LEGAL NOTES VOL 3/2020

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SA LAW REPORTS MARCH 2020

MASEMOLA v SPECIAL PENSIONS APPEAL BOARD AND ANOTHER 2020 (2) SA 1 (CC)

Pension — Benefits — Special pension — Disqualification from receiving special pension upon criminal conviction — Effect of presidential pardon — Entitlement to receive special pension restored — Special Pensions Act 69 of 1996, s 1(8)*(b)*.

Section 1(8)*(b)* of the Special Pensions Act 69 of 1996 (the SPA) provides that a person who is entitled to a special pension under s 1 of the SPA is 'disqualified from receiving or continuing to receive a pension if . . . that person . . . was convicted of a crime committed after 2 February 1990'.

During 2008 it came to the Special Pensions Appeal Board's (the Board's) attention that Mr Masemola — who was entitled to and was receiving a pension under s 1 of the SPA — had been convicted on charges of fraud in April 2001. His pension payments were subsequently discontinued under s 1(8)*(b)* of the SPA. In 2011 he was granted a presidential pardon and his convictions were expunged. He then requested the second respondent, the Government Pensions Administration Agency (the GPAA), to reinstate his pension. The GPAA, however, would not accede to his request.

Litigation ensued (see [9] – [15]), culminating in the present case, his application for leave to appeal and an appeal to the Constitutional Court. The court, having granted leave to appeal —

Held

The scope of the disqualification was limited to the *receipt* of a special pension. This disqualification did not affect the already determined right to a special pension in

[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 January 2020 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!**

terms of s 1(1). Accordingly, the pardon revived the applicant's entitlement to receive his special pension from the date of pardon.
Consequently, payment must follow as a matter of course. All that Mr Masemola had to do was to advise the relevant functionaries that, through the grant of the pardon, the impediment to his entitlement to continue receiving the special pension had been removed, and demand that payment be resumed. This he did, and his appeal would therefore succeed (see [50] and [52] – [53]).

AFRICA CASH AND CARRY (PTY) LTD v COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE 2020 (2) SA 19 (SCA)

Revenue — Assessment to tax — Additional assessment — Appeals — Power of Tax Court to alter additional assessment — Scope of — Tax Administration Act 28 of 2011, s 129(2)*(b)*.

Following an investigation of the taxpayer which showed that it had fraudulently suppressed its sales figures over a number of years, Sars raised estimated additional assessments in respect of additional income tax, value-added tax, penalties and interest income for the 2003 – 2009 years of assessment. Sars dismissed the taxpayer's objections against these assessments, and the taxpayer appealed to the Tax Court. Preparatory to the Tax Court hearing, Sars filed a notice in respect of the expert testimony of one of its experts, Ms K, who had identified a number of errors in Sars' previous estimation and which had the effect of reducing the estimated assessment. Sars, however, did not withdraw or amend the original estimated assessment; instead it indicated to the taxpayer that it would request the Tax Court to make an order under s 129(2)*(b)* of the Tax Administration Act 28 of 2011 (quoted at [42]), to alter the additional assessments in line with Ms K's reduced calculation.
The Tax Court dismissed the appeal and ordered that the additional tax per the assessments be altered in terms of s 129(2)*(b)* of the Tax Administration Act 28 of 2011 (the Act) to lesser amounts, as fixed in the Tax Court's order. In the taxpayer's appeal to the Supreme Court of Appeal, the dispositive issue was whether the Tax Court had the authority to alter assessments under s 129(2)*(b)*.

Held

The clear wording of s 129(2)*(b)* provided that a Tax Court, in principle, had the power to alter an assessment. The question whether an alteration of an assessment would be competent must be answered in the light of the facts and circumstances of each case, and was dictated by considerations of fairness with due observance of the *audi alteram partem* principle. (See [47].
A Tax Court was a court of revision, not a court of appeal in the ordinary sense. It reheard the issues, deciding afresh whether an estimated assessment was reasonable. By its very nature an estimated assessment would be subject to change, based on an evaluation of the evidence and any information that became available. Being a court of revision did, however, not mean that a Tax Court was free of restrictions; it must observe an administratively fair process. If the evidence before it did not sustain the amount determined in an estimated assessment of a taxpayer's liability, or it determined that the amount in the estimated assessment was unreasonable, then — subject to constitutional principles and compliance with the *audi alteram partem* principle and fairness — a Tax Court could alter an assessment rather than refer the assessment back to Sars. This provided that the basis for taxation was not entirely different, ie the methodology used and the assumptions on the strength of which the estimates were made should remain the

same, and provided also that the court had all the information it required to decide the matter before it. (See [47], [53] and [57].)
An alteration complying with the aforesaid principles, and justified on the facts as reasonable, would fall within the powers conferred in s 129(2)*(b)* of the Act and accordingly be competent. It would not offend against the separation of powers doctrine and, being entirely consistent with the Tax Court's function in the greater constitutional framework as a court of revision, would amount to a proper discharge of the obligation imposed upon a Tax Court (see [58]).

BODY CORPORATE OF MARINE SANDS v EXTRA DIMENSIONS 121 (PTY) LTD AND ANOTHER 2020 (2) SA 61 (SCA)

Sectional title — Body corporate — Members — Special resolution — Resolution increasing levy — Whether unit owner whose levy was increased was 'adversely affected' by resolution — Sectional Titles Act 95 of 1986, s 32(4).

Appellant was a body corporate of a sectional scheme that was both residential and non-residential (see [2]). First respondent was an owner of non-residential units (see [4]). The body corporate adopted a special resolution, and made a change to the conduct rules, with the effect that first respondent's levy doubled. There was no change in its participation quota (see [5]).
This caused first respondent to apply to the High Court for a declarator that the special resolution and change to the rules were invalid (see [6]).
It based its application on s 32(4) of the Sectional Titles Act 95 of 1986, which provides, inter alia, that —
'(M)embers of the body corporate may by special resolution, make rules . . . by which . . . the liability of the owner of any section to make contributions . . . is modified: Provided that where an owner is adversely affected by such a decision . . . his written consent must be obtained . . . .' (See [11].)
First respondent asserted that the special resolution modifying the levy and amending the rules adversely affected it, yet it did not give its written consent thereto. Thus it did not comply with s 32(4) and was invalid (see [7]).
The High Court followed provincial authority to the effect that a special resolution increasing a levy contribution would not 'adversely affect', in the manner the Act intended, an owner struck thereby (see [13]). It consequently dismissed the application (see [8]).
First respondent appealed to the full court, and it found that the special resolution was ultra vires the Act. It came to this conclusion on a basis other than the adverse-effect ground (see [9]).
The body corporate then applied to the Supreme Court of Appeal for its leave to appeal. It granted it (see [1]).
It *held*, interpreting the Act, that the legislature's intention was that a special resolution increasing a levy would adversely affect an owner hit thereby, and would require his written consent (see [19] and [21]).
Here, as there was no such consent, the special resolution and resultant amendment of the rules were ultra vires the Act and invalid (see [22]).
The body corporate's appeal accordingly dismissed (see [23]).

COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE v CLICKS RETAILERS (PTY) LTD 2020 (2) SA 72 (SCA)

Revenue — Income tax — Deductions — Allowance in respect of future expenditure on contracts — Claim for allowance in respect of cost of honouring terms of loyalty card programme — Whether income accrued 'in terms of contract' — Income Tax Act 58 of 1962, s 24C(2).

In terms of the taxpayer's 'ClubCard' loyalty programme, a customer who applied was issued with a card and awarded points on value of their purchases; vouchers were then issued based on the number of points accumulated and these were presentable as part payment for future purchases of goods (see [2] – [3]). Here the taxpayer (Clicks) invoked s 24C(2) of the Income Tax Act 58 of 1962 (quoted at [6]) to claim an allowance in respect of the costs of honouring the terms of the loyalty card programme, as 'expenditure which will be incurred . . . in the performance of [its] obligations under such contract'. The Commissioner disallowed Clicks' claim to such an allowance but Clicks' appeal to the Tax Court was successful. The present case concerned the Commissioner's appeal against the Tax Court's decision, to the Supreme Court of Appeal.
In *Commissioner, South African Revenue Service v Big G Restaurants (Pty) Ltd* 2019 (3) SA 90 (SCA) ([2018] ZASCA 179) it was held that s 24C(2) applied when the income received and the future expense to be incurred arose from *the same contract*, not from different contracts 'inextricably linked'. At issue was therefore whether the contractual relationship between Clicks and the customer could be reduced to a single qualifying contract of sale. (See [9] – [14] for the respective submissions.)
Held
The reality of the arrangement was that three contracts were operative, namely the first and second contracts of sale as well as the ClubCard contract. All of these contracts were required in order for the customer to acquire vouchers and for Clicks to receive income and be obliged to award vouchers and supply merchandise to the customer in return. The contract that created Clicks' right to income was the first contract of sale. However, the contract that obliged Clicks to honour the vouchers, and thereby incur expenditure when a customer concluded the second contract of sale with Clicks, was neither the first nor the second contract of sale, but the ClubCard contract. Consequently, the expenditure incurred by Clicks in honouring the vouchers did not arise in terms of the same contract, ie the first contracts of sale, but in terms of the separate and distinct ClubCard contracts. As a result, the income received and the future expense sought to be deducted did not arise from the same contract; the Commissioner correctly refused to grant a s 24C allowance; and the appeal would be upheld.

JONES v ROAD ACCIDENT FUND 2020 (2) SA 83 (SCA)

Motor vehicle accident — Compensation — Claim for compensation against Road Accident Fund — Establishing identity of owner of insured vehicle — What constitutes — Meaning of 'established' in s 17 of RAF Act — Identification of series of vehicles and their owners where one probably involved in accident, not amounting to identity of owner having been 'established' — Road Accident Fund Act 56 of 1996, s 17(1)*(a)*; s 17(1)*(b)* of Act read with reg 2(1)*(b)*.

The prescription period for a compensation claim against the Road Accident Fund (RAF) is two years from the date of accident where the identity of the owner or the driver of the insured vehicle has not been 'established' (s 17(1)*(b)* of the Road Accident Fund Act 56 of 1996 read with reg 2(1)*(b)* of the regulations made under s 26 of the Act).

Mr Jones was injured when a chunk of gold ore, forming part of a load being transported from a mine to a refinery, fell from a truck that he was driving behind, penetrating the windscreen of his car and striking him on the forehead. In his action for damages against the Road Accident Fund (the RAF) he listed 23 vehicles and 9 owners, contending that one of them was probably the owner of whichever truck was involved. The High Court upheld the RAF's special plea, that Mr Jones' claim — lodged more than two years after the accident — had prescribed because, having failed to establish the identity of the owner or driver of the insured vehicle, it had to be instituted under s 17(1)*(b)*. (See [7].)
At issue in this case, Mr Jones' appeal, was whether he had 'established' the identity of the owner of the insured vehicle (it being common cause that the identity of the driver could not be established). The RAF argued that furnishing the particulars of a series of vehicles and their owners, on the assumption that one of them caused the accident, did not amount to establishing the identity of the owner of the vehicle involved in the specific accident. Mr Jones argued that the identification he had provided was sufficient to bring his claim within the ambit of s 17(1)*(a)*, and that his claim therefore had not prescribed. (See [8] – [10].)
Held
The issue turned on the meaning of 'established' in s 17(1) of the Act. Having regard to the context in which it appeared and the purpose of the Act, the ordinary dictionary meaning of the word 'established' — ie 'show to be true or certain by determining the facts' — was its appropriate meaning. In other words, there must be a sufficiently close connection between a readily identifiable vehicle being driven at a specific time and the injury that the claimant suffered. The word 'established' in s 17(1) did not bear the extended meaning contended for by Mr Jones. If such a meaning were adopted, it would lead to a conclusion that would stultify the broader operation of the Act, blurring the distinction the legislature drew between a claim under s 17(1)*(a)* and one under s 17(1)*(b)*. The ordinary meaning of 'established' did not lead to absurdity, and therefore its meaning did not require to be extended. Mr Jones' identification did not establish the identity of the owner or driver of the motor vehicle which caused the accident. It was nothing more than a sample of vehicles, one of which may have been the vehicle from which the ore fell on the day of the accident. The claim had therefore prescribed because it was not lodged with the RAF within the period of two years from the date of the accident, and accordingly the appeal would be dismissed. (See paras [18] – [19] and [21] – [23].)

MURRAY NO AND OTHERS v AFRICAN GLOBAL HOLDINGS (PTY) LTD AND OTHERS 2020 (2) SA 93 (SCA)

Company — Winding-up — Voluntary winding-up — Creditors' voluntary winding-up — Company may be wound up if it would, soon after resolution to wind up, be unable to pay debts in normal course of business — Companies Act 61 of 1973, s 351.

Company — Winding-up — Insolvent company — Test for commercial insolvency — Insufficient liquid assets to pay debts in ordinary course and thereafter continue normal trading — Company's current financial position as well as its financial position in immediate future to be considered — Company that will in near future be unable to meet its obligations is commercially insolvent and liable to be wound up — Irrelevant that company's assets exceed its liabilities — Companies Act 61 of 1973, ch 14.

Company — Winding-up — Master — Jurisdiction — Masters at nine main seats of High Court exercising jurisdiction over entire province, including areas covered by local seats — Jurisdiction of Masters at local seats confined to areas over which those courts exercise jurisdiction — Pretoria Master accordingly having jurisdiction over liquidation of company with registered office in Johannesburg — Administration of Estates Act 66 of 1965, s 2(1)*(a)*(ii).

Court — High Court — Composition — Single court with nine divisions corresponding to provinces, with main seats in all of them and local seats in some — Main seats having jurisdiction over entire province, local seats over defined portion thereof — No longer appropriate to refer to local seats as local divisions — Superior Courts Act 10 of 2013.

African Global Group (Group) found itself in trouble when banking facilities were withdrawn from its operational wing (Operations) following revelations at the Zondo Commission of Enquiry about the conduct of its predecessor, Bosasa. As a result Group and its holding company (Holdings), acting under s 351 of the (old) Companies Act 61 of 1973, on 12 February 2019 resolved to place Operations and its subsidiaries in creditors' voluntary winding-up (CVW). But soon thereafter Holdings had a change of heart and sought to reverse the CVW by having it declared void in the Johannesburg High Court. Its case was that since Operations and its subsidiaries were solvent when the resolutions to wind them up were taken, s 79 and s 80 of the (new) Companies Act should have been used for their liquidation instead of s 351 of the old Act. Therefore the resolutions to wind up and subsequent appointment of the liquidators were null and void. Holdings also argued that since the companies had their registered addresses in Johannesburg, the liquidators were wrongly appointed by the Pretoria Master, and that they therefore lacked locus standi.
The application, though opposed by the liquidators, was granted on the solvency issue. In an appeal by the liquidators, the Supreme Court of Appeal —
Held
As to the appointment of the liquidators: In 2012 the Constitution was amended to constitute a single High Court in South Africa, and in 2013 the Superior Courts Act 10 of 2013 abolished local divisions and constituted the High Court in its present nine divisions, corresponding to the nine provinces, with main seats in all of them and local seats in some (see [16]). The local seats were not separate courts and it was no longer appropriate to refer to them as local divisions (see [18]). The area of jurisdiction of the Masters at the main seats overlapped that of the Masters at the local seats situated in their provinces (see [18] – [19]). Since the area of jurisdiction of the Master in Pretoria included the entire area of jurisdiction of the Master in Johannesburg, Holdings' objection to the appointment of the liquidators by the Pretoria Master was without merit (see [19]).

As to solvency: A solvent company could be wound up only under the new Act, and for the purposes of the new Act a solvent company was a commercially solvent company. Commercially insolvent companies were liable to be wound up only under the old Act and could not be wound up under the new Act (see [23]). The test for commercial solvency was whether the company had liquid assets or readily realisable assets to meet its liabilities as they fell due, and to be met in the ordinary course of business, and thereafter whether the company will be in a position to carry on normal trading (see [28]). When, for whatever reason, a company was unable to access any liquid assets, it was illiquid and unable to pay its debts as they fell due (see [29]).

In the present case the inability to pay was imminent once the Group's access to banking facilities was terminated (see [30]). Determining commercial insolvency required an examination of the financial position of the company at present and in the immediate future to determine whether it will be able in the ordinary course to pay its debts, existing as well as contingent and prospective, and still continue trading (see [31]). In the case of the Group the answer was clearly that it could not — substantial sums of VAT, provisional tax and pension-fund contributions due primarily by Operations had fallen due for payment on 28 February 2019 and were not paid (see [32]). Another factor that highlighted the commercial insolvency of the Group was its inability to afford the security that it would have to pay had there been a members' voluntary winding-up or proceedings under s 80(3) of the new Act, instead of the CvW (see [33]). Operations and the other companies in the Group were therefore commercially insolvent when the resolutions for their voluntary winding-up were taken (see [34]). Since this conclusion removed the underpinnings of Holdings' case, the High Court application should have been dismissed (see [34]).

The SCA concluded its judgment by pointing out that High Court's insinuations that the liquidators would not discharge their duties properly under the supervision of the Master and in accordance with the directions of creditors, and that the reason for the liquidators' opposition was their own financial interests, were completely unfounded (see [42] and [43]). The insinuations verged on the defamatory and there was accordingly no justification for the court's *de bonis propriis* costs order against the liquidators (see [46]).

CMC DI RAVENNA SC AND OTHERS v COMPANIES AND INTELLECTUAL PROPERTY COMMISSION AND OTHERS 2020 (2) SA 109 (GP)

Company — Business rescue — External company — Whether external company subject to business rescue proceedings in terms of Act — Proceedings available to 'company' — External company not 'juristic person incorporated in terms of this Act' — 'Company' properly defined not including external company — Business rescue therefore not available to external company — Companies Act 71 of 2008, s 1 sv 'company' and s 129.

Company — External company — Whether constituting 'company' — Companies Act 71 of 2008, s 1 sv 'company'.

Company — External company — Registration — Whether external company registered under Act deemed to have been 'incorporated' under Act, and thereby meeting definition of 'company' — Incorporation and registration two distinct processes

— Registered external company not 'juristic person incorporated in terms of this Act' — Companies Act 71 of 2008, s 1 sv 'company'.

The first applicant, CMC, was a company incorporated in terms of the laws of Italy. It was an 'external company' for the purposes of the Companies Act 71 of 2008, in that it was 'a foreign company [ie a company incorporated outside the Republic] that [was] carrying on business . . . within the Republic [of South Africa] . . .' — see s 1 sv 'external company. Further, it was registered as an external company with the Companies and Intellectual Property Commission (the Commission) under the Act — see s 23(1). (Note that CMC was in fact registered as an external company under the old Companies Act, 1973, but was deemed to have registered as an external company under the new Act by virtue of the latter Act's transitional arrangements.) In December 2018 CMC's board of directors resolved to place CMC under voluntary business rescue in South Africa. It filed the appropriate form with the Commission, commencing the process. Shortly afterwards, however, the Commission withdrew the proceedings — *external companies*, it explained, *could not be placed under business rescue under s 129 of the Act*. CMC, in the present proceedings instituted by it in the Pretoria High Court, and supported by its two business rescue practitioners, sought, in the main, an order declaring that it was validly under business rescue as contemplated in terms of s 129 of the Act pursuant to the above-mentioned resolution. The Commission opposed the relief. The companiesEsor Construction (Pty) Ltd (Esor), Absa Bank Ltd and Stefcor (Pty) Ltd intervened. Section 129 of the Act envisioned the placing under business rescue of 'the company'.

The key question, then, in the present case, was whether CMC qualified as a 'company' for the purposes of s 129 of the Act. 'Company' was defined in s 1, the general definition section — no definition was provided in s 129 — as including 'a juristic person incorporated in terms of this Act'; 'a domesticated company', or a 'juristic person that, immediately before the effective date was registered in terms of the [old Companies Act], other than as an external company as defined in that Act'. CMC argued that it, as an external company registered under the Act, was included in the general definition in the sense that it was *a juristic person incorporated in terms of the Act.* (See [29].) In support of such proposition, it submitted that an external company, when 'registered' in South Africa, was 'notionally' incorporated *under the Act in South Africa*, and therefore met the definition of 'company'. (It added that a 'juristic person' included a foreign company that conducted business in South Africa.) In contrast, the Commission's position was that registration as an external company did not result in incorporation of a secondary legal entity; that the external company was therefore subject to the laws of the jurisdiction within which it was incorporated; and, accordingly, the external company was not a 'company' and accordingly not subject to business rescue proceedings under the Act. (See [10].)
Held, that the 'company' definition did not expressly include external companies, such as CMC. (See [26].) Such fact had to be considered against a background in which the old Companies Act, 1973, under s 2(2), had a catch-all provision — of which the 2008 legislature would have been aware — which provided that the sections of that Act would apply to every company, *including external companies*. The 2008 Act had no such provision, instead only making specified sections of the Act applicable to external companies. The probable interpretation was that the

legislature intended to exclude external companies from the definition of 'company'. (See [26].) Such an interpretation was fortified by the fact that there was a specific legislative intent in the 2008 Act to reduce the regulation of external companies to promote investment in the South African markets (see [27]).
Held, further, that CMC's argument that an external company, when registered under the Act, was incorporated thereunder — and therefore met the definition of 'company' — had to be rejected. Incorporation and registration had always been two distinct processes. There was simply no 'notional' incorporation when an external company was registered in South Africa. (See [34].) Further, s 1*(a)*(i) of the definition specifically excluded an external company as defined in the Act (see [35]).
Held, accordingly, that business rescue proceedings under s 129 of the Act were not available to CMC, being an external company. It was therefore not validly under business rescue in terms of s 129 of the Act (see [40]). Application refused.

QWELANE v SOUTH AFRICAN HUMAN RIGHTS COMMISSION AND ANOTHER 2020 (2) SA 124 (SCA)

Constitutional law — Legislation — Validity — Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, s 10 — Hate speech prohibition — Overbroad and vague — Declared inconsistent with right to freedom of expression — Constitution, s 16(2)*(c)*.

Constitutional law — Human rights — Right to freedom of expression — Hate speech — Equality Act — Hate speech prohibition — Overbroad and vague — Declared inconsistent with right to freedom of expression — Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, s 10; Constitution, s 16(2)*(c)*.

Section 16 of the Constitution secures everyone the right to freedom of expression. *All forms of expression* are protected, *except* for those set out in ss (2) (see [51]), which include (ss 2*(c)*) 'advocacy of hatred that is based on *race, ethnicity, gender or religion*, and that constitutes incitement to cause harm'. The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Equality Act) — enacted to give effect to s 9 of the Constitution, which secures everyone the right to equality — has as one of its objectives the regulation of hate speech. Section 10(1) of the Act reads:

'Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to —

(a) be hurtful;
(b) be harmful or to incite harm;
(c) promote or propagate hatred.'

The principal questions in the present appeal heard before the Supreme Court of Appeal (the SCA) were the following. Did the Equality Act's hate speech provisions go further in restricting particular kinds of speech than the hate speech restriction in s 16(2)*(c)* of the Constitution, and accordingly infringe the right to freedom of expression? If so, was such limitation justifiable under s 36 of the Constitution?

The relevant background was the following. A newspaper — the *Sunday Sun* newspaper — on 20 July 2008 published a highly offensive article, written by Mr Jon Qwelane, a popular columnist, and titled 'Call Me Names'. In it the author called

homosexuality 'wrong', and called for those provisions of the Constitution allowing same-sex marriage to be amended. The author also expressed admiration for the late ex-president of Zimbabwe, Robert Mugabe's 'unflinching and unapologetic' stance on homosexuality. A cartoon accompanied the article, depicting a man and a goat kneeling before a priest, with the captions 'When human rights meet animal rights' and 'I pronounce you man and goat'.

The article led to a huge public outcry, and ultimately the Human Rights Commission's bringing an application against Mr Qwelane in the Equality Court, alleging that the article contravened s 10(1) of the Equality Act. Mr Qwelane subsequently brought proceedings in the High Court for an order declaring s 10(1), read with ss 12 and 1, of the Equality Act unconstitutional on the basis that it was inconsistent with s 16 of the Constitution. Proceedings in the High Court and the Equality Court were consolidated. The court hearing the matter dismissed Mr Qwelane's constitutional challenge (see [34]), and found the offending statements against homosexuals to amount to hate speech as envisaged in s 10 of the Equality Act.
Mr Qwelane appealed to the SCA. There he argued that the impugned provisions were overbroad and vague, and did not pass constitutional muster.

Held, that s 10(1) of the Equality Act in curtailing freedom of expression in the manner it did, *extended far beyond* the limits of expression provided in s 16(2)*(c)* of the Constitution (see [53] and [77]).

- Section 16(2)*(c)* of the Constitution excluded from constitutional protection under s 16(1) the advocacy of hatred that constituted incitement to cause harm based on the four stated grounds of *race, ethnicity, gender or religion*. Section 10(1) of the Equality Act, on the other hand, purported to extend those bases to include all of the categories set out under 'prohibited grounds' as defined in s 1, which included sexual orientation, the ground upon which the claims of hate speech against Mr Qwelane were based (see [53]). (Note: the SCA, however, found that the extension of hate speech to include the ground of sexual orientation was constitutionally permissible (see [60]). This was so, given the duty on the state, in terms of the Constitution, as well as various international treaties to which it was subject, to prohibit unfair discrimination, and to promote and protect the right to human dignity (see [54] – [60]).)

- Section 16(2)*(c)* of the Constitution proposed an objective test in which one had to establish the existence of *both* the advocacy of hatred on one or more of the four grounds *and* the incitement of harm (see [61] – [62]). On the other hand, under the Equality Act a finding of hate speech may follow in the absence of one or both requirements (see [64], [65] and [67]). Section 10(1) instead required the publication, propagation, advocacy or communication of words based on any one of the prohibited grounds that could reasonably be construed to have had *any one of the results* set out in s 10(1)*(a)* – *(c)* (see [61], [63] and [67]). (Note: the SCA held that ss 10(1)*(a)*, *(b)* and *(c)* of the Equality Act, properly interpreted, had to be read *disjunctively, not conjunctively* (see [64]).)

- The test under the Equality Act departed significantly from the objective constitutional test and replaced it with the subjective opinion of a reasonable person hearing the words (see [66]).

- Under the Equality Act, mere communication of words based on prohibited grounds which could reasonably be construed to demonstrate a clear intention to be 'hurtful' was sufficient for liability to attach and for sanction to follow (see [65]). As such, given the definition of 'hurtful', words could qualify as hate speech without any potential, or actual, harm having to be shown ([65] and [68]); it was enough that a person's feelings were injured (see [68]). However, to prohibit words that had that effect would be going too far, considering that daily human interactions produced a multitude of instances in which such words were uttered (see [69]). While the harm envisaged in s 16 of the Constitution and contemplated in the provisions of s 10(1) of the Equality Act need not necessarily be physical harm, but could be related to psychological impact, the impact had to be more than just hurtful in the dictionary sense (see [70]).

Held, further, that s 10(1) of the Equality Act was vague and difficult to understand, in particular with regard to determining what 'hurtful' was meant to capture. [See [68].]

Held, accordingly, that s 10(1) of the Equality Act could not on any reasonable interpretation be equated with the provisions of s 16(2) of the Constitution (see [77]). Further, the limitation of s 16(2) could not be justified under s 36 of the Constitution (see [78] and [88]).

There was no other democratic country whose hate speech regulations equated with, or even came close to, the low threshold contained in s 10(1) (see [85]). The respondents, in seeking to provide justification, had referred to the repeated violations of the rights of members of the LGBTI community and the repeated efforts to marginalise the community (see [78]). In this regard, it could be agreed that it was important to protect the dignity of all citizens (see [85]), and that hate speech should not be allowed to threaten the constitutional project (see [87]). It was clear that the state wished to widen the protection against hate speech and it should be allowed to do so (see [85], [87] and [93]). However, the regulation had to be carefully tailored to minimise the impairment of freedom of expression (see [82] and [85]). Section 10(1) of the Equality Act, given its overbreadth and imprecision, was not (see [78] and [87]). Accordingly, s 10(1) in its present form was unconstitutional (see [88]). The appeal was to be upheld, and the order of the court a quo set aside (see [96]).

Held, that the state should be afforded the opportunity to widen the protection against hate speech, consonant with the Constitution (see [93]). Pending the finalisation of the legislative process, it was necessary to provide for an interim remedy (see [93]), that would protect vulnerable groupings against the dreadful consequences of hate speech, but that was tailored to meet constitutional prescripts (see [92] and [94]). As such, s 10(1) would, temporarily, read as follows: 'No person may advocate hatred that is based on race, ethnicity, gender, religion or sexual orientation and that constitutes incitement to cause harm.' (See order in [96])

CORRUPTION WATCH AND ANOTHER v ARMS PROCUREMENT COMMISSION AND OTHERS 2020 (2) SA 165 (GP)

Review — Grounds — Legality — Commission of inquiry — Whether findings reviewable by court of law.

Review — Grounds — Legality — Commission of inquiry appointed to investigate and make findings on whether military arms procurement process of government was marked by fraud and corruption — Failure to enquire fully and comprehensively into issues to be investigated as per terms of reference — Failure to examine evidence material to issues at hand — Failure to rigorously test versions of vital witnesses — Various mistakes of law made — Findings of Commission set aside on basis of failure of Commission to operate according to requirements of legality and rationality.

In 2011 former President Jacob Zuma appointed a commission of inquiry to investigate the military weapons acquisition programme — labelled the Strategic Defence Procurement Package (SDPP) — undertaken by the South African Government between 1997 and 1999. Its terms of reference included, inter alia, enquiring into, and making findings and recommendations concerning, whether any person — inside the government or outside — had improperly influenced the awarding of any contracts forming part of the SDPP. In December 2015 the Commission delivered its final report, and concluded that all government officials involved in the acquisition process had acted lawfully; all allegations of fraud and corruption against them were dismissed. In the present application instituted in the Pretoria High Court, the applicants sought an order reviewing and setting aside the Commission's findings. They alleged that the Commission, in the way that it had conducted its proceedings and arrived at its findings, failed to carry out its constitutional and statutory function of investigating the allegations of fraud, corruption, impropriety or irregularity in the SDPP in the manner required by law. Accordingly, they argued, the Commission had acted contrary to the requirements of legality and rationality, and they were therefore entitled to the relief they sought.
The court firstly confirmed that the findings of a judicial commission of inquiry were reviewable by a court on the grounds of legality and rationality (see [15], [50]). As to the powers of the court to review the Commission's findings, the court noted it was granted extensive public powers through the Commissions Act 8 of 1947 to investigate and make recommendations on a matter of major public importance so as to bring finality to a controversy which had bedevilled South Africa almost from the dawn of democracy (see [51]), as well as restore public confidence in the processes of government (see [15]). The court concluded that the Commission — despite the wide discretion given to it to investigate into, and make findings on, the matters falling within its terms of reference — was obliged to operate within the framework of the principles of legality (see [51]).
The court held that the principle of legality and its underlying source, the rule of law, dictated that there had to be a rational relationship between the exercise of a public power and the objectives for which it was exercised. In this case the objects were to investigate with an open mind in order to reveal the truth to the public on a matter of the utmost public importance. (See [68].)
The court held, based on the evidence before it, that the Commission had failed to enquire fully and comprehensively into issues which it was required to investigate on the basis of its terms of reference, as was to be expected of a reasonable commission (see [53] and [69]). This was demonstrated by, inter alia, its failure to

examine evidence — incorrectly ruled inadmissible on an incorrect understanding of the law — material to the enquiry in question, pointing as it did to incidents of corruption in the procurement process (see [53], [67], [69]); and a failure to rigorously test the veracity of evidence presented by key witnesses (see [53], [69]) — in particular their denials of corruption in the face of supporting evidence pointing to the contrary (see [54] – [66]).
The court concluded that the requirements of legality dictated that findings of the commission be set aside (see [70]).

DIRECTOR-GENERAL, DEPARTMENT OF HOME AFFAIRS AND OTHERS v LINK AND OTHERS 2020 (2) SA 192 (WCC)

Immigration — Decisions — Decision materially and adversely affecting rights — Internal remedy of review or appeal — Individual dutied to exhaust internal remedy before approaching court only where decision accompanied by adequate reasons — Immigration Act 13 of 2002, s 8(4).

First and second respondents, and third and fourth respondents, were married foreign citizens (see [3]). They applied for South African permanent residence, but the Department of Home Affairs failed to respond (see [4] – [5]). Ultimately, they wrote to the Director-General of the Department, and asked him to give his decision. He did not respond (see [5]).
Third and fourth respondents then obtained a court order that the Director-General consider their applications (see [6]). The Director-General ignored it (see [7]).
Third and fourth respondents thereupon obtained an order that the Director-General was in contempt, and directing him to make a decision on the applications (see [7]).
First and second respondents similarly, after requesting the decisions by letter, and the Director-General not responding, obtained an order directing him to make the decisions (see [8]).
The Deputy Director-General now came to respond, and notified first and third respondents that he had refused their applications on the basis that they had not given him sufficient proof that they met the financial requirements. He gave no reasons supporting this assertion. (See [9] – [10].)
First and third respondents then asked the Deputy Director-General, by letter, for the reasons grounding the decision. He did not respond. (See [12] and [16].)
Meanwhile, the Director-General informed second and fourth respondents that he had declined their applications, and gave reasons.
First to fourth respondents then applied to the High Court to review the Director-General and Deputy Director-General's decisions refusing their applications for permanent residence (see [17]).
The Director-General and Deputy Director-General filed no answering affidavit, but did raise, by notice, that the respondents had not exhausted their internal remedy — a review or appeal under the Immigration Act 13 of 2002 — and accordingly that the High Court should dismiss their applications (see [19]).
The High Court found that there were exceptional circumstances present which exempted the respondents exhausting their internal remedies; reviewed the decisions; set them aside; concluded it was appropriate for it to make the decisions; and did so in the affirmative. It ordered the Director-General and Deputy Director-General to issue permanent-residence permits (see [20]).

Here the Director-General and Deputy Director-General appealed to the full bench of the High Court (see [1]).
It examined ss 8(3) and 8(4) of the Immigration Act. Those provide:
'(3) Any decision in terms of this Act, other than a decision contemplated in subsection (1), that materially and adversely affects the rights of any person, shall be communicated to that person in the prescribed manner and shall be accompanied by the reasons for that decision.
(4) An applicant aggrieved by a decision contemplated in subsection (3) may, within 10 working days from receipt of the notification contemplated in subsection (3), make an application in the prescribed manner to the Director-General for the review or appeal of that decision.'
The full bench *held* that a 'decision' in ss 8(4) was confined to a decision which materially and adversely affected a person's rights; that was communicated to the person; and accompanied by *adequate* reasons (see [43]).
Further, a person affected by a decision would only be dutied to internally review or appeal the decision, if the decision was accompanied by adequate reasons (see [46]).
However, if the Department failed to provide adequate reasons along with the decision, the affected person would need to request them; and only if the Department failed still to provide adequate reasons, would a court have grounds to exempt the person concerned from exhausting her internal remedies (see [47]).
In first and third respondents' cases, no reasons accompanied the Deputy Director-General's decisions declining the applications; third and fourth respondents had requested same, yet the Deputy Director-General had failed still to provide any adequate reasons at all (see [12], [16] and [35]).
Accordingly, ss 8(4)'s requirements before there could be an internal review or appeal, namely a decision accompanied by adequate reasons, were not met, and first and third respondents were unable to bring such review or appeal. This exempted them exhausting those remedies (see [48]).
As for second and fourth respondents, the Director-General refused their applications, but s 8 provided no internal review or appeal against the Director-General refusing an application for permanent residence (see [49] – [50]).
Accordingly the Director-General and Deputy Director-General's assertion, that the court a quo should not hear the matter because the respondents had failed to exhaust their internal remedies, was meritless (see [51]).
Moreover, even if this finding was wrong and domestic remedies available, exceptional circumstances were present which justified exemption from exhausting them.
Also, there were grounds for the court a quo not remitting the residence applications to the Director-General and Deputy Director-General for redecision, and which justified substituting its decision for theirs (see [68] – [69]).
Appeal dismissed.

FURNITURE BARGAINING COUNCIL v AXZS INDUSTRIES (PTY) LTD 2020 (2) SA 215 (GJ)

Company — Winding-up — Effect of voluntary winding-up on compulsory winding-up — Voluntary winding-up after presentation to court of compulsory winding-up application, but before hearing of application — Companies Act 61 of 1973, s 351; Companies Act 71 of 2008, s 80.

In this case, applicant presented a compulsory winding-up application to the court, in respect of respondent company, and some time later, but before the hearing of the application, a resolution of voluntary winding-up was filed with the Companies and Intellectual Property Commission, so obtaining voluntary winding-up (see [23], [27] and [38]).
This came to light at the hearing of the compulsory liquidation application, and the issue it raised was whether the voluntary winding-up barred grant of a compulsory winding-up order.
The court *held* that it did not, in that, on grant of the order, the compulsory winding-up was deemed to have commenced on the date of presentation of the liquidation application to court, which was before the voluntary winding-up, and invalidated it (see [49]).
This approach was bolstered by the apparent legislative intent that: the status quo be maintained from commencement of the compulsory winding-up until the grant of the liquidation order (see [50]); that a voluntary liquidation obtained between the date of presentation to the court of the application for compulsory liquidation, and the application's grant, did not supersede the compulsory liquidation proceedings (see [51]); and the negative effect if this were the case, which cannot have been intended (see [53]).

Compulsory liquidation granted, and it declared that the voluntary liquidation, and any steps taken pursuant to it, were ineffective and void (see [61]).

GABUZA v ROAD ACCIDENT FUND 2020 (2) SA 228 (GP)

Motor vehicle accident — Compensation — Claim against Road Accident Fund — Prescription — Lodgement — Claim prescribing three years after it arises unless it is lodged within those three years — Where last day of those three years in which to lodge is Saturday, last day is extended to next day on which claim may be lodged — Road Accident Fund Act 56 of 1996, ss 23 and 24.

On 22 March 2012, plaintiff was a passenger in a motor vehicle which was involved in an accident with another vehicle. Both drivers were identified (see [5]).
Plaintiff, who was injured, lodged a claim for compensation with the Road Accident Fund. The claim was lodged on 23 March 2015 (see [2]).
In response, the Fund raised a special plea that the last day for lodgement was Saturday 21 March 2015, and accordingly that the claim had prescribed (see [2]).
The issue before the court was whether this was so.
In this regard, the Act provides that a claim prescribes unless lodged within three years of the day on which the claim arises (see [7] – [8] and ss 23 – 24 of the Road Accident Fund Act 56 of 1996). Lodgement may be by hand-delivery or dispatch by registered post (see [9]); and the three-year period is calculated by subtracting a day from the date on which the claim arises, and adding three years to the year (see [11] and n1).
Here, this yielded Saturday 21 March 2015 as the day before, or on which, the claim had to be lodged; and on a Saturday it would be possible to send by post, and so lodge the claim, before the Post Office closed, at 13h00 (see [24]).

Thus, outwardly, the claim would appear to have prescribed on this Saturday. However, in a recent case involving the five-year period of prescription of a claim duly lodged under the Act, it was found that where the five years ended on a day on which the court was closed, so precluding issue and service of summons, the five years should end on the next working day (see [13]).
The question was whether that principle should apply here. Namely, that when a statute prescribed a time for the doing of an act, and the act could only be performed if a certain office was open, and the last day for the doing of the act fell on a day the office was closed, then the time for performance of the act was extended to the next day on which the office was open (see [26]).
Here, the office was open in the first part of the day, but closed in the second, when, on an ordinary working day, it would be open (see [32] – [33]).
Held, that the principle should apply: this would support both the aims of the Act and the spirit, purport and objects of the Bill of Rights (see [17], [30] and [33]).
Accordingly, the last day for lodgement was Monday 23 March 2015, on which the claim was indeed lodged, and so it had not prescribed.
The special plea dismissed (see Order).

INDEPENDENT SCHOOLS ASSOCIATION OF SOUTHERN AFRICA v ETHEKWINI MUNICIPALITY AND OTHERS 2020 (2) SA 235 (KZD)

Education — School — Independent school — Property — Rateability — Capped at 25% of residential property rate — Local Government: Municipal Property Rates Act 6 of 2004, s 8 and s 19.

Local authority — Rates — Power to levy — Ambit — Municipalities constrained by national legislation and regulations — Have to make policy decisions on rates consistent therewith — Constitution, s 229; Local Government: Municipal Property Rates Act 6 of 2004, s 8 and s 19.

Local authority — Rates — Imposition — Differential rates — Ratio between rates levied on residential and non-residential properties — Municipality may not levy rate exceeding prescribed ratio — May not ignore legislated property categories — Local Government: Municipal Property Rates Act 6 of 2004, s 19(1)*(b)* read with regulations promulgated thereunder.

The applicant (ISASA), an organisation representing non-profit independent (ie private) schools, sued the first respondent (the eThekwini metro) over its refusal to charge it 'public benefit organisation' (PBO) * property rates according to a ratio set out in amended national regulations made under the Local Government: Municipal Property Rates Act 6 of 2004 (the MPRA) in 2010. Specifically, ISASA sought an order directing eThekwini to comply with the regulations and reduce its rates.
The regulations, which were promulgated pursuant to an order obtained in the Gauteng High Court in 2010, capped the rates on non-residential properties owned by PBOs at 25% of the rates imposed on residential properties.

eThekwini — which had categorised independent schools as 'schools not for gain' and included them among 'business and commercial properties' — argued that it did not have the 'PBO' property category and was not obliged to use it. It counter-applied for an order declaring the regulations and s 19(1)*(b)* of the MPRA unconstitutional to the extent that they restricted the powers of a municipality to levy rates at ratios

determined by itself. It also sought the setting-aside of the ministerial decision to amend the regulations.
As to the applicable legislation: Section 229 of the Constitution authorises municipalities to impose rates on immovable property, and s 8 of the MPRA allows them to levy different rates on various types of property, including 'property owned by public benefit organisations' (s 8(2)*(h)*). ‡ But s 8(1) explicitly makes s 8 'subject to section 19', which in s 19(1)*(b)* prohibits municipalities from levying a 'rate on a category of non-residential properties that exceeds a *prescribed ratio* to the rate on residential properties' (editors' emphasis). Finally, s 151(4) of the Constitution, invoked by eThekwini to prop up its argument regarding the invalidity of s 19(1)*(b)*, provides that 'the national or a provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions'.
Counsel for eThekwini argued that a municipality had autonomy to make decisions on local taxes and could include or omit any category of ratepayers it deemed fit.
Counsel for ISASA argued that the MPRA was primary legislation and that its s 8 was subject to its s 19, which did not allow eThekwini to disregard its categorisations.
Stellenbosch Municipality joined eThekwini in the counter-application as an intervening party. (Besides eThekwini the other respondents there were two government Ministers, the Minister of Cooperative Governance and Traditional Affairs, and the Minister of Finance.)
Held
Municipalities, though constitutionally authorised to impose rates, had to do so within the statutory framework of the MPRA, the promulgation of which was not the kind of intervention prohibited under s 151(4) of the Constitution (see [50], [52]). eThekwini could not make a policy decision on rates that were at odds with the MPRA, and its suggestion that it could include non-profit-making schools in the 'business and commercial' category made no sense where the appropriate category had already been provided for by s 19(2)*(h)* of the MPRA (see [54]). In addition, the suggestion that the court could set aside the 2010 regulations, which were published pursuant to the court order which was still in force, was untenable (see [57]). Sections 8 and 19 of the MPRA were constitutionally valid and binding, as were the regulations made thereunder (see [62]). The applicant was accordingly entitled to an order that eThekwini could not levy a rate exceeding the 25% cap on non-residential properties owned by PBOs and used for the specified public-benefit activity of education and development (see [67]). Since the municipalities should not have opposed the relief sought by ISASA, and it was unreasonable for them to have done so, they would be ordered to pay ISASA's costs (see [66] – [67]).

LONG BEACH HOMEOWNERS ASSOCIATION v MEC FOR ECONOMIC DEVELOPMENT, ENVIRONMENTAL AFFAIRS AND TOURISM, EASTERN CAPE 2020 (2) SA 257 (ECG)

Environmental law — Protection of environment — Dispute — Referral to conciliation — Power of court under NEMA s 17(3) to refer dispute to conciliation — Dispute meaning dispute concerning protection of environment, not dispute over handling of internal appeal by MEC — Court lacking power to suspend latter pending conciliation — National Environmental Management Act 107 of 1998, s 17(3).

This appeal dealt with the proper interpretation of s 17(3) of the National Environmental Management Act 107 of 1998. It provides that '(a) court or tribunal hearing a dispute *regarding the protection of the environment* may order the parties to submit the dispute to a conciliator . . . and suspend the proceedings pending the outcome of the conciliation'. The issue before court was whether a dispute between the appellant and the respondent (the MEC) over the latter's handling of an internal appeal against the granting of an environmental authorisation, was a dispute the court was entitled to deal with under s 17(3). The present appellant (Homeowners) argued that, in order to advance environmental rights, s 17(3) had to be widely interpreted to include the dispute over the MEC's handling of the internal appeal. The respondent argued that since the MEC was not a party to the internal appeal, there was no basis on which he could be ordered as a party to submit to a conciliation process in terms of s 17(3). In the court a quo the judge found that as there was no dispute concerning the protection of the environment before her, that s 17(3) was of no assistance to Homeowners.
On appeal a full-bench court agreed with the respondent that, even accepting that s 17(3) must be given a wide and purposive interpretation, the dispute between the Homeowners and the MEC was not a dispute contemplated by that provision (see [36]). The dispute directly concerning the protection of the environment was the one between the Homeowners and the internal appellants, not the one between the Homeowners and the MEC, which was only tangentially connected to it (see [37]). Furthermore, the court's power under s 17(3) to 'suspend the proceedings pending the outcome of the conciliation' meant a suspension of the actual dispute regarding the protection of the environment before the court (see [40]). Section 17(3) only empowered a court to refer a dispute regarding the protection of the environment to conciliation. It did not empower the court to do so when the dispute is one concerning the exercise by an MEC of his functions (see [41]). This did not mean that Homeowners was remediless: it could, under s 17(2), request the MEC to appoint a facilitator for the purpose of reaching an agreement to refer the matter to conciliation (see [42]).

MANUEL v SAHARA COMPUTERS (PTY) LTD AND ANOTHER 2020 (2) SA 269 (GP)

Access to information — Access to information held by private body — Irrelevant that another party may also be in possession of records sought — Promotion of Access to Information Act 2 of 2000, s 50.

Access to information — Access to information held by private body — Records not found or non-existent — Whether respondent complied with statutory requirements — Promotion of Access to Information Act 2 of 2000, s 55.

Access to information — Access to information held by private body — Person acting as though CEO of private body — Person qualifying as private body — Promotion of Access to Information Act 2 of 2000, s 1 sv 'private body'.

Access to information — Records necessary for exercise or protection of right — Whether amounting to disguised prelitigation discovery — Not when records needed to formulate claim or identify correct defendant — Promotion of Access to Information Act 2 of 2000, s 7.

Practice — Applications and motions — Dispute of fact — Referral for oral evidence — If court finds allegations made by party erroneous or false, it may order viva voce evidence even in absence of dispute of fact — Uniform Rules of Court, rule 6(5)*(g)*.

The applicant, ex Finance Minister Mr Trevor Manuel, having seen an online news article entitled '#GuptaLeaks: Guptas spied on Manuel, Malema and Bank Bosses', launched a formal request under s 50 of the Promotion of Access to Information Act 2 of 2000 (the Act) for access to documents held by the respondents, Sahara and its former CEO, Mr Ashu Chawla. The contents of the article led Mr Manuel to believe that his personal information had been unlawfully disclosed to the respondents and that he was under unlawful surveillance. He stated that it was not clear to him who was responsible for this conduct and that he required access to the documents in question to identify the appropriate defendant so as to protect his constitutional right to privacy (under s 50 documents requested from private bodies must be 'required for the exercise or protection of [a] right'). Frustrated by the lack of response from the respondents, Mr Manuel launched the present application to compel. When the respondents contended in court papers that the requested documents did not exist or could not be found — a defence under s 55 of the Act — Mr Manuel sought a referral to oral evidence under rule 6(5)*(g)* of the Uniform Rules in order to determine whether the respondents were in possession of the documents.
The respondents raised the following questions for determination by the court: (i) whether Mr Manuel required the documents for the protection of a right as intended in s 50; (ii) whether Mr Manuel was, contrary to the exclusion in s 7 of the Act, seeking to obtain pre-litigation discovery; (iii) whether Mr Manuel should rather seek the documents from others; (iv) whether respondents should succeed in their s 55 defence (see above); and (v) whether Mr Chawla was a compellable 'private body' for the purposes of s 50 (see s 1 of the Act for the definitions of 'private body' and 'head' of a 'juristic person').
Held
As to (i): In order to establish a protectable right, Mr Manuel had, *first*, to identify the right that he sought to exercise and show, prima facie, that he had such a right and, *second*, to demonstrate how the requested information would assist him in exercising or protecting that right (see [28]). Here Mr Manuel had stated that the #GuptaLeaks article showed an infringement of his *right to privacy* by unlawful disclosure and surveillance and that the information sought would provide him with a *substantial advantage* or *satisfy an element of need* in relation to vindicating that right (see [48]). Respondents' argument that s 50 protected only prospective rights and could not retrospectively vindicate rights was incorrect (see [33]).
As to (ii): A party could request records under s 50 in order to formulate a claim and identify the correct defendant (see [38] – [40]). Mr Manuel did not require the documents to assess his prospects of success — which would have amounted to prelitigation discovery — but to establish who his defendants might be and what cause of action he had against them, which was permitted under the Act (see [44]).
As to (iii): It was irrelevant that another party such as the state might also be in possession of the documents sought; if an applicant satisfied the requirements of s 50 it was entitled to the documents, without more (see [47]). Mr Manuel had done so and was therefore entitled to the documents unless the respondents were able to satisfy the requirements of s 55 (see [48]).
As to (iv): While the respondents might have superficially complied with s 55, many questions relating to the existence and possession of the records remained

unanswered, particularly in view of the fact that the respondents had not challenged or seriously denied the contents of the article which, if false, cried out for a response (see [65]). Hence the respondents' contentions did not comply with the requirements of s 55 (see [67]).
As to (v): As the respondents had acted as if Mr Chawla was the CEO or equivalent officer of Sahara, only later to contend that he was not, he clearly fell within the definition of 'head' of a private body such that the Act was applicable to him (see [80] – [81]).
Mr Manuel had satisfied the requirements of rule 6(5)*(g)* by casting doubt on the respondents' assertions (see [88]). The court was entitled, if it found the assertions were made in error or false, to order viva voce evidence even in the absence of a dispute of fact (see [88]). Respondents' evasiveness, lack of candour, and failure to deny the contents of the article or possession of the documents from the outset, provided justifiable grounds to doubt the credibility of their version. Their assertions, even if they amounted to a partial answer, were at best mistaken and at worst false (see [97], [100]). Application postponed for a date to be arranged for the hearing of oral evidence (see [100]).

TERMICO (PTY) LTD v SPX TECHNOLOGIES (PTY) LTD AND OTHERS 2020 (2) SA 295 (SCA)

Arbitration — Award — Finality — Issues requiring final determination were those before arbitrator, not necessarily all issues in dispute — Arbitration Act 42 of 1965, s 33(1)*(b)*.

Arbitration — Award — Review — Grounds for review — Gross irregularity by arbitrator in conduct of arbitration proceedings — Failure to deliver final reward — Arbitrator committing irregularity where failing to decide issues before it — No irregularity where failure to take decision in respect of matter not submitted for arbitration — Arbitration Act 42 of 1965, s 33(1)*(b)*.

Arbitration — Award — Impermissible 'hybrid order' — What constitutes.

SPX Technologies (Pty) Ltd (SPXT) and Termico (Pty) Ltd (Termico) were shareholders in the company DBT Technologies (Pty) Ltd (DBT). Clause 19 of their shareholders' agreement granted to Termico an option (the put option) to sell, after a period of seven years, its shares to SPXT. Such right was subject to terms and conditions. Of relevance here were the stipulations that subsequent to notice having been given by Termico, and the put price calculated in terms of the given formula, the parties were to meet for the purposes of concluding the put option (clause 19.3); and that the put price was first to be applied in repayment of a loan (that had been given by SPXT to Termico to fund the latter's purchase of the shares in DBT in the first place), and then the balance paid over (clause 19.4). After the expiration of the requisite 'lock-in' period, Termico sought to exercise such right, and sent its notice. SPXT in response submitted that the put option was invalid and unenforceable as per the requirements of clause 19; and that Termico's understanding, as set out in the notice, as to the calculation of the put price was mistaken. The matter was referred to arbitration. The arbitrators found in favour of Termico. Consequently, SPXT instituted an application in the High Court (Johannesburg) for the review and setting-aside of the award. Termico, in turn, in a counter-application, sought an order

making the arbitration award an order of court in terms of s 31(1) of the Arbitration Act 42 of 1965. Crucially for purposes of the present matter, it also sought a money judgment in the sum of R250 million, being the put price less the balance owing to SPXT on the loan.
The High Court held that the arbitral panel, in failing to grant a monetary judgment — the panel had felt that it was precluded from doing so, given that those events, required in terms of the shareholders' agreement to take place prior to payment, namely the meeting envisioned by clause 19.3 and the set-off of the loan in terms of clause 19.4, had not yet taken place — had not delivered a final award. Such constituted an irregularity in breach of s 33(1)*(b)* of the Arbitration Act. In its reasoning, the High Court noted that it was being asked to complete an order that should have been completed by the arbitral panel. The granting of the relief sought, it held, comprising as it did partially the findings made by an arbitrator, and partially the findings made by a court, would fall foul of the prohibition articulated in the matter of *Britstown Municipality v Beunderman (Pty) Ltd* 1967 (3) SA 154 (C) against so-called 'hybrid orders'. The court granted the review application, and refused the counter-application. (The High Court's reasoning is set out in [14] of this judgment.)
Termico appealed to the Supreme Court of Appeal against such decision.
The SCA firstly considered the requirement of finality of an arbitration award. In this regard it drew attention to the fact that the relevant rule was to the effect that all issues *submitted* had to be determined. In other words, an award might not result in a final resolution of a dispute between parties (see [13]).
The SCA went on to reject the court a quo's characterisation of the award in question as an impermissible 'hybrid order'. In its view, the rule against hybrid orders encompassed determinations by a court in respect of a matter which was still the subject of a further arbitration *that had not finally run its course*; not a situation — as here — where the arbitration was complete and the court was asked to deal with issues *that were not issues in the arbitration*. The court below was not asked, in the counter-application, to decide matters which remained undecided by the arbitrators or that were still 'live' in a pending arbitration. (See [18].) All issues referred to the arbitrators had been decided by them. They could not grant a money judgment, because the events necessary for its determination had not yet occurred — the meeting and the calculation of the loan, both of which *were not issues before it*. The SCA accordingly concluded that SPXT's review application should have failed, and that Termico's counter-application to make the arbitration award an order of court ought to have succeeded. (See [20].)
The SCA in addition held that Termico was, on the facts, entitled to the money judgment claimed (see [21] – [25]). The court accordingly upheld the appeal and granted the order set out in [27].

CHURCHILL v PREMIER, MPUMALANGA AND ANOTHER 2020 (2) SA 309 (MN)
Delict — Exclusion of liability — Statutory barring of claim by employee against employer for occupational injury — Employee assaulted at workplace by protesting employees — Whether injury was 'occupational injury', so excluding delictual claim against employer — Compensation for Occupational Injuries and Diseases Act 130 of 1993, s 35.

In the course of an employment related protest, protesting employees of the provincial government assaulted a senior employee. As a result the employee was psychiatrically injured, and came later to sue the provincial government for its

alleged omission, contra its alleged duty to protect its employees, to ensure the employee's safety (see [3] and [5]).
The government's defence to the delictual claim was that it was barred by the Compensation for Occupational Injuries and Diseases Act 130 of 1993 because the injury was an 'occupational injury' (see [6] and [9]). Section 35 of the Act debars an employee recovering damages from its employer, for an 'occupational injury'.
An 'occupational injury' is defined as 'a personal injury sustained as a result of an accident' (s 1). And an 'accident' is defined as 'an accident arising out of and in the course of an employee's employment and resulting in a personal injury' (s 1).
The issue was whether the personal injury resulted from an accident 'arising out of' the employee's employment (see [14] and [59]).
The High Court *held* that it did (see [62] and [64]). This, based on the following:

- The 'accident' occurred at the employee's place of work, and while she was going about her work (see [60]); and
- The employee's role ('design and implementation' of the employer's policies) and her non-participation in the protest increased the danger to the employee posed by protesting employees (see [63]).

The employer's defence upheld, and the employee's delictual claim dismissed (see [64] and [66]).

SA CRIMINAL LAW REPORTS MARCH 2020

S v MALHERBE 2020 (1) SACR 227 (SCA)

Search and seizure — Search warrant — Validity of — Requirement that statement forming basis of application for search warrant be made under oath — Strict compliance required — Criminal Procedure Act 51 of 1977, s 21(1)*(a)*.

The appellant was convicted in a regional magistrates' court of various offences relating to the possession of child pornography arising from a search conducted by the police on a search warrant issued by a magistrate. The warrant was authorised on the basis of a statement by a police officer which was not made under oath and merely recorded:

'I hereby certify that the deponent knows and understands the contents of this statement and that the deponent's signature was placed here in my presence on . . . .'

The police officer testified that when he appeared before the magistrate, no oath was administered to him and no further enquiries were made regarding the information relied upon by the police.
Held, that the statement which formed the basis of the search warrant breached the specific requirements of s 21(1)*(a)* of the Criminal Procedure Act 51 of 1977. The law required strict adherence to the provisions of the section and a search warrant issued on the basis of an unattested statement was invalid. The magistrate should accordingly have held that the search warrant was issued unlawfully and was invalid. The appeal had to be upheld and the convictions and sentences set aside. (See [7] – [8].)

STANFIELD AND OTHERS v NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS AND ANOTHER 2020 (1) SACR 232 (GP)

Prosecution — National Director of Public Prosecutions — Centralisation of prosecution — Direction in terms of s 22(3) of National Prosecuting Authority Act 32 of 1998 to be read with s 111 of Criminal Procedure Act 51 of 1977 — NDPP entitled to specify court where trial to be held.
Prosecution — National Director of Public Prosecutions — Review of decisions of — Prosecutorial decisions specifically excluded from provisions of Promotion of Administrative Justice Act 3 of 2000.

The applicants were the first three of 23 accused who were indicted to stand trial in the Khayelitsha Regional Court in the Western Cape. They applied for an order suspending the prosecution instituted against them and their co-accused, and for an order reviewing and setting aside the decision of the National Director of Public Prosecutions to consolidate the trial in the regional court in Khayelitsha.
The respondents raised a point in limine that prosecutorial decisions were specifically excluded from the ambit of administrative action for the purposes of the Promotion of Administrative Justice Act 3 of 2000 (the application was brought in terms of s 3(4) of the Act). The court upheld the objection, finding that the decision could only be reviewed in terms of a rule-of-law review. Since no rule of law was before the court, the application had to be dismissed. (See [11] – [12].) The court, however, found it prudent to address the two other issues raised in the application, to ensure the applicants' right to have their trial begin and conclude without unreasonable delay.
The heart of the applicants' complaint was that s 22(3) of the National Prosecuting Authority Act 32 of 1998 (the NPA Act) allowed the NDPP to issue a certificate directing that an offence be tried within the area of the jurisdiction of another Director, not to direct which court should hear the matter.
Held, that s 111 of the Criminal Procedure Act 51 of 1977 (the CPA) had to be interpreted in context with s 22(3) and the apparent purpose to which it was directed. Applying the ordinary rules of grammar and syntax to the wording of s 111(1) of the CPA, the reference to 'the place at which' could only be a reference to the area of jurisdiction where the criminal proceedings should be conducted and commenced. If known, the place within the jurisdiction should be stated. That was the sensible approach because any other interpretation would not be in context with the purpose of the sections. This ground of review was bad in law. (See [18] – [21].)
The second ground of the review was that the representatives of the NDPP did not properly apply their minds to the issue of the certificate and that the facts and reasons therefor rendered the decision irrational. They argued that the balance of convenience favoured that the matter be heard in Pretoria, alternatively Olifantsfontein.
Held, that the basis for the decision and accordingly the rationality of the decision were set out in the opposing affidavit with cogent facts, including that, except for three of the 23 accused, all were resident in the Western Cape; the matter had been investigated for some time with the police in the Western Cape, and the NPA in the Western Cape had been dealing with the specific matter for some time. It was furthermore neither economical nor practical to move NPA advocates dealing with the matter in the Western Cape to Pretoria in order to conduct the trial, taking into account that those advocates had other matters which they were prosecuting in the

Western Cape as well. A court could not substitute its discretion for that of the decision-maker. It could only review a decision if the decision-maker failed to apply their mind to the relevant issues in accordance with the tenets of natural justice and the behest of the statute. In the present matter find that the NDPP, in making the decision, did not apply its mind to the facts. (See [24] – [27].) The application was dismissed.

S v M 2020 (1) SACR 241 (WCC)

Sexual offences — Victims — Child victims — Treatment of by court and social welfare — Steps needed to be taken to protect child victims from secondary trauma — Implementation required of provisions of National Policy Framework Management of Sexual Offence Matters of June 2012 — Child victim in present case subjected to unnecessary trauma, inter alia, by more than 20 postponements of trial.

The appellant was convicted in a magistrates' court of attempted rape and was sentenced to eight years' imprisonment. The complainant was the appellant's 11-year-old biological daughter. She had commenced her evidence via CCTV but after a while became distraught and could not continue. The case then had to be postponed, as it would be on another 20 occasions for different reasons. She never completed her evidence-in-chief and was not cross-examined. The court could therefore not take her evidence into consideration and had to rely on the evidence of the first reporter; the medical practitioner who completed the J88 form after examining the complainant; and the DNA evidence which revealed the presence of the appellant's DNA in the complainant's underwear. The appellant did not testify, despite the said DNA evidence and the complainant's injuries, establishing that she had been sexually assaulted. He appealed against his conviction and sentence. The court dismissed the appeal on the merits in respect of the conviction, and found no reason to interfere with the sentence imposed on the appellant. The court then proceeded to comment on the significant failure by the criminal-justice system to provide proper care for the complainant, care which it was required by law to provide, so as to avoid as far as possible secondary trauma being occasioned to the victim. (See [55].) It pointed to the statutes and procedures which were required to be put in place and implemented, to ensure that child victims of crime were treated in such a manner as to reduce, as far as possible, the occurrence of secondary trauma to the victim during the trial of the perpetrator. It held that events such as the delays and repeated postponements in the present case should not be permitted, and everything that could be done should be done to reduce the anxiety and stress that accompanied the giving of evidence at a criminal trial. There was a positive obligation on those involved to take active steps to assist the complainant in matters of the present nature. (See [70] – [71].) These steps had been set out in the National Policy Framework Management of Sexual Offence Matters, 2012. The court further pointed out numerous steps that could be taken, both at court level and at the social-welfare level, to achieve the objectives of the National Policy Framework. (See [76] – [88].)

S v ODHIAMBO 2020 (1) SACR 266 (WCC)

Review — In what cases — Lengthy delay before instituting application — Character of review, as one bearing on assertion of applicant's fundamental rights, not

exempting it from general rule that review applications to be brought within reasonable time.
Review — In what cases — Incompetence or inadequacy of legal representative — Allegations by applicant not borne out by record of proceedings and not justifying bringing of application after unreasonable delay.

After being convicted in a regional magistrates' court of rape and sentenced to 10 years' imprisonment, of which four years were suspended, the applicant unsuccessfully applied for leave to appeal. His subsequent petition to the High Court was also unsuccessful and in the present proceedings he sought to review the proceedings in terms of s 22(1)*(c)* of the Superior Courts Act 10 of 2013. By the time the proceedings were brought on 9 April 1919, a period of 14 months had already elapsed since his sentence. The court noted that the application was doomed to failure at the first hurdle by reason of it having been brought with unreasonable delay. The character of the review, as one bearing on the assertion of the applicant's fundamental rights, did not exempt it from the incidence of the general rule that applications for the review of administrative or judicial decisions had to be brought within a reasonable time, and would not otherwise be entertained unless the court was persuaded that the interests of justice required that an exception be made. (See [6] – [7].)
The charge against the applicant arose from an incident one night when the complainant, an 18-year-old woman, who was a virgin at the time, was accompanied by her blind boyfriend and a male companion at a bar where they ate and drank. At midnight they moved to the upstairs bar where the applicant was the barman. A cocktail was mixed for her and shortly after drinking it she became confused and unable to focus. Her next recollection was waking up in bed wearing only her underwear. The applicant, who was completely naked, was kissing her. After a struggle she managed to push him off and got dressed, left the flat and was collected by a friend. She laid a complaint and, when the police interviewed the applicant, he told the police official that he had engaged in oral sex with the complainant. In his application for leave to appeal, the applicant alleged that he had had 'partial penetration'. The main line of attack on the conviction was the allegation that the legal representative who had represented him at the trial had closed his case without his testimony and had made a concession that he had partial penetration with the complainant.
Held, that, notwithstanding the unreasonable delay attending the institution of the review and the absence of any acceptable explanation for it, the court would still have been inclined to condone the delay if the facts had suggested that the applicant's conviction had followed on a vitiating miscarriage of justice attributable to any inadequacy in the quality of his legal representation. But that was not the case. It was inherently improbable that any legal practitioner, even an inept or inexperienced one, would make an admission of partial penetration in the context of defending a client on a charge of rape if their instructions were not to that effect.
Held, further, that the record bore out that the legal representative did not summarily close the defence case without calling the applicant to give evidence, but showed that, following upon the unsuccessful application for the applicant's discharge at the close of the state's case, the legal representative asked for and was given an adjournment to consult with the applicant on the course of action to be followed. He had thereafter reported that the decision to close the applicant's case without calling any evidence had been made after 'careful deliberation'. (See [59].)

Held, further, that the applicant had not shown that his legal representative's conduct of his case did not fall within the wide range of reasonable professional assistance or that it gave rise to cognisable prejudice. There were accordingly no good grounds to exercise the court's discretion in his favour by condoning the unreasonable delay with which the review application was instituted. The application was dismissed.

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS v BOBROFF AND ANOTHER 2020 (1) SACR 288 (GP)

Prevention of crime — Forfeiture order — Application for in terms of s 48 of Prevention of Organised Crime Act 121 of 1998 — Proceeds of unlawful activities — Money held in foreign bank account — Such money subject to forfeiture in terms of POCA read together with provisions of International Co-operation in Criminal Matters Act 75 of 1996, ss 19 and 27 — Violations of income-tax and VAT laws, in respect of moneys earned unlawfully, to be dealt together with in terms of s 50(1) of POCA.

The applicant applied for a forfeiture order in terms of s 48 of the Prevention of Organised Crime Act 121 of 1998 (POCA) in respect of credit bank balances in the names of the two respondents, in two separate bank accounts that the respondents held respectively in Israel. A preservation order had been granted in July 2017 in terms of s 38 of POCA.
The respondents challenged the court's jurisdiction on the basis that the property sought to be forfeited to the state was in Israel, arguing that POCA had no extra-territorial application. They submitted that the fact that the preservation order had been granted, would not establish jurisdiction or render it unimpeachable. They contended that forfeiture proceedings were proceedings in rem and not penal, and that neither the personal nor the offence jurisdiction of the court was relevant.
The applicant contended that the definition of 'instrumentality of an offence' in POCA afforded the South African courts jurisdiction over property so defined, regardless of where the offence had been committed or was suspected of having been committed. Therefore, by parity of reasoning, if property that was an instrumentality of an offence could be pursued elsewhere outside of South Africa, there was no reason why property which was 'proceeds of unlawful activities' should not be pursued elsewhere outside the country.
Held, that it was apparent in the definitions of 'agreement', 'confiscation order', 'forcing confiscation order', 'foreign state', and 'letter of request' that forfeiture orders under POCA were capable of execution in or by foreign states that had similarly bound themselves to multilateral conventions to which the Republic was a signatory, or to which it had acceded and which had the same effect as an agreement referred to in s 27 of the International Co-Operation in Criminal Matters Act 75 of 1996 (ICCMA). The framework of POCA, read with the framework of ICCMA, especially s 19 thereof, gave South African courts jurisdiction over property situated in a foreign state in respect of which a forfeiture order to the state had been made, if such property, including money, constituted the proceeds of unlawful activities. (See [40] – [41].)
Held, further, that various forms of misconduct by the legal practice conducted by the respondents in South Africa had already been established in a previous case that dealt with misappropriation of trust funds and overreaching, and it was not within the court's power to disagree with the findings of that court. It accordingly had to accept

that the respondents had engaged in various forms of misconduct which warranted their being struck off the roll of legal practitioners as attorneys. (See [60] – [62].).
In respect of an argument by the respondents that if it were found in the present proceedings that the practice had been guilty of violating income-tax and VAT laws and engaged in a scheme to avoid being taxed on interest earned as a result, separate proceedings had to be instituted for such violations.
Held, that the submission would be correct if such violations were in respect of ordinarily earned moneys upon which tax and VAT liabilities were evaded and payment of tax on interest earned was evaded. However, if these violations of the income-tax and VAT laws were in respect of moneys earned unlawfully, then the violations had to be dealt together with the provisions of s 50(1) of POCA. The benefits derived from such violations of the law were accordingly themselves the proceeds of unlawful activities. The misconduct was not a mere failure to adhere to the rules of the Law Society: it was conduct prohibited by POCA. (See [66] and [70].)
The court granted an order as prayed for by the applicant.

S v CLOETE AND OTHERS 2020 (1) SACR 317 (FB)

Conservation — Threatened and protected species of wild animal — Performance of restricted activity without permit — Licensed breeders of lion and cheetah experiencing emergency situation when cubs born during cold spell — Tagging impossible due to age and condition and requisite permit could therefore not be granted for their transportation to facilities where necessary treatment and care could be provided — Defences of impossibility and necessity succeeding on appeal — National Environmental Management Biodiversity Act 10 of 2004, s 57(1); Free State Nature Conservation Ordinance 8 of 1969 s 14(1), 40(1)*(b)*.

The appellants appealed against their convictions and sentences in a regional magistrates' court on various environmental offences. The first and second appellants were convicted of a contravention of s 57(1) of the National Environmental Management Biodiversity Act 10 of 2004, in that they had carried out a restricted activity involving a specimen of a threatened and protected species by moving four cheetahs and four lions without a permit; the first appellant was also convicted of a contravention of s 14(1) of the Free State Nature Conservation Ordinance 8 of 1969 (the Ordinance) for unlawfully keeping in captivity four cheetahs and four lions without a permit issued by the administrator; and the second and third appellants were in addition convicted of a contravention of s 40(1)*(b)* of the Ordinance for failing to comply with a condition of a permit by not keeping animals at the address specified in the permit and failing to report births of four cheetahs and four lions within five working days.

The convictions arose from a cold night in June 2016 when the temperature dropped to between minus four and minus eight degrees Celsius on the second and third appellants' farm. They had a permit to breed lions and cheetahs on the farm and on that night nine cheetah cubs were born. By the next morning five had already died and the remaining four were patently in distress, and the second appellant took them to a veterinary surgeon who had a permit to treat such species. The vet treated them, but he did not have the necessary equipment and skills to help the cubs survive at his clinic and they needed to be in an environment where they would not

be exposed to infections from the other sick animals he was treating. He accordingly took them to the first appellant who had the necessary facilities. Twelve days later the second appellant was faced with a similar situation when four of a litter of nine cubs who had survived also needed treatment, and they were also taken to the vet who then transferred them to the first appellant. The appellants explained that the animals needed urgent medical attention and, since they were so small and sick, they had not yet been tagged with a microchip, which meant that they had not yet been identified, and because of this it would have been impossible to obtain permits for them.
On appeal it was contended that the magistrate had incorrectly rejected the defence of impossibility.
Held, that the defence of impossibility was a valid one regarding the obtaining of permits for the cubs, as their age and health condition made it impossible to comply with the stated practice in terms of the Ordinance. The interests which the appellants were protecting were obviously the lives of the cubs, as well as their legal interest in the survival of the cubs as the owners of the very expensive animals. It was hard to imagine that the legal convictions of society would regard the observance of a transfer-permit requirement, which was impossible to obtain, as a more important interest than that of the survival of the cubs and the financial interest of their owners. (See [26] and [31].)
Held, further, that the state had not proved beyond a reasonable doubt that the appellants did not act in an emergency situation which was still ongoing at the time that the cubs were confiscated by the authorities. The appellants' actions in protecting a legally recognised interest in the face of the emergency situation were justified and lawful and their defence of necessity accordingly had to succeed. (See [48] – [49].) The appeal was upheld, and the convictions and sentences set aside.

S v ROHDE 2020 (1) SACR 329 (SCA)

Bail — Pending appeal — When to be granted — Leave to appeal having been granted by Supreme Court of Appeal on petition after refusal by High Court of leave to appeal — Fact that leave to appeal granted meant that appellant had prospects of success on appeal — Refusal of bail set aside.

The appellant was convicted in the High Court of having murdered his wife, and was sentenced to 20 years' imprisonment. His application for leave to appeal against his conviction and sentence was dismissed, but on petition the Supreme Court of Appeal granted him leave to appeal against his conviction and sentence. He then applied in the High Court for bail pending appeal, but that was refused. In the present matter he appealed against the refusal of bail, contending that there were reasonable prospects of his appeal being successful and that, given that there was no likelihood that he would abscond, bail ought to have been granted.
Held, per Van der Merwe JA, Maya P concurring, that the court had to accept that leave to appeal could only have been granted on the merits thereof and that the judges who had considered the petition had concluded that there were reasonable prospects that the conviction may be overturned on appeal. Furthermore, in the circumstances, where all the appellant's emotional and financial ties were with South Africa, all three of his other passports had expired and were in the possession of the police, and, apart from one occasion which had been amply explained by medical

evidence, the appellant had at all times fully complied with his bail conditions, there was no likelihood that he would abscond. In the result, he ought to have been released on bail. (See [23] – [25].) The appeal was accordingly upheld.
Held, per Nicholls JA, dissenting, that the appellant had not discharged the onus of showing that it was in the interests of justice that he be released on bail, and it had not been shown that there was no likelihood of him evading his trial. (See [20].)

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Contango Trading SA and others v Central Energy Fund SOC Limited and others [2020] 1 All SA 613 (SCA)

Civil Procedure – Discovery of documents – Rule 35(12), Uniform Rules of Court – Any party who refers to a document in their pleadings or affidavits, must produce it upon receipt of a notice calling upon it to do so unless the document is irrelevant, privileged or cannot be produced – General rule is that any reference to a document even if not by name – Triggers the entitlement to claim its production – Defence of litigation privilege applies only if the document was obtained or brought into existence for the purpose of a litigant's submission to a legal advisor for legal advice; and if the litigation was pending or contemplated as likely at the time – Reports not shown to have been brought into existence for the purpose of obtaining legal advice required to be disclosed.

Review proceedings were brought by the first and second respondents against several of their own decisions, as well as certain agreements concluded pursuant thereto, concerning the disposal by the second respondent ("SFF") of some 10 million barrels of this country's crude oil reserves.

The appellants in the present appeal were oil companies affected by the said decisions. On receiving the main review, the appellants issued notices in terms of rule 35(12) requesting the respondents to produce and make available certain documents allegedly referred to in their papers. The respondents refused to disclose the requested material referred to in the founding affidavit and annexures. The appellants then brought applications to compel in terms of rule 30A to obtain the documents.

The court *a quo* dismissed both applications, resulting in the present appeal.

Held – Rule 35(12), which deals with discovery, inspection and production of documents, provides that any party who refers to a document in their pleadings or affidavits, must produce it upon receipt of a notice calling upon it to do so unless the document is irrelevant, privileged or cannot be produced. In general, any reference to a document – even if not by name – triggers the entitlement to claim its production. The appellants sought production of various documents referred to in the founding affidavit on behalf of the first respondent ("CEF") and SFF. Those were a "legal review", two opinions furnished by senior Counsel and reports by two auditing firms. The respondents resisted production of the legal review on two grounds. First, they said that the review referred to a process and not to a document as envisaged in rule 35(12); and, secondly, they claimed that the process was in any event privileged. The Court held that the reference to the legal review in the relevant affidavit was not a

reference to a document as contemplated in rule 35(12). The court *a quo* therefore correctly refused to order its production.

To claim litigation privilege in respect of the two reports by the auditing firms, the respondents had to prove that the document must have been obtained or brought into existence for the purpose of a litigant's submission to a legal advisor for legal advice; and second, that litigation was pending or contemplated as likely at the time. It was not shown that the reports were brought into existence for the purpose of obtaining legal advice in this case. The reports therefore had to be disclosed.

The same could not be held for the two opinions furnished by senior Counsel. They were privileged and accordingly the CEF and SFF were not obliged to produce them. The Court explained the requirements for an implied waiver of privilege based on the objective conduct of the party vested with the privilege, and found no waiver to have taken place.

The same could not be held for the two opinions furnished by senior Counsel. They were privileged and accordingly the CEF and SFF were not obliged to produce them. The Court explained the requirements for an implied waiver of privilege based on the objective conduct of the party vested with the privilege, and found no waiver to have taken place.

Minister of Trade and Industry v Sundays River Citrus Company (Pty) Ltd [2020] 1 All SA 635 (SCA)

Civil Procedure – Substitution order regarding recalculation of grant payable by Department of Trade and Industry – Section 8(1)(c)(ii)(aa) of the Promotion of Administrative Justice Act 3 of 2000 – An order of substitution under section 8(1)(c)(ii)(aa) entails that the reviewing court itself makes the decision that, in its view, the administrator should have made – Court's order was properly based on section 8(1)(a)(ii), and court found not to have invoked section 8(1)(c)(ii)(aa), obviating need to prove exceptional circumstances.

The respondent conducted the business of packaging and marketing citrus fruit on behalf of citrus fruit farmers in four different centres in the Eastern Cape. Its sole shareholder ("SRCC Holdings") was an entity in which some 106 citrus fruit farmers in the Sundays River Valley owned shares. Citrus fruit farmers who were shareholders in SRCC Holdings delivered their harvest to the respondent's warehouses, where the fruit was prepared and packaged for sale under various brands both to international and local markets. The respondent derived its income in the form of packing fees and marketing commission from its packaging and marketing activities on behalf of the citrus fruit farmers. The nett returns from the sale of the citrus fruit were then paid over to the farmers on a proportionate basis after deduction of not only the respondent's operational expenses but also costs associated with the preparation of the citrus fruit for sale. Each farmer's proportionate share of the net profits took account of those costs according to each farmer's level of participation in the pool.

In order to promote enterprise competitiveness, the Department of Trade and Industry ("DTI") introduced the Manufacturing Competitiveness Enhancement Programme (the "MCEP") in terms of which it paid grants to qualifying businesses. To qualify for a grant, a business entity had to first apply to the DTI and receive approval. Businesses seeking to avail themselves of a grant were required to invest in any one

or more of the following: capital equipment for upgrading and expansions; enterprise-level competitiveness improvement activities for new or increased market access; and product and process improvements.

In March 2013, the respondent submitted a claim to the DTI for payment of the grant due to it. The amount which the DTI calculated was payable to the respondent as a grant was disputed by the respondent, which subsequently instituted motion proceedings against the appellant. In its heads of argument in the High Court, the appellant conceded that the decision made by the DTI with respect to the amount of the grant payable to the respondent fell to be reviewed and set aside. Following that concession, all that remained to be determined by the High Court on the merits was the remedy as contemplated in section 8(1) of the Promotion of Administrative Justice Act 3 of 2000.

The Court granted an order substantially in the terms sought in the notice of motion. The Court directed the appellant, in recalculating the grant payable to the respondent, to utilise what was referred to as the "pool account method of calculation". The appellant argued on appeal, that the Court had in essence granted a substitution order, in terms of section 8(1)(c)(ii)(aa) of the Promotion of Administrative Justice Act, in circumstances where the respondent had not made out a case therefor.

Held – The exceptional remedy of substitution is an equitable one that has its origin in our common law, long before the advent of our constitutional order and the enactment of the Promotion of Administrative Justice Act.

The crux of the appeal was whether in granting the order at issue in this appeal, the High Court strayed beyond the parameters of the power conferred on it by section 8(1)(a)(ii) of the Promotion of Administrative Justice Act. Typically, an order of substitution under section 8(1)(c)(ii)(aa) entails that the reviewing court itself makes the decision that, in its view, the administrator should have made. As a result, the need for remittal is obviated and the dispute between the parties is put to an end once and for all. Here the High Court did not purport to invoke section 8(1)(c)(ii)(aa). Its invocation of section 8(1)(a)(ii) was confirmed as appropriate in the circumstances of the case, and the appeal was dismissed.

RK and others v Minister of Basic Education and others (Equal Education as *amicus curiae*) [2020] 1 All SA 651 (SCA)

Amicus curiae – Requirements for admission – Rule 16 of the Rules of the Court requires a party applying to be admitted as an amicus to briefly describe its interest in the proceedings and the position it intends to adopt; to set out the submissions it wishes to advance and their relevance to the proceedings; and its reasons for believing they would be useful to the court and different of those of the other parties.

Personal Injury/Delict – Claim for emotional shock – A plaintiff can only claim damages for so-called nervous or emotional shock where it is suffered as a consequence or cause of a detectable psychiatric injury – Validity in law of a claim brought under a separate heading for grief or bereavement, allegedly suffered as a result of negligence but which does not flow from a psychiatric lesion – Court finding it unnecessary to develop common law as claim for grief associated with psychiatric lesion caused by emotional shock is recoverable in our law.

In January 2014, a 5-year-old boy drowned after falling into a pit latrine at his school.

The appellants, being his parents and siblings, instituted action in the Limpopo Division of the High Court claiming damages they alleged they had sustained arising out of his death, including separate claims for emotional shock and grief. Their claims succeeded in part but, in the main, were dismissed. They appealed to this Court with leave of the court *a quo*.

A non-profit and public benefit organisation ("Equal Education") appeared as *amicus curiae* and supported certain of the appellant's claims. The application of a firm of attorneys ("RSI") to intervene as a further *amicus* was dismissed at the commencement of the appeal.

Held – Rule 16 of the Rules of the Court requires a party applying to be admitted as an *amicus* to briefly describe its interest in the proceedings and the position it intends to adopt; to set out the submissions it wishes to advance and their relevance to the proceedings; and its reasons for believing they would be useful to the court and different of those of the other parties. An *amicus* must make submissions that will be useful to the court, and which differ from those of the parties. Its submissions must be directed at assisting the court to arrive at a proper and just outcome in a matter in which the friend of the court does not have a direct or substantial interest as a party or litigant. It may urge the court to come to a certain outcome, but only in the course of assisting a court to arrive at a just outcome and not to serve or bolster a partisan interest against any of the parties in litigation. RSI failed to satisfy the test in question.

In addressing the merits, the Court began with the appellants' claims regarding emotional shock. In our law, a plaintiff can only claim damages for so-called nervous or emotional shock where it is suffered as a consequence or cause of a detectable psychiatric injury. The Court considered the validity in law of a claim brought under a separate heading for grief or bereavement, allegedly suffered as a result of negligence but which does not flow from a psychiatric lesion. The appellants and the *amicus* argued that the common law should be developed having regard to the spirit, purport and objects of the Constitution to either recognise a claim for grief and bereavement experienced as a result of the death without there being an underlying psychiatric lesion, or to allow an award to the appellants for so-called constitutional damages flowing from their grief and bereavement.

Courts should not attempt to develop the common law under the aegis of the Constitution unless it is necessary to do so.

The starting point for the enquiry regarding the development of the common law and the claim for constitutional damages, is to consider whether the common law provides an adequate or appropriate remedy for the breach complained of in the present case. The Court found that no development of the common law was required for grief, feelings of bereavement and loss to be taken into account in the assessment of their damages. The appeal was upheld in that regard and the Court made an order setting out the damages payable. Constitutional damages were not awarded as the appellants had been fully compensated for the loss sustained.

Zikhulise Cleaning Maintenance and Transport CC v Chairman of the Investigating Committee of the Construction Industry Development Board and others [2020] 1 All SA 677 (SCA)

Construction – Construction Industry Development Board – Investigation into conduct of contractor – Formal inquiry – Section 29(1) of the Construction Industry Development Board Act 38 of 2000 prescribes that the Board may for the purposes of enforcing the Code of Conduct published under section 5(4), convene an inquiry into any breach of the Code and must conduct the inquiry in the prescribed manner – Validity of charges – Conduct not constituting a breach of the Code of Conduct falls beyond the scope of an inquiry as contemplated in section 29(1), and charges brought in relation to such conduct should be dismissed by the investigating committee.

The appellant was registered as a contractor in terms of the Construction Industry Development Board Act 38 of 2000 (the "Act") for a period of three years from 1 December 2005 to 30 November 2008 whereupon such registration lapsed under section 20. It was again registered from 31 March 2009 until the end of March 2012 and thereafter again for a further three-year period with effect from 19 September 2012. Shortly thereafter, it was informed by the Construction Industry Development Board (the "Board") that it had been the subject of an investigation conducted under the Regulations promulgated under the Act, and evidence had been obtained indicating that it had contravened the Act or the Regulations or the Board's code of conduct. A formal inquiry into the relevant charges was to be conducted.

The investigating committee appointed to carry out the inquiry consisted of the first respondent as its Chair and two additional members, the second and third respondents (referred to by the court as the "Committee"). The fourth respondent, an advocate, was appointed by the Board to act as prosecutor or evidence leader at the inquiry. Only he appeared on appeal, and the other respondents chose to abide the decision of the court. At the hearing, the appellant's attorneys objected to the charges, contending that they did not disclose any offence and asked for the charges to be dismissed. The Committee's refusal to dismiss the charges led to the appellant seeking review of that decision in the High Court. The Court dismissed the application and the appellant brought the present appeal.

Held – the appellant contended that the charges did not relate to conduct which was susceptible to an inquiry. Section 29(1) of the Act prescribed that the Board may for the purposes of enforcing the Code, convene an inquiry into any breach of the Code and must conduct the inquiry in the prescribed manner. Any conduct that does not constitute a breach of the Code therefore falls beyond the scope of such an inquiry. The Code relates to acceptable conduct on the part of various parties in the procurement process in the construction industry. Relations between the Board and parties to the construction procurement process are solely governed by the Act and the Regulations. On the other hand, good practices between parties to the construction procurement process are governed by the Code. The conduct to which the first 17 charges against the appellant referred could not be construed as breaches of the Code. Those charges should have been dismissed. Furthermore, the inquiry was not procedurally compliant with the Regulations.

The appeal was accordingly upheld.

Biermann v Buffalo City Metropolitan Municipality and related matters
[2020] 1 All SA 688 (ECL)

Civil Procedure – Rescission application – Explanation for failure to appear in court when order was made, and lateness of rescission application, counting against granting of rescission – Where no proper case under rule 31(2)(b) was established for the setting aside of default judgment granted, and interests of justice not served by setting aside of order, rescission was refused.

Property – Rezoning of property – Approval of building plans – Self-review application by municipality – In absence of proof of mistake or any other grounds for assailing approval of building plans, municipality obliged to comply with order confirming approval.

Attempts by a developer ("Biermann") to develop immovable property purchased by him led to a series of skirmishes with the municipality in whose jurisdictional area the property was located.

Biermann wished to construct sectional title units on the property, for which he required the rezoning of the property. His rezoning application was granted, subject to certain conditions. One of those was a height restriction, which appeared to have been imposed as a result of the original restrictions in the title deed. Biermann had successfully applied to court for the removal of such restrictive restrictions. He was therefore under the impression that the removal of the title deed restriction in terms of the court order also removed the two-storey height restriction imposed as a condition when the rezoning application was granted, which was incorrect.

In June 2018, a set of amended building plans was submitted to the municipality, clearly showing sectional units in buildings of three storeys in height. The plans were approved by the municipality on 25 October 2018. After construction commenced, an official in the municipality set a letter to Biermann, demanding that construction cease due to the alleged lapsing of the zoning of the property.

Flowing from the above, four inter-related applications, namely a contempt application brought by Biermann against the municipal manager of the municipality, a rescission application brought by the municipality to set aside a High Court order in Biermann's favour, a (self) review application brought by the municipality to set aside its own municipal decision to approve amended building plans, and an interlocutory interdict application brought on an urgent basis to prevent Biermann's transferring attorneys from having the sectional diagram registered and opened, had to be adjudicated on.

Held – The contempt of court application was withdrawn in court.

The rescission application sought to set aside an order reviewing and setting aside several decisions made against Biermann by the municipality. The Court held that not only had the municipality not made out a proper case under rule 31(2)(b) for the setting aside of the judgment granted by default, but the interests of justice would not be served, especially at this belated stage, by setting aside the order in question. Reliance by the municipality on rule 42(1)(a) was also misplaced as Biermann was procedurally entitled to the order, which order could not be said to have been "erroneously" granted in the absence of the other party. The rescission application was dismissed.

The Court went on to find that the municipality did not make out a proper case for self-review for the setting aside of Biermann's approved amended plans. Nor was the municipality able to establish the requirements for the interdictory relief sought.

Centre for Child Law and others v Minister of Basic Education and others (Section 27 and another as *amici curiae*) [2020] 1 All SA 711 (ECG)

Constitutional and Administrative Law – Judicial review – Delay in bringing application – Section 7(1) of the Promotion of Administrative Justice Act 3 of 2000 requiring review to be brought within 180 days of impugned decision – Where explanation for delay was satisfactory, court granting condonation in terms of section 9 of Act.

Education – Right to receive education – Conditions imposed on right – Decision to withhold funding in respect of learners with no identity numbers or with invalid numbers until corrected – Constitutionality – Policy found to infringe various constitutional rights, and was set aside by court.

The present application concerned children who were precluded from unconditionally continuing to attend public schools unless they or their parents/guardians identified themselves by means of, *inter alia*, passports, identity documents, birth certificates or permits. Such children were referred to in the judgment as "undocumented children"

In 2016, the funding provided by the Department of Education of the Eastern Cape Provincial Government to schools was made conditional. Funding for learners with no identity numbers or with invalid numbers would be withheld until corrected, failing which, by 17 June 2016, the affected learners would be regarded as no longer in existence and thereupon removed from enrolment at the affected schools. The applicants sought to challenge that decision.

Held – The first question to be addressed was whether there had been an unreasonable delay in bringing the present application. As the application was launched long after the expiry of the 180-day period referred to in section 7(1) of the Promotion of Administrative Justice Act 3 of 2000, the applicants sought condonation in terms of section 9 of the Act. While the delay was found to have been unreasonable, the Court found that the explanation tendered for the delay passed muster. Condonation was granted.

It then had to be decided if the relief sought was rendered moot by the withdrawal of the circular in terms of which the department's impugned policy was introduced. It was held that the issue in contention remained alive despite the purported withdrawal of the circular in question.

The Court went on to examine the policy introduced by the department, and set out the constitutional rights infringed thereby. It was found that the first to third respondents were acting unconstitutionally in not permitting children to continue receiving education in public schools purely by reason of the fact that they lack identification documents. The impugned policy was set aside.

Chang v Minister of Justice and Correctional Services (Forum de Monitoria Do Orcamento and another as Intervening Parties and Helen Suzman Foundation as *amicus curiae*) and a related matter [2020] 1 All SA 747 (GJ)

Criminal Law and Procedure – Extradition – Request for extradition by competing States – Immunity as factor relevant to decision of Minister of Justice – Article 4(e) of the SADC Protocol on Extradition provides that extradition shall be refused if the person whose extradition is requested has, under the law of either State party, become immune from prosecution – Minister not having power to extradite person to country in which he enjoyed immunity, and such decision was ultra vires.

In terms of the SADC Protocol on Extradition (the "Protocol") and the Extradition Treaty between South Africa and the United States of America (the "US Treaty"), provision is made for the surrender and extradition of persons accused of crimes, between member States.

The operation of the treaties and the fact that the subject ("Mr Chang") had been implicated in crimes perpetrated on an international scale, led to an unusual situation ie competing claims for Mr Chang's extradition from South Africa – one from the USA and the other from Mozambique. The Minister of Justice at the time opted to extradite Mr Chang to Mozambique, South Africa's co-member in the Protocol, thus, by implication, rejecting the request of the USA.

Mr Chang was the Minister of Finance in Mozambique from 2005 to 2015, after which he became a member of the National Parliament. Investigations conducted internationally revealed that Mr Chang and his co-conspirators took part in schemes of securities fraud during approximately 2013 to 2015. A majority of the investors who were affected by the scheme were from the USA. The USA thus sought that Mr Chang and others involved in the schemes be prosecuted there.

Mozambique alleged it was unaware of US investigations and the resultant indictment of Mr Chang in New York State until Mr Chang's arrest in South Africa was made public in December 2018. It stated that it had been led to believe that Mr Chang would be tried for his crimes in Mozambique with the cooperation and assistance of the USA when, all the while, the USA was covertly involved in its own investigations. Mr Chang sought an order directing the current Minister of Justice to surrender him to the Government of Mozambique, alternatively, that he be released from custody.

Held – Mr Chang's immunity from prosecution in Mozambique *qua* Member of Parliament ("MP") in Mozambique was central to the failure to prosecute him in Mozambique. It was also central to the legality of the Minister's impugned decisions in this matter and thus of central importance to this case.

Article 4(e) of the Protocol provides that extradition shall be refused if the person whose extradition is requested has, under the law of either State party, become immune from prosecution or punishment for any reason, including lapse of time or amnesty. The former Minister did not have the power to extradite Mr Chang to Mozambique because that was prohibited by his immunity. The decision was *ultra vires*. It would be irrational for a person to be extradited so they could be prosecuted for their crimes if they were immune from prosecution for such crimes. In reality, there was no choice to make between the USA and Mozambique. The Minister did not have the option to extradite Mr Chang to Mozambique. He was faced with only one valid request – that of the USA. The decision to extradite Mr Chang to Mozambique was set

aside. The dismissal of the US extradition request was also set aside. Both decisions were remitted to the current Minister for determination.

Holtzhauzen v Cenprop Real Estate (Pty) Ltd and another [2020] 1 All SA 767 (WCC)

Personal Injury/Delict – Injury at shopping centre – Duty on centre owner and management – Duty to take reasonable steps to avoid injury to members of the public requiring a system which will ensure that spillages are not allowed to create a potential hazard for any material length of time, and that they will be discovered, and the floor made safe, with reasonable promptness – Court finding management functions at shopping centre to have been properly discharged, and no negligence involved.

While on her way to draw money at a shopping centre, the plaintiff slipped and fell on the tiled floor inside the centre and suffered a fracture to her elbow. She sought to recover damages arising from her injuries from both the management company in charge of the mall and its owner. The first defendant ("Cenprop") managed the shopping centre on behalf of its erstwhile owner, the second defendant ("Naheel") at the time.

It was common cause that Cenprop was required to physically inspect the premises on a regular basis and to attend to any hazardous situations which might imperil the use of the centre by the public. It stated that it contracted with a company ("Gabriel") to provide security duties at the shopping centre. Part of Gabriel's functions were alleged to have included being on the lookout for potentially hazardous situations in the mall which might compromise the safety and physical integrity of shoppers.

Held – It has been stated in case law that the duty on the keeper of a supermarket to take reasonable steps is not so onerous as to require that every spillage must be discovered and cleaned up as soon as it occurs. Nevertheless, it does require a system which will ensure that spillages are not allowed to create a potential hazard for any material length of time, and that they will be discovered, and the floor made safe, with reasonable promptness.

After an extensive analysis of case law, the court was satisfied that Cenprop, having been given the duty to do so by Naheel, properly discharged its management functions at the mall on the day in question and that it had not been shown that either defendant was negligent in relation to the injuries sustained by the plaintiff. Consequently, the plaintiff's claim against them had to fail.

Homo Sapiens, Negro, Ethiopian, Semite, Israelite People of South Africa and another v President of South Africa and others [2020] 1 All SA 780 (WCC)

Constitutional and Administrative Law – Indigenous group – Claim for return to rightful landowners dispossessed of land, on grounds of aboriginal title and self-determination – Despite validity of underlying claims of marginalisation of indigenous people and dispossession of land, the manner in which the applicants framed their claims, and their disavowing of the Constitution, rendered the relief sought incompetent.

The applicants were a group of indigenous people, representing themselves in court. The central demand made by the applicants was a claim for aboriginal title and for a

declaration by the Court for the return to the rightful landowners who were dispossessed of land.

In support of their claims the applicants relied on a number of random historical texts, documents, papal bulls, biblical extracts, opinions, maps, diagrams, sketches, photographs and downloads from the internet, none of which were found by the court to contribute to the coherence of their claims.

The first respondent (the "Presidency") raised an exception averring that our law did not recognise aboriginal title and that the applicants had failed to plead facts necessary to support a justiciable claim.

Held – Applicants raised important, sensitive and complex claims about what could be referred to as the marginalisation of South Africa's indigenous peoples and their recognition in the new South Africa. However, they purported to eschew the Constitution on which they would have to rely on to persuade the Court to develop the common law or apply customary law in the recognition of the doctrine of aboriginal title in South African law and for their claim for self-determination.

The Court found that the applicants had failed to establish any basis for the relief against the respondents. The application was dismissed.

Kelsey NO and another v De Hart [2020] 1 All SA 808 (FB)

Property – Lease agreement – Expiry of agreement – Failure to give vacant possession – Breach of contract – Claim for damages – In not giving vacant possession of property on termination of lease agreement, and continuing his farming activities thereon without any remuneration to the owner, defendant breached a contractual obligation leading to plaintiffs suffering damages.

Acting in their capacities as the duly appointed trustees of a testamentary trust, the plaintiffs instituted action against the defendant. The second plaintiff was nominated as trustee pursuant to the will of her late husband (the "deceased").

The deceased owned a farm. A month before his death, the deceased (father of the defendant) and defendant, both acting in person, entered into a written agreement of lease in respect of which the deceased, as lessor, leased the farm to the defendant, for the defendant to conduct farming activities thereon. The trustees administered the affairs of the trust, including the lease of the farm in accordance with the lease agreement. The defendant made payments of the annual rental until the expiration of the lease on 31 August 2013. At the expiration of the lease, no further written agreement was concluded and defendant had accordingly to restore possession of the farm then. He, instead, remained in occupation of the farm and continued to conduct farming operations on the farm.

The plaintiffs pleaded that defendant's failure to vacate the farm in accordance, constituted a breach of the defendant's express contractual obligation to vacate the farm at the termination of the lease period, alternatively that the failure to vacate, was wrongful. As a result of defendant's continued occupation, which constituted a holding over, the plaintiffs alleged that they had suffered damages.

Held – The defendant attempted to rely on a further agreement entitling him to remain in occupation of the farm. However, he was not a credible witness. Having regard to

the totality of the evidence and taking into account the probabilities, the Court found that the version of the plaintiffs was far more probable than that of the defendant. His evidence was rejected as far as it differed from that of the plaintiffs. He had not discharged the onus of proving that the agreement as alleged by him, was in fact concluded.

In not giving vacant possession of the farm on termination of the lease agreement, and continuing his farming activities thereon without any remuneration to the trust, the defendant clearly breached a contractual obligation and as a result thereof, the plaintiffs suffered damages.

Payment of damages to the plaintiffs was awarded.

Red Diamond Holdings Sarl v Eye of the Storm 2 (Pty) Ltd [2020] 1 All SA 829 (GJ)

Intellectual Property – Trade mark – Infringement – Defence of entitlement to manufacture products, based on sub-licence – Continued manufacture of products after expiry of sub-licence constituting infringement of trade mark.

Intellectual Property – Trade mark – Infringement – Holder of trade mark, in relying on past trade mark infringement, not making out a case for final interdictory relief, which requires a continuing infringement or one that is reasonably apprehended.

The applicant was owner of a trade mark ("Lee Cooper"). In October 2015, it concluded a sub-licence agreement with a close corporation ("Lonstein"), which in turn entered into an agreement with the respondent in terms of which the latter would manufacture clothing and footwear onto which it would attach the Lee Cooper trademark. The applicant sought an order interdicting the respondent from selling or distributing any item that bore the words "Lee Cooper" and for the delivery up of every item in its possession which bore those words. It averred that Lonstein had no right to transfer any rights in the trademark.

In the first of two preliminary points raised, the respondent averred that applicant relied only on a past invasion of its right but had not made out a case for final interdictory relief which requires a continuing infringement or one that is reasonably apprehended. The second preliminary point was that the applicant could not seek redress under section 34(3) or (4) of the Trade Marks Act 194 of 1993 because the section only applies in cases where a party has relied on an infringement under that Act and the applicant had failed to do so, let alone proven an infringement of its trademark. On the merits, the respondent contended that there could be no trademark infringement since it was entitled to manufacture Lee Cooper clothing and footwear.

Held – An amendment effect to its papers by the applicant cured the cause of complaint set out in the first preliminary point.

The issue of trade mark infringement by the respondent was then considered. The Court found that the applicant had established only a past, and not continuing, infringement. As a result, the applicant had not made out a case for interdictory relief based on a purely literal interpretation of section 34(3) and (4) of the Act. That however, was not the end of the matter. There remained the issue of the proper interpretation of section 34(3) and (4) bearing in mind the nature of the relief that a

court can order, whether its provisions ought to be read into, or whether they impliedly extend, the remedies otherwise available under law. The relief sought by the applicant also raised other questions of law on which the Court had not heard argument.

The respondent's right to manufacture Lee Cooper branded products was derived from its agreement with Lonstein which until 3 March 2017 had been a sub-licensee of the applicant. In terms of the agreement between the applicant and Lonstein, the latter was granted a licence which comprised a number of rights, including the right to design and have manufactured Lee Cooper apparel and the right to distribute and sell such apparel. Although the applicant claimed that the respondent held no sub-licence, it was at all times aware that the respondent was manufacturing Lee Cooper apparel for Lonstein and possibly even selling it directly. However the respondent would have been aware that it could have no greater rights than Lonstein had obtained. Accordingly when Lonstein's sub-licence terminated in March 2017 so did any entitlement of the respondent to continue manufacturing let alone sell what it had manufactured after the termination date. The Court concluded that there had been an infringement of the applicant's trademark but only to the extent that it concerned apparel manufactured or sold after the relevant date.

University of Stellenbosch Law Clinic and others v National Credit Regulator and others [2020] 1 All SA 842 (WCC)

Consumer – Micro- loans – "collection costs" – Definition in National Credit Act 34 of 2005 – The term "collections costs" as defined in the Act is to be read to include legal fees incurred to enforce the monetary obligation under the credit agreement, regardless of whether such fees are charged before, during or after litigation.

Words and phrases – "collection costs" – Definition in National Credit Act 34 of 2005 – Section 1 of the Act defines "collection costs" as referring to an amount that may be charged by a credit provider in respect of enforcement of a consumer's monetary obligations under a credit agreement, but does not include a default administration charge – Must be read to include legal fees incurred to enforce the monetary obligation under the credit agreement, regardless of whether such fees are charged before, during or after litigation.

The first and second applicants rendered legal advice and services to many, but in particular to the third to twelfth applicants who were all consumers as defined in the National Credit Act 34 of 2005. They sought a declaratory order to determine the interpretation of the definition of "collection costs" in section 1, and the application of the provisions in section 101(1)(g) and section 103(5) of the Act.

Held – Section 1 of the Act defines "collection costs" as referring to an amount that may be charged by a credit provider in respect of enforcement of a consumer's monetary obligations under a credit agreement, but does not include a default administration charge. The applicants sought an order declaring that the collections costs as defined in the Act had to be read to include legal fees incurred to enforce the monetary obligation under the credit agreement, regardless of whether such fees are charged before, during or after litigation. They also sought to have the limitation in terms of section 103(5) that all amounts (bar the capital) cannot exceed the balance of the debt, apply at all times regardless of whether a judgment has been granted.

Thirdly, an order was sought declaring that legal fees may not be claimed until they are agreed upon or taxed.

The Court held that the respondents' attempt to distinguish legal fees which are part of collections costs and legal fees which are part of ligation costs was contrived. The dispute required an interpretation of the Act, and the Court set out the principles applicable to statutory interpretation.

The applicant's interpretation was in line with consumer protection, and served to protect the consumer from collection costs far exceeding the amount that was initially borrowed in the context of micro-loans. The applicants' interpretation encouraged and promoted responsible lending by ensuring that creditor providers properly vet their clients. The Court was satisfied that the Act should be interpreted to obtain the purpose set out by the applicants.

The declaratory and other relief sought was thus granted.

Van Wyk t/a Skydive Mossel Bay v UPS SCS South Africa (Pty) Ltd
[2020] 1 All SA 857 (WCC)

Civil Procedure – Jurisdiction – Common law – Ratione domicilii – In terms of the common law, courts will exercise jurisdiction on the grounds of ratione domicilii or rei gestae, which includes ratione contractus, in which case a court would have jurisdiction in respect of contracts that are to be executed within its area of jurisdiction.

Consumer – Consumer agreement – Limitation of supplier's liability – Duty on supplier – Advising of consumer – In terms of section 49 of the Consumer Protection Act 68 of 2008, any provision of a consumer agreement that purports to limit the risk or liability of the supplier must be drawn to the attention of the consumer in the manner and form that satisfies the formal requirements of sub-sections (3) to (5).

Corporate and Commercial – Claim for payment – Supply of service – Damage to property – Conveyor of aircraft engine liable for payment of replacement cost of engine where engine was destroyed whilst being transported.

Towards the end of 2012, the plaintiff contacted the defendant, requesting a quotation for conveyance of the crate containing an aircraft engine from Oklahoma in the United States of America to George Airport, South Africa. The aircraft engine had been sent to the United States of America in 2007, to have it overhauled for purposes of flying an aircraft which the plaintiff used to conduct his skydiving business.

The plaintiff alleged that pursuant to the agreement entered into between the parties, the aircraft engine was delivered to the defendant, whose agent accepted delivery. However, the defendant failed to deliver the engine to the plaintiff, and instead notified the plaintiff that it had been damaged while in transit in the United States of America and was a total loss.

In consequence, the plaintiff instituted action (in the Western Cape division of the High Court) against the defendant, for payment of the value of the aircraft engine, plus interest.

According to the plaintiff, the agreement was governed by the provisions of the Consumer Protection Act 68 of 2008, because the agreement was for the "supply" of a "service" as contemplated in the Act.

In a special plea, the defendant challenged the court's jurisdiction to adjudicate the matter. It alleged that its registered address and principal place of business was in Kempton Park, Gauteng; that the written agreement between itself and the plaintiff was concluded in Johannesburg; that the defendant was not resident in the court's area of jurisdiction; the cause of action also did not arise within the court's area of jurisdiction; and based on the allegations as set out in the plaintiff's particulars of claim, this Court lacked the necessary jurisdiction. On the merits, the defendant denied the existence of the agreement, denied that the engine was in its possession at the time of its damage and averred that in any event its liability in respect of the consignment would be limited to R100 per 1000 kilograms, or part thereof.

Held – In terms of the common law, courts will exercise jurisdiction on the grounds of *ratione domicilii* or *rei gestae*, which includes *ratione contractus*, in which case a court would have jurisdiction in respect of contracts that are to be executed within its area of jurisdiction, which was clearly applicable in this case, based on the evidence. On the basis of the engine having had to be delivered to the airport in George, which fell within the jurisdiction of the court, the court had jurisdiction.

In terms of section 49 of the Consumer Protection Act, any provision of a consumer agreement that purports to limit the risk or liability of the supplier must be drawn to the attention of the consumer in the manner and form that satisfies the formal requirements of sub-sections (3) to (5). The clause on which the defendant relied did not meet that requirement and the defendant was not entitled to rely thereon.

The special plea was dismissed and the defendant was ordered to pay the amount claimed.

Vlok and others v Georgiou and others[2020] 1 All SA 884 (GP)

Civil Procedure – Application to strike out – Requirements – Matter sought to be struck out must be scandalous, vexatious or irrelevant, and the court must be satisfied that the party seeking such relief would be prejudiced.

Civil Procedure – Class action – Requirements – Applicants have to show that there exist classes identifiable by objective criteria; that they have a cause or causes of action raising triable issues; and that the right to relief relied on depends on the determination of issues of fact, or law, or both, common to all members of the proposed classes.

The first to fourth applicants launched an application under the above case number on 31 October 2014, applying for the certification of, and for leave to institute, class actions on behalf of investors in four companies. The fifth to ninth applicants were later joined to the proceedings, and the first to fourth applicants were effectively no longer parties to the application.

In July 2018, the fifth to ninth applicants launched the current application. Only Part B of the application formed the subject matter of the current hearing, with the first to fifth respondents effectively the only respondents in Part B. The relief in this application (the "certification application"), sought to fast track a portion of the original relief sought under the initial Notice of Motion.

The respondents brought an application in terms of Uniform Rule 6(15) in order for certain passages of the applicants' replying affidavit to be struck out on the basis that

they were irrelevant, scandalous and/or vexatious. The respondents alleged that the allegations were irrelevant and did not purport to address the certification.

Held – Two elements must be satisfied before an application to strike out will succeed. Firstly the matter sought to be struck out must indeed be scandalous, vexatious or irrelevant. Secondly the court must be satisfied that the party seeking such relief would be prejudiced. The second requirement was not proved in this matter.

A class action may be brought, in terms of section 38(c) of the Constitution in relation to the infringement or potential infringement of a right guaranteed in the Bill of Rights. A court when exercising its discretion to either grant an application for certification or refuse it may take into account any factor which may be relevant or material to the determination of the matter.

One of the requirements is that the applicants have to show that there exist classes identifiable by objective criteria. They also have to demonstrate that they have a cause or causes of action raising triable issues. The right to relief relied on by the applicants must depend on the determination of issues of fact, or law, or both, common to all members of the proposed classes. Absolute commonality is not required. There merely needs to be sufficient points of commonality in relation to the question of law or fact that bind the members of a class together and make it appropriate to deal with their combined interest in the case in a class action, as opposed to in separate actions.

Finding that all the requirements were met and based on the interests of justice, the court granted certification of the class application.

END-FOR NOW