LEGAL NOTES VOL 1/2020

Compiled by: Matthew Klein

INDEX[1]

EDITORIAL

"It is a strange, strange world we live in, Master Jack". Without giving away my age, this was one of my favourite songs. But it is indeed a strange world we live in!

Choices

What choices can we make? We have a free will, but is it free?

I made a choice to convert from advocate to attorney, which I now am. A converted attorney with a fidelity fund certificate!

Why did I do this?

"Your lordship, my apologies, I will not answer that question. I am not allowed to give evidence from the Bar, oops, which Bar? The side bar, or the real Bar?"

Yes, it is personal. I HAD A CHOICE, BUT THERE ARE THOSE WHO DO NOT HAVE CHOICES. For example a child being born autistic, a person being killed etc.

SA LAW REPORTS JANUARY 2020

FREEDOM OF RELIGION SOUTH AFRICA v MINISTER OF JUSTICE AND OTHERS 2020 (1) SA 1 (CC)

Criminal law — Defences — Excluding unlawfulness of act — Moderate and reasonable chastisement — Constitutionally invalid.

In this case a child was assaulted by his father, the state brought a charge of common assault against the man, and a magistrate convicted him (see [5]). The man appealed, and the High Court, in the course of dismissing the appeal, mero motu

[1] **A reminder that these Legal Notes are my summaries of all reported cases as are set out in the Index. In other words where I refer to the June 2012 SACR , you will find summaries of all the cases in that book. It is for private use only. It is only an indication as to what was reported, a tool to help you to see if there is a case that you can use!**

found the defence of moderate and reasonable chastisement to be inconsistent with the Constitution and invalid (see [6]).

Here, the Constitutional Court granted Freedom of Religion South Africa (FoR), an amicus below, leave to intervene as a party, and direct access; and FoR sought leave to appeal the High Court's declaration (see [13], [20] and [28]).
The court found that chastisement, even if moderate and reasonable, was violence within the meaning of s 12(1)*(c)* of the Constitution — 'the right to be free from all forms of violence' — and so limited that right (see [36], [39] and [44]). It also limited s 10, the right to dignity (see [45] and [48]).

And it further found that the defence of moderacy and reasonableness was, on a charge flowing from chastisement, an unjustified limitation of those rights (see [50] and [71]).

In coming to this conclusion it considered: the difference between chastisement administered by a parent, and that by an institution (see [51]); that invalidating the defence might remove a culturally or religiously directed form of child discipline (see [52]); the vulnerability of children (see [55]); the constitutional obligation to protect a child's rights (see [56]); that neither the Constitution nor international law recognised a parent's right to chastise (see [63]); that little had been advanced to suggest chastisement was in a child's best interests (see [65]); and that there were less restrictive means to instil discipline (see [68]).

It declared the common-law defence of moderate and reasonable chastisement inconsistent with ss 10 and 12(1)*(c)* of the Constitution; and it refused leave to appeal (see [76]).

COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE v PIETERS AND OTHERS 2020 (1) SA 22 (SCA)

Company — Winding-up — Termination of employee contracts — Awards to employees under s 98A(1) of Insolvency Act — Whether subject to employees' tax (PAYE) — Income Tax Act 58 of 1962, sch 4 para 2(1); Insolvency Act 24 of 1936, ss 38(9)*(b)* and 98A(1).

Revenue — Income Tax — Employees' tax — Termination, in terms of Insolvency Act, of employee contracts of company in liquidation — Awards to employees under s 98A(1) of Insolvency Act — Whether subject to employees' tax (PAYE) — Income Tax Act 58 of 1962, fourth schedule para 2(1); Insolvency Act 24 of 1936, ss 38(9)*(b)* and 98A(1).

Section 98A(1) of the Insolvency Act 24 of 1936 (quoted in [6]) creates a limited preference in favour of employees in respect of the free residue of an insolvent employer. In respect of salaries it is for a limited three-month period, and other claims (such as accumulated leave and severance pay) are capped.
Here the contracts of employees were terminated in terms of s 38(9)*(b)* of the Insolvency Act. The respondents, the trustees of a company in liquidation, did not deduct any 'pay as you earn' (PAYE) * from payments they made under s 98A to employees for accumulated leave, salaries and severance pay.

The High Court had held that s 98A payments were not subject to the deduction of PAYE. In the Commissioner's appeal to the Supreme Court of Appeal —

Held The legislature plainly deemed it necessary to attenuate the impact which liquidation may have on a company's employees. But it chose to do so carefully, by imposing a three-month limit in respect of unpaid salaries and wages and in placing a cap on the various amounts. It was significant that the capped amounts were relatively modest; the main objective was to ensure that the remainder of the free residue was applied equitably. The limited relief proffered by s 98A had the effect that employees had to stand at the end of the order of preference queue for the balance of their salaries (ie above the three-month limit and the cap). Self-evidently, employee tax deductions would reduce the modest amounts under s 98A. It was difficult to conceive how PAYE deductions would apply to these modest amounts, legislated to relieve the burden on vulnerable, mostly blue-collar, workers left stranded by a financially distressed employer company. A close analysis of para 2(1) of the schedule led to the compelling conclusion that its provisions do not apply to s 98A payments. The appeal would accordingly be dismissed.

LIBERTY GROUP LTD AND OTHERS v MALL SPACE MANAGEMENT CC 2020 (1) SA 30 (SCA)

Agency and representation — Mandate — Termination — Ubuntu and fairness not correct bases to determine propriety of termination of mandate — Against public policy to coerce principal into retaining individual as agent.

The respondent, Mall Space Management CC (Mall Space), was an agent of the first appellant, Liberty Group Ltd (Liberty), with an (oral) mandate to facilitate, at a fee, the conclusion of contracts with exhibitors for rental of mall space or exhibition courts at four shopping centres either owned or co-owned by Liberty. On 29 August 2017 Liberty notified Mall Space in writing that its services would no longer be required with effect from 4 September 2017.
Aggrieved, Mall Space launched High Court proceedings in which it, inter alia, sought relief interdicting Liberty from terminating the oral mandate for a period of six months from the date of the order. One of Mall Space's contentions was that the constitutional values of ubuntu and fairness required Liberty to grant it six months' notice of termination of the mandate. The High Court agreed and granted Mall Space the interdictory relief sought. In an appeal to the Supreme Court of Appeal —

Held
It was established case law that the concepts of good faith, justice, reasonableness and fairness were not self-standing rules which could justify the avoidance of performance under a contract; they were underlying values that were given expression through existing rules of law. It followed that the High Court erred in this matter (see [29] and [31]).

This case was not about a term of a contract which was alleged to be contrary to good faith, fairness and equity. Instead, it dealt with a rule of the common law, namely, that a principal was entitled to revoke a mandate of agency. It would be against public policy to coerce a principal into retaining an individual as his agent, when they no longer wished to retain them as such.

If the termination of the mandate had prejudiced the agent, their remedy was in a claim for damages — not in an order compelling the principal to retain them as their agent in the future. In the result, the appeal would be upheld.

MBUNGELA AND ANOTHER v MKABI AND OTHERS 2020 (1) SA 41 (SCA)

Customary law — Customary marriage — Requirements — Handing-over of bride — Not necessarily key determinant of valid customary marriage — Waiver permissible — Recognition of Customary Marriages Act 120 of 1998, s 3(1)*(b)*.

In the court a quo Mr Mkabi, who was Swati, had successfully launched an action for an order declaring that he had concluded a valid customary marriage with the late Ms Mbungela (the deceased), who was Shangaan. In the present appeal brought by the defendants in the action, the deceased's brother — Mr Mbungela — and daughter — Ms Mkhonza, the principal issue addressed was the following: Did the customary marriage entered into between Mr Mkabi and the deceased meet the requirement for validity set out in s 3(1)*(b)* of the Recognition of Customary Marriages Act 120 of 1998 — that it be celebrated *in accordance with customary law* — where there had been *no ceremony of handing-over of the bride*. The SCA ultimately agreed with the finding of the High Court that, on the facts of the case, the marriage custom of the 'bridal transfer' ritual had been waived (see [26]), and that such waiver did not invalidate their customary-law marriage. In reaching such conclusion, the SCA —

Held, that the purpose of the ceremony of the handing-over of a bride was to mark the beginning of a couple's customary marriage and introduce the bride to the groom's family. It was an important *but not necessarily a key determinant* of a valid customary marriage. It could not be placed above the couple's clear volition and intent to marry under customary law, where, as happened here, their families, who come from different ethnic groups, were involved in, and acknowledged, the formalisation of their marital partnership and did not specify that the marriage would be validated only upon bridal transfer. (See [30].) (Such a finding, the court held, recognised the living, actually observed customary law (see [18], [26] and [28]), and to insist upon a bridal transfer would be incongruent with customary law's inherent flexibility and pragmatism (see [28])).

Held, further, that in all the circumstances the essential requirements for a valid customary marriage were met (see [30]). Appeal accordingly dismissed.

NGOMANE AND OTHERS v JOHANNESBURG (CITY) AND ANOTHER 2020 (1) SA 52 (SCA)

Constitutional law — Constitutional damages — Award — Local authority unlawfully removing homeless people's property from public space and destroying it — Such action in breach of their constitutional rights to dignity, privacy and not to be deprived of property — Constitutional damages appropriate remedy — Constitution, ss 38 and 172(1)*(a)*.

The respondent municipality, during a public health law clean-up exercise, removed and destroyed property comprising personal effects and materials used to erect

overnight shelter belonging to the homeless appellants. This case concerned an appeal to the Supreme Court of Appeal (with its leave) by a number of the affected homeless people against the High Court's dismissal of their application for the return their confiscated personal belongings and materials, alternatively that they be provided with similar material and possessions, and/or ancillary relief.
The SCA agreed with the High Court that a spoliation order was not appropriate in the circumstances (see [18]). However, one of the grounds of appeal (a point not considered by the High Court but raised for the first time on appeal) was that they should be awarded punitive constitutional damages (see [11]). The SCA, considering this ground —
Held
The confiscation and destruction of the applicants' property was a patent, arbitrary deprivation thereof and a breach of their right to privacy enshrined in s 14*(c)* of the Constitution, 'which includes the right not to have . . . their possessions seized'. Also, the conduct of the respondent's personnel was not only a violation of the applicants' property rights in their belongings, but also disrespectful and demeaning. This obviously caused them distress, and was a breach of their right to have their inherent dignity respected and protected. In the circumstances, the respondent's conduct must be declared inconsistent with the Constitution and therefore unlawful, as required by s 172(1)*(a)* thereof. This finding entitled the applicants to appropriate relief for the violation of their fundamental rights as envisaged in s 38 of the Constitution. (See [21] – [22] and [27].)
An amount of R1500 for each applicant, R40 500 in total, was not a large sum of money, but it constituted appropriate relief in the specific circumstances of this case. It would vindicate the Constitution and protect the applicants and others similarly situated against violations of their rights to dignity and property. The appeal would accordingly be upheld.

STALLION SECURITY (PTY) LTD v VAN STADEN 2020 (1) SA 64 (SCA)

Delict — Specific forms — Vicarious liability — Employee of security company entering secured premises, robbing man, forcing him out, and shooting and killing him — Whether act sufficiently closely linked to employer's business to make it liable therefor — Criteria court may use in determining — Creation of risk of harm by employer.

Appellant company's business was the provision of security services, and it was contracted to provide those services at a certain building. To that end it employed both guards and a manager.
One evening the manager entered the building, located respondent's husband, robbed him, forced him out of the building and into the husband's car, and forced him to drive them off, and beyond the premises.
At a point the vehicle stopped and the manager shot and killed the husband.
Respondent later sued appellant for loss of support, and a High Court found appellant vicariously liable for the act of its employee, and the resultant damages.
Here appellant appealed that finding of liability to the Supreme Court of Appeal, and it considered the test for an employer's vicarious liability, namely that an employer will be vicariously liable where its employee commits a wrongful act while wholly or partly about the employer's business (see [15]).

But it will not be liable, where the employee commits the act while wholly about his own purposes, unless there is a sufficiently close link of the employee's act and the business (see [15] – [16] and [19]).
The purposes aspect of the test is subjective, while the link aspect is objective (see [16]).

In evaluating whether there is a sufficiently close link, a criterion a court may use is whether the employer created the risk of the harm that eventuated (see [32]).
Here, the Supreme Court of Appeal found that the employee committed the act, the killing, wholly for his own purposes (see [33]).

The question was whether there was a sufficiently close link of his act and the appellant's business, to make the appellant liable therefor (see [33]).
Going against sufficient closeness was that the employee carried out the action while on sick leave, outside the workplace, and with a firearm unconnected to the business (see [34]).
But for sufficient closeness, was that by employing the employee, appellant had enabled him to enter the office, and so had created the risk that he might abuse this power. And it was indeed by his abusing the power that he came to perform the act (see [36]).
Moreover, the appellant's business, which it was contracted to perform, was to protect respondent's husband's safety — to safeguard his constitutional right thereto. And it had put its employee in charge of doing so (see [37]).
Accordingly, the Supreme Court of Appeal concluded that a sufficiently close link was established, that the High Court was correct in its finding of liability, and it dismissed the appeal (see [38]).

SWIFAMBO RAIL LEASING (PTY) LTD v PRASA 2020 (1) SA 76 (SCA)

Government procurement — Procurement process — Irregularities — Fronting — BBBEE-compliant company acting as go-between for supply of foreign-made locomotives to state passenger rail agency — Company's only obligation having been to accept and hand over locomotives — No skills transfer, no change of asset-holding — Real bidder being foreign manufacturer — Fronting established.

Government procurement — Procurement process — Irregularities — Tender for supply of locomotives to state passenger rail agency set aside by High Court on application of state — Corruption and fronting vitiating award — Tenderer insisting it was innocent and that corruption occurred only on state side — Also arguing there was unreasonable delay in application for review — Supreme Court confirming finding of corruption and fronting, and finding that delay reasonable — Appeal dismissed.

Administrative law — Administrative action — Review — State may not use PAJA to review its own decisions — To proceed by way of legality review — Promotion of Administrative Justice Act 3 of 2000.

In July 2012 Prasa, the state entity responsible for commuter rail services, selected Swifambo, a recently incorporated black-owned company, as the approved bidder to provide Prasa with new locomotives. The ensuing contract between Prasa and Swifanbo was concluded in March 2013. The locomotives were to be manufactured by Vossloh, * a Spanish company that was, according to the bid, regarded as a

subcontractor. Swifambo and Vossloh concluded their own contract for the supply of the locomotives in July 2013.
Prasa's award of the tender to Swifambo, which was approved by Prasa's board and CEO, one M, was marred by a number of material irregularities, primarily the dishonest and corrupt conduct of M and other Prasa officials. Having belatedly discovered the full extent of M and his cohort's wrongdoing, a reconfigured Prasa board in November 2015 approached the High Court to set aside the award and Prasa's subsequent contract with Swifambo.
Prasa alleged that Swifambo was merely a 'front' for Vossloh, which was itself disqualified from bidding because it was, inter alia, not based in South Africa and lacked the required black empowerment credentials. According to Prasa, Vossloh, the real bidder, was hiding behind Swifambo.
While Swifambo did not deny that the bidding process was shot through with irregularities, it took issue with Prasa's allegation of 'fronting' ‡ and claimed that it was an innocent tenderer, unaware of Prasa's dishonesty.
The High Court agreed with Prasa that the award of the tender and the ensuing contract were tainted by corruption, fraud and fronting, and declared them invalid. It also found that while Prasa's three-year delay in bringing the application was unreasonable, it had to be condoned in the public interest.
In an appeal to the Supreme Court of Appeal, Swifambo persisted in its defences that Prasa's review application was unreasonably late, that it (Swifambo) was innocent and had no knowledge of Prasa's dishonesty, and that it was in the circumstances inequitable to set aside the contract. It argued that the court's finding of fronting, which formed the basis of its entire judgment, was misdirected for being based not on hard facts but hearsay. It argued that delay ran from the date of Prasa's July 2012 decision to appoint Swifambo, not from when it became aware of the unlawfulness of the decision.
Held
The High Court's finding of fronting, which coloured the issues of delay and the remedy granted, was borne out by the events leading up to and following the award (see [17], [27]). It was in the interests of justice to admit the hearsay evidence of Prasa's corruption, and the High Court had correctly done so (see [20]).
It was clear from the contract between Swifambo and Vossloh that Swifambo's only obligation was to accept delivery of locomotives and to procure their handing-over to Prasa (see [28]). Vossloh had complete control over every aspect of the contract between Swifambo and Prasa, Swifambo's role having been limited to enabling Vossloh to become the real bidder (see [29]). The High Court therefore did not err in finding that Swifambo was a party to a fronting practice, not an innocent tenderer (see [30]).
As to the effect of Prasa's delay in bringing the High Court application: The parties and the High Court wrongly assumed that the application was governed by the Promotion of Access to Administrative Justice Act 3 of 2000, which was not the case, for such applications were in fact legality reviews (see [32]). The reconstituted Prasa board did not ascertain the irregularity of the award until August 2015, and launched the application for review in November of that year. This was not an unreasonable delay, and even if it was, it would be in the interests of justice and in the public interest to condone it (see [39] – [42]).
At to the appropriate remedy: Since the locomotives were not suitable for purpose, the continued performance of the contract would serve no useful end. And since it would, moreover, be harmful to allow a contract concluded in a corrupt process to

stand, there was no reason to interfere with the High Court's order (see [47] – [48]). Appeal dismissed.

AMABHUNGANE CENTRE FOR INVESTIGATIVE JOURNALISM NPC AND ANOTHER v MINISTER OF JUSTICE AND OTHERS 2020 (1) SA 90 (GP)

Constitutional law — Legislation — Validity — Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002 — Interception of communications — Failure of Act to provide right of notice to subject of interception order — Less restrictive means existing to achieve objectives of Act — Infringement of rights to privacy and access to justice not justifiable — Constitution, ss 14, 34 and 36(1)*(e)*; Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002, ss 16(7), 17(6), 18(3)*(a)*, 19(6), 20(6), 21(6) and 22(7).

Constitutional law — Legislation — Validity — Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002 — Interception of communications — 'Designated judge' — Failure of Act to prescribe appointment process and terms for designated judge that ensured independence — Less restrictive means existing to achieve objectives of Act — Infringement of rights to privacy not justifiable — Constitution, ss 14 and 36(1)*(e)*; Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002, s 1 sv 'designated judge'.

Constitutional law — Legislation — Validity — Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002 — Interception of communications — No proper procedures in Act to be followed when state officials examining, copying, sharing, sorting through, using, destroying and/or storing collected data — Less restrictive means existing to achieve objectives of Act — Infringement of rights to privacy not justifiable — Constitution, ss 14 and 36(1)*(e)*; Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002, ss 35 and 37.

Constitutional law — Legislation — Validity — Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002 — Interception of communications — Journalist — Potential for exposure of confidential sources — Failure to expressly address circumstances where subject of surveillance is journalist — Less restrictive means existing to achieve objectives of Act — Unjustifiable breach of right to freedom of expression and of media — Constitution, ss 16(1) and 36(1)*(e)*; Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002, ss 16(5), 17(4), 19(4), 21(4)*(a)* and 22(4)*(b)*.

Constitutional law — Legislation — Validity — Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002 — Interception of communications — Lawyer — Potential revealing of legally privileged communications — Failure to expressly address circumstances where subject of surveillance is lawyer — Less restrictive means existing to achieve objectives of Act — Unjustifiable breach of right to privacy and fair trial rights — Constitution, ss 14, 35(5) and 36(1)*(e)*; Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002, ss 16(5), 17(4), 19(4), 21(4)*(a)* and 22(4)*(b)*.

Telecommunication — Interception of communications — State practice of 'bulk interceptions' of telecommunications traffic — Whether interpretation of National Strategic Intelligence Act 39 of 1994 providing authority — Practice unlawful, given absence of any law authorising such practice — National Strategic Intelligence Act 39 of 1994.

The present matter concerned the constitutionality and lawfulness of aspects of South Africa's communications surveillance regime. The chief focus was the Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002 (RICA). That Act allowed for state officials to intercept communications on exceptional grounds, ie serious crimes and threats to national security, and only once (subject to certain exceptions) having successfully applied for the permission from an independent authority — the so-called designated judge appointed by the Minister of Justice (see [27] – [35]). Also in issue in this matter was the admitted state practice of 'bulk interceptions' of telecommunications traffic.

In these application proceedings heard before the High Court (Pretoria), the Amabhungane Centre for Investigative Journalism — a non-profit company committed to the development of investigative journalism — challenged the constitutionality of RICA, on four grounds: *(a)* its failure to provide for a right of notice, to a person who had been surveilled, of such surveillance; *(b)* its failure to provide adequate safeguards in respect of the selection of a designated judge to authorise surveillance operations, and in respect of the procedures employed to facilitate their role; *(c)* its failure to provide adequate safeguards concerning the custody and management of information gathered by surveillance; and *(d)* its failure to provide adequate safeguards to effectively (1) preserve legal privilege in respect of lawyers and their clients, and (2) preserve the confidentiality of the sources of investigative journalists. The applicants challenged the lawfulness of 'bulk interceptions' on the ground that there was no law authorising such practice. The state, as represented by various parties connected with state security — inter alia, the Minister of Justice, the Minister of State Security and the Minister of Police — opposed the application.

It was common cause that RICA violated the right to privacy protected in s 14 of the Constitution (see [36]). The focus, then, was whether the infringement of the Constitution was justifiable in terms of s 36 of the Constitution, in particular, having regard to whether, in terms of s 36(1)*(e)*, less restrictive means existed to achieve the purposes of RICA. (See [36] – [37].) In these respects the court proceeded from the premise that there might be circumstances in which the interception of telecommunications was justifiable (see [41]).

(a) Lack of notice — RICA, in terms of s 16(7)*(a)*, expressly forbade any disclosure to the subject of the interception. In doing so, the court held, RICA violated the right to access to courts secured in s 34 of the Constitution, as the subject who might have wrongly had their privacy violated was denied the chance to seek redress (see [43]). The court noted that the approach adopted here was out of sync with other democratic countries, which had embraced the right to a *post-surveillance notice*, subject to the power of the relevant judicial officer to delay the granting thereof should good cause be shown. (See [47] – [51].) Such a mechanism served to ameliorate the intrusion into the privacy of persons, because it afforded redress by a court if abuse occurred (see [48]). This mechanism, the court held, as contemplated by s 36(1)*(e)* of the Constitution, amounted to a less restrictive means to achieve the

purpose of RICA, and the state had not justified its rejection (see [51] – [52]). The court declared RICA, including ss 16(7), 17(6), 18(3)*(a)*, 19(6), 20(6), 21(6) and 22(7), unconstitutional to the extent that it failed to prescribe a procedure for notifying the subject of the interception. In addition, it declared that RICA should be deemed to read to include, inter alia, an obligation on the applicant who had obtained an interception notice to subsequently notify the subject of the interception. (See [53] – [54], and see [168] for full orders.)

(b) Designated judge and process of evaluation — The court held that the independence of the designated judge was compromised where their appointment — to perform, in secret, such an inherently contentious function, for which they received remuneration — was at the sole discretion of the Minister of Justice, and where their term of office was renewable (see [62] – [63]). It declared RICA (including the definition of 'designated judge' in s 1) unconstitutional in its failure to prescribe an appointment process and terms for the designated judge that ensured such judge's independence. The court left the question of the final choice — a question of policy — as to a more appropriate appointment process, in the hands of Parliament, but, as an interim measure, granted a declarator to the effect that the Chief Justice nominate the appointees for the role of 'designated judge' (to be appointed by the Minister for a non-renewable term). (See [70] – [71] and full order in [168].)

The court further held that the fact that the designated judge evaluated, alone, the applications for interception on a purely ex parte basis — and without any input from a third party — implicated the interception subject's rights to a fair hearing (see [72]). Less restrictive measures as envisaged in s 36(1)*(e)* of the Constitution existed to achieve the objectives of RICA (see [73]), which included the creation of the role of a public advocate to assist in the evaluation process (see [72]), or to have a panel of judges evaluate the interception application (see [80]). The court declared RICA unconstitutional (including s 16(7)) in its failure to provide for appropriate safeguards to deal with the fact that the orders in question were granted ex parte (see [81] and [82] and full order in [168]).

(c) Failure to provide adequate safeguards concerning the custody and management of information gathered by surveillance — As to the information that was obtained through interception, the court held that RICA failed to put in place safeguards to limit the potential impact on the right to privacy, in the form of prescribed proper procedures to be followed when state officials were examining, copying, sharing, sorting through, using, destroying and/or storing the data. (See [90], [101], [108].) RICA (especially ss 35 and 37) was unconstitutional, the court held, and it granted a declaration to such effect. (See [108], and full order in [168].) The court rejected the state's answer that the SAPS had internal measures that set out appropriate guidelines and safeguards; that, the court held, cannot be good enough; the statute that subtracted from privacy rights was the appropriate location to effect that subtraction, including the safeguards to limit the extent thereof. (See [101].)

(d) Protection of legal privilege and journalists' confidential sources — The court noted that, in circumstances in which *a lawyer* was targeted for surveillance, legally privileged communications with persons in whom the state had no interest might be revealed (see [121]). This, it held, implicated the fair trial rights set out in s 35 of the Constitution (see [114] and [167]).

The court also noted the potential, in circumstances in which *a journalist* was a subject of surveillance, of confidential communications with 'secret sources' being revealed. The right to freedom of expression and of the media in terms of s 16(1) of the Constitution, the court held, was implicated. The court acknowledged that s 16 of

the Constitution did not expressly address the confidentiality of sources (see [131]); however, if a purposive interpretation was applied to such section, one was compelled to conclude that such right also encompassed the rights that, except in extreme circumstances, journalists' confidential sources were protected from prying. (See [133].) This was in recognition of the critical instrumentality of confidential sources in enabling the media to fulfil their constitutionally protected role (see [131] and [133].)
The court held that, in line with the norm of minimum intrusion to meet an ad hoc need, a statutory obligation should exist for those making application for an interception order to disclose the status of the subject, and statutory allowance for the designated judge to impose appropriate conditions in acknowledgement of the subject's status, possibly providing for an intermediary to sift through the data if warranted. The court concluded that RICA's failure to provide therefor rendered it unconstitutional (see [127], [128], [136], [140] and order in [168]), and the court declared it (ss 16(5), 17(4), 19(4), 21(4)*(a)* and 22(4)*(b)*) as such. It in addition granted an order to the effect that, pending the enactment of legislation to cure the defect, RICA would be deemed to include provisions described in this paragraph (see full order in [168]).
Bulk interception — The court held that, in the absence of a law authorising it, the bulk surveillance engaged in by officials of the South African state was unlawful, and granted a declaratory order to such effect (see [147] and [165]). The court rejected the proposition that the National Strategic Intelligence Act 39 of 1994 authorised such conduct (see court's analysis in [150] – [165]).

ANDALUSITE RESOURCES (PTY) LTD v INVESTEC BANK LTD AND ANOTHER 2020 (1) SA 140 (GJ)

Interdict — Interim interdict — Whether effectively final interdict — Test — Conflicting precedents — Need to distinguish between effect of interdict on disputed right and its effect on object of right — If latter may be properly addressed in balance-of-convenience enquiry, then interdict not final in effect — Normal test pertaining to granting of interim interdicts to be applied.

The applicant sought an interim interdict to secure the release of moneys to pay its staff. The first respondent (the bank) argued that, although the interdict was cast in the form of an interim interdict, it was in effect an application for a final interdict. The applicant conceded that it would establish only a prima facie right, not the clear right required for a final interdict. (Some of applicant's employees and a trade union, Amcu, sought to intervene as applicants.)
The parties had in 2011 entered into a suite of agreements, including a loan and an account-cession agreement. The first respondent averred that moneys advanced to the applicant were due and applied for a money judgment. It advised the applicant that it was exercising its right under the account cession, so that all deposits into applicant's bank account would vest in the first respondent. In response applicant brought an application for what it termed interim relief that would secure the release of moneys from its bank account. Specifically, the interdict would restrain the first respondent from preventing the applicant from accessing its bank account and from enforcing the account cession, pending the decision in the main application. While the first respondent argued that the interdict was final in its effect because it would finally and irreversibly deprive it of the security it held over the money in the account,

the applicant insisted that it sought no more than a common-or-garden interim interdict designed to operate only until the final determination of the issues in the main application. The interdict, argued the applicant, would allow it to continue trading and to pay its debts.
What made this case of interest was that there were two competing lines of authority from the Johannesburg High Court on how to classify interdicts, namely *BHT*, which held that the court should look at the substance, not the form, of the relief; and *Radio Islam*, † which held that an interdict was final when the order said so. The first respondent suggested that the court follow *BHT* to find in its favour.
Held
Courts had to distinguish between the effect of the interdict on the *disputed right itself* and its effect on the *object of that right*. Here, granting the interdict would not have a final effect on the first respondent's underlying right to enforce its cession over the bank account (an issue to be decided in the main application). But it would have a final effect on the object of that right, namely the money in the account, for if the interdict were granted and first respondent vindicated in the main application, then its right of cession would be exercised over a different object, namely the money then in the account. (See [21].)
It was not necessary, however, to decide whether *BHT* was correctly decided because the present case did not fall into the same category. Here the interdict would not have a final effect on the first respondent's underlying right. And the prejudice it would suffer — lack of access to the money and the curtailment of its ability to preserve it — could be properly addressed during the balance-of-convenience enquiry typical of interim interdicts. The application, therefore, was for an interim interdict, and the normal test pertaining to interim interdicts would apply. (See [22] – [24].)
The court decided the application principally on the balance of convenience, which, given the applicant's parlous financial state, favoured the first respondent. It was clear from the applicant's financial state that releasing the account would not enable it to pay its creditors, but instead deprive the first respondent of security in respect of a debtor (the applicant) in financial straits. The application for an interim interdict would accordingly be dismissed. (See [45], [48] – [49].) (The intervening applicants' interests overlapped to such an extent with those of the applicant that they had to follow its fate (see [50]).)

FIRSTRAND BANK LTD v SHABANGU AND OTHERS 2020 (1) SA 155 (GJ)

Practice — Judgments and orders — Summary judgment — Amended rule 32 — Whether old (unamended) or new (amended) rule to apply to applications instituted under old rule and pending when new rule came into operation (1 July 2019) — Uniform Rules of Court, rule 32.

These were summary judgment applications, which were initiated when the old rule 32 was in force, and which were pending when the new (amended) rule 32 came into operation (see [1] – [3] and [5]).
The issue was whether the old or new rule should apply to these cases, and the holding was for the latter — the new rule (see [3], [6], [11] and [23]).

KRETZMANN v KRETZMANN AND ANOTHER 2020 (1) SA 162 (ECP)

Land — Sale — Option — Formalities — Option consisting of offer and agreement to keep it open — Offer must be in writing but agreement to keep offer open need not — Alienation of Land Act 68 of 1981, s 2(1).

This case concerned an exception to plaintiffs' particulars of claim, that the oral option agreement they entered into with the defendant, to purchase certain immovable property, failed to disclose a cause of action because s 2(1) of the Alienation of Land Act 68 of 1969 (the ALA) required that the option agreement be in writing to be enforceable.
The plaintiffs relied on *Mokone v Tassos Properties CC and Another* 2017 (5) SA 456 (CC) (2017 (10) BCLR 1261; [2017] ZACC 25) — a case which held that a right of pre-emption in respect of the sale of land need not comply with the formalities of the ALA — arguing that the CC intended to deal with all types of contract having as its aim the conclusion of another contract.
Held
Mokone was concerned only with the right of pre-emption, which involved no offer at the time of the grant but where alienation arose only if and when the offeror decided to sell. (See [7] – [8].)
An option to purchase comprised an offer to purchase, and a *pactum de contrahendo* — an agreement to keep that offer open, usually for a fixed period. The agreement to keep the offer open was not an alienation as envisaged in the Act and was not required to be in writing. However, the offer which the pactum undertook to keep open must be a firm offer which would result in a binding contract when accepted; and by virtue of the provisions of s 2(1) of the ALA an offer resulting in the sale of land could only bring about a binding agreement upon acceptance if it was in writing. In the result, whilst an option agreement (the *pactum de contrahendo*) relating to the sale of land need not be in writing, it could only be validly enforced if the offer to which it related complied with the provisions of s 2(1) of the Act. (See [13] and [17].)
Here, however, the plaintiffs' case as pleaded was that both the option agreement and the agreement relating to the terms upon which the sale would occur were orally concluded. An option of that nature relating to land could not be validly exercised, whether orally or in writing. The exception would therefore be upheld. (See [17] and [18].)

LW v DB 2020 (1) SA 169 (GJ)

Children — Parents — Relocation — Parent seeking court's permission to relocate with child — Factors bearing on court's discretion.

Applicant and respondent were, respectively, the unmarried mother and father of a child. They had separated and, by order of court, the child's primary residence was with the mother. All lived in Gauteng. (See [4] and [44].)
Here the mother applied for the court's permission to relocate with the child to the Western Cape, in order to take up a job, and the issue before the court was whether it should allow her to do so.
It *held* that the factors bearing on its decision were (see [20]):

- The best interests of the child. This was paramount. (See [57] (ad the meaning of 'best'), [58] (on 'interests'), [61] ('paramount'), [63] (a caution against solely

considering the child's best interests), [64] (for the role of context in assessing interests), and [68] (no single factor was to receive pre-eminence.)

- The child's right to contact with its parents, and the parents' responsibility to maintain such contact.
- When a relocation decision was reasonable and bona fide, permission should not be lightly withheld (see [25] (ad assessment of reasonableness).
- Sensitive consideration was to be given to the situation of the parent left behind.

The court, on consideration of the matter in light of these factors, granted permission to the mother. (See, for example, [34] (best interests), [23], [29], [37] and [101] (the decision's reasonableness and fides), [92], [95] and [105] (contact), and [27], [38] and [50] (the position of the father).

MCNAIR v CROSSMAN AND ANOTHER 2020 (1) SA 192 (GJ)

Trust — Trustee — Removal — Grounds — Breakdown in relationship between co-trustees to extent that mutual respect and trust lost — Court may remove trustees in exercise of its inherent power or under statute — Trust Property Control Act 57 of 1988, s 20(1).

Our courts have the inherent power to remove trustees, and have traditionally done so in cases of misconduct, incapacity or incompetence. But there exists another ground: a breakdown in the relationship between co-trustees to the extent that there is no longer any mutual respect and trust. Such a breakdown will imperil their position as co-trustees and place the administration of the trust and the management of its property at risk. When this happens, one or both of the co-trustees should step aside, failing which the court may, on application, remove either one or both of them. Such an application could invoke either the court's above-mentioned inherent power or, to the extent that the interests of the trust and beneficiaries are threatened, be brought under s 20(1) of the Trust Property Control Act 57 of 1988. (See [29], [34] – [36].)

MURRAY & ROBERTS LTD v ALSTOM S&E AFRICA (PTY) LTD 2020 (1) SA 204 (GJ)

Engineering and construction law — Dispute resolution — Contractual adjudication — Application for enforcement of adjudicator's decision — Court's remedial competence sourced in constitutional power to regulate own processes — Respondent's defence of impossibility of performance, not raised before adjudicator, based on unjustified reading of adjudicator's decision — Would wrongly deprive applicant of remedy — Application granted.

Where parties to a contract agree to have their disputes settled through adjudication, courts may, in the exercise of their inherent power to regulate their own processes and develop the common law, exercise a discretion to make the adjudicator's decision an order of court. The court's remedial competence is not constrained by the Arbitration Act 42 of 1965 but exercised on just and equitable considerations. (See [39] – [40].)

If the enforcement of the adjudicator's remedy is in issue, then the court's decision is binary: it can either enforce the adjudicator's remedy or allow the respondent to escape. The equities involved require careful consideration, as do the systemic risks if contractual procedures for dispute resolution that are intended to be quick and avoid disruption to large projects, nevertheless give rise to lengthy litigation in the

courts. Courts should be careful of subverting an agreed scheme of expedited adjudication, or allowing enforcement proceedings to be used to delay the implementation of decisions taken in the implementation of such agreed schemes (see [41], [69] – [70]).
In the present case Alstom, which was appointed to undertake works at a power station, appointed M&R as a subcontractor. Alstom was to supply M&R with the steel plates to be used in the subcontracted works. The subcontract provided for the settlement of disputes via an adjudication process. The decision of the adjudicator was binding and had to be promptly given effect to. A dissatisfied party had 28 days to give notice of its dissatisfaction.
A dispute arose between Alstom and M&R regarding Alstom's compliance with its quality obligations, specifically the lack of quality markings on, or 'material certificates' in respect of, steel plates supplied by Alstom. In 2017 the appointed adjudicator ordered Alstom to provide the certificates. Alstom, while dissatisfied with the decision, neither gave notice nor complied. M&R then brought the present application to enforce Alstom's compliance.
While Alstom did not dispute that the adjudicator's decision was final and binding, it argued instead that it was impossible of performance, and that this prevented the court from giving an order for specific performance. M&R denied all of this.

The court, mindful of the principles set out above, found that a number of considerations went against Alstom's submissions. These included the following —

- that Alstom had agreed to be bound to the adjudicator's decision and to give effect to it (see [42]);
- that Alstom should have raised its defence of impossibility before the adjudicator (see [71]);
- that not enforcing the adjudicator's decision would inequitably deprive M&R of a remedy (see [43], [71] – [73]);
- that the adjudicator's decision was not impossible of performance since compliance with the specifications could be established by appropriate testing (see [59], [67]).

In the circumstances the court found no compelling reasons to withhold from M&R the benefit of having the decision of the adjudicator made an order of court (see [77]). Application granted.

MODISE OBO A MINOR v ROAD ACCIDENT FUND 2020 (1) SA 221 (GP)

Motor vehicle accident — Claim against Road Accident Fund — Litigation — Prejudice to plaintiff — Punitive costs order — Fund's conduct of case resulting in prejudice and wasted time and costs — Said conduct including trial-day concession on merits, failure to prepare case on quantum, failure to comply with Uniform Rule 37 and failure to furnish timeous undertaking in respect of medical costs — Punitive costs order on attorney and client scale justified, particularly in view of prejudice to injured minor child.

In 2011 Ms Modise's two-and-a-half-year-old son suffered irreversible brain injuries as the result of a motor vehicle accident. Ms Modise, acting on behalf of her son, instituted a claim for compensation against the Road Accident Fund under the Road Accident Fund Act 56 of 1996 (the Act). The Fund pleaded a bare denial of liability. At the pretrial conference, held more than two years after the delivery of the plea, its attorneys indicated that they were still awaiting instructions on whether to concede

on the merits. The trial was set down to proceed on both merits and quantum, but on the trial date the Fund conceded the merits. The Fund did not furnish a s 17(4)*(a)* undertaking in respect of medical costs, which had a negative impact on the child's treatment and, hence, his quality of life. The Fund made no attempt to narrow the issues on quantum, proceeding instead, as if in a criminal trial, to insist that plaintiff prove every aspect of her case. It failed to adequately prepare its own case on quantum or comply with its rule 37 obligations to get the matter trial-ready. Nor did it brief or consult experts, put up a version or make an estimate regarding damages, basing its case solely on cross-examination of plaintiff's experts. Then, during the trial, the Fund conceded on everything, save the contingencies to be applied to the actuarial calculations. But by this time the plaintiff had filled the court benches with her experts, resulting in the wastage of the costs so incurred.

Held

Since 80% of the Pretoria High Court's civil trial roll consisted of Fund litigation, effective case management and responsible litigation were imperative (see [1.1]). Therefore the Fund should, where appropriate, concede the merits and give an undertaking to cover medical-aid and related costs. This would benefit injured persons and fulfil the objects of the Act while enabling plaintiffs to satisfy their onus of mitigating their damages (see [3.3]). The Fund's failure to provide a s 17(4)*(a)* undertaking amounted to a dereliction of duty which prejudiced a vulnerable minor child (see [3.5]).

The public-policy considerations underlying the limitation of litigation contemplated by rule 37 applied more onerously where, as in the case of claims against the Fund, public funds were involved (see [4.3]). Parties' litigation obligations included not obstructing the finalisation of a case, not causing prejudice to the other party or incurring unnecessary costs or delays (see [4.4]). While the Fund was not required to accept the correctness of the conclusions of the plaintiff's experts, it was not obliged to appoint counter-experts or hired guns to support its position (see [4.11]).

While the Fund's legal representatives were never mala fide or vexatious, punitive costs would be ordered in the light of the unnecessary costs incurred, the wastage of time and prejudice caused to the plaintiff and her minor child (see [7.4], [7.7]). The court ordered that a copy of the judgment be sent to the Fund's CEO.

NATIVA MANUFACTURING (PTY) LTD v KEYMAX INVESTMENTS 125 (PTY) LTD AND OTHERS 2020 (1) SA 235 (GP)

Prescription — Extinctive prescription — Interruption — By service of process — Notice of joinder — Conflicting precedents on whether service of application for joinder interrupting prescription — Court finding that since cause in joinder application not same as in main claim for payment of debt, notice of joinder not interrupting prescription — Court departing from erroneous precedent — Prescription Act 68 of 1969, s 15(1).

Does the service of an application for joinder interrupt the running of prescription for the purposes of s 15(1) of the Prescription Act 68 of 1969? The court was called on to answer this question with reference to governing precedent, in particular a decision in the Supreme Court of Appeal, *Peter Taylor & Associates v Bell Estates (Pty) Ltd and Another* 2014 (2) SA 312 (SCA), and one in its home division, *Huyser v Quicksure (Pty) Ltd and Another* 2017 (4) SA 546 (GP). While both were binding on the court, it could depart from the latter if it was clearly wrong (see [1]). In *Huyser* the

Pretoria High Court had distinguished *Peter Taylor* on the basis that the SCA had dealt with a different sort of joinder application than the one before it.
The facts were that applicant (Nativa) sought to join the third respondent (Marce) as defendant in an action for damages it had instituted against the first respondent (Keymax). Marce resisted joinder on the ground that Nativa's claim against it had prescribed, and the key question before court became whether the application for Marce's joinder had had the effect of interrupting the running of prescription. Section 15(1) of the Prescription Act provides that '(t)he running of prescription shall . . . be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt'.
In its judgment the present court *held*, after a detailed analysis of the precedents (see [10] – [40]), that there was no ground for the distinction drawn in *Huyser* between that case and *Peter Taylor*. The same fundamental issue arose in both cases, namely, whether the service of the joinder application interrupted the running of prescription under s 15(1) of the Act, and the facts were in all material respects aligned. Since the finding of the judge in *Huyser* that he was not bound by *Peter Taylor* was wrong, the court was entitled to depart from the decision in *Huyser*. The service on Marce of the application for joinder did not constitute 'service of process whereby (a) creditor claims payment of (a) debt' as required by s 15(1), and consequently it did not interrupt prescription. (See [41] – [42.)

NSPCA v MINISTER OF ENVIRONMENTAL AFFAIRS AND OTHERS 2020 (1) SA 249 (GP)

Animal — Wild animal — Welfare of lions in captivity — Whether relevant consideration in setting export quotas for lion bone sourced from captive lions — Constitution, s 24; National Environmental Management: Biodiversity Act 10 of 2004, s 3.

Environmental law — Protection of environment — Biodiversity sector — Captive lions — Whether welfare considerations relevant in setting export quotas for lion bone sourced from captive lions — Constitution, s 24; National Environmental Management: Biodiversity Act 10 of 2004, s 3.

Regulations under the National Environmental Management: Biodiversity Act 10 of 2004 (NEMBA), promulgated to give effect to South Africa's obligations under CITES,require the first respondent (the Minister) to set an annual export quota for the trade in bone sourced from captive lions.
Here, the applicant (the NSPCA) sought the review and setting aside of the quotas set for 2017 and 2018 on the basis, inter alia, that the Minister did not take a relevant consideration into account — the welfare of lions in captivity — which rendered the setting of the quotas reviewable under s 6*(e)*(iii) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).
Welfare considerations were relevant, the NSPCA argued, because s 3 of NEMBA obliged the state — in fulfilling the rights contained in s 24 of the Constitution through its organs that implement legislation applicable to biodiversity — to manage, conserve and sustain South Africa's biodiversity; and because lions in captivity were part of biodiversity, the state's duty to manage that sector was activated (see [72]).
Held
Reading NEMBA as a whole together with the National Biodiversity Plan, there was little doubt that lions in captivity were part of the biodiversity sector, and it was clear from this legislative and policy framework that there was a duty to manage that

sector and set standards for it. It would be artificial and hierarchical to argue that while we should share concern about lions in the wild, our concern for the wellbeing of lions in captivity must rest on a different footing. Even if they were ultimately bred for commercial purposes, their suffering, the conditions under which they were kept, and the like, remained a matter of public concern and were inextricably linked to instilling respect for animals and the environment, of which lions in captivity were an integral part. (See [71] and [73].)
Both the Constitutional Court and the Supreme Court of Appeal have confirmed that welfare considerations and animal conservation together reflected intertwined values. When regard was had to this connection, the state respondents should not have ignored welfare considerations of lions in captivity in setting the annual export quota. The quota signalled that the state would allow exports in a determined quantity of lion bone; such signalling could not occur at the same time as signalling that the manner in which lions in captivity were kept was an irrelevant consideration in how the quota was set. It was illogical, irrational and against the spirit of s 24 and how our courts have included animal welfare concerns in the interpretation of s 24. (See [70] and [74].)
It would accordingly be declared that first respondent's decisions, setting the 2017 and 2018 quotas for the exportation of lion bone derived from captive lions, without taking into account animal welfare considerations, were unlawful and constitutionally invalid. (See [75] and [79].)

PRETORIA SOCIETY OF ADVOCATES AND OTHERS v NTHAI 2020 (1) SA 267 (LP)

Legal Practitioners — Advocate — Admission — Standing of General Bar Council and its constituent member societies of advocates, to participate in readmission applications — Legal Practice Act 28 of 2014, ss 4 and 5.

This case concerned two applications for leave to appeal, one by the Johannesburg Society of Advocates (the JSA) and another by the South African Legal Practice Council (the LPC), against the court's decision to admit the respondent — who had previously been struck from the roll of advocates for misconduct — as a legal practitioner to be enrolled as an advocate.
One of the grounds of appeal, taken up by the JSA, was a finding in the main judgment that ss 4 and 5 of the Legal Practice Act 28 of 2014 had the effect that the General Council of the Bar (the GCB) and its constituent members (like the JSA) no longer had any role to play as custos morum of the legal profession. The JSA argued that if this view were upheld or was left as a precedent, it would deprive the GCB and its constituent members of their formal standing to participate in readmission applications by their members who had been struck off the roll at their application (see [25]).
The court was not persuaded that it had erred in its interpretation. It *held* that the fact that the legislature intended regulating the legal profession by a single statute (the LPA) and furthermore repealed the Admission of Advocates Act 74 of 1964 in its entirety, meant that there was no residual power for the JSA to act in such matters. It accordingly concluded that there was no reasonable prospect of success if leave to appeal against this finding were granted. (See [14] – [17] and [26].)

REACTION UNIT SOUTH AFRICA (PTY) LTD AND ANOTHER v PRIVATE SECURITY INDUSTRY REGULATORY AUTHORITY 2020 (1) SA 281 (KZD)

Private security — Security service provider — Registration — Requirements that need be present before Authority may suspend provider's registration — Private Security Industry Regulation Act 56 of 2001, s 26(1).

Respondent, the Private Security Industry Regulatory Authority, came to hear of complaints of misconduct on the part of first applicant's employees; the Authority investigated; and ultimately suspended first applicant and its director second applicant's registration as security service providers (see [1] – [2] and [40]).
They then obtained a rule nisi temporarily interdicting that suspension (see [1] and [29]).
Here, the court considered whether to confirm it, and in the course of deciding whether the requirements for an interim interdict had been met, came to consider s 26(1) of the Private Security Industry Regulation Act 56 of 2001. It provides, inter alia, that:
'If there is a prima facie case of improper conduct . . . against a security service provider, the Authority may suspend the registration of the . . . provider . . .' (see [13]).
The court *held*, that the section implicitly contained further requirements, beyond a prima facie case of misconduct, before suspension could be imposed. Those were that the Authority had to consider if it objectively needed to suspend the provider concerned in order to carry out its functions and achieve its aims (see [38]).
If it did decide it needed to suspend the provider in order to do so, then the Authority had to balance the harm suspension would cause the provider, against the harm it would avert (see [38]).
Here, the suspension was justified by the gravity of the misconduct concerned as well as the providers' failure, in breach of their obligations, to assist the Authority in its investigation ([25], [40] – [41], [47], [49] and [53]).
Held, therefore, that the requirements for the grant of an interim interdict had not been met, and the rule nisi discharged (see [1], [54] and [60]).

TERRY AND ANOTHER v SOLFAFA AND ANOTHER 2020 (1) SA 299 (FB)

Marriage — Proprietary rights — Powers of spouses — Power to bind joint estate — Purchase of immovable property — Written consent of other spouse required only where agreement of sale qualifying as 'contract' as defined in Alienation of Land Act 68 of 1981 — Matrimonial Property Act 88 of 1984, s 15(2).

Contract — Formation — Offer and acceptance — Acceptance — Mode of acceptance — Written 'offer to purchase' signed by offeror — Mere signature by offeree constituting acceptance — Notice to offeror not required.

Land — Sale — Contract — Conditions — 'Subject to' sale — Sale subject to 'successful sale' of purchaser's property — Meaning signing of deed of sale, not completion of transaction and payment of purchase price.

The Terrys, who were married to each other in community of property, bought a house from Ms Solfafa. They asked for an order directing Ms Solfafa to transfer it into their names. Ms Solfafa, desperate to escape the consequences of having accepted the offer to purchase, resisted the application.
Ms Terry had signed the offer to purchase on 27 February 2019. The signed document purported to constitute an agreement of sale 'upon acceptance by the

seller'. It was a 'subject to' sale: it was subject to the suspensive condition that the Terrys 'successfully' sell their current home within 60 days. The agreement, but not transfer, happened within the 60-day period.
The issues were whether the sale was valid even though (i) only Ms Terry had signed the offer when it was accepted by Ms Solfafa; (ii) acceptance of the offer was not supposed to have been communicated to the Terrys; and (iii) the suspensive condition was not fulfilled because the Terrys' property was not transferred to its purchaser within the 60-day period.
Section 15(2) of the Matrimonial Property Act 88 of 1984 defines in which events one spouse has to give written consent for the other spouse to perform a juristic act. One of those events is where one of the spouses, as a purchaser, enters into a contract for the alienation of land as defined in the Alienation of Land Act 68 of 1981.
Held
(i) Since it was common cause that the present contract was not a 'contract' defined in the Alienation of Land Act, the written consent of Mr Terry was not required. Hence Ms Terry had the full capacity to bind the joint estate by signing the offer to purchase without the written consent of Mr Terry (see [6]). The judge in *Govender and Another v Maitin and Another* 2008 (6) SA 64 (D) erred in assuming that the written consent of the other spouse was required in *all* sales of immovable property, whereas it was only the case if the price was paid 'in more than two instalments over a period exceeding one year' (see [7]).
(ii) Where, as here, the offer took the form of a written contract signed by the offeror (Ms Terry), the offeree's (Ms Solfafa's) mere signature constituted, absent any indication to the contrary, acceptance of the offer. It was clear from the offer, which was said to 'constitute an agreement of sale upon acceptance by the seller', that the parties intended that the mode of acceptance would be the signature of Ms Solfafa, and nothing more. Since the common-law principle of acceptance by notice to the offeror was therefore not applicable, the failure to communicate Ms Solfafa's acceptance to the Terrys was irrelevant (see [9] – [11]).
(iii) 'Successful sale' meant the successful signing of a deed of sale, not the completion of the transaction and the payment of the purchase price. It was never the intention that within 60 days: the Terrys were to find a purchaser and sign a deed of sale; that possible suspensive conditions in that deed be fulfilled; and that registration of transfer into the purchaser's name take place. 'Successful sale' meant nothing more than the successful signing of a deed of sale (see [15] – [16]).
The application would accordingly be granted (see [17]).

SHABANGU v LAND AND AGRICULTURAL DEVELOPMENT BANK OF SOUTH AFRICA 2020 (1) SA 305 (CC)

Suretyship — Liability — Invalid loan agreement settled by acknowledgment of debt — Acknowledgment perpetuating original invalidity and itself therefore invalid — Principal debtor not being liable, sureties were not either — However, if terms of suretyship wide enough to cover enrichment claim, sureties may be held liable.

The appellant (Mr Shabangu) and the 4th – 9th respondents (see [11] – [12]) stood surety for the indebtedness of a company under a loan agreement with the first respondent (the Land Bank). After it transpired that the Land Bank was not empowered to make the loan and that the loan agreement was therefore invalid, the company signed an acknowledgment of debt accepting liability for a lesser amount in full and final settlement of its indebtedness.

When the company failed to make payment under the acknowledgment of debt, the Land Bank instituted proceedings against it and its sureties. Shorty after proceedings were instituted, the company was liquidated, and the Land Bank then proceeded only against the sureties — not directly based on the original principal debt under the loan agreement, but on the sureties' alleged liability under the acknowledgement of debt.
The High Court, applying *Panamo*, held the sureties liable on the basis that the invalidity of a principal agreement (the loan) was not necessarily visited upon the ancillary agreement (the suretyship); and that the debt acknowledged was covered by the suretyship. After unsuccessful efforts to obtain leave to appeal to the Supreme Court of Appeal, the applicant sought leave to appeal to the Constitutional Court.
The Constitutional Court, having granted leave to appeal —
Held
It was common cause that the terms of the acknowledgement of debt did not cover any enrichment claim. In effect it perpetuated the original invalidity and must therefore also be invalidated. No claim therefore lay against the company, and no claim could lay against the sureties. Even on the assumption that the High Court's interpretation of the deed of suretyship was correct, the acknowledged indebtedness remained tainted and could not found suretyship liability. (See [29], [31], [34] and [36].)
While this outcome made it unnecessary to do so, for the puposes of distinguishing *Panamo* from this case it was important to elucidate why the suretyship agreement did not cover the acknowledgement of debt. In *Panamo* the mortgage bond itself stipulated that a bond would be passed to cover 'in general . . . any existing or future debt that Panamo owe[d] or may owe to the [Land] Bank'. This was why it was held in *Panamo* that '(t)he nature of the bond thus [did] not exclude the possibility that an enrichment claim may be covered'. However, here the suretyhip clearly showed an intention by the sureties to be bound only for the 'indebtedness' arising out of the invalid agreement. An agreement in relation to an undisputed invalid earlier agreement may be possible if it related to an enrichment claim which resulted from the invalidity of the earlier debt, but not if it sought to enforce the earlier indebtedness. If the terms of the accessory suretyship agreement were wide enough to cover the enrichment claim, the sureties may well also be liable. (See [32] and [35].)

THABELA v NEDGROUP MEDICAL AID SCHEME AND ANOTHER 2020 (1) SA 318 (GJ)

Medicine — Confidential medical information — Prohibition on disclosure of information — Ambit — National Health Act 61 of 2003, s 14(2).

First defendant, a medical aid scheme, conveyed certain of plaintiff's medical information to second defendant, plaintiff's employer.
Plaintiff's claim was that the information was confidential and he had not consented to its disclosure; and he here sued for damages based on infringement of his constitutional right to privacy, breach of duty in s 14(2) of the National Health Act 61 of 2003, and under the actio iniuriarum (see [17]).
The court, in dismissing the claim (it found the information was no longer confidential at the time of its provision), came to consider the ambit of s 14(2) (see [22], [26] and [31]). It together with s 14(1) provides as follows:

'(1) All information concerning a user, including information relating to his or her health status, treatment or stay in a health establishment, is confidential.

(2) Subject to section 15, no person may disclose any information contemplated in subsection (1) unless —

(a) the user consents to that disclosure in writing;

(b) a court order or any law requires that disclosure; or

(c) non-disclosure of the information represents a serious threat to public health.'

The court's holding on the scope of s 14(2)'s prohibition was that it was not, as contended, confined to healthcare providers or workers (see [15]). Application, as noted, dismissed (see [34]).

SACR JANUARY 2020

DE KLERK v MINISTER OF POLICE 2020 (1) SACR 1 (CC)

Arrest — Procedure after arrest — Detention of accused after appearing in court — Investigating officer aware that accused would not be released on bail on appearance in court, despite recommending such — Police liable for unlawful detention after remand where magistrate failed to consider his release on bail.

The applicant instituted action in the High Court against the respondent for damages for unlawful arrest and detention, arising from his arrest on a charge of assault with intent to do grievous bodily harm and his subsequent detention for eight days. The charge resulted from an incident in which he pinned the complainant against a picture frame on a wall. After the complainant laid a charge, the applicant was required to report to the police station where said charge was explained to him. He was unable to contact his attorney and made no statement, but was immediately arrested and taken to the magistrates' court where he appeared only two hours after arriving at the police station. He was remanded in custody, despite the investigating officer's recommendation that bail of R1000 be fixed. The investigating officer was aware that the applicant would not be released on bail at his first appearance in court, such appearance being a mere formality in a busy remand court. The High Court dismissed the action, as did the majority of the court on further appeal to the Supreme Court of Appeal. At issue was whether the applicant could claim against the Minister of Police for his detention after his first court appearance.

The majority of the court, per Theron J (Basson AJ, Dlodlo AJ, Khampepe J and Petse AJ concurring), held that, although subjective foresight of harm could not itself necessarily imply that harm was not too remote from conduct, it was a weighty consideration. In the present matter, the police officer subjectively foresaw the precise consequence of her unlawful arrest of the applicant.

She knew that the applicant's further detention after his court appearance would ensue. What happened in the reception court was not, to the constable's knowledge, an unexpected, unconnected and extraneous causative factor — it was the consequence foreseen by her, and one to which she reconciled herself. In determining causation, the court was entitled to take into account the circumstances known to the constable and those circumstances implied that it would be reasonable, fair and just to hold the respondent liable for the harm suffered by the applicant, that was factually caused by his wrongful arrest. For these reasons, and in the circumstances of this matter, the court appearance and the remand order issued by the magistrate did not amount to a fresh causative event breaking the causal chain.

At the same time, holding the Minister of Police liable did not mean that a magistrate, as an officer of the court, could not and should not in egregious cases be held accountable for dereliction of constitutional duties. The duty of magistrates to apply their minds to the question of bail was of the utmost constitutional significance. Failure to discharge this duty must result in consequences for the presiding officer involved. Moreover, in the ordinary course, members of the police would not be liable for derelictions of duty by members of the magistracy. On the facts of this case, the magistrate concerned should not be exclusively liable for the subsequent detention, given the original delict by the arresting officer and her subjective foresight of the subsequent detention and the harm associated therewith.
Cameron J, concurring with the conclusion of the majority judgment, held that in view of the manner in which the applicant had cast his claim, in wrongfully arresting the applicant and sending him without more for processing to that particular court, with no effort to ensure that he was processed differently and thus afforded the opportunity to apply for bail, the police officer who unlawfully arrested the applicant was as much responsible for the wrong done by his further detention as if, were she being sued for personal injury inflicted by a negligently driven motor car, she had culpably caused him to fall into its path and the Minister was accordingly liable.
Froneman J, dissenting (Goliath J and Mhlantla J concurring), held that the police constable only had the constitutional responsibility of bringing the applicant to court timeously. She had done so and once she had done that, she had no further direct legal competence or authority to charge the applicant or to decide on his release or further detention. At best, she could attempt to influence these decisions by recommending bail, which she had also done. There was no objective evidence that she acted unlawfully in terms of her statutory powers and obligations in respect of the harm at stake, namely the further detention of the applicant after his court appearance. If there was nothing further within her competence that she could have done, then the foreseeability of further unlawful detention as a matter of legal causation did not make her liable for such harm. This was because her participation could not be said to have wrongfully caused harm if that harm was beyond her constitutional or legislative authority, control or competence, irrespective of whether it was foreseeable or not. The responsibility to charge the applicant was that of the prosecutor, that of deciding to release him or detain him further was that of the magistrate. In these circumstances, to ascribe liability to the constable on the mere basis of foreseeability of harm would undermine the distinction between unlawful and malicious deprivation of liberty. (See [133] – [135].)
Mogoeng CJ, dissenting, held that the constitutional obligations imposed on the court were an automatic *novus actus interveniens*. Considerations of public policy, particularly the value of accountability for one's own constitutional obligations, and justice, which could never depend on what an individual who caused the initial harm knew, as well as separation of powers and the supremacy of the Constitution, rendered it unreasonable to impute the liability due to the judiciary to the Minister of Police as well. (See [185].)

BK AND ANOTHER v MINISTER OF POLICE AND OTHERS 2020 (1) SACR 56 (WCC)
Search and seizure — Application for setting-aside of search warrant and seizure of items — Such application brought before High Court and not magistrates' court where criminal trial pending — Whether appropriate for High Court to decide matter

prior to finalisation of criminal proceedings — Court declining to decide matter in circumstances of case.

The applicants applied for an order against the respondents to set aside a search warrant issued by a police officer, and for an order directing the respondents to return to them all items seized from them pursuant to the warrant. The search warrant came about after the arrest of the first applicant outside a post office by a member of the Hawks after he had allegedly just sent a parcel containing two inhalers to an address in the United States of America. The police then drove him to his home nearby, where he conducted his medical practice, searched the house and seized and removed numerous items. The applicant did not consent to the search which commenced against his objections, and later those of his attorney. The Hawks subsequently did obtain a search warrant and held their search-and-seizure operation in abeyance while waiting for the warrant to arrive. The applicant and his wife (the second applicant) were arrested and appeared in court the following morning on charges of having contravened provisions of the Medicines and Related Substances Act 101 of 1965, and were released on bail.

The applicants contended that the search and seizure at their home were illegal in that they had not consented thereto, neither were they authorised by any statutory provisions. Furthermore, the warrant which was belatedly relied upon was also unlawful for procedural reasons and by reason of flaws in the warrant itself.

The respondents contended that, having arrested the first applicant in the circumstances in which they had, they were entitled in terms of s 20 and s 23(1)*(a)* of the Criminal Procedure Act 51 of 1977 to conduct a search-and-seizure operation at the applicants' residence. The respondents conceded flaws in the warrant in that the specific charges were not specified and that the warrant did not specify what articles or documents could be searched for or seized. The court raised the question of whether the court was the proper forum for the raising of the lawfulness of the search-and-seizure operation, rather than the magistrates' court where the criminal proceedings were still pending. After counsel provided notes on this aspect,

Held, that the effect, if not the purpose, of the relief sought by the applicants would be to remove from the court hearing the criminal trial any opportunity to weigh up the competing private and public interests in admitting any of the evidence seized in the search-and-seizure operation, if indeed it was legally obtained. (See [15].)

Held, further, any findings by the court could quite conceivably be the subject of an appeal or even a series of appeals, the effect of which would be to further delay the criminal trial. It was also not clear at the present stage whether the state would indeed seek to use any of the material it obtained in the search-and-seizure operation against the applicants.

Held, further, that it was desirable that the trial magistrate presiding over the criminal trial did so without constraints in the form of pronouncements from the High Court which touched on the question of what evidence was admissible before them. (See [18].)

Held, accordingly, that the applicants had failed to satisfy the court that it should intervene at that stage and even before the criminal proceedings proper had commenced, or set aside the search warrant and order the return of the items seized and not yet restored to the applicants. The application accordingly had to be dismissed.

S v DUBA 2020 (1) SACR 66 (ECG)

Rape — Attempted rape — What constitutes — Victim possibly deceased before accused committing acts that appeared to be attempts at intercourse — Accused convicted of attempted rape.

The accused was indicted to stand trial in the High Court on charges of rape and murder. He was linked by circumstantial evidence to the crime, the principal state witness having come across a semi-naked man late at night making sexual movements lying on top of a woman. The man, realising that he had been seen, jumped up and ran away. The witness gave chase but gave up and returned to the scene where he realised that the woman was a neighbour of his, but she was already deceased. The medical evidence established that the deceased had died of multiple stab wounds, and, although there were no findings consistent with sexual intercourse, the possibility that it had occurred could not be ruled out. The court was satisfied, based on the circumstantial evidence, that the accused was the person whom the state witness had seen and who had perpetrated the assault on the deceased, and, having regard to the nature of the deceased's injuries, there had clearly been an intention on the part of the accused to kill
her. If, however, he had been bent on merely killing her, he would not have needed to remove his clothes. As to the charge of rape,

Held, that the evidence established that the assault on the deceased was ferocious and she must have died almost immediately after the injury on her neck was inflicted. It was therefore not impossible that the deceased had already died at the time the accused was seen on top of her making movements akin to those of engagement in sexual activity. That, however, did not detract from his conduct constituting an attempt to have sex with the deceased — an accused who attempted to have sexual intercourse whilst under the mistaken impression that his victim was alive, whereas in fact she was already dead, could be found guilty of attempted rape. (See [27] and [29].) The accused was accordingly found guilty of attempted rape and murder.

S v CRONJE 2020 (1) SACR 74 (WCC)

Drug offences — Methamphetamine — Possession of in contravention of s 4*(b)* of Drugs and Drug Trafficking Act 140 of 1992 — Sentence — Necessity for individualised sentence restated.

In a matter that came before the court on automatic review the accused had been convicted after pleading guilty to the unlawful possession of seven packets of Tik, containing methamphetamine listed in part III of sch 2 to the Drugs and Drug Trafficking Act 140 of 1992, in contravention of s 4*(b)* of the Act. He had four previous convictions, three of which were for the same offence. The accused was 28 years of age, unmarried and had a 7-year-old child. He was sentenced to a fine of R5000 or five months' imprisonment, and a further 10 months' imprisonment was suspended for five years. In response to a query from the court the magistrate appeared to indicate that the decision in the matter of *S v Permall and Another* 2018 (2) SACR 206 (WCC) had taken away the discretion of the magistrate in sentencing, in that the mathematical formula had to be rigidly applied in each case when the magistrate decided to impose a fine.

Held, that the interpretation by the magistrate was incorrect, as it was not consonant with the cardinal principle established, that the sentence had to be individualised and had to fit the particular accused, the nature of the crime, and the interests of society. It was important to emphasise that a uniform term of imprisonment as an alternative

should not necessarily follow a particular fine that a magistrate had determined, or vice versa, mechanically. A sentence to be imposed was within the discretion of the trial court. Although no formula should be followed, fines should be consistent so as to create certainty, depending on the circumstances of each offender, the seriousness of the crime, and the interests of society. (See [8] – [10].)
Held, further, that in the present case the accused may have had no assets and it could be assumed that the term of imprisonment would ultimately constitute the primary means of punishment, which was fortified by the fact that it did not appear that the accused was informed of nor afforded an opportunity to pay a default fine. It would accordingly have been appropriate for a probation officer's report to be procured, having regard to the circumstances of the accused, and, in particular, an investigation into the reasons for his continued drug possession. But in view of the fact that he may already have served most of his sentence, it would not be appropriate to set aside the sentence and remit it for the purposes of said report, particularly because the sentence did not appear to be shockingly inappropriate. (See [16] – [17].)

S v SD 2020 (1) SACR 78 (KZP)
Indictment and charge — Duplication of convictions — Test for — Single-intent test inadequate for requirements of modern society with high crime rate — Elements-of-crime test appropriate.
Evidence — Witness — Oath — Administering of — Child witness — Witness 13 years old — Although no finding made by court, it was satisfied that complainant able to distinguish truth from lies and was alive to serious consequences of telling lies — In circumstances, complainant competent witness.
The appellant challenged his convictions in a regional magistrates' court on one count of sexual assault and one count of attempted rape, and his sentences of 10 and three years' imprisonment, respectively, where the sentences were ordered to run concurrently. He based his appeal on two main grounds, namely, that there had been a duplication of convictions, in that the sexual assault and attempted rape constituted one criminal act and that there had been a single intent; and that the court a quo had administered an oath to the 13-year-old complainant when it ought to have admonished her. The complainant testified that the appellant, her paternal uncle, had entered the room where she was getting dressed after having bathed, placed her on the bed and removed her underwear before licking her breasts and private parts. He then unzipped his pants, and, when he was about to engage in intercourse, she tricked him into thinking that her mother was coming, and he then ran away. The record indicated that when the complainant was called to testify, she was asked if she knew what the oath was, and she replied that she did not. The court then conducted an inquiry and after asking her numerous questions, came to the conclusion that she was able to distinguish between the truth and lies and to understand the consequence of telling lies. The court then proceeded to swear her in. In respect of the contention that there had been an improper duplication of charges,
Held, that there were many instances where a perpetrator started off with an intent to commit a specific offence but ended up committing other offences. Despite the close connection between the acts, two crimes would be committed due to the varying nature of their elements. Public interest and public policy in the current circumstances where the crime rate was very high called for an approach which ensured that perpetrators were adequately charged and prosecuted. The single-

intent test fell short of meeting the requirements of our society while the elements-of-the-crime test would satisfy this. On an application of the latter test, it was apparent that the offence of sexual assault embodied different elements to those of attempted rape and, accordingly, two separate offences had been committed. (See [16] – [17].)
In respect of the administering of the oath to the complainant,
Held, that it was clear that the court a quo had undertaken a process to ensure that the complainant's evidence was reliable. Although at the end of that process there was no finding by the court, it was satisfied that the complainant was able to distinguish truth from lies and was alive to the serious consequences of telling lies. In the circumstances the complainant was a competent witness and the court had correctly admitted her evidence. (See [24] – [26].)
The court dismissed the appeal in respect of the convictions, but upheld the appeal in part in reducing the sentence of 10 years' imprisonment on the charge of sexual assault to one of eight years' imprisonment.

KV v WV 2020 (1) SACR 89 (KZP)

Domestic violence — Protection orders — When to be granted — Legislature specifically excluding 'unlawfulness' and only referring to conduct causing 'harm' — Domestic Violence Act 116 of 1998, s 1 sv 'domestic violence'.
In an appeal against the confirmation by the magistrates' court of an interim protection order issued in terms of the Domestic Violence Act 116 of 1998 (the Act), the appellant argued that unlawfulness was a necessary requirement to determine whether conduct constituted domestic violence. The court a quo rejected this argument on the basis that there was nothing in the Act to provide for this and concluded that this was not what was contemplated in said Act and the Constitution. It found that, in any event, the appellant had in his own oral evidence, admitted to pushing and pulling the respondent, leading to her falling to the floor, and this conduct constituted domestic violence in the form of physical abuse. In confirming the interim order, the court found that there was, however, insufficient evidence to conclude that there was also verbal abuse and therefore discharged the order in that regard.
Held, that, in defining domestic violence, the Act specifically excluded the word 'unlawfulness' and referred only to conduct that 'harms, or may cause imminent harm to, the safety, health or well-being of the complainant'. When the Act was enacted, the legislature was alive to the criminal and delictual principles dealing with abuse, but gave consideration to the rights protected in the Constitution, more particularly, the right to equality, freedom and security of the person, and violence against women and children. It introduced a wider form of protection by making reference to the word 'harm'. To give a more restrictive interpretation to the provisions of the Act would be to defeat the purposes for which it was passed. There was accordingly no reason to interfere with the interpretation by the court a quo. (See [28] and [31].) The appeal was accordingly dismissed.

S v MDHLULI 2020 (1) SACR 98 (LP)
Bail — Application for — Duty of court hearing application — Court's power to call witnesses — Duty of judicial officer to order prosecutor or accused to place sufficient information before court — Criminal Procedure Act 51 of 1977, ss 60(2)*(b)* and 60(3).

In an appeal against the refusal by a magistrate to admit the appellant to bail it was argued that the magistrate had erred in calling two witnesses, one from the Department of Home Affairs and the other from the Department of Correctional Services. It was contended that in doing so she had overstepped her powers in terms of s 60 of the Criminal Procedure Act 51 of 1977.
Held, that s 60(3) read together with s 60(2)*(b)* provided that it was the duty of the judicial officer to order the prosecutor or the accused to place sufficient information before the court so that it could be in a position to make a just decision. Judicial officers were not empowered, of their own accord, to call witnesses so as to place such information before them. In the circumstances of the case it was clear that the witnesses were not merely called to clarify issues, but also to add more flesh to the skeleton that constituted the evidence of the state or that of the investigating officer. That evidence had to be ignored. (See [20] – [22].]
Held, further, that, if such evidence were excluded, the refusal to grant the appellant bail had to be replaced with an order that he should be admitted to bail. Bail in the amount of R2000 was set. (See [39].)

S v MENTOOR 2020 (1) SACR 104 (WCC)

Trial — Record — Lost, destroyed or incomplete — Procedure to be followed in reconstruction — Notes made by magistrate required to be certified by magistrate as correct — Rules of the Magistrates' Courts, rule 66(5).
Trial — Record — Lost, destroyed or incomplete — Procedure to be followed in reconstruction — Confirmation of reconstructed record not to be done in informal manner — Magistrates' Courts Act 32 of 1944, s 12.
Plea — Plea of guilty — Questioning in terms of s 112(1)*(b)* of Criminal Procedure Act 51 of 1977 — Record partially incomplete and magistrate questioning accused again — Procedure irregular unless earlier proceedings had been set aside.
Sentence — Correctional supervision — Imprisonment from which accused may be released and placed under correctional supervision at discretion of Commissioner of Correctional Services, s 276(1)*(i)* of Criminal Procedure Act 51 of 1977 — Court not entitled to impose ancillary restriction that accused not be released before undergoing rehabilitation.

In a matter that came before the High Court on review the accused had been convicted in a magistrates' court on 14 February 2019 on a charge of housebreaking with the intent to steal and theft, after he was questioned in terms of s 112(1)*(b)* of the Criminal Procedure Act 51 of 1977. The matter was then postponed for the compilation of a correctional and probation officers' reports. When the matter resumed on 30 May 2019 the magistrate noted that the record of the earlier proceedings was incomplete and proceeded with a 'reconstruction' of the record by 'informally' reading to the accused the reconstructed proceedings and then questioning the accused again in terms of the provisions of s 112(1)*(b)*. During such questioning the accused, unlike in the earlier proceedings, denied knowledge of the unlawfulness of his action and claimed to have been under the influence of drugs at the time. The court nonetheless convicted the accused again and sentenced him to 24 months' imprisonment in terms of s 276(1)*(i)* of the CPA, with an additional order that he was only to be considered for release once he had completed the drug-rehabilitation programme. On review,

Held, that the so-called reconstruction of the proceedings did not comply with the provisions of rule 66(5) of the Rules of the Magistrates' Courts, which required that any notes made by the magistrate during the course of the proceedings, that were used in the reconstruction of the record, were required to be certified by the magistrate as correct. Furthermore, all appearances of an accused person in court had to take place in terms of the provisions of the Criminal Procedure Act 51 of 1977 (the CPA) and s 12 of the Magistrates' Courts Act 32 of 1944, and nothing could be done in any informal manner, including the confirmation of the reconstructed record. (See [18] – [19].)
Held, further, that it was irregular for the magistrate to question the accused on the same charge on more than one occasion in terms of the provisions of s 112(1)*(b)* of the CPA unless the earlier proceedings had been set aside on review or appeal by the High Court. When the accused denied that he knew that what he was doing was wrong, the magistrate ought to have stopped the proceedings and referred the matter for review in terms of the provisions of s 304A of the CPA. (See [20] – [21].)
Held, further, that the ancillary order to the effect that the accused should not be released before he underwent rehabilitation, was an incompetent order, as it interfered with the proper exercise of the functions of the Commissioner of Correctional Services. (See [22].) The conviction and sentence were set aside.

ALL SA JANUARY 2020

Africa Cash and Carry (Pty) Limited v Commissioner for the South African Revenue Service[2020] 1 All SA 1 (SCA)

Tax – Income tax – Value-added tax – Under declarations – Revised tax assessments – Powers of South African Revenue Services (SARS) to alter assessment in terms of section 129(2)(b) of the Tax Administration Act 28 of 2011 – Where methodology used by SARS is reasonable, it has the power to alter the amounts in estimated assessments issued by it to amounts supported by the evidence adduced before it.

The appellant (the “taxpayer”) operated a cash and carry business from which it generated substantial amounts of cash. In 2011, the respondent (“SARS”) raised estimated assessments (the “assessments”) in relation to the taxpayer in respect of additional income tax and value added tax (“VAT”), penalties and interest for the financial years 2003 to 2009, totalling some R600 million. The taxpayer had fraudulently suppressed its sales figures for those years which resulted in its income tax and VAT liability being under-declared. It objected to the assessments, and when the objections were disallowed, appealed to the Tax Court.

The Tax Court dismissed the appeal and ordered that the additional tax per the assessments be altered in terms of section 129(2)(b) of the Tax Administration Act 28 of 2011.

The present appeal was against those parts of the judgement of the Tax Court dismissing the taxpayer’s point that SARS was bound by the assessments; finding that the assessments were reasonable; concluding that the Tax Court had jurisdiction in terms of section 129(2)(b) of the Act to alter the assessments and grant the order it did; and concluding that the interest in terms of section 89*quat* of the Income Tax Act 58 of 1962 should not be remitted altogether.

Held – The Tax Court’s finding that the use of the methodology employed by SARS was reasonable and that it had the power to alter the amounts in the estimated

assessments issued by SARS, to amounts supported by the evidence adduced before it was correct. The criticisms by the taxpayer's expert witnesses, amongst others, failed to take into account that there was a systematic plan in which the taxpayer suppressed its sales and manipulated its records. The taxpayer had elected not to make a full disclosure of its activities in that regard. There was thus no basis to set aside the methodology employed by SARS as being not reasonable.

Finding no basis to interfere with the order granted by the Tax Court, the present Court dismissed the appeal.

Mbungela and another v Mkabi and others [2020] 1 All SA 42 (SCA)

Family law and Persons – Marriage – Customary law marriage – Essential requirements – For a customary marriage entered into after the commencement of the Recognition of Customary Marriages Act 120 of 1998 to be valid, the prospective spouses must both be above the age of 18 years; must both consent to be married to each other under customary law; and the marriage must be negotiated and entered into or celebrated in accordance with customary law – Whether non-observance of the bridal transfer ceremony invalidates a customary marriage – Handing over of a bride is an important but not necessarily a key a determinant of a valid customary marriage.

In the court *a quo*, the first respondent ("Mr Mkabi") sought an order declaring that he and another (the "deceased") had concluded a valid customary marriage, and further orders compelling the second respondent, the Minister of Home Affairs, to register and issue a certificate of registration of that customary marriage. He also sued the first appellant as the deceased's elder brother and head of her family, the second appellant, as the deceased's daughter and executrix of her estate and the third appellant who was the Master of the High Court who issued the second appellant's letter of executorship.

The appellants contended that Mr Mkabi and the deceased did not conclude a customary marriage because the deceased was not handed over to the Mkabi family and *lobola* was not paid in full with the result that not all the requirements of section 3(1)(b) of the Recognition of Customary Marriages Act 120 of 1998 were met.

Held – Section 3(1) of the Act sets out the requirements for a valid customary marriage. For a customary marriage entered into after the commencement of the Act to be valid, the prospective spouses must both be above the age of 18 years; must both consent to be married to each other under customary law; and the marriage must be negotiated and entered into or celebrated in accordance with customary law. The legislature left it open for the various traditional communities to give content to section 3(1)(b) in accordance with their lived experiences.

The question whether non-observance of the bridal transfer ceremony invalidates a customary marriage has been decisively answered by our courts which have held that the purpose of the ceremony of the handing over of a bride is to mark the beginning of a couple's customary marriage and introduce the bride to the groom's family. It is an important but not necessarily a key a determinant of a valid customary marriage.

Satisfied that all the essential requirements for a valid customary marriage were met in this case, the Court dismissed the appeal with costs.

Member of the Executive Council for the Department of Co-operative Governance and Traditional Affairs v Maphanga [2020] 1 All SA 52 (SCA)

Litigation – Multiplicity of proceedings – Alleged abuse of court processes – Vexatious litigation – Section 2(1)(b) of the Vexatious Proceedings Act 3 of 1956 requires applicant seeking its protection to establish that the respondent has in the past instituted legal proceedings in a court against the applicant, or any other person or persons persistently and without reasonable cause, and that further litigation has been brought or is reasonably contemplated – Court unable to find that there was a persistent or repetitive institution of legal proceedings in this matter.

The High Court's dismissal of the bulk of relief sought in an application launched by the Member of the Executive Council for the Department of Co-operative Governance and Traditional Affairs, KwaZulu-Natal ("MEC"), against the respondent led to the present appeal. The main relief in the MEC's application was sought under section 2(1)(b) of the Vexatious Proceedings Act 3 of 1956 (the "Act") alternatively, the common law. The court *a quo* was not satisfied that the MEC had met the requirements of section 2(1)(b) of the Act or the common law.

On appeal, the gist of the MEC's case was that the court *a quo* had overlooked, for purposes of section 2(1)(b), that by March 2017, the respondent had instituted five legal proceedings, including the disputes referred to the bargaining council, against the MEC and misconstrued the powers and discretion conferred on courts by the common law as codified in section 173 of the Constitution to address abuses of court process. During the hearing of the appeal, however, reliance on section 2(1)(b) of the Act was abandoned and the case was solely based on the Court's inherent jurisdiction to determine its own process under common law as codified in section 173 of the Constitution.

Held – While the MEC could indeed not rely on section 2(1)(b), that did not entitle her to directly invoke the constitutional provisions to enforce her rights without first relying on the Act, which was enacted to address the common law limits regarding the Court's jurisdiction to grant curtailment orders against vexatious proceedings. An applicant who seeks the protection of the provisions must establish, first, that the respondent has in the past instituted legal proceedings in a court against her, or any other person or persons persistently and without reasonable cause. Secondly, she must prove that further litigation has been brought against her or is reasonably contemplated. The question was whether the procedures employed by the respondent, flowing from his dissatisfaction with the manner in which the Department treated him, constituted legal proceedings instituted in a court within the meaning of section 2(1)(b) of the Act. If they were such legal proceedings, it then had to be determined whether they were persistent and without any reasonable ground. The Court found that it could not be found that there was a persistent or repetitive institution of legal proceedings in this matter. It could also not be said that the respondent had approached the courts without any reasonable grounds.

Finding no grounds on which to uphold the relief sought by the MEC, the Court dismissed the appeal.

Murray NO and others v African Global Holdings (Pty) Ltd and others [2020] 1 All SA 64 (SCA)

Winding up of companies – Voluntary winding up in terms of section 351 of the Companies Act 61 of 1973 – Whether applicable legislation for the purpose of winding-up of companies was the Companies Act 71 of 2008, more particularly sections 79 and 80 thereof, and not the Companies Act 61 of 1973 – Applicability of sections 79 and 80 of Companies Act 71 of 2008 depending on whether companies were solvent or not – Evidence establishing that the companies were commercially insolvent at the time that the resolutions for their voluntary winding-up were taken, with result that their voluntary winding-up was not open to challenge.

The first respondent ("Holdings") was the holding company of a group of companies (the "Group") formerly known as the Bosasa Group.

After evidence was given at a judicial commission of enquiry into allegations of State capture, corruption and fraud in the public sector concerning the relationship between senior political figures and the Group, two banks withdrew banking facilities from some of the Group's companies. The Group's attempts to find other banks to provide it with banking facilities failed, which negatively impacted on its continued business operations.

Acting on legal advice, the Group embarked on the voluntary winding up of the relevant entity ("Operations"). The High Court appointed the appellants as liquidators.

In February 2019, Holdings was advised that the process of voluntary winding-up was defective. It approached the High Court for orders directed at having the resolutions for voluntary winding-up declared null and void and of no force and effect from inception. Consequent upon that they sought an order that the appointment of the liquidators was likewise null and void and of no force and effect and compelling the liquidators to restore control of the companies to their directors.

The present appeal was against the granting of the relief sought.

Held – The resolutions placing Operations and its subsidiaries under a creditors voluntary winding-up were expressed as being taken in terms of section 351 of the Companies Act 61 of 1973 which formed part of Chapter 14 of the 1973 Act dealing with the winding-up of companies. That chapter continued to apply under the Companies Act 71 of 2008. In terms of section 343 of the 1973 Act, a company may still be wound up either by the court or voluntarily, and in the latter event the winding-up will be either a creditors' or a members' voluntary winding-up. The exception to the continued application of the 1973 Act arises under sections 79 and 80 of the 2008 Act, which provide that in the case of a solvent company it can be wound-up either voluntarily or by way of a winding-up and liquidation by court order. Holdings' primary case was that Operations, and all the subsidiaries, were solvent companies and thus could not be voluntarily wound-up in terms of section 351 of the 1973 Act. The basis of the argument was that the applicable legislation for the purpose of winding-up the companies was the 2008 Act, more particularly sections 79 and 80 thereof, and not the 1973 Act.

The court rejected a contention that the appointment of the liquidators by the Deputy Master of the High Court, Pretoria was invalid because the companies' were based in Johannesburg. The court held that the Master in Pretoria had jurisdiction over the

whole of Gauteng and the Master's jurisdiction was not excluded merely because there was a Master in Johannesburg where the companies' offices were based.

The main question to be determined was whether the companies were solvent. The Court found that Operations and the other companies in the Group were commercially insolvent at the time that the resolutions for their voluntary winding-up were taken. That meant that Holdings should not have been granted any relief by the High Court and the application should have been dismissed.

The appeal was upheld with costs.

AF v MF [2020] 1 All SA 79 (WCC)

Divorce – Interim maintenance – Contribution to costs – Whether, under rule 43, an applicant is entitled to recover a contribution towards past costs – Court entitled to take into account legal costs already incurred, including debts incurred to fund legal costs, in the assessment of an appropriate contribution to costs in terms of rule 43.

Family Law and Persons – Divorce – Interim maintenance payable to spouse – Spouse claiming maintenance entitled to support on a scale commensurate with the social position, lifestyle and financial resources of the parties.

The applicant was the plaintiff and the respondent the defendant in a pending divorce action. The present application was for relief *pendente lite* in terms of rule 43 of the Uniform Rules of Court, requiring a contribution of R750 000 by the respondent towards applicant's costs in the divorce action and an increase in the cash maintenance which he paid.

The parties were married out of community of property in 1996, with the incorporation of the accrual system. They had two children, a 21-year-old daughter undergoing military training in Israel, and a 17-year-old son in grade eleven. Both children were still dependent on their parents for financial support.

In July 2019 the respondent filed a special plea in the divorce action, alleging that the divorce action was settled in terms of an agreement concluded between the parties on or about 29 March 2018. He then launched an application for the separation of that issue in terms of rule 33(4) of the Uniform Rules.

Held – The evidence established that the respondent earned extremely well and had considerable assets. The applicant on the other hand did not own any immovable property and had modest assets otherwise. On the papers, it was clear that the applicant had no means to fund her case in the divorce action, and respondent was well able to afford to pay her reasonable legal costs.

As the success of the issue separated for hearing would impact on the need for a contribution to costs, the applicant would have to bring a further application in terms of rule 43 should it become necessary after the adjudication of the separated issue. It then had to be decided whether the applicant was entitled under rule 43 to recover a contribution towards her past costs. Examining case law, the Court concluded that it was entitled to take into account legal costs already incurred, including debts incurred to fund legal costs, in the assessment of an appropriate contribution to costs in terms of rule 43.

In assessing the claim for an increase in the monthly cash maintenance paid by the respondent, the Court considered the expenses which the respondent was already

paying towards the applicant and the children. It held that the applicant was entitled to support on a scale commensurate with the social position, lifestyle and financial resources of the parties. It would be reasonable to maintain her in a position similar to that which she would ordinarily be accustomed while she was living together with the husband. While the applicant sought to have the cash maintenance increased from R32 000 to R42 500, the Court granted an increase to R38 500. The Court also ordered monthly payments in the amount of R6000 per month in respect of holiday costs as the applicant was entitled to maintain the standard of living to which she had been accustomed.

City of Tshwane Metropolitan Municipality v Altech Radio Holdings (Pty) Limited and others [2020] 1 All SA 99 (GP)

Constitutional and Administrative Law – Procurement – Award of tender – Judicial review – Organ of State seeking review of own decision based on its failure to act in accordance with the principle of legality and that its decision was unlawful as it was inconsistent with the applicable legal provisions – Even though decision to award tender constitutes administrative action, only a private entity and not an Organ of State may seek judicial review of its own decision – Remedy of the State lies in reviews based on rationality or legality.

The applicant municipality ("COT") awarded a broadband network tender to the first respondent ("ARH") in June 2015. It emerged that the cost of the project exceeded the COT's budget, and COT's mayoral committee decided that the shortfall be met through budget prioritisation, which is the process through which funds are redirected from other departments which are unlikely to exhaust their budgets for the year.

Section 217 of the Constitution requires that any tender process by any sphere of government be conducted in a manner which is fair, transparent, competitive and cost-effective.

In the present application, the review of the award of the tender was sought by the COT. Its case was based on its failure to act in accordance with the principle of legality and that its decision was unlawful as it was inconsistent with the applicable legal provisions.

Held – Even though the decision to award a tender constitutes administrative action, only a private entity and not an Organ of State may seek judicial review of its own decision. The State is not a bearer of rights and cannot avail itself of the right to administrative justice safeguarded in section 33 of the Constitution, or of the Promotion of Administrative Justice Act 3 of 2000. The remedy of the State thus lies in reviews based on rationality or legality.

The various irregularities involved in the tender process were detailed by the court. Those included non-compliance with the provisions of the Local Government: Municipal Finance Management Act 56 of 2003 and the Preferential Procurement Policy Framework Act 5 of 2000.

The delay in seeking review was raised by the respondents as one of the objections to the application. The Court found that the reasons for the delay, relating primarily to a change in political administration within the COT was an adequate explanation. With there being strong prospects of success on the merits, the interests of justice favoured condoning the delay.

The cumulative effect of all the irregularities in the tender process was that the award of the tender was rendered unlawful. The award of the tender and the consequent contracts were set aside.

DE and another v CE and others [2020] 1 All SA 123 (WCC)

Sale agreement – Cancellation of – Claim for return of member's interest in close corporation – Where agreement was validly cancelled, parties cancelling entitled to claim that which they had performed in terms of the agreement, as well as any damages that they might have suffered as a consequence of other party's breach.

Property – Sale agreement – Cancellation of – Claim for return of member's interest in close corporation which had subsequently been the subject of a donation – Privity of contract – Revocation of donation on grounds of ingratitude is a remedy available only to the person making the donation and cancelling parties' sole remedy lay against such donor.

At the centre of the present litigation was residential property owned by the third respondent (the "CC"). Membership of the CC was as follows. The first and second applicants (the "parents") each held 40% of the members' interest while the first respondent, their son, ("C") held 20%.

In July 2016, the parents decided to give complete control of the CC to C so that he might acquire exclusive beneficial ownership and use of the property. At that time C was living in the property with his wife, the second respondent ("M"). The parents concluded a written document entitled "Agreement of Sale" (the "contract") with C on 17 July 2016. The parents held the view that in terms of the contract they sold the property to C for R2,1 million.

Prior to their marriage C and M concluded an antenuptial contract ("ANC") in terms of which they were married out of community of property with application of the accrual system. The declared value of each spouse's estate at the commencement of the marriage was recorded as nil. The ANC contained a provision that at the dissolution of the marriage and in the event of them having acquired a communal dwelling during their marriage, M would be entitled to reside unencumbered in the dwelling together with her children, until all her children reached the age of majority. In May 2017, C transferred 50% of the members' interest in the CC to M which she said was a donation intended to represent their joint ownership of the house and its contents.

In 2017, the marriage between C and M began to unravel.

In October 2017, the parents sent a letter of demand to both C and M advising that C had breached the sale agreement with his parents as a result of which an amount of R2 060 000 was payable to the parents. M's response was that she was not a party to the contract with the parents, that she was not in breach thereof and that she was accordingly not obliged to return her 50% interest in the CC to the parents.

The present application by the parents was for confirmation that the sale agreement was cancelled; that C's purported 50% donation to M was invalid; and for M's member's interest in the CC to be relinquished.

Held – The evidence established that the agreement was intended to be a transfer of the parents' members' interest in the CC to C. The Alienation of Land Act 68 of

1981 did not apply and the agreement was valid and binding as between the parents and C.

As the agreement was validly cancelled, the parents were entitled to claim from C that which they had performed in terms of the agreement, as well as any damages that they might have suffered as a consequence of his breach.

It then had to be decided what was to be done about M's member's interest as had been donated to her by C. As there was no privity of contract between the parents and M, the issue to be determined was whether M's acquisition of her 50% members' interest in the CC was based on a *iusta causa*. The Court found that M had established a valid *iusta causa* in the form of a donation *inter vivos* for ownership of her member's interest.

The last contention of the applicants was that, assuming that the donation was not executory in nature, it was capable of being revoked by C on the grounds of gross ingratitude. The Court was unable to grant relief in that regard as revocation on the basis of ingratitude would be a remedy available against M by C. The applicant's sole remedy lay against C. The relief sought was granted as against C.

Du Toit NO and others v Steinhoff International Holdings (Pty) Limited and others and a related matter [2020] 1 All SA 142 (WCC)

Pleadings – Exceptions – Averments that particulars of claim were vague and embarrassing and that some of the claims made by the plaintiffs lacked the necessary averments to sustain the various causes of action – Requirements for pleadings – Rule 18(4) of the Uniform Rules of Court – Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies – The particulars of claim should be so phrased that the issues are clearly identified and the defendant is placed in a position to reasonably and fairly plead thereto – An exception to a pleading on the ground that it is vague and embarrassing involves a two-fold consideration: firstly, whether the pleading lacks particularity to the extent that it is vague and, secondly, whether the vagueness causes embarrassment of such a nature that the excipient is prejudiced – Where court unable to find that particulars of claim meaningless or capable of more than one meaning, exceptions were dismissed.

Two separate actions were instituted by the plaintiffs. In the first claim (the "Steinhoff action"), the plaintiffs sought damages arising from alleged misrepresentations made by the second defendant ("Jooste") and third defendant ("La Grange"). The cause of action was based on fraudulent misrepresentation and on the alleged breach of various provisions of the Companies Act 71 of 2008.

In the second action, the plaintiffs' claimed from Mr Jooste, as the only defendant, damages arising from the same set of circumstances and on the same causes of action as the Steinhoff action, together with an additional cause of action based on a breach of his fiduciary duties.

In both actions, the plaintiffs claimed that but for the unlawful conduct of the defendants, the plaintiffs would not have swopped their shares in the PSG Group for shares in the SIH-SA that plaintiffs contended were in reality almost worthless. They claimed as damages the difference in value between the two sets of shares.

The present interlocutory application concerned two exceptions – both by Jooste in the Steinhoff action and in the second action. It was contended that the particulars of

claim in both of the actions were vague and embarrassing and that some of the claims made by the plaintiffs lacked the necessary averments to sustain the various causes of action.

Held – In terms of rule 18(4) of the Uniform Rules of Court, every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for the claim, defence, or answer to any pleading, with sufficient particularity to enable the opposite party to reply thereto. The particulars of claim should be so phrased that the issues are clearly identified and the defendant is placed in a position to reasonably and fairly plead thereto. If the requisite standard required by rule 18(4) of the Uniform Rules is not met, the defendant has an option of excepting to the particulars of claim. For an exception that a pleading is vague and embarrassing to be upheld, the excipient has a duty to persuade the court that upon every interpretation of a pleading it can reasonably bear, particularly the document upon which it is based, the pleading does not disclose a cause of action or defence. An exception to a pleading on the ground that it is vague and embarrassing involves a two-fold consideration: firstly, whether the pleading lacks particularity to the extent that it is vague and, secondly, whether the vagueness causes embarrassment of such a nature that the excipient is prejudiced.

In casu, the exceptions did not establish vagueness or embarrassment in the sense of rendering the particulars of claim meaningless or capable of more than one meaning and, accordingly, no prejudice was demonstrated. The exceptions were dismissed.

FNB Fiduciary (Pty) Ltd NO v Anappa and others [2020] 1 All SA 163 (KZD)

Family Law and Persons – Marriage in community of property – Legal effect – All assets, including the right of occupation of premises by one spouse, and liabilities, whether subsisting at the time of the marriage or acquired or incurred during the course of the marriage, are pooled to form a single joint estate which is held by both spouses in co-ownership, in equal undivided shares.

Property – Immovable property – Abstract theory of transfer in respect of the passing of ownership in the case of immovable property is effected by the registration of transfer in the deeds office coupled with the so-called real agreement – Validity of transfer of ownership is not dependant on the validity of the underlying transaction, and a valid transfer of ownership can occur.

Wills, Trusts and Estates – Executor of deceased estate – Validity of appointment – Where executrix was appointed contrary to provisions of testator's will due to Master and other relevant parties being unaware of existence of will, appointment of executrix and all acts done pursuant thereto would be valid until she surrendered her letters of executorship.

At issue in this matter was the validity of the fifth respondent's appointment as executrix and the disposal by her of the member's interest in a close corporation ("CC"). The applicant sought an interim interdict preventing the respondents (except for the sixth respondent) from dealing with, alienating or encumbering the fifth respondent's member's interest, alternatively, the assets or properties of the CC, and directing all income and rentals receivable in relation to such assets to be paid to the applicant's attorneys to be held in trust. The interim interdict was granted by consent.

In the present proceedings, the issues for determination were whether the appointment of the fifth respondent by the sixth respondent (the "Master") as executrix was void *ab initio* and fell to be set aside; or where there was an irregularity in the appointment of an executrix and a contract is concluded by her pursuant to such appointment, whether such contract is void *ab initio*; and if not, then despite the irregularity in the appointment whether a contract concluded by her can be set aside subsequent to performance. The issues related to the disposition of the member's interest by the fifth respondent to the first to fourth respondents.

The fifth respondent's husband (the "deceased") died in September 2017. On 12 October 2012, he executed a will in terms of which the applicant was appointed as the executor of his estate. after his death, the fifth respondent, believing that the deceased had no will at the time, successfully applied to the Master to be appointed as executrix of the deceased's estate. She also applied to transfer to herself the deceased's entire member's interest in the CC. She thus acquired the entire member's interest in the CC, which she sold to the first respondent who in turn sold the member's interest to the second to fourth respondents. When the applicant heard of the death of the deceased, it informed the fifth respondent of the existence of the will, and she surrendered the letters of executorship issued by the Master in her name. The applicant was then appointed as executor.

Held – As the Master and all persons concerned laboured under the mistake that the deceased did not leave a will, the fifth respondent's appointment and all acts done pursuant thereto would be valid until she surrendered her letters of executorship.

The court then looked at the legal effect of a marriage in community of property. Essentially, all assets, including the right of occupation of premises by one spouse, and liabilities, whether subsisting at the time of the marriage or acquired or incurred during the course of the marriage, are pooled to form a single joint estate. The joint estate is held by both spouses in co-ownership, in equal undivided shares.

Once the fifth respondent was appointed as executrix of the deceased's estate, she was entitled to transfer the member's interest.

The abstract theory of transfer applies to both the transfer of movable and immovable property. The abstract theory of transfer in respect of the passing of ownership in the case of immovable property is effected by the registration of transfer in the deeds office coupled with the so-called real agreement. The validity of transfer of ownership is not dependant on the validity of the underlying transaction, and a valid transfer of ownership can occur. The first to fourth respondents were thus *bona fide* purchasers of the member's interest, and the relief sought by the applicant could not be granted.

The application was dismissed with costs.

Gumede v Minister of Safety and Security [2020] 1 All SA 188 (KZD)

Personal Injury/Delict – Claim for damage – Alleged unlawful arrest and detention and assault by police – Onus of proof – Once the defendant admits an arrest or a plaintiff proves an arrest, then the onus to prove that an arrest was lawful rests on the arresting officer – Court considering whether plaintiff had been deprived of his freedom in any way with the intention to assume control over his movements – Where plaintiff had

voluntarily cooperated with the police, it could not be found that he had been arrested or detained, and his claim was dismissed.

The plaintiff was employed by a security firm ("SBV") as a protection officer in the cash-in-transit department. In September 2006, he was the victim of an armed robbery whilst seated in the driver's seat of an SBV motor vehicle near a shopping centre. During the course of the armed robbery, the SBV vehicle was hijacked with the plaintiff inside and it was subsequently abandoned. Cash in the sum of approximately R3,9 million was stolen. Although the plaintiff's employer suspected him of being involved in the robbery, he was never charged criminally for the offence.

In the present action, the plaintiff sought damages from the defendant arising from his alleged unlawful arrest, detention and assault by members of the South African Police Services ("SAPS"). The defendant denied that the plaintiff had been arrested and assaulted.

Held – The plaintiff bore the onus of proving his claim.

Section 39 of the Criminal Procedure Act 51 of 1977 deals with the manner and the effect of an arrest. An arrest involves the restriction of an individual's freedom. Whether or not an arrest is lawful is closely connected to the facts of each matter. Once the defendant admits an arrest or a plaintiff proves an arrest, then the onus to prove that an arrest was lawful rests on the arresting officer. The purpose of an arrest is to ensure that a person is taken to court. An arrest or a detention will be unlawful if the purpose thereof is to force or compel a suspect to make a warning statement and not to secure his attendance in court. The question for determination in this matter in light of the defendant's plea and defence was whether the plaintiff had been deprived of his freedom in any way with the intention to assume control over his movements. Once the plaintiff established that he had been, then the onus would shift to the defendant to show that the deprivation of freedom was not arbitrary and was justified. There appeared to be an irreconcilable factual dispute based on the evidence tendered by the parties. However, the Court established that the plaintiff had voluntarily cooperated with the police and had not been arrested or detained. He also failed to prove that he was assaulted by members of the police. His claim was dismissed with costs.

Jankielsohn v Booysen and others [2020] 1 All SA 214 (FB)

Personal Injury/Delict – Claim for damages – Action based on allegedly defamatory statements published on social media – Defamation is the wrongful and intentional publication of a defamatory statement concerning a plaintiff — Once the plaintiff establishes essential elements, a presumption is created that the statement was unlawful and intentional and it is for the defendant to rebut that – Objective test is applied to determine whether the reputation of the plaintiff has been infringed on a balance of probabilities – Statement published recklessly and actuated by malice with sole purpose being a personal attack on the plaintiff, confirmed as defamatory.

Suing the defendants for damages arising from defamation, the plaintiff alleged that the first and second defendants (respectively the provincial secretary and provincial spokesperson of the African National Congress Youth League for the Free State Province) had jointly issued a statement on behalf of the Youth League, which statement third defendant, a member of the Free State Provincial Legislature, had shared and published on Facebook. The plaintiff alleged that the defendants had

defamed him by using words which were intended and understood by readers of the publications to mean that plaintiff was a racist, a white supremacist, a clown and irrelevant in the political sphere.

Held – Defamation is the wrongful and intentional publication of a defamatory statement concerning a plaintiff. Once the plaintiff establishes those elements, a presumption is created that the statement was unlawful and intentional and it is for the defendant to rebut that. Several common law defences such as truth and public interest and fair comment may be raised. A full onus rests on the defendant to rebut the presumption created and it must be discharged on a preponderance of probabilities. Facts must be pleaded and proved that will be sufficient to establish the defence.

The law of defamation lies at the intersection of freedom of speech and the protection of reputation or good name. In the context of the *actio injuriarum*, our common law has separated the causes of action for claims for injuries to reputation (*fama*) and *dignitas*.

Although it has been held that the limits of acceptable criticism are wider as regards a politician than a private individual, no one has licence to publish untrue statements about politicians, who also have the right to protect their dignity and reputation.

An objective test is applied to determine whether the reputation of the plaintiff has been infringed on a balance of probabilities.

The impugned statement in this case contained multiple references to the plaintiff being a racist. The statement was published recklessly and with indifference as to whether it was true or false. It was actuated by malice and the sole purpose was a personal attack on the plaintiff. The Court found that the plaintiff had made out a case against the defendants, and that the defences raised were without merit. It awarded damages in the amount of R300 000, plus interest.

National Director of Public Prosecutions v Van Rensburg [2020] 1 All SA 231 (WCC)

Criminal law and procedure – Organised crime – Confiscation order – Section 18 of the Prevention of Organised Crime Act 121 of 1998 – Purpose of confiscation order is to deprive offenders of the proceeds of their criminal conduct – Court unable to grant confiscation order where certain facts had to first be clarified for State to have discharged onus of proof on balance of probabilities.

Arising from his involvement in the illegal exporting of abalone, the defendant was convicted of a series of offences and was sentenced to an effective 8 years' imprisonment. His applications for leave to appeal his conviction and sentence were refused by the present Court and the Supreme Court of Appeal.

During sentencing proceedings, the applicant launched an application in terms of section 18 of the Prevention of Organised Crime Act 121 of 1998 for a confiscation order in respect of certain of the defendant's property which was alleged to be the proceeds of crime.

Held – The purpose of an application such as this, which resorts under Chapter 5 of the Act, is to procure a civil judgment against a convicted person for payment of a monetary award in favour of the State. It is not an application for the preservation and

surrender of any particular asset of the convicted person as is contemplated in Chapter 6 of the Act. The purpose of such a confiscation order is to deprive offenders of the proceeds of their criminal conduct. Its purposes are to punish convicted offenders, to deter the commission of further offences and to reduce the profits available to fund further criminal enterprises.

In terms of sections 13(1) and (5) of the Act, proceedings such as these are of a civil nature and the State is required to establish its application on a balance of probabilities while section 18(1) expressly prescribes that the nature of the proceedings is an enquiry.

After considering the evidence adduced before it, the Court decided that there were certain facts which had to be clarified before the court could come to a proper conclusion in the application for confiscation. The court's powers in an enquiry such as this are wide enough to permit the court to issue directives with which the parties were required to comply before a final determination on the confiscation application could be arrived at. The Court therefore set out a list of directives to be followed before final determination of the matter.

Phillips v Grobler and others [2020] 1 All SA 253 (WCC)

Property – Rights of occupation – Appeal against eviction order – Where owner of property became aware of the life-right by the occupier to reside in the property, prior to the transfer of the property into his name, the right to reside could only be terminated on reasonable notice – In seeking eviction before dealing with the right afforded to the occupier and placing her in the position of an unlawful occupier, property owner acting prematurely.

As occupier of residential property owned by the first respondent, the appellant appealed against an eviction order granted against her. She alleged that her rights to reside on the property had been granted to her by the former owner of a farm that previously incorporated the property.

It was undisputed that a previous owner had granted to the appellant and her husband (since deceased), the right to occupy the property for the duration of their lifetime. That owner was liquidated and the first respondent purchased the property at a liquidation auction.

Held – A dispute of fact referred to oral evidence was primarily about whether knowledge of the alleged "life-right" by the first respondent, was acquired before or after the auction was held and also whether that knowledge was acquired before or after registration of transfer into the name of the first respondent. It emerged during argument, that the first respondent became aware of the life-right by the appellant to reside in the property, prior to the transfer of the property into his name. As such, the right to reside could only be terminated on reasonable notice. The occupation of the property by the appellant was a "lawful" occupation, pending the lawful termination thereof and the lapse of a reasonable time period as set out in the appropriate notice.

The first respondent launched the eviction application before a right to evict had accrued to him. He had no right in law to launch the proceedings in the form he did before dealing in a meaningful and precise manner, with the right afforded to the appellant and placing her in the position of an unlawful occupier.

A new issue raised regarding the applicability of the Extension of Security of Tenure Act 62 of 1997 did not avail the first respondent.

The Court concluded that it was and is not just and equitable to evict the appellant taking into account her right to occupy the property for the duration of her lifetime. The appeal was upheld and the eviction order set aside.

Pro-Khaya Constructions CC v Strata Civils and others [2020] 1 All SA 267 (ECG)

Arbitration agreement – Application to declare of no effect – Arbitration Act 42 of 1965, section 3(2)(c) – A court may at any time on the application of any party to an arbitration agreement, on good cause shown, order that the arbitration agreement shall cease to have effect with reference to any dispute referred – Court's discretion must be judicially exercised and there must be "good cause" before a court will release a party to an arbitration agreement and refer that to court – In absence of any misconduct or irregularity, court refusing to set aside arbitration agreements.

In terms of section 3(2)(c) of the Arbitration Act 42 of 1965, the appellant had sought to have two arbitration agreements which it had entered into respectively with the first and third respondents declared to have ceased to have any effect. The dismissal of the application resulted in the present appeal.

Held – Section 3(2)(c) of the Act provides that the court may at any time on the application of any party to an arbitration agreement, on good cause shown, order that the arbitration agreement shall cease to have effect with reference to any dispute referred. The court's discretion must be judicially exercised and clearly there must be "good cause" before a court will release a party to an arbitration agreement and refer that to court.

Generally, applications are not designed to resolve factual disputes between the parties and are decided on common cause facts. Probabilities and onus issues are not amenable to being determined in motion proceedings. In this matter there were no relevant irresoluble factual disputes which were real and genuine.

A party will not be held to an arbitration agreement that will result in an unfair or unreasonable outcome. The courts will however hesitate to set aside an arbitration agreement absent misconduct or irregularity (not present in this case) unless a truly compelling reason exists. Finding no merit in the appeal, the Court dismissed same.

Wilms v S [2020] 1 All SA 286 (WCC)

Criminal law and procedure – Charges – Alleged duplication of charges in respect of crimen injuria and contravention of section 27(1)(a)(ii) of the Films and Publications Act 65 of 1996 – Insofar as requirements and elements of the two offences are distinct, trial court correctly convicting appellant on two separate offences for creating videos of complainants.

Criminal law and procedure – Child pornography – Appeal against conviction and sentence – Nature of offence of child pornography – Videos created by appellant found to be in contravention of section 24B(1)(b) of the Films and Publications Act 65 of 1996 where predominant purpose was the stimulation of erotic feelings in certain persons.

The appellant was charged with contraventions of section 24B(1)(b) of the Films and Publications Act 65 of 1996 for having allegedly created or produced child pornography, and with contraventions of section 24B(1) (a) of the Act in that he was allegedly in possession of child pornography. He was convicted on counts 1, 4 and 7 of contravening section 27(1)(a)(ii) of the Act (as amended by Act 18 of 2004), which was the provision that was in operation during the commission of the offence in December 2007. That was after the regional magistrate amended the charge sheet when it was realised that the provisions on which the appellant was originally charged ie contravention of section 24B(1)(b) to which the appellant pleaded was not yet in operation at the time when the offence was committed. Section 24B(1)(b) only came into operation on 14 March 2010.

The present appeal was against the three convictions referred to above. It was submitted that the State had failed to prove the commission of the offences in question.

Held – The nature and content of the videos created by the appellant were such that the Court was convinced that the predominant purpose was the stimulation of erotic feelings in certain persons, such as the appellant. The conclusion was that the appellant intended to create child pornography as defined in the Act.

The Court also rejected the argument that there had been a duplication of charges. There were two offences involved, viz *crimen injuria* and contravention of section 27(1)(a)(ii). The requirements and elements of the two offences are distinct. The magistrate was correct in convicting the appellant on 2 separate offences for creating the videos of the respective complainants.

Similarly, the Court found no merit in the appeal against sentence. No grounds existed for interference with the magistrate's order.

The appeal was dismissed.

End-for-now