application was dismissed.

Motala v Master of the North Gauteng High Court, Pretoria [2019] 3 All SA 17 (SCA)

Insolvency – Liquidator – Appointment of joint final liquidator – Removal of liquidator – Enquiry by Master in terms of section 417 of the Companies Act 61 of 1973 – Refusal of application for reinstatement – Appellant had a number of previous convictions of fraud and theft which would have disqualified him from appointment as a liquidator under section 372(f) of the Companies Act.

The respondent was the Master of the Pretoria High Court. The Master's office was placed in control of some 750 company liquidations. The long-standing practice was for Masters to maintain a list or panel of persons (the "Master's panel") that were found to be suitable for appointment.

The appellant worked as a liquidator and administrator of estates, and was previously on the Master's panel. He was appointed as a joint liquidator in a number of companies (the "Pamodzi Group") which had been placed in liquidation. The appellant was appointed as a joint final liquidator of the group. All the companies within the group owned gold mines, but were insolvent. Despite their insolvency, they each had intrinsic value not only in their tangible assets but, importantly, in the mining rights they held which would have been lost had they gone into final liquidation. It was therefore to the advantage of creditors for the companies to be kept in provisional liquidation while attempts were made to sell them.

A company ("Aurora") was the liquidators' preferred bidder for some of the mines. The liquidators concluded agreements with Aurora allowing it to carry on mining activities while it secured payment and completed the process of purchasing the mines. Unfortunately, Aurora's governance and conduct of the mines and their operations turned out to be cause for grave concern. Alarmed at the reports, and by allegations of stripping of the mines, the Master's office held an enquiry in terms of section 417 of the Companies Act 61 of 1973. A further, formal, enquiry was then held, the upshot of which was that the appellant and his co-liquidator refused to answer any question put by the Master concerning the administration of the mines. The Master regarded the appellant's refusal to answer queries both as a failure to perform his duties satisfactorily and to comply with a lawful demand. It was concluded that he was no longer suitable to be liquidator of the companies concerned, justifying his removal under section 371(1)(e) of the Companies Act.

The appellant brought an application for the review of his removal as liquidator. Further events occurred, and the appellant eventually applied to be reinstated as liquidator. The dismissal of his application led to the present appeal.

Held – Information which emerged during the enquiry showed that the appellant had a number of previous convictions of fraud and theft which would have disqualified him from appointment as a liquidator under section 372(f) of the Companies Act. Consequently, when the decision was taken to remove him from the panel, he was a person who was at the time disqualified from being a liquidator. In fact, he had been so disqualified throughout his career in the insolvency industry. The fact that those convictions and sentence were subsequently expunged was irrelevant to the consideration of the lawfulness of the decision to remove him. That alone was decisive of the appeal (although the Court did address the others issues raised in the matter).

The appeal was dismissed.

Mphephu v Mphephu-Ramabulana and others [2019] 3 All SA 51 (SCA)

Customary law – Court erred in finding that it lacked jurisdiction – Courts are vested with authority to adjudicate customary law issues in appropriate cases and to that end section 211 of the Constitution obliges them to apply and give effect to customary law where it is implicated.

Local Government – Traditional leadership – Customary law – Review – Identification of King of traditional community – High Court ruled that it lacked jurisdiction as the dispute was not lodged with the Commission in terms of section 21 of the Traditional Leadership and Governance Framework Act 41 of 2003 which provides for lodging of claim and declaring of disputes over the traditional leadership positions.

In December 2012, the appellant instituted proceedings in the High Court, seeking to have the identification and recognition of the first respondent as the King of Vhavenda, reviewed and set aside.

Several points *in limine* were raised by the parties before the High Court and it was agreed that those points would be determined separately. Fourteen issues were isolated for separate adjudication, and the Court upheld some of the points *in limine* and dismissed the application as well as an application for leave to appeal. The appeal was before the present Court with its leave.

The respondents contended that the High Court lacked jurisdiction to hear the review as it concerned a matter that could only properly be considered by the specialist Commission appointed for such disputes. The High Court ruled that it lacked jurisdiction as the dispute was not lodged with the Commission in terms of section 21 of the Traditional Leadership and Governance Framework Act 41 of 2003, which provides for lodging of claims, declaring of disputes over the traditional leadership positions as well as the resolution of such claims and disputes by the Commission.

Held – Jurisdiction of the courts is not dependent on whether or not a person has lodged a claim or declared a leadership dispute with the Commission. The courts are vested with authority to adjudicate customary law issues in appropriate cases and to that end section 211 of the Constitution obliges them to apply and give effect to customary law where it is implicated. The separated issues did not concern disputed aspects of the Venda customary law that require the Commission's expertise. The High Court therefore erred in finding that it lacked jurisdiction.

On the merits, the Court held that the Commission did not have the power to identify a person for recognition as King or Queen, as those powers vested with the royal family. The decision by the second respondent to recognise the first respondent as King of Vhavenda, was thus reviewed and set aside.

The remaining issues were to be resolved before the identification of the next King or Queen, and were referred to the High Court for evidence and adjudication.

Ngomane and others v City of Johannesburg Metropolitan Municipality and another [2019] 3 All SA 69 (SCA)

Constitutional Law – Breach of the right to privacy enshrined in section 14(c) of the Constitution, which includes the right not to have property seized – Eviction – Conduct of respondents constituted an eviction – Breach of the rights not to have homes demolished without an order of court and not to be deprived of property

unlawfully, respectively, rights to dignity and adequate shelter under section 26(3) and 25(1) of the Constitution.

Property Law – Property unlawfully destroyed – Personal belongings and materials deemed as invaluables.

Destitute and homeless, the applicants had made a home for themselves on a traffic island under a highway bridge in the business district of the City of Johannesburg Metropolitan Municipality (the "City"). They regarded the traffic island as their home as they lived and stored their property on it. Their property was removed during what the City and the second respondent described as a clean-up operation of the area conducted pursuant to the City's by-laws. As a result, the applicants sought the return of their personal belongings and materials, alternatively to be provided with similar material and possessions. The respondents denied that any eviction was committed or that any shelter was destroyed during the clean-up operation. They alleged that their officials merely removed rubbish which was found unattended or abandoned and disposed of it in a landfill. The City denied that any valuable personal items were removed and explained that its procedure during clean-up exercises which involved the removal of people's personal belongings required the preservation of any valuable items, which would be inventoried and kept for collection by the owners. The court *a quo* dismissed the applicants' application.

In the present Court, the applicants sought leave to appeal, and condonation for the late filing of their application.

Held – Although the City denied that any valuable personal items were removed during the operation, the video footage adduced into evidence indisputably showed that the police had simply collected the goods from under the bridge and summarily thrown them into the back of the truck without checking contents. However, the Court accepted that there were no buildings or structures that could be demolished and no demolition occurred. Similarly, there were no evictions. What had occurred was that the applicants' property was unlawfully destroyed. It remained to decide whether they could be granted any relief in the present proceedings and, if so, to ascertain the extent of the harm they suffered.

The confiscation and destruction of the applicants' property was a patent, arbitrary deprivation thereof, and a breach of their right to privacy enshrined in section 14(c) of the Constitution, which includes the right not to have property seized. The respondents' conduct was declared inconsistent with the Constitution and therefore unlawful.

Although the applicants sought only the return of their property, a claimant in respect of a constitutional breach that has been established is not necessarily bound to the formulation of the relief originally sought or the manner in which it was presented or argued. It was also undesirable to require the applicants to pursue the ordinary remedy in the form of a damages claim. Instead, the Court ordered the City to pay each applicant an amount of R1500, as requested by the applicants.

Ocean Ecological Adventures (Pty) Ltd v Minister of Environmental Affairs and others [2019] 3 All SA 259 (WCC)

Constitutional and Administrative Law – Environment – Award of Boat Based, Whale and Dolphin Watching permit – Review sought setting aside decisions to (a) award permit to applicant in Plettenberg Bay area (b) to set aside the Minister's decision to

award the third respondent the ten-year BBWW permit instead of the applicant – It was found that the Minister's decisions to revoke the applicant's permit and award it to the third respondent were not rationally related to the purposes of the guiding policy or the information before her and was irrational and procedurally unfair.

In March 2018, the first respondent (the "Minister") set aside the decision of the second respondent, a delegated authority, awarding a provisional Boat Based, Whale and Dolphin Watching ("BBWW") permit in the area of Plettenberg Bay to the applicant. The applicant sought the review and setting aside of the Minister's decision. It also sought to review and set aside the Minister's decision to award the third respondent the ten-year BBWW permit instead of the applicant.

The applicant's grounds of review were that the Minister had failed to notify it of her intended decision and to provide it with an opportunity to protect its rights and interests; that the Minister had acknowledged in a letter of 13 March 2018, that the applicant's application scored sufficiently high to warrant the allocation of a BBWW permit, albeit in some other area; and that the notification letter confirmed that the Minister had compared the scores and weightings allocated to the third respondent and the applicant, which was said to be impermissible. On those grounds, it was alleged that the Minister's decision to revoke, or cancel the applicant's standby permit was unlawful and irrational. By the time the matter came to court, further grounds of review were added. The grounds that were pursued fell into two categories: firstly, those relating to the Minister's evaluation, or scoring of the third respondent's application standing alone, and those relating to the Minister's evaluation or scoring of the third respondent's application in comparison to the applicant's application.

Held – The Minister raised a preliminary point that the review application could not be considered because the applicant had failed to exhaust its internal appeal remedy. The Court found that it was not necessary to deal with the preliminary point considering its conclusions on the merits. However, it held that the applicant was not barred from challenging the decision as its internal remedy was not practical and was more apparent then real.

On the merits, the Court found that the applicant had failed to establish a case for the reviewing of the Minister's decisions based on the third respondent's failure to comply with any of the compulsory requirements.

The Court then considered the grounds of review based on the scoring of the third respondent's application. The Minister's decision in that regard could not be impugned. However, the same could not be said regarding the scoring system used insofar as it compared existing permit holders to new entrants. It was found that the Minister's decisions to revoke the applicant's permit and award it to the third respondent were not rationally related to the purposes of the guiding policy or the information before her and was irrational and procedurally unfair. The decisions were set aside and the matter was remitted to the Minister for reconsideration.

Van As v Kotze [2019] 3 All SA 284 (NCK)

Contract – Lease – Option of cession – Lapsed without being exercised – Defendant failed to execute an instruction to take steps to ensure the exercise of the option.

Action against attorney – Alleged breach of mandate.

The plaintiff's parents owned a farm which had been in the possession of the family for 78 years.

In 2009, the farm was sold to an iron ore company ("Sishen"). The sale agreement provided that the sellers could carry on occupying the farm for a period of five years in terms of a lease and the farm could be bought back after the completion of building of a railway line, but within a period of five years of the conclusion of the sale agreement. Notice of the intention to exercise the option would have to be given to Sishen at least three months prior to the expiry of the five year period from the date of the conclusion of the contract. The plan was for the option to be ceded to the plaintiff and for him to eventually exercise it, and to become the owner of the family farm.

The defendant, an attorney, drew up a cession agreement, which provided for the cession of the option to the plaintiff. The option lapsed late in March 2014, without having been exercised. The plaintiff eventually had to vacate the farm. In August 2015, he issued summons against the defendant, claiming damages in an amount of R5 618 545.90. His main cause of action was that the defendant failed to execute an instruction to take steps to ensure the exercise of the option. In the alternative, the plaintiff relied on a breach of an alleged duty of care on the part of the defendant. The quantum of the damages was settled, and only the liability of the defendant remained in dispute.

Held – The version of the plaintiff, as corroborated by his mother, appeared to have been rehearsed. The Court could not reject the defendant's averment that the cession agreement was signed by all parties concerned on 20 April 2012.

The plaintiff's main cause of action was based on the breach of a mandate allegedly given to the defendant expressly. However, the evidence showed that there was no meeting of the minds regarding the alleged mandate, and no enforceable mandate agreement would have come into existence.

Imposing a duty of care on the defendant in the circumstances of this case would be unfair and unreasonable.

The plaintiff's claims were dismissed with costs.

END-FOR NOW