LEGAL NOTES VOL 8/2019

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BUFFALO CITY METROPOLITAN MUNICIPALITY v ASLA CONSTRUCTION (PTY) LTD 2019 (4) SA 331 (CC)

Review — Grounds — Legality — Organ of state bringing review of own decision — Delay in bringing review — Approach to.

Applicant municipality decided, without a tender process, to award a construction contract to respondent company, and respondent performed thereunder. The municipality later refused to pay, and respondent instituted proceedings for payment. The municipality's defence was that absent a lawful tender process, the decision to award the contract was unlawful, and that this rendered the agreement invalid. It also applied under the Promotion of Administrative Justice Act 3 of 2000 to review the award decision. The review was, however, brought out of time.

The High Court, in deciding whether to condone the delay, examined the municipality's explanation and the asserted illegality of the decision. Its finding was that the decision was unlawful and the contract invalid, and it dismissed the claims based thereon (see [11]).

This caused the respondent to appeal to the Supreme Court of Appeal, which found that the High Court, in considering condonation, ought not to have enquired into the legality of the decision. It refused condonation and dismissed the application. The municipality then applied to the Constitutional Court for leave to appeal.

Before the hearing, the law changed to require an organ of state wanting to review its own decision to bring its review under the principle of legality. The Chief Justice asked the parties to make submissions in light of this (see [13]).

The Constitutional Court later came to hear the matter and, thereafter, the municipality applied to withdraw its application for leave to appeal and for a settlement agreement with respondent to be made an order of court (see [18]). The court refused the application and granted leave to appeal (see [34] and [41]).

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[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 2018 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!**

Held, that the approach to delay in bringing a legality review, was, firstly, to examine whether the delay was reasonable. This was to be answered by considering its explanation. If, indeed, the delay was reasonable, the matter could be heard. But if the delay was unreasonable, the second enquiry was whether the interests of justice required it to be overlooked, and the matter heard. (See [43], [48] and [52] – [53].)
This was to be decided by considering four factors: (1) the consequences of setting the decision aside; (2) the decision and the challenge to it (the asserted illegality); (3) the applicant's conduct; and (4) the court's duty to declare an unlawful decision invalid. (See [54] – [55], [59], [63] and [66].)
Here, the explanation for the delay was insufficient to find it reasonable (see [77] – [78] and [80]). But supporting overlooking it was the clear illegality of the decision: the law on procurement was plainly not followed before its making (see [82], [92] and [95]). Against overlooking it was the municipality's conduct after the hearing (see [97] – [99]). Given this, the unreasonable delay could not be overlooked (see [100]). But, nonetheless, the court was obliged to declare the decision invalid (see [101]).
Ordered that leave to appeal be granted; that the appeal be upheld; and that the Supreme Court of Appeal's order be set aside, and replaced with an order that the decision to award the contract was invalid. Ordered further that despite the contract's invalidity, it should not be set aside. This to preserve the respondent's accrued rights thereunder. (See [105] and [107].)
Cameron J and Froneman J would have refused leave to appeal, to make the settlement agreement an order of court or to allow withdrawal of the application. They would also not have employed the power in s 172(1)*(a)* of the Constitution. (See [150], [152] and [154].)
In considering whether to overlook an unreasonable delay, the court had to weigh the delay's effect, its length, and explanation, against the decision and its illegality (see [122] and [148]).
Here the seriousness of the delay, encompassing its length, effect, and the absence of explanation, outweighed the possible illegality of the decision, and pointed away from hearing the review.

DIENER NO v MINISTER OF JUSTICE AND CORRECTIONAL SERVICES AND OTHERS 2019 (4) SA 374 (CC)

Company — Business rescue — Practitioner — Rescue converted to liquidation — Ranking of practitioner's claim for remuneration and expenses — Companies Act 71 of 2008, ss 135(4) and 143(5).

In this case a corporation was put into business rescue and Mr Diener appointed its business rescue practitioner. The business rescue was, however, later converted to a liquidation, and Diener came to submit a claim for his remuneration and costs to the liquidators. It was rejected.
The Master later confirmed the liquidation and distribution account, and Diener applied for review thereof, and an order that the account include his costs.
When the High Court dismissed the application, Diener appealed to the Supreme Court of Appeal.
The issue there was whether ss 135(4) and 143(5) of the Companies Act 71 of 2008, on liquidation, caused a practitioner's claim for remuneration and costs to be preferred above the claims of pre-business rescue secured creditors (see [17]).
It held that this was not the case: the practitioner's claim, on liquidation, ranked after the costs of liquidation (see [21]). It dismissed the appeal.

Here, the Constitutional Court confirmed the finding of the Supreme Court of Appeal, and refused leave to appeal.

ETHEKWINI MUNICIPALITY v MOUNTHAVEN (PTY) LTD 2019 (4) SA 394 (CC)

Prescription— Extinctive prescription — Debt — What constitutes — Claim for retransfer of property under contractual reversionary clause registered as title condition — Constituting 'debt' for purposes of extinctive prescription — Prescription Act 68 of 1969, ch III.

Land — Rights in — Registered title condition entitling transferor to claim retransfer of land if transferee not erecting buildings to certain value within certain time — Right to claim retransfer of land constituting personal, not real, right.

Land — Ownership — Restriction — By reversionary right — Binding on landowner in personal capacity — Hence constituting personal, not real, right — Registration against title deed not elevating it to latter.

Land Transfer — Registration of transfer — Condition containing reversionary clause — Creating personal obligation — Registration not converting it into real right — Deeds Registries Act 47 of 1937, s 63.

On 24 May 1985 the applicant Municipality sold land to the respondent, Mounthaven. In August 1986 the land was transferred to Mounthaven subject to special conditions (i) requiring it to erect buildings to the value of R100 000 on the land (clause C1); and (ii), if the buildings were not completed within three years, for ownership to revert to the Municipality (clause C2) (see [4] for the wording of the conditions). Mounthaven did not complete the buildings within three years. But it was only in 2014 that the Municipality brought a High Court application to compel retransfer in accordance with clause C2. This raised the matter of prescription: the High Court had to decide whether the Municipality's claim for retransfer was a 'debt' for the purposes of ch III of the Prescription Act 68 of 1969, in which case it would have prescribed by May 1991. * The Municipality argued that the obligation to return the land flowed from a real, not personal, right and could therefore not be termed a 'debt' that was subject to prescription. In the alternative the Municipality argued that the registration of the reversionary clause created either a real right that did not prescribe or a mortgage bond that prescribed after 30 years. Both the High Court and the Supreme Court of Appeal† agreed with Mounthaven that the Municipality's claim was indeed a debt that had prescribed, thereby extinguishing its cause of action.

In an application for leave to appeal to the Constitutional Court one of the issues was whether the registration of clause C2 under the Deeds Registries Act 47 of 1937 (the Deeds Act) affected the nature of the claim. Of relevance was s 63, which allows for the registration of a deed containing a personal right if the right in question is 'complementary or otherwise ancillary to a registrable condition or right contained or conferred in such deed' (see [12] – [13]).

Held

As to the court's jurisdiction: The interpretation of the Prescription Act might affect the fundamental right of access to justice, and raised a constitutional issue for the decision by the court (see [6]).

As to whether the court should grant leave to appeal: A claim to transfer immovable property into the name of another was one for the delivery of goods, and hence constituted a 'debt' for the purposes of the Prescription Act (see [8]). The Municipality's argument that C2 embodied a real right failed on a factual level

because it lacked a provision making it binding on Mounthaven's successors in title (see [11]). Instead it created a personal obligation on Mounthaven to complete buildings to a certain value within a limited time, not a real burden on the property itself (see [20]). Neither the restriction it imposed on Mounthaven's property rights nor its registration under s 63 of the Deeds Act served to elevate that personal right to a real one (see [14], [16]). And any mortgage bond it might have created would, being accessory, have lapsed when the principal obligation prescribed (see [21]). Since there were accordingly no reasonable prospects on appeal, leave to appeal to the Constitutional Court would be refused (see [22]).

SPILHAUS PROPERTY HOLDINGS (PTY) LTD AND OTHERS v MOBILE TELEPHONE NETWORKS (PTY) LTD AND ANOTHER 2019 (4) SA 406 (CC)

Sectional title— Common property — Unit owner — Whether individual owners having standing to apply for removal of antenna erected on common property in contravention of zoning scheme — Sectional Titles Act 95 of 1986, s 41.

Telecommunication — Mobile cellular communication services — Service provider, in contravention of local zoning scheme regulations, installing ellphone antenna on common property of sectional title development — Whether individual owners having standing to apply for its removal — Sectional Titles Act 95 of 1986, s 41.

Applicants were owners of units in a sectional title scheme and first respondent was a cellphone company (see [3]).

First respondent had, in contravention of the local zoning scheme regulations, installed an antenna on common property, and applicant owners applied for an order that first respondent remove it (see [6] – [7], [9] and [24]).

The issue in the High Court was whether the applicants or the body corporate had standing to bring the proceedings (see [9]). The applicants had such standing under the common law but, were s 41 of the Sectional Titles Act 95 of 1986 to apply, only the body corporate would have standing (see [10] and [24]). (Where s 41 applied, it required the appointment of a curator to bring the proceedings on behalf of the body corporate.)

The High Court found the applicants had standing, and ordered the removal of the antenna (see [10]).

But the Supreme Court of Appeal found s 41 applied and the applicants lacked standing, and it reversed the order (see [11] – [12]).

In the Constitutional Court, *held*, that s 41 did not apply, and that the applicants had standing (see [22], [34], [36] and [43]):

- Section 41 applied, inter alia, only where the matter fell in s 36(6) and where the body corporate had suffered loss. Neither requirement was satisfied here (see [34] – [36] and [39]);
- an interpretation that s 41 applied would lead to absurd results and be inconsistent with s 9(1) of the Constitution (see [25] and [40] – [41]);
- the Supreme Court of Appeal had, in concluding s 41 applied, mistakenly relied on authority with different facts to the present (see [42]).

Leave to appeal granted; appeal upheld; order of the Supreme Court of Appeal set aside, and replaced with an order dismissing the appeal before it; and order of the High Court reinstated.

ATWEALTH (PTY) LTD AND OTHERS v KERNICK AND OTHERS 2019 (4) SA 420 (SCA)

Financial institution — Financial services provider — Financial advisor — 'Advice' — What constitutes — Financial Advisory and Intermediary Services Act 37 of 2002, s 1 sv 'advice'.

Financial institution— Financial services provider — Financial advisor — Breach of statutory duties — Delictual claim against for loss on recommended investments — Need to lead evidence on what reasonably skilled financial advisor would do in circumstances.

Delict— Pure economic loss — Investments — Claim for loss on investments recommended by financial advisor — Claim based on breach of statutory duties — Need to lead evidence on what reasonably skilled financial advisor would do in circumstances.

A husband and wife, the Kernicks, approached the financial advisor Ms Moolman for financial advice on how best to invest 'spare cash' they had available. A meeting was arranged, at which Ms Moolman made a presentation to the Kernicks in which she provided information on two financial products she had identified as satisfying the Kernicks' investment needs. On the basis of such meeting, and subsequent communications, the Kernicks invested in these products. However, despite assurances from Ms Moolman of higher returns than available alternatives, this did not prove to be the case. The Kernicks entirely lost their investments. In the Grahamstown High Court they sought damages (against Ms Moolman and her employers in whose scope of employment she gave financial advice) in the amount of the losses they had sustained. They claimed that liability had arisen from the fact that Ms Moolman had given them 'financial advice' that was factually incorrect and misleading, and in doing so breached duties imposed on her, as a licensed financial services provider, by the Financial Advisory and Intermediary Services Act 37 of 2002 (the FAIS Act) and the various codes of conduct promulgated under that Act. The High Court ruled in the Kernicks' favour. This present matter was the appeal to the Supreme Court of Appeal brought by Ms Moolman (and her employers) against such decision.

The SCA firstly noted the Kernicks' assumption that Ms Moolman's liability to compensate them would arise automatically, should it be found that she had breached her statutory duties. This, the SCA found, was wrong as a matter of law. Their claim was instead one in delict *based upon negligence*. On its own, a breach of any obligations owed to the Kernicks by Ms Moolman under the FAIS Act or its codes of conduct would not fulfil all the requirements for a claim based in delict. The Kernicks had to in addition establish negligence on the part of Ms Moolman. (See [9].)

The SCA then identified two issues as being central to the Kernicks' claim (see [25] and [34]). (1) Had Ms Moolman furnished 'advice' to the Kernicks? In this regard, counsel for Ms Moolman submitted that she had merely given the Kernicks objective information about particular financial products and, at best for them, no more than advice on the procedures for concluding an investment transaction. This, counsel submitted, did not constitute advice as defined in the FAIS Act, but fell within the definition exclusions set out in s 1(3)*(a)*. (2) If Ms Moolman had furnished 'advice', in doing so had Ms Moolman's failed to comply with her legal duties as a financial services provider, in a negligent and wrongful manner? The answer, the court noted,

depended, in the first instance, on both the level of skill and knowledge required of an advisor in the position of Ms Moolman, and whether someone with the requisite skill and knowledge would have advised the Kernicks differently in the context of the present dispute (see [34]). The SCA further set out the various statutory duties imposed on financial services providers, * and noted their congruence with common-law duties of a professional investment advisor. (See [35] – [38].)
Held, as to (1), that on a careful parsing of the language of the FAIS Act, the presentation by Ms Moolman constituted the giving of financial advice, at least in the form of product information, to the Kernicks. It was advice on which they clearly intended to rely and on which they were also entitled to rely, coming as it did from a professional financial advisor from whom they had sought that advice. The presentation took the form of a proposal and constituted guidance in respect of the purchase of specific financial products (which would meet the Kernicks' investment needs). The presentation went much further than a mere description of financial investments and the mechanism by which the Kernicks could invest therein. Rather, the information furnished was designed to induce them to invest in these particular products (which they did), for which Ms Moolman was to receive a commission. (See [30] and [32] – [33].)
Held, as to (2), that the Kernicks, in order to establish that Ms Moolman had acted negligently by making a presentation without adequate knowledge of the proposed investments, had to present evidence on what kind of research and due diligence a reasonably skilled financial services provider would have done in the circumstances. The Kernicks failed to do so. Further, even assuming negligence, it would only be actionable if a reasonably skilled financial services provider would make different investment recommendations, having conducted adequate research. Once again, no evidence was presented on this point. (See [41], [42], [47], [49], [52] and [53].)
Accordingly, the court found that the Kernicks had failed to establish liability on the part of Ms Moolman, and that the appeal should therefore be upheld.

CDH INVEST NV v PETROTANK SOUTH AFRICA (PTY) LTD AND OTHERS 2019 (4) SA 436 (SCA)

Company— Directors and officers — Board of directors — Resolutions — Round robin resolution — Validity — Board passing resolution contrary to its stated purpose — Amounting to misrepresentation and breach of directors' duty of good faith — Resolution nullified — Companies Act 71 of 2008, s 74, s 76(3)(*a*).

Company— Shares and shareholders — Shares — Authorisation for shares in memorandum of association — Change — Round robin decision by board — Notice to directors — Companies Act 71 of 2008, s 36(2)(*b*) and (3), s 74.

Section 36(2)*(b)* and (3) of the Companies Act 71 of 2008 states that the number of authorised shares provided for in a company's memorandum of association may be 'changed only by . . . special resolution of the shareholders . . . or the board . . . [which may] . . . increase or decrease the number of authorised shares in any class of shares'. Section 74 of the Act enables 'a majority of directors' to pass what is known as a round robin resolution in order to avoid a formal meeting, provided that 'each director has received notice of the matter to be decided'.
In 2013 the appellant, CDH, and the second respondent, Amabubesi, caused Petrotank to be incorporated. A memorandum of understanding (MOU) concluded between the parties provided that Petrotank would have five directors — three appointed by CDH (the majority directors) and two by Amabubesi (the minority

directors). In terms of the MOU the 100 000 issued shares in Petrotank would be held by CDH and Amabubesi in a 60/40 ratio. But, due to an error on the part of the person responsible for the incorporation, Petrotank's memorandum of incorporation (MOI) recorded the number of authorised shares as 1000 rather than 100 000. Neither CDH nor Amabubesi was at this point aware of the error.
On 28 March 2014 one of the directors appointed by CDH sent an email to his fellow directors in which he pointed out that Petrotank was in breach of the Companies Act because it had issued more shares than authorised by its MOI. He asked them to rectify the situation by signing an attached round robin resolution to increase the number of authorised shares to one million. The majority directors passed the resolution over the objections of the minority, who pointed out that the one million figure was wrong and needed to be changed to 100 000. But they were ignored. CDH offered no explanation for the failure to have regard to the objections nor justification for the increase.
A subsequent breakdown in the relationship between the parties resulted in litigation in the Johannesburg High Court, * which set aside the resolution on various grounds, including bad faith on the part of the directors and because it was not in the interests of the company. In an appeal the Supreme Court of Appeal —
Held
Section 36(2)*(b)* read with s 36(3) of the Act constituted a radical departure from the old Companies Act 61 of 1973, under which a company could only increase its share capital by means of a special resolution (s 75) and after approval by the company at a general meeting (s 221) (see [18]). The notice required by s 74 was to intended to inform directors not only of the existence of the decision to be made, but also of its purpose (see [21).
CDH's directors knew that the round robin resolution on which they had been called upon to vote was contrary not only to the proclaimed purpose of the resolution but also to the MOU (see [22]). The only inference to be drawn from their conduct was that they had misrepresented the matter to be decided (see [23]). The misrepresentation, which was at the very least designed to obfuscate the real purpose behind the resolution, did not comport to the standards of good faith in s 76(3) of the Act required of directors' conduct and, as such, raised the question as to whether they exercised their powers for a proper purpose (see [24]). The round robin resolution was accordingly invalid, and the appeal would be dismissed

DE LANGE NO v MINISTER OF WATER AND ENVIRONMENTAL AFFAIRS 2019 (4) SA 445 (SCA)
Prescription — Extinctive prescription — Commencement — Claim based on delict — No ongoing infringement of right where conditions for its exercise not met or right not exercised — Claim based on losses resulting from government's failure to maintain irrigation scheme — When water supply ended, plaintiff stopped exercising his right, which was conditional — Hence no ongoing infringement — Claim prescribed — National Water Act 36 of 1998, ss 22 – 27 and 39; Prescription Act 68 of 1969, s 12(3).
Water — Right to water — Infringement — Not infringed on ongoing basis where, as in present case, conditions for exercising such right not met or right not exercised — National Water Act 36 of 1998, ss 22 – 27 and 39.
The Supreme Court of Appeal granted Mr De Lange leave to appeal a High Court order which upheld a special plea of prescription in his action for damages against the respondent (the Minister). Mr De Lange, who enjoyed lawful water use under the National Water Act 36 of 1998 (the Act), had sought damages for crop losses he

allegedly suffered between 2007 and 2010 as a result of him not being able to properly irrigate his crops. This, he claimed, was inter alia caused by the failure, since 2003, of the Minister's officials to maintain an irrigation canal forming part of an irrigation scheme under the Act, thereby infringing his water use rights.
The court a quo agreed with the Minister that the cause of action — the failure to maintain the irrigation canal — arose in 2003, and that therefore the claim had prescribed by the time that summons was issued towards the end of 2010. The appellant contended that the deceased's right to water use was a real or statutory right which did not prescribe, and that there had been an ongoing or continuous breach of such right during the period 2007 – 2010. Before the appeal was heard, Mr De Lange passed away and the executor of his deceased estate was substituted as appellant.
Held
Whatever the precise nature of the deceased's right may have been, such right was not unconditional. It was dependent upon the deceased complying with the various preconditions (particularly those in ss 22 – 27 of the Act) that entitled him to receive water, including applying for water as prescribed and paying the charges that were levied. Not only did he fail to pay any water charges during the period to which his claim related, but he also never sought to abstract water during that period either. He failed to exercise such right as early as 2003, when the water supply was stopped. It would be irrational to accept that the deceased became entitled to recover damages for a breach of a right to use water — whatever the nature of that right might be — which he had not in any way purported to exercise during the years in question. His submissions that the Minister bore an ongoing statutory duty to maintain the canal and distribute water, and that the failure to do so was an ongoing wrong, so that the deceased's claim had not prescribed, must therefore be rejected. The court a quo correctly upheld the plea of prescription; the appeal would be dismissed.

DENNEGEUR ESTATE HOMEOWNERS ASSOCIATION AND ANOTHER v TELKOM SA SOC LTD 2019 (4) SA 451 (SCA)
Spoliation — *Mandament van spolie* — When available — Installation by one electronic communications network service provider of cables in same underground ducts and sleeves as existing cables of another such provider — No loss of possession — No spoliation — Electronic Communications Act 36 of 2005, s 22.

Telecommunication — Fibre optic network — Installation in infrastructure originally provided by Telkom — Whether amounting to spoliation — Electronic Communications Act 36 of 2005, s 22.

Telkom SA Soc Ltd (Telkom) built and installed a telecommunication network infrastructure to service a private security estate (Dennegeur) at the instance and cost of its developer. This infrastructure, installed in 2000, subsequently became the property of Dennegeur's homeowners association (the HOA). In 2015 the HOA entered into an agreement with the second appellant (Vodacom) to install a high-speed fibre optic network in the infrastructure at the estate, in the same underground ducts and sleeves housing Telkom's cables.
Telkom took the view that this amounted to an unlawful deprivation of its actual physical possession of the infrastructure, which it claimed to enjoy by virtue of the cables located therein and the fact it was entitled to physically access the infrastructure as 'an electronic communications network service licensee' under s 22

of the Electronic Communications Act 26 of 2005 (ECA) (quoted at [12]). The High Court agreed and granted Telkom a spoliation order.
In this case, the HOA and Vodacom's appeal against this order, the Supreme Court of Appeal —
Held
While Telkom may have accessed the infrastructure to its benefit, even to its exclusive benefit, the indisputable facts established that the infrastructure formed an integral part of immovable property owned, occupied and controlled by the HOA in a security estate. Telkom was required to seek consent to enter the property on each occasion that it sought to attend to the infrastructure, and therefore Telkom was not in physical possession of the infrastructure or the cables. (Paragraph [11].)
Whatever the range of rights which may be bestowed on Telkom by s 22 of the ECA, Telkom could only enjoy quasi-possession of such rights for purposes of the mandament to the extent that it actually exercised such rights in accordance with the professed servitude. The extent to which Telkom in fact exercised a servitutal right to the airspace in the ducts (under s 22 of the ECA), prior to the alleged act of spoliation, was limited to the use of the space actually occupied by the cables in the infrastructure across Dennegeur. A reservation of airspace for possible future use did not give quasi-possession thereof to Telkom. It was therefore not in quasi-possession of the entire infrastructure and, particularly, it was not in possession of unused vacant space in the ducts in which Vodacom installed its fibre optic cables.
As for spoliation, notwithstanding the installation by Vodacom of its optic fibre network in the same ducts as the cables, Telkom's actual use of the ducts, cables and its service to its customers remained undisturbed. It had not lost possession of anything; there was no spoliation. Accordingly, the appeal would be upheld.

FREEDOM STATIONERY (PTY) LTD AND OTHERS v HASSAM AND OTHERS 2019 (4) SA 459 (SCA)
Practice — Judgments and orders — Default judgment — Rescission — On ground that judgment erroneously granted — Error required for rescission relating to procedure followed and not existence of defence — Accordingly, if party procedurally entitled to judgment, it cannot be one erroneously granted in absence of another party — Party that reconciled itself with reasonable prospect that relief could be granted not entitled to rescission on ground that such relief erroneously granted — Uniform Rules of Court, rule 42(1)(*a*).

Company — Oppressive conduct — Relief — Powers of court — Court not limited to relief formulated by applicant — Court's wide powers to make order it considers just and equitable — Companies Act 61 of 1973, s 252 (substantially repeated in Companies Act 71 of 2008, s 163).

An order to which a party is procedurally entitled cannot be rescinded on the ground that it was 'erroneously granted' in the absence of another party as intended in rule 42(1)*(a)* of the Uniform Rules of Court (see [18] – [19]). Nor is a party that reconciles itself with a reasonable prospect that relief may be granted entitled to rescission under the rule (see [25], [29], [32]).
The power of a court to grant relief for oppressive conduct by majority shareholders under s 252 of the (old) Companies Act 61 of 1973 is wide and not limited to the relief formulated by the applicant (see [27], [32]). (Section 252 was substantially re-enacted in s 163 of the (new) Companies Act 71 of 2008.)

During 2010 minority shareholders in the Freedom Group, convinced that the Group was conducting its affairs in an oppressive and unfairly prejudicial manner, applied to the Durban High Court for relief under s 252 . The application was opposed by all the other shareholders, except the H Trust. The High Court, which was unable to get the parties to agree on a draft order, made an order under s 252 directing the respondents to purchase the applicants' shares. Because of the disagreements between the parties, the High Court's order differed markedly from the relief claimed. After the order was implemented, the H Trust, claiming that its rights were breached by the sale of the shares, instituted action for the rescission of the High Court order. The court a quo, invoking rule 42(1)*(a)*, found that the difference between the order and the relief claimed meant that it was erroneously granted in the absence of the H Trust. It accordingly rescinded the order and invalidated the sale. In an appeal to the Supreme Court of Appeal —

Held

Since the alleged invalidity of the antecedent sale of shares agreement had no bearing on the applicability of rule 42(1)*(a)*, there had been no basis for the setting aside of the s 252 order (see [19]). In any event, when the H Trust decided not to participate in the s 252 application, it reconciled itself with the reasonable prospect that the High Court might, in the exercise of its wide powers under that section, make the order it eventually made (see [32]). In the result, the order of the court a quo would be set aside and replaced with an order dismissing the H Trust's claim.

MOUNT EDGECOMBE COUNTRY CLUB ESTATE MANAGEMENT SSOCIATION II RF NPC v SINGH AND OTHERS 2019 (4) SA 471 (SCA)

Road — Public road — What constitutes — Roads within gated estate — Roads public when public commonly using them, or having right of access thereto as opposed to access by invitation — In present case, where general public not having access to roads within estate, such roads private — National Road Traffic Act 93 of 1996, s 1 sv 'public road'.

Voluntary association — Homeowners association — Conduct rules — Lawfulness of rules setting and enforcing speed limits on roads within gated estate — Whether such roads 'public roads' as defined in NRTA — If so, whether approval under NRTA required — National Road Traffic Act 93 of 1996, s 1 sv 'public road'.

A full bench of the High Court held, inter alia, that the roads within an access-controlled security estate were 'public roads' as contemplated in the National Road Traffic Act 93 of 1996 (the Act); and that since the homeowners association did not obtain the authorisation and/or consent required under the Act, the conduct rules for the use of roads within the estate unlawfully purported to usurp functions reserved exclusively for the authorities under the Act, and were therefore to be regarded as *pro non scripto*.

In this case, the homeowners association's appeal against this aspect of the full bench decision, the main issues were: (1) whether the roads within the access-controlled security estate were 'public roads' as contemplated in the Act; and (2) if so, whether the approach of the full court was correct.

Held(1) The test to be applied, in terms of the definition of a 'public road' in s 1 of the Act, was whether a section of the public at least commonly (ie generally or universally) used the area or had a right of access thereto, as opposed to access by invitation, direct or implied. At the inception of the estate, the roads within the estate

were private roads. That never changed; the roads never acquired the character of public roads. The general public did not have access to the roads within the estate; all entry and exit to the estate were strictly controlled. (Paragraphs [12] – [17].)
(2) Even if the roads were public roads, the control of the speed limit within the estate fell squarely within the provisions of the contract concluded between the Association and the owners of the properties within the estate, entered into voluntarily when owners elected to buy property within the estate. Any breach of the conduct rules was therefore a matter strictly between the owner concerned and the Association. It was enforceable only as between the contracting parties, and not against the public at large. The mere fact that the rules provided additional contractual requirements for the operation of vehicles on those roads did not mean that the rules themselves had a public-law content. Nor did the enforcement of those contractual obligations involve the usurpation of public power. The court a quo therefore should have found that approval under the Act for purposes of contractual self-regulation was not required. It followed that the appeal would succeed.

THE *SEASPAN GROUSE*
SEASPAN HOLDCO 1 LTD AND OTHERS v MS MARE TRACER SCHIFFAHRTS AND ANOTHER 2019 (4) SA 483 (SCA)

Shipping — Admiralty law — Maritime claim — Enforcement — Action *in rem* - *P*rotective writ — May be issued in South Africa and served when vessel comes within jurisdiction — Not protecting claimant against intervening bona fide change in ownership — Admiralty Jurisdiction Regulation Act 105 of 1983, s 1(2)(*a*)(i), s 3(7).

Shipping — Admiralty law — Maritime claim — Enforcement — Action *in rem* — Arrest, under protective writ, of associated ship — Ownership of arrested ship changed after issue of writ but before service or arrest — Whether action against ship can still proceed — Conflicting High Court decisions — Supreme Court of Appeal finding that action commencing on date of arrest — Action not surviving change in ownership — Admiralty Jurisdiction Regulation Act 105 of 1983, s 1(2)(*a*)(i), s 3(7).

Shipping — Admiralty law — Maritime claim — Enforcement — Action *in rem* — Commencement — Protective writ — Whether action commenced by issue or service of writ — Conflicting High Court decisions — Supreme Court of Appeal deciding that action *in rem* commenced by service of writ — Admiralty Jurisdiction Regulation Act 105 of 1983, s 1(2)(*a*)(i).

Shortly after Hanjin Shipping, a large South Korean container line, filed for bankruptcy in South Korea in September 2016, first and second respondents, Mare Tracer and Mare Traveller, issued, in order to protect their claims against changes in ownership of Hanjin-owned vessels, a series of protective writs in rem out of coastal divisions of the High Court. The writs cited the entire 70-ship Hanjin fleet as 'associated ships'. The respondents' claims were claims in personam based on breaches of charterparties concluded with Hanjin-owned charterers. They issued the protective writs in the expectation that they would preserve their claims in the face of the inevitable sale of the Hanjin fleet.
When a vessel recently bought by the appellants, *Seaspan Grouse*, was arrested as an associated ship under one of the writs, they approached the Durban High Court for an order setting the arrest aside on the ground that they were innocent purchasers who had bought the ship at arm's length, and that its transfer to them rendered the writ ineffective. The parties were agreed that the sole issue before

court was whether the mere issuance of a writ of arrest was sufficient to commence an admiralty action, thereby protecting the claimants against a change in ownership, or whether physical service of the writ was required, thereby leaving the claimants without a cause of action. The appellants favoured the second interpretation, arguing that it preserved the underlying purpose of the associated ship, which was that liability should be imposed where it properly resided due to common ownership or control. They also pointed out that an interpretation that permitted the arrest of vessels as associated ships even in the absence of any connection between the person liable in personam on the claim and the ship being arrested, would be unconstitutional. The respondents in turn argued for the first interpretation, which kept alive their right to arrest *Seaspan Grouse* despite the change in ownership.
Under s 3(7) of the Admiralty Jurisdiction Regulation Act 105 of 1983 the respondents, as claimants, had to establish that Hanjin Shipping controlled the vessels named in the writs 'at the time when the action [was] commenced'. Section 1(2)*(a)* regulates the commencement of an action. It provides that '(a)n admiralty action shall for any *relevant purpose* commence . . . (i) by the *service* of any process by which that action is instituted . . . (iii) by the *issue* of any process for the institution of an action in rem' (emphasis supplied).
While the court a quo — relying on *The Monica S* [1967] 2 Lloyd's Rep 113 (QB Adm) ([1967] 3 All ER 740 (PDA)), which it said correctly reflected South African law — found that the action in rem was commenced by the issue of the protective writ, and that a later arm's-length transfer did not destroy the claimants' (respondents') action in rem, the Cape High Court in another Hanjin case found that the mere issue without service of the papers was insufficient to protect against changes in ownership, and that a subsequent sale was indeed destructive of the claimant's action.
These conflicting High Court views were resolved by the present judgment.
Held per Wallis JA and Schippers JA (Maya P and Molemela JA concurring)
Section 1(2)*(a)*did not fix a single commencement date for every admiralty action but required the court to apply a flexible standard by selecting the appropriate commencement date depending on the 'relevant purpose' of the enquiry (see [33], [44], [47] – [48]). The relevant purpose in the present matter was the arrest of *Seaspan Grouse* as an associated ship, which required that, at the commencement of the action, *Seaspan Grouse* was owned by a company controlled at the time by Hanjin Shipping (see [49]). This purpose was better served by selecting the date of arrest (s 2(1)*(a)*(i)), rather than the date of issue of the protective writs (s 2(1)*(a)*(iii)), as the relevant date (see [49]). Such an approach was, moreover, in line with the requirement of s 3(4) and s 3(5) that the owner of the property to be arrested also had to be the person liable to the claimant in an action in personam (see [47], [50]), and with the basic purpose of associated-ship jurisdiction, which required a connection between the arrested ship and the ship concerned, or the person liable in personam on the claim (see [51]). It would in addition avoid a series of difficulties that would otherwise arise (see [61]).
While the Act's arrest provisions were incompatible with the decision in *The Monica S*, which was therefore not applicable to South African admiralty law (whether in relation to the arrest of the ship concerned or an associated ship), this did not mean that protective writs could not be issued in South Africa and served when the vessel came within its jurisdiction. It merely meant that such a writ gave no protection to a claimant against an intervening bona fide change of ownership.

The appeal would accordingly succeed, and the order of the High Court replaced with one setting aside the arrest of *Seaspan Grouse*, releasing the cash held as security for the respondents' claims (see [64]).

Held per Makgoka JA dissenting

The appellants' interpretation, favoured by the majority, entailed a radical departure from existing law, and would remove from the maritime claimants the right to issue protective writs (see [101]). It was not supported by the express wording of the relevant provisions of the Act, especially s 1(2), s 3(6) and s 3(7), which permitted only of the construction favoured by the respondents.

TRUSTEES, OREGON TRUST AND ANOTHER v BEADICA 231 CC AND OTHERS 2019 (4) SA 517 (SCA)

Contract — Enforcement — Public policy — Contractual certainty — Contracts enforceable unless contrary to public policy or enforcement unconscionable in circumstances — No principle that sanction claimed for breach must be proportional to its consequences.

Contract — Breach — Remedies — Cancellation — No principle that sanction claimed for breach must be proportional to its consequences.

Contract — Legality — Constitutionality and public policy — *Pacta sunt servanda* essential element of public policy — No consideration of public policy permitting courts to make contracts for parties.

Lease — Cancellation — Court's power to interfere — Failure by tenants to renew as stipulated — Neither renewal clause nor its enforcement contrary to public policy — Cancellation valid — No room for interference based on importation of proportionality test.

When the respondents, four black-owned franchise operators, failed to comply with the notice period for the renewal of their leases, the appellants sought cancellation and eviction. In addition to the lease agreements, which were of five-year duration, the parties had also concluded ten-year franchise agreements. The lease agreements could be renewed for a further five-year period by giving notice six months prior to the termination date.

The respondents, who conceded that they had no case on a strict interpretation of the lease agreements, argued that the recent infusion of notions of fairness and ubuntu into the law of contract would allow the court to take into account surrounding circumstances and find that the leases had been extended. The High Court agreed with the respondents' arguments, finding, in particular, that the 'sanction' (cancellation and eviction) claimed by Oregon was disproportionate to the respondents' failure to timeously renew the leases. For the concept of disproportionality the High Court relied on *Botha v Rich NO and Others* 2014 (4) SA 124 (CC) (2014 (7) BCLR 741; [2014] ZACC 11), in which the court refused to enforce a cancellation clause on the ground that the penalty was disproportionate (see [37]).

Among the factors relied on by the High Court a quo were that the respondents were not sophisticated businessmen; that the application of the strict terms of the contract would be inimical to black economic empowerment; that the respondents would lose their businesses if evicted; and that when the agreements were concluded, both sides envisaged that the leases would, together with the franchise agreements, endure for 10 years. In an appeal to the Supreme Court of Appeal —

Held The SCA had in the past warned of the threat posed to legal certainty by value judgments such as disproportionality (see [24]). These precedents — never cited by the court *a quo* — stressed the fundamental importance for commerce of *pacta sunt servanda* and contractual certainty (see [25], [26]). Certainty entailed that parties would know what their contract meant and that they could rely on their terms, unless they were against public policy or their enforcement would be unconscionable (see [26]).
There was no principle that the enforcement of a valid term had to be fair and reasonable: the issue remained one of public policy (see [33] – [34]). Although public policy was informed by fairness and reasonableness, these were not self-standing principles but competed with other considerations such as the need for certainty in commerce (see [35]).
The notion, that an agreed-upon sanction for breach of contract was unenforceable for being disproportionate, was alien to South African law. This did not, however, mean that courts would enforce sanctions that were contrary to public policy or that would be unconscionable in the circumstances (see [38]).
There was nothing inherently offensive in the present renewal clauses (see [39]).
The effect of the court a quo's order was to make a new contract for the parties, which was contrary to public policy and could not be endorsed (see [42]). The argument, that the respondents would lose their businesses if evicted, ignored the fact that it was the respondents who, through non-compliance with the renewal clause, jeopardised their businesses (see [44]). There were, in summary, no public-policy considerations that rendered the renewal clauses unenforceable (see [46]).
The appeal would be upheld and the order of the court a quo replaced with one evicting the respondents

VAN STADEN NO AND OTHERS v PRO-WIZ GROUP (PTY) LTD 2019 (4) SA 532 (SCA)

Close corporation — Business rescue — Liquidation proceedings already initiated —Effect of application for business rescue — *Locus standi* of liquidators to oppose business rescue application — Liquidators' right to oppose application not removed — Companies Act 71 of 2008, s 131(6).

Liquidators-rights-Liquidators' right to oppose application not removed — Companies Act 71 of 2008, s 131(6).

Close corporation — Business rescue — Costs — When punitive costs order appropriate.

Locus standi- liquidators had *locus standi* to oppose the business rescue application in the first place- as a matter of principle, when a party was cited in legal proceedings, it was entitled without more to participate in those proceedings. The fact it was cited as a party gave it that right.

Cost orders- High Court's refusal to grant - not arise from the exercise of any discretion on the judge's part

After the close corporation Oljaco was placed under provisional liquidation, the company Pro-Wiz brought an urgent application to have it placed under business rescue, citing Oljaco's liquidators as respondents, who opposed the motion. Pro-Wiz, however, later withdrew the application. While tendering to pay the costs of Oljaco's principal creditor Sars, which had intervened to oppose the business rescue application, Pro-Wiz did not do so in respect of the liquidators. Consequently, the liquidators sought an order in the High Court below in terms of Uniform Rule of Court

41(1)*(c)*ordering Pro-Wiz to pay its costs. The court refused the liquidators' application on the grounds that the liquidators never had *locus standi* to oppose the business rescue application in the first place. Such conclusion was based on its finding that s 131(6) of the Companies Act 71 of 2008 meant that Pro-Wiz's institution of business rescue proceedings in relation to Oljaco deprived the liquidators of any power to continue with the administration of the close corporation and revested those powers in Oljaco's sole member, Mr Smith.
The liquidators appealed to the Supreme Court of Appeal, where they challenged the correctness of the above High Court findings. Pro-Wiz for its part insisted that the appeal was moot, and fell to be dismissed under s 16(2)*(a)* of the Superior Courts Act 10 of 2013, on the grounds that the decision sought would have no practical effect as the order under consideration dealt solely with a question of costs without there being any underlying legal issue warranting the attention of the court.
Held, that an appeal would have a practical effect or result when it raised a discrete legal issue of public importance, the answer to which would affect matters in the future on which the decision of the of the SCA was required. Costs orders rarely did this as they usually involved the exercise of a judicial discretion not lightly interfered with on appeal. (See [5].) Here, however, the High Court's refusal to grant an order for costs in favour of the liquidators did not arise from the exercise of any discretion on the judge's part; instead, it was squarely based on her conclusion of law as to the impact of s 131(6) of the Act on the liquidators' powers. That did not involve the exercise of a discretion. (See [6].) Further, the decision was on a matter of fundamental importance to all liquidators, provisional or final, and generally to those who might become involved in liquidation and business rescue proceedings. In such circumstances, the fact that the purpose of the appeal was to overturn a judgment on a question of costs did not mean that it was moot and should be dismissed in terms of s 16(2)*(a)*(i) of the Superior Courts Act.
Held, that, in terms of s 131(2)*(a)* of the Companies Act, an application for business rescue had to be served *on the company or close corporation*. Where the entity was already being wound up, this meant the company or close corporation's liquidators in whose custody or control the company was placed. It was obvious that liquidators faced with such an application should be entitled either to support or oppose the application, depending upon their judgment as to the interests of the company and its creditors. (See [10] and [12].) Furthermore, as a matter of principle, when a party was cited in legal proceedings, it was entitled without more to participate in those proceedings. The fact it was cited as a party gave it that right. (See [13].) Accordingly, s 131(6) of the Companies Act did not disentitle the liquidators from opposing the application for business rescue, and they possessed locus standi.
Held, as to the appropriate scale of costs, that the conduct of Pro-Wiz during proceedings suggested it did not have any bona fide belief in the merits of its business rescue application, or a genuine intention to pursue it. It had instead been brought to enable Oljaco's sole member, Mr Smith, to avoid enquiry under s 418 of the old Companies Act 61 of 1973. That constituted an abuse of the process of court and of the business rescue procedure. Business rescue existed for the sake of rehabilitating companies that had fallen on hard times but were capable of being restored to profitability or, if that was impossible, to be employed where it would lead to creditors receiving an enhanced dividend. Its use to delay a winding-up, or to afford an opportunity to those who were behind its business operations not to account for their stewardship, should not be permitted. When a court was confronted with a case where it was satisfied that the purpose behind a business rescue

application was not to achieve either of these goals, a punitive costs order was appropriate. (See [21] – [22].)
Held, accordingly, that the appeal should be upheld, and costs awarded in favour of the liquidators on the scale as between attorney and client. (See [23].)

AVNET SOUTH AFRICA (PTY) LTD v LESIRA MANUFACTURING (PTY) LTD AND ANOTHER 2019 (4) SA 541 (GJ)

Court — Powers — To make settlement agreement order of court — Only where there was prior litigation, may agreement be made order.

The parties, who were not involved in litigation, had concluded a settlement agreement in respect of moneys first respondent owed applicant.
Here applicant applied to make the agreement an order of court (see [1] and [5]).
Held, that it was only where there was prior litigation leading to the settlement agreement that it could be made an order of court. Application accordingly dismissed.

BEIERSDORF AG v KONI MULTINATIONAL BRANDS (PTY) LTD 2019 (4) SA 553 (GJ)

Competition — Unlawful competition — Passing-off — Deception as to trade source — Use of parts of competitor's past get-up — If having necessary distinction in relation to competitor's mark or brand, could still suffice to create confusion, even though such parts discontinued — Potential of hallmarks in get-up and logo to retain reputation through changes and rebrands.

The parties were both competitors in the South African market for the supply of body-care products. In the present application, the applicant alleged that the respondent was passing off its men's shower gel, which it supplied under the brand name CONNIE, as being that of, or associated with, the applicant's men's shower gel supplied under its NIVEA brand. More particularly, the complaint was that the get-up of the Connie shower gel was likely to cause confusion in the market as to its source or as to its connection with the applicant. The applicant consequently sought an interdict against the respondent.
The respondent's opposition to the application rested on its claim that the get-up of Nivea men's shower gel had changed many times over the years, and that those used now and at the time of the Connie product launch bore no resemblance to the respondent's product's get-up. The applicant, however, insisted that it was entitled to a claim for passing-off in circumstances where the respondent had borrowed from its stable of both past and present logos and features to create a composite which was deceptive to the average consumer. It said that the fact that there were references to features which may no longer be used in the Nivea get-up, did not detract from the confusion to consumers.
Held, that the hallmarks in get-up and logo used by a trader had the potential to retain reputation through changes and rebrands. The memory in the marketplace of past get-ups could, in some circumstances, create associations which endured and which could outlive changes in get-up and rebranding. (See [30].)
Held, accordingly, that use by a competitor of the parts of a trader's get-up, if having the necessary distinction in relation to a particular mark or brand, could suffice to create confusion and that it mattered not that the use of such parts had been discontinued.

Held, that the composite created from aspects of the get-ups of the applicant over time was deceiving. This was calculated for the purposes of passing off the Connie shower gel as belonging to a range of the applicant. The applicant's products were famous. The hallmarks of its past get-ups had created impressions and associations which lingered in the minds of consumers. The employment of these features alone or, as in this instance, as a composite, were plainly evocative of the applicant's brand.
Held, accordingly, that an interdict should be granted in favour of the applicant against the respondent in the terms set out in [36].

EX PARTE MDYOGOLO 2019 (4) SA 561 (ECG)
Attorney — Admission and enrolment — Application for — Criminal conviction — Applicant disclosing previous convictions but falsely claiming that robbery convicted for was committed in context of liberation struggle — Court refusing application for admission for lying under oath — Application for leave to appeal refused — Applicant not discharging onus of proving that he was fit and proper to practise as attorney — No merit in other grounds for leave to appeal, namely that 22 years had elapsed since robbery committed, that Law Society did not object to application, and that applicant not attorney at time of robbery.

In his application for admission as an attorney, Mr Mdyogolo disclosed that he had previous convictions, including one for robbery with aggravating circumstances, committed 22 years earlier, and which he explained in his founding affidavit was committed in the context of the liberation struggle. The court hearing his application exposed this as a lie because the robbery took place after the first democratic elections in April 1994. It accordingly dismissed his application, finding that his explanation 'evidences a lack of honesty, integrity and trustworthiness, all of which are essential qualities for any member of the attorneys' profession', and that therefore he did not discharge the onus of proving that he was a fit and proper person to be admitted as an attorney.
In this case, Mr Mdyogolo's application for leave to appeal, he advanced a number of arguments as to why the court *a quo* erred. Most related to the finding that he was not a fit and proper person. In this regard it was submitted, inter alia, that the court *a quo* erred in 'failing to take into account the fundamental honesty of the applicant in his voluntary disclosure that he had criminal convictions at all', when he could have simply failed to disclose them. The other grounds raised the following issues: whether the court *a quo* should have followed the Cape Law Society's lead, which had no objection to the applicant's admission; whether the court *a quo* failed to take into account the lapse of 22 years since the robbery was committed; and whether it counted in the applicant's favour that he was not an attorney when his 'misdemeanour' was committed. (See [7] and [8].)
Held
The courts, and the public, expected, and were entitled to expect, complete honesty from attorneys and advocates. That was the baseline. An applicant for admission to the profession did not establish that he or she was a fit and proper person by saying, 'I could have acted dishonestly, but I did not.' It was required of the applicant that he disclose his previous convictions — he had a duty to do so. The fact that the applicant disclosed his previous convictions, rather than dishonestly concealing them, therefore did not have any impact on the finding that he was not a fit and proper person to be admitted as an attorney.

There was no merit in any of the other grounds. The view by the Cape Law Society was tainted by the applicant's deception; the lapse of time since his conviction was irrelevant because his conviction per se was not the bar to his admission, instead it was the fact that he lied when applying for admission about the reason for committing the robbery; and that he was not an attorney at the time he committed the robbery made no difference to his having to discharge the onus that he was a fit and proper person.
The conduct of the applicant, in lying under oath in order to deceive the court and the Cape Law Society to allow him entry into the attorneys' profession, was so serious that there was no reasonable prospect of another court concluding that he ought to be admitted to practise as an attorney. The application for leave to appeal would therefore be dismissed.

HLUMISA INVESTMENT HOLDINGS RF LTD AND ANOTHER v KIRKINIS AND OTHERS 2019 (4) SA 569 (GP)

Company — Shares and shareholders — Shareholders — Proceedings by and against — Action by shareholders against directors for compensation for loss in value of shares flowing from loss to company as result of directors' conduct — Common-law rule against recovery of reflective loss prohibiting such claims — Company being proper plaintiff — Section 218(2) of Companies Act, allowing civil actions against persons breaching Act, not altering common-law position — Companies Act 71 of 2008, s 218(2).

Company — Directors and officers — Director — Fiduciary duty — Breach — Action brought by shareholders under s 218(2) of Companies Act against directors for compensation for loss in value of shares — Shareholders alleging breach by directors of their duties towards company in terms of s 76(3) — In such circumstances, shareholders wrong to bring claim under s 218(2), and should have brought it under s 77(2), which provides special remedy — Companies Act 71 of 2008, ss 76(3), 77(2) and 218(2).

The present matter concerned principally the question whether a shareholder in a company could claim, under s 218(2) of the Companies Act 71 of 2008, damages against the company directors, on the grounds their shares had declined in value due to losses sustained by the company as a result of the directors' conduct.
The two plaintiffs were minority shareholders in the company African Bank Investment Ltd (ABIL). The first to tenth defendants were directors of ABIL and of a wholly owned subsidiary, African Bank. The eleventh defendant (Deloitte) was the auditor for both ABIL and African Bank. In the High Court the plaintiffs issued summons against the defendants. *In claim A against the directors*, the plaintiffs sought payment of R721 384 512. They brought such claim in terms of s 218(2) of the Companies Act 71 of 2008, which provides that 'any person who contravenes any provision of [the Companies Act] is liable to any other person for any loss or damage suffered by that person as a result of that contravention'. They submitted that they were entitled to claim against the directors under such provisions because the latter had conducted the business of ABIL or African Bank in a reckless manner in breach of, inter alia, s 76(3) of the Companies Act, which breach led to losses on the part of such entities, which in turn caused a diminution in the value of the plaintiffs' shares in ABIL. *In claim B against the auditor*, the plaintiffs sought payment of R1 341 224 294,40, grounding their claim in delict based on negligent misstatements made by the auditor relating to the accuracy of the annual financial

statements, which resulted in significant losses on the part of African Bank, and hence ABIL, which in turn caused a drop in the share price of their ABIL shares.
The present proceedings dealt with exceptions raised by the defendants against both claims. The gist of the exceptions raised *against claim A*was that the plaintiffs failed to allege that the loss they claimed was suffered *as a result of* the breach by the directors of the Companies Act. Instead, they alleged that the directors' breach caused loss *to African Bank and ABIL*, which *in turn* caused a drop in their ABIL share prices. This diminution in share value merely *reflected* the loss suffered *by the companies*, and such a claim for 'reflective loss' was not sustainable in South African law. Accordingly, the plaintiff's particulars of claim lacked the necessary averments to sustain a cause of action. The exception against claim B raised similar points, its being argued that, on the facts pleaded by the plaintiffs, *African Bank* suffered the loss sustained because of the alleged misstatements; and that *neither ABIL (African Bank's parent company) nor the plaintiffs suffered* any legally cognisable loss. Accordingly, once again, the plaintiffs' particulars of claim lacked the necessary averments to sustain a cause of action.
The court held that, to the extent that they claimed in *A* that the directors were liable for damages as a result of a breach of s 76(3), the plaintiffs could not invoke s 218(2). Where a statute expressly and specifically created liability for the breach of a section, then a general section in the same statute could not be invoked to establish a co-ordinate liability. Here, s 77(2) specifically created liability for a breach of s 76(3), and hence the plaintiffs' claim had to be brought under that section, and not s 218(2). (See [28] – [30], and [91].)
The court further held that both claims *A* and *B* were precluded by the 'proper plaintiff rule' and the 'reflective loss doctrine'. Where a company suffered loss caused by a breach of duty owed to it, only the company might sue in respect of that loss (see [75]) (aside from certain exceptions not applicable in the present case. A shareholder could not recover the loss in share value as a result of a wrong done to the company, because such a loss was merely a reflection of the loss suffered by the company. The shareholders did not suffer any personal loss. Their only loss was through the company, in the diminution in the value of the net assets of the company. The plaintiffs' shares were merely a right of participation in the company in terms of the articles of association. The shares themselves, their right of participation, were not directly affected by the wrongdoing. The plaintiffs still held all the shares as their own absolutely unencumbered property. (See [70.4] and [77].)
The court also found that s 218(2), properly interpreted, did not alter the common law to allow reflective-loss claims to be brought under its provisions. (See [39], [46] , [50] and [91].) The court rejected the plaintiffs' suggestion that the phrase 'as a result of' in s 218(2) of the Companies Act did not import a legal causative requirement. Should that be the case, it would mean that all the requirements of the common law relating to fault, foreseeability, causation and the proper plaintiff should be discarded, and this could not be so. (See [43] – [44], [48] and [79].)
The court, in conclusion, upheld the exceptions raised against both claims.

JOSE AND ANOTHER v MINISTER OF HOME AFFAIRS AND OTHERS 2019 (4) SA 597 (GP)
Immigration — Citizenship — By naturalisation — Where one fulfils requirements of s 4(3) of Citizenship Act, one then has right, and choice, to apply for citizenship, and, having made choice to apply, one then has right for that citizenship to be granted — No room for exercise of discretion — South African Citizenship Act 88 of 1995, s 4(3).

Immigration — Citizenship — By naturalisation — Requirement that applicant's birth be 'registered' in terms of Births and Deaths Registration Act 51 of 1992 — What constitutes registration for such purposes — South African Citizenship Act 88 of 1995, s 4(3).

Immigration — Citizenship — By naturalisation — Application — Failure of decision-maker to determine application — Appropriate remedy — Applicants having met all requirements under s 4(3) of Citizenship Act — Order of court requiring decision-maker to grant application — South African Citizenship Act 88 of 1995, s 4(3).

The applicants applied for citizenship under s 4(3) of the South African Citizenship Act 88 of 1995, confident that they had met the qualifications thereunder. That section provided:

'A child born in the Republic of parents who are not South African citizens or who have not been admitted into the Republic for permanent residence, qualifies to apply for South African citizenship upon becoming a major if —

(a) he or she has lived in the Republic from the date of his or her birth to the date of becoming a major; and

(b) his or her birth has been registered in accordance with the provisions of the Births and Deaths Registration Act, 1992.'

The applicants became dissatisfied with the delay in the processing of their applications. Consequently, in the present matter, they brought an application in terms of the Promotion of Administrative Justice Act 3 of 2000, on the ground of an unreasonable delay to make a decision, and sought an order requiring the respondents (which included the Minister of Home Affairs; and the D-G: Department of Home Affairs) to grant them citizenship in terms of s 4(3) of the Citizenship Act.

The respondents raised a number of points of opposition, most of which were disposed of by an intervening decision of the SCA in a very similar matter. The most pertinent remaining issues were these: (a) A condition for citizenship under s 4(3) was that the '[applicant's] birth has been *registered in accordance with the provisions of the Births and Deaths Registration Act, 1992*'. The respondents argued that, because people in the applicants' position were not entered in the population register and did not have identity numbers, their births were not registered in terms of the Registration Act, and they therefore did not comply with the abovementioned condition. *(b)* Assuming that the applicants had satisfied the requirements for citizenship under s 4(3), would it be appropriate to grant the relief sought by the applicants, of ordering the respondents to grant the applicants' citizenship applications, instead of referring them back to the respondents to consider them? The concern here was that such a course would amount to judicial overreach.

Held, as to *(a)*, that s 4(3) of the Citizenship Act did not require that an applicant's details be entered in the population register or that the person have an identity number. It only required registration of the birth *in terms of the Registration Act*. And the Registration Act provided that, in respect of a child born to non-South African citizens, the *mere issuing of their birth certificate* was the registration of their birth (without their particulars being entered in the population register or their receiving identity numbers). Accordingly, there being no contention that their birth certificates had been improperly issued, the applicants had complied with s 4(3)*(b)* of the Citizenship Act. (See [45] – [46].)

Held, as to *(b)*, that an appropriate order in cases such as the present — where an applicant sought to review under PAJA the failure of the respondents to determine their application for citizenship in terms of s 4(3) of the Citizenship Act, having met all the requirements set out in those provisions — was for the respondents to grant the

applicants' application. The circumstances of such a review constituted exceptional circumstances justifying such a course, ie a court ordering a decision-maker to make a decision in a particular way. (See [48], [52] – [53].) (In reaching such a decision, the court found that, if an applicant had satisfied all the requirements set out in s 4(3) of the Citizenship Act, they had the right and the choice to apply for citizenship, and, having made that choice, they had a right for that citizenship to be granted; there was no room for the exercise of a discretion.

SOUTH AFRICAN BROADCASTING CORPORATION SOC LTD v SOUTH AFRICAN BROADCASTING CORPORATION PENSION FUND AND OTHERS 2019 (4) SA 608 (GJ)

Pension — Benefits — Withholding — Power of fund to withhold payment of benefits pending determination of member's liability to employer for compensation for damage caused by reason of theft, dishonesty, etc — Whether, for purposes of interim interdictory relief compelling fund to withhold benefits pending employer's action for recovery of losses, applicant employer established *prima facie* case for member's liability — Pension Funds Act 24 of 1956, s 37D(1)(*b*)(ii).

In *Highveld Steel & Vanadium Corporation Ltd v Oosthuizen* 2009 (4) SA 1 (SCA) it was held that, while s 37D(1)*(b)*(ii) of the Pension Funds Act 24 of 1956 (the PFA) only referred to the 'deduction' of pension benefits, in order to give effect to the subsection's purpose — which is to protect an employer's right to recovery of money misappropriated from it — its wording must be interpreted to include a pension fund's power *to withhold* payment of a member's benefits pending the determination or acknowledgment of such member's liability.

This case concerned an application for interdictory relief — premised on s 37D(1)*(b)*(ii) of the PFA, read with the rules of the pension fund in question — sought by an employer (the SABC) against the first-respondent pension fund (the Fund) to withhold the pension benefits of its former employee, Mr Motsoeneng (the second respondent), until the determination of an action that the SABC intended instituting against him for damages caused by his misconduct. At the request of the SABC, the Fund had agreed to withhold payment pending the outcome of such an application, which the SABC subsequently launched on an urgent basis during August 2017. This application was, however, not prosecuted to finality, culminating in the present application (in which only the interdictory relief was considered and not the other relief requested in the application).

The primary issue was whether, for the purposes of entitling it to the interdictory relief it sought, the SABC had established a prima facie case that Mr Motsoeneng may be liable to it in the light of the allegations against him. These were his unlawful acceptance and retention of an unauthorised and unwarranted success fee (paid to him by the SABC) in the amount of R11 508 549,12; and various instances of misconduct (identified by the Public Protector) leading to the SABC suffering R10 235 452,20 in losses. Although both opposed the application, neither the Fund nor Mr Motsoeneng disputed the alleged misconduct but instead raised a number of procedural challenges, which the judge, in her discretion, disregarded (see [44]).

Held

It was so that the SABC filed amended notices of motion without observance of the rules of court, and that it filed its supplementary affidavit without leave of the court first having been obtained therefor. The court, however, had an overriding discretion to overlook the procedural irregularities complained of. There was no real

prejudice that Mr Motsoeneng or the Fund would suffer if the case were to be determined on the basis of the SABC's notice of motion, including its supplementary founding affidavit and all other affidavits filed in the matter.
On a reading of these, and in view of the glaring absence of any serious challenge to the SABC's allegations of intentional and dishonest misconduct against Mr Motsoeneng, the SABC had established a prima facie case that Mr Motsoeneng may be liable to it for repayment of the success fee. The evidence put up by the SABC was also sufficient to prima facie point to Mr Motsoeneng's intentional misappropriation of public funds, and it therefore also enjoyed a prima facie right to recover the losses it had incurred in respect of its other claim. Accordingly, the SABC had established a prima facie right of recovery within the meaning of s 37D(1)*(b)* of the Act for purposes of entitling it to interim interdictory relief.
The SABC had also satisfied the other requirements to qualify for interim relief: it had shown irreparable harm if the interdict were not granted (see [102]); and that the balance of convenience favoured the granting of interdictory relief (see [106]). Accordingly, the SABC had established its entitlement to an interdict restraining the Fund from paying out the whole of the pension benefit standing to the credit of Mr Motsoeneng.

SA CRIMINAL LAW REPORTS AUGUST 2019

DIRECTOR OF PUBLIC PROSECUTIONS v MOLOTO 2019 (2) SACR 123 (SCA)

Murder — Sentence — Imposition of — Factors to be taken into account — Belief in witchcraft — Young woman having grandmother killed whom she believed had bewitched her — Cumulative effect of personal circumstances and belief in witchcraft justifying deviation from prescribed minimum — Sentence of 10 years' imprisonment imposed.
Sentence — Prescribed minimum sentences — Imposition of in terms of Criminal Law Amendment Act 105 of 1997 — Substantial and compelling circumstances — Trial court not conducting exercise establishing whether substantial and compelling circumstances present justifying deviation from prescribed minimum — Misdirection justifying imposition of sentence afresh.
The respondent was convicted in the High Court of having murdered her grandmother and sentenced to five years' imprisonment in terms of the provision of s 276(1)*(i)* of the Criminal Procedure Act 51 of 1977. She believed that her grandmother had bewitched her and enlisted the help of her boyfriend to kill her. The boyfriend went to the deceased's home with the intention of killing her, but left after finding visitors there. After discovering that her boyfriend had not killed the deceased the respondent arranged to return with him the next day. On arrival they found the deceased in the company of a 5-year-old girl who lived with her. They waited in the dining room for the deceased to go to bed. The respondent took the child to another room while the boyfriend followed the grandmother to her bedroom where he strangled her. When the respondent went to her grandmother's bedroom she found her boyfriend still engaged in the act, although she was already dead. Her boyfriend then killed the 5-year-old girl to eliminate her as a witness. On appeal by the state against her sentence.
Held, that, since the respondent was convicted of a premeditated murder as envisaged in part 1 of sch 2 to the Criminal Law Amendment Act 105 of 1997, the court was obliged to impose the minimum sentence of life imprisonment, unless it

found substantial and compelling circumstances that justified a deviation from that sentence. The trial court, however, failed to embark on such an exercise. This was a clear misdirection as the court was unclear as to why the prescribed minimum sentence was not imposed, and was justified in imposing sentence afresh.
Held, further, in aggravation, that the murder was premeditated; the respondent was undeterred when the first attempt could not proceed; and that she had even waited in the house for the deceased to go to bed before she and her boyfriend committed the evil deeds. She had furthermore breached her grandmother's trust and that of the child by pretending to take the latter to a bedroom to sleep while knowing she had arranged for the grandmother to be killed. That the deceased had done nothing to the respondent, but lost her life on the basis of unsubstantiated allegations of witchcraft, also required strong condemnation.
Held, further, however, that the court was prepared to accept, as the trial court did, that the respondent believed in witchcraft and that after she consulted the second traditional healer she thought that her life was in danger. These factors, when considered cumulatively with the respondent's personal circumstances, constituted substantial and compelling circumstances justifying a deviation from the prescribed minimum sentence. An appropriate sentence would be one of 10 years' imprisonment. The sentence was adjusted accordingly.

CLOETE AND ANOTHER v S AND A SIMILAR APPLICATION 2019 (2) SACR 130 (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. (See [20] and [35] – [36].) (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.

MINISTER OF POLICE v VOWANA AND ANOTHER 2019 (2) SACR 148 (ECM)
Court— Decisions of — Judgments — Judgment rewritten by attorney with approval of magistrate — Independence and impartiality of judicial officers — Proceedings set aside on review.
Court — Magistrates' court — Judgments — 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. 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.
Held, accordingly, that the proceedings of the court a quo had to be set aside.

S v GARLAND 2019 (2) SACR 162 (WCC)
Admission of guilt— Setting-aside of — Payment of by child — Proscribed by s 18(2) of Child Justice Act 75 of 2008.
Child — Arrest — On minor offence — Responsibility of police officials considering release or detention of child prior to first appearence at preliminary inquiry — Should ideally release child on written notice into care of parent, appropriate adult or guardian in terms of s 21(2)(*a*) of Child Justice Act 75 of 2008.
A 17-year-old accused was found in possession of a small quantity of cannabis at his mother's home and arrested. His mother accepted the arresting officer's recommendation that he pay an admission-of-guilt fine of R40. Almost seven years later he sought the setting-aside of the conviction on the grounds that the arresting officer had not advised him or his mother of his rights or the consequences of paying the fine.
Held, that the magistrate examining the documents for the confirmation of the admission of guilt at the time should have noticed that the accused was a child and that the payment of such a fine by him was proscribed by s 18(2) of the Child Justice Act 75 of 2008. It accordingly had to be set aside. (See [6] and [8].)
Held, further, that where a child was alleged to have committed a minor offence, such as in the present case, the police officials considering the release or detention of the child after arrest, but prior to the first appearance at a preliminary inquiry, should ideally release the child on written notice into the care of a parent, an appropriate adult or a guardian in terms of s 21(2)*(a)* of the Child Justice Act.

S v TUCKER 2019 (2) SACR 166 (WCC)
Extradition— Application for — Nature of magistrate's enquiry under Extradition Act 67 of 1962 — Request from non-associated state — Approach that magistrate relegated to mere scribe and record compiler and not able to rule on breaches of treaty or fundamental human rights, questioned.
Extradition— Application for — Procedure during enquiry in terms of ss 9 and 10 of Extradition Act 67 of 1962 — Conducted in manner of preparatory examination — Process not requiring, however, that formal charges be put to person or that they plead to such charges — Semble: Advisable that s 9 receive necessary legislative attention to clarify procedure.
Extradition— Application for — Procedure during enquiry in terms of ss 9 and 10 of Extradition Act 67 of 1962 — Evidence — Hearsay evidence admissible.
Extradition — Application for — Procedure during enquiry in terms of ss 9 and 10 of Extradition Act 67 of 1962 — Evidence — Magistrate not permitted to simply refuse to accept evidence produced by extraditee reflecting upon his human rights or rights to fair trial, were he to be extradited.

The appellant, a British national, was tried in a court in the United Kingdom in October 2000 on charges that he and others had non-consensual oral and anal sex with young boys who were 13 and 14 years old at the time. He was not present when judgment was handed down, having fled to South Africa two days earlier. In his absence he was sentenced to eight years' imprisonment.

He nonetheless lodged an appeal against his conviction, which was successful on a technical aspect relating to the judge's summing-up to the jury. The court directed that a fresh indictment be lodged and that there should be a retrial. A warrant was issued for his arrest. At that time fresh evidence came to light about further similar charges against the appellant, 41 in total, for which he was sought.

He was arrested in South Africa and a new trial indictment was lodged at a crown court containing the same offences as before, but including an additional three counts in respect of one of the boys involved in the early counts. The further offences all involved anal sex or other indecent acts committed with boys under the age of 16 years and constituted offences in terms of South African law.

The appellant appeared before a magistrate in proceedings under ss 9 and 10 of the Extradition Act 67 of 1962 (the EA). When the hearing commenced the prosecutor handed up a certificate in terms of s 10(2) of the Act, in which a chief prosecutor for the Crown Prosecution Service of England and Wales declared that the evidence contained in the appellant's extradition request was available for trial and sufficient to justify his prosecution. The appellant's counsel raised a number of objections to the proceedings, including: that the proceedings were to be conducted in the manner of a preparatory examination in terms of the Criminal Procedure Act 51 of 1977 — this meant that the prosecutor had to put forward the evidence that he had in his possession and put the charges, in respect of which extradition was sought, to the appellant, who would then plead to those charges and have the right to testify and call witnesses; that the evidence contained in the extradition request was entirely hearsay and inadmissible; and that the information provided was impermissibly vague and lacked detail. When counsel requested rulings on these issues, the magistrate became impatient and indicated that he would only make one ruling at the end of the matter.

During his evidence in the enquiry, the appellant raised further issues in challenging the extradition request, including that there had been distorted and exaggerated media coverage of his trial and that his legal team were in the process of putting together a file containing extracts of some of the media reports. They also intended to include an affidavit from an expert on British law which would show that it discriminated unfairly against homosexuals in respect of the time bar for prosecution of the type of offence with which he was charged (they were in the process of obtaining a copy of the original indictment for this purpose). His counsel applied for a postponement for these purposes, but this was refused.

At the conclusion of the enquiry, the magistrate held that the appellant was liable to be extradited and committed him to prison to await the Minister's decision in this regard. The appellant appealed against this decision.

Held, as regards the nature of the enquiry in terms of s 9, that the decision of the Constitutional Court in *Robinson* effectively relegated the magistrate, in relation to human-and constitutional-rights issues in an extradition enquiry from a non-associated state, to being a mere scribe and record compiler. He could not rule, even in the case of an obvious and flagrant breach of an extraditee's treaty or fundamental human rights, that he was not liable for extradition on the grounds that it

would be grossly unjust, and had to leave that to the Minister to decide in the exercise of his discretion. (See [47].)
Held, further, that it was obvious that, although the EA prescribed that the extradition enquiry before the magistrate was to be conducted in the manner in which a preparatory examination would be conducted, this did not envisage a process whereby formal charges were put to an extraditee, who was then required to plead to those charges. Semble: In order to avoid confusion in this regard, it would perhaps be advisable for s 9 to receive the necessary legislative attention in order to make clear that which had long been accepted as implicit in regard to how proceedings in an extradition enquiry were to be conducted. (See [53].)
Held, further, that hearsay evidence was pertinently admissible in extradition enquiries and it was not peremptory for any affidavits which were submitted by the requesting state to be in the first person. (See [68].)
Held, further, that the content of the affidavit tendered by the requesting state, together with the indictment and the warrant of arrest from the crown court, adequately set out the charges against the appellant with sufficient particularity as regards time and place for the appellant to know what he was alleged to have done, and there was no merit in the complaints raised in this regard. (See [70].)
Held, further, that the magistrate was not permitted to simply refuse to accept any evidence which the appellant wished to tender which might have reflected upon his fundamental human rights, or his rights to a fair trial, were he to be extradited. He was obliged to receive any evidence pertaining to these aspects which could have a bearing on the exercise of the Minister's discretion. (See [73].)
Held, further, that the magistrate's refusal to entertain such evidence constituted an irregularity, in that it breached the appellant's procedural rights and the *audi alteram partem* principle. (See [75].)
Held, further, that, given that the formalities required in terms of the EA and the European Convention on Extradition had been complied with and the appellant was clearly extraditable, there was no cause to set aside the proceedings. The failure to allow the appellant to put forward the affidavits and other evidence that he wished to, had to be remedied by returning the matter to the magistrate and affording the appellant such an opportunity, before the matter was then referred to the Minister by the magistrate. (See [80].) The appeal was dismissed.

S v MAKHOKHA 2019 (2) SACR 198 (CC)
Sentence — Imprisonment — Term of — Non-parole period — Section 276B of Criminal Procedure Act 51 of 1977 — Imposition of — Court not having power to fix 100% non-parole period — Such constituting infringement of applicant's rights under s 12(1)(*a*) of Constitution.
Sentence — Imprisonment — Multiple terms of imprisonment — Life imprisonment and determinate sentence — Order in which to be served — Court not empowered to order that determinate sentence commence running after completion of sentence of life imprisonment — Correctional Services Act 111 of 1998, s 39(2)(*a*).

At the time when the applicant was to be sentenced in a regional magistrates' court for the possession of a motor vehicle that was suspected to have been stolen, he was already serving a sentence of life imprisonment. The magistrate sentenced him to 15 years' imprisonment and ordered that he 'must never be released on parole', and further directed that the 15-year sentence would only start to run after completion of the life sentence. He appealed unsuccessfully against the sentence to

the High Court and the Supreme Court of Appeal. In the present proceedings he sought leave to appeal against his sentence.
Held, that the court lacked jurisdiction to hear an appeal that was purely against the magnitude of sentence based on a trial court's alleged incorrect evaluation of facts. The appeal against the 15-year term of imprisonment accordingly had to be refused. (See [6] – [7].)
Held, further, that in terms of s 276B(1)*(b)* of the Criminal Procedure Act 51 of 1977 the regional court did not have the power to fix a 100% non-parole period in respect of the 15-year term of imprisonment. The portion of the non-parole period that was proscribed by the provision, namely that in excess of two-thirds of 15 years' imprisonment, also constituted an infringement of the applicant's rights under s 12(1)*(a)* of the Constitution: the right not to be deprived of freedom arbitrarily or without just cause. The non-parole period was therefore not only in conflict with the statute but constitutionally invalid. (See [13] – [15].)
Held, further, that the direction that the applicant's sentences were to run consecutively was contrary to the provisions of s 39(2)*(a)* of the Correctional Services Act 111 of 1998, which provided that the National Commissioner determine the order in which sentences were to be served, except that a determinate sentence of incarceration had to run concurrently with a life sentence. (See [16].)
Held, further, that in circumstances where the regional magistrate had dealt at length with the factors relevant to sentence, and none of them constituted exceptional circumstances warranting the imposition of a non-parole period, remittal would be an exercise in futility and the interests of justice dictated that it be brought to finality, it having been outstanding for a long time. (See [23].) In the result, the non-parole period and order, that the term of 15 years' imprisonment would not run concurrently with his life sentence, were set aside.

S v MQUQU 2019 (2) SACR 207 (ECG)
Bail — Pending trial — When to be granted — New factors emerging after previous refusal of bail — Accused's trial delayed for lengthy period and state of health declining after contracting tuberculosis and developing diabetes — Accused also suffering financially — Magistrate failing to take all aspects of evidence into account — Bail granted on appeal — Criminal Procedure Act 51 of 1977, ss 60(4) and 60(11)(*a*) read with sch 6.
The appellant appealed against a decision of a magistrate who had refused his bail application, having been arrested on three counts of robbery with aggravating circumstances. The bail application was his second attempt at getting bail, having previously unsuccessfully applied in November 2014. His appeal against that refusal was denied by the High Court.
By the time of the present application he had already been in custody awaiting trial for four and a half years. While in prison, he contracted tuberculosis and developed diabetes. He was married and had three minor children. At his previous application there were three other cases pending against him for which warrants of arrest had supposedly been issued. These cases were subsequently withdrawn.
At the hearing of the second application, it was accepted that the case against the applicant was an offence included in sch 6 to the Criminal Procedure Act 51 of 1977 (the Act), and hence the provisions of s 60(11)*(a)* applied. The state adduced no evidence, and the appellant's evidence, that he would stand trial if he were granted bail, was not disputed by the state in cross-examination.

Held, that, to the extent that no consideration had been given by the magistrate to the appellant's state of health; the period already spent in custody; and the financial loss suffered by the appellant as a result of his detention, where they revealed that none of the likelihoods in s 60(4) of the Act were extant, he misdirected himself and arrived at the wrong conclusion. (See [16].)
Held, further, that, once the other cases were withdrawn against the appellant and none of the warrants executed, the cumulative impact of the new facts tipped the scales in his favour and rendered his circumstances exceptional, to the extent that his release on bail had to be permitted in the interests of justice. (See [17].) The appeal was upheld.

S v RAMOOTSI AND ANOTHER 2019 (2) SACR 216 (FB)

Evidence— Admissibility — Necessity for ruling on — Court failing to give ruling on admissibility of hearsay evidence and confessions — Convictions set aside.
The first appellant was convicted in the High Court of two counts of rape and one count of attempted rape, and the second appellant was convicted of one count of rape. The complainant in all the counts was the 14-year-old daughter of the first appellant. The second appellant was a family friend and the pastor of the church the family attended, whom the complainant had gone to for assistance in dealing with the situation with her father. The evidence relied on by the state was that of the complainant and two witnesses, corroborated by hearsay evidence. But the witnesses, on whose testimony the veracity of the hearsay evidence was based, were not called by the state, nor by the defence to whom they had been made available. Evidence was also led of the confessions of both first and second appellants in terms of s 219 of the Criminal Procedure Act 51 of 1977. On appeal, *Held*, that the presiding judge had failed to make a ruling on the admissibility of any of the hearsay evidence or on the admissibility of the confessions. The constitutional and statutory requirements had not been satisfied, and the appellants' trial had not been fair. The convictions accordingly could not be upheld and the appeal had to succeed.

MOCHEBELELE v DIRECTOR OF PUBLIC PROSECUTIONS, GAUTENG AND OTHERS 2019 (2) SACR 231 (SCA)
Extradition — Application for — Procedure during enquiry in terms of ss 9 and 10 of Extradition Act 67 of 1962 — Powers of magistrate — Magistrate's power to discharge person limited to only two instances in terms of s 10(3) — Court could not take into account that person still awaiting final decision on status as refugee.
The appellant appealed against the decision of the High Court which had held that the magistrate hearing the application for his extradition had acted ultra vires his powers conferred by s 10 of the Extradition Act 67 of 1962, in taking into account the consideration that the appellant's refugee-status appeal was still pending and that it had to be determined first. The magistrate had accordingly discharged the accused. His counsel sought to buttress his argument with reference to art 4(4) of the extradition treaty, which provides for discretionary refusal of extradition in 'exceptional cases'. The High Court ordered on appeal that the appellant was liable to be extradited to Lesotho.
Held, that the magistrate's power to discharge the person was limited to only two instances in terms of s 10(3): if they found that the evidence did not warrant the

issue of an order of committal; or that the required evidence was not forthcoming within a reasonable time. (See [23].)
Held, further, that the magistrate could not competently discharge the appellant based on the circumstances set out in art 4(4) of the extradition treaty, apart from the fact that he had not relied on this article in his judgment. The discretionary power to refuse an extradition in 'exceptional circumstances', properly construed, belonged to the Minister and not the magistrate. That was plain from s 11 of the Act which incorporated the provisions of art 4(4). (See [22].)
Held, further, that, in the present circumstances where the appellant had already exhausted all his appeal remedies as far as his refugee status was concerned, he was liable to be extradited to Lesotho. A warrant of arrest was authorised for his committal to a prison to await the decision of the Minister in this regard.

ALL SA LAW REPORTS AUGUST 2019

Afgri Grain Marketing (Pty) Ltd v Trustees for the Time Being of Copenship Bulkers A/S (in liquidation) and others
[2019] 3 All SA 321 (SCA)

Security-Shipping – Litigation – Security arrest made in terms of section 5(3) of the Admiralty Jurisdiction Regulation Act 105 of 1983 for the purpose of providing further security for claims that the applicants had advanced in arbitration proceedings in London against the appellant.

Shipping – Litigation – Test – Proof of genuine and reasonable apprehension that the party whose property is arrested will not satisfy a judgment or award made in favour of the arresting party.

An *ex parte* order was obtained by the first to third respondents (referred to by the Court as “Copenship”) for the arrest of the appellant’s right, title and interest in all money held in a bank account. The arrest was to be in terms of section 5(3) of the Admiralty Jurisdiction Regulation Act 105 of 1983, for the purpose of providing further security for claims that the applicants had advanced in arbitration proceedings in London against the appellant (“Afgri”), arising from charter party.

Afgri applied for the reconsideration and setting aside of the arrest order in terms of Uniform Rule 6(12)(c), but its application was dismissed.

Held – Section 5(3)(a) of the Admiralty Jurisdiction Regulation Act makes provision for security arrests. It provides that a court may, in the exercise of its admiralty jurisdiction, order the arrest of any property for the purpose of providing security for a claim which is or may be the subject of arbitration or other proceedings, whether domestic or international and whether or not the claim is subject to the law of South Africa. For present purposes, the person seeking the arrest must satisfy the court that it has a maritime claim enforceable by an action in personam in the chosen forum against the owner of the property concerned; that it has a prima facie case in respect of that claim, which is prima facie enforceable in the chosen forum; and that it has a genuine and reasonable need for security in respect of the claim. What must be demonstrated is a genuine and reasonable apprehension that the party whose property is arrested will not satisfy a judgment or award made in favour of the arresting party. That apprehension may arise from actual knowledge of the extent of the assets

of the party whose property has been arrested or other factors that legitimately justify an inference that they will seek to conceal assets or otherwise prevent the award from being satisfied. The enquiry is a factual one and the onus of proof on a balance of probabilities rests upon the applicant.

In support of its alleged genuine and reasonable apprehension, Copenship referred to Afgri's refusal of a request by provide security, leaving Copenship without any certainty that any award would be satisfied. Reference was also made to the shipping industry being under financial strain, resulting in a number of charterers experiencing financial difficulties or being placed in liquidation. Finally, it was stated that a search had been done some two and a half years previously and had not discovered any movable physical assets that could be attached or arrested in South Africa. The Court found that the evidence produced by Copenship to discharge the onus resting on it consisted of very few facts and a much speculation. Afgri was infact a substantial company with a significant trading record. There was no reason to conclude that there was any basis upon which Copenship could entertain a genuine and reasonable apprehension that Afgri might be unable to satisfy an award or try to avoid satisfying it.

Upholding the appeal, the Court set aside the decision dismissing the reconsideration application.

Gauteng Department of Agriculture and Rural Development and others v Interwaste (Pty) Ltd and others [2019] 3 All SA 344 (SCA)

Environment – Operation of waste disposal site – Issue of compliance notice in terms of section 31L Licence in terms of National Environmental Management Act 107 of 1998 – Validity of the licence terminated because of the effluxion of time.

The present appeal principally concerned the validity of a compliance notice issued by an environmental management inspector, purportedly within the regulatory structure in terms of section 31L of the National Environmental Management Act 107 of 1998. The High Court at the instance of the first respondent ("Interwaste") reviewed and set aside the decision of the third appellant, an environmental management inspector employed by the first appellant, the Gauteng Department of Agriculture and Rural Development (the "GDARD"), to issue the compliance notice. That led to the present appeal.

Interwaste operated a waste disposal site in Gauteng, pursuant to a waste management licence issued in terms of the Act. The licence was to be renewed within a period of four years from date of issue. According to the GDARD, the licence ought to have been renewed before 26 November 2015. It was common cause that the licence was not renewed. In the intervening period, on 12 December 2012, the GDARD, upon application by Interwaste, amended the licence, mainly increasing the total daily and annual tonnage of waste that the site was entitled to receive. Interwaste, in opposing the compliance notice, first of all denied that there was a four year renewal period stipulated and submitted that even if it was stipulated, an amendment to the licence on 12 December 2012 meant that the four year renewal period ran from that date, and not from the date of first issue of the licence. In its view, the licence was still valid at the time of the issuing of the compliance notice.

Held – Terms of the compliance notice showed confusion as to its purpose. The period for renewal had passed. Compliance could thus not be enforced. In the circumstances

set out above, the compliance notice was superfluous. It served no practical purpose. Instead, the validity of the licence terminated because of the effluxion of time. the High Court ought not to have granted Interwaste any relief at all and ought to have concluded that there was no purpose or profit to be gained in dealing with the question of the propriety of the compliance notices.

The appeal was upheld.

Intech Instruments v Transnet Limited t/a South African Port Operations [2019] 3 All SA 357 (SCA)

Construction – Refurbishment of terminals at port – Cancellation of agreement – Repudiation by conduct – Claim for payment – A performance specification or "lump sum" contract attracts liability for payment upon full performance by contractor – Partial performance does not lead to partial payment and interim payment certificates are issued in the expectation that the entire works will be completed.

In 2006, the appellant ("Intech") was awarded a tender for the refurbishment and upgrade of two terminals in a port operated and managed by the respondent ("Transnet"). Disputes in respect of the execution of the tender arose between the parties, culminating in litigation in the High Court. Intech alleged repudiation of the relevant contract by Transnet, cancelled same and sued Transnet for various amounts. Transnet, in turn, alleged repudiation on the part of Intech, cancelled the contract and counterclaimed for various amounts. The Court dismissed Intech's claim with costs and upheld Transnet's counterclaim, together with interest and costs. The present appeal lay against that judgment.

Held – Main issues for determination were the precise nature of the contract, with particular reference to what exactly Intech's scope of obligations was; the lawfulness of the respective cancellations by the parties; the consequent effect of a valid cancellation by Transnet on Intech's claims as pleaded; and the counterclaim.

The correct approach to the interpretation of contracts requires a court to give meaning to the words used in the contract applying the normal rules of grammar and syntax, viewed within the attendant factual context, in order to determine what the contracting parties intended. Furthermore, contracts must be interpreted in a manner that makes commercial sense.

In determining the nature of the contract, the Court looked at the ambit of the invitation to tender and its general envisaged outcome; the specific deliverables stipulated in the contract; and Intech's tender comprising specified items and outcomes. All those factors pointed to the contract being a performance specification contract with stipulated outcomes. The High Court's finding to that effect was therefore correct.

The next task of the Court was to decide at whose instance the contract was lawfully cancelled. Intech pleaded that it lawfully cancelled the contract solely on the basis of Transnet's alleged unlawful conduct in issuing two "stop works" orders in March 2007. The evidence revealed that the stop works directives were necessitated by non-compliance with safety prescripts in the Occupational Health and Safety Act 85 of 1993 and its Regulations, and were therefore lawful and justified. Intech's purported cancellation on the basis of repudiation by Transnet's stop works orders was thus unsustainable in law. The purported cancellation was itself unlawful and was correctly

regarded by Transnet as an act of repudiation. Transnet thus lawfully cancelled the contract on 14 August 2007.

Intech's claims for unpaid invoices and retention monies were bad in law. The contract was one of performance specification, without a bill of quantities, often referred to as a "lump sum" contract. It was an entire contract where entire performance by the contractor ("Intech") was a condition precedent for the client's ("Transnet's") liability. Intech's right to payment was thus dependent upon full performance of the contract on its part. Partial performance by Intech did not render Transnet liable for partial payment. Intech could also not rely on interim payment certificates. Such certificates are issued from time to time as the works progress, certifying that a certain amount of work has been done. They are issued in the expectation that the entire works will be completed. Where a client lawfully terminates a construction contract, the contractor's claims for retention monies and unpaid invoices are not self-standing claims, separate and independent from the remainder of the contract. And, upon such termination, the interim certificates cease to be of any force and effect.

The appeal was dismissed.

National Credit Regulator v Southern African Fraud Prevention Services NPC [2019] 3 All SA 378 (SCA)

Consumer – Credit bureau – Collection of consumer information – Information pertaining to fraud – Contravention of section 70(2)(f) of the National Credit Act 34 of 2005 – Whether subject to expungement within one year – Retaining information for longer than permitted by the Act – Determination of whether fraud information fell within the term "adverse classification of consumer behaviour".

In March 2015, the appellant, the National Credit Regulator ("NCR"), acting in terms of section 140(1) of the National Credit Act 34 of 2005, lodged a complaint with the National Consumer Tribunal against the respondent, Southern African Fraud Prevention Services NPC ("SAFPS").

SAFPS, a registered credit bureau, was accused of various contraventions of provisions of the Act and the regulations made thereunder. A settlement agreement disposed of all but one of the contraventions. The Tribunal was left to determine an alleged contravention of section 70(2)(f) of the Act, read with regulation 17.

The issue for determination by the Tribunal was whether SAFPS was retaining information for longer than permitted by the Act. The NCR contended that the information in question was consumer credit information as defined in section 70(1) and that it could not be retained for longer than one year. SAFPS said that it was what it described as "fraud information", which was not regulated and which it was entitled to keep for the period determined by it, namely ten years. The Tribunal upheld the contentions of the NCR that SAFPS had contravened section 70(2)(f). SAFPS successfully appealed to the High Court. The present further appeal related to the issue of the contravention and the imposition of an administrative fine.

Held – An obligation to expunge consumer credit information arises under section 70(2)(f). The obligation to expunge information arises in relation to any consumer credit information that is so prescribed. Any information not so prescribed is not subject to compulsory expungement. The issue was whether the fraud information was so prescribed. That required a determination of whether fraud

information fell within the term “adverse classification of consumer behaviour” – in which case it had to be expunged after one year. The Court could not find that fraud information fell within the relevant category and it was therefore not subject to the time limit.

Confirming that there was no obligation on SAFPS to expunge the fraud information in its possession, the Court dismissed the appeal.

NPGS Protection and Security Services CC and another v Firstrand Bank Limited [2019] 3 All SA 391 (SCA)

Summary judgment – Existence of bona fide defence – Execution against home of debtor – Rule 32(3) of the Uniform Rules of Court requires an opposing affidavit to disclose fully the nature and grounds of the defence and the material facts relied upon therefore.

In May 2009, the respondent and first appellant (“NPGS”) concluded a written credit facility agreement in terms of which the respondent advanced an amount of R250 000 to NPGS. The sole member of NPGS was the second appellant, who bound himself as surety and co-principal debtor on behalf of NPGS in favour of the respondent for payment of all amounts due by NPGS to the respondent. The credit facility was repayable upon demand and subject to annual review. The loan under the credit facility was further secured by a covering mortgage bond registered by the second appellant over his immovable property, in favour of the respondent. At the time that the credit facility was advanced to NPGS, he had already, in January 2007, registered a mortgage bond in favour of the respondent in the sum of R2 000 000, over the property.

Alleging that NPGS had defaulted on its repayment obligations in terms of the credit facility, the respondent issued combined summons in the court below against the appellants. It invoked the suretyship signed by the second appellant in its favour, as well as the mortgage bond registered in its favour over the immovable property of the second appellant.

After the appellants served their notice of intention to defend, the respondent applied for summary judgment. Resisting summary judgment, the appellants relied on the failure by the respondent to attach a certificate of balance to its particulars of claim, and the alleged failure by the respondent to demonstrate how the claimed amount was made up. The Court rejected the contentions by the appellants as not constituting a *bona fide* defence, and granted summary judgment.

Held – Rule 32(3) of the Uniform Rules of Court requires an opposing affidavit to disclose fully the nature and grounds of the defence and the material facts relied upon therefore. To stave off summary judgment, a defendant cannot content himself with bald denials, for example, that it is not clear how the amount claimed was made up. Something more is required. If a defendant disputes the amount claimed, he should say so and set out a factual basis for such denial. The appellants’ submissions did not constitute a *bona fide* defence.

Although the Court unanimously found that the High Court misdirected itself with regard to the basis on which it declined to exercise judicial oversight over the execution of the second appellant’s property, the consequence of the misdirection was in dispute. The majority stated that when courts issue an order of execution against immovable property, due regard should be had to the impact that this may have on

judgment debtors who are poor and at risk of losing their homes. It could not be found that the circumstances were such as to preclude an execution order in this case. The appeal was dismissed with costs.

PM v Road Accident Fund [2019] 3 All SA 409 (SCA)

Settlement agreement – Court's refusal to make agreement order of court – Application for abandonment and annulment of the part heard trial for a declaration that the lis between the parties had been fully and finally settled in terms of the settlement agreement – Jurisdiction of judge to adjudicate a non existent lis between parties – Judges requirements seen as an overstepping of the limits of jurisdiction.

Personal Injury/Delict – Claim against Road Accident Fund on behalf of minor – Claim for maintenance and support – Settlement agreement – RAF liable to pay 100% of proven/agreed claim.

Judge- Jurisdiction of judge to adjudicate a non existent lis between parties – Judges requirements seen as an overstepping of the limits of jurisdiction.

The appellant had sued the respondent (the "RAF") on behalf of her minor child, averring that the child's father had been killed in a collision in July 2014 and that the sole cause of the collision was the negligence of the insured driver. As a result of the death of the deceased, the appellant claimed that the minor child had been deprived of maintenance and support. The RAF defended the matter. On the date of the trial, the Court was requested to make a settlement agreement an order of court. The agreement provided that the RAF was liable to pay the appellant 100% of her proven or agreed damages. The damages were agreed in the sum of R561 314,63.

Not satisfied that the agreement should be made an order of court, on the ground that there was no indication that the insured driver was negligent at all, the Court declined to make the agreement an order of court. The trial proceeded and was postponed after one witness gave evidence.

The appellant then applied for the abandonment and annulment of the part-heard trial, and for a declaration that the *lis* between the parties had been fully and finally settled in terms of the settlement agreement. The dismissal of the application led to the present appeal.

Held – Issues on appeal were firstly, whether it was permissible to challenge the Court's decision in this way. Only if it was, would the second issue be relevant, namely, whether the Court's approach to the settlement agreement was permissible.

The appellant's case was that once they had concluded the settlement there was no longer a *lis* between the parties. The effect was to deprive the judge of jurisdiction to adjudicate that non-existent *lis*. Her jurisdiction extended only to making the order that the parties asked her to make. Accordingly, when she refused to make the settlement an order of court and required evidence to be led on the question whether the insured driver had been negligent to any degree, she overstepped the limits of her jurisdiction. The majority of the Court on appeal disagreed. It was held that when the parties arrive at a settlement, and wish it to be made a consent order, they do not withdraw the case but ask that it be resolved in a particular way. The jurisdiction of the Court to resolve the pleaded issues does not terminate when the parties arrive at a settlement of those issues.

Although not necessary to decide whether the Court had the power to refuse to make the agreement an order of court, the Court made some remarks in that regard. It pointed out that our courts have a duty to ensure that they do not grant orders that are *contra bonos mores*, or that amount to an abuse of process. A court cannot act as a mere rubber stamp of the parties. Public funds are being disbursed and the interests of the community as a whole demand that more scrutiny be involved in the disbursement of such funds.

The appeal was thus dismissed.

AS and another v JC and others [2019] 3 All SA 425 (WCC)

Lease agreement – Cancellation of agreement due to breach – Where lessee had historically not been able to pay the full rental on the due date, and paid instead after due date when funds became available, and lessor accepted that, to suddenly assert strict compliance on terms of agreement would be contrary to public policy and inimical to the values enshrined in the Constitution.

The second appellant was the registered owner of a residential unit which the first appellant ("AS") was authorised to let to tenants on her behalf. During March 2013, AS concluded a written lease agreement with the first respondent ("JC") who had already taken occupation of the unit. Either lessor or lessee was entitled to terminate the lease on two clear calendar months' written notice.

AS was an attorney and JC (a refugee from Southern Cameroon) commenced residing in the unit in 2010 under title of the lessee at the time. During 2013, the previous lessee vacated and the lease was then concluded between AS and JC. A further occupant ("EC") resided under JC's title as lessee since 2014. Neither JC nor EC received a regular income.

At the heart of the present appeal was whether or not AS lawfully cancelled the lease on 3 October 2017.

Held – The lease required notice to be given to remedy a default only when the lessee was in arrears for amounts other than rental. The grounds asserted by the appellants for valid cancellation of the lease were that notice to remedy a default in the payment of a "mixed debt" was properly given but not complied with; and that rental for October 2017 was due on the first day of the month and had not been paid by 3 October 2017, which entitled AS to cancel without notice. The appellants referred to a judgment of the Supreme Court of Appeal in which it was held that where a contract provides that, in the event of the one party committing a breach of any of the terms of the agreement and failing to remedy such breach within a stated number of days after receipt of a written notice to do so, the party seeking to rely on such failure in order to cancel the agreement has to show that it has complied strictly with the peremptory provisions of the clause.

Neither of the grounds asserted by the appellants was sustainable. On the undisputed facts, JC had historically not been able to pay the full rental on the first day of each month, but invariably during the course of a month as and when funds became available. That was historically accepted by AS without once advising JC that he was intending to demand that JC pay in full on the first day of each month under threat of cancelling the lease without notice. Consequently, JC was lulled into believing that

strict performance was not required by AS when it came to the payment of rental. To allow AS to suddenly rely on strict compliance would be contrary to public policy and inimical to the values enshrined in the Constitution. Thus, the lease was not validly cancelled, and JC and EC did not, upon the purported cancellation, become unlawful occupiers in terms of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998.

The appeal was dismissed.

Atlantis Property Holdings CC v Atlantis Exel Service Station CC [2019] 3 All SA 441 (GJ)

Lease agreement – Termination of – Respondent refused to vacate property which led to the launch of an application for eviction – Interpretation of a written fixed term lease – Lawfulness – Dispute between the parties centred on whether the appellant could cancel the agreement before the expiry of the fixed term.

The interpretation of a written, fixed term, commercial lease agreement was at the centre of the present appeal. In terms of the agreement, the respondent let from the appellant certain immovable property and utilised it for the purposes of conducting a fuel filling station and a convenience store.

Approximately seventeen months after the conclusion of the agreement, and whilst the agreement was in a renewal period, the appellant terminated the agreement in terms of a clause in the agreement which provides that the agreement may be terminated by either party serving the other notice of its intention to cancel the lease upon 30 calendar days' notice. In terms of the cancellation letter, the respondent had to vacate the property on or before 31 July 2017. The respondent refused to vacate which led to the launch of an application for eviction. The dismissal of that application led to the present appeal. The court *a quo* held that the clause was intended only to have application after the expiry of the renewal period.

Held – The dispute between the parties centred on whether the appellant could cancel the agreement before the expiry of the fixed term.

The language used in the relevant clause was unambiguous and clear. It afforded the right to both the appellant and the respondent to cancel the agreement by giving 30 days' notice. It was not necessary for there to be a breach for the clause to apply, and it was incorrect that the clause was intended only to have application after the expiry of the renewal period. Consequently, the relief sought in the notice of motion should have been granted.

Issues of public policy and good faith raised in the minority judgment in the matter were rejected by the majority of the Court as those issues were not raised by the parties. In any event, the majority did not believe that public policy or good faith were bars to the relief sought in this case.

The appeal was upheld and the eviction of the respondent ordered.

Barnard v Minister of Police and another [2019] 3 All SA 481 (ECG)

Personal Injury/Delict – Claim for damages – Unlawful arrest and detention – Arrest without warrant – An arrest without a warrant is lawful if, at the time of the arrest, the arresting officer held a reasonable belief that the arrestee had committed an offence

referred to in the First Scheduleto the Criminal Procedure Act 51 of 1977 – Jurisdictional facts for a section 40(1)(b) defence are that the arrestor must be a peace officer who entertained a suspicion, based on reasonable grounds, that the arrestee had committed an offence referred to in Schedule 1.

In June 2014, the second respondent arrested the appellant without a warrant at a scrap metal dealership for being in possession of 29 allegedly stolen metal/aluminium window blinds (the "goods"). The appellant was detained overnight at the local police cells and released on bail late the following morning on condition that he appeared in court in a few days. When the prosecutor declined to prosecute, the appellant instituted action against the respondents, claiming damages in the sum of R100 000 for unlawful arrest and detention.

The first respondent pleaded that the arrest was lawful in terms of section 40(1)(b) of the Criminal Procedure Act 51 of 1977.

The dismissal of appellant's claim by the Magistrates' Court led to the present appeal.

Held – Any arrest or detention is *prima facie* wrongful and the defendant must allege and prove the lawfulness of the arrest and detention. Consequently, where police have arrested and detained a person and the arrest and detention are common cause or not disputed (as in the present case), the onus of proving lawfulness rests on the police.

An arrest without a warrant is lawful if, at the time of the arrest, the arresting officer held a reasonable belief that the arrestee had committed an offence referred to in the First Schedule to the Criminal Procedure Act. The jurisdictional facts for such a section 40(1)(b) defence are that the arrestor must be a peace officer who entertained a suspicion, based on reasonable grounds, that the arrestee had committed an offence referred to in Schedule 1. Once those jurisdictional facts are present, the discretion whether or not to arrest arises. The discretion must be exercised in good faith, rationally and not arbitrarily.

On happening upon the appellant in possession of the blinds, the arresting officer was satisfied that the blinds were stolen. The appellant's explanation of how he had acquired them, and his request that the arresting officer make a phone call to a fellow officer who had knowledge of the matter were ignored. Such conduct on the part of the arresting officer was found not to be reasonable in the circumstances.

Apart from the absence of a reasonable suspicion, the arresting officer's discretion as to whether or not to arrest the appellant was not properly exercised. He failed to exercise his discretion at all in arresting the appellant.

The trial court therefore erred in dismissing the appellant's claim.

In considering the question of the quantum of damages to be awarded to the appellant, the court looked at similar cases and concluded that an amount of R58 000 would be appropriate in the circumstances.

Brown v Economic Freedom Fighters and others [2019] 3 All SA 499 (GJ)

Constitutional and Administrative Law – Political parties – Obligations of political parties and their leaders under the Electoral Code of Conduct – Section 94 of the Electoral Act 73 of 1998 – Under item 8 of the Electoral Code of Conduct, political

parties are expressly obliged to take all reasonable steps to ensure that journalists are not subjected to harassment, intimidation, hazard, threat or physical assault by any of their representatives or supporters.

The first and second respondents were a political party (the "EFF") and its leader ("Mr Malema"), collectively referred to by the Court as (the "respondents"). The applicant was a senior political journalist. The parties had an acrimonious relationship.

In March 2019, the applicant erroneously sent a message to the EFF's WhatsApp group, a platform created by the EFF's national spokesperson to communicate directly with journalists covering political and current affairs and to encourage them to report on the EFF's activities. The message had been intended for another WhatsApp group comprising of the applicant's colleagues. In response, Mr Malema published a screenshot of the applicant's message which contained her name and personal cellular telephone number on Twitter, circled with a thick marker. The EFF's national spokesperson then published a statement on the party's Facebook page, claiming that the applicant was not a journalist but an openly admitted ANC operative. In the wake of those statements, the applicant received a barrage of anonymous threatening phone calls and written threats on Twitter and WhatsApp from self-professed EFF supporters. Those included insults and threats of rape, violence and death.

The applicant referred a complaint to the Independent Electoral Commission ("IEC") with a request under section 95 of the Electoral Act 73 of 1998 that its chairperson institute criminal proceedings as well as civil proceedings against the respondents and to impose an appropriate remedy under section 96(2) for breaches of section 94 of the Act. The IEC referred to jurisdictional limitations, and declined the request. The applicant therefore launched an urgent application in the High Court in her own interest and in the public interest under section 38 of the Constitution, specifically in the interests of women and journalists, who are expressly afforded protection by the Electoral Code. The application concerned the obligations of political parties and their leaders under the Electoral Code of Conduct (the "Code").

The respondents launched an interlocutory application in terms of rule 30(1) of the Uniform Rules of Court in which they sought an order declaring the founding papers an irregular step and striking the application from the roll with costs. The application raised two primary issues, *viz* jurisdiction and urgency. Whilst it was not disputed that the High Court has concurrent jurisdiction under section 20(4) of the Electoral Commission Act 51 of 1996, the respondents contended that the applicant had disregarded the practice that courts prefer the specialist forum where there are two forums with concurrent jurisdiction over a particular matter.

Held – The Electoral Court may only be approached as a court of first instance when a violation of the Electoral Act might justify a sanction in terms of sections 96(2)(h) and (i) of the Electoral Act. In all other instances, justifying a lesser sanction under section 96(2), the relevant High Court or magistrates court has jurisdiction. The jurisdiction of the High Court is thus extended, but the High Court does not become an electoral court for these purposes. The Court ruled it in the interests of justice to grant the applicant leave to institute these proceedings in the High Court. It also confirmed that the application qualified as urgent. The rule 30 application was thus dismissed.

On the merits, the Court focused the issues in contention, pointing out that the enquiry was not the conduct of the applicant, who was not bound by the Code, but the respondents' compliance with their own obligations under section 94 of the Electoral

Act and the Code. To determine whether there was a contravention of the Code, the conduct of both the EFF and Mr Malema had to be considered throughout the period which followed Mr Malema's post on Twitter and in the context of his influence over his approximately 2,38 million Twitter followers. The respondents' respective obligations as a political party and candidate under item 3 of the Code, insofar as it pertained to supporters of the EFF, were to instruct both its members and supporters to comply with the Code and to take all reasonable steps to ensure that both members and supporters comply with the Code. Under item 2 of the Code, the respondents were obliged to promote and support efforts to educate voters and to widely publicise the Code in any election campaign. Under item 8 of the Code, the respondents were expressly obliged to take all reasonable steps to ensure that journalists are not subjected to harassment, intimidation, hazard, threat or physical assault by any of their representatives or supporters. Their conduct fell short of those obligations. They failed to comply with the Code and contravened section 94 of the Electoral Act.

The Court was of the view that the imposition of a formal warning under section 96(2)(a) of the Act would be an appropriate and effective sanction, which would serve as a guideline to the respondents for their obligations and future conduct.

E v E and related matters [2019] 3 All SA 519 (GJ)

Rule 43 applications – Rule 43(2) and (3) – Application of – Conflicting judgments – Relief sought pendente lite for interim maintenance, custody and contribution to costs pending the finalisation of their divorce actions – Interpretation of rule 43 – Protecting the rights of women and children vulnerable in rule 43 application.

Three applications brought in terms of rule 43(1) of the Uniform Rules of Court were referred for hearing before the Full Court as a result of two conflicting judgments in the division. The parties were found to have departed from delivering a statement in the nature of a declaration and a reply in the nature of plea, having regard to rules 43(2) and (3). The referral to the Full Court was intended to address the question of whether the Court has a discretion to permit the filing of applications that have departed from the strict provisions of rule 43(2) and (3). If such discretion did exist, the question was whether the Practice Manual should direct that all rule 43 application conform to a specific form, particularly regarding length. And finally, if the Court had a discretion, the factors necessary for the reasonable exercise of the discretion had to be identified.

The applicants sought relief *pendente lite* for interim maintenance, custody and contribution to costs pending the finalisation of their divorce actions.

Held – Rule 43 as it presently reads provides an interim remedy to assist an applicant to obtain relief speedily and expeditiously in respect of interim care, residency and contact with the children; maintenance for a spouse and or children; enforcement of specified necessary payments; and contribution towards legal costs of the divorce action.

The procedure envisaged in rule 43 is not that of a normal application commenced by way of notice of motion. It is a succinct application, aimed at providing the applicant interim relief, speedily and expeditiously. In all three applications, one or two respondents applied for the dismissal of the application or for a punitive costs order on the basis of prolixity and failure to comply with the strict provisions of rule 43(2) and (3). The question to be answered related to the interpretation of rule 43, which would

ensure a speedy and efficient resolution of the application, while at the same time protecting the rights of women and children vulnerable in rule 43 applications.

The Court decided that the best solution was for the judge allocated to such a matter to issue a directive to the parties in terms of rule 43(5) calling on the parties to file a supplementary affidavit making a full and frank disclosure of their financial and other relevant circumstances to the Court and to the other party. The affidavits in question must be accompanied by a financial disclosure form (as annexed to the Court's order in this matter). Finally, affidavits filed in terms of rule 43(2) and (3) shall only contain material or averments relevant to the issues for consideration.

Ebenhaeser Communal Property Association and others v Minister of Department of Rural Development and Land Reform and others
[2019] 3 All SA 530 (LCC)

Costs – Costs de bonis propriis – Costs de bonis propriis are awarded against erring attorneys only in reasonably serious cases such as cases of dishonesty, wilfulness or negligence in a serious degree.

The plaintiffs were the claimants in a land restitution claim which, by agreement, was to be heard over a three-week period in February 2019.

The Court *mero motu* raised the question of costs *de bonis propriis* at a pre-trial conference held on 23 January 2019, and gave notice to both the plaintiff's attorney ("Parker") and the State Attorney to show cause why costs *de bonis propriis* should not be awarded against them. In the submissions received, it emerged that only the third to twenty sixth defendants (the "landowner defendants") claimed such costs against Parker on the basis that her non-compliance, *inter alia* with the Practice Directions and her failure to get the files properly indexed, paginated and ready for trial, was the cause of the trial not proceeding.

Held – Once a claim for restitution of rights in land is referred to the Court, the procedure to be followed by the parties is prescribed at rule 38 of the Land Claims Court Rules.

The Court detailed a litany of instances of non-compliance with its request for compliance with the rules and the Practice Directive by Parker. The files were found to be in a shambolic state and had not been indexed and paginated in accordance with the practice directions.

Costs *de bonis propriis* are awarded against erring attorneys only in reasonably serious cases such as cases of dishonesty, wilfulness or negligence in a serious degree. The facts showed that Parker persistently failed to comply with Practice Directions 8 and 10 which required her to index and paginate the Court files as prescribed, and file the requisite practice note from the time of her appointment, and that she continued not to comply thereafter. That was notwithstanding a direction from the Court to make amends. A court direction is tantamount to a court order and failure to comply is not only disrespectful to the court and other parties but can be contemptuous. The cumulative effect of the failure to comply on the part of Parker on multiple occasions, notwithstanding various admonishments by the Court, was a flagrant disregard for the Rules, Practice Directions and further directions of the Court. That ultimately constituted the sole cause for the trial being adjourned. The conduct of Parker substantially and materially deviated from the standard expected of legal practitioners, was irresponsible, grossly negligent and displayed lack of care.

The Court was satisfied that the circumstances of this case warranted punitive costs to be paid *de bonis propriis* by Parker on an attorney client scale so that the landowner defendants would not be out of pocket. An order to that effect was thus made, setting out precisely what costs should be awarded to the landowner defendants.

Joubert and others v Joubert and others [2019] 3 All SA 551 (WCC)

Wills, Trusts and Estates – Inter vivos trust – Resolution by trustees – Introduction of additional beneficiary as a capital income and capital beneficiary – Validity of resolution –Whether trust deed required a minimum of three trustees at any given time – Whether all the signatory trustees were properly appointed and, if not, the consequences thereof for the validity of the resolution – Whether it was necessary for the second, third and fourth applicants, as original beneficiaries, to consent to the variation to the trust deed sought to be affected by the disputed resolution.

In the present matter, the trustee and three beneficiaries of an *inter vivos* trust sought to challenge the validity of a resolution of the trustees taken in September 2014, introducing a further beneficiary.

The trust deed initially provided that the income and capital beneficiaries would be the testator, the first applicant and his siblings (the "second, third and fourth applicants"). In terms of the disputed resolution, the testator's then wife, the applicants' step mother, was added as a capital income and capital beneficiary.

Held – Issues were whether the trust deed required a minimum of three trustees at any given time, whether all the signatory trustees were properly appointed and, if not, the consequences thereof for the validity of the resolution. The second main issue was whether it was necessary for the second, third and fourth applicants, as original beneficiaries, to consent to the variation to the trust deed sought to be affected by the disputed resolution.

As from 2010, one of the trustees of the trust was a corporate entity. A corporate trustee cannot validly act until such time as its chosen nominee has been authorised by a letter of authority issued by the Master. In particular, a corporate trustee cannot be a valid signatory to a resolution of a trust until such time as its nominee has been duly authorised by the Master in terms of section 6(4) of the Trust Property Control Act 57 of 1988. A corporate trustee can only act through an authorised nominee and in order for the validity of the corporate trustee's actions to be considered, the identity of its authorised nominee must be clear and objectively determinable. The next issue to be determined was what the consequences of that finding were *vis-à-vis* the corporate trustee's action in purporting to pass the disputed resolution. The Court found that when the resolution was adopted only two trustees validly participated in that decision, namely, the testator and the first applicant. In terms of the trust deed, the endorsement of the resolution by two of the three trustees was sufficient.

The conclusion was that the resolution in terms of which the first respondent was added as a capital and income beneficiary, was unassailable.

Kubheka v Adendorf and others [2019] 3 All SA 566 (LCC)

Land rights – Labour tenant – Onus of proof that occupier is a labour tenant and not a farm worker – Occupier bears the onus of proving that he was a labour tenant. In terms of section 2(5) of the Land Reform (Labour Tenants) Act 3 of 1996, and once he

proves that he complies with the definition of a labour tenant, the onus shifts to the property owner to prove that occupier is a farmworker.

Words and Phrases – "Farm worker" – Land Reform (Labour Tenants) Act 3 of 1996 – A farm worker is a person who is employed on a farm in terms of a contract of employment which provides that, in return for the labour which he or she provides to the owner or lessee of the farm, he or she shall be paid predominantly in cash or in some other form of remuneration, and not predominantly in the right to use and occupy land; and he or she is obliged to perform his or her services personally.

Words and Phrases – "Labour tenant" – Land Reform (Labour Tenants) Act 3 of 1996 – A labour tenant refers to a person residing or having the right to reside on a farm; who has or has had the right to use cropping or grazing land on the farm in exchange for providing labour to the owner or lessee; whose parent or grandparent resided or resides on a farm and had the use of cropping or grazing land on such farm or another farm of the owner in exchange for providing labour to the owner or lessee.

The plaintiff was a pensioner residing on a farm owned by the first defendant. In terms of the Land Reform ("Labour Tenants") Act 3 of 1996, the plaintiff sought a declaratory order to the effect that he was a labour tenant, as well as an award of land in terms of section 16 of the Act.

Held – Section 1 of the Act defines a labour tenant as (a) a person residing or having the right to reside on a farm; (b) who has or has had the right to use cropping or grazing land on the farm in exchange for providing labour to the owner or lessee; and (c) whose parent or grandparent resided or resides on a farm and had the use of cropping or grazing land on such farm or another farm of the owner in exchange for providing labour to the owner or lessee.

The plaintiff bore the onus of proving that he was a labour tenant. In terms of section 2(5) of the Act, once a plaintiff proves that he complies with the definition of a labour tenant, then the onus shifts to the defendant to prove that the plaintiff is a farmworker.

The evidence adduced established that the plaintiff had resided on the farm since 1975 and still resided on the farm. It was also not disputed that he had cropping and grazing rights on the farm and provided labour to successive owners of the farm. The first and second defendants agreed that the plaintiff complied with paragraph (b) of the definition of a labour tenant insofar as the periods 1975 to 1986 and 1995 to 2001 were concerned. However, they argued that from 1986 to 1995, the plaintiff worked for a person who was neither the owner nor the lessee of the farm, he did not comply with paragraph (b) of the definition during that period and was therefore not a labour tenant.

The main problem with that argument was that it failed to adopt a holistic and continuous approach to the definition of labour tenant. The plaintiff provided labour to the other owners and lessees of the farm for a cumulative period of 18 years. On a holistic and continuous interpretation of the labour tenant definition, that constituted compliance with paragraph (b). The evidence further established that the plaintiff complied with the third part of the definition as his parents lived on the farm, had cropping and grazing rights on the farm and provided labour to the owner.

The plaintiff having established that he complied with the definition of labour tenant, the onus shifted to the first and second defendants to establish that he was a farmworker. One of the elements to the definition of farm worker is that the person

must be obliged to perform his services personally. The first and second defendants led no evidence to establish that and it was therefore not proven that the plaintiff was a farm worker.

In terms of section 16 of the Act, a labour tenant may apply for the award of land which he was entitled to occupy in terms of section 3. An application for the award of land is made in terms of section 17 and must have been made before the cut-off date of 31 March 2001.The question was whether the plaintiff lodged a valid application in terms of section 17 of the Act prior to 31 March 2001. The Court was satisfied that the evidence established on a balance of probabilities that the plaintiff had made a valid application for the award of land in terms of section 17 of the Act prior to 31 March 2001, and was thus entitled to the award of the land he was using and occupying as at 2 June 1995.

Manuel v Economic Freedom Fighters and others (judgment and appeal) [2019] 3 All SA 584 (GJ)

Personal Injury/Delict – Claim for damages – Defamation – First respondent (the "EFF") published a tweet on its official Twitter account, criticising the interview process for appointment of new Commisioner for Revenue Services (SARS) – Award of damages – Application for leave to appeal – Section 17(1)(a) of the Superior Courts Act 10 of 2013 – A judge may only grant leave to appeal if of the opinion that the appeal would have a reasonable prospect of success.

In the wake of the removal of the former Commissioner of the Revenue Services ("SARS") in November 2018 a new Commissioner had to be appointed. The President of South Africa appointed a panel which would shortlist interviewees and submit a list recommending a suitable and competent candidate for appointment. The applicant ("Mr Manuel") was appointed as the Chairman of the panel. Before the interviews were conducted, panel members were asked to disclose any relationships they had with candidates for the interviews. Mr Manuel recused himself from the interview of one of the candidates ("Mr Kieswetter") because Mr Kieswetter had previously worked at SARS as head of the Large Business Centre, and subsequently as a Deputy-Commissioner, while Mr Manuel was the Minister of Finance. Mr Kiewetter was anonymously recommended by the panel as being, by far, the most suitable and preferred candidate for the position. He was duly appointed by the President as the Commissioner of SARS.

On 27 March 2019, the first respondent (the "EFF") published a tweet on its official Twitter account, criticising the interview process. The second respondent was the national spokesperson of the EFF, and the third respondent was the president of the EFF. The published tweet referred, *inter alia*, to nepotism and corruption in the interview process.

Objecting to the tweet, Mr Manuel interpreted it as alleging that in his capacity as Chairman of the panel, he appointed his relative and close business associate and companion, Mr Kieswetter, as a Commissioner of SARS in a corrupt manner for nepotistic and corrupt reasons. He sought final interdictory relief against the respondents relating to the publication of the alleged defamatory statement.

Held – Mr Manuel had met the requirements for an interdict. He had a clear right to protect his dignity and reputation, which he alleged the respondents had infringed. Secondly, he suffered and continued to suffer harm to his reputation, both in his

personal and professional capacity, through the widespread dissemination of the impugned statement. He had no alternative remedy to the persisting injury, as the respondents refused to apologise or to take down the defamatory statement from their social media platforms. There was also ongoing harm to the well-being of the country as the public laboured under the misapprehension that SARS was led by a person who was appointed for nepotistic and corrupt reasons.

The Court found that the EFF knew their statement to be false.

Defamation consists of the wrongful and intentional publication of a defamatory statement concerning a person once the applicant proves that the publication of the defamatory matter concerned himself, a presumption of unlawfulness and intent arises, which can be rebutted by the respondent by raising a defence which rebuts either the requirement of wrongfulness or intention. None of the defences raised by the respondents were sound. The court issued a declaratory order in favour of Mr Manuel, ordered the respondents to apologise to him, and awarded R500 000 damages payable by the respondents.

Application was made for leave to appeal against the granting of a declaratory order to the effect that the statement published by the applicants was false, defamatory and unlawful.

On appeal, the Court referred to section 17(1)(a) of the Superior Courts Act 10 of 2013 which provides that a judge may only grant leave to appeal if of the opinion that the appeal would have a reasonable prospect of success.

The applicants' averment that the relief granted was overbroad was unfounded. The Court rejected the applicants' claim that the respondent was obliged to specify the defamatory portions of the statement. It was confirmed that the defamatory meaning was explicit, and that there was no need to have them pointed out.

The applicants also contended that the Court erred in finding that the respondent had met the requirements for interdictory relief. In particular, they argued that he had adduced no evidence to demonstrate that he had suffered and continued to suffer harm to his reputation, both in his personal and professional capacity, through the widespread dissemination of the statement. The Court pointed out that the applicants had accused the respondent of corruption and nepotism, and the likelihood of serious harm to reputation was plain.

The defence of truth and public interest, belatedly argued by the applicants, did not assist them because they conceded expressly in their supplementary heads of argument that the information contained in the impugned statement was false.

All the grounds of appeal were dismissed as lacking in merit.

Finally, the Court confirmed the reasonableness of the *quantum* awarded as damages. The application for leave to appeal was dismissed with costs.

Mineur v Baydunes Body Corporate and others [2019] 3 All SA 611 (WCC)

Sectional title scheme – Section 13(1)(g) of the Sectional Titles Schemes Management Act 8 of 2011 – Interpretation of – Where an owner intends to use a section for a use other than its purpose as shown expressly or by implication on a

registered sectional plan, and such intended use will materially affect the other owners in the scheme, the consent of all owners in the scheme is required.

The first respondent was the body corporate of a sectional title scheme, and the applicant was the owner of a unit in the scheme. The scheme consisted of a number of physically separate buildings or terraced houses (the “cantons”) within the greater complex. As it was not originally built as a unitary sectional title complex, each canton differed. A system intended to maintain aesthetics and uniformity was implemented in 2002 by special resolution. In 2011/2012 that system was abandoned by the trustees elected at the time. From at least 2012, a number of owners made alterations, improvements or extensions to their sections without any formal approval from the body corporate and/or the local authority. By December 2016 it was recognised that steps had to be taken to regularise the unlawful conversions.

At an annual general meeting of the body corporate held in December 2017, two resolutions were passed, approving the conversion by residents of their garages into residential spaces and authorising the body corporate to amend and approve the conduct rules in that regard. The first special resolution purported to approve the conversion of garages in the scheme to living quarters. The other resolution created new exclusive use areas from common property, and the new conduct rule conferred rights of exclusive use of additional parts of the common property upon members of the body corporate (the “registered owners”) for parking purposes in accordance with a certain layout plan.

Having unsuccessfully objected to the resolutions, the applicant made a referral to adjudication in terms of section 48 of the Community Schemes Ombud Service Act 9 of 2011. The third respondent, as adjudicator, dismissed the relief sought by the applicant, resulting on the present appeal.

Apart from the setting aside of the adjudication order, the applicant sought a declarator that section 13(1)(g) of the Sectional Titles Schemes Management Act 8 of 2011 applied to the conversion of garages to living quarters in the scheme; that the adoption of the new conduct rule was unlawful, invalid and set aside; and that the special resolutions taken at the annual general meeting were unlawful, invalid and set aside.

Held – The Appeal essentially related to the correct interpretation of section 13(1)(g). The Sectional Titles Schemes Management Act came into operation on 7 October 2016, with its purpose being to assume all management provisions previously contained in the Sectional Title Schemes Act 95 of 1986 in a separate legislative instrument, with its own management rules and conduct rules. The management rules are prescribed in terms of section 10(2)(a) of the Sectional Titles Schemes Management Act and the conduct rules in terms of section 10(2)(b) thereof.

Section 13(1)(g) provides that an owner must, “when the purpose for which a section or exclusive use area is intended to be used is shown expressly or by implication on or by a registered sectional plan, not use nor permit such section or exclusive use area to be used for any other purpose: Provided that with the written consent of all owners such section or exclusive use area may be used for that purpose as consented to”.

The Court found that the proper interpretation to be placed on section 13(1)(g) was that, where an owner intends to use a section for a use other than its purpose as shown expressly or by implication on a registered sectional plan, and such intended

use will materially affect the other owners in the scheme, the consent of all owners in the scheme is required. As a result, the first special resolution was declared unlawful, invalid and set aside.

Next, the Court considered the other special resolution and the consequent adoption of conduct rule 10, which purported to create new exclusive use areas from common property and to confer those upon owners for parking purposes in accordance with a certain layout plan. It was held that the adoption of the impugned conduct rule did not comply with section 10(8)(a)(ii) of the Sectional Titles Schemes Management Act as the layout plan did not clearly indicate the purpose for which such parts of the common property could be used. The special resolution and the conduct rule were also declared unlawful, invalid and set aside.

The third respondent having erred on questions of law, the applicant's appeal succeeded.

MS v Road Accident Fund [2019] 3 All SA 626 (GJ)

Road Accident Fund claims – Passenger claim – Approach to delictual claims, with specific application to a Road Accident Fund claim – Court postulating a four-stage enquiry in determination of liability ie the "merits enquiry", the "first causation enquiry", the "second causation enquiry", the "quantum determination stage".

The Road Accident Fund ("RAF") is the statutory insurer for claims such as that brought by the plaintiff for damages for personal injury arising out of a motor vehicle accident. Such cases are often handled by the plaintiff's attorneys on the basis that the attorney earns his fee from the award and often on the basis that the attorney takes a percentage of the damages award in lieu of his fee. The matters are fought on a "no win no pay basis" as far as the plaintiffs' attorneys are concerned. The nature of such matters has resulted in a situation where litigation is treated in a rote and formulaic way. Parties often carve up the issues without seeking a separation order, or circumvent the rules of the law of evidence or the rules of court.

Held – It was necessary to restate the approach to delictual claims, with specific application to a RAF claim. Liability generally depends on the wrongfulness of the act or omission relied on by the plaintiff. Wrongfulness, in these cases is inferred from the fact that the third party negligently caused the accident. Once negligence of the third party driver is proved, wrongfulness is generally assumed. It must then be shown that the loss suffered by the claimant is due to the negligent/wrongful act in issue. That is when the causation phase of the enquiry begins. In cases of claims for personal injury, the plaintiff must show that the injuries were sustained in the accident and that these injuries have had certain effects on the person of the claimant. Once these effects are established, the court can move to determine how such effects translate into loss. The assessment as to *quantum* does not require proof of facts. Instead it is based on an acceptance of the facts proved in the causation inquiry.

The court postulated a four-stage enquiry. The first question was whether the negligence of the third party driver caused the accident (the "merits enquiry"). If both plaintiff and the third party driver were negligent, blame may be apportioned on the basis of a percentage allocation in terms of the Apportionment of Damages Act 34 of 1956. The second question (the "first causation enquiry") asks whether the plaintiff sustained the pleaded injuries in the accident. In the third leg (the "second causation enquiry") consideration is given to how the proven injuries have affected the plaintiff.

Finally, it is asked how the plaintiff should be remunerated for the effects of such injuries (the "*quantum* determination stage"). The Court highlighted the specific issues involved at each stage of the enquiry before turning to deal more specifically with the particular facts of the plaintiff's case.

The plaintiff was a young man who was involved in the collision in issue whilst he was a passenger in a taxi. The RAF raised a special plea to the effect that its obligation in relation to non-pecuniary loss (ie general damages) was limited to the consequences of "serious injury", which it disputed the plaintiff's injuries were. Examining the plaintiff's submissions, the Court found his evidence to be contrived and exaggerated, and that causation was not established. The actuary who testified for the plaintiff was also found to be wanting. Both assumptions posited by him pointed to substantial projected losses which were determined without any foundation whatsoever.

The Court concluded that a purported case for substantial damages was conjured out nothing more than the fact that the plaintiff was involved in a motor accident in which he suffered some facial cuts. He failed to show that the injuries resulted in the loss which he contended. His claim was therefore dismissed.

Sharma v Harry [2019] 3 All SA 645 (GJ)

Rule 43 order, interdict suspending parental rights and division order in divorce decree – Application for rescission – Appropriateness of remedy – If there were good grounds for interdict to be discharged, those would be available to the applicant to advance in a new application to court, and if the applicant believed that the Rule 43 order should not be extended, he could apply for its variation or discharge.

Family law – Divorce order – Division of joint estate – Rule that marital property regime determined by law of domicile of husband at time of marriage – South African law wrongly applied.

The applicant and respondent were married in 2008, and in 2009, a child was born of the marriage. The parties divorced in 2016. An allegation of sexual abuse of the child by the applicant led to a final order being issued a month after the divorce, in terms of which the applicant's parental rights and responsibilities were suspended and he was interdicted from contact with the child. The divorce decree was accompanied by ancillary orders dividing the joint estate and extending a rule 43 order. The rule 43 order, the divorce decree and the final interdict were all granted by default as the applicant did not appear. He currently resided in Switzerland.

The present application was a combined rescission application in respect of the rule 43 order, the divorce decree and its ancillary orders, and the final interdict cutting off applicant's parental rights and interdicting him from contact with the child. The basis for seeking rescission of all three orders was the same. The applicant claimed that he did not know of the orders until 11 October 2016; he experienced logistical difficulties in acting expeditiously from that date to 6 March 2017; he was depressed, and he had, until he learnt of the orders, left everything up to a South African attorney to deal with, and that attorney had let him down.

Held – No substantive grounds were advanced for overturning the rule 43 order or the final interdict.

The Court considered first, the appropriateness of the rescission remedy in respect of the rule 43 order and the final interdict. Finding rescission to be an inappropriate remedy, the Court held that if there were good grounds for the interdict to be discharged, those would be available to the applicant to advance in a new application to court. Secondly, if the applicant believed that the rule 43 order should not be extended, he could apply for its variation or discharge. It was in any event by its nature an interim order, and it endured only until the postponed orders in the divorce decree traversing the same ground were set down for determination.

Noting the absence of any grounds for the contention that the orders in relation to maintenance and contact were in fact wrong, the Court questioned whether there was a bona fide intention on the part of the applicant for relief so as to defend the case in the event of the judgment being rescinded. It was concluded that no sufficient cause was shown to render it just to rescind the Rule 43 order or the final interdict order.

The position was different with regard to the division order in the divorce decree. It was submitted that the law of the applicant's domicile at the time of the execution of the marriage determined the marital property regime and that he was domiciled in Switzerland at the time of the marriage. The applicant thus contended that it was wrong to have applied South African law to the proprietary consequences of the marriage. The evidence strongly supported the applicant's assertions, establishing sufficient cause for rescinding the division order in the divorce decree.

Save for that, the application was dismissed.

Williams NO v Taxing Mistress of the High Court, Port Elizabeth and a related matter [2019] 3 All SA 658 (ECP)

Bill of costs –Taxation of decision by Taxing Mistress to disallow portion of Counsel's fees for trial based on Counsel having, on the same day, charged a full day trial fee in two other matters – Test applicable when dealing with a review of taxation is that the Court must be satisfied that the Taxing Master was clearly wrong before it will interfere with a ruling made by him.

In a claim for damages arising from a motor vehicle accident, the plaintiff filed a notice of review of the taxation of a bill of costs taxed by the Taxing Mistress in Port Elizabeth. The Taxing Mistress had taxed off certain items on the bill, including a portion of Counsel's fees.

Held – The Civil trial roll in Port Elizabeth was a "running roll", so when a trial commences it runs until conclusion. All other matters enrolled on the day (and subsequent days) wait to commence. Whilst the roll was a single running roll, Counsel were permitted to accept trial briefs in consecutive matters on the roll. Upon the introduction of two separate rolls, the normal "double briefing" rule in respect of the acceptance of briefs applied to the two separate rolls.

The Taxing Mistress' decision to disallow a portion of Counsel's fees for trial was based on Counsel having, on the same day, charged a full day trial fee in two other matters. Counsel's explanation was that the present matter was set down for trial on 24 November 2016. The matter had stood down to 29 November 2016 and thereafter to 1 December 2016. The trial commenced on 5 December 2016 and proceeded to 6 December 2016. The fees charged were for an attendance fee on each of 24 and 29 November 2016 and 1 December; for preparation and a fee on trial on each of 5 and 6 December 2016. Counsel's involvement in two other matters which were on the roll

was then explained. Both those matters had been settled, and Counsel's fees included a fee for "the reservation of the day on the running roll".

The test applicable when dealing with a review of taxation is that the Court must be satisfied that the Taxing Master was clearly wrong before it will interfere with a ruling made by him.

The questions raised in this matter were whether the Taxing Mistress properly considered the question as to Counsel's fees raised in respect of other matters in the taxation of this matter. Secondly, it concerned the question of whether the Taxing Mistress properly exercised her discretion in taxing off a portion of Counsel's fees, based on what was charged in relation to those other matters.

There is no onus upon an advocate or attorney to justify his fee. The Taxing Mistress will, as starting point, assume that Counsel acted honourably and in accordance with ethical obligations in raising charges for work done. However, where there is evidence to the contrary, the Taxing Mistress will take such evidence into account in the exercise of her discretion. It is incumbent upon a taxing master in giving effect to the purpose of taxation in terms of rule 70, to solicit appropriate information relevant to the exercise of his/her discretion where it appears that such may exist. The Court rejected the suggestion that a Taxing Mistress who becomes aware of facts which are relevant to deciding what constitutes a reasonable fee, is precluded from taking those into account merely because such facts may relate to a disciplinary infraction by a practitioner. Nor could it be suggested that all that can be done is to refer the matter to the relevant professional body.

Counsel may not charge a fee for work not done. Where one trial does not proceed because it has settled no work is performed on trial. In that event Counsel may only charge a fee on trial if he is in fact "prejudiced" in that the opportunity to earn a trial fee is lost. There can be no such lost opportunity if Counsel holds a second trial brief for the day in a successive matter and that matter proceeds. To charge a full trial fee in both matters would constitute over-reaching.

Examining each of the disallowed items on the bill of costs, the Court found no grounds to interfere with the exercise of the Taxing Mistress' discretion. The application for review was dismissed.

END-FOR NOW