LEGAL NOTES VOL 9/2019

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AIRPORTS COMPANY SOUTH AFRICA v BIG FIVE DUTY FREE (PTY) LTD AND OTHERS 2019 (5) SA 1 (CC)

Court — Powers — To make settlement agreements orders of court — Settlement agreements purporting to set aside judgments in rem — When they can be made orders of court.

Acsa, an organ of state, awarded a tender to Big Five Duty Free (Pty) Ltd, but DFS Flemingo SA (Pty) Ltd, an unsuccessful bidder, later obtained its review and setting-aside (see [6] and [13]). This for the tender's non-compliance with the requirements of s 217 of the Constitution.

Big Five, however, later appealed, with Acsa abiding the outcome, to the full court, and after the hearing, but before judgment, Big Five and Flemingo settled. Under the settlement, Flemingo purported to withdraw and abandon the judgment of the lower court. The full court made the settlement agreement an order, but it provided no reasons for its doing so.

Sometime later Acsa announced it was not bound by the full court's order, that the lower court's review and setting-aside of the tender stood, and that it intended, once again, to put the contract concerned out to tender.

Big Five then applied to the High Court for a declarator that the effect of the full court's order was to set aside the judgment of the lower court. The application was dismissed, and Big Five appealed to the Supreme Court of Appeal. It held that the full court's order had set aside the lower court's order. Here, Acsa appealed to the Constitutional Court.

Held, that, only after determining that the merits favoured the setting-aside of a lower court's judgment in rem, could an appeal court make an order of court a settlement

[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!**

agreement that set aside the judgment (see [1] – [3] and [18]). Furthermore, the appeal court was required to record its reasons for making the order (see [26]).
The deciding issue on appeal, though, was whether the settlement agreement, properly interpreted, set aside the review judgment (see [5], [12] and [27]). Contrary to the Supreme Court of Appeal's finding, it did not purport to do so.
Appeal accordingly upheld; the order of the Supreme Court of Appeal set aside; and the order of the High Court, dismissing Big Five's application for a declarator, reinstated (see [64]).

Jafta J, concurring, found that, once it was declared that the award was constitutionally invalid, it was not possible for the parties to, by agreement, nullify that finding.
Moreover, the Supreme Court of Appeal's finding, that the full court's order, embodying the settlement agreement, had the effect of overturning the lower court's order, was erroneous. This, in that the agreement did not seek to set aside the lower court's finding (see [74] – [76]); and nor could it competently have been made an order (see [77], [79] and [81]).

Cachalia AJ, dissenting, found that Acsa was bound by the full court's order (see [94] and [96]). This was as:

- It was a judgment in rem, binding all (see [96]);
- Acsa agreed to abide, without qualification, the full court's decision (see [97]); and
- The onus was on Acsa to show that the order was incompetent, but it had failed to show this (see [99]).

Found, further, that, where an appeal court made a settlement an order of court, and the settlement agreement set aside a judgment in rem, the appeal court's failure to provide reasons for the order did not invalidate it (see [100]).
Found, ultimately, that, properly interpreted, the order embodying the settlement agreement set aside the review judgment (see [101] and [109] – [110]).
Accordingly, the appeal ought to have been dismissed (see [111]).

ROAD TRAFFIC MANAGEMENT CORPORATION v WAYMARK INFOTECH (PTY) LTD 2019 (5) SA 29 (CC)

Government procurement — Contract — Information technology services — Duration of three years — Whether contract was 'transaction' involving 'future financial commitment' — Public Finance Management Act 1 of 1999, s 66(3)(*c*).

Applicant corporation, a national public entity, conducted a lawful tender process and contracted with respondent company (Waymark) for Waymark to provide it, over three financial years, with information technology services (see [2] and [10]).
The corporation later repudiated the agreement, and Waymark cancelled it and instituted an action for its damages (see [14] – [15]).
The corporation counterclaimed for an order that the agreement was invalid because of non-compliance with s 66(3)*(c)* of the Public Finance Management Act 1 of 1999 (see [16]). It provides that a national public entity 'may only through the [Minister] . . . enter into any . . . transaction that binds . . . that public entity to any future financial commitment . . .' (see [7]).

No ministerial approval was obtained before the agreement was concluded (see [10]).
The High Court's finding was that s 66 applied, and the failure to obtain approval resulted in the corporation not being bound by the agreement (see [17] and [19]).
The Supreme Court of Appeal found, however, that s 66 did not apply and that the corporation was bound by the agreement (see [20]).
In the Constitutional Court, *held*, that 'future financial commitment' meant a financial commitment beyond the present moment (see [35]); and that 'transaction' was confined to transactions similar to credit or security agreements (see [45]).
Here, the transaction was a procurement contract and so fell outside s 66 (see [62]).
It was thus binding without ministerial approval (see [20]).
Leave to appeal granted but appeal dismissed.

COOK v MORRISON AND ANOTHER 2019 (5) SA 51 (SCA)

Appeal — Leave to appeal — Refusal by Supreme Court of Appeal — Referral by President for reconsideration — Reconsideration to be considered by court constituted in terms of s 13(1) of Superior Courts Act, and not only two appeal judges who considered application in first instance — Superior Courts Act 10 of 2013, ss 13(1) and 17(2)(*f*).

Appeal — To Supreme Court of Appeal — Special leave to appeal — Application — Requirements — Existence of reasonable prospects of success, as well as special circumstances.
Prescription — Extinctive prescription — Debt — What constitutes — Obligation by contracting party to make restitution of money or property following cancellation for repudiation.

After the High Court upheld the respondents' special plea of prescription to his claim, and refused him leave to appeal, the applicant approached the Supreme Court of Appeal for special leave to appeal. Two judges of appeal refused such application. The applicant then applied, in terms of s 17(2)*(f)* of the Superior Courts Act 10 of 2013 (SC Act), to the President to refer that decision to 'the court' for reconsideration. Consequently, the President referred the special-leave application to a *court of five (SCA) judges* for oral reconsideration. This is that court's decision.
Preliminary point — The respondents argued that the present court had no jurisdiction to hear the application for reconsideration, as, they claimed, the President acting under s 17(2)*(f)* of the SC Act may only direct *the appeal judges who considered the application* to revisit their decision, and no more. The court disagreed. It held that the respondents' proposition was not borne out by the wording of the proviso to s 17(2)*(f)*, which referred to 'the court'. That expression meant a court constituted in terms of s 13(1) of the SC Act. Further, the proposition was not supported by the current practice that the issue of reconsideration was heard by a court properly constituted and not only the two judges who considered the application in the first instance. (See [4] – [5].)
Merits of special plea — The applicant and the first respondent, as well as certain other persons and entities, were parties to what was called by the applicant a joint-venture agreement to create an ecotourism reserve. What gave rise to the present dispute was the conclusion of an agreement facilitating the applicant's exit from the joint venture. In proceedings he instituted before the High Court, the applicant

alleged that he had complied with his obligations in terms of such agreement — ie by selling to the first respondent his shares and claims in certain companies through which the venture was conducted — but that the first respondent had refused to comply with certain of his obligations, thereby repudiating the agreement. The applicant alleged that he then accepted Morrison's breach or repudiation of the exit agreement and cancelled it; alternatively, he gave notice in his particulars of claim that he was cancelling the agreement. He sought damages he claimed he had suffered because the first respondent did not restore him to his former position. The respondents then successfully raised their special plea of prescription, on grounds that the debts enforced in the summons had prescribed, over three years having passed since the alleged cancellation of the exit agreement on 29 September 2010. Before the SCA on reconsideration, the applicant, to defeat the special plea, argued that (i) his claims were not matched by 'debts' owed by the defendants within the meaning of the Prescription Act 68 of 1969 (the Act); and (ii) if they were, the completion of prescription was delayed in terms of s 13(1)*(d)* of the Act because the relationship between the parties was one of partnership.

The SCA first restated the required preconditions for the granting of special leave to appeal. In this regard, it stressed that the existence of reasonable prospects of success was a necessary but insufficient precondition for the granting of special leave. Something more, by way of special circumstances, was needed. These may include that the appeal raised a substantial point of law; or that the prospects of success were so strong that a refusal of leave would result in a manifest denial of justice; or that the matter was of very great importance to the parties or to the public. This was not a closed list.

As to (i), the SCA held that the first respondent's obligation to the applicant to deliver the shares fell comfortably within the accepted definition of 'debt', ie 'something (as money, goods or service) which one person is under an obligation to pay or render to another'. When a contract was cancelled because of repudiation, the obligation to make restitution was a personal one resting on the indebted party to pay money or deliver assets which it received as performance under the contract. (See [15].)

As to (ii), the SCA found that the applicant had failed to prove the existence of a partnership between himself and the first respondent. The relationship was instead one of co-shareholding. Where persons agree to conduct a venture through a company and become co-shareholders, the company was not a 'partnership' and the shareholders were not 'partners'. For some purposes the courts have drawn on partnership principles; but this did not mean that in law the shareholders were partners.

The SCA held, in conclusion, that there were no reasonable prospects of success; but even if there were, no special circumstances had been shown to justify the granting of special leave. The court accordingly dismissed the application for special leave.

COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE v DANWET 202 (PTY) LTD 2019 (5) SA 63 (SCA)

Income tax — Assessment to tax — Appeal — Against Commissioner's refusal of condonation for late filing of appeal — Tax Court having jurisdiction to grant such condonation but subject to taxpayer first objecting against Commissioner's refusal of condonation — Tax Administration Act 28 of 2011, ss 104(2), 104(3), 107(2) and 129.

The taxpayer lodged an appeal against a revised assessment on Sars' e-filing system but it later transpired that the appeal was not recorded. When the Commissioner refused the taxpayer's request for condonation of the late filing — refused on the basis that by then it was past any extended periods for the lodging of appeals allowed by s 107(2) of the Tax Administration Act 71 of 2011 (the Act) — the taxpayer, on appeal to the Tax Court, obtained leave to appeal the revised assessment.

In the Commissioner's appeal against the Tax Court's order, the Supreme Court of Appeal considered the relevant provisions of the Act, and —

Held

A decision not to extend the prescribed period falls within the definition of a 'decision' for the purposes of s 129(2). Thus, the Tax Court did have the jurisdiction to determine an application for condonation of the failure by a taxpayer to lodge an appeal timeously. Such jurisdiction was, however, subject to compliance with s 104(3) of the Act, which expressly obliged the taxpayer to lodge an objection against a refusal under s 107(2) to extend the time for the lodging of an appeal. (See [12] and [16].)

Since the taxpayer failed to lodge such an objection, it followed that there was no valid application before the Tax Court. It therefore did not have jurisdiction to hear the application, and accordingly the appeal would be upheld.

FUNDSATWORK UMBRELLA PENSION FUND v GUARNIERI AND OTHERS 2019 (5) SA 68 (SCA)

Pension— Death benefits — Dependants — Time for determination of — Pension Funds Act 24 of 1956, s 37C(1)(*a*).

In this case a member of a pension fund died and was survived by his wife and children and his mother (see [1] – [2]). Some months later the member's mother died, and very shortly thereafter, and apparently in ignorance of this, the fund made its decision of how the member's death benefit should be distributed to his dependants (see [3] and [22]). It allocated parts thereof to each of the member's now deceased mother, his wife, and each child (see [3]).

The member's wife later challenged the distribution, and the adjudicator set it aside; only for the fund to make the same distribution, and for it later to be set aside by the High Court, the High Court ordering that the part of the benefit that the fund had awarded to the mother be allocated to the member's wife and children (see [4]).

Here the fund appealed the High Court's finding to the Supreme Court of Appeal, and the issue before it was when, for the purpose of a s 37C(1)*(a)* distribution of a death benefit to dependants, a person should be a dependant (see [6] for this provision of the Pension Funds Act 24 of 1956, and [9]).

Held, that it was at the point when the fund had completed its enquiry into who the dependants were and what their allocations should be, and it formally I made this decision (see [20], [23] and [25]).

Accordingly, at the time the fund made the decision, the mother was not a dependant, and so its award to her was contrary to the section, and invalid (see [26] and [29]). It was thus rightly set aside by the High Court, and the appeal against that court's decision should be dismissed (see [27] and [31]).

JOHANNESBURG SOCIETY OF ADVOCATES v EDELING 2019 (5) SA 79 (SCA)

Advocate — Reinstatement — Application for — Correct approach by court — Court not having discretion to readmit or re-enrol advocate struck from roll — If applicant for reinstatement discharged onus of showing he/she fit and proper person, court obligated to reinstate — Whether onus discharged, question of fact — Where applicant struck from roll for serious dishonesty, genuine, complete and permanent reformation to be shown.

Mr Edeling was struck from the roll of advocates in December 1997 by order of the High Court, which had made findings of serious dishonesty against him (see [4] – [8]). This case concerned the Johannesburg Society of Advocates' appeal to the Supreme Court of Appeal (with that court's leave) against a High Court decision granting Mr Edeling's 2015 application for his readmission and re-enrolment as an advocate. The High Court, in readmitting Mr Edeling, had held that it could do so 'if in its discretion, it finds that he has once again become a fit and proper person to be readmitted and re-enrolled as an advocate'.

Held

The High Court had proceeded on the misconception that its decision was discretionary. In applications for the readmission of an attorney, the statute expressly vested the court with a discretion in regard to the applicant being a fit and proper person to be readmitted — but there was no equivalent provision in the Admission of Advocates Act. Whether a person who had previously been struck from the roll of advocates was a fit and proper person to be readmitted, was a question of fact, and the onus of proving it rested on the applicant. In such an application the only issue before the court was whether that onus had been discharged. If so, the court had no discretion to refuse readmission. Conversely, if not, the court had no discretion to overlook that failure and admit the applicant. (See [34].)

Where an applicant is struck from the roll for serious dishonesty, genuine, complete and permanent reformation must be shown. Mr Edeling did not discharge this onus, and in the result the appeal would be upheld

MINISTER OF DEFENCE AND MILITARY VETERANS AND OTHERS v MASWANGANYI 2019 (5) SA 94 (SCA)

Defence force — Member — Service — Termination — Member sentenced to imprisonment without option of fine — Whether termination decision required to be made or termination following by operation of law — Defence Act 42 of 2002, s 59(1)(*d*).

Mr Maswanganyi, a member of the South African National Defence Force, was convicted of rape and sentenced to life imprisonment (see [2]). This had the effect that his service was terminated under s 59(1)*(d)* of the Defence Act 42 of 2002 ('(t)he service of a member of the Regular Force is terminated . . . if he . . . is sentenced to a term of imprisonment by a competent civilian court without the option of a fine . . .' (see [3] and [7]).

Mr Maswanganyi appealed the conviction and sentence and they were set aside. Some time thereafter he asked the Defence Force to reinstate him (see [3]). When this was declined, Mr Maswanganyi obtained a High Court order setting aside the purported 'decision' of the Chief of the Defence Force to terminate his service under s 59(1)*(d)*, as well as one reinstating him (see [1], [3] and [6]).

Here, the Minister of Defence, the Chief of the Defence Force and the Secretary for Defence appealed to the Supreme Court of Appeal (see [1]).
The Supreme Court of Appeal held that where the requirements of s 59(1)*(d)*were met, the member's service was terminated by operation of law, and no decision was required to be made (see [13]). And if a requirement for the operation of the section was *not* met, this would not mean that the individual's service was automatically reinstated (see [14]).
Appeal upheld and the High Court's order set aside and replaced with an order dismissing Mr Maswanganyi's application (see [16]).

NATIONAL CREDIT REGULATOR v SOUTHERN AFRICAN FRAUD PREVENTION SERVICES NPC 2019 (5) SA 103 (SCA)

Credit agreement — Consumer credit agreement — Consumer credit records — Credit bureau — Information pertaining to fraud — Whether its retention regulated as category of 'customer credit information' — National Credit Act 34 of 2005, s 70(2)(*f*); National Credit Regulations, 2006, reg 17.

Section 70(2)*(f)* of the National Credit Act 34 of 2005 (the NCA) provides that a credit bureau must 'promptly expunge from its records any prescribed credit information that, *in terms of the regulations* . . . is required to be removed from its records'. The applicable regulation is reg 17 of the National Credit Regulations, 2006, which tables maximum retention periods for different categories of credit bureau information; and in particular category 5 thereof, under the heading 'Adverse classification of consumer behaviour', which prescribes a maximum of a one-year period for retention of such information.
The subject-matter of this appeal was the High Court's setting aside of a ruling by the National Consumer Tribunal (the NCT), that the 'fraud information' collected by the respondent credit bureau (the SAFPS) constituted 'consumer credit information' as defined in s 70(1) of the NCA, and that therefore reg 17 applied. In this case, the National Credit Regulator's appeal to the Supreme Court of Appeal against the High Court's decision, the issue was whether the NCT was correct in contending that the fraud information held by the SAFPS was consumer credit information, and if so whether and when the SAFPS was obliged to expunge the information.
Held
Even if some of the fraud information held by the SAFPS constituted consumer credit information, the obligation imposed by s 70(2)*(f)* on credit bureaux to expunge consumer credit information only arose in relation to information so prescribed. (See [21] – [22].)
The meaning that must be given to the term 'adverse classification of consumer behaviour' throughout category 5 of reg 17(1) was the same meaning given to it in s 71A(4)*(a)* of the NCA, which included classifications such as 'delinquent', 'slow paying', 'absconded' and 'not contactable'. It encompassed subjective classifications of a failure by consumers to perform their legal and contractual obligations; it said nothing about fraud. Fraud information did not involve a subjective classification of consumer behaviour which, as a matter of common sense, warranted being retained for a shorter period. By contrast, the types of fraud on the SAFPS database were generally based on fact and objective criteria. The expression '(a)dverse classification of consumer behaviour' appeared to be directed at the behaviour of a consumer once credit had been advanced, rather than behaviour aimed at defrauding a credit provider in a prospective credit application.

So, even if it constituted consumer credit information, the fraud information held by the SAFPS was not consumer credit information within any of the prescribed categories in reg 17 (see [25] – [31]). It followed that the SAFPS was not obliged to expunge the fraud information. The appeal would therefore be dismissed.

RATLOU v MAN FINANCIAL SERVICES SA (PTY) LTD 2019 (5) SA 117 (SCA)

Credit agreement — Consumer credit agreement — Whether agreement subject to NCA — Settlement agreement — Parties entering into settlement agreement providing for deferred payment instalments and interest, where underlying agreements falling outside ambit of NCA — On purposive interpretation, Act not applying to such settlement agreements — National Credit Act 34 of 2005, s 8(4)(*f*).

A settlement agreement provided for payment in deferred instalments plus interest. The issue before court was whether it was governed by the National Credit Act 34 of 2005 (the NCA) where the underlying agreements were not subject to it. The facts were as follows. The company Phapho Nkone Transport (PNT), as lessee, had entered into various truck rental agreements with the respondent company MAN Financial Services (MAN). The appellant (a director of PNT) agreed to stand as surety. PNT's defaulting under those agreements led to MAN's repossessing and selling the trucks to third parties. The appellant, PNT and MAN subsequently entered into a settlement agreement in respect of the outstanding amount owing. The appellant and PNT fell into default of the settlement agreement's terms, and consequently MAN instituted application proceedings in the court a quo (the Johannesburg High Court) seeking payment. The court a quo dismissed the application on the basis that the settlement agreement was a credit transaction for the purposes of the NCA, and that MAN had failed to comply F with notice requirements prescribed by s 129. The court acknowledged that the original rental agreements fell outside the ambit of the NCA, as they were large agreements concluded with a juristic person, and therefore so too did the suretyship. It held, however, that the settlement agreement was a compromise or transactio, constituting a new and independent agreement, and extinguishing any rights and obligations emanating from the underlying contracts. As it stood, it required compliance with the NCA (providing as it did for deferred instalment payments and interest thereon).
The appellant appealed to the Supreme Court of Appeal against the part of the order of the court a quo declaring the settlement agreement to be an order of court. Most importantly for present purposes was the cross-appeal launched by MAN, in which it attacked the finding that the settlement agreement was a credit transaction subject to the NCA. This formed the focus of SCA's attention. (It was agreed between the parties that a determination of the cross-appeal in MAN's favour would dispose of the appeal, and vice versa.)
Held, that on a literal interpretation of s 8(4)*(f)* of the NCA, the settlement agreement in question met the definition of a credit transaction. However, a purposive interpretation was required. And it was clear that the NCA was not intended to apply to settlement agreements where the underlying agreements, such as the present ones, fell outside the ambit of the Act. To hold otherwise would give rise to absurd consequences; as an example, it would mean that a settlement agreement concluded in relation to a delictual claim would immediately fall within the ambit of the NCA; further, there would be a devastating impact on the willingness of parties to

conclude settlement agreements and thereby curtail litigation. (See [21], [22] and [26].)
Held, accordingly, that the settlement agreement in the present appeal did not fall within the ambit of the NCA, and MAN had no obligation to comply with the provisions thereof prior to enforcing the agreement's terms. The cross-appeal would be upheld, and the appeal dismissed. (See [28] and [29].)

TADVEST INDUSTRIAL (PTY) LTD v HANEKOM AND OTHERS AND A SIMILAR MATTER 2019 (5) SA 125 (SCA)

Appeal — To Supreme Court of Appeal — Against decision of Land Claims Court sitting as appeal court — Special leave of Supreme Court of Appeal required — Land Claims Court not having jurisdiction to grant leave — Superior Courts Act 10 of 2013, s 16(1)(*b*) and (*c*); Restitution of Land Rights Act 22 of 1994, s 22(2)(*a*).

On appeal the Land Claims Court (LCC), in two separate matters heard together, set aside eviction orders granted by the Stellenbosch District Magistrates' Court in favour of the appellant landowner against the respondent occupiers. The appellant applied for and was granted leave by the LCC to appeal to the Supreme Court of Appeal in both matters, which were enrolled for hearing together. Prior to the hearing of the matter, in terms of a directive issued under instruction by the registrar of the SCA, the parties' attention was drawn to s 16(1)*(b)* and *(c)* of the Superior Courts Act 10 of 2013. Those provisions read:

'(1) Subject to section 15(1), the Constitution and any other law —

. . .

(*b*) an appeal against any decision of a Division on appeal to it, lies to the Supreme Court of Appeal upon special leave having been granted by the Supreme Court of Appeal; and

(c) an appeal against any decision of a court of a status similar to the High Court, lies to the Supreme Court of Appeal upon leave having been granted by that court or the Supreme Court of Appeal, and the provisions of section 17 apply with the changes required by the context.'

The parties were requested to address the question of whether, in light of the above, the LCC had jurisdiction to grant leave to appeal to the SCA, and if it did not, whether its granting of leave amounted to a nullity depriving the SCA of jurisdiction to hear the appeal. The issue here was whether, in fact, 'special leave of the SCA' was required in respect of an appeal from a decision of the LCC *on appeal to it*. After hearing argument, the SCA declined to exercise jurisdiction, and struck the appeals from the roll.

Held

In terms of s 16(1)*(c)*, an appeal against any decision of the LCC — as 'a court of a status similar to the High Court' — lay to the SCA, upon leave having been granted by the court or the SCA. Section 16 applied to 'any decision' of the LCC, which therefore included a decision of the LCC sitting as an appeal court. The section thus conferred jurisdiction on the SCA to hear an appeal from a decision of the LCC sitting as an appeal court. Section 16's provisions, however, were subject to 'any other law'. Section 16(1)*(c)* of the Act itself was therefore subject to the provisions of s 22(2)*(a)* of the Restitution of Land Rights Act, which provided that the LCC had 'all such powers in relation to matters falling within its jurisdiction as are possessed by a High Court having jurisdiction in civil proceedings'. Its powers were accordingly limited to those possessed by a High Court in civil proceedings. Consequently,

because the High Court sitting as an appeal court lacked the power to grant leave to appeal to the SCA, as the special leave of the SCA was required in terms of s 16(1)*(b)* of the Act, the LCC had to similarly lack the power to do so. It would be anomalous if the higher threshold of special leave were required in the case of the High Court, which possessed a far more extensive jurisdiction than the LCC, but ordinary leave was sufficient in the case of the LCC. There was no basis in logic or principle why such a distinction should be drawn. (See [10] – [12].)
(The SCA acknowledged the anomalous situation that, where the LCC heard an eviction matter on automatic review from the magistrates' court in terms of s 19(3) of the Extension of Security of Tenure Act 62 of 1997, an appeal lay to the *SCA with the leave of the LCC*. It held, however, that the difference in treatment could be explained by the fact that the LCC when acting as a court of automatic review was not acting as an appeal court.
In the result, the LCC sitting as appeal court did not have the power to grant leave to appeal to the SCA. The order was a nullity, and the SCA had no jurisdiction to entertain the appeals. The appeals were according to be struck from the roll.

BARLOWORLD LOGISTICS AFRICA (PTY) LTD AND ANOTHER v FORD AND OTHERS 2019 (5) SA 133 (GJ)

Company — Accounts — Annual financial statements — Applicable accounting standards — 'Generally accepted accounting practice' — Vagueness of concept — Claim against company directors based on their alleged participation in accounting treatment that failed to conform to 'generally accepted accounting practice' excipiable for vagueness — Companies Act 61 of 1973, s 286(3).

Practice — Pleadings — Exception — On ground that vague and embarrassing — Involving twofold consideration, viz whether pleading lacking particularity to extent that it is vague, and whether vagueness causing embarrassment such that excipient prejudiced.

Plaintiffs instituted claims for pure economic loss against three defendants — first plaintiff's former CEO and two of its directors — based on their alleged participation in an accounting treatment that contravened 'generally accepted accounting practice' and fraudulently misrepresented plaintiff's 2016 operating profit so as to induce it to pay the defendants inflated incentives.
Defendants excepted to plaintiffs' particulars on ground of their vagueness in relation to the concepts of 'operating profit' and 'generally accepted accounting practice', pointing out that plaintiffs not only failed to identify what operating profit meant or how it was to be calculated, but also to set out the principles of generally accepted accounting practice allegedly contravened. Plaintiffs in turn argued that they did not use the concept of generally accepted accounting practice as a term of art but in the sense of requiring the defendants simply to act honestly and accurately in relation to accounting statements.
Section 286(3) of the Companies Act 61 of 1973 provided that a company's annual financial statements 'shall, *in conformity with generally accepted accounting practice*' present its state of affairs at the end of the year and its profit or loss for that year.
The background to accounting standards in South Africa was, briefly, the following (see [17] – [26]): Until the emergence of official statements of accounting practices drawn up by the Accounting Practices Board (APB), there had been no clear concept of what 'generally accepted accounting practice' as envisaged in s 286(3) was.

Alongside the formal APB statements, known as SA GAAP, there also emerged a parallel body of unpromulgated standards called 'little gaap'. In December 2012 the APB was wound up and its functions transferred to the newly created Financial Reporting Standards Council (FRSC). Simultaneously, SA GAAP was withdrawn and replaced by International Financial Reporting Standards (IFRS). The fate of little gaap in all this was unclear.

Held

Deciding whether to uphold an exception that a pleading was vague and embarrassing involved a twofold consideration: first, whether it lacked particularly to the extent that it was vague; and second, whether the vagueness caused embarrassment to such an extent that the excipient was prejudiced (see [40]). The plaintiffs' argument that the concept of 'generally accepted accounting practice' was used only in the sense of the need to act honestly and accurately in relation to accounting statements was not based on a fair reading of the pleading: when the notion of generally accepted accounting practice was introduced, it was in conjunction with, and did not subsume, the requirement of accurate rendition of the accounting records. Absent the identification of the specific accounting practice offended by the accounting treatment alluded to by the plaintiffs, the particulars were rendered vague and embarrassing. This vagueness was not confined to a specific paragraph of the particulars but went to the heart of the cause of action, prejudicing the defendants, who were unable to address the material merits of the fraud of cause of action. Exception accordingly upheld and plaintiffs' particulars set aside.

BASSON v HUGO AND OTHERS 2019 (5) SA 142 (GP)

Medicine— Medical practitioner — Disciplinary proceedings — Health Professions Council of South Africa — Recusal — Bias or appearance of bias — Non-disclosure of association with petition against practitioner — Member ordered to recuse himself.

Recusal — On grounds of bias or appearance of bias — Non-pecuniary interest in outcome of proceedings — Member of disciplinary tribunal for medical profession associated with petition to remove subject of proceedings from roll of practitioners — Member's failure to disclose such association sufficient for reasonable apprehension of bias — Member ordered to recuse himself.

Dr Basson (the applicant) was the subject of a disciplinary hearing conducted by the Health Professions Council of South Africa (the third respondent). The Council's Tribunal Committee, which presided over the hearing, consisted of the first and second respondents, Profs Hugo and Mhlanga, as well as a judge, since deceased. In 2015 the Committee found Dr Basson guilty of various charges of unprofessional conduct. During the subsequent sanction proceedings, Dr Basson, having obtained information that Prof Hugo might be a member SAMA, an organisation that had campaigned for his removal from the roll of medical practitioners, applied for a postponement and later for the Committee to recuse itself on the ground of appearance of bias. The Committee refused both requests. In the present proceedings Dr Basson sought the setting-aside of the Committee's refusal to recuse itself. He argued, inter alia, that the Committee was *automatically* disqualified by virtue of the principle of nemo debit esse judex in causa propria sua — that nobody may be a judge in his own cause.

Held

Since the court had to determine whether there was 'reasonably apprehended' bias, it could not find that Prof Hugo's membership of SAMA automatically disqualified the

Committee from presiding (see [26] – [27]). However, Prof Hugo's refusal to furnish a proper explanation for his possible involvement in or knowledge of the petition led to a reasonable apprehension of bias since it was not far-fetched or untenable to accept that he was deliberately doing so because he supported it (see [31]). Professor Hugo's failure to disassociate himself from the petition and the Committee's earlier refusal to postpone the matter, together constituted an emphatic 'yes' to the question whether a reasonable, objective and informed person would reasonably apprehend that the Committee had not brought an impartial mind to bear on the adjudication of Dr Basson's case (see [36]). The Committee's refusal to recuse itself from the disciplinary proceedings against Dr Basson would therefore be set aside and replaced by an order that it recuse itself (see [38]).

BENSON AND ANOTHER v STANDARD BANK OF SOUTH AFRICA (PTY) LTD AND OTHERS 2019 (5) SA 152 (GJ)

Credit agreement — Consumer credit agreement — Debt enforcement — Preliminary procedures — Notice of default — Delivery — Failure to deliver notice prior to commencement of proceedings — Effect — Proceedings not rendered a nullity — Proceedings instead to be adjourned to permit credit provider to give notice before proceedings may be resumed — National Credit Act 34 of 2005, ss 129(1)(*a*) and 130.

Credit agreement — Consumer credit agreement — Debt enforcement — Preliminary procedures — Notice of default — Delivery — Failure to deliver notice prior to commencement of proceedings, but such failure cured by time of hearing — Effect — No need for adjournment of proceedings — National Credit Act 34 of 2005, ss 129(1)(*a*) and 130(4)(*b*)(ii).

This was an appeal against the refusal by Du Plessis AJ to grant the appellants' application for rescission of a judgment granted by default by Kathree-Setiloane J against them and in favour of Standard Bank (whose cause of action was the failure of the appellants to comply with a mortgage loan agreement entered into with Standard Bank). The appellants alleged that the notice required in terms of s 129 of the National Credit Act 34 of 2005 had not been properly sent to them and that, accordingly, the default judgment had been erroneously granted. The court a quo disagreed, finding that, while the s 129 notice was initially forwarded to the wrong address, they did receive the notice as it formed part of Standard Bank's application for a money judgment and consequential relief that was served on them; any non-compliance with the provisions of the NCA was accordingly cured. But before the present court the appellants argued that the s 129 notice they received with the Standard Bank application was a nullity because s 129(1)*(b)* did not permit a credit provider to commence any legal proceedings to enforce an agreement before it had given notice to the credit receiver of the s 129(1)*(a)* options.
Held, that, contrary to the appellants' assertions, the evidence established that the s 129 notice was sent to the correct address, and the appeal had to fail on this basis. (See [13].)
Held, further, that the commencement of proceedings without prior notice in terms of s 129 of the NCA did not render the proceedings a nullity, but simply required an adjournment of proceedings so as to permit the credit provider to give notice before the proceedings might be resumed. A failure to give notice did not invalidate the proceedings but was simply dilatory. (See [16].)

Held, further, that where, prior to the hearing of a judgment by default, any non-compliance with the notice requirements of the NCA was properly cured, there could be no purpose served in adjourning proceedings: Provided that by the time of the hearing, no further steps were required of the credit provider; and the credit receiver had been given the statutory time to consider their position. Such a conclusion followed from the provisions of s 130(4)*(b)*(ii) of the NCA. (See [18].)
Held, on the facts in this appeal, that by the time of the hearing of the default judgment, the appellants had obtained actual notice of their rights as required in terms of s 129 of the NCA, and had been in default under the credit agreement for at least 20 days, and at least 10 days had elapsed since the delivery of the s 129 notice (when Standard Bank launched its application). There had accordingly been compliance with the requirements of ss 129 and 130 at the time the default judgment application was heard on 1 June 2011. The default judgment was thus not erroneously sought and granted. And for these reasons the appeal had to fail. (See [19].)

CORAL ISLAND BODY CORPORATE v HOGE 2019 (5) SA 158 (WCC)

Housing — Consumer protection — Community schemes ombud — Body corporate of sectional title scheme bringing simple matter before High Court with legal representation — Matter more appropriately brought before Community Schemes Ombud Service, without legal representation — Court declining to award body corporate its costs — Community Schemes Ombud Service Act 9 of 2011.

Respondent had without written permission installed white plastic piping from the geyser in her garage to a point where it disgorged, in the event of H overflow, into the garaging area (see [1]). Respondent had also, again without consent, used her garage for a purpose other than garaging (see [1]).
The body corporate brought proceedings in the High Court for an order that respondent replace the plastic piping with copper piping, that she redirect the overflow to disgorge into a drain, and that she be interdicted from using her garage for anything other than that purpose (see [1]).
Before the hearing respondent conceded these points but asked, however, that she not be required to bear the applicant's costs (see [3]).
Held, that, given the simple nature of the matters in dispute, it had been inappropriate for the body corporate both to bring the matter in the High Court rather than to the Community Schemes Ombud Service, and for it to employ legal representatives at all (see [10] – [11]).
Accordingly, the relief asked for was granted, but no award made as to costs

DISTRICT SIX COMMITTEE AND OTHERS v MINISTER OF RURAL DEVELOPMENT AND LAND REFORM AND OTHERS 2019 (5) SA 164 (LCC)

Land— Land reform — Restitution — Duty of state — Breach — Delay in implementation of restitution — Non-delivery of homes 20 years after submission of claims — Constituting violation of claimants' rights and breach of state's obligations.

The applicants, representatives of those dispossessed of their homes in District Six, Cape Town, during the 1960s, were entitled to a declaratory order stating that the state's failure, for 20 years, to finalise their claims for restitution, constituted a violation of their rights and a breach by the state of its obligations under the Constitution and the Restitution of Land Rights Act 22 of 1994.

INTERACTIVE TRADING 115 CC AND ANOTHER v SOUTH AFRICAN SECURITISATION PROGRAMME AND OTHERS 2019 (5) SA 174 (LP)

Practice — Judgments and orders — Rescission — Of judgments erroneously sought and granted — Once established that defendants not properly served with summons, judgment granted in their absence may be set aside as erroneously granted — Uniform Rules of Court, rule 42(1).

Sheriff — Service — Duty to perform honestly and diligently — Not discharged where no effort made to find party to be served but instead affixing summons to gate of premises chosen as domicilium citandi et executandi, or by service on person ostensibly in control of such premises — Court ought to be able to rely on information contained in return as correct.

The applicants applied for rescission of default judgment on the basis that judgment was 'erroneously granted in [their] absence', as contemplated in Uniform Rule 42(1), claiming that the proceedings were not brought to their attention, in that summons was not served on them.

The sheriff had affixed a copy of the summons to the gate of first applicant's business, stating in his return of service that 'the premises remained locked and nobody was present'. Service on the second applicant was effected on another person ostensibly in control of the premises, the return stating that the second applicant 'moved from the given address — current address unknown'. The first applicant claimed that his business, a fuelling station operated on a 24-hour basis, was at all times staffed; and the second applicant, that he still resided at his given (domicilium citandi et executandi) address and that he did not know the person upon whom summons was served. Both applicants accordingly denied being aware of the process that had been instituted.

Held

Once it is accepted that the applicants were not served, it followed that the judgment granted in their absence was liable to be set aside on the basis that it was erroneously granted. It is a fundamental principle of our law that a court will not make a final order that may prejudice the rights of a person without notice to him. It followed that the default judgment granted against the applicants should be rescinded, and they be granted leave to defend.

The sheriff who prepared the returns of service did not perform his duties honestly and diligently in fulfilment of his obligations to the court. The court relied on the office of the sheriff that the process leading up to the granting of a judgment was fair and that the legal proceedings had been brought to the attention of the other party. Sheriffs, like attorneys, are required to be honest in their dealings with the court. The court should be in a position, upon mere production of the return of service, to accept the information contained therein as correct.

INVESTEC BANK LTD v LAMBRECHTS NO AND OTHERS 2019 (5) SA 179 (WCC)

Insolvency — Compulsory sequestration — Provisional sequestration — Discretion of court — Semble: Court may, where case for provisional sequestration marginal (marginal excess of liabilities over assets, modest benefit to creditors), exercise discretion against sequestration — Insolvency Act 24 of 1936, s 10(*c*).

Insolvency — Compulsory sequestration — Provisional sequestration — Requirements — Advantage to creditors — Applicant sole secured creditor — Had mortgage bond over debtor's only asset — Court addressing, obiter, bank's arguments that sequestration 'always urgent', that creditor best judge of own interests, and that sequestration preferable to judicial execution — Insolvency Act 24 of 1936, s 10(I).

Insolvency — Compulsory sequestration — Provisional sequestration — Requirements — Actual insolvency — Proof — Market value, rather than forced-sale value, of debtor's immovable property to be used to determine factual insolvency of debtor — Insolvency Act 24 of 1936, s 10(*b*).

The applicant (Investec) applied for the provisional sequestration of the Muscat Trust. The three respondents were Muscat's trustees, the first respondent (Lambrechts) being its driving force. In issue was: (i) Investec's claim and whether it was bona fide disputed on reasonable grounds; (ii) Muscat's alleged factual insolvency; (iii) benefit to creditors; and (iv) the appropriate exercise of the court's residual discretion to refuse a sequestration order.

Muscat's only asset of substance was an immovable property it acquired for R17 million in 2008. The purchase was financed by bond-holder Investec. When Muscat subsequently defaulted, Investec launched sequestration proceedings. The alleged balance due on the mortgage bond was just over R12 million. Since Investec did not rely on an act of insolvency, the question was whether it could prove, on a prima facie basis, that Muscat's liabilities exceeded its assets, fairly valued (see [27]). Investec tendered evidence that the property had an open-market value of R11 million and a forced-sale value of R7,6 million. It sought to rely on the lower figure to establish Muscat's factual insolvency. The only other creditor in the estate was another of Lambrechts' vehicles, Huganel, which had granted Muscat an insider loan of R2 million.

In regard to benefit to creditors, Investec argued that sequestration was preferable to ordinary execution for the reason, inter alia, that it conferred greater flexibility on the trustee in realising the property to their best advantage. It also argued in this regard that creditors could be taken to be the best judges of their own interests (see [58]).

Held

(i) Investec's claim was, on the evidence, proved beyond reasonable dispute (see [16] – [26]).

(ii) |To determine factual insolvency, the relevant value of Muscat's immovable property was its open-market value, which was the ordinary way in which value was determined (see [30]). Investec failed to establish on a balance of probabilities that Muscat's property was worth less than the amount owing to Investec or even that amount together with the insider loan from Huganel (see [53]). While this rendered it unnecessary to do so, the court would nevertheless proceed to deal with the issues of (iii), advantage to creditors; and (iv), the court's residual discretion (see [54]).

(iii) and (iv): Investec was a mortgage holder and sequestration would not in the circumstances seem to hold any advantage over ordinary execution (see [55]). While it was true that Investec would, in the absence of sequestration, have to incur costs and time in obtaining judgment against Muscat, those would be no greater than would be incurred in obtaining opposed provisional and final sequestration orders (see [56]). It was, in any event, ultimately for the court to decide whether sequestration was to the benefit of the creditors; the ipse dixit of even a sole creditor like Investec could not be decisive. Here, sequestration would not be to the benefit of Huganel or other creditors that might emerge (see [57] – [59]). Where, as in the

present matter, the case for provisional sequestration was marginal (marginal excess of liabilities over assets coupled with, at best, a modest benefit to creditors), an exercise of discretion against sequestration was justified (see [61]).

MAJOLA AND ANOTHER v COUNTRY CLOUD TRADING 221 CC AND OTHERS 2019 (5) SA 195 (KZP)

Constitutional law — Human rights — Right to property — Deprivation of property — Title deed condition allowing transferor to claim retransfer of land without compensation — Condition unconstitutional and unenforceable against innocent third party purchasers — Constitution, s 25(1).

Land — Transfer — Deeds Office — Powers of Registrar — Rectification of title deed — Cannot create right — Deeds Registries Act 47 of 1937, s 4(1)(*b*).

Land — Rights in — Registered title deed condition entitling transferor to claim retransfer of land without compensation — Unconstitutional and unenforceable against innocent third party purchasers — Constitution, s 25(1).

Land — Transfer — Registration of transfer — Condition containing reversionary clause — Transferor entitled to claim retransfer without compensation — Unconstitutional — On proper interpretation, creating personal obligation only — Constitution, s 25(1); Deeds Registries Act 47 of 1937, s 63.

A, a developer, sold land to B subject to a reversionary right specifying that, upon approval of subdivision, A could claim retransfer of a portion of the property without compensation (the reversionary clause). The reversionary clause was incorporated as a condition in the deed of transfer. B sold the property to C, who in turn sold to D. After subdivision, A, invoking s 4(1)*(b)* of the Deeds Registries Act 47 of 1937 (the Act), approached the KwaZulu-Natal High Court claiming rectification of the incorporated reversionary clause. D produced no source document (such as a sale agreement) showing the alleged errors requiring rectification. The High Court found that the reversionary clause created a real right and granted rectification.
In appeal to a full bench D contended that rectification should not have been granted because A failed to show the required common intention and because it would adversely affect the rights of innocent parties like C and D.
Held
Section 4(1) of the Act could not be used to achieve an unconstitutional end, and the reversionary clause, by requiring D, who was not a party to the sale, to transfer its property back to A, without any form of compensation, was ultra vires s 25(1) of the Constitution and hence invalid (see [22]). Rectification would, moreover, be contrary to s 4(1)*(b)*(iv) in that it would result in the transfer of rights to A without conclusive proof of their existence (see [26], [28] – [29]). Appeal upheld.

MANUEL v ECONOMIC FREEDOM FIGHTERS AND OTHERS 2019 (5) SA 210 (GJ)

Defamation — Damages — Assessment — Twitter posting — Allegations by political party (EFF) of corruption and nepotism against applicant, in capacity as head of panel tasked with interviewing candidates for position of commissioner of Sars — Conduct of EFF motivated by malice — No apology — Award of R500 000.

Defamation — Defences — Reasonable publication — Whether defence also available to private individuals.

Defamation — What amounts to — Twitter posting — Allegations by political party (EFF) of corruption and nepotism against applicant, in capacity as head of panel tasked with interviewing candidates for position of commissioner of Sars — Statement found to be defamatory.

In March 2019 the political party, the Economic Freedom Fighters (EFF), published a 'tweet' on its official account on the microblogging platform Twitter. It addressed the appointment process of the new commissioner of Sars, Mr Kieswetter, and in particular the role played by Mr Trevor Manuel in his capacity as chairperson of the panel tasked with interviewing candidates and recommending a short list to the President. The tweet characterised the process as nepotistic, corrupt and clandestine. It alleged that Mr Kieswetter — whom it described as a 'dodgy character' 'with a clear connection to the white capitalist establishment' — was a relative and close business associate of Mr Manuel, and also that he had been unlawfully appointed to his previous position of deputy Sars commissioner by Mr Manuel. Mr Manuel, in the present urgent application proceedings instituted by him against the EFF, and the EFF national spokesman and president, alleged that such tweet constituted defamation against him, and sought a declaration to such effect, as well as an order granting him damages plus certain interdictory relief.

The court reiterated that defamation comprised the wrongful and intentional publication of a defamatory statement concerning a person. While not refuting the defamatory nature of the tweet, the respondents raised a number of defences to rebut wrongfulness. The most significant of these, and the one forming the focus of the court's attention, was their defence of 'reasonable publication'. In this regard, the respondents argued that their conduct, even in publishing false allegations, was reasonable: after being given information from a confidential source concerning unlawful activities by the panel, which information they had no reason to doubt, the only course left open to them — having exhausted all parliamentary avenues, and where the media had been left in the dark — was to take on a public- disclosure role and publish the information in the manner they did (akin to a whistle-blower). This argument raised the question whether the defence of reasonable publication — traditionally the preserve of the media — should be extended to private individuals. (The respondents also raised defences that the statement *(a)* was true and in the public interest; *(b)* amounted to fair comment; and *(c)* was made in the public interest. The court rejected all of these. As to *(a)*, it held that the respondents had failed to prove the truth of the statement (see [56]); as to *(b)*, that they had failed to prove the truth of the facts underlying their comment (see [73]); and as to *(c)*, that 'public interest', on its own, was not a defence to a defamation claim (see [75]).

Held, that the tweet was defamatory in the sense that it tarnished the reputation and dignity of Mr Manuel in the eyes of the reasonable person of ordinary intelligence.

Held, that the limitation of the defence of reasonableness to the media could not be justified under s 36 of the Constitution. There was no reason why the press should enjoy a greater privilege of freedom of expression than that enjoyed by private individuals. The liberty of the press was no greater than the liberty of the individual.

Held, however, that the defence of reasonable publication could not assist the respondents in the present case, as they had failed to show that it was reasonable in the circumstances to publish the particular facts in the manner they had. In particular, they had failed to take any steps to verify the defamatory allegations, and had not given Mr Manuel any opportunity to respond before publishing them.

Held, as to the appropriate order, that an award of R500 000 in general damages was merited, given, inter alia, the serious nature of the defamatory statement; the

reputations of the parties; the widespread dissemination of the statement; and the conduct of the respondents, which was actuated by malice, as evidenced by their refusal to apologise and to remove the impugned statement from their social-media platforms, even though it had E been revealed to be untrue. The applicant was further entitled to the declaratory order sought, an order requiring the respondents to apologise and to remove the statement, as well as a punitive costs order.

MINING AND ENVIRONMENTAL JUSTICE COMMUNITY NETWORK OF SOUTH AFRICA AND OTHERS v MINISTER OF ENVIRONMENTAL AFFAIRS AND OTHERS 2019 (5) SA 231 (GP)

Environmental law — Protected areas — Prohibition on mining and prospecting activities in protected areas without ministerial consent — Nature of ministerial discretion — Minister's duties to act in procedurally fair and transparent manner, and to take relevant considerations into account — National Environmental Management: Protected Areas Act 57 of 2003, ss 48(1)(*b*) and 48(4); Promotion of Administrative Justice Act 3 of 2000, s 6(2).

This case concerned an application for review of a decision by the responsible ministers to grant second respondent mining company (Atha) permission, under s 48(1)*(b)* of the National Environmental Management: Protected Areas Act 57 of 2003 (NEMPAA), to conduct mining activities in an area which had been declared a marine protected area under s 28 of NEMPAA. The applicants' grounds of review, all contemplated in s 6(2) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), encompassed that the ministers —

- had not acted within the ambit of the enabling legislation, in that permission to mine in a protected area could only be granted in 'exceptional circumstances' (words that the applicants submitted should be read into s 48 of NEMPAA so as to render it functional), and only once all the other required ministerial authorisations/permissions had been obtained;
- had failed to discharge their distinctive duties, in that they relied on decisions taken by other officials in respect of other authorisations, without 'applying their fresh minds' in exercising their discretion under s 48(1)*(b)*;
- had acted procedurally unfairly, in that the applicants were not granted an opportunity to be heard in respect of Atha's request for s 48(1)*(b)* permission, and therefore the decisions lacked transparency (which was heightened because ATHA was politically connected — see [2.2] and [11.1.3]).
- had failed to take relevant considerations into account, inter alia, in that the decisions were taken while statutory appeals against the granting of certain of the other environmental authorisations to Atha were pending; were taken in the absence of a final management plan for the marine protected area; were taken without regard to Atha's social and labour plan as required by s 48(4) of NEMPAA; and failed to take international responsibilities relating to the environment into account.

The ministers conceded that PAJA's prescripts for procedurally fair administrative action were not followed but insisted that it had been 'reasonable and justifiable' (as contemplated in PAJA) to depart from those prescripts. With regard to allegations that they failed to take relevant considerations into account, the ministers conceded that they had overlooked certain reports but contended that these were either immaterial (as with a certain environmental assessment report — see [11.7]) or unnecessary (as with the social labour plan — see [11.6.1]).

Held

As to the interpretation of s 48(1)(b) read with s 48(4)

Reading the qualification of 'exceptional circumstances' into s 48 was unnecessary and might set the bar higher than the legislative intention. To purposively give effect to the envisaged environment within and manner in which the ministers were obliged to exercise their discretions, s 48(1)*(b)* and s 48(4) should be interpreted to mean the following: Despite the fact that a person may have obtained all the necessary authorisations required in terms of all other applicable statutory provisions (see [4.11]) in order to lawfully conduct mining activities on a certain portion of land, should that land fall within a protected environment as contemplated in NEMPAA, then such a person would, *in addition*, need to obtain the written permission of both the ministers of environmental affairs and mineral resources to do so. In considering a request for such permission, the ministers shall act as custodians of such protected environment *and with a strict measure of scrutiny* take into account the interests of local communities and the environmental principles referred to in s 2 of NEMA.

A failure to take South Africa's international responsibilities relating to the environment into account would not satisfy the 'higher level of scrutiny' necessary when considering whether mining activities should be permitted in a protected environment or not.

As to the ministers' distinctive duties

Relying on decisions taken by other officials, in terms of other provisions, raised the spectre of an impermissible 'tick-box' approach. NEMPAA enjoyed supremacy (ito s 7 thereof) over other conflicting statutory provisions when dealing with protected environments. The ministers were expected to apply their minds when exercising their s 48(1)*(b)* discretion. To hold otherwise would be contrary to the strict measure of scrutiny required by s 48(1)*(b)*. The ministers did not appreciate their distinctive duties, and neither did they fulfil them in the manner in which they came to their conclusions. Their decisions should therefore be reviewed and set aside.

As to procedural fairness and transparency

There was no evidence, written or otherwise (apart from the answering affidavit), indicating that prior to the launching of the review application the departure from PAJA's procedural requirements was motivated, considered or 'concurred' in, or that any of the component specific factors listed in ss 3(4)*(b)* and 4(4)*(b)* of PAJA had been considered, as the ministers had been required to do. It was astounding that, in an admittedly novel procedure, the ministers decided that it would be procedurally fair not to hear the applicants while well knowing that each and every preceding authorisation had been hotly contested. Whatever the case, it resulted in an unjustifiable and unreasonable departure from the PAJA prescripts and led to procedurally unfair administrative action which should be reviewed and set aside on this ground alone. (See [11.2.4] and [11.2.6].)

As to the ministers' failure to take certain relevant considerations into account

- *Failure to consider the management plan*: Until the ministers knew how the specific part of the protected environment in which the proposed mining area was situated was going to be managed, or how the management criteria set out in s 40 of NEMPAA was going to be applied, they should have been precluded from exercising their discretion in terms of s 48(1)*(b)* of NEMPAA. On the same basis as the ministers would need to know what the position was in respect of all the other prescribed authorisations, so as to be able to exercise their discretion in an informed manner pertaining to a protected environment, they could only do so once they were

in a position to consider how their consent, if granted, would either fit in with or impact on the management of the specific environment. (See [11.5.3] and [11.5.5].)

- *Failure to consider pending statutory appeals*: The permission of the ministers envisaged in s 48 of NEMPAA was an *additional* requirement to be obtained by a mining company in respect of prospective mining operations in a protected environment *after* all other authorisations had been obtained. It must follow that, until all internal remedies had been exhausted in respect of such authorisations, their existence, nature or any conditions attached thereto would not have been determined. It was therefore a requirement that the ministers must wait to exercise their s 48(1)*(b)* discretion until finalisation of internal appeal procedures.

The ministers' decisions would be reviewed, set aside and remitted (see [11.1].)

MINEUR v BAYDUNES BODY CORPORATE AND OTHERS 2019 (5) SA 260 (WCC)

Sectional title — Sectional plan — Section — Use of section for purpose other than that recorded on sectional plan — When consent of all owners required for such use — Sectional Titles Schemes Management Act 8 of 2011, s 13(1)(*g*).

Certain of the owners in the Baydunes sectional title scheme had converted parts of their sections, which on the sectional title plan were recorded to have the purpose of garaging, into living quarters (see [9] and [16]).

At some point the body corporate made to regularise the situation, and to this end adopted, with an 84% majority vote, two resolutions and a conduct rule (see [26]). The first resolution purported to approve the garage conversions, and the second to adopt a conduct rule creating exclusive use areas, from the common property, for parking (see [24] – [25] and [49]).

Applicant, an owner, opposed this course, and sought relief from the Community Schemes Ombud Service, but an adjudicator dismissed her application

Here, she appealed the adjudicator's ruling to the High Court (see [1]).

Held, that s 13(1)*(g)* of the Sectional Titles Schemes Management Act 8 of 2011 required, that where an owner sought to use his section for a purpose other than that recorded on the sectional plan, and the proposed use would materially affect other owners, then the consent of all owners was required to such use (see [46] – [47]).

The conversion and use of garages as living quarters materially affected other owners, and, absent the consent of all, were unlawful (see [28], [34] and [46] – [47]).

Accordingly, the resolution, which purported to approve the conversions, but which was not voted for by all the owners, was invalid (see [47]).

The other resolution, and conduct rule it purported to adopt, were unlawful and invalid, inter alia, because the conduct rule was 'irreconcilable' with the management rules (see [5], [50.1], [50.3] and [51] – [52]).

Appeal accordingly upheld, the adjudicator's ruling set aside, and replaced with a ruling that the resolutions and conduct rule were unlawful and invalid, and had to be set aside (see [54]).

UZANI ENVIRONMENTAL ADVOCACY CC v BP SOUTHERN AFRICA (PTY) LTD 2019 (5) SA 275 (GP)

Environmental law — Environmental legislation — Enforcement — Private prosecution — Whether permissible after application made for rectification of unlawful

commencement or continuation of listed activities — National Environmental Management Act 107 of 1998, ss 24G and 33.

Environmental law — Environmental legislation — Enforcement — Private prosecution — Requirements for instituting — Consultation between applicant and national prosecuting authority — What constitutes 'consultation' — National Environmental Management Act 107 of 1998, s 33; Criminal Procedure Act 51 of 1977, s 8(2).

Environmental law — Environmental legislation — Enforcement — Rectification of unlawful commencement or continuation of listed activity — Effect of application for rectification on private prosecution for unlawful commencement of listed activity — Status of rectification report — National Environmental Management Act 107 of 1998, s 24G.

The prosecutor (Uzani), an environmental advocacy group, had obtained the High Court's leave to institute a private prosecution as contemplated in s 33 of the National Environmental Management Act 107 of 1998 (NEMA). Uzani charged the accused (BPSA) with commencing or continuing the construction of 21 filling stations without environmental authorisation, as required by s 22 of the Environmental Conservation Act 73 of 1989 (the ECA). BPSA pleaded not guilty, and also denied Uzani's entitlement to prosecute. In the latter regard, some of the grounds BPSA advanced were the following:

(a) The fact that BPSA had applied under s 24G of NEMA for rectification of the impugned activities precluded private prosecution under s 33. This was so, BPSA contended, because on a proper interpretation of s 24G(6), only the National Prosecuting Authority (NPA) was allowed to prosecute once an application had been made under s 24(G)(1) or environmental authorisation was granted under s 24G(2)(*b*).

(b) There was no prior consultation with the Director of Public Prosecutions (the DPP) as required by s 33(2) of NEMA read with s 8(2) of the Criminal Procedure Act 51 of 1977 (the CPA), which would in turn require the DPP to be possessed of sufficient information to make an informed decision, which was not the case here.

(c) The prosecution failed to prove that it was in the interest of the environment. BP submitted, inter alia, that there was no evidence that any of the filling stations posed a risk to the environment. Uzani offered expert evidence as to the need for environmental authorisation prior to filling stations being erected, the expert testifying that, for the purposes of environmental protection, a post-construction application under s 24G was qualitatively inferior to the more rigorous requirements of an environmental assessment report because refusing a rectification report was not a realistic option as it would lead to job losses.

Held as to *(a)*

Section 33 did not commence with the words 'Subject to s 24G'. It was formulated in unequivocal terms and its purpose was manifest. If there was an ambiguity between the unequivocal formulation of s 33 and the provisions of s 24G(6), then it must be resolved by an interpretation that would not lead to an absurdity but that would be consistent with the legislation read as a whole. It would be absurd to suggest that the moment an application was brought under s 24G(1) a private prosecution was not competent whereas a prosecution initiated by the NPA would be. There was no logic indicating why there should be such a discrimination when s 24G effectively provided for an administrative penalty, which did not impact on a right to prosecute. (See [106] – [113].)

Held as to *(b)*
Section 33(2) of NEMA was couched in terms that facilitated, if not encouraged, interest groups wishing to protect the environment. It achieved this by compelling compliance with the environmental laws in a manner which facilitated fast-track private prosecutions for offences under NEMA. On the evidence presented, there was consultation, bearing in mind that a consultation need not necessarily be face to face (but may be satisfied by a phone call or the exchange of correspondence) to reach consensus.
Held as to *(c)*
Uzani's expert evidence regarding the degradation that can be caused by storage tanks, the failure upfront to produce an EIA report and the failure of any applications for authorisation under s 24G to provide rectification reports demonstrated that the prosecution was in the interest of the protection of the environment. While the expert's claim that post-construction approval under s 24G was inferior to that required pre-construction was challenged, he stood his ground and his reasoning would be accepted as reliable.
Held as to whether the offences were proved
Uzani only had to rely on the lack of authorisation by the minister or the competent authority (aside from proving the construction or upgrading of the filling stations referred to in the indictment and the date of its commencement). It was for BPSA to rebut the presumption of lack of authority (in s 250(1) of the Criminal Procedure Act 51 of 1977). In making an application under s 24G of NEMA, BPSA admitted that it had 'commenced with a listed or specified activity without an environmental authorisation in contravention of section 24F(1)'. The fail-safe position was that the terms of a s 24G application (without explanation) amounted to a statement against interest. The accused would be convicted on all counts, except those in respect of which the records created sufficient doubt (counts 3, 4, 7 and 10).

WILD & MARR (PTY) LTD v INTRATEK PROPERTIES (PTY) LTD 2019 (5) SA 310 (GJ)

Company— Winding-up — Jurisdiction of court — Proposition that service of winding-up application can take place only at registered address of company not applying in Gauteng Division — May also take place at principal place of business — Dual-jurisdiction regime provided for in s 12(1) of the (old) Companies Act 61 of 1973 still standing in Gauteng Division.

There is no precedent that binds the Gauteng Division of the High Court to the proposition that a court with jurisdiction over the registered address of a company has sole jurisdiction over its winding-up, and that the winding-up application can therefore be served only at that address. For liquidation-related matters, the dual-jurisdiction regime provided for in s 12(1) of the (old) Companies Act 61 of 1973 still stands. Therefore, liquidation proceedings may be launched also from the court with jurisdiction over the company's principal place of business.
Here the court had to decide whether an application for the winding-up of the respondent company (Intratek) was correctly served at its principal place of business in Johannesburg. Intratek argued that since its registered office was in the jurisdictional area of another court (the Mpumalanga Division, Nelspruit), only that court had jurisdiction. This, said Intratek, was because s 23(3) of the (new) Companies Act 71 of 2008 had abolished the dual-jurisdiction regime provided for in s 12(1) of the old Companies Act. The present court, however, regarded itself bound

by countervailing precedent (which it in any event favoured) and dismissed Intratek's argument. Final winding-up order granted.

NATIONAL HOME BUILDERS REGISTRATION COUNCIL v ADENDORF AND OTHERS 2019 (5) SA 317 (SCA)

Housing — Consumer protection — Unregistered builder — Trust carrying on business of home building — Whether to be regarded as 'a person' requiring to be registered as home builder — Housing Consumers Protection Measures Act 95 of 1998, s 10(1).

Trust and trustee — Trust — Nature of — Whether trust carrying on business of home building to be regarded as 'a person' requiring to be registered as home builder — Housing Consumers Protection Measures Act 95 of 1998, s 10(1).

Section 10(1) of the Housing Consumers Protection Measures Act 95 of 1998 (the Act) provides that '(n)o person shall carry on the business of a home builder . . . unless that person is a registered home builder'.
A 'person', for the purposes of s 10(1) of the Act, includes a trust carrying on the business of a home builder.

SA CRIMINAL LAW REOPRTS SEPTEMBER 2019

S v NDOU 2019 (2) SACR 243 (SCA)

Appeal — By Director of Public Prosecutions or other prosecutor against acquittal — State not cross-appealing but merely requesting appeal court to reverse acquittal — High Court not entitled, either at own instance or that of state, to set aside acquittal and substitute conviction in its stead.
Assault — With intent to do grievous bodily harm — Sentence — Conviction changed on appeal from attempted murder to assault with intent to do grievous bodily harm — Reduction in severity of crime ought to be reflected in sentence — Trial court erred in imposing sentence of 10 years' imprisonment on count of attempted murder on assumption that provisions of Criminal Law Amendment Act 105 of 1997 prescribed such sentence — At best was one envisaged in part IV of sch 2 to Act which carried prescribed minimum sentence of 5 years' imprisonment.
The appellant was convicted in a regional magistrates' court of having participated in an armed robbery. During the incident a shot was fired from inside the getaway vehicle at a man attempting to apprehend the perpetrators, striking his arm. The appellant was sentenced to 15 years' imprisonment for robbery with aggravating circumstances, and to 10 years' imprisonment for the attempted murder of the man who had tried to thwart their escape. The appellant was acquitted of the unlawful possession of a firearm. He appealed against his conviction and sentence on the count of attempted murder.
The state did not cross-appeal on the firearm charge but warned that it would argue for the reversal of the acquittal.
The full court set aside the conviction on the attempted-murder charge and replaced it with a conviction for assault with intent to do grievous bodily harm, but retained the original sentence. It then set aside the acquittal on the firearm charge and replaced it with a conviction and imposed a sentence of two years' imprisonment. The appellant

was thus sentenced effectively to a term of 27 years' imprisonment. In a further appeal,
Held, that the state had no right of appeal and the High Court was not entitled, either at its own instance or that of the state, to set aside the acquittal and substitute a conviction in its stead. (See [18].)
Held, further, that the trial court had committed a material misdirection in sentencing the appellant on the count of attempted murder on the assumption that the provisions of the Criminal Law Amendment Act 105 of 1997 prescribed a sentence of 10 years' imprisonment. At best for the state the offence was one envisaged in part IV of sch 2 to the Act which carried a prescribed minimum sentence of five years' imprisonment. (See [22].)
Held, further, that the appellant was a first offender and there was no evidence that he was the one who had shot the complainant. The finding that he was not guilty of attempted murder, but rather of assault with intent to do grievous bodily harm, should have resulted in the reduction of his sentence. The appeal against sentence on that count should succeed and the sentence of five years' imprisonment should replace the sentence of 10 years' imprisonment imposed by the trial court and confirmed by the full court. The sentence was altered accordingly.

RODRIGUES v NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS AND OTHERS 2019 (2) SACR 251 (GJ)

Fundamental rights — Trial within reasonable time — Application for permanent stay of prosecution — Lengthy delay in commencing prosecution of apartheid-era crime by security police — Death in custody of prominent political activist — Examination of period of 47 years involved requiring nuance and context, and large periods of delay had to be excluded.
Fundamental rights — Trial within reasonable time — Application for permanent stay of prosecution — Lengthy delay in commencing prosecution of apartheid-era crime by security police — Death in custody of prominent political activist — Trial-related prejudice — Poor memory constituting neutral factor as applied both to state, which bore onus, and accused — Accused on bail and legal expenses being covered by state — Application for permanent stay refused.
Fundamental rights — Trial within reasonable time — Application for permanent stay of prosecution — Lengthy delay in commencing prosecution of apartheid-era crime by security police — Death in custody of prominent political activist — Interests of justice; societal need to ensure accountability for commission of serious crime; and nature of crime located in its historical context, all militating against grant of relief sought.
The applicant, a former security policeman, was indicted to stand trial in the High Court on a charge of having murdered a political activist (the deceased) in his custody at the time, in October 1971. The applicant applied for a permanent stay of the prosecution against him, based on the unreasonable delay in the prosecution; the prejudice he would suffer — particularly, given his age; and that the prosecution had been advanced for an improper motive.
Held, that, although the period of 47 years since the death of the deceased was a lengthy delay, the time line was more nuanced and complex and could be divided into three separate periods, namely (1) the period between 1971 and 1994 when the government, and the whole system of which the applicant was a part, sought to cover up any such wrongdoing and this period could accordingly not be

characterised as constituting part of the delay (see [42] – [45]); (2) the period from 1994 to 2002 which was a time regarded as necessary and important to allow a new society to come to terms with its past, to allow victims and perpetrators to take advantage of the opportunities created by the Truth and Reconciliation Commission (the TRC) and to seek a mechanism to find closure — this period could not be said to be part of the delay when, by operation of the law, it was a period of hiatus contemplated by the Promotion of National Unity and Reconciliation Act 34 of 1995 (see [52] – [53]); (3) and the period from 2003 to 2017 in which there was clear political interference in the prosecution of cases that had been highlighted by the TRC — the conduct of the relevant officials and others outside of the National Prosecuting Authority at the time ought to be brought to the attention of the National Director of Public Prosecutions for her consideration, and in particular to consider whether any action in terms of s 41(1) of the National Prosecuting Authority Act 32 of 1998 was warranted (see [55] and [65]).

Held, further, that it followed that the period from 1971 until 2003 had to be excluded and what remained was the delay from 2003 to 2017. This undoubtedly constituted a substantial period of time and the reasons advanced by the state therefor, namely that of political interference, could not serve to justify it. (See [74].)

Held, further, in examining the trial prejudice that the applicant contended he would face, it was not in dispute that he had access to the full docket in the criminal trial and he was at liberty to engage experts if he regarded that as necessary. The applicant was on bail and his legal fees were being paid by the state. Although he alleged that he suffered from memory loss due to old age, such was not a bar to prosecution and imprisonment. (See [81] – [85].)

Held, further, that there was no evidence that the alleged poor memory of the applicant and other witnesses was likely to taint the fairness of the trial: if anything, that remained a neutral factor, as it applied equally to the state and ultimately it was the state that carried the burden of proving guilt beyond reasonable doubt. (See [86].)

Held, further, as to the interests of the family of the deceased, they had for many years simply sought to establish what had happened to the deceased and the circumstances that led to his death. For a long time their efforts seemed to come to nothing. They were not in search of revenge but rather the truth, and participated in the victims hearing of the TRC. They too were entitled to the justice that had eluded them for so long, and had an interest in ensuring that there was a proper process to ventilate the truth of what occurred, and for the applicant's guilt or innocence to be determined in a court of law. (See [95] – [96].)

Held, further, that, whilst it was accepted that there was a delay that could correctly be characterised as unreasonable in its duration and in respect of the justification advanced for it, there was no evidence that the delay would result in trial prejudice, nor were there any exceptional circumstances present that would justify granting the radical and far-reaching relief the applicant sought. If anything, the interests of justice; the societal need to ensure accountability for the commission of serious crime; and the nature of the crime located in its historical context, all militated against the grant of the relief sought. The application was accordingly dismissed.

WILKINSON AND ANOTHER v NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS AND OTHERS 2019 (2) SACR 278 (GP)

Indictment and charge — Objection to charge — Proper forum for ventilating objection is court sitting in trial — Removal of criminal proceedings to civil courts deprecated — Criminal Procedure Act 51 of 1977, s 85.
Environmental offences— Rhino horn — Evidence — Reverse-onus provisions in various provincial ordinances — Obiter: reverse-onus provisions in question reasonable, proportionate and justified under s 36 of Constitution.
The applicants, together with eight other people, had been indicted to stand trial on numerous criminal charges relating to the operation of a syndicate that dealt illegally in rhinoceros horns. In the present application they challenged the reverse-onus provisions contained in the legislation under which they were charged, namely various sections of provincial ordinances of Gauteng, the North West and KwaZulu-Natal. They also sought an order declaring that certain of the criminal charges in the indictment were unconstitutional, alternatively as not constituting a criminal offence. The Minister of Environmental Affairs was granted leave in an interlocutory application to intervene in the proceedings. The Minister raised a preliminary objection that the application, being one before a civil court, was premature and the procedure incorrect. Counsel for the Minister also submitted that there was no indication that the prosecution intended to rely on the specific reverse-onus provisions referred to by the applicants.
Held, that departure from the procedures laid down in the Criminal Procedure Act 51 of 1977 (the CPA) and the removal of criminal proceedings to the civil courts were not to be encouraged. The trial of the applicants had not yet commenced, and the charges were yet to be adjudicated upon. The applicants required the court in the present proceedings to decide the constitutionality of the provisions of the various ordinances, without the benefit of the criminal-court findings on a number of issues which had a bearing on the question whether said provisions should be declared unconstitutional. The application was premature, and it had to be dismissed. (See [26].)
Obiter, that the reverse-onus provisions in s 110(1)*(c)* of the Gauteng Nature Conservation Ordinance 12 of 1983; s 84(1)*(a)* of the North West Nature and Environmental Conservation Ordinance 19 of 1974; and s 39 of the KwaZulu-Natal Nature Conservation Ordinance 15 of 1974 were justified in the light of the serious concerns regarding the conservation of wildlife, and they enabled government to act in the public interest. They were reasonable and proportionate, as no less intrusive means existed to achieve the objective, and were justifiable in terms of s 36 of the Constitution. (See [52] – [54].)
Held, further, that s 85 of the CPA dealt with and regulated the objection procedures before a criminal court as part and parcel of criminal proceedings, and it was difficult to understand why the applicants had elected to challenge charges preferred against them in the present forum. There was no basis in the founding affidavit to justify a declaratory order in that regard. The application was dismissed.

ECONOMIC FREEDOM FIGHTERS AND ANOTHER v MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT AND ANOTHER 2019 (2) SACR 297 (GP)

General principles of liability — Incitement — What constitutes — Mere voicing of one's opinion not sufficient and clear intention to influence mind of another to commit crime had to be present — Riotous Assemblies Act 17 of 1956, s 18(2)(*b*).
Incitement — See General principles of liability — Incitement.
General principles of liability — Incitement — What constitutes — Interrelationship with s 16 of Constitution — Limitation of right to freedom of expression — Limitation bore rational connection to purpose of timely law enforcement and prevention of commission of crimes en masse — Riotous Assemblies Act 17 of 1956, s 18(2)(*b*).
General principles of liability — Incitement — Sentence — Provision in s 18(2)(*b*) of Riotous Assemblies Act 17 of 1956, that inciter punishable as if had committed crime in question, not rationally connected to purpose of crime prevention, and to this limited extent unconstitutional.
The applicants sought orders declaring s 18(2)*(b)* of the Riotous Assemblies Act 17 of 1956 unconstitutional on the basis that it violated, inter alia, s 16 of the Constitution, and declaring that s 1(1) of the Trespass Act 6 of 1959 did not apply to occupiers of land protected by the Extension of Security of Tenure Act 62 of 1997 (ESTA) and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE). They contended that s 18(2)*(b)* criminalised the exercise of free expression protected by s 16 of the Constitution and that the definition of the crime of incitement was overbroad and an unjustifiable limitation on said right. The applications arose from three charges laid against the second applicant, the leader of the first applicant, that he had unlawfully and intentionally incited, instigated, commanded or procured his followers to commit a crime, namely trespassing in contravention of s 1(1) of the Trespass Act.
Held, that the applicants' arguments misunderstood the crime of incitement: the mere voicing of one's opinion would not be enough for incitement, and the clear intention to influence the mind of another to commit a crime had to be present, which evidently was a high bar for the state to prove beyond a reasonable doubt. (See [19] – [34].)
Held, further, that the argument by the Minister, that s 16 only offered protection to expressive acts within a certain scope, was incorrect: the right to freedom I of expression was not limited to the values of a functioning of democracy, self-fulfilment and the search for truth, as was proposed, but extended to any and all conduct that was not excluded in s 16(2) of the Constitution. (See [37].)
Held, further, that the limitation in s 18(2) did not attack the core of the right to freedom of expression. It most apparently limited the listed ground in s 16(1)*(b)*of the Constitution, which enshrined the 'freedom to receive or impart information or ideas'. Section 18(2) only limited that to the extent that one was prohibited from imparting the idea to commit a crime that would not otherwise be excluded in s 16(2). It was not a wholesale restriction on speech, but merely a prohibition on influencing the minds of others to commit acts already considered to be unlawful. (See [55].)
Held, further, that, quite clearly, the limitation bore a rational relation to the purpose of timely law enforcement and the prevention of the commission of crimes en masse. (See [59].)
Held, however, that the provision in s 18(2), that a person who incited a crime was liable to punishment as if they had actually committed that crime, could not be said to be rationally connected to the purpose of crime prevention. The mere possibility of

criminal sanction was enough to successfully dissuade one from inciting another to commit a crime. It was therefore not reasonable and justifiable that the inciter should be held liable as if they had actually committed the crime, and to this limited extent s 18(2) was unconstitutional. (See [61] – [62] and [94].)
Held, further, that there was no immediate conflict between the Trespass Act and PIE, which required the court to grant any declaratory or other relevant relief, and, accordingly, the applicants' challenge to the Trespass Act, without a direct constitutional attack, had to fail. (See [81].) The applications were accordingly dismissed, except for the declaration of constitutional invalidity of the penalty provision in s 18(2)*(b)* of the Riotous Assemblies Act, which was referred to the Constitutional Court for confirmation.

CITY OF JOHANNESBURG v BERGER AND ANOTHER 2019 (2) SACR 319 (GJ)

Animal — Protection of — Domestic animals — Dogs and cats being kept on property in contravention of zoning bylaws and local authority seeking order for charitable organisation to cease operations on site — Grant of order might involve putting down some of 200 animals housed at site — Court embarking on weighing-up exercise and holding that order could be postponed pending finalisation of rezoning application.
The applicant applied for an order requiring the respondents to immediately cease using their property in contravention of its bylaws. The property was being used as a veterinary clinic, rescue, rehabilitation and rehoming centre for cats and dogs, operating under the name Kitty and Puppy Haven. In doing so, the applicant relied on the bylaws promulgated in terms of the Johannesburg Town Planning Scheme under Administrator’s Notice 1157 of 1979 as read with the Town Planning and Townships Ordinance 15 of 1986.
The matter was unopposed, but the court had qualms about the effect of a potential order on the lives of approximately 200 animals on the site. The court therefore postponed the application to establish what alternative arrangements could be made to provide for the animals if the order sought by the City was granted, and whether any of the animals would be put down. It appeared that the respondents operated the facility as a registered non-profit (and approved public-benefit) organisation. In 2008 they set about having the property rezoned, but that application had still not been finalised in August 2011 when the matter came before the court.
Held, that the situation that had developed was of the City’s own making. It was obliged to act within the provisions of s 33 of the Constitution and provide just administrative action, which included the duty to make decisions within a reasonable time, having regard to the nature of the matter before it, and to provide certainty. (See [32].)
Held, further, the court had to weigh the obligation to enforce a bylaw against the city’s failure to comply with its constitutional obligations. The question came down to whether the court should sacrifice life because of a failure to consider an application made to the city within a reasonable time, particularly when such a decision was due imminently: the values we aspire to implicitly involve avoiding the ending of animal life unnecessarily. Even though the paradoxes of slaughtering for food had to be accepted as a reality, that was a far cry from the present situation of killing very young animals. (See [36] and [38]–[39].)
Held, further, that, while the entitlement of the City to enforce its bylaws was self-evident, the evidence before court confirmed that if the order was implemented with

immediate effect, an indeterminate number of young animals were likely to be put down. This was contrary to the Societies for the Prevention of Cruelty to Animals Act 169 of 1993, which had as its object the ‘good treatment by man’ of animals and to prevent their ‘ill-treatment’. It was also unnecessary. The object of the bylaw could easily be achieved by delaying the enforcement of the order—delay in the enforcement of orders for specific performance was not uncommon and found as its base the interests of justice. There was also nothing in the Ordinance which precluded delay in enforcement of bylaws in the interests of justice, particularly where a failure to do so would result in the contravention of animal-protection laws, laws which in turn had to be broadly construed and applied by reason of their foundational value based on humanity. (See [50]–[51].) The court accordingly postponed the matter pending the outcome of the rezoning application.

S v MATROSS 2019 (2) SACR 331 (WCC)

Admission of guilt — Payment of — Duty on police officer to disclose serious consequences of paying admission-of-guilt fine — Criminal Procedure Act 51 of 1977, s 56(1)(*d*).
The accused applied for the review and setting-aside of an admission-of-guilt fine of R100 which she had paid after having spent a night in the police cells for the possession of a small quantity of dagga. She alleged that she was not aware that, by paying the fine, this would stand as a previous conviction.
Held, that the plain wording of s 56(1)*(d)* of the Criminal Procedure Act 51 of 1977 imposed a duty on the police officer to disclose to an accused the serious consequences of paying an admission-of-guilt fine. In the absence of such a warning the entry of the fine in the criminal record book by the clerk of the court had to be set aside and expunged.

S v KARAN 2019 (2) SACR 334 (WCC)

Admission of guilt — Setting of by prosecutor — No magisterial determination for district in respect of particular offence — Magistrate of view that fine inadequate and setting aside conviction and sentence — Prosecutor disputing magistrate's entitlement to do so — Prosecutor's decision to fix admission-of-guilt fine reviewable by magistrate in terms of s 57(7) read with s 57(4) of Criminal Procedure Act 51 of 1977.
The accused paid an admission-of-guilt fine of R10 000 on a charge of contravening reg 36(1)*(b)* of the regulations promulgated under the Marine Living Resources Act 18 of 1998, in that he was found in possession of 192 shucked abalone without a permit. The prosecutor had issued a notice in terms of s 57A of the Criminal Procedure Act 51 of 1977 (the CPA) that an admission-of-guilt fine was payable in respect of the offence. The magistrate, however, noted that no magisterial determination in terms of s 57(5) of the CPA existed and, due to the serious nature of the offence, she considered that the admission-of-guilt fine set by the prosecutor was not in accordance with justice. She therefore set aside the conviction and sentence and directed that the accused be prosecuted in the ordinary course.
The public prosecutor disputed the magistrate's entitlement to do so, contending that she was entitled to determine an admission-of-guilt fine for the offence and requested that the magistrate submit her decision to the High Court for special

review in terms of s 304(4) of the CPA. She contended that her decision to fix the admission-of-guilt fine was immune from review by the magistrate in terms of s 57(7) of the CPA. This was because s 57(4) provided that no provision of the section should be construed as preventing a public prosecutor from reducing an admission-of-guilt fine on good cause shown.
Held, that the argument was misconceived because the prosecutor had not reduced an admission-of-guilt fine, but had simply fixed an admission-of-guilt fine in circumstances where there was no magisterial determination. (See [13].)
Held, further, that s 57(7) conferred a broad, overarching discretion on the magistrate to ensure that the conviction and sentence were in accordance with justice. This power overrode the power of the prosecutor in terms of s 57(4). The words 'except as provided in subsection (4)' in s 57(7) did not operate to immunise from magisterial review a decision of the prosecutor under s 57(4) to reduce a fine; they simply meant that where a sentence had been reduced in terms of s 57(4), the mere fact that it differed from a magisterial determination would not automatically operate as a ground for review. Where a fine had been reduced in terms of that section, the magistrate could intervene if they considered that it was not in accordance with justice. (See [19].) The magistrate's decision was accordingly confirmed.

S v MATANZIMA AND ANOTHER 2019 (2) SACR 342 (WCC)

Evidence— Confession — Admissibility of — Trial-within-a-trial — Ruling at end of trial-within-a-trial — Provisional ruling — Clear from record that court made provisional ruling and that placed accused on his defence.
The appellants appealed against their conviction in the High Court on, inter alia, a count of murder. It was contended for the first appellant that the presiding judge had not made a finding on the admissibility of statements he had made after a trial-within-a-trial and that this had affected his decision not to testify, on the merits. It appeared that at the end of the trial-within-a-trial, state counsel had requested a final decision on the admissibility of the statements before it closed its case, to which the court responded that it was not its duty to assist either of the parties to the case in a piecemeal way. The first appellant's counsel contended further that, because no ruling had been given, this rendered first appellant's statements inadmissible.
Held, that the court's statement to state counsel had been preceded by a detailed ruling at the end of the trial-within-a-trial, in which the court had stated that it was satisfied that the state had proved its case beyond a reasonable doubt; the documents had been made freely and voluntarily by the accused in their sound and sober senses and without having been unduly influenced; and that the statements were provisionally admitted. Read together, what had transpired was that the statements were admitted, subject to a possible reassessment at the end of the trial. (See [12] – [14].)
Held, further, that it was clear from the ruling that the first appellant had been placed on his defence, in that the evidence given in terms of the statements was admissible and could therefore have been employed. The appeal was dismissed.

S v SKEPE 2019 (2) SACR 349 (ECP)

Rape — Proof of — Cautionary rule — Single and child witness — Complainant was 7 years old when called to testify and did not have mental capacity to give evidence in court — Court having to rely on hearsay evidence — Fact of rape established, but insufficient evidence as to identity of perpetrator — Court questioning why state had not gathered other circumstantial evidence — Accused acquitted.
The accused, a 30-year-old man, was charged with having raped a 5-year-old girl. At the time of the trial the girl was 7 years old. When she was called as a state witness the court concluded that she would not understand the nature and import of the oath. The court then invoked the provisions of s 164(1) of the Criminal Procedure Act 51 of 1977 and conducted an inquiry to determine whether she could distinguish between truth and falsehood. Her answers were, however, contradictory and the court requested the assistance of a clinical psychologist who concluded that the child did not have the mental capacity to give evidence in court — she was confused about truth and lies due to negative environmental factors that had deleteriously affected her intellectual growth. The court then made the ruling that the child was not a competent witness due to this inability to distinguish between truth and lies. The only evidence then available was the hearsay evidence of the child that alleged the rape and identified the perpetrator as the accused, and the reports that were made to two witnesses who testified. The defence applied for the discharge of the accused at the end of the state's case.
Held, that the state had relied unduly on the hearsay evidence of the child, and insufficient effort had been expended to corroborate the hearsay evidence or gather other circumstantial evidence. The only issue for determination was the identity of the perpetrator; the fact of rape was not in dispute. (See [15] – [17].)
Held, further, that the evidence of identity had to be treated with caution, and, in circumstances where no corroborating circumstantial evidence had been obtained to bolster the scant state case, the accused had to be discharged. (See [21] – [22].)
The court commented further that the evidence of one of the state witnesses was that she had called the police to report the alleged rape and had been told to wait at the road in her locality, but the police never came. This delay in registering the case may have played a role in the acquittal of the accused due to evidence not being gathered in time. The Provincial Commissioner of the South African Police Service was ordered to investigate this failure.

<u>All SA [2019] Volume 3 September</u>

Cook v Morrison and another [2019] 3 All SA 673 (SCA)

Civil Procedure – Appeal in terms of section 17(2)(f) of the Superior Courts Act 10 of 2013 – Application for special leave in terms of rule 33(4) – “Debts” owed by the defendants within the meaning of the Prescription Act 68 of 1969 – Prescription of debt – Granting of special leave for special plea of prescription to be heard first – Special circumstances to justify the grant of special leave to appeal – Appeal raises a substantial point of law; the prospects of success are so strong that a refusal of leave would result in a manifest denial of justice; or that the matter is of very great importance to the parties or to the public.

As plaintiff in the High Court, the applicant instituted action against the respondents, who filed a special plea of prescription and applied for the special plea to be

determined first. The court hearing that application granted a separation and upheld the special plea. The plaintiff's appeal to the Full Court was dismissed, and he applied to the present Court for special leave to appeal. Pursuant to the dismissal of that application, he successfully applied to the President of the Court in terms of section 17(2)(f) of the Superior Courts Act 10 of 2013 for a reconsideration of the dismissal.

The plaintiff's claims were for the restitution of money he had paid and shares he had delivered to the first defendant in terms of a contract which, according to the plaintiff, he had lawfully cancelled because of the defendants' repudiation. The special plea alleged that the debts enforced in the summons prescribed three years after the alleged cancellation of the agreement on 29 September 2010. The plaintiff did not deliver a replication The plaintiff contended that (i) his claims were not matched by "debts" owed by the defendants within the meaning of the Prescription Act 68 of 1969; (ii) that, if the first point were rejected, the completion of prescription was delayed in terms of section 13(1)(d) of the Act because the relationship between the parties was one of partnership; and (iii) that the special plea should not have been adjudicated separately because evidence was needed to determine the date on which the exit agreement was cancelled. The court below had rejected these contentions and upheld the special plea.

Held – Something more than the existence of reasonable prospects of success is needed for the granting of special leave. Special circumstances are required, such as the appeal raising a substantial point of law; or the prospects of success being so strong that a refusal of leave would result in a manifest denial of justice; or that the matter is of very great importance to the parties or to the public.

The Court held that there were no reasonable prospects of success in an appeal challenging the finding that, on the plaintiff's primary case, the debts sought to be enforced prescribed before summons was served. The proposed appeal did not raise a substantial point of law, and the plaintiff was unable to successfully counter the prescription point. There were thus no special circumstances justifying the grant of special leave, and the application for special leave to appeal was dismissed with costs.

Gordhan v Public Protector and others [2019] 3 All SA 743 (GP)

Civil Procedure – Nature of Interlocutory interdict – An interlocutory interdict is granted pendent lite and designed to protect the rights of the complaining party pending an application to establish the respective rights of the parties – Civil Procedure – Interim interdict – Requirements – An applicant seeking an interim interdict must establish a prima facie right though open to some doubt; a reasonable apprehension of irreparable and imminent harm to the right; the balance of convenience; and that the applicant has no other remedy.

Constitutional and Administrative Law – Public Protector – Report of – Remedial orders – Suspension pending review – Whether court can grant interim interdict suspending operation of Public Protector's remedial orders pending final determination of review – Applications for suspensions of mandatory orders, pending reviews shown to be commonly granted by the courts, and Public Protector's remedial action has previously been suspended with interim orders pending reviews of her reports

The first respondent (the "Public Protector") issued a report in which she made various findings against the applicant ("Mr Gordhan"), and issued remedial orders. In the present application, Mr Gordhan sought the suspension of the remedial orders made in the report pending the final determination of Part B of the application, as well as an interdict preventing the Public Protector from enforcing the remedial order pending the determination of Part B of the application.

Held – An interlocutory interdict is granted *pendente lite* and designed to protect the rights of the complaining party pending an application to establish the respective rights of the parties. It is aimed at ensuring, as far as reasonably possible, that the party that is ultimately successful will receive adequate and effective relief. An applicant seeking an interim interdict must establish a *prima facie* right though open to some doubt; a reasonable apprehension of irreparable and imminent harm to the right; the balance of convenience; and that the applicant has no other remedy. Applications for suspensions of mandatory orders, pending reviews are common. The Public Protector's remedial action has been suspended with interim orders pending reviews of her reports, and it was conceded by Counsel for the Public Protector that normally those interim orders are not opposed by the Public Protector.

Challenging the rationality of the Public Protector's findings, Mr Gordhan set out various grounds of review which the Court found to constitute a *prima facie* right to the relief sought. The harm to Mr Gordhan lay in the fact that he was to be disciplined by the President, appear before the Parliamentary Ethics Committee, be criminally investigated seemingly by the Commissioner of Police, all of which had serious consequences for him. The report maligned him as being untruthful and a spy and would impact his political career and his personal circumstances. The harm would be irreparable if the interdict was not granted. The harm to the Public Protector in awaiting the outcome of the review decision weighed against the harm that would befall Mr Gordhan if the interdict was not granted meant that the balance of convenience favoured the granting of the interdict. There was also no suitable alternative remedy available to Mr Gordhan in view of the binding nature of the remedial action.

The relevant remedial orders in the report were suspended pending review.

Growthpoint Properties Ltd v All persons intending to occupy Erf 165639, Cape Town (Reclaim the City and others as interested parties) [2019] 3 All SA 759 (WCC)

Civil Procedure – Civil Procedure – Ex parte application –Interim interdict – Interdicted from entering or remaining on the applicant's immovable property; from erecting or attempting to erect any form of structure on the property – Failure to disclose all facts – Duty of utmost good faith breached

Constitutional Law – Right to protest –Constitution of the Republic of South Africa 1996, section 17.

In terms of a rule *nisi* granted in December 2018, the respondents were interdicted from entering or remaining on the applicant's immovable property which consisted of a portion of vacant land currently utilised as a parking lot. The respondents were also interdicted from erecting or attempting to erect any form of structure on the property.

On receiving the interim order, the respondents vacated the property and never returned. On the return date of the order, the applicant consented to the first to third

interested parties being granted leave to intervene and oppose. The first and second interested parties were the only parties who opposed the granting of a final interdict. They did so in their capacity as civic society organisations acting in the public interest and in their own interest, in order to uphold and protect the constitutional right to protest contained in section 17 of the Constitution.

Held – The interested parties' opposition boiled down to the averment that the applicant breached the duty of utmost good faith in not disclosing all material facts when it brought the *ex parte* application. Had it done so, it was submitted, the Court would have been made aware of the facts relating to the nature and context of the protest and the sequence of events, and might have refused the interim order, alternatively granted an order in different terms.

The Court found on the facts that the respondents' occupation of the property was not a random land invasion, but was in fact an act of protest. In not explaining that to the Court, the applicant breached its duty of utmost good faith. It omitted to place all relevant facts before the Court, and the extent of the non-disclosure was material.

The rule *nisi* was discharged.

Economic Freedom Fighters and another v Minister of Justice and Constitutional Development and another and a related matter [2019] 3 All SA 723 (GP)

Constitutional and Administrative law – Constitutionality of section 18(2)(b) of Riotous Assemblies Act 17 of 1956 challenged – Declaratory relief relating to the Trespass Act 6 of 1959 – Right to freedom of expression in terms of section 16 of the Constitution – Limitation analysis in terms of section 36(1) of the Constitution – Section 18(2)(b) was an unjustifiable limitation on the right to freedom of expression.

The first applicant (the "EFF") was a political party and the second applicant was its leader. Arising from three related charges laid against the second applicant, the applicants sought to challenge the constitutionality of the Riotous Assemblies Act 17 of 1956 as well as seeking declaratory relief relating to the Trespass Act 6 of 1959. They argued that section 18(2)(b) of the Riotous Assemblies Act should be declared unconstitutional as it criminalised the exercise of free expression protected by section 16 of the Constitution. Section 18(2)(b) provides that any person who incites, instigates, commands, or procures any other person to commit, any offence, whether in common law or against a statute or statutory regulation, shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable. The applicants argued that the definition of the crime of incitement was overbroad and that the limitless scope of section 18(2)(b) was an unjustifiable limitation on the right to freedom of expression.

Held – The crime of incitement is the intention, by words or conduct, to influence the mind of another in the furtherance of committing a crime. For the crime of incitement to be committed, the accused must possess the direct intention to influence the mind of another so that they may intend to commit a crime. Section 18(2)(b) criminalised conduct by a person which evidences an intention to influence the mind of another to themselves commit a crime. Much of such conduct would fall within the exclusions of free speech listed in section 16(2) of the Constitution. The section criminalised, at least for some conduct, acts which would form part of the general right to free speech

enshrined in section 16(1). Having determined that a constitutional right was limited, the Court then had to conduct a limitations analysis in terms of section 36(1) of the Constitution.

Significantly, a person who incites a crime is liable to the maximum punishment as if they had actually committed that crime. Properly understood, the crime of incitement is reserved for instances in which the crime has not yet been committed. The Court found that not to be rationally connected to the purpose of crime prevention. It being not reasonable and justifiable that the inciter should be held liable as if they actually committed the crime, section 18(2) was unconstitutional.

The applicants also sought declaratory relief that, constitutionally interpreted, section 1(1) of the Trespass Act does not apply to occupiers of land protected by the Extension of Security of Tenure Act 62 of 1997 and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998. The Court held that the applicants failed to show that any conflict exists between the Trespass Act and our post-Constitution eviction legislation.

MEC for the Department of Co-operative Governance and Traditional Affairs v Nkandla Local Municipality and others and a related matter [2019] 3 All SA 772 (KZP)

Local Government – Municipal manager – Validity of appointment of – Local Government: Municipal Systems Act 32 of 2000, section 54(A)(8) – Municipality's powers exceeded – Appointment of Municipal Manager set aside.

In two separate applications, the applicant (the "MEC") sought to challenge the validity of the appointment of the municipal manager in each of two municipalities. Reliance was placed on section 54(A)(8) of the Local Government: Municipal Systems Act 32 of 2000. The legal basis for the relief sought was that the first respondent did not have the power and authority to appoint a municipal manager in contravention of section 54A(3) of the Act. It was contended in each application that the first respondent had exceeded its powers in appointing the third respondent as the latter did not have the prescribed five years' relevant experience at senior management level specified by item 2 of Annexure B to the 2014 regulations to the Act.

In each application, the primary defence raised was that the High Court had no jurisdiction to entertain the applications because the issue raised was a labour matter in respect of which the Labour Court exercised exclusive jurisdiction.

Held – Section 54A(2) provides that a person appointed as a municipal manager must at least have the skills, expertise, competence and qualifications as prescribed. The skills, expertise, competence and qualifications as prescribed pursuant to section 54A(2) are contained in the Regulations on Appointment and Conditions of Employment of Senior Managers 2014. They include *inter alia* five years of relevant experience for a municipal manager. Provision is however, made in section 54A(10) of the Local Government: Municipal Systems Act that a municipality may in special circumstances and on good cause shown, apply to the Minister to waive any of the requirements contained in sub-section (2) if it is unable to attract a suitable candidate. The applicant's constitutionally mandated role of supervision in regard to the appointment of municipal managers is expressly provided for in section 54A(8).

On the issue of jurisdiction, the Court held that the present challenge did not arise out of the Labour Relations Act 66 of 1995, but from the provisions of the Local Government: Municipal Systems Act. All that the applicant sought to do, in carrying out her supervisory role, was to prevent unlawful conduct by the municipalities. The present Court therefore did have jurisdiction in the dispute.

The respondents also raised defences that the applicant failed to bring the application within fourteen days of receiving the information about the third respondent's appointment as municipal manager as required by section 54A(8); and that the Promotion of Administrative Justice Act 3 of 2000 applied to the review and therefore the applications had to have been brought without unreasonable delay and not later than 180 days. On the first of those points, the Court held that the appointment of a municipal manager involves the exercise of executive powers or functions of the municipal councils. The exercise of executive powers or functions of the municipal council is expressly excluded from the definition of administrative action. Consequently, the 180-day limitation in section 7 of the Promotion of Administrative Justice Act did not apply. The Court also was of the view that the delays which did exist were not unreasonable.

Finding the appointment of the third respondent to have been unlawful, the Court set the appointment aside.

Minister of Mineral Resources v Stern NO and others and a related matter [2019] 3 All SA 684 (SCA)

Environmental Law – Rights to explore for shale gas using hydraulic fracturing – Objections against applications – Potentially adverse environmental impacts of hydraulic fracturing and the lack of proper regulation.

Mining, Minerals and Energy – Environment – Powers of Minister of Mineral Resources to make regulations – Procedural fairness of rulemaking – Promulgation of Regulations for Petroleum Exploration and Production, 2015 – Whether authorised by section 107(1) of the Mineral and Petroleum Resources Development Act 28 of 2002.

Between 2008 and 2010, three companies applied for rights to explore for shale gas in the Karoo by the use of hydraulic fracturing. A large number of objections were made against the applications, mainly based on the potentially adverse environmental impacts of hydraulic fracturing and the lack of proper regulation. The report of a task team appointed by the Minister of Mineral Resources (the "Minerals Minister") contained recommendations which Cabinet approved. The Minister then promulgated the Regulations for Petroleum Exploration and Production, 2015 (the "Petroleum regulations").

The entering into of an agreement ("One Environmental System") by the Minister of Environmental Affairs, the Minerals Minister and the Minister responsible for Water Affairs resulted in all environment-related aspects of mining being regulated through one environmental system and that all environmental provisions would be repealed from the Mineral and Petroleum Resources Development Act 28 of 2002. The National Environmental Management Act 107 of 1998 was established as the only environmental statute, and the Minister of Environmental Affairs was the "lead" Minister.

In November 2015, the trustees of a family trust and several farmers' organisations applied to the High Court for the review of the Petroleum regulations promulgated by the Minerals Minister. The relevant grounds of review concerned whether the Minerals Minister had the power to make the Petroleum Regulations and whether their making was procedurally fair. The Court in that matter (the "*Stern* matter") found for the applicants on both grounds.

About a week after the commencement of the *Stern* matter, two non-profit organisations, Treasure the Karoo Action Group and AfriForum, launched a similar application (the "*TKAG* matter") in the High Court. The Court found for the respondents and dismissed the application.

Held – Deliberate changes wrought by the One Environmental System divested the Minerals Minister of the power to make any regulations relating to the management of the environmental impacts of exploration or production of petroleum or the process and requirements of an application for an environmental authorisation. The regulation-making powers of the Minerals Minister were limited to those set out in section 107(1)(b)–(l) of the Mineral and Petroleum Resources Development Act. It therefore had to be determined whether all or some of the Petroleum Regulations were authorised by one or more of these provisions.

The Court found most of the provisions of the Petroleum Regulations to be *ultra vires* as they regulated environmental matters which only the Minister of Environmental Affairs had the power to regulate. The separation of those provisions from those that were authorised was impractical. Therefore, the Regulations were set aside in their entirety.

Mngomezulu and Mistry Incorporated v MEC for Health: NW Province and another [2019] 3 All SA 796 (NWM)

Constitutional and Administrative Law – Procurement – Tenders – Department split the tender for five sites between the applicant (which was awarded three sites) and the second respondent (which was awarded two sites) – Higher price tendered to second respondent for same services rendered by applicant – Review – Grounds of non-compliance with section 2(1)(f) of the Preferential Procurement Policy Framework Act 5 of 2000 – Section 217(1) of the Constitution requires that an organ of State must contract for goods in accordance with a system which is fair, equitable, transparent, competitive and cost effective.

The first respondent (the "Department") invited tenders for the provision of tele-radiology services. It decided to split the tender for five sites between the applicant (which was awarded three sites) and the second respondent (which was awarded two sites); and also to pay the second respondent a substantially higher price for the same services as those rendered by the applicant.

In terms of the Promotion of Administrative Justice Act 3 of 2000, the applicant sought the review and setting aside of the decision to award part of the tender to the second respondent; alternatively, the decision to pay the second respondent more than the applicant. According to the applicant, the Department's decision fell to be set aside on the grounds of non-compliance with section 2(1)(f) of the Preferential Procurement Policy Framework Act 5 of 2000 and with the terms of the tender invitation itself.

Held – Section 217(1) of the Constitution requires that an organ of State must contract for goods in accordance with a system which is fair, equitable, transparent, competitive and cost effective.

The gravamen of the applicant's submissions was that, the mandatory requirements of the bid invitation, the Preferential Procurement Policy Framework Act and its accompanying regulations to award the tender to the highest point scorer, were not adhered to.

In the evaluation of bids, a bid document must speak for itself, in that the terms and conditions of a particular tender must be succinctly, explicitly and unambiguously stated in the tender document and not in extraneous or with reference to other material. Tenders may only be assessed against the evaluation criteria stated in the bid document.

In the present case, the head of the Department unilaterally decided to split the award contrary to what the Bid Evaluation Committee recommended. The tender document did not mention the risk of having one service provider and that the factor relating to excluding new entrants to the market would be taken into consideration during evaluation of the tender. There was therefore no basis to split the tender between the applicant and the second respondent. The applicant was the highest scoring bidder, and the second respondent's bid was hopelessly inadequate. The Department's decision was thus set aside.

A declaratory order as to the invalidity of the tender award coupled with an order of compensation to the applicant was held to be a just and equitable relief in this matter.

Mpungose Traditional Council and others v MEC for Education, KZN Province and others [2019] 3 All SA 817 (KZP)

Constitutional and Administrative Law – Department promised to build a school – Withdrawal of decision – Review – Not reviewable under the Promotion of Administrative Justice Act – Public powers – Principle of legality – Principles of the rule of law – Access to basic education under section 29 of the Constitution.

Acting in their own interests and in the interests of the Mpungose traditional community, the applicants sought to have the first respondent, as the political head of the Department of Education in the Province (the "Department"), to make good on its promise to build and provision a school. The community had applied to the Department for the establishment of a secondary school in 1996, 2002 and then again in 2007. Essentially, the applicants sought the review and setting aside of the decision of the Department taken on or about 16 February 2017, to withdraw its earlier decision to establish and construct the school in question.

Held – The case concerned enforcing the fundamental right of access to basic education under section 29 of the Constitution, and the foundational principles of the rule of law and the principle of legality insofar as the exercise of public powers is concerned.

The State's obligation to provide basic education is not limited to providing schools *per se*. The right to basic education requires the provision of a range of educational resources: schools, classrooms, teachers, teaching materials and appropriate facilities for learners.

The uncontested evidence provided by the applicants, read with the responses of the schools and the Department showed that school provisioning fell far short of the norm required for basic education in the affected community.

The Court was of the view that the decision of the Department did not constitute administrative action and was thus not reviewable under the Promotion of Administrative Justice Act 3 of 2000 but under the principle of legality, which obliges public functionaries to act within their powers and also requires that the exercise of all public power be rationally related to a legitimate government purpose. Rationality in this sense means rational both as to process and as to the merits of the action taken. A decision can be irrational because the procedure by which it was taken was unfair. In this case, the Department relied on incorrect information in making its decision. As a result, the decision to withdraw the decision to register, establish, construct and provision the school was arbitrary and irrational and fell to be set aside under section 172 of the Constitution.

National Credit Regulator v Standard Bank of South Africa Limited (South African Human Rights Commission as amicus curiae) [2019] 3 All SA 846 (GJ)

Consumer – Credit agreements – Practice by banks of applying the common-law principle of set-off against amounts received by consumers into accounts they held with the bank, without consent of such account holders – Sections 90(2)(n) and 124 of the National Credit Act 34 of 2005 – Effect on common law set-off – Sections 90(2)(n) and 124 of National Credit Act render common law right of set-off inapplicable to credit agreement regulated by the Act – Banks therefore required to comply with provisions of sections 90(2)(n) and 124, aimed at protecting consumers, before setting off debts against clients' accounts.

The applicant was the National Credit Regulator (the "Regulator"), tasked with regulating the South African credit industry. It brought the present application in its statutory capacity and in its representative capacity on behalf of all consumers of credit who have been affected by the practices adopted by banks in respect of the common-law principle of set-off. It sought an order declaring that, in light of sections 90(2)(n) and 124 of the National Credit Act 34 of 2005, the common law right to set-off is not applicable in respect of credit agreements which are subject to the Act.

The application evolved out of various complaints lodged with the Regulator by consumers against the respondent bank regarding its practice of applying the common-law principle of set-off against amounts received by consumers into accounts that they held with the bank. Relying on its common-law right of set-off, the bank debited the accounts in question without the consent of the account holders against amounts owed by the account holders to the bank.

Relying on section 90(2)(n), the bank argued that on a plain reading of the section, it is only express provisions of a credit agreement that will be unlawful if they do not accord with section 124. As the common law principle of set-off does not have to be expressed in a credit agreement, it does not fall within the ambit of this section. Section 124 falls under Chapter 6, which deals with "collection, repayment, surrender and debt enforcement". More specifically, it falls under Part A of the Chapter, which is headed "collection and repayment practices". The section itself is headed "charges to other accounts".

Held – Set-off under the Act represents a marked departure from the common-law principle of set-off relied on by the bank. Significantly, however, section 124 does not expressly exclude the continued application of the common-law principle of set-off. The question for the Court was whether it nonetheless ought to be interpreted so as to have such effect.

Under the common law set-off allows one debt to be cancelled by another. It applies in circumstances where debts are mutually owing between two parties so that each is simultaneously the debtor and the creditor of the other. It permits a creditor, like the bank, who is owed money by its customer, immediately to debit a customer's account when funds are credited to it. It can do so without notice to the customer; without the customer's authorisation; and in any amount that the bank considers to be validly due to it.

The starting point of the inquiry is section 124, and not section 90(2)(n). Section 124 establishes what form of set-off is lawful in respect of credit agreements regulated by the Act. Critically, it is not limited to set-off provisions contained in a credit agreement only. Instead, section 124 covers a broader field incorporating different possible lawful "repayment practices", and is not aimed only at regulating set-off when a set-off clause is actually included in the credit agreement itself.

Rejecting the bank's interpretation of sections 90(2)(n) and 124, the Court granted the declaratory relief sought by the Regulator.

National Director of Public Prosecutions and others v Fields of Green for all NPC and others and a related matter [2019] 3 All SA 866 (GP)

Constitutional and Administrative Law – Appeal against ruling to allow live stream broadcasting – Court proceedings – Rights to broadcast – Should a litigant who is not a member of the broader public media or is not a recognised media house be granted the rights to broadcast its own proceedings – Principle of open justice – Court proceedings must, where possible, be accessible to any member of the public who wished to be timeously apprised of such proceedings.

In July 2017, pursuant to a request by the first respondent in each of the two appeals now before the Court, the High Court issued a ruling to allow the live stream broadcast of the proceedings in the main action subject to certain conditions.

The appellants appealed against the ruling, contending that the court erred in the exercise of its discretion in that its decision on a fundamental issue was made without hearing the parties beyond the correspondence exchanged by them.

Held – The question central to the appeals was whether, despite opposition from interested parties, a litigant who is not a member of the broader public media or is not a recognised media house, should be granted the rights to broadcast its own proceedings.

The legal principles applicable to the broadcasting of court proceedings have been dealt with by the Courts and is guided by the principle of open justice. Court proceedings must, where possible, be accessible to any member of the public who wishes to be timeously apprised of such proceedings. Broadcasting of proceedings enables that to occur. The appellants' main objection was that the first respondent was

not a conventional media house or broadcaster. The Court held that the distinction sought to be made by the appellants in that regard was illogical.

On the question of whether the appellants should have been heard, the present Court found that the Court which issued the ruling had all the relevant facts at its disposal when making its decision. No prejudice was caused to the appellants.

The appeals were dismissed.

Paul v MEC for Health, Eastern Cape Provincial Government and others and related matters [2019] 3 All SA 879 (ECM)

Constitutional and Administrative Law – Promotion of Access to Information Act 2 of 2000 – Right of access to records from public bodies – Procedural requirements in terms of section 11 of the Promotion of Access to Information Act to be complied with before order is granted – Special court to matters of this nature and provide comprehensive guidance – Refusal of request – Internal appeal in terms of sections 75 and 76.

In terms of the Promotion of Access to Information Act 2 of 2000, the applicants sought orders directing the respondents to furnish them with their hospital records to enable them to institute actions for damages arising from alleged negligent treatment at various hospitals.

Acting in terms of section 14 of the Superior Courts Act 10 of 2013, the Judge President in motion court directed that the matters be heard by a specially constituted court as such matters formed the bulk of the court rolls in most motion court sittings. The special court was therefore to provide comprehensive guidance in respect of applications brought under the Promotion of Access to Information Act.

Held – The starting point in such applications is section 11 of the Act which deals with the right of access to records of public bodies. The procedural requirements of the section must be complied with before a requester is entitled to the record. The court is not at liberty to waive the peremptory provisions of section 11(1). On a proper construction of section 11(1), both the requester's entitlement to be given access to a record of a public body and the obligation imposed on the requester to comply with all the procedural requirements of the Act are couched in peremptory terms. In the absence of full compliance with the procedural requirements the information officer is entitled to refuse access and to not provide the record. Section 18 provides for the manner in which the request for access to information is to be made. Only once a proper request for access to the record in the prescribed form has been sent to the correct information officer at the correct address can the provisions of section 25(1) kick in. Section 25(1) provides that, as soon as reasonably possible but within 30 days of receiving a request for access to information, an information officer must decide whether to grant the request or not and notify the requester about his or her decision. Only after the 30 day period has elapsed will the deeming provisions of section 27 apply. The latter section states that, "If an information officer fails to give the decision on a request for access to the requester concerned within the period contemplated in section 25(1), the information officer is, for the purposes of this Act, regarded as having refused the request." The next step is that of an internal appeal, the process for which is provided for in sections 75 and 76. In terms of section 77(3) the relevant authority must decide on the appeal as soon as reasonably possible but in any event within 30 days of receiving the internal appeal from the information officer.

At no stage does a requester have to communicate with the relevant appeal authority. The information officer is always the party with whom the requester deals.

In all three applications dealt with in this judgment, the correct procedure was not followed. The applications were thus dismissed.

Premier of KwaZulu-Natal and others v KwaZulu-Natal Gaming and Betting Board and others and a related matter [2019] 3 All SA 916 (KZP)

Gambling – Bingo licences not permitting use of Electronic Bingo Terminals ("EBT's") – Section 60 of the KwaZulu-Natal Gaming and Betting Act provides that a licence is required in order to conduct bingo games – Granting of amended licence conditions – Application for review – Intervention application – Relief sought had no practical effect.

Jurisdiction – High Court – Court having jurisdiction over application arising from provisions of Local Government: Municipal Systems Act 32 of 2000 seeking to prevent unlawful conduct – Appointment of Municipal Manager set aside.

In 2010, the KwaZulu-Natal Gaming and Betting Board granted bingo licences to a number of aspirant proprietors of proposed bingo halls. The conditions of those licences did not then permit the use of Electronic Bingo Terminals ("EBT's") in those halls. In 2014, the Board approved the registration of a number of EBTs. It subsequently granted applications for the amendment of licence conditions made by the various operators who featured as the eleventh to twenty-fifth respondents in the present proceedings. The decisions to grant those amended licence conditions were the subject of the review application brought in this matter.

In February 2015, the third applicant ("Afrisun") applied to be joined as an applicant in the review proceedings. In April 2015, an order was made that a number of issues should be separately dealt with, and the case set down for adjudication of them on a date to be arranged with the registrar. In essence those were other intervention applications, objections to Afrisun's intervention, the question as to whether Afrisun should be permitted to seek relief attacking the registration of the equipment supplied by three entities, and the joinder applications relating to those entities.

Held – Section 60 of the KwaZulu-Natal Gaming and Betting Act 8 of 2010 provides that a licence is required in order to conduct bingo games. A manufacturer or supplier of gaming equipment (which would include EBTs) had to be registered by the Board, and its gaming equipment had to be separately registered by the Board. A licensee (which would include a bingo operator whose licence permits the use of EBTs) cannot use an EBT which is not registered by the Board.

The first issue to be decided was whether Afrisun had the right in these proceedings to challenge the registration of EBTs at the instance of the suppliers – that being relief not sought in the main application. Having become a co-applicant, Afrisun exercised its right under rule 53(4) to deliver a supplementary founding affidavit. The Court held that rule 53(4) cannot be given so broad a construction as to permit what Afrisun sought to do in bringing under review in the present proceedings three new sets of decisions to which the existing respondents (besides the Board) were not parties. The applications to join the suppliers had to fail.

The Court also found against Afrisun in considering the objections to its intervention as Afrisun failed to establish its standing with respect to each of the impugned decisions.

In the main review application, the Court found that it should not entertain the relief sought because it would have no practical effect.

Pikitup Johannesburg SOC Limited v Nair (Maharaj and others as third parties) [2019] 3 All SA 899 (GJ)

Civil Procedure – Claim for payment – Third party claim – Contribution by joint wrongdoers – Exceptions raised to annexure necessary to sustain relief claimed – Annexure lacked averments – Legal basis not disclosed – Whether the defendant was entitled under the common law to recover a contribution from the third parties in circumstances where the cause of action was founded on a statutory entitlement under section 176(2) of the Local Government: Municipal Finance Management Act 56 of 2003 – Whether third parties were joint wrongdoers together with the defendant in respect of such damages in terms of section 176(2) of the Act.

The plaintiff sued the defendant for payment of various sums of money together with interest thereon and costs of suit.

After filing her plea, the plaintiff filed a third party notice and annexure under rule 13 of the Uniform Rules of Court, seeking orders declaring the third parties to varying degrees to be jointly and severally liable together with her to the plaintiff, for payment by them of a proportionate contribution or share of the amounts claimed by the plaintiff.

Fourteen of the third parties raised an exception to the annexure to the third party notice, on the basis that the annexure lacked averments necessary to sustain the relief claimed by the defendant against the third parties. The exception was founded on two grounds, both of which were asserted on the basis that the annexure to the third party notice did not disclose a legal basis for the relief claimed by the defendant against the third parties. Moreover, both were premised on the proposition that section 176(2) of the Local Government: Municipal Finance Management Act 56 of 2003 creates a statutory remedy that entitles a municipality to recover from an official any loss or damage caused by that official when performing a function or office.

Held – The question was whether the defendant was entitled under the common law to recover a contribution from the third parties in circumstances where the cause of action was founded on a statutory entitlement under section 176(2) of the Local Government: Municipal Finance Management Act and the third parties were joint wrongdoers together with the defendant in respect of such damages in terms of section 176(2) of the Act.

The Court found no authority in support of the third parties' contention that a joint wrongdoer sued by a plaintiff for the full amount of the plaintiff's loss may not recover a contribution from his/her fellow joint wrongdoers. The common law and the preponderance of authority stood for the opposite conclusion and the defendant was in law entitled to claim such a contribution.

The exception was dismissed, and the third parties were to file such pleadings as they considered appropriate as provided for in rule 13(6) of the Uniform Rules of Court.

Radebe v S [2019] 3 All SA 938 (GP)

Criminal law and procedure – Rape of child – Life imprisonment – Prescribed minimum sentence – Appeal against sentencing – Sentence was inappropriate – Purposes of sentencing are retribution, prevention, rehabilitation and deterrence – Suitable sentence must have regard to the nature of the crime, the personal circumstances of the offender and the interests of society.

On the basis of his plea of guilty in respect of a charge of having raped a 10-year-old girl, the appellant was convicted. He was sentenced to the prescribed minimum sentence of life imprisonment. The present appeal lay against that sentence. The grounds of appeal were that the trial court misdirected itself in finding that there were no substantial and compelling circumstances which would allow for the imposition of a lesser sentence, and that the sentence induced a sense of shock and was strikingly inappropriate

Held – The purposes of sentencing are retribution, prevention, rehabilitation and deterrence. The imposition of a suitable sentence must have regard to the nature of the crime, the personal circumstances of the offender and the interests of society. The existence of substantial and compelling circumstances warranting a sentence less than the prescribed minimum must be considered against those three factors.

Having regard to the facts of the present case, and the principles referred to above, the Court emphasised the seriousness of the offence of rape – particularly in respect of a child. The appellant's conduct was strongly condemned by the Court. He was found to have pre-planned the offence and his assertion that this was not the worst kind of rape was rejected by the Court.

Finding no ameliorating factors to counter the numerous aggravating factors, the Court dismissed the appeal.

Rodrigues v National Director of Public Prosecutions and others (Sooka and others as amici curiae) [2019] 3 All SA 962 (GJ)

Constitutional Law – Violation of Constitution rights to begin and conclude a trail without delay in terms of Rule 35(3), violated – Delay in prosecution – Permanent stay of execution – Relevant factors to be determined: length of the delay; the reasons the government assigns to justify the delay; the accused's assertion of a right to a speedy trial; and prejudice to the accused; interests of the victim and the family – Political interference materially affected the ability of the National Prosecuting Authority ("NPA") to properly deal with the TRC cases – Delay found to be unreasonable and prejudicial, however ,no evidence that delay would result in trial prejudice or that it warranted the far-reaching relief of a stay of prosecution.

Criminal Law and Procedure – Permanent stay of prosecution – Basis for relief sought – Delay in prosecution – Court not required to consider prejudice in isolation, but rather, whether the delay would inevitably taint the overall substantive fairness of the trial if it were to commence – While delay found to be unreasonable and causing some degree of prejudice, there was no evidence that the delay would result in trial prejudice or that it warranted the far-reaching relief of a stay of prosecution.

Criminal Law and Procedure – Permanent stay of prosecution – Radical nature of relief– Relief of a permanent stay of prosecution is regarded as radical in nature, and will seldom be warranted in the absence of significant prejudice to the accused.

Criminal Law and Procedure – Permanent stay of prosecution – Relevant factors include length of the delay; the reasons assigned to justify the delay; the accused's assertion of a right to a speedy trial; and prejudice to the accused; nature of the offence and the public policy considerations that might be attached to it; and the interests of the victim and the family.

Criminal Law and Procedure – Permanent stay of prosecution – Basis for relief sought – Delay in prosecution – Court not required to consider prejudice in isolation, but rather, whether the delay would inevitably taint the overall substantive fairness of the trial if it were to commence – While delay found to be unreasonable and causing some degree of prejudice, there was no evidence that the delay would result in trial prejudice or that it warranted the far-reaching relief of a stay of prosecution.

In October 1971, an anti-apartheid activist (Ahmed Timol) died in police custody, five days after having been arrested. The police, in whose custody he was at the time, said that he had committed suicide by jumping from the tenth floor of the police building. An inquest held in 1972 came to the same conclusion and found that no person was responsible for his death. It also found that the applicant was the only other person with Timol when the latter was said to have moved towards the window, opened it, and jumped out despite unsuccessful efforts by the applicant to reach him before he jumped. The Timol family disputed the police version of events and the alleged cause of death, and campaigned for the reopening of the inquest into Timol's death. Eventually, a second inquest was held in 2017, and the court found that Timol's death was brought about by his having been pushed from the tenth floor or the roof of the building with the necessary intent to kill in the form of *dolus eventualis*. Significantly, it was also found that the applicant, on his own version, participated in the cover up to conceal the crime of murder. It was recommended that he be investigated with a view to being prosecuted for being an accessory after the fact in respect of Timol's murder.

The applicant did not participate in the process set up by the Truth and Reconciliation Commission ("TRC") to facilitate the granting of amnesty for those who had committed crimes with a political objective and who had made full disclosure of all relevant facts. He also did not apply for amnesty. The State retained the right to prosecute those who had committed crimes in the past if either they did not apply for amnesty or were unsuccessful in their application for amnesty. The applicant was not prosecuted then, despite the TRC listing him as one of the police officials responsible for Timol's death. However, after the second inquest, he was arrested and charged with murder on 30 July 2018. His trial was pending, awaiting the outcome of the present application for a permanent stay of prosecution. The basis of the application was that the applicant's rights in terms of section 35(3) of the Constitution - to have his trial begin and conclude without delay – had been violated by the delay of some 47 years.

Held – The relief of a permanent stay of prosecution is regarded as radical in nature, and will seldom be warranted in the absence of significant prejudice to the accused.

In addition to the main relief, the applicant also raised a point *in limine* contending that great political interference was brought to bear on the prosecutorial authorities, resulting in the charging of the applicant. He therefore contended that it was unclear whether the nature of the political decisions arrived at constituted an amnesty and/or a pardon and that the court was hamstrung by the lack of such information in determining the relief. It was submitted that the court could not make a decision until all relevant information in that regard was obtained. The court disagreed that the

matter could not be finalised in the absence of the details the applicant contended for, as such details would not take the matter any further. The point *in limine* was dismissed.

The factors to be considered when determining applications for a permanent stay of execution are the length of the delay; the reasons the government assigns to justify the delay; the accused's assertion of a right to a speedy trial; and prejudice to the accused. That is not a closed list, and a further factor is the nature of the offence and the public policy considerations that might be attached to it. Additional relevant considerations are the interests of the victim and the family.

In assessing the delay, the court divided the 47-year period of delay into three blocks. The first two were not seriously in issue, as the applicant's case was located in the third period (2003 to 2017). The contention was that the delay in prosecuting the applicant was not as a result of the National Director of Public Prosecution's own doing, but due to political interference. The court, in considering the nature of the interference and its impact on the prosecuting authority agreed that such political interference materially affected the ability of the National Prosecuting Authority ("NPA") to properly deal with the TRC cases. However, the NPA had constitutional and legal responsibilities to act on behalf of society and protect the public interest despite such interference. Section 179(2) of the Constitution vests exclusive power in the NPA to institute criminal proceedings on behalf of the State, and section 179(4) requires the NPA to exercise its functions without fear, favour or prejudice and requires the enactment of legislation to give effect to this requirement. The NPA therefore had a duty to assert its authority and independence and resist the political interference. The manner in which the respondents introduced the issue of political interference into evidence suggested to the court that the intention was to deliberately withhold from the court the fact that such interference had occurred.

The court accordingly accepted that the delay from 2003 until 2017 constituted a substantial period of time and that the reasons advanced by the State - namely that of political interference – could not serve to justify the delay. The applicant argued that the lengthy delay would materially prejudice his right to a fair trial as many of the material witnesses had since died, and the memory of events was negatively affected by the passage of time. The question that the court was then required to consider in its balancing exercise was not prejudice in isolation, but rather, whether the delay would inevitably taint the overall substantive fairness of the trial if it were to commence. In examining the trial prejudice that the applicant contended he would face, it was not in dispute that he had access to the full docket in the criminal trial the State sought to pursue, and was free to engage experts, if necessary, in supporting his defence. More importantly, the trial court, in such proceedings, was constitutionally bound to ensure that the trial was conducted in a fair manner.

In response to the applicant alleging that he suffered from memory loss due to old age, it was pointed out that age and infirmity are generally considered at the stage of sentencing. The court stated that old age is not a bar to prosecution and imprisonment. It held that while the unreasonable delay had caused some measure of prejudice, there was no evidence that the delay would result in trial prejudice nor were there any exceptional circumstances present that would justify granting the radical and far-reaching relief sought by the applicant.

The nature of the offence of murder was clearly serious, and sharpened the need for the applicant to be brought to trial. The court considered the submission by one of the *amici curiae* that the charge sheet be construed as constituting the elements necessary to found a crime against humanity. Given the principle of the separation of powers and the independence of the prosecutorial authority, the court declined to do so.

The interests of justice; the societal need to ensure accountability for the commission of serious crimes; and the nature of the crime located in its historical context all militated against the grant of the relief sought.

Finally, the court found no merit in the applicant's submission that the prosecution was advanced for an improper motive or that the prosecution of the applicant was not in keeping with the findings of the inquest court.

The application was accordingly dismissed.

Sandvliet Boerdery (Pty) Ltd v Mampies and another [2019] 3 All SA 709 (SCA)

Property – Occupiers of farm land – Burial rights in terms of section 6(2)(dA) of the Extension of Security of Tenure Act 62 of 1997 – Proof of being "occupiers" of the land – Definition of "occupiers", "owner" and "reside" in terms of Extension of Security of Tenure Act – Contextual interpretation of the occupier's right to security of tenure with the rights of the owner – "Reside" had to include the use of a graveyard in casu.

The appellant owned various, adjacent parcels of registered land forming part of a trilogy of farms referred to as the Montina farms. The respondents were a retired, married couple, and occupiers of a portion of one of the farms. The respondents regarded the Montina farms as one unit. They were allowed use of an unrestricted movement across the farms, working, living as families, rearing and grazing their livestock and burying their dead on them.

The issue in the present appeal was whether the respondents had the right to bury a deceased family member on registered land owned by the appellant, in terms of section 6(2)(dA) of the Extension of Security of Tenure Act 62 of 1997. When the deceased passed away her parents, who did not reside on the Montina farms, and the respondents, who regarded her as their own daughter, wished to bury her in the graveyard on one of the farms ("Middel-Plaas") with the rest of her family. The appellant, however, refused to allow the respondents and their family to bury the deceased in the Middel-Plaas graveyard because they lived on another of the farms ("Onder-Plaas").

The respondents launched urgent proceedings in the Land Claims Court ("LCC"). The Court found that the respondents complied with the provisions of section 6(2)(dA) as they were family members of the deceased and had established that it was in accordance with their religious and cultural beliefs for the deceased to be buried in the Middel-Plaas graveyard.

On appeal, the appellant contended that the LCC's judgment divested section 6(2)(dA) of legal effect because it allowed a burial without compliance with the provision's clear requirements.

Held – It had to be determined whether the respondents met the requisites for the right to bury envisaged by section 6(2)(dA). That required proof that the respondents were occupiers within the definition in the Act; that the deceased resided on the land at the time of her death; and that there was an established practice in terms of which the owner or person in charge or his or her predecessors routinely gave permission to people residing on the land to bury deceased members of their family on that land in accordance with their religion or cultural belief.

The respondents' burial practices and the location of their family graves near where they lived formed a vital part of their religion and their day-to-day lives. The question was where and how the Legislature contemplated that occupiers in the respondents' position would meaningfully exercise their section 6(2)(dA) right if they were excluded from invoking it against a landowner who allowed them to bury their dead and establish an ancestral burial site, not where their homes were built, but on nearby land that he also owned and which had historically been used by the respondents and the deceased. The Court held that on a contextual interpretation, which balanced the occupier's right to security of tenure with the rights of the owner, the meaning of the term "reside" had to include the use of a graveyard in the circumstances of this case.

The appeal was thus dismissed.

South African National Parks v Biggs and others [2019] 3 All SA 987 (ECM)

Constitutional and Administrative Law – Approval of subdivision and rezoning of the land – Judicial review – Delay – Condonation – Review proceedings brought outside the period prescribed in section 7(1) of the Promotion of Administrative Justice Act 3 of 2000 – Factors to be considered in determining condonation application: (a) the nature of the relief sought; the extent and cause of delay; (b)the effect of the delay in the administration of justice and other litigants (c) the explanation for the delay (d) the importance of issues to be raised in the intended review; and d)the merits of the review and the prospects of success.

In 2001, the first respondent, sold a portion of his farm to the applicant. The deed of sale provided for a right of pre-emption to the remainder of the farm. The applicant was already the owner of the Addo Elephant National Park which neighboured the portion of the farm it purchased. Without the applicant being afforded the opportunity to exercise its right of pre-emption, the first respondent through the fourth respondent was granted approval to subdivide of the remainder of the farm by the third respondent (the eighteenth respondent also approved the subdivision and rezoning of the farm). The said remainder was later sold or transferred to various respondents.

The applicant sought the review of the third and eighteenth respondents' decisions to approve the subdivision and rezoning of the land.

Held – The first issue to be considered was the condonation of the delay by the applicant in the bringing of the review proceedings, outside the period prescribed in section 7(1) of the Promotion of Administrative Justice Act 3 of 2000. The factors to be considered when determining a condonation application, include the nature of the relief sought; the extent and cause of delay; the effect of the delay in the administration of justice and other litigants; the explanation for the delay; the importance of issues to be raised in the intended review; and the merits of the review and the prospects of success. While the applicant did not satisfactorily furnish an explanation for the delay, the irregularities and non-compliance with statutory requirements in the process of

zoning and subdivision of the land were grounds for condoning the delay. The Court also, in the interests of justice, condoned the failure to exhaust internal remedies.

The irregularities, flaws and non-compliance with statutory requirements in the process of seeking exemption for subdivisions, rezoning and the obtaining of financial assistance for acquisition of land tenure rights, were common cause in this matter. The Court in its discretion was not inclined to set aside the subsequent transfers to the tenth to seventeenth respondents, as it had not been established that, in respect of some of those respondents, they were aware of

the pre-emptive right. The respondents' involvement could not be taken as having been intended to defeat the applicant's pre-emptive right.

The relief sought by the applicant was granted.

END-FOR NOW